

17, 1951

No. 2 of 1950.

# In the Privy Council.

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

FROM THE APPEAL COURT IN HONG KONG

31270

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 Respondents.

RECORD.

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 14th day of July 1949 dismissing an appeal by the Appellant from the judgment of the former Chief Justice, Sir Alasdair Duncan Atholl MacGregor, dated the 19th day of December 1950, whereby he gave judgment in this action in favour of the Respondents.

2. The Respondents as Plaintiffs brought the action as tenants in common of certain land and buildings known as and situated at No. 300 Des Voeux Road Central, Victoria, Hong Kong. They claimed:—

- 20 (i) A declaration that two mortgages in respect of the said land and buildings purporting to be executed by them and dated respectively the 29th day of October 1937 and the 2nd day of November 1938 in favour of the Appellant were forgeries ;
- (ii) An order that the said mortgages be set aside ;
- (iii) Rectification of the Land Register and certain consequential relief.

3. At the trial the said mortgages were found to have been forged and declarations and orders were made in favour of the Respondents in the terms asked for in the Writ and Statement of Claim.

30 4. By his Statement of Defence and Counter-claim the Appellant pleaded that if the mortgages were executed by persons other than the

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Respondents (which the Appellant denied) the Respondents, by their conduct in allowing the said persons to have the custody or control of the documents of title to the property allowed or enabled the said persons to deal with the said property wherefore the Appellant was induced to believe and did believe that the said persons were the true owners of the said property, were estopped as against the Appellant from saying that the said mortgages were not executed by them or with their authority, knowledge or consent. This plea was not seriously argued before the trial Judge and was rejected by him.

p. 57, ll. 5-13.

In the course of the trial the Appellant applied for and obtained 10 leave to amend his Statement of Defence and Counter-claim to allege that the third Respondent was fraudulently impersonating the real Chan Kwok Nim and that the first and second Respondents were well aware, before the proceedings were instituted, of the said impersonation wherefore the claim of the first and second Respondents against the Appellant was fraudulent and void. This plea was rejected by the trial Judge.

pp. 27, 32.

p. 7.

p. 50.

In the course of the trial the Appellant applied for and obtained leave to amend his Statement of Defence and Counter-claim to allege, in the alternative, that all the Respondents, by reason of their conduct in 20 standing by with full knowledge that the mortgages were forged, were estopped as against the Appellant from saying that the said mortgages were not executed by them or with their authority, knowledge or consent.

pp. 27, 32.

p. 7.

p. 50, ll. 5-14;  
p. 53, l. 28.

5. In both Courts the Appellant, in relying upon the doctrine of estoppel, contended that when the Respondents discovered the said forgeries they owed the Appellant the duties of (A) informing him of the forgeries and (B) informing him of the identity of the forger and that, having failed in these duties and thereby caused detriment to the Appellant, the Respondents were estopped from denying the validity of the said mortgages. 30

p. 50, ll. 43-45;  
p. 51, l. 7.

p. 50, ll. 45-53.

p. 50 ll. 52, 53.

6. The Respondents acquired their respective interests in the said land and buildings in or prior to 1927. In 1932 or 1933 the second Respondent with the consent of the other Respondents handed the title deeds to one Chan Chung Wah, a younger brother of the third Respondent, who thereafter lived upon and managed the property and collected the rents, which he regularly remitted to the Respondents. The Respondents had no suspicion that anything was wrong prior to 1939.

p. 51, l. 10.

p. 14, ll. 15, 16.

Exhibit J.

p. 51, ll. 13, 14.

p. 10, l. 51.

p. 14, ll. 21-23.

p. 51, ll. 15-17.

7. In 1938 Chan Chung Wah ceased to remit rent regularly and as a result of enquiries made by the second Respondent shortly before the 24th day of May 1939 the latter on the 24th day of May 1939 sent a letter 40 to the first Respondent which caused the first Respondent to come to Hong Kong on the 31st day of May or the 1st day of June 1939. Before the first Respondent arrived in Hong Kong the second Respondent knew, as a result of enquiries which he made, that the property had been mortgaged and that Chan Chung Wah was responsible and he so informed the first Respondent when the first Respondent arrived in Hong Kong. Both the

first and second Respondents suspected Chan Chung Wah of forging or being a party to the forgery of the mortgage or mortgages. They decided to try to obtain arrears of rent from Chan Chung Wah before taking action against him and decided not to tell the third Respondent of their suspicions because the third Respondent was Chan Chung Wah's brother and might have been implicated in the forgeries. Chan Chung Wah had in fact forged the mortgages or conspired to procure the forgeries.

p. 51, ll. 15-17.  
p. 51, ll. 18-21.  
p. 51, ll. 21-28.  
p. 51, ll. 25, 26 ;  
p. 51, ll. 42-51 ;  
p. 52, ll. 1-13.

8. The first Respondent saw Chan Chung Wah on the 10th day of June 1939 and obtained from him \$100 on account of the rent which was owing. None of the Respondents saw Chan Chung Wah after the 10th day of June 1939. The Respondents and the Appellant were strangers, that is to say the Respondents did not know the Appellant and the Appellant did not know the Respondents.

p. 50, ll. 28-29.  
p. 51, ll. 30-31.  
p. 51, ll. 32-34.  
p. 50, ll. 27-31 ;  
p. 68, ll. 45, 46.

9. On the 17th day of June 1939 the first and third Respondents issued the Writ in this action against the Appellant. Thereupon the third Respondent, who until this time had known nothing of these matters, took steps to have himself joined as a Plaintiff and was so added on the 21st day of June 1939.

p. 2, ll. 5, 6.  
p. 1, ll. 14, 21.

10. In August 1939 Chan Chung Wah mortgaged his one-tenth share of a property known as 164, Des Voeux Road, Victoria, Hong Kong, for \$10,000. In October 1939 Chan Chung Wah appointed the third Respondent, his brother, an attorney and on the 14th day of December 1939 the third Respondent executed a mortgage of other property of Chan Chung Wah in favour of the Wai Tak Co.

p. 59, ll. 43, 44.  
p. 18, l. 30.  
p. 59, ll. 44-47.  
p. 20, l. 34.

11. Between the issue of the Writ on the 17th day of June 1939 and the trial of the action on the 11th day of December 1939 the Appellant made no enquiry of the Respondents or their Solicitors as to the identity of the forger of the said mortgages and rejected a proposal by the Respondent's Solicitors that the Respondents should be identified by means of an identification parade.

Documents Nos. 39-45.

12. The Appellant did not give evidence at the trial and therefore did not establish :—

(A) that Chan Chung Wah had no property in Hong Kong or elsewhere, other than the property mortgaged in August and December 1939, which might have satisfied any claim which the Appellant might have had against him ;

(B) that he, the Appellant, did not know from any other source prior to the service of the Writ in this action on the 23rd day of June 1939 that the mortgages were forged and did not know from any other source prior to the hearing of the action of the identity of the forger.

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p. 58. 13. The only part of the judgment of the trial Judge, Sir Alasdair Duncan Atholl MacGregor, C.J., which the Appellant challenged in the Full Court was that part which related to estoppel. The judgment of the Full Court, which was delivered by Sir Leslie Gibson, C.J., Williams and Scholes, J.J., concurring, dismissed the Appellant's appeal on the following grounds :—

p. 68, ll. 22-50. (1) That the Respondents were under no duty to disclose the fact of the forgeries to the Appellant ;

p. 69, ll. 1-16. (2) That, even if a duty to disclose the fact of the forgeries existed, there was no duty to disclose the identity of the forger ; 10

p. 69, ll. 17-27. (3) That up to the time of the service of the Writ the Appellant had suffered no detriment arising from the Respondents' non-disclosure.

14. The Respondents submit that the Appeal should be dismissed for the following among other

### REASONS.

- (1) BECAUSE the Respondents were under no legal duty to disclose to the Appellant the fact of the forgeries ;
- (2) BECAUSE, even if the Respondents were under a legal duty to disclose the fact of the forgeries, they were under no legal duty to disclose the identity of the suspected forger ; 20
- (3) BECAUSE, if the Respondents were under a legal duty to disclose to the Appellant the fact of the forgeries, they discharged that duty by the issue of the Writ within a reasonable time, namely on the 17th day of June 1939 ;
- (4) BECAUSE, although it was proved that the Appellant did not learn from the Respondents of the forgeries until the issue of the Writ on the 17th day of June 1939 and did not learn from the Respondents of the identity of the suspected forger until December 1939, the Appellant did not discharge the onus, which was upon him, of satisfying the Court that in fact he did not know from any other source before the issue of the Writ of the fact of the forgeries or of the identity of the forger ; 30
- (5) BECAUSE the Appellant did not establish that he had suffered detriment by reason of the Respondents' non-disclosure of the forgeries or of the identity of the suspected forger and, in particular, did not establish that he had suffered any detriment before the issue of the 50

Writ on the 17th day of June 1939, and unless detriment is established no estoppel arises in favour of the Appellant ;

- (6) BECAUSE the question whether there is an estoppel is a question of fact in each case and because there is evidence to justify the finding of the trial Judge that no estoppel arose in all the circumstances of this case ;
- (7) BECAUSE the judgment of Sir Alasdair Duncan Atholl MacGregor was right ;
- (8) BECAUSE the judgment of the Full Court was right.

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R. E. MANNINGHAM-BULLER.

G. R. KING ANNINGSON.

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