Privy Council Appeal No. 2 of 1980

Cheung So Yin Kay - - - - - - - - *Appellant*

v.

The Chartered Bank Hong Kong Trustee Limited - *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER 1980

Present at the Hearing:

LORD EDMUND-DAVIES
LORD ELWYN-JONES
LORD FRASER OF TULLYBELTON
LORD RUSSELL OF KILLOWEN
LORD ROSKILL

[*Delivered by* LORD RUSSELL OF KILLOWEN]

The question in this appeal is whether two Crown leasehold properties registered in the name of Cheung Tai Wai (" Wood Lun ") formed part of his estate at his death on 19 March 1967 (as both Courts below have held on a review of the circumstances of the case) or whether his mother the appellant was beneficially entitled to them.

Wood Lun having died intestate, leaving him surviving a widow (" the widow ") and a son *en ventre* (later duly born), letters of administration to his estate were ultimately on 16 November 1973 granted to the respondent. The appellant in October 1974 sued the respondent as administrator of Wood Lun's estate asserting (by amendment in 1977) that the purchase prices of both the properties when they were sold to Wood Lun were provided by her " and at all material times it was intended and understood by the Plaintiff and the deceased that [the properties] were to be held by the deceased in trust for the Plaintiff ". It may be said at once that the appellant did in fact provide the purchase prices of $49,100 and $320,000 respectively. The appellant asserted that the two properties were " at all material times held by the deceased and are now held by the Defendant upon a resulting trust for the Plaintiff ".

The only oral evidence given at the trial before Li J. in 1978 was that given by the appellant.

It is perhaps useful to set out the dates and events leading to the transfer of these two properties to Wood Lun.

On 5 June 1959 a contract to buy and sell the first property was entered into between Wood Lun and Factories Agency (H.K.) Ltd. It appears that at the time the vendor was (under contract with the then owners) developing a site by erection of a block of flats. The agreement with Wood Lun included an agreement to complete development and was for the assignment of the leasehold in two flats both on the second floor referred to as C.1 and C.4 in Block S. The price was $96,700 for the two.

On 11 June 1959 Wood Lun executed a power of attorney in favour of the appellant in wide terms. It recited the contract to buy the two flats, and that Wood Lun was desirous of appointing the appellant (with whom he was living) " to do execute and perform for [him] all acts matters and things thereinafter appearing that might be necessary for the purchase and management of the said property ". This power of attorney it is noted related to flats C.1 and C.4.

On 6 April 1961 the vendor assigned to Wood Lun flat C.1 for a purchase price of $49,100. It appeared from the oral evidence of the appellant that flat C.4 was at some time assigned by the vendor to another brother (Steven), that the appellant paid the purchase price, and that Steven also executed a power of attorney in her favour. Their Lordships apprehend that Wood Lun's power of attorney would have been needed to carry through this transaction, unless of course Wood Lun directly authorised it. This Appeal is not concerned with the beneficial ownership of flat C.4.

On 15 April 1964 the second property known as 6–7 Canal Road East—a long Crown leasehold—was assigned to Wood Lun (described as of the flat C.1) by the then owner for the purchase price of $320,000, pursuant to an agreement between vendor and purchaser of which the date is not known to their Lordships.

On 22 September 1964 Wood Lun executed a further power of attorney in favour of the appellant. This was perfectly general in terms and in effect empowered the appellant to deal in every way on Wood Lun's behalf with any assets belonging to him.

Wood Lun was, she said, the appellant's favourite son and that was because he was mentally unstable with a history of recurrent sickness. He was at one time in the United States, but apart from that and from periods in hospital he lived with his mother in Tai Shek Street, and later in flat C.1. Wood Lun married late in 1966 and he and his wife and the appellant returned to Tai Shek Street. Wood Lun was born in 1934.

Their Lordships do not propose to rehearse in detail the evidence given by the appellant. She said she managed the properties C.1 and Canal Road (and C.4) collecting the rents when occupied by tenants and paying the outgoings, any nett amounts being paid into her bank account. She also kept the title deeds. But the powers of attorney suffice to account for that.

The appellant's oral evidence of her motives and intentions was, to say the least, obscure and, to say the most, inconsistent with an intention that, on assignment to Wood Lun and their registration in his name, the properties should there and then be vested in him as trustee for her absolutely. She gave no evidence in support of the intention of Wood Lun that she had pleaded. Their Lordships do not of course dispute the existence of a presumption of a resulting trust in favour of a person providing the purchase money: but whether in any case that presumption, which in the final analysis rests on presumed intention, is applicable to any particular case must depend upon a review of all the circumstances of the case. It is not necessary, in order to rebut the presumption of a resulting trust, to establish a presumption of advancement. Their

Lordships, being of opinion that the circumstances of the case, including the appellant's oral evidence, suffice, without reference to a presumption of advancement, to negative the proposition that the whole beneficial interest in the properties was from the moment of their acquisition vested in Wood Lun upon trust for the appellant, do not think it a suitable case for discussion of a question whether intention to advance is to be assumed in the case of a widowed (and wealthy) mother and an adult (and sickly) son, without means and not working at the relevant times (as the appellant said), and supported by the mother.

In examination-in-chief the appellant said that she had Wood Lun's powers of attorney drawn up and executed in her favour " Because I paid with my money and if I died it would be inherited by him, and if not then I will manage it myself ". She said that she used Wood Lun's name in connection with the properties so that after her death he could have them without going through the process of applying for them.

In cross-examination in relation to the two properties (the appellant had many other properties registered in her own name) she suggested that what had happened was so that when she died they would not belong to her estate, but to Wood Lun, but if Wood Lun died first they would belong to her. " Once I die then it belongs to him, but before I die I can get it back." She agreed that she was saying that when she died the properties would belong to Wood Lun if he survived her, without the trouble of further registration. She said that she told the solicitors who acted in the two purchases that Wood Lun was registered merely as trustee for her; but of course there is nothing in the documents to suggest that. She seemed to have thought the combination of powers of attorney with use of her money in the purchases by themselves achieved that " because my son was abnormal ".

The appellant in evidence said that after the death of Wood Lun she insisted to Messrs. Lo & Lo her solicitors that the properties were hers and did not form part of the estate of Wood Lun. But without question the correspondence shows that that suggestion was never made to Lo & Lo. The properties were included as the major part of the son's estate in the estate duty affidavit, sworn indeed in April 1967 by the son's widow: but the appellant swore corrective affidavits without attempting to correct the inclusion of the properties, and produced $19,000 for estate duty, plainly based upon the footing that the properties were properly so included, at a time when she was hoping to obtain a grant to the estate (the son's widow then in Australia having renounced) and before a grant was issued to the respondent. The appellant said that Lo & Lo had made a mess of things.

On 19 May 1967 the relevant estate duty office suggested an increase in the valuation of these two properties in the estate of Wood Lun. This was reported by Lo & Lo by letter on 27 July 1967 to the appellant asking for instructions. Their request was repeated on 14, 23 August and 8 September 1967, with no answer from the appellant. On 20 September 1967 Lo & Lo tried again. On 27 September Lo & Lo wrote to the Office saying that the appellant had instructed them to ask the basis of the suggested valuation. By 20 October 1967 the appellant had given Lo & Lo details of the grounds on which she challenged the valuation. There can be no shadow of doubt on the correspondence that the appellant knew that these properties were treated throughout as forming part of the estate of Wood Lun on which estate duty had to be paid as his property beneficially. In connection with the need for two administrators (the grandson having been born to create a minority interest) she made no objection to a valuation of the estate at about $300,000 requiring a bond in $600,000: and on 15 March 1970 wrote to Lo & Lo to ask whether or not " the properties of the above named deceased could be sold by the

co-administrators ". When challenged on that letter she could only say " But they were purchased by me ": and " Before he died it was his property of course, but after he died it would be my property ". On 27 April 1972 the appellant and a daughter made an affirmation with a view to a grant to them of letters of administration to Wood Lun's estate. It expressly stated that the estate of the deceased and its value were as stated in the Estate Duty Commissioner's Schedule of Property (which of course included the two properties) and that the gross value amounted to $300,000. (Their Lordships point out that the appellant was not unfamiliar with such matters, having been executrix of her late husband who died in 1954.) The affirmation also stated that the deceased " held his immovable properties under the name of CHEUNG WOOD LUN ". The appellant dealing with this in cross-examination was asked " You were aware that the person entitled to inherit your son's estate under the Tsing law, was his son David [the posthumous child]? " Her answer was " Although he was the son but before he died of course he can give him the property; but after he died then it should be mine, or come back to me ".

Other letters written by Lo & Lo to the son's widow were on the footing that she and the posthumous child were the only people beneficially interested in these properties. The appellant simply denied they wrote thus on her instructions.

In the event a grant of letters was issued to the respondent in November 1973.

On 31 December 1973 the appellant wrote to the son's widow in Australia. The letter was headed

" Re Cheung Ng Lun's Estate (deceased)

(*a*) [description of flat C.1]

(*b*) [description of the Canal Road property] "

The letter referred to the grant to the respondent, and suggested that, since the daughter-in-law was one of " our family members " and David was her grandson, it was natural that the estate of Wood Lun should be administered by his family members having blood relationship, " particularly the fact that I am only acting as the stakeholder and that the properties will eventually belong to you and David ". She asked the daughter-in-law to cancel the appointment of the respondent and in their stead " appoint me as the authorised agent of yourself to administer the above estate ". It is in their Lordships' opinion difficult to draft a more precise contradiction of her later contention—for the first time adumbrated by new solicitors on 23 February 1974—that she had all along been the beneficial owner of these two properties. Challenged in cross-examination on that letter she said that she hoped that she would get it [*sc.* the properties] back from her, the daughter-in-law. She further said that what she meant by as stakeholder for the daughter-in-law and David " was that I would in any event die and the property will in any event be my children's property— . . . my children, or my grandchildren, my descendants ". This answer was plainly inconsistent with the limitation to the daughter-in-law and David in the letter.

In re-examination the appellant's counsel reminded her that on two occasions in cross-examination she had said that before Wood Lun died, those properties were his, after his death they would be hers: and she agreed. She said that in 1959 and 1964 she did not expect the son to predecease her.

" Q. So the only question was while he was alive to whom the property belonged?

A. Yes, when he was alive, it belongs to him.

"Q. So even in 1959 and 1964 while he was alive the property would belong to him?

A. Right."

At that point her counsel metaphorically threw his brief on the floor.

"Q. Madam, why didn't you tell either your solicitor or me of this before?

A. It's not so lucky to have the son die before me."

For the appellant it was urged before their Lordships that much light was thrown on the question of intention as to the properties by a bank account opened in the name of Wood Lun into which the appellant said that from time to time she made payments of her own money and from time to time made withdrawals by the use of Wood Lun's chop. She said that Wood Lun was ignorant of the existence of this account, from which she withdrew the balance of some $122,000 on the day after his death. The respondent counter-claimed in respect of that but failed both at first instance and in the Court of Appeal, and did not pursue it before this Board. If that was right it was suggested that it strongly supported her case on the properties. Their Lordships are content to say that they do not agree.

It was argued that the appellant's payment of some $19,000 in estate duty based on the value of the properties at a time when she was hoping for a grant was made only because she was in a "desperate hurry" to obtain a grant. The course of her correspondence with Lo & Lo does not support that suggestion made by counsel of desperate hurry.

It was further contended that the appellant should be allowed, either with or without amendment of her pleadings, to argue (in the alternative to a resulting trust taking effect unconditionally on the acquisition of the properties) for a conditional benevolence. This was expressed in the appellant's case thus: if the 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 predeceased the appellant. This suggestion was not advanced at the trial: it is not to be found in the pleadings though it was put forward in the grounds of appeal to the Court of Appeal. The Court of Appeal refused to allow the point to be taken and refused leave to amend the pleadings. In their Lordships' opinion this was quite right. It was an attempt to build an entirely different case on the final answers of the appellant in re-examination, and one inconsistent with the simple allegation of a resulting trust upon which the appellant's case had relied throughout the trial. Additionally it would appear to their Lordships that even if the concept could hold water at all it would involve communication of the condition to the son, and of this there was no evidence: as has been already remarked no evidence was given of his intention.

The trial judge dismissed the appellant's claim to be beneficially entitled to the properties. On the counter-claim he declared that the grandson David was the only beneficiary in Wood Lun's estate subject under Chinese law and custom to maintenance of his widow: ordered delivery up of the title deeds of the flat by the appellant to the respondent—the Canal Road property had been sold by arrangement: ordered that the respondent should treat the proceeds of that sale as an asset of the estate of Wood Lun: and ordered the appellant to account to the estate for her net receipts from the two properties. The trial judge did not accede to the respondent's claim for payment of money by the appellant insofar as it was based upon the withdrawal by her of some $122,000-odd from a bank account as already mentioned. He ordered the appellant to pay the respondent's costs of claim and counter-claim. The Court

of Appeal affirmed the order of Li J. and ordered the appellant to pay the respondent's costs of the appeal, and the respondent to pay the appellant's costs of the cross-appeal on the $122,000-odd Bank withdrawal point. Counsel for the appellant submitted to their Lordships that this case arose in the course of the administration of Wood Lun's estate and that all costs should come out of the estate. This their Lordships cannot accept.

Their Lordships are of opinion that this appeal must be dismissed with costs and they will humbly advise Her Majesty accordingly.

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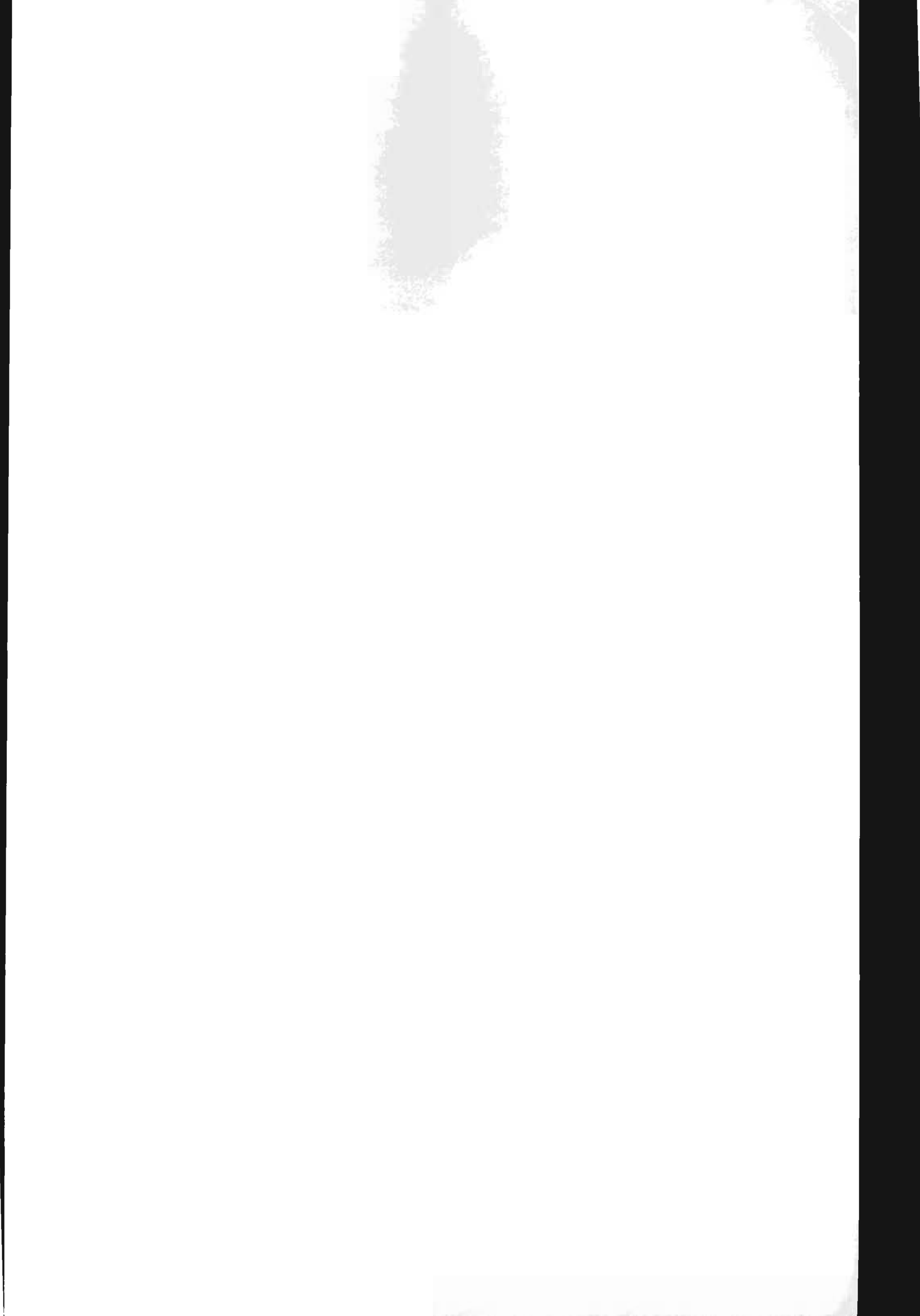

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