

38,1980

In the Privy Council

No. 2 of 1980

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ON APPEAL

*FROM THE COURT OF APPEAL IN HONG KONG*

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*BETWEEN:*

CHEUNG SO YIN KAY

Appellant

and

THE CHARTERED BANK HONG KONG  
TRUSTEE LIMITED

Respondent

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**CASE FOR THE RESPONDENT**

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**Introduction**

Record

p. 193-4

p. 187-190

p. 174-181

p. 180-181

1. This is an appeal by leave of the Court of Appeal in Hong Kong, from a unanimous Judgment of that Court (Huggins, Pickering JJ.A and McMullin AJA) dated 26th April 1979 dismissing with costs an appeal by the Appellant from the Judgment of the High Court of Hong Kong (Li, J.) dated 14th April 1978, whereby he dismissed with costs the Appellant's claim to be the beneficial owner of certain properties, and granted certain consequential relief to the Respondent upon its Counterclaim.

2. (i) The principal question to be determined on this Appeal is whether the properties in question (Flat C1 and the Canal Road properties) were held by the Appellant's deceased son on a resulting trust in her favour or had been conveyed to him absolutely as a gift from the Appellant with a view to making provision for his future. 10

p. 174-181

p. 187-191

On this question both Li J. and the Court of Appeal held in favour of the Respondent that the properties were intended to be a gift to the deceased and that no resulting trust arose in favour of the Appellant.

(ii) In the Court of Appeal the Appellant by her Counsel also sought for the first time to argue in the alternative that the conveyance of the properties to her deceased son was by way of a conditional gift, the condition being that they should revert to her in the event of her son predeceasing her. This contention had not been pleaded or argued in the Court below and the Court of Appeal refused leave to re-reamend the Reply and Defence to Counterclaim to raise the point. Accordingly it is not dealt with in the Judgment of Li J. and only briefly by the Court of Appeal. 20

p. 188 1.9-24

3. A further question arose at the hearing at first instance and on appeal before the Court of Appeal regarding a sum of \$122,800 placed by the Appellant in a Savings Account with the Liu Chong Hing Bank in the name of the deceased prior to his death but withdrawn by the Appellant from the said Account immediately thereafter. At the hearing before Li J. and the Court of Appeal the Respondent sought to contend by way of Counterclaim and Cross Notice of Appeal that the said monies were intended as a gift to the deceased and formed part of his estate upon his death and sought orders consequential thereon.

p. 21  
p. 185

The learned judge Li J. dismissed this part of the Counterclaim and the Court of Appeal dismissed the Respondent's Cross Appeal.

p. 177 1.42  
p. 178 1.22  
p. 190 1.6  
p. 191

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Consistently with the well established practice of your Lordships Board not to interfere on final Appeals with concurrent findings of fact in the Courts below except in very special cases, the Respondent does not propose to pursue its arguments on this part of the Counterclaim and Cross Appeal on the hearing of this Appeal before Your Lordships Board.

p. 282  
p. 64 1.15

4. The Respondent is the Administrator of the estate of, and the Appellant is the mother of, Cheung Ng Lun, alias Cheung Wood Lun, deceased (hereinafter referred to as "the deceased").

p. 209-212  
p. 213-215

5. By a deed of assignment dated 5th April 1961, a property known as Flat C1, 2nd floor, Great George Building, 11 Great George Street, Causeway Bay, Hong Kong (hereinafter called "Flat C1"), was assigned to the deceased. By a deed of assignment dated 15th April 1964, properties known as Houses Nos. 6 and 7 Canal Road, East, Hong Kong (hereinafter called "the Canal Road properties") were assigned to the deceased. A consideration of HK\$49,100.00 was paid for the 1st and HK\$320,000.00 for the 2nd assignment. These sums were both paid to the respective vendors by the Appellant who thereby purchased the said properties in the deceased's name. On the face of the said assignments the deceased took the said properties absolutely.

p. 68 1.13  
p. 70 1.4  
p. 209-215

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p. 75 1.12  
p. 64-65  
p. 71 1.15  
p. 289  
p. 76 1.1  
p. 268

6. The deceased was born in 1934 and, from about 1957 or 1958 became mentally disordered, suffering from schizophrenia. He married in 1966 and took his own life on 19th March 1967 and was survived by his widow, Mrs. Doreen Cheung and their son, Cheung Tai Wai (hereinafter called "the grandson") who was at the time of the deceased's death, en ventre sa mere.

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### Constructive Trust

7. (a) The Appellant contends that Flat C-1 and the Canal Road properties were conveyed to the deceased and held by him and, upon his death, by his administrator, on resulting or constructive trust for herself. In support of this contention the Appellant relies upon the presumption of a resulting trust arising from her provision of the said purchase monies. The Appellant has expressly disclaimed any allegation of an express trust.

p. 103 1.20

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(b) In answer the Respondent contends that the Appellant was, at all material

times, in loco parentis to the deceased and that, accordingly, any presumption of a resulting trust was displaced by a presumption of advancement.

- p. 178 1.15
- (c) Additionally, the Respondent relies upon positive evidence establishing, as the learned trial judge found, an actual intention on the Appellant's part to have the properties conveyed to the deceased by way of absolute gift, such intention being inconsistent with any intention on the Appellant's part that the said properties be held on trust for herself.
- (d) In response to the above arguments on behalf of the Respondent, the Appellant contends that the presumption of advancement is rebutted by evidence of certain conduct by the Appellant in relation to the said properties and also argues that because of such conduct, an intention to make an absolute gift should not be inferred. 10
- p. 174-181  
p. 187-190
- (e) Both Courts in Hong Kong held that on the evidence adduced, the arguments advanced on behalf of the Respondent prevailed.
- (f) Accordingly the Respondent respectfully contends that in accordance with the well-established practice of Your Lordships Board it will not interfere with concurrent findings of fact in the Courts below, and that for this reason alone, if for no other, the Appeal ought to be dismissed. It is respectfully submitted that such an approach has particular validity in a case such as the present where the Appellant and her deceased son were of the Chinese race and where the learned judge at first instance was also of the Chinese race and of considerable experience and had had the additional advantage of being able to comprehend the evidence of the Appellant (who was the only witness called to testify) in the original Chinese tongue. 20
- p. 63 1.15
- E.g. p. 77 1.12

8. In support of the contention that the Appellant was a person in loco parentis to the deceased the Respondent relies on *Bennet v. Bennet (1879) 10 Ch. 474* as establishing that a person other than the father may put himself in loco parentis, and on *Re Orme (1884) 50 L.T. 51*, as showing that, in the case of a mother very little evidence is required to establish that this has been achieved. 30

p. 176 1.18

p. 178 1.13

9. In the present case both Courts in Hong Kong found in effect that the Appellant was a person in loco parentis to the deceased at the date that the properties were purchased. Li J. said at page 176 line 18, "When she purchased the properties her son...had been suffering from some mental illness. She was afraid there was no one to provide for him. She had been looking after him, paying for his keep and maintenance all along"; and at page 178 line 13, "...I am satisfied that the Plaintiff being a widow and having a son suffering from mental illness took upon herself as a mother to provide for him. There is every indication to show that when she purchased the property it was intended to be an advancement in view of her answer." 40

p. 188 1.1

10. In the Court of Appeal Huggins J.A. with whom both Pickering J.A. and McMullin A.J.A. concurred held in terms "The Plaintiff clearly put herself in

loco parentis to the deceased”.

p. 169 1.13  
p. 100 1.34  
p. 65 1.8, 26, 33  
p. 71 1.17  
p. 75 1.34  
p. 81 1.28  
p. 100 1.38  
p. 101 1.4, 7, 17  
p. 95-96  
p. 75 1.15  
p. 74 1.26  
p. 68 1.24  
p. 75 1.22

11. There was ample evidence upon which the Courts below could find that the Appellant had put herself in loco parentis to the deceased; the deceased was her favourite son; the Appellant provided for her younger children including the deceased after her husband died in 1954; the deceased lived with the Appellant rent free both before and after his marriage and she (the Appellant) paid for his food and educational expenses as well as making all arrangements for his hospital treatment. The deceased’s father had left everything to the Appellant and nothing to the deceased and the deceased had no means of his own. The Appellant purchased the properties to provide for the deceased and so that he should be together with his brother, Stephen Ng Sheong. On the basis that the Appellant was in loco parentis, the Respondent relies on *Dyer v. Dyer (1788) 2 Cox 92* and *Bennet v. Bennet* (above), as establishing that any presumption of resulting trust is thereby displaced by a presumption of advancement.

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12. In the Court below the Appellant relied on the following matters and respective authorities to rebut any presumption of advancement, namely:—

- (i) that the Appellant had retained the title deeds after the said purchases citing *Warren v. Gurney (1944) 2 All E.R. 472*;
- (ii) that she had caused powers of attorney to be executed in her favour in respect of the said properties immediately upon their purchase, thereby empowering herself to deal with those properties;
- (iii) that she had in fact taken possession of and managed the said properties without accounting to the deceased citing *Stock v. McAvoy (1872) 15 Eq. 55*.

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p. 189 1.13

13. The Court of Appeal considered these contentions but having regard in particular to the deceased’s state of health held the presumption of advancement to be unrebutted. As Huggins J.A. observed at page 189 line 13 “The entirety of the evidence overwhelmingly indicated that the Plaintiff intended to make a gift whilst retaining the power to manage the properties herself during the joint lives of herself and the deceased”. The Respondent respectfully submits that Your Lordships Board should be of the same view.

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14. The Respondent relied upon the following particular matters in support of its argument that the Appellant’s actual intention was to make an absolute gift of the said properties to the deceased inconsistent with any intention that the properties be held on trust for herself.

p. 64 1.30  
65 1.5  
68 1.25  
74 1.27  
101 1.17  
102 1.7, 10, 20, 30  
169 1.13  
289  
p. 188 1.27—32  
p. 66 1.25  
p. 68 1.10, 25

- (i) that the character and mental health of the donee made it unlikely that the Appellant would have intended him to act as trustee (*Shephard v. Cartwright (1955) A.C. 431, 452*); an authority relied upon in the judgment of the Court of Appeal.
- (ii) that at the time that Flat C1 was purchased, the Appellant also purchased for a different son, a 2nd flat adjacent to the said flat (Flat C4). It

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- p. 69 1.19  
p. 75 1.23  
p. 188 1.33
- was unlikely, if a trust was intended, that the Appellant would have caused Flat C1 to be held on entirely separate terms by the deceased as trustee;
- p. 287
- (iii) that it was not until February 1974 some 7 years after the death of the deceased that the Appellant raised for the first time the allegation that the said properties did not belong to the deceased but were held by him on a resulting trust for her;
- p. 237-241; 248;  
255-7; 261;  
265-6; 271-7;  
281, 284
- (iv) that after the death of the deceased the Appellant and her solicitors Messrs. Lo & Lo conducted extensive correspondence with various Government offices and others over a period of several years regarding the deceased's estate, throughout referring to the said properties as forming part of the estate; the majority of such correspondence has not been incorporated in the Record but is referred to at pages 5-13. In particular, on 15th March 1970 the Appellant wrote to her Solicitors asking whether or not the properties of the deceased could be sold by the co-administrators, and on 31st December 1973 the Appellant wrote to the deceased's widow stating that she (sc. the Appellant) was only acting as stakeholder and the properties would eventually belong to the said widow and the Grandson. 10
- p. 265
- p. 284
- p. 63 1.26
- (v) that the Appellant who had previously acted as executrix of her husband's estate and was therefore familiar with the requisite procedures had sworn 3 affidavits for estate duty and probate purposes in which she had accepted by necessary implication that the properties formed part of the deceased's estate; 20
- p. 244-247  
p. 250-253  
p. 267-270  
p. 225-231
- p. 225-231
- (vi) that the Appellant had not sought to incorporate the properties in Account 2 of the Estate Duty Affidavit which is an account intended specifically for property held by a deceased person as trustee only;
- p. 112 1.9  
p. 257  
p. 269
- (vii) that if the properties were excluded from the deceased's estate its value for Estate Duty purposes would have been only \$1,451 and as such not liable to Duty. Nevertheless the Appellant had paid \$19,000 by way of Estate Duty on the footing that the properties were part of the deceased's estate; 30
- p. 111 1.23  
p. 139 1.20  
p. 147 1.7  
p. 254
- p. 89 1.16  
p. 91 1.10, 21, 29  
p. 92 1.8  
p. 209  
p. 213
- (viii) that the Appellant is a wealthy woman who owned some 42 flats and had been buying and managing property since 1932. She was therefore quite familiar with property transactions and specifically chose to purchase the said properties not in her own name but in that of the deceased;
- p. 155 1.13  
p. 157 1.10  
p. 171, 1.12, 33  
p. 172 1.3
- (ix) that the Appellant had stated specifically in her testimony that the properties were owned by the deceased during his lifetime.
15. Indeed in the light of the Appellant's admission that the properties were owned by the deceased during his lifetime, no further witnesses were called to testify by either side. 40
- p. 59 1.18  
p. 172 1.10

16. On the Appeal the Respondent will advance broadly the same contentions and will respectfully submit that Your Lordships Board take the same view of the evidence as both Courts below.

### Conditional Gift

17. In the Court of Appeal the Appellant sought to contend in the alternative that the conveyance of the said properties to the deceased was by way of gift subject to the condition that if the deceased were to predecease her, the said properties were to revert to herself, provided that the deceased had not, during his lifetime previously disposed of the same to the said grandson.

18. As stated above, this contention was not pleaded and had not been argued or even mentioned in the Court below. In the Court of Appeal the Counsel then appearing for the Appellant sought to re-re-amend paragraph 3 of the Reply and Defence to Counterclaim to raise the point. This application was resisted and leave to effect the re-re-amendment was refused. 10

19. In the event that Counsel for the Appellant should seek the leave of Your Lordship's Board to argue this contention, the Respondent respectfully submits that leave should not be granted for the following among other reasons:—

- (i) the point was not pleaded or raised in any way at trial.
- (ii) the condition alleged necessarily involves an allegation that there was created an express private trust relating to land. Accordingly if raised in the Appellant's pleading the Respondent would plead by way of rejoinder that any such alleged condition is void for want of formality under Section 6 of the Law Amendment & Reform (Consolidation) Ordinance Cap. 23 of the Laws of Hong Kong which is in the same terms as Section 53 of the Law of Property Act 1925. 20
- (iii) the point was raised for the first time some 19 years after the purchase of Flat C1 and 12 years after the death of the deceased. The alleged condition is entirely unsupported by any contemporaneous documents and is based solely upon an ex post facto construction of part of the Appellant's evidence at the trial. 30
- (iv) if leave be granted to raise the point and if Your Lordships Board were of the view that there was any substance in it, the matter would either have to be sent back to the Trial Judge for further evidence to be adduced and further cross-examination of the Appellant or there would have to be a re-trial. Each of these courses would give rise to considerable further costs and delay and would be grossly unfair to the deceased's widow and infant son who are of modest means and who have waited so long already for the deceased's estate to be distributed.
- (v) the Appellant by her Counsel expressly disclaimed any allegation of an express trust. 40

p. 155 1.13  
p. 157 1.10  
p. 171 1.12, 13  
p. 172 1.3

p. 103 1.20

20. The Respondent also takes an objection in law. It is submitted, relying upon well established principles referred to in *Shephard v. Cartwright (1955) A.C. 431 at page 445* that subsequent declarations by the Appellant of what her intentions were at the time that the properties were purchased are only admissible as evidence against the Appellant. To the extent therefore that the Appellant now seeks to rely upon her own evidence of her intention at the time the Respondent contends such evidence is inadmissible alternatively that no weight ought to be given to such evidence.

21. Generally in answer to this contention the Respondent says

(i) that it is entirely unsupported by any contemporaneous documents or conduct or by any independent testimony, 10

p. 155 1.13  
p. 157 1.10  
p. 171 1.12, 33  
p. 172 1.3

(ii) that on the Appellant's own evidence, the deceased was free to dispose of the said properties during his lifetime, thereby necessarily rendering the said conveyances absolute gifts to the deceased, in the absence of any express condition to the contrary. There was no evidence of any such condition being imposed or in any way communicated to or accepted by the deceased

p. 171 1.20, 27  
p. 176 1.21-22

(iii) that the Appellant expressly admitted in evidence that at the time of the said purchases the possibility of the deceased predeceasing her was not within her contemplation, 20

(iv) that in truth and in fact the Appellant is seeking to revoke a completed gift of the said properties to the deceased, and

(v) that it repeats the matters set forth in paragraph 14 above.

22. This part of the Appellant's case was dealt with by the Court of Appeal at page 188 line 9-24 and the Respondent respectfully submits that the Court of Appeal was correct in rejecting this contention.

p. 188 1.9-24

### General

p. 180 1.18

23. There is no issue between the parties over the first declaration made by Li J. on 14th April 1978. The only matter to be determined on this Appeal is the question of whether Flat C1 and the Canal Road properties form part of the assets of the deceased's estate or are held by the Respondent on trust for the Appellant. 30

p. 279  
p. 112 1.9

p. 175 1.8-10

24. The Respondent is a trust corporation which was authorised by the deceased's widow to apply for a grant of Letters of Administration after the Plaintiff had failed to obtain such a grant for some 6 years after the death of the deceased. Excluding the said properties the value of the deceased's estate is only \$1,451.00. Apart from her salary as a nurse, the deceased's widow and son have no means of support except their expectations from the estate of the deceased. In the event that Your Lordships Board allow this Appeal the Respondent will respectfully seek an order that its costs nevertheless be taxed and paid out of the proceeds 40



of sale of the said properties as if they formed part of the deceased's estate.

### **Conclusion**

The Respondent accordingly submits that the decision of the Court of Appeal ought to be affirmed for the following (among other)

### **REASONS**

- (1) BECAUSE by virtue of the presumption of advancement the properties were conveyed by way of absolute gift to the deceased, became part of the deceased's estate and are now held by the Respondent on trust for the deceased's son and widow according to Chinese law and custom.
- (2) BECAUSE the evidence clearly showed that the Appellant actually 10 intended to make absolute gifts of the said properties to the deceased.
- (3) BECAUSE the Judgments of Li J., Huggins and Pickering JJ.A and McMullin A.J.A. were right.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 1980

JOHN S. TRENHAILE  
*Counsel for the Respondent*

IN THE PRIVY COUNCIL

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**CASE FOR THE RESPONDENT**

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