Yongnam Engineering & Constructions (Pte) Ltd and Another v Yeo Wee Kiong and Others [2006] SGHC 62

Case Number : Suit 90/2005

Decision Date : 11 April 2006

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Leslie Chew SC, Joseph Yeo Swee Teck and Vanessa Yeo (KhattarWong) for the plaintiffs; Tan Kok Quan SC and Ang Wee Tiong (Tan Kok Quan Partnerhsip) for the defendants

Parties : Yongnam Engineering & Constructions (Pte) Ltd; Yongnam Development Pte Ltd — Yeo Wee Kiong; Wong Kok Hoe; Tan Kheng Lee Arnold; Foo Maw Shen

Legal Profession – Duties – Client – Plaintiff agreeing to complete construction works in exchange for developer's promise to transfer one floor in development to it – Paramount mortgagee subsequently refusing to discharge mortgage – Whether defendant solicitors negligent in not advising plaintiffs about existence and significance of mortgage – Whether defendant solicitors negligent in failing to advise plaintiffs of unlikelihood of developer paying off mortgage

11 April 2006 *Judgment reserved.*

Choo Han Teck J:

1 The Ban Hin Leong name, comprising a group of companies, was well known in the property development business. Sometime in 1996, Springleaves Tower Ltd ("Springleaves"), a company in the Ban Hin Leong group of companies, ventured with Liang Court Development Pte Ltd ("Liang Court"), later renamed Somerset Development Pte Ltd (but for the relevant period it was known as Liang Court), to build a 37-floor office building known as Springleaf Tower. Springleaves was responsible for 70% of the development and Liang Court the remaining 30%. The development was financed by the then Overseas Union Bank Limited ("OUB") who held a paramount mortgage over the development. The main contractor for the development was Tuan Kai Construction Pte Ltd ("Tuan Kai"), which was another company in the Ban Hin Leong group. By agreement, the obligation of the joint developers to pay Tuan Kai was apportioned in the ratio of 70:30, that is, the extent of their joint-venture stakes. The first plaintiff was a nominated subcontractor of Tuan Kai in the Springleaf Tower development. There were in fact two contracts, excluding the variation contract known as "the Additional Contract" in the settlement agreement that I shall shortly refer to. I will refer to the two contracts (not including the Additional Contract) collectively as "the subcontract", for convenience. Tuan Kai fell into arrears in progress payments due from February 1998. Consequently, in October 1998 the first plaintiff threatened to stop further work. This threat led to negotiations between the first plaintiff, Tuan Kai, and Springleaves.

2 The upshot of the negotiations was that the first plaintiff would continue its work, and Springleaves would transfer the entire 23rd floor of Springleaf Tower to the first plaintiff or its nominee (which, in the event, was the second plaintiff) in lieu of payment of Tuan Kai's payment obligations under its (Tuan Kai's) subcontract with the first plaintiff. Throughout the material times the first plaintiff's holding company was preparing for a second attempt to list itself in the Stock Exchange of Singapore. The first defendant was the solicitor advising the plaintiff's holding company in respect of the listing exercise. There was an added anxiety on the part of both lawyer and client because the latter had failed in its initial attempt in 1996 because it did not declare the insolvency of one of its subsidiary companies called Yong Yeh Mechanical Engineering Pte Ltd. The first defendant

was also instructed to advise the plaintiffs in the settlement negotiation with Tuan Kai and Springleaves. The second, third, and fourth defendants were partners of the first defendant at the material times but only the first and second defendants had any involvement in the present matter. Price Waterhouse was also advising the plaintiffs in respect of the listing, and the settlement of the Tuan Kai debts was significantly large enough not to be ignored in that exercise, especially when the memory of the previous non-disclosure of an insolvent subsidiary still fresh in everyone's mind. The plaintiffs had also engaged a private accountant, Carrie Cheong, to attend specially to the listing of their holding company.

3 Eventually, a settlement agreement ("the Agreement") was executed on 13 February 1999 between Springleaves, Tuan Kai, and the first plaintiff giving effect to the broad understanding of the parties, namely, that the developers would transfer the 23rd floor of Springleaf Tower to the first plaintiff or its nominee in consideration of the purchase price of $13,964,600 (at the rate of $1,300 per square foot). The Agreement provided that the first plaintiff be entitled to set off money owing by Tuan Kai in payment of the purchase price of the 23rd floor. At the time the contract was executed, the contract sum due to the first plaintiff and payable by Tuan Kai was $12,883,100. At that time, Tuan Kai had made payment of $4,893,527.09 with a further sum of $2,875,317.56 due and owing. The aggregate debt, if the contract was fully performed, thus amounted to $7,989,572.91. Hence, throughout the proceedings before me, counsel and the witnesses referred to these monies in rounded figures, that is to say, that the purchase price for the 23rd floor was about $14m; the aggregate debt due from Tuan Kai was about $8m and the amount paid was about $4m. There were two other relevant figures in the Agreement, namely, the sum of $3,031,000 for "additional contracts" and $2,730,112.20 being what the parties called the "Compensatory Credit". The total of these two sums is $5,761,112.20, referred to at trial as the rounded figure of $5m, representing the difference between the purchase price and the balance amount under the subcontract and payable to the first plaintiff by Tuan Kai. Under the Agreement, Springleaves was substituted in place of Tuan Kai in respect of the subcontract previously entered between Tuan Kai and the first plaintiff.

4 Since the Agreement envisaged payment by means of a set-off, the standard sale and purchase agreement would have to be amended to reflect the change, and, consequently, the Controller of Housing's approval was required. His approval was given on 31 March 1999 and on the same day the amended sale and purchase agreement ("S&P Agreement") was executed between Springleaves for and on behalf of itself and Liang Court, and the second plaintiff. Under the Agreement, the first plaintiff had to complete its work under the subcontract by 30 June 1999. In the event, it did so. Hence, in due course it called upon the performance of the developers under the S&P Agreement. That could not be done because OUB who had the paramount mortgage of the development did not agree to discharge the mortgage in respect of the 23rd floor because it had not been paid. The second plaintiff sued Springleaves and Liang Court for breach of the S&P Agreement. Default judgment was entered against Springleaves who, by which time, had become insolvent. On 1 December 2003, the High Court dismissed the second plaintiff's claim against Liang Court principally on the grounds that Liang Court had no substantive or beneficial interests in the 23rd floor, and was not concerned with the Agreement between the plaintiffs and Springleaves. The Court of Appeal dismissed the second plaintiff's appeal on 16 August 2004. The plaintiffs then commenced the present action based on negligence against the four erstwhile partners of the firm of Yeo Wee Kiong & Partners that represented the plaintiffs in the above said transactions. The crux of the plaintiffs' claim was based on the evidence of Seow Soon Yong, a director of both plaintiff companies. The thrust of the plaintiffs' claim was that had their lawyers done their work properly, the plaintiffs would have obtained the title to the 23rd floor, alternatively, they would not have entered into the Agreement had they been advised about OUB's paramount mortgage. The first point in itself was too vague to be of any use. So it was really the second point that was central to the plaintiffs' claim in negligence.

5 The question then, is what ought the solicitors have advised? There was no doubt that the plaintiffs were aware that Springleaves and Liang Court had mortgaged the development to OUB to finance the development. What was the consequence of executing a contract to purchase any part of the development? People who are familiar with such transactions would immediately know that the mortgage must be discharged if the purchaser is to get title to the property. I think that I am on safe ground in thinking that the first and second defendants would know this, and so would Seow Soon Yong. But the law of negligence requires a more objective test than that. On this narrow point, the evidence showed that in the discussions between the solicitors and client, the fact of OUB's paramount mortgage and the necessity of getting it discharged were matters that had been brought to everyone's attention, that is, by the lawyers to the client. In the attendance note dated 15 December 1998 written by a lawyer from the defendants' firm, the following was recorded:

> Can developer take assignment of the debt? Even then the bank still has paramount charge over the development. BHL don't think the bank will agree to release the mortgage over the floor.

The persons who attended this meeting were, the first defendant, his assistant who recorded the note, one Richard Lim who was the managing director of the Ban Hin Leong group of companies, and Seow Soon Yong. The "BHL", in the note was a reference to Richard Lim. The first defendant testified that BHL's scepticism related to his proposal that the mortgage be discharged "up front", that is, before the S&P Agreement was signed. In his evidence, Seow testified that the plaintiffs had not yet decided "whether or not to accept the proposed settlement of title to a floor in exchange for carrying out the structural steel works". The explicit instructions to draft the settlement agreement along those terms might not have been given till 30 December 1998 as Seow Soon Yong testified, but this meeting of 15 December 1998 indicated that the idea was already formed and the parties were considering some of the details that might need to be firmed up. It was apparent from this meeting that the first defendant had brought his client's attention to the existence of the bank's paramount mortgage. Bringing the existence of the mortgage to the client's attention would not be of much use unless the significance of its existence was explained. The significance of the paramount mortgage in this case arose from the nature of the settlement terms, and so it would be important to consider these terms in some detail.

6 The situation by that time was as follows. Tuan Kai was clearly unable to make further progress payments to the first plaintiff. The first plaintiff then looked to Springleaves as Tuan Kai's sister company to take over the existing debt and for the assurance of future payments when they become due. It seemed, certainly on hindsight, that Springleaves were not so financially secure either otherwise the natural step was for it to make payment directly to the first defendant. So although it was unable to make cash payment, it had assets. It had its share of the 37-storey building that was being constructed. Hence, it was suggested (there was no clear evidence as to who suggested it) that Springleaves pay off all of Tuan Kai's debts to the first plaintiff by transferring the 23rd floor to it (or its nominee). As a straightforward barter this exchange would be unproblematic if both parties were happy with the deal. But it was not really a straightforward barter because OUB had a paramount mortgage. That meant, so far as the bank was concerned, unless it was paid, it would not release the security of the mortgage. In order to pay the bank, the mortgagor (in this case that would be Springleaves and Liang Court) had to sell the building or any part of it at market value and make a proportionate payment to the bank accordingly. That would be the least the mortgagor had to do. That meant that, first, a monetary value of the 23rd floor had to be calculated. Secondly, the bank must be persuaded to accept either payment of that sum or some assurance that that sum would be paid, and agree to release the mortgage in respect of the 23rd floor in exchange.

7 There was no market value of the property at that time mainly because it was a new building yet to be marketed. However, the bank and Liang Court were adamantly not willing to place the value

at less than $1,300 per square foot. This created a problem for the negotiating parties because the plaintiffs (to be more specific, the Yongnam group) were adamant in not paying more than $1,050 per square foot. As a result, the negotiation turned to other options in filling the difference between $1,300 and $1,050. The first defendant testified that he impressed upon the parties that the solution had to be genuine to be legally effective. After discussing various options and permutations, the parties agreed to make up that difference by means of raising variation works orders, but they could only make up $3,031,000 worth of such works since they could not falsely create works orders. They then agreed on a formula of the Compensatory Credit to cover the balance. The Compensatory Credit was effectively a discount but it would not appear as such in the S&P Agreement, and OUB would not therefore have any objection. It was then left to Springleaves to determine how it would record the discount in its books. These solutions merely resolved the problem of the plaintiffs' unwillingness to pay the price set by OUB. The solution did not naturally mean that OUB was or would be willing to release the mortgage on those terms – especially since Springleaves did not want to show the settlement agreement to OUB. Mr Leslie Chew SC, counsel for the plaintiffs cited the case of *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co* [1987] 1 WLR 916 ("*County Personnel*"), and submitted that if a solicitor had a legal obligation to alert his client of any unusual clauses in a lease as in *County Personnel*, the defendants here ought similarly warn the plaintiffs of the inherent dangers in the Agreement.

8 It appeared that about that time, that is, shortly after 20 January 1999, the first defendant went on leave and work on the Yongnam matters, which included the listing and the Agreement, was passed to the second defendant in the absence of the first defendant. It was still not clear how OUB was to be paid because unless that was done, OUB was unlikely to release the mortgage on the 23rd floor and that would not be of any use to the plaintiffs. In fact, it could be disastrous as the first defendant explained to the first plaintiff. First, he pointed out that if Tuan Kai and Springleaves became insolvent, the liquidator could interpret the discount as undue preference and apply to set the Agreement aside. That meant that the plaintiffs would have to pay the full price for the 23rd floor when it had not received any payment for its work. The first defendant also saw the hidden danger that the difference between the purchase price ($13,964,600) and the amount the plaintiffs were willing to pay ($11,234,487.80) was not the only money at risk. The amount of debt unpaid at the time the Agreement was signed might itself be the subject of an undue preference action. That advice had been set out in a letter dated 26 January 1999 by the second defendant to the first plaintiff. In the circumstances, Springleaves and the first plaintiff agreed that on the terms as set out above, Springleaves would undertake to procure the release of the mortgage from OUB. Once again it has to be asked, how did Springleaves propose to do that without paying? It is not known whether that question was asked, but if it was, there was no evidence as to what the answer was. Why was this so?

9 It must be obvious that if Springleaves did not pay OUB it must somehow obtain the agreement of OUB either to accept some sort of barter, or for some other consideration or reason, to release the mortgage without receiving payment. Generally, it is unlikely that a mortgagee, in such circumstances, would accede to propositions of that nature. But it is not inconceivable; and I cannot put it any higher than that. So the question is whether the first and second defendants ought to have reasonably advised the first plaintiff specifically in those terms. On the evidence, the record shows that the first and second defendants had specifically advised the first plaintiff that OUB had a paramount mortgage over the property; that unless they consented or released the mortgage in respect of the 23rd floor the first plaintiff or its nominee was not going to get title. Those were not the exact words but the advice was clear enough. In my view, it would be wrong and unfair to assume that an experienced contractor and businessman, such as Seow Soon Yong was, would not have understood the import of an advice that the bank had a paramount mortgage over the property, and that that mortgage must be discharged. It was recorded at the meeting of 15 January 1999 that

"[Springleaves] to get the bank to release the mortgage when works are completed rather than at completion of the building". That was because the first plaintiff's work was mainly structural and would be completed earlier than the rest of the construction. More specifically, the defendants' minutes of a meeting held on 29 December 1998 recorded that, "It was also noted at the meeting that as the bank has to release the paramount mortgage in order for [the first plaintiff] to get good title to the floor, the settlement should also be approved by the bank." *County Personnel* was thus of little assistance to the plaintiff. I find that the advice rendered by the first and second defendants to the plaintiffs was sufficiently clear and adequate. I do not think that the law expects solicitors to render perfect advice – if for no better grounds than the fact that then one would labour impossibly to find what perfection might mean in such cases.

10 The defendants' advice was not followed because Springleaves did not wish to show the settlement agreement to OUB, and it appeared that it must have persuaded the first plaintiff to agree because the Agreement was not shown to the bank. Seow Soon Yong's evidence in respect of the advice that the paramount mortgage was concerned, was that he believed that their solicitors would have taken care of that in drafting the Agreement. By that I understood his evidence to mean that the Agreement ought to have been drafted in such a way that OUB would be contractually bound to release the mortgage. The statement of claim averred that the "First Plaintiff, in the belief that the Settlement Agreement prepared by the Defendants would ensure that the First Plaintiff or its nominee would receive a good, clear and unencumbered title to the 23rd floor upon completion of the remaining work required under, inter alia, their subcontract dated 9 June 1997 with Tuan Kai, duly executed the same on or about 13 February 1999".

11 Mr Chew also argued that the defendants were not justified in expressing no opinion "when it should have been plain to them that agreeing to [Springleaves'] proposal was unwise and exposed the First Plaintiff to the danger of non payment which was the danger that the First Plaintiff [was] seeking to avoid in the first place". Hence, counsel submitted, the defendants could not aver that it was clear that the only way to obtain a release of the paramount mortgage was by making payment to OUB. Counsel referred to Danckwerts LJ in *Neushul v Mellish & Harkavy* [1967] EGD 418 ("*Neushul*"), in support. Danckwerts LJ held at 420 that:

> [A] solicitor might undertake to advise on a business matter, and, if he did so, owed a duty to give competent advice. It was often difficult to disentangle legal from business advice, and a solicitor carrying out a transaction for a client was not justified in expressing no opinion when plainly the client was rushing into an unwise, not to say disastrous, adventure.

I agree completely with the passage from Danckwerts LJ, but in applying that principle, I think that the comment from the dissenting judgment of Sellers LJ ought to be considered as well. It will be noted that *Neushul* concerned a trickster's deception of a mature woman, leading her to mortgage her home and losing a large sum of money to him. Mrs Neushul's solicitor was found to have breached his duty of care as solicitor to the woman for his professional services in the mortgage transaction. Sellers LJ was of the opinion (at 419) that:

> If a woman of 47 thought that she could gain a husband and security by mortgaging her house up to the hilt, [I] was concerned to inquire what ground, human or professional, a man could be said to be required to deter her, if indeed deterrence had been possible. It was an encroachment on personal independence.

In the present case, I find that the first plaintiff entered into the Agreement on the terms it did because it was hopeful that the reputable Ban Hin Leong group would not fall to bankruptcy. That faith was held by Seow Soon Yong and was good enough for the plaintiffs. A businessman's intuition

for profit does not differ very much from a 47-year-old woman's intuition for security – generally reliable, occasionally disastrous. And it would be the businessman, not the solicitor, who has to make the call once proper advice had been rendered, as I so find in this case.

12 The above expectation, or belief as the plaintiffs pleaded, that the Agreement would ensure a good title to the 23rd floor cannot give rise to a cause of action whether in contract or in tort unless the defendants as the plaintiffs' solicitors had by their act or omission reasonably led the latter to form that belief. It is unusual for any solicitor to give such a warranty as this. If this was an exceptional case, evidence must be adduced to provide the necessary and essential details. The evidence did not support any such detail or cause. In the absence of such evidence, the contract itself became an important document because the knowledge and intention of the parties and the solicitors' work could be understood from what it had provided. Clause 7.5 of the Agreement provided in explicit terms as follows:

> The parties acknowledge that the Bank has a paramount mortgage (the "Paramount Mortgage") over the Springleaf Tower development, including the Floor, and [Springleaves] hereby agrees and undertakes to [the first plaintiff] that [Springleaves] shall procure that the Bank shall release its mortgage over the Floor on or before the Agreed Date.

The meaning in the above passage quoted was clear: it meant that the plaintiffs were not going to get a clean title until OUB had released the mortgage, and that the duty of getting OUB to do that lay with Springleaves. So, on the wording of the Agreement, the plaintiffs could not be assured that the terms of the Agreement itself would be sufficient to ensure that the second plaintiff obtained an unencumbered title to the 23rd floor. Neither could it be inferred that a reasonable man in Seow Soon Yong's situation would have understood cl 7.5 in any other way.

13 Seow Soon Yong's evidence comprised different ways of saying that the defendants as the legal advisors knew what the plaintiffs wanted and ought to have ensured that when the first plaintiff's work was completed (which it was) it would obtain an unencumbered title to the 23rd floor. In its most direct form, the witness's point was that as the client, the plaintiffs were not concerned with the legal niceties, they were only interested in getting the 23rd floor; the defendants were engaged to do just that – get them the 23rd floor. The following particulars at paras 47.6 and 48.6 of the statement of claim exemplified the point:

> Failing to draft the necessary documentation such that the paramount mortgage over the 23rd floor would be discharged upon completion of the work by the First Plaintiff [.]

The plaintiffs cannot succeed on this point without showing that they had given specific instructions to the defendants that the plaintiffs would be given an unencumbered 23rd floor when the first plaintiff had completed its work, and that the first and second defendants understood those instructions and advised that that would be so. The evidence showed that the case was far from being so simple. Given the account of the circumstances, the true nature of the plaintiffs' grievance and claim was, as Seow Soon Yong said under cross-examination, that he (Seow Soon Yong) would not have agreed to sign the Agreement had he been advised that the bank would not have released the mortgage. The words were not entirely clear, but I take them to mean that if the defendants had advised him that the bank would not have discharged the mortgage he would not have approved and signed the Agreement with Springleaves. Distilling the evidence, I think it fair to summarise Seow Soon Yong's evidence as follows, namely, that the defendants had a legal duty not only to tell him that the bank had a paramount mortgage over the property and unless that was discharged, his company was not going to get a clean title to the 23rd floor, but also that they (the defendants) had further, ought to have advised him that it was so unlikely an event, because Springleaves could not

pay the bank, that the plaintiffs were best advised not to execute the Agreement on those terms.

14 The above presupposes two facts. First that that was indeed the plaintiffs' allegation of negligence and breach of contract in their pleadings; and secondly, that the defendants knew that Springleaves could not pay the bank. On the first point, it will be seen that the neither the evidence of Seow Soon Yong nor that of any other witness supported the 13 particulars of breach of duty in para 47 (which were identical to the particulars of negligence under para 48) of the statement of claim. I find that the evidence was congruous with the pleadings.

15 However, on the assumption that the evidence was sufficiently within the matters pleaded, the question remained as to whether the defendants owed a duty to their clients to warn them not to execute the Agreement because OUB was not likely to release the mortgage. A strong argument might have been made out had it been proved that the defendants knew that OUB was not likely to do so. A fact as specific as that ought to be asserted and proved, but it was not. The inability of the developer to pay was the main, if not the only, reason that OUB would not release the mortgage. But the defendants had stated and advised the first plaintiff explicitly in their letter of 26 January 1999 that they did not know Springleaves' financial situation. They went further and advised that since it was difficult to verify if Springleaves was financially able to pay OUB, the first plaintiff ought to obtain a director's statutory declaration of financial solvency, and a personal guarantee from the directors of Springleaves. Furthermore, in the circumstances prevailing at the time, without a settlement agreement to take care of the payments due from Tuan Kai, the Yongnam group might have accumulated a huge deficit in its balance sheet that could jeopardise its listing effort. Seow Soon Yong was then in constant contact with Richard Lim of Ban Hin Leong, and, was confident that Ban Hin Leong could not afford to let Tuan Kai or Springleaves become insolvent. According to the first defendant, Seow Soon Yong was confident that Ban Hin Leong would ultimately bail everyone out. There was one other factor that was relevant in the understanding of the plaintiffs' conduct; and that was the discounted price that Springleaves agreed to let the second plaintiff acquire the 23rd floor. It will be recalled that OUB wanted to maintain the market price at $1,300 per square foot. Under the Agreement, the parties agreed to fix the price between themselves at $1,050 per square foot. The evidence also showed that this special deal was not to be made known to OUB. The relevance of this was that if Ban Hin Leong would eventually keep Springleaves from collapsing financially, and OUB was able to maintain the market price at $1,300 per square foot, the plaintiffs would have made a huge gain. I am thus of the view that Seow Soon Yong believed that the balance of probabilities laid in the plaintiffs' favour so that he did not heed the advice of the first defendant to check out Springleaves' financial status, or else get a personal guarantee from its directors. Seow Soon Yong might not be faulted for finding the financial prospects too tempting, but it was wrong to hold the plaintiffs' solicitors responsible for the adverse outcome on the evidence that I have heard and the documents that were drawn to my attention in the trial.

16 For the reasons above, the plaintiffs' claim is dismissed. Costs to follow the event and to be taxed if not agreed.