

In the Privy Council

ON APPEAL
FROM THE COURT OF APPEAL OF HONG KONG

BETWEEN

CHEUNG SO YIN KAY *Appellant*

and

THE CHARTERED BANK HONG KONG
TRUSTEE LIMITED *Respondent*

THE CASE FOR APPELLANT

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**Re: CHEUNG SO YIN KAY v. THE CHARTERED
BANK HONG KONG TRUSTEE LIMITED**

THE CASE FOR APPELLANT

Reference pages
in the Record

1. This is an appeal from a decision of the Court of Appeal of Hong Kong (Huggins — President, Pickering and McMullin, J.J.A.) whereby they unanimously dismissed an appeal by the Appellant against that part of the judgment of Li J. whereby he dismissed the Appellant's claims with costs and entered judgment with costs for the Respondent on part of its counterclaim, ordering that : —

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- (a) Cheung Tai Wai, the son of the late Cheung Ng Lun *alias* Cheung Wood Lun, deceased (hereinafter referred to as "the deceased") is declared to be the only beneficiary in the estate of the deceased subject to maintenance of the deceased's widow, Doreen Cheung according to Chinese law and custom. **10**
- (b) The Plaintiff do deliver up the title deeds relating to one equal undivided 280th shares of the premises registered in the Land Office as the Remaining Portion of Inland Lot No. 470 and known as Flat C 1, 2nd floor, Great George Building, 11 Great George Street, Causeway Bay, Hong Kong (hereinafter called "the flat") to the Defendant and that the Plaintiff has no interest therein.
- (c) The Defendant do treat the proceeds of sale of the premises registered in the Land Office as Section J of Inland Lot No. 746 and known as Nos. 6 and 7 Canal Road East, Hong Kong (hereinafter called "the Canal Road properties") as an asset of the estate of the deceased to the exclusion of any interest therein of the Plaintiff. **20**
- (d) The Plaintiff do account for what is due to the estate of the deceased in respect of rents, profits and income received by the Plaintiff in respect of the flat and the Canal Road properties subject to deduction of outgoings incurred by the Plaintiff on behalf of the estate of the deceased relative thereto.

and ordered the Appellant to pay the costs of the appeal.

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2. The Appellant is the lawful mother of the deceased. The deceased died on 19th March 1967 and the Respondent was appointed Administrator of the deceased on 16th November 1973. **30**

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3. In the Amended Statement of Claim the Appellant claimed, *inter alia*, that she purchased the flat on 5th April 1961 and the Canal Road properties on 15th April 1964 in the name of the deceased for the sums of \$49,100.00 and \$320,000.00 respectively; and by reason whereof, and at all material times, it was intended and understood by the deceased that the flat and the Canal Road properties were to be held by him in trust for the Appellant; and the same were, in the premises, at all material times and are held by the Respondent upon a resulting trust for the benefit of the Appellant.

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4. The Cross-Appeal of the Respondent in the Court of Appeal of Hong Kong against that part of the judgment of Li J. whereby the Respondent's counterclaim for the recovery of a sum of \$122,800.00 (with interest) withdrawn by the Appellant from a bank savings account (No. 12198) at the Causeway Bay Branch of Liu Cheong Hing Bank Limited opened and operated by the Appellant in the name of the deceased was dismissed by the said Court of Appeal. The Respondent has not pursued its said cross-appeal on this appeal. **10**

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5. It is now not disputed by the Respondent that the said sums of \$49,100.00 and \$320,000.00 the consideration for the flat and the Canal Road properties, were paid by the Appellant. The only issue on this appeal is whether, at the time of action brought, there was a resulting trust held for the benefit of the Appellant. **20**

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6. The material evidence and facts, also now undisputed, relied on by the Appellant on this appeal and given by her in evidence before Li J. are: —

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(i) The Appellant has since her purchase of the flat and the Canal Road properties and at all material times held the title deeds to the same.

(ii) The Appellant had obtained a full power of attorney dated 11th June 1959 from the deceased in respect of the flat shortly after the signing of the Sale and Purchase Agreement dated 4th June 1959 in respect of the same.

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(iii) The Appellant had also obtained a full power of attorney dated 22nd September 1964 from the deceased enabling her to deal completely with the flat and the Canal Road properties. **30**

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(iv) The Appellant had always collected and kept the rents and profits of the flat and the Canal Road properties including the net income without at any time accounting for the same to the deceased.

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(v) At the time the Appellant opened a savings account, nominally in the deceased's name she signed his name on the specimen signature form, in effect, as her signature; kept the chop also with his name on it; and in fact the deceased never even knew anything about that account. **40**

The Respondent elected to call no evidence.

- 188 7. The said Court of Appeal of Hong Kong held that the Appellant was in loco parentis to the deceased at the time she purchased the flat and the Canal Road properties and when she opened the said bank account in the name of the deceased. It was thus held that the presumption of advancement displaced the presumption of a resulting trust.
- 188 8. The said Court of Appeal further held that the following was evidence of the Appellant's intention of making the flat and the Canal Road properties gifts : —
- 188 (i) The Appellant's answer in her cross-examination that if the deceased were to predecease her the properties in his name would belong to him until his death, and he would be able to dispose of them to his son, but that after the death of the deceased they would belong to her. 10
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- 188 (ii) In view of the mental health of the deceased it was unlikely that the Appellant would have selected him as a trustee.
- 188 (iii) In her correspondence and the estate duty affidavits the Appellant treated the flat and the Canal Road properties as belonging to the deceased's estate.
- 188 9. The said Court of Appeal rejected the fact of the said retention of the title deeds, the taking of possession and management of the said properties the keeping of the rents and profits, and the obtaining of the said full powers of attorney were inconsistent with the intention of making the flat and the Canal Road properties gifts. 20
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- 190 10. The said Court of Appeal, however, also held that "The object of the opening of the bank account was similar to that of the purchasing of the landed properties, namely to make provisions for the deceased". Nevertheless, they held that the intention of the Appellant in respect of the bank account was that the deceased was to enjoy the balance left in the account at the time of her death and not as an immediate inter vivos gift to the deceased during her lifetime, and/or that the Appellant had, in this respect, rebutted the presumption of advancement. It is respectfully submitted that the circumstances and the intention of the Appellant was, on the evidence, the same in the case of purchasing the flat and the Canal Road properties as in the case of the opening of the savings account. 30
11. It is the Appellant's respectful submission that equity starts with the proposition — "He who provides the money for the purchase of the property is the real owner", and undisputedly it was the Appellant in the present case. In the premises, *prima facie*, a resulting trust came into existence in the Appellant's favour when she purchased the flat and the Canal Road properties in the deceased's name, unless the principle of advancement applies and is not rebutted, or there is clear evidence that she intended these properties to be an absolute and immediate gift to the deceased. 40

12. Even if, on the evidence, the Appellant had put herself in loco parentis to the deceased since the death of her husband, after the deceased was mentally sicked, it is, nevertheless, submitted that this principle of advancement has been rebutted. The material evidence and facts set out in paragraph 6 supra in respect of the possession of the title deeds, possession of full powers of attorney, keeping the rents and profits, the obvious non-accountability for the same and the circumstances of the opening of the savings account are all very relevant in establishing that the presumption of advancement has been clearly rebutted.

76, 78 14. In Warren v. Gurney [1944] 2 A.E.R. 472 it was said that if a gift 10
189 was intended one would have expected the donor to hand over the title deeds to the donee. It was undisputed in the present case that the Appellant had retained and held the title deeds to the flat and the Canal Road properties at all material times. The said Court of Appeal held that one would not have expected the Appellant to hand over the title deeds to the deceased in view of his mental illness. It was held that he was mentally sick in 1959. However, 187 it was also held that there was no evidence as to the degree of his mental 189 incapacity and that "There was no clear evidence that the deceased was at any time so ill that he would be totally incapable of managing his own affairs". In the premises, there was no real justification for the Appellant's retention 20 of title deeds in her own possession rather than putting them in the possession or control of the deceased, e.g. in a safe-deposit box in the name of deceased and operated by a chop with the deceased's name; apart from an intention of retaining her interest in the flat and the Canal Road properties as a real owner.

66, 71 15. In Stock v. McAvery [1872] 15 Eq. 55, it was held that the presump- 30
73, 74 tion of advancement was rebutted by evidence of taking possession of the properties and complete control over them by the father despite uncontested evidence of declarations, made against the interest, about the son being entitled to the property when his father died and other declarations against interest. It is again undisputed in the present case that the Appellant had entered into 30 possession (either personally or by tenants) of the flat and the Canal Road properties and had been paying all expenses and outgoings in respect of the same without reimbursement from and obtaining and enjoying all benefits and rents from the same without accounting to the deceased at all material times. It is submitted that all these acts were inconsistent with the intention of passing ownership of the properties to the deceased. The fact of non-reimbursement and non-accounting in respect of outgoings and incomes clearly distinguish the present case from a case of mere management on behalf of 189 the deceased or mere acts of protecting the interest of the deceased as held by the said Court of Appeal. 40

189 16. The securing of full powers of attorney from the deceased shortly after the purchase of the properties showed a clear intention of the Appellant to retain control of the same. The said Court of Appeal held that the powers of attorney were not inconsistent with a gift or a resulting trust and was thus not helpful to the determination of the issue. However, in her uncontradicted evidence, the Appellant very clearly testified that her intention in asking the

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deceased (and her other son) to execute powers of attorney were sufficient to indicate her ownership in the properties as she would have all the powers and rights of an owner under them. It may well be that powers of attorney per se would be of no assistance to indicate a gift or a trust, but it is submitted the same, considered in the light of other facts such as retaining possession of the title deeds and exercising powers and rights under the powers of attorney not as an attorney but as an owner of the properties (*i.e.* without accounting to the donor of the power the benefits arising thereunder), do clearly indicate a trust rather than a gift.

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17. The Appellant when asked in her cross-examination as to the reason why she said registered the properties in the deceased name, answered “in case I die then they could be given to him instead of going through the procedures in changing after I die”; that “once I die they will not belong to me, but if I still survive they belong to me”; that “I can say that I borrow his name or I use his name in buying, and I could dispose them at any time” and that “Because I am old, I don’t use my name”. 10

18. The case of Young v. Sealey [1949] Ch. 278 upon which the Court of Appeal relied in dismissing the Respondent’s cross appeal, it is submitted is equally applicable to these said claims of the Appellant; and if it was a gift at all, then the intention was that it should be a gift on her death if the deceased had survived her. 20

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19. The said Court of Appeal also regarded the correspondence after the death of the deceased and the Appellant’s two corrective affidavits for estate duty as indicating her treating the flat and the Canal Road properties as part of the estate of the deceased. The Appellant had been cross-examined at length on the said documents, and the Appellant had already given evidence to the effect that she intended to have the properties re-registered in her own name when the deceased died and had given instructions to her solicitors of her ownership of the properties and her intention of having the same registered in her own name. 30

20. It is the respectful submission of the Appellant that the evidence taken as a whole shows a clear intention to retain the equitable title over the flat and the Canal Road properties at least during her own lifetime and was clearly similar to her intention in respect to the bank account. In both cases also there was evidence of an intention that the same were to be the deceased’s upon her death had he lived.

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21. The Respondent and the learned trial judge relied heavily on some answers the Appellant gave towards the end of the cross-examination (and repeated in re-examination directly thereafter) that “Before he died it was his property of course, but after he died it would be my property” and “Although he was the son, but before he died of course he can give him the property; but after he died then it shall be mine, or came back to me” as being inconsistent with her allegation of a trust. It must first be borne in mind that the answers were given towards the end of a long and strenuous cross examina- 40

tion of an elderly woman. Indeed, the Appellant's counsel declined to ask any more questions as result of her repetition of the answers in re-examination. However, it is respectfully submitted that the court should have regard to her evidence as a whole, including the decision, that is not the subject of any appeal, dismissing the Respondent's counterclaim in respect to the said bank savings account.

22. Even if those said answers be taken as admissions that the flat and the Canal Road properties were intended as some sort of gift, it is submitted that still does not affect the Appellant's claim. Taking the evidence as being incapable of any interpretation other than such an admission, it could only mean, in the context of the whole evidence, that at the time of using the deceased's name, the Appellant's intention was to make a gift to the deceased of the said properties conditional on him surviving her, unless in the meantime he transferred the same to his own son (who had yet to be born or even conceived). The effect would be to vest the properties in the deceased until the happening of an event, *i.e.* the deceased predeceasing the Appellant; but that this condition could be defeated if the deceased transfer the same to his son prior to his own death. 10

23. Such interpretation of her evidence would mean the properties vested in the deceased until his death and under sections 6 (1) (b) and, perhaps, 6 (1) (h) of the Estate Duty Ordinance, Cap. 111, Laws of Hong Kong the same would be liable to estate duty and do form part of the estate of the deceased for estate duty purpose. This would incidentally be consistent with estate duty being paid in respect of the flat and the Canal Road properties and with the same being treated as part of the deceased's estate in the correspondence and the Appellant's corrective affidavits, which the Appellant said were all done under the legal advice of her solicitors. 20

24. In the premises, upon the happening of the event under the said condition subsequent, *i.e.* the death of the deceased, the ownership in the said properties would revert back to the Appellant upon a resulting trust and the title of the deceased in the same defeased by his own death. Re Grape [1952] 1 Ch. 743 is but one of the numerous authorities which hold that upon the happening of a condition subsequent the interests of the donee of a gift would be divested as the gift was subject to defeasance. 30

25. At the hearing of the appeal before the said Court of Appeal, the Court was of the view that this argument was not open to the Appellant on the pleadings. Later, the Appellant applied to amend the Re-amended Reply and Defence to Counterclaim to include an alternative plea that; if, which was denied, the flat and the Canal Road properties were intended by the Appellant to be inter vivos gifts to the deceased the same were subject to a defeasance and/or condition subsequent that the same would become void in the event the deceased predecease the Appellant. However this also was refused by the said Court of Appeal, and counsel was still not allowed to argue this point. 40

26. The Appellant respectfully submits on this appeal that the said Court of Appeal ought to have allowed the Appellant's said application for amendment and/or that counsel should have been permitted to argue the question of condition subsequent being a point only of law on the facts of the case or largely of law. It is further submitted that allowing the said application for amendment if it was necessary would be in the interest of justice in view of the heavy reliance placed by the learned trial judge on the few answers made by the Appellant after a long and strenuous cross-examination as being inconsistent with the allegation of a trust, despite her very consistent and strong evidence generally of a resulting trust. It is further submitted that the Respondent could not be prejudiced in allowing the Appellant's said application and no injustice would result by allowing the case to proceed on that basis.

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27. It is therefore respectfully submitted that even without the said amendment to her pleadings the Court of Appeal ought to have held that if the flat and the Canal Road properties were intended to be gifts, they were clearly subject to the condition subsequent of the deceased surviving the Appellant and that upon his death the said properties were held by the Respondent upon a resulting trust for the benefit of the Appellant. Furthermore, if the said amendment was necessary before the Court of Appeal could hold such a resulting trust arose upon the deceased's death the said Court ought to have allowed the said application for amendment by the Appellant.

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28. For all the above reasons, it is respectfully submitted that the part of the judgment of the said Court of Appeal of Hong Kong and the judgment of Li J. at the first instance, the subject matter of this appeal, should be reversed and that judgment be entered in favour of the Appellant or, in the alternative, there should be an order for new trial either generally, or limited to the issue pleaded in the Appellant's said application for amendment.

JEROME C. H. CHAN



BROOK BERNACCHI, QC.

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