

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Imperial Bank of China v. Leung Shiu Kong, from the Supreme Court of Hong Kong; delivered the 16th January 1912.

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD MERSEY.

LORD ROBSON.

[DELIVERED BY LORD MERSEY.]

This is an Appeal from a judgment of the Full Court of the Supreme Court of Hong Kong, dated the 28th June 1909, allowing the Appeal of the Respondent from a judgment of the Chief Justice of the Court, whereby he had held the Respondent liable in respect of items 3 and 4 in the Appellants' statement of claim.

The action was brought upon a guarantee note in Chinese which had been given by the Respondent to the Appellants in respect of certain classes of defaults which might be made by the Respondent's brother, Leung King Wo (now deceased), who was an official of the Appellant Bank in charge of their agency or branch at Tientsin. The two items are described in the statement of claim, and in the Appellants' case in the following words :—

“(3.) The sum of 45,747. 79 taels, which sum
“ was admitted by the said Leung King Wo in a
“ secret book of account which he caused to be
“ kept for his own private purposes to have been
“ due and owing by him to the Plaintiffs ”; and

[*] J. 107. 100.—1/1912. E. & S.

“(4.) The sum of 13,532.03 Tientsin dollars,
 “ which sum was admitted by the said Leung
 “ King Wo in a secret book of account which he
 “ caused to be kept for his own private purposes
 “ to have been due and owing by him to the
 “ Plaintiffs.”

Stated shortly, the answer of the Respondent to the claim was, first, that there was no sufficient proof of any default on the part of the deceased Leung King Wo within the meaning of the guarantee, and, secondly, that even if there were, the terms of the deceased's employment, had been so materially altered since the date of the guarantee as to release the Respondent from his liability.

The circumstances out of which the action arose are as follows :--

The Appellant Bank was formed in 1896 by an Imperial Decree of the Chinese Government. Its head office was at Shanghai. In 1897 an agency or branch of the Bank was established at Tientsin, and of this branch Leung King Wo was appointed manager. He was required by the Bank to furnish a guarantee as a condition to his appointment, and thereupon, at his request, his brother, the Respondent, gave to the Bank a document in Chinese, of which the following is a translation :--

“ *Guarantee Note.*

“ The maker of this guarantee note, Leung Shiu Kong,
 “ now guarantees Leung King Wo, who has been appointed
 “ by the Imperial Bank of China to be manager of its
 “ branch office in Tientsin to manage all matters according
 “ to the rules and regulations of banks. In all matters
 “ which are required to be guaranteed, such as the manager
 “ Leung King Wo secretly appropriating any money of the
 “ said branch office to do any private business of his own, or
 “ losing (any of its moneys) through using same, or doing
 “ anything of a like nature, the guarantor shall be held
 “ wholly responsible. This guarantee is made in good
 “ faith. Appended are the conditions of this guarantee :--

“Particulars.

“ 1. Leung King Wo is hereby guaranteed as manager
 “ of the branch office in Tientsin that he will not appropriate
 “ any money from this Bank, or become secretly indebted to
 “ this Bank in any sum of money.

“ 1. Leung King Wo is hereby guaranteed not to use
 “ the money of this Bank in secretly doing any other
 “ business.

“ 1. Leung King Wo is guaranteed as follows :—

“ If (Leung King Wo) should lose any money belonging
 “ to this Bank, or become indebted to this Bank, or if any
 “ person in his employ should lose any money belonging to
 “ this Bank, or become indebted to it, and if Leung King
 “ Wo should be unable to satisfy and pay back the same,
 “ the present guarantor shall be held solely responsible
 “ therefor.

“ 1. Should the guarantor withdraw this guarantee
 “ another man will be required to take up the guarantee
 “ before (Leung King Wo) can be allowed to remain in his
 “ post.”

This document is dated the 28th August
 1897.

Except that the document itself described
 Leung King Wo as “manager of the branch
 “ office in Tientsin to manage all matters
 “ according to the rules and regulations of
 “ Banks,” there was nothing to show that
 the Respondent knew anything of the nature
 or extent of the duties which Leung King Wo
 had to discharge at the Bank or of the precise
 relations existing between him and his employers.
 Evidence was however given at the trial as to
 what these duties and relations in fact were. It
 appears that an agreement between the Bank and
 Leung King Wo had been drawn up on the
 13th August 1897, providing for his remuneration
 and to some extent defining his duties as manager.
 This document begins by stating that the powers
 of the manager are to be the same as those vested
 in the manager of the Tientsin branch of the
 Hong Kong and Shanghai Bank, but it is silent
 as to what those powers were. The document
 then sets out certain regulations which are to
 guide the manager in matters of business, and it

provides that the manager shall be paid a salary of 100 taels a month, and shall receive a further 200 taels a month for the expenses of the branch. The agreement is stated to be "for one year by way of trial" at the end of which time any "necessary changes or modifications may be discussed and decided." Shortly after this agreement was entered into the Bank by writing authorised Leung King Wo to engage a compradore or himself to act as such. The words of the authority reading (according to the translation) "the manager of the agency who is appointed by the Head Office may engage a compradore or (if he likes) act jointly in lieu thereof."

Their Lordships are of opinion that the agreement of the 13th August 1897, together with the authority to engage a compradore or himself to act as such, defined the terms of Leung King Wo's appointment, and that those terms were operative at the date of the guarantee. Leung King Wo took up his duties in October 1897, and received from the Head Office a sum of 50,000 taels, which was to form the working capital of the Tientsin branch. He did not engage a compradore, but did the work of compradore himself.

At the end of the first year of his appointment a fresh agreement was entered into between the Bank and Leung King Wo. It is in writing under date the 17th August 1898. In the translation of this document, Leung King Wo is throughout described as the "agent" of the Bank at Tientsin. In the translation of the original agreement of the 13th August 1897 he is always referred to as the "manager" of the Bank. It is said by the Appellants that the Chinese word is the same in both documents, and this may be so; but the substance of the later agreement shows that the English word

“agent” more correctly describes Leung King Wo’s relation to the Bank under that agreement than the word “manager.” Under the original agreement the capital of 50,000 taels was not to be lent at less than 6 per cent., and if lent out at a higher rate the Bank was to have the benefit, whereas under the second agreement the capital was lent by the Bank to Leung King Wo himself at 7 per cent., and he was apparently at liberty to deal with it as he liked and to keep for himself anything that the money might yield over 7 per cent. In other words, the capital of the Bank, instead of being dealt with or managed by Leung King Wo for the benefit of the Bank, was to be dealt with by him for his own benefit on the terms that he paid the Bank the fixed rate of interest of 7 per cent. There were many other differences between the two agreements showing that the personal responsibility of the Bank for the business done at Tientsin was shifted under the second agreement from the shoulders of the Bank to Leung King Wo.

Both the Judges in the Court below were of opinion that the appointment under the later agreement was a new appointment involving liabilities different from and larger than those undertaken by Leung King Wo under the earlier agreement existing at the date of the guarantee. The Appellants themselves also appear to have taken the view that a change had been made, for in the English translation kept at Shanghai of the Tientsin accounts the English word “agent” is used to describe Leung King Wo’s position after the new agreement came into operation, whereas before the change the word “manager” only had been used. The Respondent was not informed of the change.

The second agreement, like the first, was to last for one year, and would therefore expire on the 17th August 1899. But Leung King Wo remained at his post after this date,

and no fresh agreement having been drawn up it must be taken that he remained on the terms of the second agreement. Meanwhile, the accounts of the Tientsin business were regularly audited from time to time by an inspector sent from the head office at Shanghai and apparently no irregularities were discovered. So matters remained until the Boxer rebellion which broke out in June 1900. This rebellion put an end to the business in Tientsin for the time being, and the premises of the Bank were occupied by troops. In the following August, Leung King Wo went from Tientsin to Shanghai, and while there he died. The date of his death was the 4th August 1900. Shortly after this event the English manager and the Chinese manager of the Bank at Shanghai wrote a joint letter from Shanghai to the Defendant, dated the 28th September 1900, in which the following passage occurs:—

“ To our deep regret, elder brother Leung King Wo, having been sick for a few days, died on the tenth day of seventh moon. Why did Heaven deprive us of our good friend so soon? The grief still lingers in our memory. Before his illness he said that the box containing all the account books was kept in the Chartered Bank of India, Australia, and China, at Tientsin. Last month we brought down here these books and examined them with elder brother Chan Yat Cho, an employee in the Tientsin agency, in the presence of us three, and we found that besides the Bank’s accounts there were a great many other accounts. . . . We enquired of elder brother Yat Cho, who said that elder brother Leung King Wo had some other account books in his own name placed somewhere. We must obtain these books and re-examine them before we can find out whether any mistakes have been made or not in the Banks or private accounts.”

What the other account books mentioned in this letter were or whether (with one exception) they were ever discovered or indeed existed does not appear. Yat Cho was not called as a witness and no light is thrown on the point. But from the evidence of a man named Sung Hang Chang,

who entered the service of the bank at Shanghai in August 1900 as an accountant, it appears that "some foreigner" either sent down or brought down a box from Tientsin to Shanghai some time in the year 1900. There is no evidence to show who the foreigner was or where the box came from, and perhaps it is not material to inquire. But the box was opened, and in it was found (with many other things) a book called Exhibit 54. It is upon the entries in this book that the claim in respect of the two items now in question is based. On the cover of the book there was written in Chinese "King Kee Current Account." "King Kee" is said to be another way of describing Leung King Wo. There was nothing on the outside of the book to connect it with the Plaintiff Bank. But an accountant named Fan Sung Yan was called who had been in the employment of Leung King Wo in the Compradore Department of the Tientsin branch, and he identified the book as one which he had kept while there. He stated that his business was (among other things) to attend to Leung King Wo's private accounts, and that he made the entries in the book day by day upon his instructions. While so employed he sat in a room and at a desk with another clerk named Li, who was aware of the existence of the book and who had made one or more entries in it. There seems to have been no concealment or mystery in the Tientsin branch about the book, or about the use to which it was put. The clerk Li was not called. Turning to the translation of the contents of the book the entries show two accounts, the one in taels and the other in dollars. Each account begins with a debit balance brought forward from some previous book (not produced), and the entries run down to the eve of the Boxer rebellion, when they stop. Fan Sung Yan says that when the rebellion

broke out he ran away, and presumably he left the book behind him in the bank. When the two sides of the accounts are added up the result shows the two debits, in taels and in dollars, in respect of which it is sought to make the Respondent liable under the guarantee. There is no reference in the book to the pages of any other book, so that it would appear that the entries were neither taken from nor posted to any other account book. In other words there is nothing on the face of either the tael or the dollar account to show that the transactions recorded are transactions with which the Bank was in any way concerned. Reading the items they record a number of small personal payments and receipts such as the cost of peacock's feathers, a payment to a tailor, and for gloves, the cost of an iron pot, and of a box of kerosine for family use, money spent at dominoes, &c. They also record many larger transactions in the way of receipts and payments of money by King Kee, many of which may have been with the Bank; and evidently Fan Sung Yan thought that the resulting debits did represent money due by the deceased man to the Bank. He, however, admits that he had no personal knowledge about it. Some years after Leung King Wo's death the Bank sent the accountant Sung Hang Chang to Tientsin to go through the accounts there. In his evidence, speaking of this book, Exhibit 54, he says :--

“ I infer that it (viz., the amount of the debit balances) “ is owing by King Kee because the book bears a label “ ‘ Account King Kee.’ This is his (King Kee's) special “ book. There is no date down on the book showing when “ the balance was made up. The book is not labelled in “ any way Imperial Bank, but the money must have been “ drawn.”

The witness is then asked the question :--

“ What entry have you got in any book to show that “ that money belongs to the Bank ? ”

This question was put in cross-examination, and it was a direct challenge to the Bank to produce any book to connect the accounts in Exhibit 54 with the Bank. The answer of the witness is:

"I have never tested that myself. I was not an accountant at the Bank at the time, how can I know? The question seems unreasonable."

Their Lordships are of opinion that the question was a very reasonable and proper one, and that it should have been answered by the production of the Bank books. Exhibit 54 without explanation is unintelligible, and the inference drawn by Sung Hang Chang from the label "Account King Kee," that the balances resulting from the addition of the columns represent sums of money due to the Appellant Bank by the deceased man, appears to be unreasonable. If, as suggested by the Appellants, the entries in the book represent sums of money drawn from the Bank by the deceased man for his own use, the Bank books would have been of great significance, either by reason of what they did, or of what they did not, contain. There is no suggestion that Leung King Wo falsified the books, and, if he did not, the items in Exhibit 54, which are said to record payments to and by the Bank, would be found also in the ordinary Bank books. Apparently the excuse made by the Bank at the trial for the non-production of the Bank books was that the cost of translation would have been excessive. The Chief Justice quite properly dismisses this excuse with the observation that "the cost of proving a claim cannot be an excuse for not proving it at all." It is true that this observation was made with particular reference to other parts of the Bank's claim against the Respondent upon which the Bank failed and as to which there was no appeal to the Full Court. But it is an

observation of general application, and their Lordships are of opinion that when challenged to do so the Bank ought to have produced the Bank books with translations for the purpose of enabling the Defendant and the Court to compare them with Exhibit 54. It was the duty of the Bank to establish the indebtedness of the deceased man by clear evidence. The Chief Justice, after observing that Exhibit 54 was written at the dictation of Leung King Wo, says: "I am disposed to think this amounts to an admission by Leung King Wo of his indebtedness." But in truth it amounts to no such thing. Putting upon it the construction most favourable to the Bank, it amounts to no more than an admission that some of the items contained in it represent money received by Leung King Wo which may, or may not have been, obtained from the Bank. To say that the two sides of the book represent a current account with the Bank is mere speculation, and probably an ill founded speculation.

But there is another difficulty in the Appellants' way. The guarantor did not make himself responsible for any mere indebtedness which the deceased might come under to the Bank. He made himself liable only if the deceased became *secretly* indebted. The action, so far as it relates to the two items under consideration, is brought on the contract contained in the last words of the first particular of the guarantee "Leung King Wo is hereby guaranteed that he will not become secretly indebted to this Bank in any sum of money." It was, therefore, a necessary part of the Plaintiff's case to show that the indebtedness, if it existed, was secret; in other words that it was concealed from the Bank. The only evidence of secrecy consisted of the production of a translation of some returns made by Leung King Wo to the Head Office of

the Bank at Shanghai which were contained in a book marked Exhibit 21. It was said that inasmuch as this book contained no reference to Exhibit 54 the account in Exhibit 54 must be regarded as secret within the meaning of the guarantee. Exhibit 21 was first tendered in evidence during the examination of Chu Pao Sang, who had been a director of the Bank since its formation. This witness says that the branches were ordered to send in monthly returns. These returns were translated (or perhaps only partly translated) and then the translations were entered in a book. The witness was then shown Exhibit 21 and he says of it:—

“ This volume contains returns that were received from the Tientsin agency. The first return is dated the 29th day of the 12th moon of the 23rd year of Kwangsui (21st January 1898). The date of the last entry is 29th day 4th moon, 26th year (27th May 1900).”

The only other witness who speaks as to Exhibit 21 is Sung Hang Chang, the accountant employed by the Bank after the Boxer troubles to examine the books. He says of the Exhibit:—

“ We call it a return book. It contains the half yearly balance sheets and the monthly statements of account from the 21st January 1898 to the 27th May 1900 The half-yearly statement of accounts has been translated but not the monthly returns I have worked through these returns to see if there is any sum which might be the equivalent for Taels 45,747 or Dollars 13,532. 03. There are no such entries.”

But further on in cross-examination he says:—

“ According to the accounts in the Bank Returns (Exhibit 21) the capital account of 50,000 taels is fully accounted for.”

According to the evidence of this witness all accounts not found in Exhibit 21 are called secret accounts, but he adds that it never occurred to him or to anyone else to use the word “secret” in that connection before October 1901. Up to that date the so-called secret accounts were called by the witness and others “compradore accounts,” and he is unable to say why the description was

changed (as it was) to "secret accounts." The Chief Justice, however, appears to have had no difficulty in discovering the reason for the change. In his judgment delivered at the trial, speaking of the way the accounts were kept at the Branch Bank, he says :—

" There was nothing secret in the way the business was actually carried on in the Bank itself, it was indeed the reverse of secret. It is true that these accounts were not included in the returns: (I treat this as a fact, although the contents of the portfolio, Exhibit 21, were not properly proved), but this is consistent with the fact that these items represented the business done by Leung King Wo himself, as from Mr. Sung's evidence seems possible, or by Leung King Wo in his capacity as compradore, which also is probable. But the value of this assertion may be accurately gauged by the action of the Plaintiff's agents themselves. For this alteration of the name to 'secret accounts' was obviously done to bring them into the paragraphs of the guarantee which refer to 'secret' dealings."

The meaning of the passage in the judgment is plain, namely, that the absence in Exhibit 21 of any specific reference to the two debits in taels and dollars respectively is no proof that the existence of the accounts in Exhibit 51 was kept secret from the Bank. It is true that later on in his judgment the Chief Justice, speaking of the two items in question, says :—"I must assume that the manager's overdraft was not reported to the Bank and therefore that it was unknown to the Head Office." But their Lordships can find no justification for this assumption nor does it appear to be consistent with the earlier passage in the judgment, which deals generally with the so-called secret accounts. The truth of the matter is fairly plain. Leung King Wo carried on a business of his own as compradore for the purposes of this business, he drew money from the Bank as he wanted it, some of the items in Exhibit 54 may very well be items of cash drawn from the Bank in this way, although the Bank's books were not produced to prove it, and it may be that at the moment the Boxer riots broke out

Leung King Wo was indebted to the Bank in some sum or other in his capacity as compradore. But all this was or ought to have been well known to the Bank, the Bank had nominated him compradore, they were regularly sending their auditors to Tientsin to examine the accounts, the cash if any which was drawn from the Bank must have appeared in those accounts, and no complaint was made. The auditors who would presumably know all about the business were not called, and as to the observation of the witness Sung Hang Chang that he can find in Exhibit 21 no reference to the two items, the answer is, first, that such an account as that contained in Exhibit 54 would probably not be included in the returns at all, because it was not a Bank account, and further that the two balances referred to by the witness had not been ascertained at the date of the last return made. The whole case put forward by the Appellants resolves itself into one of possibility or perhaps of probability that Leung King Wo's account with the Bank was and is still an overdrawn account, nothing more. The guarantee does not cover such a case and the Appellants therefore fail.

The Full Court did not review the Chief Justice's decision on the question of the accounts. They confined their attention to the question whether the guarantor's liability had not been extinguished by the change in the relations between Leung King Wo and the Bank, and they decided that it had. Having regard to the view taken by the Board of the evidence adduced in support of the Appellants' case on the accounts it becomes unnecessary to consider that question.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellants will pay the costs.

In the Privy Council.

THE IMPERIAL BANK OF CHINA

v

LEUNG SHIU KONG.

DELIVERED BY LORD MERSEY.

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