Nava Bharat (Singapore) Pte Ltd *v* Straits Law Practice LLC and another and another appeal [2016] SGCA 12

Case Number	: Civil Appeal Nos 129 and 133 of 2015
Decision Date	: 22 February 2016
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Steven Chong J
Counsel Name(s)	: Francis Xavier, SC, Ang Tze Phern and Alina Chia (Rajah & Tann Singapore LLP) (instructed counsel), Liew Teck Huat, and Jason Yeo (Global Law Alliance LLC) for the appellant in CA 129/2015 and the respondent in CA 133/2015; and Cavinder Bull, SC, Chia Voon Jiet, Darryl Ho and Yeo Wen An Jeremy (Drew & Napier LLC) for the respondents in CA 129/2015 and the appellants in CA 133/2015.
Parties	: NAVA BHARAT (SINGAPORE) PTE LTD — STRAITS LAW PRACTICE LLC — M RAJARAM

Contract – Breach

Tort – Negligence – Professional Negligence

[LawNet Editorial Note: These were appeals from the decision of the High Court in [2015] SGHC 146.]

22 February 2016

Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

1 Civil Appeal No 129 of 2015 ("CA 129/2015") and Civil Appeal No 133 of 2015 ("CA 133/2015") arise from a professional negligence suit brought by the plaintiff, Nava Bharat (Singapore) Pte Ltd ("the plaintiff"), against the defendant solicitors, Straits Law Practice LLC and its senior director, M Rajaram ("the defendants"). Following a trial that lasted more than 40 days, the Judge delivered a 327 page judgment, dismissing the plaintiff's claim. The decision of the High Court is published as *Nava Bharat (Singapore) Pte Ltd v Straits Law Practice LLC and another and another suit* [2015] SGHC 146.

2 The Judge was presented with a wide array of issues, but in the appeals before us, only a single issue remains, and on that issue, both parties have appealed. The sole issue in question pertains to an oral undertaking that was furnished on 19 December 2008. The context of the undertaking may be stated briefly. The defendants were engaged as the plaintiff's solicitors in a transaction concerning the plaintiff's acquisition of an interest in a coal mine in Indonesia. In the course of negotiating and finalising the deal, an issue arose in respect of a lend-use permit that had to be obtained from the Indonesian Ministry of Forestry before mining could commence ("the Forestry Licence"). The plaintiff's Indonesian counsel made it clear that the Forestry Licence was an essential prerequisite to the deal. The counterparty to the transaction, one Mr Dicky Tan, maintained that no licence was required and in fact that he was and had already been mining coal without such a licence. This came to a head at a meeting on 19 December 2008. Faced with an impasse, and the prospect of the deal being scuppered, Mr Dicky Tan orally undertook to obtain the Forestry Licence, if this should prove necessary.

3 It was undisputed that at the meeting on 19 December 2008, Mr Ashwin Devineni, the plaintiff's main representative, was aware that his Indonesian counsel and business team had advised that a Forestry Licence would be necessary if the deal was to proceed. Shortly after the meeting, as Mr Rajaram testified, he reminded Mr Devineni that without the Forestry Licence, the plaintiff could not proceed with the deal. We are therefore satisfied that as matters stood, as far as the plaintiff was concerned, the deal could and would only go forward if the Forestry Licence was in fact procured. A few days later, on 23 December 2008, in correspondence exchanged between Mr Rajaram and Mr Dicky Tan's lawyers, it was acknowledged in writing by the latter that Mr Dicky Tan was to apply for and obtain the Forestry Licence from the relevant government department in Indonesia, if this was found to be necessary.

4 As things transpired, the parties went forward with the transaction on that basis. Initial completion of the transaction took place on 22 and 28 January 2009. Pursuant to the terms in the initial completion documents, on 28 January 2009, the plaintiff released a loan of US$3m to Mr Dicky Tan. Indeed, before us, it is this payment of US$3m that lies at the heart of the plaintiff's complaint.

5 Counsel for the plaintiff, Mr Francis Xavier, SC, contended that prior to the plaintiff proceeding with initial completion and committing further sums of money, Mr Rajaram ought to have properly advised Mr Devineni on certain specific matters arising directly out of the oral undertaking. Specifically, it was said that Mr Rajaram should have obtained advice from the Indonesian lawyers primarily on the question of whether and how it would be possible to take proceedings in Indonesia to enforce the oral undertaking.

6 Although the transaction was one that transcended borders, notably, those of Singapore and Indonesia, we are satisfied that Mr Rajaram was the solicitor with overall carriage and charge of the matter. We emphasise, however, that notwithstanding this observation, the precise duties that befall solicitors are always intensely fact sensitive. In this case, we accept in principle that a lead solicitor for a cross border commercial transaction in Mr Rajaram's position may have a duty to consider issues such as whether the oral undertaking is enforceable or not, and how it would be enforced as a practical matter. Even if he was not in a position to personally give advice on Indonesian law, he may well be under a duty to ensure that his client has been properly advised by the foreign counsel working on the transaction.

7 Having said that, with great respect to the Judge, we cannot agree with the finding that Mr Rajaram had *breached* his duty to advise on the legal implications of proceeding with the transaction based on Mr Dicky Tan's oral undertaking to obtain the Forestry Licence. We make a few observations in this regard.

8 First, to say that Mr Rajaram had breached his duty to advise on the legal implications of proceeding with the Transaction on the basis of the oral undertaking is in our judgment much too broad and general. Greater specificity as to what the Judge found Mr Rajaram *should have advised on* is needed. For instance, the evidence shows that Mr Rajaram had taken the step of having the oral undertaking recorded in writing. Therefore, one implication of proceeding on an oral undertaking, namely, that a dispute on its existence or terms might ensue, had been dealt with. Moreover, Mr Rajaram had told Mr Ashwin after the meeting that if the undertaking were not carried out, the transaction would fail. The short point we make here is that it was necessary to frame the precise duty that Mr Rajaram was said to be required to discharge before attention could be directed at whether he did or did not discharge such a duty. It was possible to frame the relevant duty in such specific terms, for instance, as we have done at [5] above; namely that in the present circumstances, Mr Rajaram should have obtained advice from the Indonesian lawyers primarily on the question of whether and how it would be possible to take proceedings in Indonesia to enforce the oral

undertaking.

9 But this leads us to the second point. The case that was run by the plaintiff at the trial below was that no oral undertaking had been given at the meeting on 19 December 2008. We digress to observe that this seems odd to us because the substance of the oral undertaking was clearly mentioned in a document sent by Mr Rajaram's firm to Mr Dicky Tan's solicitors dated 23 December 2008 regarding the state of legal due diligence, and was confirmed by Mr Dicky Tan's solicitor in the same document (see [3] above). But in any case, the Judge found against the plaintiff on this issue and the plaintiff now accepts that such an undertaking was given at the meeting.

10 However, because the heart of the battle on this issue in the court below centred on *whether the undertaking had been given at all*, rather than on *what specific steps Mr Rajaram ought to have taken when faced with such an undertaking*, the case that Mr Xavier put before us, namely that Mr Rajaram ought to have addressed his mind to and then advised Mr Devineni on the specific issues arising from the undertaking as we have articulated above, was not squarely put to Mr Rajaram in the proceedings below. This meant that the precise nature of the duty that Mr Rajaram was said to be under, and consequently, the precise communications that did or did not take place between Mr Rajaram and his Indonesian counterparts in discharging any such duty with respect of the oral undertaking, were not explored in any meaningful way at trial. In these circumstances, we consider that it would not have been open to the Judge, even if he had framed the duty more specifically, to make a finding that Mr Rajaram had breached his duty to advise on the oral undertaking in the manner and to the extent we have outlined above. Nor, obviously, is it open to us to do so. For these reasons, we allow the defendants' appeal in CA 133/2015.

11 This is also sufficient to dispose of CA 129/2015, but we would make a further point. The claim being pursued today is for the recovery of the loan of US$3m that was released to Mr Dicky Tan on 28 January 2009 (see [4] above). This loan, however, was secured by a share pledge agreement which was entered into for the *precise purpose* of giving the plaintiff a pledge or charge over Mr Dicky Tan's shares in the Indonesian company owning the mine. There is no suggestion before us that the plaintiff's interests were not adequately looked after by the defendants in relation to the entering into the share pledge agreement. That was not the case the plaintiff ran either in the court below, or before us.

12 We agree with the Judge's observation that at all material times, the plaintiff was keen to proceed with the deal. When it was time to make the payment of US$3m before the deal was finally completed, the plaintiff was willing to do so, on the basis of the security interest which it thought it had acquired under the share pledge agreement. In our judgment, this diminishes any causative force that any alleged breach of duty in relation to the oral undertaking might have had in relation to the plaintiff's losses. Based on the evidence before us, we are satisfied that the plaintiff agreed to make the loan and to release the sum of US$3m because it considered that it had adequate security for that loan in the share pledge agreement.

13 For these reasons as well, we dismiss the plaintiff's appeal in CA 129/2015. The defendants are to have one set of costs of the appeal to be taxed, if not agreed.