

HCA013687/1998

HCA 13687/98

HEADNOTE

Transfer of Property - Resulting Trust - Estoppel by Deed - Illegality - Order 14A summons.

The Plaintiff was the registered owner of two properties. He approached a bank for loans to be secured by second mortgage. When the bank refused to accept second mortgage, he allegedly entered into oral agreement with the First Defendant whereby the properties were to be transferred by deed of assignment to the First Defendant who would hold them in trust for the Plaintiff. The First Defendant would borrow the purchase price of the properties on the security of first mortgage and let the Plaintiff have use of the money. In due course the properties were conveyed to the First Defendant without actual payment of the consideration stated in the deeds of assignment which in all respects appeared to be for genuine sale and purchase. The Plaintiff used and repaid the loans secured by first mortgage. After the bank loans had been fully repaid, the Plaintiff demanded the First Defendant to transfer the legal title of the properties back to him. The First Defendant refused. Instead, the properties were transferred successively to the other Defendants in turn. The Plaintiff sued the first three Defendants pleading that the properties were under trust in his favour on the basis of his oral agreement with the First Defendant. Recorder K. Kwok, SC struck out the action on the ground that express trust affecting land cannot be sustained by oral agreement. The learned Recorder declined to deal with the issue of resulting trust. The Plaintiff then commenced this second action pleading, expressly, resulting trust. The Defendants, again, applied for dismissal.

Held:

1. Res judicata does not apply because the Plaintiff in the first action did by way of argument through counsel raise the issue of resulting trust which the learned Recorder decided could not be dealt with on the then state of pleadings. It was open to the Plaintiff to amend the pleadings in the first action. Whether the pleadings should be amended or a fresh action should be commenced is a matter of tactics only. Hence the Plaintiff is not barred from starting a second action.
2. Applying the Privy Council decision in *Tsang Chuen v. Li Po Kwai* [1932] AC 715, the Plaintiff is estopped by the deeds of assignment he executed from adducing evidence to prove resulting trust. Hence his action must fail. A number of English and Hong Kong authorities distinguished.
3. Quaere whether the oral agreement between the Plaintiff and the First Defendant amounted to illegal contract or soiled the hands of the Plaintiff so as to deprive him of remedy and relief irrespective of estoppel by deed.

HCA 13687/98

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 13687 OF 1998

BETWEEN

TSUI HOI PAN	Plaintiff
AND	
WONG CHUN LING	1st Defendant
WONG WING CHI	2nd Defendant
MANISTAR INVESTMENT LIMITED	3rd Defendant
LUK TIN SHEK	4th Defendant

Coram: Deputy Judge Li in Chambers

Date of Hearing: 14 May 1999

Date of Handing Down Judgment: 26 May 1999

J U D G M E N T

1. This is the second action that the Plaintiff claims against the same First to Third Defendant for possession of two properties - "Tung Chau Street Property" and "Fuk **Wa** Street Property" - based on the same set of facts. The first action - HCA9743/97 - was dismissed by Recorder K Kwok, SC at a hearing for striking out on 14 July 1998.

2. Before me is the First to Third Defendant's application to strike out the Statement of Claim on the grounds that, inter alia, it discloses no reasonable cause of action, it is scandalous, frivolous or vexatious and it is an abuse of the process of the Court. At the same time, the Fourth Defendant has also taken out a summons to dismiss the action with costs on the ground that the Plaintiff (1) is not entitled to adduce evidence to show a resulting trust thereby contradicting the assignment of the Fuk **Wa** Street Property to the First Defendant; (2) alternatively, is estopped from contradicting the terms of the assignment; and (3) alternatively, is unable to establish his title to the Fuk **Wa** Street Property without relying on his own illegal or immoral conduct such that the Court will not enforce his claim.

3. The litigation between the parties and the claim of devolution of the two properties may be shown by the following chronology:-

<u>Date</u>	<u>Event</u>
15/5/87	Purchase of the Tung Chau Street Property by the Plaintiff.
4/9/87	Purchase of the Fuk Wa Street Property by the Plaintiff.
25/10/88	Assignment of the Fuk Wa Street Property by the Plaintiff to the First Defendant.
12/11/88	Assignment of the Tung Chau Street Property by the Plaintiff to the First Defendant.
16/6/92	Assignment of the Fuk Wa Street Property by the First Defendant to the Second Defendant.
7/8/96	Assignment of the Fuk Wa Street Property by the Second Defendant to the Third Defendant.
15/9/97	Writ of HCA9743/97 with Statement of Claim issued by the Plaintiff against the First to Third Defendant.
30/9/97	Assignment of the Fuk Wa Street Property by the Third Defendant to the Fourth Defendant.
27/3/98	The First to Third Defendant took out Summons for striking out the Statement of Claim and dismissal of HCA9743/97.
14/7/98	Hearing before Recorder K Kwok, SC dismissing HCA9743/97.
13/8/98	Writ of present action with Statement of Claim issued by the Plaintiff against the First to Fourth Defendant.
26/11/98	The First to Third Defendant took out Summons for striking out the Statement of Claim and dismissal the present action.
24/12/98	The Fourth Defendant took out Summons for dismissal of the present action.

4. The root of the problem lies in the conveyance of the two properties from the Plaintiff to the First Defendant. This is what the Plaintiff pleads in the Statement of Claim in this action:-

"3. Sometime in 1988 at the request of the Plaintiff the First Defendant agreed to assist the Plaintiff to obtain finance from the Bank of East Asia Limited in the manner hereinafter mentioned.

Particulars

Sometime in 1988 the Plaintiff wanted to obtain a mortgage loan from the bank on the security of the said Tung Chau Street property and the said Fuk **Wa** Street property in order to financially help a good friend Wong Yuk Keung who was also somebody known to the First Defendant. After learning that the bank was not prepared to re-finance on the said two properties the Plaintiff approached the First Defendant who was a friend of his at the time for help. The First Defendant then agreed with the Plaintiff that the said two properties could be transferred into her name and mortgage loans could then be obtained in her name. It was agreed that the bank loans could then be made available to the Plaintiff who was to be responsible for all mortgage repayments to the bank and that the First Defendant was to be merely a nominal owner who was not entitled to the use or enjoyment of the said two properties in any way. The First Defendant agreed that after the said two properties had been transferred to her name she was to hold the beneficial interests in the said two

properties on trust for the Plaintiff and to transfer the legal and/or beneficial interest back to the Plaintiff if and when required by the Plaintiff in the future.

4. Consequent upon the said agreement referred to in paragraph 3 above, [the two properties were conveyed to the First Defendant. The mortgage loans to the First Defendant on the properties were then made available to and used by the Plaintiff.]"

5. Pretty much the same facts, albeit in less detail, were pleaded in the first action:-

"STATEMENT OF CLAIM

2. By an oral agreement made between the Plaintiff and the First Defendant sometime in October 1988, the First Defendant agreed to act as the trustee and nominee of the Plaintiff to take up the First Property by way of an Assignment in the consideration of \$500,000.00 in order to secure a mortgage loan from The Bank of East Asia Limited in the sum of \$390,000.00

4. The First Defendant was purely acting as the Plaintiff's trustee holding the First Property in her name for the use and benefit of the Plaintiff. The First Defendant did not pay any consideration or money for this transfer.

5. The Plaintiff is at all material times the beneficial owner of the 1st Property and is entitled to possession of the 1st property.

16. By an oral agreement made between the Plaintiff and the First Defendant sometime in 1988, the First Defendant again agreed to act as the trustee and nominee of the Plaintiff to take up the 2nd Property by way of an Assignment in the consideration of \$550,000.00 in order to secure a mortgage loan from The Bank of East Asia Limited in the sum of \$420,000.00.

18. The First Defendant was purely acting as the Plaintiff's trustee holding the 2nd Property in her name for the use and benefit of the Plaintiff. The First Defendant did not pay any consideration or money for this transfer.

19. The Plaintiff is at all material times the beneficial owner of the 2nd Property and is entitled to possession of the 2nd Property."

6. The Defendants in the first action seized upon the Plaintiff's pleaded case to apply for strike out. The Fourth Defendant in the present action also appeared before Recorder Kwok, SC on that occasion because the Plaintiff sought to join the Fourth Defendant as a defendant in the first action. The application to strike out was on the grounds, that (1) the Statement of Claim therein did not disclose a reasonable cause of action and (2) the Plaintiff's claim was founded on illegality. This is the record of the oral judgment delivered by Recorder Kwok on the application:-

"For the purpose of this application, Mr. WONG Po Wing, Counsel for the plaintiff, did not argue that there was any viable or arguable cause of action on express trust.

Mr. WONG immediately goes on to argue that the plaintiff had pleaded the case or the plaintiff's case is one of resulting trust, and his contentions are focused upon the premise that a resulting trust has been pleaded.

I have gone through the statement of claim, and with respect to Mr. WONG, and in disagreement with him, the statement of claim does not plead the necessary averments of fact upon which a resulting trust can be said to arise.

... ..

The statement of claim, as I read it, is one which really pleads an express trust. It does not, on my reading of the statement of claim, raise an issue of resulting trust.

... ..

... on the basis that the statement of claim has formulated, is bound to fail in that there is no attempt to defend a case of express trust and in my judgment has not raised a case of resulting trust.

There is no application for amendment, apart from an amendment to make to averment that the plaintiff notionally provided consideration to himself, which I do not think will really help the plaintiff in rescuing the case as pleaded, and turn it into a viable one of resulting trust.

These are complicated and difficult issues of fact and law which should be properly formulated before the court, or be placed in a proper position, to consider the position and for the defendants to plead to them. And for the reasons which I have endeavoured to give, what I intend to do is to strike out the statement of claim and to dismiss the action. Whether or not the plaintiff wishes to issue a new writ is a matter for the plaintiff and what the defendant wishes to do about the fresh writ, if and when issued, is not a matter for me at this stage"

7. In the present action, the Defendants again seized upon the Plaintiff's pleaded case to apply for dismissal of the action. Only this time they rely on an additional ground - res judicata in the broad sense.

RES JUDICATA

8. The First to Third Defendant rely on the wider concept of res judicata as pronounced in the landmark decision of **Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd** [1975] AC 581. The rationale behind the doctrine of issue estoppel or res judicata is to prevent abuse of the process of the court. Mr. Chong for these Defendants submitted that where there has been litigation of a certain question or issue before the court resulting in a final or substantial order which decides it, then it is well established that it is too late (save in exceptional cases) for a party to adduce in subsequent litigation against the same opponent, or one privy to him, an issue that might well have been brought forward on the previous occasion. See: s 16(2) of the High Court Ordinance (Cap 4); **Yat Yung Investment Co Ltd v. Dao Heng Bank Ltd** [1975] AC 581 at pp 588-591; White Book, paras 18/19/18, 18/19/19 & 18/19/34; **Yeo Teo Bok v. Yeung Kai Pun** [1984] HKC 47, 48F-49D; **Collin Navigation Co Sa v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)** [1986] HKC 78, 83C-84C; **Elijah Saatori v. Cheng Chun Mo**, HCA3908/95.

9. Counsel for the First to Third Defendant suggests that the Plaintiff sought to rely on resulting trust as a cause of action against the First to Third Defendant in HCA9743/97 and indeed argued the same before Recorder K Kwok, SC although the Plaintiff omitted, whether deliberately or inadvertently, to plead the same in the Statement of Claim thereof. The Writ of HCA9743/97 was issued on 15 September 1997. Since then the Plaintiff had had ample time (i.e. 10 months) and opportunity to reframe his case and amend the Statement of Claim till the 14th July 1998 hearing. But the Plaintiff chose not to do so. The resulting trust point goes to the root of the matter. Whether

it was raised or argued in HCA9743/97 is immaterial; what is material is whether it could have been argued in the first action. Thus Mr. Chong contended that it is an abuse of the court's process and vexatious for the Plaintiff to assert in the present action resulting trust being matter which the Plaintiff exercising reasonable diligence should have asserted, and indeed asserted at 14th July 1998 hearing, in HCA9743/97 in which final judgment was given. And nothing in the way of special circumstances recognized by law justifies the Plaintiff's having a second bite at the cherry.

10. I believe Mr. Wong for the Plaintiff does not quarrel with Mr. Chong over the general principle of res judicata as canvassed. Mr. Wong, however, says that that principle does not apply to the present case because all that Recorder Kwok, SC did was to dismiss a claim for equitable interest in land founded on oral agreement. There was no decision on resulting trust. The learned Recorder declined to look into the question of resulting trust although Mr. Wong did attempt to raise it at the hearing. The learned Recorder observed that there were complicated and difficult issues in that regard which could not be dealt with on the then state of pleadings. Moreover, there was no trial as such in the first action when there was no hearing of evidence.

11. In fairness to the Plaintiff, even if the Statement of Claim in the first action did not specifically plead resulting trust, resulting trust was brought up at the hearing before Recorder Kwok, SC. Hence, it cannot be said that the Plaintiff failed to assert resulting trust at the first opportunity. The learned Recorder, if I may say so, for good reasons declined to deal with it. More importantly, it is quite clear from the transcript that had there been an application to amend pleadings to assert specifically resulting trust, Recorder Kwok, SC would have given serious consideration to the application. I would have done the same too. The learned Recorder also pointed to the possibility of a fresh action for resulting trust. I think whether resulting trust should be specifically asserted by way of amendment of the Statement of Claim in the first action or by way of a fresh action is a matter of tactics only. There is no hard and fast rule that one way or the other is the only acceptable one. On any view, it is far from it that the court made any decision on the substantive merits of the cause of resulting trust. It follows that there is no res judicata.

ESTOPPEL BY DEED

12. If successful, estoppel by deed set up by all the Defendants would defeat the Plaintiff's claim which solely relies on resulting trust. Both Mr. Chong for the First to Third Defendant and Mr. Pang for the Fourth Defendant rely on the decision in **Tsang Chuen v. Li Po Kwai** [1932] A.C. 715. There, by a deed of 1917 the respondent assigned leasehold premises in Hong Kong to A and B as joint tenants, the deed stating that the property had been sold to them for \$16,000.00, the receipt of which was acknowledged. The deed was registered under the (Hong Kong) Land Registration Ordinance, 1844. In 1929, B mortgaged a half interest in the property to the appellant as security for an advance of \$25,000.00; the mortgage was registered under the Ordinance. B, unknown to the appellant or his solicitor, was a son of the respondent. The respondent brought an action claiming to be entitled to the property freed from the mortgage. By his evidence, which the courts in Hong Kong accepted as reliable after an objection to its admissibility, the respondent stated that the name A was an alias for himself, that there was no consideration for the deed of 1917, and that it had remained in his possession, no beneficial interest being intended to be conveyed to his son B. The Privy Council held, inter alia, that the action by the respondent must fail because the respondent's evidence was inadmissible to contradict the plain terms of the deed.

13. Not to be outdone, Mr. Wong contends that the Tsang Chuen case must be considered as one decided on its own facts. With respect, I cannot see anything so peculiar in the facts of that case to make it sui generis. It will be seen that the Privy Council there applied a long established principle regarding the effect of conveyance by deed. Another argument put forward by Mr. Wong, however,

has some force. Counsel suggests that the law has developed since the Tsang Chuen decision so that it is now permissible to look behind the operative words of a deed and establish by evidence a resulting trust that would effectively over-ride the very conveyance performed by the deed. See: *Tinsley v. Milligan* [1994] 1 A.C. 304; *Tribe v. Tribe* [1996] Ch. 107; *Wong Chim Ying v. Cheng Kam-wing* [1991] 2 HKLR 253; *Watson v. Smith* [1998] 3 HKC 461; *Yu Shiu Ngam v. Zen She Lin and another* [1999] 1 HKC 823.

14. To verify Mr. Wong's proposition, it is necessary to study the authorities. For this purpose, I think it is safe to rely on the headnote of the reports:-

Tinsley v. Milligan

The plaintiff and the defendant, two single women, formed a joint business venture to run lodging houses. Using funds generated by the business they purchased a house in which they lived together and which was vested in the sole name of the plaintiff, but on the understanding that they were joint beneficial owners of the property. The purpose of that arrangement was to assist in the perpetration of frauds on the Department of Social Security ("D.S.S.") and over a number of years the defendant, with the connivance of the plaintiff, made false benefit claims on the D.S.S. The plaintiff did likewise. The money thus obtained helped the parties meet their bills but did not represent a substantial part of their income and contributed only in a small way to their acquisition of the equity in the house. Subsequently the defendant repented of the frauds and disclosed them to the D.S.S. A quarrel between the parties led to the plaintiff moving out, leaving the defendant in occupation. Thereafter the plaintiff gave the defendant notice to quit and in due course brought proceedings against the defendant claiming possession and asserting sole ownership of the property. The defendant counterclaimed for an order for sale and for a declaration that the property was held by the plaintiff on trust for the parties in equal shares.

On appeal by the plaintiff:-

Held, dismissing the appeal (Lord Keith of Kinkel and Lord Goff of Chieveley dissenting), that a claimant to an interest in property, whether based on a legal or equitable title, was entitled to recover if he was not forced to plead or rely on an illegality, even although it transpired that the title on which he relied was acquired in the course of carrying through an illegal transaction; that, in the circumstances, by showing that she had contributed to the purchase price of the property and they there was a common understanding between the parties that they owned the property equally the defendant had established a resulting trust; that there was no necessity to prove the reason for the conveyance into the sole name of the plaintiff, which was irrelevant to the defendant's claim, and that since there was no evidence to rebut the presumption of a resulting trust the defendant was entitled to succeed on her counterclaim.

Tribe v. Tribe

The Plaintiff held 489 of the 500 issued shares in a company that sold ladies' clothing from a number of shops. Two of the shops were in poor repair and were held under full repairing leases, the plaintiff being the tenant. In 1986 the plaintiff, then aged 65, wished to retire and hand over the running of the company to the defendant, one of his four children. He transferred 30 shares in the company to the defendant for a stated consideration of £ 6,000.00 which remained unpaid. During 1987, under the terms of the leases, the landlords served on the plaintiff schedules of dilapidations. To meet the cost of the necessary repairs the plaintiff would have had to sell the company. To safeguard his interests, in September 1988 he transferred his remaining shareholding, then amounting to 459 shares, to the defendant for £ 78,000.00, a consideration which was not, and was

not intended to be, paid by the defendant. In the event no repairs were carried out. The lease of one of the shops was surrendered to the landlord and the defendant purchased the reversion of the other shop from the landlord. Thereafter the plaintiff requested the defendant to retransfer the 459 shares in the company. The defendant refused to do so and the plaintiff sought a declaration that he was entitled to the entire beneficial interest in the 459 shares and an order that the defendant transfer them into his name. The judge found that the transfer had been made for an illegal purpose, namely the intention of deceiving the plaintiff's creditors, but held that since the illegal purpose had never been carried into effect the plaintiff was entitled to lead evidence to rebut the presumption of advancement that would require the transfer to be treated as a gift. The judge then found that there had been an agreement that the defendant would hold the shares on trust for the plaintiff pending the settlement of the dilapidation claims, and he granted the plaintiff the relief sought.

On appeal by the defendant:-

Held, dismissing the appeal, that since the transfer of the shares was a voluntary transfer between father and son for no consideration the presumption of advancement applied unless the transferor could rebut it; that an action for restitution could be brought by the transferor either at common law or in equity but as a general rule would fail if it would be illegal for the transferor to retain any interest in the property; that in a case where no presumption of advancement arose a transferor could recover property transferred without consideration if he could do so without reliance on an illegality and could show an intention to retain a beneficial interest in the property; that that exception to the general rule applied where the presumption of advancement arose but the illegal purpose which the transferor had to rely on in order to rebut the presumption had not been carried into effect in any way; and that, accordingly, the plaintiff had been entitled to lead evidence of the agreement with the defendant in order to rebut the presumption of advancement.

Wong Chim-ying v. Cheng Kam-wing

The plaintiff appellant was the purchaser of a domestic property from its registered legal owner, Cheung Siu-chun, the spouse of the respondent. Following the payment of the purchase price, and the assignment of the property Cheung Siu-chun absconded. The respondent, who had been in occupation of the premises at the time of the purported sale refused to give up possession to the plaintiff. The respondent claimed that he was entitled to the entire beneficial interest in the property. This was by reason of his having paid the entire purchase price of the flat, without intending in so doing to advance his wife, Cheung Siu-chun.

Held:

1. The judge was entitled to infer from the evidence that the respondent had provided the whole of the purchase price, his wife being nothing more than a conduit for the respondent in the raising of loans, applying them to the purchase price, and repaying them to the lenders.
2. The surrounding circumstances indicated that the sole reason for the property being registered in the name of the wife was one of convenience. This was positive evidence that the respondent did not intend a gift to his wife, and the presumption of advancement was therefore rebutted.
3. There being no statutory provisions in Hong Kong relating to the interest of a spouse in occupation of property, the English common law, and rules of equity were to be applied subject to the qualifications contained in the Application of English Laws Ordinance (*Cap. 88*) s. 3.

4. It was the law in England that the doctrine of constructive notice of a spouse's interest in land being constituted by the occupation of the land by that spouse to the knowledge of the purchaser at the time of its sale, applied to unregistered land equally as to registered land. The plaintiff, by her agent had actually discovered that the respondent was in occupation, but had made no inquiry of the respondent as to his interest in the property. The appellant was therefore fixed with constructive notice of the respondent's rights in the flat.

Watson v. Smith

The plaintiff was the mother of the defendant (the daughter). The daughter and her then boyfriend purchased a flat in Happy Valley. It was subsequently arranged that the boyfriend would sell his half share in the flat to the mother and that the mother would continue to make the mortgage repayments and move into the flat. The transaction was completed. The conveyance was made not to the mother but to all daughter. The mother and daughter disputed the nature of the transaction. The daughter maintained that the half share was intended as a gift from her mother to her. The mother denied that there was any such intention. She claimed that she had always intended to have the beneficial interest of the half share. The judge heard and assessed the evidence. He preferred the evidence of the mother and gave judgment in her favour. He also relied on the contents of two letters written by the daughter to her mother long after the transaction had been completed as evidence against the daughter. The daughter appealed.

Held, dismissing the appeal:

(1) There was no presumption of advancement between mother and daughter. The issue was one strictly of credibility. The Court of Appeal would not disturb the findings of primary fact by a trial judge when these were based on the credibility of the witnesses, unless there was something which the judge had overlooked.

per Godfrey JA:

(2) Since there was no equitable obligation on a mother to advance a daughter, there was no presumption of advancement when a mother made a purchase of property in the name of her child. Rather, in the absence of other evidence, there would in such a case be a presumption of a resulting trust. The burden of proof that a transaction was intended to be by way of gift rested on the donee. In the present case, the judge found that the daughter's case that the property taken in her name was a gift by her mother had not been made out.

(3) Under the rule regarding admissibility of evidence, the acts or declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, were admissible in evidence, either for or against the party who did the act or made the declaration; but subsequent acts and declarations were only admissible in evidence against the party who made them and not in his favour. In the present case, the two letters which the judge placed reliance on as evidence against the daughter might not bear the weight which was put on them, but this was not sufficient to enable the Court of Appeal to interfere with the decision of the judge.

Yu Shiu Ngam v. Zen She Lin & another

The plaintiff was the elder brother of the second defendant, who was married to the first defendant. In 1972, the plaintiff transferred his property to the first defendant in order to prevent a bank from charging his property. The assignment was executed on 4th February 1972. Consideration was mentioned in the assignment but no sum was actually paid. Further, there was no element of gift.

On the other hand, the bank obtained a charging order nisi against the property on 4th January 1972, thus ahead of the assignment. Between the dates of the assignment and the return date of the hearing to show cause, the plaintiff paid the amount he owed the bank under a guarantee and the charging order nisi was discharged. According to the plaintiff, as early as in 1973 and 1974, he had orally requested that the property be reassigned to him. In 1992 and 1993, the plaintiff reiterated the request but the first defendant told the plaintiff that he had transferred the property to the second defendant on 13th July 1992 for a consideration of \$1.6m. There was, however, no evidence that such consideration had ever been paid. The plaintiff commenced proceedings against the defendants seeking, inter alia, a declaration that the first defendant held the property on resulting trust for him, and an order that the second defendant reassign the property to him. In defence, the defendants claimed that the plaintiff's case was founded on illegality and as such he was not entitled to recover the property. Alternatively, even if there had been resulting trust in relation to the initial agreement to avoid the bank's charge, there had been a separate agreement in 1974 whereby the plaintiff agreed to transfer the property to the second defendant as payment of profits he owed her from their joint trading in shares in 1972 and 1973.

Held, giving judgment for the plaintiff:

(1) There were certain exceptions to the rule that property transferred under an illegal contract could not be recovered by the transferor. One of the exceptions was that the transferor could recover the property when, if the purpose was to defraud creditors, no creditor was defrauded. In the present case, the creditor bank's interest in the property was not blocked in any way as the charging order nisi was registered prior to the assignment, and the plaintiff met his obligations under the guarantee before the charging order could be made absolute.

(2) Where there was no question of advancement, a transferor could recover a property transferred without consideration, if he could do so without reliance on an illegality and could show an intention to retain a beneficial interest in the property. On the facts of the case there was no presumption of advancement and the plaintiff did not have to rely on the illegality to prove his right. On the contrary, as the first defendant had not paid any consideration for the property, there was a presumption of a resulting trust in favour of the plaintiff. Further, the second defendant took the property subject to the resulting trust as she was found not to be a genuine purchaser for value without notice.

(3) Having considered the evidence, the court could not be satisfied on the balance of probabilities that there had been any agreement in 1974 as alleged by the second defendant by which the plaintiff transferred his interest in the property to her.

15. At a gloss, one may say that in all these authorities cited, evidence was admitted to prove resulting trust. Resulting trust was given effect to by the courts notwithstanding contrary effect evidenced by deed. But it is not as simple as that. The defendant in **Tinsley v. Milligan** who succeeded in establishing resulting trust was not a signatory to the deed of conveyance to the plaintiff. She did not have to overcome estoppel by deed. The father in **Tribe v. Tribe** was obviously a party to the transfer of shares originally under his name to his son. However, there is no evidence that the transfer was effected by deed. Normally, such transfer would be by an instrument which is not a deed. Hence, there was no question of estoppel by deed against the father. It should be noted in passing that the English Court of Appeal apparently misunderstood the facts of **Tinsley v. Milligan**. For instance, Nourse LJ said in his judgment:-

"In *Tinsley v. Milligan* [1994] 1 A.C. 340 it was held by a majority of the House of Lords that where, in order to achieve an illegal purpose, property is transferred by one person into the name of

another, being persons between whom the presumption of advancement does not apply, the transferor can recover the property, on the ground that he is not forced to rely on the illegality but only on the resulting trust that arose in his favour on the transfer."

As a matter of fact, the property in **Tinsley v. Milligan** was not transferred by the beneficiary to the trustee of resulting trust. There was an arrangement or agreement, strictly between the beneficiary and the trustee and not even reduced into writing, whereby the trustee would hold the property transferred by the vendor in trust for the beneficiary and the trustee.

16. The husband in **Wong Chim Ying v. Cheng Kam-wing** was in the same position as the beneficiary in **Tinsley v. Milligan**. He contributed to the payment for the property which was held in the sole name of the wife. He was not a party to any deed of conveyance. So, again, estoppel by deed did not apply to him. In **Watson v. Smith**, the son-in-law transferred a half share of the interest in the flat to the daughter, making the daughter at least on paper the 100 per cent owner of the property, although the mother made the mortgage repayments for the property. The mother as beneficiary under resulting trust was not even a party named on any deed of conveyance.

17. The Plaintiff in **Yu Shiu Ngam v. Zen She Lin & another** did transfer his property by a deed of assignment to one of the defendants in order to prevent a bank from charging his property. He put his hand to the deed of assignment and then he sought to assert his interest on resulting trust which is, of course, inconsistent with the deed he executed. Beeson J gave judgment for him. But there is, in my view, a crucial difference between that case and the one now before me, the defendant in that case did not seek to set up estoppel by deed. That issue was never raised before the learned judge. I agree with Mr. Pang for the Fourth Defendant that **Yu Shiu Ngam v. Zen She Lin & another** must be taken as correctly decided on the issues then placed before the court. It would be idle to speculate how Beeson J would decide had the issue of estoppel by deed been argued before the learned judge. In the light of the circumstances, that case does not assist the Plaintiff herein.

18. As far as I am concerned, the Privy Council decision in **Tsang Chuen** is directly on the point and is the only binding authority on the point. None of the subsequent authorities relied upon by Mr. Wong and discussed in this judgment considered the **Tsang Chuen** decision. Naturally, one cannot find any compelling reason offered by any of the learned judges in any subsequent case to show that the **Tsang Chuen** decision no longer represents good law. In any event, I cannot imagine how the House of Lords, the English Court of Appeal, the Hong Kong Court of Appeal or the Hong Kong High Court can over-turn a decision of the Privy Council on an appeal from Hong Kong.

19. Mr. Wong said that the law has developed since **Tsang Chuen**. I believe what he means to say is that the **Tsang Chuen** decision did not involve resulting trust and the application of the doctrine of resulting trust has been extended to situations like the one the Plaintiff is in. Mr. Pang demurs. Counsel drew my attention to the judgment of the Privy Council in **Tsang Chuen** and I quote from Lord Blanesburgh who penned the advice of the Board:-

"The outstanding fact disclosed by the examination is that the evidence of the respondent, admitted by both Courts, and essential to support the judgment in each, was evidence which directly contradicted the terms of his own deed. It ought not to have been received at all.

Tindal C.J.'s statement of the law on this subject in **Shore v. Wilson** has never been departed from. It may be useful to recall his words: "The general rule," he says, "I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under

the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself."

These observations apply with peculiar force here. Perhaps the evidence of the respondent tendered and accepted may euphemistically be termed evidence to rebut the presumption of advancement and incidentally establish a resulting trust, but it was in fact tendered to show that the deed of assignment, followed by its attested registration, was an elaborate make-believe with, so far as the operative provisions of the deed were concerned, no word of truth in it from beginning to end. There were no "purchasers"; there had been no sale to any one; no purchase money had either been paid or received; it was a mere assignment by the respondent to himself. It is unnecessary, however, to dwell on more than one of these contradictions - that which sought to deny the payment and receipt of purchase price acknowledged in the deed by the respondent and attested by his solicitor.

... ..

Evidence to that effect accordingly, under Tindal C.J.'s rule, was here inadmissible "to establish either a lien for unpaid purchase money or that there was a resulting trust for the" vendor.

... ..

The truth, indeed, is that after the execution of his deed of assignment, the respondent's claim had to be rested on an express declaration of trust by the mortgagor. But such a trust unregistered would have been useless to him as against the appellant. His essential task, accordingly, was to establish a resulting trust, which, in the circumstances, alone could help him. This he has sought to do by evidence inadmissible for its purpose. On this ground alone, therefore, as it seems to their Lordships, the respondent's case must fail. He proves no resulting trust whatever." (pp 727 - 730)

20. There can be no doubt, after reading through the judgment by Lord Blanesburgh, that the Privy Council repeatedly indicated that the respondent could only succeed on proving resulting trust but he should not be allowed to adduce evidence to that end because such evidence would be inadmissible an account of estoppel by deed. To come to that conclusion, their Lordships had abundant long established authorities.

21. In the premises, whilst I am not entirely unsympathetic towards the Plaintiff in this action, I cannot see how the Plaintiff can overcome the hurdle of estoppel by deed upheld by the Privy Council in **Tsang Chuen**. It follows that the Plaintiff's claim in this action, based solely on resulting trust, cannot possibly proceed.

ILLEGALITY

22. Irrespective of estoppel by deed, all four Defendants contend that the Plaintiff must in any event fail because the alleged oral agreement between the Plaintiff and the First Defendant was unenforceable as contrary to public policy. The object of the alleged oral agreement between the

Plaintiff and the First Defendant was to deceive a bank. Or, to put it in another way, since the plaintiff is seeking equitable relief, he must come with clean hands.

23. Mr. Wong contends that firstly, there is no evidence before the court at this stage to decide whether there was an illegal contract between the Plaintiff and First Defendant. Mr. Pang, on the other hand, argues that on the Order 14A summons taken out by his client the Fourth Defendant, the court may rely on any affidavit evidence. And, of course, I am at all times entitled to take judicial notice of the contents of the court's records, including affidavits filed with the court, in the first action and in this action.

24. It appears from an affidavit filed by the Plaintiff in the first action that the Plaintiff initially approached the East Asia Bank Limited for a loan to be secured by second mortgage on the properties. The bank indicated that it would not advance money on second mortgages. The Plaintiff then devised an artificial sale of the properties to the First Defendant so that the "purchase price" lent by the East Asia Bank Limited to the First Defendant secured by first mortgage on the properties could be made available for use by the Plaintiff. This affidavit is referred to in another affidavit filed by the Plaintiff for the purposes of the summonses before me. Moreover, the Plaintiff has pleaded particulars of the alleged oral agreement between he and the First Defendant.

25. With the aforementioned materials, can the court now draw the conclusion that the alleged oral agreement between the Plaintiff and the First Defendant is illegal or that the Plaintiff's hands are soiled so as to deprive him of the benefits of the contract or equitable relief? Mr. Wong says not. Counsel pointed out the East Asia Bank Limited was at all times protected by legal mortgage and the Bank has been repaid in full. No one has been cheated of any money. There is nothing illegal or unclean.

26. In this connection, **Tinsley v. Milligan** and the subsequent authorities considered under the heading of estoppel by deed are more relevant. That is the reason why I set out in extenso the facts and the decision in those cases. It will be recalled that in **Tinsley v. Milligan**, the agreement between the plaintiff and the defendant there giving rise to resulting trust was to enable the defendant to claim social security benefits which she would not be entitled to. As I understand it, the House of Lords held that although the agreement produced a result whereby the defendant could cheat the Department of Social Security, the agreement by itself was not illegal. Hence the defendant succeed on resulting trust. I must say I feel a little uneasy with the reasoning of their Lordships. It is basic contract law principle that a contract may be regarded as illegal if either the performance would be a breach of the law or the purpose for the contract would offend the law even if the performance does not. The **Tinsley v. Milligan** agreement appears to fall within the second limb or second type of illegal contracts. However, the House of Lords decision being formidable authority, I am happy to treat it as good authority for the proposition that, in deciding whether a contract is illegal for purpose, one should adopt a narrow approach. Be that as it may, the Plaintiff before me is not quite, as it were, home and dry on this score. The assignment of the properties by deed from the Plaintiff to the First Defendant is a solemn act and a representation to the world at large including the mortgagee bank that the Plaintiff conveys all, legal and equitable, interests in the properties to the First Defendant. The alleged oral agreement between the Plaintiff and the First Defendant, however, is to the effect that the Plaintiff retains substantial equitable interest in the property. That, I should think, is plain deception. Imagine what the East Asia Bank Limited would think. The bank is supposed to have its loan protected by mortgage of all the legal and equitable interests of the mortgagor. But, in reality, the mortgagor by the alleged oral agreement has agreed to give back equitable interests in the property to the Plaintiff.

27. I guess it may be said that the Plaintiff's interests on resulting trust were always subject to the Bank's mortgagee rights. Indeed, in **Yu Shiu Ngam v. Zen She Lin & another**, before the transfer of the property was completed, the bank had already registered a charge. For that reason, Beeson J held that the illegal purpose had been defeated and so there was no illegality. In answer to that, it is canvassed on behalf of the Defendants that in the present case the transfer of the properties to the First Defendant had been completed and the East Asia Bank Limited had advanced money on that basis. The Plaintiff had, technically at least, obtained pecuniary advantage by deception within the meaning of the Theft Ordinance. It matters not whether the loans have been repaid and no loss suffered by the bank. There was a completed criminal offence.

28. At the end of the day, I think it is open to one judge to find that the alleged oral agreement is illegal but another judge to come to a different conclusion on the facts of this case. For my part, I am inclined to find the arrangement between the Plaintiff and the First Defendant illegal because I do not think this sort of arrangement should be encouraged. We have the wider interests of the banking community to safeguard. The fact that fortunately the East Asia Bank Ltd has not suffered any loss does not mean that any bank misled by a similar arrangement is not at risk. We have to bear in mind too that the public at large are entitled to rely on the records of the Land Registry. The Plaintiff in this case happens to be in occupation of the properties he falsely transferred. Given a similar case but the "transferor" does not occupy the property, it would be well nigh impossible for a bona fides purchaser or mortgagee to discover a resulting trust for the "transferor". Would it be right then to overturn what appears in the Land Registry record as a perfectly valid conveyance from the "transferor"? The Privy Council in *Tsang Chuen* indicated that it would not be right.

29. Putting his case at its highest, I think the Plaintiff is only entitled to some kind of right to occupy or an indeterminable tenancy as against the First Defendant; not an equitable right to have legal title over the properties transferred back to him. Any subsequent bona fides purchaser taking after the First Defendant would be fixed with notice of the Plaintiff's right to occupy or tenancy if the Plaintiff was or remains in occupation. However, the Plaintiff is not praying for recognition of such right or tenancy against the Defendants. So, if my views are correct, the Plaintiff's case as pleaded must fail too.

DECISION

30. In the light of the conclusion I have reached on the question of estoppel by deed, the Defendant should succeed on their summonses. For the avoidance of doubt, I make it clear here that although I have expressed some views under the heading of illegality, I make no firm finding or conclusion under that heading.

31. As I have mentioned, I am not entirely unsympathetic with the Plaintiff. If I dismiss the action outright now and the Plaintiff starts a third action to assert right to occupy or tenancy against the Defendants on the same facts, it is foreseeable that the Defendants would again apply for strike out on the ground of *res judicata* in that the Plaintiff should have asserted such right in this action. Possibly, the Plaintiff, assuming he accepts my decision, may also sit back and do nothing until the Defendants take action to evict him when then he pleads in defence his arrangements with the First Defendant and his *de facto* occupation. I do not know what he wants to do or what is best for him. But I should endeavour to leave some sort of saving grace for him. I order that the action be dismissed unless the Plaintiff applies within 21 days from the day of handing down this judgment for leave to amend the Statement of Claim in which event the action be dismissed if the court refuses to grant leave to amend. This means that if the Plaintiff applies in time for leave to amend and the proposed amendment is acceptable to the court (any judge or master) as showing a reasonable cause of action the present action remains alive. In any other case, the action is

automatically dismissed. Should there be an appeal against this judgment, the application to amend can be heard after the appeal has been decided. This is not a very tidy piece of work by me but I hope it takes care of the law and equity and the interests of all parties.

32. In any event, the Defendants are entitled to their costs. I make an order nisi that the Plaintiff shall bear the costs of all the Defendants of all stages so far in this action and costs for and occasioned by the summonses to be taxed if not agreed; the order nisi to be made absolute unless application is made within 21 days from the day of handing down this judgment.

33. Finally, I would like to remark that I have had very able assistance from each counsel involved in this case. I thank them all.

(Z. E. Li)

Deputy Judge of the Court of First Instance

Representation:

Mr. Wong Po Wing instructed by M/s Jesse H. Y. Kwok & Co. for the Plaintiff

Mr. Matthew C.S. Chong instructed by M/s George Tung, Jimmy Ng & Valent Tse for the First to Third Defendant

Mr. Robert Pang, Esq. instructed by M/s Leonard K. L. Heung & Co. for the Fourth Defendant