

24, 1957

No. 27 of 1950.

In the Privy Council.

31349

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG  
(APPELLATE JURISDICTION).

BETWEEN  
HANGKAM KWINGTONG WOO  
AND  
LIU LAN FONG alias LIU AH LAN

UNIVERSITY OF LONDON  
- Appellant  
20 JUL 1953  
INSTITUTE RESPONDENCED  
LEGAL STUDIES

10

Case on behalf of the Appellant.

RECORD.

1. This is an appeal from a judgment of the Supreme Court of Hong Kong (Appellate Jurisdiction) dated the 10th June 1949 confirming the judgment of the Supreme Court of Hong Kong (original jurisdiction) dated the 25th February 1949 in favour of the Respondent.

2. The principal questions which arise on this appeal are :—

20

(A) Whether a power of attorney given by the Appellant at a time when both he and the Attorney were resident in Hong Kong remains valid and the powers thereby conferred remained exercisable by the Attorney at a time when by reason of the Appellant's residence in China and the Attorney's residence in Hong Kong (then occupied by the Japanese) they were separated by the line of war.

(B) If the said powers did remain so exercisable whether an agreement made by the said Attorney on the Appellant's behalf during such occupation on the footing of the currency law then prevailing in Hong Kong ceased to be binding on the Appellant on the coming into force of the (Hong Kong) Debtor & Creditor (Occupation Period) Ordinance of 1948.

3. From the 25th December 1941 until the 1st September 1945 Hong Kong was in the effective occupation and control of the Japanese between whom and His Majesty a state of war existed. The Appellant who was a resident of and carried on the business of a solicitor in Hong Kong was in

30

p. 16, l. 24. the month of September 1942 desirous of leaving Hong Kong for Free China in order to avoid arrest by the Japanese and with a view to the management of his affairs during his absence gave to one Chan Hung Cheung (hereinafter called the Attorney) two several powers of attorney the one in English dated the 15th September 1942 the other in Chinese.

p. 64.  
p. 67.

pp. 16, 17, l. 22. 4. The Appellant left Hong Kong on or about the 6th October 1942 and thereafter resided in Free China until the month of February 1946. He was at all material times the owner of certain land and a messuage thereon known as 48 Kennedy Road which was registered in his name at the Land Office of Hong Kong as Inland Lot No. 2153. The said property 10 was subject to (A) a first mortgage in favour of Kwong Sang Hong Limited for an aggregate sum of 73,000 dollars Hong Kong currency and (B) a second mortgage to Ko Ho Ning for 30,000 dollars Hong Kong currency.

p. 17.

p. 104. 5. By an Order of the 10th May 1943 effective from the 1st June 1943 the Japanese authorities made military yen the only permissible currency in Hong Kong and forbade under heavy penalties the use of Hong Kong dollars which before the Japanese occupation was the recognised currency of Hong Kong. The official rate of conversion prescribed by the Japanese authorities was four Hong Kong dollars to one military yen.

p. 68, Exhibit B. 6. On the 21st August 1943 the Attorney purporting to act as the 20 Attorney of the Appellant entered into an agreement in writing with Koo Wan Sing for the sale by the Appellant to the said Koo Wan Sing of the said property at the price of 68,000 yen in military notes of which a sum of 50,000 yen was expressed by the said agreement to have been paid to and received by the Appellant on the date thereof. It was also thereby agreed that the said property was free of any mortgages pledges or any other encumbrances.

7. China was at the date of the said agreement and had since the 9th December 1941 been at war with Japan and was at all material times an ally of His Majesty. It is the Appellant's contention that he and the 30 Attorney were at the date of the said agreement separated by the line of war and that the Attorney's authority to act under the said powers of attorney was abrogated and that accordingly the said agreement is not and never was binding on the Appellant.

8. The following steps were taken to implement the said Agreement—

p. 15, l. 23. (A) On the 21st September 1943 the purchaser thereunder handed to the Attorney six several promissory notes each for 3,000 military yen payable at half-monthly intervals. These were duly honoured.

p. 71, Exhibit C. (B) An undated assignment of the said property was executed 40 on or about the 21st September 1943 by the Attorney in the name of the Appellant and by the said Koo Wan Sing. The consideration for such assignment is therein expressed to be 272,000 dollars Hong Kong currency and a receipt for that sum is annexed thereto.

(c) An undated Deed of Sale in Chinese was also executed in respect of the said property by the Attorney and the said Koo Wan Sing in which the agreed price is stated to be 272,000 Hong Kong dollars and a receipt for that sum is annexed. p. 74, Exhibit D.

10 (d) An undated reassignment of the said property to the Appellant was executed by the said First Mortgagees on or about the 30th September 1943 which is expressed to be made in consideration of the sum of 73,000 dollars paid by the Appellant to the said First Mortgagees and a receipt for that sum is annexed thereto. p. 76, Exhibit E.

(e) A further receipt in the Chinese and Japanese language was signed by the First Mortgagees acknowledging the sum of 20,987 military yen as refund for 73,000 Hong Kong dollars and 10,948 dollars interest for mortgage arranged on the said property. p. 78, Exhibit F.

(f) An undated guarantee was signed by the Attorney (purporting to act for the Appellant) and by a son of the Appellant to discharge the said Second Mortgage. p. 79, Exhibit G.

20 (g) On the 14th October 1943 the Foo Hang Bank of Macao acknowledged receipt from the Appellant through his said son of 8,550 military yen being the amount of principal and interest owing on the Second Mortgage. p. 80, Exhibit H.

9. None of the said documents was registered at the Land Office of Hong Kong. p. 20, l. 6.

10. The Debtor and Creditor (Occupation Period) Ordinance 1948 was passed by the Hong Kong Legislature and came into effect on the 17th June 1948 (being Ordinance No. 24 of 1948). By Section 2 (1) thereof the expression "occupation period" was defined as meaning in relation to the Colony the period between the 25th December 1941 and the 1st September 1945 and as including any part of such period ;  
 30 Hong Kong currency as meaning the dollar currency in circulation and constituting legal tender in the Colony before the occupation period or after 1st May 1946 and "occupation currency" as meaning any currency issued by the occupying power and in circulation during the occupation period but not including Hong Kong currency.

11. Sections 3, 4 and 11 of the said Ordinance are as follows :—

40 "3. (1) Where any payment was made during the occupation period in Hong Kong currency or occupation currency by a debtor or by his agent or by a custodian or a liquidator acting or purporting to act on behalf of such debtor to a creditor or to his agent or to a custodian or a liquidator acting or purporting to act on behalf of such creditor and such payment was made in respect of a debt—

(a) payable by virtue of an obligation incurred prior to the commencement of the occupation period and

(b) accruing due either prior to or after the commencement of the occupation period,

such payment shall subject to the provisions of sub-section (2) of this Section be a valid discharge of such debt—

- (i) to the extent of the face value of such payment if made in Hong Kong currency ; or
- (ii) at the official rate prescribed by the occupying power if payment made in occupation currency ; or
- (iii) at the rate agreed by the parties concerned.

(2) In any case—

- (a) where the acceptance of such payment in occupation currency was obtained by duress or coercion or 10
- (b) where such payment was made in occupation currency in respect of a pre-occupation capital debt which
  - (i) was not due at the time of such payment or
  - (ii) if due was not demanded by the creditor or by his agent on his behalf and was not payable under a contract the parties to which expressly stipulated that it should be of the essence of such contract that payment should be made on a date certain or
  - (iii) if due and demanded was not made within three months of such demand, 20

such payment shall be re-valued in accordance with the scale contained in and in the manner prescribed in the Schedule to this Ordinance and shall be a valid discharge of such debt only to the extent of such re-valuation.

(3) In sub-section (2) of this Section ' pre-occupation capital debt ' means any such debt as is referred to in sub-section (1) of this Section, including a sum payable as interest but not including a sum payable as rent and accruing due after the commencement of the occupation period.

4. Any payment made during the occupation period by a debtor or his agent to a creditor or his agent in respect of a debt payable by virtue of an obligation incurred during the occupation period and accruing due before on or after the commencement of this Ordinance—

- (a) shall, if made in a currency in which the debt was incurred, be a valid discharge of the debt to the extent of the face value of the payment ; and
- (b) shall, if made in occupation currency in respect of a debt incurred in Hong Kong currency, or if made in Hong Kong currency in respect of a debt incurred in occupation 40 currency, be a valid discharge of the debt to the extent of the face value of the equivalent amount in Hong Kong currency or in occupation currency, as the case may be,

calculated at the official rate of exchange prescribed by the occupying power or, where another rate was agreed by the parties concerned, at that rate.

10 11.—(1) In any case where a debt purporting to have been discharged in whole or in part by payment in occupation currency is by virtue of the provisions of this Ordinance deemed to be wholly or partly undischarged at the commencement of this Ordinance and where the payment of such debt before such purported discharge as aforesaid was secured by any mortgage charge lien guarantee indemnity or other form of security the rights of the creditor in relation to such mortgage charge lien guarantee indemnity or other form of security shall be deemed not to have been extinguished or diminished by such purported discharge."

The Schedule to the said Ordinance provides for the revaluation of debts within Section 3 (2) of the said Ordinance paid in occupation currency during August 1943 at the rate of 390 Hong Kong dollars during September 1943 at the rate of 320 Hong Kong dollars and during October 1943 at the rate of 280 Hong Kong dollars to 1,000 military yen. The effect of the said Ordinance was to revive and render the Appellant liable to pay the greater  
20 part of the said mortgage debts which had been previously discharged by payment in military yen.

12. The said Koo Wan Sing died on the 25th May 1946 and on the 24th May 1948 the Respondent issued the Writ in this action against the Appellant claiming as his Sole Executrix and the beneficiary of his estate a declaration that she was the sole beneficial owner and entitled to the possession of the said property and that the Appellant had no right or title thereto. p. 8, l. 29.  
pp. 1 and 2.

13. By her Statement of Claim dated the 17th June 1948 the Respondent alleged the execution of the said power of attorney dated the  
30 15th September 1942 by the Appellant and that under and by virtue of the said power of attorney the Appellant by the said Agreement dated the 21st August 1943 agreed to sell the said property to the said Koo Wan Sing for 68,000 military yen, and claimed specific performance of the said Agreement and an order on the Appellant to convey the said property to the Respondent. p. 2.

14. The Appellant's Statement of Defence (which as ultimately amended pursuant to Orders made in the said Action before and during the course of the trial was dated the 21st February 1949) alleged (inter alia) (A) that at all material times the Appellant and the Attorney were divided  
40 by the line of war and that by reason thereof the said power of attorney was cancelled or abrogated and that the Appellant was not bound by documents purported to have been executed on his behalf by the Attorney and (B) that the said Agreement had been frustrated by and its performance rendered impossible by the said Ordinance and that an order for specific performance would work great hardship to the Appellant. p. 4.

15. The Respondent's reply to the said Amended Defence was dated the 19th November 1948. Thereby issue was joined on the Amended Defence and certain of the allegations therein more specifically answered. p. 7.

p. 19. 16. The Action was heard by His Honour Sir Leslie Gibson Chief Justice on the 9th, 10th and 11th February 1949 and on the 25th February 1949 judgment was given in favour of the Respondent for specific performance of the said Agreement and for the costs of the Action.

p. 21, l. 31. 17. At the trial a plea by the Respondent that the Appellant had ratified the acts of the Attorney and a plea by the Appellant of fraud were abandoned. Pleas by the Appellant of undue influence and duress were held not to be established. It was found that the written agreement of the 18th August 1943 was the only agreement between the parties.

p. 22, l. 36. 18. Of the Defence that the Appellant and the Attorney were divided 10  
p. 41, l. 6. by the like of war and that therefore the said power of attorney and the acts done under it were invalid the Court was bound as the Appellant conceded by a decision of the Full Court of Hong Kong in Appeal No. 12 of 1948 and though the point was taken it was not argued. The point was further reserved at the hearing before the Full Court. In the case referred to the question arose whether a partnership had been dissolved by operation of law by reason of the fact that two of the partners went to Free China during the Japanese occupation of Hong Kong. The Court took the view that there was an effective Japanese occupation but nevertheless held that while the law of England would regard occupied Hong Kong as enemy 20  
territory it was not possible to contemplate that the law of Hong Kong could operate to turn all the residents of the Colony into enemies that it might be that under some law of the Japanese administration the principle was applied in reverse on the basis that Free China became the enemy in that case the result would flow from the Japanese law and not from the Common Law in force in Hong Kong.

19. The Appellant contends that the decision referred to by which both Courts held themselves bound in the present case was wrong in principle. No relevant ordinance dealing with the matter exists in Hong Kong and the principles of the Common Law of England are applicable 30  
and thereby (it is contended) during the Japanese occupation of Hong Kong the residents of Hong Kong became enemies of His Majesty and his allies and were shut off from communication and intercourse and commercial dealings with those resident in His Majesty's free territories or in the unoccupied territory of an ally of His Majesty and in particular in the present case the relationship of principal and agent between the Appellant and the Attorney was determined so soon as they were divided by the line of war.

p. 23, l. 12. 20. On the issues of frustration of the said Agreement the trial Judge having declined to imply a term therein that the incumbrances on 40  
the said property should be paid off out of the purchase money and in the same currency and having held that there was no absolute impossibility of performance held that Sections 3 and 11 of the said Ordinance did not have the effect of frustrating the Agreement. He further held that there was no such hardship as would deprive the Respondent of her right to specific performance of the said Agreement.

21. The Appellant on the 12th March 1949 gave notice of appeal to the full Court of the Supreme Court of Hong Kong from the said Judgment and such appeal was heard on the 30th and 31st May 1949 by Williams and Scholes JJ. who delivered judgment on the 10th June 1949 dismissing such appeal with costs and confirming the judgment in the Court below. One judgment only was delivered.

22. The full Court by its judgment recognised that the effect of the said Ordinance was to leave the Appellant liable to pay considerable sums to the respective mortgagees of the said property but held (agreeing with the construction placed on Section 11 of the said Ordinance by the Court below) that the liability was a personal one and did not revive the mortgages as charges on the land as against a purchaser thereof. It is contended that this was a matter which could not be determined against the mortgagees in their absence. The Court also held that while the passing of the Ordinance was clearly beyond what either the Appellant or the purchaser contemplated nevertheless the said agreement was not thereby frustrated. On the question of hardship the Court agreed with the reasoning and conclusion of the trial judge who had regarded the agreement as having resulted merely in a bad bargain for the Appellant. The Appellant contends that the effect of the said Ordinance was to render impossible performance of the said Agreement in manner contemplated by the parties at the date thereof and to frustrate the same and in the alternative that an order for specific performance thereof would involve such hardship on the Appellant that it ought not to be made.

23. By Order made on the 15th August 1949 by the said Full Court on the petition of the Appellant filed on the 18th June 1949 the Appellant was granted provisional leave to appeal from the said judgment of the Full Court to His Majesty the King in Council and the Appellant having duly complied with the conditions of the said order final leave so to appeal was granted by an Order made by the Full Court on the 20th May 1950.

24. The Appellant submits that the decision of both the Trial Judge and of the Full Court of the Supreme Court of Hong Kong exercising appellate jurisdiction was wrong and should be reversed and that the Action of the Respondent against the Appellant should be dismissed with costs for the following (amongst other)

## REASONS.

(1) BECAUSE the agency of the Attorney under and by virtue of the said power of attorney ceased and determined so soon as the Appellant left Hong Kong and took up residence in China and accordingly the said Agreement dated the 21st August 1943 and all other acts done by the Attorney and documents executed by him in purported exercise of powers conferred by the said power of attorney were not the acts of or binding on the Appellant.

- (2) BECAUSE the said action was brought and tried on the footing that the said Agreement remained executory and if contrary to the Appellant's contention the same was originally binding on him it ceased to be so binding at the commencement of the said Ordinance.
- (3) BECAUSE the said Ordinance resulted in a change of circumstances which was not contemplated by either of the parties to the said Agreement in that the said Agreement was made in contemplation of the then existing currency law of Hong Kong under which not merely the purchase price payable thereunder but the said mortgages would be discharged by the payment in military yen at the prescribed rate of exchange. 10
- (4) BECAUSE the effect of the said Ordinance as construed by the Courts of Hong Kong is to the charges created by the said mortgages discharged while leaving the Appellant under a personal liability for the greater part of the said mortgage debts and without any recourse to the Respondent or the property comprised in the said Agreement for any further payment in respect of the purchase price payable under the said Agreement. 20
- (5) BECAUSE such construction was not open to the said Courts in the absence of the mortgages.
- (6) BECAUSE whether or not there was an implied term in the said Agreement that the mortgages should be discharged out of the purchase money the change of circumstances effected by the said Ordinance was so fundamental as to be outside the contemplation of the parties to the said Agreement and to frustrate the said Agreement or to render its performance in manner contemplated by the parties impossible. 30
- (7) BECAUSE to compel the Appellant specifically to perform the said Agreement would having regard to such change of circumstances result in grave hardship to him.
- (8) BECAUSE neither at law nor in equity could the said Agreement in the changed circumstances be enforced.

ROLAND BURROWS.

In the Privy Council.

---

ON APPEAL

from the Supreme Court of Hong Kong  
(Appellate Jurisdiction).

---

BETWEEN

HANGKAM KWINGTONG

WOO - - - - Appellant

AND

LIU LAN FONG alias LIU

AH LAN - - - Respondent.

---

Case on behalf of the Appellant.

---

REID SHARMAN & CO.,

36 Bedford Row,

London, W.C.1,

*Solicitors for the Appellant.*