[2012] UKPC 19
Privy Council Appeal No 0109 of 2010

JUDGMENT

Li Chen Ling Kaw (Appellant) *v* Societe Piang Sang Pere et Fils and Chong Fee Ng Wong (Respondents)

From the Supreme Court of Mauritius

before

Lord Hope
Lord Brown
Lord Mance
Lord Dyson
Lord Sumption

JUDGMENT DELIVERED BY
LORD HOPE
ON

23 May 2012

Heard on 27/28 March 2012

Appellant	*Respondent*
Narghis Bundun	Mr Nandklshore Ramburn
Yusra Nathire-Beebeejaun	Anwar Moollan
	Miss Kamlesh Domah
(Instructed by M A Law (Solicitors) LLP)	(Instructed by Simons Muirhead and Burton)

LORD HOPE

1. The appellant, Li Chen Ling Kaw, and the second respondent, Chong Fee Ng Wong, are husband and wife. They were married on 12 July 1976 under the legal regime of community of goods and property. The first respondent is a commercial partnership whose partners are members of the Piang Sang family. One of its members, Marc Piang Sang, is married to a sister of the second respondent. It is the owner of commercial premises situated at 54 Queen Street, Port Louis, which are the subject of these proceedings. Marc Sang Piang was until about March 2004 the first respondent's representative.

2. The appellant avers that following their marriage in 1976 they started to trade in part of the premises at 54 Queen Street. The second respondent had taken out the necessary trade licences in his own name. In practice however the business was run by the appellant jointly with the second respondent. She also avers that, as the first respondent is aware, she and the second respondent are the shareholders of a company known as CF Ng Wong Co Ltd, which has its registered office at 54 Queen Street and whose objects include carrying on business as wholesalers and retailers of goods in general and acting as distributors of foodstuffs.

3. It appears to be common ground that the business was carried on in the premises from the outset under a tenancy agreement in consideration of a monthly rent. The appellant avers that the first respondent and its partners have always considered herself and the second respondent as joint tenants of the premises, but that there was no written tenancy agreement and that no rent book was ever issued. The appellant says that this was because of the close relationship that existed between the parties. These averments are denied by the second respondent. His position, as stated in an oral plea to the magistrate, is that CF Ng Wong Co Ltd does not exist and that he is the sole tenant of the premises. He is also recorded as having said that the shop did not operate. But he did not suggest that there are any documents in existence such as a rent book that support his version of the facts, nor did he offer any explanation of when or how the tenancy agreement was entered into.

The origin of the dispute

4. The sequence of events that led to these proceedings appears, according to the appellant's averments, to have begun in 2004 when the second respondent fell ill. Although they are still married to each other, their relationship is said to have come to an end in 2004 since when, as a result of pressure from the second

respondent's sisters, they have been living separately. The appellant avers that since that date she has taken over the whole business and the responsibility to pay all the debts that she and the second respondent had contracted during their commercial activities. She has produced an affidavit which was sworn by the second respondent on 15 July 2004 in the Bankruptcy Division of the Supreme Court in proceedings brought against him by Ets Aboobakar & Cie in support of these averments. In that affidavit the second respondent stated:

> "That I am now living separately with my wife. That she has taken over my whole business because of my ill-health."

5. On 5 April 2004 the first respondent raised an action against the second respondent in the District Court of Port Louis in its capacity as the owner and landlord of the premises at 54 Queen Street. It sought payment by him of rent said to be due for the period from September 2001 to March 2004 and an order for him to vacate the premises for non-payment of rent. The basis for the bringing of these proceedings was set out in the following averments:

> "2. The defendant is occupying the commercial premises forming part of the said building as tenant thereof for and in consideration of a monthly rent of Rs 550.
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> 3. The defendant is indebted to the plaintiff in the sum of Rs 17,050.00cs representing rent due for the months of September 2001 to March 2004 inclusively.
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> 4. Should the defendant deny the said lease and same cannot be proved, then plaintiff claims the said sum of Rs 17,050.00cs as indemnity for use and occupation of the said premises for the above mentioned period.
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> 5. Although often times requested to pay the sum of Rs 17,050.00cs and to vacate the said premises for non-payment of rent, the defendant has so far failed and neglected so to do."

6. When the cause came before the magistrate on 5 April 2005 the court was informed by counsel for the plaintiff that the parties had reached an agreement. The magistrate was told that, in consideration of the plaintiff abandoning its claim for all rent due by him, the second respondent had agreed that he would quit and vacate the premises on or before that date. A written agreement between these parties to that effect dated 30 March 2005 was produced. The second respondent,

who was also present, ratified the agreement. Counsel for the plaintiff then moved the court for judgment in terms of the agreement. His motion was granted and a judgment in terms of the agreement was pronounced. The appellant was not joined as a party to these proceedings, nor was she a party to the agreement.

The present proceedings

7. On 25 April 2005 the appellant raised the present proceedings before the District Court of Port Louis, to which the first and second respondents were both made parties. Her purpose in bringing them was to protect her right in the business, which she says she has been carrying on the premises since she and the second respondent separated, and her right to earn a livelihood. She sought the following orders: (i) an order authorising her to make a "tierce" opposition against the judgment which the first respondent had obtained against the second respondent; (ii) an order decreeing that the judgment in that case was not enforceable against her and that she could not be made to vacate the premises; and (iii) a perpetual injunction directing the first respondent not to proceed to execute the judgment.

8. The appellant avers that the agreement to which the order which she seeks to have set aside gave effect was entered into behind her back and in fraud of her rights. She claims that, on taking over the business after the second respondent fell ill, she had been paying the rent to the first respondent's representative Marc Piang Sang, but that about a year previous to her bringing these proceedings the first respondent's representative Julien Piang Sang had replaced him as the first respondent's representative and since then he had failed to come and collect the rent. Her interest in bringing these proceedings is set out in para 18 of her proecipe. She avers that she is the lawful tenant of the said premises or, in the alternative, that the first respondent should have made her a party to its action as it was aware that the plaintiff was running the business that was being carried on in the premises.

9. When the appellant's case came before Mr Magistrate Boodhoo on 12 January 2007 submissions were made in support of the first respondent's plea in limine that the appellant's action was misconceived and that it should be set aside. On 6 April 2007, having heard oral argument, the magistrate informed the parties that in his view the precise definition and ambit of the tenancy agreement was at the core of the issue to be determined. He told them that further submissions were required on this issue and on its bearing and implication for the plea in limine.

10. On 5 November 2007 written submissions were filed by both parties. For the appellant reference was made to article 223 of the Civil Code which, as amended by Act 26 of 1999, provides:

> "Chaque époux peut librement exercer une profession, percevoir ses gains et salaires et en disposer après s'être acquitté des charges du mariage."

It was also submitted that the second respondent's affidavit in the bankruptcy proceedings clearly showed that he had not been the tenant of the premises since 15 July 2004 and neither he nor the appellant were indebted to the first respondent in any sum whatsoever. For the respondents it was submitted that, as there was no mention of any written agreement between the parties, the case was concerned with a statutory tenancy under the Landlord and Tenant Act 1999 in respect of commercial or trade premises. It was clear that the second respondent was the person who held the trade licences, that he was the person occupying the premises for the purposes of his trade and consequently that he was the tenant of the premises. In the situation where a spouse helps his or her spouse tenant in the running of a business, the irresistible inference was that there was only one spouse tenant. The appellant could not be a trader as she had never held a trade licence in her name, and the first respondent could not let premises for business or commercial use to a person who did not hold a trade licence.

11. In his ruling, which was delivered on 12 February 2008, the magistrate said that it was clear from the pleadings that the premises were business premises within the meaning of the Landlord and Tenant Act 1999, but that its application to the lease agreement was excluded by section 3 of that Act. In this situation the relevant provisions of the law were to be found in the Civil Code. Any agreement, whether for a tenancy or otherwise, required certainty as to the parties who were contracting. The argument presented for the appellant to show that she held a right, though ingenious, was inapplicable to this case, as the need for certainty as to the contracting parties must be preserved. He upheld the plea in limine and dismissed the action.

12. On 18 February 2008 the appellant gave notice of appeal and the magistrate's judgment was stayed pending the decision of the Appeal Court. The appeal was heard by the Supreme Court sitting as the Court of Civil Appeal (Matadeen, Ag Chief Justice, and Bhaukaurally J) on 7 September 2009. The grounds of appeal were that the magistrate was wrong to have set aside the appellant's application without hearing any evidence, that he was wrong not to have found that she had an interest in the tenancy and that he had failed to address his mind to the real controversy. In her oral submissions counsel for the appellant said that it was unusual for an agreement to be reached on the day when a case was

called, that the magistrate had failed to pronounce on the status that the appellant had as a "tiers" irrespective of the fact that she was married under the legal regime of community of goods and property, that a spouse was entitled to exercise his or her profession irrespective of the regime under which he or she was married and that there had been an admission by the second respondent in his plea in the trial court that he had acted in fraud of the appellant's rights and behind her back. For the respondents it was submitted that the second respondent had never relinquished his tenancy and that, even if the appellant had a common interest in the business, she was duly represented in the District Court and could not claim to be a "tiers". On 27 May 2010 the appeal was dismissed.

13. The Supreme Court observed in its judgment that the question that the magistrate had to decide was whether, in the absence of the appellant being called as a party to the suit at the District Court, she had not been duly represented. The present case differed from cases where a spouse was co-owner of property with another spouse and from cases about the rights in a tenancy of a widow who had contributed one way or the other in the business or profession of her husband. It was noted, but without further comment or discussion, that counsel for both sides had referred to paragraphs 78 and 95 of Encyclopédie Dalloz, Procédure Civile, Vo Tierce Opposition as to situations where "tierce" opposition to a decision was inadmissible. It was also noted that there had been appended to the plaint an affidavit by the second respondent in which he mentioned that the business had been taken over by his wife because of his ill-health. The ratio for the judgment was expressed at the end of the penultimate paragraph in the following sentences:

> "Whilst it appears on record that respondent no 2, in an oral plea, accepted having reached an agreement in fraud of the rights of the appellant, the general tenor of the plea is that the business had gone under, and the rent not paid since many years. Although we tend to agree that the learned magistrate could have been more explicit in his conclusions, we are unable to say that ex facie the plaint the tenancy had been transferred solely to the appellant."

Leave to appeal to the Judicial Committee

14. On 8 June 2010 the appellant applied to the Supreme Court for conditional leave to appeal as of right to the Judicial Committee of the Privy Council against the judgment of the Supreme Court, on the ground that her interest related to a matter which was not less than the prescribed amount of Rs 10,000 and that her interest had been prejudiced to an extent of not less than Rs 10,000. Conditional leave to appeal was refused by the Supreme Court. It was of the opinion that the appellant was not entitled to appeal as of right. On 24 March 2011 the Judicial Committee granted special leave to appeal.

15. The Judicial Committee did not give reasons for its decision to give special leave. It is not its practice to do so. But it may be observed that it is not easy to understand why the Supreme Court thought that an appeal as of right did not lie in this case. It is true that the monthly rent of the premises is only Rs 550. But the amount of the rent payable each month is not a true measure of the value to the appellant of being able continue to trade in the premises. No figures were produced to indicate how much profit she derives from the business each year, but it is hard to believe that it is less than the relatively modest sum of Rs 10,000 per annum. Given that the appellant's case is that she is entitled to remain as tenant of the premises under the protection of the Landlord and Tenant Act 1999 as amended until at least 31 December 2017, her argument that she was entitled to an appeal as of right seems unanswerable. However that may be, the Board was satisfied that special leave ought to be granted.

Discussion

16. It is clear that, in order to make good her claim to be entitled to apply for "tierce" opposition to the District Court's judgment of 5 April 2005, the appellant has to show that she has a right to occupy the premises which is, in some way or another, a right of tenancy. Without that, she would lack the interest which she needs to have to be entitled to be regarded as a "tiers" in the first respondent's proceedings in that court against the second respondent. There could be no objection to an order for his removal being made against the second respondent if he was the sole tenant of the premises.

17. It is reasonably clear from the parties' averments that there are grounds for suspicion that the first respondent's object was to recover possession of the premises free of the constraints on realising their full value that were imposed by the 1999 Act. As Mrs Bundhun for the appellant pointed out, the agreement was entered into only a few days after the enactment of the Landlord and Tenant (Amendment) Act 2005 which amended the system that section 9 of the 1999 Act laid down for permitted increases in rent for business premises let on or before 15 August 1999. The magistrate's assertion that the application of the 1999 Act to the premises was clearly excluded by section 3 of that Act was mistaken. That section provides that the Act shall apply to any premises, and prior to the amendments made by the 2005 Act business premises were not among the exceptions listed in subsection (2). Those amendments do not alter the position as far as these premises are concerned, as they were let before 1 July 2005 and premises of that description will not be removed from the protection of the 1999 Act until 31 December 2017: section 3(2)(ab), as amended by the Landlord and Tenant Amendment Act 2009. But mere suspicion as to the first respondent's motives cannot give the appellant a right to a "tierce" opposition to the judgment.

18. The appellant avers that the agreement was entered into behind her back and in fraud of her rights. Mr Ramburn submitted for the first respondent that these allegations were too vague, as it was a cardinal principle of pleading that an allegation of fraud must be distinctly charged and its details specified: *Maxo Products v Swan Insurance Co Ltd* [1996] SCJ 41 at p 45. It may be said that the appellant's complaint is not of fraud in the sense that would attract the application of that principle, rather that this was a collusive agreement that was entered into in prejudice of her rights. But this complaint too begs the question what the rights are that she can claim to have been prejudiced.

19. As already noted (see para 8, above), the appellant avers that she is the lawful tenant of the premises. She also avers, in the alternative, that she has a right in the business which she has been running in those premises. It is obvious, of course, that her business will be prejudiced if she is no longer able to occupy the premises. But this in itself is not enough to entitle her to make a "tierce" opposition to the judgment that gave effect to the respondents' agreement. So the crucial issue is whether she has a right as tenant to continue to occupy the premises.

20. Her own averments on this issue are rather vague. In para 6 of the proecipe she says that the first respondent and its partners "have always considered" herself and the second respondent as joint tenants of the premises. This averment does not sit easily with the averment in para 18 that she is "the lawful tenant" of the premises, which suggests that she is the only tenant. The fact that there was no written lease and that no rent book was ever issued was regarded by the magistrate as an indication that the arrangement to which she claimed to be a party was too uncertain. Like any other contract a tenancy does, of course, require certainty as to the identity of the parties and the essential terms of their agreement. But it is open to a court to decide these matters from oral evidence that it accepts or by inference from facts that it holds to be established. If that can be achieved, there is no problem of uncertainty. The fact that there was no written lease in this case cannot, of itself, be a ground of objection. "On peut louer ou par écrit, ou verbalement": Civil Code, article 1714.

21. The parties themselves, after all, may not have given much thought to the details. There is no suggestion on either side that they were ever, even orally, the subject of an express agreement which is now capable of being proved by oral evidence. The admitted fact that one of the Piang Sang family is a sister of the second respondent tends to show they were not really dealing at arm's length. A receipt delivered by the owner of the premises may be enough to establish that there was a lease: *Appadoo v Chung Wan Cheung* [1962] MR 280, 282, per Glover J. But there were no receipts in this case. This in itself indicates the informal nature of the arrangement. The appellant attributes the absence of a rent book and of receipts for the rent that was paid to the close relationship that existed between

the parties. In this situation the identity of the party or parties who were given the right to occupy the premises as tenant can only be discovered by examining what the parties actually did during the period of their relationship, and then determining what inferences can be drawn from those acts as to what was understood to have been agreed between them. If this approach is adopted, the case that is revealed by the appellant's averments can be seen to be more substantial.

22. The appellant avers that since she became the sole person running the business when the second respondent fell ill she took over the responsibility for paying all its debts. She says that she paid the rent as it fell due to Marc Piang Sang until he was replaced by Julien Piang Sang as the first respondent's representative. This was at about the time when the first respondent took proceedings to obtain an order against the second respondent to vacate the premises. It would be open to the court to draw the inference that the appellant, as the person to whom the landlord looked for payment of the rent, was as much entitled to occupy the premises as a tenant under the informal arrangement that existed between the parties as the second respondent. That trade licences were taken in the name of the second respondent only is, no doubt, a factor to be taken into account. But the first respondent does not appear to have been troubled by the fact that the trade licences were not taken out in the appellant's name when the second respondent fell ill and that she was the only person running the business. In these circumstances the fact that she did not have a licence cannot be regarded as determining the issue whether she had a right to occupy the premises as a tenant together with the second respondent.

23. The Supreme Court was addressed on the issue whether the appellant's claim to be entitled to "tierce" opposition was precluded by the fact that she and the second respondent were married under the system of legal community of goods and property. Reference was made to para 95 of Encyclopédie Dalloz where, with regard to "tierce" opposition, it is stated:

> "Lorsque le tiers ne démontre pas l'existence d'un préjudice, la tierce opposition formée doit être déclarée irrecevable pour défaut d'intérêt….De même, lorsqu'un local d'habitation est occupé par deux époux et que le propriétiare a fair jouer la clause résolutoire du bail à l'égard du mari seul pour défaut d'occupation, la femme n'est pas recevable à former tierce opposition à l'ordonnance de référé qui a ordonné l'expulsion de son mari et de tous occupants de son chef."

The Supreme Court did not express any opinion on this issue, perhaps because it thought that it was unnecessary to do so as it was of the view that the appellant's

case that she had an interest that would support her claim for a “tierce” opposition did not appear ex facie of the plaint.

24. But, as Mrs Bundhun pointed out, we are not concerned in these proceedings with the parties’ place of residence. She also drew attention to the fact that article 1421 of the Civil Code had been amended. It can no longer be said that the system of legal community of goods and property is under the administration of the husband alone. As amended by Act 26 of 1999, article 1421 now provides:

> “Chacun des époux a le pouvoir d’administrer seul les biens communs et d’en disposer, sauf à répondre des fautes qui’il aurait commises dans sa gestion. Les actes accomplis sans fraude par un conjoint sont opposables à l’autre.
>
> L’époux qui exerce une profession séparée a seul le pouvoir d’accomplir les actes d’administration et de dispositions nécessaires à celle-ci.
>
> Le tout sous réserve des articles 1422 à 1425.”

She submitted that the position since 1999 has been that, where both spouses are acting jointly in the conduct of their business, one spouse cannot surrender it behind the back of the other. The Board accepts that conduct of that kind is sufficient to show that there was “fraude” within the meaning of the article. The word “fraud” is normally understood, in the context of the common law, to mean a contrivance to deceive. That is why, when the word is used in the sense of something that is done with that intention, the fraudulent act must be distinctly charged and its details specified. But in the context of article 1421 its meaning can extend also to conduct amounting to an abuse of rights. This is what the appellant is alleging here. So it cannot be said, at least at this stage, that she has no right to object to the agreement that the second respondent entered into because he validly represented her interests too when he undertook to vacate the premises.

25. The question then, as indicated in para 19 above, is whether the appellant is able to show that she has an interest as tenant in the premises. The Supreme Court held that it was not possible to say ex facie of the plaint that the tenancy had been transferred solely to the appellant. But the appellant does not need to go that far. She does not need to prove that the second respondent’s interest as tenant was transferred to her. It will be enough for her to establish that it can be inferred from the way the parties acted that, prior to the date of the agreement which she seeks to

have set aside, she had acquired *an* interest as tenant in the premises. Whether she can do this must depend on what inferences can be drawn from the evidence.

Conclusion

26. The Board is satisfied for these reasons that the issues raised by this case cannot be resolved satisfactorily without an inquiry into the facts. The appeal will therefore be allowed and the order by the magistrate dismissing the action will be set aside. The case will be remitted to the District Court for a hearing so that the parties may lead evidence in support of their averments. The first respondent must pay the costs of the proceedings before the Board and in the Supreme Court.

27. The Board is conscious of the fact that on her own averments the appellant has been in occupation of the premises and carrying on business without payment of rent since Marc Piang Sang was replaced by Julien Piang Sang as the first respondent's representative in or about the end of March 2004. Mrs Bundhun said that this was not the appellant's fault, as it was the landlord's responsibility to collect the rent. Article 1247 of the Civil Code provides that, subject to certain exceptions which do not apply here, "le paiement doit être fait au domicile du débiteur." However that may be, the rent for the period since that date remains due. If the appellant fails to prove that she is a tenant of the premises, she will of course be under no obligation to pay rent. But she will be under an obligation to indemnify the first respondent for her use and occupation of the premises. Mrs Bundhun confirmed that the appellant is still trading and that she is able and willing to pay the whole amount of the rent that remains due and has not been paid. The amount outstanding from 1 April 2004 to the date of this judgment is Rs 53,350.

28. Allowing for the fact that another year may be expected to elapse before the District Court is in a position to give judgment, it is a condition of the appellant's case being permitted to go to trial that she pays into the Supreme Court of Mauritius the sum of Rs 60,000 to await the further order of the court, such sum to be paid by banker's draft or in such other manner as the Registrar of the Supreme Court may approve. The first respondent will be at liberty to apply for that sum to be released to it as soon as it has been received by the Registrar.