4/80

No. 38 of 1978

In the Privy Council

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 45 OF 1978
(On Appeal from High Court Action No. 785 of 1978)

BETWEEN

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

AND

CIVIL APPEAL NO. 46 OF 1978
(On Appeal from High Court Action No. 1006 of 1978)

BETWEEN

ANSTALT NYBRO (formerly named ANSTALT SORO)	**Appellant (Plaintiff)**
and	
HONG KONG RESORT CO. LIMITED	**Respondent (Defendant)**

RECORD OF PROCEEDINGS

K. K. Chu & Co.,
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.

ERRATA

Page (iv)	:	24th line, Description of Documents of "JW-17", 4th word "Finncing" to read "Financing".
Page 122	:	33rd line, 4th word "contest" to read "contrast".
Page 158	:	13th line, 5th word "rhe" to read "the".

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PART I

WRIT OF SUMMONS

1978, No. 785

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

HONG KONG RESORT CO. LIMITED	Plaintiff
and	
ANSTALT NYBRO (formerly named ANSTALT SORO)	1st Defendant
EDWARD WONG WING CHEUNG	2nd Defendant
ANTHONY JACK BURGESS	3rd Defendant

10

INDORSEMENT OF CLAIM

The Plaintiff's claim against the Defendants and each of them (save where the contrary may be expressly stated) is for:—

1. (a) A declaration that the purported agreement with a plan annexed, whether in this original form or as purportedly varied, dated October 11, 1976, in respect of Lot No. 385 in Demarcation District No. 352, Discovery Bay, Lantau Island in the Colony of Hong Kong between the Plantiff and the 1st Defendant and the addendum thereto, namely, Addendum No. 1 dated November 25, 1976 (hereinafter called 'the purported agreement') is so vague as to be unenforceable. 20

(b) Alternatively, a declaration that the purported agreement was voidable and has been avoided by a letter dated February 22, 1978 to the 1st Defendant's solicitors or alternatively is hereby avoided.

2. A declaration that irrespective of whether the purported agreement is and has always been unenforceable or was voidable and has been avoided the option purportedly granted thereby has not been exercised validly, in time or at all.

3. Damages for conspiracy in respect of the purported agreement.

4. Damages, as against the 2nd and 3rd Defendants, for breach of fiduciary duty as directors of the Plaintiff in respect of the purported agreement. 30

5. Damages, as against the 2nd and 3rd Defendants, for negligence as directors of the Plaintiff in respect of the purported agreement.

6. An injunction

(a) compelling the 1st Defendant to do all things necessary to erase the registration on March 2, 1978, of

(i) the purported agreement and

(ii) a document purporting to be a letter dated January 24, 1977, from the 1st Defendant to the Plaintiff (hereinafter called 'the purported letter')

under the provisions of the Land Registration Ordinance, Cap. 128 and/or the New Territories Ordinance, Cap. 97

(b) restraining the 1st Defendant, whether by its directors, officers, servants, agents or howsoever otherwise until the trial of this action or until further order from effecting or taking any steps with a view to effecting any fresh registration of

(i) the purported agreement and/or

(ii) the purported letter and/or

(iii) anything connected with the purported agreement and or the purported letter under the provisions of the said Ordinances, either of them or at all as something affecting the said lot or any part thereof.

10

7. An injunction

(a) compelling the 2nd and 3rd Defendants and each of them to do all things necessary to erase the said registration on March 2, 1978

(b) restraining the 2nd and 3rd Defendants and each of them, whether by themselves, himself, his servants, agents or howsoever otherwise until the trial of this action or until further order from effecting or taking any steps with a view to effecting any fresh registration of

(i) the purported agreement and/or

20

(ii) the purported letter and/or

(iii) anything connected with the purported agreement and/or the purported letter

under the provisions of the said Ordinances, either of them or at all as something affecting the said lot or any part thereof.

8. Interest under statute on such sums, at such rate and for such periods as may be just.

9. Such further or other relief as may be just.

10. Costs.

Woo, Kwan, Lee & Lo
Solicitors for the Plaintiff

30

Dated 14th March, 1978

Supreme Court of Hong Kong

No. 2 Inter Partes Summons 14 Mar 1978

High Court Action 1978, No. 785

INTER PARTES SUMMONS

Let all parties concerned attend before the Honourable the Chief Justice in Chambers at the Supreme Court in Victoria, Hong Kong, on Saturday, the 8th day of April, 1978, at 10 o'clock in the forenoon, on the hearing of an application on the part of the Plaintiff for:–

1. An injunction

(a) compelling the 1st Defendant to do all things necessary to erase the registration on March 2, 1978, of

(i) the purported agreement with a plan annexed, whether in its original form or as purportedly varied, dated October 11, 1976, in respect of Lot No. 385 in Demarcation District No. 352, Discovery Bay, Lautau Island in the Colony of Hong Kong between the 1st Defendant and the Plaintiff and the addendum thereto, namely addendum No. 1 dated November 25, 1976, (hereinafter called 'the purported agreement') and 10

(ii) a document purporting to be a letter dated January 24, 1977, from the 1st Defendant to the Plaintiff (hereinafter called 'the purported letter')

under the provisions of the Land Registration Ordinance, eap. 128 and/or the New Territories Ordinance, Cap. 97

(b) restraining the 1st Defendant, whether by its directors, officers, servants, agents or howsoever otherwise until the trial of this action or until further order from effecting or taking any steps with a view to effecting any fresh registration of 20

(i) the purported agreement and/or

(ii) the purported letter and/or

(iii) anything connected with the purported agreement and/or the purported letter

under the provisions of the said Ordinances, either of them or at all as something affecting the said lot or any part thereof.

2. An injunction

(a) compelling the 2nd and 3rd Defendants and each of them to do all things necessary to erase the said registration on March 2, 1978 30

(b) restraining the 2nd and 3rd Defendants and each of them, whether by themselves, himself, his servants, agents or howsoever otherwise until the trial of this action or until further order from effecting or taking any steps with a view to effecting any fresh registration of

(i) the purported agreement and/or

(ii) the purported letter and/or

(iii) anything connected with the purported agreement and/or the purported letter

under the provisions of the said Ordinances, either of them or at all as something affecting the said lot or any part thereof.

3. An order that if the said registration on March 2, 1978, is not erased within 3 days of this Honourable Court's Order made with a view to securing such erasure the Plaintiff be empowered and authorised to do all things necessary to secure such erasure including calling upon the Land Officer to erase the said registration.

4. Such further or other relief as may be just.

5. Costs. 10

S. H. Mayo
Registrar

This summons was taken out by Messrs. Woo, Kwan, Lee & Lo of 2601 Connaught Centre, Hong Kong, Solicitors for the Plaintiff.

Dated 14th March, 1978.

High Court Action 1978, No. 785

AFFIRMATION OF JOHN YING BUN WU (No. 1)

I, John Ying Bun WU of 73, Sing Wo Road, Happy Valley, Hong Kong, Company Director do solemnly sincerely and truly affirm and say as follows:–

1. I am and since June 24, 1977 have been a director of the Plaintiff, which has duly authorised me to make this my Affirmation on its behalf. In my capacity as such director I have acquired knowledge of and information about the matters to which this action relates. The contents of this my Affirmation are true to my knowledge and belief save where the contrary may appear in which case the same are true to my information and belief.

2. The Plaintiff is and since September 10, 1976 has been the registered owner of Lot No. 385 in Demarcation District No. 352, Discovery Bay, Lantau Island in the Colony of Hong Kong (hereinafter called 'Discovery Bay'), which is its main asset and which is in the process of being developed into a leisure resort and housing complex. The total land area of Discovery Bay is some 66,217,000 square feet and on the Master Layout Plan approved on or about January 23, 1978, the Plaintiff is permitted to build as follows:– 10

(a) Residential accommodation: 5,650,000 sq.ft.

(b) Hotel : 350,000 sq.ft.

(c) Community facilities and services: 770,000 sq.ft.

(d) Recreation facilities: 215,000 sq.ft.

giving a total floor area of 6,985,000 square feet. Under the conditions of Exchange the Plaintiff is required to expend a sum of not less than $600 million on the whole development of Discovery Bay over a period of 120 months from the date thereof as follows:– 20

(i) $120 million within 48 months of September 10, 1976;

(ii) $180 million within 72 months of September 10, 1976;

(iii) $150 million within 96 months of September 10, 1976;

and

(iv) $150 million within 120 months of September 10, 1976.

The sum of $600 million does not include monies required to form the building areas 30

3. Very briefly the history of the Plaintiff is as follows: It was formed to develop Discovery Bay into a leisure resort and housing complex. The Plaintiff was originally owned and controlled by the 2nd Defendant. Under his stewardship it got into grave financial difficulties. He left the Colony in or about December 1976 and has not since returned. A

Supreme Court of Hong Kong

No. 3 Affirmation of John Ying Bun Wu (no. 1) 14 Mar 1978 (Contd.)

winding-up petition was presented against the Plaintiff on March 31, 1977, the Official Receiver was appointed provisional liquidation by this Honourable Court on April 1, 1977 and as a result the development of Discovery Bay came to a halt. Then a large consortium stepped in to rescue the Plaintiff. This consortium acquired ownership and controlling interest of the Plaintiff, enabled the Plaintiff to pay off its creditors, to the extent of $37 million approximately and had the said winding-up petition dismissed on December 13, 1977. Of the $37 million the sum of about $10 million was paid to Government in September, 1977 as the annual premium and Crown rent payable under the Conditions of Exchange for Discovery Bay. The consortium purchased, inter alia, the one share held by the 2nd Defendant in his own name in the Plaintiff and the 20 shares held in the name of the 1st Defendant in the Plaintiff. Now, under the stewardship of its present directors, the Plaintiff is in a sound financial position and the development of Discovery Bay is proceeding well. 10

4(a) From the time my fellow directors and I became directors of the Plaintiff (namely, in June 1977) we commenced preparation for a Master Layout Plan (hereinafter called 'the M.L.P.') for the development of Discovery Bay. The requirement of a M.L.P. is set out in the Conditions of Exchange and must be subject to the prior approval of the Secretary for the New Territories (hereinafter called 'the S.N.T.'). Final approval was given by the S.N.T. to the M.L.P. on or about January 23, 1978. Since that date we have considered and propose to make certain amendments thereto. These amendments are in the nature of relocating certain buildings and do not affect the schedule of uses in paragraph 2 hereof. 30

(b) In addition to the recreation facilities comprising about 215,000 square feet of building space which include a recreation club, a sports hall, a number of swimming pools, a marina and a number of tennis courts, there will be 3 golf courses, a picnic/camping area, an aviary and botanical garden and 2 conservation areas. After considerable study and planning, the Plaintiff proposes to develop Discovery Bay in 5 phases. It is expected that the said development will be completed by the end of March 1984. The annual (and total) expenditure on this development, which includes basic infrastructure construction costs, related infra-structure construction costs and building construction costs, will be as follows:- 30

Period	Amount
April – Dec., 1978	$ 98.4 million
Jan. – Dec., 1979	$ 267.9 million
Jan. – Dec., 1980	$ 271.9 million
Jan. – Dec., 1981	$ 258.4 million
Jan. – Dec., 1982	$ 277.3 million
Jan. – Dec., 1983	$ 206.3 million
Jan. – Dec., 1984	$ 35.7 million
	$1,415.9 million

(c) The dates on which the Plaintiff proposes to commence construction and on each phase are:– 40

Commencement dates	Phases
March 1978	I
June 1979	II & III
Jan. 1980	IV
July 1981	V

(d) The said development will involve 5,650,000 square feet of residential accommodation. These will be developed as follows in relation to the said Phases I to V in terms of square footage:–

Square footage	Phases
860,500	I
967,500	II
1,041,000	III
1,353,000	IV
1,428,000	V
5,650,000	

10

(e) I will deal in greater detail with the immediate future of the said development by giving the following data relating to the first period tabulated under sub-paragraph (b) above, namely April – Dec., 1978, when $98.4 million is expected to be spent:–

(i) **Basic infra-structure work**
The Plaintiff has already entered into a contract with Malayan Drillers (HK) Limited for the demolition of the existing pier at Discovery Bay and for the construction of a new one in its place. The work, which as already commenced, will be completed in about 4 months. Upon the completion of such work, work on the main road, stream diversion, a sea wall, site formation at Tai Pak Village, for the community facilities and commercial areas, beach scheme, incinerator, sewage outfall and system and potable and non-potable water will commence. The amounts to be expended during this period will total $19.2 million.

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(ii) **Related infra-structure work (Phase I)**
During this period it is anticipated that work on the dam, the South Road, the South Golf Course and the Club House will commence and the amount to be expended on such work during such period will total $22 million.

30

(iii) **Building construction operated expenses, Condition of Exchange Premium and financing expenses**
During this period these items will cost $57.2 million of which about half will be expended on building construction.

(f) It is the Plaintiff's proposal that all such garden houses and holiday flats as it develops in Discovery Bay will be sold prior to the same being completed throughout each of the said 5 phases. it is not anticipated that there will be a positive cash-flow until about September 1981.

40

5. The 1st Defendant, as its name implies, is a Liechtenstein entity called an 'anstalt'.

One of the features of such entities is the anonymity with which it cloaks those who own and control them.

6. Last month the Plaintiff received a letter dated January 6, 1978, from the 1st Defendant which:

(i) refer to a purported agreement dated October 11, 1976, (with an attached plan and addendum) in respect of Discovery Bay between the 1st Defendant and the Plaintiff (hereinafter called 'the purported agreement')

(ii) referred to a letter dated January 24, 1977, purportedly from the 1st Defendant to the Plaintiff by which the 1st Defendant claimed to have exercised the option (hereinafter called 'the purported option') which it claimed was conferred upon it by the purported agreement; 10

(iii) enclosed a copy of the said letter dated January 24, 1977;

(iv) claimed that the letter was handed to the Plaintiff's then Chairman, the 2nd Defendant, when he was in London on the date thereof, namely, January 24, 1977; and who purportedly acknowledged acceptance of it to the 1st Defendant's Chairman (who happens to have been the 3rd Defendant);

(v) stated that it was anxious to proceed with the incorporation of the 3 companies referred to in clause 2 of the purported agreement; and

(vi) suggested a meeting between its representatives and the Plaintiff.

True copies of the said letter dated January 6, 1978, the purported agreement and the said letter dated January 24, 1977 are marked "JW-1", "JW–2" and "JW-3" respectively and exhibited hereto. 20

7. The first intimation that the Plaintiff, had that the 1st Defendant proposed to register the purported agreement against Discovery Bay was when it received the letter dated January 25, 1978, from Messrs. K.K. Chu & Co., a copy of which letter is marked "JW-4" and exhibited hereto. The purported agreement, "JW-2" and the said letter dated January 24, 1977, "JW-3" were in fact registered against Discovery Bay under the provisions of the Land Registration Ordinance, Cap. 128 and the New Territories Ordinance, Cap. 97 on March 2, 1978, through Messrs. K.K. Chu & Co. on behalf of the 1st Defendant. In connection with recent events with regard to such registration I respectfully refer this Honourable Court to the following letters, copies of which are exhibited hereto as indicated below: 30

(i) a letter dated January 31, 1978, from Messrs. D.W. Ling & Co., the Plaintiff's then Solicitors, to Messrs, K.K. Chu & Co., (with an enclosure): "JW-5";

(ii) a letter dated February 20, 1978, from the 1st Defendant to Messrs. D.W. Ling & Co. 'JW-6";

(iii) a letter dated February 22, 1978 from Messrs. Woo, Kwan, Lee & Lo, the Plaintiff's present Solicitors, to Messrs. K. K. Chu & Co. (with enclosures): "JW-7";

(iv) a letter dated February 22, 1978, from Messrs. Woo, Kwan, Lee & Lo to the Registrar General (with enclosures); "JW-8";

(v) a letter dated February 22, 1978, from Messrs. K.K. Chu & Co. to Messrs. Woo, Kwan, Lee & Lo: "JW-9";

(vi) a letter dated February 23, 1978, from the Registrar General to Messrs. Woo, Kwan Kwan, Lee & Lo; "JW-10";

(vii) a letter dated February 25, 1978, from Messrs, K.K. Chu & Co. to Messrs. Woo, Kwan, Lee & Lo: "JW-11".

8. The Plaintiff challenges the validity of the purported agreement JW-2 and it also says that the said letter dated January 24, 1977, JW-3 is a sham and that in fact the 1st Defendant had not even attempted to exercise the purported option prior to it having lapsed (even on the assumption that the purported agreement was valid). Indeed although the purported agreement JW-2 is dated October 11, 1978 there were "changes" made to it thereafter. I am now shown copies of a letter dated October 14, 1976 to the 3rd Defendant from J.E.M. Ault, then a director of the Plaintiff with an enclosure exhibited hereto as "JW-12A" and "JW-12B". A copy of a reply dated October 25, 1976 from the 3rd Defendant is also exhibited hereto marked "JW-13".

9. I shall attempt to let this Honourable Court have a little background on matters pertaining to the 1st Defendant's connection with the Plaintiff. These are matters which are contained in some documents in the Plaintiff's files.

10. The 1st Defendant became a shareholder of the Plaintiff on or about 8th September, 1976 when pursuant to a board meeting the Plaintiff allotted 20 shares of $100 each nominal value to the 1st Defendant at par. The 3rd Defendant was appointed a director of the 1st Defendant at the same meeting. I am now shown copies two telexes exhibited hereto as "JW-14" and "JW-15". I am also shown a copy of a letter dated September 14, 1976 from the 2nd Defendant to the 3rd Defendant exhibited hereto as "JW-16". At the time of the 1st Defendant becoming a shareholder of the Plaintiff the registered shareholders of the Plaintiff were as follows:–

(a) the 2nd Defendant: 1 share

(b) Ta Hing Company (Hong Kong) Limited ("Ta Hing"): 44,101 shares

(c) Paclantic Financing Company Inc. ("Paclantic Financing"): 390,000 shares

(d) Malahon Credit & Finance Ltd.: 35,000 shares.

11. There are also in the files of the Plaintiff documents pertaining to the entering into what appears to be option agreements between:–

(a) one James R. Anderson ("Anderson") (either representing himself or Robert B. Anderson Co. Ltd. of New York, United States of America) and Ta Hing and Paclantic Financing; and

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(b) between Anderson and the 1st Defendant.

The Anderson/Paclantic Financing agreement was entered into by a letter dated September 17, 1976 under which Paclantic Financing gave an option to Anderson to buy from it 140,000 shares in the Plaintiff for the sum of US$3,400,000 such option being exercisable on or before March 31, 1977. For this option Anderson was to pay Paclantic a non-refundable deposit of US$5,000. I am now shown a copy of the option agreement exhibited hereto as "JW-17". The Anderson/Ta Hing agreement was entered into by a letter dated September 28, 1976 under which Ta Hing gave an option to Anderson to buy from it 42,000 shares in the Plaintiff for the sum of US$1,024,800 such option being exercisable on or before April 20, 1977. Anderson was to pay Ta Hing a non-refundable deposit of US$10,000. I am now shown a copy of the option agreement exhibited hereto as "JW-18". It appears that Anderson put the Plaintiff in funds and requested it to make payment of the deposits of US$5,000 and US$10,000. There also appears to be some arrangement between the 1st Defendant and Anderson under which the 1st Defendant lent the sum of US$15,000 to Anderson. I am now shown a copy of a letter dated September 13, 1976 from the 1st Defendant to Anderson exhibited hereto as "JW-19". It appears that one Jose Yanes Duran signed on behalf of the 1st Defendant. Mr. Duran is also a director and one of the 2 vice-presidents of Paclantic Financing (as appears from the letter dated May 19, 1976, a true copy of which is marked "JW-20" and exhibited hereto). I am also shown a copy of a letter dated October 11, 1976 from the 2nd Defendant to Anderson enclosing a letter dated September 13, 1976 from the 1st Defendant to Anderson exhibited hereto as "JW-21A" and "JW-21B" respectively. It would seem that JW-21B was to "replace" "JW-19".

12. The Anderson "options" do not just and simply in the circumstances set out above. By a letter dated September 20, 1976 Anderson appoints the 1st Defendant to take all the 140,000 shares in the Plaintiff under the Anderson/Paclantic Financing option "JW-17" at the same price. A copy of this letter is now shown to me and exhibited hereto as "JW-22". The Anderson/1st Defendant option "JW-22" was signed on behalf of the 1st Defendant by the said Mr. Duran which apparently was an error as is illustrated by a letter dated October 12, 1976 from the 2nd Defendant to Anderson enclosing a copy of "JW-21" duly signed by JohnAnna Perrot on behalf of the 1st Defendant copies of which are now shown to me and exhibited hereto as "JW-23A" and JW-23B" respectively. By a letter from the 2nd Defendant to Anderson dated November 29, 1876 enclosing a copy of a letter dated October 26, 1976 copies of which are exhibited hereto as "JW-24A" and "JW-24B" respectively Anderson "appointed" the 1st Defendant to take up the 140,000 shares in the Plaintiff under the Anderson/Paclantic Financing option "JW-17".

13. What may be of some significance is the prices at which the 42,000 and 140,000 shares in the Plaintiff were given under option to Anderson. The price per share of the 42,000 was US$24.40 or say $122.00 and the price per share of the 140,000 was US$24.30 or say $121.40. The 2nd Defendant had spent a great deal of time putting together Discovery Bay and just 10 days or so after the grant in favour of the Plaintiff was signed he, through companies owned or controlled by him, Ta Hing and Paclantic, grants options to sell share at prices which do not appear to reflect their worth. At about the same time a board meeting of the Plaintiff took place on September 20, 1976 at which it was proposed, inter alia, that 4,000 shares and 35,000 shares of $100 each in the Plaintiff be allotted to Kennedy Estate Limited and the 1st Defendant respectively at par payable in full on application. It was resolved that limited issue of shares to Kennedy Estate Limited

and the 1st Defendant should be authorised. The options were not exercised by either Anderson or the 1st Defendant nor were the proposed allotments made either to Kennedy Estate Limited or to the 1st Defendant.

14. It appears from a telex dated December 1, 1976, from the 2nd Defendant to one George Critchfield (a true copy of which is marked "JW-25'. and exhibited hereto) that the 2nd Defendant was giving instructions to the said Critchfield, a money broker, as to the opening of a letter of credit for the account of the 1st Defendant in favour of the Plaintiff to the extent of US$850,000.00. This letter of credit reflects 2 things: first, a further attempt by, in effect, the 2nd Defendant, to issue more shares in the Plaintiff to the 1st Defendant; and, second, a further example of the 2nd Defendant controlling the 1st Defendant. 10

15. At all material times the 2nd and 3rd Defendants were directors of the Plaintiff and owed it a fiduciary duty; and at the same time they were both persons behind the 1st Defendant. The fact that the 2nd Defendant was one of the persons behind the 1st Defendant was concealed from the Plaintiff. While the 3rd Defendant was openly a highly placed officer of the 1st Defendant, such concealment masked the true relationship between the 1st and 2nd Defendants and accordingly also the unfairly advantageous position occupied by the 1st Defendant in relation to the Plaintiff.

16. It would appear that the 2nd and 3rd Defendants had little regard for the interests of the Plaintiff when they purported to enter into the purported agreement JW-2. The Conditions of Exchange prohibit certain dealings with Discovery Bay except on the terms and conditions set out therein. The material part of the relevant clause, namely, paragraphs (a) and (b) of clause 8 reads:— 20

"8.(a) Subject to (b), (c) and (d) hereof the Grantee shall not except with the prior consent of the Secretary and in conformity with any conditions imposed by him (including the payment of such fee as may be required by him);

(i) assign, underlet, part with the possession of or otherwise dispose of the lot or any part thereof or any interest therein or any building or any part of any building thereon or enter into any agreement so to do, or

(ii) mortgage or charge the lot or any part or parts thereof of any interest therein or any building or any part or parts of any building thereon except for the purpose of the development thereof and then only by way of a building mortgage or mortgages in such form and containing such provisions as the Secretary shall approve or require, 30

unless and until he shall have in all respects observed and complied with these Conditions to the satisfaction of the Secretary and then only subject to the provisions of Special Conditions Nos. 9 and 10 hereof.

(b) Notwithstanding anything to the contrary herein contained the Grantee (which expression shall, for the purpose of these Special Conditions No. 8(b) only, exclude its successor and assigns) may, after the date hereof but before the Grantee has in all respects observed and complied with these Conditions to the satisfaction of the Secretary and for the purpose of development of the lot but not 40

otherwise, subject to the prior written consent of the Secretary and in conformity with any conditions imposed by him (including the payment of any fee as may be required by him), assign the whole of the lot or, subject also to Special Condition No. 10 hereof, any part or parts thereof to the Grantee's subsidiary companies. For the purpose of these Conditions "subsidiary company or subsidiary companies" shall mean only a company or companies of which the Grantee has effective control and not less than 51% of the issued shares in which at the time of such assignment or assignments are owned by the Grantee. The Grantee shall not at any time before he has in all respects observed and complied with these Conditions to the satisfaction of the Secretary in respect of the lot as a whole or, as the case may be, in respect of a part or parts, sell, transfer or otherwise part with or dispose of his shareholding in the subsidiary company or subsidiary companies to which the whole of the lot or such part or parts, as the case may be, have been assigned as aforesaid so as to reduce his shareholding therein to less than 51% of the issued shares or permit or suffer or cause anything to be done whereby his said majority shareholding or effective control is so reduced or no longer retained. 10

(c) The Grantee may, subject to these Condtions and in particular subject to Special Conditions Nos. 9 and 10 hereof, assign, underlet, part with the possession of or otherwise dispose of a part or parts of the lot together with the building or part of the building, if any, theron if he shall have in all respects observed and complied with these Conditions so far as they relate to such part or parts of the lot and the building or buildings to be erected thereon as to which observance and compliance the certificate in writing of the Secretary shall be required. 20

(d) The Grantee may also subject to these Conditions and in particular subject to Special Conditions Nos. 9 and 10 hereof assign, underlet, part with the possession of or otherwise dispose of a part or parts of the lot for the sole purpose but not otherwise of development of such part or parts pursuant to the Master Layout Plan if he shall have first satisfied the Secretary that the sum of not less than $600 million has already been expended on the other part or parts of the lot in observance and compliance with these Conditions so far as they relate to such other part or parts of the lot in respect of which the Secretary has issued a certificate of observance and compliance." 30

I am advised and do verily believe that by entering into this purported agreement the 2nd and 3rd Defendants exposed the Plaintiff to risk that Government might re-enter on the basis that there has a breach of Clause 8 of the Special Conditions. My compliant is that in view of the nature of the purported agreement JW-2 the 2nd and 3rd Defendants acted quite wrongly in even exposing the Plaintiff to such a risk. Secondly, the terms of the purported agreement is most unfavourable to the Plaintiff. The Plaintiff, presumably at the request of the 2nd Defendant, caused Economic Research Associates of Los Angeles, California, United States of America (hereinafter called "ERA") to prepare a valuation report which is dated April 1975 and is in the Plaintiff's possession. This report is based on a gross site area of 40,661,000 square feet and a gross floor area of 6,619,000 square feet whereas the present gross site area is 66,217,000 square feet and the gross floor area is about the same. The difference in the gross site area is mainly represented by a catchment area for the reservior that has to be built. ERA placed a value of $506.8 million on the land in April, 1975. The value was actually US$101.4 million and ERA used an average conversion or exchange rate 40

of $5.00 to US$1.00. Based on a gross floor area of 6,619,000 square feet the value per square foot would therefore be HK$76.57 per square foot gross or if based on the gross site area the value would be $12.53 per square foot gross. The purported agreement provides:—

(a) the assignment by the Plaintiff to 3 companies 11 lots or sections of Discovery Bay with a total gross area of 4,163,000 square feet;

(b) the total paid up capital of these 3 companies would be HK$4,500,000;

(c) the Plaintiff would be alloted 51% of the issued share capital in these 3 companies credited as fully paid as consideration for the assignment of 4,163,000 square feet of land; and

(d) the 1st Defendant would be alloted 49% of the issued share capital in these 3 companies duly paid in consideration of payment by the 1st Defendant of the sum of HK$2,205,000.

It is to be noted that the sum of HK$2,205,000 paid by the 1st Defendant to the 3 companies is not to be paid to the Plaintiff but remains with them. Based on a land value of HK$12.53 per square foot (being the value in April 1975) the area to be assigned to the 3 companies appears to be worth HK$52.16 million. I hasten to add that it is not clear in the purported agreement JW-2 the amount of floor area that can be built upon those 11 sites and that this may have a bearing on the value except that it seems to me fair to say that it is extremely unlikely that the value would be as low as that placed by the purported agreement JW-2. Since the Plaintiff would only have retained 51% of the 3 companies for every dollar in value in excess of the paid-up share capital of HK$4,500,000 the Plaintiff was therefore giving away 49 cents and if the value was the aforesaid HK$52.16 million the Plaintiff would be giving away HK$25.55 million.

17. The Plaintiff respectfully submits that in all the circumstances referred to above, (i) the purported agreement is one made, to the 1st Defendant's knowledge, by the 2nd and/or 3rd Defendants purportedly on behalf of the Plaintiff but in bad faith and in breach of their fiduciary duty to the Plaintiff as its directors and (ii) the purported agreement is one by which the Plaintiff has rightfully refused to be bound.

18. I turn now to expand upon the Plaintiff's allegation that the said letter dated January 24, 1977, JW-3, is a sham.

19. Firstly, until a copy of the said letter dated Janaury 24, 1977, JW-3, was sent to the Plaintiff by the 1st Defendant under cover of its said letter dated January 6, 1978, JW-1, the Plaintiff had never received it. The 1st Defendant's very act of providing the Plaintiff with a copy is a clear indication that the 1st Defendant realised as much. The suggestion in the said letter dated January 6, 1978, that the said copy was enclosed for the Plaintiff's 'convenience' is clearly a device. If the letter in question was not a sham it would be odd indeed if the Plaintiff could not easily lay its hands on not only copies thereof but the original.

20. While the Official Receiver was the provisional liquidator of the Plaintiff (having

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No. 3 Affirmation of John Ying Bun Wu (No. 1) 14 Mar 1978 (Contd.)

been so appointed on April 1, 1977) one Mr. J.P. Duckworth, a solicitor in the Official Receiver's Office was, on the Official Receiver's behalf, principally concerned with the Plaintiff's affairs. Mr. Duckworth has informed me and I verily believe as follows: while the Official Receiver was provisional liquidator of the Plaintiff he did not see any document or letter or copy of any document or letter by which the 1st Defendant exercised or purported to exercise the said option, nor was he ever informed verbally or otherwise that the said option had or might possibly have been exercised. He never heard any suggestion whatsoever to that effect. He took it as a fact, and in his conversations with directors of the Plaintiff and with others it was taken as a fact, that the said option had not been exercised. He recalls that when June 30, 1977, passed without any communication being received from the 1st Defendant he assumed that the 1st Defendant no longer had any interest in the said project or the Plaintiff except as a minority shareholder (at one time). The provisional liquidator has never received any communication, whether by letter, telex, telephone or otherwise, from the 1st Defendant or from anyone on its behalf. No claim against the Plaintiff was made by the 1st Defendant or on its behalf while the Plaintiff was in provisional liquidation.

21. But this is not all: The following facts are even more telling:–

(a) Originally the purported option was exercisable by January 31, 1977.

(b) At a meeting of the Plaintiff's board held on November 30, 1976, the minutes in respect of which are marked "JW-26" and exhibited hereto, the date for exercise of the purported option was purportedly extended to March 1, 1977. The 1st Defendant was advised of this by a letter dated December 1, 1976 exhibited hereto as "JW-27".

(c) The said letter dated January 24, 1977, JW-3 purports to show that on that date the 1st Defendant gave notice that it wished to exercise the option on March 1, 1977.

(d) On February 24, 1977, the Plaintiff's then accountant, Mr. Yuen, made enquiries of the Plaintiff's then directors with regard to the forfeiture of the said deposit of $50,000 (which was apparently paid in cash) under the purported agreement JW-2.

(e) On February 25, 1977, 2 of the then directors of the Plaintiff, namely, Mr. J.E.M. Ault and Mr. T. Beesley spoke to the 2nd Defendant (then the Managing Director of the Plaintiff) on the telephone (they being in Hong Kong and he being in London). The 2nd Defendant told them that the 1st Defendant had requested a further extension of the purported option from March 1 to June 30, 1977, and told them to arrange the granting of such further extension. Accordingly, they prepared a draft minute and spoke to Mr. Wong by a long-distance telephone call again later that morning. One of them read the said draft minute to him as one in respect of a proposed meeting of the Plaintiff's board granting such further extension. The 2nd Defendant approved the minute and that same day the Plaintiff's board met in accordance with the minute and granted the said further extension by its resolution: At no time did the 2nd Defendant tell Mr. Ault or Mr. Beesley about the said letter dated January 24, 1977, JW-3 or that the 1st Defendant had in any way exercised the purported option. A true copy of the said minute is marked

"JW-28" and exhibited hereto. It does not contain any reference to the said letter dated January 24, 1977, or the slightest suggestion that the 1st Defendant had in any way exercised the purported option.

(f) By a letter dated February 25, 1977, from the said Mr Ault on behalf of the Plaintiff to the 3rd Defendant as the Chairman and on behalf of the 1st Defendant, the Plaintiff told the 1st Defendant that the said further extension had been granted, enclosing a copy of the said minute. A true copy of this letter is marked "JW-29" and exhibited hereto.

(g) This letter dated February 25, 1977, JW-29 did not draw any reply whatsoever.

(h) At or about the time of the said Mr. Beesley's resignation from the Plaintiff on September 19, 1977, the 2nd Defendant telephoned from London to him in Hong Kong. In the course of this conversation (in which the 2nd Defendant thanked the said Mr. Beesley for his past services and told him not to worry unduly about the future) the 2nd Defendant said something about "Anstalt's option agreement' whereupon the said Mr. Beesley said something to this effect: 'What option? It's lapsed and the deposit forfeited.' The 2nd Defendant did not dispute this and the conversation moved on to personal matters. 10

22. The said registration will unless it is erased (and its repetition prohibited until the trial of this action or until further order) cause the Plaintiff to suffer irreparable damage in that:— 20

(a) Unless the Plaintiff is able to create a first mortgage on the whole of Discovery Bay unencumbered save by such mortgage itself it will be unable to borrow the money it needs to carry out the said development or any significant part thereof. The Plaintiff has been negotiating a financial package with its bankers for some time. Such negotiations are at a very advanced stage and indeed, barring some details, can be concluded within a matter of several weeks subject only to the preparation of the necessary documentation which would include a first mortgage on the whole of Discovery Bay. The Plaintiff anticipates that it will require to draw on the facilities to be made available as aforesaid in or about the middle of this year. The bankers are, understandably, also anxious to complete the matter quickly. Apart from the Plaintiff's requirement for such funds the basic terms upon which agreement in principle has been arrived at are very favourable to the Plaintiff and any delay in conclluding such package is very likely to jeopardise this arrangement or at least alter the basic terms to ones that are less favourable to the Plaintiff. 30

(b) No prudent purchaser would, in face of the said registration, enter into any agreement for the purchase of any of the properties which the Plaintiff proposes to develop in Discovery Bay.

(c) It cannot be emphasised too strongly to this Honourable Court that in a project of this magnitude there are many factors which have to be taken into account to ensure its successful completion. One very important factor is timing. Whilst the Plaintiff is confident that it can meet the schedule referred to above this can only be done if the necessary finance is able and if sales can be effected. 40

23. In all the circumstances I(i) respectfully submit that it would be proper to grant the relief the Plaintiff seeks by its summons filed herein on even date and humbly ask for relief. I am duly authorised by the Plaintiff to offer on its behalf the usual undertaking as to damages as a condition of the granting of such relief.

Affirmed on 14th march, 1978.

This Affirmation is filed on behalf of the Plaintiff.

Surpeme Court of Hong Kong

No. 4 Writ of Summons (1006/78) 8 Apr 1978

WRIT OF SUMMONS

1978, No. 1006

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

ANSTALT NYBRO (formerly named as ANSTALT SORO) — Plaintiff

and

HONG KONG RESORT COMPANY LIMITED — Defendant

INDORSEMENT OF CLAIM 10

The Plaintiff claims:—

1. Specific performanceof an agreement made the 11th day of October 1976 between the Plaintiff of the one part and the Defendant of the other part as varied and as varied by an addendum thereto dated November 25th 1976 (hereinafter referred to as "the said Agreement") whereby the Plaintiff was granted an option to participate in the ownership development and subsequent management operation and exploitation of certain sections of Lot No. 385 in Demarcation District No. 352 Discovery Bay Lantau Island (hereinafter referred to as "the said Sections") upon the terms and conditions therein contained which said option the Plaintiff exercised by letter dated 24th January 1977.

2. A Declaration that the said Agreement is valid binding and enforceable as against the Defendant. 20

3. A Declaration that the Plaintiff has validly exercised the option given by the said Agreement by letter dated 24th January 1977.

4. Specific performance of the agreement created by the exercise by the Plaintiff of the said option by letter dated 24th January 1978 (hereinafter called the said "Option Agreement")

5. All necessary Orders and Directions for the purpose of ensuring that the Defendant do specifically perform the said Agreement and the said Option Agreement.

6. Further or alternatively Damages for breach of the said Agreement and of the said Option Agreement. 30

7. Further or alternatively and in so far as may be necessary an enquiry as to damages and/or an account of profits and payment to the Plaintiff of all sums found due.

8. An injunction to restrain the Defendant directly or indirectly and whether itself or by any officer employee servant agent or otherwise howsoever from:—

(a) Developing or causing permitting or allowing the said Sections to be developed in any manner however inconsistent with the Master Plan therefor and approved by

the Secretary for the New Territories on the 10th day of November, 1976; and/or

(b) Causing permitting or allowing any person firm or company other than the Plaintiff to develop the said Sections; and/or

(c) Selling disposing or charging or in any manner howsoever dealing in or with the said Sections in any manner inconsistent with the Plaintiff's rights under the said Agreement and under the said Option Agreement.

9. All such further necessary injunctions to restrain the Defendant whether itself or by any officer employee servant agent or otherwise howsoever from acting in breach of or in any manner inconsistent with the Plaintiff's rights under the said Agreement and under the said Option Agreement. 10

10. Further or other relief.

11. Costs.

Richard Mills-Owens
Counsel for the Plaintiff

Dated 8th April, 1978.

High Court Action 1978 No. 785

AFFIDAVIT OF ANTHONY JACK BURGESS (No. 1)

I ANTHONY JACK BURGESS of 2/3 Philpot Lane, London E.C.3, England Notary Public MAKE OATH AND SAY as follows:–

1. I am the Chairman of ANSTALT NYBRO, the 1st Defendant, and make this Affidavit on its behalf and on behalf of myself the 3rd Defendant.

2. I have read the Summons dated the 14th March 1978 taken out on behalf of the Plaintiff in this action and also the Affidavit of MICHAEL PANG CHIU CHIU and the Affirmation of JOHN YING BUN WU.

3. In this Affidavit I will confine myself to responding to and commenting upon the relief sought by the Summons. 10

4. The 1st Defendant was established in Liechtenstein on 28th July, 1959 and was registered there on the 30th July, 1959 under the name ANSTALT SORO. It was acquired by clients of mine in 1973 and I have been the Chairman of the 1st Defendant since Setpember, 1976.

5. I am sure this Honourable Court would appreciate some information as to the status of an Anstalt. An Anstalt is an entity capable of registration under the Laws of Liechtenstein. It has independent legal status, its capital being endowed by a Founder. The beneficial interests in the profits and assets of an Anstalt are the persons nominated as such in accordance with the provisions of the Statutes and By-laws thereof. 20

6. As Mr. Wu observed in Paragraph 5 of his Affirmation the participants in an Anstalt (I use that term to identify the persons who are beneficially entitled to the assets and profits) do expect a degree of anonymity. I hope this Honourable Court will recognize my difficulty in disclosing the identity of the participants. However I am able to say, since both Mr. Wu and Mr. Pang (in his Affidavit) infer to the contrary, that to the best of my knowledge and belief the 2nd Defendant in this action is not and never has been nor controls an entity which is or ever has been a participant in the 1st Defendant.

7. It would be wrong of me to create the impression that the 1st Defendant was ignorant of the affairs of Hong Kong Resort Co Ltd (HKR) and indeed of the 2nd Defendant's connection therewith. 30

8. Over a period of years before the date of the Agreement dated 11th October, 1976 I have had on behalf of the 1st Defendant many discussions with the 2nd Defendant regarding the affairs of HKR. The central theme of these discussions was the concern displayed by the 2nd Defendant to raise the finance for the Lantau Project by finding parties prepared to take participation therein in return for financial assistance.

9. I do not propose to comment in any detail on the option arrangements referred to in Paragraphs 9-14 of Mr. Wu's Affirmation since I do not consider it bears on the matters upon which this Honourable Court is asked to assist at the present time, save that the total arrangement (which I am not convinced is accurately portrayed by Mr. Wu's description)

Supreme Court of Hong Kong

No. 5 Affidavit of Anthony Jack Burgess (No. 1) 13 Apr 1978 (Contd.)

demonstrates a further example of the 2nd Defendant's attempts to raise the finance for HKR.

10. Over the few months prior to the signing of the said Agreement dated 11th October, 1976, the 2nd Defendant explained to me at some length his strategy for financing the Lantau project. As a result he indicated that he wished me to join the HKR Board and to make a trip to Hong Kong. According to him, such arrangement would pave the way to the 1st Defendant striking up a joint venture relationship with HKR in the Lantau project. In early September 1976, I was appointed a Director of HKR. In the following month I was invited to and did visit Hong Kong. Thus, my appointment was really in anticipation of the joint venture which eventually materialised. I also remember the 2nd Defendant explained to me, in connection with a proposed joint venture, that he was concerned that the Bank that had been financing him, The Moscow Narodny Bank Limited, Singapore Branch, would not be able to provide the total support HKR required and he appealed to me to recognize that the sheer scale of the project required that the developer's risk be shared. 10

11. The 2nd Defendant also explained that the terms of the "conditions of exchange" to which Mr. Wu refers in some length in his Affirmation required that HKR retained control of the development of the project.

12. Having established that the participants of the 1st Defendant were interested in assisting HKR negotiations were commenced which evolved into the Agreement eventually signed on the 11th October, 1976 (Exhibit JW2 in Mr. Wu's Affirmation) ("the Agreement") and the monies then due thereunder were paid. 20

13. By way of clarification of Mr. Wu's remarks in Paragraph 8 of his Affirmation, at the time of the negotiation of the Agreement I was given to understand that the exact carving out plan defining the development to be carried out at the Discovery Bay, Lantau Island, was being finalised with the Government Authorities. On the basis of the draft plan available at the time of the Agreement the lots of land were agreed. It eventually transpired that it was more appropriate from both parties' points of view to vary the lots slightly. I am now shown copies from the files I maintain on behalf of the 1st Defendant recording these amendments. These are exhibited hereto as AJB1. 30

14. During the period October, 1976 to January, 1977 the 2nd Defendant on behalf of HKR was frequently in contact with me. It became apparent during this period that HKR was undergoing a certain amount of financial pressure. It was also apparent that the implementation of the Agreement by the 1st Defendant exercising the option therein contained would significantly relieve that pressure.

15. On the 24th January, 1976, the 2nd Defendant visited me in my office in London. He displayed some anxiety in relation to the affairs of HKR and enquired as to whether the 1st Defendant was yet in a position to proceed with the exercise of its option.

16. At that point the 1st Defendant was not under great pressure to proceed since it had negotiated an extension of the option until 1st March, 1977 (see Exhibit AJB1 Page 3). 40

17. I was aware that the 1st Defendant considered the proposal most attractive and had by this time resolved to exercise the option in any event. Accordingly, not being

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No. 5 Affidavit of Anthony Jack Burgess (No. 1) 13 Apr 1978 (Contd.)

anxious to upset the Chairman of the new partner I agreed with the 2nd Defendant to proceed with the exercise of the option and accordingly prepared and signed the letter a copy of which I am shown (Exhibit AJB2 herewith) dated 24th January, 1977 to HKR.

18. The said letter was handed by me to the 2nd Defendant who acknowledged receipt of the same by adding to a carbon copy thereof the words in his own handwriting:– "The acceptance is hereby acknowledged, Hong Kong Resort Co. Ltd." adding his signature and handing the same to me. A photostatic copy of the said carbon copy so endorsed is Exhibit AJB3 herewith.

19. I believe that the 2nd Defendant left London immediately after my meeting with him on the 24th January, 1977 and I did not have further communication with the 2nd Defendant for some time and am unaware of whether or not be advised the other Directors of HKR of the exercise of the option contained in the Agreement. 10

20. At all times in my discussions and at Meetings with Board Members of HKR it was made manifestly clear to the other Board Members that I was representing the 1st Defendant and the Board was, I believe, convinced of the benefits the execution of the Agreement could afford HKR.

21. Naturally, following the "take-over" of HKR by Mr. Wu and his colleagues the underlying participants in the 1st Defendants were alarmed.

22. In or about September, 1977 the 2nd Defendant contacted the 1st Defendant through me in connection with the sale of the minority interest held by the 1st Defendant in HKR. It was made clear to me at that time that unless the 1st Defendant co-operated in the sale of the minority shares, the deal would not proceed. Since the 1st Defendant had such a small holding in HKR, I confirmed on behalf of the 1st Defendant to Mr. Chu of Messrs. K.K. Chu and Co., that so far as the 1st Defendant was concerned, the 2nd Defendant could negotiate the sale of the 1st Defendant's share in HKR provided only that the sale price of such shares would not be less than 400 HK dollars per share. 20

23. In due course I was informed that an Agreement had been achieved and arranged that a Power of Attorney was duly executed to effect the transfer.

24. The 1st Defendant retained the view that the project at Discovery Bay Lantau Island was sound and following the receipt of information that the Receiver appointed to HKR had been discharged wrote to HKR requesting that they immediately proceed with the implementation of the Agreement. This I did on the 6th January, 1978 (Exhibit JW1 to Mr. Wu's Affirmation). 30

25. I learnt from Mr. Wu's Affirmation and in particular Paragraph 4 thereof that HKR has now revised the "Master Plan" and accordingly the development now being considered at Discovery Bay Lantau Island is not identical with the project which formed the basis of the Agreement between the 1st Defendant and HKR. It is not possible on the information made available by Mr. Wu's Affirmation to appraise the merits of the revised plan or indeed to consider whether such revisions jeopardised the interests of the 1st Defendant. 40

26. Following upon the 1st Defendant's sale of shares in HKR I disclosed to Mr. Chu

of K.K. Chu and Co. the nature of the 1st Defendant's interest in the development. He advised me that to protect such interest the said Agreement should be registered pursuant to the land registration ordinance. At about the same time as the letter to HKR of 6th January, 1978 I gave instructions on behalf of the 1st Defendant to K.K. Chu and Co. to proceed with the registration of the said Agreement and the exercise of the option dated the 24th January, 1977.

27. On the 5th of January, 1978, the 1st Defendant executed a Power of Attorney in favour of one JONATHAN NORTH, Solicitor, whereby he was given full authority to act on behalf of the 1st Defendant in Hong Kong. I was given to understand that the said Jonathan North arrived in Hong Kong during the middle of January and gave instructions to Messrs. K. K. Chu and Co. to proceed with the registration of the said Agreement and the exercise of the option dated the 24th January, 1977. 10

28. I would respectfully submit to this Honourable Court that in the circumstances referred to above it would be inappropriate to grant to the Plaintiff the relief it requests and assure this Court that the 1st Defendant remains ready to honour the terms of the Agreement.

Sworn on 13th April, 1978.
This Affidavit is filed on behalf of the 1st Defendant.

Supreme Court of Hong Kong

No. 6 Affidavit of Edward Wong Wing Cheung (No. 1) 18 Apr 1978

AFFIDAVIT OF EDWARD WONG WING CHEUNG (NO. 1)

I, EDWARD WONG WING CHEUNG of 45 Marlborough Place, London, N.W.8 Merchant make Oath and say as follows:–

1. The contents of this my Affidavit are true to my knowledge save where the contrary may appear in which case the same are true to my information and belief.

2. I make this Affidavit for the purpose of opposing an Application on the part of the Plaintiff by a Summons issued on the 14th March 1978 for an interlocutary Mandatory Injunction against me.

3. (a) I have read what purports to be true copies of the Affidavit of Michael Pang Chiu Chiu and the Affirmation of John Ying Bun Wu sworn herein on 14th March 1978. 10

(b) Mr. Wu's said Affirmation contains many allegations against me but I am advised by my legal advisers that I need only deal with those mentioned below because they are the only ones relevant to the Plaintiff's said Application.

(c) I am further advised by my legal advisers that I should deal only with the admissible facts contained in the said Affirmation and Affidavit, and that I ought to leave for argument the comments and speculations of the said Mr. Wu and of the said Mr. Chiu.

4. (a) I am not and I have never been in control of the First Defendant.

(b) I am not and I have never been a Director of Officer in or shareholder in the First Defendant. 20

(c) I am not and I have never been beneficially interested in the first Defendant.

(d) I am not and I had never been able in any way to control the First Defendant.

(e) I am not and I have never been the person or one of the persons behind the First Defendant.

5. (a) It is not within my power directly or indirectly to erase or to procure the erasure of the said registration of the 2nd March 1978.

(b) I have no plan to effect or to take any steps with a view to effecting any fresh registration of (1) the Agreement of the 11th October 1976 (2) the letter of 24th Janaury 1977 or (3) anything connected with the said Agreement or the said letter as alleged or at all. 30

6. (a) The Agreement of the 11th October 1976 was advantageous to both the Plaintiff and the first Defendant.

(b) It was entered into with the Agreement of the then Board of Directors of the Plaintiff.

(c) It was signed by two Directors of the Plaintiff who have not been made parties to this action.

(d) The Agreement was acceptable to all the then shareholders of the Plaintiff.

7. (a) The option conferred by the said Agreement was exercised by the First Defendant on the 24th January 1977 when the letter dated the 24th Janaury 1977 was handed to me by the Third Defendant in his office at 41/43 Mincing Lane, London, E.C.3.

(b) I acknowledged the acceptance of the exercise of the option by signing a carbon copy of the said letter of the 24th January 1977 on the same day.

(c) On the morning of the 26th January 1977 at the offices of the Plaintiff at Realty Building, 26th Floor, Hong Kong, I passed certain papers, including the original of the said letter handed to me by the First Defendant, to my secretary for filing. 10

(d) On or about the 29th January 1977 while in New York, I informed Mr. Robert B. Anderson an off shore Director of the Plaintiff that the First Defendant had exercised the said option on the 24th January 1977.

Sworn on 18th April, 1978.
This Affidavit is filled by the 2nd Defendant.

High Court Action 1978, No. 1006

INTER PARTES SUMMONS

Let all parties concerned attend before the Honourable the Chief Justice in Chambers at the Supreme Court in Victoria, Hong Kong on Saturday, the 22nd day of April, 1978, at 10 o'clock in the forenoon on the hearing of an application on the part of the Defendant for:—

1. An injunction

(a) compelling the Plaintiff to do all things necessary to vacate the registration effected on April 8, 1978, of the Writ of Summons herein under the provisions of the Land Registration Ordinance, Cap. 128 and/or the New Territories Ordinance, Cap. 97, and

(b) restraining the Plaintiff, whether by its directors, officers, servants, agents or however otherwise until the trial of this action or until further order from effecting or taking any steps with a view to effecting any fresh registration of the Writ of Summons herein or anything else whatsoever in or connected with this action under the provisions of the said Ordinances, either of them or at all as something affecting Lot No. 352, Discovery Bay, Lantau Island in the Colony of Hong Kong on any part thereof.

2. An order that, if the said registration on April 8, 1978, is not vacated within 3 days of this Honourable Court's Order to so vacate, the Plaintiff be empowered and authorised to do all things necessary to secure such vacation including calling upon the Land Officer to vacate the said registration.

3. Such further or other relief as may be just.

4. Costs.

S. H. Mayo
Registrar

This Summons was taken out by Messrs. Woo, Kwan, Lee & Lo of 2601 Connaught Centre, Connaught Road, Central, Victoria, Hong Kong, Solicitors for the Defendant.

Dated 18th April, 1978.

High Court Action 1978, No. 1006

AFFIRMATION OF JOHN YING BUN WU (NO. 2)

I, John Ying Bun WU of 73 Sing Wo Road, Happy Valley, Hong Kong, Company Director, do solemnly, sincerely and truly affirm and say as follows:–

1. I am, and since June 24, 1977, have been, a director of the Defendant herein, which has duly authorised me to make this my Affirmation on its behalf. In my capacity as such director I have acquired knowledge of and information about the matters to which this action relates. The contents of this my Affirmation are true to my knowledge and belief save where the contrary may appear in which case the same are true to my information and belief. 10

2. The Defendant herein is the Plaintiff in High Court Action No. 785 of 1978 in which the Plaintiff herein is the 1st Defendant.

3. The Defendant herein will for the purposes of this action rely on and refer to documents filed in High Court Action No. 785 of 1978.

4. The Writ of Summons herein was filed at 9.30 a.m. on Saturday, April 8, 1978. No mention of this fact was made by the Plaintiff herein to the Honourable the Chief Justice at the appearance before his Lordship at 10.00 a.m. on the same day in relation to the Summons filed on behalf of the Defendant herein on March 14, 1978, in High Court Action No. 785 of 1978, although Counsel on behalf of the Plaintiff herein then stated upon being asked that those instructing him had no instructions to accept service. Neither 20 the Defendant herein nor its advisors were aware of the present action until April 10, 1978, when the Writ of Summons herein was sent to Solicitors for the Defendant herein under cover of a letter dated April 10, 1978, from the Solicitors for the Plaintiff herein, a copy of which letter is marked "JW-1" and exhibited hereto.

5. At the same time the Solicitors for the Plaintiff herein sent another letter, also dated April 10, 1978, to the Solicitors for the Defendant herein, a copy of which letter is marked "JW-2" and exhibited hereto.

6. The Solicitors for the Defendant herein wrote to the Solicitors for the Plaintiff herein on April 12, 1978, a true copy of this letter is marked "JW-3" and exhibited hereto.

7. The view taken by the Defendant herein on legal advice was that (i) the present 30 action was unnecessary and not conclusive to the speedy disposal of the real issues between the parties, (ii) it would be utterly wrong in all the circumstances for the Plaintiff herein to register the Writ of Summons herein or anything else whatsoever in or connected with this action under the provisions of the Land Registration Ordinance, Cap. 128 and/or the New Territories Ordinance, Cap. 97, and (iii) there was nevertheless every danger that the Plaintiff herein would seek to effect some such registration. Accordingly, a summons was issued on behalf of the Defendant herein on April 12, 1978, with a view to preventing such registration.

8. After issuing this summons the Defendant herein discovered that the Plaintiff herein had actually registered the Writ of Summons herein on Saturday, April 8, 1978 – the 40

same day as the aforesaid appearance before the Honourable the Chief Justice and 2 days before the Defendant herein even knew that the document so registered existed.

9. On 18th April, 1978 a summons was taken out on behalf of the Defendant herein to secure the vacation of the said registration and to prevent any repetition thereof.

10. The said registration is as harmful to the Defendant herein as the one complained of in High Court Action No. 785 of 1978, and, on behalf of the Defendant herein, I respectfully submit that it would be just and proper that it be granted the relief it seeks by the Honourable Court to grant it such relief. I am duly authorised by the Defendant herein to offer on its behalf the usual undertaking as to damages as a condition of the granting of such relief. 10

Affirmed on 18th April, 1978.
This Affirmation is filed on behalf of the Defendant.

Supreme Court of Hong Kong

No. 9 Affidavit of Chu Ka Kim (No. 1) 20 Apr. 1978

AFFIDAVIFIT OF CHU KA KIM (NO. 1)

I, CHU KA KIM of 1618 Prince's Building, Ice House Street, Victoria in the Colony of Hong Kong, Solicitor, do make oath and say as follows:–

1. I am the Solicitor having the conduct of these proceedings on behalf of the Plaintiff.

2. I crave leave to refer to the Affirmation of John Ying Bun Wu filed herein on the 18th day of April, 1978.

3. On 3rd April, 1978 I was in London and received instruction from the Plaintiff to issue these proceedings and to register the Writ herein against Lot No. 385 in D.D. 352 to the extent of the Plaintiff's interest therein. 10

4. The Plaintiff was minded to issue and register these proceedings for the following reasons:–

(a) That the Plaintiff was alarmed by the statements made by John Wu in his Affirmation filed under Action No. 785/78 that the Defendant intended to:–

(i) encumber the said Lot by way of a first legal mortgage; and

(ii) sell or otherwise dispose of houses/flats to be erected on the said Lot prior to completing the erection thereof.

(b) That, from the manner in which the proceedings under Action No. 785/78 were purported to be served on the Plaintiff, the Plaintiff had every reason to believe that the Defendant would attempt to "railroad" through its interlocutory application in the said Action in complete disregard of the Plaintiff's right 20

(c) That the Plaintiff did not then intend to submit to the jurisdiction in the said Action in that it wished to commence its own proceedings and in view of manifest defects and irregularities in the service of proceedings in the said Action.

(d) That the Plaintiff had no control over the due and prompt prosecution of the proceedings under the said Action although it was evident that the Defendant would attempt to "cut corners" in seeking to obtain an interlocutory injunction under the said Action against the Plaintiff.

(e) That until a Statement of Claim had been served in the said Action, the Plaintiff could not serve a Defence and Counterclaim. 30

(f) That the Defendant wished to protect its interests by registering its claim as a Lis Pendes which could not otherwise be done in the said Action until service of the Counterclaim.

5. It is correct that neither this Honourable Court nor the Defendant was informed of

the institution of the present proceedings on Saturday the 8th day of April, 1978. The following matters may explain the "silence":–

(a) Although instructions had been given by me to my filing clerk to file the Writ, I did not receive confirmation from him that this had been done until the following Monday. Even I did not know whether the Writ had actually been issued at the time when I entered the Chambers of the Honourable the Chief Justice that morning. As the Plaintiff's solicitors I considered it important that the Plaintiff's interest be protected by the institution of proceedings and registration of the same as a "Lis Pendes" against the land. Until this was achieved I considered it not to be in the Plaintiff's interests to inform the Defendant of our intentions with the obvious risk that the Defendant might seek to create other adverse interests in the land which if registered could have priority over the Lis Pendes.

(b) The "appearance" of the Plaintiff at the proceedings in Action 785/78 on Satruday the 8th day of April, 1978 was under protest and as a matter of courtesy to this Honourable Court.

6. It is also correct that a negative answer was given by Counsel for Anstalt Nybro and A.J. Burgess in Chambers on Saturday the 8th day of April, 1978 in Action 785/78 to the question put by Mr. Charles Ching, Q.C., as to whether we had instructions to accept service on behalf of Anstalt Nybro and A.J. Burgess in that Action. However, with respect, Mr. John Wu has himself confused the difference between on the one hand instructions to institute one set of proceeding and on the other instructions with regard the acceptance of service of other proceedings which Anstalt Nybro and A.J. Burgess then contended to be bad.

7. John Wu has not exhibited my letter of 17th April, 1978 which was in reply to the letter exhibited in his Affirmation therein marked "JW-3". A true copy of my said letter is now produced and shown to me thereon marked "CKK".

8. As regard Paragraph 8 of John Wu's Affirmation, it should be noted that as early as 13th April, 1978, the legal advisers of the Defendant were informed by me that the Writ had been presented for registration.

9. I am instructed to oppose the Defendant's Application filed herein on the 18th day of April, 1978. The Plaintiff craves leave to refer to and will rely on all the Affidavits and Affirmations filed or to be filed on behalf of Anstalt Nybro and A.J. Burgess in Action No. 785 of 1978 in opposition to the inter Partes Summons filed therein on the 14th day of March, 1978.

Sworn on 20th April, 1978.
This Affidavit is filed on behalf of the Plaintiff.

High Court Action 1978 No. 785

AFFIRMATION OF DUNCAN SCOTT FLEMING

I, DUNCAN SCOTT FLEMING, Fellow of the Royal Institution of Chartered Surveyors, of D10 Broadacres, 4 Broadwood Road, Happy Valley, Hong Kong do solemnly sincerely and truly affirm and say as follows:—

1. I joined the firm of Chartered Surveyors known as Tony Petty & Associates in May 1973 and was made a Partner of the firm as from 1st April 1975. During this period, Tony Petty & Associates acted on behalf of Hong Kong Resort Company Limited ("HKR") solely in negotiating the grant by way of exchange of Lot No. 385 in D.D. 352, Discovery Bay, Lantau Island. On 10th March 1978 Tony Petty and Associates accepted an appointment to act on behalf of the 1st Defendant as consultants relating to certain sections of Lot No. 385 in D.D. 352 at Discovery Bay. I have now been requested by Messrs. K. K. Chu & Company, Solicitors, to compare the master plan dated 3rd December 1975 with a plan described as a master plan dated 15th September 1977 and a carving out plan. I have confined my evidence in his affirmation to an aspect comparison between the three aforementioned drawings which could be done by any experienced surveyor without any previous knowledge of the development. 10

2. There is now produced and shown to me thereon marked "DSF-1 a reduction in size of the master plan dated 3rd December 1975 and signed on behalf of HKR by its Managing Director and Secretary and on behalf of the Government by the Secretary for the New Territories, Mr. D. Akers-Jones (hereinafter referred to as "the Original Master Plan ') to which I now crave leave to refer. 20

3. Very briefly the Original Master Plan can be divided up into four separate entitles being:—

(a) **Private Residential Resort Accommodation**:
The private residential resort accommodation was planned to give a total of 2,675 units on a gross site area of 5,375,000 sq.ft. having a maximum gross building area of 4,320,000 sq.ft.

(b) **Hotel Accommodation**:
The hotels being four in number were to provide a total of 1,750 rooms on a gross site area of 1,235,000 sq.ft. giving a total building area of 1,510,000 sq.ft. 30

(c) **Community Facilities and Services**:
The community facilities were broken down into a commercial area planned to have a total of 485,000 sq. ft. with a possible extension to a further 185,000 sq.ft. giving a maximum building space of 555,000 sq.ft. Fire, police and ambulance facilities on a site of 60,000 sq.ft. providing 20,000 sq.ft. of building space and schooling facilities on another site of 60,000 sq.ft with 30,000 sq.ft. of building space. In addition public transport and public works facilities were to be provided.

(d) **Recreation Facilities with Landscaped Open Spaces**:
The recreation facilities and open space were planned to provide for two full length golf courses designated north and south on sites of 6,630,000 sq.ft. and 7,165,000 40

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No. 10 Affirmation of Duncan Scott Fleming 22 Apr 1978 (Contd.)

sq.ft., a recreation club, tennis courts and marina, large aviary botanical gardens, parks and playgrounds, sports hall and entertainment centre, swimming and recreation facilities, camping and picnicking facilities, a public golf course, a dam and reservoir together with approximately 15,500,000 sq.ft. of open space for conservation roads and hiking trails etc.

In addition, several other minimum facilities and infrastructure are shown involving salt and fresh water storage and treatment areas, sewage treatment plant, refuse disposal plant, a cable-car system and ferry pier to provide access to the main urban area.

4. There is now produced and shown to me thereon marked "DSF-2" a reduction in a plan described as a master plan dated 15th September 1977 and signed by John Y. Wu and James S.W Wong, joint Managing Directors of HKR (hereinafter referred to as "New Master Plan"). This New Master Plan shows that:–

(a) Private residential accommodation will provide a total of 2,166 garden houses on a gross site area of 6,290,000 sq.ft., giving a gross building space of 3,250,000 sq.ft. together with 4,000 holiday flats on a site area of 1,743,000 sq.ft., giving a gross building space of 2,400,000 sq.ft.

(b) One hotel is now planned having a total of 350 rooms on a site area of 175,000 sq.ft. giving a total of 350,000 sq.ft. of building space.

(c) Under community facilities and services, the commercial area is planned on a total of 465,000 sq.ft. of site area giving a total of 465,000 sq.ft. of building space while an additional 65,000 sq.ft. of commercial space is planned in the podium levels of the holiday flats.

Fire, police and ambulance facilities are in a site area of 174,000 sq.ft. giving 20,000 sq.ft. of building space while schooling is provided on a site of 174,000 sq.ft. giving 30,000 sq.ft. of building space. In addition, there are sewage treatment plant, storage yards and refuse disposal plants provided.

(d) The recreation and open space facilities provide two golf courses on sites of 5,750,000 sq.ft. and 6,710,000 sq.ft. a public golf course, tennis courts, marina, aviary botanical gardens, sports hall together with parks, playgrounds, camping and picnic areas, further golf facility and dam and reservoirs.

In addition, all the necessary infrastructure facilities are to be provided.

5. As will be seen from the above, there are differences between the two Master Plans and these can best be summarised as follows:–

	Original Master Plan	**New Master Plan**
Private Residential Accommodation	2,675 units	4,000 units
Hotels	1,750 rooms	350 rooms

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Fire, police and ambulance	site area of 60,000 sq.ft. giving 20,000 sq.ft. of building space	site area of 174,000 sq.ft. giving 20,000 sq.ft. of building space
School	60,000 sq.ft. site giving 30,000 sq.ft. of building space	174,000 sq.ft. site giving 30,000 sq.ft. of building space
Golf courses	Two full sizes golf course on area of 6,630,000 sq.ft. and 7,165,000 sq.ft.	two golf courses on area of 5,750,000 sq.ft. and 6,710,000 sq.ft.

The remaining facilities are substantially the same between the two Master Plans. 10

6. From a study of the New Master Plan, there is an increase in the number of private residential accommodation in areas originally planned for hotel use and in the areas of the golf courses and open space conservation areas.

There is also a change in the positioning of the ferry piers and storage yards.

It is also noted that some of the areas are now designated for garden houses adjacent to the north golf course on the New Master Plan which will require road access up steep hillsides not envisaged on the Original Master Plan.

7. There is now produced and shown to me copy of a Carving Out Plan thereon marked "DSF-3" in respect of Lot No. 385 in D.D. 352. I now crave leave to the said Carving Out Plan. 20

8. The sections correspond to certain development areas shown on the Original Master Plan as follows:—

Section "M" : On the Carving Out Plan refers on the Original Master Plan to Blocks 5A, 9E, 7A and 7B, which are shown for development as set out hereunder:—
- 5A: 180 private residential units on 400,000 sq.ft. of site;
- 9E: a sports hall and entertainment centre on a site area of 185,000 sq.ft.
- 7A: commercial area of 485,000 sq.ft. or a site of 485,000 sq.ft.; and 30
- 7B: being public transport facilities or a site of 60,000 sq.ft.

Section "N" : refers to Block 5B which is planned for 160 private residential units on a site of 320,000 sq.ft.

Section "O" : is shown as Block 5C which is planned for 110 private residential units on a site area of 260,000 sq.ft.

Section "P" : is shown as Block 5D which is reserved for 20 private residential units on a site of 70,000 sq.ft.

Section "Q" : is shown as Block 5E which is planned for 15 residential units on 30,000 sq.ft.

Section "R" : is shown as Block 5F which is planned for 40 private residential units on a site of 190,000 sq.ft.

Section "S" : is shown as Block 6A which is planned for 120 private residential units on a site of 425,000 sq.ft.

Section "T" : is shown as Block 6B planned for 100 residential units on a site area of 245,000 sq.ft.

Section "V" : is shown reserved for hotel number 2 which is a 800-room hotel on a site of 600,000 sq.ft. 10

Section "W" : is shown as hotel 3 having 500 rooms on a site area of 250,000 sq.ft.

Section "BB": is shown as Block 8B which is a recreation club on 210,000 sq.ft.

Section ,,dd..; is shown as Block 8D which is the proposed marina on a site of 95,000 sq.ft.

9. It is, however, not simple to coincide the boundaries of the said sections on the New Master Plan due to difference in scale but it would appear that they fall as follows:–

Section "M", "N", "O" and "P" all now fall within an area shown as Block 4 with part in an area shown as Block 23 which is planned to have 400 private residential units on a gross site area of 1,163,000 sq.ft. and also into portion of 23 which is the recreation club situated on a site of 210,000 sq.ft. 20

Section "Q" also appears to fall within part of Block 23 the recreation club.

Section "R" falls within part of Block 10 now reserved for ferry and service areas on a site of 218,000 sq.ft.

Section "S" falls within an area shown as 1B which overall is designated for 225 private residential units on a site of 666,000 sq.ft.

Section 'T' falls within part of Block 1A which is planned to house 325 private residential units on a site of 932,000 sq.ft.

Section "BB" now appears to fall within part of 11B, 11C and 23 which are designated as storage yard, refuse dispose plant and part of the recreation club.

Finally, Section "DD" appears to fall within part of Block 22 and 23 which are marina and recreation club respectively. 30

10. From the above it will be seen that there are changes with two hotels being replaced by private residential units, the commercial and public transport and sports hall/

entertainment centre being replaced by private residential units and portions of the recreation club being replaced by storage yard and ferry pier services.

Affirmed on 22nd April,. 1978.
This Affirmation is filled on behalf of the 1st Defendant.

High Court Action 1978 No. 785

AFFIDAVIT OF JONATHAN NORTH

I, JONATHAN NORTH partner of Messrs. North & Co Solicitors of 27 Ovington Square, London, SW3 1LJ make oath and say as follows:-

1. On 5th January 1978 the first defendant herein executed the Power of Attorney in favour of myself a true copy which is now shown to me as Exhibit JN1 hereto.

2. I have read what purport to be true copies of the Affidavit of Michael Pang Chiu Chiu and the affirmation of John Ying Bun Wu both sworn herein on the 14th March 1978.

3. I have read the affidavit of the third defendant sworn herein on the 13th April 1978 and indeed attended upon the third defendant during the preparation thereof. 10

4. The third defendant left his office immediately following the swearing of the said Affidavit for an overseas trip which had previously been planned and advised me that he would not be returning thereto until some time after Saturday 22nd April 1978 which I understand to be the date upon which the matters contained in the summons taken out on behalf of the Plaintiff herein on the 14th March 1978 are to be considered by this Honourable Court.

5. Prior to the departure of the third defendant he expressed to me his considerable concern (which indeed is reflected in paragraph 25 of his Affidavit) as to what effect the new master plan referred to in the affirmation of Mr. Wu had upon the value of the land in which the first defendant holds its interest. He requested that I make some preliminary investigation into this matter and if I thought it appropriate bring the results thereof to the attention of this Honourable Court. 20

6. On Monday 17th April 1978 I spoke on the telephone with Mr. Ronald Thomson of Project Planning Associates (International) Limited ("PPAIL") of 111 Avenue Road, Toronto, Canada, Suite 201. PPAIL in February 1977 agreed to act as consultants to the first defendant in connection with the project contemplated by the Agreement and was prior thereto consultants to the Plaintiff over a period of 2 or 3 years in connection with the planning of the original master plan for the Lantau project.

7. There are now produced to me three plans being:–

(a) a copy of the carving out plan annexed to the said agreement which formed part of the subject of the said agreement as specified in the schedule thereto and the said plan forms Exhibit JN2 herein; 30

(b) a copy of a plan which forms part of a booklet prepared on behalf of the Plaintiff by PPAIL a copy of which was handed to the first defendant at some time during or since the negotiation of the said agreement and which purports to reflect the "master plan" as conceived by the original management of the Plaintiff. Upon the said plan a wharf or breakwater has been marked in yellow ("the Breakwater") the said plan forms Exhibit JN3 herein; and

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No. 11 Affidavit of Jonathan North 22 Apr 1978 (Contd.)

(c) a copy of a plan which came into the possession of the first defendant at some time since 23rd January 1978 which I am given to understand is a copy of the Master Plan referred to in paragraph 2 of Mr. Wu's affirmation the said plan forms Exhibit JN4 herein.

8. During my telephone conversation with Mr. Ronald Thomson we discussed the possible consequences on the first defendant's land flowing from the alterations in the master layout plan as demonstrated in Exhibits JN3 and JN4 herein. Mr. Thomson informed me that he had difficulty in forming a definitive view prior to studying the master plan in greater detail, however, he expressed considerable surprise that the new master plan had dispensed with the need for the Breakwater. I asked Mr. Thomson to expand on this point and he advised me that during the evolution of the original master plan considerable time and money was spent in ascertaining and overcoming the flood risks associated with the Lantau site during the typhoon period. He advised me that detailed reports should be available amongst the files of the Plaintiff which to his recollection indicated that unless the Breakwater was constructed the area shown as the commercial area in both Exhibit JN3 and JN4 herewith could expect to be flooded to a depth of some feet at any high tide during the typhoon period. 10

9. The land in which the first defendant has an interest of course is not directly affected by the flood risk however the area is central to the communications and services required for the entire project and accordingly the value of the first defendant's interest in such land would be diminished if the Breakwater is not constructed. 20

10. Mr. Thomson went on to stress to me the years during which the original management of the Plaintiff slowly evolved the original master plan. He expressed considerable surprise that a completely new plan could be devised and all aspects of it thoroughly approved by the authorities in the time available to the new management.

11. Following our telephone conversation Mr. Thomson wrote to me on behalf of PPAIL expanding on the points mentioned above. The original of his letter forms Exhibit JN5 herewith.

12. At the time that I make this Affidavit I have not had an opportunity of sighting the details associated with the new master plan but only the layout plan constituting Exhibit JN4 herewith. However, from a brief perusal thereof it appears to me evident that the proposed density layout and standard and therefore the commercial viability of the areas in which the first defendant has its interest has been varied and accordingly to continue with the development of the project in accordance with the new master plan may severely jeopardise the first defendant's interests in such development. 30

13. On the 8th April 1978 a Writ of Summons was issued on behalf of the first defendant against the Plaintiff. A copy of this Writ is now shown to me as Exhibit JN6 herein. The Writ seeks the relief more particularly described in the endorsement of claim annexed thereto. The issuance of this Writ by the first defendant I hope underlines to this Court the statement made in paragraph 28 of the third defendant's Affidavit to the effect that the first defendant remains ready to honour the terms of the agreement of 11th October 1976. The First Defendant is most anxious to complete its bargain under the Agreement and, in my capacity as attorney for the 1st Defendant, I am aware that the 1st Defendant has available to it financial resources which together with suitable development 40

finance would enable it to do so. The 1st Defendant is also confident of being able to mount development finance through a well-known European contractor and has received an offer of participation in the project from a reputable Eastern group.

14. I now refer to paragraph 22 of the affirmation of Mr. Wu and believe that the following comments may assist the Court:–

(1) The total site area of the Lantau project is in excess of 66 million square feet. From the plan comprising Exhibit JN2 herewith the site area in which the first defendant is interested is about 4 million square feet, a mere 6 per cent of the whole and it would be readily seen that the total amount of land in which the first defendant has an interest is relatively small compared with the very substantial areas of land retained and capable of development by the Plaintiff. 10

(2) Mr. Wu affirms that "unless the Plaintiff is able to create a first mortgage on the whole of the Discovery Bay unencumbered save by such mortgage itself it will be unable to borrow the money it needs to carry out the development. . ." this is not only an oversimplification it is also to my mind false. Under special condition 9 of the Conditions of Exchange, it is possible for the plaintiff to charge the site or part thereof by way of a building mortgage. I now reproduce hereunder the full text of the said special condition 9:–

> "Notwithstanding of any provision of these conditions other than special condition No. 8 hereof, in the event of the grant having elected to pay the 20 premium aforesaid by instalments, he shall not except with the prior consent of the secretary and in conformity with any conditions imposed by him (including the payment of such fee as may be required by him), assign (other than by way of a building mortgage approved under special condition No. 8(A) (II) hereof and other than an assignment under special condition No. 8(B) hereof) underlet (other than at a rack rent and without any premium) or part with the possession or otherwise dispose of the lot or any part thereof or any interest therein or any building or part of any building thereon until the whole of the amount of the said premium has been paid and then only subject to and in accordance with the provisions of special condition No. 10 hereof, 30 provided that if the grantee shall have paid the outstanding instalments of the premium apportioned with the approval of the secretary in accordance with special condition No. 4(B) (II) above on any part or parts of the lot, this special condition shall cease to apply to such part or parts".

(3) Perhaps however the most significant point made by Mr. Wu is his allegation that it will be difficult to raise bank finance unless the registration of the agreement is vacated. The inference I draw from this remark is that Mr. Wu would prefer to mislead third parties and potential financiers by creating the impression that the first defendant does not have substantial and registerable interests in the land and in asking the Court to support such a course of action. Surely part of the function 40 of the registration procedures contained in the Land Registration Ordinance and the New Territory Ordinance are to prevent third parties from dealing without notice of claims relating to the land.

15. I would humbly ask this Court that before it considers granting the relief requested

in the Plaintiff's Summons to consider the following points:–

(1) The registraton of the agreement does not inhibit the Plaintiff from either commencing development in accordance with the original master plan or financing the same in the extensive areas unaffected by the Agreement.

(2) The real danger that, if the register is vacated, innocent third parties will become involved in the disputes between the Plaintiff and the first defendant.

(3) The need to ensure that the first defendant's rights are not jeopardised during the period prior to a full hearing of this action and indeed of Action No. 1006 (see Exhibit JN6 hereto).

16. In all these circumstances I submit that this Court should decline to grant the relief sought by the Plaintiff in its Summons. 10

Sworn on 22nd April, 1978.
This Affidavit is filed on behalf of the 1st Defendant.

High Court Action 1978 No. 785

AFFIDAVIT OF MICHAEL WONG GAI YAN (NO. 1)

I, MICHAEL WONG GAI YAN of Apartment 10 No. 34A Kennedy Road, Victoria in the Colony of Hong Kong, Company Director, do solemnly sincerely and truly make oath and say as follows:–

1. On Thusday 20th April 1978 I was approached by Mr. K. K. Chu of Messrs. K. K. Chu & Co. the solicitors acting on behalf of the 1st and 3rd Defendants in this Action. He handed to me a copy of what purports to be a true copy of the affirmation of John Ying Bun Wu filed herein on the 15th day of March 1978. Mr. Chu asked me if having read the said affirmation I would be prepared to make an affidavit commenting on the matters therein mentioned. 10

2. I was disinclined to comply with Mr. Chu's request since my father is the second Defendant named herein and recognised that his interests and those of the Defendants expressed by Mr Chu may not coincide. However having read the said Affirmation I felt bound to correct the impressions given by many of the statements contained therein and perhaps assist this Honourable Court by recording the history of this affair at first hand.

3. I was a director of the Plaintiff between 1975 and 1977 and was personally involved in the planning and implementation of the proposed development project in Lantau throughout that period.

4. My principal area of responsibility was as technical director and accordingly I am thoroughly familiar with the various, often conflicting economic legal and structural factors which together shaped the creation of the project as originally conceived. 20

5. Perhaps I should start by correcting the impression made in Pragraph 2 of Mr. Wu's affirmation that the new management of the Plaintiff had achieved something which the old management had failed to do by causing what he describes as "the Master Plan" to be approved on or about January 23rd 1978. In fact, there was an Original Master Plan for the Lantau Project which was approved in December 1975 after years of negotiation with the Government.

6. Let me attempt to describe briefly the original concept for the Lantau Island development. 30

7. The negotiation of the "Land exchange" contract which led the Plaintiff acquiring control of this enormous and significant site was intensely complicated. It involved:–

(a) the acquisition of 800 separate lots of land both within the Lantau area and elsewhere for the purpose of exchange.

(b) the development with the Government of a plan which was not only within the stringent planning regime the New Territories Administration had devised for the development of Lantau Site which was also viable. Obviously, numerous other administrative consents were required including the consent of the Executive Council.

(c) Most significantly, the devising of a programme where the construction of the essential infrastructure could be financed thereby permitting the whole area to be developed within the ambit of the Master Plan.

8. The Plaintiff incurred heavy expenses in assembling the Land necessary to implement this arrangement and in engaging local and foreign consultants to devise the Plan.

9. By mid 1976 the Plaintiff:-

(a) Had acquired sufficient land to enable the "land exchange" envisaged with the Government to proceed;

(b) Had agreed the Master Plan with the Government; 10

(c) Had negotiated a contract with Societie Francaises d'Entreprises de Dragages et Travaux Publics ("Dragages") to construct all the essential infrastructure for the first phase of the project; and

(d) Had arranged finance to underpin the infrastructure contract by way of stand-by Banker's credits.

10. The stage was therefore set to commit the Plaintiff to the project. The Plaintiff, which was privately owned, was mindful of the volume of finance that would be required if it proceeded, notwithstanding the facilities it had already negotiated. The Conditions of Exchange contemplated, and the Plaintiff would therefore become committed to, a development expediture of some HK$600,000,000 over a period of 10 years. 20

11. The possibility of raising financial support for the total development had been explored but, not surprisingly, financial sponsorship in this scale from a single source was not feasible.

12. With this knowledge prior to the Conditions of Exchange, special provisions were negotiated to deal with the following conflicting requirements:-

(a) the Government's requirement that overall control be retained by the Plaintiff and thereby monitored by the Conditions of Exchange; and

(b) The Plaintiff's need to be able to raise development finance which effectively meant the need to be able to section off parts of the Land within the project in order to introduce 3rd-party financing. 30

13. Special Condition 8(3) to which Mr. Wu referred at length in his affirmation should not be read alone. If read in the context of the whole agreement, it will be appreciated that the Agreement with the 1st Defendant and the other agreements to which I will refer below were negotiated specifically within the context of those clause in the Conditions of Exchange reflecting the negotiation I have referred to in my paragraph 12 above. They specifically permit the Plaintiff to enter into joint venture prospects provided that 51 per cent participation is retained by the Plaintiff.

Supreme Court of Hong Kong

No. 12 Affidavit of Michael Wong Gai Yan (No. 1) 22 Apr 1978 (Contd.)

14. Both the Dragages contract and the Conditions of Exchange were executed in September 1976.

15. All members of the Plaintiff's Board appreciated that the key to the Lantau Island Project was the infrastructure contract without which the Project could not be launched. In view of the sheer size of the Project, it was also recognised by the Board at the very out-set that the investment was a "front-end loaded" operation in that, to make it to success, at least Phase I of the Project had to be compromised or sacrified in order to attract infrastructure financing and to produce a cash-flow which would satisfy the repayment schedule of the infrastructure finance. As mentioned, the Dragages contract was supported by a stand-by Letter of Credit issued by Moscow Narodny Bank. However, later events indicated that Moscow Narodny Bank was not to honour its obligation to issue the said Letter of Credit. Further negotiations therefore followed with Dragages which resulted in an understanding that, as long as the Plaintiff was able to show a positive repayment schedule of the infrastructure finance, they would re-structure the infrastructure finance to suit the Plaintiff. Such alternative arrangement was agreed on the basis that the Plaintiff might enter into joint-venture with third parties the essence of which should demonstrate to and satisfy Dragages that the Plaintiff was able to repay the infrastructure finance. I also remember that in the contract with Dragages, the Plaintiff undertook to assign part of its sale-proceed to Dragages in securing repayment to it.

16. Under the above some-what tense finance condition, the Plaintiff entered into the following three contracts, namely:—

(a) One with John Lok & Partners of Hong Kong in September, 1976;

(b) One with the 1st Defendant in October, 1976; and

(c) One with Peter Leung Construction Company Limited of Hong Kong in November, 1976.

These contracts, though varying in details, embodied and entered into with the underlying concept stated in Paragraph 15 above.

In addition the agreement so negotiated were within the contemplation of the Special Conditions agreed with the Government as referred to in Pragraph 13 and any necessary consents would have been obtained as and when appropriate under such conditions.

17. I accordingly disagree with the suggestion by Mr. John Wu in his Affirmation that the 1st Defendant's Agreement was "unfavourable to the Plaintiff. This Honourable Court would now appreciate that, without the aforesaid 3 contracts, of which the 1st Defednant was the largest and most significant, the Lantau Project might not then be able to have been implemented. Only later events, unrelated there overtook the proposed Development and a provisional liquidation order interposed. It is of interest to note that the Plaintiff as well as the Official Receiver never did challenge the other two contracts with John Lok and Peter Leung as being "unfair" to the Plaintiff.

18. I now refer to Paragraph 21(e) of Mr. John Wu's Affirmation and to the Exhibit (not having been assigned an exhibit number) which was in someone's handwriting and

placed between Exhibits JW-27 and JW-28, I do not recall having seen this document before. However, while it is apparent on the face of it that someone was using it to keep a record of the extensions of the Option contained in the 1st Defendant's Agreement, it is impossible to reconcile the three dates placed against the initials at the top of the said document with the date (25th February, 1977) referred to in Paragraph 21(e). I fail to see how, say, on the 30th of January, 1977 someone could have "forecasted" a telephone conversation on 25th February, 1977 with the 2nd Defendant in connection with an extension to June, 1977.

19. The 3rd Defendant was appointed Director of the Plaintiff on account or in anticipation of a joint venture relationship to be entered into with the 1st Defendant; which relationship was later established by the Agreement with the 1st Defendant. The same arrangement was made with and offered to Mr. John Lok of John Lok & Partners. I remember that the 2nd Defendant also made the same arrangement with Mr. Peter Leung of Peter Leung Construction Company Limited. The idea was that all partners of all joint-ventures should be appointed directors in the Plaintiff. 10

At the same time as Mr. Burgess was appointed a director, the 1st Defendant was given an opportunity of buying a token holding of shares in the Plaintiff which it proceeded to and did do.

20. I now turn to deal with the exercise by the 1st Defendant in January, 1977 of its Option Agreement purely as a then director of the Plaintiff. Going back a bit in time, the Plaintiff had just learnt that Moscow Narodny Bank's support was being withdrawn but Dragages was to re-structure the agreement to the effect that in place of Moscow Narodny Bank's support, it would look to the revenue generated by the joint-venture agreements for repayment. It was known to all of us as directors, and most of all to Mr. John Ault who was the only full time executive director of the Plaintiff in Hong Kong, that the earlier the deal was clinched the more certain the infrastructure contract could be comsummated. 20

21. I now crave leave to refer to Paragraph 15 of the Affidavit of Mr. A.J. Burgess sworn the 13th day of April, 1978 in which he suggested that the 2nd Defendant was anxious that the option be exercised. I can only say that it was very much consistent with the then policy of the Plaintiff. 30

22. As regard Paragraph 20 of Mr. John Wu's Afffirmation, I say that Mr. J.P. Duckworth of the Official Receiver's Office only came to the Plaintiff's office and took away the Plaintiff's Common Seal, Statutory Books and cheque books. As far as I know, at no time did he read or search any other records of the Plaintiff.

23. I feel I should point out that the plan annexed to the 1st Defendant's Agreement with the Plaintiff coincides in every respect with the carving out plan subsequently approved by the New Territories Administration. This is explained, perhaps, by the close co-operation that existed between the Administration and the Plaintiff at that time and the Administration desired to ensure that the situation represented by the Plaintiff to propose co-venturers was not subsequently aggravated by trivial disputes as to the precise geometry or other details of such plan. Accordingly, it is represented by the 40

Plaintiff to the 1st Defendant that there was effectively no real likelihood of any change in the plan annexed to and formed part of the said Agreement.

Sworn on 22nd April, 1978.
This Affidavit is filed on behalf of the 1st Defendant.

High Court Action 1978 No. 785

AFFIDAVIT OF PIERRE EMILE HAMON

I, PIERRE EMILE HAMON of 6 Old Peak Road, Hong Kong make oath and say as follows:-

1. I am the Far East Area Manager of Dragages et Travaux Publics and am authorized to make this affidavit on their behalf.

2. I have seen what purports to be a copy of an affidavit of Michael Wong Gai Yan sworn on the 22nd day of April 1978 filed in this action. To the best of my information and believe the statements made in paragraph 15 of the said affidavit insofar as they relate to my company, give a correct outline of the main events which occurred during 1969 although certain matters of detail are omitted. 10

Sworn on 25th April, 1978
This Affidavit is filed on behalf of the 1st Dependant.

High Court Action 1978 No. 785

AFFIDAVIT OF CHU KA KIM (NO. 2)

I, CHU KA KIM of Messrs. K. K. Chu & Co., Solicitors and Notary Public of 1618 Prince's Building, Hong Kong, Solicitor, , make oath and say as follows:-

1. I received this 26th day of April, 1978 a telex dated 25th April, 1978 from Mr. Jonathan North, the person holding a Power of Attorney for the 1st Defendant herein. The said telex is in 2 parts; one of which was the text of a letter dated 24th April, 1978 from one Mr. B. Chapron of C.E.C. International of Paris and the other a letter dated 25th April, 1978 from one Mr. Robert B. Anderson of New York, U.S.A., therein enclosing a statement by him. 10

2. I am informed that both the said letters have been dispatched to my office in Hong Kong. As they may not reach Hong Kong before the present proceedings are due to be heard on Thursday the 27th day of April, 1978, I crave leave of this Honourable Court to adduce copy of the said telex on behalf of the 1st and 3rd Defendants. There is now produced and shown to me true copy of the said telex in respect of which I have separated into 2 parts as follows:–

(a) The one part containing the said letter from Mr. B. Chapron of C.E.C. International thereon marked "CKK-1"; and

(b) The other part containing the said letter from Mr. Anderson thereon marked "CKK-2". 20

3. I undertake to make and file a further Affidavit exhibiting those letters as soon as they are received by me in Hong Kong.

Sworn on 26th April, 1978.
This Affidavit is filed on behalf of the 1st Defendant.

High Court Action 1978 No. 785

AFFIDAVIT OF MICHAEL WONG GAI YAN (NO. 2)

I, MICHAEL WONG GAI YAN of Apartment 10 No. 34A Kennedy Road, Victoria in the Colony of Hong Kong,Company Director, do solemnly sincerely and truly make oath and say as follows:–

1. This is my Supplemental Affidavit to the one made and filed by me on the 22nd day of April, 1978.

2. I crave leave to refer to paragraph 14 of my said Affidavit and would like to make a correction thereto to the effect that the Dragages Contract was signed in July 1976 instead of September 1976 as previously deposed to by me. I make this correction because since the making of the said Affidavit, I have had the opportunity of discussing with Mr. Pierre Hamon, the Far East Area Manager of Dragages, about the Dragages Contract and was able to ascertain that the date of the Dragages Contract was the 8th day of July, 1976.

3. Mr. K. K. Chu of Messrs. K. K. Chu & Co. has also asked me whether I would wish to expand on my said Affidavit as it was obvious that very little time was available for me in preparing my said Affidavit. I do wish to expand on it as follows.

4. As regard Paragraph 13 thereof, I did not at that time have in my possession a copy of the Conditions of Exchange therein referred. I have since located a true copy thereof which is now produced and shown to me thereon marked "MWGY".

5. As regard Paragraph 17 thereof, I would add that the Agreement with the 1st Defendant had one further vital significance to the Plaintiff, which was known to the then Directors thereof, particularly to Mr. John Ault in that the then Directors believed that the 1st Defendant, being a foreign partner to the Plaintiff, would enhance the status of the Plaintiff in tapping foreign finance and increasing sales prospectus abroad.

6. As regard Paragraph 23 thereof which deals with the Carving Out Plan, I wish to point out that the same was prepared based on the Approved Master Plan dated the 3rd day of December, 1975. One of the requirements imposed by the New Territories Administration for the approval of the said Carving Out Plan was that it be drawn to a scale to 200 feet to an inch so that it might be super-imposed on or coincided with the said Approved Master Plan. The Approved carving Out Plan was prepared in accordance with those requirements and the sub-division lines thereon actually followed the lines on the said Approved Master Plan. Any sections, whether they be assigned to Peter Leung's Agreement or to the 1st Defendant's Agreement, were known to and identifiable by the Plaintiff.

Sworn on 26th April, 1978.
This Affidavit is filed on behalf of the 1st and 3rd Defendants.

High Court Action 1978 No. 785

AFFIRMATION OF WILLIAM JAMES O'NEILL

I, WILLIAM JAMES O'NEILL of Flat 8A, 27 Perkins Road, Jardine's Lookout in the Colony of Hong Kong, Civil Engineer, do solemnly sincerely and truly affirm and say as follows:-

1. I am the Plaintiff's project manager in respect of its project at Discovery Bay, and, as such, I am wholly familiar with the said project. The matters set out in this my Affirmation are true to my knowledge save where the contrary may apear in which case the same are turue to my information and belief. The Plaintiff has duly authorised me to make this my Affirmation on its behalf. 10

2. In 1955 I was awarded the degree of M.Sc by the Missouri School of Mines; and since then I have been active in the field of civil engineering and land development in the United States and about 14 countries in the Far East. I have held, inter alia, the following posts:–

(i) Assistant Professor of Civil Engineering at the Missouri School of Mines;

(ii) Chief of Civil Engineering for the Far East of the United States Government's Foreign Aid Programme;

(iii) Director of Engineering in Cambodia, Vietnam and Afghanistan under the auspices of United States Government. I have also been president and principal shareholder of several successful engineering and construction companies in Vietnam, Indonesia and Guam. 20

3. In Guam, in or about May, 1977, the Plaintiff, through Mr. John Ying Bun Wu, asked me to come to Hong Kong and look into the said project with a view to becoming project manager thereof. The said project interested me, and, accordingly, in or about June 1977, I came to Hong Kong and became the project manager in respect of the said project. At the time that Mr. Wu approached me in Guam he and I were involved in a joint venture involving several development projects there.

4. Having became project manager I took the following immediate steps:–

(a) I began to gather and study the material left by those who been previously worked on the said project for the preceding 4 years or so (when the 2nd Defendant controlled the Plaintiff). These included Mr. Joseph Hruda, who had been the technical director of the said project and who had before that been the project planner for Project Planning Associates (International) Ltd. (hereinafter called "Project Planning"). 20

(b) I started building up a team to deal with the said project comprising of Lyon Associates, who were highly respected resort planners based in Hawaii; Binnie and Partners, one of the largest and most respected consultant engineering firms in Hong Kong; and Wong and Tung, one of the major firms of architects in Hong Kong.

Supreme Court of Hong Kong

No. 16 Affirmation of William James O'Neil 26 Apr 1978 (Contd.)

5. As a result of the work we did over about six months, that team and I came unanimously and confidently to the following conclusions:—

(a) The concept embodied in Master Layout Plan 3.5 was arrived at in ignorance of vital engineering considerations, e.g. Project Planning had never completed the most basic planning requirement, namely mapping the site. Whereas they needed maps with one meter contour intervals to enable them to efficiently plan overall site formation work and to arrive at an accurate assessment of developable area density and related infrastructure, they had worked on 20 year old maps with 10 foot contour intervals.

(b) The project called for under the 3.5 plan did not divide itself into different phases. Unless a project of this nature is so divided it is very difficult if not impossible to obtain finance for it. 10

(c) It appears that the 3.5 plan with its major emphasis on hotels was slanted towards the international market whereas any sensible project of this nature in Hong Kong ought to be primarily slanted towards providing the local population with a welcome escape from the crowded conditions of this colony.

6. I have read the Affidavit of Jonathan North filed herein on April 22, 1978. The things which I have said above go some way towards answering the points which the said Affidavit apparently seeks to make. I will now, however, deal with 3 specific points which Mr. North says were made to him by Mr. Ronald Thomson of Project Planning. 20

7. Mr. Thomson is said to have expressed considerable surprise that Master Layout Plan 4.0 dispensed with a breakwater. Apparently Mr. Thomson thinks that the breakwater was to overcome flood risk. He is utterly wrong in so thinking. The breakwater is for typhoon protection of the ferry boats contemplated by the 3.5 plan. An examination of the 3.5 plan shows that the breakwater only extends partially into the Tai Pak Bay area and in fact would serve a very minor role in low land protection and would be highly dependant upon the vector direction of any maximum design wave arising from typhoon action. The proper way of protecting the developable area from flooding is to set the platform elevation of these areas above the design highwater levels. This information was obtained by the present planners through oceanographic studies which the present planners made. The typhoon protection for ferry boats provided for in marina under 4.0 plan constitutes a much more reasonable and economic solution than the expensive breakwater contemplated under the 3.5 plan. 30

8. Mr. Thomson apparently takes the view that the 3.5 plan was very carefully developed with regard to the construction programme and the circulation of vehicles and pedestrians during construction and upon completion of certain section of the development. Apparently, he also takes the view that this is absent from the 4.0 plan. The fact of the matter is that Binnie and Partners discovered that it was necessary to redesign and relocate numerous sections of the road under the 3.5 plan. There were numerous problems presented by the old design location and I am in entire agreement with what Binnie & Partners have done. 40

9. Mr. Thomson's remarks about the golf courses are unfounded. Apparently he thinks that the decrease in the size of the golf courses brought about by the 4.0 plan is

detrimental to the standard of the same. This remark is obviously made in ignorance of the fact that the present planners have been advised by distinguished architects of international golf courses. The changes in the golf courses have raised their standard. They remain full size and are better than the old ones.

10. With the greatest respect to Mr. Thomson, the work that he produced while involved in the planning of the said project is unacceptable and the criticisms which he seems to make of the present planning is unfounded.

11. As may be apparent from all the foregoing, the things that I have said in reply to Mr. North's Affidavit are based on things which we carefully researched and acted upon prior to the Defendants in this action coming upon the scene to asset the alleged rights which they now assert. There is absolutely no question of any of the things I have said being in any way strained to support the Plaintiff's case in this action.

10

Affirmed on 26th April, 1978.
This Affirmation is filed on behalf of the Plaintiff.

AFFIDAVIT OF THOMAS BEESLEY

I, THOMAS BEESLEY of 21 Lower Kai Yuen Lane, 4th Floor, in the Colony of Hong Kong, Retired Gentleman, make oath and say as follows:–

1. I was a director of the Plaintiff from September 19, 1973 to June 2, 1977, (both inclusive).

2. On February 25, 1977, I and another of the Plaintiff's then directors, John Edwin Michael Ault, spoke to the 2nd Defendant (the then Managing Director of the Plaintiff) on the telephone (we being in Hong Kong and the 2nd Defendant being in London). The 2nd Defendant told us that the 1st Defendant had requested a further extension of the option (purportedly granted by the agreement dated October 11, 1976, between the Plaintiff and the 1st Defendant relating to Lot No. 385 in Demarcation District No. 352, Discovery Bay, Lantau Island in the Colony of Hong Kong) from March 1 to June 30, 1977, and told us to arrange the granting of such further extension. Accordingly, we prepared a draft minute and spoke to the 2nd Defendant by a long-distance telephone call again later that morning. One of us read the said draft minute to him as one in respect of a proposed meeting of the Plaintiff's board granting such further extension. The 2nd Defendant approved the minute. and that same day the Plaintiff's board met in accordance with the minute and granted the said further extension by its resolution. At no time did the 2nd Defendant tell Mr. Ault or me about any letter dated January 24, 1977, from the 1st Defendant to the Plaintiff purporting to exercise the said option or that the 1st Defendant had in any way exercised the said option. A true copy of the said minute is marked "TB-1" and exhibited hereto. It does not contain any reference to the said letter dated January 24, 1977, nor mention that the 1st Defendant had in any way exercised the purported option.

3. At about the time of my resignation from the Plaintiff on September 19, 1977, the 2nd Defendant telephoned from London to me in Hong Kong. In the course of this conversation (in which the 2nd Defendant thanked me for my past services and told me not to worry unduly about the future) the 2nd Defendant said something about 'Anstalt's option agreement' whereupon I said 'What option? It's lapsed and the deposit forfeited.' The 2nd Defendant did not comment on this and the conversation moved on to personal matters.

Sworn on 26th April, 1978.
This Affidavit is filed on behalf of the Plaintiff.

High Court Action 1978 No. 785

AFFIRMATION OF WILFRED JAMES REYNOLDS

I, WILFRED JAMES REYNOLDS of Flat 1102, Block C, Dahfuldy, 21 Homantin Hill Road, Kowloon, Hong Kong to solemnly sincerely and truly affirm and say as follows:–

1. I am a Fellow of the Royal Institution of Chartered Surveyors and I am and have been, since October 1974, the Estate Manager of Central Enterprises Limited. Prior to my joining Central Enterprises Limited, I was employed by the Hong Kong Government and immediately prior to resignation from the Hong Kong Government I was Senior Estate Surveyor at Tsun Wan District Office and had served in all district offices in the New Territories over a period of approximately 8 years. 10

2. In or about May 1977 the Plaintiff, through Mr. John Yin Bun Wu, requested me to investigate a Master Plan dated 1st October 1976 (Master Plan 3.5). I compared master Plan 3.5 with the plan of the project as contained in the Conditions of Exchange and after study of the topographical details I noticed that part of the south golf course road on the south eastern side of the project protruded over the boundary of the site of the project.

3. I have visited the site of the project several times since May 1977 and was struck by the beautiful view one obtains from the areas adjoining the proposed golf courses and I therefore made enquiries from the engineering team assembled by the said Mr. John Wu whether or not it was feasible to open up these areas for garden homes. I would mention 20 that throughout the world, in resort areas, garden homes are built around golf courses. The engineering team, after intensive and extensive research, was of the opinion that it was not only feasible but desirable to build garden homes around the golf courses and accordingly it was decided to incorporate them in Master Plan dated the 15th September 1977 (Master Plan 4).

4. I refer to the Affidavit of Mr. Duncan Fleming and in particular to Clause 8 thereof wherein Mr. Fleming referred to a Carving Out Plan. I do not understand the various references and comparisions and I am unable to reconcile the sections referred to in many respects. For example, the Carving Out Plan gives Section M a total site area of 400,000 sq.ft. whilst Mr. Fleming gives Section M a total site area of 1,130,000 sq.ft. 30 Again, the Carving Out Plan gives Section V a total site area of 917,000 sq.ft. whilst Mr. Fleming gives Section V a total site area of 600,000 sq.ft. Again, the Carving Out Plan gives Section D.D. a total site area of 533,000 sq.ft. whilst Mr. Fleming gives Section D.D. a total site area of 95,000 sq.ft.

5. Referring to the Carving Out Plan based on the Master Plan 3.5, as far as I am aware, it was submitted to the New Territories Administration by Messrs. Tony Petty & Associates, as agent for the Plaintiff and it was confirmed that the Plan was acceptable but as far as I am aware, it has not been approved.

6. In my opinion, one hotel of 350 rooms will be sufficient since the 4,000 holiday flats, as envisaged in Master Plan 4 and as approved, will all be fully furnished and 40 equipped. In my opinion also, the steepness of the road is outweighed by the comparatively attractive sites for garden homes which the road opens up. In my opinion also the golf courses will be ones which the average golfers will enjoy.

7. I refer to the Affidavit of Mr. Duncan Fleming and in particular to Clause 10 thereof and I say that the commercial and public transport and sports hall/entertainment centre and portions of the recreation club have not been replaced by holiday flats and storage yard and ferry pier services but have been provided elsewhere within the site of the project.

8 Finally I am of the opinion that the project as envisaged in Master Plan 4 is infinitely more practical and economically viable than Master Plan 3.5 and will, with minor amendments, prove to be a success.

Affirmed on 26th April, 1978.
This Afrirmation is filed on behalf of the Plaintiff.

Supreme Court of Hong Kong

No. 19 Affidavit of John Edwin Michael Ault 26 Apr 1978

High Court Action 1978, NO. 785

AFFIDAVIT OF JOHN EDWIN MICHAEL AULT

I, JOHN EDWIN MICHAEL AULT of Flat 30, Block 31, Baguio Villa, Victoria Road, Pokfulam in the Colony of Hong Kong, Merchant make oath and say as follows:–

1. I was a director of the Plaintiff from September 19, 1973 to June 2, 1977, (both inclusive) and then from June 2, 1977 to September 20, 1977, (both inclusive).

2. I have been shown what purports to be a copy of the Affidavit of Edward Wong Wing Cheung sowrn in this action on April 18, 1978; and I crave leave to refer to paragraph 7 thereof.

On or about January 26, 1977, the 2nd Defendant broke a journey and was in transit in Hong Kong for one morning. Together with Mr. Beesley I visited the 2nd Defendant at his request in his home, about midday, where a number of senior employees of his various Hong Kong companies were already having separate discussions with him. The conversation between the 2nd Defendant, Mr. Beesley and myself sitting together lasted about fifteen minutes after which Mr. Beesley and I returned to the Plaintiff's offices. The 2nd Defendant did not mention the fact that the 1st Defendant had exercised the option nor to the best of my recollection was the subject of the 1st Defendant even touched upon. This was the only occasion on this day when I saw or spoke to the 2nd Defendant. 10

3. On February, 1977, the Company Secretary, who was also one of the Plaintiff's then directors, Mr. Thomas Beesley, and I, spoke to the 2nd Defendant (the then Managing Director of the Plaintiff) on the telephone (we being in Hong Kong and the 2nd Defendant being in London). The 2nd Defendant told us that the 1st Defendant had requested a further extension of the option as per the agreement dated October 11, 1976, between the Plaintiff and the 1st Defendant relating to Lot No. 385 in Demarcation District No. 352, Discovery Bay, Lantau Island in the Colony of Hong Kong from March 1, to June 30, 1977, and told us to arrange the granting of such further extension. Accordingly, Mr. Beesley prepared a draft minute and we spoke to the 2nd Defendant by a long-distance telephone call again later that morning. Mr. Beesley read the said draft minute to him as one in respect of a proposed meeting of the Plaintiff's board granting such further extension. The 2nd Defendant approved the minute and that same day the Plaintiff's board met in accordance with the minute and granted the said further extension by its resolution. At no point in the telephone conversation or at any other time did the 2nd Defendant tell Mr. Beesley or me about any letter dated January 24, 1977, from the 1st Defendant to the Plaintiff purporting to exercise the said option or that the 1st Defendant had in any way exercised the said option. A true copy of the said minute is marked "JEMA-1" and exhibited hereto. It does not contain any reference to the said letter dated January 24, 1977, or any objection that the 1st Defendant had in any way exercised the option in question. 20 30

4. By a letter dated February 25, 1977, signed by me on behalf of the Plaintiff to the 3rd Defendant as the Chairman and on behalf of the 1st Defendant, the Plaintiff told the 1st Defendant that the said further extension had been granted, enclosing a copy of the said minute. A ture copy of this letter is marked "JEMA-2" and exhibited hereto. 40

5. I have no recollection of any reply to the said letter dated February 25, 1977, "JEMA-2".

Supreme Court of Hong Kong

No. 19 Affidavit of John Edwin Michael Ault 26 Apr 1978 (Contd.)

6. I have read what purports to be a copy of the Affidavit of Michael Wong Gai Yan filed herein on April 22, 1978; and I crave leave to refer to paragraph 18 thereof. To the best of my recollection the following things on the handwritten sheet referred to therein were written by Mr. Beesley: (1) the initials "JA", "MW" and "MYF" at the top of the sheet and (ii) the passage at the bottom which reads:–

'Courses are:–

In the absence of any application from Anstalt Nybro for an extension of the option (approved by the HK Resort Co. Ltd. before 1st March, 1977) HK Resort Co. would forfeit the option money. If forfeitable the money would presumbaly be credited to Miscellaneous income A/C 10

TB
24/2/77'

To the best of my recollection, (i) I crossed out the initials "JA" and I wrote the initials "T.B." the word 'file", the words "Now 31 June ? JA" and the notation immediately to the right thereof; and (ii) Mr. Daniel Yuen the Plaintiff's then accountant wrote the rest of what is on that sheet.

I cannot now recollect exactly when each thing was written on that sheet, but I am certain that the words "Now 31 June JA" were written by me at some time after February 24, 1977.

Sworn on 26th April, 1978. 20
This Affidavit is filed on behalf of the Plaintiff.

High Court Action 1978, No. 785

AFFIDAVIT OF JOHN PETER DUCKWORTH

I, JOHN PETER DUCKWORTH, of C4, Ridge Court, 21 Repulse Bay Road, Hong Kong, Solicitor, make oath and say as follows:-

1. I am a solicitor in the Official Receiver's Office as I was during the period from and including April 1, 1977, to and including 13th December, 1977, during which period the official Receiver was the provisional liquidator of the Plaintiff. During this period it was I who was, on the Official Receiver's behalf, principally concerned with the Plaintiff's affairs.

2. During the said period, during which I studied the Plaintiff's files relating to this matter thoroughly, I did not see any document or letter or copy of any document or letter by which the 1st Defendant exercised or purported to exercise the option purportedly granted by the purported agreement dated October 11, 1976, in respect of Lot No. 385 in Demarcation District No. 350, Discovery Bay, Lantau Island, in the Colony of Hong Kong, nor was I even informed verbally or otherwise that the said option had or might possibly have been exercised. I never heard any suggestion whatsoever to that effect. I took it as a fact, and in my conversations with directors of the Plaintiff and with others it was taken as a fact, that the said option had not been exercised. I recall that when June 30 1977, passed without any communication being received from the 1st Defendant I assumed that the 1st Defendant no longer had any interest in the project at Discovery Bay or the Plaintiff except as a minority shareholder (at one time). The provisional liquidator has never received any communication, whether by letter, telex, telephone or otherwise from the 1st Defendant or anyone on its behalf. No claim against the Plaintiff was made by the 1st Defendant or on its behalf while the Plaintiff was in provisional liquidation.

Sworn on 26th April, 1978.
This Affidavit is filed on behalf on the Plaintiff.

High Court Action 1978, No. 785

AFFIRMATION OF JOHN YING BUN WU (No. 3)

I, JOHN YING BUN WU of 73, Sing Wo Road, Happy Valley, Hong Kong, Company Director do solemnly sincerely and truly affirm and say as follows:—

1. I am and since June 24, 1977 have been a director of the Plaintiff, which has duly authorised me to make this my Affirmation on its behalf. In my capacity as such director I have acquired knowledge of and information about the matters to which this action relates. The contents of this my Affirmation are true to my knowledge and belief save where the contrary may appear in which case the same are true to my information and belief. 20

2. The Plaintiff having asked Government what its attitude with regard to the matters dealt with below was, the Secretary for the New Territories, the Hon. David Akers-Jones, at a meeting in his office on April 25, 1978, which I attended, stated Government's position on these matters, thus: Government's attitude was that Master Layout Plan 3.5 in respect of the Plaintiff's project at Discovery Bay had been superceded by Master Layout Plan 4.0 in respect of such project. If Government was asked to agree to the reverting to the said Master Layout Plan 3.5, Government would not be prepared to consider agreeing to such a thing unless it appeared that the said Master Layout Plan 4.0 was not safe or not economically viable, and that there were good reasons for changing back to the former plan. 30

3. The Secretary for the New Territories has agreed to my recounting what he said on the matter in question at that meeting; and, upon the contents of the foregoing paragraph being communicated to him, has confirmed that the contents thereof accurately sets what he so said.

Affirmed on 27th April, 1978.
This Affirmation is filed on behalf of the Plaintiff.

High Court Action 1978 No. 785

AFFIDAVIT OF CHU KA KIM (No. 3)

I CHU KA KIM of Messrs. K. K. Chu & Co., Solicitors and Notary Public of 1618 Prince's Building, Hong Kong, Solicitor, make oath and say as follows:–

1. I crave leave to refer to paragraph 2 of my affidavit filed herein on the 26th day of April 1978 and inform this Honourable Court that my firm received:–

(a) a letter from C.E.C. International, Paris, dated the 24th day of April 1978; the text of which was reproduced in that portion of the telex exhibited to in my said Affidavit thereon marked "CKK-1"; and

(b) a letter from the Secretary to Mr. Robert B. Anderson therein enclosing a copy of that portion of the telex exhibited to in my said Affidavit thereon marked "CKK-2"; the last-mentioned copy telex being signed by Mr. Robert B. Anderson and witnessed by Julia Host and Danielle Wennegers. 10

2. There are now shown and produced to me a true copy of each of the two documents mentioned in the above paragraph respectively thereon marked "CKK-1" and "CKK-2".

Sworn on 4th May, 1978.
This Affidvait is filed on behalf of the 1st Defendant.

High Court Action 1978 No. 785

ORDER
Before The Honourable Mr. Justice Li in Chambers

UPON hearing Counsel for the Plaintiff, Counsel for the 1st and 3rd Defendants and Counsel for the 2nd Defendant, and

UPON reading the Affidavits and Affirmations filed herein to the date hereof and the exhibits thereto, and

UPON the position as between the Plaintiff and the 2nd Defendant with regard to the summons herein taken out on behalf of the Plaintiff on March 14, 1978, having been settled on terms endorsed on Counsel's briefs, and 10

SUBJECT to the Plaintiff giving to the Defendant an undertaking as to damages and fortifying it by the provision of a Banker's Guarantee in the amount of HK$100 million for both this Action and Action No. 1006 of 1978

IT IS ORDERED as follows:–

1. The 1st Defendant shall do all things necessary to erase the registration on March 2, 1978, of

(i) the purported agreement with a plan annexed, whether in its original form or as purportedly varied, dated October 11, 1976, in respect of Lot No. 385 in Demarcation District No. 352, Discovery Bay, Lantau Island in the Colony of Hong Kong between the 1st Defendant and the Plaintiff and the addendum thereto, 20 namely, addendum No. 1 dated November 25, 1976, (hereinafter called "the purported agreement") and

(ii) a document purporting to be a letter dated January 24, 1977, from the 1st Defendant to the Plantiff (hereinafter called "the purported letter")

under the provisions of the Land Registration Ordinance, Cap. 128 and the New Territories Ordinance, Cap. 97.

2. The 1st Defendant be restrained, whether by its directors, officers, servants, agents or howsoever otherwise until the trial of this action or until further order from effecting or taking any steps with a view to effecting any fresh registration of

(i) the purported agreement and/or 30

(ii) the purported letter and/or

(iii) anything connected with the purported agreement and/or the purported letter

under the provisions of the said Ordinances, either of them or at all as something affecting the said lot or any part thereof.

3. If the said registration on March 2, 1978, is not erased within 3 days of the last

of the 14 days referred to in item 4 below the Plaintiff is empowered and authorised to do all things necessary to secure such erasure inclduing calling upon the Land Officer to erase the said registration.

4. The Order under item 1 above be stayed for a period of 14 days from the date hereof, namely, May 12, 1978.

5. The costs of the above-mentioned summons as between the Plaintiff and the 1st and 3rd Defendants be in the cause.

6. The said summons is certified fit for 2 Counsel.

(Sd.) S. H. Mayo
Registrar

10

Dated 12th May, 1978.

Supreme
Court of
Hong Kong

No. 24
Order of
Li J.
12 May 1978

High Court Action 1978 No. 1006

Before The Honourable Mr. Justice Li in Chambers

ORDER

UPON hearing Counsel for the Plaintiff and Counsel for the Denfendant and

UPON reading the Affidavits and Affirmations filed herein and in High Court Action No. 785 of 1978 to the date hereof and the exhibits thereto and

SUBJECT to the Defendant giving to the Plaintiff an undertaking as to damages and fortifying it by the provision of a Banker's Guarantee in the amount of HK$100 million for both this Action and Action No. 785 of 1978

IT IS ORDERED as follows:– 10

1. The registration of the Writ of Summons herein as a lis pendens under the provisions of the Land Registration Ordinance, Cap. 128 and the New Territories Ordinance, Cap. 97 be vacated.

2. The Order under item 1 above be stayed for a period of 14 days from the date hereof, namely, May 12, 1978.

3. The costs of the summons herein taken out on behalf of the Defendant on April 18, 1978 be in in the cause.

4. The said summons be certified fit for 2 Counsel.

(Sd.) S. H. Mayo
Registrar 20

Dated 12th May, 1978.

Supreme Court of Hong Kong

No. 25 Judgment of Li J. 12 May 1978

Action No. 785 and Action No. 1006 of 1978

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

HONG KONG RESORT CO. LIMITED	Plaintiff
and	
ANSTALT NYBRO (formerly named ANSTALT SORO)	1st Defendant
EDWARD WONG WING CHEUNG	2nd Defendant
ANTHONY JACK BURGESS	3rd Defendant

10

Coram: Li, J. (in Court as Chambers)
Date: 12th May 1978 at 10.30 a.m.

Mr. Nourse, Q.C., Mr. Ching, Q.C., Mr. Bokhary (Woo, Kwan, Lee and Lo) for plaintiff

Mr. Thomas, Q.C., Mr. Mills-Owens (K.K. Chu) for 3rd defendant and 1st defendant

JUDGEMENT

Before me are two Summonses to vacate the registrations of an agreement affecting certain land and of a lis pendens affecting the same pursuant to the Land Registration Ordinance. These Summonses are taken out by the Hong Kong Resort Company Limited which I shall refer throughout this application as the plaintiff.

The Plaintiff obtained a grant from the Government sometime in 1975/76 and became the registered owner of a large area of land about 66 million square feet in the Lantau Island near Discovery Bay with a view to develop the said area into a resort, residential, tourist attraction with recreational facilities. The project involved capital cost of over 1,400 million. It became the registered owner on 10th September 1976. The project would spread out for some ten years.

20

The 1st defendant, the Anstalt Nybro, is a legal entity incorporated or registered in Liechtenstein. The 2nd defendant, Edward Wong, was at one time the chairman of the plaintiff, but he had since resigned. The 3rd defendant, Anthony Jack Burgess, is the chairman of the 1st Defendant. At the commencement of these applications, I have been informed that the plaintiff and the 2nd defendant, Mr. Edward Wong, has come to terms. However, in the course of this judgment, I still have to refer to Mr. Wong as the 2nd defendant.

30

The plaintiff cites the 3rd defendant as one of the necessary parties because he is the chairman of the 1st defendant, because the 1st defendant as a legal entity has to act through a natural person, the 3rd defendant. However, I have been told that the 3rd defendant is in fact not personally concerned with these applications. Thus, the issues are in practice a matter between the plaintiff and the 1st defendant.

Having acquired such a large area of land with a view to development the plaintiff

quite naturally had to look for financial support. At one time a foreign bank was interested. Financial support was assured. Even so, the plaintiff required participation by others. That was why the 2nd defendant approached the 3rd defendant with the view to co-operation for the development. After some negotiations an agreement was signed purporting to grant to the 3rd defendant an option to develop some 4.2 million square feet of land in the project. It is a short agreement and I shall read it. It reads that:

> "THIS AGREEMENT made on the 11th day of October, 1976 between ANSTALT SORO of Vaduz, Liechtenstein"

which is the predeceassor of the 1st defendant

> "of the one part and HONG KONG RESORT CO. LIMITED a limited liability company incorporated in Hong Kong with its registered office at 71 Des Voeux Road, Central, Hong Kong of the other part. 10
>
> WHEREAS
> 1. By an Agreement and Conditions of Exchange dated 10th September 1976 between HKR and the Secretary of the New Territories on behalf of His Excellency the Governor of Hong Kong HKR is the grantee of the lot described in the First Schedule hereto for the residue of a term of 99 years less (than?) the last three days thereof commencing from the 1st day of July, 1898.
>
> 2. HKR is engaged in the project to develop the lot referred to in (1) above by the construction thereon of buildings and other structures and works in accordance with a project known as the TA YUE SHAN Project. 20
>
> 3. SORO wishes to purchase an option to participate in the ownership development and subsequent management operation and exploitation of eleven sections of the above-mentioned lot, namely those more particularly described in the Second Schedule hereto.
>
> THE PARTIES HERETO HAVE ACCORDINGLY AGREED AS FOLLOWS:
> (1) In consideration of the payment by SORO to HKR of the sum of HKR50,000.00, the receipt whereof HKR hereby acknowledges, SORO shall have the option to participate in the ownership, development and subsequent management operation and exploitation of the said eleven (twelve?) sections in the manner hereinafter set forth. SORO is to give notice to HKR by letter or telex of its intention to take up this option by 31st Janaury 1977 latest. 30
>
> (2) In the event of SORO declaring its acceptance of the above option SORO and HKR will form three limited companies under the Companies Ordinance of Hong Kong in which SORO will have 49% of the capital and HKR will have 51% of the capital as follows:"

Then follows a detailed description of the contribution to be made by each party of the capital of the companies. The plaintiff was to dish out land which had been listed in the schedule as their part of the capital of the three companies and the 1st defendant would pay out some $2,250,000.00 in cash to make up the capital of these three companies. Then in clause (3): 40

"The three companies to be formed in accordance with clause (2) hereof shall as regards the respective sections to which they are to be assigned parts of the grant referred to in recital (1) hereof develop such sections in accordance with the Master Plan of HKR for the TA YUE SHAN Project.

(4) Once they have been incorporated Companies A, B and C shall appoint SORO as Manager to undertake and complete the development of their respective sections of the said Lot to be assigned to them after the taking by SORO of the above option and to undertake and administer the running, operation and exploitation of the development when completed for a period of 10 years after the completion of such development or for the period at the end of which all taxes whatsoever in respect of the development have been paid, all loans in respect thereof have been repaid and the capitals of the respective companies have been fully recovered from the operation and exploitation, whichever period shall be the shorter." 10

Then the First Schedule described the land that was owned by the plaintiff. The Second Schedule set out the various lots to be assigned to the three companies and their approximate square footage. The agreement was signed between the director of the plaintiff, one John Ault and by the 3rd defendant on behalf of the 1st defendant.

In early 1977 financial support of the foreign bank was withdrawn. The plaintiff was in financial difficulty. There was a petition on the 31st of March 1977 to wind up the plaintiff. The Official Receiver was appointed provisional liquidator of the plaintiff on the 1st April, 1977. Later a large consortium came into the picture, negotiated with the provisional liquidator and purchased the shares in the plaintiff to continue the project after injecting huge sums of money to pay off some of the debts. On 13th December 1977 the petition to wind up the plaintiff was dismissed. A new board of directors took over from the former directors such as the 2nd and 3rd defendants. 20

I must add that even by late 1976 there had already been a Master Plan approved in principle for the development of the land in question though no carving out Plan had been finally approved. After the new board of directors took office they rearranged and replanned the whole scheme. As a result there was a new Master Plan was approved in January 1978. Nothing happened to the agreement I have recited until the 6th January 1978 when a letter was received from the 1st defendant. The letter reads: 30

"We refer to our letter to you on the 24th January 1977 (a copy of which is enclosed for your convenience) relating to the Option Agreement of 11th October, 1976 (as amended) by which we exercised the rights conferred upon us thereby. The letter was handed to your Chairman when he was in London on 24th January 1977 who acknowledged acceptance of it to our Chairman.

We are anxious to proceed with the incorporation of three development companies in accordance with Clause 2 of the Agreement. 40

Our representatives will be visiting Hong Kong shortly and we would be grateful if a mutually convenient time might be arrranged for a meeting with you to further the matter."

Supreme Court of Hong Kong

No. 25 Judgment of Li. J. 12 May 1978 (Contd.)

The letter they enclosed purporting to exercise the option reads as follows. It is dated 24th January 1977.

> "Dear Sirs,
>
> We refer to your letter of 1st December, 1976 confirming the agreement to extend the Option until 1st March, 1977 and now give you Notice that we wish to exercise the option on 1st March 1977."

This letter was subscribed by the 2nd defendant in his capacity as the then Chriman of the plaintiff that 'The acceptance is hereby acknowledged. Hong Kong Resort Co., Ltd."

On 2nd March 1978 the agreement, that is the main agreement granting the option and dated 11th October 1976, and the enclosed letter dated 24th January 1977 purporting to exercise of the option were registered against the land under the Land Registration Ordinance by the 1st defendant. On 14th March 1978 the plaintiff issued a Writ in Action No. 785 of 1978 to vacate that registration. On 8th April 1978 the plaintiff issued a Summons to apply to this Court to vacate this registration pending trial of Action No. 785. On 8th April, the defendant issued a Writ against the plaintiff for specific performance relying on the agreement and the exercise of the option. The defendant, further, registered on 8th April 1978 the Action as a lis pendens and effected service on the plaintiff on 10th April, 1978. On 18th April 1978 the plaintiff issued the Summons to vacate the lis pendens. These two Summonses issued by the plaintiff are being heard together and are now before me. The above events are not disputed.

As the registrations are made under the provisions of Land Registration Ordinance, I like to refer to them in the outset. Section 2 of the Land Registration Ordinance provides that:

> "(1) The Land Office shall be a public office for the registration of deeds, conveyances, and other instruments in writing, and wills and judgments; and all deeds and conveyances, and other instruments in writing, and wills and all judgments, by which deeds, conveyances, and other instruments in writing and wills and judgments, any parcels of ground, tenements, or premises in the Colony may be affected, may be entered and registered in the said office in the manner hereinafter directed."

Subsection (2) provides that:

> "For the purpose of this Ordinance, "judgments" includes judgments and orders both of the Supreme Court and of the District Court."

Section 14 of the same ordinance provides that:

> "The provisions of this Ordinance relating to judgments shall extend to lites pendentes within the intent and meaning of the Judgments Act 1839, and the Act of 13 and 14 Victoria, chapter 35:
>
> Provided that any cause or matter in the District Court which in the Supreme Court would be lis pendens within the meaning of the said Acts shall be deemed to be a lis pendens for the purpose of this Ordinance."

Supreme Court of Hong Kong

No. 25 Judgment of Li. J. 12 May 1978 (Contd.)

and then Section 19 provides that:

> "The court or judge before whom any property sought to be bound is in litigation, may on the determination of the lis pendens, or during the pendency thereof, where the said court or judge is satisfied tht the litigation is not prosecuted bona fide, or for other good cause shown, make an order for the vacating of the registration in the Land Office of such lis pendens without the consent of the party who registered it, and may direct the party on whose behalf the registration was made to pay all (the) costs expenses occasioned by the registration or the vacating thereof, including the costs of the application to vacate, or may make such (other) order as to such costs or any of them as to the said court or judge may seem just."

It is agreed between learned counsel for both parties that, apart from any statutory provisions, this Court has inherent jurisdiction to vacate a registration upon good cause shown and also to order undertakings as to damages to be given by either party as the court sees fit. It is also agreed that the Court may vacate registration of a contract which is not specifically enforceable. Registration of an agreement or contract or any document is to protect a party who has a chance of obtaining specific performance of its terms at trial. If damages are sufficient remedy then such registration serve no useful purpose other than that to embarrass the opponent. A specifically enforceable contract is therefore practically the prerequisite for allowing registration to remain. To this extent the registration of the lis pendens in the present applications stands or falls with the registration of the agreement and the letter upon which the lis is founded.

Thus in the case of *Ontario Industrial Loan and Investment Company v. Lindsey* (1883) The Ontario Reports 66 the registration of a bare assertion of a right to property was vacated. Hagarty, C.J. said at page 75:

> "I think it clear that the registry laws do not permit such a document as the defendants Shaw and Caston prepared to be recorded. In the sense of "affecting" the lands I think we must hold that the instrument must have some bearing on the title, professing to convey, charge, or affect it by its own operation."

In *Heywood v. B.D.C. Properties Ltd.* (1963) 1 W.L.R. 975 where the registration of a claim was founded on negotiations through correspondence the Court examined the correspondence, found that it was clear that there was no possible binding contract existing between the parties, vacated the registration. At page 980 Wilmer L.J. said:

> "It seems to me that this is a clear case and that the judge was plainly right. The correspondence relied on as constituting an estate contract was precisely specified and limited to the period between the dates given. With regard to that correspondence, the judge in his judgment said: 'I will not go through that correspondence in detail. It will be sufficient for me to say that it is clear beyond argument that nothing in that corresponence creates a binding contract as between the plaintiffs and the defendants. The whole correspondence consists of negotiations 'subject to contract' for the sale of land, those negotiations being conducted on the basis that a contract would in due course be entered into and that the parties would not be bound until a contract was

Supreme Court of Hong Kong

No. 25 Judgment of Li. J. 12 May 1978 (Contd.)

entered into.' I entirely agree with what the judge said in that passage; indeed, the contrary has not really been argued; for Mr. Merriton has admitted that on the correspondence as it stands he cannot understand (contend?) that a binding contract was entered into. If that be right, then, it seems to me, the entry which is on the register ought not to be allowed to stand.

Mr. Merriton has, however, indicated that it may be possible, with the aid of documents which are not at present available, and possible with the aid of oral evidence from a witness, to prove that there was some other contract. Assuming for the sake of argument that he is justified in that contention, it does not seem to me to affect the question whether this particular entry in these terms ought to be allowed to stand. Agreeing, as I do, with the judge that on the correspondence it is quite clear that the alleged contract registered was not a contract, I also agree with him in the conclusion he reached that the previous case of In re Engall's Agreement was clearly distinguishable." 10

In *The Rawlplug Co. Ltd. v. Kamvale Properties Ltd.* 1969) Planning Reports 32 the defendant failed to complete in time a contract for the sale of land. The Court again examined the correspondence to satisfy itself that the contract was no longer in force and vacted the registration filed by the defendant. Megarry J. said at page 40 as follows:

"Accordingly, it seems to me that the speedy form of remedy by way of a motion ought to be available to a landowner in all cases where there are no substantial grounds for supporting the registration. I would thus favour a certain robustness of approach in these motions, of the type to be found in the administration of R.S.C., Ord. 14. If there is a fair, arguable case in support of the registration, then the matter must stand over until the trial. But if, though not cloudless, the sky has in it no more than a cloud the size of a man's hand, I would clear the register and leave the purchaser to seek such remedy by way of specific performance or damages as he may be advised. Judged by this standard, I have had no doubt about this case." 20

Similarly in *Tiverton Ltd. v Wearwell Ltd.* (1975) 1 Ch. 147 the registration was vacated when on construction of the documents the Court was satisfied that there is no memorandum in writing to satisfy the provisions of Section 40 of the Law of Property Act 1925. Lord Denning M.R. said at page 156: 30

'If the point depends on the correct interpretation of correspondence, then the court can decide the matter then and there without sending it for trial. There is no point in going formally to trial when the discussion at the trial would be merely a repetition of the discussion on the summary procedure. We have often decided cases under Order 14 when the only point is one of construction, even though it is a difficult and arguable point. So also under Order 86 in regard to which Russell L.J. said in *Bigg v. Boyd Giggins Ltd.* (171) 1 W.L.R. 913: 40

". . . . . if you have got simply a short matter of construction, with a few documents, the judge on this summary application should simply decide what is in his judgment the true construction.' "

Supreme Court of Hong Kong

No. 25 Judgment of Li. J. 12 May 1978 (Contd.)

Then in *Re Engall's Agreement* (1953) 2 A.E.R. 503 where the existence of a contract was in doubt it was held that the application to vacate the registration was inappropriate and the matter should be resolved at trial. At page 505 Vaisey J. said:

> "The existence or non-existence of a contract at any relevant time is of the utmost importance, and is a matter which ought to be considered carefully and in an appropriate manner. The summons is an attempt to use the machinery of the Land Charges Act, 1925, to obtain adjudication on the existence or non-existence of the contract at the time when the notice was served, or when it expired, or at the present time. In my judgment, it is not an appropriate way in which to approach the solution of what, in my view, is a somewhat difficult question. Under the contract for sale either party could bring an action for specific performance or for rescission. The existence of the charges is the shadow of the matter, not the substance of it – which is the existence of the contract – and I am being asked to deal with the shadow, not with the substance. That is not the proper procedure to ascertain the existence or non-existence of the contract. To ask that the charges be removed from the register before the point has been decided by any action is wrong. The charges register is only a record. Before the notice to complete was served, the vendors' solicitors stated, accurately, that an action for specific performance was the appropriate remedy. It does not follow that because the deposit has been forfeited the entry on the register ought to be vacated. I am not going to decide the question one way or the other. There is a good deal to be said for the view that the notice to complete is deficient in point of time, but the purchaser might receive little sympathy in an action for specific performance."

In the light of these authorities it appears to be that the Court will exercise its jurisdiction to vacate only where, on construction of documents or by conduct of the parties, the contract alleged to be affecting land does not exist. The so-called robust approach applies only when the party entering the registration has only a slim chance to succeed. Whether the slim chance is described as the cloud the size of a man's hand in a clear day or as having no arguable case as in an Order 14 Summons amount to the same thing.

In *Turley v. Kackay* (1944) 1 Ch. 37 the plaintiff was bound to create a legal estate in favour of such third person as the defendant should direct. The Court refused to vacate the registration of the contract and Uthwatt J. said at page 40:

> "On the construction of the agreement it appears to be clear that, while the agents cannot require the plaintiff to sell, or grant the lease of, any property to themselves, it is for them to determine whether and how any site is to be disposed of and the plaintiff is bound to comply with the directions which the agents give him in good faith. The question, therefore, arises whether a contract under which one person is bound to a second person to create a legal estate in such a third person as the second person may direct is an estate contract. In my opinion, the object of s.10 is to secure that obligations affecting land may be registered by persons who have a commercial interest in seeing that those obligations shall be carried out. In this case, undoubtedly, the agents have such a commercial interest, and, on the construction of the section, I cannot see that it is limited to cases where the obligation is to convey or create a legal estate in favour of the person with whom the obligation is entered into. The

Supreme Court of Hong Kong

No. 25 Judgment of Li. J. 12 May 1978 (Contd.)

section is perfectly general in its terms. Having regard to its language and the limited ground on which it is sought to displace the entry from the register, the application must be refused."

In support of the applications to vacate the registrations and the lis pendens, learned counsel for the plaintiff listed no less than 4 reasons with an alternative contention that should the registration be not vacated the defendant should be ordered to give an undertaking as to the damages. It is not a long document, I shall read the summary of its reasons. The first reason is that:

"1. The Agreement of 11th October, 1976 is wholly unenforceable because it is void for uncertainty. 10

2. Alternatively, the Agreement is enforceable only in damages and not by specific performance, because

   (a) It is the enquivalent of a contract to enter into a partnership;

   (b) It involves continuous supervision and the rendering of continuous services by one person to another;

   (c) it is an agreement to assign land to three companies which may never come into existence and

   (d) damages would be an adequate remedy.

3. If the Agreement is either (a) wholly unenforceable or (b) not specifically enforceable it does not 'affect' the land and cannot be registered under the Land Registration Ordinance. 20

4. In any event, the evidence discloses that the option was never effectively exercised and that there is no triable issue on this point.

5. Alternatively to 4, the registration should be vacated unless Nybro either

   (a) gives HKR an undertaking as to damages or

   (b) seeks and obtains an injuction against HKR and gives the usual cross-undertaking as to damages and in either case fortifies the undertaking."

I shall consider them not in their numerical order but begin with the one which appears to me to be the most fundamental, namely, that 'the evidence discloses that the option was never effectively exercised and that there is no triable issue on this point'. In connection with this contention and, indeed, with the others, both parties have filed a fair number of affidavits and affirmations. I shall not repeat them verbatim so as to give this judgment unnecessary length. Suffice it to say that I have read and considered them and shall refer to the gist of their contents in so far as they are relevant. 30

Mr. Nourse for the plaintiff contends that the letter dated 24th January 1977 in purported exercise of the option can only be a sham created by the 3rd defendant, and

Supreme Court of Hong Kong

No. 25 Judgment of Li J. 12 may 1978 (Contd.)

the 2nd defendant, ex post facto. Alternatively the said letter was only a provisional exercise of the option to be held in suspense by the 2nd defendant until the 3rd defendant gave the final instructions to go ahead. Alternatively, that the letter had been cancelled by subsequent events as it occurred.

The option is said to have been exercised in a letter dated 24th January and handed by the 3rd defendant to the 2nd defendant in London on the same day. The 2nd defendant wrote an acknowledgement of receipt on that letter. The 2nd defendant, left London for New York the next day via Hong Kong. He had a brief stop-over in Hong Kong and he handed the letter exercising the option to his secretary.

In support of the plaintiff's contentions, Mr. John Wu, a present director of the plaintiff, says that the original of the said letter purporting to exercise the option had never been found amongst the plaintiff's papers. This is confirmed by J.P. Duckworth, a solicitor in the office of the Official Receiver who was appointed provisional liquidator of the plaintiff between 1st April 1977 and 13th December 1977. In his affidavit dated 26th April 1978, Mr. Duckworth further deposed that throughout the period when he acted on behalf of the Official Receiver as provisional liquidator no one informed him as to the exercise of the said option in any way. Further, in paragraph 21 of John Wu's affirmation, it is alleged that on 1st December 1976 one J.E. Ault, another director of the plaintiff at the time, wrote to the 3rd defendant in his capacity as chairman of the 1st defendant to the effect that the expiration date for the exercise of the option was extended to the 1st March 1977. No reply was received. Nothing was put on record until January 1978 when a copy of the disputed letter dated 24th January 1977 was received under a covering letter dated 6th January 1978. Again on the 25th February 1977 the plaintiff held a board meeting to consider a request made by the 3rd defendant through the 2nd defendant on a long distance telephone call between the 2nd defendant and one Beesley, another director of the plaintiff at the time. No mention was made as to the exercise of the option by the 2nd defendant or by anyone. At the said meeting the Board approved of an extension up to 30th June 1977. J.E. Ault, the then director, again wrote to the 3rd defendant a letter dated 25th February 1977 which reads:

> "We send you herewith a copy of the Minutes of the meeting of Board of Directors of our Company held on the 25th February, 1977, wherefrom it will be noted that your Company's option under the Agreement dated 11th October, 1976 has been extended to the 30th June, 1977."

No reply or acknowledgement was given by the 3rd defendant. Nor was there any intimation by the 34d defendant to the effect that he had exercised the option on the 24th January 1977. All the aforesaid were contained in John Wu's affirmation which had been made known to the 3rd defendant. Yet in his affidavit the 3rd defendant never dealt with them apart from his bare assertion that he had exercised his option by handing the disputed letter to the 2nd defendant. Nor does Michael Wong, the 2nd defendant's son, who was one of the directors of the plaintiff at the material time and also present at the Board meeting on 25th February 1977 to approve the minutes deal with this discrepancy in his affidavit at all. It is thus contended that had these applications been treated as an Order 14 Summons the Plaintiff would have obtained summary judgment because the defendants never descended upon the forum to explain the peculiar situation. As such, there is no arguable case. The only explanation is that the letter dated 24th January 1977 is a sham or a provisional exercise on that by virtue of the conduct of the parties the exercise

Supreme Court of Hong Kong

No. 25 Judgement of Li. J. 12 May 1978 (Contd.)

had been cancelled as from the 25th February 1977.

On the other hand the 3rd defendant asserts that he had exercised the option. In his affidavit dated 26th April 1978 Mr. Chu Ka Kim exhibits a telex from one Jonathan North who showed the test of one letter from a Mr. Chapron of C.E.C. International of Paris and a Robert Anderson of New York showing that the 2nd defendant had told them separately that the option had been exercised by the 1st defendant.

It is appreciated that all the allegations are founded on affidavit evidence. There has been no opportunity for cross-examination. It is also realised that 2nd defendant's interests in these proceedings do not coincide with those of the 1st defendant and the 3rd defendant. he has come to terms wih the plaintiff. It is understandable that he keeps his discreet silence. Mr. Michael Wong is his son. When it comes to a conflict of interests between the defendants, one is in no difficulty to ascertain where his loyalty lies. The 3rd defendant's lack of response to the plaintiff's letter dated 25th Febraury 1977 does present a dubious position. However, there is documentary evidence to show at least that two other persons knew of the exercise of the option by the 1st defendant. Looking at the case as a whole I am not prepared to rule that there is no arguable case. The conflict of evidence is best resolved at the trial when there will be a full opportunity for cross-examination. Following the decision in *Re Engall's Agreement* I am not prepared to vacate the registration on this ground.

I now come to the contention that the agreement dated 11th October 1976 is void for uncertainty. The nature of the agreement as I've read them is that:

(a) The plaintiff and the 1st defendant jointly form three companies in which the plaintiff will hold 51% and the defendant 49% of the interest in shares.

(b) On formation of the companies the plaintiff will assign land to the companies to the equivalent value of its shares in them and the 1st Defendant will pay into the three companies a total sum of about HK$2.2 million as cash capital.

(c) The three companies are formed to develop the land so assigned by the plaintiff according to the Master Plan attached to the agreement, namely, in the form of houses and flats.

(d) The 1st defendant is to be appointed the Manager of the companies, to undertake and complete the development and to undertake and administer the running, operation and exploitation of the development.

(e) The houses and flats are to be disposed of within ten years after the development or within a shorter period subject to certain conditions.

It is contended that even the formation of the companies is questionable because there is no provision for their articles of association. This is certainly not fatal – Section 11(2) of the Companies Ordinance provides that:

> "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

Supreme Court of Hong Kong

No. 25 Judgment of Li. J. 12 May 1978 (Contd.)

contained in Table 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."

Nor do I attribute much difficulty in the identification of the lots of land to be assigned by the plaintiff to the three companies. These are mapped out in the 1st Master Plan to be approved by the Government and attached to the agreement. There is no evidence of any government objection to the Master Plan in principle.

However, the terms of development and management are left in a vacuum. Even if I were to assume that the 1st defendant would undertake to develop and manage as a right or duty or as a monopoly free of charge, there is still the question of the 1st defendant's mandate. As manager, the 1st defendant is entitled to carry out the companies' policy. But who makes the policy decision? The plaintiff has a 51% shares in each company. Even if equal number of directors are to be appointed to each company, the terms regarding their rights and obligations are not as clearly defined as in Turley's case. No one can suggest that the cash capital as provided in the agreement is sufficient for the development of the 4.2 million sq.ft. of land. Is it to be assumed that the 1st defendant would be responsible for the arrangement of financial backings? If so, on what terms and by what method? Would the plaintiff be in a postiion to veto the defendant's terms and methods? All these had been carefully provided for in the agreement under the consideration in the *Turley's Case*, but not in the present agreement. It is appreciated that the *Turley's Case* was decided on the question whether the agreement was specifically enforceable and not on the question of certainty. Nevertheless a contract is not specifically enforceable unless its terms are not void for uncertainty. It is said that the courts are reluctant to hold void for uncertainty any provision that was intended to have legal effect. Paragraph 107 of Chitty on Contract 24 Edition (paragraph 107 Chitty on Contract 24th edition) is cited in support of the proposition.

It reads:

"For example, in *Smith v. Morgan* a contract for the sale of land gave the purchaser the first option to purchase' adjoining land 'at a figure to be agreed upon.' It was held that the vendor was bound to offer that land to the purchaser at the price for which he was in fact prepared to sell. The result was not to create a contract for the sale of the adjoining land at an indeterminate figure: it was up to the purchaser to decide whether to accept the offer at the vendor's price."

But the present agreement is not one of the simple conveyance of land at a price. It is for a joint venture the terms of which are far more complicated and for which there is no provision in the agreement. For this reason I am of the opinion that the agreement on 11th October 1976 is void for uncertainty. This should be sufficient to dispose of the applications.

In case I am wrong in that opinion, I now proceed to consider the plaintiff's second point that is: the agreement is not specifically enforceable. To begin with I find that the terms of the contract are not severable. Indeed it is not suggested that they are. The terms envisage not only an assignment of land but also a contract of service to be rendered by the 1st defendant. I have dealt with the terms of service when I considered the question of uncertainty of the agreement. I find that even if the terms can be ascertained their performance require continuous supervision by this Court. If we assume that the 1st

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No. 25 Judgment of Li. J. 12 May 1978 (Contd.)

defendant may exercise its discretion, the voting power is vested in the plaintiff.

The terms of the agreement require he 1st defendant and the plaintiff to form three companies. The 1st defendant is to manage them. The 1st defendant is to develop the land to be assigned to the companies and to manage the companies and its properties (houses and flats). Yet the terms for development and management are not provided for. To force two unwilling parties into such an ill-wed companionship on such precarious terms is a folly. The Court will be required to supervise continuously on the rights and obligations of the 1st defendant in the performance of its duty to develop and to manage.

The lack of mutuality is yet another problem. Should the 1st defendant refuse to carry out its duties I cannot see how the plaintiff can seek specific performance against the 1st defendant. In para. 367 of Vol. 36 Halsbury's Laws 3rd edition it is stated that: 10

> "a plaintiff cannot enforce a contract which could not be enforced against himself as involving performance of personal service or continuous acts, even though the consideration to be performed by the defendant is not in itself of a nature to exclude specific porformance; and a vendor of property in or over which he had no estate or power at the time of the sale may be met by this fact as a defence to a suit by him for specific performance."

For the aforesaid reasons I am further of the opinion that no court is likely to decree specific performance on the agreement now in dispute.

Having come to this conclusion no useful purpose is served by indulging in a detailed consideration of the third issue. On the face of it the agreement does contain terms affecting land. However, such terms are so intermixed with and unserverable from other terms which are uncertain or the performance of which require continuous supervision of the Court that I find the agreement not specifically enforceable. The plaintiff is naturally anxious to have the registration vacated. The reason is understandable. In this respect I accept the evidence of John Wu in paragraphs 22 and 23 of his affirmation. Having regard to the aforesaid reason I find that a good cause has been shown to have the registrations vacated. 20

In this connection I am not unmindful of the fact that one of the terms does touch upon the defendant's interests in land and also of the defendant's anxiety to enforce their rights. These are interlocutory proceedings. The formal solution of the dispute can only be found at trial. Whatever decision I make at this stage has been made without hearing the full evidence. Naturally the defendants expect and require some protection in case they vindicate themselves at trial. The Crown Lease for the land is due to expire by the 27th June 1997. The whole project which costs over $1,415 million will not be finished until 1984 (See paragraph 4 of John Wu's affirmation). Let us imagine that the agreement in dispute were allowed to run its own course and the option were valid. All the time the defendant has in this matter would be some sort of a 13 years lease in respect of the land. Within this period the defendant has to dispose of all the houses and flats so developed according to that agreement. Whatever loss the 1st defendant may suffer has a limit in view of the short terms that the companies can ever confer on the houses and flats to intended purchasers. Taking into consideration that the initial capital by the 1st Defendant is only $2.2 million, it is reasonable to expect that the profit that can be accrued to the 1st defendant would be within the term of $100 million. I am given to understand that the 30 40

plaintiff is willing and able to give an undertaking as to damages for this figure if the registration are vacated.

On the other hand, the defendants are not in a position to offer any specific sum for the undertaking if the registrations are allowed to remain even though they have given an indication that they are prepared to give such an undertaking.

Anyway, I have come to the conclusion that I have accepted John Wu's evidence that the plaintiff's project will be jeopardised if registration is not vacated. In these circumstances, I find that it is fair and equitable that the registration be vacated subject to the plaintiff giving an undertaking.

In the case of *Clearbrook Property Holdings Ltd, v. Verrier* (1974) 1 W.L.R. 243 where the purchaser was held to have an arguable case in the estate contract, Templeman J. decided that the registrationof a caution should be vacated and that the purchaser should apply for an interlocutory injunction subject to the purchaser giving an undertaking as to damages. Here is the reverse. The plaintiff is prepared to do so. In the present case, having regard to the reasons I have given and the willingness of the plaintiff to give an undertaking I am inclined to do the reverse of the order in the *Clearbrook's Case.* Accordingly, I order that both registrations be vacated subject to the condition that the plaintiff will give an undertaking as to damages to the defendants in the sum of HK$100 million and in the form of a bankers' guarantee pending trial. 10

I will grant the injunction in terms of the applications which are merely to reinforce the application for vacation of the registrations. I feel that it is just in this matter that costs should be costs in the cause. There will be certificate for two counsel. I alsoorder that the order be stayed for 14 days. This will be sufficient to enable the defendants to lodge an appeal within time. If they feel that they are so aggrieved they might be able to obtain leave from the Appeal Court to order a stay pending appeal. I make this order because I find that it is a matter of urgency for all parties concerned. That is why I do not take upon myself to order a stay for longer than 14 days. 20

Supreme
Cout of
Hong Kong

No. 26
Notice of
Appeal
19 May 1978

Civil Appeal No. 45 of 1978

IN THE SUPREME COURT OF HONG KONG
COURT OF APPEAL
(ON APPEAL FROM HIGH COURT ACTION NO. 785 OF 1978)

BETWEEN

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

10

NOTICE OF APPEAL

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above named Appellant on Appeal from so much of the Judgment and Orders herein of the Honourable Mr. Justice Li given and made on the 12th day of May 1978 whereby injunctions against the Appellant were granted in the following terms:–

SUBJECT to the Plaintiff giving to the Defendant an undertaking as to damages and fortifying it by the provision of a Banker's Guarantee in the amount of HK$100 million for both this Action and Action No. 1006 of 1978

IT IS ORDERED as follows:–

20

1. The registration on March 2, 1978 of

(i) the purported agreement with a plan annexed, whether in its original form or as purportedly varied, dated October 11, 1976, in respect of Lot No. 385 in Demarcation District No. 352, Discovery Bay, Lantau Island in the Colony of Hong Kong between the 1st Defendant and the Plaintiff and the addendum thereto, namely, addendum No. 1 dated November 25, 1976, (hereinafter called "the purported agreement") and

(ii) a document purporting to be a letter dated January 24, 1977, from the 1st Defendant to the Plaintiff (hereinafter called "the purported letter")

under the provisions of the Land Registration Ordinance, Cap. 128 and/or the New Territories Ordinancce, Cap. 97 be vacated.

30

2. The 1st Defendant be restrained, whether by its directors, officers, servants, agents or howsoever otherwise until the trial of this action or until further order from effecting or taking any steps with a view to effecting any fresh registration of

(i) the purported agreement and/or

(ii) the purported letter and/or

(iii) anything connected with the purported agreement and/or the purported letter

under the provisions of the said Ordinances, either of them or at all as something affecting the said lot or any part thereof.

3. If the said registration on March 2, 1978, is not erased within 3 days of the last of the 14 days referred to in item 4 below the Plaintiff is empowered and authorised to do all things necessary to secure such erasure including calling upon the Land Officer to erase the said registration.

4. The Order under item 1 above be stayed for a period of 14 days from the date hereof, namely, May 12, 1978.

5. The costs of the above-mentioned summons as between the Plaintiff and the 1st and 3rd Defendants be in the cause. 10

6. The said summons is certified fit for 2 Counsel.

FOR AN ORDER that the said Judgment and Orders be set aside and that the costs of this Appeal and of the hearings before the Learned Judge may be paid by the Respondent to the Appellant.

AND FURTHER TAKE NOTICE that the grounds of this Appeal are that:—

(1) The Learned Judge was wrong in holding that the whole or any part of the Agreement dated 11th October 1976 was void for uncertainty.

(2) The Learned Judge was wrong in holding that this Honourable Court would not decree specific performance of the whole or any part of the Agreement of 11th October 1976. 20

(3) The Learned Judge was wrong in holding that no Court is likely to decree specific performance of the Agreement of 11th October 1976 on the grounds either

(a) That such an Order would require continuous supervision by the Court or

(b) For lack of mutuality.

(4) The Learned Judge failed to give any or any sufficient consideration to the fact that the said Agreement directly or indirectly granted an interest in the said lands to the Appellant.

(5) The learned Judge should have held that the said Agreement of 11th October 1976 as well as the letter of 24th January 1977 whereby the option was exercised were instruments affecting land within the provisions of the Land Registration Ordinance and as such registrable thereunder. 30

(6) The Learned Judge was wrong in holding that there was good cause for vacating the Registrations of the said Agreement of 11th October 1976 as well as of the letter of 24th January 1977.

(7) The Learned Judge failed to give any or any adequate consideration to the consequences of an Order that the said Registrations be vacated, having regard to the provisions of the Land Registration Ordinance Cap. 128.

(8) The Learned Judge was wrong in holding that in the event of the Respondent being in breach of the said Agreement that damages would be an adequate remedy to the Appellant.

(9) There was no or no sufficient evidence before the Court that the Respondent would be jeopardized to any or any significant extent if the said Registrations were not vacated pending trial of this Action.

(10) There was no or no sufficient evidence to show what if any irreparable damage the Respondent would suffer if the Registrations were not vacated. 10

(11) In the event of the Court ordering vacation of the said Registration the Learned Judge should have

(a) Directed an enquiry as to the amount by which the Respondent's undertaking in damages ought to be fortified, alternatively.

(b) Directed that the security to be furnished by the Respondent be substantially greater than the suggested figure of $100 million, having regard to the amount of damage likely to be sustained by the Appellant in the event of the said Registrations being found to have been wrongly vacated.

AND FURTHER TAKE NOTICE that the Appellant proposes to apply to set down this Appeal in the Appeals List. 20

Dated the 19th day of May 1978.

K. K. CHU & CO.,
1618 Prince's Building,
Hong Kong.
Solicitors for the Appellant
(1st Defendant)

To: The Registrar,
Supreme Court,
Hong Kong 30

and

the abovenamed Respondent (Plaintiff) and its Solicitors, Messrs. Woo, Kwan, Lee & Lo of 26th floor, Connaught Centre, Hong Kong.

Supreme
Court of
Hong Kong

No. 27
Notice
of Motion
19 may 1978

Civil Appeal No. 45 of 1978.

NOTICE OF MOTION

TAKE NOTICE that the Court of Appeal will be moved at 11:30 a.m. on the 24th day of May 1978 at the sitting of the Court or so soon thereafter as Counsel on behalf of the Appellant can be heard for an Order that execution and all further proceedings on the Order of the Honourable Mr. Justice Li made on 12th May 1978 in High Court Action NO. 785 of 1978 be stayed and in particular that the Orders of the said Learned Judge whereby he granted injunctions to compel the vacation of the Registration of the Agreement of 11th October 1976 and of the letter dated January 24th 1977 be stayed until the outcome of this Appeal or until further Order 10

AND FURTHER that the costs of this Application may be provided for.

Dated the 19th day of May 1978.

K. K. CHU & CO.,
Solicitors for the Appellant
(1st Defendant)

Civil Appeal No. 46 of 1978.

IN THE SUPREME COURT OF HONG KONG
COURT OF APPEAL
(ON APPEAL FROM HIGH COURT ACTION NO. 1006 OF 1978)

BETWEEN

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

10

NOTICE OF APPEAL

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the above named Appellant on Appeal from so much of the Judgment and Orders herein of the Honourable Mr. Justice Li given and made on the 12th day of May 1978 whereby injunctions against the Appellant were granted in the following terms:–

SUBJECT to the Defendant giving to the Plaintiff an undertaking as to damages and fortifying it by the provision of a Banker's Guarantee in the amount of HK$100 million for both this Action and Action No. 785 of 1978

IT IS ORDERED as follows:–

1. The registration of the Writ of Summons herein as a lis pendens under the provisions of the Land Registration Ordinance, Cap. 128 and the New Territories Ordinance, Cap. 79 be vacated. 20

2. The Order under item 1 above be stayed for a period of 14 days from the date hereof, namely, May 12, 1978.

3. The costs of the summons herein taken out on behalf of the Defendant on April 18, 1978 be in the cause.

4. The said summons be certified fit for 2 Counsel.

FOR AN ORDER that the said Judgment and Orders be set aside and that the costs of this Appeal and of the hearings before the Learned Judge may be paid by the Respondent to the Appellant. 30

AND FURTHER TAKE NOTICE that the grounds of this Appeal are that:–

(1) The Learned Judge was wrong in holding that the whole or any part of the Agreement dated 11th October 1976 was void for uncertainty.

(1) The Learned Judge was wrong in holding that this Honourable Court would not decree specific performance of the whole or any part of the Agreement of 11th

October 1976.

(3) The Learned Judge was wrong in holding that no Court is likely to decree specific performance of the Agreement of 11th October 1976 on the grounds either

(a) That such an Order would require continuous supervision by the Court or

(b) For lack of mutuality.

(4) The Learned Judge failed to give any or any sufficient consideration to the fact that the said Agreement directly or indirectly granted an interest in land to the Appellant.

(5) The Learned Judge should have held that the said Agreement of 11th October 1976 as well as the letter of 24th January 1977 whereby the option was exercised were instruments affecting land within the provisions of the Land Registration Ordinance and as such registrable thereunder. 10

(6) The Learned Judge was wrong in holding that there was good cause for vacating the Registrations of the said Agreement of 11th October 1976 as well as of the letter of 24th January 1977.

(7) The Learned Judge failed to give any or any adequate consideration to the consequence of an Order that the said Registrations be vacated, having regard to the provisions of the Land Registration Ordinance Cap. 128.

(8) In the premises, the Learned Judge was wrong to hold that there was good cause for vacating the Registrations of the lis pendens. 20

(9) The Learned Judge failed to give any or any adequate consideration to the consequences of an order that the said Registrations of the lis pendens be vacated, having regard to the provisions of the Land Registration Ordinance Cap. 128.

(10) The Learned Judge was wrong in holding that in the event of the Respondent being in breach of the said Agreement that damages would be an adequate remedy to the Appellant.

(11) There was no or no sufficient evidence before the Court that the Respondent would be jeopardized to any or any significant extent if the said Registrations were not vacated pending trial of this Action.

(12) There was no or no sufficient evidence to show what if any irreparable damage the Respondent would suffer if the said Registrations were not vacated. 30

(13) In the event of the Court ordering vacation of the said Registrations the Learned Judge should have

(a) Directed an enquiry as to the amount by which the Respondent's undertaking in damages ought to be fortified, alternatively.

(b) Directed that the security to be furnished by the Respondent be substantially

greater than the suggested figure of $100 million, having regard to the amount of damage likely to be sustained by the Appellant in the event of the said Registrations being found to have been wrongly vacated.

AND FURTHER TAKE NOTICE that the Appellant proposes to apply to set down this Appeal in the Appeals List.

Dated the 19th day of May 1978.

K. K. CHU & CO.,
Solicitors for the Appellant
(Plaintiff)

To: The Registrar,
Supreme Court,
Hong Kong.

10

and

the abovenamed Respondent (Defendant) and its Solicitors, Messrs. Woo, Kwan, Lee & Lo of 26th floor Connaught Centre, Hong Kong.

Civil Appeal No. 46 of 1978

NOTICE OF MOTION

TAKE NOTICE that the Court of Appeal will be moved at 11:30 a.m. on the 24th day of May 1978 at the sitting of the Court or so soon thereafter as Counsel on behalf of the Appellant can be heard for an Order that execution and all further proceedings on the Order of the Honourable Mr. Justice Li made on the 12th May 1978 in High Court Action No. 1006 of 1978 be stayed and in particular that the Orders of the said Learned Judge whereby he granted injunctions to compel the vacation of the Registration of the lis pendens be stayed until the outcome of this Appeal or until further Order.

AND FURTHER that the costs of this application may be provided for. 10

Dated the 19th day of May 1978.

K. K. CHU & CO.,
Solicitors for the Appellant
(Plaintiff)

Civil Appeal No. 45 of 1978.

AFFIDAVIT OF CHU KA KIM (No. 4)

I, CHU KA KIM of No. 6 Fontana Gardens, 12th floor, Causeway Bayin the Colony of Hong Kong, Solicitor, make oath and say as follows:–

1. I am the Principal of Messrs. K. K. Chu & Company, Solicitors & Notary Public of 1618 Prince's Building, Hong Kong and I have the conduct of these proceedings on behalf of the Appellant.

2. This Affidavit is made in support of the Appellant's Application for a stay of the Orders made by the Honourable Mr. Justice Li on 12th May 1978 whereby he ordered that certain Registrations be vacated under the provisions of the Lnd Registration Ordinance Cap. 128 and/or the New Territories Ordinance Cap. 97. The Registrations to which I refer are:– 10

(i) The Registration on March 2nd 1978 of an Agreement with a Plan annexed dated 11th October 1976 in respect of certain section of Lot No. 385 in Demarcation District 352, Discovery Bay Lantau Island and made between the Appellant and the Respondent and the Addendum thereto dated November 25th 1976 together with a letter dated 24th January 1977 from the Appellant to the Respondent.

(ii) The Registration on the 8th day of April 1978 of Action No. 1006 of 1978 as a lis pendens against the same land.

3. I crave leave to refer to the Record of Proceedings in Actions Nos. 785 and 1006 respectively. As appears therefrom the Respondent sought interim injunctions to compel the Appellant to erase the said Registrations. The Respondent's applications came on for hearing on the 27th day of April, 1978 and on 12th May, 1978 the Learned Judge delivered his Judgment and granted the relief sought by the Respondent in its Applications. He also directed that a copy of his Judgment should be made available to the parties as soon as possible after it had been typed but at the date of making this Affidavit I have not yet been supplied with a copy of the typed Judgment. 20

4. The Appellant is desirous of appealing against the Judgment and Orders of the Learned Judge and a Notice of Appeal has been settled by Counsel and I crave leave to refer thereto. 30

5. An application for a stay of the Orders of the Learned Judge was made to him on 12th May, 1978 when he delivered his Judgment but after hearing argument he granted a stay for 14 days only and indicated that the application for a stay pending the outcome of the Appeal should be made to this Honourable Court.

6. I am informed by the Officer in charge of the Lists, Mr. Yeung Choi, that this Appeal, has been set down for hearing on the 3rd day of October 1978 for 3 days. It is the intention of the Appellant to seek the services of Leading Counsel from London and I verily believe that the Respondent will also be so represented. Indeed at the hearing before the Honourable Mr. Justice Li Leading Counsel from London appeared for both sides. 40

Supreme Court of Hong Kong

No. 30 Affidavit of Chu Ka Kim (No. 4) 22 May 1978 (Contd.)

7. It is the Appellant's respectful submission that unless a stay of the Orders of the Learned Judge whereby he in effect directed that the Registrations be vacated is granted this Appeal will be rendered nugatory. I crave leave to refer to the said Agreement of 11th October, 1976, the Addendum thereto of 25th November, 1976 and the letter of 24th January 1977 all of which were registered pursuant to the provisions of the Land Registration Ordinance. The Respondent has indicated both in the Affidavit filed on its behalf in Action No. 785 of 1978 as well as by way of submission through its Counsel at the said hearings that it intends to charge the whole of the said property and sell off parts thereof and generally to proceed with development of the project in disregard of the Appellant's rights under the said Agreement. The Appellant has instituted Action No. 1006 of 1978 seeking specific performance of the said Agreement and in those proceedings seeks to establish its rights under the said Agreement. Section 3(2) of the Land Registration Ordinance Cap. 128 provides that all instruments in writing which (being registrable) are not registered are, as against any subsequent bona fide purchaser or mortgage for valuable consideration of the same parcels of ground, absolutely null and void to all intents and purposes. Further, under Section 4 of Cap. 128 no notice whatsoever whether actual or constructive of any prior unregistered instrument affects the priority of any instruuments as are duly registered. Thus, if the Registrations are vacated prior to the hearing of this Appeal, the rights of the Appellant under the said Agreement will be absolutely null and void to all intents and purposes as against any bona fide purchaser or mortgagee of the land for valuable consideration. In summary the Appellant's rights under the said Agreement of 11th October 1976 in so far as they affect the land itself will be completely nullified before this Appeal is heard and indeed before there has been any adjudication of the Appellant's rights on the trial of its Action No. 1006 of 1978.

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Sworn on 22nd May, 1978.
This Affidavit is filed on behalf of the Appellant.

Civil Appeal No. 46 of 1978.

AFFIDAVIT OF CHU KA KIM (No. 5)

I, CHU KA KIM of No. 6 Fontana Gardens, 12th floor, Causeway Bay in the Colony of Hong Kong, Solicitor, make oath and say as follows:–

1. I am the Principal of Messrs, K. K. Chu & Co., Solicitors and Notary Public of 1618 Prince's Building, Hong Kong and I have the conduct of these proceedings on behalf of the Appellant.

2. This Affidavit is made in support of the Appellant's Application for a stay of the Orders made herein by the Honourable Mr. Justice Li on 12th May, 1978.

3. The Appellant herein is also the Appellant (1st Defendant) in Civil Appeal No. 45 of 1978 and will, for the purposes of this Application, refer to and rely on the Affidavit filed therein by me on 22nd May, 1978. 10

Sworn on 22nd May, 1978.
This Affidavit is filed on behalf of the Appellant.

No. 32
Order of
Court of
Appeal
24 May 1978

Civil Appeal No. 45 of 1978.

ORDER

Before The Honourable Sir Geoffrey Briggs, Chief Justice, Mr. Justice Huggins and Mr. Justice Pickering in Court

UPON hearing Counsel for the Appellant and Counsel for the Respondent and

UPON referring to he Affidavits and Affirmations filed in High Court Action No. 785 of 1978 and the Exhibits thereto and

UPON the Appellant by its Counsel undertaking to abide by any Order this Court may make as to damages in case this Court shall hereafter be of the opinion that the Respondent shall have suffered any such damages by reason of this Order which the Appellant ought to pay and fortifying such undertaking within 14 days to the staisfaction of the Registrar in the amount of HONG KONG DOLLARS ONE MILLION for both High Court Actions Nos. 785 and 1006 of 1978 (10)

IT IS ORDERED that execution and all further proceedings on the Order of the Honourable Mr. Justice Li made on the 12th day of May, 1978 in High Court Action No. 785 of 1978 be stayed and in particular that the Orders of the said Learned Judge whereby he granted injunctions to compel the vacation of the registration of the Agreement of 11th October, 1976 and of the letter of 24th January, 1977 be stayed until the outcome of this Appeal or until further order

AND IT IS ORDERED that the costs of this Application be costs in the Appeal. (20)

S. H. Mayo
Registrar

Dated 24th May, 1978.

Civil Appeal No. 46 of 1978.

ORDER

Before The Honourable Sir Geoffrey Briggs, Chief Justice, Mr. Justice Huggins and Mr. Justice Pickering in Court

UPON hearing Counsel for the Appellant and Counsel for the Respondent and

UPON referring to the Affidavits and Affirmations filed in High Court Action No. 1006 of 1978 and the Exhibits thereto and

UPON the Appellant by its Counsel undertaking to abide by any Order this Court may make as to damages in case this Court shall hereafter be of the opinion that the Respondent shall have suffered any such damages by reason of this Order which the Appellant ought 10 to pay and fortifying such undertaking within 14 days to the satisfaction of the Registrar in the amount of HONG KONG DOLLARS ONE MILLION for both High Court Actions Nos. 785 and 1006 of 1978

it is ordered that exeuction and all further proceedings on the Order of the Honourable Mr. Justice Li made on the 12th day of May, 1978 in High Court Action No. 1006 of 1978 be stayed and in particular that the Orders of the said Learned Judge whereby he granted injunctions to compel the vacation of the registration of the lis pendens be stayed until the outcome of this Appeal or until further order

AND IT IS ORDERED that the costs of this Application be costs in the Appeal

(Sd.) S. H. Mayo 20
Registrar

Dated 24th May, 1978.

NOTICE OF MOTION

TAKE NOTICE that the Court of Appeal will be moved on Wednesday, the 31st day of May, 1978, at 9.30 o'clock in the forenoon or so soon thereafter as Counsel for the abovenamed Respondent, Hong Kong Resort Co. Limited can be heard for:—

(a) an Order that time may be abridged so that this application may be heard on the abovementioned date

(2) an Order that the stay of execution and all further proceedings on the Order of the Honourable Mr. Justice Li made in High Court Action No. 785 of 1978 on the 12th day of May, 1978 until the disposal of the appeal herein or until further Order imposed by the Order of the Court of Appeal made herein on the 24th day of May, 1978 be lifted by such further Order

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(3) alternatively to (2) above, an Order that the above-named Respondent do have leave to appeal to Her Majesty in Council from the said Order of the Court of Appeal

(4) an Order that the costs of this application be provided for

(5) such further or other relief as may be just.

Dated the 29th day of May, 1978.

(Sd.) Woo, Kwan, Lee & Lo,
Solicitors for the said Respondent.

Civil Appeal No. 46 of 1978

NOTICE OF MOTION

TAKE NOTICE that the Court of Appeal will be moved on Wednesday, the 31st day of May, 1978, at 9.30 o'clock in the forenoon or so soon thereafter as Counsel for the abovenamed Respondent, Hong Kong Resort Co. LImited can be heard for:—

(1) an Order that time may be abridged so that this application may be heard on the abovementioned date

(2) an Order that the stay of execution and all further proceedings on the Order of the Honourable Mr. Justice Li made in High Court Action No. 1006 of 1978 on the 12th day of May, 1978 until the disposal of the appeal herein or until further Order imposed by the Order of the Court of Appeal made herein on the 24th day of May, 1978 be lifted by such further Order

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(3) alternatively to (2) above, an Order that the above-named Respondent do have leave to appeal to Her Majesty in Council from the said Order of the Court of Appeal

(4) an Order that the costs of this application be provided for

(5) such further or other relief as may be just.

Dated the 29th day of May, 1978.

(Sd.) Woo, Kwan, Lee & Lo,
Solicitors for the said Respondent.

AFFIRMATION OF JOHN YING BUN WU (No. 4)

I, John Ying Bun WU of 73, Sing Wo Road, Happy Valley, Hong Kong, Company Director do solemnly sincerely and truly affirm and say as follows:–

1. I am and since June 24, 1977, have been a director of the Respondent (to which I will refer as 'HKR'), which has duly authorised me to make this my Affirmation on its behalf. In my capacity as such director I have acquired knowledge of and information about the matters to which this appeal relates. The contents of this my Affirmation are true to my knowledge and belief save where the contrary may appear in which case the same are true to my information and belief. 10

2. On Wednesday, May 24, 1978, I was present in the Court of Appeal when the Orders of the Honourable Mr. Justice Li erasing the Appellant's registrations in respect of Lot No. 385 in Demarcation District No. 352, Discovery Bay, Lantau Island in the Colony of Hong Kong (hereinafter called 'Discovery Bay') were stayed until the outcome of Civil Appeals Nos. 45 and 46 of 1978 or until further order. It also appeared that it was not possible to give the hearing of the appeals a fixed date before October 3 next.

3. The present position of HKR is very serious. I crave leave to refer to my Affirmation filed in High Court Action No. 785 of 1978 on March 15, 1978, in particular to paragraphs 4 and 22 thereof. As appears therefrom, HKR is committed to a tightly-scehduled development of enormous complexity, involving a total expenditure of about 20 $1,415 million and necessarily dependent on financial support from its bankers.

4. In paragraph 22(a) of my said Affirmation I said that unless HKR was able to create a first mortgage on the whole of Discovery Bay unencumbered save by such mortgage itself it would be unable to borrow the money it needs to carry out the development or any significant part thereof. I also said, inter alia, that HKR had been negotiating a financial package with its bankers for some time and that it is anticipated that it would require to draw on the bank facilities in or about the middle of this year. I confirm that this is still the position today.

5. Since the decision of the Court of Appeal on Wednesday last, I have raised the matter afresh with HKR's bankers, namely, the Hongkong and Shanghai Banking 30 Corporation. The present attitude of the bank is stated in its letter dated May 30, 1978, marked "JW-1" and exhibited hereto.

6. In the light of the programme for the development set out in paragraph 4 of my said Affirmation, it will readily be seen that time is of vital importance to HKR and that if the stay is on any footing bound to remain in force until the hearing of the appeal fixed for October 3, 1978, HKR will, even if the appeal is unsuccessful, suffer irresparable damage. The purpose of the learned Judge's Orders would thereby be largely, if not wholly, defeated.

7. In all the circumstances, and in particular in the light of the size of HKR's development and the enormous sums of money involved, HKR respectfully submits that the 40 question whether the stay should be lifted pending the hearing of the appeal is sufficiently

Supreme court of Hong Kong

No. 36 Affirmation of John Ying Bun Wu (No. 4) 30 May 1978 (Contd)

important for it to be submitted to Her Majesty in Council for decision, and HKR respectuflly requests that leave should be given accordingly.

8. I have been informed by HKR's solicitors, Messrs. Woo, Kwan, Lee and Lo and verily believe that when the appals were before the Court of Appeal last Wednesday no transcript of the Judgment of the learned Judge was available. There is now shown to me marked "JW-2" and exhibited hereto a copy of the transcript of the said Judgment, which HKR's said solicitors have been informed by the learned Judge's clerk has been approved by the learned Judge.

Affirmed on 30th May, 1978.
This Affirmation is filed on behalf of the Respondent. 10

Civil Appeal No. 45 of 1978

AFFIRMATION OF JOHN YING BUN WU (No. 5)

I, John Ying Bun WU of 73, Sing Wo Road, Happy Valley, Hong Kong, Company Director do solemnly sincerely and truly affirm and say as follows:–

I respectifully refer to Affirmation filed on even date in Civil Appeal No. 45 of 1978 and adopt for all purposes herein the contents of that Affirmation.

Affirmed on 30th May, 1978.
This Affirmation is filed on behalf of the Respondent

Supreme
Court of
Hong Kong

No. 38
Order of
Court of
Appeal
31 May 1978

Civil Appeal No. 45 of 1978.

IN THE SUPREME COURT OF HONG KONG
COURT OF APPEAL
(ON APPEAL FROM HIGH COURT ACTION NO. 785 OF 1978)

BETWEEN

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

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ORDER

Before The Honourable Sir Geoffrey Briggs, Chief Justice, Mr. Justice Huggins and Mr. Justice Pickering in Court

UPON hearing Counsel for the Appellant and Counsel for the Respondent

AND UPON referring to the Affirmation of John Ying Bun Wu filed herein on the 30th day of May 1978

IT IS ORDERED that the Applications of the Respondent in the Notice of Motion filed herein on the 29th day of May 1978 be dismissed

AND IT IS FURTHER ORDERED that the costs of this Application be costs to follow the event.

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Dated the 31st day of May, 1978.

S. H. Mayo
Registrar

Supreme
Court of
Hong Kong

No. 39
Order of
Court of
Appeal
31 May 1978

Civil Appeal No. 46 of 1978.

IN THE SUPREME COURT OF HONG KONG
COURT OF APPEAL
(ON APPEAL FROM HIGH COURT ACTION NO. 1006 OF 1978)

BETWEEN

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

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ORDER

Before The Honourable Sir Geoffrey Briggs, Chief Justice, Mr. Justice Huggins and Mr. Justice Pickering in Court

UPON hearing Counsel for the Appellant and Counsel for the Respondent

AND UPON referring to the Affirmation of John Ying Bun Wu filed herein on the 30th day of May 1978

IT IS ORDERED that the Applications of the Respondent in the Notice of Motion filed herein on the 29th day of May 1978 be dismissed

AND IT IS FURTHER ORDERED that the costs of this Application be costs to follow the event.

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Dated the 31st day of May, 1978.

S. H. Mayo
Registrar

RESPONDENT'S NOTICE OF ADDITIONAL GROUNDS

Take notice that the Respondent intends upon the hearing of the appeal under the Appellant's Notice of Appeal dated the 19th day of May, 1978, from the Order of the Honourable Mr. Justice Li dated the 12th day of May, 1978, to contend that the said Order should be affirmed on grounds additional to those relied on by the Court below, namely:—

1. That the evidence disclosed that the option purportedly granted by the purported Agreement dated the 11th day of October, 1976, between the Appellant and the Respondent was never effectively exercised, and that there was no triable issue on that point. 10

2. That no agreement can affect land within the meaning of the Land Registration Ordinance, Cap. 128 unless it is specifically enforceable and if (which is denied) the learned Judge did not so hold then he ought to have done so.

And further take notice that the Respondent will apply to the Court of Appeal for an Order that the Appellant pay to the aforesaid Respondent the costs occasioned by this Notice to be taxed.

Dated the 2nd day of June, 1978.

Woo, Kwan, Lee & Lo,
Solicitors for the Respondent 20

Supreme Court of Hong Kong

No. 41 Respondent's Notice of Additional Grounds 2 Jun 1978

Civil Appeal No. 46 of 1978

RESPONDENT'S NOTICE OF ADDITIONAL GROUNDS

Take notice that the Respondent intends upon the hearing of the appeal under the Appellant's Notice of Appeal dated the 19th day of May, 1978, from the Order of the Honourable Mr. Justice Li dated the 12th day of May, 1978, to contend that the said Order should be affirmed on grounds additional to those relied on by the Court below, namely:—

1. That the evidence disclosed that the option purportedly granted by the purported Agreement dated the 11th day of October, 1976, between the Appellant and the Respondent was never effectively exercised, and that there was no triable issue on that point 10

2. That no agreement can affect land within the meaning of the Land Registration Ordinance, Cap. 128 unless it is specifically enforceable and if (which is denied) the learned Judge did not so hold then he ought to have done so.

And further take notice that the Respondent will apply to the Court of Appeal for an Order that the Appellant pay to the aforesaid Respondent the costs occasioned by this Notice to be taxed.

Dated the 2nd day of june, 1978.

Woo, Kwan, Lee & Lo,
Solicitors for the Respondent

SUPPLEMENTAL NOTICE OF APPEAL

TAKE NOTICE that on the hearing of the appeal under the Notice of Appeal herein on the 19th day of May, 1978, the Appellant will rely upon the following Grounds of Appeal in lieu of the Grounds of Appeal specified in the said Notice of Appeal, namely:—

(1) The Learned Judge was wrong in holding that the whole or any part of the Agreement dated 11th October 1976 was void for uncertainty.

(2) The Learned Judge failed to pay any or any sufficient regard to the fact that the management of the development was a duty undertaken by the 1st Defendant as part of the consideration for its acquisition of a minority interest in companies A, B and C. 10

(3) The Learned Judge was wrong in holding that this Honourable Court would not decree specific performance of the whole or any part of the Agreement of 11th October 1976.

(4) The Learned Judge was wrong in holding that no Court is likely to decree specific performance of the Agreement of 11th October 1976 on the grounds either

(a) That such an Order would require continuous supervision by the Court or

(b) For lack of mutuality.

(5) The Learned Judge was wrong in holding that the Agreement of 11th October 1976 was not severable and should have held that specific performance was an available remedy in respect of that part of the Agreement concerning the transfer of land to companies A, B and C and the issue of shares therein even if such remedy was not available in respect of the development of the land by companies A, B and C and/or the management of that development. 20

(6) The Learned Judge failed to give any or any sufficient consideration to the fact that the said Agreement directly or indirectly granted an interest in the said lands to the Appellant.

(7) The Learned Judge should have held that the said Agreement of 11th October 1976 as well as the letter of 24th January 1977 whereby the option was exercised were instruments affecting land within the provisions of the Land Registration Ordinance and as such registrable thereunder even if the contract embodied in those instruments or any part thereof was not specifically enforeceable. 30

(8) The Learned Judge was wrong in holding that there was good cause for vacating the Registrations of the said Agreement of 11th October 1976 as well as of the letter of 24th January 1977.

(9) The Learned Judge failed to give any or any adequate consideration to the

consequences of an Order that the said Registrations be vacated, having regard to the provisions of the Land Registration Ordinance Cap. 128.

(10) The Learned Judge was wrong in holding that in the event of the Respondent being in breach of the said Agreement that damages would be an adequate remedy to the Appellant.

(11) There was no or no sufficient evidence to show what if any irreparable damage the would be jeopardized to any or any significant extent if the said Registrations were not vacated pending trial of this Action.

(12) There was no or no sufficient evidence to show what if any irreparable damage the Respondent would suffer if the Registrations were not vacated. 10

(13) In the event of the Court ordering vacation of the said Registrations the Learned Judge should have

(a) Directed an enquiry as to the amount by whih the Respondent's undertaking in damages ought to be fortified, alternatively

(b) Directed that the security to the furnished by the Respondent be substantially greater than the suggested figure of $100 million, having regard to the amount of damage likely to be sustained by the Appellant in the event of the said Registrations being found to have been wrongly vacated.

Dated the 17th day of June, 1978.

K. K. Chu & Co., 20
Solicitors for the Appellant
(1st Defendant)

Civil Appeal No. 46 of 1978

SUPPLEMENTAL NOTICE OF APPEAL

TAKE NOTICE that on the hearing of the appeal under the Notice of Appeal herein on the 19th day of May, 1978, the Appellant will rely upon the following Grounds of Appeal in lieu of the Grounds of Appeal specified in the said Notice of Appeal, namely:—

(1) The Learned Judge was wrong in holding that the whole or any part of the Agreement dated 11th October 1976 was void for uncertainty.

(2) The Learned Judge failed to pay any or any sufficien regard to the fact that the management of the development was a duty undertaken by the 1st Defendant as part of the consideration for its acquisition of a minority interest in companies A, B and C. 10

(3) The Learned Judge was wrong in holding that this Honourable Court would not decree specific performance of the whole or any part of the Agreement of 11th October 1976.

(4) The Learned Judge was wrong in holding that no Court is likely to decree specific performance of the Agreement of 11th October 1976 on the grounds either

(a) That such an Order would require continuous supervision by the Court or

(b) For lack of mutuality.

(5) The Learned Judge was wrong in holding that the Agreement of 11th October 1976 was not severable and should have held that specific performance was an available remedy in respect of that part of the Agreement concerning the transfer of land to companies A, B and C and the issue of shares therein even if such remedy was not available in respect of the development fo the land by companies A, B and C and/or the management of that development. 20

(6) The Learned Judge failed to give any or any sufficient consideration to the fact that the said Agreement directly or indirectly granted an interest in the said lands to the Appellant.

(7) The Learned Judge should have held that the said Agreement of 11th October 1976 as well as the letter of 24th January 1977 whereby the option was exercised were instruments affecting land within the provisions of the Land Registration Ordinance and as such registrable thereunder even if the contract embodied in those instruments or any part thereof was not specifically enforceable. 30

(8) The Learned Judge was wrong in holding that there was good cause for vacating the Registrations of the said Agreement of 11th October 1976 as well as of the letter of 24th January 1977.

(9) The Learned Judge failed to give any or any adequate consideration to the consequences of an Order that the said Registrations be vacated, having regard to the provisions of the Land Registration Ordinance Cap. 128.

(10) The Learned Judge was wrong in holding that in the event of the Respondent being in breach of the said Agreement that damages would be an adequate remedy to the Appellant.

(11) There was no or no sufficient evidence before the Court that the Respondent would be jeopardized to any or any significant extent if the said Registrations were not vacated pending trial of this Action.

(12) There was no or no sufficient evidence to show that if any irreparable damage the Respondent would suffer if the Registrations were not vacated.

(13) In the event of the Court ordering vacation of the said Registrations the Learned Judge should have 10

(a) Directed an enquiry as to the amount by which the Respondent's undertaking in damages ought to be fortified, alternatively

(b) Directed that the security to the furnished by the Respondent be substantially treater than the suggested figure of $100 million, having regard to the amount of damage likely to be sustained by the Appellant in the event of the said Registrations being found to have been wrongly vacated.

Dated the 17th day of June, 1978.

K. K. Chu & Co.,
Solicitors for the Appellant
(Plaintiff) 20

Supreme Court of Hong Kong

No. 44 Affidavit of Anthony Jack Burgess (No. 2) 10 Jul 1978

AFFIDAVIT OF ANTHONY JACK BURGESS (NO. 2)

I, ANTHONY JACK BURGESS of 2/3 Philpot Lane, London E.C.3, England, Notary Public, MAKE OATH AND SAY as follows:–

1. I am the Chairman of the Appellant which has duly authorized me to make this my Affidavit on its behalf. In my capacity as such Chairman since 1976, I have acquired knowledge of and information about the matters to which this Appeal relates. The contents of this my Affidavit are true to my knowledge and belief save where the contrary may appear in which case the same are true to my information and belief.

2. This my Affidavit is intended to supplement and expand the Affidavit made by me on 13th April, 1978 (hereinafter referred to as "my Principal Affidavit" located at Pages 125-132 of the Records for Appeal – Pink Cover) to which I crave leave to refer. 10

SECTION ONE

3. I will in this Affidavit attempt to assist this Honourable Court as much as I can. But, before I do so, I must first explain why I did not cover the matter in full detail in April this year. I should also immediately seek this Court's indulgence should I have, unintentionally, given the impression of disrespect in undertaking the overseas trip notwithstanding that these proceedings were in progress. The trip had been arranged for several weeks before these proceedings became known to me and it was not possible to cancel these arrangements at that time. 20

(a) I received the Notice of Writ of Summons of the Action etc. during the week in which the Easter Holidays (24th to 27th March, 1978) commenced. The first opportunity I had to consult Mr. K. K.Chu in the case was in London on Monday the 3rd of April, 1978. Mr. Chu and I then felt that there was insufficient time to prepare the case and to be ready for the 8th April, 1978 (the return date of the Respondent's Application for Injunctions dated the 14th day of March, 1978). Mr. Chu accordingly advised that I should swear an Affidavit with the view to applying for more time. Such an Affidavit was in fact sworn by me and handed to Mr. Chu. There is now produced and shown to me marked "AJB-1" a photostic copy of the said Affidavit which, I understand, has not hitherto been filed with this Court but I will explain below why it has not been so filed. 30

(b) I understand that Mr. Chu arrived back in Hong Kong in the late afternoon of Wednesday the 5th of April, 1978 and consulted Counsel on the following day. On the same day he sought and obtained my instructions to enter a Conditional Appearance for both myself and the Appellant and to apply to set aside the proceedings and the service thereof on the ground that they were defective. An apperance in those terms was filed on 7th April, 1978 (see Pages 112 to 117 of Pink Cover). For this reason, my said Affidavit dated 3rd April, 1978 was not filed. Thus, up to this point (7th April), I had no reason to think that it would be necessary for me to deal with the substance of the Respondent's Application for Injections. 40

(c) On 8th April, 1978, the hearing was adjourned to 22nd April, 1978 on the terms of the Order of the Court of the same day (Page 123 of Pink Cover).

(d) As I was due to depart for France on 15th April, 1978, I thought it best to prepare an affidavit (i.e. my principal Affidavit) which I did in considerable haste and left it with Mr. Jonathan North, the Attorney for the Appellant. This Affidavit was a comparatively brief document and was thought sufficient to meet the Respondent's case as then disclosed by the Affidavits/Affirmations filed on behalf of the Respondent.

(e) The Appellant had the benefit of the advice of Mr. Neville Thomas, Q.C. only after he was called to Hong Kong for the hearing on 22nd April. On that day, the Respondent applied for and was granted an adjournment to th 27th April, 1978. During the adjournment, the Respondent filed a total of six further Affidavits, four on the 26th April, 1978 (served on my solicitor late in the afternoon of that day) and two some seven minutes before the hearing was to commence on 27th April, 1978.

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I have taken some pains in the preceding passages to demonstrate the very swift flow of events (a total of 26 affidavits and other documents prepared and filed by the parties in a matter of 13 full working days not counting the six other documents prepared and filed under Action No. 1006 of 1978) all to suit the convenience of the Respondent who knew full well that the Appellant and I were eight thousand miles away and keeping office seven hours behind Hong Kong. Accordingly even if I had accompanied Mr. Jonathan North to Hong Kong for the purpose of assisting Counsel in preparing the defence to the Respondents application I would not have had the opportunity of replying to the late Affidavits and Exhibits filed on behalf of the Respondent.

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4. I was under the impression that I was only required to make out a triable issue to resist the Respondent's Application, which, I then believed, would turn simply on whether or not the Option had in fact been exercised. Moreover, it was my view and my preliminary advice indicated that a very large part of the evidence in the Affidavits/Affirmations filed on behalf of the Respondent was not required to be answered by the Appellant because it:—

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(a) had nothing to do with the Appellant, and/or

(b) was speculative, and/or

(c) was solely intended to create prejudice, and/or

(d) was hearsay.

The Court will further note that at the time when I swore my Affidavit, I had in front of me only the Affirmation of John Ying BunWu and the Affidavit of Michael Pang Chiu Chiu both dated 14th March, 1978. Furthermore, I had then only received preliminary advice and had only a brief opportunity to confer with the owners of the Appellant Company.

SECTION TWO

5. I now wish to supplement and expand my Principal Affidavit.

6. The first I learned of the purported extension, alleged to have been effected by the resolutions passed on the 25th February, 1977, was when I sighted a copy of the Minutes of the alleged meeting at my office in London. I believe I received the letter enclosing the purported copy Minutes on either one of the first two days of March, 1977. My recollectior of matters pertaining to extending the Option is as follows:-

(a) In the very first place, there was only one extension, namely, that evidenced by the Respondent's Letter of 1st December, 1976 which would expire on 1st March 1977 (hereinafter referred to as "the March Extension"). The parties agreed to the March Extension and the Appellant accordingly counter-signed and returned to the Respondent a copy of the letter dated 1st December, 1976 which evidenced such extension. 10

(b) Neither I nor anyone for or on behalf of the Appellant had ever asked for any other extension, and, in particular, neither I nor anyone for or on behalf of the Appellant had ever asked for the "extension" now alleged to have been made by the Respondent in the purported Minutes dated 25th February, 1977. Even the wording of these purported Minutes, namely: '. . . . . since negotiations with interested parties have not yet been completed . . . . . " makes no sense because, nothing remained to be negotiated. The remaining part of that sentence saying that the Appellant "applied for the Option Agreement to be extended . . . . ." was simply untrue. Whereas the Appellant was required to acknowledge the March Extension which was done by counter-signing a copy of the December letter nothing of the sort was required of the Appellant in the letter dated 25th February, 1977. Furthermore, there had never been any discussion between the then Chairman of the Respondent and I in this regard much less an "agreement". 20

(c) I can say little more about this document with the preparation of which the Appellant was not concerned except to further draw the attention of this Court to the following facts:–

  (i) The Option had already been exercised by the Appellant as far back as 24th January, 1977. 30

  (ii) It was exercised in the circumstances described by me in my Principal Affidavit (Paragraphs 14-18 inclusive).

(d) When I joined the Board of Directors of the Respondent I was anxious to ensure that I was kept abreast of affairs of the company without, of course, complicating the running of the Respondent's affairs. Accordingly I agreed with the then Management, whilst I was in Hong Kong, on a modus operandi which is reflected by the exchange of letters dated 12th October, 1976 copies whereof are now produced and shown to me marked "AJB-2" and "AJB-3". Whilst the terms of those Exhibits do not refer to the Agreement, I would say that the spirit of the arrangement was such that a resolution of the type purportedly passed on 25th February, 1978 should have been passed to me for approval and not merely for information. 40

(e) I recall that when I first received the letter dated 25th February, 1977, I was puzzled. But since there had in the past been administrative misunderstandings on the part of the Respondent I was not unduly surprised or concerned. As mentioned, however, the then Chairman of the Respondent came to my office on both the 1st and 2nd days of March, 1977 (my diary shows these appointments). I recall showing him the 25th February letter and asking for his comments. He said words to the effect: "There must have been some misunderstanding, I will sort it out, you need take no further action". I saw no reason to discuss the matter further since I knew the Option had already been exercised on 24th January, 1977. I left it at that and moved on to discuss with him the continuing financial difficulties of the Respondent. I recall that I expressed my concern, both as the representative of the Appellant and in my personal capacity as a director of the Respondent.

(f) Throughout my contact with the then Chairman of the Respondent in relation to the Project, I had the distinct impression that key information was quite often carried in his head and, although he was always prepared to supply information on request to his fellow directors, he was not in the habit of keeping or supplying formal records and, since he was travelling very often, the Board was not always fully appraised of the facts on any particular topic unless the Chairman was present.

(g) In or about early April, 1977, I learned of the presentation of a petition to wind up the Respondent Company. I discussed this development with the owners of the Appellant who decided to adopt a wait-and-see attitude, since, whilst they were very keen on the project, they preferred to see if the Respondent would be able to overcome its obvious difficulties.

7. As deposed to by me in Paragraph 24 of my Principal Affidavit, the Appellant considers the Discovery Bay Project sound and profitable. As deposed to by Mr. Jonathan North in Paragraph 13 of his Affidavit filed on 22nd April, 1978, the Appellant is most anxious to proceed with and complete its bargain under the Option Agreement. In accordance with the requirements of the Option Agreement and notwithstanding the refusal of the Respondent to do so the Appellant has caused three limited liability companies to be incorporated under the Companies Ordinance (Cap. 32) for the purpose of implementing the terms of the Option Agreement. The three companies are named respectively Bay Resort Development Limited, Island Resort Development Limited and Garden Resort Development Limited. The Memorandum and Articles of Association of each of the the said companies is a matter of public record and copies will be available to this Honourable Court on the hearing of this Appeal.

8. I have read the two Affidavits of Michael Wong Gai Yan of 22nd and 26th April, 1978 an I have also been shown a draft of a second Supplemental Affidavit which I am informed by Mr. North will be sowrn by Mr. Michael Wong. I agree with the summary that he has given of the concept of the Lantau Project and of the joint venture proposals which the Option Agreement reflects. I also agree with what he has said on the subject of Development, Management and Finance in the second Supplemental Affidavit to be sowrn by him. I did not consider that there was any uncertainty or misunderstanding between the parties i.e. HKR and Nybro as to their respective functions and duties under the Agreement of 11th October, 1976.

9. Lastly, I would comment that Mr. John Wu is probably the person least likely to be

able to assist this Court as he is a new-comer to the Respondent and has obviously not done much home-work in acquainting himself with its affairs. This is apparent from his Affirmation dated 14th March, 1978 (Paragraph 9-14 and elsewhere) in that he saw necessary to raise matters of sheer prejudice and speculation. I did not and still do not find reason to deal with those parts of his Affirmation. I would only say that in my view he has intentionally or otherwise misled the Court.

10. Furthermore, even with the amount of time to prepare his said Affirmation, he also saw fit to introduce hearsay or double hearsay evidence therein.

Sworn on 10th July, 1978.

1978 No. 785

AFFIDAVIT OF EDWARD WONG WING CHEUNG (No. 2)

I, EDWARD WONG WING CHEUNG of 45 Marlborough Place, London N.W.8. Merchant make oath and say as follows:—

1. I am the second Defendant in this action and I make this further Affidavit at the request of the Appellant.

2. I crave leave of this Honourable Court to refer to my Affidavit sworn herein on 18th April 1978. I have been informed by my Solicitors that the Plaintiffs in this action have sought to draw adverse inferences from the fact that my said Affidavit did not deal with certain matters. 10

As the Plaintiffs are aware:—

(a) I had before me at the time of preparing the said Affidavit incomplete documentation as to the Plaintiffs' case and this was only received by me on the evening of Friday 31st March 1978. Between that date and 18th April I was obliged to travel to several cities in Europe and to the Far East in connection with pressing business and I was able to confer with my London Solicitors, and through them my Hong Kong Solicitors, for a short time only.

(b) I was advised (as stated at paragraph 3 of my said Affidavit and as confirmed by the letter of my Hong Kong Solicitors to the Plaintiffs' Solicitors dated 19th April 1978) that it was pertinent for me to deal with limited matters arising out of the Plaintiffs' Affidavit evidence, relating directly to the application before the Court and not to matters of hearsay and prejudice. 20

(c) My Affidavit was directed principally to confirming that it was, and is, totally beyond my power to control the actions of the Appellant and its registration or de-registration of the option agreement. The plaintiffs in due course accepted this by their action in ceasing to seek an interlocutory Order against me.

3. Any incompleteness in my earlier Affidavit was the result of the above considertions and in no sense a result of lack of respect for the Honourable Court adjudicating upon the Plaintiffs' application. I am conscious of my responsibilities to both parties, as one of the then Directors of Hong Kong Resort Company (H.K.R.) who induced the Appellant 30 to enter into the said Option Agreement, and to assist the Court as far as possible in arriving at a fully informed view as to the wider issues affecting the Plaintiffs' application, I now beg leave to supplement my earlier Affidavit in certain respects. It will be appreciated that the files of H.K.R. have been unavailable to me and I have not had the opportunity of access to documents which will undoubtedly be relevant to the final determination of the issues.

4. The Option Agreement with the Appellant was entered into in October 1976. As Mr. A.J. Burgess correctly states at paragraph 8 of his Affidavit sworn herein on 13th April 1978, the Anstalt he represented had been kept informed of developments in relation to the Lantau project for some years before 1976. The Appellant was one of 40

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the concerns which the Directors of H.K.R. were seeking to interest in the development, in particular, to share the burden of raising the substantial initial finance needed to get the project under way to the point where it became self financing. On the occasion of Mr. Burgess's visit to Hong Kong in 1976 we succeeded in satisfying him in regard to the project (as demonstrated by his acceptance of appointment to the Board of Directors of H.K.R.), and concluded the terms for such participation by the Appellant. It was agreed that a lengthy and formal document (like the Peter Leung agreement which was then in the course of preparation) was unnecessary in view of our close relationship and common understanding with Mr.Burgess, and the trust and good faith which existed between us. The terms were settled by Mr. Beesley and Mr. burgess, after I had left Hong Kong, and the agreement was approved by the Board of Directors and then executed in some haste as the Directors of H.K.R. were anxious for this to be concluded before Mr. Burgess's departure for London.

5. Mr. Wu is correct when he stated in his Affirmation that, in late 1976 and early 1977, H.K.R. got into some financial difficulties. This was mainly as a result of the failure of the longer term stand by financial support which had been expected and which had been provided for in the main contract with H.K.R.'s principal contractor, Dragages. It became necessary to negotiate a revision of part of the arrangement which had been established for securing their performance of the infra structure work. The Directors of H.K.R. set about negotiating a revised scheme under which Dragages would accept the conclusion of agreements parcelling out land, such as that concluded with the Appellant and those set out in paragraph 6 below as their additional reassurance that finance was available for the initial infra structure cost.

6. It should be noted at this point that the agreement with the Appellant was not unique but was part of the parcelling out arrangements reflected also in agreements with Lantau Development Company dated 11th June 1976, John Lok and Partners dated 10th September 1976 and Peter Leung dated 2nd November 1976.

7. I was due to fly to Hong Kongon Monday 24th January 1977, and whilst I was in London, I spoke that morning by long distance call with Mr. Tom Beesley who was in Hong Kong and we discussed a number of matters associated wih H.K.R..s current financial difficulties. Mr. Beesley reminded that I should take the opportunity, whilst I was in LOndon, to try to persuade the Appellant to exercise its option, in view of the further reassurance that this would give to the contractors, Dragages. We were all concerned however, that we should not risk getting a negative response from the Appellant by pushing them too hard and Mr. Beesley suggested that, in case they were not yet prepared to exercise the option, H.K.R. should give consideration to extending the deadline for this. This was a sensible proposal and I agreed that Mr. Beesley should go ahead and prepare a Minute of a Board resolution granting an extension, and in the meantime I would see Mr. Burgess and try to persuade him to have the option exercised. To the best of my recollection I did not discuss or agree with Mr. Beesley what extension of time should be given for the exercise of the option.

8. It was in these circumstances that I met later that morning with Mr. Burgess and the option was exercised in the manner deposed to in paragraph 7 of my earlier Affidavit. The option was only exercised on behalf of the Appellant after some discussion had taken place with Mr. Burgess, and I had again impressed upon him the importance to H.K.R. of securing the full support and participation of the Appellant. Having

persuaded Mr. Burgess to exercise the option I did not have reason to mention to him the suggestion of extending the deadline for this and did not do so. The question of an extension thereafter passed from my mind.

9. I understand that it is now being suggested on behalf of H.K.R. that the exercise of the option on 24th January was merely provisional. This is certainly not correct and I do not understand on what basis it can be alleged. In H.K.R. we had no concept of provisional exercise of options and we would have derived no benefit from this. It would have left matters on an inconclusive basis, and would in fact simply have prevented us from making alternative arrangements with other parties.

10. I left London to return to Hong Kong on 24th January and departed from Hong Kong for New York, via Tokyo, on the morning of 27th Janaury. I have not returned to Hong Kong since then. 10

11. On the 26th January 1977 I was fully engaged in successive meetings at my home with Members of the staff of my companies operating in Hong Kong and others, and was bringing myself up to date on recent developments. It will be recalled that at this time I was reviewing my group's financial position. In the case of H.K.R. in particular we faced immediate cash flow problems and were seeking to obtain limited finance to meet day to day expenses, salaries and New Year Bonuses that would be falling due.

12. Amid these many pressing problems, and with different parties seeking to discuss matters with me the meeting that I had with Mr. Ault and Mr. Beesley at my home was 20 relatively brief. I do not recall mentioning to them that the Appellant had exercised its option, nor do I recall any continuation of the conversation I had had with Mr. Beesley in regard to granting an extension of the deadline for this. Our concern was more directed to the day to day problems of H.K.R. and, so far as I can recall, the subject of the Appellant did not arise at all.

13. I refer to paragraph 7(c) of my earlier Affidavit of 18th April 1978. On further consideration I think that it must have been during the evening of 26th January that I called briefly at my office in order to deposit the papers which I had collected on various matters during my last trip abroad. For many years I have travelled extensively on business and it has become my custom, upon returning to Hong Kong, to place on my desk all 30 the papers I am then carrying relating to the affairs of the companies operating from Hong Kong, and collect any documents awaiting my attention. My secretary would then attend to those papers and other employees would handle their filing. I followed my usual practice on this occasion and deposited the papers which I had collected on my desk for attention by a secretary on the following day. Those papers will have included the original letter of the Appellant addressed to H,K.R. exercising its option. I have not seen the original letter at any time since then and can only conclude that it was attended to in the usual way and must have remained in the files of H.K.R.

14. I have been referred to those paragraphs of the Affidavits of Messrs. Ault and Beesley which set out certain purported telephone conversations with me and which are 40 alleged to have taken place on 25th February 1977 whilst I was in London and they were in Hong Kong. They state that I told them that the Appellant had requested a further extension of the option and had told them to arrange the granting of such extension. This is not correct. There was a telephone conversation with Mr. Beesley on 24th

January 1977 to which I have referred in paragraph 7 above but no such conversation took place after the option had been exercised on 24th January. I can only say that Messrs. Ault and Beesley were atleast mistaken in stating that any such conversation did take place. I have explained above that the affairs of H.K.R. were giving rise to a number of problems at this time, and it is a fact that over this period I must have spoken with my Hong Kong office over the telephone almost daily when I was travelling, but I am confident that no draft minute was ever read to me over the telephone. This was not the manner in which the Directors of H.K.R. conducted its business. It was common in practice for draft minutes of Board Meetings to be prepared and circulated amongst the Directors for comment and approval at their leisure, but a formal meeting would not normally be held. 10
I have no doubt that we did not discuss or agree any extension of time for the exercise of the Option as this was completely unnecessary, the Option having already been exercised.

15. I can further confirm that the Appellant at no stage put forward a request for an extension of the time for the exercise of its option. The extension which was given in November 1976 was at the instigation of H.K.R.

16. I visited London again early in March 1977 and, as was my custom, I took the opportunity to meet with Mr. Burgess. He showed to me a letter that he had received from HK.R. which had attached to it a detailed minute of a Board Meeting dated 25th January extending the time for the exercise of the Appellant's option. Mr. Burgess was confused by this, and I told him that there must have been some internal 20
administrative mistake on the part of H.K.R. and that he should ignore both the letter and the Minute and need not reply. I said that I would sort this out when I next returned to Hong Kong. As is known, I have not since returned and very shortly after the date of that meeting the affairs of H.K.R. were taken over by the Provisional Liquidator.

17. I have mentioned in paragraph 10 above that I left Hong Kong for New York on 27th January. I remained in New York for several days and during that time I met Mr. Robert B. Anderson, who was an overseas director of H.K.R. appointed, in part, to assist us in establishing contact with financial sources outside Hong Kong. He was thus particularly interested in our arrangements with the Appellant and I informed him that 30
I had been successful in persuading Mr. Burgess to exercise the option on 24th January.

18. At a later date which I cannot now recall I also advised Mr. B. Chapron of this on one of my visits to Paris. Mr. Chapron was, and is, a Director of C.E.C. International with whom we were in very close contact as intended consultants to undertake the overall organisation of the Lantau project. In his letter to Messrs. North and Company dated 24th April 1978 Mr. Chapron mentions that his company's files contain copies of the documents relating to the Appellant's option. I assume that I must have been responsible for supplying these to him, although I cannot now recall the occasion on which this happened. 40

19. In planning the development of the Lantau project there was consultation with many experts in the field, including Project Planning Associates (International) Limited, I recall informing Mr. Thomson of that company that the Appellant had exercised its option and in February 1977 Mr. Burgess contacted him to ascertain whether P.P.A. would continue to act in regard to the project on behalf of the Appellant and its

development of the area which was the subject of the option agreement. P.P.A. agreed, as is also confirmed by Mr. Thomson's letter of 17th April 1978, to Messrs. North and Company.

20. The option agreement provided for the transfer of specified areas of land into the possession of three companies to be formed, in which H.K.R. and the Appellant would respectively have 51 per cent and 49 per cent interests. By Clause 4 of the Agreement the three companies were then to appoint the Appellant as their Manager to undertake and complete the development of their respective sections and thereafter administer the running operation and exploitation of development for a further period of 10 years. At the date of the agreement there were available to H.K.R. and its Directors, including Mr. Burgess, an approved Master Plan and voluminous detailed reports and analysis prepared by our consultants defining how the development was to proceed. The benefit of these reports, and indeed the services of the Consultants were to be made available to third parties who joined with us in the development – as for example is demonstrated by the appointment of P.P.A. as Consultants by the Appellant. The principal contribution of any third party such as the Appellant would be to bring in finance. Advances would be secured by charges on the land transferred to the joint venture companies, and would be repaid out of the income from the development. The development itself would follow the scheme which already had been devised. H.K.R.'s 51 per cent interest in the joint venture companies would ensure that it could continue to dictate matters of policy and could practically control and determine the terms of the management agreements to be entered into between the joint venture companies and the Appellant and their daily routine works.

21. I devoted the major part of my time, over many years up to 1976, to creating the Lantau development and making it possible. I would not have sacrificed those efforts by agreeing to a foolishly unfavourable contract as the Plaintiff now suggests. The contract was in fact essential to the further development of the project and I fully endorse the clear explanation of this given in paragraphs 15 - 18 of the Affidavit of my son, Michael Wong, sworn on 22nd April 1978. The Contract was also approved by the Board of Directors of H.K.R. and by its shareholders in full knowledge of all the facts. The suggestion that the Appellant's option was unfavourable and uneconomic to H.K.R. is without foundation and indeed the opposite of the truth.

22. I refer to paragraph 3 of the Affidavit of Mr. Beesley dated 22nd April 1978. I recall speaking to Mr. Beesley in September 1977 in connection with the sale by Ta Hing Company (HK) Limited of its shares in the Plaintiff, which was being negotiated at that time. Mr. Beesley was then a Director of that Company and since I was not in Hong Kong he was assisting in this matter. There was no reason why this would have been an occasion for me to thank him for his past services, or to wish him well for the future, and I can not recall doing so. I certainly do not remember any reference being made to the Option Agreement with the Appellant during that conversation, which was the only conversation I had with Mr. Beesley at that time. I repeat that the option had in fact been exercised as I have already stated.

Sworn on 10th July, 1978.
This Affidavit is filed by the 2nd Defendant.

Civil Appeal No. 45 of 1978.

AFFIDAVIT OF MICHAEL WONG GAI YAN (NO. 3)

I MICHAEL WONG GAI YAN of Apartment 10 No. 34A Kennedy Road, Victoria in the Colony of Hong Kong, Company Director, do solemnly sincerely and truly make oath and say as follows:–

1. This is my second supplemental Affidavit to the Affidavit made by me on the 22nd day of April, 1978. I have since been shown the Affidavits of Mr. John Ault and Mr. Thomas Beesley both dated 26th April,1978.

2. I am absolutely certain that no formal Board Meeting of the Respondent was held on 25th February, 1977. I have examined my 1977 diary, and it contains a total of three entries for 25th February, 1977. None of these entries relates to Board or other internal meetings of the Respondent. If there had been any such meeting it would have been entered in my diary. I would further add that I never attended any Board Meeting of HKR in Hong Kong at which the 2nd Defendant my father was not present other than the formal Statutory Meeting required to pass the Accounts. I am quite satisfied that both Ault and Beesley were mistaken when they deposed that there was a Board Meeting on 25th February, 1977. My belief is that those minutes and the attendance notice were circulated in accordance with the practice of the office at that time, but I don't recall whether this was done on 25th February itself. It was in other words a "paper meeting". Although I appear to have signed the "attendance note" which accompanies the minutes as exhibited to Mr. Wu's Affidavit I cannot recall reading the minutes at any time before sighting a copy of the same in Mr. Chu's office in April 1978. I would suggest that what is likely to have happened is that Mr. Beesley the acting Secretary of the Respondent at that time would have handed me the documents and I would probably have enquired as to their contents. I was probably told they related to an extension of the option given to the Appellant and since I then had no reason to suppose the matter was other than purely procedural I would have signed the attendance note without reading the minutes in any detail. It is perhaps worth noting that my signature is the last on the attendance note. For this reason, I say that the preambles preceding the resolution purportedly passed on that day may only be read subject to my above comments. At most the purported minutes only show that a resolution to extend the option was passed at some time and dated the 25th February, 1977. I do not, however, know:–

(i) whether or not the Appellant had applied for any such extension and if so when; and

(ii) whether or not and if so when the 2nd Defendant had agreed to such an extension.

3. (i) The 2nd Defendant returned to Hong Kong late in the afternoon of Tuesday 25th January, 1977 and left for Tokyo in the early morning on the 27th January, 1977. (The scheduled departure of PA002 on 27.1.77 was 9.00 a.m.)

(ii) I collected the 2nd Defendant from the Airport and we went home. I had arranged meetings for the 2nd Defendant the following day which in the circumstances it was thought advisable to hold at my residence rather than at the office. I recall

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No. 46 Affidavit of Michael Wong Gai Yan (No. 3) 14 Jul 1978 (Contd.)

that Beesley and Ault attended these meetings which were also attended by other officers and directors of Hong Kong companies associated with the 2nd Defendant. The purpose of those meetings was to resolve the immediate cash problems of the Respondent and of the other companies. The Nybro Option was neither raised nor discussed.

(iii) The cash flow problem was of such urgency that the whole of our attention was directed to it. I do not recall any separate discussions taking place between Ault, Beesley and the 2nd Defendant nor for that matter with any other person during the meetings.

(iv) In view of the Respondent's financial difficulties and in particular the fact that staff salaries were overdue, it had been agreed that the 2nd Defendant would not visit the Respondent's office during office hours. 10

4. At or about 5.30 p.m. on the 2nd day of February, 1978, Ault and Beesley called at my office. So far as I was aware they had by this time both left the employment of the Respondent. They indicated that they had been approached by the new management following receipt of a letter from the Appellant. Beesley showed me an affidavit which he stated he had already sworn and Ault informed me that he would be swearing a similar Affidavit. I recall that the Beesley Affidavit was much longer than that sworn later by him on 26th April, 1978. I asked him for a copy but he refused to let me have one. They explained that they had come to see me as a curtesy to me as a fellow director at the relevant time. They pointed out that I was on my own and I had to look after my own interests, and suggested that I should swear a corresponding Affidavit. I made no comment. 20 Shortly after this I had occasion to go to the office of James Wong one of the Joint Managing Directors o HKR. He told me that he had requested Ault and Beesley to make Affidavits on behalf of HKR and that they had done so. I believe this to be particularly significant therefore since I understand that the Affidavits of Ault and Beesley were not filed until 26th April, 1978.

5. I have also had the opportunity of reading the Affidavit of John Peter Duckworth filed herein on 26th April, 1978. I repeat paragraph 22 of my Affidavit of 22nd April, 1978. Although Duckworth refers to conversations with the directors, none of such conversations were with me. I did not observe Mr. Duckworth or his staff spending time at the Respondent's office persuing the files. 30

6. I am informed that criticism has been directed at the Agreement of 11th October, 1976 on the basis that it does not sufficiently define the rights and obligations of the parties and in prticular does not set out in detail their functions in respect of Development, Management and Finance. As to this I would say as follows:–

(A) Development

(i) It was not the purpose of the Option Agreement to define the Development that was to take place. This, as I explain below, had already been covered in enormous detail. The function of the Option Agreement was to commit the parties, when the Option had been exercised, to a joint venture for the purpose of implementing the development of the particular 11 sections to 40 be assigned to the 3 Companies to be created.

(ii) As I have stated the manner in which the Lot (Lot 385) including the eleven

sections (the "Nybro Sections") had been planned in enormous detail. Both HKR and Nybro were well aware of this fact when the Option Agreement was prepared and signed.

(iii) The Development of Lot 385 was in the first place covered by the General and Special Conditions of Grant. These specified inter alia the permitted density of usage. Special Condition No. 6 required a Master Layout Plan to be prepared and approved. The Master Plan (No. 3.5) had in fact been prepared and approved long before the Nybro Agreement was entered into, and the development had to proceed in accordance with the Master Plan. I refer to Page 111 of the Green Bundle and in particular to the key on the top right hand side. As can be seen the Master Plan provided for the type of buildings to be constructed, their maximum gross building space permitted, the plot ratio, general location of units etc. 10

(iv) HKR had been planning the Development of Lot 385 for many years past and in the course of such planning had sought and obtained the advice of many experts on the details of the Project and appointed a number of consultants to the scheme. These experts and consultants included.

Economic Researches Associates of Canada ("ERA")

Project Planning Associates of Canada ("PPA")

Chooljian and Associates of USA 20

Societe Francaise D'Enterprises de Dragages et de Travaux Publics of France ("Dragages")

Golders and Associates of Canada

Binnie and Partners of England

Levett & Bailey of Hong Kong

Tony Petty and Associates of Hong Kong

Bell & Collins Associates of Honolulu

Honsu Paper Company of Japan

and many others.

(v) When the Agreement was signed with Nybro on 11th October, 1976 there was already in existence and available of course both to HKR and Nybro a voluminous quantity of Reports, Plans, Projections, Calculations, Drawings, Models etc. going into the details of the development. The Calculations included inter alia 29 Computer Runs analysing the whole of Development, its Schedule, Phasing, Costs, Finance and Cash Flow projection. These Computer Runs enabled HKR (as well as Nybro in respect of the Nybro 30

sections) to ascertain inter alia its financial and other requirements for the entire project. These materials were kept at the offices of HKR and required substantial storage space of several hundred square feet and a Design Office of about 4,000 square feet.

(vi) Economic Research Association of California is one of the World's biggest and best known firms of planning Consultants and I recall in particular Mr. Michael Masterson of that firm remarking to me that the Discovery Bay Project had been one of the most detailed studies and pre-planned projects that he had ever experienced.

(B) **Management** 10

(i) By the terms of the Agreement of 11th October, 1976 Nybro was to accept appointment as manager to undertake and complete the development of the Nybro Sections. This was a duty imposed upon Nybro as part of its contribution to the joint venture.

(ii) Thus, it would be for Nybro to act as Project Manager, e.g. to supervise and control the development of the Nybro sections and coordinate such development with the development of the remainder of the project which would be going ahead at the same time; to call for tenders for the actual Building Works; select Contractors, finalise the Building Contracts (the Standard Conditions of Contract had already been finalized) etc. and generally administer the development of the Nybro sections. 20

(iii) All this would of course be done subject to the control of the three Companies to whom the land had been assigned and thus they (and ultimately HKR in virtue of its position as majority shareholders) would in the event of any disagreement arising over any details of development have had the final say.

(C) **Finance**

(i) Obviously the initial authorized capital of the three Companies referred to in the Agreement of 11th October, 1976 was insufficient to finance the development costs of the Nybro sections. However these sections were unencumbered and were available for and indeed intended to be used as security for the raising of finance by way of building Mortgage. 30

(ii) Anstalt Nybro's role was to locate and introduce financiers who would finance the development of the Nybro sections upon terms which would of course then be agreed with the respective Boards of the 3 Companies. It was known to the Board of HKR that Nybro had good contacts with European Financiers and was in a position therefore to arrange financial backing for the development. However, it was not for Nybro itself to finance the development and indeed the Agreement does not provide for this.

(iii) In the unlikely event of the financial terms offered by the financiers introduced by Nybro not being acceptable then each of the three Companies would have sought other sources of finance against the security of the sections of land, 40

but this would not in any way have prejudiced or altered the participation of Nybro in the joint venture.

(iv) Detailed cost projections had been prepared for the project by "ERA" of the USA, Messrs. Levett and Bailey of Hong Kong and P.P.A. of Canada and as I have mentioned above they included some 29 volumes of Computer-Runs.

In conclusion therefore I would simply say that I am most surprised that it is suggested that there was any uncertainty as to the respective roles of HKR and Nybro in so far as the Agreement of 11th October, 1976 is concerned. In saying this I intend no disrespect to the Court, but I say that it was abundantly clear to the parties at the time, i.e. to the Board of HKR and so far as I am aware to Nybro what were the respective functions rights and obligations of HKR and Nybro in the event of the Option being exercised. 10

Sworn on 14th July, 1978.

Civil Appeal No. 45 of 1978

AFFIRMATION OF FAN MENG YEN

I, FEN MENG YEN of Flat A, Mandarin Court, 9th floor, Nos. 142-144 Argyle Street, Kowloon in the Colony of Hong Kong Company Manager, do solemnly, sincerely and truly affirm as follows:–

1. I was until the 2nd day of June, 1977 a Director of the Plaintiff "HKR".

2. On the 4th day of July, 1978 I received a telephone call from Mr. K. K. Chu as a result of which I met him at his office that day. Mr. Chu showed me certain Affidavits in particular, the Affidavits of John Ault and Thomas Beesley as well as the affirmation of John Wu and asked me for my comments. 10

3. I had no part in the negotiation of the Agreement of 11th October, 1976 with Anstalt Nybro but I knew that it had been signed and certainly so far as I was aware it was an agreement freely entered into by HKR with the full knowledge of the Board and intended to be a binding Agreement.

4. I know that Mr. Edward Wong was last in Hong Kong on about 25th/27th January, 1977. I was present at his home on 26th January, 1977 at a meeting attended by John Ault, Thomas Beesley, Michael Wong and K. C. Wong as well as myself. The main discussion related to HKR's cash flow and financial problems. These were urgent and pressing problems facing the company and to the best of my recollection there was no discussion of the matter of the exercise on the Nybro Option. I do not recall Ault and Beesley having any separate conversations with Eddie Wong. 20

5. I have seen what purports to be a photostat copy of a Minute of Directors Meeting of HKR dated the 25th February, 1977. To the best of my recollection there was no Board Meeting as such on or about that date. In fact no Board Meetings were held in Hong Kong in the absence of Mr. Eddie Wong other than formal statutory meetings to pass the accounts. What happened in practice was that minutes were circulated for signature. I do not recall seeing the manuscript document bearing the initials "JA", "MW", "MYF" and "TB" before. The initials "MYF" were neither written nor crossed out by me.

6. As a result of the appointment of the Official Receiver as provisional Liquidator of HKR, a group of people walked into the offices of HKR on 26th floor, Realty Building on 1st April, 1977. I subsequently learnt that these people were from the office of the Official Receiver and were there to meet the Directors. Subsequently Thomas Beesley pointed out a European person to me and said that he was Mr. John Duckworth the acting Official Receiver and provisional Liquidator of HKR. He told me that Mr. Duckworth had locked up all the cabinets of HKR and taken away the company seal, statutory books and cheque books. During the period between 1st April, 1977 and 2nd June, 1977 when I resigned from the Company, I only saw Mr. Duckworth in the company's office on very few occasions and I do not recall seeing him going through or studying the HKR papers. 30

7. I confirm that it was Mr. Edward Wong's habit and practice to leave papers accumulated during his travels on his desk or on the desk of his personal secretary Miss Winnie Cheung Lai Ping to be sorted out and filed. 40

Affirmed on 14th July, 1978.
This Affirmation is filed on behalf of the Appellant.

AFFIRMATION OF WINNIE CHEUNG LAI PING

I, WINNIE CHEUNG LAI PING of Flat 7, Star Mansion, 3rd floor, Minden Road, Kowloon in the Colony of Hong Kong, Married Woman do solemnly sincerely and truly affirm as follows:—

1. I was until the 31st day of March, 1977 the personal secretary of Mr. Edward Wong Wing Cheung (the second defendant) who was then the Chairman of the Plaintiff.

2. On 4th July, 1978 I was introduced by Mr. Fan Meng Yen who was formerly a director of HKR to Mr. K. K. Chu who told me that he represented a company called Anstalt Nybro and a Mr. Anthony Jack Burgess. I told Mr. Chu that I had met Mr. Burgess before in the offices of HKR. Mr. Chu asked me if I would swear an affidavit with regard to certain of the affairs of HKR and I agreed to do so. 10

3. I was the personal secretary to the 2nd Defendant until the 31st March, 1977 handling his personal affairs such as his personal bank accounts, making out cheques, and generally handling and finding his personal papers. By "personal" papers I refer to papers not connected with his group of companies.

4. Mr. Wong used to travel a great deal and it was common for him to accumulate papers during his travels which he would then either hand to me or leave on his desk or on my desk for me to sort out. I would extract his personal papers and file them away. In so far as the papers that he left included documents not connected with his personal affairs but connected with company business then I would put these into the "out" tray in my room. From time to time the filing girls in the office would then take out these papers and file them. There were two filing girls in the office. One handled HKR papers and the other dealt with companies other than HKR. The girl who was responsible for filing HKR documents was named Wendy Kwok who is now living in Canada. 20

5. To the best of my recollection the last time that I heard of Mr. Eddie Wong being in Hong Kong was very early 1977. I do not recall the exact date. I heard rumours to the effect that Mr. Wong was in Hong Kong but I did not see him.

6. I have been shown a copy of the letter of the 24th January, 1977 from Anstalt Nybro to HKR which is countersigned by Mr. Eddie Wong I cannot say whether or not I have seen the original of this document before as of course a large number of documents passed through my hands when I was Mr. Wong's secretary. I note that it does not relate specifically to Mr. Wong's personal affairs and therefore there is no particular reason for me to remember this document. I left the employment of HKR on 31st March, 1977 and frankly cannot now recall whether or not I saw the original of this document in view of the passage of time since January 1977. In any event as I have indicated above as it was a company document, it would have been dealt with and filed by Wendy Kwok. 30

7. I was in fact approached by a Mr. Cheung who said he was a solicitor from Messrs. Woo, Kwan, Lee & Lo in about April of this year and answered some questions put by him. He asked me whether I remembered the last time Mr. Wong was in Hong Kong to which I said "about Chinese New Year last year". He also asked me whether I remembered being handed a letter from Anstalt Nybro to HKR for filing by Mr. Wong during that visit and I told him that I did not remember. 40

Affirmed on 14th July, 1978.
This Affirmation is filed on behalf of the Appellant.

Summary or Respondent's Submissions

1. The Agreement of 11th October, 1976 is wholly unenforceable because it is void for uncertainty.

2. Alternatively, the Agreement is enforceable only in damages and not by specific performance, because

(a) it is the equivalent of a contract to enter into a partnership;

(b) it involves the rendering of continuous services by one person to another;

(c) it requires continuous supervision;

(d) it lacks mutuallity; and

(e) damages would be an adequate remedy. 10

3. If the Agreement is either (a) wholly unenforceable or (b) not specifically enforceable it does not "affect" the land and cannot be registered under the Land Registration Ordinance.

4. In any event, the evidence discloses that the option was never effectively exercised and there is no triable issue on this point.

5. Alternatively to 4, the registrations should be vacated unless Nybro either

(a) gives HKR an undertaking as to damages or

(b) seeks and obtains an injunction against HKR and gives the usual cross-undertaking as to damages

and in either case fortifies the undertaking. 20

Dated 21st July, 1978.

Supreme Court of Hong Kong

No. 50 Transcript of Appellant's Submission 24 Jul 1978

TRANSCRIPT OF APPELLANT'S SUBMISSIONS

Issue (1) : Is it so clear that it can be decided now without trial that the Agreement of 11/10/76 void for uncertainty?

Issue (2) : Is it clear beyond argument:—

(i) That a contract does not affect land unless it can be specifically enforced?

(ii) That an Agreement is un-registrable which can not be the subject matter of an order for specific performance?

(iii) That registration of lis pendens can be maintained only with a view to relief by specific performance and not to preserve pending suit. A party's right to other specific relief — e.g. by way of injunction. 10

Issue (3) : Is it clear beyond argument that this is an Agreement that in no circumstances the Ct. will enforce by a decree of Specific performance?

Issue (4) : Is it clear beyond argument that the evidence of EW & AJB be dismissed as perjury and the letter of 24/1/77 dismissed as forgery?

Submission (1) : Void for Uncertainty (P-42)

(a) Judge did not see details of "Management & Development". I agree. This Agreement does not spell out details of future development for simple reason it cannot be done. If the law requires that the whole detail require to be set out, I do not believe a binding contract can ever be made. Totally un-necessary. Whether it it possible to set out in full. Judge failed to put this Agreement in its context. Remarkable that the only reference to the Master Agreement was on the 2nd page of the Judgment. He does not consider the MLP and the degree of definition. 20

(b) J. half considered but never applied the correct principle of construction when the issue of voidness was raised. The correct principal is: Where Ct. is faced an Agreement The object of lis pendens is to protect parties pending suit. Proper test to apply is performed, Ct. should reject it only as a last resort. This is not simply the principle of *Smith & Morgan* which is distinguishable on facts.

(c) Judge failed to understand the corporate structure established by Clause 2 of the Agreement. 51% control to HKR and 49% to Nybro. Control would vest in majority shareholder. Whatever terms the Board decide. 30

(d) Judge failed to understand *Turley*.

Submission (2) : (P. 35)

(a) Not the right construction of Section 2. You only ask yourself: Does contract affect land and no more. You don't ask again would the Ct. enforce it by specific performance.

(b) The object of lis pendens is to protect parties pending suit. Proper test to apply is

not have you an arguable case for specific performance: but have you an arguable case for any specific claim in your writ. Judge adopted much too narrow a view of the word "affect" and of the rules on "lis pendens".

Submission (3) :

(a) Nybro as manager has to carry out the Board's directions. The company is to develop the land but not Nybro. If by "severable" means deletion, that is not our case. The arguments before Judge was you have to look at the Agreement by stages. At the moment, you have Nybro and HKR – the only clause which can be enforced is Clause 2. This is the only specific performance can be ordered by this Ct. The argument is not severability but to look at it at the relevant stage at the time. 10

(b) Judge failed to construe Clause 4 correctly. All it requires that the 2 parties shall jointly secure the appointment of Nybro as manager. No difficulty to obtain specific performance on that.

(c) Supervision of Nybro as manager would be by the Board and not the Ct. Supervision and lack of mutuality goes only to the exercise of Ct's discretion at the trial and not to jurisdiction.

Submission (4) : (i) In its arguments on "provisional" and "cancellations"; were HKR

(a) Open to them on the pleading; and

(b) Supported even in any prima facie case on their evidence?

If answer is No, we should hear no more at all. If answer to (i) is Yes, 20

(ii) Is it plain beyond argument that the Appellant would have no answer to them. I emphasis "would" because we have not purported to deal with it at all.

Submission (1) : Void for uncertainty (P-42)

(a) The 1st function of Ct. is to identify and apply the appropriate principles of construction. Those principles in *Prenn v. Simmonds*(1977) IWLR 1394: it must be placed in its context. My fundamental criticism of judgment is Judge never had regard to the full circumstance at all. He did not appear to have considered the Master Agreement except a passing reference.

(b) When plea for void, necessary to identify correct principle. Agreement entered into intended to be binding, Ct. would treat it void as a last resort. 30

Whether the parties had used language which is appropriate and sufficient to show their intention. Ascertain parties' intention in 3 ways:–

(i) Whether they intend to be bound. It matters not that it contemplates further agreement or agreements where they have provided the essential terms.

(ii) Whether this contract defines the subject matter of their intention. Here is an association for a future development. This has been defined in Agreement and

defined in Master Agreement. The subject matter was a joint-venture for a development defined. Quite un-necessary to define future details.

(iii) Whether this contract establishes sufficient machinery for the resolution of all details.

Submission (2)

1. An Option Agreement between A and B under which, upon its exercise, A agrees to convey land to C in which A and B are jointly interested gives B an interest in such land and affects land. A contract which creates in B a future interest in land affects land.

2. For the purpose of registration under Section 2 of the L.R.O., the sole question is whether the Agreement to be registered affects land. This is to be answered by the terms of that Agreement. L.R.O. only requires to ask or answer one further question – is the contract enforceable in equity not will the Ct. enforce the contract by way of decreeing SP. 10

3. The purpose of registration of a lis pendens is to protect a party pending suit. The only requirements here under Sec. 19 of L.R.O. are:–

(i) That he has an arguable case in the contract before the Ct.

(ii) That the contract affects land, and

(iii) That he has a commercial interest in seeing that the contractual obligations are carried out.

4. A party is entitled pending suit to maintain the registration of either a contract affecting land or a lis pendens if the same 3 conditions are satisfied.

20

5. If a party by his writ claims specific relief by way of:–

(i) A declaration that a contract affecting land is binding,

(ii) Injunctions to prevent breaches of such contract, and

(iii) Specific performance of that contract,

it will be a matter for the exercise of judge's discretion at trial when the full facts become known whether he grants relief under any head. Pending suit, a party is entitled to protect his position under all 3 heads, conversely, good cause is not shown by proof that specific performance would not be granted but only upon proof of no arguable case for any specific relief, i.e. injunctions or declaration.

SUMMARY 30

That a contract which affects land must be registered. In order to answer that Q – look at contract – whether it creates interest in land. It creates such interest if capable enforced specifically in contest giving rise to rights only in damages. This fundamental difference between a contract affecting land and one which is personal. If Ct. has a contract affecting land, then pending suit, a party is entitled to be protected unless all his claims for specific relief are hopeless.

Submission (3)

Is it clear beyond argument that this is a contract the Ct. would not enforce by S.P.?

1. In these actions, i.e. between HKR & Nybro, the only S.P. which the Ct. can decree and with which the Ct. is now concerned is the S.P. of the obligation in Clause (2) of Agreement. It is clearly arguable that these obligations can be specifically enforced. It does not follow that if any difficulty should arise under subsequent clauses that S.P. for Clause (2) must be refused. Ct. at this stage is not concerned to speculate as to what may happen after Cos. A, B and C are formed or with any threat of non-co-operation that may be advanced by Respondent.

2. The obligation in Clause (4) is an obligation upon:– 10

(i) The Respondent to procure the Appellant's appointment, and

(ii) Upon the Appellant to accept such appointment and there can be no objection to specific enforcement of such obligation. It gives rise to neither difficulty upon which the Judge founded – i.e. supervision or lack of mutuality.

3. Alternatively, if obligation in Clause (4) is to be equated with an obligation to manage and under the supervision and control of the relevant Co's Board of Directors. That is an obligation which can be specifically enforced because:

(a) Ct. can compel appointment

(b) Ct. would not thereafter be concerned with the direct supervision of the manager as this would be the task of the Board and 20

(c) Any supervision involvement by Ct. would no longer be fatal objection to S.P.

4. Supervision and lack of mutuality are not what Judge thought fatal in that they go either to jurisdiction or lead to refusal because:–

(a) they do not go to jurisdication

(b) they are relevant only to exercise of Ct's discretion and

(c) this could only be exercised with full knowledge of facts.

Submit in stages. Ct. not concern with future issues. Ct. deals with issue before the Ct.

Dated 24th July, 1978.

Supreme Court of Hong Kong

No. 51 Order of Court of Appeal 16 Aug 1978

Civil Appeal No. 45 of 1978

BEFORE THE HONOURABLE MR. JUSTICE HUGGINS, THE HONOURABLE MR. JUSTICE PICKERING AND THE HONOURABLE MR. JUSTICE McMULLIN IN COURT

ORDER

UPON reading the Notices of Motion dated the 19th day of May 1978 and the 17th day of June 1978 respectively on behalf of the Appellant on appeal from so much of the judgment and orders in Hign Court Action No. 785 of 1978 of the Honourable Mr. Justice Li given and made on the 12th day of May 1978 whereby it was orderd as follows:–

SUBJECT to the Plaintiff giving to the Defendant an undertaking as to damages and fortifying it by the provision of a Banker's Guarantee in the amount of HK$100 million for both this Action and Action No. 1006 of 1978 10

IT IS ORDERED as follows:–

1. The registration on March 2, 1978 of

(i) the purported agreement with a plan annexed, whether in its original form or as purportedly varied, dated October 11, 1976, in respect of Lot No. 385 in Demarcation District No. 352, Discovery Bay, Lantau Island in the Colony of Hong Kong between the 1st Defendant and the Plaintiff and the addendum thereto, namely, addendum No. 1 dated November 25, 1976, (hereinafter called "the purported agreement") and 20

(ii) a document purporting to be a letter dated January 24, 1977, from the 1st Defendant to the Plaintiff (hereinafter called "the purported letter").

under the provisions of the Land Registration Ordinance, Cap. 128 and/or the New Territories Ordinance, Cap. 97 be vacated.

2. The 1at Defendant be restrained, whether by its directors, officers, servants, agents or howsoever otherwise until the trial of this action or until further order from effecting or taking any steps with a view to effecting any fresh registration of

(i) the purported agreement and/or

(ii) the purported letter and/or

(iii) anything connected with the purported agreement and/or the purported letter 30

under the provisions of the said Ordinances, either of them or at all as something affecting the said lot or any part thereof.

3. If the said registration on March 2, 1978, is not erased within 3 days of the last of the 14 days referred to in item 4 below the Plaintiff is empowered and authorised to do all things necessary to secure such erasure including calling upon the Land Officer to erase the said registration.

4. The Order under item 1 above be stayed for a period of 14 days from the date hereof, namely, May 12, 1978.

5. The costs of the above-mentioned summons as between the Plaintiff and the 1st and 3rd Defendants be in the cause.

6. The said summons is certified fit for 2 Counsel.

AND upon reading the Respondent's Notice of Additional Grounds dated the 2nd day of June, 1978 on behalf of the Respondent.

AND upon reading the said judgment.

AND upon hearing Counsel on behalf of the Appellant and Counsel on behalf of the Respondent. 10

IT IS ORDERED that this appeal be dismissed with costs to be paid by the Appellant to the Respondent, such costs to be taxed.

AND IT IS FURTHER ORDERED as follows:–

1. The said Judgment and Orders of the Honourable Mr. Justice Li and this Judgment and Orders, in so far as they all relate to the vacation of the said registrations be stayed for a period of 14 days from the 16th day of August 1978.

2. The Appellant's application for liberty to apply to increase the said fortification is dismissed.

3. The Respondent is granted liberty to apply to the Court of Appeal in respect of the said guarantee in default of agreement in respect thereof between the Appellant and the Respondent. 20

By the Court
N.J. Barnett
Acting Registrar.

Dated 16th August, 1978.

Supreme Court of Hong Kong

No. 52 Order of Court of Appeal 16 Aug 1978

Civil Appeal No. 46 of 1978

BEFORE THE HONOURABLE MR. JUSTICE HUGGINS, THE HONOURABLE MR. JUSTICE PICKERING AND THE HONOURABLE MR. JUSTICE McMULLIN IN COURT

ORDER

UPON reading the Notices of Motion dated the 19th day of May 1978 and the 17th day of June 1978 respectively on behalf of the Appellant on appeal from so much of the Judgment and Orders in High Court Action No.1006 of 1978 of the Honourable Mr. Justice Li given and made on the 12th day of May 1978 whereby it was ordered as follows:–

SUBJECT to the Defendant giving to the Plaintiff an undertaking as to damages and fortifying it by the provision of a Banker's Guarantee in the amount of HK$100 million for both this Action and Action No. 785 of 1978 10

IT IS ORDERED as follows:–

1. The registration of the Writ of Summons herein as a lis pendens under the provisions of the Land Registration Ordinance, Cap. 128 and the New Territories Ordinance, Cap. 79 be vacated.

2. The Order under item 1 above be stayed for a period of 14 days from the date hereof, namely, May 12, 1978.

3. The costs of the Summons herein taken out on behalf of the Defendant on April 18, 1978 be in the cause. 20

4. The said Summons be certified fit for 2 Counsel.

AND upon reading the Respondent's Notice of Additional Grounds dated the 2nd day of June, 1978 on behalf of the Respondent.

AND upon reading the said Judgment.

AND upon hearing Counsel on behalf of the Appellant and Counsel on behalf of the Respondent.

IT IS ORDERED that the said Judgment of the Honourable Mr. Justice Li be affirmed, and that this appeal be dismissed with costs to be paid by the Appellant to the Respondent, such costs to be taxed.

AND IT IS FURTHER ORDERED as follows:– 30

(1) The said Judgment and Orders of the Honourable Mr. Justice Li and this Judgment and orders, in so far as they all relate to the vacation of the said registrations be stayed for a period of 14 days from the 16th day of August 1978.

(2) The Appellant's application for liberty to apply to increase the said fortification is dismissed.

(3) The Respondent is granted liberty to apply to the Court of Appeal in respect of the

said guarantee in default of agreement in respect thereof between the Appellant and the Respondent.

By the Court.
N.J. Barnett
Acting Registrar.

Dated 16th August, 1978.

Supreme Court of Hong Kong

No. 53 Judgment of Court of Appeal 16 Aug 1978

IN THE COURT OF APPEAL

1978 Nos. 45 and 46
(Civil)

BETWEEN

ANSTALT NYBRO (formerly named ANSTALT SORO) — Appellant

and

HONG KONG RESORT CO. LTD. — Respondent

Coram: Huggins and Pickering, JJ.A., and McMullin, J. 10

JUDGMENT

Huggins, J.A.:

This appeal relates to an agreement in writing for an option to share in the development and management of land and is against orders of a judge in chambers the vital parts of which direct the vacation of two entries in the Land Register, one of an estate contract and one of a lis pendens.

The Hong Kong Resort Co. Ltd. (HKR) are the lessees of a large area of land in the New Territories under what, for the purpose of clarity, I prefer to call the Crown Agreement. That Agreement requires them to develop the land at a cost of not less than $600,000,000 in accordance with a "Master Layout Plan" which was to be prepared by 20 HKR and approved by the Secretary for the New Territories. Such a plan was duly prepared and approved but was confusingly headed "Master Plan". HKR then entered into the option agreement in writing with Anstalt Soro, who subsequently changed their name to Anstalt Nybro (Nybro). The Option Agreement was concerned with specified sections of HKR's land. The consideration for the option was $50,000, which has been paid. The option itself was in these terms:

> "to participate in the ownership, development and subsequent management operation and exploitation of the said twelve sections in the manner hereinafter set forth."

The option was originally to be exercised on or before 31st January 1977 but was extended 30 by mutual consent to 1st March 1977. Nybro claim to have exercised the option by a letter dated 24th January 1977, which reads:

> **"re: Ta Yue Shan option Agreement 11/10/76**
> We refer to your letter of 1st December, 1976 confirming the agreement to extend the Option until 1st March, 1977 and now give you Notice that we wish to exercise the option on 1st March, 1977."

HKR ran into financial difficulties and eventually new directors took over. These new directors, believing (so they say) that the option had not been exercised and had lapsed, agreed with the Secretary for the New Territories a new Master Layout Plan which was substantially different from the first one. Some months later Nybro registered the Option 40

Supreme Court of Hong Kong

No. 53 Judgment of Court of Appeal 16 Aug 1978 (Contd.)

Agreement and the letter purporting to exercise the option as an estate contract. Immediately thereafter HKR issued a writ claiming declarations that the Option Agreement was so vague as to be unenforceable and that the option had not been validly exercised. A month after that Nybro instituted an action against HKR for declarations that the Option Agreement was enforceable and that the option had been validly exercised and for specific performance. On the same day the action was registered as a lis pendens. There were before the judge two summonses, one by Nybro for declarations in the terms of their writ and one by HKR for vacation of the entries in the Land Register.

If these actions come to trial there will be one main issue of fact and two main issues of law: (1) whether the option was validly exercised: (2) whether the Option Agreement was void for uncertainty: and (3) whether the contract between the parties was a contract affecting land within the meaning of the Land Registration Ordinance. 10

The first of those issues includes three subordinate issues, (a) whether the letter of 24th January 1977 was ever delivered at all; (b) if it was, whether it amounted to an exercise of the option; and (c) if it did, whether such exercise was subsequently cancelled by agreement of the parties. As to (a) it will be contended that the letter was not delivered and that the copy which has been produced by Nybro is a sham. Before the judge it was conceded that this could not be decided until all the evidence had been adduced at the trial but he appears to have misunderstood and to have thought that he was being asked to decide that issue of fact on the affidavits. He rightly declined so to do. What in fact was 20 submitted, and was submitted again before us on a Respondent's Notice, related to issues (b) and (c), which are to some extent based on the same evidence. The letter itself does not take the form one would expect of an immediate, unconditional and irrevocable exercise of the option but purports to exercise the option with effect from 1st March. It is suggested that this was no more than a notice that Nybro intended, by a further notice to be dated 1st March, to exercise the option. HKR put this forward as one of two possible explanations of subsequent events. There is evidence that on 25th February 1977 there was a board meeting of HKR at which it was reported that Nybro was seeking an extension of time within which to exercise the option and that it was thereupon resolved to grant an extension until 30th June 1977. Although it is common ground that minutes of that 30 meeting were sent to Nybro as soon as they wrote indicating that they regarded the option as having been exercised, Nybro never wrote a formal protest, but it is said that the Chairman of Nybro (Mr. Burgess) spoke to the Chairman of HKR (Mr. Edward Wong) in London and that Mr. Wong promised to sort out the muddle. Mr. Wong appears never to have mentioned the matter to anyone else and Mr. Burgess did nothing more. Therefore, assuming in Nybro's favour that the letter was delivered, HKR contend that it is apparent that in February 1977 neither side regarded itself as bound to proceed wih the suggested joint venture, whether because the option had never been validly exercised at all or because of an agreement to reopen the option, which no one says has been exercised again. Mr. Hunter did ask us to consider whether this argument was open to HKR on the pleadings. 40 It is enough to say that it was addressed to the judge without objection and that if necessary I would give leave to amend. We were invited by Mr. Nourse to adopt "a certain rebustness of approach" to the evidence and he suggested that, even in the light of the further evidence which has been admitted before us, Nybro was left with no arguable case that the option was, in the end, validly exercised. The alleged board meeting of 25th February 1977 will itself have to be the subject of careful scrutiny. There is now direct evidence that no extension beyond 1st March was asked for and that the purported exercise of the option on 24th January 1977 was not cancelled. No useful purpose will be served by reviewing the evidence in detail. There is much that will require explanation in due course on both sides and I am not prepared to hold that on the whole of the evidence Nybro does not have an 50

arguable case.

So far, of course, I have assumed that a valid exercise of the option was possible. The main argument which found favour with the learned judge was that the option could not be validly exercised because the Option Agreement was void for uncertainty. The uncertainty contended for related to three matters: (1) uncertainty as to Articles of Association of the three companies to be formed; (2) uncertainty as to the manner in which the land was to be developed; and (3) uncertainty as to (a) the payments (if any) to be made to Nybro for managing the estate and (b) the nature of the management services to be rendered.

The learned judge was persuaded that the absence of draft Articles of Association was not fatal, because, if no Articles were registered, the regulations contained in Table A would be the Articles of the companies by virtue of s. 11(2) of the Companies Ordinance. HKR has challenged that conclusion. It is true that the promoters might adopt part or the whole of Table A and that if no Articles were registered at all the company would not be left without Articles, but there is no immediate certainty as to what the Articles would be. It is as if the parties had expressly said that the Articles were to be agreed or, in default of agreement, were to be the regulations contained in Table A, for we should assume that the parties realized the necessity for Articles of some kind. Would that be sufficient? In a sense there would be uncertainty as to what the articles would eventually be, but in my judgement there would be that degree of certainty which is required for the formation of a contract. *Id certum est quod certum reddi potest.* The case is analogous to *Foley v Classique Coaches Ltd*. 1934 2 k.B. 1 save that the part performance in the present cases as yet consists in nothing more than the payment of the price of the option. On this point I would respectfully agree with the learned judge and if the participation in the "ownership" were the only matter upon which uncertainty was alleged, would hold that the Option Agreement was not void for uncertainty.

In the view of the learned judge, however, HKR was bound to succeed on the basis that the nature of the option was uncertain in relation to both the development and the management: as he put it, "the terms of development and management are left in a vacuum". He was concerned that this was a complicated venture and that before it was complete many details would have to be decided for which there was no provision in the Agreement. There is a dispute as to the degree of detail for which provision has been made, since Nybro contend for a liberal construction of the Option Agreement: they submit that the development agreed upon is development not only in accordance with the Master [Layout] Plan No. 3.5, which is all that is mentioned in Clause (3), but also with the Crown Agreement. For my part I am not at all sure that it is necessary for us at this stage to decide what is the true construction of the Option Agreement: an agreement is not void simply because the parties have not set out all the possible details or even all the details which it would have been sensible to include. If A and B agree for consideration to develop land by erecting a house in accordance with such plans and at such a cost as C may dictate, I do not see why they should not be bound. Whichever construction of the Option Agreement is correct there are details still to be decided and the parties have seen fit to leave it to the companies to make the decisions. That was not as rash of them as of the parties in the example I predicated, because the parties jointly are in fact the companies. The companies would have to decide what development was to be done and what it was to cost. Nybro, as development managers, would then carry out the development so decided upon was not in accordance with the Crown Agreement and the current Master Layout Plan, the Secretary for the New Territories might object: so, if the Crown Agreement is not, upon the true

construction of the Option Agreement, incorporated into the the Option Agreement, the companies might find themselves unable to carry out what they have agreed to do. That does not mean that what they have agreed is uncertain but only that it would have been wise to include an express reference to the Crown Agreement. On the other hand, if that document is incorporated into the Option Agreement, the difficulty would not arise, because the parties would be bound to see that the companies developed in accordance with it also. The Option Agreement would be uncertain only if it were not possible to say whether a particular proposed development was within the Master Layout Plan, and there could be no doubt what that plan required. In theory no difficulty would be likely to arise upon either construction of the Agreement, because HKR would (as required by the Crown Agreement) have a controlling interest in each of the companies and could ensure development in accordance with the Crown Agreement whether Nybro are bound to comply with it or not. One thing which has never been doubted was the intention of the parties to enter into a binding legal relationship. We should be slow to hold that their agreement is void for uncertainty because they could have used words which were more precise: *Borwn v Gould* 1972 1 Ch. 53. The fact that one can conceive of circumstances in which Nybro might regret having committed themselves to a development which threatened to lead them into bankruptcy is no reason for holding that the Option Agreement is uncertain.

I must briefly express my opinion on the construction point. Mr. Hunter relies upon *Prenn v Simmonds* 1971 1 W.L.R. 1381 as authority for the general proposition that "in order for the Agreement . . . to be understood, it must be placed in its context": per Lord Wilberforce at p. 1283H. Counsel submits that the relevant matrix of facts includes the Crown Agreement and even, as I understand him, all the mass of information collected for the preparation of the Master Layout Plan. Mr. Nourse protests that *Prenn v Simmonds* goes nowhere near as far as that and that it permits of parol evidence only where a particular word or phrase is ambiguous. There is no doubt, alas, that we have passed the days when parties to a written agreement were expected to say what they meant and to mean what they said and the pendulum is fast swinging towards the point where the written word will represent nothing more than a peg on which to hang evidence of the parties' alleged intentions (real or imagined). It is to be hoped that the swing will be stopped before it goes any further. We have been referred to a great number of cases from *River Wear Commissions v Adamson* 1877 2 A.C. 742 to *Thoresen v Weymouth Public Borough Council* 1977 3 Lloyd's Rep. 614, but I think the present limit of the rule is still that stated by Lord Watson in *Orr v Mitchell* 1893 A.C. 238, 294, where, the issue being whether a recital could be called in aid to construe the operative part, he said:

> "The context cannot be referred to for the purpose of contradicting the terms of the dispositive cluase".

Provided that limit is not exceeded I think the cases do show that

> "what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of theese opinions seem to be implicitly to recognise that, in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed.": *Reardon Smith Line Ltd. v Hansen-Tangen* 1976 1 W.L.R. 989, 997, per Lord Wilberforce.

That seems to me to apply directly to the present case. The representatives of Nybro may not have had the Crown Agreement in the forefront of their minds, but clearly they were aware of its terms and could not have intended that the land should be developed otherwise than in accordance with its terms. However, that does not make the Crown Agreement "a contract document" if by that is meant, inter alia, that Nybro has agreed to the right of HKR uniterally to replace Master Layout Plan 3.5 with Master Layout Plan 4.0.

I come now to the alleged uncertainty as to the terms of management and of the remuneration for the services which Nybro is to agree to render to the companies. There is no apparent definition of the services to be rendered and there is no express provision for payment for the management services and expenses. The former omission is not altogether surprising: when one appoints a manager one does not normally set out in detail the services that are to be rendered and, if necessary, the court will decide whether, in all the circumstances, a particular service is or is not included within the term "management". The difficulty as I see it here lies in the second omission and in the fact that no provision is made for the removal of Nybro as manager if the services are not performed efficiently. Nybro, in seeking to uphold the contract, is forced to argue that no provision was made as to remuneration because there was to be no remuneration: the expense of management was, along with a cash payment to each of the companies, to constitute Nybro's contribution to the project. The question is whether that is a fair construction of the contract or merely a device to prevent avoidance of the contract so that it may be used as a bargaining weapon against HKR, who have now changed their plans. In so saying I appreciate that Nybro's submission is that it is the reconstructed HKR which is using the uncertainty argument as device to avoid liability under a contract inherited from the previous Board of Directors.

An agreement to render services requires a consideration, but the court will often imply a promise to pay a reasonable reward for the services: if no reward can be implied there is no consideration and the agreement is not legally enforceable. There can be no legally enforceable agreement to do something for nothing, except by deed. At first sight the Option Agreement might appear to contemplate just that – a rendering of managerial services without remuneration. However, it is contended that this is not simply an agreement for services, or even for an option to undertake services, with no remuneration stated: here the rendering of the services is part of a much wider agreement involving also the setting up of companies to carry out the development. Mr. Hunter submits that when the contract is construed in the light of the surrounding matrix of facts it is clear, or at least arguable, that nothing is left uncertain because the machinery of ascertainment is providied. Thus, he says, Clause (4) requires no more than that the parties should secure the appointment, by the companies, of Nybro as managers: it will be for the companies to arrange the details. As I understand it, he asks us to read Clause (4) as defining (and sufficiently defining) the degree of participation in the management for which Clause (1) gives an option. At least, as it seems to me, that is an arguably tenable position. I can see that HKR may be reluctant now to have Nybro appointed as managers in the light of all that has happened, but the parties are bound to use their best endeavours to secure the appointment. It is not an agreement to agree although at a casual glance it may have the appearnce of such. As for the remuneration there can be no *quantum meruit* unless it is first clear that the work is not to be done gratuitously. Bearing in mind that the employer would be not HKR but the companies, I see no ground for Nybro's suggestion that the work is to be done gratuitously and the fact that they have made that suggestion has caused me great anxiety: it is a reasonable implication that Nybro were to agree their remuneration with the companies and that in default of agreement the court would be asked to fix a reasonable remuneration for the services rendered. It may be asked Would the court be able to fix the remuneration for services which are not yet defined? However, that is not a

relevant question, because on the view I take of the contract the services will be defined before the remuneration falls to be fixed.

Do the contract and lis pendens "affect" the land within the meaning of the Land Registration Ordinance? Unless, beyond argument, they do not, we ought not to vacate the entries in the Register at this stage. The Option Agreement does not create an interest in the land itself, present or future, but it does contemplate that the title to the specified sections of land shall pass to the companies once they have been formed: the contract merely gives "a commercial interest" to Nybro in having the land assigned to the companies. HKR contends that that is not enough and that the Option Agreement cannot "affect" land unless by that Agreement the title to the land is transferred and the Agreement can be, and might be, enforced by an order for specific performance. The learned judge was mistaken when he said that it was agreed that the court might properly vacate the registration of a contract which was not specifically enforceable. Mr. Hunter argues that the contract with which we are concerned is capable of enforcement by an order of specific performance and that, even if it is not, it can be enforced in other ways which show that the land is affected despite the fact that those ways involve remedies of a personal nature. Thus he says that the promise by HKR to assign the land to the companies could be enforced indirectly by an injunction which prohibited an assignment to anyone else and that it is therefore in the class of contracts which it was intended could be protected by registration. The statute provides that the instrument in writing or the judgment must be one by which the land "may be affected". "Affected" is not a word of art but an ordinary English word, which may have a very large meaning. In the context of the Land Registration Ordinance it is the title to the land which must be affected and anything which either calls for a change of title or which may prevent or limit changes of title affects the land. In *Thian's Plastics Co. Ltd. v Tin's Chemical Industrial Co. Ltd.* (No.2) 1971 H.K.L.R. 249 the lis which had been registered concerned "the inner working and relationship of the first and second plaintiffs and the conduct of the second defendant" and if it succeeded it would "affect the persons who [were] entitled to deal with the properties on behalf of the companies but it [would] not affect the properties themselves". Whatever may be the position as regards the development of the land and the management of the project the promise to assign the land to the three companies would clearly be capable of enforcement by injunction even if specific performance were refused.

As for the question whether specific performance could be granted of the clauses relating to development and management, Mr. Hunter argues that one has to look at this contract in stages. As I understand him, he means by this that, first, specific performance could be ordered of the first part of Clause (2) of the Option Agreement to compel the formation of the companies; after that, secondly, specific performance can be ordered of the second part of Clause (2) to compel the assignment of the land to the companies; after that, thirdly, specific performance can be ordered of Clause (3) to compel the parties, as shareholders, to ensure that the companies develop the land assigned to them and after that, fourthly, specific performance can be ordered of Clause (4) to compel both parties to exercise their pwoers as the sole shareholders in the companies to appoint Nybro as manager and to compel Nybro to accept the appointment. Mr. Nourse submits that one may not approach the matter in this way and that the argument is analogous to one to enter into a partnership. He rightly says that the court will not as a general rule order specific performance of an agreement to form or carry on a partnership, although it will order specific performance of an agreement to execute a partnership deed where the parties have already started carrying on the partnership business. I agree with Mr. Nourse that *Lisle v Reeve* 1902 1 Ch. 53 is not in point. Where I part company with him is where he says that the Option Agreement involves the rendering of continual services by one person to another

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and requires continual supervision. He relies upon *Page One Records Ltd v Britton* 1968 1 W.L.R. 157, which distinguished the well-known case of *Lumley v Wagner* (1852) 1 de G., M. & G. 604, but I do not think it assists us here. This is not a contract to manage but to procure the appointment of Nybro as managers by the companies. The management contracts between the companies and Nybro will involve the rendering of such continual services and I apprehend that those contracts could not be specifically enforceable. In this connection I am attracted by the dictum of Megarry, V.C., in *Tito v Waddel* (No. 2) 1977 1 Ch. 106, 322;

> "The real question is whether there is sufficient definition of what has to be done in order to comply with the order of the court". 10

But even the third stage of the Option Agreement will require no constant supervision by the court. I am not persuaded that this contract is not capable of enforcement by orders for specific performance.

What is then argued on behalf of HKR is that in all the circumstances of this case no court would in fact grant specific performance. Although for a long time I was doubtful whether it would be right for us to go to the length of so holding, in the event I am now persuaded that the learned judge had good cause for saying:

> "To force two unwilling parties into such an ill-wed companionship on such precarious terms is a folly".

Whether the strict limits of the Option Agreement, and although we should not too readily 20 assume that the parties could not make it work, it seems to me that it clearly cannot be made to work. All the machinery may be there but one cannot close one's eyes to the fact that the companies will never in reality be independent entities, entirely distinct from the parties to the Option Agreement, who are the only shareholders. If HKR is reluctant to accept development in accordance with Master [Layout] Plan 3.5 and if Nybro are unwilling to accept development in accordance with Master [Layout] Plan 4.0, the whole project is doomed to failure, for the position of both parties would be intolerable. That being so, it would be wrong in effect to sterilize the land until the action can be brought to trail. I have had the advantage of reading the judgment of McMullin, J. in draft and I agree that when one looks at the case as a whole it is inconceivable that any remedy other than 30 damages will be granted at the trial. I think that a contract for which the only remedy can be, or clearly will be, an award of damages does not affect the land within the meaning of the Land Registration Ordinance. That does not mean that the Registry was to be criticised for registering an Agreement and a lis pendens which had all the appearance of registrable documents, but it does mean that the learned judge was right to order that the entries be vacated, and I would dismiss the appeal.

Pickering, J.A.:

By their Respondents' Notices in the two appeals Hong Kong Resorts (HKR) claimed that the order of the learned judge should be affirmed on a ground additional to those relied on in the Court below namely that the evidence disclosed that the Option 40 purportedly granted by the Agreement of the 11th October 1976 between the parties was never effectively exercised and that there wsas no triable issue on that point. The learned judge had found that there was such a triable issue. Mr. Nourse concedes that in advancing this particular argument before this Court he has a heavy burden and the more so since

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new evidence by way of affidavit has been allowed in by this Court. I propose to say no more on this issue than that it does not appear to me to be possible for this Court, on the evidence before it, to say that the exercise of the option sworn to by Mr. Burgess, the Chairman of Nybro, and by Mr. Wong, the then Chairman of HKR, was either provisional or subsequently cancelled. In my view that is a distinctly triable issue and is quite impossible for this Court to short-circuit the proceedings by holding otherwise. Indeed if the matter came to trial it would be a matter for the trial judge as to whether HKR's arguments based upon provisional exercise of the Option or cancellation thereof was open to them upon the pleadings.

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I turn to the issue which appears to me to be crucial to this appeal.

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The learned judge's finding that the Parties' Agreement of the 11th October 1976 was void for uncertainty was the subject of spirited attack by Mr. Hunter who said that the judge had failed to relate that Agreement to the Master Agreement and had failed to consider the impact of the Master Plan and whether the Agreement between the parties, the Master Agreement and Master Plan were together sufficient to establish certainty in law. The learned judge, the argument continued, had not applied the correct principle of construction upon the issue of voidness which principle was that where the Court is faced with an agreement which the parties plainly intended to be binding and which had been partly performed, the Court should reject it only as a last resort. Moreover the judge had failed to understand the corporate structure set up by Clause 2 of the Agreement whereby fifty-one per cent of the control of each of the three companies to be formed would vest in HKR and forty-nine per cent in Nybro with the result that control would vest in the majority shareholder which could dictate the policy and activities of each company within the terms of the Master Agreement and the Agreement of the 11th October 1976 made between the parties.

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Developing the theme that the Agreement between the parties, the Master Agreement and the Master Plan should be construed together Mr. Hunter cited the case of *Prenn v Simmonds* [1] where Lord Wilberforce said:—

"The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *Rive Wear Commissioners v. Adamson* (1877) 2 App. Cas. 743, 763 provides ample warrant for a liberal approach. We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. Moreover, at any rate since 1859 (*Macdonald v. Longbottom,* 1 E. & E. 977) it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term."

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That principle had since been applied in *Lep Air Services v. Rolloswin Investments Ltd.* [2] , *Reardon Smith Line Lte. v. Hansen-Tengen* [3] , *Bunge v. Kruse* [4] , *Thoresen v*

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(1) 1971 1 W.L.R. 1381, 1383
(2) 1972 2 W.L.R. 1175.
(3) 1976 1 W.L.R. 989.
(4) 1977 1 Lloyd's Rep. 492.

Weymonth P.B.C.[5] and *Mottram v sunley*[6]

Applying this principle, the argument continued, it was possible to relate Special Condition 8 of the Master Agreement to clause 2 of the Agreement between the parties, the former authorizing HKR to assign the whole or any part of the land demised to its subsidiary company or companies, – defined as a company or companies of which HKR had effective contorl and not less than fifty-one per cent of the issued shares at the time of the assignment or assignments to the companies – whilst Clause 2 of the Agreemnt between the parties provided that the shares in the companies when formed should belong as to fifty-one per cent to HKR and forty-nine per cent to Nybro thus according with the terms of Special Condition 8. Likewise, it was said, Special Conditions 5 and 6, relating to the development by HKR of the land demised in the manner therein set out and to the satisfaction of the Secretary of the New Territories, could be allied to Clause 3 of the Agreement between the parties which provided for development by each of the three companies of the section of land assigned to it. Thus the Agreement between the parties was not a mere contract to contract they having used language appropirate and sufficient for the transaction into which they were entering and intending to be bound by their contract. The effect of the cases, counsel urged, in the words of Roskill L.J. in *Bunge v. Kruse*[4] was that one "must not give a legalistic construction with total disregard of the commercial background against which the parties were contracting". Placing oneself in the some factual matrix as that in which the parties were at the time of the Agreement, the relationship of the parties was adequately spelt out and the Court should be reluctant to hold void for uncertainty a provision intended to have legal effect (*Brown v. Gould*[7]).

In summary it was Mr. Hunter's contention that, putting the Agreement between the parties in its context, the object of the parties was plain, namely to create a joint venture between them through the medium of three limited companies for the development of the named section of land in respect of which HKR had obtained from the Government the rights afforded them under the Master Agreement. That Agreement, together with the Master Plan, constituted the essential background circumstances of the Agreement between the parties the draftmanship of which was not so inept that it was impossible to give effect to it.

To this Mr. Nourse replied that the Option was to participate in the exploitation of the land "in the manner hereinafter set forth" and although in Clause 3 of the Option there was reference to the Master Plan there was no reference to the Agreement and Conditions for Exchange entered into between the Crown and HKR beyond a mere recital. It was not open to the Court to introduce a contractual document which the parties had not themselves introduced by their writing. It was to the Master Plan alone that one had to look to decide the method of development and that Plan did no more than set out in very general terms the areas and nature of the development on each part of the land: it did not specify whether the residential accommodation was to consist of houses or flats or where in the areas marked orange the hotels were to be situated nor was there any mention of the design and construction of any of the buildings to be erected. There was, counsel argued, no specification at all – a fact which was appreciated by Nybro whose contention it was that

(4) 1977 1 Lloyd's Rep. 492
(5) 1977 3 Lloyd's Rep. 614
(6) 1972 Lloyd's Rep. 197 at 209.
(7) 1972 1 Ch. 53.

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the contract impliedly gave the resolution of any difficulties to HKR as the dominant shareholder in each of the companies: the contract into which the parties had entered was to develop in accordance with the Master Plan not to develop in accordance with that Plan until doubts or difficulties arose which were then to be resolved by the companies. That, it was said, was a contract into which the parties could have entered but not that into which they did enter and it was not permissible to say that because HKR controls the companies the Agreement gives the companies the right to fill in gaps where the contract does not give any such right. The matters left open on the Master Plan were so various and fundamental that it was inconceivable that Nybro had to sit back and watch HKR, by virtue of its fifty-one per cent shareholdings, develop in whatever way it liked within the Master Plan: under the Agreement between the parties it was Nybro which had to undertake and complete the project and if Nybro had no control at all, it involved attributing to the parties an intention they could never have entertained. Moreover although the Agreement between the parties provided that Nybro should be appointed Manager by each of the three companies there was no provision for the remuneration of Nybro – a fact which had led Mr. Hunter for Nybro to say that the Agreement was that the work should be performed without remuneration; it was a very big step indeed to imply a term that there was to be no remuneration; in addition there was no mention of how much time Nybro was to devote to the project, no provision for early determination of the Agreement and it was not stated whether and in what circumstances Nybro could delegate.

Again, it was common ground that there were no draft Articles of Association of the three companies to be formed. The learned judge had held that that was immaterial since under section 11(2) of the Companies Ordinance if no Articles were registered then the Regulations contained in Table A should be applicable. The Agreement however was simply to form three companies "under the Companies Ordinance" and the question of what were to be the Articles of Association had been left open; what the judge had accepted was that if you agree to form a company and to say nothing about the Articles you must be deemed, when you come to register the company, not to have registered Articles and in that case section 11(2) would apply: but it was quite a different thing to say that that sub-section was automatically brought into the Agreement under consideration; at the time of the Agreement the parties had simply not directed their minds to what the Articles were to be and it could not be presupposed that no Articles were to be registered so that Table A would be brough into play.

In meeting further the argument that the Agreement between the parties, the Master Agreement and the Master Plan should be construed together, Mr. Nourse contended that it was permissible to have regard to the surrounding matrix of facts upon the *Prenn v. Simmonds* principle[1] only where the document under construction contained a word the meaning of which was doubtful. Some of the cases appear to support that view but others do not. Thus in *Prenn v. Simmonds* itself the surrounding circumstances were called in aid to assist in establishing what was meant by the word "profit" in the document under construction. Again, in *Lep Air Services v. Rolloswin Ltd.*[2] Lord Simon, citing *Prenn v. Simmonds,* held it permissible to examine surrounding circumstance in order to explain a figure mentioned in a leter which figure represented a sum of money said to have been paid and which sum differed from the sum which, on the face of the contract between the parties, one would have expected to have been quoted. Thus in both those cases resort was had to the surrounding circumstances for only a very circumscribed purpose. However in *Bunge v. Kruse*[4] similar resort was had for the purposing of deciding whether or not there

(1) 1971 1 W.L.R. 1381.
(2) 1972 2 W.L.R. 1175.
(4) 1977 1 Lloyd's Rep. 492

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had been an accord and satisfaction – a very much wider concept. Again, in *Reardon Smith Line Ltd. v. Hansen-Tangen* [3] Lord Wilberforce said:–

> "To argue that practices adopted in the shipbuilding industry in Japan, for example as to sub-contracting, are relevant in the interpretation of a charterparty contract between two foreign shipping companies, whether or not these practices are known to the parties, is in my opinion to exceed what is permissible. But it does not follow that, renouncing this evidence, one must be confined within the four corners of the cocument. No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

In *Charington & Co. Ltd. v. Wooder* [8] Lord Kinear at p. 80 said:

> ". . . it may be necessary to prove the relation of the documents to facts: and I take it to be sound doctrine that for this purpose evidence may be given to prove any fact to which it refers, or may probably refer . . ."

And Lord Dunedin at p. 82:

> ". . . in order to construe a contract the court is always entitled to be so far instructed by evidence as to be able to place itself in thought in the same position as the parties to the contract were placed, in fact, when they made it – or, as it is sometimes phrased, to be informed as to the surrounding circumstances."

It is true that in borh *Reardon Smith* and *Charrington* what was under review was the construction of a particular term but the speeches of their Lordships go far to suggest that, as happened in the case of *Bunge v. Kruse* [4], surronding circumstances may be examined for far wider purposes. As it seems to me the principle of *Prenn v. Simmonds* [1] does not stop at the point for which Mr. Nourse contends but rather that it is permissible in the present case to construe the Agreement between the parties in the light of the Master Agreement and, as conceded by Mr. Nourse, the Master Plan – though of course it is his contention that the latter document does no more than to set out in very general terms the areas and nature of development of each part of the land. A careful perusal of that Plan and its Key does not persuade me that that is so. The Plan divides the area, designating to every square inch the type of development which is to take place upon it, specifies the number of units of residential accommodation and hotels with gross site areas, gross building space and plot ratios and defines the community facilities, services and recreational amentities to be provided. At that stage of the scheme it is doubtful if much more could have been done. Certainly it was not to be expected that detailed plant of teh numerous buildings and installations to be erected could have been provided.

(3) 1976 1 W.L.R. 989
(4) 1977 1 Lloyd's Rep. 492
(8) 1914 A.C. 71.
(1) 1971 1 W.L.R. 1381
(4) 1977 1 Lloyd's Rep. 492

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As to what Mr. Hunter termed the corporate structure, I agree that the learned judge did not fully appreciate its effect. He posed certain rhetorical questions which led him to the view that the terms of development and management had been left in a vacuum. But as it seems to me the answers to those questions are really inherent in the corporate structure. Thus policy decisions would be made by the Boards of the respective companies which would likewise be responsible for the provision of financial backing on such terms and by such methods as seemed to them the most commercially desirable.

In short I would not hold the Agreement of 11th October 1976 void for uncertainty on the basis of Mr. Nourse's reluctance to accept, in the present circumstances, what I conceive to be the effect of the *Prenn v. Simmonds* line of cases. 10

However that may be what does, in my opinion, wreck the Appellant's case on the rock of voidness for uncertainty is the failure of the parties to provide, or even to provide for, Articles of Association of the three companies to be formed. The learned judge said that this did not matter. Mr. Nourse says it does and I think that Mr. Nourse is plainly right. The judge considered that in the absence of Articles of Association section 11(2) of the Companies Ordinance (Cap. 32) would operate to bring Table A into operation. That sub-section provides that:–

> "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 A, those 20 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."

The facile argument appears to have been put to the judge that because no draft Articles had been agreed Table A would automatically come into operation – and the judge accepted that argument. But the situation he accepted was premature. What the sub-section says is that upon a company being registered without Articles Table A shall apply: but that provision does not operate unless and until the company is registered. It cannot operate in futuro. Thus it cannot relate to the Agreement between the parties that three companies should be formed. At the time of that Agreement no thought had been given by either side to the contents of the Articles of Association, no draft Articles were in being, no outline 30 of those Articles existed and there was no agreement that Table A should apply. Mr. Hunter argues that the capital of the companies having been determined, the manner in which it should be subscribed having been laid down and consequently the proportions in which profits should be shared agreed, that we sufficient. That is a view to which I cannot subscribe for Articles of Association can be expected to contain a hundred matters unconsidered by the parties and the skeleton points referred to by Mr. Hunter as being in fact agreed did not contain the flesh and blood of an enforceable agreement. Articles of Association are the very regulations under which a company is to operate and they were neither provided, provided for, nor encompassed by a reference to Table A. That fact left open the widest field of potential disagreement when the companies came to be formed and 40 contains within it uncertainty of a high degree. I would hold that for such uncertainty the Agreement between the parties is void.

If it be said that when the parties did eventually turn their thoughts to Articles of Association, then in the event of disagreement as to the contents of the Articles Table A must apply, it must be remembered that Table A could not apply unless and until the companies were registered without Articles of Association – and if the companies were at

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loggerheads as to the Tables neither would be likely to apply for registration nor indeed, under the Agreement, was either entitled to so apply unilaterally. Nonetheless we are told that Nybro has in fact registered three companies on the basis of Table A. That can only be a futile gesture since the Agreement was that both parties should procure the registration. Unilateral action can count for nothing. Again, if it be argued that in the event of disagreement as to the terms of the Articles either party could obtain specific performance of the agreement to register the three companies, invoking Table A, and that this expectation conferred certainty upon the agreement to register the companies, it must be remembered that neither party could possibly be sure that the Court would grant a decree of specific performance. Uncertainty as to the Articles was rife and is fatal to the Agreement between the parties. 10

Mr. Hunter conceded that if the Agreement between the parties were to be found void for uncertainty he was, in his own word, "dead". I have found the Agreement to be so void and, if that view be right, that is the end of the matter. Lest however the case go further and my view be considered to be wrong, I must state briefly my opinion as to specific performance and the question of whether or not the Agreement "affects" the land so as to be capable of registration under the Land Registration Ordinance. In this connection I have had the considerable advantage of reading the judgment prepared by McMullin, J. It is wholly unnecessary and would make for tedious reading were I to repeat here the history of the relations between the parties which he has so clearly outlined nor do I think that I could more tellingly etch the present relationship between the parties whose interests are now almost totally divergent. I have considered with care my brother's analysis of many of the cases cited to us in argument. In the result I am not persuaded that the learned judge was wrong when he said "No court is likely to decree the specific performance of the Agreement now in dispute". Like *Wilson v. Northampton and Banbury Junction Railway Co.* [9] this appears to me to be eminently a case in which substantial justice may be done by an inquiry as to damages: but I do not see how it could possibly be done by way of specific performance or other equitable remedy. 20

Thus in the special circumstances of this case the option Agreement cannot affect the land and the learned judge was right to order the vacation of the two entries in the Land Register. 30

I would dismiss the appeal.

McMullin, J.:

The general histroy of this dispute has been dealt with in the judgment of the learned president and I do not propose, therefore, to recapitulate more of it than the especial features which bear upon the issues of specific performance and registration – the particular issues which have principally engaged my attention. I agree with the other members of this court that a clearly triable issue arises in relation to the authenticity of the exercise of the option. I also agree that the option agreement is not void for uncertainty inasmuch as it contains terms which are in themselves simple and unambigious and are capable of implementation via the machinery of the corporate structure if it be conceded that that machinery is itself complete and ready to operate. I differ, however, from the learned president in adhering to the opinion of Pickering, J.A., and for the reasons which he gives, that it is in precisely that vital area that the agreement is crippled. I would add to that 40

(9) (1874) 9 Ch. App. 279

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only one further consideration. Under the agreement the three companies are to be set up as the essential engines of development and it is subject to them that Nybro is to carry out its task of management, and ultimately, it is said, in case of difficulty, subject to the final control of HKR. It is conceded that there is an enormous area of specific detail relative to the development which the option agreement does not expressly cover. This area would include such practical matters as the separate spheres of competance of the three companies, their relationships *inter se* and their relationship with the manager, Nybro. Again, it is not enough to say that the appointment of Nybro as manager is a simple matter and that the role of a manager is something readily understood. What we are here considering is an extra-territorial body the composition of which, and even the nature of which, remains somewhat mysterious. How this body will actually carry out the duties of management – through what agency, by delegation in what form and to whom – is something upon which there is at present no visible consensus. These are all things which the parties may well wish to see reflected in the contents both of the Articles and Memoranda of Association of the companies. This is, to my mind, an additional reason for concluding that the part of the option agreement relating to the formation of the companies is stranded at the level of an agreement further to agree. But if I am wrong in my view that the want of articles is fatal to the agreement there yet remains the question of enforcement out of which arises what is, to me, the most visibly practical of the difficulties in the way of the appellant company.

When we turn to consider Mr. Nourse's alternative submissions the argument takes a sharply different course. It must now be assumed that the terms of the option agreement were not so wanting in certainty as to be unenforceable as they stand. Nevertheless it must be said that those terms are to be construed precisely as they stand and not as though they embodied, as implied or express terms, the various conditions of the "master agreement" (i.e. the conditions of exchange agreement between HKR and the Hong Kong Government) to which Mr. Hunter has referred, still less the enormous volume of background research material referred to in the latest affidavit of Mr. Michael Wong (14/7/78). I did not understand Mr. Hunter – following *Prenn v. Simmonds*[1] and the several subsequent cases in which the "matrix of the circumstances" approach to interpretation of contract documents was approved – to argue for more than the right of the court to scrutinize that material for any illumination it might throw upon the intentions of the contracting parties in order to determine whether the language they had employed amounted to a viable consensus from which neither party should be permitted to resile. I find nothing in the decided cases which would justify us in regarding anything as a "contract document" which was not actually adopted for that purpose by express words in the option agreement itself. The only such document with which we are thus directly concerned is the master plan 3.5 which is, by common assent, the particular plan to which the option agreement refers (Clause 3). If it be assumed that no insuperable difficulty, deriving solely from the wording of the option agreement, stands in the way of implementing it, whether by stages, as Mr. Hunter suggests, or otherwise, is there any other reason deriving from the circumstances generally which would oblige this court to sustain the opinion of Li, J. that the option contract is not enforceable as to its terms or in amy manner otherwise than by damages for its breach? Mr. Nourse puts his alternative argument under two heads as follows:

> "2 Alternatively, the Agreement is enforceable only in damages and not by specific performance, because
>
> (a) it is the equivalent of a contract ot enter into a partnership;

(1) (1971) 1 W.L.R. 1381

(b) it involves the rendering of continuous services by one person to another;

(c) it requires continuous supervision;

(d) it lacks mutuality; and

(e) damages would be an adequate remedy.

3. If the Agreement is either (a) wholly unenforceable or (b) not specifically enforceable it does not 'affect' the land and cannot be registered under the Land Registration Ordinance."

These points correspond respectively to thrid and second issues proposed by Mr. Hunter.

It appears to me that in order fully to appreciate the scope of these objections it is necessary to keep clearly in mind the history of this large venture and the present attitudes and relationships of the parties at suit insofar as these are unmistakably shown upon the affidavits and their related documents. One might indeed very usefully enlist the notion of the "factual matrix" in testing the worth of this particular part of the agrument. What is evident at once is that the appellant company and the respondent company are involved in a total collision of opposing views as to what constitutes the proper development of the TaYue Shan project. The appellants' whole claim to have rights exercisable in respect of that project rests upon master plan 3.5. It is common ground that – as counsel put it – that plan cannot "live together with" master plan 4 which is the scheme towards the implementation of which the management of HKR was moving when its progress was suddenly arrested by the registration of the option agreement and the lis pendens founded on the appellant's claim in action 1006 of 1978 which itself is founded on that agreement. Indeed, even a cursory scrutiny of the two plans side by side will make it clear how radically the two proposals for development differ from each other. We were told that the overall difference is in the shift from a development calculated primarily to attract tourist custom to one aimed primarily at providing recreation and holiday accommodation for local people. The lots allocated to the appellants under the option agreement are, in common with other lots in the area generally, greatly affected by this alteration.

The Ta Yue Shan project is a very ambitious scheme of development. Mr. Edward Wong, the second defendant in Action 785 of 1978, would seem to have been its originator and its guiding spirit during the many years of its gestation which culminated in the acquisition by HKR – a privately owned company of which he was managing director – of the large area on Lantao Island known as Lot 385. This land passed to the company in exchange for some 800 individual lots which had been acquired over many years and which were surrendered to the Hong Kong Government under the exchange agreement (referred to in this case as the master agreement) executed on the 10th September 1976. The master plan which is referred to in the option agreement (plan 3.5) was approved by the Hong Kong Government in December 1975. The agreement itself was signed by the representatives of Nybro and HKR on the 25th of November 1976. The way was thus finally clear to seting the project in motion. Thereafter the search for financing from external scurces in motion. Thereafter the search for financing from external scurces commenced, it being considered that the scheme was too big to rest wholly on local resources. After some apparent initial success the company found itself in deep financial difficulty the exact origin of which has not been disclosed but which would seem to have been precipitated by, or at least to have followed upon, the withdrawal of a substantial

financial backer, the Moscow Narodny Bank, some time in 1976. At this time the board of the company consisted of Mr. Edward Wong, his son Michael Wong, Mr. John Ault, a Mr. Thomas Beesley and a Mr. FAN Meng-yan. The company went into provisional liquidation on the 31st of March 1977 following the presentation of a winding up petition. A large consortium came to its rescue. Creditors to the extent of some 37 million dollars were paid off and the petition was dismissed on the 13th of December 1977. By that date none of the original five directors was any longer actually concerned with the affairs of the company. Messrs. Ault, Beesley and Fan had resigned from the board in June 1977 and Mr. Michael Wong at some unspecified date about the same time. As to Mr. Edward Wong, the managing director and chief architect of the whole scheme, although we do not know whether he has actually resigned from the company, he would seem at any rate to have abandoned it for he is no longer a shareholder and, on his own admission, he was last in Hong Kong in January 1977 and has since never returned here and has given no further indication of his intention to resume involvement with the company's fortunes. The third defendant in Action 785, Mr. A.J. Burgess who, as Chairman of Nybro, was also a member of the HKR board for a brief period between 1976 and 1977 is likewise no longer a member. A wholly new board of directors now occupies the place of the former board and one of the new directors, Mr. John Wu, has been the principal deponent for HKR in these proceedings. He and his fellow directors assumed office some time in June 1977. Between then and the end of the year when the petition was dismissed they had caused a new master plan (plan 4) to be produced. According to Mr. John Wu this plan was given final approval by the Secretary for the New Territories in late January 1978 although in the course of argument counsel for the appellant company expressed some doubt as to wether this was so. It is true, as Mr. Hunter says, that plan 4 does not bear the signature of the secretary as does plan 3.5 and that special condition 6C of the master agreement provides that any such plan and any amendment thereto should be signed on behalf of the grantee and of the Government. On the other hand we have, in addition to the affirmation of Mr. Wu the opinions of Mr. O'Neil the respondent's project manager and Mr. Reynolds (formerly a senior surveyor in the New Territories Administration) as to the advantages of the new scheme over the old and we have no countervailing evidence even in the new affidavits introduced in the course of the hearing of the appeal. On what was before Li, J., still more on what has been put before this court, it would,I think, be impossible to conclude that the new scheme was anything other than a carefully considered alternative which the new management has every intention of procecuting and which either has the Hong Kong Government's blessing or is very unlikely to be refused it. I stress these features in the background events leading up to the present dispute not because I wish to suggest that we are entitled to form any concluded opinion on the relative attractions of these two schemes but because I wish to emphasize the practical realities of the situation with which we are confornated in coming to a determination of the particular issues with which I am now concerned. It is beyond question that HKR as it now exists stands charged with any obligations lawfully incurred by the previous board of directors. The law governing corporations which does not permit the coporate persona to die despite the most radical alteration in its constituents is directed to securing, among other benefits, the stability of contractual arrangements. But that is not to say that a court which is asked to give equitable relief to a party who claims to be aggrieved in contract should be blind to any features in the evidence which may suggest a disastrous disadvantage to either party in the granting of the specific relief which is sought. It would be wholly unrealistic in the present case to overlook the radical transformation which has taken place in the respondent company and in the orientation of its project. In a real if not a legal sense the company has died and has been re-born. In its new manifestation it has set its foot upon a wholly different path. If Nybro succeeds in establishing the validity of its claim to have exercised its option and if it is then given the full range of the relief which it presently seeks the result will

plainly be that HKR will be wrenched from its present purpose and forced to co-operate in a form of development which it has abandoned for want of confidence in its commercial viability. There is a great deal in the evidence already to support the view that the new HKR directors were taken by surprise by the letter of the 6th January 1978 and that it was, as Mr. Nourse put it, "a bombshell' apprising them for the first time of Nybro's claim. Correspondingly there is nothing on the other side to affirm the contrary. Indeed, there is much that is questionable in the evidence and the conduct of Mr. Edward Wong. He confirms Mr. Burgess's statement that the option was accepted on the 24th of January 1976 but he appears to have done nothing, after that date, to secure and safeguard the custody of such an important document in the company's records and his evidence as to the manner in which he dealt with this vital letter is distinctly unsatisfactory. There is no positive evidence to show that it ever was included in the company's records. Again his denial that Nybro had applied for a further extension of the option in February 1976 was contradicated by two of his own former co-directions. These are no doubt ultimately questions for the trial judge, but in considering the present issues we are entitled – indeed obliged – to take the evidence as we find it and it is noteworthy that Mr. Edward Wong does not even claim to have informed any member of the new board (or indeed any member of the old board) of the exercise of the option by Mr. Burgess. In addition there was the evidence of Mr. Duckworth of the Official Receivers Office who had custody of all the company's files during the provisional liquidation period and he is positive that there was no record, among the papers then in his custody, of the option having been exercised. 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 after their successful rescue operation.

It is common ground that the option agreement reflects something in the nature of a joint venture between Nybro and HKR. It is also, I think, accepted by Mr. Hunter that the contract is of its nature indivisible. To that extent he is not at odds with the finding of Li J. who held that its terms were not severable. What counsel says, however, is that the learned judge overlooked the importance of the corporate structure, or machinery, created by the agreement and that had he appreciated its importance he would have held that Clause 2 (which provides for the setting up of three companies to which the land is to be assigned) could be enforced as it stood leaving the successive stage provided for in Clauses 3 and 4 to be enforced, should need arise by subsequent orders. Clause 2 was indeed the only clause, in counsel's view, with which any court could be concerned at present since until these companies had been established it would not be possible to order the assignment of the land or to appoint Nybro as manager within the terms of Clause 4. The corporate structure was of course also invoked to answer the objection of uncertainty in the terms. These are however matters concerning primarily the first issue which was whether the agreement was void for uncertainty. The fact remains that the contract is indeed to be considered as a whole and the effect of it, so considered, is to involve the parties in an enormous and costly venture which of its nature will demand, to a high degree, a spirit of co-operative harmony if it is to succeed. At this juncture it may be useful to recount the sequence of stages which Mr. Hunter, basing himself on the principles which he extracts from *Giles v. Morris*[2] and *British Murac Syndicate, Ltd. v. Alperton Rubber Co. Ltd.*[3] sees as open to his clients and to the court in securing compliance with the contractual terms. Firstly, he says, there could be declarations in the terms sought in paragraphs 2 and 3 of the writ in Action 1006 viz: that the contract is a binding contract and that the option was validly exercised. The second stage would be an interval to permit "tempers to cool". If no accommodation was

(2) (1972) 1 W.L.R. 307.
(3) (1915) 2 Ch. 186.

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thereby reached the third stage would be to solicit an order of the court to compel the formation of the three companies and the transfer to them of the parcels of land in accordance with Clause 2. The fourth stage would be a further pause to see if this degree of part performance, albeit exacted through the court would, as counsel put it, carry its momentum forward into spontaneous co-operation in the implementation of Clause 4. If it did not then the fifth stage would be to secure the enforcement by order of the court of the obligation to appoint Nybro as manager of the development companies. At this point the situation as counsel saw it, would be that the newly appointed manager, subordinated to the views of HKR through its majority holdings in the three companies, would carry out its duty of management under the direct orders of HKR should any divergence of views arise between the manager and the company as to the development. A sixth stage would then arrive in the event of HKR standing – as Mr. Hunter put it – mute of malice and refusing to give any orders to Nybro. In that event, counsel suggested, it would be incumbent upon Nybro to produce a detailed scheme of development and to present it to the board of HKR for its consideration. Should HKR refused to consider it then, as a seventh and final stage, Nybro could once more enlist the court's assistance to enforce that scheme since, at this point in the sequence, all difficulties arising from uncertainty of terms would have been eliminated. Thus, upon the slender spindle of the one form of relief to which Nybro might be said to be unequivocally entitled at the present – the declaratory orders – the argument winds inexorably forward growing steadily more robust as it advances and ending with the invocation of the most powerful orders with which the court can control the behaviour of reluctant subjects. We must ask whether that is something which any court of trial would be likely to do in this case.

For a start it may be said that both sides agree that Clause 2 of the option agreement constitutes something in the nature of an agreement to enter into a partnership. This relationship is the first of the five factors which Mr. Nourse advances under his second submission in derogation of any possibility that a court of trial would decree specific performance. He cites in this regard *Scott v. Rayment*[4] which is used at paragraph 387 of the 3rd Edition of Halsbury to support a principle stated in this way:

> "The court does not as a general rule enforce an agreement to form and carry on a partnership".

Mr. Hunter does not dispute the relevance or force of that principle but retorts with *Lisle v. Reeve*[5] a case cited in the same place as the sole authority for the proposition that a court will nevertheless enforce an agreement for an option to enter into a partnership. This he regards as a more relevant authority in view of his progress-by-stages argument and the contention that at the moment the court will do no more (indeed cannot do more) than decree specific performance of the clear terms of Clause 2. Then there followed the argumnets in relation to the three further factors said to disable the plea for specific performance viz.: (2) that the contract involves the performance of personal services; (3) that it would require constant supervision by the court; and (4) that it is wanting in mutuality. I do not propose to examine these argumaents in detail nor to enter into any discursive consideration of the passges cited from the fairly considerable number of authorities which figure in that part of the debate. I think Mr. Hunter was right to say, as regards the particular circumstances of this present case, that the support afforded by these authorities was often more by way of an analogy than by direct application. I think he was right also when he observed that, on these two issues, we find ourselves in an

(4) (1868) L.R. 7 Eq. 112.
(5) (1902) 1 Ch. 53.

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area wherein recent growth and development of the law has to some extent undermined old principles so that, as he aptly put it, yesterday's heresies were in process of becoming today's accepted doctrine. A good illustration of that trend is to be found in the judgment; of the Court of Appeal in *Price v. Strange*[6] especially in relation to the question of mutuality.

As to personal services Mr. Nourse does not deny that a contract which involves in some measure, as one obligation among others, the performance of personal services may properly be made the subject of a decree for specific performance. But, in his contention, that can only be in cases in which the element of continuous personal service is slight and the nature of the services themselves is simple enough to admit of enforcement or where there has been something substantial in the way of part performance. In this regard he pointed to the decision in *Fortescue v. Lostwithiel & Fowey Rail Co. Ltd.*[7]. He would however place the services to be peformed for HKR by Nybro as manager in an altogether different category. Mr. Hunter, on the other hand relies on certain dicta in recent decisions especially those of Megarry J. in *Giles v. Morris*[2] and in *Tito v. Waddell*[8] in support of his contnetion that there are no longer any hard and fast rules against: (a) specifically enforcing part of a contract; (b) specifically enforcing a contract involving personal services; and (c) specificially enforcing a contract even where the order may demand a considerable degree of supervision by the court. All these things counsel says go to the question of discretion not of jurisdiction and the relevant discretion is that of the trial judge. In this regard he relies also, of course, on the corporate structure and progress-by-stages argument and he says if that approach were adopted the difficulties deriving from constant supervision and personal services would be reduced comfortably within the effective reach of the court's control. Now all of these matters are distinctly debatable and although these four factors together may be said to weigh against the likelihood of Nybro obtaining a decree to enforce the terms of the contract in the manner suggested I would hesitate, on the strength of them alone, to say that it is so plain that these objections must succeed that this court should hold that they go to jurisdiction and not discretion and that the appellant company must therefore be deprived of the right to pursue its claim for specific relief. What seems to me to constitute the decisive factor when taken together with the other four and when all are together held against the background of the case, as it has been described earlier, is the factor of damages as a just and adequate alternative. Indeed, my note of the arguments of counsel on both sides discloses that this was regarded by Mr. Nourse as the strongest of his points in favour of the course taken by Li J. at least in relation to issues 2 and 3. The principle which is most directly relevant here is that which I have already referred in the quotation in Halsbury above where *Scott v. Rayment*[4] is cited. It is a principle which receives strong endorsement, if, again, somewhat analogical in nature from the decision in *Page One Records Ltd.*[9] a case on which Mr. Nourse himself greatly relies. In that case a group of pop musicians who were in breach of a contract with the plaintiff, which was their manager, successfully resisted an attempt by the plaintiff to obtain an injurction the effect of which would have been to cause the musicians to retain the plaintiff as their manager. The contract contained negative stipulations forbidding the defendants from engaging any other person as their manager for a certain period. At page 165 Stamp J. says:

(6) (1977) 3 W.L.R. 943.
(7) (1874) 3 Ch. D. 621.
(8) (1977) 1 Ch. 106.
(2) (1972) 1 W.L.R. 307.
(4) (1868) L.R. 7 Eq. 112.
(9) (1968) 1 W.L.R. 157.

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> "For the purposes of consideration of equitable relief, I must, I think, look at the totality of the arrangements, and the negative stipulations on which the plaintiffs rely, are, in my judgment, no more or less than stipulations designed to tie the parties together in a relationship of mutual confidence, mutual endeavour and reciprocal obligations."

He went on to consider a passage in the judgment of Knight Bruce L. J. in *Johnson v Shrewsbury and Birmingham Railway Co.* [10] in which that Lord Justice distinguished the case of *Lumley v. Wagner* [11] from cases in which the enforcement by injunction of a negative covenant would effectively cause the specific enforcement of the positive covenant involving personal services. In the passage quoted by Stamp J., Knight Bruce L. J., having considered *Lumley v. Wagner*, the case of the opera singer who broke her contract, and was prevented by injunction from singing elsewhere, went on to say: 10

> "She could not be compelled to sing as she had contracted to do, but as she had contracted not to sing at any other place than the one specified in the agreement, she was (and very properly in my opinion) restrained from singing at any other place. There all the obligations on the part of the plaintiff could have been satisfied by the payment of money, but not so those of the defendant. Here the parties are reversed. Here all the obligations of the defendants can be satisfied by paying money; but not so the obligations of the plaintiffs, who come here for the purpose of compelling the defendants by a prohibitory or mandatory injunction, to do or abstain from doing certain acts, while the correlative acts are such as the plaintiffs could not be compelled to do." 20

Refusing the injunction in the case before him Stamp J. went on to say (p. 166)

> "As a practical matter on the evidence before me, I entertain no doubt that they would be compelled, if the injunction was granted, on the terms that the plaintiffs seek, to continue to employ the first plaintiff as their manager and agent and it is, I think, on this point that the case diverges from *Lumley v. Wagner* and the cases which have followed it, including the *Warner Brothers* case: for it would be a bad thing to put pressure upon these four young men to continue to employ as a manager and agent in a fiduciary capacity one who, unlike the plaintiff in those cases (who had merely to pay the defendant money) has duties of a personal and fiduciary nature to perform and in whom the Troggs, for reasons good, bad or indifferent, have lost confidence and who may, for all I knwo, fail in its duty to them." 30

When one faces the realities of the present situation it can, I think readily be seen that all those observations apply with re-doubled force in the present case. If the parties here had been mutually agreed, in fact as well as in law, upon the scheme of development to be adopted there might yet be grave objections in the way of forcing HKR to accept the services of Nybro, even by the method proposed by Mr. Hunter. But, as I see it, the evidence tendered before us so strongly favours the view that the new directors were unaware of the exercise of the option by Nybro that we are entitled to approach the matter on the footing of their having been taken by surprise. If the new directors are serious in thier intention to pursue the new scheme – and I have no reason to assume that they are not – it does not 40

(10) (1853) 3 De G.M. & G. 914.
(11) (1 De G.M. & G. 604).

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need much in the way of imagination to foresee abundant discord on the path of managment if HKR, unwillingly yoked to its partner, is to be held to the old scheme under the ultimate curb of the court. In those circumstances the whole question of mutual confidence becomes, in a sense, irrelevant and, indeed, approaches the nature of an absurdity when one realises that the control allegedly to be retained by HKR over the performance of its manager would be a control restricted to giving Nybro such directions as HKR might see fit to give in the development of a scheme in which HKR has no interest and which runs more or less directly counter to the nature of the scheme which it has itself proposed. Here one has not only a question of want of confidence in the manager but of want of confidence in the only scheme which that manager is prepared to promote. Although he did not put it quite as I have done, it was, I think, this aspect of the case which counsel had in mind when he said that damages was the perfect remedy because the alternative of specific performance would be intolerable to HKR and to Nybro. In *Honslow L.B.C. v. Twickenham G.D. Ltd.*[12] Megarry J. dealing with an application by a council, which owned a building site, to exclude from the site, by means of an injunction, a contractor when there was a dispute between the parties as to whether the contractor had or had not properly conducted the works confided to his care. The judge was primarily concerned with questions relating to the revocability of licences. In the end he refused to grant the relief sought by the council. In the course of his judgment he cites without dissent, as part of his survey of the law generally, a passage from another judgment of Knigth Bruce L. J. which is pertinent to the present issue. That passage appears in the Report of *Garett v. Banstead & Epsom Downs Railway Co.*[13] and it is as follows:

> "To suppose, in a case like this, where, if the company are wrong, ample compensation in damages may be obtained by the contractor, that the company are liable to have a person forced on them to perform these works, to whom they reasonably or unreasonably object, whereas there would be no reciprocity if the wrong were on the other side for the purpose of compelling the performance of the works, is more than I am able to do."

I appreciate that in the passages cited from these cases the courts were concerned with want of mutuality in refusing specific relief and that on the newer principles which Mr. Hunter would enlist that factor may no longer disable as it formerly did. But in *Price v. Strange* (cited supra) the very case in which the Court of Appeal held that lack of mutuality does not disable as to jurisdiction but is a factor for the exercise of the judge's discretion, I find, in the judgment of Buckley L. J., on P. 959 a passage which admirably summarizes the several considerations relevant to the exercise of that discretion. He says this:

> "Considering the position *a priori* and apart from authority, it would seem that the questions which should be asked by any court which is invited to enforce specific performance of a contractual obligation should be: (1) is the plaintiff entitled to a remedy of some kind in respect of the alleged breach of contract? (2) If so, would damages be an adequate remedy? (3) If not, would specific performance be a more adequate remedy for the plaintiff? (4) If so, would it be fair to the defendant to order him to perform his part of the contract specifically? The first question goes to the validity and enforceability of the contract. Only if it is answered affirmatively do the subsequent questions arise. If the second question is answered affirmatively there is no occasion for equity to interfere, so that again the subsequent questions

(12) (1971) Ch. D. 233.
(13) (1864) 4 De G.J. & S. 462 at 465.

do not arise. If the second question is answered in the negative it will not necessarily follow that the third question must be answered affirmatively. For instance, the circumstances may not be such as to admit of specific performance, as where the subject matter of the contract no longer exists. Only in the event of the third question arising and being answered in the affirmative can the fourth question arise."

It follows that if the second of those questions is answered affirmatively none of the rest will arise. The question remains, of course, whether this court would be justified in concluding that the discretion of the trial judge must necessarily be exercised in favour of damages. 10

As Mr. Nourse has said, this point as to damages is a short and simple one – a question of first impression. It is implicit in the judgment of Li J. that he regarded it as a matter of fundamental improtance. On the penultimate page of his judgment, having considered the inadequacy, as he saw it, of the terms of the option contract, he said:

> "To force two unwilling parties into such an ill-wed companionship on such precarious terms is a folly."

Although he did not deal explicitly with the question of damages as an alternative, the possibility of that alternative must clearly have been in his mind and that is perhaps the explanation of the contradiction which Mr. Hunter discerned in the fact that, having found the agreement void for uncertainty, alternatively unenforceable by specific relief, the 20 learned judge went on to point out that the proceedings before him were interlocutory in nature and that as he said: "the formal solution of the dispute can only be found at the trial." That remark occurs immediately after his consideration of the issue as to unenforceability and should, I think, be regarded as referable to his finding on that issue solely. He had need to have regard to the fact that the matter was likely to go further and that his finding as to the voidness of the contract might be upset and yet the finding as to unenforceability sustained.

Mr. Hunter rightly puts this issue (his third issue relating to the second submission of Mr. Nourse) in this strong form:

> "Is it clear beyond argument that this is an agreement that in no circumstances 30 the court will enforce by a decree for specific performance?"

His opponent frankly conceded that it was at that level he must meet the challenge. For my own part I am sttisfied that he has succeeded. If this had been a case such as *Wilson v. Northampton & Banbury Junction Railway Co.*[14] (a case upon which Mr. Nourse relies) and had there been a realistic possibility that a trial would reveal HKR to be guilty of the unblushing dishonesty which Bacon V-C attributed to the defendants in that case, I might have felt compelled to say, depite misgivings, that the remedy they seek would be available. It is indeed of great interest that, notwithstanding the patent delinquency of the defendants in *Wilson's* case specific performance was nevertheless refused and although one of the reasons advanced for that seems to have been want of certainty in the terms, the other, 40 advanced as the primary reason, is that damages would be the plaintiff's best remedy.

For the reasons declared in my survey of the history of the matter I think it is clear

(14) (1874) 9 Ch. Appeals'

that this is, on its facts, very far from being a case such as *Wilson*. It is of course not beyond the bounds of possibility that something might come to light, and be available at the trial, to show that the new directors of HKR in full knowledge of their responsibilities under the option agreement in effect tore it up by launching out in an entirely new direction. But I think I am justified in saying that the prospect of their being fixed with anything more than constructive notice of the exercise of the option is, on what has been placed before us, simply too remote to be realistic. In other words, assuming everything which I think can reasonably be assumed in favour of Nybro, the worst that HKR can expect from a trial court is a finding that there was a valid exercise of the option and that HKR is fixed with liability for the results thereof albeit that the post-June 1977 directors acted in good faith in overhauling and transforming the nature of the enterprise. In such circumstances I am confident that the only remedy which can reasonably be anticipated at the trial, should Nybro succeed in its claim, will be damages for breach. As to the $50,000 already paid by Nybro to HKR, I do not think that that can be said to alter the situation materially. Either it should be regarded as something collateral to the contract proper – the price of the option solely, or else, if not so regarded, then as an item in itself incapable of amounting to part performance being a mere money payment (*Frame v Dawson*[15]) at any rate in respect of an engagement involving acts of such varied and extensive character.

That leaves only for consideration the question of registration (Mr. Nourse's third submission and Mr. Hunter's issue 2). Mr. Nourse's contention was that since section 2 of the Land Registration Ordinance, under which the option agreement was registered applies only to instruments which, in the language of the section insofar as it is relevant, are "instruments in writing by which any parcels of ground may be affected" the option agreement had been improperly registered because it was not such an instrument. An instrument to come within the section must, in his view, be one capable of creating an interest in land. Thus far, as I understood him, Mr. Hunter was in agreement with his opponent. But then Mr. Nourse went on to say that an agreement could only create such an interest if the terms of it were capable of enforcement by a decree of specific performance. If for any of the reasons he had given, or any combination of those reasons, the court would not so enforce the option agreement then it could not, he said, affect the land and so could not be lawfully registered. I understood him to concede, however, that, in itself, the agreement was inherently of such a nature as to be capable of affecting the land but, he said, because of the circumstances surrounding it, it was incapable of attracting this particular equitable remedy and therefore could not affect the land. Here once again Mr. Hunter argued for a broader view and said that if the agreement was enforceable by any form of equitable relief it was capable of affecting the land and therefore was registrable. He conceded, however, that if it was to be regarded as creating a purely personal right enforceable only in damages it would not be registrable. Both counsel relied upon the judgment of Goulding J. in *First National Securities Ltd. v. Chiltern District Council*[16] although it seems to me to favour the argument of Mr. Hunter considerably more than that of Mr. Nourse, for insofar as it establishes a general principle relevant to our present concerns, and apart from considerations relating to the special legislation there being dealt with (the Land Charges Acts of 1925 and 1972), that general principle is to be found on p. 1079 where the learned judge said:

> "An option to buy land is a different sort of contract. The landowner is only bound to sell if and when the grantee of the option calls on him to do so. None the less, the grantee of the option has an interest in the land even before he exercises his right".

(15) (1807) 14 Vesey.
(16) (1975) 1 W.L.R. 1075.

In the circumstances as I find them here, these two issues which counsel have argued separately as though they stood each upon a quite different footing tend, as it seems to me, to converge towards a single point of resolution. At root the real reason why this contract may be said not to be specifically enforceable is 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. As for the lis pendens, like the judge in chambers I do not see that that merits any right to survival higher than that of the contract on which it rests. For these reasons I would dismiss the appeal. 10

D. Hunter, Q.C. & R. Mills-Owens (K.K. Chu & C0.) for Appellant.
M. Nourse, Q.C.& C. Ching, Q.C.& Bokhary (Woo, Kwan, Lee & Lo) for Respondent.

Dated 16th August, 1978.

No. 54
Notice of
Motion for
Leave
21 Aug 1978

NOTICE OF MOTION

TAKE NOTICE that the Court of Appeal will be moved on Tursday the 19th day of August 1978 at 9.30 in the forenoon or so soon thereafter as Counsel for the abovenamed Appellant can be heard for an Order that the said Appellant have leave to appeal to Her Majesty in Council from the Judgment herein of the Court of Appeal given on the 16th day of August, 1978.

Dated the 21st day of August 1978.

K.K. CHU & CO.
Solicitors for the Appellant

10

No. 55
Notice of
Motion for
Stay
24 Aug 1978

NOTICE OF MOTION

TAKE NOTICE that the Court of Appeal will be moved at 9.30 a.m. on the 29th day of August 1978 at the sitting of the Court of so soon thereafter as Counsel on behalf of the Appellant can be heard for an Order that execution and all further proceedings on the Order of the Honourable Mr. Justice Li made on 12th May 1978 in High Court Actions Nos. 785 and 1006 of 1978 and the Order of the Court made on the 16th day of August 1978 in Civil Appeals Nos. 45 and 46 of 1978 be stayed until the outcome of the Appeal to Her Majesty in Council or until the application for special leave therefor or until further order 10

AND FURTHER that the costs of this Application may be provided for.

Dated the 24th day of August 1978.

K. K. CHU & CO.,
Solicitors for the Appellant.

Supreme Court of Hong Kong

No. 56 Affidavit of Chu Ka Kim (No. 6) 24 Aug 1978

Civil Appeal Nos. 45 & 46 of 1978

AFFIDAVIT OF CHU KA KIM (No. 6)

I, CHU KA KIM of No. 6 Fontana Gardens, 12th floor, Causeway Hill, Hong Kong, a Solicitor of the Supreme Court and the Principal of Messrs. K.K. Chu & Co., Solicitors for the Appellant, make oath and say as follows:–

1. This Affidavit is made in support of the Notice of Motion for leave to appeal to Her Majesty in Council from the Judgment of the Court of Appeal given on the 16th day of August, 1978 and further in suport of the Appellant's application for a further stay of execution pending Appeal to Her Majesty in Council.

2. I crave leave to refer to the Record of Proceedings in these Appeals and the Judgment of this Honourable Court. 10

3. It is the Appellant's respectful contention that the Judgment of the Court is a FINAL judgment within the meaning of Rule 2(a) of the Order in Council regulating Appeals to Her Majesty in Council and that this Appeal involves, directly or indirectly, property exceeding the value of $50,000.00.

4. It is the Appellant's respectful contention in the alternative, if it be held that the said Judgment was an interlocutory judgment, that the said Judgment was an interlocutory judgment, that the question involved in this Appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to Her Majesty in Council for decision. 20

5. I have caused enquiry to be made with the view to ascertaining when the Appeal to Her Majesty in Council might be heard. There are now produced and shown to me photostatic copies of the following telexes:–

(a) Telex dated 22nd August, 1978 from Mr. Peter Knight, senior Chambers Clerk, thereon marked "CKK-1"; and

(b) Telex dated 23rd August, 1978 from Messrs. North and Company, Solicitors and the Appellant's legal agents in London, thereon marked "CKK-2".

6. I have further spoken on the telephone to Mr. J. North as well as to Mr. Peter Knight both of whom have made enquiries of the Privy Council Office and have indicated that it will be possible to obtain hearing dates in January 1979. 30

7. I am instructed that the Appellant is prepared to abide by such terms and conditions as this Honourable Court may think fit to impose as conditions for the granting of leave to appeal to Her Majesty in Council.

8. In support of the Appellant's application for a further stay of execution pending appeal to Her Majesty in Council, I crave leave to refer to the Recrod of Appeal and to the argument advanced at the hearing of the Appeal by Counsel for the Appellant. I also refer specifically to para. 7 of my Affidavit of 22nd day of May, 1978 at Page 12 of the Record (Pink Bundle).

Sworn on 24th Augusst, 1978.
This Affidavit is filed on behalf of the Appellant.

AFFIDAVIT OF RONALD JOSEPH ARCULLI

I, RONALD JOSEPH ARCULLI of No. 14 Shouson Hill Road, Flat A-1, Ground Floor, Hong Kong, solicitor make oath and say as follows:–

1. I am a partner of Messrs. Woo, Kwan, Lee & Lo, solicitors of 2601 Connaught Centre, 1 Connaught Place, Victoria, Hong Kong, the Respondent's solicitors, and I have the conduct of these proceedings on behalf of the Respondent. The contents of this my affidavit are true to my knowledge and belief save where the contrary may appear in which case the same are tru to my information and belief.

2. On 25th August 1978 I spoke on two occasions to Mr. William Roberts, clerk to Mr. Michael Ogden Q.C., by long distance telephone call. On the first occasion Mr. Roberts informed me and I verily believe that he spoke to Mr. Dixon, chief clerk of the Judicial Committee of the Privy Council who informed him that: 10

> "If an appeal is likely to take a day or so there is a reasonable chance of the appeal being heard sometime during Hilary term, 1979."

Mr. Roberts also informed me and I verily believe that upon an enquiry by him (Mr. Roberts) as to whether an appeal could be heard sometime in January 1979, Mr. Dixon replied that it was quite wrong to suggest that it could. I asked Mr. Roberts to enquire of Mr. Dixon as to when an appeal which may take 5 to 7 days could be heard. On the second occasion when I spoke to Mr. Roberts, he informed me and I verily believe that Mr. Dixon 20 had said to him that on reflection, as to an appeal which is likely to take a day or so "there was a possibility of the appeal being heard sometime during Hilary term, 1979" and as to an appeal which may take 5 to 7 days" it would be very difficult to fit in such a case during Hilary term, 1979." The parts I have put in quotation marks are words actually used by Mr. Dixon to Mr. Roberts, and which were agreed by Mr. Dixon as being accurate when they were read abck to Mr. Dixon by Mr. Roberts, who had written them down.

Sworn on 26th August, 1978.
This Affidavit is filed on behalf of the Respondent.

Supreme
Court of
Hong Kong

No. 58
Order of
Court of
Appeal
29 Aug 1978

IN THE COURT OF APPEAL

1978 No. 45 and No. 46
(Civil)

BETWEEN

ANSTALT NYBRO
(formerly named ANSTALT SORO) Appellant

and

HONG KONG RESORT CO. LIMITED Respondent

BEFORE THE HONOURABLE MR. JUSTICE PICKERING, ACTING CHIEF JUSTICE AND THE HONOURABLE MR. JUSTICE McMULLIN IN COURT

10

ORDER

UPON the application of the Appellant by way of a Notice of Motion filed herein on the 21st day of August 1978 and upon hearing Counsel for the Appellant and Counsel for the Respondent and upon reading the Affidavit of Chu Ka Kim filed herein on the 24th day of August 1978 and the exhibits thereto and the Affidavit of Ronald Joseph Arculli filed herein on the 29th day of August 1978 IT IS ORDER that the Appellant do have leave as of right to appeal to Her Majesty in Council from the Judgment herein of the Court of Appeal given on the 16th day of August 1978 CONDITIONAL UPON the Appellant within 14 days hereof entering into good an sufficient security to the satisfaction of the Court in the sum of $30,000.00 for the due prosecution of the appeal and the payment of all such costs as may become payable to the Respondent in the event of the Appellant's not obtaining an order granting it final leave to appeal, or of the appeal being dismissed for non-prosecution, or Her Majesty in Council ordering the Appellant to pay the Respondent's costs of the appeal (as the case may be) and upon the Record of Proceedings being prepared and despatched to England within 7 weeks from the date hereof.

20

AND it is ordered that the order of the Honourable Mr. Justice Li for fortification of Respondent's undertaking in the sum of HK$100 million to constitute the security required under r.5 of the Order in Council regulating appeals from the Supreme Court or Court of Appeal for Hong Kong to Her Majesty in Council.

30

AND it is further ordered that the costs of this Application be costs in the appeal.

By the Court

Dated the 29th day of August, 1978.

S.H. Mayo
Registrar

Supreme Court of Hong Kong

No. 59
Order of Court of Appeal
29 Aug 1978

IN THE COURT OF APPEAL

1978 No. 45 and No. 46
(Civil)

BETWEEN

ANSTALT NYBRO
(formerly name ANSTALT SORO) Appellant

and

HONG KONG RESORT CO. LIMITED Respondent

BEFORE THE HONOURABLE MR. JUSTICE PICKERING, ACTING CHIEF JUSTICE AND THE HONOURABLE MR. JUSTICE McMULLIN IN COURT

10

ORDER

UPON the application of rhe Appellant by way of a Notice of Motion filed herein on the 24th day of August 1978 and upon hearing Counsel for the Appellant and Counsel for the Respondent and upon reading the Affidavit of Chu Ka Kim filed herein on the 24th day of August 1978 and the exhibits thereto and the Affidavit of Ronald Joseph Arculli filed herein on the 29th day of August 1978 IT IS ORDERED that the Appellant's application for an Order that execution and all further proceedings on the Order of the Honourable Mr. Justice Li made on the 12th day of May 1978 in High Court Actions Nos. 785 and 1006 of 1978 and on the Order of the Court of Appeal made on the 16th day of August 1978 in Civil Appeals Nos. 45 and 46 of 1978 be stayed until the outcome of the Appeal to Her Majesty in Council or until application for special leave therefor or until further order be dismissed. AND it is further ordered that the costs of this application be costs in the appeal.

20

By the Court

Dated the 29th day of August 1978.

S.H. Mayo
Registrar

PART II

MASTER PLAN 3.5

DISCOVERY BAY Master Plan

October 1st. 1976
Scale in Feet
1" = 400 ft.
200 0 400 800 1200

DISCOVERY BAY

Master Plan

A	BLOCK No. & UNITS	GROSS SITE AREA (000Ft²)	MAX GROSS BUILDING SPACE (000Ft²)	PLOT RATIO
	1 A — 225	120	190	1.58
	1 B — 225	175	195	1.11
	1 C — 225	135	190	1.41
	2 A — 260	490	615	1.25
	2 B — 100	180	180	1.00
	3 — 580	1,530	1,150	0.75
	4 A — 90	235	170	0.72
	4 B — 110	280	190	0.68
	4 C — 115	290	195	0.67
	5 A — 180	400	150	0.38
	5 B — 160	320	340	1.06
	5 C — 110	260	245	0.94
	5 D — 20	70	50	0.72
	5 E — 15	30	30	1.00
	5 F — 40	190	100	0.53
	6 A — 120	425	180	0.42
	6 B — 100	245	150	0.61
	SUB-TOTAL 2,675 UNITS	5,375	4,320	0.80
B				
	1 300	250	250	1.00
	2 800	600	780	1.30
	3 500	250	400	1.60
	4 150	135	80	0.59
	SUB-TOTAL	1,235	1,510	1.22
A + B	SUB-TOTAL	8,610	5,830	0.88
C				
	7 A₁ COMMERCIAL	485	485	1.00
	7 A₂ COMMERCIAL	(185)	65	0.35
	7B PUBLIC TRANSPORT	(60)	50	0.84
	7 C₁ PUBLIC WORKS	60	15	0.25
	7 C₂ PUBLIC WORKS	225	105	0.48
	7 D₁ FIRE / POLICE / AMBULANCE	60	20	0.33
	7 D₂ COMMUNITY FACILITIES	60	30	0.50
	SUB-TOTAL	890	770	0.87
A + B + C	SUB-TOTAL	7,500	6,600	0.88
D	RECREATION FACILITIES & OPEN SPACE			
	8 A NORTH GOLF COURSE	6,630	5	-
	8 B RECREATION CLUB	210	20	0.09
	8 C RAQUETS	240	20	0.08
	8 D MARINA	95	12	0.13
	8 E YI PAK GOLF COURSE	2,045	17	0.008
	9 A SOUTH GOLF COURSE	7,165	10	-
	9 B PARK / PLAYGROUND	150	5	0.03
	9 C AVIARY / BOTANIC GARDENS	1,030	5	0.005
	9 D SWIMMING / RECREATION	350	15	0.04
	9 E SPORTS HALL / ENTERTAINMENT	(185)	65	0.35
	9 G CAMPING / PICNIC	190	1	0.005
	8A / 9A GOLF FACILITIES	(230)	50	0.21
	10 OPEN SPACE CONSERVATION / ROADS/HIKING TRAILS	15,540	-	-
	10 A DAM RESERVOIR	1,910	-	-
	SUB TOTAL	2,265*	215	0.0[illegible]
	GRAND TOTAL	9,765*	6,825	0.70

TOTAL SITE AREA WITHIN PLANNING BOUNDARY = 40,000,000 FT²

MINIMUM ASSOCIATED FACILITIES
HOTEL (HOTEL 4)
DAM
RESERVOIR
SALT & FRESH WATER STORAGE & TREATMENT AREA
SEWAGE TREATMENT PLANT
REFUSE DISPOSAL PLANT (7C₁)
CABLE-CAR SYSTEM
FERRY PIER
NON-MEMBERSHIP GOLF COURSE (8E)

* NOTE Site areas without buildings and those which are shown in brackets are not included in these totals. The golf course is excluded from the total also.

NOTE All land areas are subject to confirmation by survey and detail adjustment and calculation on submission of block site plans.

PS PUMPING STATION
ST SEWAGE TREATMENT
SWI SALT WATER INTAKE
FWT FRESH WATER TREATMENT
SWS SALT WATER STORAGE
FWS FRESH WATER STORAGE
H HELICOPTER PAD
E PERMANENT ELECTRIC SUB-STATION
TE PERMANENT TELEPHONE EXCHANGE
PRIVATE LOTS

MANAGING DIRECTOR, HONG KONG RESORT CO. LIMITED
SECRETARY AND DIRECTOR, HONG KONG RESORT CO., LTD.
SECRETARY FOR THE NEW TERRITORIES
Date: 3rd December, 1975

3.5

12 JAN 1977

This Exhibits is the same as "DSF-1"

located at Page 159

"JW-20"
Affirmation of John Y.B. Wu (NO. 1)
(Respondent)

LETTER FROM PACLANTIC FINANCING CO., INC. TO TOM BEESLEY

May 19, 1976

Mr. Tom Beesley
P O. Box 1358
Hong Kong

Dear Tom:

For your information, today we have provisionally registered at the Public Registry Daily Book, Volume 124, Folio 72, Entry 1333 the document increasing the Authorized Capital of Paclantic Financing Company Inc. up to US$10,000,000 divided into 10,000 shares issued to bearer or nominative.

The New Board of Directors has been also registered at the Public Registry Daily Book, Volume 124, Folio 68, Entry 1334 and now it is as follows:

Edward W. C. Wong	–	President
Jose Yanes Duran	–	Vice-President
Dennis Gai On Wong	–	Vice-President
Kel Harmodio Arosemena	–	Secretary
Eduardo Yin Vega	–	Treasurer

As these inscriptions are provisional, we will revert to you in a few days the final inscription, but meanwhile they are legally valid from the date of inscription (today).

Sincerely
(sd.) Jose Yanes Duran
Director

" "JW-15"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

TELEX FROM RESPONDENT TO APPELLANT

TO: MR. A.J. BURGESS
CHEESWRIGHT, MURLY AND CO.

FROM: HONG KONG RESORT CO. LIMITED

DATE: 3/9/76

OUR REF. SEPT-117

PLEASE TELEX FULL NAME ANSTALT SORO WITH CORRECT ADDRESS (STREET AND BUILDING) LIECHTENSTEIN. NEEDED FOR ALLOTMENT OF SHARES. YOUR TELEX 24/8/76 GIVES THE NAME AS ANSTALT SORO OF VADUZ. LIECHTENSTEIN. IS THAT THE FULL CORRECT NAME OF THE COMPANY. HAS MR. E.W.C. WONG RECEIVED A COPY OF THE ARTICLES OF SAID COMPANY WHICH MAY BE REQUIED TO BE SEEN BY RESORT AND OR OTHER COMPANIES. 10

END MESSAGE.

TELEX FROM APPELLANT TO RESPONDENT

3.9.76.
AJB/DN/LD

YOUR REF: SEPT-117
THANKS FOR YOUR TELEX OF 3.9.76.

THE FULL NAME IS ANSTALT SORO REPEAT ANSTALT SORO.

ITS ADDRESS IS: LANDSTRASSE 31
VADUZ
LIECHTENSTEIN

10

I RETAIN THE ARTICLES (CORPORATE DOCUMENTS) OF ANSTALT SORO AND THEY ARE AT THE MOMENT IN THE PROCESS OF BEING REVISED.

WHEN I SEE MR. WONG AGAIN I SHALL BE ABLE TO SHOW HIM THE PRESENT AND PROPOSED REVISED ARTICLES.

TRUST THAT THE ABOVE ANSWERS YOUR POINTS FULLY.

BURGESS.

"MWGY"
Affidavit of M. Wong (No.2)
(Appellant)

EXTRACT OF CONDITIONS OF EXCHANGE OF LOT NO.385 IN D.D. NO.352 DATED 10TH SEPTEMBER, 1976.

SPECIAL CONDITION 5

(a) The Grantee shall develop the lot by the erection thereon of buildings and other structures and works complying with the Special Conditions, such buildings and other structures (including any breakwater, pier of other marine structure) to be completed, finished and fit for occupation in all respects in accordance with the provisions of all Ordinances, By-laws and Regulations relating to building and sanitation which are or may be in force in Hong Kong and shall expend thereon a sum of not less than $600 million (such sum to exclude monies required to form the building areas) which amount shall be expended over a period of 120 months from the date of this Agreement in the following manner: 10

(i) $120 million being part thereof within 48 months

(ii) a further $180 million within 72 months

(iii) a further $150 million within 96 months and

(iv) a balance of $150 million with 120 months

all from the date of this Agreement. 20

(b) The Grantee shall in accordance with (a) of this Special Condition erect, maintain and keep in use on the lot membership club houses and a leisure resort and associated facilities which shall include an hotel or hotels, a dam, a reservoir, salt and fresh water storage and treatment areas, a sewage treatment plant, a refuse disposal plant, a cable-car system, a ferry pier and a non-membership golf course (in these Conditions called "the minimum associated facilities"). In addition to the minimum associated facilities but not in substitution therefor the Grantee may erect and operate such other facilities and structures as are or may be shown on the Master Layout Plan approved under Special Condition No. 6 hereof.

SPECIAL CONDITION 6 30

(a) Prior to the commencment of any work on the lot the Grantee shall submit for the prior approval of the Secretary within six months of the date of this Agreement a Master Layout Plan and Development Schedule (hereinafter together called "the Master Layout Plan") showing delineated and coloured thereon:

(i) the positions of the roads proposed to be made;

(ii) the general location and nature of the buildings proposed to be erected on the lot;

(iii) all breakwaters, piers or other marine structures which it is proposed to erect; and

(iv) the stages or phases by which it is proposed to develop the lot.

(b) In complying with Special Condition No. 5 hereof the whole of the Lot shall be developed or redeveloped to the satisfaction of the Secretary in conformity and in accordance with the Master Layout Plan approved and signed by the Secretary who shall retain a copy thereof, and no alterations whatsoever shall be made by the Grantee to the Master Layout Plan or to the development or any redevelopment without the prior consent in writing of the Secretary, it being agreed that in the case of minor alterations such consent shall not be normally withheld.

(c) The Master Layout Plan and any plan amending the same signed by or on behalf of the Grantee and the Government shall be deposited and kept at District Land Office, Islands.

SPECIAL CONDITION 8

(a) Subject to (b), (c) and (d) hereof the Grantee shall not except with the prior consent of the Secretary and in conformity with any conditions imposed by his (including the payment of such fee as may be required by him)–

(i) assign, underlet, part with the possession of or otherwise dispose of the lot or any part thereof or any interest therein or any building or any part of any building thereon or enter into any agreement so to do, or

(ii) mortgage or charge the lot or any part or parts thereof of any interest therein or any building or any part or parts of any building therein except for the purpose of the development thereof and then only by way of a building mortgage or mortgages in such form and containing such provisions as the Secretary shall approve or require.

unless and until he shall have in all respects observed and complied with these Conditions to the satisfaction of the Secretary and then only subject to the provisions of Special Conditions Nos. 9 and 10 hereof.

(b) Notwithstanding anything to the contrary herein contained the Grantee (which expression shall, for the purpose of this Special Condition No. 8(b) only, exclude its successor and resigns) may, after the date hereof but before the Grantee has in all respects observed and complied with these Conditions to the satisfaction of the Secretary and for the purpose of development of the lot but not otherwise, subject to the prior written consent of the Secretary and in conformity with any conditions imposed by him (including the payment of any fee as may be required by him), assign the whole of the lot or, subject also to Special Condition No. 10 hereof, any part or parts thereof to the Grantee's subsidiary company or subsidiary companies. For the purpose of these Conditions "subsidiary company or subsidiary companies" shall mean only a company or companies of which the Grantee has effective control and not less than 51% of the issued shares in which at the time of such assignment or assignments are owned by the Grantee. The Grantee shall not at any time before he has in all respects observed and complied with these Conditions to the satisfaction of the Secretary in respect of the lot as a whole or, as the case may be, in respect of a part or parts, sell, transfer or otherwise part with or dispose of his shareholding in the subsidiary company or subsidiary companies to which the whole of the lot or such part or parts, as the case may be, have been assigned as aforesaid so as to reduce his shareholding therein to less than 51% of the issued shares or permit or suffer or cause anything to be done whereby his said majority shareholding or effective control is so

reduced or no longer retained.

(c) The Grantee may, subject to these Conditions and in particular subject to Special Conditions Nos. 9 and 10 hereof, assign, underlet, part with the possession of or otherwise dispose of a part or parts of the lot together with the building or part of the building, if any, thereon if he shall have in all respects observed and complied with these Conditions so far as they relate to such part or parts of the lot and the building or buildings to be erected thereon as to which observance and compliance the certificate in writing of the Secretary shall be required.

(d) The Grantee may also subject to these Conditions and in particular subject to Special Conditions Nos. 9 and 10 hereof assign, underlet, part with the possession of or otherwise 10 dispose of a part or parts of the lot for the sole purpose but not otherwise of development of such part or parts pursuant to the Master Layout Plan if he shall have first satisfied the Secretary that the sum of not less than $600 million has already been expended on the other part or parts of the lot in observance and compliance with these Conditions so far as they relate to such other part or parts of the lot in respect of which the Secretary has issued a certificate of observance and compliance.

Supreme Court of Hong Kong Exhibits "JW-19" Letter from Appellant to J.R. Anderson 13 Sep 1976

"JW-19"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

LETTER FROM APPELLANT TO J.R. ANDERSON

13th September, 1976

Mr. James R. Anderson,
Suite 2700,
1290 Avenue of The Americas,
New York, N.Y. 10019,
U. S. A. 10

Dear Sir,

Re: Loan Agreement

Further to our meeting of today in respect of the above mentioned matter, we write to confirm the following arrangements:–

That we will advance a sum US$15,000 or at today's exchange rate = HK$73,200.00 to you on 15th September, 1976 and the repayment terms and rate of interest to be mutually agreed at a later date.

Yours faithfully,

For account of Anstalt Soro
Jose Yanes Duran 20

Supreme Court of Hong Kong
Exhibits
"JW-21B"
Letter from Appellant to J. R. Anderson
13 Sep 1976

"JW-21B"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

LETTER FROM APPELLANT TO J.R. ANDERSON

13th September, 1976

Mr. James R. Anderson,
Suite 2700,
1290 Avenue of The Americas,
New York, N.Y. 10019,
U. S. A.

10

Dear Sir,

Re: Loan Agreement

Further to the meeting of today in respect of the above mentioned matter, we write to confirm the following arrangements:–

That we will advance a sum US$15,00 or at today's exchange rate = HK$73,200.00 to you on 15th September, 1976 and the repayment terms and rate of interest to be mutually agreed at a later date.

Yours faithfully,
ANSTALT SORO

(Sd.) JOHN ANNA PERROT
Director

20

Supreme Court of Hong Kong Exhibits
"JW-16"
Letter from E.W.C. Wong to A.J Burgess
14 Sep 1976

"JW-16"
Affirmation of John Y. B. Wu (No. 1)
(Respondont)

LETTER FROM E.W.C. WONG TO A.J. BURGESS

14th Septmber, 1976

A.J. Burgess, Esq.,
Cheeswright Murly & Co.,
Nordic Bank House,
41/42 Mincing Lane (5th Floor)
London, E.C. 3R 7SL
ENGLAND.

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Dear Tony,

Yours of 8th Setpember (Your Ref. AJB/CLCC) came to hand this morning. Thank you for your prompt response. I believe you have a copy of the Memorandum & Articles of Association of Hong Kong Resort Co. Limited. If you do not have one I shall be pleased to mail a copy to you. Looking up the provisions for appointment of Alternate Directors I see on pages 44/45 (copy enclosed) the form of instrument for the appointment of Alternate Director. Just in case we have to deal with a troublesome party, perhaps your appointment of Mr. Oscar K.T. Lai should be made in that form. I suggest you date it 8th September, 1976 and it will upon receipt be filed by Hong Kong Resort Co. Ltd.

I enclose a certified true copy of the Minutes of the Meeting of Hong Kong Resort Co. Limited held on 8th September, 1976 which dealt with the allotment of shares to Anstalt Soro and your appointment to the Board. The share certificate No. 33 is held by me pending instructions.

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I have pleasure in sending you a few Press cuttings on the signing of the Exchange Conditions for the Lantau Project and we reserve any comments and the giving of further details for my impending visit to London and look forward to seeing you.

Warmest regards,

Yours sincerely,
(Sd.) E.W.C. Wong

Supreme Court of Hong Kong Exhibits "JW-17" Letter from Paclantic Financing Co. Inc. to J.R. Anderson 17 Sep 1976

LETTER FROM PACLANTIC FINANCIAL CO., INC., TO J. R. ANDERSON

17th Septmber, 1976

J.R. Anderson, Esq.,
Robert B. AndersonCo. Ltd.,
Sperry Rand Building,
27th Floor,
1290 Avenue of Americas,
New York,
U. S. A 10

Dear Sir,

Re: Hong Kong Resort Co. Limited ("HKRCL")

We hereby grant you an option to purchase 140,000 shares of HK$100.00 each in the capital of Hong Kong Resort Co. Limited ("HKRC") for an aggregate purchase price of US$3,400,000.00 on the following erms and conditions:

1. You are to pay us a non-returnable deposit of US$5,000.00 within seven days of the date of this letter.

2. The option is to be exercisable by notice in writing to us at any time up to and including 31st March 1977. Such notice is to be irrevocable and the option is to be deemed exercised upon our receipt of the option notice and not before. 20

3. The purchase will be completed within seven days of our receipt of the notice when:

   (a) The purchase price is to be paid in a form to be agreed between us to a bank in Singapore nominated by us; and

   (b) Against receipt of the purchase price we will deliver to you duly executed transfers in your favour, or as you may direct, accompanied by the relative shares certificates and duly executed contract notes on sale.

4. We will use our best endeavours to procure that upon presentation of such transfers duly stamped accompanied by the relative shares certificates the board of directors of HKRC will register you or your nominee as the registered holder of the shares.

5. The stamp duty payable in respect of this option and the stamp duty payable on the contract notes on sale shall be paid by HKRC, and on the contract notes on purchase and on the share transfers by you. 30

Please signify your agreement to the terms of this letter by signing and returning to us the enclosed duplicate copy of this letter.

Yours faithfully,
PACLANTIC FINANCIAL COMPANY, INC.
(Sd.) E. W. C. Wong
Chairman.

Agreed.
(Sd.) James R. Anderson 40

"JW-18"
Afrirmation of John Y.B. Wu (No. 1)
(Respondent)

LETTER FROM TA HING CO., (H.K.) LTD. TO J.R. ANDERSON

20th September, 1976

J.R. Anderson, Esq.,
Robert B. Anderson Co. Ltd.,
Sperry Rand Building,
27th Floor,
1290 Avenue of Americas, 10
New York
U. S. A.

Dear Sir,

**Re: Hong Kong Resort Co. Limited
("HKRC")**

We hereby grant you an option to purchase 42,000 shares of HK$100.00 each in the capital of Hong Kong Resort Co. Limited ("HKRC") for an aggregate purchase price of US$1,024,800.00 on the following terms and conditions:

1. You are to pay us a non-returnable deposit of US$10,000.00 within three days of the date of this letter; 20

2. The option is to be exercisable by notice in writing to us at any time up to and including 20th April 1977. Such notice is to be irrevocable and the option is to be deemed exercised upon our receipt of the option notice and not before.

3. The purchase will be completed within three days of our receipt of the notice when:

   (a) the purchase price is to be paid in a form to be agreed between us to a bank in Singapore nominated by us; and

   (b) Against receipt of the purchase price we will deliver to you duly executed transfers in your favour, or as you may direct, accompanied by the relative shares certificates and duly executed contract notes on sale.

4. We will use our best endeavour to procure that upon presentation of such transfers 30 duly stamped accompanied by the relative shares certificates the board of directors of HKRC will register you or your nominee as the registered holder of the shares.

5. The stamp duty payable in respect of this option and the stamp duty payable on the contract notes on sale shall be paid by HKRC, and on the contract notes on purchase and on the share transfers by you.

Supreme Court of Hong Kong Exhibits "JW-18" Letter from Ta Hing Co. (H.K.) Ltd. to J.R. Anderson 20 Sep 1976 (Contd.)

Please signify your agreement to the terms of this letter by signing and returning to us the enclosed duplicate copy of this letter.

Yours faithfully,
TA HING COMPANY (HK) LTD.
(Sd.) E.W.C. Wong Cheang Koon Zung
(Managing Director

Agreed.
James R. Anderson

"JW-22"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

LETTER FROM J.R. ANDERSON TO APPELLANT

20 September 1976

Anstalt Soro
c/o Cheeswright, Murly & Co. Ltd.
Nordic Bank House
41/42 Mincing Lane
London E.C.3 10
ENGLAND

Dear Sirs:

With reference to the Agreement signed between myself and Paclantic Financing Corp., dated 17 September 1976, granting me an Option on 140,000 shares of Hong Kong Resort Co. Ltd.

I HEREBY APPOINT Anstalt Soro of Landstrasse 31, Vaduz, Liechtenstein my nominee, to make all payments as and when due and Anstalt Soro shall be the Owners of the aforementioned shares.

Sincerely yours,

James R. Anderson 20

Please signify your agreement to the terms of this letter by signing and returning to me the enclosed duplicate copy of this letter.

(Sd.) Yanes Duran
for Anstalt Soro

"JW-23B"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

LETTER FROM J.R. ANDERSON TO APPELLANT

20 September 1976

Anstalt Soro
c/o Cheeswright, Murly & Co. Ltd.
Nordic Bank House
41/43 Mincing Lane
London E.C. 3 10
ENGLAND

Dear Sirs:

With reference to the Agreement signed between myself and Paclantic Financing Corp., dated 17 September 1976, granting me an Option on 140,000 shares of Hong Kong Resort Co. Ltd.

I HEREBY APPOINT Anstalt Soro of Landstrasse 31, Vaduz, Liechtenstein my nominee, to make all payments as and when due and Anstalt Soro shall be the Owners of the aforementioned shares.

Sincerely yours,
(Sd.) James R. Anderson 20

Please signify your agreement to the terms of this letter by signing and returning to me the enclosed duplicate copy of this letter.

(Signed & crossed out)
Yanes Duran

(Sd.) John Anna Perrot
Director
For Anstalt Soro

"JW-2"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

AGREEMENT

THIS AGREEMENT made this 11th day of October, 1976 between ANSTALT SORO of Vaduz, Liechtenstein (Hereinafter called "SORO") of the one part and HONG KONG RESORT CO. LIMITED a limited liability company incorporated in Hong Kong (hereinafter called "HKR") of the other part.

WITNESSETH AS FOLLOWS:

WHEREAS

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1. By an Agreement and Conditions of Exchange dated 10th September 1976 between HKR and the Secretary for the New Territories on behalf of His Excellency the Governor of Hong Kong HKR is the grantee of the lot described in the First Schedule hereto for the residue of a term of 99 years less than the last three days thereof commencing from the 1st day of July, 1898.

2. HKR is engaged in the project to develop the lot referred to in (1) above by the construction thereon of buildings and other structures and works in accordance with a project known as the TA YUE SHAN Project.

3. SORO wishes to purchase an option to particupate in the ownership development and subsequent management operation and exploitation of eleven sections of the above-mentioned lot, namely those more particularly described in the Second Schedule hereto.

20

THE PARTIES HERETO HAVE ACCORDINGLY AGREED AS FOLLOWS:

1. In consideration of the payment by SORO to HKR of the sum of HK$50,000.00, the receipt whereof HKR hereby acknowledges, SORO shall have the option to participate in the ownership, development and subsequent management operation and exploitation of said twelve sections in the manner hereinafter set forth. SORO is to give notice to HKR by letter or telex of its intention to take up this option by 31st January 1977 latest.

2. In the event of SORO declaring its acceptance of the above option SORO and HKR will form three limited liability companies under the Companies Ordinance of Hong Kong in which SORO will have 49% of the capital and HKR will have 51% of the capital as follows:

30

(i) COMPANY A with a share capital of HK$2,500,000.00 divided into 2,500 ordinary shares of HK$1,000.00 each.

(ii) COMPANY B with a share capital of HK$1,000,000.00 divided into 1,000 ordinary shares of HK$1,000.00 each.

(iii) COMPANY C with a share capital of HK$1,000,000.00 divided into 1,000 ordinary shares of HK$1,000.00 each.

The capital of the three above-mentioned companies will be contributed for as follows:

(i) For its 49% participation in the capital of Company A, SORO will pay a sum of HK$1,225,000.00 in exchange for the corresponding share certificates.

(ii) For its 49% participation in the capital of Company B, SORO will pay a sum of HK$490,000.00 in exchange for the corresponding share certificates.

(iii) For its 49% participation in the capital of Company C, SORO will pay a sum of HK$490,000.00 in exchange for the corresponding share certificates.

(iv) HKR will assign to Company A: Sections G, M, O, P, Q, BB and DD referred to in the Second Schedule hereto in exchange for HK$1,275,000.00 worth of share certificates corresponding to 51% of the capital of Company A. 10

(v) HKR will assign to Company B: Sections S, T and W referred to in the Second Schedule hereto in exchange for HK$510,000.00 worth of share certificates corresponding to 51% of the capital of Company B.

(vi) HKR will assign to Company C: Section V referred to in the Second Schedule hereto in exchange for HK$510,000.00 worth of share certificates corresponding to 51% of the capital of Company C.

3. The three companies to be formed in accordance with clause (2) hereof shall as regards the respective sections to which they are to be assigned parts of the grant referred to in recital (1) hereof develop such sections in accordance with the Master Plan of HKR for the TA YUE SHAN Project. 20

4. Once they have been incorporated Companies A, B and C shall appoint SORO as Manager to undertake and complete the development of their respective sections of the said Lot to be assigned to them after the taking by SORO of the above option and to undertake and administer the running, operation and exploitation of the development when completed for a period of 10 years after the completion of such development or for the period at the end of which all taxes whatsoever in respect of the development have been paid, all loans in respect thereof have been repaid and the capitals of the respective companies have been fully recovered from the operation and exploitation, whichever period shall be the shorter.

FIRST SCHEDULE

PARTICULARS OF THE LOT

D.D. No.	Lot No.	Location	Site	Area in Sq.ft.
352	385	Discovery Bay Lantau Island	As delineated shown coloured red, red hatched black, red cross hatched black and verged green on the Plan annexed to the Agreement and Conditions of Exchange dated 10th September, 1976.	66,217,000

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SECOND SCHEDULE

Those sections which when the carving out of the lot referred to in this agreement has been approved by the Hong Kong Government will most closely correspond to the sections on the carving out plan (which is hereunto attached and signed by the parties hereto for purposes of identification) marked as follows:

SECTION	APPROXIMATE AREA IN SQ.FT.
G	495,000
M	400,000
O	260,000
P	70,000
Q	30,000
S	425,000
T	245,000
V	917,000
W	250,000
BB	538,000
DD	533,000

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Supreme Court of Hong Kong Exhibits "JW-2" Agreement 11 Oct 1976 (Contd.)

IN WITNESS whereof the parties hereto have executed this Agreement the day and year first abvoe written. 10

SIGNED by ANTHONY JACK BURGESS Chairman and JOHN ANNA PERROT Director for and on behalf of ANSTALT SORO in the presence of: (sd.) T. Beesley Merchant, 26th Floor Realty Building, Hong Kong.	))))	(sd.) A.J. Burgess (sd.) John Anna Perrot
SIGNED by JOHN EDWIN MICHAEL AULT Director and MICHAEL WONG Director for and on behalf of HONG KONG RESORT CO. LIMITED in the presence of: (sd.) T. Beesley Merchant, 26th Floor Realty Building, Hong Kong.	))))	(sd.) John Edwin Michael Ault (sd.) Michael Wong

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ADDENDUM NO. 1

RE: TA YUE SHAN OPTION AGREEMENT entered into on 11th October 1976 between ANSTALT SORO of Vaduz, Liechtenstein (called "SORO") of the one part and HONG KONG RESORT CO. LIMITED (called "HKR") of the other part WHEREAS in view of the change of name of Anstalt Soro to ANSTALT NYBRO on 18th October 1976 notice of which "HKR" received from The Registrar of the Duchy of Liechtenstein, IT IS HEREBY agreed that the name Anstalt Nybro be substituted for that of Anstalt Soro in the aforesaid Agreement.

IN WITNESS whereof we have hereunto set our hands this 25th day of November One thousand nine hundred and seventy six. 30

SIGNED for and on behalf of ANSTALT NYBRO in the presence of: B. Mayor Law Profession 2, rue St. Laurent, Geneve	)))	(sd.) A.J. Burgess Chairman (sd.) John Anna Perrot Director
SIGNED by John Edwin Michael Ault and Michael Wong Directors for and on behalf of HONG KONG RESORT CO. LIMITED in the presence of: (sd.) T. Beesley Merchant, 26th Floor Realty Building, Hong Kong.	)))))	(sd.) John Edwin Michael Ault (sd.) Michael Wong

This Exhibit is the Carving Out Plan Annexed to the Agreement and

is Located at Page 179

This Exhibit is the Carving Out Plan and is Located

at Page 179

"JW-21A"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

LETTER FROM E.W.C. WONG TO J.R. ANDERSON

11th October, 1976

Mr. J.R. Anderson,
Suite 2700,
1290 Avenue of The Americas,
New York, N.Y. 10019,
U. S A.

10

Dear Dick,

I send you herewith the original of a letter dated 13th September, 1976 addressed to your goodself and signed by John Anna Perrot Director of Anstalt Soro in regard to the advance payment of US$15,000 to you. This letter is to replace the one dated 13th Septmber, 1976 given to you in Hong Kong and signed by Jose Yanes Duran for account of Anstalt Soro. Will you please cancel the letter signed by Jose Yanes Duran and return same to me in Hong Kong.

Thanking you,

Yours sincerely,
(Sd.) E. W. C. Wong

Supreme
Court of
Hong Kong
Exhibits
"AJB-2"
Letter from
A. J.
Burgess to
Respondent
12 Oct 1976

"AJB-2"
Affidavit of A.J. Burgess (NO.2)
(Appellant)

LETTER FORM A.J. BURGESS TO RESPONDENT

12th October, 1976

The Secretary,
Hong Kong Resort Co. Limited,
Realty Building, 26th Floor,
71 Des Voeux Road, Central,
Hong Kong.

Dear Sir,

I refer to my directorship in your Company and wish to put on record the following: 10

As I shall in most cases not be in Hong Kong when you hold board meetings you have my full agreement to proceed as follows:—

1. For board meetings covering the day to day running and administration of the Company in accordance with Article 116 of your Articles of Association of your Articles of Association do not attempt to notify me.

2. In the event of a board meeting affecting in any way the share holding of Anstalt Soro in accordance with Article 119 please arrange for resolutions to be in writing and notify me of the resolution in question by telex or telegram so that I may consider the resolution in question and, if in agreement with it, send you a signed copy of such resolution. 20

Yours faithfully,
(sd.) A. J. Burgess

Supreme
Court of
Hong Kong
Exhibits
"AJB-3"
Letter from
A.J. Burgess
to
Respondent
12 Oct 1976

"AJB-3"
Affidavit of A.J. Brugess (No.2)
(Appellant)

LETTER FROM RESPONDENT TO A.J. BURGESS

12th October, 1976

Mr. A. J. Burgess,
PRESENT

Dear Sir,

Re: Your Directorship

We acknowledge the receipt of your letter dated 12th October, 1976 and note your request. 10

Yours faithfully,
HONG KONG RESORT CO. LIMITED
(sd.) T. Beesley
Director

Supreme Court of Hong KOng Exhibits
"JW-23A"
Letter from E.W.C. Wong to A.J. Burgess
12 Oct 1976

"JW-23A"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

LETTER FROM E.W.C. WONG TO A.J. BURGESS

12th October, 1976

Mr. J.R. Anderson,
Suite 2700,
1290 Avenue of The Americas,
New YOrk, N.Y. 10019,
U. S. A.

10

Dear Dick,

At the request of Anstalt Soro I send you herewith a copy of your letter to them dated 20th September 1976 which in haste was erroneously signed by Mr. Duran. It is now correctly signed by the Director of Anstalt Soro John Anna Perrot. Please return your copy of the wrongly signed document by Mr. Duran.

Thanking you,

Yours sincerely,
(Sd.) E. W. C. Wong

"JW-12A"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

LETTER FROM RESPONDENT TO APPELLANT

14th October 1976

Mr. A. J. Burgess,
Anstalt Soro,
c/o Cheewright, Murly & Co.,
Nordic Bank House,
41-43 Mincing Lane,
London, E.C. 3,
England.

Dear Sirs,

Further to your recent visit to Hong Kong and regarding the signing of the Agreement dated 11th October, 1976 between Anstalt Soro and Hong Kong Resort Co. Limited it was subsequently found that page 3 needed corrections. Accordingly, we have attended to these and we have initialled the original copy and would be grateful if you could also initial same.

Please return the altered page to us and after photostating we would forward copies for your file.

Yours faithfully,
J.E.M. Ault

Encl.

Supreme
Court of
Hong Kong
Exhibits
No."JW-13"
Letter from
Appellant to
Respondent
25 Oct 1976

"JW-13"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

LETTER FROM APPELLANT TO RESPONDENT

25th October, 1976

J.E.M. Ault Esq.
Hong Kong Resort Co. Limited
G.P.O. Box 1358,
Hong Kong.

Dear John,

10

I thank you for your letter of 14th October, 1976.

I return the page three of the Agreement which you sent me duly initialled by the two directors of Anstalt Soro. You appreciate, of course, that the correction effectively reduces the price at which the land is assigned to half of that which was originally contemplated.

Yours sincerely,
(sd.) Tony Burgess

Encl.

"JW-12B"
Affirmation of John Y. B. Wu (No. 1)
(Respondent)

AMENDMENT TO "JW-3" PAGE 176

(iii) For its 49% participation in the capital of Company C, SORO will pay a sum of HK$490,000.00 in exchange for the corresponding share certificates.

(iv) HKR will assign to Company A : Sections M, N, O, P, Q, R, BB and DD referred to in the Second Schedule hereto in exchange for HK$1,275,000.00 worth of share certificates corresponding to 51% of the capital of Company A.

(v) HKR will assign to Company B : Sections S, T and W referred to in the Second Schedule hereto in exchange for HK$510,000.00 worth of share certificates corresponding to 51% of the capital of Company B. 10

(vi) HKR will assign to Company C : Section V referred to in the Second Schedule hereto in exchange for HK$510,000.00 worth of share certificates corresponding to 51% of the capital of Company C.

(3) The three companies to be formed in accordance with clause (2) hereof shall as regards the respective sections to which they are to be assigned parts of the grant referred to in recital (1) hereof develop such sections in accordance with the Master Plan of HKR for the TA YUE SHAN Project.

"JW-24B"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

LETTER FROM J.R. ANDERSON TO APPELLANT

26 October 1976

Anstalt Nybro
c/o Cheeswright, Murly & Co. Ltd.
Nordic Bank House
41/43 Mincing Lane
London E.C. 3
ENGLAND

10

Dear Sirs,

With reference to the Agreement signed between myself and Paclantic Financing Corp., dated 17 September 1976, granting me an Option on 140,000 shares of Hong Kong Resort Co. Ltd.

I HEREBY APPOINT Anstalt Nybro of Landstrasse 31, Vaduz, Liechtenstein my nominee, to make all payments as and when due and Anstalt Nybro shall be the Owners of the aforementioned shares and I shall have no interest or right in or to any of the shares.

Sincerely yours,
(Sd.) James R. Anderson

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Please signify your agreement to the terms fo this letter by signing and returning to me the enclosed duplicate copy of this letter.

ANSTALT NYBRO
(Sd.) A.J. Burgess
President

(Sd.) John Anna Perrot
Director

Supreme Court of Hong Kong Exhibits "AJB-1b" Letter from Respondent to Appellant 12 Nov 1976

"AJB-1b"
Affidavit of A.J. Burgess (No. 1)
(Appellant)

LETTER FROM RESPONDENT TO APPELLANT

Mr. A. J. Burgess,
Chairman,
Anstalt Nybro,
c/o Cheeswright Murly & Co.,
Nordic Bank House,
41/43 Mincing Lane (5th floor) 10
London, E.C. 3R 7SL,
England.

Dear Sir,

Re: Ta Yue Shan Option Agreement of 11/10/76

Further to our telex message to you dated 8th November, 1976 (Our Ref: NOV-120) on captioned matter and your reply on 9th November, 1976 and in view of the amendments agreed by the parties, we send you herewith pages 1, 3 and 5 of the Agreement which now incorporate the amendments. Would you kindly initial the original and one duplicate copy and return same to us at your earliest convenience retaining one copy for your file. 20

We are having a corrected Carving Out Plan for Lot No. 385 in D.D. 352 made and will be forwarding a copy to your goodselves when it is ready.

Yours faithfully,
HONG KONG RESORT CO., LIMITED
(Sd.) J.E.M. Ault
Executive Director

Encl:

P.S. Also enclosed is the required Addendum No. 1 in respect of the change of name made on the 18th October 1976 of Anstalt Soro to Anstalt Nybro for your completion and return please. 30

Remark: Addendum No. 1 is located at Page 178 .

Supreme
Court of
Hong Kong
Exhibits
"AJB-1a"
Letter from
Appellant to
Respondent
18 Nov 1976

"AJB-1a"
Affidavit of A.J. Burgess (No. 1)
(Appellant)

LETTER FROM APPELLANT TO RESPONDENT

18th November, 1976

Attention E.W.G. Wong Esq.
Hong Kong Resort Co. Limited
Realty Building, 26th Floor,
71, Des Voeux Road, Central,
Hong Kong. 10

Dear Sirs,

We were very pleased to meet Mr. Eddie Wong on his visit to London today and to hear of the crash programme for the development of the TA YUE SHAN project in its first phase.

We quite understand the anxiety to comply with the master planning and for there to be no delay in the progress of the whole programme. We accordingly hereby confirm that we have no objection to your allotting sections to us in exchange for those over which we hold options pursuant to our Agreement of 11th October, 1976 provided that any section you allot us in exchange for one over which we have an option shall have the same floor area as or a greater floor area than the one over which we have 20 an option and you wish to change.

We were also pleased to hear from Eddie that the Hong Kong Government has at last given its consent to a Carving Out Plan, and we look forward to receiving a copy of this for our records.

Yours faithfully,
ANSTALT NYBRO
(Sd.) A.J. Burgess (Sd.) John Anna Perrot
President Director

"AJB-1c"
Affidavit of A.J. Burgess (No. 1)
(Appellant)

LETTER FROM APPELLANT TO RESPONDENT

19th November, 1976

J E.M. Ault Esq.,
Hong Kong Resort Co. Limited
Realty Building, 26th Floor,
71, Des Voeux Road, Central,
Hong Kong.

10

Dear Sir,

Re: Ta Yue Shan Option Agreement of 11/10/76

We thank you for your letter of 12th November, 1976 and have the pleasure to return to you the original and one copy of the amended pages 1, 3 and 5 of the above agreement. Addendum No. 1 to the Agreement will be posted to you shortly from Switzerland.

Yours faithfully,

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Supreme
Court of
Hong Kong
Exhibits
"JW-24A"
Letter from
E.W C. Wong
to J.R.
Anderson
29 Nov 1976

"JW-24A"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

LETTER FROM E.W.C. WONG TO J.R. ANDERSON

29th November, 1976

Mr. James R. Anderson,
Robert B. Anderson & Co. Ltd.,
630 Fifth Avenue (9th Floor)
New York, New York 10020,
U. S. A.

10

Dear James,

Re: Option for 140,000 shares
Hong Kong Resort Co. Limited

I enclose a signed copy of your letter dated 26th October 1976 to Anstalt Nybro whereby they signify their agreement to the terms of your letter. I have also received a signed copy.

Yours sincerely,
(Sd.) E. W. C. Wong

"JW-26"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

RESPONDENT'S BOARD MINUTES

BOARD OF DIRECTORS' MEETING of HONG KONG RESORT CO. LIMITED held at the Company's Registered Office at Realty Building, 26th Floor, 71 Des Voeux Road, Central, Hong Kong on Tuesday, 30th November, 1976.

PRESENT:

Mr. Edward Wong Wing Cheung (Chairman) 10
Mr. John Edwin Michael Ault
Mr. Thomas Beesley
Mr. Fan Meng Yen
Mr. Michael Wong Gai Yan

OPTION AGREEMENT WITH ANSTALT NYBRO FOR EQUITY PARTICIPATION & MANAGEMENT OF TA YUE SHAN PROJECT

The Managing Director referred to the option Agreement negotiated by him with Anstalt Soro (since renamed Anstalt Nybro whereby Anstalt Nybro has taken up an option to participate in the ownership development and subsequent management operation and exploitation in the manner set forth on the Agreement of the eleven sections of D.D. No. 352 Lot No. 385, Discovery Bay, Lantau Island as delineated in the Agreement and Conditions of Exchange dated 10th September 1976. Anstalt Nybro has paid option money of HK$50,000 which is forfeitable and under the Agreement is to give notice to the Company of its intention to take up this option by 31st January, 1977 latest. However it was, Mr. Wong said, agreed by the parties on his recent business trip to Europe, that the option Agreement be extended until 1st March 1977. Effect to this option agreement can only be given when the overall bridging mortgage of Lot No. 385 to John Lok is discharged and the Government has approved the Carving Out Plan in detail. The exact areas to be allocated under this option agreement are subject to amendment in the light of circumstances such as the effect the negotiations with Peter Leung or under the discussion with other parties. 20 30

Members of the Board confirmed and approved the terms and conditions of the said option Agreement entered into in Mr. E.W.C. Wong's absence for and on behalf of the Company by Mr. J.E.M. Ault and Mr. M.G.Y. Wong, Directors and of the subsequent amendments made thereto.

(Sd.) E.W.C. Wong
Chairman

Hong Kong, 30th November, 1976.

ATTENDANCE

BOARD OF DIRECTORS' MEETING of HONG KONG RESORT CO. LIMITED held at the Company's Registered Office at Realty Building, 26th Floor, 71 Des Voeux Road, Central, Hong Kong on Tuesday, 30th November, 1976 attended by:–

(Sd.) E. W. C. Wong
(Sd.) J.E.M. Ault
(Sd.) Thomas Beesley
(Sd.) Feng Meng Yan
(Sd.) Michael Wong Gai Yan

TELEX FROM E.W.C. WONG TO G. CRITCHFIELD (RESPONDENT)

1 Dec., 1976

To: Mr. George Critchfield
From: Mr. E.W.C. Wong
Date: 1/12/76
Our Ref. Dec-103

Reference our telephone conversation today we quote hereunder the text of the letter of credit to be opened by Anstalt Nybro:— 10

QUOTE
Hong Kong Resort Co. Limited,
Realty Building, 26th Floor,
71, Des Voeux Road, Central,
Hong Kong.

Dear Sirs,

OUR IRREVOCABLE LETTER OF CREDIT NO.

We open our irrevocable credit in your favour by order of Anstalt Nybro, Liechtenstein and for account of themselves to the extent of USDOLS 850,000.00 (United States Dollars Eight Hundred and Fifty Thousand Only) available by beneficiary's draft(s) drawn at 180 days after sight on accountee accompanied by share certificate(s) issued by the beneficiary for the number of shares at par value of HKDOLS 100.00 each equivalent to the amount drawn at fixed rate of exchange USDOL 1.00 to HKDOLS 4.70. Discounting charges, if any, are for account of the accountee. 20

Partial drawings are permitted.

All documents to be forwarded to us by first registered airmail.

We undertake to favour drawings complying strictly with the terms of this credit if negotiated in Hong Kong not later than 28th February 1977.

This credit is subject to uniform customs and practice for documentary credits (1962 revision) I.C.C. brochure number 222. Presentation must quote the above credit number. 30

Yours faithfully,
(Opening Bank)
(Sd.) E.W.C. Wong

Date:
UNQUOTE

End Message.

"JW-27"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

LETTER FROM RESPONDENT TO APPELLANT

1st December, 1976

Mr. A.J. Burgess,
Chairman,
Anstalt Nybro,
c/o Cheeswright, Murly & Co.,
Bordic Bank House, 10
41/43 Mineing Lane (5th Floor)
London, E.C. 3R 7SL,
England.

Dear Sir,

Re: Ta Yue Shan Option Agreement 11/10/76

We acknowledge the receipt of your letter of 19th November, 1976 with the enclosures mentioned and look forward to receiving Addendum No. 1 to the Agreement, which has not as yet arrived from Switzerland.

We refer to page 2 Clause (1) of the Agreement. The parties have overlooked the need to amend the first word of the sixth line i.e. "twelve" should read "eleven" sections. 20
As it was and is the intention of the parties to the Agreement that the sum of HK$50,000 paid by Anstalt Nybro is to be forfeited in the event of Anstalt Nybro not taking up its option by 31st January 1977 under the Agreement, this should be stated.

It was also subsequently agreed by the parties concerned that the option Agreement be extended until 1st March, 1977.

We would therefore appreciate your signing and returning to us the duplicate copy of this letter by way of confirmation and acceptance of the above changes to the Agreement.

Yours faithfully,
HONG KONG RESORT COMPANY, LTD. 30
(Sd.) J. E. M. Ault
Managing Director

"AJB-1d"
Affidavit of A.J. Burgess (No. 2)
(Appellant)

This Exhibit is the Letter from the Respondent to the Appellant

and is the same as Exhibits "JW-27" at Page 196.

Supreme Court of Hong Kong Exhibits No. "JW-3" Letter from Appellant to Respondent acknowledged by Respondent to Appllant 24 Jan 1977

"JW-3"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

LETTER FROM APPELLANT TO RESPONDENT ACKNOWLEDGED BY RESPONDENT TO APPELLANT

24th January, 1977
AJB/DN

Hong Kong Resort Co. Limited,
Realty Building,
26th Floor,
71, Des Voeux Road,
Central,
Hong Kong.

10

Dear Sirs,

Re: Ta Yue Shan Option Agreement 11/10/76

We refer to your letter of 1st December, 1976 confirming the agreement to extend the Option until 1st March, 1977 and now give you Notice that we wish to exercise the option on 1st March, 1977.

20

Yours faithfully,
ANSTALT NYBRO
(sd.) A. J. Buygess
Chairman

The acceptance is hereby acknowledged.
Hong Kong Resort Co., Ltd.

(Sd.) Edward Wong Wing Cheung
Chairman
24/1/77

This Exhibit is the same as "JW-3" at Page 198

Supreme
Court of
Hong Kong
Exhibits
"AJB-2"
Letter from
Appellant to
Respondent
24 Jan 1977

"AJB-2"
Affidavit of A.J. Burgess (No. 1)
(Appellant)

LETTER FROM APPELLANT TO RESPONDENT

24th January, 1977
AJB/DN

Hong Kong Resort Co. Limited,
Realty Building,
26th Floor,
71, Des Voeux Road, 10
Central,
Hong Kong.

Dear Sirs,

Re: Ta Yue Shan Option Agreement 11/10/76

We refer to your letter of 1st December, 1976 confirming the agreement to extend the Option until 1st March, 1977 and now give you Notice that we wish to exercise the option on 1st March, 1977.

Yours faithfully,
ANSTALT NYBRO
(Sd.) A.J. Burgess 20
Chairman

Supreme Court of Hong Kong
Exhibits
"000"
Manuscript in between "JW-27" & "JW-28" (Date not identified)

~~JA~~ u
~~MW~~
~~MYF~~
~~T, B~~

23/I/77
30/I
24/II

$50,000.00 Deposit

Forfeitable

Anstalt Nybro – file

1st March, 1977 Now 31 June?

Expiry Date:

Courses are:-

In the absence of an Anstalt Nydro application from Anstalt for an extension of the option (approved by HK Resort Co. Ltd before 1st March, 1977), HK Resort Co. would forfeit the option money. If forfeitable, the money would presumably be credited to Miscellaneous income A/c 24/II/77.

Supreme Court of Hog Kong Exhibits "JW-28" Respondent's Board Minutes 25 Feb 1977

"JW-28"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

RESPONDENT'S BOARD MINUTES
HONG KONG RESORT CO. LIMITED

BOARD OF DIRECTORS' MEETING of HONG KONG RESORT CO. LIMITED held at Realty Building, 26th Floor, 71 Des Voeux Road, Central, Hong Kong on Friday, 25th February, 1977.

Present: Mr. John Edwin Michael Ault (Chairman of Meeting)
Mr. Thomas Beesley
Mr. Fan Meng Yen
Mr. Michael Wong Gai Yan

10

OPTION AGREEMENT WITH ANSTALT NYBRO FOR EQUITY & MANAGEMENT PARTICIPATION OF TA YUE SHAN PROJECT

In the absence of Mr. E.W.C. Wong the Managing Director, Mr. J.E.M. Ault was appointed Chairman of the Meeting.

Mr. Ault referred to the Minutes of the Meeting held on 30th November, 1976, regarding the Option Agreement which the Managing Director had negotiated with Anstalt Nybro which agreement as subsequently amended expires on 1st March, 1977. Mr. Ault informed the Board that as the Option Agreement can only become effective when the exact areas to be allocated under the said Agreement have been determined and since negotiations with interested parties have not yet been completed, Anstalt Nybro have applied for the Option Agreement to be extended to 30th June, 1977. Mr. E.W.C. Wong, who is presently in the United Kingdom, has agreed to this and he has requested that Members of the Board in meeting confirm and ratify the extension of the Agreement.

20

IT WAS RESOLVED:

";that the terms and conditions of the Option Agreement dated 11th October, 1976 with Anstalt Nybro for equity and management participation of the Ta Yue Shan Project be extended to the 30th June, 1977".

(Sd.) J.E.M. Ault
Chairman of the Meeting

30

Hong Kong, 25th February, 1977.

ATTENDANCE

BOARD OF DIRECTORS' MEETING of HONG KONG RESORT CO. LIMITED held at Realty Building, 26th Floor, 71 Des Voeux Road, Central, Hong Kong on Friday, 25th February, 1977 attended by:–

(Sd.) J.E.M. Ault
(Sd.) Thomas Beesley
(Sd.) Fan Meng Yen
(Sd.) Michael Wong Gai Yan

"JW-29"
Affirmation of John Y.B. Wu (No. 1)
(Respondent)

LETTER FROM RESPONDENT TO APPELLANT

25th February, 1977

Mr. A.J. Burgess,
Chairman,
Anstalt Nybro,
c/o Cheewright, Murly & Co.,
Nordic Bank House, 10
41/43 Mincing Lane (5th Floor)
London, E.C. 3R 7SL,
England.

Dear Sir,

Re: Ta Yue Shan Option Agreement 11/10/76

We send you herewith a copy of the Minutes of the Meeting of Board of Directors of our Company held on the 25th February, 1977, wherefrom it will be noted that your Company's option under the Agreement dated 11th October, 1976 has been extended to the 30th June, 1977.

Yours faithfully, 20
(Sd.) J. E. M. Ault

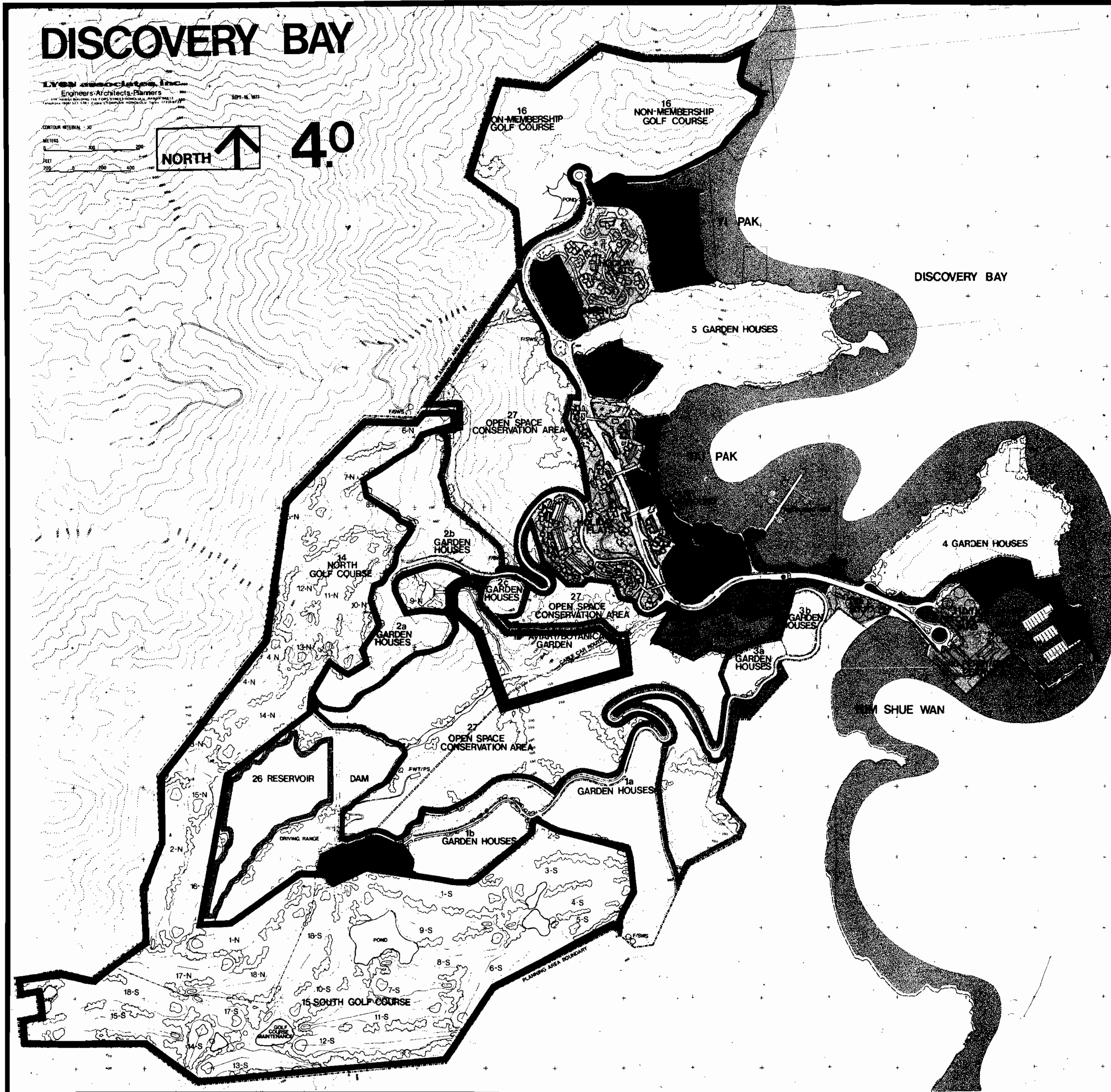
This Exhibit is the same as "JW-28" at Page 202

This Exhibit is the same as "JW-28" at Page 202

"JEMA-2"
Affidavit of J.E.M. Ault
(Respondent)

This Exhibit is the same as "JW-29" at Page 203

MASTER PLAN 4.0



Master Plan

DISCOVERY BAY

	LOT NUMBER (DBL) & UNIT COUNT		GROSS SITE AREA AC	GROSS SITE AREA (000 FT^2)	GROSS SITE AREA (000 M^2)	MAX GROSS BUILDING SPACE (000 FT^2)	MAX GROSS BUILDING SPACE (000 M^2)	PLOT RATIO
A	HOUSING ACCOMMODATIONS							
	GARDEN HOUSES							
	1a	325	21 4	932	87	488	45	52
	1b	225	15 3	666	62	337	31	52
	2a	165	11 0	479	45	248	23	52
	2b	210	14 0	610	57	315	29	52
	2c	75	5 0	218	20	[illegible]	10	52
	3a	55	3 7	161	15	82	8	52
	3b	45	3 0	131	12	68	6	52
	4	400	26 7	1,163	108	600	56	52
	5	666	44 3	1,930	179	999	93	52
	SUBTOTAL	2,166	144 4	6,290	585	3,250	301	52
	GARDEN HOUSES							
	6*	2600	26 0	1,133	105	1,560	145	1 38
	7	1400	14 0	610	57	840	78	1 38
	SUBTOTAL	4000	40 0	1,743	162	2,400	223	1 38
B								
	8*	350	4 0	175	16	350	[illegible]	2 00
A & B	SUBTOTAL	6,516	188 4	8,207	763	6,000	556	73
C	COMMUNITY FACILITIES AND SERVICES							
	9a*		9 8	425	39	425	39	1 0
	9b***		1 4	60	6	60	6	1 0
	9c					(65)**	(6)**	
	PUBLIC TRANSPORT							
	10 FERRY & SERVICE AREAS		5 0	218	20	100	9	45
	PUBLIC WORKS							
	11a S.T.P.		3 0	131	12	5	5	04
	11b STORAGE YARD		7 0	305	28	55	5 0	17
	11c REFUSE DISPOSAL PLANT		1 0	44	4	10	1 0	25
	12 FIRE, POLICE & AMBULANCE		4 0	174	16	20	2	12
	13 SCHOOL		4 0	174	16	30	1	18
	SUBTOTAL		35 2	1531	141	770	71 5	50
A & B & C	SUBTOTAL		223 6	9 738	904	6 770	627 5	69
D	RECREATION FACILITIES AND OPEN SPACE							
	14 NORTH GOLF COURSE		132 0	5 750	534	5	5	00
	15 SOUTH GOLF COURSE		154 0	6,710	623	-	-	-
	16 NON-MEMBERSHIP GOLF COURSE		73.0	3 180	295	17	1.6	00
	17 RACQUETS		5 5	240	22	20	1.9	09
	18 PARK PLAYGROUND		3 4	150	14	5	5	04
	19 AVIARY, BOTANICAL GARDENS		23 6	1,030	96	5	5	00
	20 SWIMMING RECREATION		8 0	350	33	15	1 4	04
	21 SPORTS HALL ENTERTAINMENT		4 2	185	17	65	6 0	35
	22 MARINA		2 2	95	9	12	11	12
	23 RECREATION CLUB		4 8	210	20	20	1.9	10
	24 CAMPING PICNIC		4 4	190	18	1	1	00
	25 GOLF FACILITY		7 5	330	31	50	4.6	15
	26 DAM & RESERVOIR		44	1,910	177	-	-	-
	27 OPEN SPACE ROADS & CONSERV AREA		[illegible]	9,932	923	-	-	-
	SUBTOTAL		694 7	10,262	2,812	21 5	20 1	01
	GRAND TOTAL		918 3	40,000	3,716	6,995	648 5	17

NOTES ALL LAND AREAS ARE SUBJECT TO CONFIRMATION BY SURVEY AND DETAIL ADJUSTMENT AND CALCULATION ON SUBMISSION OF BLOCK SITE PLANS

*ON THE MASTER PLAN THE AREA INDICATED FOR COMMERCIAL 9a, HOLIDAY FLAT 6 AND HOTEL 8 ARE GROUPED TOGETHER INTO ONE LOT OF 166,324 SQ METERS (41.1 ACRES)

**BUILDING AREAS SHOWN IN BRACKETS ( ) ARE SITUATED IN THE PODIUM LEVELS OF THE HOLIDAY FLAT HOUSING AREAS AND ARE NOT INCLUDED IN THE AREA TOTALS

*** TO BE LOCATED LATER

LEGEND
PS PUMP STATION
STP SEWAGE TREATMENT
SWI SALT WATER INLET
FWT FRESH WATER TREATMENT
SWS SALT WATER STORAGE
FWS FRESH WATER STORAGE
H HELICOPTER PAD
E PERM ELECTRIC SUB-STATION
TE PERMANENT TELEPHONE EXCHANGE

MINIMUM ASSOCIATED FACILITIES
8 HOTEL
26 DAM & RESERVOIR
SALT & FRESH WATER STORAGE & TREATMENT AREA
11a SEWAGE TREATMENT PLANT
11c REFUSE DISPOSAL PLANT
CABLE CAR SYSTEM
10 FERRY PIER
16 NON-MEMBERSHIP GOLF COURSE

JOHN Y WU

JAMES S.W. WONG

JOINT MANAGING DIRECTORS,
HONG KONG RESORT CO., LTD.

This Exhibit is the same as "DSF-2" located at Page 207

"JW-1"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

LETTER FROM APPELLANT TO RESPONDENT

6th January, 1978

Dear Sirs,

re.: TA YUE SHAN PROJECT

We refer to our letter to you of 24th January 1977 (a copy of which is enclosed for your convenience) relating to the Option Agreement of 11th October, 1976 (as amended) by which we exercised the rights conferred upon us thereby. The letter was handed to your Chairman when he was in London on 24th January 1977 who acknowledged acceptance of it to our Chairman. 10

We are anxious to proceed with the incorporation of three development companies in accordance with Clause 2 of the Agreement.

Our representatives will be visiting Hong Kong shortly and we would be grateful if a mutually convenient time might be arranged for a meeting with you to further the matter.

Yours faithfully,
ANSTALT NYBRO
(sd.) A.J. Burgess 20
Chairman

Remark: For enclosure, please refer to Page 198

"JN-1"
Affidavit of J. North
(Appellant)

POWER OF ATTORNEY

TO ALL TO WHOM these presents shall come, I JAMES MALCOLM WAUGH of the City of London Notary Public by Royal Authority duly admitted and sworn DO HEREBY CERTIFY the genuineness of the signatures "A. J. Burgess" and "John Anna Perrot" at foot of the Power of Attorney hereunto annexed, such signatures being in the own, true, proper and respective handswriting of Anthony Jack Burgess, the Chairman of the Board of Directors, and of John Anna Perrot, one of the Directors of ANSTALT NYBRO of Liechtenstein, together duly authorized to sign on its behalf by virtue of its Statutes. 10

IN FAITH AND TESTIMONY whereof I the said Notary have subscribed my name and set and affixed my seal of Office at London aforesaid this ninth day of Jauary One thousand nine hundred and seventy eight.

(Sd.) James Malcolm Waugh
Notary Public

Supreme Court of Hong Kong
Exhibits
"JN-1"
Power of Attorney
9 Jan 1978
(Contd.)

ANSTALT NYBRO of FL-9497 Triesenberg Bergstrasse 389, Liechtenstein, HEREBY APPOINT JONATHAN NORTH, Solicitor of 34/35 Old Bond Street, London W1H 3AR, England (hereinafter called "the Attorney") to act for us in the Colony of Hong Kong in every respect as fully and effectually as we could act ourselves concerning all our present and future affairs and all our present and future property rights and interests real and personal and whether sole or joint in the said Colony of Hong Kong, all of which we place in the unfettered control and discretion of the Attorney with authority to bind us in relation thereto in any manner whatsoever including (but without prejudice to the generality of the foregoing authority) power to buy, take on lease or otherwise acquire and to sell, convey, let or otherwise dispose of the create mortgages of and charges on real and personal property of every description, to open and operate on banking accounts, to borrow and lend, to give, vary and revoke instructions as to the manner in which dividends, interest or other moneys payable to or by us shall be paid or dealt with, to settle or compromise claims by us or against us and to receive and to give valid receipts for any money or property due, owing or belonging to us on any account whatsoever and to vote and to give proxies for voting at meetings and with a general power of substitution and sub-delegation and for all or any of the above purposes to sign, seal, deliver and execute and do any deeds transfers, documents, acts and things as effectually as we ourselves could do, and to employ and remunerate bankers, brokers, lawyers and agents. 10

AND WE HEREBY DECLARE:– 20

(1) that we purposely refrain from further particularising the description of our affairs and our property rights and interests in the said Colony of Hong Kong and the powers conferred lest by so doing it should be deemed to limit the intended operation of this instrument as a full and general Power of Attorney for use in the said Colony of Hong Kong,

(2) that this instrument shall at all times be conclusively binding on us in favour of third parties who have not received notice of the revocation thereof, but so that the exercise by ourselves from time to time of any of the powers hereby conferred shall not of itself be deemed to be a revocation.

IN WITNESS whereof we have executed this Power of Attorney this fifth day of January One Thousand nine hundred and seventy eight. 30

ANSTALT NYBRO
(Sd.) A.J. Burgess
Chairman

(Sd.) John Anna Perrot
Director

Supreme Court of Hong Kong
Exhibits
"JW-5(i)
Letter from Respondent's solicitors to Appellant
21 Jan 1978

"JW-5(i)"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

LETTER FROM RESPONDENT'S SOLICITORS TO APPELLANT

21st January, 1978

BY AIR MAIL

Anstalt Nybro,
PF-9497 Triesenberg,
Borgstrasse 389,
P. O. B. 777,
Liechtenatein.

10

Attn: Mr. A. J. Burgess

Dear Sirs,

Re: Hong Kong Resort Co. Ltd.

We act for Hong Kong Resort Co. Ltd. and have been consulted on your letter to them dated 6th January 1978, received on 16th January 1978, enclosing therewith a copy of a letter from you to them dated 24th January 1977, purporting to exercise the option under an Agreement dated 11th October 1976.

It would appear that our clients have no record of such letter or indeed of any purported exercise of the option.

20

Whilst our clients are looking into this matter, we should be grateful it you would kindly let us have more information about your claim and send us copies of all relevant documents. If you are sending representatives to Hong Kong, we shall be glad to arrange a meeting.

Meanwhile, no admission is made by our clients as to anything mentioned in your letter.

Your faithfully,
(sd.) D. W. LING & CO.

"JW-4"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

LETTER FROM APPELLANT'S SOLICITORS TO RESPONDENT

25th January, 1978

Hong Kong Resort Co., Ltd.,
26th floor, Realty Building,
Hong Kong.

Dear Sirs,

Re: Agreement dated 11/10/76

10

We act for Anstalt Nybro (formerly Anstalt Soro) whose duly constituted attorney passed through Hong Kong recently.

We are instructed to refer you to the captioned Agreement and enquire whether you are now in the position to incorporate the 3 companies referred to in Clause (2) thereof and carrying out the terms of the said Agreement; the performance of which has been held up due entirely to internal problems of your Company which, according to our clients' understanding, have since been resolved.

We are further instructed that our clients are in possession of unconfirmed informations that you may be amending the Master Plan annexed to the said Agreement. Should such informations be correct, our clinets are of the opinion that any alteration to the Master Plan would constitute a clear breach of the Agreement in respect of which our clients have no hestitation to enforce their rights. In this connection, please be informed that the registration in the District Office of the captioned Agreement is being done.

20

Our clients inform us that they or their representatives are at all times able, willing and ready to return to Hong Kong to carry out the terms of the said Agreement as and when response to this letter is received by us. Thus, we look forward to hearing from you by return.

Yours faithfully,
(sd.) K.K. Chu & Co.

"JW-5"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

LETTER FROM RESPONDENT'S SOLICITORS TO APPELLANT'S SOLICITORS

31st January 1978

Messrs. K. K. Chu & Co.,
1618, Prince's Building,
Hong Kong.

Dear Sirs,

Re: Hong Kong Resort Co. Ltd. and Anstalt Nybro. 10

We act for Hong Kong Resort Co. Ltd. and have been consulted on your letter to them dated 25th January.

Your client in fact wrote to our clients on 6th January and we have written in reply. We enclose a copy of our letter dated 21st January 1978 and should be grateful if you would kindly let us have a reply.

Yours faithfully,
(sd) D. W. Ling & Co.

Remark: For the enclosure please refer to Page 212.

Supreme
Court of
Hong Kong
Exhibits
"JW-6"
Letter from
Appellant to
Respondent's
Solicitors
20 Feb 1978

"JW-6"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

LETTER FROM APPELLANT TO RESPONDENT'S SOLICITORS

20th February, 1978

Messrs.
D.W. Ling & Co.,
Solicitors & Notaries,
1609 Connaught Centre,
1, Connaught Place,
Hong Kong.

10

Dear Sirs,

Re: Option Agreement dated 11th October, 1976/ TA YUE SHAN PROJECT

We acknowledge receipt of your letter dated 21st January, 1978, (Ref. PCC/ef/H/77/3757) but not received by us until 6th February, 1978.

We point out in reply that instructions have been given to our Solicitors, Messrs. K.K. Chu & Co. in Hong Kong, who will, in due course, be dealing with your above-mentioned letter.

20

Yours faithfully,
ANSTALT NYBRO
(sd.) A.J. Burgess

c.c. Messrs. K.K. Chu & Co.,
1618 Prince's Building,
Hong Kong

c.c. Mr. J. North,
London

Supreme Court of Hong Kong Exhibits "JW-7" Letter from Respondent's solicitors to Appellant's solicitors 22 Feb 1978

"JW-7"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

LETTER FROM RESPONDENT'S SOLICITORS TO APPELLANT'S SOLICITORS

22nd February, 1978

Messrs. K.K. Chu & Co.,
Solicitors,
1618 Prince's Building,
Hong Kong.

URGENT

10

Dear Sirs,

Re: Lot No. 385 D.D. 352 Discovery Bay.

We act for Hong Kong Resort Co., Ltd. in place of Messrs. D.W. Ling & Co.

We understand from your letter dated 25th January, 1978 that you act for Anstalt Nybro (formerly Anstalt Soro) and you are in the process of attempting to register a purported agreement dated 11th October, 1976 against our clients' aforementioned property at Discovery Bay, Lantau Island under the provisions of the Land Registration Ordinance, Cap. 128 and the New Territories Ordinance, Cap. 97. Our clients have handed to us certain documents which we have considered and taken advice on. Our clients have been advised that neither the purported agreement nor anything purportedly done thereunder are valid. Our clients have also been advised that the purported agreement is not registrable under the aforesaid Ordinances. Our clients have asked us to supply you with two documents which are self-explanatory. These are:–

20

(a) Minutes of a board meeting held on 25th February, 1977

(b) Copy letter dated 25th February, 1977 to your clients from our clients.

We are also instructed that there was no response to our clients' letter of 25th February, 1977.

You may have concluded by now that our clients did not receive the letter dated 24th January, 1977 by which your clients "exercised" the purported option. Indeed, the first time our clients saw this letter was when your clients wrote to our clients in January this year. Our clients' former solicitors wrote to your clients on 21st January, 1978 and to you 31st January, 1978 and have not to-date received any reply to their letters. Notwithstanding your clients' professed desire to meet with ours no such attempt has been made by your clients' or their representative.

30

In all the circumstances the conclusion to which one is driven is that your clients are not acting in good faith when they seek registration of the purported agreement but intend simply to harass our clients in respect of their development of Discovery Bay. We have instructions to commence proceedings against your clients and such proceedings will include

an application for an interlocutory injunction unless your clients either (1) give to our clients an undertaking in the form attached hereto or in some other form acceptable to our clients; or (2) confirm in writing that they acknowledge that they have no valid claim against our clients in connection with or in respect of our clients' said property. We expect to receive your confirmation that such undertaking or confirmation is forthcoming by 5.00 p.m. on 23rd February, 1978 failing which we will institute proceedings without further notice. In the event that your clients are prepared to give the undertaking our clients will obviously still have to commence proceedings and will undertake to prosecute such action diligently.

We are grateful for your indication to Messrs. D.W. Ling & Co. that you will, upon a written request, take instructions to ascertain whether you will be instructed to accept service on behalf of Anstalt Nybro. Kindly do so and perhaps you will also be good enough to let us know whether you have instructions to accept service on behalf of the persons who we understand control Anstalt Nybro, namely, Messrs. Edward Wing Cheung Wong and Anthony Jack Burgess. 10

Yours faithfully,
(sd.) Woo, Kwan, Lee & Lo

encl.

c.c. The Registrar General,
Hong Kong. 20

Remark: For Enclosure (a), please refer to Page 202
For Enclosure (b), please refer to Page 203

ENCLOSURE

Undertaking

We, Anstalt Nybro (Formerly called Anstalt Soro) hereby undertake that we will not whether by our directors, officers, servants, agents, legal advisors or howsoever otherwise register or take any steps to register the purported agreement, whether in its original form or as purportedly varied, dated October 11, 1976, in respect of Lot No. 385 in Demarcation District No. 352, Discovery Bay, Lantau Island, Hong Kong between ourselves and Hong Kong Resort Co. Ltd. and/or anything connected with or arising out of such purported agreement under the provisions of the Land Registration Ordinance, Cap. 128 and/or the New Territories Ordinance, Cap. 97 or at all. 30

Supreme
Court of
Hong Kong
Exhibits
"JW-8"
Letter from
Respondent's
solicitors to
the Registrar
General
22 Feb 1978

"JW-8"
Affirmation of John J.B. Wu (No.1)
(Respondent)

LETTER FROM RESPONDENT'S SOLICITORS TO THE REGISTRAR GENERAL

22nd February, 1978

The Registrar General,
N.T. Section,
101 Princess Margaret Road,
4th Floor,
Kowloon.

URGENT 10

Dear Sir,

Re: Lot No. 385 D.D. 352 Discovery Bay

We act for Hong Kong Resort Company Limited.

Our clients have recently received a letter from a Liechtenstein entity ANSTALT NYBRO (formerly known as ANSTALT SORO) claiming to be interested indirectly in our clients' said property ("the Property"). We enclose herewith for your reference a copy of the letter dated 6th January, 1978 and the enclosures thereto namely, a copy letter purportedly written to our clients dated 24th January, 1977 and a copy letter dated 6th January, 1978 written to one Mr. E. Baumgartner of Geneva, Switzerland. We also enclose 20 for your reference copies of the following:—

(a) Purported agreement dated 11th October, 1976.

(b) Minutes of a Board Meeting of our clients dated 30th November, 1976.

(c) Letter dated 1st December, 1976 from our clinets to Anstalt Nybro's Chairman, Mr. A.J. Burgess.

(d) Minutes of a Board Meeting of our clients dated 25th February, 1977.

(e) Letter dated 25th February, 1977 from our clients to Anstalt Nybro's Chairman, Mr. A.J. Burgess.

(f) Letter dated 21st January, 1978 from Messrs. D.W. Ling & Co. to Anstalt Nybro.

(g) Letter dated 25th January, 1978 from Messrs. K.K. Chu & Co. to our clients. 30

(h) Letter dated 31st January, 1978 from Messrs. D.W. Ling & Co. to Messrs. K.K. Chu & Co.

(i) Letter dated 22nd February, 1978 from ourselves to Messrs. K.K. Chu & Co. with enclosure.

Supreme Court of Hong Kong
Exhibits
"JW-8"
Letter from Respondent's solicitors to the Registrar General
22 Feb 1978
(Contd.)

Our clients have been advised that the pruported agreement or anything done thereunder (Document (a) above) is not valid and is not registrable under the provisions of the Land Registration Ordinance Cap. 128 and/or the New Territories Ordinance Cap. 97 and will take out proceedings, if necessary, to prohibit such registration or any attempt to do so. We are writing to you to enquire whether you are prepared to refuse registration of such documents and whether you are prepared to give our clients an undertaking that such documents will not be registered. Whilst our client have no particular desire to join you as a party to such proceedings they will be forced to do so if the undertaking sought from Anstalt Nybro is not forthcoming by 5.00 p.m. on 23rd February, 1978 and you are not prepared to give the undertaking now requested of you by the same time and date. 10

Our clients are not overly anxious to involve you in litigation which has been brought about by Anstalt Nybro's action but regrettably will have to do so to protect their interests and rights.

Your early reply would be appreciated.

Yours faithfully,
(sd.) Woo, Kwan, Lee & Lo.

Remark: For the Enclosures, please refer
(a) at Page 175
(b) at Page 194
(c) at Page 196 20
(d) at Page 202
(e) at Page 203
(f) at Page 212
(g) at Page 213
(h) at Page 214
(i) at Page 216

Supreme Court of Hong Kong
Exhibits
No."JW-9"
Letter from Appellant's solicitors to Respondent's solicitors
22 Feb 1978

"JW-9"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

LETTER FROM APPELLANT'S SOLICITORS TO RESPONDENT'S SOLICITORS

22 nd February, 1978

Messrs. Woo, Kwan, Lee & Lo,
Solicitors,
Hong Kong.

Dear Sirs,

Re: Lot No. 385 in D.D. 352 Discovery Bay 10

We acknowledge receipt of your letter dated even date with thanks and have immediately passed on the contents thereof by telex to a director of our clients for instructions.

The letter of your clients' former solicitors dated 31st January, 1978 reached our office when the undersigned was out of Hong Kong. It is regretted that no prompt attention to it could have been given.

As regard your remark that no attempt has been made by our clients' representative to meet your clients, please note that our clients' representatives have offered through us that they are at all times able, willing and ready to return to Hong Kong. It is obvious that your clients have chosen not to take up such offer. 20

We will deal with the other parts of your letter under reply until after instructions have been received from our clients.

Yours faithfully,
(sd.) K.K. Chu & Co.

Supreme Court of Hong Kong Exhibits No."JW-10" Letter from the Registrar General to Respondent's solicitors 23 Feb 1978

"JW-10"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

LETTER FROM THE REGISTRAR GENERAL TO RESPONDENT'S SOLICITORS

Messrs. Woo, Kwan, Lee & Lo,
Solicitors & Notaries,
Connaught Centre, 26/F.,
Hong Kong.

23rd February, 1978

Dear Sir,

10

Re: Lot No. 385 D.D. 352 Discovery Bay

I refer to your letter of 22.2.78.

I regret that I am unable to give you the undertaking you seek in your third last paragraph.

Yours faithfully,
(E. J. Davison)
p. Registrar General (N.T.S.)

"JW-11"
Affirmation of John Y.B. Wu (No.1)
(Respondent)

LETTER FROM APPELLANT'S SOLICITORS TO RESPONDENT'S SOLICITORS

28th February, 1978

Messrs, Woo, Kwan, Lee & Lo,
Solicitors,
Hong Kong.

Dear Sirs,

Re: Lot No. 385 in D.D. 352 Discovery Bay 10

Further to our letter to you of 22nd instant, we have since taken preliminary instructions from Anstalt Nybro.

You are correct in your understanding that we were instructed by Anstalt Nybro to implement registration of the Agreement of 11th October, 1976.

With regard to your 4th paragraph, our preliminary view would be that delivery of the acceptance letter to the then Chairman and Managing Director of your clients would constitute receipt by your clients of the letter dated 24th January, 1977 and our clients take exception to the conclusions you have expressed.

We understand that our clients wish to convene a Board Meeting before considering whether my firm should be instructed to accept service of proceedings on their behalf (in 20 view of this firm's involvement with the affairs of Mr. E.W.C. Wong).

We will advise you in due course.

Yours faithfully,
(sd.) K.K. Chu & Co.

c.c. Clients
Jonathan North, Esq.

Supreme Court of Hong Kong Exhibits "AJB-1" Affidavit of A.J. Burgess 3 Apr 1978

"AJB-1"
Affidavit of A.J. Burgess (No.2)
(Appellant)

High Court Action No. 785/78

3rd April, 1978

AFFIDAVIT OF ANTHONY JACK BURGESS

I, Anthony Jack Burgess of 2/3 Philpot Lane, London, EC3 England, Notary Public, make oath and say as follows:–

1. I am the Chairman of the 1st Defendant and make this Affidavit on behalf of the 1st Defendant and myself as the 3rd Defendant herein.

2. During the working week commencing 20th March, 1978 (that is the week in which the Easter holidays commencing 24th March, 1978 started) there were delivered to my office at 2/3 Philpot Lane, London, E.C.3, two envelopes both addressed to me. One had been posted to me from Hong Kong and the other from the registered office of the 1st Defendant. Upon opening those envelopes I discovered they contained copies of a Notice of Writ of Summons Served Out of the Jurisdiction dated 15th day of March, 1978 issued under High Court Action No. 785 of 1978 out of the Supreme Court of Hong Kong together with an Inter Partes Summons filed on the 14th day of March, 1978 and the Affidavit of Mr. Michael Pang Chiu Chiu and the Affirmation of Mr. John Ying Bun Wu both filed on the 15th day of March, 1978.

3. As Mr. K. K. Chu of Messrs. K. K. Chu and Co had hitherto been acting for the 1st Defendant I immediately made enquiries as to his whereabouts since I felt it would be appropriate to instruct Mr. Chu to act in these proceedings on behalf of the 1st Defendant and myself.

From my enquires I learnt that Mr. Chu was due to arrive in London before the end of March 1978 and therefore resolved to wait for him.

4. Mr. Chu in fact arrived in London on Thursday the 30th day of March, 1978 and I was able to have an appointment with him on Monday the 3rd day of April, 1978.

5. On the last mentioned date, I instructed Mr. Chu in the case on behalf of the 1st Defendant and myself and realised that he would require time to return to Hong Kong to instruct Counsel in the case. He indicated that he would need four to five weeks to draw up the Affidavits in answer to the Inter Partes Summons and to seek Counsel for his opinion as regards service of proceedings and other matters. He summarized his estimate as follows:–

A.	Expected return to Hong Kong	6th April
B.	Filing time summons	7th April
C.	Perusing documents and taking incidental instructions (5 days)	13th April
D.	Drawing up brief to counsel (2 days)	15th April

Supreme Court of Hong Kong Exhibits "AJB-1" Affidavit of A.J. Burgess 3 Apr 1978 (Contd.)

E.	Conference with counsel	18th April
F.	Drawing up affidavit (3 days)	21st April
G.	Attending counsel in settling affidavit	24th April
H.	Despatching affidavit by post to London	25th April
I.	Draft affidavit reaching London	29th April
J.	Affidavit sworn in London and despatched to Hong Kong	2nd May
K.	Sworn affidavit reaching Hong Kong	6th May
L.	Seven days' allowance	13th May

Since I am not familiar with the procedures of this honourable Court I rely on Mr. Chu's estimate. 10

6. I accordingly crave leave of this honourable Court to make an order in terms of the Summons filed herein on behalf of the 1st Defendant and myself.

Sworn on 3rd April, 1978.
This Affidavit is sworn by the 3rd Defendant.

This Exhibit is the Writ Located at Page 17

Supreme Court of Hong Kong
Exhibits
"JW-1"
Letter from Appellant's solicitors to Respondent's solicitors
10 Apr 1978

"JW-1"
Affirmation of John. Y.B. Wu (No. 2)
(Respondent)

LETTER FROM APPELLANT'S SOLICITORS TO RESPONDENT'S SOLICITORS

10th April, 1978.

Messrs. Woo, Kwan, Lee & Lo.
Solicitors,
Hong Kong.

Attention; Mr. Ronald Arculli

Dear Sirs,

10

Re: High Court Action No. 1006/78

The above proceedings were served on the Defendant, Hong Kong Resort Company Limited, to-day.

We enclose a photostatic copy thereof for you as being the Solicitors currently acting for the Defendant in High Court Action No. 785 of 1978 in which the Defendant was the Plaintiff thereof.

Yours faithfully,
(Sd.) K. K. Chu & Co.

Remark: For enclosure, please refer to Page 17.

"JW-2"
Affirmation of John Y.B. Wu (No. 2)
(Respondent)

LETTER FROM APPELLANT'S SOLICITORS TO RESPONDENT'S SOLICITORS

10th April, 1978.

Messrs. Woo, Kwan, Lee & Lo,
Solicitors,
Hong Kong.

Attention: Ronald Arculli, Esq.

Dear Sirs, 10

Re: High Court Action 1978/785

In Chambers on Saturday Morning, Mr. Charles Ching, Q.C., indicated that registrability of the documents now registered in the District Office by Anstalt Nybro would be an argument to be advanced on behalf of the Plaintiff. You would, of course, appreciate that such argument is neither supported by the Writ of Summons nor the Inter Partes Summons hitherto issued. Consequently, if such argument is to be pursued, we would enquire whether an application in that connection might be taken out on behalf of the Plaintiff?

On the basis that such application would be made, we would further enquire whether you would be agreeable to confine argument to registrability of those documents 20 as being the only issue before the Court on the adjourned date? If such is agreeable, we would feel sufficiently confident of being ready to deal with that issue there and then. On the other hand, we are less confident of being ready had we to obtain, within the time limited, necessary instructions and affidavits to deal with the very voluminous Affidavits and Exhibits filed on behalf of the Plaintiff.

We look forward to hearing from you by return.

Yours faithfully,
(Sd.) K. K. Chu & Co.

"JW-3"
Affirmation of John Y. B. Wu (No. 2)
(Respondent)

LETTER FROM RESPONDENT'S SOLICITORS TO APPELLANT'S SOLICITORS

12th April, 1978.

Messrs, K. K. Chu & Co.,
Solicitors,
1618 Prince's Building,
HONG KONG.

Dear Sirs, 10

Re: H.C. Action Nos. 785 and 1006 of 1978

We refer to your letter dated 10th April, 1978.

We do not agree with and cannot understand the first paragraph of your letter under reply. As to the second paragraphs of your said letter we do not think it is appropriate nor is it in our clients' interest (although it may be in yours) to confine our arguments. We have filed affidavits, which your clients have had for at least 20 days, and we will rely on such affidavits as the adjourned hearing on 22nd April, 1978. Whether or not you will be given any further time to file affidavits, assuming your clients intend so to do, by the Court in view of the action your clients have commenced is a matter you will have to deal with and our clients would not be amendable to any further adjournment. We 20 repeat, we would be prepared to have copies of affidavits your clients intend to rely on delivered to us by 5.00 p.m. on Thursday 20th April, 1978 as Friday 21st April, is a public holiday.

We have entered an appearance on our clients' behalf to the Action your clients commenced. We are somewhat disappointed that no mention of your clients' action was made to the Honourable The Chief Justice during the hearing on Saturday, 8th April, 1978. Had it been mentioned we would have taken two points: first that the adjournment of our summons inter partes be on terms that either an injunction be made, pending determination of our said summons, that your clients be restrained from registering the writ of summons as a lis pendens or an undertaking to the same effect; secondly we 30 would have expected you to have perhaps taken a different stand on the question of an application by your clients to set aside service of the writ. Be that as it may be have to-day issued a summons returnable on 22nd April, 1978 at 10.00 a.m. before the Honourable The Chief Justice seeking an injunction restraining your clients from registering the writ. In the event that your clients register the writ before 22nd April, 1978 we will simply take out a summons returnable on 22nd April, 1978 and, on short notice if necessary, seeking an order to vacate such registration.

The issues between our respective clients appear to us to be clearly defined and a duplicity of actions or summonses in our respectful view tends to cloud such issues. Our clients have no wish to cloud such issues and our clients sincerely hope that 40 your clients do not wish to do so either. In the circumstances we would be grateful if you

Supreme Court of Hong Kong
Exhibits
"JW-3"
Letter from Respondent's Solicitors to Appellant's Solicitors
12 Apr 1978
(Contd.)

would inform us by return or as soon as your Mr. K.K. Chu returns to Hong Kong:– (1) whether you agree with us that a registration of the writ serves no useful purpose; (2) whether you would be at least prepared to inform us of any registration; (3) whether you propose to pursue your appliction to set aside service and/or the order for service and if so when you propose to issue a summons and (4) whether your clients propose to issue a summons for an injunction against our clients whether in our action or in your action.

Yours faithfully,
(Sd.) Woo, Kwan, Lee & Lo.

"CKK"
Affidavit of K. K. Chu (No. 1)
(Appellant)

LETTER FROM APPELLANT'S SOLICITORS TO RESPONDENT'S SOLICITORS

17th April, 1978.

Messrs. Woo, Kwan, Lee & Lo,
Solicitors,
Hong Kong.

Attention: Ronald Arculli, Esq.

Dear Sirs,

10

Re: H.C. Action Nos. 785 and 1006 of 1978

We refer to your letter dated 12th April, 1978 (received on 13th April) and noted your views on our letter dated 10th April.

We do not agree that, as at the date of your letter under reply, our clients "have had for at least 20 days" the Affidavits filed by yours.

We do not think the last sentence of your letter under reply gave an accurate account of the Statements made by your leading counsel in Chambers on Saturday the 8th April. Should our clients choose to file any affidavits, let us assure you that every effort will be made to file them with as much as speed as is humanly possible.

As regard the 3rd paragraph therein, we sympathize with you in your disappointment. We could not see whatelse could have been done to an appearance under protest, the position would have been totally different had service of proceedings been properly effected. In any event, it was, and still is, our view that where some rights and interests of a client is in jeropardly, the protection of such rights and interests should take precedence.

20

Your Mr. Ronald Arculli had been informed by phone on the 13th April, and we hereby repeat, that the Writ of Summons in High Court Action No. 1006/78 was, on the same date it was issued, presented to the District Office for registration.

We do not agree that the issuance of a Writ in protection of a person's rights and interest is 'to cloud the issue". We agreed that neither us nor our respective clients should indulge in such fruitless exercise.

30

The following are the answers to the questions posed by you in the last paragraph of your letter under reply:–

(1) We do not agree.
(2) This has been answered elsewhere.
(3) We are still taking clients' instructions and counsel's advice.
(4) This is being considered by our clients.

Yours faithfully,
(Sd.) K. K. Chu & Co.

"JN-5"
Affidavit of J. North
(Appellant)

LETTER FROM PROJECT PLANNING ASSOCIATES (INTERNATIONAL) LTD. TO NORTH AND CO.

17 April, 1978

North and Co
27 Ovington Square
London SW3 1LJ

Attention of Jonathan North 10

Dear Sir

**Ta Yue Shan Resort Development,
Discovery Bay**

During February 1977 Anstalt Nybro asked us to be their Consultants and advisers with respect to certain parcels of land which they wished to develop and which lay within the Ta Yue Shan Resort Development.

With respect to our telephone conversation today I though that this letter would at this time record my thoughts, opinions and concerns with regard to a revised Master Plan for the Ta Yue Shan Resort Development. Having just received this new plan and no having available the appropriate back-up documentation to describe the plan and the various 20 details, I can only make a general statement regarding Anstalt Nybro's lands.

As you recall the original Master Plan took some two to three years to compile and obtain the approval from the Hong Kong Government. A major part of that process during that period were very detailed land use and economic studies in order to optimise the land use plan with respect to certain investment targets. No doubt you are aware of some of the detailed econonic evaluations compiled by this firm and Economic Research Associates of the United States.

In analysing the "new plan" I am somewhat surprised and concerned that so many major alterations have been made which definitely effect the total project as well as individual parcels of land or investment opportunities. 30

Within this letter I have described in general terms some of my concerns and will look forward to receiving complete documentation with respect to the "new Master Plan" such that a detailed report can be issued.

It is noted that the new plan has eliminated the break-water across the entrance to the main bay. The breakwater was placed there in the original Master Plan for specific purposes with respect to high water and wave action control that could affect installations along the low lands, particularly the commercial area and park and playground area around the edge of the bay. Many detailed studies, including hydraulic investigations were undertaken during the development of the original Master Plan in order to ensure that any

investment within the areas mentioned would be properly protected. In my opinion this protection no longer exists and investment in certain parcels of land around the bay would definitely be affected.

I also note that the main transportation system has been changed in terms of location and the development schedule. The original Master Plan was very carefully developed with regard to the consturction programme and circulation of vehicles and pedestrians during construction, and upon completion of certain sections of the development. In my opinion this careful scheduling does not now exist on the "new plan".

I also note that sections of the golf course have been decreased in size thus detrimentally affecting the high standard of international golf course design which was a pre-requisite by the Hong Kong Resort Company, the Government and investors with whom discussions were being undertaken while the plan was being developed. 10

In general terms it would appear that many major investment portions of the plan (particularly hotels, commercial) have been left out of the new plan, and additional construction has been suggested in areas that, in my opinion, would be very difficult to develop (i.e. Sections 2A, 2B on the new plan). And generally the buildings indicated and the development indicated is of a much lower quality and standard than that envisaged and established by the original plan.

I would also raise questions with regard to the sewage systems and general road and traffic patterns as they do not seem to have the proper design quality from a functional and safety viewpoint. 20

I am advising Anstalt Nybro that in my view the value of their investment and their ability to undertake the type of development that they had initially envisaged has been jeopardised by the new plan.

Yours sincerely
(sd.) R L Thomson
PRESIDENT

"CKK-1"
Affidavit of K.K. Chu (No.2)
(Appellant)

TELEX FROM JONATHAN NORTH TO APPELLANT'S SOLICITORS

24th April, 1978

FOR THE ATTENTION OF K K CHU

There follows the text of a letter received from B. Chapron of CEC international. I understand it was this company who was contemplating investment with Nybro. Original of the letter has been air-freighted through HFW's Office to arrive on Thursday 27th April 1978. 10

Suggest you exhibit quoted letter with telex you should have from R. B. Anderson.

Quote: C. E. C. International

372 Rue Saint-Honore
75001 Paris – France

Paris April 24 1978

North & Co
27 Ovington Square
London SW3 1LJ

ATTENTION OF MR JONATHAN NORTH

Dear Sir, 20

Subject : Discovery Bay – Lantau Island – Hong Kong

In connection with your telephone conversation today, we checked in our records and documentation covering the period from mid 1976 until May 1977, date at which we closed the Lantau Dossier, having been informed that the project was temporarily stopped due to financial problem of HKR Co Ltd. and provisional liquidator was appointed.

I feel that the best is to give you in the present letter a general outline of our knowledge concerning Hong Kong Resort Co Ltd and Anstalt Nybro's.

We feel that our company was asked for this project because of the world wide reputation of our group for the organization of large projects. For your own information, our group's activities are twofold: 30

A. Engineering and financial services, which include general engineering services ranging from feasibility reports to construction of industrial plants and major infrastructure projects in various fields including electric power development and public works.

B. General contractor services – our group has on several occasions been assuming

Supreme Court of Hong Kong Exhibits "CKK-1" Telex from Jonathan North to Appellant's solicitors 24 Apr 1978 (Contd.)

responsibility of construction contracts as project managing contractor. In this respect whenever required by the projects magnitude and complexity the group works in association with other firms, forming as the case may require, consortiums or joint ventures with companies specialized in given fields in particular works.

I hope that this introduction will help you to understand the actions that we took on the above mentioned project. Actually at the stage of its development until it was stopped, actions were orientated to management and financial consideration and to the formation of contractors consortium capable to carry out the work as soon as the financial package will be set up.

From our files, we have extracted the following date records corresponding to main conversations with responsibilities of the project and/or to receipt of documents related to the project. 10

Late 1976 – receipt of the master plan and the scope of the project. Noted favourable comments on the concept.

Preliminary considerations on possible financing scheme, basically set up in Europe in connection with the involvement of European contractors.

It was followed by:

A. receipt of documentation regarding the signing of exchange conditions between the Hong Kong Government and Hong Kong Resort Co Ltd on September 10th 1976.

B. receipt of documentation in connection with economics of the project, including project overview, feasibility report and estimation of land cost made by various consultants. 20

C. meetings in Paris – agreement of principle on the outlines of acceptable financing schemes based upon:

(i) Long term loans, guaranteed by SNCI bonds for the principal and by a "BASKET" of deposits, bank guarantees (US Banks) and mortgage on parcels of Ta Yue Shan Land.

(ii) Requirement to parcel the land in order to affect individual mortgage to various segments of the financing, in particular to cover:

– on the one hand, the most difficult financing of infrastructures. 30

– in the other hand, the financing of the individual program (hotels, houses, etc. . . . . .).

(iii) sekectueeee selection of a major French Contractor for carrying out the infrastructures which appeared the cornerstone of the project.

October/November 1976 – receipt of positive indications on the proposed scheme:

A. From Banks and Financial Institutions in Luxembourg and Belgium.

Supreme Court of Hong Kong Exhibits "CKK-1" Telex from Jonathan North to Appellant's solicitors 24 Apr 1978 (Contd.)

B. From French contractor, societe francaise D'Entreprises de Drageges et Travaux Publics, and we were remitted also a copy of the agreement signed between this French Company and Hong Kong Resort Co Ltd.

C. From the progress of the parcelling out the project Land. In this respect, a copy of the carving out plan was received. This plan shows the signature of Anstalt Soro's Chairman and Hong Kong Resort Co Ltd's representatives dated October 12 1976.

NOTE: Informations were then received that option agreement with Anstalt Soro was passed to the name of Anstalt Nybro and later on, that the option has been exercised by Anstalt Nybro. We have in our fles copy of the related doucments.

1st quarter 1977 – exchange informations were kept from both sides until April 1977, when it became evident that the project will be delayed. 10

I hope that hose records will fit, and/or complement, with your own ones. It is my considered opinion that, should the project have progressed as planned end of 1976, realistic schemes were underwat fir finalizing packages including financing, managment, supply of equipment and construction, based upon agreements, options, and/or positive indications given by reputed names in banking and constructing field.

In this respect, Anstalt Nybro's interest if it still stands as we learnt, has been badly hurt. If you deem advisable, we are, However, ready to examine with you the possibility to adapt previous packages after reviewing the present situation for the development of his property. 20

Yours sincerely,
B. CHAPRON
DIRECTOR
UNQUOTE
REGARDS NORTH

Supreme
Court of
Hong Kong
Exhibits
"CKK-1"
TElex from
Jonathan
North to
Appellant's
solicitors
24 Apr 1978

"CKK-1"
Affidavit of K.K. Chu (No. 3)
(Appellant)

This Exhibit is the same as "CKK-1" in the Affidavit of K. K. Chu (No. 2) and is located at Page 233.

"CKK-2"
Affidavit of K.K. Chu (No.2)
(Appellant)

TELEX FROM J. NORTH TO APPELLANT'S SOLICITORS

25th April, 1978

ATTN: K.K. CHU AND COMPANY

Dear Sirs,

RE: HONG KONG RESORT CO. LTD. (HKR): ANSTALT NYBRO (NYBRO)

I refer to a telephone conversation between Mr. J. North and me of 22nd April 1978. During that conversation Mr. North inquired if I recalled the circumstances surrounding the grant of an option by HKR to Nybro relating to certain parcels of land forming part of a resort development on Lantau Island, and subsequent exercise of such option. I indicated that I did and the matter was discussed at some length. Mr. North then inquired as to whether I would be prepared to make a statement under oath briefly summarizing my recollection of the matter for the purposes of providing evidence in proceedings against Nybro in Hong Kong.

I readily agreed and now confirm my willingness to swear to the truth of the attached statement which at the date hereof has not been sworn merely in view of the urgency with which Mr. North impresseed on me to send such statement to yourselves as solicitors to Nybro.

I understand that, and consent to this letter and the statement attached being used in evidence in the proceedings in the Hong Kong proceedings.

Yours faithfully,
Robert B. Anderson

I, Robert B. Anderson, of Khakum Wood Road, Greenwich, Connecticut, U.S.A., do hereby state the following:

1. I became a director of Hong Kong Resort Co. Ltd. in 1974. In December 1975 I submitted my resignation to Mr. E.Q.C. Wong, However, I have been informed that my resignation was not recorded on the books of the company. Mr. Wong has continuously kept me informed as to the actions and proposals made to HKR.

2. As director and advisor of HKR my duties were principally to assist that company in raising non-local finance for its project at Lantau Island.

3. Mr. Edward Wong Wing Cheung the chairman and managing director of HKR kept me advised of the affairs of HKR particularly in so far as they related to external financing possibilities.

4. Following the execution in September 1977 of the conditions of exchange and the infrastructure contract with the French group "Dragages", I was informed the HKR board took the view that the Financial obligations of HKR under infrastructure

contract would be best served by promoting joint ventures with contractors over parts of the Lantau Site.

5. I recall being informed that a number of negotiations were implemented in this respect, and that among these was an agreement achieved with Nybro which received the sanction of the board and was signed. I was informed that Anthony Jack Burgess joined the HKR Board to represent Nybro's interest.

6. The period end 1976 – early 1977 was financially difficult for HKR. HKR's Principal Bankers withdrew support in circumstances which I believe have caused HKR's shareholders to start separate proceedings against the Bank and this gave rise to real difficulties with the infrastructure contract. In addition HKR was receiving unfavorable and damaging press comment in Hong Kong. 10

7. By January 1977 Mr. Wong informed me that he was most anxious to cause the various joint venture partners to commit.

8. I recall by reference to my diary that Mr. Wong visited my office on or about Friday 28th January 1977. He had recently arrived from Hong Kong via Tokyo.

9. Our discussions ranged over the affairs of HKR which as mentioned were giving rise to concern at that time. Mr. Wong informed me during our discussions at that time that the option granted to Nybro had recently been exercised on behalf of Nybro by Mr. Burgess.

Signed Robert B. Anderson 20

April 25, 1978

"CKK-2"
Affidavit of K. K. Chu (No. 3)
(Appellant)

This Exhibit is the same as "CKK-2" in the affidavit of K. K. Chu (No. 2)

and is Located at Page 237

This Exhibit is the Judgment of Li J Located at Page 61

"JW-1"
Affirmation of JOHN Y.B. Wu (No. 4)
(Respondent)

LETTER FROM HONGKONG SHANGHAI BANK TO RESPONDENT

PRIVATE AND CONFIDENTIAL

30 May, 1978

Hong Kong Resort Co. Ltd.
26th Floor
Realty Building
Des Voeux Road C.
Hong Kong. 10

Attention: Mr. John Wu

Dear Sirs,

BANKING FACILITIES

You have informed us that a stay has been imposed on the Judge's Orders to erase Anstalt Nybro's registrations in respect of Lot No. 385, Demarcation District No. 352, Discovery Bay, Lantau Island.

The Bank has agreed in principle to offer certain facilities to the Company on the basis of the Company's ability to grant a first mortgage security to the Bank over the entire property under development and not merely certain portions of it.

However, if such a mortgage cannot be given we regret that we cannot maintain this offer of facilities. 20

Yours faithfully
(sd.) P. J. WRANGHAM
Chief Accountant

Supreme Court of Hong Kong
Exhibits
"CKK-1"
Telex from P. Knight to Appellant's solicitors
22 Aug 1978

"CKK-1"
Affidavit of K.K. Chu (No.6)
(Appellant)

TELEX FROM P. KNIGHT TO APPELLANT'S SOLICITORS

TO K. K. CHU

22/8/78

RE: ANSTALT NYBRO V HKR

I HAVE SPOKEN TO PRIVY COUNCIL. AN APPEAL WILL NOT BE HEARD UNTIL JANUARY 1979.

KIND REGARDS

PETER KNIGHT.

TOD 221948

10

Supreme
Court of
Hong Kong
Exhibits
"CKK-2"
Telex from
North & Co.
to Appellant's
solicitors
23 Aug 1978

"CKK-2"
Affidavit of K.K. Chu (No.6)
(Appellant)

TELEX FROM NORTH & CO. TO APPELLANT'S SOLICITORS

23.8.78

ATTENTION K K CHU

THANKS FOR YOUR TELEX OF 21ST AUGUST. BE ADVISED AS FOLLOWS:–

(A) NO VACATION BUSINESS IN PRIVY COUNCIL.

(B) IF LEAVE GRANTED IN HONG KONG ACTUAL APPEAL LIKELY HEARD EARLY HILARY SITTINGS. 10

REGARDS

NORTH + CO

DOCUMENTS OMITTED FROM THE RECORD

INDEX OF REFERENCE

No.	Description of Documents	Date
	PART I	
1.	Affirmation of Michael Pang Chiu Chiu	14 Mar 1978
2.	Notice of Writ (1st Defendant)	15 Mar 1978
3.	Notice of Writ (2nd Defendant)	15 Mar 1978
4.	Notice of Writ (3rd Defendant)	15 Mar 1978
5.	Affirmation of Kwan Siu Lung	15 Mar 1978
6.	Memorandum of Conditional Appearance (1st Defendant)	7 Apr 1978
7.	Memorandum of Conditional Appearance (3rd Defendant)	7 Apr 1978
8.	Memorandum of Conditional Appearance (2nd Defendant)	8 Apr 1978
9.	Affidavit of Henry Liang Sau Shan	8 Apr 1978
10.	Memorandum of Appearance (1006/78)	11 Apr 1978
11.	Order	11 Apr 1978
12.	Inter Partes Summons	12 Apr 1978
13.	Affidavit of Chu Ka Kim	18 Apr 1978
14.	Affidavit of Dennis Wong	18 Apr 1978
15.	Affirmation of Kwan Siu Lung	19 Apr 1978
16.	Affirmation of Kwan Siu Lung	19 Apr 1978
17.	Affidavit of Henry Liang Sau Shan	20 Apr 1978
18.	Memorandum of Appearance (1st Defendant)	20 Apr 1978
19.	Memorandum of Appearance (3rd Defendant)	20 Apr 1978
	PART II	
"HLSS-1"	Letter from E.W.C. Wong's solicitors to Respondent's solicitors	19 Apr 1978
"MWGY"	Conditions of Exchange other than Special Conditions, 5, 6 and 8	10 Sep 1976
----	Letter from A.J. Burgess to E. Baumgartner	6 Jan 1978
----	All duplication of Exhibits	-----