

Chu Yam Om and another - - - - - Appellants

v.

Li Tam Toi Hing - - - - - Respondent

FROM

THE FULL COURT OF THE SUPREME COURT  
OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 2ND OCTOBER, 1956

*Present at the Hearing:*

VISCOUNT SIMONDS  
LORD MORTON OF HENRYTON  
LORD TUCKER  
LORD SOMERVELL OF HARROW  
MR. L. M. D. DE SILVA

[*Delivered by* LORD SOMERVELL OF HARROW]

This is an appeal from a judgment of the Supreme Court in Hong Kong in its appellate jurisdiction, dismissing an appeal from a judgment of the Supreme Court in its original jurisdiction ordering the appellants to discharge mortgages on certain property and to execute an assignment of and give possession of that property; the order also provided for an inquiry as to mesne profits in default of agreement.

The respondent was plaintiff in the action. There were originally three defendants named in the writ. It is admitted that in the circumstances set out below they held the property in question as joint tenants. The second defendant had died before the issue of the writ. There is no dispute that the two surviving defendants, the present appellants, are the proper parties to the claim for the discharge of the mortgages and the assignment. It was submitted to the Board, though the point does not seem to have been taken below, that they were not proper parties for the order for possession and mesne profits. In describing the history up to the start of these proceedings the "appellants" include the deceased defendant.

On 10th December, 1932, the property, Inland Lot 2182, was assigned by the Hong Kong and Shanghai Bank to the appellants. The total purchase price was \$180,000. Of this \$120,000 was raised by a mortgage to the vendor Bank and \$25,000 by a second mortgage to the Dominican Missions in the Far East. These three transactions were duly registered at the Land Office Register under the Land Registration Ordinance of 1844.

On 12th December, 1932, the appellants signed, sealed and delivered a Declaration of Trust of the said property which was to be held in trust for the Sih Nan College, a school at which boys and girls were educated. This was not registered. The Trustees undertook not to sell the premises except by the direction of the persons having authority in that behalf and in accordance with the constitution and for the use of the said Sih Nan College.

Sections 2 and 3 of the Ordinance of 1844 are as follows :—

“ 2. (1) The Land Office shall be a public office for the registration of deeds, conveyances, and other instruments in writing, and wills and judgments; and all deeds, conveyances, and other instruments in writing, and wills, and all judgments, by which deeds, conveyances, and other instruments in writing, and wills and judgments, any parcels of ground, tenements, or premises in this Colony, may be affected, may be entered and registered in the said office in the manner hereinafter directed.

(2) For the purpose of this Ordinance, ‘judgments’ includes judgments and orders both of the Supreme Court and of the District Court.

3. (1) All such deeds, conveyances, and other instruments in writing, and wills and judgments, made, executed, or obtained, and registered in pursuance hereof, shall have priority one over the other according to the priority of their respective dates of registration.

(2) All such deeds, conveyances, and other instruments in writing, and wills and judgments, as last aforesaid, which are not registered shall (as against any subsequent *bona fide* purchaser or mortgagee for valuable consideration of the same parcels of ground, tenements, or premises) be absolutely null and void to all intents and purposes: Provided that nothing herein contained shall extend to *bona fide* leases at rack rent for any term not exceeding three years.”

It is not disputed that the Declaration of Trust was an instrument within these sections.

On the 25th December, 1941, the Japanese occupied Hong Kong. At first the Japanese occupied the premises in question but later allowed their use for the school of which the deceased defendant became headmaster at some date in 1942.

The Japanese authorities appointed a Liquidator of the Hong Kong and Shanghai Bank. In the autumn of 1943 the Liquidator demanded, as he was entitled to do under the mortgage, repayment of the principal sum with interest by 31st December, 1943. The school had no resources. The plaintiff's daughter, who was at the school, introduced the then headmaster, the deceased defendant, to her father, the plaintiff's husband, Li Koon Chun. Transactions at that time were in military yen. A loan was suggested, but Li wanted the stipulated repayment to be in Hong Kong dollars. Such a term it was thought might be unfavourably regarded by the Japanese. After further negotiations Li agreed to buy and the appellants agreed to sell the property for M.Y.62,000 free from encumbrances. This agreement was reached on 28th December, 1943, and a document was drawn up and signed. The purchase was in the name of the plaintiff as her husband's nominee. The third defendant was absent from Hong Kong but his wife held a Power of Attorney and signed for him. Her authority was at one time disputed but is so no longer. A sale to be valid required the assent of the Japanese authorities and there was no time to get this by 31st December. Li agreed to advance on a mortgage the sum required to pay off the mortgages namely M.Y.35,000. This was to be effective if the Japanese refused to allow the sale. If the sale became effective then the M.Y.35,000 was to be treated as a payment on account of the purchase price of M.Y.62,000.

The mortgages were paid off and the assent of the Japanese authorities was given to the sale. On 17th February what is called a Japanese assignment was executed and duly registered with the Japanese authorities. The balance of the M.Y.62,000 was paid and a Certificate of Sale issued.

The property having thus passed to the respondent a tenancy agreement was entered into between the respondent and the deceased defendant as headmaster of the school. The term was three years from the 1st March, 1944. There was a fixed rent for the first two years and the rent for the third year was to be 0·8 per cent. per month of the then market value.

The Japanese occupation came to an end in January, 1946. The two years fixed rent ended on the 28th February of that year. Some time in February Li wrote to the school setting out the rent as he estimated it for the third year. No answer or rent was received in response to this or later letters until on the 13th January, 1947, solicitors wrote on behalf of the Director and other members of the Committee of the school alleging inter alia that the appellants as registered owners had no power of sale and maintaining that their clients were not tenants. It seems that they were in occupation and have since remained in occupation without payment.

On 18th June, 1948, the Debtor and Creditor (Occupation Period) Ordinance was enacted. Its effect can for the purposes of this appeal be summarised. It provided that where payment of a pre-occupation debt had been made in occupation currency the payment was in certain cases to be revalued in accordance with a scale set out in the Schedule and was to be a valid discharge only to the extent of such revaluation. Under the Schedule 1,000 Military Yen in December, 1943, were to be taken as equivalent to 280 Hong Kong dollars. Apparently the payments on both mortgages and certainly that to the Bank came under these provisions. Under section 70 (1) of the Ordinance the rights of the mortgagees are not extinguished and the appellants cannot therefore assign free from encumbrance without paying large sums to the mortgagees.

The effect of this Ordinance was considered by the Board on points which do not arise in this appeal in *Hangkam Kwingtong Woo v. Liu Lan Fong* 1951 A.C. 707.

On the 16th July, 1948, the Land Transactions (Enemy Occupation) Ordinance came into force. Its purpose as stated was "To give effect to voluntary transactions affecting land during the Japanese occupation". The Japanese had kept a register of such transactions. These entries had been written in the Land Office Registers in green ink. The Japanese assignment referred to above appears with the date of February 17th, 1944. Section 5 (1) provides:

"A Japanese assignment shall be construed and take effect as a valid and subsisting agreement by the assignor to assign on demand without further consideration and (save in so far as such agreement or other instrument otherwise provides) at the cost of the assignee or other person lawfully requiring the same the property to which such assignment relates in the form which would have been directed by the court prior to the Japanese occupation in a successful action for the specific performance of such an agreement."

On the 10th May, 1949, the respondent issued the writ for an order under the above section that the defendants assign the property in question free from encumbrances and for a further order that the defendants pay off the two mortgages in accordance with the provisions of the Debtor & Creditor Occupation Period Ordinance.

In their defence the defendants alleged, (1) that the agreement for sale and assignments were shams to deceive the Japanese authorities, (2) that the second defendant's attorney was not authorised to make the agreement, (3) that the sum of M.Y. 27,000, the balance of the alleged purchase price had not been received, (4) that the defendants were, as the plaintiff well knew, trustees who had no authority to sell, (5) that the agreement had been signed in consequence of undue influence or duress.

Leaving aside the allegation numbered (4), the learned Chief Justice found against the defendants on all points. He found that the agreement was not a sham. "It", he said, "is not tainted with any question of duress or undue influence on the part of the plaintiff and there is no question of mistake, misunderstanding or ignorance on the part of the vendors." He found that the second defendant's attorney had authority and that the sum of M.Y. 27,000 had been paid as balance of the purchase price.



On appeal the Full Court were in complete agreement with the learned Chief Justice on all his findings of fact. No grounds were suggested which would justify a departure from the general rule that the Board will not disturb concurrent findings of fact.

On the fourth allegation the learned Chief Justice found that neither Mr. Kan, a solicitor who searched the register on behalf of Li, nor Li, nor the plaintiff knew that the defendants were trustees: he found that the purchaser was a bona fide purchaser for valuable consideration.

Accepting this finding the appellants submit that under the section cited of the Land Transactions Ordinance the Japanese assignment takes effect not as an assignment or conveyance but as a subsisting agreement requiring a further assignment in the form which would have been directed in an action for specific performance. The result it is submitted is to import the equitable principles on which a decree of specific performance was and is granted or refused in this country. In particular reliance is placed on the remedy being, it is said, discretionary and on the principle that the Court will not decree specific performance if the conveyance would constitute a breach of trust by the vendor. *Mortlock v. Buller* 10 Vesey, Jr. 292, *Wood v. Richardson* 4 Beav. 174, *White v. Cuddon* 8 Cl. & Fin. 766 and *Dance v. Goldingham* L.R. 8 Ch. App. 902 were cited. In the last case Mellish L.J. said "I am of opinion that the rule in this Court is, if there is a breach of trust, if the sale is conducted in such a manner that, as between the trustees, who have the power of sale, and the *cestuis que trust*, it constitutes a breach of trust, the *cestuis que trust* are entitled to prevent the sale being completed, leaving the purchaser to his remedy against the trustees." The learned Lord Justice regarded this as a necessary consequence of the rule that a purchaser would be bound by the trust if he had notice of it before completion. Section 5 of the Land Transaction Ordinance, as has been said, treats a transaction which was complete as between the parties under the conditions prevailing during the occupation as an agreement requiring a further assignment. Although the point does not seem to have been taken below the words used do not seem to their Lordships clearly to import the application of equitable principles as to specific performance which arose in very different circumstances from those with which the Ordinance had to deal. The reference to specific performance would seem to relate to the form of the assignment rather than to the circumstances in which it might or might not be ordered. The Board have not however the advantage of the opinion of the Hong Kong Courts on this point so will proceed to consider the appeal on the basis adopted by the courts below.

The written declaration of trust was unregistered and therefore as against the respondent, a bona fide purchaser, was to be "absolutely null and void to all intents and purposes." If the existence of the trust is to prevent the respondent obtaining the assignment to which she would otherwise be entitled, is this contrary to the section? The learned Chief Justice so regarded it. Under the Ordinance he held the trust must be completely disregarded. To use it to deprive the respondent of the right which apart from this point she would have is to have regard to it and this the Ordinance forbids.

Their Lordships agree. There are however other circumstances considered by the learned Chief Justice which would prevent the principle relied on being applicable. The school had a board of Directors. In normal times it may well be their consent would have had to be obtained for a sale under the provision of the trust deed set out above. The learned Chief Justice was satisfied that the members of the Board in Hong Kong deliberately made themselves unavailable, and he did not think a breach of trust was established. This finding was criticised by the appellants but it is clear that the appellants had to raise the money and there is no ground for suggesting that they did not do the best that they could in the circumstances for the school. There are no grounds for suggesting that the breach, if there was one, was other than a technical one for

which any court would have given relief to the trustees if the *cestuis que trust* had sought to complain. The rule as formulated by Mellish L.J. would clearly not apply to such a breach. It is a paradoxical position that the appellants now wish to turn their own breach of trust to their advantage. Happily it was so minor a breach that on any view they are unable to do so.

The appellants had a further submission in order to avoid the consequences of the non-registration of the Declaration of Trust. There was a two days interval between the conveyance and the Declaration. In those two days the appellants would, it is submitted, have been bound by an oral resulting trust to hold the property for the school. It is then suggested that this oral trust survived the reduction of its terms into writing for the purpose of defeating the provisions of the Land Registration Ordinance. This would appear to have been the main point argued on appeal. It was rightly rejected by the Full Court. There is no suggestion that the Declaration of Trust was inconsistent with the prior position. As from its date the trust was contained in the document and in the document alone.

It was further submitted that specific performance being a discretionary remedy the respondent's claim should be refused. Reference was made to the fact that the premises are used for a school and to the oppressive attitude of the enemy authorities in demanding through the Liquidator the repayment of the mortgage debt. Assuming the right under the Ordinance to an assignment is discretionary the appellants are in this difficulty. If this point was taken below the Board would need very strong grounds for interfering with a decision as to discretion of the two courts below. No such grounds were put forward. The conduct of the appellants in these proceedings, on the facts as found, has not been such as to commend itself to any court.

That leaves the question whether an order for possession and mesne profits was rightly made against the appellants. These claims were added after the issue of the writ. There is no evidence that this point as to parties was taken below.

The second appellant is headmaster of the school and the natural inference is that the appellants were prepared to treat the action as properly constituted for the purpose of determining whether the respondent was entitled to any or all the relief claimed, the appellants being of course free to exercise their rights as against the *cestuis que trust* for any sum awarded as mesne profits. The point fails. If the present appellants sought to say later that they were not in a position to see that the respondent had possession, the courts in Hong Kong would be able to deal with the matter. If the parties agree on a further lease, that question will not arise.

For the above reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants will pay the respondent's costs.

In the Privy Council

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CHU YAM OM AND ANOTHER

v.

LI TAM TOI HING

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DELIVERED BY  
LORD SOMERVELL OF HARROW