

9/80

ON APPEAL FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN :

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

STANLEY YEUNG AND COMPANY LIMITED 2nd Appellant (2nd Third Party)

10 - and -

THE HONG KONG AND SHANGHAI BANKING CORPORATION Respondent (Defendant)

CASE FOR THE RESPONDENT

Record

1. This is an Appeal from a Judgement of the Court of Appeal of the Supreme Court of Hong Kong (The Honourable Sir Geoffrey Briggs, Chief Justice, The Honourable Mr. Justice Pickering, Justice of Appeal, and The Honourable Mr. Justice Leonard) dated 26th of October 1977 dismissing with costs the Appeal of the 1st and 2nd Appellants from a Judgment of The Honourable Mr. Justice Cons in the High Court of the Supreme Court of Hong Kong dated 11th March 1977 whereby it was adjudged that the 1st and 2nd Appellants as Third Parties do pay the Respondent such sum as might be necessary for the Respondent as Defendant to discharge its obligations to the Plaintiff arising under the Judgment in High Court Action No. 276 of 1976 dated 1st December 1976 together with the costs of the said action and of the Third Party proceedings therein on a common fund basis. The said sum was certified by the Registrar of the Supreme Court of Hong Kong by Order dated 2nd November 1977 at \$3,374,312-48 plus interest.

pp.109-130

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pp.103-105

30 that the 1st and 2nd Appellants as Third Parties do pay the Respondent such sum as might be necessary for the Respondent as Defendant to discharge its obligations to the Plaintiff arising under the Judgment in High Court Action No. 276 of 1976 dated 1st December 1976 together with the costs of the said action and of the Third Party proceedings therein on a common fund basis. The said sum was certified by the Registrar of the Supreme Court of Hong Kong by Order dated 2nd November 1977 at \$3,374,312-48 plus interest.

pp.93-101

40 The question for decision in this Appeal is whether a stockbroker who presents share

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certificates accompanied by completed transfer forms to a public company or similar corporation with an express and/or implied request that the shares be transferred on the company's register into the name of the transferee mentioned in the said transfer forms and that new share certificates be issued is liable to indemnify the company in respect of any liability to the true owner of the shares which may be incurred by the company in the event that the purported signatures of the true owner on the said transfer forms are found to be forged. 10

3. The Plaintiff in High Court Action No. 276 of 1976 was The Administrator in Hong Kong of the Catholic Mission of Macao, being a corporation sole incorporated by the provisions of the Catholic Mission of Macao Incorporation Ordinance (Chapter 1006 of the Laws of Hong Kong). The Plaintiff was and is the registered shareholder of a considerable number of shares of and in the Respondent. 20

4. On two dates in May 1973 a total of four share certificates in the name of the Plaintiff representing a total of 12,557 such shares were presented to the Respondent by an employee of the 1st Appellant herein trading under the firm name "Stanley Yeung Stockbrokers Company". Each such certificate was so presented together with a completed transfer form and a letter signed by or on behalf of the 1st Appellant requesting the Respondent to transfer the shares therein to the transferee named in the transfer form and to issue fresh share certificates in the name of the said transferee. 30

5. Each of the said four transfer forms bore what purported to be the signature of The Most Reverend Monsignor Paulo Jose Tavares Bishop of Macao, who pursuant to the provisions of the said Catholic Mission of Macao Incorporation Ordinance was the person authorized to execute documents on behalf of the Plaintiff. Each of the said 4 transfer forms further bore the impression of a rubber stamp inscribed with the corporate name of the Plaintiff. 40

p.48,11.9-10

p.48

6. In delivering his Judgment on 1st December 1976 The Honourable Mr. Justice Cons found as a fact that the signatures on the said four transfer forms were not those of the said Bishop of Macao.

7. The Respondent is a body corporate incorporated by the Hongkong and Shanghai Bank Ordinance, 1866, and now organized under the provisions of the Hongkong and Shanghai Banking Corporation Ordinance (Chapter 70 of the Laws of Hong Kong) and the 50

10 Hongkong and Shanghai Bank Regulations (Chapter 70 of the Laws of Hong Kong, Subsidiary Legislation). Shares of and in the Respondent are freely bought and sold in the stock markets of Hong Kong and London. The conditions under which share certificates are issued by the Respondent are set out in Regulations 11 to 19 of the said Regulations and the conditions under which shares are transferred and transfers are registered are set out in Regulations 46 to 56 inclusive of the said Regulations.

20 8. In accordance with the request of the 1st Appellant and in ignorance of the fact that the said transfer forms were forgeries the Respondent removed the name of the Plaintiff as holder of each of the four lots of the said shares from its Register of shareholders, replaced it with the name of the transferee named in the said transfers and issued fresh share certificates in the same name in respect of the said four lots. pp. 8, 9,11

9. By the Judgment in the said Action dated and entered 1st December 1976 it was adjudged (so far as is material to this Appeal) :- pp. 91-92

30 That the Respondent restore the Plaintiff's name to the Register of Members of the Respondent in respect of 12,557 shares of \$25.00 each or their equivalent and that the Respondent do deliver to the Plaintiff a certificate or certificates of ownership of such shares.

40 10. The Respondent herein as Defendant brought Third Party proceedings against the 1st and 2nd Appellants and against three other persons for an indemnity in respect of any sum which it might be liable to pay to the Plaintiff and for an indemnity in respect of costs. At the time of presentation of the share certificates and transfer forms as aforesaid in May 1973 the 1st Appellant was the sole proprietor of the business known as Stanley Yeung Stockbrokers Company. The 2nd Appellant and the 3rd, 4th and 5th Third Parties (who have not appealed) became partners in Stanley Yeung Stockbrokers Company on 21st January 1974, but no notice of such change of proprietorship was published in the Hong Kong Government Gazette or elsewhere pursuant to the provisions of the Fraudulent Transfers of Businesses Ordinance (Chapter 49 of the Laws of Hong Kong) and the 2nd Appellant and the 3rd, 4th and 5th Third Parties accordingly became liable for the pp. 13-15

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debts liabilities and obligations of the 1st Appellant pursuant to the provisions of the said Fraudulent Transfers of Businesses Ordinance. This liability was not challenged at the trial of the Third Party proceedings or in the Court of Appeal.

pp. 13-15

11. By its Statement of Claim against the Third Parties, which was dated 17th May 1976, the Respondent claimed an indemnity on the following grounds :-

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That it was an implied term and condition of the instruments of transfer and by presenting the same the 1st Appellant (with whom the 2nd Appellant and other Third Parties are jointly and severally liable) warranted

(i) that the signatures on the instruments of transfer were genuine;

(ii) that the transactions evidenced by the instruments of transfer were of a genuine nature; and

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that there had been a breach of the warranties set out in sub-paragraphs (i) and (ii) above in that the signatures were forgeries and were ineffective to pass title to the transferee.

p. 19

The Respondent further relied (in its reply) on an express warranty that the said instruments of transfer were duly completed.

pp. 93-99

p.95, 11.1-5

12. The Honourable Mr. Justice Cons in his Judgment dated 11th March 1977 held that the implied warranty was established, that the 1st Appellant was in breach thereof and that the 2nd Appellant and other Third Parties were liable with the 1st Appellant to indemnify the Respondent against the loss thereby caused. The learned judge rejected the three defences put forward on behalf of the 1st and 2nd Appellants, namely :-

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p.95, 11.8-29

(i) that the indemnity is a question of fact;

pp.95-96

(ii) that the 1st Appellant did not request the transfer; and

p.96, 11.12-42

(iii) that the Respondent did not prove that it relied on the implied warranty.

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pp. 97-98

13. The learned Judge also rejected two further contentions advanced on behalf of the 1st and 2nd Appellants as to the reduction of the indemnity payable by them (if they were found liable) on the grounds of :-

- (i) the contributory negligence of the Respondent;
- (ii) liability of the Respondent to contribute to any damages payable by the 1st or 2nd Appellants as a joint tortfeasor.

10 As to (i) the Judge held that the Respondent owed no duty of care. He added obiter that if he was wrong then he would have held both sides equally to blame. The Respondent should have noticed that the signatures were forgeries. As to (ii), contribution was excluded by the relevant language of the statute.

14. By further Points of Defence dated 1st December 1976 the 1st and 2nd Appellants raised by way of defence the contention that the Plaintiff caused or contributed to its loss or was otherwise estopped in equity from claiming against the Defendant by reason of its own negligence in failing to notify the Defendant of discrepancies in lists of shares and failing to respond to a letter dated 2nd June 1973 from the Defendant to the Plaintiff. The 1st and 2nd Appellants were given leave to maintain such defence against the Respondent. Both these contentions were rejected by The Honourable Mr. Justice Cons.

p. 21
p. 194
p. 49, 1.10
p. 98, 11.27-39

15. Evidence was given by the 1st Appellant that he personally did not handle the transactions and that he did not know the person Wong Kwan-Man who requested the 1st Appellant to act. He had been introduced by a runner. The 1st Appellant further said that the wording of the letters accompanying the share certificates and transfer forms was borrowed from another stockbroking company.

p. 52, 11.1-2 & 11.13-14
p. 52 11.17-20
p. 50, 11.5-6

16. Evidence was given by Michael Edward Antonio for the Respondent of the procedure in the Share Registry Department of the Respondent. He gave general evidence relating to the procedure in the Share Registry Department. Since 1966 some specimen signatures were held. A specimen signature of the Bishop of Macao as authorized signatory of the Plaintiff was in the Respondent's possession. He had not personally compared it with the signatures on the transfer forms found by Mr. Justice Cons to be forgeries. He further gave evidence that in May/June 1973 there would be 500 to 700 share transfers presented per week and that the number of shareholders in the Respondent would be numbered in tens of thousands.

pp. 59-69
p. 59 & 60 pp. 181-182
p. 60, 1.28
p. 62, 11.21-22

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pp. 103-105

17. The Appellants appealed to the Court of Appeal of Hong Kong (The Honourable Sir Geoffrey Briggs, the Chief Justice, The Honourable Mr. Justice Pickering, J.A., and The Honourable Mr. Justice Leonard). On 26th October 1977 the Court of Appeal gave judgment dismissing the Appellants' Appeal with costs. The Judgment of the Court was delivered by Mr. Justice Leonard, who after reciting the facts and the grounds of appeal held :-

- p.127,11.31-33 (i) that a warranty or implied contract of indemnity was established; 10
- p.112,11.24-27;
p.120,11.8-14 (ii) that the Respondent was performing a ministerial duty in registering the transfers requested by the 1st Appellant despite the discretion exercisable by its directors in certain cases under Regulation 48 of the Hongkong and Shanghai Bank Regulations;
- p.127,11.34-38 (iii) that the conduct of the Respondent in accepting and acting on the instruments of transfer without comparing them with the specimen signature of the Bishop of Macao and/or in exercising its discretion to accept transfers which did not bear the addresses and calling of the attested witnesses did not preclude the Respondent from claiming full relief; 20
- p.129, 11.1-5 (iv) that the Respondent could not in law successfully have maintained as against the Plaintiff that the Plaintiff could not succeed because of its failure to reply to the Respondent's letter warning of the impending transfer; 30
- p.130, 11.4-20 (v) that any carelessness on the part of the Respondent or its servants could not affect its claim against the Appellants and Third Parties.

p. 107
pp.187 & 189 18. By a Respondent's Notice dated 13th September 1976 the Respondent had advanced the contention that the 1st Appellant by its letters gave express warranties to the Respondent, but no finding was made in respect thereof by the Court of Appeal. 40

p. 137 19. On 16th November 1977 the Court of Appeal of Hong Kong made an Order granting leave to appeal to Her Majesty in Council.

20. It is the Appellants' respectful contention that in the circumstances summarised in paragraph 2 above a stockbroker expressly and/or impliedly

warrants the genuineness of the signatures on the said transfer forms, alternatively that the stockbroker expressly and/or impliedly contracts with the company to indemnify it against any liability arising from transfer of the shares on its register in accordance with the stockbroker's request.

10 21. In his speech in the House of Lords in Lord Mayor, &c., of Sheffield v. Barclay and Others, [1905] A.C. 392 at 397, the Earl of Halsbury, L.C., approved a proposition of law advanced by Mr. Cave, of Counsel, in the course of his argument in Dugdale v. Lovering, (1875) L.R. 10 C.P. 196 in the following terms :-

20 "In Dugdale v. Lovering Mr. Cave, arguing for the plaintiff, put the position thus: 'It is a general principle of law when an act is done by one person at the request of another which act is not manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.' This though only the argument of counsel was adopted and acted upon by the Court, and I believe it accurately expresses the law The principle insisted upon by Mr. Cave in his argument quoted above has been undoubtedly sanctioned as part of the law by several old decisions, and I think the principle as enunciated is well established."

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22. In the present case the stockbroker presented one of the share certificates and transfer forms in question to the Respondent together with a letter in the following terms:-

p. 187

40 "Dear Sir,

We beg to enclose herewith the undermentioned Certificates) for -1418- shares in your Company with duly completed transfer deed(s) attached in favour of Mr. Wong Kwan Man, 2 Lee Yuen Street, East, 4/Fl., Hong Kong and shall be glad if you will kindly effect the transfer and send us Thirty-six new Certificate(s) when ready as follows:-

50Thanking you for your kind attention in this matter."

The other share certificates and transfer forms were presented with a letter in similar terms.

23. It is further the contention of the Respondent that on the true construction of the said letters the stockbroker expressly warranted that the transfer deeds were duly completed being duly signed by the person named as the registered owner of the shares in the share certificates which accompanied the transfers and further that he was authorized to procure such transfers by the person entitled to dispose of the said shares and with the transferor's authority to procure the issue to the transferee of the prescribed number of new share certificates. 10

24. Alternatively, it is the contention of the Respondent that such a warranty was to be implied from the circumstances in which the share certificates and transfer forms were presented to the Respondent. In the words of Lord Davey in his speech in Lord Mayor, &c., of Sheffield v. Barclay and Others, [1905] 20 A.C. 392 at 399: 20

"I think that the appellants have a statutory duty to register all valid transfers, and on the demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But, of course, it is a breach of their duty and a wrong to the existing holders of stock for the appellants to remove their names and register the stock in the name of the supposed transferee if the latter has, in fact, no title to require the appellants to do so. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it." 30 40 50

Lord Davey further expressed the view (at 404-405):

"But I can see no legal reason why, in circumstances like those of the present case, it should not be held, if necessary, that the true contract to be implied from those circumstances is not only a warranty of the title, but also an agreement to keep the person in the position of the appellants indemnified against any loss resulting to them from the transaction."

10 25. The Respondent is by statutory regulations required (save in cases where its directors adopt the view that the application should be refused) to register transfers of its shares in books kept for that purpose. In the light of the principles laid down in Lord Mayor, &C., of Sheffield v. Barclay and Others, the Respondent further submits that having at the request of the stockbroker performed its statutory ministerial duty to effect a transfer of
20 shares in its register to the name of the person put forward as the transferee by the stockbroker it is as a matter of law entitled to be indemnified against the consequences of so doing. The entitlement to an indemnity cannot be affected by the fact that the stockbroker making the request does not participate in or receive a commission on the sale of the shares. The Appellants' Notice of Appeal to the Court of Appeal acknowledged that the 1st Appellant was acting for "its customer".
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p.103 11.26-27

26. It was contended at the trial of the Third Party proceedings giving rise to this Appeal that the liability of the stockbroker should be extinguished or reduced on the ground of contributory negligence. Although in an obiter passage the learned trial judge expressed the view that the Respondent should have noticed that the purported signatures of the registered holder of the shares in question appearing on the transfer forms were forged, it is submitted that the learned judge rightly (and it was not contested on appeal) held that there could be no question of negligence because the Respondent owed no duty of care to persons presenting transfers. Lord Davey said in Lord Mayor, &c., of Sheffield v. Barclay and Others, [1905] A.C. 392 at 403:-
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p. 98 11.6-12

p. 97 11.9-22

50 "I am also of opinion that the authority keeping a stock register has no duty of keeping the register correct which they owe to those who come with transfers. Their only duty (if that be the proper expression) is one which they owe to the stockholders who are on the register."

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27. The Respondent so far as may be necessary will further submit (as it did at the trial) that its right of action against the stockbroker lies in contract and that the doctrine of contributory negligence does not extend to the reduction of a sum recoverable under a contract of indemnity.

28. It was further contended at the trial of the Third Party proceedings that both the Respondent and the stockbroker would have been liable as joint tortfeasors to the true owner of the shares had the true owner elected to take proceedings in tort against them, and that the Respondent was accordingly liable to pay contribution to the stockbroker under the provisions of Section 19(1)(c) of the Law Amendment and Reform (Consolidation) Ordinance (Chapter 23 of the Laws of Hong Kong) which provides as follows :- 10

"(1) Where damage is suffered by any person as a result of a tort (whether a crime or not)

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought." 20 30

p.98 11.1-5 29. It is submitted that the learned trial judge was right in holding that whether or not either the Respondent or the stockbroker would have been liable to the true owner of the shares in tort, the stockbroker inasmuch as he was (as the judge found) liable to indemnify the Respondent he came within the ambit of the proviso at the end of Section 19(1)(c) of the Ordinance and was thus unable in any event to recover contribution from the Respondent. 40

pp.21,48-49
p. 98
p. 75 30. It was pleaded for the purposes of the Third Party proceedings (and contended at the trial thereof by the 3rd, 4th and 5th Third Parties, the Appellants herein reserving the point) that the Respondent might have raised against the Plaintiff in the said Action the defences that the Plaintiff by its own negligence caused or contributed to its loss, or was estopped, on the grounds that it failed to notify the Respondent of the theft of the share certificates and blank transfer forms which 50

were eventually presented by the stockbroker to the Respondent, and in that it failed to reply to a letter from the Respondent notifying the Plaintiff of the intended transfer of its shares. It is submitted that the learned trial judge rightly held that any such omission on the part of the Plaintiff did not cause or contribute to the loss, and it is further submitted that the learned judge by implication rightly held (alternatively he should have held) that no such defence was available to the Respondent. No argument based on this plea was pursued before the Court of Appeal.

31. The Respondent respectfully submits that this Appeal ought to be dismissed with costs for the following amongst other

R E A S O N S

- 20 (1) BECAUSE the learned judge and the Court of Appeal were right in holding that there was an implied warranty in the circumstances of the case;
- (2) BECAUSE there was an express warranty;
- (3) BECAUSE the learned judge and the Court of Appeal were right in holding that the Respondent was entitled to be indemnified by the 1st and 2nd Appellants;
- 30 (4) BECAUSE the learned judge and the Court of Appeal were right in holding that despite the existence of a discretion on the parts of its directors the Respondent was performing a ministerial duty in effecting the registration of the purported transfer;
- (5) BECAUSE neither the failure of the Respondent to compare the forged signatures with the specimen signature in its records nor any carelessness on the part of the Respondent can be relied on by the Appellants;
- 40 (6) BECAUSE no defence as against the Plaintiff in the original action based on any carelessness or failure on the part of the Plaintiff was available to the Respondent;
- (7) BECAUSE the Judgments of both The Honourable Mr. Justice Cons and the Court of Appeal were right and ought

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to be upheld.

F.P. NELL

ANTHONY DICKS

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 AND COMPANY
LIMITED 2nd Appellant
(2nd Third Party)

- and -

THE HONGKONG AND SHANGHAI BANKING
CORPORATION Respondent
(Defendant)

CASE FOR THE RESPONDENT

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