

9/80

IN THE PRIVY COUNCIL

APPEAL NO. ⁹~~21~~ OF 1978

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

STANLEY YEUNG KAI YUNG 1st Appellant
(1st Third Party)

STANLEY YEUNG & CO. LTD. 2nd Appellant
(2nd Third Party)

- and -

10 THE HONG KONG AND SHANGHAI BANKING
CORPORATION Respondent
 (Defendant)

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from the judgment of the Court of Appeal of Hong Kong (Briggs, C.J., Pickering, J.A. and Leonard J.) given on 26th October 1977 whereby the Court dismissed with costs the appeal of the Appellants against a judgment dated 11th March 1977 of the Supreme Court of Hong Kong (Cons. J.) which had ordered the Appellants (who were the 1st and 2nd Third Parties) and the 3rd, 4th and 5th Third Parties (who had not appealed) to pay the Respondent (who was the Defendant) such sum as might be necessary for the Respondent to meet its obligations to the Plaintiff together with costs to be taxed on a common fund basis.

pp. 109-130
p. 131
pp. 93-99
p. 101

2. The Plaintiff was the administrator in Hong Kong of the Catholic Mission of Macao (hereinafter called "the Bishop") who was the registered holder of various parcels of shares in the Respondent bank. The proceedings concerned a total of 12,557 shares represented by four certificates. In May 1973 the certificates in question were presented to the bank together with share transfer forms purportedly signed by the Bishop as transferor and one WONG KWAN-MAN as transferee. WONG

Exhibit 2,
pp. 156, 157,
158 & 159

RECORD

Agreed Bundle
No. 10, pp.
187, 189

KWAN-MAN sent or caused documents to be sent through the 1st Appellant's firm, Stanley Yeung Stock Brokers Co, (hereinafter called "the brokers") to the Respondent bank under cover of standard forms of letter addressed by the brokers to the Respondent's registrar requesting the registrar to effect the transfers and send the new certificates to them. Unknown to the brokers the signatures of the Bishop on the four transfer forms were in fact forgeries. The Respondent bank had a specimen signature of the Bishop kept by it for the very purpose of verification of signatures on transfers and should have noticed, but did not, the obvious discrepancies between the genuine and the forged signatures. The brokers, for their part, did not have such a specimen signature or similar means of verification and in fact had not previously acted for any party in the purported transactions contained in or evidenced by the Instruments of Transfer. Nor did the brokers attest or purport to verify the signature of or act for the Bishop when they were passing the share scrips over to the Respondent bank. The Respondent registered the transfer. The Bishop then sought reinstatement of his name on the Respondent's register in respect of the shares. The Respondent brought in the Third Parties including the Appellants for, in effect, an indemnity. The 1st Appellant was at the relevant time the sole proprietor of the brokers' firm; the other Third Parties are the partners who took over the firm subsequently but did not issue a notice in accordance with the Fraudulent Transfers of Businesses Ordinance Cap. 49.

10

20

30

p. 14

3. The Respondent's case was that there was an implied warranty by the 1st Appellant that the said instruments of transfer and the transactions evidenced thereby were genuine; further or alternatively, that the 1st Appellant had expressly warranted that the Instruments of Transfer were duly completed.

p. 19

40

pp. 17, 18

4. The Appellants denied that they were liable to indemnify the Respondent as alleged or at all; the brokers neither expressly nor impliedly warranted the genuineness of the transfers; as the Respondent knew or ought to have known from the contents of the Instruments of Transfer themselves the brokers neither attested nor did they otherwise verify the signatures of or purport to act for the transferor; the brokers in presenting the transfer forms acted as a mere conduit pipe for the transferee; the Respondent,

50

10 for its part, kept or ought to have kept records of its shareholders' specimen signatures and ought to have checked the transferor's signature appearing on the Instruments of Transfer against its records before effecting any transfer; and the Respondent negligently failed to make any or any adequate check or other enquiries and thereby caused or alternatively contributed to the matters complained of and was therefore itself in default. Further, the Instruments of Transfer presented to the Respondent bank were not completely filled in, wherefor the Respondent bank did not have a duty to register the transfers; and the registration was done at their own risk and volition.

20 5. The trial judge found that it was not necessary to express and he did not express any "considered opinion" on the allegation of an express warranty but he found that there was an implied warranty that the transfer forms and the signatures thereon were genuine and that the Third Parties must therefore indemnify the Respondent. He relied in particular on Sheffield Corporation v. Barclay [1905] A.C. 392.

p. 94-95

p. 95

6. On the issues of contributory negligence on the part of the Respondent and contribution by a joint tortfeasor he found that -

30 (1) The Respondent was under no duty of care to the brokers and that in the absence of such a duty "there can be no actionable negligence";

p. 97

(2) There was no question of contribution because the Respondent was entitled to be indemnified by the Appellants in respect of the liability in respect of which the contribution was sought.

pp. 97, 98

40 7. He went on to say, however, that should he be wrong as regards these two points he would have held the Respondent bank and the brokers equally to blame because -

(1) The Respondent bank should have noticed that the signatures were forgeries; and

p. 98

(2) The brokers made no effort "to check upon the identity or bona fides of the person on whose behalf they consented to act".

p. 98

RECORD

p. 110
lines 2-20

8. The judgment of the Court of Appeal was given by Leonard J. He did not in any way modify the findings of fact by the trial judge. His approach, however, appears to differ from the trial judge's in at least one significant way. He held that -

p. 123
lines 19-23

"On their facts neither Sheffield Corporation v. Barclay [1905] A.C. 392 nor Starkey v. The Bank of England [1903] A.C. 114 is conclusive. No agent was involved in Sheffield v. Barclay; it was the authority of the agent to act which was questioned in Starkey v. The Bank of England." 10

p. 122
lines 7-11

In the present case the brokers never warranted that they were acting on behalf of the transferor (as distinct from the transferee) so there was no question of any breach of warranty of authority. Further the question of agency is relevant here because (in amplification of the "conduit pipe" argument) it was contended by the Appellants before the Court of Appeal that the brokers were acting on behalf of and as bare agents for the transferee so that if any warranty ever arose it was a warranty of their principal, the transferee. The Court of Appeal, whilst recognising that in the normal course of business stockbrokers sending transfer documents to a company would send them on behalf of the transferee rather than on behalf of the transferor, nevertheless held that the brokers here could not be regarded as a mere conduit pipe and that Sheffield's case should in effect be extended by applying it to stockbrokers who acted merely as agents. 20

p. 119
lines 35-37

p. 127
lines 23-24

p. 127
line 17

30

9. It is the Appellants' primary contention that the Court of Appeal erred in applying the rule in Sheffield's case to the facts of the present case.

10. The Appellants submit that there is no absolute principle of law which says that a person who brings a transfer to a company for registration impliedly warrants that the transfer is genuine and that he will indemnify the company if it should turn out to be otherwise. A contract of indemnity pre-supposes agreement between the parties express or implied. In Dugdale & Others v. Lovering (1878) L.R. 10 C.P. 196, for example, Grove J. in dealing with the question whether any contract of indemnity could be implied on the facts before him said:- 40

p. 115

".....I should hesitate to say that in cases of this sort it can be an absolute proposition of law that the party making the request is bound to indemnify. Whether there is such an obligation must greatly depend on the circumstances of each individual case....."

10 11. The Court of Appeal recognised that there is no absolute principle as contended for by the Respondent, at any rate not as wide in scope as that formulated in 7 Halsbury's Laws, 4th Edn, paragraph 414, upon which the Respondent relied. The Court of Appeal was apparently of the view that the main questions to be considered are (1) whether a broker acting as a mere agent for a transferee who puts forward in good faith on behalf of his principal a transfer which proves to be forged, warrants not only that he has authority to act for his principal but also that the transfer is genuine; and (2) whether a broker so acting is liable to indemnify a company which registers that transfer.

p. 123
lines 15-19
p. 121
lines 30-34

30 12. It is submitted that whilst the Court of Appeal was right not to accept that the applicable principle is as wide as the Respondent contended, it failed to appreciate the true significance of the fact that, as found by the trial judge and accepted by the Court of Appeal, the staff of the Respondent bank's registry "placed no stock on the personality of those who submitted requests for transfers". There is therefore no valid basis for making any distinction, on the facts of the present case, between the brokers who acted as agent for the transferee in presenting the transfers and a person doing the same thing who is not a broker. Yet such a distinction was apparently made by the Court of Appeal and it was made, not on the basis that the Respondent bank did differentiate between brokers and non-brokers, but on the basis that "the bank's attitude to a private individual presenting a document of transfer might well differ from its attitude to a stockbroker presenting such a transfer" (emphasis supplied) and that "stockbrokers are professional persons and have a responsibility to those with whom they deal."

p. 109
line 33-
p.110
line 1

p. 127
lines 17-19

p. 127
lines 24-26

50 13. The distinction made by the Court of Appeal might be valid where it was shown that the registering authority did in fact differentiate between brokers and non-brokers. On the facts of the present case however no such distinction

RECORD

is available. Such an approach would involve abandoning the task of ascertaining whether on the facts an implied contract to indemnify arose and substituting for it an ineluctable rule of law.

14. It is further submitted that the point for consideration is not whether or no the Respondent owed any duty to the brokers to check the signatures or otherwise verify the genuineness of the transaction. The question is whether in the circumstances, despite the fact that the Respondent bank was in a position to verify the signature of the transferor, and would reasonably be expected to do so but did not, the brokers must still be held to have impliedly given a warranty on their own behalf that the signature of the transferor (for whom the brokers did not act and did not purport to act) was genuine and that they would personally indemnify the Respondent bank should it turn out to be otherwise. It is submitted that on the facts no such implication arose.

10

20

15. The Appellants submit that Sheffield's case itself, and in particular the judgment of the Earl of Halsbury L.C., makes it clear that it is relevant to look into the respective positions of the company registering a transfer and the party requesting the registration as regards their means of ascertaining the genuineness or otherwise of the transfer documents. At page 396, the Earl of Halsbury L.C. said (emphasis added) -

30

"The corporation is simply ministerial in registering a valid transfer and issuing fresh certificates. They cannot refuse to register, and though for their own sake they will not and ought not to register or to issue certificates to a person who is not really the holder of the stock, yet they have no machinery, and they cannot inquire into the transaction out of which the transfer arises. The bank, on the other hand, is at liberty to lend their money or not. They can make any amount of inquiries they like....."

40

16. In the present case the Respondent clearly had the machinery whereas the brokers had not. As mentioned above the brokers had not acted for any party in the purported sale and purchase of shares. There was also evidence before the court that where a broker dealt in a sale and purchase transaction of shares the broker would

50

10 put his chop upon the transfer form; that in the present case the transfer forms had no such chop but bore only the chops of the stamp duty office, thereby indicating that the brokers submitting the forms had not dealt with the transaction and were in no position to warrant that the applications were genuine. Both the trial judge and the Court of Appeal, it is submitted, failed to appreciate the significance of this piece of evidence. The trial judge said that the Appellants' argument on this point must fail unless "what was in effect a trade custom was made out" and he said that he was not prepared to accept trade customs on the 1st Appellant's evidence alone as the 1st Appellant did not appear to be very experienced in the broking world. But the 1st Appellant's evidence on this point was never challenged. Further, the Plaintiff's own witness, Michael Edward Antonio, who was the Senior Supervisor of the Respondent's Share Registry Department and a very experienced man, said in his evidence in chief that where the transfer form did not bear a broker's chop but a chop or chops of the stamp duty office, it "would be probably a private transaction not through a broker". In cross-examination he was even more explicit on the point. He agreed that it was "obvious" to him that no broker was involved in the sale and purchase and that this fact "would have been obvious to anyone" in his department. This therefore not only fully corroborated the 1st Appellant's evidence on the point but also indicated the existence of a very well-known practice in the trade. In any event it is submitted that it is not necessary to establish a trade custom; nor was it a question as to whether the Respondent had waived its rights (if any) by consenting to act with the knowledge that the brokers had not dealt with the transaction. The question is whether, given such knowledge on the part of the bank, it can still be said that there must be implied not only a representation but also a warranty on the part of the brokers that the transferor's signature was genuine.

p. 96
lines 38-43

p. 59
lines 17-18

p. 66
lines 14-15,
17, 18

17. Admittedly, Lord Davey in Sheffield's case said at page 403:-

50 "I dissent from the proposition that a person who brings a transfer to the registering authority and requests him to register it makes no representation that

RECORD

it is a genuine document, and I am disposed to think (though it is not necessary to decide it in the present case) that he not only affirms it is genuine, but warrants that it is so. I think this is the result of the decision in Oliver v. Bank of England /1902/ 1 Ch. 610 affirmed in this House under the name of Starkey v. Bank of England /1903/ A.C. 114. It may be argued with some force that for this purpose no solid distinction can be made between the power of attorney through which the transfer of Consuls is effected and the deed of transfer in the present case. Each of these instruments, it may be said, is put forward as evidence of the authority with which the person making the application professes to be clothed to request the removal of the stockholder's name and the substitution of another name in his place. But, however this may be, it is enough for the decision of this appeal to say that the deed of transfer was put forward as a genuine document, and the appellants were invited to act upon it as such."

10

20

18. The Appellants respectfully submit:-

(1) That these dicta of Lord Davey were clearly obiter;

(2) That they are not applicable or necessarily applicable to a situation where the person presenting the transfer for registration does not himself claim under the transfer, is not in breach of any warranty of authority and has not dealt with, and is known by the registering authority not to have dealt with, the transaction embodied in the transfer which subsequently proves to be forged;

30

(3) That, in any event, in a case where the person presenting the transfer is acting as a mere agent, no warranty of genuineness should be held to have been impliedly given by him on his own behalf, but if any warranty arises it is one impliedly given by or on behalf of the person for whom he is acting.

40

19. The case of Starkey v. Bank of England /1903/ A.C. 114 H.L., cited and relied upon by Lord Davey, was one in which the broker claimed

50

under the very instrument proved to be forged; the thing which the broker there warranted as genuine was the authority to act embodied in the forged power of attorney; he was therefore in breach of his warranty of authority.

10 20. The Court of Appeal regarded the Bank of England v. Cutler /1908/ 2 K.B. 208 as being on its facts "almost on all fours with the present case". In that case the Bank of England before registering any transfer of stock required verification of the transferor's identity by one or other of the stockbrokers appearing in a list of privileged stockbrokers kept by the Bank whose identification of intending transferors would be accepted by them. A woman fraudulently personating a registered stockholder instructed Cutler, one of the privileged stockbrokers, to prepare a transfer. Upon Cutler's introduction the personator
20 attended at the bank and forged the holder's signature, Cutler identifying her as the true stockholder. The Court of Appeal (Vaughan Williams L.J. dissenting) held that Cutler had in the particular circumstances of the case made a request or demand purportedly on behalf of the true stockholder for the transfer to be registered.

p. 124
lines 5-6

30 21. It is submitted that Cutler's case is distinguishable from the facts of the present case. For one thing, Cutler, if he purported to act on behalf of anybody at all, must have purported to act on behalf of the true stockholder so that if he had sought to escape liability on the basis that he was merely an agent for the transferor he would have been found to be in breach of his warranty of authority; the fact that he was acting as agent therefore would not have helped him. Further and in any event,
40 Cutler was not a mere conduit pipe because it was his verification of identity that was the crucial factor: he prepared the very transfer in question and put it forward when verifying the identity of the transferor (see in particular Farwell L.J. at page 232).

50 22. In Welch v. The Bank of England /1955/ Ch. D 508, which was also relied on by the Court of Appeal, the question of agency was simply not argued nor was the scope of the principle in Sheffield's case put in issue at the trial by the jobbers and brokers joined as third parties.

p. 127
lines 12-15

RECORD

23. The Appellants further or alternatively contend that in any event no contract of indemnity can arise by implication of law unless and until it is shown that the Respondent in fact had a ministerial duty to act and that the Respondent bank acted without default.

24. The Appellants submit that such a ministerial duty could only have arisen if the transfer forms presented were complete and regular on their face. The Respondent bank is a creature of statute; it was incorporated by the Hong Kong & Shanghai Banking Corporation Ordinance Cap. 70. Section 4 thereof provides that the regulations of the Respondent bank shall be binding in all respects upon the Respondent bank and upon all persons whatsoever, whether shareholders or not and shall regulate the rights and liabilities of all the above persons inter se their heirs, executors, administrators, assignees or successors. Regulation 46 imposes on the Respondent bank a duty to keep "registers of transfers". Regulation 48 gives to the Board a discretion to refuse registration of transfers. Regulation 53 prescribes the form of transfer. Section 66 of the Companies Ordinance Cap. 32 makes it unlawful for a company to register a transfer of shares unless "a proper instrument of transfer has been delivered to the company". The Respondent in the Appellants' submission would not only be entitled to reject a transfer that was not complete and regular on its face but would prima facie be bound to refuse registration of incomplete instruments of transfer.

10

20

30

Ex. 2
pp.183-186

25. The transfers in the present case (apart from the question of forgery) were not complete and regular in that the transfers did not bear in the space provided for them the addresses and calling of the witness purporting to attest the signatures. In the circumstances of the case the Appellants contend that the Respondent acted on the transfers in the exercise of their own discretion and at their own risk.

40

26. Further or alternatively the Appellants submit that by reason of its negligence the Respondent bank did not act "without default" within the meaning of the term as used by Lord Davey in Sheffield's case at p. 399.

50

10 27. The Appellants say that the Court of Appeal
erred in holding that "default" in the sense used
by Lord Davey "must amount to some form of
complicity by a servant of the bank in the
fraud and occur before or accompany the
presentation of the transfers" (emphasis
supplied). It is submitted that there is no
reason why events subsequent to the
presentation of the transfers can never be
relevant to the question of "default". Indeed
Lord Davey appears to be directing his mind not
to the position before or at the time when the
person invested with a ministerial duty is
called upon to act but primarily to the manner
in which that person after being called upon
to act proceeds to exercise his duty. Lord
Davey seems to say that he must do so "without
any default on his own part" and "in a manner
20 which is apparently legal" (ibid. at p.399)
before the indemnity principle can be brought
into play.

28. In the present case the default of
Respondent bank disentitles it to any indemnity
from the Appellants and it is submitted that
unless there is such an indemnity there is no
liability at all on the part of the Appellants.

30 29. Alternatively if the Appellants are in
anywise liable they are at most liable to
contribute up to half of the loss suffered by
the Respondent bank. If it is permissible to
imply a contract to indemnify in a case where
both parties have acted without negligence
it should in principle be equally permissible
to imply a contract to contribute in a case
where both parties have acted negligently or
are otherwise in default as between each
other or as against a third party. It may
not matter greatly whether that result is
40 reached by saying that the contract to
indemnify, being conditional on the
registering authority acting without default,
is displaced by a contract to contribute in
the event of the registering authority and
the requesting party being found to be both
at fault; or by saying that in the absence
of any contract to indemnify there is
liability to contribute as between tortfeasors
under Section 19 (1)(c) of the Law Amendment
and Reform (Consolidation) Ordinance Cap. 23;
50 or by saying that the implied contract of
indemnity is itself subject to implied terms
which can cut down or displace the obligation
altogether.

RECORD

30. It remains the primary contention of the Appellants that in the circumstances the brokers did not on their own behalf give any warranty of genuineness either expressly or impliedly and in absence of such a warranty the Appellants are not liable at all.

p. 137

31. On 16th November 1977 the Court of Appeal of Hong Kong (Briggs C.J., Pickering, J.A. and Leonard J.) made an order granting the Appellants leave to appeal to Her Majesty in Council.

10

32. The Appellants submit that the judgment of the Court of Appeal of Hong Kong was wrong and ought to be reversed and that this appeal ought to be allowed with costs for the following amongst other

R E A S O N S

(1) BECAUSE, the brokers gave no express warranty that the transfers were genuine and in all circumstances summarised in paragraphs (2) to (6) below, no such warranty should be implied;

20

(2) BECAUSE the Respondent bank "placed no stock on the personality" of those presenting transfers for registration and the fact that the particular transfers in question happened to have come through stockbrokers in no way affected what the bank did subsequently;

(3) BECAUSE the brokers in presenting the transfers for registration never acted or represented that they were acting for or on behalf of the Bishop nor did they purport to verify his signature;

30

(4) BECAUSE to the knowledge of the Respondent bank the brokers never acted for any party in the transaction contained in or evidenced by the forged Instruments of Transfer and, also to the knowledge of the Respondent bank, were not in a position to and did not verify the genuineness thereof;

40

(5) BECAUSE the Respondent bank had the machinery to check and verify the signature of the transferor and could reasonably have been expected to do so;

- (6) BECAUSE the brokers never claimed under the forged transfers but acted merely as agents for the transferee in presenting the same to the Respondent bank;
- (7) BECAUSE if, which is denied, any warranty was given as to the genuineness of the transfers, it was not given by the brokers on their own behalf but on the transferee's behalf;
- 10 (8) BECAUSE since the transfer forms were not properly completed, the Respondent bank did not have a ministerial or other duty to register such transfers and indeed if they had any duty at all it was to refuse to register the transfers;
- (9) BECAUSE, in any event, in so far as the Respondent bank failed to check the transferor's signature it was held by the trial judge to be blameworthy and therefore did not act 'without default';
- 20 (10) BECAUSE the Respondent bank ought to be held to have acted in the exercise of its own discretion and at its own risk;
- (11) BECAUSE in all the circumstances summarised in paragraphs (1) to (10) above no contract of indemnity ought to be implied;
- (12) BECAUSE, if any liability were to be implied against or imposed on the Appellants, it would at most be an obligation to contribute, not an obligation to indemnify, and such contribution would fall to be assessed in the light of the finding that the brokers and the Respondent bank were equally to blame.
- 30

Dated this day of April, 1979.

Andrew Leggatt QC
Dennis Chang

APPEAL NO. ~~21~~⁹ OF 1978

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N :

STANLEY YEUNG KAI YUNG 1st Appellant
(1st Third Party)

STANLEY YEUNG & CO. LTD. 2nd Appellant
(2nd Third Party)

- and -

THE HONG KONG AND SHANGHAI BANKING
CORPORATION

Respondent
(Defendant)

CASE FOR THE APPELLANTS

Dated this day of April, 1979.

YUNG, YU, YUEN & CO.,
SOLICITORS,
HONG KONG.