

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1991] SGHC 115

Suit 27/1985

Between

Lee Kam Wah

... Plaintiff

And

Associated Asian Securities
(Pte) Ltd

... Defendant

GROUND OF DECISION

Financial and Securities Markets — Securities

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Lee Kam Wah v Associated Asian Securities (Pte) Ltd

[1991] SGHC 115

Suit 27/1985
Karthigesu J
21 August 1991

1 The plaintiff was a remisier with the defendants. At the time when this action was commenced on 2 January 1985, the defendants were members of the Stock Exchange of Singapore Ltd but when this action came on for hearing on 15 July 1991, they were no longer members having been put into liquidation in September 1987.

2 The plaintiff ceased being a remisier with the defendants on 31 August 1984 and claimed for moneys due to him on his account with the defendants as of that date, which he quantified in the sum of \$35,484.13. The defendants did not dispute the plaintiff's claim but counterclaimed a sum of \$161,429.70 as being losses suffered by them through the sale of certain public listed shares namely Genting shares, Magnum shares and Promet shares which the plaintiff, as remisier with the defendants, had put through between 1 and 16 September 1983 for one `Tan Yong Khoon` (TYK) against which the said TYK had delivered scrips which turned out to be fictitious or forgeries. The defendants also claimed interest on the sum of \$161,429.70 at the rate of 1.2% pa from 20 June 1985 till payment and/or judgment.

3 The basis of the defendants' counterclaim as pleaded reads as follows:

The plaintiff agreed, by a memorandum in writing dated 14 September 1981, to abide by the terms and conditions governing his service as a remisier. The said terms and conditions provide, inter alia, that:

(i) The plaintiff shall be responsible for all liabilities arising from contracts written by the plaintiff.

(ii) The plaintiff shall indemnify the defendants for any losses and damages that may arise on all contracts written by the plaintiff.

(iii) The plaintiff shall indemnify the defendants for any losses and damages arising from any contracts written or any transactions entered into by the plaintiff.

4 The plaintiff's defence to the defendants' counterclaim was that on a proper construction of the terms and conditions relied on by the defendants as aforesaid, he was not liable to the defendants for any loss or damage suffered by them and, in the alternative, that the defendants were themselves negligent in having accepted the scrips delivered to them by the said TYK pursuant to the sale transactions in question without first ascertaining their authenticity such that the defendants were debarred in law from relying upon the terms and conditions previously referred to. Numerous particulars of negligence were given to which reference will be made later.

5 On 5 July 1985, the learned registrar ordered that judgment be entered for the plaintiff for the sum claimed, namely, \$35,484.13 together with interest at 8% pa from 5 July 1985 until payment and \$700 costs and stayed execution pending the trial of the defendants' counterclaim.

6 At the conclusion of the trial on 17 July 1991, I dismissed the defendants' counterclaim with costs prefacing my decision with the following remarks:

*The question in this case and on which it turns is whether the plaintiff warranted the genuineness of the scrips sold by the person who called himself 'Tan Yong Khoon'. Such a warranty will have to be implied in the circumstances of this case. I am unable from the facts and evidence given to imply that there was such a warranty. It is this feature which distinguishes this case from **Yeung v HSBC (Yeung & Anor v Hong Kong and Shanghai Banking Corp** [1980] 2 All ER 599) on which the defendants rely.*

7 The defendants have now appealed.

8 The facts, in the main, are not in dispute. They are that sometime towards the end of August 1983 one Dennis Ng Siong Seng, posing as TYK whose identity card he had clandestinely obtained, introduced himself over the telephone to the plaintiff as being a friend of one of his 'clients', namely, one Raymond Loh, and had wanted the plaintiff's services in buying and selling shares on the Stock Exchange. The plaintiff agreed to accept TYK as a 'client' but before doing so had interviewed him briefly, checked his identity card and got him to fill out a form for the opening of a new account. The first transaction was on 1 September when TYK had purchased 4,000 Genting shares and had paid for them over the defendants' payment counter. Thereafter and up to 16 September, TYK had given instructions over the telephone to sell various lots of Promet, Genting and Magnum shares which sale transactions the plaintiff had put through.

9 The plaintiff explained in cross-examination his mode of operation. When a client wanted, say, to sell a lot of a particular share he would give the client a quotation and when the client instructed him to sell he would contact

one of the defendants' persons on the floor and ask him to sell at the stated price. When he was told that the lot had been sold, he would inform the client and fill out the trading form the defendants used and hand it in to the defendants to convert it into a sale note. The client would then deliver the share scrip of the counter sold to the defendants' scrip delivery department. He was required to do this before 12.30pm to enable him to receive a cheque for the shares sold from the defendants the next day. If he missed the 12.30pm deadline, the client would receive the cheque only on the second market day following the sale.

10 Generally, it was the client who would deliver the scrips of the shares sold to the defendants' scrip delivery department. However, on rare occasions, the plaintiff would do so on behalf of his client but in so far as the shares sold by TYK between 1 and 16 September were concerned, the plaintiff maintained that he had not delivered any of them to the defendants' scrip delivery department on behalf of TYK. There was no evidence to the contrary. In fact the defendants' witness, Alan Pwee Ah Tee (DW3), recalled that he had seen TYK himself deliver share scrips to the defendants' scrip delivery department and what had struck him was that TYK invariably made the deliveries around 12.15pm or 12.20pm, that is to say, just before the deadline of 12.30pm. This observation had aroused a suspicion in the mind of DW3 so much so that he had drawn the plaintiff's attention to it and had asked whether TYK was reliable. The plaintiff remembered DW3 talking to him about TYK but according to him only to enquire whether TYK was a new 'client', for if he was, then the plaintiff ought to be careful in dealing with him. DW3 at the material time was the manager of the defendants' scrip delivery department.

11 DW3 also recalled that late one evening he had received a telephone call from one Albert Lim, the supervisor at Ong & Co, another stockbroking firm, who told him that his signature on a transfer form received by his firm from the

securities clearing computer services and emanating from the defendants had been forged. Immediate investigations were instituted which revealed that the transfer form referred to by Albert Lim had been presented by TYK that day. DW3 could not remember the date of this telephone conversation. It must have been 16 September 1983 because that was the last recorded date on which TYK sold any shares through the plaintiff and/or the defendants. Anyhow, all payments for the shares sold by TYK were stopped. The plaintiff, DW3 and another staff member of the defendants then lodged police reports as a result of which Dennis Ng Siong Seng who had been posing as TYK was apprehended and prosecuted for dealing in forged share certificates.

12 There was no doubt that the shares TYK sold through the plaintiff between 1 and 16 September 1983 were all forgeries. The plaintiff accepted this. The plaintiff also accepted that, by the Stock Exchange Rules, the defendants were obliged to deliver genuine share scrips of the shares sold through them to the buyer. In order to discharge this obligation, the defendants had bought the required number of the various shares to replace the forged shares TYK had sold through them between 1 and 16 September. This had cost them \$161,429.70 but as there was no evidence that the 4,000 Promet shares sold by TYK were forgeries, the defendants limited their claim to \$143,707.74.

13 The figure of \$143,707.74 was not in dispute. What was in dispute was the plaintiff's liability to the defendants for this sum.

14 A remisier is licensed by the Stock Exchange and has to trade through a member firm of the Stock Exchange. The relationship of the remisier and the member firm is that of agent and principal. This is provided by the Stock Exchange Rules. Member firms of the Stock Exchange trade through two classes of persons, namely, dealers and remisiers. Dealers are employees of the

member firm whereas remisiers are not. They are self-employed persons who tie themselves to a member firm by agreement and are remunerated from the official brokerage received by the member firm in respect of all contracts transacted by the remisier in the name of the member firm.

15 The plaintiff's agreement with the defendants was embodied in a written document dated 14 September 1981 which set out the terms and conditions of the plaintiff's services as a remisier with the defendants. The provisions relied on by the defendants were the following:

Clause 1(viii)

You (the plaintiff) shall be responsible for all liabilities arising from contracts written by you.

Clause 3(iv)

You (the plaintiff) shall indemnify the company (the defendants) of any losses and damages that may arise on all contracts written by you.

16 and a clause at the foot of the document and above the plaintiff's signature which reads:

I (the plaintiff) agree to the above terms and conditions and hereby indemnify the company (the defendants) for any losses or damages arising from any contracts written or any transactions entered into by me.

17 The defendants' counsel's first line of argument (which was the pleaded case) was that the indemnity provisions contained in cl 3(iv) and in the clause at the foot of the document dated 14 September 1981 were wide enough to cover fraudulent transactions. The defendants had incurred an expense of \$143,707.74 which they would not have were it not for the fact that the plaintiff's 'client', TYK, had delivered forged certificates of the shares he sold which the defendants were obliged, by the Stock Exchange Rules, to replace with genuine certificates. It was because of this obligation which the defendants had under

the Stock Exchange Rules that an indemnity provision has been included in the terms and conditions of the agreement embodied in the document dated 14 September 1981. Furthermore, the defendants had no contact with `the client` TYK, except in an administrative capacity. TYK was the plaintiff`s `client` and not the defendants. Accordingly, the plaintiff was legally liable to indemnify the defendants in the sum of \$143,707.74.

18 Secondly, the defendants` counsel argued that from the manner in which remisiers put through the business of `their clients` through the member firms of the Stock Exchange, there was to be implied a warranty that the certificates delivered by `their clients` in a sale were genuine certificates and not forgeries. For this proposition, he cited ***Yeung & Anor v Hong Kong and Shanghai Banking Corp*** [1980] 2 All ER 599 .

19 Since the plaintiff was in breach of this implied warranty, he was legally liable to indemnify the defendants in the sum of \$143,707.74.

20 The wording of the indemnity clauses and the document itself is inelegant. They can mean every conceivable loss or damage. In my view, it would be wrong to give these indemnity clauses such an open-ended construction without trying to ascertain what the parties really intended from the terms of the document in question and the surrounding circumstances at the time the parties entered into the agreement unless the evidence clearly established that the plaintiff was negligent or had been a party to the fraudulent transaction. On the evidence I have summarized above, I was unable to make any finding that the plaintiff had been negligent in dealing with TYK or in putting through his transactions or that he had been a party to TYK`s fraudulent transactions.

21 The question was what the parties had in mind when they entered into the agreement. Did they intend it to apply to genuine and bona fide transactions of buying and selling shares on the Stock Exchange and the unforeseen losses and damages that flow from the speculative nature of these transactions or did the parties also have in mind the losses and damages brought about by fraudulent transactions? *Omnia praesumuntur rite esse acta* . It must be presumed, unless the contrary is specifically stated, that the parties had in mind only the unforeseen losses and damages that flow from genuine and bona fide transactions. Sudden and sharp increases or drops in share prices can result in contra losses. Failure to take up shares bought or deliver shares sold could result in the `selling out` or `buying in` procedures being instituted by the broking firm which could result in losses or damages to the broking firm. I have no doubt that it was losses and damages of this kind which can result from genuine and bona fide transactions that were in the contemplation of the parties. It is pertinent to note that two witnesses called by the defendants, DW3 who has been in the securities industry since 1964 and Krishna Kumar (DW4) who was the managing director of the defendants from July 1977 until it was wound up, both said that in their experience fraudulent transactions such as the sale of forged share certificates was virtually unheard of in 1981. This could hardly have been in the contemplation of the parties when they entered into the agreement on 14 September 1981.

22 Thus, I concluded that the plaintiff could not be made liable to the defendants for the sum of \$143,707.74 on the indemnity clauses in the agreement.

23 The second argument of defence counsel, that of an implied warranty, was not pleaded. However that might be, counsel submitted that in every sale transaction on the Stock Exchange there was to be implied a warranty that there

will be good delivery against payment. Delivery of forged certificates was not good delivery. The question was who warranted the good delivery, the genuineness of the certificates delivered. Defence counsel tried to make out a case for saying that the plaintiff, as the remisier, through whom TYK had put through the sale transactions, simply by reason of that had impliedly warranted to the defendants that the certificates TYK would deliver pursuant thereto were genuine. Not only was it to be implied that genuine certificates would be delivered by TYK but it was also to be implied that the plaintiff warranted to the defendants that TYK would deliver genuine certificates.

24 I was quite unable to accept this submission. From the facts as I have recounted them, I could not find any act, word or deed of the plaintiff from which I could imply that he had warranted to the defendants that the certificates TYK would deliver were genuine certificates. Unless I could imply such a warranty, reliance on the case of ***Yeung & Anor v Hong Kong and Shanghai Banking Corp*** would be misplaced. The plaintiff had not made any request nor could any request be implied from the facts of this case that the defendants accept the certificates that TYK would deliver pursuant to his contract to sell, albeit transacted through the plaintiff, as genuine certificates and not forgeries.

25 ***Yeung & Anor v Hong Kong and Shanghai Banking Corp*** is clearly distinguishable. It will be seen from that case that the firm of stockbrokers presented certificates to the bank together with duly completed transfer deeds under cover of a letter signed in the firm's name requesting the bank to give effect to the transfer in favour of its client and to issue new certificates in the client's name. The bank acted on that request without checking the transferor's signature with the signature in their books. The Privy Council held that the firm of stockbrokers were liable to the bank on the basis that the stockbrokers'

request in their letter amounted to an implied warranty that the documents presented by them were genuine.

26 Notwithstanding that an implied warranty had not been pleaded but on the basis that I would have allowed an amendment to the pleading had an application been made, I held that the plaintiff could not be held liable to the defendants on this ground as well.

27 The plaintiff's counsel advanced the further argument that even if the indemnities could be held to cover losses and damages arising from a fraudulent transaction, the defendants' claim must still fail since they were negligent in not having detected that the certificates delivered by TYK were forgeries. He relied on the case of *Canada Steamship Lines Ltd v R* [1952] AC 192.

28 The authority relied on is good authority but I was not persuaded that the plaintiff had proved negligence on the part of the defendants. Two acts of negligence of the several acts of negligence particularized were given in evidence. The first related to the spelling of the name 'Ong **Tek** Gee' which was wrongly spelt 'Ong **Teck** Gee' in the transfer form. The other was that a difference in the 'originating broker' and the 'witnessing broker' should have alerted the defendants' scrip delivery department that something was amiss and failing to be so alerted was an act of negligence. The 'originating broker' is identified by the code letters stamped on the share certificate and merely identifies the first broker handling that particular certificate. The 'witnessing broker' is the one who witnesses the transferor's signature. The plaintiff's argument was that when they were different, suspicions were aroused and should be investigated.

29 I fail to see how the failure to detect a minor mis-spelling of a name or the failure to detect and act on a difference in originating broker`s code and the name of the witnessing broker, both of which were not consistently evident in the certificates and transfers delivered by TYK, can be said to be acts of negligence resulting in the failure to uncover forgery. Accordingly, I placed no reliance on this argument.

30 For the aforementioned reasons, I dismissed with costs the defendants` counterclaim for \$143,707.74 and interest thereon at the rate of 1.2% pa from 20 June 1985 till payment or judgment.

31 ***Defendants` counterclaim dismissed.***

Karthigesu J

Ng Kai Ming (PK Wong & Advani) for the plaintiff
Bernard Doray and Cynthia Lim (Bernard Rada & Lee) for the
defendants
