

11/83

No. 28 of 1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

(Appellate Jurisdiction)

(On Appeal from High Court Action No. 2927 of 1973)

BETWEEN

SANG LEE INVESTMENT CO.LTD Appellant
(Third Party)

- and -

WING KWAI INVESTMENT CO.LTD First Respondent
(Plaintiff)

- and -

BALL LAND INVESTMENT CO.LTD Second Respondent
(In Liquidation) (Defendant)

CASE FOR THE FIRST RESPONDENT

1. This is an appeal from the Order of the RECORD
Court of Appeal of Hong Kong exercising appellate No. 23
jurisdiction (Cons, J.A., Young and Bewley JJ.) at p.112
dated 18 July 1980 dismissing an appeal by the
present Appellant from the judgment of McMullin J. No. 15
(exercising original jurisdiction) dated 10th at p.55
March 1979. The Order of McMullin J. and of the
Court of Appeal was a decree of specific performance
of two agreements for the sale and purchase of a block
of flats in Quarry Bay, one being for a sale thereof by
the Appellant to the Second Respondent ("the First
Agreement") and the other being for a sale thereof

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by the Second Respondent to the First Respondent ("the Second Agreement"); and the order provided for consequential relief. The Court of Appeal unanimously upheld McMullin J's order.

2. For the sake of consonance with the terminology employed in the judgments below the following phrases will be employed in this Case:-

- (i) Reference to "the Plaintiff" means the First Respondent.
- (ii) Reference to "the Defendant" means the Second Respondent.
- (iii) Reference to "the Third Party" means the Appellant.

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A-7

at p.147

A-8

at p.155

3. The First Agreement was dated 17 January 1963 and made between the Third Party (Vendor) and the Defendant (Purchaser); and the Second Agreement was dated 20 February 1963 and made between the Defendant (Vendor) and the Plaintiff (Purchaser). The Second Agreement was a sale on by the contracting purchaser under the First Agreement. The flats were not then built, nor had building commenced. The circumstances leading to the execution of the said two agreements are fully set out in the judgment of McMullin J. and are not in dispute. Nor is it now disputed that the two Agreements are both valid and enforceable at law. The sole issue now raised is whether McMullin J. was right in granting the discretionary remedy of specific performance of the two Agreements. The Third Party contends that the equitable remedy of specific performance ought to have been refused by the courts below because it is alleged that the Defendant does not come to court with clean hands and therefore should not be afforded the equitable remedy of

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specific performance, without which the Plaintiff's claim to obtain specific performance against the Defendant must necessarily fail.

4. The essential facts found or admitted are sufficiently summarised in paragraphs 2 and 4 of the Case for the Second Respondent, to which reference is made, mutatis mutandis.

10 5. At the Trial, the Third Party's case was that there was a conspiracy (to which the Defendant was a party) to strip the Defendant of its assets and render it insolvent; and that both Agreements were therefore tainted with illegality. There were formidable legal difficulties in the way of that contention. In particular, it is difficult to see how it could afford the Third Party a defence to an Action brought on the First Agreement by the Defendant. The Defendant must have been the victim of any such conspiracy, not a party to it: see Belmont Finance Corporation Ltd. v. Williams Furniture Ltd. [1979] Ch. 250. If the existence of such
20 a conspiracy were capable of affording the Third Party a defence to the Defendant's claim, the Defendant would lose twice over; once as a result of the fraud, and once by the loss of the contract. On the other hand, if the Third Party is bound by the First Agreement, it cannot intervene to prevent an onward sale by the Defendant to the Plaintiff, either by the Second Agreement, or by any other agreement they may reach.

30 6. However this may be, the allegation that there was a fraudulent conspiracy to strip the Defendant of its assets was rejected by the Trial Judge, whose finding was upheld by the Court of Appeal. It must now be taken to be abandoned, since the only contention now raised

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by the Third Party is that the Defendant is precluded from obtaining equitable relief in respect of the First Agreement by reason of its alleged unconscionable conduct; and that, in the absence of a specifically enforceable First Agreement between the Third Party and the Defendant, the Plaintiff's claim against the Defendant to enforce the Second Agreement must fail. The Third Party did not plead or particularise a case for refusal of specific performance against the Third Party founded on allegations that the Defendant came to the Court with unclean hands.

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7. The Plaintiff submits that this appeal is misconceived for the following reasons.

8. First, the two Agreements have been substantially performed.

(1) As conceded by the Third Party, the whole of the purchase price payable under the Second Agreement has long ago been paid by the Plaintiff to the Defendant, and 90% of the purchase price payable under the First Agreement has long ago been paid by the Defendant to the Third Party. Only 10% of the purchase price payable under the First Agreement (by agreement abated from \$126,173.40 to \$96,000.00 because of discrepancies in area) remains payable by the Defendant to the Third Party on completion. The Third Party has refused tender of this sum, which was lodged in Court by the Plaintiff pursuant to the order of McMullin J. made on the 10th March 1979. (It was later released on the granting of a stay of execution on the judgment of McMullin J. because interest is not payable on funds in Court in Hong Kong). The sum remains available for the Third Party on completion.

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- (2) As found by McMullin J: "actual possession of the 47 flats to which the agreements Documents A4 and A5 relate was given to the Plaintiff and Plaintiff's sub-purchasers shortly after the occupation certificate was issued."
- (3) Possession has been retained by sub-purchasers from the Plaintiff for more than 12 years.

10 9. In these circumstances, the Plaintiff's claim is more in the nature of a claim to perfect a de facto title than for specific performance of an executory contract. This has always been a most material consideration when considering whether or not to grant the discretionary remedy, or whether to refuse it on purely equitable grounds: see, for example, Crofton v Ormsby (1806), 2 Sch. Lef. 583, and Williams v. Greatex, [1957] 1 W.L.R. 31 C.A.; where laches was in issue.

20 10. Second, the conduct now complained of by the Third Party is not sufficiently, or at all, connected with the subject-matter of the suit.

30 General depravity unconnected with the contract sought to be enforced is no bar to relief: Dering v. Winchelsea 1 Cox 318; Moody v. Cox & Hatt, [1917] 2 Ch. 71 at pp.85-86. Courts of equity do not judge the moral character of litigants in the abstract, but in relation to the relief sought: Argyll v. Argyll, [1967] Ch. 307 at p.332. To deprive a Plaintiff of his equitable remedy, his conduct must be such as would render it unjust to the Defendant to grant the relief sought by the Plaintiff. It must "have an immediate and necessary relation to the equity sued for": Spry on Equitable Remedies 2nd Edn. at p.232: and see Meyers v Casey, (1913) 17 C.L.R. 90.

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11. The conduct complained of by the Third Party consists of :-

- (i) payments made by the Defendant to its shareholders, alleged by the Third Party to constitute an unlawful declaration of dividend or return of capital, but found by the Trial Judge to be loans;
- (ii) alleged breaches of fiduciary duty by the Defendant as a partner of the Third Party.

12. The conduct of which complaint is made thus has no, or no sufficient, connection with the subject-matter of these proceedings, namely the sale by the Third Party to the Defendant, and the onward sale by the Defendant to the Plaintiff, of a block of 47 flats. In particular:-

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- (1) The Trial Judge found that the intention of the First Agreement was to take the 47 flats out of the partnership, and so to enable the Third Party's partner to dispose of them for its own sole benefit.
- (2) It is not alleged that there was anything unconscionable in the Defendant's conduct leading to the conclusion of the First Agreement. Subsequent breaches of the Defendant's obligations as partner are extraneous to and cannot affect its right to enforce the First Agreement.
- (3) Even if there were an unlawful element in, or arising out of, the payment to members of the syndicate of the sums mentioned in the judgments below, this was a transaction between the Defendant and its members and wholly extraneous to the First and Second Agreements. Refusing the relief sought by the Plaintiff against the Defendant, or by the Defendant against the Third

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Party, would not preclude the Defendant from recovering any of its moneys unlawfully paid away.

(4) No call for further contribution to the partnership capital (i.e. after the initial contribution) was ever made on the Defendant by the Third Party.

(5) Any need for additional capital was created by the wrongdoing of the Third Party as found by McMullin J.A. in his further judgment given on 3rd January 1980.

No.21
at pp.107,109
No.23
at p.121-122

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13. It is submitted that there is no principle of law or equity which entitles the Court to refuse an equitable remedy on the ground of unconscionable or even unlawful conduct which is extraneous to the transaction sought to be enforced: see Curragh Investments Ltd. v. Cook, [1974] 1 W.L.R. 1559 at p.1563. Similarly, unconscionable behaviour by a party, but in a different capacity, does not disentitle him from obtaining equitable relief against the other: Moody v. Cox & Hatt (supra).

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14. Third, the Third Party was fully aware of what was happening and what was intended.

(1) Kwan Fan Fat (who was the "guiding spirit" behind the Third Party) had access to the counsels of first the Syndicate and later the Defendant through his son Kwan Kong-pui and through his personal assistant Lee Shiu-man, who were both members of the Syndicate and of the Defendant, Kwan Kong-pui being also a Director of the Defendant

Judgment of
McMullin J.
No.15
at p.59,90

(2) Third Party knew and intended that the 47 flats sold by it to the Defendant would immediately be sold at a heavy discount. As the Court of Appeal

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found: this was the only way in which the Defendant could raise immediate cash, which was what both the Defendant and the Third Party wanted.

15. Fourth, the Third Party has, with full knowledge, affirmed the transactions:-

- (1) by delivering possession of the 47 flats in or shortly after October 1967;
- (2) by acting as selling agents accounting to the Plaintiff in sales of the flats to sub-purchasers, and by taking commission for so acting.
- (3) by acquiescing in designating, and for many years continuing the designation, in the joint venture accounts as equal liabilities of itself and the Defendant the said two sums of \$1,135,560.60 each.

No.15
at p.70,76

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16. Fifth, third party rights have come into existence with the knowledge and acquiescence of the Third Party. It would be unjust to the sub-purchasers from the Plaintiff for the Court to refuse the decree of specific performance.

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17. Sixth, the Third Party now concedes that the Agreements are valid and enforceable at law.

The Third Party does not now claim rescission of the contracts, but only the refusal of the equitable remedy, which would leave the other parties to their remedies in damages. Yet all the circumstances already referred to show that the equitable remedy is alone appropriate.

18. The reality of the position in 1962, and now, is that both partners agreed to and did appropriate partnership assets at an early stage. The Third Party took money and the Defendant took flats in lieu, but with a view to subselling the flats for cash. The Third Party having had the full benefit of its appropriation now seeks to withhold from the Defendant and those deriving title through the Defendant the formal stages which remain to be completed to give full effect to the Defendants' equal and balancing appropriation. To accede to that desire would be unjustly to enrich the Third Party at the expense of the Defendant and to deprive the Plaintiff of the benefit of its contract.

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19. Accordingly the First Respondent contends that this appeal should be dismissed and the order for specific performance should be upheld for the following (among other) reasons:-

BECAUSE the two Agreements have been substantially performed, and persons who are not parties to this suit have taken rights in the property which is the subject matter of this suit.

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BECAUSE it has not been shown, nor was it the case, that the learned trial judge was wrong in exercising his discretion to grant a decree of specific performance or the Court of Appeal was wrong in upholding him.

BECAUSE the concurrent findings of fact in both courts below are that there was no dishonest scheme or fraudulent conspiracy in which the Defendant was implicated (and none was suggested in the Court of Appeal); so that the Defendant was the victim rather

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than a participant in any reduction of its assets.

BECAUSE there was no unconscionable conduct on the part of the Defendant relating to the transaction of the sale to it of 47 flats or to the remedy sought in this action.

BECAUSE any conduct to which objection might be taken was not, or not sufficiently, connected with the subject matter of this suit.

BECAUSE the trial judge's findings of fact and his exercise of his discretion were correct.

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BECAUSE any divergence from the trial judge's findings in the Court of Appeal which may be found to be correct did not, and do not, justify a reversal of the trial judge's exercise of his discretion.

BECAUSE the Third Party has, with full knowledge, affirmed the transaction.

P.J.MILLETT
BENJAMIN LEVY

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CASE FOR THE FIRST RESPONDENT

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