

Hangkam Kwingtong Woo - - - - - Appellant

v.

Liu Lan Fong alias Liu Ah Lan - - - - - Respondent

FROM

THE SUPREME COURT OF HONG KONG

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1951

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*Present at the Hearing :*

LORD SIMONDS  
LORD NORMAND  
LORD OAKSEY  
LORD RADCLIFFE  
THE CHIEF JUSTICE OF CANADA  
(THE RIGHT HON. T. RINFRET)

[*Delivered by* LORD SIMONDS]

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This appeal is brought from an Order of the Supreme Court of Hong Kong in its Appellate Jurisdiction which dismissed the appellant's appeal from a judgment and order of the Chief Justice of that Court in its Original Jurisdiction decreeing specific performance of a certain agreement which will be later stated in detail.

Hong Kong was from the 25th December, 1941, until the 1st September, 1945, in the effective occupation and control of the Japanese between whom and His Majesty a state of war existed. The appellant, who resided in Hong Kong and there carried on the business of a solicitor, was in the month of September, 1942, apprehensive of arrest by the Japanese and was minded to leave Hong Kong and go to Free China. With a view to the management of his affairs during his absence he gave to one Chan Hung Cheung, who will be called Chan, two powers of attorney the one in English dated 15th September, 1942, the other in Chinese.

The English power of attorney gave to Chan wide and general powers and specifically authorised him to sell the appellant's real and personal property as he should think fit.

On or about the 6th October, 1942, the appellant left Hong Kong and thereafter resided in Free China until the month of February, 1946, when he returned to Hong Kong. He was at the date of his departure from Hong Kong the owner of certain land and a messuage thereon known as 48, Kennedy Road. This property, which was registered in his name at the Land Office of Hong Kong as Inland Lot No. 2153, was subject to a first mortgage for an aggregate sum of 73,000 dollars Hong Kong currency and to a second mortgage for 30,000 dollars Hong Kong currency.

By an Order of the 10th May, 1943, which was effective from the 1st June, 1943, the Japanese authorities made "military yen" the only permissible currency in Hong Kong and forbade under heavy penalties

the use of Hong Kong dollars which before the occupation were the recognised currency. The prescribed official rate of conversion was four Hong Kong dollars to one military yen.

In these circumstances the appellant by his attorney, Chan, on the 21st August, 1943, entered into an agreement with one Koo Wan Sing, who will be called "the purchaser", for the sale to him of the said property in accordance with the law as proclaimed in Hong Kong at the price of 68,000 yen in military notes, of which 50,000 yen were expressed to be paid on the date thereof, and it was thereby agreed that the transaction should be put through within one month from that date, when the balance of the purchase money should be paid to the vendor, who should hand over all the title deeds of the predecessors and execute a formal deed of sale in favour of the purchaser. It was also agreed that the property was free of any mortgages pledges or other incumbrances. It is not disputed that under this agreement the purchaser was entitled to have the property assigned to him free of incumbrance, nor is it disputed that the balance of the purchase money was duly paid. Certain other documents were executed and acts done, to which reference must be presently made, but for the present purpose it is necessary only to add that the sale was not completed, that on the 25th May, 1946, the purchaser died and that on the 24th May, 1948, the respondent as his executrix commenced the proceedings out of which this appeal arises. By her writ she claimed that she was the sole beneficial owner and entitled to possession of the said property but by her statement of claim she alleged, and claimed specific performance of, the agreement which has been stated and it is upon the basis of this claim that the action proceeded and that this appeal has been brought.

The first defence to the claim is that at all material times the appellant and Chan were divided by the line of war, the appellant being in Free China, then in alliance with His Majesty, and Chan being in enemy occupied territory, and that therefore the power of attorney was cancelled or abrogated and the appellant was not bound by documents which Chan purported to have executed on his behalf. Upon this interesting and difficult question their Lordships have not the advantage of a judgment of the Supreme Court in this case, for that Court rightly considered itself bound by its own previous decision in Appeal No. 12 of 1948, to which reference will be made.

The argument for the appellant is thus stated in his formal case. It is that no relevant ordinance dealing with the matter existed in Hong Kong, and that the principles of the common law of England were applicable and thereby during the Japanese occupation of Hong Kong the residents of Hong Kong became enemies of His Majesty and his allies and were shut off from communication and commercial dealings with those resident in His Majesty's free territories or in the unoccupied territory of an ally of His Majesty and in particular the relationship of principal and agent between the appellant and Chan was determined as soon as they were divided by the line of war.

To this contention the respondent replies, first (relying on the authority of *Tingley v. Muller* 1917 2 Ch. 144) that by the common law of England a general power of attorney given by a British subject residing within His Majesty's allegiance to one who is or becomes an enemy of His Majesty is not abrogated or avoided by the outbreak of war, and secondly, that there is no principle of the common law of Hong Kong, which the Courts of Hong Kong administer, which constrains them to treat the residents of Hong Kong when that territory is in enemy occupation as for all purposes divided by the line of war from former residents who have escaped to some part of His Majesty's Dominions, or to the territory of an ally. This latter plea will first be examined by their Lordships, for in a certain event it will be unnecessary to express a final opinion upon the former.

As has been said, the Supreme Court of Hong Kong rejected the contention of the appellant upon the authority of its own previous decision in Appeal No. 12 of 1948 and it is convenient to examine that case in which the learned Chief Justice Sir Leslie Gibson delivered a valuable and penetrating judgment. The facts, there, so far as they need to be stated, were that during the Japanese occupation of Hong Kong two members of a partnership which carried on business there, escaped to Free China and the remaining members remained in Hong Kong and continued to carry on the partnership business. The partners were thus said to be divided by the line of war and the question was whether from the time of such division the partnership was by the law of Hong Kong *ipso facto* dissolved. The Chief Justice accepted the view that the Colony of Hong Kong was the victim of a Japanese occupation and not of a mere invasion, and he further upon a consideration of the authorities agreed that according to the common law of England a partnership is automatically dissolved, if at the outbreak of war one or more partners are in England and the other partner or partners are in enemy territory which for this purpose includes enemy occupied territory, and that the same principle applies, if after the outbreak of war one or more partners go to enemy territory while the other partner or partners remain in England, and that residents in Allied territory are on the same footing as residents in England for the purpose of these principles. "No doubt too," said the Chief Justice, "the Common Law in so far as it forms part of the law of Hong Kong would be similarly interpreted here in ordinary times." "But" he added "the question I have to ask myself is 'How would the Common Law—as part of the law of Hong Kong—be interpreted in Hong Kong while the colony was under enemy occupation?'" And, after examining the basis of the principles which he had discussed, he says "To support his argument that the partnership in this case was dissolved, Mr. Wright must go further and his further proposition is not supported by authority. He must argue that under the law of Hong Kong (a) residents in Hong Kong became enemies on the Japanese occupation of Hong Kong and (b) residents in Free China were therefore unable to communicate with them or remain in contractual relations with them. I am unable to accede to these propositions. The law of England regards occupied Hong Kong as enemy territory but it seems impossible to contemplate that the law of Hong Kong itself (and Mr. Wright must rely on the Common Law as forming part of the law of Hong Kong) could operate to turn all the residents of the Colony into enemies. Could it, for example, by turning them into enemies preclude them from suing in their own Courts? It might be that under some law of the Japanese administration (no such law has been established) the principle was applied in reverse on the basis that Free China became the enemy, but in that case the result would flow from the Japanese law and not from the Common Law as in force in Hong Kong". Their Lordships have thought it proper to set out these passages from the judgment of the learned Chief Justice at length because they appear to go to the heart of the matter.

It is constantly to be borne in mind that it is the law of Hong Kong which is to be administered and the question therefore is: assuming that the common law of England in regard to trading with the enemy prevails in the Colony, what is the common law of England in this matter if England is itself enemy occupied territory? To ask this question is to plunge into the unknown. But upon the answer to it depends the issue what is the law of Hong Kong when Hong Kong is in enemy occupation. The researches of learned counsel on either side were unable to bring to their Lordships' notice any case-law or institutional writings which were of real assistance. This was perhaps inevitable since the soil of England has not within the period of the development of the common law in this matter been occupied by the enemy. Nor, though the same problem must in recent times have arisen in occupied Europe, can it be said that such a universal rule has been evolved that it ought to be adopted as part of the municipal law of England or Hong Kong. In

these circumstances it appears to their Lordships that the problem must be approached, and, if there is a solution, solved, by examining the principle upon which at common law trading with the enemy is held to be illegal and indeed criminal, and then asking whether upon that principle the Courts of England (if England were occupied territory) or of Hong Kong, as in the present case, are bound to hold that contractual relations are abrogated between its citizens who are temporarily divided by the line of war. Their Lordships at this stage make no distinction between the relationship of partner to partner and of donor to donee of a power of attorney.

The basis of the principle is variously stated: their Lordships would refer to Professor McNair's treatise on "Legal Effects of War" 2nd Edn. p. 171 et seq. as containing an accurate and adequate exposition of this matter and in the following observations borrow freely from it. In "*The Hoop*" I.C. Rob. 196 Lord Stowell could refer to the principle as "a general rule in the maritime jurisprudence of this country by which all trading with the public enemy, unless with the permission of the Sovereign, is interdicted", while a few years later a learned American Judge in "*The Rapid*" 8 Cranch 155 could say "The individuals who compose the belligerent States exist as to each other in a state of utter occlusion . . . . Every individual of this our nation must acknowledge any individual of the other nation as his own enemy—because the enemy of his country." Other reasons too were ascribed by Lord Stowell, as e.g., the procedural disability, shared by enemies generally, which precluded an appeal to the tribunals of one country on the part of the subjects of the other, and "the consequences that might follow if every person in time of war had a right to carry on a commercial intercourse with the enemy and under colour of that had the means of carrying on any other intercourse he might think fit", an aspect of the matter which has frequently been emphasised in later authorities. And this is closely linked with the reasoning of Willes J. in *Esposito v. Bowden* 7 E. & B. 763 who there founds the prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country on "the presumed object of war being as much to cripple the enemy's commerce as to capture his property".

But it is to be observed that the common feature of every statement of the principle and its reason is that the person with whom intercourse is illegal is regarded as an enemy by the Court which has to determine the illegality. This is most clearly shown in connection with the rule as to the procedural disability which attaches to enemies. At once the question arises, how this doctrine can be applied in the Courts of an enemy occupied country. To take the present case, whom were the Courts of occupied Hong Kong to regard as an enemy, to whom deny *persona standi in judicio*? Presumably not to the appellant, who had escaped from the occupied territory and sought refuge amongst the King's allies: to him no taint of enemy character could attach. To Chan, then, the attorney who remained in Hong Kong? But to whom, if not to Chan, were the Courts of Hong Kong open? The result seems plainly to ensue that, whatever consequences may follow outside the occupied territory if one of its inhabitants, who has left it, seeks to maintain or to initiate relations with another who has stayed within it, yet the Courts of that country cannot regard either him who has left or him who has stayed behind as enemies of the King or enemies of each other. This result may perhaps be tested thus. Suppose that the appellant had, instead of going to the territory of an ally, gone to Japan and thence sought to maintain some contractual relations with Chan. Then, apart from any regulation which the occupying Power might lawfully make, a Court of Hong Kong would be bound to treat him as an enemy, to deny him access to its presence and to treat the contractual relation as determined. Is he then to be regarded as an enemy to whatever territory, British, allied or enemy, he goes?

Enough has been said on this aspect of the case to show that there is a wide divergence between the problems which face the Courts of a belligerent Power and of an occupied territory.

No less striking is the difference in the conditions which must determine whether a particular class of contract should be abrogated. The general grounds of abrogation are, broadly speaking, the danger of intercourse and the desire not to enhance but to cripple the resources of the enemy. Often it might be said of this or that communication or of this or that relationship that it could not possibly redound to the advantage of the enemy but rather must benefit this country: yet it is illegal and void, for it cannot be left to the individual to judge what may or may not be harmful or beneficial to his country. Let it be assumed (contrary to the contention of the respondent) that such a relation is that which is established by the grant of a general power of attorney. Yet how different an aspect must such a transaction wear if it takes place in an occupied country. New considerations at once arise which had no place in the formulation of the general rule of law. Is it in the interest of the King that, when British territory is occupied by the enemy, its able-bodied or skilled inhabitants should escape across the line of war and continue to render him service? No one would deny it nor give little weight to such a consideration, remembering what is owed to those who, when Europe was over-run, thought it their duty to carry on the fight from English shores. If for such men that is their right, or, as some would say, their duty, does public policy demand that, doing it, they should leave their affairs unattended by any responsible agent lest it should be said that, placing them in the hands of a lawful attorney, they were guilty of illegality and crime? If it were so, it would be a powerful deterrent against them rendering the service to the King which they could usefully continue to render. Their Lordships do not think it necessary to assess the general advantage or disadvantage of endeavouring to apply in the courts of Hong Kong the rigid rules of the common law which might have to be applied outside the colony in regard to a transaction taking place within it. The purpose of their observations is to show that the contentions of the appellant involve a grave extension of the common law, and that that extension means not merely the application of old principles to new circumstances or their adjustment to fresh needs but the rewriting of them in conditions in which their foundations are shaken. In these circumstances their Lordships are of opinion that the judgment of the court of Hong Kong should be upheld.

It becomes unnecessary to determine whether a general power of attorney is an instrument of a kind which must in ordinary cases be regarded as abrogated when donor and donee are divided by the line of war. For, even if it is, it is not as their Lordships hold, to be regarded as abrogated in the extraordinary case now under appeal. It is sufficient to say that *Tingley v. Muller* 1917 2 Ch. 144, upon which the respondent strongly relied as authority for the proposition that such an instrument remains of full force and effect notwithstanding the division of war, is difficult to reconcile with later cases and has itself been the subject of criticism in the highest tribunal.

But in addition to the defence with which their Lordships have just dealt the appellant also raised two pleas which must now be considered: (1) that by reason of certain events which will next be mentioned there was such a change of circumstances as to frustrate the agreement and render its performance in the manner contemplated by the parties impossible; and (2) that in any case in view of the hardship which would be imposed upon the appellant the equitable remedy of specific performance should be denied to the respondent.

For the consideration of these pleas some further facts must be stated.

As has already been noted, the property was subject to a first and second mortgage in sums expressed in terms of Hong Kong dollars. In September and October, 1943, these mortgages were paid off in military

yen at the prescribed rate of exchange; it was not permissible to pay them off in any other currency. Thus, but for the passing of the Ordinance of 1948 to which reference will next be made, the way was clear for an assignment of the property free of incumbrances to which the purchaser was entitled. And in fact such an assignment was at some date towards the end of September, 1943, executed by Chan in favour of the purchaser. In this document the consideration was stated to be 272,000 Hong Kong dollars, a fact at one time relied on by the appellant but no longer relevant in view of the finding of fact by the learned Chief Justice that the agreement was for a sale for military yen and nothing else. This assignment was not, and for obvious reasons could not be, registered at the Land Office of Hong Kong.

In 1948 there was passed by the Hong Kong Legislature the Debtor and Creditor (Occupation Period) Ordinance 1948 (being Ordinance No. 24 of 1948). It is not necessary to refer at length to the terms of this Ordinance and in particular it is not desirable, since the mortgagees are not parties to the proceedings, to attempt to define their rights under it against the appellant or the respondent or the property. But it is at least clear, as it is alleged by the appellant and made the ground of defence by him, that the result of the Ordinance is that, while it imposes on the purchaser no obligation to pay to the appellant any sum beyond the military yen already paid, yet it renders the latter liable to pay to the mortgagees a large sum in Hong Kong dollars beyond the military yen already paid in purported full discharge of the mortgage debts.

Upon these facts the appellant raises the plea of frustration, a plea rejected by the learned Chief Justice and by the Full Court on appeal. Their Lordships so fully agree with their reasons and conclusion that they can state their own view very shortly. It is beyond question that the passing of the Ordinance placed on the appellant a burden not contemplated by him or by the purchaser at the date of the agreement: this is put somewhat graphically by saying that, whereas it was contemplated that the mortgages would be fully discharged out of the purchase money and there would be a balance left over for the appellant, not only is there no balance left for him but he will lose his property and may still remain liable in substantial sums to the mortgagees. That this is an event not contemplated by him or his attorney is certain, though there is no evidence that the purchaser was aware that the property was mortgaged. But the question is whether this change of fortune is to be regarded as so fundamental as to strike at the root of the agreement and render its performance in the manner contemplated by the parties impossible. In their Lordships' opinion it clearly is not. The purchaser has long since fulfilled his part of the agreement: the appellant as vendor can fulfil his part by the execution of a single document. It is therefore not a case where performance has become impossible. Nor, if as the result of the Ordinance the appellant has not obtained the advantage from the agreement that he had expected, can this be deemed a change of circumstances so fundamental as to satisfy the test laid down by Viscount Simon in *Cricklewood Property and Investment Trust Ltd., v. Leighton's Investment Trust Ltd.* 1945 A.C. 221. at 225, which test was, as their Lordships think, correctly applied by the Supreme Court of Hong Kong.

The final plea, with which their Lordships must deal, is that equitable relief should be refused on the ground of hardship to the appellant. The Full Court cited with approval that part of the judgment of the learned Chief Justice which dealt with this plea and, as their Lordships respectfully think, his reasoning and conclusion are unimpeachable. That the appellant in the events that happened made a bad bargain is clear enough. That resulted from the fact that the Hong Kong legislature deliberately enacted that in some cases there should, and in others there should not, be a revaluation of debts incurred or discharged in military yen. The appellant would have been in no better position if the transaction of sale had been fully performed before the Ordinance came into operation.

It does not appear to their Lordships that any good reason has been shown why the Court should, by denying to the purchaser, who has performed his part of the bargain, the appropriate remedy of specific performance, in effect add to or alter the carefully thought out provisions of the Ordinance for the adjustment of the rights of certain creditors and debtors. In their Lordships' opinion therefore this plea also fails and they would only add that in any case they would hesitate long before interfering with the exercise of a discretionary jurisdiction by the learned Chief Justice in which the Full Court concurred.

They will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

**In the Privy Council**

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DELIVERED BY LORD SIMONDS

Printed by His Majesty's STATIONERY OFFICE PRESS,  
DRURY LANE, W.C.2.

1951