

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 84

Suit 874/1990

Between

Wai Wing Properties Pte Ltd

... Plaintiff

And

Lim, Ganesh and Liu (sued as
a firm)

... Defendant

GROUND OF DECISION

Legal Profession — Duties — Client; Tort — Negligence — Causation

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Wai Wing Properties Pte Ltd v Lim, Ganesh and Liu (sued as a firm)

[1994] SGHC 84

Suit 874/1990
Chao Hick Tin J
31 March 1994

1 Cur Adv Vult

2 This is an action by a client against a firm of solicitors claiming damages on account of professional negligence. The action is only against those solicitors who were at the material times the partners of the defendant firm, namely, Liu Ming Yuen (Liu), B Ganeshamoorthy and Lim Hong Kan. It is Liu's alleged negligent omission which formed the subject of this action. Liu has since 1 November 1989 ceased to practice in Singapore. On that date he assumed the office of a Senior Crown Counsel in Hong Kong. He is still holding that office.

3 **Background and plaintiffs' case**

4 The plaintiffs are property developers and were during the period 1982 to 1987 developing a project known as Rainbow Gardens on Lot 3660 of Mukim 5, off Toh Tuck Road.

5 On 29 April 1983 the plaintiffs entered into an agreement to sell unit #03-03 of Rainbow Gardens to one Lee Kok How (Lee) at a price of \$480,000.

On 17 May 1983 the plaintiffs entered into another agreement to sell unit #03-05 of the same development to one Neo Hiam Huat (Neo) at the same price. In both these sales and purchases M/s Chee & Teo acted for both the developers and the purchasers. For completeness I should add that at about the same period of time the plaintiffs had also sold three other units to three friends of Lee and Neo.

6 In 1985 recession hit Singapore. There was a significant downturn in the property market. Both Lee and Neo wanted to give up the purchase of the two units. So did their three friends. They were prepared to let the plaintiffs forfeit the 20% of the purchase price which they had already paid. Pursuant to discussions between Kwok Wai Hoi (Kwok), the managing director of the plaintiffs, and Lee, Neo and their three friends, the plaintiffs agreed to reduce the purchase price of each unit by \$80,000, from \$480,000 to \$400,000. But `the reduction (was) to be applied only to the last progress instalment payable.` At that point in time, only the foundation for the construction of the units in question had been completed.

7 On 7 January 1986 Lee granted an option to three persons, Sim Loo Lee, Sim Baba and Tan Kim Lan, or their nominees (hereinafter referred to as `the three sub-purchasers`), to purchase unit #03-03 from him at the price of \$290,000. The option was duly exercised. Following the sub-sale, by a letter dated 26 May 1986 Lee authorized and directed the plaintiffs to enter into a fresh agreement with the three sub-purchasers for the sale and purchase of unit #03-03, to rescind the agreement between the plaintiffs and Lee dated 29 April 1983 and to credit all moneys paid by Lee to the three sub-purchasers. Lee confirmed that henceforth he would have no claim or interest whatsoever in the unit. Accordingly, on the same day a fresh agreement was entered into between

the plaintiffs and the three sub-purchasers. In the fresh agreement, the sale price remained at \$480,000.

8 On 27 January 1986, Neo similarly gave an option to Wong Mun Choi Johnny and Lui Cheng Geok (hereinafter referred to as `the two sub-purchasers`) to purchase unit #03-05 at the price of \$290,000. On 27 June 1986 Neo gave a similar letter of authorization and direction to the plaintiffs as that given by Lee. A fresh agreement was also entered into by the two sub-purchasers with the plaintiffs in respect of unit #03-05.

9 In the meantime on 10 May 1986, before the sub-sale by Lee to the three sub-purchasers was completed, M/s Chee & Teo, who were acting for both the plaintiffs and Lee, wrote to the plaintiffs (DB23) as follows:

... we are informed by the sub-purchasers` solicitors that they require your confirmation that you will accordingly not proceed against the sub-purchasers for the sum of \$80,000.00. This is because in your sale of the abovenamed units to the original purchasers you have agreed to reduce the sale price of \$480,000 to \$400,000. In addition you have also further agreed to enter into a fresh sale and purchase agreement with the sub-purchasers at the price of \$480,000.

10 In the premises, please let us have your confirmation that you will not claim from the sub-purchasers the sum of \$80,000.

11 On 20 May 1986 the plaintiffs gave the following confirmation to M/s Chee & Teo (DB25):

We are pleased to confirm that we have agreed to give the purchasers of the abovementioned units a reduction in the sale price of \$480,000 to \$400,000. This reduction is also applicable to their subsequent sub-sales.

12 Please note, however, that the reduction of \$80,000 can only be applied and deducted from the last progress payment.

13 Sometime in June/July 1987, after the project had been completed and the last instalment paid by the sub-purchasers, Lee and Neo asked the plaintiffs for the refund of the \$80,000 reduction which the plaintiffs had agreed to give in respect of each of the two units. On 7 July 1987, the plaintiffs made a payment of \$40,000 to Lee on the advice of their solicitor, Mr Patrick Chee. The plaintiffs also paid Neo a sum of \$38,400 on 10 July 1987, though Kwok claimed that this payment was made by Patrick Chee without his direction. Subsequently, both Lee and Neo asked for the balance. Kwok told Lee that he was not going to refund the balance because Lee had sub-sold the property and was not entitled to the reduction which was only to be applied to the last instalment. Kwok also refused to pay the balance to Neo.

14 On 9 September 1987 the plaintiffs received two letters of demand under s 254(2) of the Companies Act written by M/s Tan Lee & Choo on behalf of Lee and Neo claiming the payment of \$40,000 and \$41,600 respectively, within 21 days. A week later, on 16 September 1987, Kwok went to consult Liu and wanted the latter to act for the plaintiffs on the two notices. Kwok gave to Liu an account of how the matter arose and asked for his advice. Liu said he needed the relevant files before he could advise.

15 The next day, Kwok despatched two files of the plaintiffs to Liu. He also, by way of a separate letter, requested M/s Chee & Teo to release the relevant solicitors' files to Liu. Kwok claimed that he saw Liu a second time on either 18 or 19 September 1987. It was at this second meeting that Liu gave the opinion that it would not be prudent for Lee or Neo to file a winding-up petition without first obtaining a judgment. He also advised Kwok that Lee and Neo did not have a clear case to obtain judgment; there was a fair case of dispute. As will be apparent later, Liu disputed that there was such a second meeting on either 18 or 19 September 1987.

16 Kwok also told the court that at the second meeting with Liu the latter expressed the view that the payments of \$40,000 to Lee and \$38,400 to Neo were made under a mistake of fact and law. This was because by virtue of the sub-sales, both Lee and Neo had lost the benefit of the reduction and that the plaintiffs could commence proceedings against Lee and Neo to recover the two sums paid by mistake. Liu further said that he would be writing to M/s Tan Lee & Choo to explain the nature of the dispute in order to prevent the presentation of a winding-up petition against the plaintiffs. Kwok agreed with Liu and instructed Liu to do the same. Liu promised to extend copies of his replies to M/s Tan Lee & Choo to the plaintiffs for information. There is a dispute as to whether Kwok had specifically instructed Liu to reply to the two notices.

17 Kwok said that after a few days, having failed to receive copies of Liu's replies to M/s Tan Lee & Choo, he asked his secretary, one Jennifer, to call and remind Liu. Jennifer reported that Liu said he had written and would forward the copies to the plaintiffs.

18 Kwok was away in London from 26 September 1987 to 2 October 1987. He was accompanying his son who was going for further studies. He said that in a telephone conversation with Jennifer from London he did again enquire if copies of the replies to M/s Tan Lee & Choo had been received and Jennifer answered in the negative. As a result he again asked Jennifer to call Liu.

19 I should mention here that Kwok has explained to the court that he could not call Jennifer to testify because she is now living in Australia and as her application for permanent resident status is still under consideration, she could not leave Australia without jeopardising her application. Kwok tendered a fax letter which he said he received from Jennifer. Defence counsel objected to the admissibility of that letter which did not even have an address. However, I

accept Kwok's oral evidence that he spoke to Jennifer who told him why she could not come to Singapore to testify. As will be apparent later, this aspect of the matter is quite immaterial to the crux of this action.

20 In the meantime, on 25 September 1987 Chee & Teo forwarded some 11 documents to Liu. The documents were received by Liu on 28 September 1987. The covering letter was copied to the plaintiffs. Kwok did not call Liu to ascertain the position when he returned from London on or about 2 October 1987.

21 On 12 October 1987 the plaintiffs were served with a winding-up petition filed by Tan Lee & Choo on behalf of Lee. Kwok called Liu who answered that he had not sent out the letters to Tan Lee & Choo. In that conversation, Kwok did not ask Liu why he had not sent out the letters. Kwok's explanation for that omission was that he was panicky. As requested, on either 13 or 14 October 1987, Kwok sent his office attendant to deliver the petition to Liu. Either on the same day or the next, Kwok himself also went to see Liu. When questioned by Kwok why he did not send the reply to Lee's notice, Liu said that it was not necessary and would serve no purpose. When asked to send the letter then, Liu said it was too late and that he would prepare an application to have the petition dismissed. At that point Kwok's main pre-occupation was to have the petition dismissed which Liu said he would do.

22 The petition appeared in *The Straits Times* and the Gazette on 23 October 1987. It appeared in the Chinese press the next day. On 23 October 1987, one of the plaintiffs' bankers, Oversea-Chinese Banking Corporation (OCBC), wrote to freeze the plaintiffs' account. On 27 October 1987 the Bank of China suspended the plaintiffs' account. Still later on 17 November 1987

Malayan United Bank Bhd froze the plaintiffs account and refused to release funds against architect's certificates on a project of the plaintiffs at Geylang.

23 On 26 October 1987 Kwok came to Liu's office to affirm an affidavit in support of the application to dismiss the winding-up petition. Liu also asked him to request Patrick Chee for the balance of the documents as Liu felt that Patrick Chee had not given him all the documents. It would seem that Kwok was also at Liu's office the day before to work with Liu on a draft affidavit.

24 On the same day, after the affidavit had been affirmed by Kwok, Liu wrote a letter to the plaintiffs, the relevant portion of which reads:

*We also enclose xeroxed copy of a case **Re Nima Travel Sdn Bhd** [1986] 2 MLJ 374 to show that when there is a bona fide dispute between you and the petitioner, winding-up procedure should not be used. What the petitioner should have done was to issue a writ for judgment, and not a winding-up petition.*

25 In any event, after perusing the papers, we are of the view that you have a fair case to dispute the petitioner's claim. Indeed, we could advise you to file in a writ to recover the sum of \$40,000 paid by you earlier to the petitioner. Please let us know.

26 The important point to note in the winding-up proceeding is that winding-up court is not the forum to decide whenever there is a bona fide claim. When you have a dispute with another party, it does not mean that you are insolvent. These are quite different matters. You should impress your bankers on this, by showing them the affidavit of Mr Kwok Wai Hoi together with this letter and the case enclosed. Should they require any further clarifications, please let us know. Alternatively, you may ask them to contact us direct.

27 It seems to me clear that this letter was written by Liu on Kwok`s request in order that the plaintiffs could show it to their bankers. It would be recalled that OCBC had frozen the plaintiffs` account on 23 October 1987.

28 Again, on that same day, pursuant to a request made by Kwok, Liu belatedly wrote to Tan Lee & Choo with regard to the statutory notice of Neo. After stating that the earlier payment of \$38,400 to Neo was made under a mistake of fact and law, that the reduction was on the condition that Neo would complete the purchase, and as Neo had sold the unit before completion he had lost the benefit of the reduction, Liu continued:

Our clients hereby caution your client for any more attempt to wind-up our clients as our clients see that such move is totally unjustified.

29 Our clients will resist such a move at all costs and will claim for all damages that they may suffer should such a step to wind-up is taken.

30 Neo never filed any petition to wind-up the plaintiffs. He only brought an action in the district court to claim for the balance of \$41,600. Here, I may add that I do appreciate the point made by Liu that in view of the petition already filed by Lee, there was really no need for Neo to file a petition even if Neo was quite determined to wind up the plaintiffs. Neo could just be a supporting creditor. In this way Neo would not have to incur the costs of filing a petition.

31 The application to have the petition dismissed came up before the winding-up court on 30 November 1987. Following an adjournment, the plaintiffs took objection to the learned judge hearing the application on the ground of possible bias because there was then a pending dispute between the plaintiffs and a company in which the learned judge had an interest. The plaintiffs, following a discussion with Liu, decided to appoint a senior counsel,

Mr AC Fergusson, to address the judge on the question of disqualifying himself. Having heard the submissions, the learned judge decided not to hear the matter further and adjourned it to enable the Registrar to fix it before another court. For the services of Mr Fergusson, the plaintiffs paid a fee of \$1,500.

32 On 29 December 1987 the winding-up petition was withdrawn by Lee following an understanding reached with the plaintiffs whereby the latter would provide a banker`s guarantee to Lee for the sum claimed and Lee would in turn bring an action against the plaintiffs to seek recovery of the same. Accordingly, on 7 January 1988 a district court action (DC 80/1988) was commenced by Lee against the plaintiffs to recover the \$40,000.

33 Earlier, on 11 November 1987, Liu requested the plaintiffs to pay \$2,000 towards costs. No payment was however made. On 30 December 1987, following the withdrawal of the petition by Lee, Liu tendered a bill to the plaintiffs for \$6,771.60 for work done on the winding-up petition, consisting of \$6,000 for fees and \$771.60 for disbursements. On 21 January 1988 Liu informed the plaintiffs that another \$40 should be added to disbursements claimed as a stamp fee of \$40 was inadvertently left out. On 12 February 1988 the plaintiffs paid only \$2,771.60 in respect of that bill.

34 From January to March 1988 Liu was further engaged by the plaintiffs to contest DC 80/1988. Because the plaintiffs refused to pay the balance of the bill on the winding-up matter, relationship between Liu and Kwok became strained. In March 1988 Liu threatened to take out a summons to recover the balance. Kwok wanted the bill taxed. In April 1988, Liu applied to be discharged from acting for the plaintiffs in DC 80/1988 on the ground of non-payment of fees. On 12 April 1988 Liu got the order authorizing his firm to

cease acting for the plaintiffs. Accordingly, the plaintiffs appointed Chong Yeo & Partners in place of Lim Ganesh & Liu.

35 Thereafter, there was correspondence on the question of the transfer of the files between Lim Ganesh & Liu and Chong Yeo & Partners. On 15 April 1988, Chong Yeo & Partners gave an undertaking to the defendants to preserve the defendants' lien of costs yet the defendants refused to release the files. This undertaking on costs was confirmed by M/s Chong Yeo & Partners on 27 April 1988. Because of the refusal of Liu to release the files, the plaintiffs had to ask for adjournment on two occasions on an O 14 application by Lee in DC 88/1988, resulting in the plaintiffs having to pay costs to Lee fixed at \$300. Furthermore, summary judgment was obtained by Lee against the plaintiffs in DC 80/1988, which judgment was later set aside by Thean J, who gave the plaintiffs leave to defend that action. In respect of the refusal to release the files, a complaint was lodged by the plaintiffs against Liu to the Law Society, which after due inquiry imposed a fine of \$2,000 on Liu.

36 On 22 August 1988 Lim Ganesh & Liu raised a bill in relation to work done on DC 88/1988. Another bill was raised in respect of the district court action taken out by Neo. On 25 August 1988 the plaintiffs wrote, inter alia, 'we reject your bills and would rather have them taxed'.

37 On 27 August 1988 Lim Ganesh & Liu commenced an action in the magistrate court (MC 9978/88) claiming for the balance of the fees due in respect of work done on the winding-up petition. Judgment by O 14 was obtained. The question of professional negligence or the liability of the plaintiffs to pay was not raised by the latter.

38 Eventually a total of seven bills of costs of Lim Ganesh & Liu were taxed and paid by the plaintiffs.

39 When asked why did he retain Liu after the receipt of the winding-up petition, Kwok explained that as the time factor then was crucial he kept Liu to continue with the work. Furthermore, Liu had assured him that he could have the petition dismissed.

40 Again he kept Liu for DC 80/1988 because Liu was familiar with the matter. That action was eventually settled in November 1992 with the plaintiffs paying \$25,000 to Lee. The action brought by Neo was also settled. Kwok said he accepted the advice of M/s Chong Yeo & Partners to settle as there were complex issues of law involved in the matter.

41 **Defence case**

42 Two witnesses were called for the defence - Lee and Liu. Lee told the court that at the time when he made the sub-sale to the three sub-purchasers, Kwok told Lee that Kwok could not give the \$80,000 discount as yet until completion of the building and the new buyer had paid up all the instalments. This is contrary to what was to be the arrangement as stated in DB23 and 25. Lee claimed that after the development was completed in May/June 1987 he had difficulties getting in touch with Kwok. Eventually when they met, Kwok told Lee that he had no money and asked for one week's grace to pay \$40,000, with the balance of \$40,000 to be paid one or two weeks after that. Lee agreed. When Kwok refused to pay the balance of \$40,000, he consulted Tan Lee & Choo who advised him that he could go by way of a winding up petition if the plaintiffs should still fail to respond to a statutory notice of demand. He understood that this would be the fastest way to getting back his money.

43 Lee said that one or two days after the petition appeared in the newspaper on 23 October 1987 Kwok called Lee to inform him that because of the advertisement, the plaintiffs' business had to stop and the bank had frozen their account. Kwok complained that he had suffered a great loss and asked Lee to withdraw the petition. Lee said Kwok was prepared to give him a banker's guarantee. Eventually he accepted a banker's guarantee as a condition for his withdrawing the petition; with the guarantee he need not worry that he could not get his money if he should succeed in the action.

44 Lee initially asserted that whatever might be the legal grounds which could have been put up by the plaintiffs' solicitors, if the plaintiffs did not pay up within the 21-day period given in the notice, he would proceed with the filing of a petition and that nothing would stop him.

45 Lee admitted that he did not know the risk of filing a winding-up petition without judgment. He claimed that his solicitor Mr Kelvin Lim advised him that there was a 70% chance to win. He did not know of the controversies surrounding the two documents in DB23 and 25. Finally he had to admit that if his solicitor had advised him that the petition would be dismissed he would not have proceeded with it.

46 Lee also claimed that from his dealings with Kwok he had come to realize that the plaintiffs were in a very tight financial position. To his mind three incidents show that. First is the inability of the plaintiffs to pay him the \$80,000 discount in one lump sum. Second, Lee said that at the meeting to discuss the discount Kwok made another suggestion: that the plaintiffs would be prepared to sell to each of them another unit at a much reduced price of \$200,000 but on condition that the \$200,000 was paid in one lump sum up front. Third, there was an occasion when he was late in making progress payment, and

upon Kwok contacting him on a Saturday, he told Kwok that he would bank the cheque into the account of the plaintiffs on the following Monday. But Kwok insisted that he bank in the cheque right away.

47 I do not think any of these three instances, either separately or combined, necessarily suggest that the plaintiffs were insolvent. Regarding the first incident, Kwok explained that he agreed to pay half the amount following discussion with Patrick Chee even though he did not think Lee was entitled to it. What I would observe is that it was never put in cross-examination to Kwok that the plaintiffs did not pay the full amount because the plaintiffs were unable to do so. With regard to the offer of Kwok to sell each additional unit at \$200,000, this was again never put to Kwok. I seriously doubt it was stated quite that way. If something like that did in fact take place, I would not be surprised if it was stated in rhetorical terms in the course of arguments to determine what was the appropriate discount to give to each of the buyers. As regards the incident involving the banking in of a cheque on a Saturday, I do not see why Lee should complain and draw any adverse conclusion against the plaintiffs when he himself was late in making payment. The plaintiffs were entitled to insist that Lee bank in the cheque immediately, lest something should happen between then and Monday.

48 Liu's evidence was that on 16 September 1987 Kwok came to see him pursuant to an appointment. That was the first time Liu had dealt with Kwok on a professional basis. After Kwok had given him a brief account of the matters relating to the two notices, Liu advised Kwok, in a general sort of way, that if he had a bona fide dispute with a prospective petitioner, winding-up procedure would not be an appropriate remedy for the petitioner to seek. A judgment would have to be first obtained. The winding-up court should not be used as a means to compel payment which was under dispute. Liu stated all this is trite

law. He advised Kwok to let him have all the files, including those from Chee & Teo, so that he could study the matter. He admitted that he had also advised Kwok that it would be unlikely that Lee and Neo would have a clear case to obtain judgment by way of an action and less so to obtain a winding-up order against the plaintiffs.

49 Liu said that he perused the two files, which the plaintiffs sent him on 17 September 1987, a day or two later. However, he waited for the files from Chee & Teo as he felt that the documents in the solicitors' files would be more complete. Liu insisted that he never saw Kwok on 18 or 19 September 1987. Neither did he tell Kwok that he would reply to the two notices and to explain to Tan Lee & Choo of the dispute.

50 Liu claimed that before receiving the 11 documents on 28 September 1987 he called up Patrick Chee to remind him that he needed the conveyancing files soon as the 21-day statutory notice was running out. Having studied the 11 documents, of which only two were not found in the files of the plaintiffs, Liu felt that there were gaps. Thus on either that day or the next, he spoke to the secretary of Kwok telling her that the documents from Chee & Teo were not complete. He did consider whether to respond to the two statutory notices but 'decided not to in view of the fact that (he had) already told Kwok of his opinion in the matter on 16 September 1987.' Later Liu corrected himself on this; he admitted that it was necessary to reply to the two notices but due to an oversight on his part he failed to do so. More will be said about this in a moment, as it is central to this action.

51 Liu said he did not see Kwok on either 13 or 14 October 1987. However, when Kwok spoke to him on 12 October 1987, Kwok did ask him why he did not reply to the two statutory notices. To that, Liu answered he overlooked.

There was no emotional outburst from Kwok. Liu insisted that Kwok did not specifically instruct him to reply to the two statutory notices. He did not get all the files from Chee & Teo until 28 October 1987. But he admitted that the general care of the matter was left in his hands. He had the general conduct of the case and was to get the files from M/s Chee & Teo and assess the merits.

52 **Issues**

53 What the defendants contend is that the presentation of the winding-up petition was not caused by Liu`s omission in responding to the two statutory notices. In the alternative, the defendants aver that the single omission could not amount to negligence or lack of reasonable care. Further, it could not have been a term of the retainer that the defendants were to prevent or forestall the presentation of a winding-up petition.

54 On the question of damages, it is submitted for the defendants that the plaintiffs have not proven that they have suffered any loss. Furthermore, even if there were such losses, they were not foreseeable; or at least some of the losses were not foreseeable.

55 **Did Liu fail in his duty?**

56 The first question to examine is whether Liu had failed in his professional duty when he did not reply to the two statutory notices, in particular that issued by Lee. As indicated above, there is a dispute of fact as to whether Kwok did see Liu on 18 or 19 September 1987. Liu admitted that he received the two files from Kwok on 17 September 1987. He did not read them immediately. He said he read them one or two days later. This is certainly

consistent with what Kwok said that he saw Liu on 18 or 19 September 1987, thus necessitating Liu to look into the two files.

57 In any event, I do not think this question of fact, whether there was a second meeting, is really that crucial or material. The fact is that as of 16 September 1987, based on an oral account given by Kwok to Liu, the latter was able, on the facts as so related, to offer a view (no doubt tentative) that there was a dispute between the plaintiffs on the one hand and Lee and Neo on the other, and it would be wrong for them to present any winding up petition when there was a bona fide dispute on the claim. All that make a lot of sense. What troubles me is the view Liu expressed that there was no need to reply to the two statutory notices. I think I should quote what he said in cross-examination:

Q: Are you saying that the necessity of replying to the notices did not arise at the meeting?

A: It did not arise.

Q: Did you not think that a reply was needed to forestall a winding-up petition?

A: On 16/9/87, I did not think it was necessary.

Q: How were Tan Lee & Choo to know about the disputes?

A: That was why I asked for Chee & Teo's files.

Q: It must surely follow that a reply was a necessity. You asked for the files?

A: It was not necessary. I asked for the files to verify what PW1 said to me orally was true.

Q: You got his files on 17/9/87 and with the two additional documents from Chee & Teo on 28/9/87 you were able to prepare the affidavit on 26/10/87?

A: Yes.

Q: Were you not able to reply along the same lines to the two statutory notice as in the affidavit affirmed on 26/10/87?

A: I could have.

*Q: Was it not a necessity to inform the claimant's solicitors of the dispute having regard to the principle in **Re Nima**?*

A: No.

Q: You still said it was not necessary?

A: Yes.

Q: How were Lee's solicitor to know about the dispute?

A: They would not know.

Q: According to you it was not necessary to tell them?

A: That is right.

58 From the foregoing evidence two points are pertinent: (i) the necessity of replying to the notices did not arise at the meeting; (ii) to Liu's mind there was no need to reply to the notices. When confronted with para 3(d) of the defence, which reads as follows:

Liu also expressed his opinion to Kwok that based on his instructions from the discussions in the conference there was no need to reply to the two notices. Liu further advised Kwok that a reply to the two notices would not stop the said Lee and the said Neo from commencing winding-up proceedings if they chose to do so. Kwok agreed and accepted the opinion and advise of Liu and promised to arrange for all the files to be forwarded to the defendants as soon as possible,

59 he agreed that the question of replying to the two notices did arise and that he had advised Kwok not to reply to the two notices; there was no need to explain to Tan Lee & Choo of the dispute. He said that even had he replied there was nothing to stop the claimant from presenting the petition. Liu further explained as follows (NE 86-87):

At that time I did not think it was necessary. There was no bona fide claim by the claimant. Of course now looking back in hindsight I would say I should have replied. Looking back I should not have taken up the case. It must be borne in mind that at that time that was my first dealing with him. I did not know his character finance and personality. Second, I could not rely on a lay client's file to reply as solicitor. I need to verify. I did not and do not want to write based on client's oral instructions alone

without verification. Of course on hindsight, I agree that I should have written. But at that time 16 or 17 September 1987 there was no need to reply.

60 Liu claimed that Kwok accepted his opinion that there was no necessity to reply. He said that when Kwok first came to see him on 16 September 1987, Kwok was concerned about the need to pay the balance sums to Lee and Neo rather than the procedural aspects of winding up proceedings. Liu's mind was preoccupied with the defences to the two claims. Eventually he agreed that a reply to the statutory notices was necessary. He clarified:

When I said this morning that it was not necessary to reply, I meant to reply right away. If I did not think it was necessary to reply at all then why should I ask for the documents from Chee & Teo. In the midst of obtaining these documents there was a gap of time. When Chee & Teo's relevant documents came on 28/9/87 it was almost time up. The point of replying promptly slipped my mind although I have been chasing PW1 and Chee & Teo on the documents. I had the general conduct and I did not realize the time had passed so fast and Lee had filed the petition. During all these times I was concentrating on drafting the defence and the counterclaim for client. After I got the winding-up petition from PW1 there would have been no need to write the letter anymore. When I saw PW1 on 25/10/87 the situation was explained to PW1 and he understood. We sat down and decided to write the letter to Neo. I was looking after the file. I did not intend to expose the plaintiffs to that kind of risk ...

61 It was necessary to reply. But at that time I thought I should get all the material in hand to make a proper reply.

62 So the real position is that when the time came, the matter of giving a reply slipped Liu's mind though he was waiting for further material. He was concentrating on the merits of the two claims. He admitted he did not make a note in his diary. Giving a reply was within the scope of his retainer. There were merits in the plaintiffs' case. However, while accepting that it was a slip on his part not to have sent a reply, he maintained that the slip did not amount to negligence.

63 Liu laid stress upon the fact that since he filed the affidavit on behalf of Kwok on 27 October 1987, no complaint was heard from Kwok. Their relationship remained cordial right up to the time when the petition was withdrawn by Lee following the compromise. Relationship only began to cool after Liu sent his bill for costs to the plaintiffs. Indeed, in all further proceedings there was no complaint by Kwok that Liu had not discharged his duties diligently as a solicitor in relation to the two statutory notices or the winding-up petition; not even in the magistrate court action where the defendants claimed for the balance of the fees due for handling the winding-up petition.

64 In my opinion, the need to reply to the two statutory notices is obvious. A client comes to see a solicitor precisely to get his advice and assistance to prevent any harm from arising. Liu quite clearly stated that he had the general conduct of the matter and that would, I think, include advising and doing all that was necessary to protect the interest of the plaintiffs. The 21-day notice expired on 30 September 1987 and that should be the last day on which a reply should have been given. Not only did Liu fail to respond by 30 September 1987, he failed to respond up to 7 October 1987, the date on which the petition was filed.

65 As far as I can see, there is no reason why Liu could not have replied by 30 September 1987. After all he drafted the affidavit for Kwok to affirm on 26 October 1987 based on the documents which were in the plaintiffs' files and the 11 documents sent by Chee & Teo. He had all those documents by 28 September 1987. He could and should have replied to the two statutory notices by 30 September 1987 or at any time before 7 October 1987 when Lee filed his petition. The truth of the matter, as Liu admitted, is that there was an oversight on his part. Liu knew the law as stated in ***Re Nima Travel Sdn Bhd; Sun Soon Heng Coach Works v Nima Travel*** that a creditor cannot use winding-up proceedings to compel payment where there is a bona fide dispute on the claim.

66 With respect, I am unable to follow the logic of the argument of Liu when he said that a mere oversight to reply to the statutory notices does not amount to negligence. Counsel for the defendants made a similar submission in his closing address. Then what is it? `Negligence` has been described in ***Cordery on Solicitors*** (8th Ed) to be `the omission to do something which a reasonable man would do, or the doing of something which a reasonable man would not do.` A solicitor is expected to use reasonable care and skill in giving such advice and taking such steps as the facts of the particular case demand and the standard of care and skill required is that of a reasonably competent and diligent solicitor. By not writing to explain why the plaintiffs had refused to pay Lee, Liu had failed to take the necessary steps to protect the interest of the plaintiffs. In the circumstances a reply was really imperative. Liu foresaw the risk of not replying (NE 106D). There is clearly negligence.

67 In ***Fletcher & Son v Jubb, Borth & Helliwell*** a solicitor was held to be guilty of negligence when he overlooked time and allowed his client`s claim to be time-barred under the Public Authorities Protection Act 1893. The Court of Appeal held that it was the duty of the solicitor to know the provisions of that Act. I cannot see any difference between the oversight in that case and the oversight in the present case.

68 ***Cordery on Solicitors*** (at p 140) listed the following acts or omissions as being matters for which the solicitor could be liable:

*... in matters of practice and procedure a solicitor is liable for ignorance of or for **overlooking** familiar points, eg for not filing writs, of which personal service could not be effected, to save the Statute of Limitations; for not taking proceedings within the period prescribed by statute; for failing to make an application for review on behalf of an injured infant workman within six months of his attaining the age of 21; for delay in obtaining his client`s discharge from prison; for not inserting the proper notices of meetings of creditors, so that his client was forced to pay debts*

in full that would otherwise have been barred; for not giving the proper notices in conducting an appeal against a magistrate's conviction; for proceeding under the wrong section of a statute; for pursuing an improper course of defence before the magistrates so that no appeal would lie; for taking proceedings in a court without jurisdiction, or one not provided with adequate machinery, or in the High Court where it is clear that the sum to be recovered would only carry costs on the county court scale, unless his client, having been warned of the consequences, so instructs him; and generally where there are two ways of doing a thing, and one is clearly right and the other doubtful, for doing it in the doubtful way.

69 It is true that on the evidence there is a dispute as to whether Kwok did, in fact, instruct Liu to reply to the two statutory notices. But I do not think it matters whether Kwok did so specifically instruct Liu. It was Liu's duty to advise Kwok. A solicitor should advise his client of a step that ought to be taken. He should not wait for client's specific instructions if it was a necessary step to take. In **Otter v Church, Adams, Tatham & Co** it was held to be the duty of a solicitor to advise a client whose life was in danger that he should execute a disentailing deed or make a will without delay.

70 I would stress that what happened here is not an instance of an error of judgment. I do appreciate that a solicitor is not expected to be faultless in his judgment. I am conscious of the words of Lord Cottenham LC in **Hart v Frame** at p 210:

Professional men, possessed of a reasonable portion of information and skill, according to the duties they undertake to perform, and exercising what they so possess with reasonable care and diligence in the affairs of their employers, certainly ought not to be held liable for errors in judgment, whether in matters of law or discretion.

71 Indeed earlier in **Godefroy v Dalton** , the court laid down the obligations of a solicitor in a contentious business as follows:

It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that crassa negligentia or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, which have been cited and commented on at the bar, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession of the law.

72 This reference to the higher branch of the profession was obviously in reference to the work of a barrister who would not be held to be negligent just because of an error of judgment in the opinion he renders either in or outside court.

73 In some of the older cases, eg **Purves v Landell** , **Baikie v Chandless** , the court seems to be more indulgent to legal practitioners, and had identified lack of reasonable skill and care with `gross negligence` or `crassa negligentia.` Perhaps, that was the court`s way of saying a solicitor or barrister should not be made liable for errors of judgment. Whatever the previous position might be, I hold that the correct test is what a reasonably competent legal practitioner would do having regard to the standards normally adopted in his profession.

74 I would hasten to add that a solicitor cannot escape liability by merely labelling a mistake as an error of judgment. It depends on the nature of the mistake. I would like to quote the speech of Lord Fraser in **Whitehouse v Jordan** at 281:

Merely to describe something as an error of judgment tells us nothing about whether it is negligent or not. The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent.

75 In the light of the facts of the case and the law as to the duty of a solicitor as outlined above, I have no doubt whatsoever that Liu was guilty of negligence. Due to an absence of mind, he failed to take a necessary step, an obvious step, which should have been taken.

76 **Causation**

77 I come next to the question of causation. There is no doubt that the statutory notices required an answer. Though Lee initially said in evidence that a reply from the plaintiffs' solicitor would not have deterred him from filing a petition, he admitted that if his solicitor should advise him not to, he would follow the advice.

78 The failure to reply to the statutory notice would convey to Lee and his solicitor the impression that the plaintiffs had no defence to the notice and that the plaintiffs were just being difficult or unreasonable in refusing to pay the sum claimed. In those circumstances, I cannot see what other conclusion any reasonable person or solicitor could have drawn. It was really inevitable that Lee, on the advice of his solicitor, decided to file the petition. There was simply no reason for him not to proceed.

79 Liu has suggested in his evidence that even if a reply had been given there was no guarantee that Lee would not file his petition. In answer to that I would make these observations. Firstly, in civil litigation what needs to be

shown is on a balance of probabilities, not certainty. Secondly, having been negligent in discharging his duties as a solicitor, which negligence I have found caused Lee to file the petition, I think the burden shifts to the defendants to show that even if there was no failure, Lee would still have proceeded to file the petition. Lee said he would act on the advice of his solicitors. Mr Kelvin Lim, the solicitor of Lee, was not called upon by the defence to testify. Thirdly, Liu himself said that there were merits in the plaintiffs' defence to the claim and that following the principles laid down in **Re Nima**, a winding-up petition was not the proper procedure to recover a debt which was in dispute. What is there to suggest that Mr Kelvin Lim would not have been an equally competent and reasonable solicitor and see the point which Liu himself saw?

80 The argument here is similar to that advanced in **Heywood v Wellers** where the solicitors were alleged to have failed to take certain steps to protect the client. Denning MR rejected that argument as follows (at p 459):

It was suggested that even if the solicitors had done their duty and taken the man to court he might still have molested her. But I do not think they can excuse themselves on that ground. After all, it was not put to the test: and it was their fault that it was not put to the test. If they had taken him to court as she wished - and as they ought to have done - it might well have been effective to stop him from molesting her anymore. We should assume that it would have been effective to protect her, unless they prove that it would not.

81 In my opinion, in the absence of any evidence from Mr Kelvin Lim as to his views on the disputed claim, both as to fact and law, I do not think that there is any basis for Liu to assert, or for me to hold, that whatever explanations may be offered by Liu, Kelvin Lim would nevertheless advise Lee to proceed with the filing of the winding-up petition. Even now in court Liu has not said that the advice he tendered to Kwok as to the merits of his defence is wrong. It is a solicitor's duty to safeguard the interest of his client. Liu has failed in that.

On the evidence before me, I do not think it is open to the defendants to say that even if Liu had replied, it would not have made a difference.

82 **Damages**

83 I now turn to the question of damages. From the pleadings it seems to me (though not entirely clear) that the plaintiffs are proceeding against the defendants in contract, though recent authorities would suggest that a client could also sue in tort, eg *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* . However, for the present purposes of determining what losses suffered by the plaintiffs should be allowed, I do not think it makes any real difference whether I treat the case as one in contract or in tort. In order to succeed on any item of loss, not only must the plaintiff establish that the loss was caused by the defendants` negligence or breach of duty, but that it was also foreseeable, in contract as at the date of the contract and in tort, as at the date the tort was committed: see *Victoria Laundry (Windsor) Ltd v Newman Industries Coulson & Co* and *The Wagon Mound; Overseas Tankship (UK) v Morts Dock & Engineering Co* . In the statement of claim the plaintiffs claimed for three specific sums, namely, \$15,507.70, being the costs paid to the defendants on three bills of costs, \$300, being the costs incurred and paid by the plaintiffs in DC 80/1988 on account of adjournments and \$1,500, being the fee paid to Mr AC Fergusson, and an unquantified claim for damages for `negligence and breach of duty as solicitor.`

84 In my view the following items of claim satisfied both the tests and should be compensated by the defendants:

(i) Bill of costs No 1451/89 being solicitor and client bill of the defendants for work done for the plaintiffs in the winding-up petition (as taxed) 8,174.20

(ii) Bill of costs No 1450/89 in relation to MC Suit No 9978/88 taken out by the defendants against the plaintiffs for the remainder of the fees claimed by the defendants for the work done on the winding-up petition (as taxed) \$1,904.50

(iii) Costs incurred and paid for the adjournments in DC 80/1988 300.00 \$10,378.70

85 Of these three items, (i) relates to the work done in getting the winding-up petition dismissed/withdrawn. Following from what I have said above, this work would not have been necessary had Liu replied to the two statutory notices explaining the dispute in question. Item (ii) is so closely linked to (i) and should be allowed. This item need not have been incurred if only Liu would have his bill for the work done on the winding-up petition taxed as requested by Kwok. Instead, Liu instituted MC 9978/88. What I am effectively saying is that Liu is not entitled to be paid for the work he did on the winding up petition and those directly relating to or flowing from that. As regards item (iii), it arose essentially because Liu refused to release the files though an undertaking on costs was given by Cheong Yeo & Partners. The defendants attempted to rely on a telex sent out by Cheong Yeo & Partners to the defendants dated 1 June 1988 where it was stated `in order to avoid any complications on the matters, we shall be obliged if you could let us have the relevant documents immediately as the matter will be coming up for **mention** on 2.6.88.` The reference to `mention` is wrong. The date 2 June 1988 was to be for the hearing of the O 14 application. But the costs which were awarded against the plaintiffs and are now claimed by them were in respect of the adjournments in April and May 1988. They do not relate to the hearing of 2 June 1988.

86 As regards the fee of \$1,500 paid to Mr AC Fergusson I entertain some difficulties on it. While that expense might be said to arise from Liu`s breach I

have some doubts whether it was foreseeable. Liu could not reasonably have foreseen that a situation like that could have arisen which required the engagement of a senior counsel.

87 Similarly, I do not think the plaintiffs are entitled to claim as damages for costs paid by them to the defendants in relation to work done in DC 80/1988, DC 4884/88 and DC 9295/87 instituted by Lee, Neo and a third person Neo Teck Huat, respectively, to recover what they claimed. Those costs were not incurred as a result of Liu's negligence or breach of duty in failing to reply to the two statutory notices. All the three district court actions had nothing to do with Liu's failure to reply to the statutory notice of Lee. They arose because of the disputes between the plaintiffs and those purchasers on account of the reduction plaintiffs had agreed to give them and which was to be deducted from the last instalment. Indeed, had Liu replied to the two notices, he would be asking Lee and Neo (and the others too) to establish their individual claim by way of an action.

88 I now come to a more difficult item of claim for damages. There is some evidence to indicate that the plaintiffs' Geylang project was delayed by approximately two months on account of the petition being filed. The plaintiffs could not use the overdraft granted by Malaysian United Bank to pay for progress payments. The plaintiffs allegedly had to borrow from moneylenders at 5% per month; but there is no proof of such borrowings. The plaintiffs' suppliers stopped giving them credit in relation to material required for the project. As a result, the progress of work at the Geylang project slowed down. An example was given: 12 days were taken to complete the structure of the second storey whereas it took 24 days to complete the third storey.

89 Furthermore, after the petition was advertised, the purchasers of the Geylang project refused to pay. Kwok instructed his solicitors, MPD Nair, to demand payment. However, MPD Nair replied to say that the purchasers were not in a position to release any further progress payment to the plaintiffs until the petition was discontinued or withdrawn.

90 The distinction between general and special damage is neatly described in ***Bullen & Leake on Precedents of Pleadings*** (12th Ed) at p 60 as follows:

General damage is such as the law will presume to be the natural or probable consequence of the defendant's act. It arises by inference of law, and need not, therefore, be proved by evidence and may be averred generally. Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant's act, but such as depends in part, at least, on the special circumstances of the particular case. It must therefore be always explicitly claimed on the pleading, as otherwise the defendant would have no notice that such items of damage would be claimed from him at the trial.

91 This is an action for negligence or breach of duty as a solicitor. The losses suffered by the plaintiffs in consequence thereof should be particularized. I accept that the plaintiffs' accounts had been frozen by their bank and that the purchasers of the Geylang project had refused to pay so long as the petition was pending. But no specific figures have been proved to show the losses which the plaintiffs had in fact suffered on those accounts. Furthermore, there is the serious question of remoteness. There is no evidence that Liu knew that the plaintiffs were also engaged in the Geylang project or any other project. This was the first time that Liu dealt with the plaintiffs. In the circumstances, I make no award for these unspecified claims.

92 Counsel for the plaintiffs sought general damages for the injury caused to the fair name of the plaintiffs as a result of the petition being advertised in the media. Two authorities are relied upon: ***Quartz Hill Consolidated Gold***

Mining Co v Eyre and ***Wilson v United Counties Bank Ltd*** . Counsel conceded that these two cases are not similar to our present case but he urged me to apply the principles decided in those two cases by analogy. In ***Quartz Hill*** , the English Court of Appeal held that an action for malicious prosecution could lie even though no pecuniary loss or special damage to the company could be proved because the presentation of a winding-up petition was, from its very nature, calculated to injure the credit of the company. The appeal court reversed the decision of the first instance judge who held that the action would not lie without proof of special damage. In *Wilson* the plaintiff sued the bank for damages for negligence in discharging its duties resulting in the plaintiff being adjudicated a bankrupt. There, the court granted Â£7,500 as damages for the injury caused by that negligence to the plaintiffs` credit and reputation.

93 In my view ***Quartz Hill*** is obviously a different kind of a case. In ***Wilson*** , a bankruptcy order was in fact made. In the present case, the winding-up petition was withdrawn. By the omission in sending out the reply to the statutory notice of Lee, Liu did not intend to injure the reputation or credit of the plaintiffs. The plaintiffs are only entitled to compensation for the losses and expenses they have actually incurred on account of the omission. Accordingly, other than the specified losses suffered by the plaintiffs which I have allowed above, I have serious reservations that the plaintiffs are entitled to any amount by way of general damages and I would refrain from making such an award.

94 In the result I hold that the plaintiffs are only entitled to damages in the sum of \$10, 378.70.

95 One final point before I conclude this judgment. It is alleged that the plaintiffs should be precluded from making any claim for any loss since they continued to engage Liu even after discovering the omission and they did not

question the defendants' entitlement to the costs of the winding-up petition in MC 9978/88. All that the plaintiffs asked was to have the bill taxed and that was also their stand in MC 9978/88. However, counsel for the defence in his final submission has only made some general remarks on estoppel or res judicata without elaboration. No authorities were cited by him in support thereof although in his opening statement he referred to the case ***Shook Lin & Bok v Yeo Kian Teck & Anor*** where some aspects of the fact situation are similar to our present case but where the liability to pay fees for work done was not in dispute. Neither did counsel for the plaintiffs address me on it in his closing submission. I need only say this. In MC 9978/88 the defendants were claiming for their fees for work done on the winding-up petition. In the present action the plaintiffs are claiming for damages for professional negligence, an issue which has not been determined before. They are separate causes of action. While the plaintiffs could have raised the question of professional negligence in MC 9978/88, I do not think they are thus precluded from doing so now.

96 As regards costs, the defendants have submitted that if the amount of damages awarded by this court should come within the jurisdiction of the subordinate courts, costs should be taxed on that scale. I accept that submission. Accordingly, there shall be judgment for the plaintiffs in the sum of \$10,378.70 with costs to be taxed on the subordinate courts scale. The judgment sum shall carry interest at the rate of 8% from the date of the writ.

97 ***Plaintiffs' claim allowed.***

Wai Wing Properties Pte Ltd v Lim, Ganesh and Liu (sued as a firm)[1994] SGHC 84

Chao Hick Tin J

KS Chung (Harry Elias & Partners) for the plaintiffs
Peter Madhavan and Ganesh Moorthy (Madhavan Louis & Partners)
for the defendants
