

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

B E T W E E N :

MERCHANT CREDIT PRIVATE LIMITED Appellants

- and -

INDUSTRIAL & COMMERCIAL REALTY COMPANY LIMITED Respondents

10 CASE FOR THE APPELLANTS

1. This is an appeal from a judgment dated the 25th February 1980 of the Court of Appeal of the Republic of Singapore (Wee C.J. Sinnathwray and Chua J.J.) allowing an appeal from the judgment dated the 18th July 1979 of the High Court in Singapore (Choor Singh J.) and setting aside the said judgment and ordering the Appellants to pay the Respondents the sum of \$332,500 and \$265,963.56 for interest at the rate of 12% per annum from the 20th June 1973 to the 25th February 1980 after allowing for \$13,300 paid before commencement of action.

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2. The questions raised by this appeal are, firstly, whether the sum of \$332,500 was paid by the Respondents to the Appellants (i) pursuant to an unconditional agreement for the allotment of shares in the Appellants to the Respondents, or (ii) as a loan pending an allotment of such shares to be made only if a certain ice skating project proved to be a going concern, such loan to be repaid if the project was not proceeded with; and, secondly (subject to a contention that it should not be entertained at all), if such sum was paid pursuant to an agreement for allotment, whether the Appellants had waived or otherwise lost their right to make such allotment. There is also an alternative contention by the Appellants that the Respondents are estopped from demanding repayment of the sum in this action and a further question arises out of the application in the Respondents' favour by the Court of Appeal of the principle in

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Hughes v. Metropolitan Railway Co. 2 App. Cases 439. Finally, a question arises as to the date from which interest should run even if the Respondents are entitled to repayment.

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3. The background to the material events is set out in the following opening passage in the judgment of the Court of Appeal:

"The Respondents are a wholly owned subsidiary of Industrial and Commercial Bank (ICB). The Appellants were formed pursuant to a Shareholders' Agreement (the Agreement) dated 28th March 1972. The three shareholders in the Agreement were ICB, Arthur Lipper International Limited (ALI), and D.F.H. Sinclair (Sinclair). A material term in the Agreement was:

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"all share capital shall be allocated in such manner that the parties will at all times hold the same in the following proportions:

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ICB	-	47.5%
ALI	-	47.5%
Sinclair	-	5%

and the parties hereto undertake with each other that as and when required they shall subscribe for the capital of the Company in the proportions aforesaid."

The Appellants were incorporated on 7th of April 1972. The initial issued share capital was \$100,000. On 3rd of May 1972 the authorised capital was increased to \$ 1 million, and the issued share capital of \$300,000 was subscribed for by the three shareholders in the proportions aforesaid.

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The directors of the Appellants were Y.K. Hwang (nominee of ICB) as Chairman, William H. Crafter (nominee of ALI) and Sinclair. From January 1975 Arthur Lipper III (Chairman of ALI) sat on the board of directors as an alternate to Crafter.

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The Appellants were primarily engaged in merchant banking. They participated in some business ventures. In early 1973, the directors decided to invest in an ice-skating project in Kuala Lumpur. For that purpose, land and equipment were to be purchased, amounting to about \$1 million.

In order to raise the necessary funds, the shareholders at an Extraordinary General Meeting, on 20th of June 1974, resolved to increase the authorised share capital of the /Appellants/ from \$1 million to \$2 million. At about that time it was decided by the board of directors of the /Appellants/ that the three shareholders would subscribe for further shares in the /Appellants/, that is to say ALI and ICB, each 332,500 shares and Sinclair 35,500 to increase the issued share capital to \$1 million. It was further agreed that the capital so contributed would be credited to a share application account in the books of the /Appellants/."

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4. The increase in share capital and the decision of the board of directors of the Appellants were made in the light of the recommendations of one of the directors, William Crafter, contained in letters dated the 26th April and the 11th May 1973. The shareholders through their nominee directors agreed to subscribe for the further shares in accordance with the shareholders' agreement save that it was further agreed that the Respondents would subscribe for shares instead of its parent company The Industrial & Commercial Bank Limited ("I.C.B.").

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p.137  
p.255  
p.28 L.1-23  
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p.33  
L.34-46

5. On the 28th June 1973 the Respondents applied for the 332,500 shares pursuant to the agreement and enclosed a cheque for \$332,500 in payment for which a receipt was issued. On the 30th June 1973 Arthur Lipper International Limited ("A.L.I.") paid its subscription of \$332,500.

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p.28 L.36-42  
p.140  
p.141  
p.29 L.1-3

6. Y.K. Hwang (the nominee of I.C.B.) then informally suggested to the other two directors that the shares should not be issued until the ice skating project got going. The other directors did not object to this suggestion. There was a dispute of fact as to whether the question of the refund of the moneys subscribed was discussed.

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p.23 L.31-48  
p.29 L.16-41  
p.30 L.1-10  
p.32 L.2-6  
p.33 L.47-51  
p.34 L.1-7  
p.23 L.36-42  
p.34 L.3-4  
p.38 L.32-42

7. The moneys subscribed were used to purchase land and equipment in connection with the ice skating project.

p.29 L.6-11  
p.34 L.1-7

8. After the purchase, the Appellants tried to resolve the question of the zoning of the land to enable it to be used for commercial purposes. Nothing came of it and the project was abandoned

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p.34 L.10-18

- Record by December 1974.
- p.154-158 9. Towards the end of 1974, I.C.B. wanted to  
p.160 realise its investment in the Appellants and in  
p.167-170 December 1974 and January 1975 negotiations took  
place between I.C.B. and A.L.I. with a view to  
A.L.I. purchasing I.C.B.'s shareholding and  
procuring the return to the Respondents of the  
sum of \$332,500 paid into the share application  
account. By early February 1975 these  
negotiations broke down and nothing came of them. 10
- p.188-189 10. At a meeting of the board of directors of  
the Appellants on the 30th April 1975 it was  
resolved to continue to try and dispose of the  
land and ice skating equipment as speedily as  
possible and that the proceeds of sale should be  
applied in the repayment of the funds due to  
I.C.B. and A.L.I. then held in the share  
application account and it was also resolved that  
interest at the rate of 12% per annum be paid on  
the said share application monies as from the 1st 20  
December 1974.
- p.203 11. By a letter dated the 5th July 1975 the  
Respondents demanded a refund of the sum of  
\$332,500 together with interest at the rate of  
12% per annum from the date of payment to the  
Appellants.
- p.217 12. By a letter dated the 9th October 1975 the  
Appellants, through their solicitors, rejected  
the Respondents' claim.
- p.265 13. At an Extraordinary General Meeting of the 30  
Appellants held on the 31st March 1976 it was  
resolved that the directors be authorised to  
allot 655,000 ordinary shares in the capital of  
the Appellants at par being 332,500 shares each  
to the Respondents and to A.L.I.
- p.32 14. The said shares were allotted pursuant to  
L.37-38 the said resolution and a share certificate sent  
p.243 to the Respondents on the 7th May 1976 but the  
p.244 Respondents returned the same on the 10th May  
1976. 40
- p.1-8 15. In the meantime the Respondents had  
started this action on the 3rd April 1976  
claiming the return of the said sum of \$332,500  
with interest at the rate of 12% per annum from  
the 28th June 1973. By an amendment dated the 7th  
September 1976 the Respondents also sought a  
declaration that their application for the said  
shares had lapsed or been withdrawn and any  
purported allotment of shares in the Appellants

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- 10 to the Respondents pursuant to the said resolution of the 31st March 1976 was void. The Respondents' claim was based upon a term to be implied in their application that any allotment of shares must be made within a reasonable time after which the application would lapse and also based upon a withdrawal of their application in December 1974 and prior to the allotment. By the said amendment the Respondents contended in the alternative that the purchase money was paid to the Appellants as a loan which in the events that happened became repayable on demand or within a reasonable time of the abandonment of the ice skating project.
16. The Appellants by their Defence and Counterclaim relied in substance on the material facts set out above and counterclaimed for a declaration that the Respondents were shareholders in the Appellants in respect of the said 332,500 shares, the allotment having been validly made pursuant to a binding agreement to allot. The Appellants also raised an alternative defence based on promissory estoppel whereby it was contended that the Respondents were estopped from demanding the return of the sum claimed until the land and ice skating equipment purchased with it were sold. p.10-16
17. The action came on before Choor Singh J. on the 15 July 1979 and on the 18th July 1979 the learned Judge dismissed the Respondents' claim and made a declaration as sought on the Appellant's counterclaim. p.43
18. On the 30th August 1979 the learned judge gave reasons for his judgment. p.43-48
19. Having set out the facts, the learned judge found that in June 1973 there was a binding contract between the Appellants and the Respondents for the allotment of the said 332,500 shares to the Respondents. The learned judge further held that the request by Y.K. Hwang to defer the actual issue of shares was a binding variation of the contract for allotment, but it did not, and could not, entitle the Respondents to a refund of the subscription monies. p.46 -  
p.46 L.8  
p.46  
L.16-30  
p.46 L.30-35  
p.46 L.35-38  
p.47 L.7-25
20. The learned judge rejected the Respondents' alternative claim that the purchase money was paid to the Appellants as a loan. p.46  
L.39-50
21. The learned judge also upheld the Appellants' alternative defence that the p.47 L.26 -  
p.48 L.31

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Respondents were estopped from demanding the return of the sum of \$332,500 until the land and ice-skating equipment purchased with it were sold.

22. By notice of appeal dated the 13th August 1979 the Respondents appealed to the Court of Appeal. The appeal came on before Wee C.J. and Sinnathway and Chua JJ. on the 25th February 1980 when the Court of Appeal made the order now appealed from. The Court of Appeal gave their reasons in writing on the 26th September 1980.

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p.62 L.46  
- p.63 L.18

23. The reasons were given in the form of a judgment of the whole Court, and in it the Court of Appeal first rejected the learned Judge's findings of fact as to an agreement to allot with a subsequent variation, and instead found that the sums were paid as a loan and that the sums were to be repaid if the project was not proceeded with. The Court of Appeal then went on to hold that if there was an agreement to allot, the Appellants right to make an allotment under it failed because the Appellants had in January 1975 waived their right, and the Respondents were entitled to repudiate the contract and claim a refund.

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p.63 L.22  
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p.63 L.32  
-p.64 L.40

24. Finally the Court of Appeal held that on the principle of Hughes v. Metropolitan Railway Company 2 App.Cas.439 as applied in Brikom Investments Ltd. v. Carr 1979 Q.B. 467 it was not just and equitable for the Appellants to have issued the shares to the Respondents in March 1976 having, for over a year, treated the monies paid by the Respondents as a loan.

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25. The Court of Appeal did not deal with the Appellants' alternative submission based on promissory estoppel.

26. The Appellants respectfully submit that the Court of Appeal was wrong in rejecting the learned judge's findings as to the existence of a binding contract for allotment not subject to any condition, and in rejecting his finding that there was no agreement for a loan. There was evidence before the learned judge of an unconditional offer to subscribe for the shares, acceptance of such offer, and communication of the acceptance. There was no evidence of an agreement for a loan.

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27. The Appellants respectfully submit that the Court of Appeal was also wrong in holding that, if there was a contract, the Appellants had "as early as January 1975" waived their right to allot shares pursuant to it, and that the Respondents

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were entitled to repudiate it. The resolution of the 7th January 1975, relied upon by the Court of Appeal, was passed in the context of negotiations between I.C.B. and A.L.I., which negotiations came to nothing but in any event such contentions involve questions of fact and law which were not pleaded investigated or argued in the Court below. Further, as a matter of law, the Appellants could not "waive" their rights under a binding contract for the allotment of shares.

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p.60 L.30-34

28. The Appellants respectfully submit that the Court of Appeal was also wrong in applying the principle in Hughes v. Metropolitan Railway Co. 2 App. Cases 439 at 448. Again, the contention was not pleaded or investigated or argued in the Court below, nor was it argued in hearing before the Court of Appeal. Even if the Court of Appeal was right to consider the application of the principle at all, there was no evidence that could lead to the conclusion that the dealings between the Appellants and the Respondents or I.C.B. amounted to a contractual variation of strict contractual rights dis-entitling the Appellants from issuing the shares in March 1976. In any event, no such variation could be made as a matter of law. Nor was there any evidence that the Respondents acted or relied in any way upon any words or conduct on the part of the Appellants which would make it inequitable for the Appellants to have made the said issue of shares. In any event, the principle cannot be invoked to found a cause of action which would be the case in the circumstances of this action by the Respondents.

29. Finally if the Court of Appeal was right to order the repayment of the sum of \$332,500 it was wrong to order the payment of interest from the 28th June 1973. In the circumstances set out in this Case there could be no implied obligation to pay interest on the sum, and the only express agreement to pay interest was to pay it as from the 1st December 1974.

p.188 L.46  
-p.189 L.3

30. On the 7th July 1980 the Court of Appeal of Singapore made an order granting the Appellants leave to appeal to the Judicial Committee of Her Britannic Majesty's Privy Council.

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31. The Appellants respectfully submit that the judgment of the Court of Appeal of Singapore was wrong and ought to be reversed and this appeal allowed with costs and the order of Choor Singh J restored for the following (amongst other)

1. Because there was a binding contract in June 1973 for the allotment of 332500 shares to the Respondents and the learned judge was right so to find.
2. Because the Court of Appeal ought not to have entertained any submissions by the Respondents based upon a waiver or variation of the parties' rights under such contract. 10
3. Because, if the Court of Appeal was right to have entertained such submissions, the Appellants had not waived and could not waive or vary their right to complete such contract by allotting shares pursuant to it.
4. Because the Respondents were not entitled to treat the Appellants as having repudiated such contract by such waiver or otherwise. 20
5. Because the Court of Appeal ought not to have considered the application of the principle in Hughes v. Metropolitan Railway Co. 2 App. Cases 439.
6. Because if the Court of Appeal was right to consider such principle there was no evidence to support its application in this action and in any event it could not be invoked by the Respondents as plaintiffs in the action. 30
7. Because even if the learned judge was wrong in his finding that there was a binding contract he was right in dismissing the Respondents' claim on the alternative basis that they were by their conduct estopped from demanding the refund of the \$332,500 in this action.
8. Because even if the sum of \$332,500 ought to be repaid to the Respondents, they are not entitled to interest thereon save as from the 1st December 1974. 40
9. Because the judgment of Choor Singh J was right and the judgment of the Court of Appeal was wrong.

T.L.G. CULLEN  
HELEN YEO



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PRIVY COUNCIL

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MERCHANT CREDIT PRIVATE LIMITED  
Appellant

- and -

INDUSTRIAL & COMMERCIAL REALTY  
COMPANY LIMITED  
Respondent

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CASE FOR THE APPELLANTS

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