

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chu Ping v. Chan Ut Chiu and another, from the Supreme Court of Hong Kong; delivered the 10th May 1906.

Present at the Hearing :

LORD DAVEY.

LORD ATKINSON.

SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

This is a dispute as to the beneficial ownership of a piece of land reclaimed from the foreshore in the harbour of Victoria, Hong Kong, under the provisions of an Ordinance passed on the 10th May 1889. The Respondents are the successors in title of one Yiu Chow, deceased, and the Appellant is the surviving executor of one Chu Chuen, also deceased. The action was commenced by the Respondents against the Appellant and his co-executor (who has since died) on the 21st May 1903, under the following circumstances.

At the date of the passing of the Ordinance the ownership of the Crown lease of Marine Lot No. 53A, fronting the Praya roadway along the line of the proposed reclamation, was divided between Chu Chuen, Yiu Chow, and an Englishman named Stephens. The sections coloured red and grey, and marked on the plan at p. 88 of the Record "Section A" and "remaining portion," belonged to Chu Chuen, and of these sections the "remaining portion" only had a frontage towards the Praya roadway. The

sections uncoloured and marked "Section B" and "Section D" belonged to Yiu Chow, and both of these sections had a frontage on the roadway. The section uncoloured and marked C belonged to Stephens.

The material portions of the Ordinance for the present purpose are contained in Clauses 6, 7, and 8, which are as follows:—

" Section 6. All the land and foreshore and bed of the sea to be reclaimed under this Ordinance, and all the land occupied by the present Praya road-way and wall along the line of the intended reclamation, is hereby declared to be absolutely the property of the Crown free from any restriction whatever, and the Governor shall have power, subject to the provisions of this Ordinance, to deal with the same and to dispose of the same for building or any other purpose in the same way and to as full an extent as in the case of other Crown lands; and all property, estate, rights or supposed rights, and easements or supposed easements of any persons or class of persons whether Crown leaseholders or licensees or otherwise, to the user or possession or occupation of, in, over or in any way in relation to such land, foreshore, bed of the sea, embankment, reclamation or Praya road-way and wall, or in relation to any wharf, landing place, pier, or other place, situate thereupon are hereby declared to be absolutely extinguished and determined.

" Section 7. Whereas the Crown lessees or their assigns registered in the Land Registry Office at the date of the commencement of this Ordinance in respect of the lots of land or sections thereof fronting the Praya road-way along the line of the proposed reclamation (which persons with their executors, administrators and assigns except where repugnant to the context are hereinafter referred to as the lessees) or the majority of them have already declared or signified their readiness to contribute towards the cost to be incurred for and in connection with the works authorized by the Ordinance provided the Governor will grant to them respectively Crown leases of such equitable proportion of the proposed reclamation as may be available having regard to public requirements, in respect of the roads and streets to be made on the land when reclaimed, and in the case of each lessee having regard to the claims of other lessees, and whereas it has been agreed that the cost of the said works shall also include a sum not exceeding \$ 5,000 for preliminary expenses, a sum not exceeding \$ 180,000 by way of compensation to owners and occupiers of wharves and piers along the line of the proposed reclamation, and a further sum not exceeding \$ 105,000 for the purchase of a portion of the land in course of reclamation opposite Marine Lots Nos. 95, 96, 97, 98 and 105.

“ Be it further enacted as follows—

“ (i.) As soon as practicable after the commencement
“ of this Ordinance a further plan signed by the Surveyor-
“ General and countersigned by the Governor, showing in
“ detail the portion of the proposed reclamation assigned
“ to lessees in respect of the lots of land or sections
“ thereof registered in their names at the Land Registry
“ Office at the date of the commencement of this Ordinance,
“ shall be deposited at the said office and shall have
“ annexed thereto a schedule containing a list of the lessees
“ of such lots of land and sections as aforesaid and the
“ approximate contribution required from each of them in
“ respect of the cost of his portion of the reclamation.

“ (ii.) The deposit of such further plan as aforesaid shall
“ be notified in the *Gazette*, a copy of the said schedule
“ being published at the same time, and lessees who are
“ desirous of entering into the agreement hereafter
“ mentioned shall within a period of two months from
“ the date of such notification signify respectively in
“ writing their acceptance of the portions of the land
“ assigned to them on the said plan and of their intention
“ to enter into an agreement.

“ (iii.) On the expiration of two months from the date
“ of such notification as aforesaid and within a further
“ period of one month it shall be lawful for the Governor,
“ if he shall think fit, to enter into an agreement with the
“ lessees individually who have signified their intention
“ and acceptance as aforesaid, such agreement being upon
“ the terms and subject to the conditions in the form in
“ the schedule to this Ordinance; and the Governor is
“ hereby empowered to dispose of the reclaimed land in
“ accordance therewith.

“ (vi.) In case any lessee shall not signify his acceptance
“ in the manner and within the time provided in Sub-
“ sections (ii.) and (iii.) of this Section, he shall have no
“ claim to any compensation in respect of any depreciation
“ of his lot by reason of the said works, but the Governor
“ may, if he thinks fit, award to him such a sum of money
“ or such a Crown lease of new land as he may in his
“ absolute discretion think sufficient as and by way of
“ compensation for any injury that such lessee may have
“ sustained by the said works.

“ (8.) Except as in this Ordinance provided no marine
“ lot-holder or other person shall be entitled as against the
“ Crown to any damages or compensation for the depreciation
“ or injurious affecting of his property or business caused
“ by, or resulting either directly or remotely from, any of the
“ said works.”

A notification appears to have been published
by the Governor on the 6th July 1889, con-
taining a schedule of the owners of lands with

whom the Governor was prepared to treat as provided by the Ordinance, and of the Sections in respect of which reclaimed lands were proposed to be apportioned, and the number of square feet of such land to be apportioned to such owners. It appeared from such schedule that 1,526 square feet were apportioned to Chu Chuen in respect of his ownership of the section marked "remaining portion," and 5,853 square feet were apportioned to Yiu Chow in respect of his ownership of Sections B and D. The estimated amount of the contribution to the cost of the works by Chu Chuen was \$3,326, and by Yiu Chow \$12,795. Nothing was apportioned to Chu Chuen in respect of Section A or to Stephens in respect of Section C.

Yiu Chow did not within the time limited by the Ordinance signify his acceptance of the portion of land assigned to him or his intention to enter into an agreement, and in fact never did so. Mr. Bruce Shepherd, the acting Land Officer of the Government, says in his evidence that he tried to get Yiu Chow to sign the agreements as to the frontages of B and D before the undertaking of the 19th December (which will be mentioned). He adds that it would be during the month of November he (Yiu Chow) said he wanted to buy the godowns on Section A, and he would not sign anything or agree to anything till he could settle with Chu Chuen about the purchase of Section A and the "remaining portion," and that Chu Chuen having refused to sell to Yiu Chow, the latter said to the witness that it would be better for him to wait for Chu Chuen's death and then buy all the lot, and get the reclamation cheaper.

Chu Chuen on the other hand duly signified his acceptance of the land allotted to him in respect of the "remaining portion," and executed an agreement in the form scheduled to

the Ordinance in respect of it, and no question now arises as to this piece of land. Chu Chuen however made a claim to an allotment of land in respect of his ownership of Section A, which was rejected by the Government. In the result, and upon Yiu Chow's refusal to take up his allotment or sign any agreement, Mr. Bruce Shepherd decided that Chu Chuen should sign the agreement in respect of the allotment which Yiu Chow had refused, and enter into a guarantee to the Government, which Chu Chuen agreed to do.

Accordingly, on the 19th December 1889, Chu Chuen signed an agreement in the scheduled form, which was dated the 5th October 1889. The agreement so signed had in fact been prepared and dated in anticipation of Yiu Chow taking up the allotment, and his name is crossed out and Chu Chuen's name is substituted for it. It recites that the lessee was a Crown lessee of Marine Lot 53 A (the words "Section D, and 53 A Section B," being crossed out), and had agreed to contribute towards the cost of the works authorized by the Ordinance, the sum of \$12,759. 54, and such further and other sums as therein-after mentioned. It was then agreed that the lessee should contribute the sum mentioned, of which \$3,189. 88 (it is stated) had been that day paid by the lessee to the Governor as a guarantee for the due performance by the lessee of the agreement; the balance to be paid in such instalments and at such times as should be required by the Governor. And the lessee further agreed that in addition to the above contribution the lessee should also contribute a proportion (to be settled by the Governor) of the sums that might be required to make good any loss, damage, or expense which might have been caused to any portion of the works previous to the completion

thereof, by or in consequence of any unforeseen difficulties or any typhoon, storm or other catastrophe. Upon completion of the works in the area of reclamation described as Section 6 on the deposited plan, and on payment of all the sums payable by the lessee as above, the Governor agreed to grant to the lessee a Crown lease of the land coloured red on the plan annexed to the agreement (being the land previously intended to be allotted to Yiu Chow) for a term of 999 years, subject to a proviso that nothing in the agreement should be held to give the lessee any rights over the new foreshore or in respect of the portion of the reclamation thereby agreed to be granted to him of a nature different to, or in a degree greater or less than, such rights as the lessee might have had in respect of "the said Marine Lot 53 A, Sec. D 53A, Sec. B," immediately before the coming into operation of the Ordinance.

The present Appellant contends that the reference to Sections D and B in the portion of the Agreement last referred to is an obvious clerical mistake and the words were left in the agreement only by an oversight of the clerk in adapting an agreement prepared for Yiu Chow to the altered circumstances. The Respondents, on the other hand, say that the words are quite right, and quote them in support of their theory that Chu Chuen was intended to be, and was, a bare trustee for Yiu Chow of the land agreed to be leased. It is obvious that the words require either some amendment, or to be so construed as to harmonize with the rest of the agreement. But in the view which their Lordships take of the case the point is quite immaterial. The meaning is plain enough that the lessee of the reclaimed land shall not enjoy other foreshore rights than the lessee or lessees of 53A had before

reclamation. And their Lordships cannot see how the agreement can be construed to give Yiu Chow any rights which he had not independently of the agreement.

On the same 19th December 1889 Chu Chuen signed and handed to the Government the document already referred to as a guarantee or undertaking in the following terms:—

“ I the undersigned Chu Chuen Crown lessee of Marine Lot No. 53A in consideration of the Agreement entered into by me this day for the reclamation of the foreshore in front of the said lot under the Praya Reclamation Ordinance 1889 hereby guarantee either to assign an equitable proportion of the said reclamation or to pay an equivalent in money to the owners of Sections B, C, and D of the said lot.

“ I hereby also agree to indemnify the Government in respect of any legal claim that may hereafter be made against it in respect of the said reclamation.”

Chu Chuen settled with Mr. Stephens, the owner of Section C, by payment of a sum of \$2,000, but he failed to come to any agreement with Yiu Chow. Chu Chuen or his executors (he having died in January 1898) paid all the instalments which became due from him under his agreement, and the reclamation of the section containing the land in dispute was completed some time in the year 1903.

Yiu Chow died in May 1893, and on the 12th September 1900 his representative assigned to the Respondents Sections B and D of Marine Lot 53 A, and also all his interest in the pieces of ground or extension seawards known or registered in the Land Office as the reclamation of Marine Lot 53 A. Neither Yiu Chow in his lifetime, nor his representative after his death, nor the Respondents contributed anything towards the payments made by Chu Chuen or his executors. But in consequence of a notice having been sent to them by a mistake, the Respondents paid to the Government the amount of the fourth instalment which on discovery of the mistake the Government offered to return to

them. Nothing turns on this payment. No lease has yet been granted, but since the commencement of the action the Appellant has been let into possession under an agreement with the Government.

The Respondents by their Statement of Claim alleged that the said agreement bearing date the 5th October 1889, though nominally entered into by Chu Chuen in his own name, was in fact entered into on behalf of the owners of Sections B and D, and, in the alternative, that altogether apart from the said agreement, they, as the owners of Sections B and D, are entitled upon the true construction of the Ordinance to such proportion (from front to back) of the whole of the reclamation to Marine Lot No. 53 A as the frontage of Sections B and D upon the old Praya roadway bears to the whole frontage of the said lot upon the said roadway (that is to say) that they are entitled to the whole of the land comprised in the agreement, and they claimed a declaration to that effect.

The action was tried by the Chief Justice, who seems to have thought (for some reason which is not apparent) that Yiu Chow had acquired a right under the Ordinance to the land originally proposed to be allotted to him, although he had not accepted the invitation made to him, and that the only question was one of the construction of the Ordinance. Holding that the scheme contemplated in Section 7 of the Ordinance was addressed only to lessees of lots or sections of lots, which lots or sections fronted the Praya roadway, the learned Judge gave judgment in favour of the Respondents for the whole of the land in dispute. An Appeal from this Judgment was heard by the Chief Justice and Mr. Justice Sercombe Smith. The Chief Justice adhered to the view which he had expressed at the trial. The other learned Judge

held that, notwithstanding the evidence of Mr. Bruce Shepherd, it was clear that the Crown recognised Yiu Chow as a Crown lessee who had signified his acceptance under Section 7 of the Ordinance, and was therefore qualified to enter into the agreement, and as owner of Sections B and D became, under the Ordinance, equitable owner of the right to a grant of a Crown lease of the land in dispute, and the legal right being by the agreement in Chu Chuen, and the equitable right by the Ordinance in Yiu Chow, Chu Chuen was trustee for Yiu Chow of such right. The Judgment of the Chief Justice was therefore affirmed, and by Order dated the 24th August 1904 the Appeal was dismissed with costs.

The foundation for Mr. Justice Sercombe Smith's opinion that the Government had recognised Yiu Chow as having title to a lease is a Government notification published in the Gazette of the 19th December 1891 purporting to be "A list of Lessees who have signified their acceptance of the portions of land assigned to them under the Praya Reclamation Ordinance, 1889, Section 7, Sub-section ii," in the Schedule to which the name of Yiu Chow is entered in respect of Sections B and D of Lot 53A. No explanation was given of this document, which is so plainly at variance with the facts proved, that it is not surprising that the Chief Justice disregarded it, and found that Yiu Chow never did accept, and the learned Counsel for the Respondents did not maintain the contrary.

The documents do not show—and apart from the documents there is no evidence whatever—that the Government treated Yiu Chow as being in the same position as if he had signified his acceptance of the Government proposal, or intended to make the grant to Chu Chuen in

trust for Yiu Chow. Although he seems to have been cognisant of the agreement made with Chu Chuen, he was not a party to it or in any way bound by it, and he never came under an obligation either to the Government to pay, or to Chu Chuen to provide him with money for the payment of, the amounts payable by Chu Chuen under the agreement, which might have entailed a very heavy liability. And he was free, when the reclamation was complete, to continue to stand aside and refuse to have anything to do with the matter.

Their Lordships do not dissent from the opinion of the Chief Justice on the construction of the Ordinance as regards the lessees to whom the invitation to contribute to the cost of the works was addressed. But Yiu Chow having elected not to accept the offer made to him never acquired any right whatever to the land in dispute under the Ordinance, and the Governor had the right (under Section 6) to deal with and dispose of the same like other Crown lands. The Governor exercised his discretion by entering into the agreement with Chu Chuen, but for his own protection he took from him the cotemporaneous undertaking to respect whatever rights the owners of the other sections of the Lot 53A might have, and to indemnify the Government. The only semblance of a right which Yiu Chow had was to claim from the Government compensation for any injury which he should sustain by the reclamation works, under Section 7, Subsection vi. of the Ordinance. It is entirely in the Governor's discretion whether he will give effect to such a claim, and whether he will do so in land or money. And until the Governor has given his decision the Respondents have no right in respect of it against either the Government or the Appellant.

Their Lordships are of opinion that there is

nothing in the documents or in the evidence to establish the relation of trustee and *cestui que trust* between the Appellant and the Respondents as regards the land, or (as things stand at present) any part of it. The Judgment of the Chief Justice therefore cannot be maintained, and the action must be dismissed. But such dismissal will not prejudice any claim which may be made by the Respondents either directly or through the Government, or any action they may be advised to bring in respect of any part of the land or any sum of money which may hereafter be awarded to them by the Governor under Section 7, Sub-section vi. of the Ordinance.

Their Lordships will therefore humbly advise His Majesty that the Order of the Supreme Court of Hong Kong dated the 24th August 1904 be reversed, and instead thereof it be ordered that the action of the Respondents be dismissed with costs in both Courts. The Respondents will also pay the costs of this Appeal.

