Privy Council Appeal No. 38 *of* 1978

Anstalt Nybro (formerly named Anstalt Soro) – – – *Appellant*

v.

Hong Kong Resort Co. Limited – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11th February1980

Present at the Hearing:

VISCOUNT DILHORNE
LORD SALMON
LORD FRASER OF TULLYBELTON
LORD RUSSELL OF KILLOWEN
LORD LANE

[*Delivered by* LORD LANE]

This is an appeal from a determination of the Court of Appeal of Hong Kong on August 16th 1978 dismissing an appeal from the judgment of Li J. delivered on May 12th 1978. The effect of those decisions was to order that the registration as an estate contract of an option agreement dated October 11th 1976 together with a letter exercising the option and also the registration as a *lis pendens* of a Writ of Summons in an action between the parties should be vacated on certain terms. The contention of the appellant is that those registrations should be restored.

The appellant (Nybro), formerly called Anstalt Soro but now renamed Anstalt Nybro, is an institution registered in Liechtenstein. Its precise composition is not altogether clear. The respondent (HKR) is a limited liability company incorporated under the Companies Ordinance of Hong Kong.

HKR has been since September 1976 in effect the lessee from the Crown of a large area of land at Discovery Bay on Lantau Island in the New Territories. The agreement between HKR and the Crown required HKR to develop the land in accordance with what was called a Master Layout Plan to be prepared by HKR and approved by the Secretary for the New Territories. That plan was in fact prepared and approved accordingly as Master Plan 3.5. It is no secret that building land in Hong Kong is very valuable. The proposed development of this site at Discovery Bay was likely to result in great profit to the developers. It also required the provision of large amounts of capital.

On October 11th 1976 HKR agreed in writing with Nybro to grant for a consideration of HK$50,000 an option to Nybro in respect of certain parts of the land. The material terms were as follows:—

"(1) In consideration of the payment by Soro to HKR of the sum of HK$50,000 . . . Soro shall have the option to participate in the ownership, development and subsequent management operation and exploitation of the said . . . . sections . . . .

(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 . . . ."

The effect of the proposed agreement was that HKR would provide the land; Nybro would provide some $2,250,000 as capital for the three companies.

The agreement goes on:

"(3) The three companies to be formed . . . . shall . . . . develop such sections in accordance with the Master Plan . . . .

(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".

A further plan was prepared and agreed called the "Carving Out Plan". This showed the areas of Plan 3.5 which it was proposed to allocate to each of the three companies to be formed.

By the early months of 1977 for reasons which are not material the financial support which HKR had enlisted had been withdrawn and the company faced serious difficulties. On March 31st 1977 there was a petition to wind it up. However a consortium came to the rescue and on December 13th 1977 the petition to wind up was dismissed. A new board of directors took control of the company. The new board apparently were of the opinion that the earlier Master Plan 3.5 was not satisfactory. They prepared a new plan (Master Plan 4.0). Its emphasis was more on providing facilities for recreation and accommodation for the residents of the Colony, whereas the earlier plan (3.5) had been directed more to the tourist than the resident. There is some doubt as to the precise date upon which this plan was approved by the Secretary for the New Territories and upon what terms and subject to what amendments but approved it has certainly been and developments are proceeding upon the basis of Plan 4.0. This much was clear from information provided to the Board by the parties during the hearing.

Meanwhile it is alleged by Nybro that on January 24th 1977 by letter they informed HKR that they wished to exercise their option "on 1st March 1977". HKR contend that that letter is not genuine; that it was written long after the date it bears; that it was not a valid exercise of the option. Those

are issues which, it was agreed, cannot be determined on affidavit. They must be decided at trial. For the purposes of the present appeal it must be assumed that the letter of January 24th 1977 was genuine and that the option was validly exercised.

There are two main issues to be decided:

(1) Is the agreement void for uncertainty, so as to render its registration ineffectual?

(2) Is the agreement one which in all the circumstances is properly the subject of registration under the relevant Ordinance?

It is agreed that the two registrations, that of the estate contract and that of the *lis pendens*, stand or fall together.

1. *Uncertainty*

HKR contend that the option agreement is void for uncertainty on two separate grounds. The first ground is that no provision is made in the agreement for any Articles of Association of the three companies to be formed. The argument advanced was that in a matter so important as the Articles of Association it was not to be supposed that the parties would be content to allow section 11(2) of the Companies Ordinance of Hong Kong (set out hereafter) to supply by means of its Table A the necessary Articles. Table A might produce deadlock at the very outset on the composition of the board of directors. It must therefore have been implicit that a further agreement would take place between the parties as to the appropriate Articles of Association. This implicit agreement to agree, it is said, rendered the contract uncertain and void. Nybro contend that since the companies were expressly according to the agreement to be formed under the Companies Ordinance of Hong Kong this apparent omission is indeed cured by section 11(2) of that same Ordinance which provides as follows:—

> "In the case of a company limited by shares . . . . . 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 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".

Li J., but not the majority of the Court of Appeal (Pickering J.A. dissenting), adjudged that this Ordinance cured any apparent uncertainty in the agreement. Their Lordships agree with the views of Li J. It may be that the parties to the agreement never considered the question of Articles of Association; it may be that they were content to rely upon Table A to supply the Articles for them. It is impossible to determine what was the process of thought. Nor does it matter. What is important is that the terms of the agreement that the three companies should be formed could be implemented without the necessity for any further agreement between the parties as to the Articles of Association. Section 11(2) of the Ordinance ensures this.

The second ground on which the alleged uncertainty is based is that the "development" to be supervised and the services to be provided by Nybro as manager are so ill-defined by the agreement as to be incomprehensible without some further agreement between the parties. Similarly, it is said, there was no provision for any remuneration to Nybro for its managerial services and no provision for the circumstances in which those services could be terminated on either side. These arguments were rejected by the Court of Appeal, in their Lordships' opinion rightly so. This was an agreement entered into by two responsible commercial organisations clearly believing

and intending that they were to be bound thereby and that enough terms had been expressed to make it workable. In such circumstances a court should shrink from declaring the agreement void unless the words used, however benignly interpreted, cannot result in sufficient certainty to make the bargain workable. See *Hillas & Co. Ltd.* v. *Arcos* (1932) 147 L.T. 503, 512, per Lord Tomlin. It was unnecessary to spell out the duties of the manager. They would consist primarily in obeying the proper orders of the board employing him which in its turn would be effectively controlled by HKR with its majority shareholding. Questions as to the circumstances in which the employment might be terminated would without difficulty be decided by the application of general principles. The fact that no provision is made by the agreement for payment to Nybro for its managerial services does not preclude the possibility of agreement between Nybro and the companies as to remuneration for those services; but as Nybro concedes, the fact that no such provision was made means that Nybro cannot claim to be entitled under the agreement to remuneration. That may be unfair, but even if it is, unfairness is a far cry from uncertainty. Nybro might very well have considered that the potential profitability of the venture made it worthwhile to provide a competent manager at its own expense to supervise operations. Subordinate staff would have to be supplied by the companies. Indeed, Nybro, who were to provide the cash, may well have thought that for the protection of their investment it was essential that they should be entrusted with the management. There is in their Lordships' opinion nothing uncertain about this stipulation and HKR's arguments on uncertainty fail.

2. *Registration*

The Land Registration Ordinance provided as follows:

Section 2(1)

> "The Land Office shall be a public office for the registration of deeds, conveyances, and other instruments in writing . . . .; and all deeds, conveyances, and other instruments in writing . . . . . by which deeds, conveyances, and other instruments in writing . . . . . any parcels of ground . . . . . in the Colony may be affected, may be entered and registered in the said office . . . . . ".

Section 3(1)

> "All such deeds, conveyances, and other instruments in writing . . . . . registered in pursuance hereof, shall have priority one over the other according to the priority of their respective dates of registration".

Section 3(2)

> "All such deeds, conveyances, and other instruments in writing . . . . . which are not registered shall, as against any subsequent *bona fide* purchaser or mortgagee for valuable consideration of the same parcels of ground . . . . . be absolutely null and void to all intents and purposes . . . . . ".

Section 4

> "No notice whatsoever, either actual or constructive, of any prior unregistered deed, conveyance, or other instrument in writing . . . . . shall affect the priority of any such instrument as aforesaid as is duly registered".

There are corresponding provisions as to the registration of *lites pendentes*. The immense importance of registration is apparent.

There is no doubt that the agreement was *prima facie* registrable. If the parties had carried out their respective obligations "parcels of ground in the Colony" would have been in one sense of the word "affected", at least indirectly.

However, it is only where the agreement may create some interest legal or equitable in the parcel of ground that the instrument can be the subject of registration under the Ordinance.

The question that has to be considered in the present case is this. If the case proceeds to trial is there any likelihood that specific performance of the option agreement would be ordered? If so, then the land may be "affected" by Nybro's equitable interest and the agreement is registrable. If not, there is no sufficient interest affecting the land and it was right to order the entries to be vacated.

Mr. Hunter put forward an argument based on a distinction between what he termed on the one hand the jurisdiction of the court and on the other hand the discretion of the court to grant specific performance. Only if it is clearly demonstrated that the court would have no jurisdiction to grant specific performance, he suggested, should HKR on this point succeed. By lack of jurisdiction in this context their Lordships understood him to mean circumstances such that no court would even consider making such a decree. For example, a case where the only obligation to be enforced was one for purely personal services. Where the outcome was less certain than that, he contended, the court was not entitled of its own motion to conduct a trial by affidavit nor to forecast future factual findings nor to pre-empt what amounts to the future discretion of the trial judge. For their Lordships' part, they do not consider it realistic to make the distinction between jurisdiction and discretion in this way. There is always an element of discretion in the decision to grant or withhold specific relief. Some cases are clear one way or the other, some are nicely balanced. Even at this interlocutory stage, if it is clear that no court directing itself properly would grant a decree of specific performance then the entries should be vacated and Nybro left to their possible remedy in damages.

The factual situation, from which there is no escape, is at present this. The option agreement was wedded to Plan 3.5 and the "Carving Out Agreement". It is now clear that the Government has approved a different plan, Plan 4.0, and more recently on November 17th 1979 has also approved extensive amendments to Plan 4.0. Their Lordships do not have a copy of the amended Plan 4.0, but it is as clear as anything can be, first that it bears little resemblance to Plan 3.5 with which it is inconsistent, and secondly that the Government is now firmly backing Plan 4.0 and would be extremely unlikely to sanction a return to Plan 3.5. Thus the venture which was the basis of the option agreement is now no longer alive and it would be an empty exercise to decree specific performance of an agreement which is to all intents and purposes dead and buried. Such a decree would not exhume the agreement because the Government would not be affected by it.

For this reason alone, even assuming the registration to have been initially justified because the agreement then might have affected land, the agreement no longer does so and the entries are rightly vacated.

That is enough to conclude the argument in favour of HKR. There are however other equally cogent reasons for the view that specific performance would not in these circumstances be ordered.

This type of relief will not in general be ordered when to do so would be ineffectual or unnecessary. It is a vain exercise to try to force one person against his will to co-operate with another and it would not be proper to attempt by order to produce that effect. Equity does nothing in vain.

An order for specific performance here would have the effect of compelling the three companies to employ Nybro as manager in the development of the land. This was essentially a joint business venture as appears clearly from the evidence of Mr. Burgess, Chairman of Nybro, and also of Mr. Michael Wong Gai Yan. Both are agreed that the function of the option agreement was to commit the parties, upon exercise of the option, to a joint venture for the purpose of implementing the development. One must not overlook the fact that the activities of a limited company or Anstalt must be carried out by human beings. In this case the parties to the joint venture are HKR and Nybro, but the board of directors of Nybro was when the venture started an entirely different board, desirous of implementing a different form of development from that originally agreed. Nor must one overlook the fact that the human beings will be those very people by and against whom accusations of fraud in relation to the exercise of the option have been made. To attempt to force these parties into the joint venture of operating Plan 3.5, or indeed any other plan, in these circumstances would at the best result in impasse and at the worst in chaos. No court would embark on such a course.

The result is that the entries in the Register remain deleted and Nybro is left to establish if it can that the option was properly exercised. If it then succeeds further in proving a breach by HKR, perhaps by way of repudiation, of its obligations under the agreement, it will be entitled to an award of damages. This in the circumstances would be the appropriate and an adequate remedy.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. There will be no order as to costs.

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ANSTALT NYBRO (FORMERLY NAMED ANSTALT SORO)

v.

HONG KONG RESORT CO. LIMITED

DELIVERED BY LORD LANE

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