

ON APPEAL  
FROM THE COURT OF APPEAL IN HONG KONG

BETWEEN :

ANSTALT NYBRO (formerly named  
ANSTALT SORO) Appellant

- and -

HONG KONG RESORT CO. LIMITED Respondent

CASE FOR THE RESPONDENT

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Introduction

RECORD

1. This is an appeal by leave of the Court of Appeal in Hong Kong, from a Judgment of that Court (Huggins and Pickering JJ.A. and McMullin J.) dated 16th August 1978 dismissing with costs an appeal by the Appellant from an interlocutory Order dated 12th May 1978 of the Supreme Court of Hong Kong (Li J. in chambers) by which two entries caused to be made by the Appellant in the Land Register were ordered to be vacated.

pp.157-158  
pp.128-151

pp.58-60

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2. Shortly stated, the question to be determined on this appeal is whether an agreement which was made between the Appellant of the one part and the Respondent of the other part is one by which land "may be affected" within the meaning of section 2(1) of the Land Registration Ordinance of Hong Kong. This question has been answered in the negative by both Courts in Hong Kong. If, as the Respondent respectfully submits, that answer is correct, then it is believed to be common ground that the orders for vacation were rightly made.

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3. The Respondent is a limited company incorporated under the laws of Hong Kong: and

pp.5-6

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it is and was at all material times the registered owner of a piece of land covering an area of approximately 66,217,000 square feet and fronting upon the sea, namely, Lot No. 385 in Demarcation District No. 352, Discovery Bay, Lantau Island in the Colony of Hong Kong (hereinafter called 'Discovery Bay'). The Respondent is and was at all material times in the process of developing Discovery Bay into a resort; and it is expected that such development will be completed by the end of March 1984 by which time the Respondent will have expended approximately HK\$1,451,900.00 thereon.

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p.7 & 41

4. The Appellant is an anstalt formed in Liechtenstein.

5. There are in existence four documents relied upon by the Appellant as giving it the right to participate in the ownership, development and subsequent management, operation and exploitation of twelve sections of Discovery Bay, namely:

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pp.175-178

(i) a document dated 11th October, 1976 purporting to be an agreement made between the Appellant of the one part and the Respondent of the other part and granting the Appellant an option so to participate,

p.178

(ii) a document purporting to be an addendum thereto dated 25th November 1976,

p.196

(iii) a letter dated 1st December 1976 from the Respondent to the Appellant, and

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p.198

(iv) a document which has the appearance of a typewritten letter dated 24th January 1977 from the Appellant to the Respondent stating that the Appellant wished to exercise such option on 1st March 1977, and upon which letter there is what appears to be a handwritten acknowledgement by the Respondent's then managing director, Mr. E.W.C. Wong, also dated 24th January 1977.

6. The three documents mentioned in items, (i), (ii) and (iii) of paragraph 5 above are hereinafter collectively referred to as 'the Agreement'. The document mentioned in item (iv) of paragraph 5 above is hereinafter referred to as 'the pretended letter'.

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7. A petition to wind up the Respondent was presented in March 1977 and the Official Receiver was appointed provisional liquidator. Thereafter a consortium acquired a controlling interest in the Respondent and enabled it to pay its debts (which totalled approximately HK\$37,000,000.00) following which the winding up petition was dismissed in December 1977.

p.5 & 34 -  
p.6 & 9

10 On 25th February 1977 (after the date of the pretended letter) the said Wong told two of the then directors of the Respondent that the Appellant had asked for an extension of the option to 30th June 1977, which was granted at a board meeting held on the same day and a letter to that effect was sent to the Appellant; there was no reply.

p.50 & 7  
and  
p.53 & 19

20 The pretended letter was not found in the Respondent's papers by the Solicitor in the Official Receiver's office who was concerned with the Respondent's affairs while the Official Receiver was the provisional liquidator of the Respondent nor was it found by the directors who took office thereafter. Although the said Wong had allegedly told three persons of the purported exercise of the option by the pretended letters, namely, a then off-shore director of the Respondent (whom he allegedly told in New York), a director of a French company which was at one time intended consultants in respect of the project in question (whom he allegedly told in Paris) and an officer of a Canadian company, which was also at one time consultants or intended consultants in respect of the said project (whom he allegedly told in, presumably, Toronto), neither the said Wong nor anyone else ever told either of the two directors with whom he spoke on 28th February 1977, or anyone else in Hong Kong concerned with the affairs of the Respondent at the material time of such purported exercise of the option.

p.13 & 33  
and p.55

p.108 & 26

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40 The Respondent contends that the pretended letter is a sham which was brought into existence long after the date it bears in furtherance of a conspiracy to which the Appellant, the said Wong, and the Chairman of the Appellant were parties.

The Appellant contends that the pretended letter is genuine in every respect.

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The Respondent contends that if the option was exercised by the pretended letter, such exercise was subsequently cancelled.

The Appellant contends that there was no such cancellation.

Contrary to the arguments advanced by the Respondent, the Learned Judge of first instance and the Court of Appeal held that there were triable issues on these points.

Consistently with the well established practice of Your Lordships' Board not to interfere on final appeals with concurrent findings of fact in the Courts below except in very special cases, the Respondent does not propose to pursue those arguments on this appeal.

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8. In the circumstances it is unnecessary further to re-state the facts. The Respondent will refer to the facts as set out in the Record and the Judgments in the Courts below both for the general background to the case and so far as may be necessary for the purposes of its arguments on the law.

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9. As to the law, the Respondent will on this appeal advance broadly the same arguments as it advanced in the Courts below. These arguments and the extent to which they were accepted can be shortly stated as follows:

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(1) The Agreement is wholly unenforceable because it is void for uncertainty. This argument was accepted by Li J. at first instance and by the majority of the Court of Appeal (Pickering J.A. and McMullin J.) but rejected by Huggins J.A.

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p.139 & 41  
and p.140  
& 39  
p.132 & 50

(2) Alternatively, the Agreement is enforceable only in damages and not by specific performance. This argument was unanimously accepted in the Courts below.

p.134 & 29  
p.140 & 23  
p.151 & 11

(3) If the Agreement is either (a) wholly unenforceable, or (b) not specifically enforceable, it does not "affect" the land and cannot be registered under the Land Registration Ordinance. Alternative (a) was conceded by the Appellant. The Respondent's argument on (b) was unanimously accepted in the Courts below.

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p.140 & 12

Preliminary Point

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10 10. Before the above arguments are elaborated, a preliminary point must be dealt with. In both Courts below the Appellant unsuccessfully objected that the orders to vacate the entries ought not to be made in interlocutory proceedings. The Respondent will respectfully submit that this objection was rightly overruled and that the questions of law were capable of being fully argued, and were fully argued, on both occasions. In the circumstances, "There is no point in going formally to trial when the discussion at the trial would be merely a repetition of the discussion on the summary procedure"; see Tiverton Ltd. v. Wearwell Ltd. (1975) Ch. 146, at p.156E, per Lord Denning M.R. It is well established both in England and Hong Kong that the Court will make an order of this kind on an interlocutory application if it is warranted by the circumstances; see e.g. 20 Heywood v. B.D.C. Properties Ltd. (1963) 1 WLR 975 (C.A.) and Thian's Plastics Ltd. v. Tin's Chemicals Ltd. (1971) H.K.L.R. 249 (Full Court). The Respondent will further contend that Your Lordship's Board are faced with the fact that two Courts in Hong Kong have taken the view that the orders could properly be made in interlocutory proceedings and that the arguments in favour of not making the orders are in any event not so 30 decisive as to require the Board to take a different view from that taken in Hong Kong; see the Judgment of the Board on the analogous question of summary proceedings for specific performance under the Jamaican equivalent of R.S.C., Ord. 86 in Rose Hall Ltd. v. Reeves (1975) A.C. 411, at p.418E-F.

Is the Agreement void for uncertainty?

40 11. Clause (1) of the Agreement gave the Appellant the option to participate in the ownership, development and subsequent management, operation and exploitation of the twelve sections of Discovery Bay "in the manner hereinafter set forth". It is therefore clear at the outset that the terms of the transaction between the parties are to be found in the Agreement itself and not outside it. As to those terms, the Respondent's contentions can be summarised as follows:

p.175 & 23

(1) Clause (2) provided for the formation of three limited companies "under the Companies

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Ordinance of Hong Kong". But the Agreement did not specify what the articles of association were to be. The articles of association of a company constitute the terms of the agreement between those who incorporate it. A contract to incorporate a company whose articles of association are not specified is therefore a classic example of an agreement to agree on terms which are not themselves agreed. Li J. and Huggins J.A. thought that section 11(2) of the Companies Ordinance would step in and supply the omission by adopting the articles in Table A en block. The Respondent contends that this view was erroneous and (inter alia) respectfully adopts what was said on this point by Pickering J.A. (with whom McMullin J. agreed). 10

p.70 & 35  
p.130 & 10

p.139 & 23  
p.140 & 42

p.176 & 18  
p.159

(2) Clause (3) provided that the three companies should develop their respective sections "in accordance with the Master Plan of HKR for the Ta Yue Shan Project". It is not permissible to look beyond the Master Plan, either at the Crown Agreement or, far less, at the other background material on which the Appellant relied. The Master Plan is not sufficiently detailed. The Respondent respectfully adopts the view of Li J. on this point. 20

p.71 & 8

p.176 & 22

(3) Clause (4) provided that the three companies should appoint the Appellant "as Manager to undertake and complete the development of their respective sections ... and to undertake and administer the running, operation and exploitation of the development when completed for a period" which might extend to, but could not exceed, ten years after the completion of the development. Once again the terms on which the companies were to appoint the Appellant as manager were not specified. In particular there was no provision for its remuneration. There was no definition of the services to be rendered. There was no provision for the circumstances in which the management agreement could be terminated, for example if the Appellant did not perform its services efficiently. As to remuneration, the Appellant was forced to support the validity of this part of the Agreement on the highly improbable basis that its services were to be free. Huggins J.A. recognised this difficulty but he sought to meet it, in the Respondent's respectful submission wrongly, by holding that there was an implied term that the Appellant was to be remunerated at a 30 40 50

p.132 & 45

p.132 & 24

reasonable rate which in default of agreement could be fixed by the Court. However, as the Appellant's argument in both Courts below tacitly acknowledged, it is not permissible to imply a term giving the Appellant reasonable remuneration as manager. The terms on which the Appellant was to act as manager are not sufficiently certain. This point is again one on which the Respondent respectfully adopts the view of Li J.

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p.71 & 8

10 12. The Respondent will advance the other arguments on the question of uncertainty which it advanced in the Courts below and will contend that the Appellant's arguments, in particular that which became known in the Court of Appeal as "the corporate structure" argument and that based on "the factual matrix", are misconceived.

20 13. If the Respondent succeeds on the question of uncertainty, it will follow that this appeal should be dismissed. It will also in practice be the end of all the Appellant's claims in the action. However, the action will still have to proceed to trial on the Respondent's claims for damages for (i) conspiracy (against the Appellant, the said Wong and the Appellant's Chairman) and (ii) breach of fiduciary duty and, further or alternatively, negligence as directors (against the said Wong and the Appellant's Chairman).

p. 1 & 28

30 If the Agreement is not void for uncertainty, is it specifically enforceable?

40 14. The Respondent has throughout successfully contended that this is a case where it can be seen from the start that no Court would ever grant specific performance of the Agreement at the trial but would leave the Appellant to its remedy in damages. This question is dealt with in great detail in the Judgment of McMullin J. in the Court of Appeal. As appears below, the Respondent bases this contention on a number of different specific grounds but (as McMullin J. rightly observed) the Respondent relies principally on the argument that damages would be a just and adequate alternative. Indeed, the Respondent goes further and says that this is a case where the Appellant would do itself a disservice by seeking an order for specific performance because it would do much better on an inquiry as to damages; cf. Wilson V.

p.141 & 21

p.146 & 23

15. The five grounds on which the Respondent relies in support of its contention that the Agreement is enforceable only in damages and not by specific performance can be summarized as follows:

(1) Because it is the equivalent of a contract to enter into a partnership;

(2) Because it involves the rendering of continuous services by one person to another; 10

(3) Because it requires continuous supervision;

(4) Because it lacks mutuality; and

(5) Because damages would be an adequate and the only appropriate remedy.

16. The Respondent contends that any of the five grounds mentioned in the preceding paragraph would in itself be a sufficient reason for refusing specific performance of the Agreement. However, it is not necessary for the Respondent to go that far. It is enough if Your Lordships' Board are satisfied, as were all the Judges in the Courts below, that all five grounds or some or one of them are enough to make it clear that specific performance would be refused. The main arguments of the Respondent on each of the five grounds are referred to in the Judgment of McMullin J. and it is unnecessary to re-state them here. 20

p.145 & 30  
p.149 & 27

17. The Respondent will again contend that the Appellant's arguments on this question, in particular its "stage by stage" argument, are misconceived. The Agreement is one and indivisible. It is not specifically enforceable in part only. The notion that a part of a contract can be specifically enforced and the remainder enforced in damages is one that is unknown to the law. 30

If the Agreement is not specifically enforceable can it "affect" the land?

18. In Ontario Industrial Loan & Investment Company v. Lindsey (1883) 6 O.R.66, at p.75, Hagarty C.J., in dealing with a comparable enactment, said: 40



"In the sense of "affecting" the lands I think we must hold that the instrument must have some bearing on the title, professing to convey, charge or affect it by its own operation".

10 The Respondent respectfully adopts this definition of "affecting", subject to the qualification that it is not enough for the instrument to "profess" to convey etc. unless by that it is meant that it does actually have that effect. In the Court of Appeal in the present case Huggins J.A. said:

p.133 & 22

"In the context of the Land Registration Ordinance it is the title to the land which must be affected and anything which either calls for a change of title or which may prevent or limit changes of title affects the land".

20 Again, the Respondent would respectfully adopt this definition, provided that it is clear that an instrument can only affect the land if it is in some way enforceable against the land itself and not merely by some remedy in personam, e.g. an injunction.

30 19. The Respondent's contention on this point, shortly stated, is that if it can be seen from the start that the Agreement is not specifically enforceable then it cannot "affect" the land. An instrument can only "affect" the land if it creates some interest in or charge over the land itself. If a contract is not specifically enforceable, then it does not create any interest in or charge over the land. As in the case of many fundamental propositions of law, it is not easy to find specific authority to this effect. However, reference can be made to Megarry & Wade's Law of Real Property, 4th Ed. at pp.132 ("This right to specific performance created a right in the land, a species of equitable property right"), 260 ("Contracts for the sale or lease of land, if specifically enforceable, are binding as equitable interests ...") and 575 ("If the purchaser is potentially entitled to the equitable remedy of specific performance, he obtains an immediate equitable interest in the property contracted to be sold ...").

40 20. In the Courts below it was variously argued on behalf of the Appellant that the Agreement

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"affected" the land because it was "concerned" with land or because the Court, even if it did not grant specific performance, would grant some form of specific relief, e.g. a declaration or an injunction. These arguments are again misconceived. Neither of the remedies suggested would create an interest in or a charge over land.

21. Further or alternatively to the arguments mentioned above, the Respondent respectfully adopts the views expressed in the Courts below on this question so far as they differ from those arguments. 10

Conclusion

The Respondent accordingly submits that the decision of the Court of Appeal ought to be affirmed for the following (among other)

R E A S O N S

- (1) BECAUSE the Agreement, being void for uncertainty, is wholly enforceable;  
alternatively 20
- (2) BECAUSE the Agreement is enforceable only in damages and not by specific performance;
- (3) BECAUSE if the Agreement is either (a) wholly unenforceable or (b) not specifically enforceable it does not "affect" the land and cannot be registered under the Land Registration Ordinance;
- (4) BECAUSE the orders to vacate the entries in the Land Register were properly made in interlocutory proceedings; 30
- (5) BECAUSE the Judgments of Li. J., Pickering J.A. and McMullin J. were right;  
alternatively
- (6) BECAUSE the Judgment of Huggins J.A. was right.

MICHAEL OGDEN

MARTIN NOURSE

KEMAL BOKHARY

IN THE PRIVY COUNCIL No. 38 of 1978

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O N A P P E A L  
FROM THE COURT OF APPEAL IN HONG KONG

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B E T W E E N :

ANSTALT NYBRO (formerly  
named ANSTALT SORO) Appellant

- and -

HONG KONG RESORT CO.  
LIMITED Respondent

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CASE FOR THE RESPONDENT

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