Malayan Banking Berhad v Sivakolunthu Thirunavukarasu and Others
[2007] SGHC 161

Case Number : OS 1009/2005

Decision Date : 28 September 2007

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Ng Yeow Khoon and Seah Yi Lein (Shook Lin & Bok) for the plaintiff; Philip Fong and Navin Lobo (Harry Elias Partnership) for second to fourth defendants

Parties : Malayan Banking Berhad — Sivakolunthu Thirunavukarasu; Sim Chiang Lee; Sim Sien Tiong; Sim Ah Ban

Land – Registration of title – Land titles act – Indefeasibility of title – Transfer and mortgage of property procured by fraud – Whether mortgagee guilty of wilful blindness akin to fraud so as to defeat principle of indefeasibility – Section 160(1)(b) Land Titles Act (Cap 157, 2004 Rev Ed) – Presumption of undue influence by solicitor

28 September 2007

Kan Ting Chiu J:

Background

1 This is yet another case where a fraud is committed, the prime suspect flees, and the victims are left to dispute over who is to bear the loss.

2 The prime suspect in this case is the first defendant, Sivakolunthu Thirunavukarasu, an advocate and solicitor who practised as a consultant in the firm of M/s M Dass & Co. She has absconded after this matter came to light.

3 The second, third and fourth defendants are siblings. The three of them and a fourth sibling, Sim Thiam Oh ("STO") were involved in litigation which was eventually settled between them.

4 The terms of the settlement are only relevant to the present action where they affect the property known as No 23 Senang Crescent ("the property"). Under the terms of settlement, STO was to transfer his 25% share in the property to the second, third and fourth defendants. This transaction will be referred to as Transaction 1. Transaction 1 took place simultaneously on 17 March 2004 with two other transactions, Transaction 2 and Transaction 3. All these transactions related to the property.

5 In Transaction 2, the second, third and fourth defendants transferred their interests in the property to the first and second defendants to be held by them as tenants-in-common, with the first defendant holding a 75% share and the second defendant holding a 25% share.

6 In Transaction 3, the first and second defendants mortgaged their respective interests in the property to the plaintiff, Malayan Banking Berhad, to secure a loan of $700,000 ("the loan") from the plaintiff to the first defendant alone.

7 As the property came under the Land Titles Act (Cap 157, 2004 Rev Ed) ("LTA"), the transfers in Transaction 1 and Transaction 2 and the mortgage in Transaction 3 were registered in the

Registry of Land Titles.

The solicitors involved

8 In Transaction 1, M/s Lee Bon Leong & Co acted for STO as vendor and Mr M Dass ("Mr Dass") of M/s M Dass & Co, the husband of the first defendant (they are now estranged), appeared on the record to have acted for the second, third and fourth defendants as purchasers.

9 On the record, Mr Dass also acted for the second, third and fourth defendants as the transferors and the second defendant as transferee, and Mr Chua Soo Kok ("Mr Chua") of M/s S K Chua & Co acted as the solicitor for the first defendant as transferee in Transaction 2.

10 In Transaction 3, Mr Norman Ho ("Mr Ho") of M/s Rodyk & Davidson, acted for the plaintiff, and on the record, Mr Chua acted for the first defendant, and Mr Dass acted for the second defendant. In the earlier stages leading up to the three transactions, the first defendant was represented by M/s M Dass & Co. However, M/s S K Chua & Co appeared on the record to act for her by the time of the completion of the transactions, probably to avoid the manifest conflict of interest of M/s M Dass & Co acting for the vendors when a member of the firm was the purchaser.

11 I have used the term "on the record" in the foregoing paragraphs because Mr Dass and Mr Chua did not actually act in the transactions, and the evidence points to that being part of the fraud perpetrated by the first defendant.

The fraud perpetrated

12 There was no sale of any interest in the property to the first defendant, and the second defendant did not mortgage his interest in the property to secure any loan to the first defendant. The second, third and fourth defendants accepted that Mr Dass and Mr Chua did not perpetrate or participate in the fraud and they were not involved in these proceedings as parties or witnesses. [note: 1] The evidence suggested that the first defendant was the person responsible for the fraud.

13 The second, third and fourth defendants never had the intention to enter into Transaction 2 and Transaction 3, and their signatures on the documents recording those transactions were forged, apparently by or with the knowledge of the first defendant.

The plaintiff's claim

14 The plaintiff filed the present action after the fraud was uncovered and the first defendant had absconded. At that stage, the plaintiff knew that the second, third and fourth defendants denied the validity of Transaction 2 and Transaction 3.

15 The plaintiff was not a party to Transaction 1 where STO sold his share in the property to the second, third and fourth defendants. Its interest was as the mortgagee in Transaction 3. In this action it sought:

(a) a declaration that the mortgage is valid and the plaintiff's title under the mortgage is indefeasible;

(b) a declaration that the plaintiff is entitled to enter into possession of the property, to receive rents and profits thereof and to exercise their mortgagee's power of sale over the property; and

(c) judgment against the first defendant for $752,637.60 and interest in respect of the loan.

The counter-claim

16 The first defendant whose present whereabouts are unknown did not defend the claim after the cause papers were served on her by substituted service. The second, third and fourth defendants resisted the plaintiff's claim and counter-claimed for:

(a) a declaration that the transfer in Transaction 2 was invalid as it had been obtained by fraud and/or forgery and that the true owners of the property are the second, third and fourth defendants; and

(b) a declaration that Transaction 3 was invalid as it had been obtained by fraud and/or omission and/or wilful blindness and/or voluntary ignorance; and for consequential orders thereto.

17 As the documents in Transaction 2 and Transaction 3 were registered in the Registry of Land Titles, the issue before me was whether the registered instruments should be valid and effective despite the forgery of the signatures of the second, third and fourth defendants. (These three defendants shall be referred to henceforth collectively as "the defendants").

18 The defendants contended that the plaintiff's registered title is not indefeasible because "the conduct of the Plaintiff or their agent (i.e. Mr Ho) in this matter was so willfully blind or voluntarily ignorant that it amounted conduct (sic) akin to fraud", and they set out three "major factors" which they relied on:

(a) The Plaintiff's knowledge and notice of the undue influence between [the first defendant] and [the second defendant] that renders Transaction 2 and 3 (sic) voidable;

(b) The Plaintiff's knowledge and notice that the terms set by Mr Ho for Completion were not met;

(c) The Plaintiff's knowledge and notice that the Completion Accounts did not tally. [note: 2]

19 The defendants identified the legal bases on which the mortgage should be declared invalid, i.e.:

(a) Under Section 46(2)(a) of the Land Titles Act (Cap 157) ("LTA");

(b) Under Section 46(2)(b) of the LTA; and/or

(c) That at least the 2nd Defendant has an enforceable personal equity against the Plaintiff which would defeat its title under the Mortgage. [note: 3]

and they also relied on s 160(1)(b) read with s 46(1)(v) of the LTA for the right to rectify the land register. [note: 4]

20 It is useful to set out relevant provisions of the LTA. The most important provision is s 46(1), which confers indefeasibility on a registered title:

46.–(1) Notwithstanding —

(a) the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority;

(b) any failure to observe the procedural requirements of this Act; and

(c) any lack of good faith on the part of the person through whom he claims,

any person who becomes the proprietor of registered land, whether or not he dealt with a proprietor, shall hold that land free from all encumbrances, liens, estates and interests except such as may be registered or notified in the land-register, …

21 Section 46(2)(a) and (b) on which the defendants relied read:

46. – (2) Nothing in this section shall be held to prejudice the rights and remedies of any person –

(a) to have the registered title of a proprietor defeated on the ground of fraud or forgery to which that proprietor or his agent was a party or in which he or his agent colluded;

(b) to enforce against a proprietor any contract to which that proprietor was a party;

(The defendants did not explain how s 46(2)(b) would apply in their case, as there was no contract between them and the plaintiff which they can or wanted to enforce.)

22 Section 160(1)(b) reads:

(1) Subject to subsection (2), the court may order rectification of the land-register by directing that any registration be cancelled or amended in any of the following cases:

…

(b) where the court is satisfied that any registration or notification of an instrument has been obtained through fraud, omission or mistake;

The relevant case law

23 When the defendants made the counter-claim on 16 February 2006, a leading case on s 46(2) and s 160 of the LTA was the High Court decision in *United Overseas Bank Ltd v Bebe bte Mohammad* [2005] 3 SLR 501 ("*UOB v Bebe No 1*"), and it can be inferred that the defendants drew encouragement and support from that decision when they made their counter-claim.

24 In that case, the plaintiff, a bank, sought to enforce a mortgage it held over a property. In the course of preparing the mortgage, the solicitors acting for the plaintiff were aware that a replacement certificate of title had been issued for the property. Notwithstanding that, when the borrowers' agent handed to the solicitors the original duplicate certificate of title, the solicitors prepared the mortgage and had it registered on the strength of the original duplicate certificate of title.

25 When the bank sought to enforce the mortgage, its action was dismissed by the trial judge on the grounds summarized in the headnote, that:

> Wilful blindness could in certain circumstances be "akin to fraud". This was a situation of wilful blindness on the part of the plaintiff's conveyancing clerk, if her conduct was not fraudulent in the first place. On either basis, the defendant was entitled to defeat the Mortgage registered pursuant to s 46(2) of the LTA on the ground of fraud …
>
> In accepting the original duplicate CT at the Registry of Titles, the staff concerned must have made a mistake. As such, the land-register should be rectified by cancelling the registration of the Mortgage under s 160(1)(*b*) of the LTA on the ground that it was obtained through a mistake …
>
> … the defendant had a personal right recognised by equity to set aside the transaction on the ground that the plaintiff's agents had unlawfully used the cancelled original duplicate CT to get on the land-register as a mortgagee, to the defendant's detriment, when they were not entitled to do so. The use of the cancelled original duplicate CT to register the Mortgage was unconscionable. The sanctity of the land-register under the LTA under the doctrine of indefeasibility should not be used to allow unconscionable behaviour.

26 The bank appealed against the trial judge's decision. On 25 September 2006, before the present action came on for hearing before me, the Court of Appeal delivered its decision in *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR 884 ("*UOB v Bebe No 2*"). Chan Sek Keong CJ who delivered the judgment of the Court, undertook a thorough review of the facts, the trial judge's reasoning and the law, and allowed the appeal on grounds stated in the headnotes, that:

> On the evidence, the conduct of UOB's solicitors amounted to, if anything, no more than negligence or lack of due diligence in finding out the true state of affairs. Accordingly the Mortgage could not be set aside on the ground of fraud under s 46(2)(*a*) of the LTA …
>
> The registration of the Mortgage using the cancelled original CT was not a mistake or omission by UOB's solicitors since they intended to register the Mortgage. The mistake or omission, if any, was made by the Registry, and that did not come within the terms of s 160(1) of the LTA: …
>
> Bebe had no personal equity against UOB to set aside the Mortgage as there was no pre-existing relationship between UOB and Bebe that could have given rise to any obligation or responsibility on the part of UOB with respect to the custody or use of the original CT, and UOB's solicitors did not unlawfully facilitate the registration of the Mortgage by using the original CT with the knowledge that it had been cancelled …

27 The Court's analysis of the law is best appreciated by reading the full judgment, and I will only make reference to the parts of the judgment directly relevant to the present case. In its preliminary observations (at [8]), the Court cautioned against:

> … undue reliance on the concept of unconscionability to erode the principle of indefeasibility under the LTA. This might lead to unwelcome uncertainty in land dealings under the LTA and could even undermine its primary objective.

28 On wilful blindness, the Court held (at [21]) and [22]):

> 21. … the allegation that [the bank's solicitors] or [the solicitors' conveyancing clerk] had knowledge that the replacement CT had been issued for the respondent's property, cannot be established from the registry search that [the solicitors] had made showing that a replacement CT had been applied for. There was no evidence that [the solicitors] knew that the replacement

CT had been issued. Indeed, the subsequent delivery of the original CT by the respondent's solicitors' agent to [the solicitors] could easily have lulled them into thinking that the original CT had been found.

22. … the mere failure to make further inquiries could not amount to wilful blindness akin to fraud as there was no dishonesty, moral turpitude, want of probity, or intent on the part of UOB's solicitors to disregard the respondent's rights. At worst, as counsel contended, [the conveyancing clerk] was guilty of negligence or a failure to exercise due diligence.

29 On the meaning of "fraud" in the LTA, the Court found (at [34] and [35]):

34. The hallmark of fraud is dishonesty or moral turpitude, which usually stems from greed, and greed simply means taking something of value which does not belong to you. However, when a financial institution, such as UOB, gives a secured loan to a customer, its primary interest in the security is in ensuring that it is a valid and enforceable security. It has no commercial interest beyond that. Accordingly, in ordinary banking transactions, there is no reason for the bank to act dishonestly or to seek to defraud the customer of his property in the security. … When fraud occurs in connection with bank mortgages, it usually involves employees or agents acting fraudulently or dishonestly in their own personal interest, contrary to their obligations to the bank. Except for such cases, court actions against lending banks on the ground of fraud have little chance of success. …

35. The same comments apply to solicitors. When they act for clients, they are acting in the ordinary course of their profession, for which they are remunerated accordingly. Unlike their clients, they normally have no personal interest in the outcome of the transaction, and accordingly there is no reason for them to act dishonestly. Unless there is evidence that they have received payment well beyond their normal professional fees for the transaction, it would be difficult to impute a fraudulent intent in any act or omission in which they have been involved in relation to the taking of the security. They might be careless, negligent, indifferent or reckless, but they are not, in the ordinary circumstances, very likely to be dishonest or fraudulent. Furthermore, any allegation that they had turned a blind eye in order to assist a fraudster would be difficult to prove without evidence of dishonesty on their part.

30 With regard to the reference to "fraud, omission or mistake" in s 160(1)(b), the Court ruled (at [47] and [48]) that:

47. … the meaning of the words "*registration of any instrument has been obtained*" in s 160(1) is plain: they refer to the fraud, omission or mistake of the party who presents the instrument to the registry for registration. With respect to fraud, this interpretation provides the linkage to s 46(2)(*a*) as it is only the fraud to which the registered proprietor or his agent is a party or in which he or his agent colluded that is capable of defeating his otherwise indefeasible title. With respect to omission or mistake, this interpretation provides the linkage to ss 46(2)(*b*)–46(2)(*e*) as it should only be the mistake or omission of the registered proprietor that is capable of prejudicing the rights of other parties in relation to the properties in question. …

48. It is only just if as a result of his fraud, mistake or omission, a registered proprietor thereby obtains title to the property that the court should have the power to set the matter right by exercising its power of rectification under s 160(1)(*b*).

31 Lastly, on the relationship between personal equities and the principle of indefeasibility, the Court was of the view that:

91. Baalman [*The Singapore Torrens System* (Government of the State of Singapore, 1961)] did not go as far as to suggest that the enactment of the long list of overriding interests and exceptions to the principle of indefeasibility in s 46 of the LTA was exhaustive of all claims, including personal equities, that could be made against a registered proprietor. But the inclusion of the exception of fraud to which the registered proprietor or his agent is a party would, by implication, also exclude from such exception all conduct which in law or equity has a lesser degree of moral turpitude than actual fraud. … As regards all other unspecified personal equities, we are of the view that having regard to the policy objectives of the LTA to reduce uncertainty and to give finality in land dealings, *our courts should be slow to engraft onto the LTA personal equities that are not referable directly or indirectly to the exceptions in s 46(2) of the LTA*. These exceptions are, as we have shown, capable of encompassing most of the *in personam* actions at common law or in equity that a court exercising *in personam* jurisdiction may grant.

[Emphasis added]

The defendants' case

32 The defendants' principal "major factor" was plaintiff's knowledge of the undue influence the first defendant had over the second defendant, which rendered Transaction 2 and Transaction 3 voidable. [note: 5]

33 When the defendants complained of undue influence they appeared to treat the first defendant as a solicitor who was purchasing an interest in the property from her clients.

34 Counsel for the defendants referred to a host of cases on undue influence. They include Singapore decisions in *Mookka Pillai Rajagopal and Others v Khushvinder Singh Chopra* [1996] 3 SLR 457, *Law Society of Singapore v Khushvinder Singh Chopra* [1999] 4 SLR 775, *Oversea-Chinese Banking Corp Ltd v Tan Teck Khong and Another (committee of the estate of Pang Jong Wan, mentally disordered) and Others* [2005] 2 SLR 694 and the instructive and authoritative decisions of the House of Lords in *Barclays Bank plc v O'Brien and another* [1993] 4 All ER 417 and *Royal Bank of Scotland v Etridge (No 2) and other appeals* [2001] 4 All ER 449.

35 The basis of the defendants' complaint has to be tested against some questions. Does the presumption of undue influence arise whenever one member of the firm is the purchaser and another member of the firm is acting as the solicitor for the vendor? Would the fact that the two members of the firm are spouses make a difference? For the first question, insofar as there are grounds to infer that the solicitor would want the transaction to be concluded to the satisfaction and benefit of the other solicitor, the presumption of undue influence could arise, though I do not hold a concluded position on this question. However, I will say that where the two members of that firm are spouses, a rebuttable presumption of undue influence would arise when one of them acts for the vendors and the other is the purchaser.

36 The situation in the present case is that neither the same solicitor nor the same firm acted for the first defendant and the second defendant. On the record, the first defendant was represented by Mr Chua of M/s S K Chua & Co while Mr Dass of M/s M Dass & Co acted for the second, third and fourth defendants. Would that make a difference? I do not think it should. When a solicitor acts for clients who are selling a property to his wife, a rebuttable presumption of undue influence arises even if he does not act for his wife.

37 In this case, what could the plaintiff or Mr Ho have done? There was no legal basis to prevent M/s M Dass & Co from acting for the defendants. However, I believe that on a commercial

basis, a lender bank uncomfortable with such a situation can impose a condition in the loan offer that the borrowers be represented by solicitors with no interest, direct or indirect, in the transaction other than as solicitors.

38 It can be argued that a prudent solicitor in Mr Ho's position would be cautious about M/s M Dass & Co acting for the second defendant who was offering his interest in the property to secure a loan to Mr Dass' wife, and that a prudent solicitor should have taken action to eliminate the risk of undue influence.

39 Was there wilful blindness or fraud in Mr Ho's inaction? I take heed to the Court of Appeal's advice for caution and restraint in alleging fraud against solicitors. There was no suggestion that Mr Ho received any payment beyond the professional fees, or that he had any interest in the transactions beyond being the plaintiff's solicitors. When Mr Ho was cross-examined by the defendants' counsel on this issue, it appeared that Mr Ho did not fully consider the implications of Mr Dass acting for the defendants. It should be added that even if he had, he might have concluded in good faith, albeit probably wrongly, that the presumption of undue influence would not arise.

40 As stated in [35] of *UOB v Bebe No 2*, it would be difficult to prove that a solicitor had turned a blind eye in order to assist a fraudster without evidence of dishonesty on the part of the solicitor. On the evidence before me, I do not find that Mr Ho was wilfully blind or voluntarily ignorant. His duty was to look after the interests of his client, the plaintiff. If the plaintiff incurred a loss in the transactions, it might complain that he did not protect its interests, and it might seek redress from him (and/or M/s Rodyk & Davidson), but that would be on the basis of negligence, not fraud or dishonesty. I make clear that I am not making a finding on whether Mr Ho was negligent, but I am saying that he was not a party to any fraud as contemplated by s 46(2)(b) of the LTA.

41 The two other "major factors" that the defendants relied on to assert wilful blindness, are as set out in [18] at (b) and (c). These are comparatively minor matters regarding the certification of correctness executed by Mr Dass as the solicitor for the borrower, [note: 6] the completion accounts, [note: 7] the request for a certified copy of the option, [note: 8] amendments to the transfers in Transaction 1 and Transaction 2, [note: 9] differences in the recipients and accounts for the drawdown of the loan. [note: 10]

42 Counsel for the defendants described them as tell-tale signs of fraud or *mala fides* at work. I found them to be nothing more than the meagre returns of *ex post facto* fault-finding. There were discrepancies which parties may have overlooked or waived. None of them pointed to dishonesty or fraud. There could be reasons for not insisting on full compliance or consistency, but even if the discrepancies should not have been overlooked or waived, it was a quantum leap to label them evidence of fraud.

43 On their counter-claim found on personal equities, it was submitted that:

> [The second defendant] having an action in equity to set aside the Mortgage as against the Plaintiff by reason of undue influence, has a personal equity as against the Plaintiff which ought to be enforceable in this case as the LTA does not specially exclude this. [note: 11]

44 This is a wider application of personal equities than the Court of Appeal considered permissible in *UOB v Bebe No 2* (see [31] hereof). The defendants had not established fraud or wilful blindness against the plaintiff or Mr Ho. Noting and applying the constraints the Court of Appeal imposed, it is clear that no personal equity existed in this case that could oust the application of the principle of indefeasibility.

Conclusion

45 The plaintiff shall have the declarations and the judgment it seeks. The defendants' counter-claim is dismissed.

[note: 1]Affidavit of Sim Ah Ban para 13

[note: 2]2nd, 3rd And 4th Defendants' Closing Submissions para 19

[note: 3]2nd, 3rd And 4th Defendants' Closing Submissions para 2

[note: 4]2nd, 3rd And 4th Defendants' Closing Submissions para 3

[note: 5]2nd, 3rd And 4th Defendants' Closing Submissions para 19

[note: 6]2nd, 3rd And 4th Defendants' Closing Submissions para 63

[note: 7]2nd, 3rd And 4th Defendants' Closing Submissions para 109

[note: 8]2nd, 3rd And 4th Defendants' Closing Submissions para 118

[note: 9]2nd, 3rd And 4th Defendants' Closing Submissions para 119

[note: 10]2nd, 3rd And 4th Defendants' Closing Submissions para 122

[note: 11]2nd, 3rd And 4th Defendants' Closing Submissions para 148

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