Cheng William *v* Allister Lim & Thrumurgan and another and another appeal [2015] SGCA 15

Case Number : Civil Appeal Nos 148 and 152 of 2014

Decision Date : 16 March 2015

Tribunal/Court : Court of Appeal

Coram : Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Quentin Loh J

Counsel Name(s) : Melvin Chan Kah Keen and Rachel Tan Pei Qian (TSMP Law Corporation) for the appellant in CA 148/2014 and the fourth respondent in CA 152/2014; Christopher Anand s/o Daniel, Ganga d/o Avadiar and Foo Li Chuan Arlene (Advocatus Law LLP) for the respondents in CA 148/2014 and the appellants in CA 152/2014; Thomas Lei and Chua Lyn Ern (Lawrence Chua & Partners) for the first to third respondents in CA 152/2014; Fifth respondent in person; Sixth respondent absent.

Parties : Cheng William — Allister Lim & Thrumurgan and another

Tort – Negligence – Contributory negligence

Damages – Apportionment

16 March 2015 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

1 These two appeals concern a businessman who bought a shophouse ("the Shophouse") in his wife's and son's names, thinking that it had a remaining lease of 62 years. Some weeks after the sale and purchase of the property had been completed, he discovered that there were only 17 years left on the lease. The businessman and his family then sued their conveyancing solicitor in negligence for the reduced value of the Shophouse. They say that their solicitor failed to inform them of the length of the remaining lease. The solicitor in turn pinned the blame on the seller who misrepresented the position; the family's property agent who passed on that misrepresentation and so misled the family; and indeed on the businessman and his family for not having mentioned at any time their understanding of the length of the remaining lease or that such a representation as to the length of the remaining lease had been made to them and was being relied on by them.

Background Facts

2 The background facts are set out in full in the High Court judge's ("the Judge") judgment in *Su Ah Tee and others v Allister Lim and Thrumurgan (sued as a firm) and another (William Cheng and others, third parties)* [2014] SGHC 159 ("the Judgment"). We do not propose to repeat them in their entirety, but will highlight the salient facts that are germane to these appeals.

3 Mr Su Ah Tee ("Su"), a businessman, paid $900,000 for the Shophouse, which was located at Block 63 Kallang Bahru #01-423 Singapore 330063. The seller of the Shophouse was Mr William Cheng ("Cheng"). Su's conveyancing solicitor was Mr Allister Lim ("Lim") of M/s Allister Lim & Thrumurgan ("ALT"). Lim qualified as a solicitor in 1999 and has practised conveyancing law since 2004. He had acted for Su from time to time from December 2010 in the purchase of some other shophouses. Su's property agent, Ng Sing ("Ng") and Cheng's property agent, Mr Sam Oh Seng Lee ("Sam") jointly

brokered the sale.

4 After the sale of the Shophouse was completed, Su realised that the Shophouse had a remaining lease of just 17 years. He, his wife and their son ("the Plaintiffs") filed a professional negligence suit ("the Main Action") against Lim and ALT ("the Defendants") in the High Court. The Defendants then brought third party proceedings against Cheng, Ng and Ng's alleged employer SGR Property Pte Ltd ("SGR Property") (collectively "the Third Parties"), seeking a contribution of damages payable under s 15(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA"), which reads:

> **Entitlement to contribution**
>
> **15.**—(1) … [A]ny person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

5 The Judge entered judgment in default against SGR Property for failing to enter appearance (the Judgment at [225]–[227]). She also ruled against the Defendants, Cheng and Ng (the Judgment at [115]–[116], [194]–[195] and [220]–[223]).

6 The Judge found that Cheng made a fraudulent misrepresentation to both Sam and Ng that the Shophouse had a remaining lease of 62 years, who then repeated this misrepresentation to Su. At trial, Cheng argued that he did not make any misrepresentation, and that he in fact handed Ng an option to purchase that stated that the Shophouse had a remaining lease of 17 years. The Judge found that this option to purchase was in fact a forgery and accordingly rejected this argument (the Judgment at [43]–[46] and [192]–[196]). Ng was also found liable for negligent misrepresentation (the Judgment at [220]–[223]).

7 The Judge also held the Defendants liable for negligence in failing to inform Su that the Shophouse had a remaining lease of only 17 years (the Judgment at [69(f)], [91]–[100]). Lim did two title searches on the Shophouse, which showed that the Shophouse had a remaining lease of only 17 years (the Judgment at [69(f)] and [92]–[93]). But he did not give Su either of these title searches (the Judgment at [93]). The Judge also found that Su never informed the Defendants that he had been told by the vendor through Ng and Sam that he was purchasing a shophouse with 62 years remaining on its lease (the Judgment at [69(d)]). Even so, the Judge held that in property transactions, the duration of the term of the lease was of such vital importance that conveyancing solicitors were expected to keep their clients informed of such information as the number of years left on the lease (the Judgment at [98]–[100]).

8 Having found the Defendants as well as the Third Parties variously liable, the Judge proceeded to apportion liability between them. She ordered Cheng to bear 50% of the overall liability for damages, the Defendants to bear 45%, and Ng to bear the remaining 5% (the Judgment at [233]). She also ordered full costs in the Main Action in the Plaintiffs' favour (the Judgment at [234]) and full costs in the third party proceedings in the Defendants' favour (the Judgment at [235]–[236]).

9 Dissatisfied, both Cheng and the Defendants appealed. Cheng filed Civil Appeal No 148 of 2014 on 8 September 2014 ("CA 148/2014"). The Defendants filed Civil Appeal No 152 of 2014 on 10 September 2014 ("CA 152/2014").

Arguments on appeal

10 On appeal, both Cheng and the Defendants argue that they are not liable and, in any event,

that the respective proportions of the damages awarded against them are excessive. In CA 152/2014, the Defendants also take issue with the order on costs. The Defendants say that they should not be made to bear the Plaintiffs' costs in the Main Action on their own as they had succeeded in the third party proceedings; the Third Parties ought therefore to contribute towards these costs. The Defendants also say that the Judge should have ordered SGR Property to indemnify the Defendants at least in relation to Ng's portion of damages payable on the basis that SGR Property is Ng's employer.

11 Ng appeared in person. He accepts the Judge's finding that he is liable for negligent misrepresentation, but wishes to pay no more than 5% of the damages. SGR Property did not appear in the appeal and has not applied to set aside the judgment in default that was entered against it.

Our decision

Overview

12 We do not accept the arguments made by Cheng and the Defendants that they are not liable for fraudulent misrepresentation and negligence respectively. In our judgment, the Judge rightly held them liable and we generally agree with the detailed reasons she gave in the Judgment, in which she painstakingly analysed the evidence and the law. We agree with much of what she said and, to that extent, we do not repeat the basis or the reasons set out in the Judgment. However, we respectfully disagree with three aspects of her decision:

(a) First, the Judge made no finding of contributory negligence on Su's part. In our judgment, such a finding should have been made having regard to the evidence, the facts that were found, and the pleadings. Su's case was that a fraudulent representation – that the Shophouse had a remaining lease of 62 years – was made to him and he then acted upon it. An essential element of such a case is reliance – that the representee had taken a certain course of action *because* the representation had been made to him and he believed it to be true. However, the Judge eventually found that Su had never informed either Lim or ALT of the fact of this representation that he said he had (and indeed was found to have) relied on. Given these three factors – the legal significance of the element of reliance in an action for misrepresentation and the two factual aspects, namely, Su's awareness of the importance of the representation, as well as his failure to inform the Defendants about it – we find he should be held contributorily negligent;

(b) Second, we consider that the Judge's apportionment of liability between Cheng, the Defendants, and Ng should be adjusted to reflect the greater degree of culpability on Cheng's part in making a *fraudulent* misrepresentation; and

(c) Third, we have also found it necessary to revise aspects of the Judge's order on costs.

In this judgment, we confine ourselves to these points.

Contributory negligence

General principles

13 Contributory negligence is a partial defence that reduces the quantum of damages payable to plaintiffs if they fail to safeguard their own interests (*Froom v Butcher* [1976] QB 286 at 291, approved in *Parno v SC Marine Pte Ltd* [1999] 3 SLR(R) 377 ("*Parno*") at [59]; *Astley v Austrust Ltd* (1999) 197 CLR 1 at [30], approved in *PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd* [2007] 4 SLR 513 at [119]). It is regarded as a salutary power to register disapproval of

the plaintiffs' conduct by a reduction of damages (Glanville Williams, *Joint Torts and Contributory Negligence* (Stevens & Sons Ltd, 1951) ("*Joint Torts and Contributory Negligence*") at p 353). It used to be the case at common law that contributory negligence operated as a complete defence against a claim in damages, *ie* if the damage suffered by the plaintiffs was partly due to the plaintiffs' failure to take reasonable care, the plaintiffs could not recover any damages at all from the defendant (*Butterfield v Forrester* (1809) 11 East 60, *per* Ellenborough CJ; *Davies v Mann* (1842) 10 M & W 546). This is no longer so following statutory intervention – England passed the Law Reform (Contributory Negligence) Act 1945 (c 28) and Singapore followed suit by enacting the Contributory Negligence and Personal Injuries Act (Cap 54, 2002 Rev Ed) ("Contributory Negligence Act"). The relevant provision in the Contributory Negligence Act is s 3, which reads:

> **Apportionment of liability in case of contributory negligence**
>
> **3.**—(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.
>
> (2) Subsection (1) shall not operate to defeat any defence arising under a contract.
>
> (3) Where any contract or written law providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant under subsection (1) shall not exceed the maximum limit so applicable.
>
> …

14 As is apparent from s 3(1), both the fault of the claimant and the fault of the defendant are relevant. The term "fault" is defined under s 2 of the Contributory Negligence Act as follows:

> "fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

15 It is clear from this that the definition of "fault" is a broad one, and that it is not just an "act" that is caught; an omission also would fall within the ambit of "fault".

16 The defence of contributory negligence must be specifically pleaded under Order 18 r 8 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). As with virtually all pleading requirements, the underlying purpose of this requirement is to ensure that the other side is not taken by surprise (*Rajendran a/l Palany v Dril-Quip Asia Pacific Pte Ltd* [2001] 1 SLR(R) 887 at [17]–[19], approving *Fookes v Slaytor* [1979] 1 All ER 137).

Can a failure on a client's part to inform his solicitor of information amount to contributory negligence?

17 In our judgment, a client *can* be held contributorily negligent for omitting to inform his solicitor of material information and that such an omission can fall within the ambit of "fault" under the Contributory Negligence Act.

18 We recognise that a solicitor is under a duty to elicit information from a client before acting and that there are concerns that a finding of contributory negligence may derogate from this duty on the

part of solicitor (Richard Scott Novak, "Attorney Malpractice: Restricting the Availability of the Client Contributory Negligence Defense" (1979) 59 BULR 950). Indeed, there are authorities which suggest that courts should be slow in finding contributory negligence on the part of a solicitor's client. One such authority is Rimer J's pronouncement in *Football League Ltd v Edge Ellison* [2006] EWHC 1462 (at [330]):

> It is only in rare cases that a solicitor is able to advance a plea of contributory negligence with any real prospect of success, and for obvious reasons. This is because his breach of duty will usually be in relation to a matter within his special expertise as a solicitor, being a duty which is not usually one relating to a purely commercial matter of judgment falling squarely within the client's own competence. It will usually relate to a matter upon which the client is depending upon the solicitors' own special expertise.

19 Similarly, the Hong Kong Court of Appeal in *Hondon Development Ltd and another v Powerise Investments Ltd and another* [2005] 3 HKLR 605 ("*Hondon*") at [36] held:

> As a solicitor is remunerated for his services and it is his duty to advise his lay client and protect his interest, public policy requires that such a professional's claim of contributory negligence by the client may only be successfully raised in very limited circumstances …

20 It is not difficult to appreciate why this is the case. As the authors of *Jackson & Powell on Professional Liability* (Sweet & Maxwell, 7th Ed, 2012) ("*Jackson & Powell*") state at para 5-146:

> In the context of professional negligence a successful plea of contributory negligence by the defendant is less common than in other areas of negligence. This is because the parties often do not stand on an equal footing (as they do in, say, claims arising from road traffic accidents). If the defendant makes a mistake, it may be difficult to say that the client was negligent not to spot it or correct its effect, unless the client is expected to be wiser than his own professional advisers.

21 But there are exceptions to this general observation. *Jackson & Powell* goes on to note this in the next paragraph (para 5-147):

> There are, of course, exceptions to the very general statements made in the previous paragraph. First, the claimant may be particularly well placed to spot or correct the defendant's mistake. Secondly, the claimant may do something quite separate which aggravates the consequences of the defendant's breach of duty. … [Thirdly,] [w]here a relevant fact is not communicated by the client to his professional advisers, the question commonly arises whether the client was negligent to withhold it or the defendant was negligent not to elicit it. If the client is an experienced businessman, the court is more likely to treat his omission as amounting at least to contributory negligence.

22 This categorisation of the exceptions to the general rule may be useful for analytical purposes but we do not regard it as necessarily exhaustive. The court in *Hondon* cited the first two exceptions (citing an earlier edition of *Jackson & Powell*) with approval (at [36]). The first category of cases includes claims made by mortgage lenders (such as banks) against solicitors for the latter's failure to draw the lender's attention to particular problems such as the creditworthiness of the borrower, which, had it been brought to the lender's knowledge, would have caused the lender to withdraw the mortgage offer or reduce the amount of the advance (see *eg*: *Birmingham Midshires Mortgage Services Ltd v David Parry & Co* [1998] PNLR 249; *Omega Trust Co Ltd and another v Wright Son & Pepper and another (No 2)* [1998] PNLR 337). Lenders are particularly well-placed to spot these

problems as they have the resources and means for this (Hugh Evans, *Lawyer's Liabilities* (Sweet & Maxwell, 2nd Ed, 2002) at para 8-04) and indeed the motivation to do so since this goes to the core of their own business decision. *Jackson & Powell* states that *Crossman v Stewart* (1977) 5 CCLT 45 ("*Crossman*") is an example of the second category. In *Crossman*, a patient was held liable in contributory negligence for taking larger doses of a negligently prescribed drug. As the present case does not fall within the first two categories, we say no more about them.

23 As to the third category, we agree with *Jackson & Powell* that a client can *in principle* be held liable for failing to communicate information to a professional. In our judgment, a client who omits to reveal information that the solicitor would be expected to need in order to properly carry out that which is within his special expertise, can be said to have failed to take steps to protect himself. If a client neglects to inform his solicitor of such information, the solicitor might not fully appreciate the client's concerns and interests and might not therefore be sufficiently alive to the risk of harm to the client. There are three cases that illustrate this:

(a) First, in *Carradine Properties Ltd v D J Freeman & Co* (1989) 5 Const LJ 267, the claimant's managing director, an experienced property developer, hired a demolition contractor to demolish the upper floors of a freehold property. In the process of the demolition, the contractors damaged the ground floor of the property, which was owned by a third party. As a result, the claimant was liable in damages to the third party. The claimant instructed its solicitors to sue the contractor, but the contractor turned out to be worthless. The claimant then brought a claim under its insurance policy but was refused cover because it had made the claim too late. The claimant subsequently commenced proceedings against its solicitors. It alleged that its solicitors failed to safeguard its interests as they did not remind it to make a claim under its insurance policy. It asserted that this resulted in its claim being impermissibly late. The claimant was not awarded any damages and its claim failed in its entirety. The court held that the solicitors were not to blame as the claimant had not informed them that it had an insurance policy to begin with.

(b) Second, in *Fong Maun Yee and another v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751 ("*Fong Maun Yee*"), a decision of this court, a businessman wishing to purchase property from a company gave his property agent a deposit. The agent later absconded with the money, and it turned out that the owner of the property in question (the company) never had any intention to sell the property. The businessman's solicitor was given a copy of the option to purchase purportedly signed by the managing director of the company and a company resolution stating that the board approved the sale. These documents turned out to be forgeries. The solicitor was held liable in negligence for failing to confirm the position with the company directly. He had only carried out a company search to confirm that the persons who had purportedly signed the resolution and the option were named as the company's directors. Nonetheless, the court held that the businessman client was contributorily negligent for having failed to tell his solicitor that he suspected that something was amiss. The businessman admitted that he thought that things were not right because of the notably low price at which the purported seller was prepared to sell the property. The court held that had the businessman told the solicitor that he (the businessman) suspected that matters were amiss, the solicitor would have been put on guard, and would hence have been able to better protect his client's interests.

(c) Third, in *Edwards v Lee* [1991] 141 NLJ 1517 ("*Edwards*"), the sellers of an expensive car were approached by a rogue who offered to buy it. A third party later telephoned the sellers saying that the rogue had tried to sell him their car at a large discount. At this point, the sellers telephoned the rogue's solicitors for a reference but omitted to tell them of the call that had been made to them. The rogue's solicitors provided a clean reference even though they knew that their client was on bail and faced 13 charges for fraud. The solicitors were found liable in

negligence but the claimants' damages were reduced by 50% because of their failure to mention the telephone conversation that would have alerted them (the solicitors) that the sellers were *themselves* about to become victims of a fraud.

24 Advice by solicitors will generally only be as good as the facts on which it is based (John Murdoch, "Client negligence: A lost cause" (2004) 20(2) PN 97 at p 100). Indeed, the courts have also recognised that there is a reciprocal duty on the part of a client to communicate relevant information to his solicitor. Richardson J in the decision of the New Zealand Court of Appeal in *Mouat v Clark Boyce* [1992] 2 NZLR 559 (reversed on appeal to the Privy Council on an unrelated point) said at 572:

> In conducting business affairs, as in other areas of life, *failure to provide adequate information* to the professional adviser and inflexibility in responding to advice received *may be one of the causes of the damage*. [emphasis added]

25 A client must also be candid and disclose information notwithstanding that this may be detrimental to the possibility of a successful claim. In *Dawe v Brown* (1995) 130 Nfld & PEIR 281 ("*Dawe*"), the Newfoundland Supreme Court found that a client had not been candid with his solicitor in disclosing information that was detrimental to the possibility of a successful claim. There, a seller sold fish to a buyer but did not receive full payment. The seller retained a solicitor to recover the monies to which he thought he was entitled. However, the seller failed to mention to the solicitor that some of the fish sold to the buyer was not fresh and the buyer had withheld full payment because of this. Schwartz J made the following observations at [45]:

> A problem is not simply left at the hands of a lawyer with the sole expectation of a satisfactory resolution. It is incumbent on the client to explain the problem fully, provide all facts pertaining to the matter *including anything which might be detrimental to the possibility of a successful claim*, and to give the lawyer instructions on proceeding after being fully advised. It is only then that a solicitor can act properly on behalf of the client. [emphasis added]

26 To ensure that a solicitor's duty to elicit information from his client before acting is not derogated from, the quantum of reduction in damages payable should generally be modest to reflect a solicitor's primary responsibility in safeguarding his client's interest. *Fong Maun Yee* provides a useful illustration. There, although we reduced damages payable by the solicitor to the claimant, the reduction was a modest one of 25%. This was because the solicitor must assume the primary responsibility as a professional (at [63], approving *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769).

Application of law to the present case

27 In the present case, as we have noted above, an essential element of Su's case is that he in fact acted on the misrepresentation. At trial, Su strenuously asserted that he had conveyed the fact of the representation to ALT but the Judge did not accept this. Before us, faced with this finding, Su's counsel, Mr Thomas Lei, contended that Su had not mentioned the representation at all because he was not placed on inquiry as the information that was conveyed to him was routine and consistent with what he knew about the leasehold durations of properties in the vicinity. Indeed, the Judge noted at [26] of the Judgment that the Shophouse was the only lot in that location with a 30-year leasehold. The neighbouring shophouses had 78-year leaseholds. In these circumstances, Mr Lei suggested that it would be wrong to hold that Su was at "fault" in not informing ALT or Lim of the impression he had or of the representation that had been made to him.

28 In our judgment, it was not open to Mr Lei to make this argument. This is for two reasons. First, to stretch this argument too far would risk running afoul of Su's basic position that he was the victim of a fraudulent misrepresentation, which was a finding of fact made by the Judge. If the representation was such a routine piece of information, then did he even rely on it? Second, it was also inconsistent with the affirmative position he had taken in the trial where, as we have already noted, his evidence was that he had told ALT of this fact. The point ultimately is that the representation was a significant piece of information as far as Su was concerned and he had relied on it in entering into the sale. In these circumstances, we are unable to see how Su can avoid all responsibility for having failed to convey this to his solicitors.

29 This point was first raised by the Plaintiffs in para 6 of their Statement of Claim (Amendment No 1) ("SOC"), which reads:

> On or about 23.3.2001, [Su] instructed and retained the [Defendants] to conduct the legal conveyance of the property at 63 Kallang Bahru #01-423 which he told them had a remaining 60 plus years' leasehold from the HDB, to be conveyed to the names of [Su's son] and [Su's wife] as [Su's] nominees. …

30 This was categorically denied by the Defendants. At paras 7 and 16 of their Defence (Amendment No 1), the Defendants averred that Su did not tell them or instruct them to check that the Shophouse had a remaining lease of "more than 60 years"; he only gave instructions to "proceed" with the purchase of the Shophouse. The Defendants repeated this averment at para 42 of their opening statement. The Plaintiffs were clearly aware that this was part of the defence mounted, as evinced by para 33(2) of their opening statement where they stated:

> 33. The defences that can be gleaned from the pleadings in brief are:
>
> …
>
> (2) … Su did not expressly request or instruct the Defendants to ensure that the property has a leasehold of more than 60 years …
>
> …

31 Moreover, the Defendants squarely raised Su's failure to mention his expectation that the remaining leasehold of the property was 62 years as contributory negligence in their closing submissions. The Plaintiffs were not caught off guard by this. In fact, they had fought strenuously at trial to convince the Judge that Su did in fact inform the Defendants that the Shophouse had a remaining lease of 62 years (the Judgment at [14] and [58]–[62]). The Judge concluded that Su did not (the Judgment at [59]). Given this finding, the remaining issue was whether Su *ought* to have informed his solicitors. This is a point of law.

32 In our judgment, Su's failure in these circumstances does come within the ambit of "fault" in s 2 of the Contributory Negligence Act. It is an "omission" and, as we have stated above, a client can be held liable in contributory negligence for failing to communicate information to his solicitor. To some degree, Su was an author of his own misfortune in failing to communicate a piece of information *that he appreciated was important*, namely, his belief that the Shophouse had a remaining leasehold of 62 years. The damages payable to Su should therefore be reduced to take into account such contributory negligence on his part.

33 In the circumstances, we reduce the damages by 15% which, in our judgment, is a just and

equitable reduction having regard to Su's responsibility for his loss pursuant to s 3(1) of the Contributory Negligence Act. This reduction is less than the 25% applied in *Fong Maun Yee* because, unlike the position in *Fong Maun Yee*, it does not appear that Su suspected that Cheng was acting fraudulently. Where a client's suspicions have been aroused in a material way and he nonetheless fails to mention the relevant facts and circumstances to his solicitor then it would generally warrant a larger reduction in the damages recoverable.

Apportionment of liability

34 We also consider that the Judge ought to have ordered Cheng to pay more than 50% of the damages to reflect his culpability in having made a fraudulent misrepresentation. In deciding the contribution that should be made by each third party under s 15 of the CLA, the court must have regard to the extent of the third party's responsibility for the damage. This is made clear by s 16(1) of the CLA, which reads:

> **Assessment of contribution**
>
> **16.**—(1) Subject to subsection (3), in any proceedings for contribution under section 15, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

35 Counsel for Cheng, Mr Melvin Chan, argues that the Judge placed undue weight on Cheng's moral blameworthiness and that insufficient attention was given to the actual wording of s 16(1) of the CLA. In this regard, Mr Chan relies especially on two cases, *Downs and another v Chappell and another* [1997] 1 WLR 426 ("*Downs*") and *Collins v Hertfordshire County Council and another* [1947] 1 KB 598 ("*Collins*").

36 In *Downs*, the claimants sued the seller of a property for fraudulent misrepresentation and the seller's accountant for negligent misrepresentation. The seller misrepresented the value of the property by inflating its worth and the seller's accountant repeated that misrepresentation in a letter addressed to the claimants. The English Court of Appeal found in favour of the claimants but apportioned damages equally between the defendants.

37 In *Collins*, Hilbery J followed his earlier decision in *Smith v Bray (Wickham, third party)* (1939) 56 TLR 200 ("*Smith*") in holding the following in relation to s 6(2) of UK's Law Reform (Married Women and Tortfeasors) Act 1935 (c 30) ("Law Reform (Married Women and Tortfeasors) Act 1935"), a provision that is worded similarly to s 16(1) of the CLA and apportioning liability equally between the defendants (at 624):

> If the wording of that sub-section had stopped at the word "equitable" and the semi-colon had occurred there, I should have thought that what was plainly intended was that the court was to have the fullest discretion and to distribute the contribution to the damages between persons whose several acts had brought about the damage according to what the court thought were their degrees of culpability. But the sub-section does not stop at the words "just and equitable" but continues with the governing words "having regard to the extent of that person's responsibility for the damage." … The words "having regard to the extent of that person's responsibility for the damage," certainly seem to indicate that the extent of the responsibility for the damage is to be the guiding principle of the assessment. *It is difficult to conceive how anything other than causal acts resulting in the damage can show the extent of a person's responsibility for the damage.* [emphasis added]

38 With respect, we are unable to accept Mr Chan's submission. First, *Downs* does not stand for the *general* proposition that the court should not take into account moral blameworthiness. On the contrary, Hobhouse LJ (as he then was) (with whom Roch and Butler-Sloss LJJ agreed) in *Downs* held that both moral blameworthiness and causative responsibility are important considerations in deciding a just and equitable apportionment of damages (at 445) as follows:

> The extent of a person's responsibility involves both the degree of his fault and the degree to which it contributed to the damage in question. It is just and equitable to take into account both the seriousness of the respective parties' faults and their causative relevance. …

39 In our judgment, the court in *Downs* could well have held the seller responsible for a higher percentage of the damages as he had misrepresented the position *fraudulently* and we respectfully disagree with Hobhouse LJ's reasons in apportioning liability equally between the fraudulent seller and the negligent accountant. Hobhouse LJ held that even though a fraudulent party should be made to bear a greater proportion of the damages to take into account his moral blameworthiness in the normal case, the facts of *Downs* warranted a different treatment. On the facts of *Downs*, the claimants relied on the accountants' letter *instead* of the fraudulent misrepresentation made by the seller in deciding to purchase the property. On this basis, Hobhouse LJ held that the accountants' letter had a greater "causative impact" than the fraudulent misrepresentation made by the seller in inducing the claimants to purchase the property. Therefore, both the seller and the accountant bore equal overall responsibility for the claimants' loss (at 445). We respectfully disagree with this reasoning because it seems to us to be artificial to say that the buyer in *Downs* did not rely on the seller's fraudulent misrepresentation when the accountant's letter repeated that *same* misrepresentation.

40 Similarly, the view expressed in the passage from *Collins* that we have extracted above is too restrictive a reading of the equivalent provision in the UK of s 16(1) of the CLA as it places too much emphasis on a person's causative responsibility and neglects the need for the court to apportion liability in a "just and equitable" manner.

41 Indeed, *Smith*, the decision relied on in *Collins*, and *Collins* itself, have both been subject to trenchant criticism. For ease of reference, we refer to the approach taken in *Smith* and *Collins* as the "causative test".

42 J P Lawton in his article "Vicarious Liability of Hospital Authorities" (1947) 10(4) Mod LR 425 at pp 427–428 argues that the causative test gives the equivalent provision in the UK of s 16(1) of the CLA a "strained and impracticable" interpretation, and if Parliament had intended the provision to be read restrictively, it would have used a more neutral phrase such as "the extent to which the person *caused* the damage".

43 Similarly, both Professor Glanville Williams in "The Law Reform (Contributory Negligence) Act 1945" (1946) 9(2) Mod LR 105 at pp 131–132 and Stephen Chapman in "Apportionment of liability between tortfeasors" (1948) 64 LQR 26 at pp 27–28 have argued that the causative test is too restrictive and may cause injustice. Williams and Chapman argue that the causative test – in focusing *only* on causation in apportioning liability – is very likely to result in an equal apportionment of damages among parties without having regard to the parties' respective degrees of blame in many cases, especially those involving successive tortfeasors, because it will often be impossible in such cases to say that one was more the cause of the damage than the other. Each tortfeasor's causal responsibility will commonly be the same because each of their acts/omissions will be equally important forming one part of a continuous causal link resulting in the eventual loss. Williams and Chapman further argue that this cannot have been the intended result given that the statute does

not direct the courts to apportion damages equally among defendants, but rather affords a wide discretion in deciding a just and equitable apportionment of damages.

4 4 *Collins* in fact illustrates the potential for injustice. There, a final year surgical student was asked by her supervisor (a fully qualified surgeon) to prepare anaesthesia for a surgery. Instead of mixing procaine with adrenalin, she mixed cocaine with adrenalin. The anaesthesia was administered by the surgeon, and the patient died as a result. The widow of the patient sued, and an issue of apportionment of liability between the surgeon and student arose. Hilbery J rejected an argument made by counsel for the student that the surgeon, who failed to supervise her, was more blameworthy, holding that the wording of s 6(1) of the Law Reform (Married Women and Tortfeasors) Act 1935 directed him to apply the causative test alone.

45 As mentioned above, we disagree with the approach in *Collins*. In determining each party's contribution, both causative responsibility and blameworthiness have to be considered (see *eg*: *Randolph v Tuck* [1962] 1 QB 175 at 185; *Acrecrest Ltd v Hattrell & Partners* (1982) 252 EG 1107 at 1113; *Madden v Quirke* [1989] 1 WLR 702). In this regard, we approve of the following passage in para 4-018 of *Jackson & Powell*, which provides:

> The court should have regard to both the culpability of the various parties and to the extent to which each party's conduct "caused" the damage in question. … *The "just and equitable" criterion is wide enough to enable the apportionment take account of blameworthiness* as well as causative potency, and even, to an extent, of non-causative matters. However, the main factor to consider is each party's responsibility for the damage. [emphasis added]

46 The term "blameworthiness" is broad and it gives the court the flexibility to take into account a wide range of conduct to arrive at a just and equitable result in a myriad of situations (G H L Fridman, *Torts* (Waterlow Publishers, 1st Ed, 1990) at para 13-40). This inevitably necessitates a value judgment and, as rightly pointed out by the Judge, there are cases which demonstrate that the courts will take fraud and dishonesty into account (*Nationwide Building Society v Dunlop Haywards Ltd* [2010] 1 WLR 258 ("*Nationwide Building Society*") and *Clydesdale Bank Plc v Workman* [2014] PNLR 18 ("*Clydesdale Bank*"), both discussed in the Judgment at [230]).

47 In passing, we note that it is a well-established principle in contributory negligence that blameworthiness is a relevant consideration in the reduction of damages (*Stapley v Gypsum Mines Ltd* [1953] AC 663 at 682, *per* Lord Reid and *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 at 326, *per* Denning LJ, both approved in *Parno* (see above at [13])). We see no reason why blameworthiness should not be a relevant consideration under s 16 of the CLA as well when it is accepted as a relevant consideration in contributory negligence. Indeed, s 16 of the CLA and s 3 of the Contributory Negligence Act are conceptually similar in that both direct the court to *apportion* damages between parties having regard to their responsibility to reach a just and equitable result. Of course, the two are concerned with different things. In contributory negligence, damages are apportioned between claimant and defendant having regard to the fault of the claimant, whereas under s 16 of the CLA, the apportionment is between the defendant and third parties having regard to their respective responsibility for the damage in question (Douglas Payne, "Reduction of Damages for Contributory Negligence" (1955) 18 Mod LR 344 at p 346; Spike Charlwood, "Contribution and professionals: an overview of the 1978 Act, alternatives to it, and its relationship with contributory negligence" (2007) 23(2) PN 82 at p 83). A court should therefore first determine the extent of the reduction in the damages to be awarded to the claimant by reference to the claimant's contributory fault and then apportion the liability that is found among the defendant(s) and third parties (see *Fitzgerald v Lane and another* [1989] AC 328 at 339). We adopt that approach here.

48 In our judgment, the Judge ought to have ordered Cheng to bear a larger share of the damages. We are conscious of the need to give due deference to the Judge's exercise of discretion in apportioning liability. As we recently said in *Goh Sin Huat Electrical Pte Ltd v Ho See Jui (trading as Xuanhua Art Gallery) and another* [2012] 3 SLR 1038, an appellate court should be slow to intervene in a trial judge's decision in apportioning liability, particularly where "the apportionment decision of the trial judge was supported by cogent reasons alluding to the interaction of the respective parties' individual culpability in a myriad of identified causes from which the damages flowed" (at [54]). It is clear from the Judgment that the Judge did apply her mind to Cheng's, the Defendants' and Ng's culpability in apportioning liability (the Judgment at [228]–[233]). But an appellate court is permitted to interfere with a trial judge's decision in apportioning liability if the trial judge erred in principle (*Capps v Miller* [1989] 2 All ER 333; *Holland Hannen and Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation* (1985) 35 BLR 1 at 18, *per* Lawton LJ). We are satisfied that the Judge, with respect, erred in principle here in apportioning liability equally between Cheng (who acted fraudulently) on the one hand, and the Defendants and Ng (who acted negligently) on the other hand.

49 In this regard, we have considered the following two cases which demonstrate that fraudulent parties should generally be made to bear more than an equal share of the damages payable, both of which were mentioned in the Judgment, though the Judge did not appear to pay heed to the percentage of damages the fraudulent parties in those cases were made to bear (the Judgment at [230]):

(a) In *Nationwide Building Society* (see above at [46]), the property was overvalued by a fraudulent employee of the valuer. The plaintiff made two advances to a company based on the valuation. The company later defaulted. The plaintiff sued the valuer as well as the negligent solicitors who handled the advances. The solicitors later brought a claim for contribution against the valuer. Christopher Clarke J decided that it would be just and equitable to apportion liability 80:20 to the valuer, since "the moral blameworthiness of [the valuer] and the causative potency of the fraud of its [employee]" were very much greater than that of the solicitors, whose "failing was not to pick up on the fraudulent scheme rather than to play any part in it" (at [77]).

(b) Similarly in *Clydesdale Bank* (see above at [46]), Mr Mark Pelling QC (sitting as a Deputy Judge of the English High Court) concluded that dishonesty was a relevant consideration in deciding a "just and equitable" apportionment. He therefore ordered that the dishonest party bear 65% of the damages, and the negligent party, the remaining 35% (at [97]–[99]).

50 In our judgment, Cheng should bear 65% of the overall liability for the damages for which the Defendants are found responsible. His moral blameworthiness and the causative potency of his fraud were very much greater than those of the Defendants and Ng, whose failing was in not picking up on Cheng's fraud, rather than playing any part in perpetrating it.

51 As between the Defendants and Ng, we are satisfied that the Defendants should bear the bulk of the remaining damages payable and will therefore not increase the proportion of damages payable by Ng. Lim is a solicitor of close to 16 years' standing, and has practised conveyancing law for a considerable time. Yet, he fell well below the mark in discharging his duties owed to the Plaintiffs. We do not propose to repeat the multiple breaches of duty on his part as these have been dealt with by the Judge (the Judgment at [106]–[115]). However, we do wish to reiterate that the remaining leasehold on any property is a highly important piece of information to purchasers in conveyancing transactions; conveyancing solicitors are expected to keep their clients apprised of such information even if not specifically asked. Furthermore, in our judgment, when a solicitor is asked to represent the purchaser in the sale and purchase of a property, there will be a duty in general to take proper

instructions as to what the purchaser's understanding of the deal that he wishes to enter into is. Had the question been asked by Lim or ALT in this case, and had Su omitted to mention the representation in the light of such a question, a different result might well have ensued. However, those are not the facts before us.

52 We therefore apportion liability in the following manner: Cheng (65%), the Defendants (30%) and Ng (5%). These ratios should apply in relation to the 85% liability that we have found having regard to Su's contributory negligence. The Judge valued Su's loss in the sum of $308,436 (the Judgment at [154]). 85% of that sum amounts to $262,170.60, which is what Su and his family are entitled to. The sum of $262,170.60 shall be borne by the Defendants and the Third Parties in the following manner: Cheng ($179,410.89), the Defendants ($78,651.18) and Ng ($13,108.53).

53 We decline to order SGR Property to indemnify the Defendants in relation to Ng's portion of damages payable. The Judge found at [226] of the Judgment that there was insufficient evidence to prove that SGR Property is Ng's employer and we are not minded to interfere with this.

Costs

54 In the light of the forgoing, we turn finally to the question of costs. We deal with the costs of the matter below and the costs of these appeals in turn.

Costs of the matter below

55 There are two aspects to the costs of the matter below. The first pertains to the Main Action. The Judge ordered that the Defendants should pay the Plaintiffs' costs of the Main Action without any contribution from the Third Parties. The Defendants take issue with this and contend that the Third Parties ought to contribute to the Defendants for a share of the costs payable by them to the Plaintiffs. We accept the Defendants' contention and order that the Third Parties should contribute in the proportions in which we have apportioned the overall liability. Hence, Cheng should contribute towards 65% of the Plaintiffs' costs for which the Defendants are liable and Ng should contribute towards 5% of such costs.

56 The second aspect pertains to the third party proceedings. The Judge ordered that the Defendants' costs are to be paid in the proportionate share of the contribution by Cheng and Ng. We generally agree with this approach, but given our finding on what the respective contribution by each of the Third Parties should be, we order that the Defendants' costs of the third party proceedings are to be borne by the Third Parties on a standard basis in the proportion of 90% by Cheng and 10% by Ng. For the avoidance of doubt, we do not disturb the Judge's finding in relation to costs for the counterclaim (the Judgment at [236]).

57 Having dealt with the apportionment, we come now to quantum. The Defendants argued the amount of costs they should be paying to the Plaintiffs for the Main Action ought to be reduced for two reasons. First, they succeeded in their contention that the Plaintiffs' entitlement to damages should be reduced on account of contributory negligence. Second, a large part of the trial below was taken up with such issues as Su's contention that he had conveyed the fact of the representation to ALT, on which Su was ultimately unsuccessful. In our judgment, the Defendants' contentions are valid. Taking a broad view on costs, we order that the Plaintiffs should only be entitled to two-thirds of their costs for the Main Action on a standard basis.

Costs of the appeals

58 We turn finally to the costs of these appeals. In relation to CA 148/2014, Cheng is to pay the Defendants' costs.

59 In relation to CA 152/2014, the Defendants who brought the appeal have succeeded in part against the Plaintiffs (who were the first three respondents in the appeal) on the issue of contributory negligence. They have also succeeded against Cheng on the question of apportionment of damages. However, they have not succeeded against Ng who appeared in person. We accordingly hold that the Defendants are entitled to 50% of their costs of the appeal, which shall be borne in equal shares as between the Plaintiffs on the one hand and Cheng on the other hand. These costs are to be taxed if not agreed.

Conclusion

60 We accordingly dismiss CA 148/2014 with the costs order noted above and with the usual consequential orders. We allow CA 152/2014 in part similarly with the costs order noted above and with the usual consequential orders.

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