Bank of China v Yong Tze Enterprise (Pte) Ltd and Another
[2005] SGHC 68

Case Number : OS 1085/2004, RA 366/2005

Decision Date : 14 April 2005

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Kelvin Poon and Rebecca Chew (Rajah and Tann) for the plaintiff; Alvin Yeo SC and Sim Bock Eng (Wong Partnership) for the second defendant

Parties : Bank of China — Yong Tze Enterprise (Pte) Ltd; United Overseas Bank Ltd

Equity – Estoppel – Estoppel by representation – Competing interests of plaintiff bank and defendant bank for possession of mortgaged property – Plaintiff bank claiming possession of property as successor-in-title of paramount mortgagee – Letter from paramount mortgagee to paramount mortgagor with representation to release property from paramount mortgage under certain circumstances – Defendant bank allegedly acting in reliance of representation contained in letter – Whether plaintiff bank estopped from resiling from such representation by paramount mortgagee vis-a-vis defendant bank – Whether elements of estoppel by representation made out

Restitution – Subrogation – Competing interests of plaintiff bank and defendant bank for possession of mortgaged property – Defendant bank's loan used to retire loan from predecessor bank and to refinance debt to paramount mortgagee – Paramount mortgagee's letter to paramount mortgagor stating terms for discharge from paramount mortgage whilst predecessor bank's loan in operation – Whether defendant bank entitled to be subrogated to predecessor bank's rights under letter – Applicable principles when court considering whether to allow subrogation

14 April 2005

Belinda Ang Saw Ean J:

1 This appeal concerned the competing interest of two banks, the plaintiff and the second defendant, for possession of a three-storey detached house at 114 Toh Yi Drive, Singapore 596568 ("the property") that was mortgaged to The Kwangtung Provisional Bank ("KPB") as first and second mortgagee. In the present proceedings, the plaintiff, Bank of China ("BOC"), claimed possession of the property as successor-in-title of KPB. On 28 January 2005, I dismissed the second defendant's appeal against the order for possession made on 8 December 2004 by Assistant Registrar Ms Lee Kee Yeng. The second defendant, United Overseas Bank Limited ("UOB"), has appealed against my decision.

2 The first defendant, Yong Tze Enterprise (Pte) Ltd, was the developer and mortgagor of three houses built on two plots of land. In December 1995, the first defendant sold one of the houses to Ong Cher Keong ("Ong") and his wife, Tan Hwee Cheng Esther ("Tan"). The purchase was financed in part by Focal Finance Ltd, renamed OCBC Finance Limited ("OCBC"). OCBC lodged its caveat with the Singapore Land Authority on or about 5 November 1996. Four years later, the purchasers refinanced their purchase with UOB. After defaulting on the UOB loan, the purchasers on or around 18 December 2003 voluntarily gave up physical possession of the property to UOB. On 17 September 2004, UOB was added as a party to the present proceedings. The first defendant did not participate in the proceedings.

3 The dispute primarily centred on a letter dated 20 July 1996 ("the 1996 letter") written by M/s Helen Yeo & Partners as solicitors for KPB. In that letter which was addressed to the solicitors for the first defendant, KPB approved the sale of the property at the price of $4,230,000 on terms. The terms were:

(1) all sale proceeds are to be forwarded to [KPB] for the Borrower's Account, through [Helen Yeo & Partners];

(2) [KPB] shall give a Discharge on the unit upon receipt of 85% of the sale price;

(3) upon discharge of the unit, the overdraft facility shall be reduced by $1.5 million and the Development Loan shall be reduced by S$500,000.00.

4 A second letter dated 20 May 1999 ("the 1999 letter") from KPB to the first defendant is also important. The relevant paragraphs read:

4. Please also be informed that with immediate effect our terms of discharge with regard to sale of units in the development, including Plot 1 [the property] which has been sold are revised as follows:

a) All sale proceeds pertaining to each unit shall be forwarded to the Bank for your Account.

b) The Bank will give a Partial Release/Discharge of any unit sold only after the receipt of full 100% of the respective sale prices. In this connection, kindly review the sale of Plot 1 and ensure that all progress payments due and payable to date have been/will be forwarded to the Bank.

c) Your Overdraft and Development Loan facilities shall be adjusted accordingly upon each Partial Release/ Discharge at the Bank's discretion.

d) …

5. Save for the above-mentioned, all terms and conditions of our Letters of Offer dated 31 May 1995 and 17 September1996 and the Security Documents shall remain unchanged.

The case for UOB

5 By a letter dated 29 November 2000 ("offer letter"), UOB offered to Ong and his wife a sum of $3.1m to refinance the loan with OCBC and another sum of $211,500 to pay the last 5% of the purchase price of the property. The UOB loan was to be secured by a first legal mortgage over the property. As Central Provident Fund ("CPF") moneys were to be utilised, there was also a deed of arrangement with the CPF Board. In the offer letter under the heading "Securities", UOB required "an undertaking by the developer's mortgagee to discharge the property from their [*sic*] mortgage". At the material time, separate legal title to the property had not yet been issued. The security documents thus consisted of a mortgage in escrow executed by Ong and Tan and a deed of assignment in favour of UOB assigning the purchasers' interest under the sale and purchase agreement dated 27 December 1995. UOB claimed that the 1996 letter operated as the undertaking required in the offer letter. With a partial discharge of the paramount mortgage, UOB could register its mortgage over the property once separate title was issued. As it turned out, the first defendant failed to complete the sale of the property. The purchasers also defaulted on the UOB loan. In 2004, the purchasers were adjudicated bankrupts.

6 The firm of M/s William Lai & Alan Wong ("WL") acted for UOB. Chua Yak Hoon ("Chua") of WL was the case handler. Lau Kim Koon, First Vice President, Special Loans Division of UOB, in his affidavit of 8 October 2004, said that UOB, on the advice of WL, disbursed the loan of $3,062,098.78

on 16 January 2001.

7 Before disbursing the UOB loan, Chua spoke to the first defendant's solicitor, Mr Teo Cheng Tee ("Teo"), who informed her that the plaintiff had agreed to a partial discharge of the paramount mortgage upon receipt of 85% of the sale proceeds. She was also given a copy of the 1996 letter. She had relied upon it in her advice to UOB. In her view, though the 1996 letter was addressed to the first defendant, it was meant for all purchasers and their financiers and for them to act upon it. Banks in the position of paramount mortgagees were aware that developers would pass such letters, which were commonly issued, to prospective purchasers and their financiers in situations involving the financing or the sale of properties where title to the units in the development had not been issued. As such was the conveyancing practice of the day, the plaintiff knew or ought to have known that the purchasers and their financiers, including UOB, would rely on the 1996 letter. It was the second defendant's case that at the time the UOB loan was disbursed, KPB had already received more than 85%, if not 95%, of the sale proceeds. KPB should have, but did not, give a partial discharge of the paramount mortgage upon receipt of 85% of the sale proceeds.

8 Counsel for UOB, Mr Alvin Yeo SC, submitted that the second defendant, and not BOC, was entitled to possession of the property. The 1996 letter bound BOC. The letter was a representation to all purchasers and their financiers as to the terms upon which KPB would release the property from the paramount mortgage. UOB relied on the 1996 letter and accordingly disbursed the loan which was used to retire the OCBC loan.

9 A second way in which counsel sought to resist the proceedings was to argue that the doctrine of subrogation applied in this case. The second defendant was subrogated to the rights of OCBC as the UOB loan was used to pay off the OCBC debt. Under the subrogated rights, UOB could rely on the 1996 letter in these proceedings to stop the plaintiff resiling from the position represented.

The case for BOC

10 Counsel for the plaintiff, Ms Rebecca Chew, argued that the plaintiff was entitled to the order of possession. The plaintiff had only received $3,446,000, which was approximately 81% of the sale proceeds. OCBC could not have insisted on a partial discharge of the paramount mortgage. In the result, UOB must fail on both issues.

11 Ms Chew further submitted that the 1996 letter was a matter between the first defendant and KPB and it was confined to them. It was for the purchasers or their financiers to obtain the terms of the partial discharge of the paramount mortgage from KPB separately. Further, the 1996 letter was confined to the first legal mortgage as the second mortgage was registered five months after the letter. This state of affairs would have been apparent to UOB's lawyers from the result of the title search.

12 At the request of the first defendant, KPB granted it additional facilities on 17 September 1996. A second mortgage dated 18 December 1996 was given for this additional facility. Following a review of the first defendant's account in 1999, KPB in its 1999 letter informed the first defendant and its directors that the paramount mortgage would only be discharged upon receipt by KPB of 100% of the sale proceeds. Tham Wai Keong ("Tham"), a deputy manager of the plaintiff, in his second affidavit pointed out that the 1999 letter was also marked for the attention of Ong, a director and shareholder of the first defendant. Neither the first defendant nor its purchasers (Ong and Tan) objected to the revision of the terms of the 1996 letter. Also, between 29 November 2000 and 16 January 2001, nobody approached KPB, BOC or their solicitors to ascertain the amount of the sale

proceeds received by KPB.

Discussions and decision

13 I start with the sale proceeds received by KPB. After considering the evidence and arguments from both sides, I was fully satisfied that KPB had only received $3,446,000 of the purchase price.

14 I noticed that Chua had not prior to the disbursement of the UOB loan sought confirmation from Teo as to the amount of sale proceeds actually paid to KPB. She also did not go to the borrower, Ong, who was someone in the know. Ong was a director and shareholder of the first defendant and one of its authorised signatories. Ong confirmed, in his affidavit filed in the bankruptcy proceedings against him, that the total sum of $3,446,000 was received by KPB and that was the position even as late as 22 September 2003. Chua formed the view that the plaintiff had received all 95% of the sale proceeds based on her own assessment of the state of affairs gathered from, *inter alia*, the various progress payments collected by the first defendant. Chua also checked with some officers from OCBC and her understanding from her conversations was that only the last 5% of the purchase price was unpaid. Given her belief that 95% of the purchase price had been paid, Chua omitted to explain why she had not at that time ensured that she held in escrow a duly executed partial discharge of the paramount mortgage.

15 The eight receipts exhibited by Chua in her first affidavit showed the various amounts that were received by the first defendant. They did not show, nor was it possible to infer from them, that the same amount of money was received by KPB for the property. According to Tham, two cheques referred to in the receipts were never received by KPB. There was nothing from the first defendant to controvert the plaintiff's evidence. Documented evidence from the first defendant and exhibited in Tham's third affidavit supported the plaintiff's position. The last payment of $1,480,500 was received by KPB on or shortly after 28 April 1999.

16 There was no merit in Ms Chew's contention that the partial discharge of the paramount mortgage was premised on full payment of all sums outstanding under the first and second mortgages. She relied on the terms of the second mortgage, which was to additionally secure all sums due and payable under the first and second mortgages. She also referred me to para 5 of the 1999 letter. I agreed with Mr Yeo that the discharge was tied to the receipt of sale proceeds of the property by KPB. KPB in the 1996 letter as well as in the 1999 letter used the word "unit" as in the property concerned. Other communications from KPB also expressly mentioned a discharge of the paramount mortgage over the property based on receipt of the outstanding sale proceeds as opposed to the amounts owing under the first and second mortgages. To illustrate, KPB in its fax dated 5 April 2001 to its then lawyers, Helen Yeo & Partners, stated that it would require payment of the balance sale proceeds of $684,000 to redeem the property. In arriving at the figure of $684,000, KPB had allowed the first defendant to deduct $100,000 from the sale price as rectification costs for defects. There was another letter dated 13 October 2001 from KPB to the first defendant to the same effect and saying that KPB required 100% payment of the sale proceeds in exchange for a partial discharge of the paramount mortgage.

17 The second defendant's case on estoppel by representation was that KPB in the 1996 letter represented to UOB that it would release the property from the paramount mortgage upon receipt of 85% of the sale proceeds; that the second defendant relied upon such a representation to its detriment; and accordingly the plaintiff was estopped from resiling from that representation. Mr Yeo submitted that UOB was one of the persons to whom the representation in the 1996 letter was intended to be communicated with a view to it being acted on. It was within the contemplation of

KPB that UOB would rely on the 1996 letter for the refinance.

18 I was not prepared to decide on whether or not there was indeed a conveyancing practice of the kind and extent alluded to by Chua without the benefit of expert evidence. Mr Yeo was alive to the evidential deficiencies and quite properly did not base his argument on the alleged "conveyancing practice". He relied on "commercial logic" which sounded distinctly plausible but was however not enough to fit the present circumstances within the elements of estoppel by representation. Besides, the second defendant's offer letter seemed to depart from the alleged practice. Instead, it supported Ms Chew's stance. Ms Chew maintained that it was for the buyer and its financier to approach the paramount mortgagee for confirmation of the partial discharge and the terms thereof. On a plain reading of the UOB offer letter, what was probably contemplated was an undertaking from the developer's mortgagee addressed to UOB. The 1996 letter would not quite measure up to an "undertaking".

19 UOB came into the picture in the last quarter of 2000 and the loan was disbursed in January 2001. The 1996 letter was issued on 26 March 1996, some four years earlier. Did it mean that, regardless of this four-year interlude, the 1996 letter could still go down the line *ad infinitum* and that anyone or someone within a class of persons who came to know of it could rely on it? I did not think so. If anything, the effect of the 1996 letter was spent or exhausted after either the deed of assignment dated 31 October 1996 was executed in favour of OCBC or the second mortgage of 18 December 1996 was executed in favour of KPB.

20 Above all and more importantly, the 1999 letter made a very great difference. It was a salient feature of this case. In my judgment, as far as UOB was concerned, there was no representation by KPB that the paramount mortgage would be discharged upon KPB's receipt of 85% of the purchase price. The 1996 letter was superseded and replaced by the 1999 letter. The 1996 letter was itself spent so as to cease to have any effect by the time it was provided to Chua in connection with the refinancing and disbursement of the UOB loan in January 2001. In the circumstances, it could not be said that UOB was one of the persons to whom the 1996 letter was intended to be communicated. It was the first defendant's solicitor who had informed Chua of the terms of the 1996 letter and by so using and releasing a spent letter it was the first defendant and not the plaintiff who had made the representation to Chua. It seemed to me that the first defendant and Ong could have disillusioned UOB about the 1996 letter, but nothing of the sort happened. In the end, I had no difficulty concluding that the second defendant could not succeed on estoppel by representation.

21 UOB had disbursed $3.06m to OCBC which duly discharged the security interest which OCBC had on the property. By process of subrogation, UOB would step into OCBC's shoes to enjoy the same rights as OCBC. UOB would be able to hold BOC to the 1996 letter in the same way OCBC could have done.

22 Subrogation is an equitable remedy which the court allows in a number of differing circumstances to reverse the unjust enrichment of a party. The decision of *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 firmly recognises the remedy as coming under the law of restitution. Neuberger LJ in *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA 291 conveniently summarises some twelve propositions relating to equitable subrogation. The court has no general discretion whether to give the remedy, but does so as a matter of judgment in recognised circumstances which make it unconscionable for one party to deny the proprietary interest claimed by another party (*Boscawen v Bajwa* [1996] 1 WLR 328 at 335 *per* Millett LJ). In addition to unconscionablity, one of the other conditions for the remedy is that the enrichment be unjust.

23 In most cases in this particular area of subrogation, the person held entitled to be subrogated was a lender providing the money used to discharge the original secured creditor's debt. Mr Yeo cited *Filby v Mortgage Express (No 2) Limited* [2004] EWCA 759. It is an example of the application of the doctrine though in circumstances not on all fours here.

24 The second defendant in the present case claimed to be subrogated to the personal rights of OCBC. So it was necessary for me to consider what OCBC's rights were immediately before the discharge of OCBC's loan. Evans LJ in *Halifax Mortgage Services Ltd v Muirhead* (1998) 76 P & CR 418 said at 426:

> Clearly, the rights which are transferred, or are capable of transfer, to the third party who discharges the mortgage must be those which existed immediately before the discharge took place. But the extent to which they may be exercised by the third party thereafter by virtue of subrogation depends also upon the terms on which the money, which is used to discharge the original mortgage, is advanced to the borrower by the new lender. If he makes an unsecured loan, he cannot claim the benefit of a security which was available to the original mortgagee ...
>
> In my judgment, the extent to which the rights may be exercised by the subrogatee may also be affected by subsequent events. They are not simply fossilised and then revived in exactly the same form.

25 As far as the purchasers were concerned, it could not be said that they bought the property on the strength of the 1996 letter. The letter was issued on 20 July 1996, more than six months after the execution of the sale and purchase agreement on 27 December 1995. There was nothing in the terms of the sale promising a discharge of the paramount mortgage after receipt of 85% of the purchase price. The first defendant was not a licensed developer and r 11 of the Housing Developers (Project Account) Rules (Cap 130, R 2, 1997 Rev Ed) did not apply to the development. Rule 11 required a licensed housing developer to discharge the paramount mortgage in respect of a purchaser's unit upon grant of the temporary occupation permit. The purchasers continued to make payment as they were contractually obliged to do so under the sale and purchase agreement and certainly not in reliance on the 1996 letter. OCBC could not have acquired more rights than the purchasers had to give. OCBC, as assignee of the sale and purchase agreement, was in no better position than the assignors (*ie*, the purchasers).

26 Even as someone within the class of persons to whom the representation in the 1996 letter was originally made, OCBC would not have been able to insist on a partial discharge of the paramount mortgage as KPB had not received 85% of the sales price. Separately and at any rate, I was not persuaded that OCBC necessarily acted to its detriment by meeting the various progress payments. The element of detriment is not limited to monetary expenditure or financial loss. The English Court of Appeal in *Gillett v Holt* [2001] Ch 210 (a case on proprietary estoppel) held that the issue of detriment could be approached as part of a broad inquiry as to whether it was unconscionable in all the circumstances for the representor to resile from the representation. Such an inquiry can apply to other forms of estoppel and is no different from the conditions for the remedy in subrogation emphasised in *Banque Financière de la Cité v Parc (Battersea) Ltd*. Adopting the same approach, I turn to consider Mr Yeo's submissions that the 1999 letter could not be invoked against OCBC, for by the time the 1999 letter was sent, OCBC had acquired rights under the 1996 letter. That contention assumed that the rights acquired had not been altered by subsequent events. The revision of the terms of the 1996 letter was within the plaintiff's contractual entitlement. It was not UOB's case that the plaintiff had no right to review the first defendant's account. It bears noting that the first defendant and its directors, which included Ong, were expressly asked in the 1999 letter to review the sale of the property in the

light of the revision. In the normal course of events, OCBC would probably have been told about the change from 85% to 100% of the sale proceeds to secure a partial discharge of the paramount mortgage. Significantly, OCBC had not filed an affidavit in these proceedings.

27 On the other hand, the plaintiff's evidence was that the revised terms were accepted, the plaintiff not having heard anything from anyone to the contrary since the 1999 letter was sent. According to Tham, between 29 November 2000 and 16 January 2001, nobody approached KPB, BOC or their solicitors about the partial discharge of the paramount mortgage even though OCBC knew that 5% of the sale proceeds remained to be paid. All these facts suggested that OCBC might probably have gone along with the 1999 letter.

28 As between UOB and the purchasers, the latter was bound by the 1999 letter and so would UOB who took over their rights as assignee following the refinancing. I have already ruled that there was no representation from the 1996 letter as far as UOB is concerned. In my view, subrogation could not be invoked for it would put UOB in a better position than it had contracted for.

29 For reasons I have already given, not only were the essential elements of estoppel not made out, there was nothing in the circumstances of the case seen in the round that was unconscionable so as to deny the personal rights claimed by the second defendant in subrogation.

30 In my judgment, the assistant registrar was not wrong to order possession in favour of the plaintiff. I accordingly dismissed the appeal with costs fixed at $4,000.

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