

17, 1950

UNIVERSITY OF LONDON  
W.C.1.  
12 NOV 1956  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

APPELLANTS CASE

ON APPEAL  
FROM THE APPEAL COURT IN HONG KONG.

BETWEEN

31269

FUNG KAI SUN (Defendant) - - - - Appellant

AND

CHAN FUI HING, CHAN SIK TIN and  
CHAN KWOK NIM (Plaintiffs) - - - Respondents.

Case for the Appellant.

RECORD.

10 1. This is an appeal by leave of the Supreme Court of Hong Kong from a judgment of the Full Court (Sir Leslie Gibson C.J., Williams and Scholes JJ.) dated the 13th August 1949 which dismissed an appeal from the judgment of the former Chief Justice (Sir Alastair Duncan Atholl MacGregor) dated the 19th December 1940. p. 58. p. 49. p. 49.

20 2. The action was brought by the Respondents as Plaintiffs for a declaration that two Mortgages relating to certain land and buildings in Hong Kong which purported to have been made by the Respondents in favour of the Appellant were forgeries and null and void and of no legal effect. The said Mortgages were held at the trial to have been in fact forged. p. 1. Exhibits p. 72. p. 77.

3. The questions involved in the appeal are as to the existence nature and extent of any duty owed by the Respondents to the Appellant to inform him of the forgeries and of the identity of the forger and as to the validity of the Appellant's plea based upon the existence of such a duty that the Respondents were estopped as against him from saying that the said deeds were not executed by them or with their authority knowledge or consent. p. 5, ll. 10-15.

30 4. The Plaintiffs were at all material times the owners, as tenants in common of the land and property in question which was known as No. 300 Des Voeux Road Central and No. 92 Wing Lok Street, Hong Kong, the first and third Plaintiffs having bought their shares in 1925 and the second Plaintiff having bought his share in about 1927. Their title was duly registered in the Land Office. About 1932 the title deeds of the said property were handed by the second Plaintiff with the consent of the other Plaintiffs to one Chan Chung Wah (also known and sometimes p. 9, ll. 15, 30, 31. p. 9, l. 35.

p. 9, l. 38.  
p. 9, l. 39.

referred to in the evidence as Chan Kwok Yin), the younger brother of the third Plaintiff, who collected the rents for the Plaintiffs. Up to 1938 he remitted the rents regularly to the Plaintiffs who were all living away from Hong Kong.

p. 51, l. 49.  
p. 52, ll. 8-11.

Exhibit D.  
Exhibit H.

5. Chan Chung Wah habitually used the name of his elder brother Chan Kwok Nim as though it were an alias of his own and before the execution of the mortgages to which the action related he introduced to certain solicitor's clerks entrusted with the identification of mortgagors two persons in the names of Fui Hing and Sik Tin and as being the first two Plaintiffs. These clerks then vouched the identity of the signatories. 10  
The Mortgages which were duly registered in the Land Office were dated 29th October 1937 and 2nd November 1938 and purported to be executed by the three Plaintiffs in favour of the Defendant who advanced \$55,000 in Hong Kong currency on the security of the first of the said mortgages and 5,000 such dollars upon the second. They were in fact forged by the said Chan Chung Wah and the two persons whom he so caused with himself to impersonate the Plaintiffs.

p. 25, ll. 33-40.  
p. 26, ll. 1-6.

p. 26, l. 10.  
p. 14, ll. 15-18,  
21-23.  
p. 26, ll. 12-18.

6. After some earlier requests from January 1939 onward by the Plaintiffs to Chan Chung Wah to forward rents then due had proved fruitless, the second Plaintiff shortly before 24th May 1939 had inquiries 20 made and learnt that the rents of tenants of the property were being collected by a Bank. This caused him to suspect that Chan Chung Wah had mortgaged the property and he sent his informant to instruct a solicitor to ascertain the facts.

p. 14, ll. 17-25.  
Exhibit J.  
p. 10, l. 51.

p. 10, ll. 8, 30.

P. 26, ll. 15-19.

7. On 24th May 1939 the second Plaintiff wrote a letter to the first Plaintiff voicing his suspicions of Chan Chung Wah and requesting the first Plaintiff to come to Hong Kong without delay. The first Plaintiff arrived in Hong Kong on 31st May or 1st June 1939. Before that date, as a result of the further inquiries, the second Plaintiff, and upon his arrival in Hong Kong the first Plaintiff too, knew of the said mortgages 30 to the Defendant and that they had been forged by Chan Chung Wah, and that the Defendant had advanced money to Chan Chung Wah thereon.

p. 14, ll. 25, 26.

p. 14, ll. 27, 28.  
p. 15, ll. 11, 12.

p. 12, ll. 1, 2.

8. Chan Chung Wah was at that date indebted or accountable to the first Plaintiff in the sum of 900 Hong Kong dollars and to the second Plaintiff in the sum of 210 Hong Kong dollars for rent. These two Plaintiffs then decided to maintain silence about the forgeries until they had collected from Chan Chung Wah the moneys which were due to them. They adopted this course because they considered that if they disclosed the facts about the forgeries they would be unable to recover this rent from Chan Chung Wah. 40

p. 11, ll. 49, 50.

p. 12, ll. 10, 11,  
35, 36.  
p. 15, ll. 38, 39.

9. Pursuant to this plan the first Plaintiff saw Chan Chung Wah in Hong Kong on 10th June 1939 and obtained from him 100 dollars in Hong Kong currency on account of the rent due. He did not mention the mortgages to Chan Chung Wah or to the third Plaintiff, whom he then suspected of complicity in the fraud, or to the police. He expected to receive the balance on the following Monday, 12th June, but his efforts to find Chan Chung Wah on that day and the following days were

unsuccessful. It was only after these failures that he, and the second Plaintiff, instructed their solicitors to start the proceedings against the Defendant which are the subject of this appeal. p. 11, ll. 50, 51.  
p. 12, ll. 37-41.

10. The writ was issued in the names of the first and second Plaintiffs, on 17th June 1939. The third Plaintiff was informed of the forgeries on that date by the first two Plaintiffs and added as a party on 21st June 1939. pp. 1, 2.  
p. 15, l. 50.  
p. 18, l. 48.

11. The service upon him of the writ on 23rd June 1939 was the first intimation that the Defendant received that the mortgages which he held were forged. The identity of the forger, although known to all the Plaintiffs, was not disclosed to him; he did not in fact learn the identity of the forger until after the hearing had begun in December 1939. p. 59, l. 32.  
p. 52, ll. 43, 44.  
p. 59, ll. 49, 50.

12. At the date, namely 17th June 1939, at which the fact of the forgeries and the identity of the forger were known to all three Plaintiffs, Chan Chung Wah owned unincumbered real property in Hong Kong which would have been available to satisfy, at any rate in part, the claim of the Defendant against him in respect of the forgeries. Between that date and the date when the identity of the forger was first disclosed to the Defendant, Chan Chung Wah raised money by mortgages of such real property as follows: In August 1939 he mortgaged the one-tenth share which he owned in No. 164 Des Voeux Road for \$10,000. On 13th October 1939 he appointed the third Plaintiff as his attorney, and by virtue of that power of attorney a mortgage of property of Chan Chung Wah was executed on 14th December 1939 by the third Plaintiff in favour of the Wai Tak Co. By this means by the date that the Defendant had learnt the identity of the forger and would have been able for the first time to prosecute his remedies against Chan Chung Wah in respect of the forgeries, the property of Chan Chung Wah, which would have been available to satisfy the claims of the Defendant, had ceased to be available. p. 52, ll. 36-39.  
p. 18, ll. 28-30.  
p. 19, l. 28.  
p. 18, l. 30.  
Exhibit NN.  
p. 19, l. 38.  
p. 20, l. 35.  
p. 52, l. 45.  
p. 52, ll. 39-45.

13. The Judgment of the Chief Justice at the said trial held upon the said facts that the defence of estoppel was not open to the Defendant on the ground that there was no duty as between the Plaintiffs and the Defendant to disclose the said facts. The Chief Justice further held that the Plaintiffs' action in entrusting their title deeds to Chan Chung Wah could not be relied upon as a defence unless it were both negligent and fraudulent and that neither negligence nor fraud in this respect had been alleged. He accordingly gave judgment for the Plaintiffs for the declaration and consequential relief sought with costs. pp. 49-57.

14. After hearing the Defendant's appeal in June 1949 the full Court, whose Judgment was delivered on 14th July 1949, by Sir Leslie Gibson C.J. and concurred in by Williams and Scholes JJ. dismissed the appeal on two grounds, namely— pp. 58-69.

(A) *first*, that on the said facts there was no duty on the part of the Plaintiffs to make any disclosure to the Defendant that the mortgages were forged, and

(B) *secondly*, that even if there were such a duty it did not extend to disclosing the identity of the forger and the detriment suffered by the Defendant flowed not from non-disclosure of the fact that the mortgages were forged, but from non-disclosure of the forger's identity.

15. In reaching their conclusion upon the first ground the Court started from the proposition, conceded by the Appellant, that there can be no misrepresentation by silence unless there is a duty to speak; and proceeded to consider a passage in Halsbury's Laws of England (Hailsham Edition) Vol. 13 page 496 :—

“ A duty to speak arises whenever a person knows that another is acting on an erroneous assumption of some authority given or liability undertaken by the former, or is dealing with or acquiring an interest in property in ignorance of his title to it. It is the duty of a man who knows that another is relying on a document bearing a counterfeit of his signature to give notice of the forgery without delay.” 10

This passage the full Court rejected as an erroneous statement of the law and as unsupported by authority.

16. The authorities to which the Court devoted particular attention were a decision of the Full Court of Hong Kong in Appeal No. 10 of 1947, the substance of which is set out in the Record at page 61 and the under-mentioned cases, referred to as “ the Bank Cases ” namely :—

*McKenzie v. British Linen Co.* (1881) 6 A.C. 82.

*Ogilvie v. West Australian Mortgage and Agency Corporation* 20 (1896) A.C. 257.

*Greenwood v. Martins Bank Ltd.* 1933 A.C. 51.

and a Canadian case *Ewing & Co. v. Dominion Bank* (1904, S.C.R. 133). The Court, however, did not have access to the report of the Judgment of the Supreme Court of Canada in the last-mentioned case, but only to the report of the proceedings in the Privy Council (1904 A.C. 806) in which leave to appeal from the Judgment of the Supreme Court of Canada was refused.

17. The Full Court held that the Bank Cases, although authority for the proposition that a duty to disclose the fact that an instrument has been forged exists between a customer and his banker, do not support the existence of such a duty where no such relationship between the parties has previously existed. They accordingly held that the Bank Cases were not an authority for the broad proposition stated in the second sentence of the quotation from Halsbury's Laws of England. They further considered that the proposition was not supported by *Stroud v. Stroud* (7 Manning & Granger 417). Their conclusion on this part of the argument was expressed in the following words :— 30

“ If one examines the various cases in which it has been held that there is a duty to speak, I do not think any can be found where the parties were complete strangers to each other, the fraudulent transaction had been completed without the knowledge of the person alleged to be estopped and the only detriment to the person setting up the estoppel which could arise if there was no disclosure was that the person setting up the estoppel might delay taking action against some third person or persons to recover his losses and so suffer prejudice.” 40

18. The conclusion of the full Court upon the second ground, namely, that in any event there was no duty to disclose the identity of the forger, was expressed so briefly that it can conveniently be set out verbatim :—

“ There is another broad reason why I think this appeal must fail. I cannot accept Mr. Sheldon’s contention (challenged by Mr. Potter) that a duty to speak, where one exists, is a duty not only to disclose the fact of the fraud, but also (if they are known) the identities of the persons responsible. The importance of the point is that, even if a duty existed, it was discharged, if I am right, when the writ was served on the Appellant. There is no clear authority for Mr. Sheldon’s proposition and there seems to me to be all the difference in the world between failure to disclose the fact, and so put the person defrauded on his guard, and failure to give information as to the persons who might, if the person defrauded thought fit, be sued by him. It would be a very unusual rule of law, whatever the morality of the matter may be, which required a person who had no interest in the result of his accusation, to accuse another person for the benefit of a party who had such an interest, and certainly this would be so where there was no special relationship involving frankness. p. 69.

What detriment was caused by the Respondents’ silence up to the service of the writ? There is no evidence that, up to that time, Chan Chung Wah had disposed of any property. He had probably run away or was in hiding, but 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. Chan 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.”

19. With regard to the first ground upon which the Full Court dismissed the Appeal, it is respectfully submitted that it mistakenly formed the view—possibly because the Judgment of the Supreme Court of Canada in *Ewing & Co.’s* case was not available to it—that *Greenwood’s* Case decided that the duty to disclose the facts of a forgery only arose where the relationship of Banker and Customer existed. In *Greenwood’s* Case the relationship did exist and the duty, in the House of Lords at any rate, was conceded. The only issue was whether the loss by the Defendants of a remedy against the forger and her husband in respect of the forgeries was a sufficient detriment to the Defendants upon which to found an estoppel. In *McKenzie’s* Case, where the duty of disclosure of the fact that an instrument was forged was first laid down although the estoppel in the result failed because no detriment to the Defendants resulted from the non-disclosure, the relationship of Banker and Customer did not exist. Again, in *Ewing & Co.’s* Case where the estoppel succeeded in the Supreme Court of Canada, no relationship of Banker and Customer existed; but the Privy Council in refusing leave to appeal referred to *McKenzie’s* Case and said that the question whether the circumstances would raise

an estoppel were "absolutely a question of fact," and that their Lordships could not see "that there was not evidence upon which the Courts might fairly find as they did."

20. It is submitted that the true principle with respect to the duty to disclose forgeries is :—

A duty of disclosure is owed by a person whose signature to an instrument is forged to any person whom he can reasonably foresee may on the faith of the validity of the instrument act to his detriment or lose a remedy against the forger."

21. With regard to the second ground upon which the Full Court 10 dismissed the appeal it is submitted that since the essence of the duty of disclosure, if it exists at all, is that the person to whom it is owed should be enabled to refrain from acting to his detriment, or to prosecute, before it is too late, his remedies against the forger, the facts which must be disclosed include all those which are necessary to enable him to do so. Where the detriment which it can reasonably be foreseen the Defendant will suffer is the loss of a remedy against the forger, these facts necessary include the identity of the forger if known to the Plaintiff.

22. *A fortiori* it is submitted that a duty to disclose the identity of the forger arose in the present case where the forgery was committed 20 not by a stranger to the Plaintiffs, but by their agent to whom they had entrusted the Title Deeds which enable the forger to execute the forged mortgages.

23. The Appellant submits that the Judgment of the Full Court should be reversed and the action dismissed for the following among other

### REASONS

- (1) BECAUSE it is proper to infer from the facts of this case
  - (A) That the Plaintiffs between 24th May and the 30 month of December 1939 wilfully refrained from disclosing to the Defendant the facts which would have enabled the forger of the mortgages to be identified, in order to prevent the Defendant from taking any steps against him, or his property ;
  - (B) That the Defendant was thereby prevented from prosecuting any remedy against the forger at a time when the latter had property which could have been rendered available by attachment to 40 meet the Defendant's claim against him ; and
  - (c) That the Defendant thereby lost any effective remedy against the forger.
- (2) BECAUSE the Plaintiffs, when they discovered that the agent to whom they had entrusted their Title Deeds

had used them to facilitate a fraud upon the Defendant by means of a forgery of the mortgages, ought reasonably to have foreseen that the Defendant would be likely to be injured by their omission to disclose the forgeries and the identity of the forger ;

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- (3) BECAUSE in the circumstances of the case, the Plaintiffs owed to the Defendant a duty to disclose the forgeries and the identity of the forger, and the Defendant has been injured by their breach of that duty.
- (4) BECAUSE the Plaintiffs are, in the premises, estopped from alleging that the said mortgages are forged or otherwise invalid.
- (5) BECAUSE the Judgment of the Full Court is wrong and ought to be reversed.

KENNETH DIPLOCK.

RODGER WINN.

In the Privy Council.

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**ON APPEAL**

*from the Appeal Court in Hong Kong.*

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BETWEEN

FUNG KAI SUN (Defendant)

*Appellant*

AND

CHAN FUI HING, CHAN

SIK TIN and CHAN KWOK

NIM (Plaintiffs) - - *Respondents.*

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**Case for the Appellant.**

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