

25 June 2004

By fax & by hand

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Land Titles Bill

Rectification under Clause 81

Further to our letter of 24 June, we have obtained a copy of the unreported judgment of the Privy Council in *Li Tse Shi v. Pong Tsoi Ching* from the High Court Library, a copy of which is enclosed.

You will note that the Privy Council proceeded on the basis that the plaintiff procured the property to be apparently conveyed into the name of the adopted son, as on a sale to the adopted son by his deceased adopted father (at page 2).

You will also note that the Privy Council found that the plaintiff authorised the creation of the forged deed of assignment to the adopted son and its entry on the Land Register (at page 4).

The forged deed of assignment was in fact a conveyance authorised by the plaintiff who was the beneficial owner of the property.

The *Li Tse Shi* case is therefore not relevant to the point in issue.

Yours sincerely

Louis Loong
Secretary General

c.c. Secretary for Housing, Planning and Lands (Attn : Ms. Olivia Nip)
Clerks to Bills Committee on Land Titles Bill (Attn: Miss Salumi Chan)

Li Tse Shi - - - - - Appellant
v.
Pong Tsoi Ching - - - - - Respondent

FROM

THE SUPREME COURT OF HONG KONG.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 10TH OCTOBER, 1935.

Present at the Hearing :

LORD ATKIN.

LORD TOMLIN.

LORD RUSSELL OF KILLOWEN.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

This is a very peculiar case, depending in large measure on its very peculiar circumstances, which must first be stated.

One, Li Woon Nam, died on the 19th April, 1925, leaving his widow, Li Tse Shi (the appellant), and an adopted son, Li Kai Loy, him surviving. He was the owner of a Crown lease of certain premises (hereinafter referred to as the premises), 73, Bonham Strand West, situate at Victoria in the colony of Hong Kong, which he had acquired from one Ng Yu Hon by an assignment dated the 11th October, 1924. His name appeared at his death as such owner in the Hong Kong Land Registry, the premises being then in the occupation of the said Ng Yu Hon as sub-lessee.

By his will the premises, together with other property, were bequeathed absolutely to the appellant. As will appear, no legal personal representative of the testator was appointed until some years after his death. In the meantime a strange transaction had taken place.

On the 24th March, 1930, an indenture was signed, sealed and delivered, purporting to be an assignment on sale of the premises by Li Woon Nam to Li Kai Loy, in consideration of a sum of 70,000 dollars paid by Li Kai Loy to Li Woon Nam, the receipt of which Li Woon Nam duly acknowledged. The sole witness to this document was a partner in a firm of solicitors known as Deacons. His good faith is in no way impugned. Li Kai Loy had been introduced to him by Ng Yu Hon, and Li Kai Loy had in turn introduced some other man as being the proposed vendor Li Woon Nam. This man, whoever he was, came armed with the title deeds, viz., a deed of the 19th February, 1917,

vesting the property in Ng Yu Hon, and the assignment to Li Woon Nam. These he left with Deacons. After the matter had been completed, Deacons registered this assignment by Li Woon Nam to Li Kai Loy in the Hong Kong Land Registry, and by a letter of the 7th April, 1930, sent to Li Kai Loy the title deeds above mentioned.

Obviously there was something wrong here. Li Woon Nam had been dead for nearly five years. Whatever may have been the reason which prompted the person or persons responsible for bringing this document into existence and recording it in the Hong Kong Land Registry, it is clear that *per se* the assignment was a nullity and passed nothing to anybody. For the purposes with which their Lordships are concerned, however, it is crucial to know whether the appellant was in any way, and to what extent, responsible for the transaction; and at this point the findings of fact by the Courts in Hong Kong are of vital importance.

The trial Judge found that "contemporaneous knowledge of the impersonation" of Li Woon Nam had been brought home to the appellant. The full Court on appeal, having had the advantage of some further evidence, took the same view. From these concurrent findings their Lordships see no reason to dissent. The case falls to be decided accordingly upon the footing that the appellant (who was by virtue of her husband's will and possession of the title deeds in command of the situation), procured the premises to be apparently conveyed into the name of Li Kai Loy, as on a sale to him by Li Woon Nam, and entries to be made in the Hong Kong Land Registry, representing that Li Woon Nam had, on the 24th March, 1930, sold and conveyed the premises to Li Kai Loy in consideration of a price of \$70,000.00.

The rest of the story now remains to be told. In the following year Li Kai Loy proceeded to raise money on the security of the premises. The title deeds meanwhile had found their way, for some reason or other, into the possession and custody of one Wong Wa Kong, who was the father-in-law of Li Kai Loy. Li Kai Loy, being thus unable, without outside consent, to produce the title deeds to an intending mortgagee, made a statutory declaration on the 13th April, 1931, in regular form under the Act, explaining the reason for the non-production of the title deeds. Therein he stated that while travelling from China to Hong Kong with the title deeds in his suit case, his suit case had been stolen and the title deeds had been lost. This statutory declaration was entered on the Hong Kong Land Registry on the 13th April, 1931. On the same day Li Kai Loy executed a full power of attorney in favour of one, Li Hip Loy, a nephew of Li Woon Nam.

Later in the same month Li Hip Loy produced the statutory declaration and the power of attorney to a firm of solicitors, Messrs. Wilkinson and Grist, whom he instructed to prepare a mortgage of the premises in favour of one, Yan Pun. This was done and on the 20th April, 1931, a mortgage of the premises in favour of Yan Pun was executed by Li Kai Loy by his attorney, Li Hip Loy, to secure the repayment of a principal sum of \$65,000.00 and interest. This was duly entered in the Hong Kong Land Registry. The interest, which was payable monthly, was not paid, and the mortgagee on the 23rd July, 1931, put the premises up for sale by auction in exercise of a power of sale contained in the mortgage. Ng Yu Hon tried to stop the sale, alleging, what was not the fact, that either the mortgage or the power of attorney had been forged. The auction proceeded, and the premises were purchased by the respondent, Pong Tsoi Ching, for the sum of \$77,000.00. The conditions of sale stipulated that the title should commence with the mortgage, and that no objection should be raised by the purchaser to the non-production of any earlier title deeds. The purchase was completed and the premises were conveyed to the purchaser by an indenture dated the 6th day of August, 1931, and made between Yan Pun of the one part and Pong Tsoi Ching of the other part.

On the 4th December, 1931, letters of administration, with the said will annexed, of all and singular the personal estate and effects of Li Woon Nam, were granted to the appellant, she having given security for payment of estate duty in respect of No. 73, Bonham Strand West.

On the 15th December, 1931, she issued a writ against Pong Tsoi Ching as sole defendant, claiming as administratrix (amongst other relief) declarations (1) that the premises were vested in her as administratrix and sole beneficiary under the will, (2) that the mortgage was null and void and had no legal effect, and (3) that the defendant had no right in or title to the premises. The action was dismissed by Wood J. and an appeal from his judgment was dismissed by MacGregor C.J. and Lindsell J. Upon the facts as narrated above it is not easy to see how any other result could have ensued.

It is to be observed that the action is based upon the view that nothing passed by the assignment to Li Kai Loy, and that accordingly nothing passed by the mortgage to Yan Pun, or by the assignment to the respondent. It appears to their Lordships that the question which calls for decision at the outset, is the question whether the mortgage to Yan Pun was effectual as against the appellant to vest the premises in him as mortgagee. If it was, no attack can be effectively made on the respondent's title. He can be in no worse case than the mortgagee. If any invalidity existed in

the title of the mortgagee, the title of the respondent might conceivably be a better one. This position is recognised by the appellant, who in her pleadings, by the reply, alleged actual or constructive notice by the respondent of infirmity of title; but it was properly conceded at the argument before the Board, that if Yan Pun had acquired a good title, the appeal must fail; for, be it noted, the appellant's claim is not coupled with any offer to redeem the mortgagee, or the respondent as standing in his shoes. It is solely a claim on the footing that nothing passed to the mortgagee.

In their Lordships' opinion this claim is, upon the facts of this case, an ill-founded claim. The appellant authorised the creation of the deed of assignment to Li Kai Loy, and its entry on the Hong Kong Land Register. This is a statement (authorised by her), and a continuing statement to the world, intended to be acted upon by any one desirous of acquiring an interest in the premises, that Li Kai Loy is the owner of the premises as a purchaser for valuable consideration from Li Woon Nam. The evidence shows that before advancing the money the mortgagee, through his solicitors, searched the register and relied upon the title as therein disclosed; in other words Yan Pun acted upon the appellant's statement, as she intended he should, and advanced his money on the faith of it. In these circumstances the appellant is estopped from asserting against him that Li Kai Loy was not the owner of the premises as a purchaser for value from Li Woon Nam. The title of Yan Pun as against the appellant was accordingly complete and valid. It follows that as against her the title of the respondent is equally unimpeachable.

A recent judgment of the Board is not without relevance here. In a case, which also dealt with registration in the Hong Kong Land Registry (*Tsan Chuen v. Li Po Kwai* [1932] A.C. 715) this Board used the following language:—
 “To their Lordships it seems clear that by his registration of the memorial of his deed of assignment, the respondent is estopped as against the appellant who took his mortgage in reliance on that memorial from denying its correctness in any essential particular.” So here it may properly be said that the appellant by authorising the registration of the memorial of the deed of the 24th March, 1930, is estopped as against Yan Pun (and therefore the respondent) from denying that Li Kai Loy was the owner of the premises, having bought them from Li Woon Nam for the sum of \$70,000.00 As Farwell J. stated in *Rimmer v. Webster* [1902] 2 Ch. 163, at p. 173:—

“If the owner of property clothes a third person with the apparent ownership and right of disposition thereof, not merely by transferring it to him, but also by acknowledging that the transferee has paid him the consideration for it, he is estopped from asserting his title as against a person to whom such third party has disposed of the property and who took it in good faith

and for value. . . . If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfers property, 'he voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of encumbrance or adverse equity,' and he cannot be heard to say that he has not in fact received such purchase money."

In their Lordships' opinion, the principle underlying this passage is equally applicable to the present case, in which the beneficial owner of the premises has represented that someone else, being the owner thereof, has assigned them to a third person in consideration of a sum of money paid by the third person to and received by the alleged assignor.

It was argued, however, that no estoppel grounded on any representation made by the appellant before she took out letters of administration could bind her as administratrix; and certain authorities were cited in support of that proposition. Whatever the true position might have been had she been suing to recover the premises for the benefit of persons other than herself, the present case is not that case. Her husband has been dead many years; there is no suggestion of any outstanding debts for the payment of which the premises have to be realised, or indeed of any outstanding debts at all; provision has been made by security for the payment of the estate duty; the only person concerned in the recovery of the premises, or interested in asserting the falsity of her representations, is the appellant herself. In these circumstances their Lordships feel no doubt that she is effectually bound by estoppel.

It was further suggested that Yan Pun was in some way affected with notice of the lack of title in Li Kai Loy from the absence of the title deeds, and from the fact that, as appears from the evidence, Yan Pun was warned that he ran some risk in lending money on mortgage of property without obtaining the title deeds. The risk which he ran, was the risk of some adverse title being or having been established, which originated in a deposit of those deeds with some third party for valuable consideration. This was a risk which he might run if he chose, and one the existence of which in no way suggested or implied any flaw in the title disclosed by the entries in the register. He was, their Lordships think, entitled in the circumstances to rely on the statutory declaration, which was entered on the register, as a true explanation of the reason why the title deeds were not forthcoming, and also if he thought fit to run the risk indicated above. That risk did not in fact mature, for the appellant's claim is not founded on possession of the title deeds.

For the reasons appearing herein their Lordships are of opinion that this appeal fails and should be dismissed; and they will humbly advise His Majesty accordingly. The appellant must pay the costs of this appeal.