

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 246

Suit 433/1995

Between

Sit Ley Timber Pte Ltd

... Plaintiff

And

Ho Lee Construction Pte Ltd

... Defendant

GROUND OF DECISION

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Sit Ley Timber Pte Ltd v Ho Lee Construction Pte Ltd

[1997] SGHC 246

Suit 433/1995
Chao Hick Tin J
30 September 1997

1

Judgment:

2 1 In this action the plaintiff,

which is a company dealing in timber, sued the defendant for the return of certain

machineries - a concrete batching plant and four passenger hoists. At the conclusion of

the trial I ruled in favour of the plaintiff. I now give my reasons.

3 Background

4 2 Towards the end of 1993 the

defendant, Ho Lee Construction Pte Ltd (Ho Lee), was appointed by the Housing and

Development Board (HDB) as the main contractor for the construction of HDB flats at a site

known as Tampines N3 C15 ("the site"). In turn, pursuant to a sub-contract dated

20 December 1993, Ho Lee engaged Wee Star Construction Ltd (Wee Star) as sub-contractor to

carry out the construction works. The person in charge of Ho Lee was one Peter Tan, the

Managing Director. The person managing Wee Star was one Leow Cheng Hoe (Leow).

5 3 On or about 31 December 1993 Ho

Lee sold the following items of machineries and vehicles (the machineries) to Wee Star for

a consideration of \$313,600:-

6 (i) 1 unit - CFA Batching with two

silos and two water tanks;

7 (ii) 4 units - Passenger Hoist.

8 (iii) 1 unit - Caterpillar Wheel
Loader.

9 (iv) 1 unit - Nissan Mixer Truck
(RD8-101560).

10 (v) 1 unit - Nissan Mixer Truck
(RD8-101226)

11 (vi) 1 unit - Isuzu Mixer Truck.

12 (vii) 1 unit - Manitou Maniscopic
Forklift; and

13 (viii) 2 units - Winget Model
Dumper.

14 4 To obtain the funds to pay for
some of the above, Wee Star entered into hire-purchase arrangements with
Singapore Finance

with regard to items (iii), (iv), (vi) and (viii). The machineries were brought onto

the

site and used for the project.

15 5 To carry out the construction

works, Wee Star ordered timber materials from the plaintiffs, Sit Ley Timber Pte Ltd (Sit

Ley), whose executive director was one Tan Ah Piaw (Piaw). Sometime in September 1994,

Leow approached Piaw for a loan from Sit Ley because Wee Star was in financial

difficulties and it could not pay its workers and sub-sub-contractors. If the work did not

proceed, there would be delay and Wee Star would be liable to Ho Lee for liquidated

damages. Piaw, however, refused to give any loan.

16 6 Some days later, Leow approached

Piaw suggesting that Wee Star would use the machineries as security for the loan. This was

again rejected. The next day, Leow told Piaw that the machineries which Wee

Star had could

be disposed of in the market for \$300,000 but as he needed to use the machineries to

continue the works he was prepared to sell the machineries to Sit Ley for \$200,000,

provided that Sit Ley enter into a lease-back agreement with Wee Star to enable Wee Star

to continue to use them until 28 November 1994 for a monthly rent of \$8,000. Wee Star also

promised to buy back the machineries from Sit Ley at \$200,000 when Wee Star's

financial position improved in three months' time. But if Wee Star were unable to buy

them back in the said three-month period, Sit Ley would be entitled to dispose of them to

third parties and keep the proceeds. Piaw was agreeable to the purchase and lease-back.

Accordingly, on 24 October 1994 the machineries listed above were bought over by Sit Ley

17 7 I should add here that, though

Wee Star to advance its timber business vis-a-vis Wee Star. A second point is that _____ though

on 31 December 1993, a discount of more than a third in just ten months should be a good

from Singapore Finance and that he had no right to sell them. To that extent
Leow had had

18 8 On or about 31 October 1994, a

Version No 1: 11 Sep 2026 (01:05 hrs)

There was some controversy as to the date on which the lease-back agreement was entered into. On the evidence I found that it was either on 31 October 1990 or 1 November 1994. Nothing turned on that. The lease was for up to 28 November 1994. The agreement was drawn up by Sit Ley's solicitors and I was satisfied that it was a bone fide arrangement.

19 9 Upon the expiry of the lease period, Leow informed Sit Ley that Wee Star had not received payment from Ho Lee for work done and asked for an extension of the lease of the machineries . Piaw, for Sit Ley, agreed to an extension.

20 10 Sometime in mid-December 1994 Wee Star could no longer carry on with the sub-contract. Leow approached one Yong Kok Sian (Yong) of Atisa Service Pte Ltd (Atisa) to take over and complete the works.

Atisa agreed.

A deed of assignment dated 29 December 1994 was accordingly entered into among Wee Star,

Atisa and Ho Lee, under which Atisa assumed all rights and liabilities of Wee Star (other

than a sum of \$39,000 due to Wee Star from Ho Lee) under the sub-contract. I should add

that Atisa started work even before the deed of assignment was formally executed. A

pre-condition of the assignment was that Atisa would furnish a security bond for \$500,000

for the due fulfillment of the terms of the sub-contract. In addition, Atisa, was also

required to furnish a separate security bond for \$150,000.

21 11 Piaw was aware of the assignment

of the sub-contract to Atisa and he agreed with Yong to allow Atisa to use the machineries

on the site on condition that Yong agreed to (i) buy the machineries for a sum

of \$200,000

in a few months time when Atisa would have received payment from Ho Lee and (ii) purchase

all timber and timber products required for the works from Sit Ley.

22 12 At the time when negotiations on

the assignment were in progress, Yong told Piaw of the requirement of Ho Lee that he must

furnish a performance bond of \$500,000. Yong asked Piaw for his personal help to obtain

the performance bond as Atisa had then just started and did not have the capital or

standing to obtain such a bond. I will now quote from Piaw's affidavit of

evidence-in-chief where he stated why he helped Atisa:-

23 "I agreed to help Atisa as my

discussions with Mr Yong convinced me that he was capable of completing the contract with

Defendants and thinking that the performance bond was something like an insurance policy

whereby I would not be liable for the full sum of \$500,000-00 if I were to pay the

premiums regularly, I agreed to stand as one of the guarantors indemnifying The Tai Ping

Insurance Company for losses it might incur in providing the Defendants with a performance

bond to guarantee the due performance of the contract of assignment by Atisa. I only

realized that my actual liability under the performance bond could be as high as of

\$500,000-00 when I sought the advice of solicitors after Atisa defaulted on its contract

with the Defendants."

24 13 Having heard him I was prepared

to accept Piaw's evidence that he stood as a guarantor on account of that

misunderstanding. Though he had been in business for sometime he really thought that his

liability was only for the premium due, the performance bond being provided by _____ an _____ insurer.

I could not find any other reason for Piaw assuming that liability. There was no suggestion that Piaw was in any way related to Wee Star/Leow or Atisa/Yong. Piaw's

relationship with them was purely business and that was in timber. He agreed to _____ assume _____ the

liability for the premium in the hope of advancing his timber business.

25 14 Before a formal contract for the

lease and sale of the machineries to Atisa could be drawn up, Atisa encountered

difficulties in proceeding with the works because payment received from Ho Lee _____ was _____ less

than expected. Thus by 20 January 1995 Atisa had abandoned work. Indeed about _____ a _____ week

before 20 January 1995 Atisa intimated to Ho Lee that it could not carry on with the

works.

26 15 In order to pre-empt a call on

the performance bond, discussions took place between Ho Lee, Atisa, Piaw and
Tai Ping

Insurance Co (who issued the performance bond). On 19 January 1995,
following the

discussions, Lie Kee Pong & Co, solicitors for Ho Lee wrote to M/s Choy &

Partners, solicitors for Atisa, inter alia, as follows:-

27 "We act for M/s Ho Lee

Construction Pte Ltd, the main contractor, and understand that you act for M/s
Atisa

Services Pte Ltd, the sub-contractor for the abovementioned project (the
"Project").

28 We are instructed that your clients

have stopped all works on the Project and indicated to our clients that they are
unable to

proceed further.

29 Your clients have also requested

our clients to take over and complete all the building works. Negotiations have been going

on between our respective clients in the meantime with the view of reaching an amicable

settlement.

30 Entirely without prejudice, we are

instructed that our clients are willing not to make demand for payment under the

Sub-contract Performance Bond if:

31 1. Your clients pay to our clients

the sum of \$225,000.00 forthwith by way of Cashier's Order as partial compensation;

32 2. Your clients release and forgo

and hereafter shall have no claim against our clients for the sum of \$150,000.00 or any

part thereof now held and retained by our clients as separate security which said sum

shall hereafter be forfeited in favour of our clients;

33 3. Your clients forthwith release

or cause to be released in favour of our clients the sum of \$100,000.00 deposited
by _____ your

clients with The Tai Ping Insurance Co Ltd as cash collateral for the issuance of the

Sub-contract Performance Bond. For this purpose, your clients shall sign a proper Letter

of Authority addressed to the said Insurance Co authorising them to release and pay the

said sum of \$100,000.00 to our clients.

34 4. Upon all the abovementioned

payment duly received by our clients, the said Sub-contract between our
respective clients

shall be treated as terminated. Thereafter, your clients shall have no claim whatsoever

against our clients for anything whether in respect of the Project, Sub-contract,
or

36 17 Another significant point to

note is that while the letter of M/s Lie Kee Pong referred to "all the materials presently on the site" nothing was mentioned of the machineries.

37 18 Sometime in early February 1995

Sit Ley secured a buyer for the machineries (including the vehicles listed in paragraph 3

above) for \$309,000. At the time Piaw did not know yet that some of the machineries were

on HP from Singapore Finance. The plaintiffs sought to remove the machineries from the

site. Ho Lee's staff refused Sit Ley's representatives access to the site to

identify the machineries. On 21 February 1995 Sit Ley's solicitors offered to forward

documents to prove that Sit Ley was the owner. Ho Lee did not respond to that.

38 19 In the meantime, soon after the

settlement was reached, Leow wanted to take away the equipments of Wee Star which were in

the site office. The evidence of the parties is at variance as to what Leow wanted to

remove. According to Ho Lee's witnesses, Leow wanted to remove the batching plant and

the passenger hoists. It was alleged that Leow told Peter Tan that he was in dire

financial strait. To stop Leow's nuisance, on 28 January 1995 Ho Lee paid a sum of

\$15,000 to Leow "as purchase of their reversionary and other rights in the

machineries." However, according to Leow, the \$15,000 was in payment of the

equipments and other assets in the site office; he did not sell the machineries as they

did not belong to Wee Star. Furthermore, he said that it was absurd to suggest that he

would sell the machineries for only \$15,000, when they were worth \$309,000 a year ago.

39 20 The present action was

instituted by Sit Ley on 15 March 1995 to recover items (i), (ii), (iv), (vii) and (viii)

of the machineries listed in paragraph 3 above. On the same day Sit Ley obtained an

ex-parte order directing Ho Lee to deliver up the machineries to Sit Ley. On 22 March 1995

the ex-parte order was set aside on the application of Ho Lee.

40 21 On 19 April 1995, Sit Ley

amended the Statement of Claim to exclude those items of machineries which were either on

HP or could not be found and claimed only the batching plant and the four units of

passenger hoists (hereinafter called "the batching plant and hoists"). In July

and August 1995, pursuant to orders of court, the batching plant and hoists were sold and

the net proceeds were held by the plaintiffs' solicitors as stakeholders. At the time

of the trial before me the proceeds of \$61,000 were still held by the plaintiff's

solicitors.

41 Issues

42 22 Sit Ley claimed the batching

plant and hoists as owner, having bought them, together with the other
machineries, from

Wee Star, who in turn bought them from Ho Lee. In their Defence filed, Ho Lee
pleaded that

"the sale from Wee Star to Sit Ley was a sham and not bona fide as a result of
which

Sit Ley did not acquire good title." An alternative defence was that Sit Ley were
estopped by their conduct from asserting their title to the machineries.

43 23 I should at this juncture

mention that on the day of the commencement of the trial, Ho Lee sought to
amend its

pleadings to plead a defence based on the Bill of Sales Act. As no acceptable
reason was

advanced why that defence was not raised earlier and as granting leave to amend
would lead

to vacating the trial dates, I refused the application to amend. They should have

seen

this point well before the trial.

44 Sale

45 24 There was clear documentary

evidence before me (7AB64) to show that Wee Star sold the entire lot of
machineries to Sit

Ley. There was also evidence which proved that Sit Ley paid \$200,000 for them.
Ho Lee was

not able to adduce anything concrete or credible to challenge the genuineness
of those

documents.

46 25 As mentioned above, it was true

that at the time when Sit Ley bought those machineries for \$200,000, Piaw did
not inspect

them. But he relied upon the fact that barely ten months before, Wee Star paid
\$313,000

for them. He saw the sale invoice of Ho Lee. Piaw accepted Leow's assurance
that

\$200,000 was a good price so much so that Leow even promised Piaw that in a few

months' time, when his cash flow situation improved, he would buy the machineries

back from Sit Ley. This promise of Leow to re-purchase was of course, at best,

conditional. However, if Wee Star did not buy them back within a few months, Sit Ley would

be free to sell them to any person at any price.

47 I found that what was effected was

a sale by Wee Star to Sit Ley. That was what was intended by Piaw, who was prepared to

help Wee Star having regard to the then existing business relationship between Wee Star

and Sit Ley, with the former buying timber from the latter. Furthermore, after the 3-month

period, Sit Ley would not be bound to sell to Wee Star and could sell to any third party

and if the sale price were more than \$200,000, Sit Ley would not have to account for the

excess to Wee Star. Indeed Sit Ley could also not recover any shortfall from Wee Star if

the sale price were less than \$200,000. If it were a loan, Sit Ley should be able to do

that. In any case, upon assignment of the sub-contract from Wee Star to Atisa, Wee

Star's promise to buy back in 3 months' time had effectively been withdrawn.

Atisa was told that the machineries belonged to Sit Ley.

48 26 Much was made of the fact that

Piaw did not inspect the machineries before he agreed to purchase from Wee Star.

Basically, he trusted Leow and accepted the sale invoice of Ho Lee showing the price which

Wee Star paid. Even Ho Lee agreed to Atisa taking over the sub-contract from Wee Star

without checking the credentials or previous work experience of Atisa.

49 Estoppel

50 27 I now turn to the question of

estoppel. Here Ho Lee argued, relying on the first assignment of the sub-contract from Wee

Star to Atisa, that upon further assignment by Atisa to Ho Lee, that the right to use the

machineries, as opposed to ownership, must also have been assigned along with it. This was

the confusion in Ho Lee's case; they seemed to be concerned more with the right to

use rather than ownership.

51 28 Ho Lee, by its Managing

Director, Peter Tan, also relied upon the fact that in the course of negotiations leading

to the settlement on 19 January 1995, Piaw never mentioned that the machineries had been

bought over by Sit Ley. This was the basis upon which Ho Lee alleged estoppel. Now I shall

quote what Peter Tan said in his affidavit of evidence-in-chief:-

52 "In the absence of any protest

or any mention of the ownership rights by the Plaintiffs, the defendants accepted the

terms of settlement on the understanding that the defendants would be entitled to retain

and use the Machineries to complete the construction work. If the Plaintiffs had fulfilled

their duty to speak and made known their rights over the Machineries at the various

meetings where they had ample opportunities so to do, the Defendants would not have

settled the matter with Atisa on the terms they had. This is because, as stated earlier,

the removal and installation of new concrete batching plant and hoists would involve great

expense and tremendous losses from hindrance to the work in progress. The defendants would

have insisted on all their rights, that is to say, call upon the performance bond
in full

and forfeit the security bond of \$150,000.00 (i.e. \$650,000.00 in total)"

53 29 I was surprised by what Peter

Tan's alleged. If the continued use of the machineries was very much in his
mind why

didn't Peter Tan raise it expressly, either at the discussion or in writing. The

letter from Ho Lee's solicitors of 19 January 1995 referred to the

"materials" on site, not the machineries. If it were true that the question of

the "machineries" was in the mind of Peter Tan, why didn't he say so. It

would have been the most natural thing to do. In his evidence, Peter Tan agreed
that there

is a difference between "materials" and "machineries". Indeed, he

being an experienced contractor, must know the difference.

54 30 The indisputable fact is that at

the negotiations no one mentioned about the machineries. In appropriate

circumstances, it

is possible to infer representation by conduct. But here Peter Tan said that at the time

of the negotiation for a settlement the machineries were very much in his mind. There was

nothing to suggest that it was in Piaw's mind. In fact Piaw's evidence was he did not think of the machineries. It was perfectly understandable if Piaw's mind was

pre-occupied with his liability under the guarantee having then discovered the mistake and

the grave consequence of his error. I accepted his evidence that the machineries were not

in his mind

55 31 The truth of the matter is this:

this aspect did not enter Peter Tan's mind when he was negotiating on the settlement,

as it did not enter the mind of Piaw. I found this to be an instance of *ex-post facto* rationalization.

the same or any part thereof without the prior written consent of the
Superintending

Officer's Representative, which consent shall not be unreasonably withheld.
The

Employer will

58 permit the Contractor the use of

all such Plant Temporary Works materials and goods for the carrying out and
completion of

the Works which permission shall cease upon the occurrence of any event
entitling the

Employer to exclude the Contractor from the site and proceed himself to
complete the

Works.

59 (2) Upon the removal from the Site

of any plant Temporary Works materials or goods with consent as aforesaid, the
property in

the same shall be deemed revested in the Contractor." (Emphasis added).

60 33 Clause 55 could not apply to the

instant situation because the machineries did not belong to Ho Lee but to Wee Star and

later to Sit Ley. For plants and materials to fall within that clause, those things must

be provided or owned by Ho Lee or by "any person, firm or corporation in which (Ho

Lee) has a controlling interest."

61 34 In the circumstances of the

present action I could not see how any term could be implied. It was expressly stated in

the correspondence that materials on site would go to Ho Lee following the settlement. By

not mentioning machineries or plants, if there was anything to be implied, I would have

thought that it would be the other way, namely, plants/machineries would not go to Ho Lee.

62 35 The evidence of Peter Tan showed

that he was quite confused as to whom he thought owned the machineries. At one point he

said he thought the machineries belonged to Wee Star and the latter had only allowed Atisa

to use them. Later, he said he thought the machineries belonged to Atisa. Furthermore, as

mentioned before, even on Peter Tan's evidence he was talking of right to use rather

than ownership. He said that upon assignment of the sub-contract from Wee Star to Atisa,

the right to use the machineries was assigned to Atisa. He also said "the defendants

accepted the terms of settlement on the understanding that the defendants would be

entitled to retain and use the machineries to complete the construction work."

There was no assertion that ownership passed. Even on this basis, Ho Lee should have

returned the batching plant and hoists to Sit Ley sometime in May 1995 when the works at

the site had been completed.

63 36 Finally, there is the payment of

\$15,000 which Ho Lee made to Leow. According to Ho Lee's payment voucher,
it was for

"purchase of batching plant and four units of passenger hoists". Peter Tan tried

to explain away the significance of this payment by saying that this was a
payment to get

rid of a nuisance, so that Leow would not come to cause trouble anymore. This
was in

contradiction to what was stated on the voucher. There were other questions to
be

answered. He said he thought the machineries had already belonged to Ho Lee
under the

settlement. Then why the need to pay for them again. Peter Tan said he paid the
\$15,000 to

emphasise Ho Lee's ownership: what that means is far from clear. As mentioned
above,

Peter Tan also thought the machineries belonged to Atisa. Then why pay to Wee Star? Why

was he paying only \$15,000 when the machineries (or even just the batching plant and

hoists) were worth much more than \$15,000? The truth as I found, was that Peter Tan paid

Leow \$15,000 for two things: (ii) the office equipments which were left behind by, and

which belonged to Wee Star, and (ii) to ensure that Leow did not cause any more nuisance.

64 37 In any case, even if it were

true that Ho Lee was buying the machineries for \$15,000, Leow (and Wee Star) had no title

to pass to Ho Lee in the same way that Wee Star had no title to pass to Sit Ley in respect

of those items on HP from Singapore Finance. A person can only sell what he owns. Ho Lee

was deceived by Leow; in the same way that Sit Ley was deceived by Leow to the extent that

the latter purported to sell machineries which did not belong to Wee Star.

65 Orders

66 38 In the light of the foregoing I

made an order in terms of prayer 1 to declare that Sit Ley was the owner of the batching

plant and the four passenger hoists.

67 39 Accordingly, Sit Ley was

entitled to have the plant and hoists returned to them in February 1995. As mentioned

before, pursuant to orders of court, the batching plant and hoists were sold in September

1995 and the proceeds of \$61,000 were being held by the plaintiff's solicitors as

stakeholders. It became necessary to determine what was their value as at February 1995.

68 40 There was evidence before me to

show that before the batching plant and hoists were sold by auction they were

dismantled

by Ho Lee separately, and over a period of time, incurring a total cost of about \$16,000.

It was argued for Ho Lee that had the batching plant and hoists not been dismantled, they

would not have fetched \$61,000. On the other hand the plaintiffs argued that had the plant

and hoists been dismantled in one exercise, the costs would be significantly less. There

was no evidence before me to show how much the buyer would have paid for them if the buyer

had to dismantle them. However, for the purpose of determining that value, I was prepared

to take a broad view of things and reckon that the actual price paid would be reduced by

\$11,000, (being the reasonable cost of dismantling) giving it a value of only \$50,000.

69 41 It was not disputed that Wee

Star bought the batching plant and hoists from Ho Lee on 31 December 1993 for \$135,000. In

September 1995 their value, as computed above, was only \$50,000. In the absence of any

other evidence to help me determine the true value of the plant and hoists as at February

1995, I felt it would not be unfair to use the straight line depreciation method.

Therefore, for approximately 20 months (1 January 1994 to September 1995) the depreciation

was \$85,000 (\$135,000 less \$50,000). Up to February 1995, it would be only about 13

months. It follows that as at February 1995 their value would be $(\$50,000 + \frac{13}{20} \times \$85,000)$

7/20]). Thus Sit Ley should be entitled to \$79,750. Accordingly, I directed that the

plaintiff's solicitors, the stakeholders, pay the \$61,000 over to the plaintiff and

in addition the defendant should pay the plaintiff the difference of \$18,000 (rounding it

down from \$18,750).

70 42 I awarded costs to the plaintiff

on the District Court scale to be taxed, if not agreed.

71 **Chao Hick Tin**

72 **Judge**

73 **Singapore**

74 **30th September 1997**

Chao Hick Tin J

Joseph Lopez with Aaron Nathan (Choy & Lopez) for the plaintiffs
Peh Chong Yeow with Lim Mei Ann (Lie Kee Pong & Co) for the
defendants
