

Kwok Chi Leung Karl (An Executor  
named in the Will of Lamson Kwok)

Appellant

v.

The Commissioner of Estate Duty

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 11TH JULY 1988

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*Present at the Hearing:*

LORD BRIDGE OF HARWICH  
LORD BRANDON OF OAKBROOK  
LORD TEMPLEMAN  
LORD ACKNER  
LORD OLIVER OF AYL MERTON

*[Delivered by Lord Oliver of Aylmerton]*

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This is an appeal from an order of the Court of Appeal of Hong Kong dated 27th March 1987 reversing the decision of Jackson-Lipkin J. in the High Court and declaring that at the date of the death of the late Lamson Kwok property belonging to him passed in the form of his disposable right to receive in the future with interest the amount specified in a certain promissory note and that that property was situate in Hong Kong.

The appeal arises out of a simple but ingenious scheme for the technical removal from Hong Kong immediately prior to the death of the deceased of a substantial part of his extremely valuable property and, so it is claimed by the appellant, the consequent avoidance of Hong Kong estate duty. The Estate Duty Ordinance (Hong Kong) (Cap. 111) is modelled broadly upon the United Kingdom Finance Act 1894 so far as it related to estate duty. For present purposes its only relevant provisions are those which are contained in sections 3, 5, 6 and 10 which, so far as material, are as follows:-

"3. 'Property' includes movable and immovable property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale;

'property passing on the death' includes property passing either immediately on the death or after any interval, and either certainly or contingently, and either originally or by way of substitutive limitation, and 'on the death' includes 'at a period ascertainable only by reference to death';

5. In the case of every deceased person there shall, save as hereinafter expressly provided, be levied and paid upon the principal value, ascertained as hereinafter provided, of all property passing on the death of such person, a duty called estate duty at the graduated rates mentioned in the applicable Schedule:

6.(1) Property passing on the death of the deceased shall be deemed to include the property following -

(a) property of which the deceased was at the time of his death competent to dispose; ...

10. Estate duty shall not be payable in respect of - ....

(b) property situate outside the Colony; ..."

The late Lamson Kwok ("the Testator") was resident in Hong Kong and died there on 27th April 1983. The appellant is a son of the Testator and one of the three executors named in his will. He is the sole proving executor, probate having been granted to him on 24th December 1985. On 25th February 1983, only some two months prior to the death of the Testator, there was incorporated in Liberia and under the laws of that country a limited company called Tolu Limited. Although they were exhibited to the affidavit of the plaintiff in the proceedings in the High Court, the Articles of Incorporation have not been included in the record before their Lordships so that their Lordships have not seen the corporate objects for which the company was formed. It may be assumed, however, that they embrace the power to carry on a wide range of trading activities, but that scarcely matters in any event since it does not appear that the company engaged in any activity anywhere other than that of acquiring assets from the

Testator in return for the conveniently worded promissory notes which have given rise to the only issue on this appeal. The entire issued capital of the company consisted of 100 bearer shares which are and were at all material times owned by the widow and the four sons of the Testator. The appellant and two of his brothers were the only directors. In the short period which elapsed between the company's incorporation and the death of the Testator, there took place five directors' meetings, all of which were held outside Hong Kong at the Hotel Lisboa in Macao and which were attended only by proxies for the directors. At the third such meeting held on 18th April 1983 a resolution was passed to open a United States dollar account at a bank in San Francisco and at a subsequent meeting on the same day a resolution was passed for the acquisition from the Testator of certain Hong Kong shares for a price of US\$1,807,839.24 and one of the directors, Lester Chi-Hang Kwok, was authorised to sign an agreement for that acquisition and to execute a promissory note pursuant to such agreement. At the same meeting similar resolutions were passed for the acquisition of other property of the Testator and the execution of other promissory notes for the amount of the consideration. Under the Business Corporation Act of Liberia, a Liberia registered company is obliged to appoint a registered agent for service of process in Liberia and that was duly done by the company.

Pursuant to the directors' resolution already mentioned, an agreement was entered into at 8.45 p.m. on 26th April 1983 between Tolu Limited acting by Lester Kwok and the Testator acting by the plaintiff as his attorney. It recited that the Testator held certain shares which were specified in a schedule marked A and that he was desirous of selling them to the company. The material part of the agreement was as follows:-

"NOW, THEREFORE, in consideration of the mutual covenants and conditions herein set forth, the parties hereto agree as follows:

1. For the sum of US Dollars One Million Eight Hundred and Seven Thousand Eight Hundred Thirty Nine and Cents Twenty Four (US\$1,807,839.24) being the agreed equivalent of HK Dollars Twelve Million Two Hundred Ninety Three Thousand Three Hundred and Six and Cents Eighty Four (HK\$12,293,306.84) to be paid or satisfied in manner described in Paragraph 2 by Buyer to Seller, Seller hereby sells, assigns and transfers to Buyer all of his right, title and interest in and to the Said Shares and shall sign or cause the necessary instruments of transfer or any other documents to be signed by Wing On Bank

(Nominees) Limited necessary for the purpose of effecting the sale.

2. Seller agrees to accept from Buyer in consideration for the sale and transfer of the Said Shares a promissory note executed by Buyer in the principal sum of US Dollars One Million Eight Hundred and Seven Thousand Eight Hundred Thirty Nine and Cents Twenty Four (US\$1,807,839.24) being the agreed equivalent of HK Dollars Twelve Million Two Hundred and Ninety Three Thousand Three Hundred and Six and Cents Eighty Four (HK\$12,293,306.84) with interest thereon at the rate of ten percent (10%) per annum, principal and interest all due and payable on demand after 60 days from the date hereof at City of Monrovia, Republic of Liberia. A copy of the said promissory note is attached hereto, marked Exhibit 'B' and incorporated herein by reference."

At the same time, the company, acting by Lester Kwok executed a promissory note dated 26th April 1983 in the following form:-

"PROMISSORY NOTE  
(NOT NEGOTIABLE)

US\$1,807,839.24

26th April, 1983  
8:45 pm

On demand after sixty (60) days from the date hereof, TOLU LIMITED, a Liberian Corporation, promises to pay LAMSON KWOK the sum of US Dollars One Million Eight Hundred and Seven Thousand Eight Hundred Thirty Nine and Cents Twenty Four (US\$1,807,839.24) (being the agreed equivalent of HK Dollars Twelve Million Two Hundred and Ninety Three Thousand Three Hundred and Six and Cents Eighty Four (HK\$12,293,306.84) in Liberia, for value received, with interest from date at the rate of ten percent (10%) per annum until payment.

Principal and interest shall be payable at City of Monrovia, Republic of Liberia, and in case suit is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as Attorney's fees in said suit.

DUE:

For and on behalf of  
TOLU LIMITED  
A Liberian Corporation

BY: (Sd.) Lester Chi-hang  
Kwok  
LESTER CHI-HANG KWOK

Director."

Both documents were executed in the presence of a public notary in Hong Kong. The company is not registered in Hong Kong as a foreign corporation under the Companies Ordinance and it has not and never has had any address for service or place of business in Hong Kong. So far as appears, the only business activity ever conducted by it consisted of the agreements and promissory notes already referred to. The Testator died on the day after the execution of the agreement and the promissory note.

Those are the material facts and they raise the short, but by no means easy, question whether at the date of the Testator's death the obligation represented by the promissory note was property which was situate within the colony.

The question was raised by and determined on an Originating Summons issued by the appellant, supported only by an affidavit setting out the facts already recited and exhibiting the relevant documents, with the result that none of the background facts has been investigated. A series of transactions so unusual and so close to the death of the Testator almost inevitably suggests that there might have been grounds for attacking the transactions as a sham or as lacking *bona fides* or as ineffective under the principles enunciated by the House of Lords in *Ramsay v. Commissioners of Inland Revenue* [1982] A.C. 300. That, however, has not been suggested by the respondent at any stage of the proceedings and their Lordships must, therefore, approach the matter in the same way as the courts below, that is to say as a genuine, arm's length transaction which had the effect of transforming the Testator's property in Hong Kong into a single chose in action represented by the promissory note. Thus the only question to be answered is where that chose in action was situate at the death of the Testator.

In the High Court it appears to have been conceded that the company's management and control were in Hong Kong, where all the directors resided, but, as the learned judge pointed out, this was not in itself sufficient, since the question of situs was raised not in relation to the residence of the corporation for tax purposes but in relation to a non-negotiable promissory note payable in futuro in a place outside the jurisdiction of the Hong Kong court. He accordingly applied the test of where the sum represented by the note was recoverable and held that the chose in action was situate outside Hong Kong.

The Court of Appeal took an entirely contrary view. There was, they held, no debt recoverable at the Testator's death to which the test of recoverability as the criterion of situs could be applied. The only "property" of the Testator at the date of his death

was his present right to assign the future right to present the note and to receive payment. Whether the situs of that right was represented by the presence of the Testator himself or by the note as a physical chattel, both were situate in Hong Kong and the Testator's "property" was therefore situate there.

Their Lordships are unable to accept the Court of Appeal's analysis of the matter. A chose in action is no less a chose in action because it is not immediately recoverable by action and their Lordships know of no authority for the view that the situs of a chose in action recoverable in futuro is to be determined either by the residence of the person to whom the obligation is owed or by the physical whereabouts of the document evidencing the right (not being a specialty debt). Indeed, the respondent has not sought to uphold the Court of Appeal's decision on the ground upon which that court rested it.

The matter falls, in their Lordships' opinion, to be determined by reference to first principles. In the first place, the notion that a debt or other chose in action, because incorporeal, can have no situs was laid to rest by the House of Lords in *English, Scottish and Australian Bank Limited v. Commissioners of Inland Revenue* [1932] A.C. 238. It is clearly established that a simple contract debt is locally situate where the debtor resides - the reason being that that is, *prima facie*, the place where he can be sued (*New York Life Insurance Company v. Public Trustee* [1924] 2 Ch. 101, per Warrington L.J. at page 114). A debt which is payable in futuro is no less a debt and there is no logical reason why it should, as regard its locality, be subject to any different rule. It is simply a chose in action and like any chose in action is subject to the general rule which is conveniently stated in Rule 115 in Dicey and Morris, *The Conflict of Laws* 11th Edition Vol. 2, page 907 as follows:-

"Choses in action generally are situate in the country where they are properly recoverable or can be enforced."

That will normally be where the debtor resides, although there are exceptions. For instance, a specialty debt is situate where the deed is physically situate. Similarly a negotiable instrument will be situate where the instrument is, at any rate where there is an available market for its negotiation. In the instant case, however, where the instrument evidencing or creating the obligation is non-negotiable and where it is in any event payable only on presentment abroad, there can be no reason for departing from the general rule that the chose is situate where it can be enforced, and that can only be in the place in which the debtor resides and can

be sued. There is, of course, an obvious difficulty in establishing the situs of a debt due from a corporation, because a corporation may have a presence in several different places. The matter is conveniently summed up in the following passage from the judgment of Atkin L.J. in the *New York Life Insurance* case already referred to (at page 120):-

"Now, when you are dealing with a corporation, you are dealing again with a legal notion, and you have to examine the question where the debt can be said to be situate. It appears to me plain that a corporation according to our law is deemed to reside for the purposes of suit in the place where it carries on business in its own name, and in the case of corporations, you have many activities in many countries, such as the big insurance companies - for example, the plaintiffs in this case. It appears to me that the true view is that the corporation resides for the purposes of suit in as many places as it carries on business, and it is to be noticed that in ordinary cases where an obligation is entered into by the corporation without any particular limits of the place where it is payable, inasmuch as that obligation is an ordinary personal obligation which follows the person, you have in each jurisdiction a right to sue the corporation there; the corporation is resident there, and the obligation is enforceable there. Under ordinary circumstances the debt would be situate in each place where the corporation can be found."

The critical question, therefore, is where Tolu Limited is resident or can be found for purposes of service. The concession made before the judge that its central management and control were in Hong Kong, whilst no doubt of relevance in determining the residence of a company for the purposes of its liability to local taxation, does not really assist very much in answering the only material question for the purposes of the present appeal for, as the Court of Appeal rightly held, the line of authority concerned with the residence of a corporation for purposes of income tax is of no relevance in this context. Where the question to be determined is the whereabouts of a company for purposes of service, the enquiry is normally directed to ascertaining where it carries on its business or where it is incorporated and has its registered office. In the instant case, the company has, so far as the evidence goes, no office in Hong Kong nor has it any place from which it carries on business. Its sole activities appear to have been the holding of directors' meetings, all of which took place outside Hong Kong, and the entry into the agreements referred to with the Testator, an activity which seems to have taken place in the office of a notary public. It is, therefore, in

their Lordships' view, at least open to doubt whether service of process on the company could properly be effected in Hong Kong at all. Their Lordships are, however, prepared to assume for present purposes that it could. What is beyond doubt is that the company is incorporated in Liberia, where presumably it has a registered office and where certainly it has a registered address for service of process. At least, therefore, it is resident in Liberia and accordingly, making the above assumption, has two places of residence. In that situation it is clearly established that the locality of the chose in action falls to be determined by reference to the place - assuming it to be also a place where the company is resident - where, under the contract creating the chose in action, the primary obligation is expressed to be performed (see the *New York Life Insurance* case already referred to; re *Russo-Asiatic Bank* [1934] Ch. 720, 738; and *Jabbour v. Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139, 146). In the instant case the expressed contractual obligation is to pay after sixty days in Liberia and upon presentation in the City of Monrovia. Their Lordships accordingly see no escape from the conclusion that at the date of the Testator's death the chose in action represented by the promissory note was situate in Monrovia and accordingly was property outside the colony.

This conclusion, which accords with that of Jackson-Lipkin J., is not one at which their Lordships arrive with any feeling of satisfaction. It is indeed one which the judge described as "flying in the teeth of common sense". Their Lordships agree, but only because of the circumstances in which the chose in action was brought into being. If this had been a genuinely commercial transaction at arm's length there is nothing particularly startling in according to it the ordinary legal consequences as regards the situs of the debt so created. As has already been stated, no challenge has been raised to the *bona fides* of the transaction, so that their Lordships have been compelled, as were the courts below, to treat it in the same way as an arm's length transaction. Lest, however, it should be thought that the door has been opened to making estate duty in Hong Kong a voluntary imposition, their Lordships would add that it would be unwise to assume that the genuineness of similar transactions in the future will necessarily be beyond challenge.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be allowed and the order made by Jackson-Lipkin J. on 14th May 1986 restored. The respondent must pay the appellant's costs in the Court of Appeal and before their Lordships' board.





