

Sang Lee Investment Co. Ltd. - - - - - Appellant

v.

Wing Kwai Investment Co. Ltd. and Another - - Respondents

FROM

THE COURT OF APPEAL OF HONG KONG

---

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 12TH APRIL 1983

---

*Present at the Hearing :*

LORD FRASER OF TULLYBELTON

LORD EDMUND-DAVIES

LORD SCARMAN

LORD BRIGHTMAN

LORD TEMPLEMAN

[Delivered by LORD BRIGHTMAN]

---

This is an appeal against orders for specific performance of two contracts made as long ago as 1963 for the sale and re-sale of land forming part of a large property development in Hong Kong. The original vendor is Sang Lee Investment Co. Ltd. ("Sang Lee"). The original purchaser is Ball Land Investment Co. Ltd. ("Ball Land") which is now in liquidation. The sub-purchaser is Wing Kwai Investment Co. Ltd. ("Wing Kwai"). Wing Kwai is the plaintiff in the action and the first respondent to this appeal. Ball Land is the defendant, and the second respondent. Sang Lee was brought into the action as third party, and is the appellant. The High Court of Hong Kong made orders for specific performance against Sang Lee and Ball Land. Sang Lee appealed to the Hong Kong Court of Appeal. The appeal was dismissed. Sang Lee now appeals to Her Majesty in Council. Specific performance was originally resisted by Sang Lee on a number of grounds. All save one have now been disposed of. Before this Board specific performance is resisted, in substance, on the sole ground that "the respondents were not entitled to equitable relief by reason of the fact that they did not come to a Court of Equity with clean hands". Although the nature of this assertion will require considerable elaboration, it is the only point in the appeal.

In 1961 a Hong Kong business man, Mr. Mok Tsze Fung ("Mr. Mok") became interested in the development potentiality of a site at Quarry Bay, Hong Kong. He entered into negotiations with the owner of the site, Davie, Boag and Co. Ltd. ("Davie Boag"), which held under a Crown Lease for a long term of years. A purchase price of \$6,091,200 was agreed.

Mr. Mok did not wish, or was not able, to finance this project on his own. So he secured initial finance from two sources. He approached a business associate Mr. Kwan Fan Fat ("Mr. Kwan"), who was a director of and played a prominent part in the affairs of Sang Lee. The other directors of Sang Lee were Mr. Ma To Sang ("Mr. Ma"), Mr. Hudson Chen Wood ("Mr. Chen") and Mr. Mok himself. It was arranged that Sang Lee should have a half interest in the project and should find the deposit on the purchase money and certain preliminary expenses. It was also arranged that Mr. Mok should form a syndicate from among members of his family and his business friends who would have the other half interest in the project. There would be a partnership between Sang Lee and the syndicate. The syndicate would act in the first instance through the agency of a company called Far East Land Investment and Guarantee Co. Ltd. ("Far East") in which Mr. Mok was interested, pending the formation of a company (in the event, Ball Land) of which the members of the syndicate would be the shareholders. The business of the partnership was to be managed and the development project was to be carried out by Sang Lee as agent for the partnership.

The project took shape as one whereby the site, some 50,000 sq. ft., would be developed as three separate estates. The estates, which came to be called Tak Lee, Wai Lee and Po Lee, would each contain a number of high rise blocks, the ground floors of which would be shops and the upper floors would be residential flats. There were to be 1,335 units in all. These would be sold off before construction began in consideration of the payment by purchasers of a down deposit and the promise of future instalments. The money so received would be utilised to finance the project. In this way it was conceived that the project would be self-financing and that a large profit would ultimately result for the benefit of Sang Lee and the syndicate without their having to raise any substantial capital out of their own pockets.

It was also agreed at this stage that each partner should take as its separate property two of the blocks, all of which were then still in the planning stage, which would be allocated to it at something less than the list price of the units, the consideration being payable to the partnership. The partners were to be free to sell their allocation to outside purchasers at whatever price they might achieve. Mr. Mok chose on behalf of his syndicate two blocks in the Wai Lee estate, which came to be called blocks one and three. This arrangement was not in the end followed to the letter, because Sang Lee took out cash instead of property.

Mr. Mok formed a syndicate which initially consisted of himself and 17 other members, who contributed amounts varying between \$20,000 and \$108,000. Mr. Mok himself was the second largest contributor. The syndicate included Mr. Lai Kwai Tim ("Mr. Lai"), who was the moving spirit, if not the owner, of Wing Kwai. By 9th October 1961 the members of the syndicate had contributed \$628,000. Mr. Mok promised them a speedy return of their initial investment.

On 25th October 1961 Mr. Mok entered into an agreement with Davie Boag to buy the leasehold interest in the site, which was described as "The remaining portion of section B of Quarry Bay Marine Lot No. 1". A 10% deposit, \$609,120, was payable on the execution of the agreement. A further 10% was to be paid on 25th April 1962. A further 30% was to be paid when possession was given in mid-1963 and the final 50% on completion at the end of 1964. The dates for possession and completion, and the amounts then payable, were, however, altered by a later agreement. On the same day as the agreement, Mr. Mok executed a declaration of trust in favour of Sang Lee.

The accounts of the project were drawn up and audited on the basis that a partnership was in existence as from 25th October 1961. This accords with the finding of fact made by the trial judge. It would seem therefore that the declaration of trust should have been in favour of the partnership and not in favour of Sang Lee alone.

By early 1962 revenue in the form of deposits on the forward sales of units was coming to hand. It was received by Sang Lee as agent for the partnership. It was the duty of Sang Lee, as the manager of the affairs of the partnership existing between itself and the members of the syndicate, and later between itself and Ball Land, to keep a separate banking account for money which it received from forward sales of units and from borrowings, and out of which it would answer payments for construction costs, loan interest and other expenses. However Sang Lee kept no separate banking account, but mingled partnership monies with its own monies. This breach of duty was responsible for most of the confusion into which the affairs of the partnership were thrown.

On or about 19th March 1962 Far East, as agent for the syndicate, paid a sum of \$563,737 to Sang Lee as its contribution to the capital of the partnership. This was made up of half the initial deposit of 10%, plus half the commission agreed to be paid to Mr. Mok, and half two other small outgoings met by Sang Lee. This sum of \$563,737 was shown as the capital of the partnership contributed by each partner from the inception of the partnership down to the balance sheet as at 31st March 1968. There is a finding of the trial judge that "the capital investment of both partners has remained throughout the sum of \$563,737 as shown in the books of account. Though (Sang Lee) was indeed the active partner in the scheme there is nothing to show that (it) contributed anything out of its own coffers to replenish the scheme."

In February or March 1962 transactions took place for the purpose of implementing the agreement whereby the syndicate would be allocated blocks one and three of the Wai Lee estate. These transactions took the following form, and there are the following comments to be made upon them:—

- (1) The partnership lent the sum of \$1,135,560 to each partner.
- (2) Two agreements were drawn up and signed. Under one agreement ("the first sale agreement") Sang Lee agreed to sell and Far East agreed to buy what were expressed to be 47/1335 parts of the site together with the right to hold and enjoy to the exclusion of Sang Lee the 47 units specified in the agreement. The consideration was a sum of \$1,261,734 of which \$1,135,560.60 was payable as a deposit on the signing of the agreement, leaving a balance of \$126,173.40 payable on completion. As a matter of strict analysis Sang Lee was vendor in its capacity as agent for the partnership and Far East was purchasing in its capacity as agent for the syndicate.
- (3) Under the other agreement ("the second sale agreement") Far East agreed to sell and Wing Kwai agreed to buy the same property in consideration of \$771,875.50, 10% being payable on the signing of the agreement and the remainder by instalments on 19th March and 19th April 1962. It is not now in dispute that the consideration has been fully paid, although the manner in which it was satisfied is not wholly clear.
- (4) Although a re-sale at little more than half the cost of purchase might appear to have been a re-sale as an undervalue, this was not in fact the case. The sum of \$771,875.50 was found by the trial judge to be a proper price for the forward sale of the unbuilt blocks.

(5) The first and second sale agreements are not in evidence and have presumably been lost or are otherwise not available. However, the trial judge recorded that it was common ground between the parties that these two agreements were identical in content with two confirmatory agreements later made on 17th January and 20th February 1963 to which reference will be made later.

(6) It was a term of the first sale agreement that "On issuance of the occupation certificate and payment of the balance of the purchase price (Sang Lee) and all other necessary parties (if any) shall execute a proper assignment of 47/1335 equal undivided parts or shares of and in the said property, or as the case may be, to (Far East) or its successors and assigns subject as hereinafter appears but otherwise free from incumbrances. The assignment shall be in the form usually adopted by (Sang Lee's) solicitors for the sale of flats."

(7) The trial judge found that "the intention of the parties . . . was that, upon the issue of the occupation certificate and payment of the balance, the assignment should follow promptly without further ado whatever the interim condition of the project then might be". Sang Lee was not therefore intended to have any right to defer completion because the loan of \$1,135,560.60 had not been repaid to the partnership.

(8) Thereafter Wing Kwai sold off certain of the 47 units. These sales were made by Sang Lee as agent for Wing Kwai. Sang Lee accounted to Wing Kwai for the consideration money received, and in due course placed the sub-purchasers in possession.

By the end of March 1962 the capital of the syndicate had been increased from its former level of \$628,000 to \$640,000 by the receipt from the syndicate's major contributor of a further sum of \$12,000. Most of the \$640,000 went out during this month to Sang Lee in recoupment of the syndicate's half share of the expenses of the purchase from Davie Boag and Mr. Mok's commission.

As a result of the consideration paid under the second sale agreement, Far East was now in sufficient funds to enable the members of the syndicate to receive reimbursement in accordance with the representation when they subscribed. A sum of \$320,000 was paid out to members of the syndicate in April 1962, and a similar sum in June 1962.

On 25th April 1962 the second payment of 10% of the purchase price, namely \$609,120, was due to be made to Davie Boag, and presumably this sum was paid over by Sang Lee out of deposits received on forward sales.

On 4th December 1962 Ball Land was incorporated as a limited liability company. Its capital was \$640,000. The directors included Mr. Mok and Mr. Lai. The shares were allotted to the members of the syndicate credited as fully paid, but no money was actually paid by the shareholders to Ball Land in consideration of the allotment. It is apparent from a reading of the minutes of the first board meeting of Ball Land that the directors saw no relevant distinction between the syndicate and the company, because the transactions of the syndicate—the purchase and re-sale of the 47 units and the return of the two sums of \$320,000 to the members of the syndicate—were recorded and approved as if they had been the transactions of the company. To a lawyer this was a startling misconception but a layman might have viewed matters differently. In substance, on the incorporation of the company the members of the syndicate, formerly trading with unlimited liability, merely turned themselves into a corporation trading with limited liability.

At this stage one would have expected to find a formal assignment to Ball Land of the interest of the syndicate in the partnership with Sang Lee. Such an assignment seems to have been made in a somewhat roundabout way. It will be recalled that Far East was agent or trustee for the benefit of the members of the syndicate. It was Far East which had acquired the 47 units from the partnership and had then sold them on to Wing Kwai. On 14th December 1962, just after the incorporation of Ball Land, Far East wrote the following letter to Sang Lee. The letter reads:

*" Re: R.P. of Sec. B of Q.B.M.L. No. 1*

Pending the incorporation of a syndicate who are to acquire one moiety of the interest and responsibility in the above property including its future development our names have been used and put on record in the minutes of your Board Meetings as Nominees for such interested party. We have to give you notice that since the said syndicate has been incorporated on the 4th instant by the name of Ball Land Investment Co., Ltd. you are required to accept the said Ball Land Investment Co., Ltd. into the joint venture for the development of the said property in our place and stead.

We hereby renounce and abandon all our claims and interest in the said property and undertake to indemnify you in respect of all responsibilities that may arise on the part of the said Ball Land Investment Co., Ltd.'s non performance or observance of the partnership agreement to be entered into between them and you."

On the assumption that this letter was written with the authority of or was ratified by the members of the syndicate, it had by implication the effect of consenting to the vesting in Ball Land of the interest in the partnership previously vested in Far East as trustee for the members of the syndicate. This follows from the fact that Far East, as trustee for the syndicate, gave up "all our claims and interest in the said property". Their Lordships wish however to make a further observation on this letter. It is expressed as an indemnity by Far East in respect of all responsibilities that might arise on the part of Ball Land by reason of its non-performance of the partnership agreement "to be entered into". Prima facie therefore Far East guaranteed the liabilities of Ball Land to the future partnership. As however Far East was a bare trustee for the syndicate, the members of the syndicate would prima facie be jointly and severally liable to recoup to Far East any payments which Far East was called upon to make to Sang Lee pursuant to the guarantee, assuming that the guarantee was properly given on behalf of the syndicate. So in the end it may well be that, as a result of this letter, the members of the syndicate continued to be under a liability to Sang Lee notwithstanding that their place in the partnership was taken by Ball Land. The true construction and effect of this letter is not however a matter for present decision.

On 5th December 1962 Far East paid out to the persons who were members of the syndicate and also shareholders in Ball Land a sum of \$128,000. This money, or the bulk of it, can only have come out of deposits received by Sang Lee from forward sales. Some of the receipts are in evidence, and they describe the payments as "refund of a part of the profit on Davie Boag site". This was equivalent to a 20% bonus on the original investment by the members of the syndicate of \$640,000 which had been repaid in April and June. If it is correct to regard the interest of the syndicate in the partnership as having at that stage become vested in Ball Land, so that Ball Land owned a half share of the deposits on forward sales, such distribution by Ball Land was clearly improper.

It is now necessary to revert to the agreement with Davie Boag, and to go into some detail because it helps to explain the terms of the partnership agreement which followed at the end of the month. The original agreement was altered on 6th December 1962 by a supplemental agreement which reduced the purchase price to \$6,096,600 to allow for an error in the measurement of the area of the site. It also divided the site into what were called the pink land and the green land. Possession of the pink land was to be advanced to 15th January 1963, on payment of \$775,708.38. Possession of the green land was to be given on 30th June 1963 as before, on payment of \$1,053,271.62. Completion of the sale of the pink land was advanced to 15th July 1964, when 50% of the apportioned balance of the purchase money was to be paid. Completion of the green land was to take place on 31st December 1964 as before.

On 31st December 1962 Sang Lee and Ball Land entered into a partnership deed. The deed recited the original agreement with Davie Boag and the supplemental agreement signed three weeks previously. It was recited that Sang Lee had agreed to admit Ball Land into the joint venture for developing the Quarry Bay site, and that upon the treaty for the joint venture it was agreed that Ball Land should pay to Sang Lee for its own use and benefit the sum of \$3,048,300, being one moiety of the purchase price of the property. The deed then provided for the payment of such moiety by instalments; \$609,120 on the execution of the agreement; this was presumably intended to cover one half of the \$609,120 deposit already paid to Sang Lee by the syndicate, and half of the second sum of \$609,120 which became due for payment under the original purchase agreement on 25th April 1962. The payment of this sum by Ball Land was expressed to be acknowledged. A further sum of \$387,854.19 was to be paid by 15th January 1963. This was equivalent to one half of the instalment of purchase money due to be paid by that date under the supplemental agreement with Davie Boag, being the date by which vacant possession was to be given of the pink land. A further sum of \$526,635.81 was to be paid by 30th June 1963. This was equivalent to one half of the instalment due to be paid by that date on vacant possession being given of the green land. A final sum of \$1,523,610, being half the balance of the purchase money, was to be paid on 30th December 1964. This does not quite fit the supplemental agreement, which required the final instalment of the purchase money in respect of the pink land to be advanced to mid-July 1964. The instalments specified in the partnership deed, oddly enough, add up to a little less than the total sum expressed to be payable to Sang Lee, but nothing turns on this. Another oddity of the deed is that one partner is expressed to be under an obligation to pay a moiety of the future instalments of the purchase money to the other partner "for its own use and benefit". One would have expected that each partner would have been under an obligation to pay matching instalments to the partnership. There is no express obligation imposed on Sang Lee to pay matching instalments to the partnership but it is not in dispute that such an obligation on the part of Sang Lee is to be implied.

Clause 3 of the partnership deed reads:

"The said property shall belong to the parties hereto in equal shares and shall upon the request at any time of Ball Land be at the cost of the parties hereto duly assured to and vested in the parties hereto in joint tenancy and in the mean time shall be held by Sang Lee in trust for the parties hereto."

Clause 9 of the partnership deed provided that "Sang Lee shall have the sole and exclusive management of the business and shall devote its

whole time and attention thereto and carry on and manage the same for the common benefit of the parties hereto to the utmost of its skill and ability . . .”.

The trial judge recorded that, apart from the share in the initial deposit, it was common ground that Ball Land never paid any of the specified instalments. He also found, as already mentioned, that there was nothing to show that Sang Lee ever contributed anything out of its own coffers (except the deposit).

On 17th January and 20th February 1963 agreements were executed which were to all practical intents identical with the first and second sale agreements except that the name of Ball Land was substituted for the name of Far East. The broad effect of these agreements was to vest in Ball Land the benefit, and to subject it to the liabilities vested in and imposed on Far East (as trustee for the members of the syndicate) by the first and second sale agreements. The 1963 agreements will be referred to as the third and fourth sale agreements. These are the agreements sued upon by Wing Kwai.

The first accounting period of Ball Land ended on 31st March 1963. Messrs. Lowe, Bingham and Matthews certified the company's accounts on 15th October 1963. Mr. B. J. Young, of that firm, pointed out to Ball Land's accountant that profits could not properly be distributed by the company before they had been earned. Thereafter in each year he required each shareholder who had received and retained monies in this way to sign an acknowledgment of his indebtedness to the company. Despite this advice, on 29th October 1963 Ball Land paid out a further \$51,200 to its shareholders. The Court of Appeal was clearly right in saying that Ball Land paid only lip service to the advice it received from its auditors.

On 22nd July, 1964, a week after the due date under the supplemental agreement, Davie Boag assigned the pink land to Sang Lee. Under clause 3 of the partnership agreement Ball Land could have insisted on an assignment to Sang Lee and itself as joint tenants. Apparently this was not required by Ball Land. In the result, under the terms of clause 3, Sang Lee held the pink land upon an express trust for itself and Ball Land. Exactly what money had to be paid to Davie Boag on this occasion is not clear, because only the total consideration of \$2,585,694 is stated in the assignment, but presumably it was 50% of this amount or thereabouts. The share which ought to have been contributed by each partner, but was not, would therefore have been about \$646,000.

On the same day Sang Lee mortgaged the pink land to the Bank of East Asia to secure an immediate loan of \$1,500,000 and further advances of a like amount. This was followed by a guarantee given by Mr. Kwan, Mr. Ma and Mr. Chen to the bank on 1st August 1964. (The guarantee was expressed to relate to a different section of the Quarry Bay site, but that was presumably a clerical error.)

The first formal meeting of the partnership was held on 28th October 1964. This meeting, like all other partnership meetings of which minutes appear in the record, was chaired by Mr. Kwan or his nominee Mr. Kan Man. It is of some significance that Mr. Kwan reported as follows, “Regarding the financial state of the construction site, it is believed that there will not be any great problem because of the following items of sources:—

- (1) Raw material in store;
- (2) Income by way of monthly instalments; and
- (3) Mortgage with the Bank,

hence it can be dealt with adequately.”

On 30th December 1964 a fourth and final instalment of \$1,523,610 was due from Ball Land under the terms of the partnership agreement. It was not paid. Nor was any matching payment made by Sang Lee.

By the end of 1964 the project ceased to be self-financing, and Sang Lee resorted increasingly to borrowed money. The euphoria which had greeted the project at its inception began to evaporate.

On 7th January 1965 Davie Boag assigned the green land to Sang Lee alone. The total consideration was \$3,510,905.40, so that the sum then paid was presumably half, and the share of each partner of the order of \$877,000. On the next day Sang Lee mortgaged the green land to the Bank of East Asia to secure an immediate advance of \$1,500,000 and further advances of a like amount. Although ostensibly a provision of new money, the mortgage was said by the Court of Appeal to have been treated merely as collateral for the existing advances. A further guarantee was given on the same day by Mr. Kwan, Mr. Ma and Mr. Chen. Further loans were raised on mortgage in January and March 1966. The latter mortgage, for \$750,000, consisted of or included the separate property of Sang Lee.

In March 1966 a further and last payment of \$64,000 was made to the shareholders of Ball Land.

In 1967 and 1968 further money was raised in order to complete the construction works. This included \$900,000 advanced to the partnership personally by Mr. Kwan, Mr. Ma and Mr. Chen at 24% interest per annum.

On 27th October 1967 an occupation certificate was issued in respect of the whole development. Under the terms of the third sale agreement, Sang Lee was required upon payment of the balance of the purchase price (then \$126,173.40) to execute an assignment of the 47 units to Ball Land, which in turn was obliged under the fourth sale agreement to make an assignment without further payment to Wing Kwai. No such assignments were made, but possession of the 47 units was given by Sang Lee to Wing Kwai and its sub-purchasers.

In 1969, 1970 and 1971 Mr. Kwan, Mr. Ma and Mr. Chen advanced further moneys to the partnership, at interest.

On 23rd September 1970 Wing Kwai wrote to Ball Land protesting at the delay in executing assignments of the 47 units in favour of itself and its sub-purchasers.

In November 1971 Ball Land was compulsorily wound up on the petition of Mr. Kwan, Mr. Ma and Mr. Chen, the petition being based on a judgment debt for the \$500,000 initially loaned by them to the partnership.

By March 1972, the bank loans had been paid off out of money received from the sale of the Tak Lee estate and loaned by Mr. Kwan, Mr. Ma and Mr. Chen.

On 3rd October 1973 Wing Kwai issued a writ against Ball Land for specific performance of the fourth sale agreement pursuant to leave given by the companies court. Leave was given on the terms that the liquidator should issue a third party notice against Sang Lee at the cost of Wing Kwai claiming specific performance of the third sale agreement and an account of the partnership dealings, and that Wing Kwai should indemnify the liquidator against any award of costs against him.

When the action came to trial, there were three issues before the judge. First, whether Wing Kwai had paid to the syndicate the sum of \$771,875 due under the second sale agreement. At an advanced stage of the trial an agreed statement of facts was produced, and in this



statement it was accepted that the money had been paid by Wing Kwai. This issue therefore went. The second issue was whether the sum of \$1,135,560.60 was paid by Ball Land (or perhaps more accurately by the syndicate) to Sang Lee (as agent for the partnership) under the first sale agreement, having regard to the fact that the money was borrowed from the partnership. That issue was decided by the trial judge against Sang Lee, and was not pursued by Sang Lee when the case went to appeal. The third issue was whether there was any other reason to refuse Wing Kwai a decree of specific performance.

This last issue became the only issue when the case went to the Hong Kong Court of Appeal, and is the only issue before the Board. The argument of Sang Lee was that Ball Land had disentitled itself by its inequitable conduct to a decree for specific performance against Sang Lee, and that therefore, and also by its own misconduct, Wing Kwai was itself precluded from getting a decree of specific performance against Ball Land.

The principal allegation of Sang Lee was that Mr. Mok had devised a scheme, to which Mr. Lai was a party, that was intended to have and did have the effect of stripping Ball Land of its assets, so that when Ball Land entered into the partnership agreement it was nothing but an empty shell incapable of fulfilling its obligations thereunder. The result, it was said, was that if the development project prospered and the forward sales produced enough money to finance the development, Ball Land would be entitled to its share of the profit; if however the project foundered, Ball Land would be incapable of fulfilling its financial obligations. The shareholders stood to gain a large profit, if all went well, but to lose nothing in the reverse situation. This was a fraud on Sang Lee which disentitled Ball Land and Wing Kwai to equitable relief.

During the course of the argument at the trial, counsel for Sang Lee expressly withdrew the allegation that there was an intent on the part of Mr. Mok and Mr. Lai to defraud creditors of the syndicate and of Ball Land. Five contentions however remained, one of which still involved a charge of fraud or something akin to fraud. Contention (1): it was said that the third sale agreement should not be enforced because it provided a means for the return by Ball Land to its shareholders of the whole of their capital, and that such payments were unlawful in the absence of a court order. Contention (2): it was said that the agreement should not be enforced because Ball Land unlawfully paid dividends out of non-existent profits. Contention (3): it was said that there was a breach of section 48(1) of the Companies Ordinance (prohibiting a company from giving financial assistance for the purchase of its own shares). Contention (4): it was said that the third sale agreement constituted "an essential part of the mechanism of an unconscionable scheme devised by Mr. T. F. Mok to ensure a fail-safe passage for himself and his colleagues in the syndicate through any possible vicissitudes of the joint venture to the detriment of its partner". Contention (5): it was said that all these tainting and vitiating factors affected the fourth sale agreement by reason of the fact that Mr. Lai and Wing Kwai had been throughout privy to Mr. Mok's scheme.

As regards contentions (1) and (2), if the sums of \$128,000, \$51,200 and \$64,000 were paid by Ball Land out of its assets, whether as a purported return of capital or as purported dividends out of profits, there can be no doubt that such payments were unlawful and a breach of duty on the part of the directors of Ball Land. Sang Lee sought to rely on such unlawful acts as misconduct disentitling Ball Land to equitable relief. The trial judge, however, found that the payments were genuine loans by Ball Land to its shareholders, and therefore not unlawful payments.

Contention (3) was not accepted by the judge. It has not been argued before their Lordships, and no more need be said about it.

Contention (4) was rejected by the trial judge, who exonerated Ball Land and Wing Kwai and their constituent members from all charges of fraud or duplicity. This finding is of prime importance. Whatever unlawful acts or breaches of contract were done by Ball Land and Wing Kwai or their constituent members, there was no intention to defraud or overreach Sang Lee.

In arguing contention (4), Sang Lee also submitted at the trial that Ball Land was guilty of inequitable conduct because it had failed to pay the instalments due from it under the partnership deed. This submission was rejected by the trial judge because Ball Land's failure to pay was part of the accepted pattern of events. Nor was there any evidence that Sang Lee had contributed anything from its own money except the original deposit which the partners shared equally. The judge also found that Ball Land was never called upon to pay the instalments specified in the agreement.

In the result, the trial judge made an order that Ball Land and Sang Lee should cause an assignment of the premises, the subject-matter of the third and fourth sale agreements, to be executed in favour of Wing Kwai or its nominees, subject to Wing Kwai paying into court the sum of \$96,000 which was the agreed abated balance of the purchase money due from Ball Land under the third sale agreement.

Sang Lee appealed. The submission on appeal was that the conduct of Ball Land and Wing Kwai had been so unconscionable that the court ought not in equity to enforce the sale agreements, but should leave Ball Land and Wing Kwai to their remedies at law. At this stage the submission rested on three contentions only, which either by themselves or in conjunction were said to be sufficient for refusing equitable relief. First, that there was a fraudulent scheme between Mr. Mok and Mr. Lai, and perhaps other members of the syndicate, and thus between Ball Land and Wing Kwai, of the nature already adumbrated. This contention was again rejected, so that there is a concurrent finding of "no fraud". Secondly, that the three payments of \$128,000, \$51,200 and \$64,000 were either an unlawful reduction of capital or an unlawful payment of dividend from non-existent profits. On this issue the Court of Appeal rejected, and in their Lordships' view rightly rejected, the finding of the trial judge that the payments were genuine loans. Thirdly, that Ball Land was in flagrant breach of its fiduciary duties under the partnership agreement, in particular by failing to pay the sum of \$3,480,000 due from it thereunder. The Court of Appeal held that it was a verbal quibble to say that Ball Land was not called upon to contribute to the finances of the partnership, because it was well aware of the urgent need for money.

Sang Lee accordingly succeeded on its second and third contentions. The Court of Appeal nevertheless dismissed the appeal because (1) Sang Lee knew full well what Ball Land was doing and gave its blessing and (2) Sang Lee was the worse offender because it had abused its position as manager by using partnership monies for its own private ends and had committed other admitted breaches of faith, upon which it is unnecessary to enlarge. These defaults on the part of Sang Lee are explained at length in a second judgment of the trial judge, as a result of which an account of the partnership dealings was directed to be taken on the footing of wilful default. Sang Lee has not appealed from that order.

With so many issues fallen by the wayside, Sang Lee was left before their Lordships with only two arguments in support of the proposition that misconduct on the part of Mr. Mok and his company, implicating Mr. Lai and his company, deprived Wing Kwai and Ball Land of the right to specific performance. One argument is founded on the alleged failure of Ball Land to answer its financial obligations to the partnership. The other argument is founded on the alleged breaches of company law in relation to Ball Land; that is to say the wrongful allotment to the members of shares credited as fully paid up, and the wrongful payment of \$128,000, \$51,200 and \$64,000. Counsel accepts that the grant of a decree of specific performance is primarily a matter for the discretion of the trial judge. But he seeks to facilitate a review of the exercise of that discretion by relying on the fact that it was partly based on a misconception of the true nature of the payments to the members of Ball Land.

As already indicated, Sang Lee's basic proposition in this appeal, as it was in the courts below, is that, "as specific performance is an equitable remedy, a party who calls for the aid of a Court of Equity must come with clean hands". It is accepted that the want of probity, to disentitle a plaintiff to equitable relief, must arise "in the transaction"; it must have "an immediate and necessary relation to the equity sued upon". See *Cadman v. Horner* (1810) 18 Ves. 10, *Dering v. Earl of Winchelsea* (1787) 1 Cox 318.

One of the more helpful statements to which their Lordships were referred is to be found in the American case of *Weegham v. Killefer* (1914) 215 Federal Reporter 168, 171, quoting from an earlier authority: "A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud or any unconscionable act in the transaction which forms the basis of his suit." Two conditions are therefore to be satisfied by the litigant who seeks to resist equitable relief on the ground of the misconduct of his opponent. First, such conduct must be wanting in good faith. Secondly, it must be "in the transaction" which is the basis of the suit.

Their Lordships will deal first with the alleged breach by Ball Land of its financial obligations to the partnership. Their Lordships have already mentioned the fact that there is now no dispute that the purchase money expressed to be payable under the sale agreements must be treated as paid, save for the adjusted balance of \$96,000 due from Ball Land to Sang Lee. It is true that neither the syndicate nor Ball Land ever repaid the loan of \$1,135,560.60 which was advanced to the syndicate to finance the first sale agreement. But this does not avail Sang Lee, because not only did Sang Lee omit to require the loan to be called in, but it has never repaid to the partnership its own matching loan of the same amount, as Sang Lee's counsel conceded during the course of his reply. Furthermore, although it is correct that Ball Land never paid the last three instalments due from it under the terms of the partnership agreement, amounting to \$2,438,100, this again does not avail Sang Lee. For at the close of his reply counsel was constrained to agree that Sang Lee was by implication, if not expressly on the true construction of clause 3 of the partnership agreement, under an obligation to make the like contribution to the partnership, and that it had never done so. The most that could be laid at the door of Ball Land was its failure to match the loan of \$750,000 made by Sang Lee in March 1966, and

the loans amounting to \$2,888,800 made by Mr. Kwan, Mr. Ma and Mr. Chen in the period 1968 to 1971. Counsel did not advance any reason why Wing Kwai should be prejudiced by these non-fraudulent defaults—if they were defaults—on the part of Ball Land committed three years or more after Wing Kwai had acquired its equitable interest in the 47 units.

Their Lordships turn finally to the alleged wrongful acts done by the directors of Ball Land in the conduct of the internal affairs of that company. The first of such acts to be considered is the allotment of 64,000 shares of \$10 each credited as fully paid. When and how such allotment was made is not clear. No allotment is mentioned in the minutes of the first board meeting of the company which took place on 4th December 1962. The allotment is however treated in the balance sheet of 31st March 1963 as an accomplished fact. There was no intermediate board meeting. However that may be, there is no evidence that any allottee paid Ball Land for his shares in money, or in money's worth equivalent to the nominal value of his shares. In the absence of such evidence, the shares are not entitled to be treated as fully paid up and should not have been so allotted. The remaining unlawful acts were the payments of \$128,000 (5th December 1962), \$51,200 (29th October 1963) and \$64,000 (March 1966). These payments, if made out of money which then belonged to Ball Land, must have been unlawful unless they were loans, for there were no profits that could lawfully be distributed and there was no capital that could lawfully be returned to the shareholders. As already indicated, their Lordships have no difficulty in accepting the finding of the Court of Appeal that these payments were not genuine loans. There is a possibility that the assets of the syndicate had not become vested in Ball Land as early as 5th December 1962, in which case the \$128,000 must have been paid, and would have been lawfully paid, out of the syndicate's share of the partnership assets. There is however no purpose in attempting to analyse these transactions of Ball Land more deeply. First, there is no finding that Ball Land thereby intended to defraud or overreach Sang Lee. Secondly, these transactions had no connection whatever with any of the four sale agreements. The first and second sale agreements were made some 9 months before Ball Land was even incorporated, and the third and fourth sale agreements were mere reflections of the earlier agreements.

In the result their Lordships respectfully disagree with the Court of Appeal that there was any relevant unlawful conduct on the part of Ball Land which would or might disentitle Ball Land or Wing Kwai to a decree of specific performance. But apart from that consideration, their Lordships do not accept that in a case of this sort, where there are alleged improprieties on each side, the proper approach of the court in exercising its discretion is to compare the misconduct on the one side with the misconduct on the other side. The court should first decide whether there has been any relevant want of faith, honesty or righteous dealing on the part of the person seeking relief, and the court should then decide whether, as a matter of discretion and in all the circumstances, which may include any relevant misconduct on the part of the person resisting equitable relief, it is right to grant or refuse specific performance. There is no balancing exercise which falls to be performed.

In their Lordships' opinion the claim of Wing Kwai and Ball Land to a decree of specific performance is unanswerable. The agreement made between Mr. Mok and Mr. Kwan in 1961 was that each partner should take out of the project two blocks, which the partner was to be at liberty to sell to sub-purchasers for his own benefit. This would have been a futile arrangement unless a partner was to be in a position to make a good title to a sub-purchaser. Furthermore it was a specific term of the first and third sale agreements that Sang Lee should execute an

assignment as soon as an occupation certificate was issued and the balance of the purchase price paid. It was not made a term of such agreements, as it could have been, that Sang Lee should not be bound to execute an assignment unless not only had the balance of the purchase money been paid but also the syndicate, and Ball Land as its successor, had fulfilled their financial obligations to the partnership. Sang Lee had received 90% of the purchase price some 11 years before action brought, and in addition Sang Lee had put Wing Kwai into possession some 6 years before action brought. Nothing now remains to be done on the part of Ball Land except to pay the balance of the purchase price to Sang Lee, which Wing Kwai is willing to do in place of Ball Land. Nothing remains to be done on the part of Sang Lee except to clothe Wing Kwai with the legal estate. It would call for exceptional circumstances to deny Wing Kwai the legal title in such a case.

Their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs of the first respondent. The incidence of the costs of the second respondent raises a more difficult problem. Their Lordships do not know whether such costs are covered by any indemnity, and it is not necessary to enquire. What has troubled their Lordships is that the claim of the second respondent in this appeal is identical with the claim of the first respondent, namely, that the appeal should be dismissed and the decrees of specific performance upheld. In such circumstances their Lordships had difficulty in understanding why counsel for the first respondent could not also have represented the second respondent. Under Rules 41 and 64 of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982, it is expressly provided that ~~two or more respondents who enter separate appearances, or lodge separate cases, in the same appeal do so at their own risk as to costs.~~

After considerable hesitation, their Lordships have formed the view that the official receiver and liquidator was probably justified in taking the cautious view that he ought to be separately represented on the appeal, having regard to the complexity of the litigation and the difficulty of foreseeing exactly how the matter might develop during the course of the argument. Furthermore, the appellant did not raise any point on the separate appearance of the second respondent until after an observation thereon had been made by one of their Lordships. The appellant will pay the costs of the second respondent of the appeal.

**In the Privy Council**

---

**SANG LEE INVESTMENT CO. LTD.**

**v.**

**WING KWAI INVESTMENT CO. LTD.  
AND ANOTHER**

---

**DELIVERED BY  
LORD BRIGHTMAN**