RECENT DEVELOPMENTS NO. 2
TAI HING

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As I am not on the programme I have no time at all and I don't propose to enter into an argument although I would like to argue paragraph by paragraph right through the main paper. I thought it might be helpful to you, as I was in the case, to tell you one or two things about Tai Hing that are not immediately apparent from the reports. I am glad that the Chairman kindly has removed the slur on the approach by David Bruce who said I merely lost it in first instance. I did lose it both the first instance and in the Court of Appeal.

Curiously, at first instance the judgment was the same as that of the Privy Council and at the end of 23 pages. Suddenly on half a page the judge went "potty" and said: "However all the elements of estoppel are present - judgment for the banks" without stating what the elements of estoppel were. That was reversed in the Court of Appeal which then found on the point which the Privy Council reversed its decision. It is a case where if you actually read the Hong Kong judgments you will see that both of the local Hong Kong judges were very reluctant to go along with Mr Justice Hunter, who had just come out from England and was supposed to know a lot about banking law.

However, having failed to ride the hot favourite home to victory in two successive races, I was dismissed by a Chinese owner. Pat Neill "rode the horse to victory" in the Privy Council. But he tells me that the case was effectively over in the first hour and a half because the Privy Council regarded that the successful argument in the Hong Kong court was so obviously hopelessly wrong that the rest of the six days was spent politely listening to half a dozen counsel for different banks trying to get it back on its feet again. But the horse was dead by 12 o'clock on the first day which is why you have got quite a short judgment.

I do not, with respect to Martin, think it has anything like the implications which he suggests. But the other thing which you ought to know about it in order to understand how it was the Hong Kong courts went wrong in the first place is this. In support of the argument there were cited a whole series of American and Canadian cases, the principal one in Canada being Canadian Pacific Hotels on very similar facts; but there was one

difference - and this was vital to the factual decisions being taken both in the United States and in Canada. That is that the banks there, unlike the banks in Hong Kong who follow the London practice, return cancelled cheques to the customer. So what they were saying is that the customer had in his hand in front of him when he opened the envelopes, the cheques on which his signatures were forged and he should have realised that and told the bank. And what the Tai Hing case did, was to go from there (what Privy Council regards as a hopelessly impermissible link) and to say that even when the cheques are not returned to you, you should have set up such a sufficiently sophisticated accounting system that you would be able to detect that they were forged notwithstanding the fact that the bank had not sent the cheques back to you. That is the argument which is regarded as a hopeless construction in tort and I think that the Privy Council was right.

Even worse than that, in the Canadian case, in giving judgment for the banks against Canadian Pacific Hotels, the Canadian court expressly said "we think that major commercial concerns such as Canadian Pacific Hotels, one of the biggest corporations in Canada, should have had such a sophisticated accounting system that they can do this". Those words were then taken by the Court of Appeal in Hong Kong and applied in completely general terms which would require you and me who do not have a sufficient accountancy system, to find out that our cheques have been forged too, notwithstanding the banks choose not to send the cheques to us. The factual differences were absolutely colossal.

The last matter which I think heavily underlay the Privy Council decision, and which is why Lord Scarman's speech specifically says "Their Lordships find it unhelpful to argue on a tortious basis in a contractual situation" is because you do that in order to get terms which are wider and different from the contractual terms. In such a case you might as well tear up the contract in the first place because it has no meaning if it is over-written by the tortious duties. The reason which underlay that, not stated in the judgments, is this: it has long been the view, ever since Lord Justice Matthews set up the Commercial Court, that the principle that you learn with your nursing bottle when you first do a commercial case or your first in commercial chambers, is the dictum "you will never understand the commercial law or commercial contract unless you realise what business men are seeking to defend themselves against is insolvency, not fraud". They rely on their judgments of whom they will deal with and how they will deal with them; what they are concerned about in the documentation is to prevent themselves against the consequences of insolvency which they cannot foresee.

And if Tai Hing had stood, it would have put an end to that principle which is fundamental to all English commercial decisions for than 100 years. It would have had effect far more sweeping than Donoghue v. Stevenson. You simply would not have known where you were in any contractual situation because the contract would not matter and you would have to look at it in

tort. That is why the Privy Council's judgment is as terse as it was. That horse should never really have been ridden as far as London. It should not have been ridden into the Supreme Court in Hong Kong.