

24, 1951

31348 No. 27 of 1950.

# In the Privy Council.

## ON APPEAL

FROM THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION).

BETWEEN	UNIVERSITY OF LONDON
HANGKAM KWINGTONG WOO .	(Defendant) <i>Appellant</i>
AND	20 JUL 1953
LIU LAN FONG alias LIU AH LAN	(Plaintiff) <i>Respondent</i> INSTITUTE OF ADVANCED LEGAL STUDIES

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## Case for the Respondent

RECORD.

1. This is an appeal from the Judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) (Williams and Scholes, J.J.) dismissing the Appellant's appeal from the Judgment and Order of Sir Leslie Bertram Gibson, C.J. in the Supreme Court of Hong Kong in Original Jurisdiction dated the 25th February 1949, whereby it was declared that an agreement in writing in the Chinese language dated the 21st August 1943 made between the Appellant of the one part and one Koo Wan Sing (hereinafter called the deceased) of the other part for the sale by the Appellant to the deceased free from incumbrances, of a piece of land registered in the Land Office as Inland Lot 2153 held under a Crown Lease dated the 11th September 1922, together with the dwelling-house and garage pertaining thereto, and known as No. 48 Kennedy Road, Hongkong, for the price of 68,000 Military Yen, ought to be specifically performed and carried into execution ; and whereby appropriate ancillary relief was granted. The deceased died on the 25th May 1946 and the Respondent is the widow and sole Executrix of his Will.

2. It is not disputed that the said agreement was executed by the Appellant and the deceased, or that the consideration thereby expressed to be payable by the deceased to the Appellant was in fact paid, or that pursuant to the said agreement two Deeds being respectively an Assignment of the said property from the Appellant to the deceased in the English language, and a Deed of Sale in the Chinese language, were duly executed by the Appellant and the deceased on the 21st September 1943. In the said two Deeds the consideration was expressed to be \$272,000 in Hongkong currency, being the equivalent of 68,000 Military Yen at the then current rate of exchange. It is also not disputed that at the date of the said agreement the property thereby agreed to be sold was held by the

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Appellant subject to a First Mortgage and a Second Mortgage. The First Mortgage was discharged by the payment to the First Mortgagee of 19,737 Military Yen on the 30th September 1943 and the First Mortgagee thereupon executed a re-assignment of the property. The Second Mortgage was discharged by the payment of 8,550 Military Yen on the 14th or 16th October 1943 and the Second Mortgagee duly executed a receipt for the principal and interest which had been secured by the Second Mortgage. The said two payments were made by or on behalf of the Appellant out of the purchase price paid by the deceased.

3. The Appellant executed the said agreement and the said two Deeds 10 by one Chan Un Chau who had been duly appointed by the Appellant to be his Attorney prior to his leaving Hongkong (which was then in the occupation of the Japanese Military Authorities) for Free China.

4. By the Land Registration Ordinance 1844 of the Ordinances of Hongkong a Land Office was established for the registration of Deeds, Conveyances, and other documents affecting land. The said Ordinance provides that a Memorial be delivered to the Land Office for registration containing particulars of the land affected by any such instrument. As no such Memorial was registered during the Japanese occupation of Hongkong the Respondent by her Solicitors on the 9th February 1948 requested the 20 Appellant to execute a confirmatory assignment of the property as the deceased was then dead. The Appellant refused the said request and claimed the right to repudiate the said Agreement and the said Deeds. In the circumstances the Respondent was unable to secure registration of the said Assignment or the said Deed of Sale in the Land Office without the assistance of an Order of the Court. Accordingly by Writ of Summons dated 24th May 1948 the Respondent commenced the present proceedings in the Supreme Court of Hongkong.

5. The Appellant by his amended Statement of Defence (which was amended three times, the last two amendments being made at the trial) 30 alleged :—

(A) That the purchase price was intended to be H.K.\$272,000 and not M.Y.68,000, which latter sum was only inserted in the Agreement to comply with Japanese law and that the payment of M.Y.68,000 did not represent the true value of the property.

(B) That at all material times the Appellant and his alleged Attorney Chan Un Chau were divided by line of war by reason whereof the power of attorney was cancelled and the Appellant was not bound by the signature of the said Chan Un Chau.

(C) That the deceased induced the Appellant to sign the said 40 Agreement and other documents by fraudulent misrepresentation that M.Y.68,000 was the equivalent of H.K.\$272,000.

(D) That the Respondent had made or caused to be made fraudulent alterations to certain documents. (This allegation was abandoned at the trial.)

(E) That it was an implied term of the Agreement that the said Mortgages should be discharged out of the purchase money

and in the same currency, and that by virtue of Sections 3 and 11 of Hong Kong Ordinance No. 24 of 1948 this had become impossible of performance and the Agreement was frustrated.

(F) That specific performance of the Agreement would be unfair and would work great hardship on the Appellant.

(G) That the said Chan Un Chau as Attorney of the Appellant was induced to enter into the Agreement by the false representation of the deceased that he would pay the purchase price in Hong Kong dollars—alternatively that specific performance ought not to be granted because the Appellant entered into the Agreement in the belief that he would be paid in Hong Kong dollars.

(H) That the acceptance of the purchase money in M.Y. was obtained by duress or undue influence.

6. The action came on for trial before Chief Justice Sir Leslie Bertram Gibson sitting as a Judge of first instance in the Supreme Court on the 9th February 1949 and succeeding days. On the 25th February 1949 the learned Chief Justice delivered a considered judgment whereby he held that the Respondent was entitled to specific performance of the Agreement and to the costs of the action. <sup>p. 19.</sup>

20 7. By his said judgment the learned Chief Justice made the following findings of fact :—

(A) That the written Agreement of the 21st August 1943 was the only Agreement between the parties and that even if any question of payment in dollars had arisen prior to the signing of the Agreement it had been abandoned when the Agreement was signed.

(B) That there was no evidence to support any allegation of duress or undue influence.

(C) That there were no grounds on which a term could be implied in the Agreement that the Mortgages should be discharged out of the purchase money or in the same currency and that therefore the contract was not impossible of performance.

(D) That there was no evidence that the purchase price fixed by the Agreement was unfair or inadequate, and that there was no evidence of unfairness or hardship to justify the refusal of an order for specific performance.

Although the learned Chief Justice did not expressly deal in his judgment with the allegations of misrepresentation on the part of the deceased it is implicit in the judgment that the learned Chief Justice held that there was 40 no such misrepresentation as alleged in the amended Statement of Defence.

8. The issue of law raised by the Appellants' defence that at the date of the said Agreement he was living in Free China and divided by the line of war from his Attorney who was living in Hongkong which was then in the occupation of the Japanese and that accordingly the said Agreement and the said two Deeds were void or unenforceable at the suit of the <sup>p. 22.</sup>

Respondent, had already been answered adversely to the Appellant by the decision of the full Court in Appeal No. 12 of 1948 (which is reported in Volume 32 of the Hongkong Law Reports for the year 1948 at page 121) and the learned Chief Justice held that he was bound by that decision.

9. The Appellant's contention that performance of the said Agreement was impossible was based upon the provisions of the Debtor and Creditor Occupation Period Ordinance 1948 which came into force on the 17th June 1948 and in particular Sections 3 and 11 of the said Ordinance which are in the following terms :—

*Discharge during occupation period of pre-occupation debts.*

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3.—(1) Where any payment was made during the occupation period in Hong Kong currency or occupation currency by a debtor or by his agent or by a custodian or liquidator acting or purporting to act on behalf of such debtor to a creditor or to his agent or to a custodian or a liquidator acting or purporting to act on behalf of such creditor and such payment was made in respect of a debt—

- (a) payable by virtue of an obligation incurred prior to the commencement of the occupation period and
- (b) accruing due either prior to or after the commencement of the occupation period,

such payment shall subject to the provisions of sub-section (2) of this section be a valid discharge of such debt—

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- (i) to the extent of the face value of such payment if made in Hong Kong currency ; or
- (ii) at the official rate prescribed by the occupying power if payment made in occupation currency ; or
- (iii) at the rate agreed by the parties concerned.

(2) In any case—

- (a) where the acceptance of such payment in occupation currency was obtained by duress or coercion, or
- (b) where such payment was made in occupation currency in respect of a pre-occupation capital debt which—

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- (i) was not due at the time of such payment or
- (ii) if due was not demanded by the creditor or by his agent on his behalf and was not payable under a contract the parties to which expressly stipulated that it should be of the essence of such contract that payment should be made on a date certain or

- (iii) if due and demanded was not made within three months of such demand,

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such payment shall be re-valued in accordance with the scale contained in and in the manner prescribed in the Schedule to this Ordinance and shall be a valid discharge of such debt only to the extent of such re-valuation.

(3) In sub-section (2) of this section “ pre-occupation capital debt ” means any such debt as is referred to in sub-section (1)

of this section, including a sum payable as interest but not including a sum payable as rent and accruing due after the commencement of the occupation period.

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*Reinstatement of securities.*

10           11.—(1) In any case where a debt purporting to have been discharged in whole or in part by payment in occupation currency is by virtue of the provisions of this Ordinance deemed to be wholly or partly undischarged at the commencement of this Ordinance and where the payment of such debt before such purported discharge as aforesaid was secured by any mortgage charge lien guarantee indemnity or other form of security the rights of the creditor in relation to such mortgage charge lien guarantee indemnity or other form of security shall be deemed not to have been extinguished or diminished by such purported discharge.

(2) Where the rights of a creditor in respect of a security have been deemed by virtue of sub-section (1) of this section not to have been extinguished or diminished—

20           (a) the creditor may give notice in writing of not less than one month calling upon the debtor and any third party who furnished the security to reinstate or replace such security and to execute all documents and do all acts necessary for that purpose; and in default of compliance therewith the Supreme Court may, on application by the creditor on an originating summons, make such order as to the Court shall seem fit to reinstate the security or replace it with other equivalent security and to execute all documents and do all acts necessary for that purpose,

30           (b) where any person neglects or refuses to comply with an order under paragraph (a) of this sub-section directing him to execute any such documents or to do any such acts the Court may on such terms and conditions if any as may be just nominate any person to execute such documents and to do such acts and any document so executed or act so done shall operate for all purposes as if it had been executed or done by the person originally directed to execute or do the same,

40           (c) the creditor may give notice in writing to any company the stock share bonds or debenture of which were subject to any charge to such creditor by way of a security as aforesaid and upon the receipt of such notice such company shall not permit or record any transfer of such security until the debtor or any third party who has furnished the security has reinstated or replaced such security or in default thereof the Supreme Court has made an order under paragraph (a) of this sub-section.

10. The learned Chief Justice dealt with the contention that it was impossible to perform the said agreement by reason of the provisions of the Ordinance (so far as may be material here to set out) as follows :—

“ I do not think that there was in fact any impossibility in performance. There is clearly nothing in the Ordinance to prevent a title free from incumbrances from being given now if the mortgage debts are discharged at the rate of exchange provided for in the Ordinance. No reason has been given why the Agreement could not have been specifically performed before the Ordinance on the basis of the discharge of the Mortgages by the payments in yen 10 in fact made. Once the legal estate had (under the then existing law) been got in from the Mortgagees and the property assigned to the Purchaser, I do not think that Section 11 would have operated to divest the legal estate. No doubt the Mortgagor would have remained liable on his personal covenants to comply with Section 3, but as regards the legal estates of the Mortgagees Section 11 (1) merely provides that the mortgages shall have been deemed not to have been extinguished, i.e., it creates a legal fiction and the consequences of this legal fiction are set out in Section 11 (2) . . . neither side could in fact have contemplated the enactment of the 20 Ordinance. As far as the purchaser was concerned, it would not have mattered even if he had contemplated it. It was a matter of indifference to him how the mortgages were discharged so long as he got a good title. As far as the Vendor was concerned, he could not have avoided the effect of the Ordinance on his liability to the Mortgagees whether he made the agreement or not. In so far as the sale of his property is involved, apart from the question of the mortgages, nothing has happened to change his position.”

p. 27.

11. By a Notice of Appeal dated the 12th March 1949 the Appellant appealed from the said judgment of the learned Chief Justice to the Full 30 Court. The grounds of appeal stated in the said Notice were :—

- (1) That the trial judge was wrong in law.
- (2) That the trial judge was wrong in his application of the principles of equity to the facts.

12. The Appeal was heard before the Full Court (Williams and Scholes, JJ.) on the 30th and 31st May 1949 and on the 10th June 1949 the Full Court delivered a considered joint judgment dismissing the Appeal with costs.

13. There was no appeal as to any question of fact and the facts as found in the judgment of the learned Chief Justice were stated not to be in 40 dispute. The only defences relied upon by the Appellant before the Full Court were :—

- (1) Impossibility of performance of the said Contract amounting to frustration by reason of the effect of the Debtor and Creditor (Occupation Period) Ordinance No. 24 of 1948.
- (2) That specific performance of the Agreement ought not to be ordered because of the equitable doctrine of hardship.

14. With regard to the first of the above defences the Full Court, after considering the proper construction and effect of the Debtor and Creditor (Occupation Period) Ordinance, held as follows :—

“ There is no reason why the mortgagee should be put in the p. 57, l. 45.  
very privileged position vis-a-vis a bona fide purchaser for which  
Mr. Potter contends. We hold that, on the reading of the Ordinance  
as a whole, the mortgagee in this case under the legal fiction  
contained in Section 11 (1) retains his rights to the legal estate  
as between himself and the mortgagor only and that once the  
mortgagor had assigned to a bona fide purchaser, the only remedy  
for the mortgagee is to call on the mortgagor to provide equivalent  
security. The word “ deemed ” is operative here only between  
the mortgagor and mortgagee, and without prejudice to the rights  
of a bona fide purchaser. We therefore agree with the construction  
put on Section 11 by the trial judge.”

Dealing with the question of frustration the judgment of the Full Court, so far as material to be set out, is as follows :—

“ Applying the definition of frustration given by Viscount p. 58, l. 20.  
Simon in Cricklewood Property & Investment Trust Ltd. v.  
Leighton’s Investment Trust Ltd., 1945 A.C. 221 at 228, can it be  
said that the effect of the passing of the Debtor and Creditor  
Ordinance is so fundamental as to be regarded both as striking at  
the root of the agreement and as entirely beyond what was  
contemplated by the parties when they entered into the agreement.  
The passing of the Ordinance was clearly beyond what either vendor  
or purchaser contemplated. Its effect is that the mortgagor is  
now liable to pay additional sums to the mortgagees. Is that so  
fundamental that it strikes at the root of the agreement. The  
foundation of the contract was that the vendor would assign the  
lease to the purchaser free from encumbrances and the purchaser  
would pay the agreed purchase price. The latter has fulfilled his  
portion of the agreement ; there is nothing to prevent the vendor  
now fulfilling his part of the agreement. Lord Goddard at p. 245  
of the Cricklewood case when considering frustration has also  
emphasised that frustration applies only where the foundation of  
the contract is destroyed so that performance is no longer possible.  
Obviously in this case performance is now possible and we consider  
the judgment of the trial judge correct that there was no frustration.”

15. With regard to the second of the above defences the Full Court,  
40 after stating that before them Counsel for the Appellant did not contend  
that there was anything whatsoever in the conduct of the Respondent  
to merit censure, held as follows :—

“ We can find no reason to differ from both the reasoning and  
conclusion of the trial judge in the exercise of his discretion to  
decree specific performance.”

16. The defence that the Appellant and his Attorney Chan Un Chau  
were at all material times divided by line of war by reason whereof the  
said Power of Attorney was cancelled was not specifically raised before the

Full Court possibly because it was accepted that the said decision of the Full Court in Appeal No. 12 of 1948 was equally binding on the Full Court itself as on the trial judge.

p. 60.

17. On the 18th June 1949 the Appellant petitioned the Judges of the Supreme Court of Hong Kong for leave to appeal to His Majesty the King in Council. The said Petition stated that the question involved "concerns inter alia the applicability or otherwise of the doctrine of frustration to the said Agreement and the construction of certain sections in the Debtor and Creditor Ordinance and in the Land Transfer Ordinance No. 34 of 1948." No mention is made in the said Petition of any intention 10 to challenge the correctness of the decision of the Full Court in the said Appeal No. 12 of 1948.

18. On the 15th August 1949 the Full Court made an Order granting the Appellant provisional leave to Appeal to His Majesty in His Privy Council from the Judgment of the Full Court upon the performance by the Appellant of the Further Order therein, that is to say, that the Appellant within three months from the said date obtain a Certificate of Satisfaction from the Second Mortgagee of the said property, and sign a Memorial for the registration at the Land Office of the reassignment which had been executed by the First Mortgagees of the said property, and 20 execute a Conveyance of the said property to the Respondent free from all incumbrances and sign any other necessary documents for that purpose.

19. The Appellant duly performed the said Further Order and the Respondent is now registered as the Proprietor of the said property in the Land Office.

20. On the 20th May 1950 the Full Court made an Order granting the Appellant final leave to appeal to His Majesty in His Privy Council.

21. The Respondent respectfully submits that in the circumstances aforesaid the Appellant ought not to be permitted to raise again in this appeal the defence based on the separation of the Appellant from his 30 Attorney Chan Un Chau by line of war. If however this defence is still open to the Appellant the following submissions are made in regard thereto.

22. In support of the Appellant's claim to avoid the Agreement on the ground that he was divided by the line of war from his Attorney the Appellant said in evidence that he left Hongkong in October 1942 together with his children to avoid arrest by the Japanese and before leaving Hongkong gave Powers of Attorney to the said Chan Un Chau to enable the said Attorney to sell the said property.

23. Whilst it is true that by the law of England and Hongkong communication for the purpose of business or trade with a resident of 40 territory which is in the occupation of the enemy is forbidden and contracts entered into between residents of such territory and a person resident in non-occupied territory may be void or unenforceable, it is submitted that an enforceable agreement can be made between (1) a resident in the territory of the appropriate Court for the enforcement of such agreement, whether that territory was or was not in the temporary

occupation of the enemy, and (2) a person ordinarily resident in the same territory, who is taking refuge from the common enemy in friendly territory, when both the party actually resident in the territory of the appropriate Court and the Attorney of the refugee from such territory are both resident at the material time in the territory of the appropriate Court.

24. It was held by the Supreme Court of Hongkong (Appellate Jurisdiction) in the said Appeal No. 12 of 1948 that the law to be applied in regard to contracts entered into by residents of the Colony during the period of the enemy occupation was the Common Law of Hongkong and that this law could not operate to turn all the residents of that Colony into enemies so as to preclude them for example from suing in their own Courts or so as to make the residents in Free China enemies vis-a-vis the residents of Hongkong according to the Common Law of the Colony. It is submitted that the said decision is correct.

25. It is submitted that the judgments of the trial judge and of the Full Court were right and accordingly this Appeal should be dismissed for the following among other

### REASONS

- 20           (i) BECAUSE it was never impossible to perform the said agreement in accordance with its terms.
- (ii) BECAUSE such agreement was in fact performed in September 1943 and was duly recorded by registration at the Land Office in 1949.
- (iii) BECAUSE it was never proved that the Appellant was under any obligation to his Mortgagees by reason of any provision of the Debtor and Creditor Occupation Period Ordinance 1948 and in particular by reason of subsections (1) or (2) of Section 3 of the said Ordinance ; and even if the Appellant was affected by the terms of the said Ordinance it did not affect any provision of the Agreement or the rights of the Respondent.
- (iv) BECAUSE the Common Law of Hongkong does not invalidate voluntary transactions affecting land during the Japanese occupation, and the Land Transactions (Enemy Occupation) Ordinance, 1948 gives effect to such transactions.
- (v) BECAUSE the Debtor and Creditor Occupation Period Ordinance 1948 did not affect the right or title of the Respondent to the said property.
- 40           (vi) BECAUSE the fact that changes in the value of property which occur after the date on which an agreement for its sale has been concluded affords no grounds on which a Vendor or a Purchaser can avoid a bargain.

- (vii) BECAUSE the fact that the Appellant's Mortgagees may be entitled to receive further moneys from him in respect of their advances to the Appellant does not affect the rights of the Respondent.
- (viii) BECAUSE the Attorney of the Appellant and the deceased (the Purchaser) were not divided by the line of war.
- (ix) BECAUSE the Common Law of Hongkong does not invalidate agreements entered into between its residents during the occupation of that Colony by the enemy on 10 the ground that one of such residents was at the material time a refugee from the occupying enemy in the territory of a friendly power.
- (x) BECAUSE the Agreement did not and could not assist any enemy of Hongkong but on the contrary was for the benefit of its inhabitants.
- (xi) BECAUSE it is not contrary to the law of Hongkong to recognise the validity of the said Agreement.
- (xii) And upon the grounds and for the reasons set out in the Judgments of the Trial Judge and the Full Court 20 in this case and for the reasons set out in the Judgment of the Full Court in the said Appeal No. 12 of 1948.

ANDREW CLARK.

HAROLD LIGHTMAN.

No. 27 of 1950.

In the Privy Council.

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ON APPEAL

*from the Supreme Court of Hong Kong  
(Appellate Jurisdiction)*

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BETWEEN

**HANGKAM KWINGTONG**

**WOO - - - - Appellant**

AND

**LIU LAN FONG alias LIU**

**AH LAN - - - - Respondent**

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Case for the Respondent

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