Privy Council Appeal No. 2 of 1950

Fung Kai Sun - - - - - - - - - - *Appellant*

v.

Chan Fui Hing and others - - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH JUNE, 1951

Present at the Hearing:

LORD PORTER
LORD REID
SIR LIONEL LEACH

[*Delivered by* LORD REID]

This is an appeal against a judgment of the Full Court of the Supreme Court of Hong Kong dated 14th July, 1949, by which the Full Court unanimously dismissed an appeal against a judgment of the late Sir D. A. MacGregor, C.J., dated 19th December, 1940.

The plaintiffs in this action and respondents in this appeal are tenants in common in equal shares of property at 300, Des Voeux Road Central, and 92, Wing Lok Street, Hong Kong. They acquired this property in 1925 and 1927 and until 1933 the title deeds were held and the rents were collected by a firm of which the second respondent was manager. In 1933 that firm ceased to carry on business and thereafter the title deeds were entrusted to Chan Chung Wah, a younger brother of the third respondent. Chan Chung Wah managed the property and remitted the rents and submitted accounts to the respondents. About the beginning of 1939 his remittances of rent fell in arrear and in March or April of that year the second respondent asked a fellow clansman, Chan Kwok Shing, to look into the matter. He did so but Chan Chung Wah put him off with excuses for a time; then he discovered that the tenants were no longer paying their rents to Chan Chung Wah but had for some time been paying their rents to a collector for a bank. He reported this to the second respondent on or about 19th May and the second respondent says that he then suspected that Chan Chung Wah had fraudulently mortgaged the property. On 24th May he wrote to the first respondent who was not then in Hong Kong and the first respondent arrived in Hong Kong on 31st May or 1st June and immediately went to see the second respondent about the matter. The second respondent says that by this time he knew that Chan Chung Wah had mortgaged the property by forged mortgages.

The first and second respondents decided to try to obtain payment from Chan Chung Wah of the sums which he owed to them before doing anything else. They refrained from giving any information about the forgery to the defendant and appellant who was the holder of the forged mortgages and they did not consult the third respondent as they thought that he might be involved in the forgery. The first respondent

went several times to look for Chan Chung Wah who had rooms in the property at 300, Des Voeux Road, but did not find him until 10th June. He then succeeded in getting $100 from Chan Chung Wah with a promise to pay the rest of the debts immediately, but two days later Chan Chung Wah had disappeared. Little is known about his later movements. He was in Macao for a time and once in the later part of 1939 he was seen by a witness in Hong Kong. No proceedings appear to have been taken against him.

Several witnesses say that Chan Chung Wah had been known to them for a considerable time under the name of Chan Kwok Nim, which is the name of his brother, the third respondent. In Hong Kong mortgages are registered, and in order to effect registration the mortgagors have to appear and be identified. In this case this safeguard was wholly ineffective. Chan Chung Wah succeeded in registering three forged mortgages without any suspicion being aroused. The first, in favour of the Overseas Chinese Bank, was registered in 1935: the sum due to the bank was later repaid to them by Chan Chung Wah and no question arises in this case about this mortgage. The second mortgage was in favour of the appellant for $55,000 dated 29th October, 1937, and the third, also in favour of the appellant, was for $5,000 and was dated 2nd November, 1938. In each case Chan Chung Wah's method was the same. He approached some man who had known him as Chan Kwok Nim and introduced two strangers to this man as Chan Fui Hing and Chan Sik Tin, the first and second respondents and co-owners of the mortgaged property with Chan Kwok Nim. This man then purported to identify Chan Chung Wah and the two strangers as Chan Kwok Nim, Chan Fui Hing and Chan Sik Tin and the forged mortgage which they presented was accepted and registered. Their Lordships regard it as extremely unfortunate that this laxity should have been possible, but there is no suggestion that the appellant or any of the respondents were in any way to blame or that the forgeries ought to have been discovered at any earlier date.

When the first and second respondents discovered that Chan Chung Wah, the forger, had disappeared, they decided to raise an action against the appellant. The writ of summons was dated 17th June, 1939. Before it was served they told the third respondent about the position and on 21st June the third respondent was added as a plaintiff. The plaintiffs' claim was for a declaration that the two mortgages held by the appellant were not executed by the plaintiffs and that these mortgages are null and void, for an order that these mortgages be set aside, and for rectification of the register in the Land Office. This writ was served on the appellant on 23rd June and this was the first intimation to him that his mortgages were alleged to be forged. No further information was given to the appellant at that time. The appellant's main original defence was a denial that the mortgages were forged: he also pleaded that, if the deeds were executed by persons other than the plaintiffs, the plaintiffs by allowing these persons to have the custody or control of the documents of title were estopped as against him from saying that the deeds were not executed by them. The appellant made no request to be told who had had the custody of the documents of title, but considerable correspondence passed on the question whether the appellant's witnesses who had seen those who purported to be the mortgagors could have facilities to identify the respondents. In the course of this correspondence on 20th November, 1949, the appellant was informed that Chan Chung Wah had had the titles in his possession, but he still maintained as his principal defence that his two mortgages were genuine documents which had been signed by the respondents. The trial began on 11th December, 1939. It soon became apparent from the evidence led that the mortgages were forgeries and that the original defence would fail. But it also appeared from the respondents' evidence that by 24th May the second respondent knew that the deeds were forged and knew or at least strongly suspected that Chan Chung Wah was the forger. The appellant then sought and obtained leave to amend his defence by adding a further defence to the effect that the respondents, by reason of their conduct in standing by with full knowledge from 24th May,

failing to inform the appellant of the forgery until 23rd June and failing to disclose that Chan Chung Wah was the forger until 11th December, were estopped from saying that the deeds were not executed by them. The appellant alleged that this keeping silent deprived him of any opportunity of obtaining restitution from Chan Chung Wah. This is the defence on which the appellant now relies.

It is clear that the first and second respondents knew by the end of May that the appellant held mortgages for $60,000 over their property which bore to be signed by them but which were in fact forgeries, and they must have known that the appellant believed these mortgages to be genuine. But in order to benefit themselves they deliberately refrained from informing the appellant that his mortgages were forged until 23rd June. By that time the forger had disappeared. It is not proved that the appellant would have been in any better position to recover anything from the forger at the end of May than he was immediately after 23rd June but it was argued for the appellant that the respondents had a duty to inform the appellant immediately they discovered the forgery, that if the appellant had been told in time he might have taken some action against the forger while he could still be found in Hong Kong, and that the respondents' delay in fulfilling their duty, having deprived the appellant of an opportunity to take action against the forger while he could still be found, must result in the respondents being now estopped from pleading the forgery against the appellant. This argument raises two questions; first, whether the respondents had any duty to inform the appellant of the forgery, and, secondly, if they had such a duty, whether their delay in informing him caused detriment to him so that they are now estopped from asserting against him that the deeds are forged. If it were held that the circumstances create an estoppel a third question would arise—whether that estoppel would only affect the first and second respondents who were aware of the true facts from 31st May or whether it could also affect the third respondent who is only proved to have become aware of the facts immediately before information was given to the appellant by service of the writ.

It was argued for the respondents that they were under no duty to volunteer information to the appellant, and that, as they never said or did anything which misled the appellant, they cannot now be prevented be mere delay from asserting the truth about the deeds. It was said that as there was no contractual or other relationship between the respondents and the appellant there could be no duty to volunteer information. It is quite true that there was no duty in the sense that failure to perform it would be a tort or a ground for an action of damages. But it is well established that silence can in some cases give rise to estoppel without there having been a duty in that sense: one example is given by Lord Cranworth, L.C., in *Ramsden* v. *Dyson*, L.R. 1 H.L. 129 at p. 140. "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right and leave him to persevere in his error, a Court of Equity will not allow me to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented." The question in this case is whether any duty of that kind arises when a person learns that another person is holding and relying on a forged deed which bears to be signed by him. It is unnecessary to enter upon any general consideration of the basis of this kind of duty because there is cogent authority in favour of there being a duty of this kind on a person who becomes aware that another person holds a forged deed which purports to be signed by him, and there does not appear to be any direct authority to the contrary effect. In *M'Kenzie* v. *British Linen Company*, 6 App. Cas. 82, the bank had informed M'Kenzie on 14th July, 1879, that they held his bill due on 17th July, and when the bill

was dishonoured they pressed him for payment; but he kept silent until 29th July when he informed the bank that his signature was forged. It was held that M'Kenzie had not by his silence adopted the bill. It was not suggested that there had been any change in the bank's position between 17th and 29th July and it was held that M'Kenzie was not barred or estopped from asserting the forgery. A statement of the law directly in point in the present case is to be found in the speech of Lord Watson at p. 109: "In the present case the inference which has been drawn by the Court below, adversely to the appellant, appears to depend upon the fact that after he came to know in July that the second bill had been discounted with the bank, he (the appellant) kept silence or at least did not inform the bank of the forgery of his own name until a fortnight or thereby had elapsed. The only reasonable rule which I can conceive to be applicable in such circumstances is that which is expressed in carefully chosen language by Lord Wensleydale in the case of *Freeman* v. *Cooke* (2 Ex. 654). It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if when he did so the bank was in no worse position than it was at the time when it was first within his power to give the information." There was not in *M'Kenzie's* case any contractual or other relationship between him and the bank and the only distinction between that case and the present case is that the document in *M'Kenzie's* case was a negotiable instrument whereas here it is a mortgage. It was argued for the respondent that this distinction is material, but their Lordships are unable to find any good reason for so regarding it. No later case was cited in which any doubt was thrown on the authority of the passage which has been quoted, or any limitation of its scope suggested. In *Muir's Executors* v. *Craig's Trustees,* 1913 S.C. 349, a case which dealt with a forged bond over property, Lord Dunedin (then Lord President of the Court of Session) after referring to *Freeman* v. *Cooke* and *M'Kenzie's* case said: "When you know there is a forgery and when you know that the person relying upon that forgery is putting himself in a worse position or losing some remedy which he would otherwise have you are not entitled to keep silence and then to tell him at the end of the day after his position has been made worse by the delay that the signature is forged." Another case in which there was no previous relationship between the person holding the forged document and the person whose signature had been forged is *William Ewing & Co.* v. *Dominion Bank,* 1904 A.C. 806. In that case a promissory note was forged and handed by the forger to the bank. The bank informed Ewing & Co., whose name had been forged, that they held the note, and Ewing & Co. delayed to inform the bank of the forgery. During this delay the bank paid out money to the forger. The Supreme Court of Canada by a majority held (35 S.C.R. 137) that the company were estopped from denying their signature. On a petition for special leave to appeal to His Majesty in Council leave was refused by their Lordships for reasons given by Lord Davey. He said: "Messrs. Ewing, wishing apparently to screen Wallace (the forger) did not give the bank any information that the note was forged and they must have known that their withholding such information from the bank would entitle the bank to believe that the note was a genuine note of Messrs. Ewing themselves. Whether the circumstances were such as would raise either an estoppel against the petitioners or would amount to what Lord Blackburn in *M'Kenzie* v. *British Linen Co.* calls a 'ratification for a time' by the supposed makers of the note of their signature is in the opinion of their Lordships absolutely a question of fact. They cannot see that any important question of law is really at stake." Their Lordships now find it difficult to see how that could have been said if their Lordships in *Ewing's* case had thought that there was any ground for holding that a person who learns that a stranger is holding a document

purporting to be signed by him is entitled in all cases to keep silent and will not be estopped from denying his signature although his silence causes detriment to the holder of the document.

In their Lordships' judgment it must be held that the respondents were not entitled to withhold from the appellant information that the appellant's mortgages were forgeries and that when they chose to do so they took the risk that they would later be estopped from asserting that these deeds were forged if by reason of their keeping silent the appellant suffered detriment. Accordingly the next question for consideration is whether the respondents, having delayed from 1st June to 23rd June to inform the appellant that his mortgages were forgeries, caused any such detriment to the appellant as will now give rise to estoppel. The only detriment suggested is that if the appellant had been informed on or about 1st June he might have been able to take some more effective action to minimise his loss than it was possible for him to take after 23rd June, and the only action which he could have taken would have been action against the forger or his property. The forger, Chan Chung Wah, had real property in Hong Kong of substantial value but there is no evidence that this was less available to the appellant after 23rd June than it had been before. It is true that Chan Chung Wah disappeared about 10th June but Sir L. Gibson, C.J., states in his judgment "it was still open to the appellant to take proceedings under Chapter XVII of the Code of Civil Procedure. It is clear from the case of *Sing Tak Bank* v. *Chau Tung Shan* 1 H.K.L.R. 27, at p. 28, that it would not have been necessary to serve a writ of summons before applying for the writ of attachment. There is no indication that proceedings taken under that chapter, if the appellant had been in a position to take them, would have been any less effective than proceedings taken when Respondents first heard of the forgery."

This statement of the law was not challenged by the appellant so the delay cannot be held to have caused any detriment to the appellant by reason of the loss of any opportunity to attach the forger's real property. There is no evidence that the forger had any personal property which the appellant could have recovered if he had taken action immediately after 1st June, and moreover there is no reason to suppose that the appellant would have taken any action at all if he had been told of the forgery on 1st June. When he was told on 23rd June he made no attempt even to discover who the forger was because he relied on his defence that the deeds were genuine, and there is nothing in the Record to suggest that the appellant would have acted differently if he had been told on 1st June instead of on 23rd June. The appellant can therefore only have suffered detriment by reason of this delay on the suppositions first that if he had been told on 1st June his attitude would have been different from his attitude when he was told on 23rd June, and secondly that if he had taken action on 1st June there was something which he could have recovered then but which he could not have recovered after 23rd June. Nevertheless it was argued that even so there is a sufficient foundation for estoppel, and the authorities chiefly relied on were *Greenwood* v. *Martins Bank*, 1933 A.C. 51, and *Ogilvie* v. *West Australian Mortgage and Agency Corporation*, 1896, A.C. 257. In *Greenwood's* case a wife had forged her husband's name on cheques and thereby obtained money from the bank. When the husband discovered this he refrained for several months from informing the bank of the forgery. Then he determined to tell the bank and the wife committed suicide. The husband then brought an action against the bank to recover the sums paid by the bank out of his account on the forged cheques but it was held that the bank had suffered sufficient detriment by reason of the delay to enable them to plead estoppel. If the bank had been able to raise an action while the wife was alive they could have sued the husband for his wife's tort, but this remedy was no longer available after her death. If the husband had told the bank sooner the wife might have committed suicide then, and if she had done so the bank would have been no better off than they were later. But there could be no certainty that the wife would have committed suicide if circumstances had been different,

and as the bank would have been able to avoid loss if she had not, they lost by the delay a chance of defeating the husband's claim. This was held sufficient detriment to enable them to plead estoppel. In *Ogilvie's* case a customer of the bank was informed by the bank's agent that a clerk in the bank's employment had forged his name to certain cheques which had been paid out of his account, but he was told by the bank's agent that it was in the banks' interest that he should delay raising the matter for a time. He believed the agent and allowed some time to elapse during which time the forger left the colony. When he raised an action against the bank for the money which had been paid out of his account on the forged cheques he was met by a plea of estoppel. It was held that in the circumstances he was entitled to keep silence and therefore there was no estoppel, but in delivering their Lordships' judgment Lord Watson went on to make certain observations as to what the position would have been if the customer by keeping silence had violated his duty to the bank. He said, "If the true import of the previous findings had been that by keeping silence and allowing the forger to escape from the colony and the jurisdiction of its courts the appellant had violated his duty to the bank, their Lordships are of opinion that these circumstances would in themselves have been sufficient to show prejudice entitling the bank to have their plea of estoppel sustained to its full extent." Taken by itself this passage would appear to indicate that the mere fact that the forger had escaped was enough even if it were clear that the bank would have recovered nothing from him in any event. But their Lordships doubt whether that was intended because in an earlier passage dealing with *M'Kenzie's* case and similar cases, Lord Watson said, "The ground upon which the plea of estoppel rested in these cases was the fact that the customer being in the exclusive knowledge of the forgery withheld that knowledge from the bank until its chance of recovering from the forger had been materially prejudiced." In their Lordships' judgment this is the true test: the chance of recovering must have been materially prejudiced by the delay. In the present case their Lordships are of opinion that the appellant has not shown that he was materially prejudiced by the delay. The appellant took no action when he was told of the forgery, and he did not give evidence in this case. In the absence of any explanation from him, and the whole trend of the evidence being to show that he would not have taken any action even if he had been told of the forgery earlier, their Lordships are not prepared to assume that he might have done so and it is only on that assumption that he can have suffered any possible prejudice by the delay. Their Lordships therefore hold that no estoppel arises from the respondents having delayed to inform the appellant that his mortgages were forged.

Finally the appellant argued that when the respondents discovered the true facts it was not enough for them to disclose to him that the mortgages were forgeries; as they knew who the forger was they were under a duty to give him that information also, and if they failed to do so to his detriment they must on that account now be estopped from maintaining that the mortgages are forgeries. It was said that the purpose of requiring prompt information of the forgery to be given is to enable the person who holds the forged document to recover as much as possible of what he has lost by proceeding at once against the forger, and therefore where there is any duty to speak it must be a duty to give all information in the informant's possession which will assist the person holding the forged document to work out his remedy against the forger.

In their Lordships' judgment this argument is based on a misconception of the nature of estoppel. The question is whether the respondents are to be estopped from proving one particular fact—that the appellant's mortgages are not their deeds—and the reason why a person is estopped from proving a particular fact is that instead of disclosing it when he ought to have done so he concealed it or made some misrepresentation about it. He cannot now be heard to say something which he ought to have said sooner. But their Lordships can find neither principle nor authority to support the proposition that although one party may have clearly stated to the other at the right time the fact which he now wishes

to prove, yet he will be estopped from continuing to assert that fact because he has withheld some other information which it was in his power to give. The respondents asserted in June that the appellant's mortgages were not their deeds; they were not then estopped from asserting that fact and they cannot now be estopped from continuing to assert it.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs of the appeal.

(12188) Wt. 8137—69 100 6/51 D.L./PI/3

In the Privy Council

FUNG KAI SUN

v.

CHAN FUI HING AND OTHERS

DELIVERED BY LORD REID

Printed by His Majesty's Stationery Office Press.
Drury Lane, W.C.2.

1951