Anwar Patrick Adrian and another *v* Ng Chong & Hue LLC and another [2013] SGHC 202

Case Number : Suit No 455 of 2012

Decision Date : 03 October 2013

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Tan Cheng Han SC (instructed) and Balachandran s/o Ponnampalam (Robert Wang & Woo LLP) for the plaintiffs; Michael Khoo SC, Andy Chiok and Josephine Low (Michael Khoo & Partners) for the defendants.

Parties : Anwar Patrick Adrian and another — Ng Chong & Hue LLC and another

Tort – Negligence – Duty of care – Solicitor and client – Identity of client

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 138 of 2013 was allowed by the Court of Appeal on 29 May 2014. See [2014] SGCA 34.]

3 October 2013 Judgment reserved

Choo Han Teck J:

1 The second defendant, Ng Soon Kai ("Ng"), a lawyer of 21 years standing, met Agus Anwar about 2002. Agus Anwar was then the Chief Executive Officer of PT Bank Pelita, a bank in Indonesia. Agus Anwar became a client of Ng. Through Agus Anwar's instructions, Ng completed the legal work for the purchase of several properties but the purchases were made by different parties as the purchasers. The details of the purchases were as follows –

(a) 57A Devonshire Road (#21-05) in the name of Agus Anwar;

(b) 57A Devonshire Road (#21-03) in the name of the first plaintiff (Patrick Anwar);

(c) 57A Devonshire Road (#18-03) in the name of the second plaintiff (Andrew Anwar);

(d) 8 Scotts Road (#35-08) in the name of Scotts Island Trust Pte Ltd ("SITPL"), whose director and shareholder was the first plaintiff; and

(e) 8 Scotts Road (#36-04) in the name of Scotts Skyline Trust Pte Ltd ("SSTPL"), whose director and shareholder was the second plaintiff.

2 The first and second plaintiffs are the sons of Agus Anwar. The Devonshire properties were purchased in 2006 in which Ng wrote to all relevant parties including the purchasers under the name and style of the first defendant ("NC&H"). NC&H in a letter dated 22 May 2006 to the first plaintiff wrote in the very first line – "We thank you for your instructions to act for you in the above matter". The matter in question was the purchase of the Devonshire #21-03 property. Similar letters were written in respect of the different purchasers of the above properties.

3 The Scotts properties were purchased in 2007. Similar letters were written by Ng under the firm's name NC&H on behalf of the purchasers. Nothing turned on the purchases. On 6 October 2008

Agus Anwar, through his secretary, notified Ng that Societe Generale Bank & Trust ("SocGen") had served a notice of demand on him in respect of credit facilities granted by SocGen to Agus Anwar. The shortfall at the time stood at US$8,079,204.41. Agus Anwar instructed Ng to act for him in respect of SocGen's demand. A series of negotiations ensued between Ng (under the name of NC&H) and Allen & Gledhill ("A&G"), acting as solicitors for SocGen.

4 On 7 October 2008 Ng wrote to A&G in the following terms –

> We act for Agus Anwar and we refer to your letter dated 6 October 2008 to our clients. As additional collaterals to your clients, our client is willing to procure a mortgage over the following properties in favour of your clients.

The letter then set out the two Devonshire properties under the names of the first plaintiff and second plaintiff, as well as the two Scotts properties (under SITPL and SSTPL). The letter ended with the following sentence –

> Please let us know if your clients are willing to accept the above properties as additional collaterals whilst our client takes steps to raise further cash to regularise his account with your clients.

A&G's letter of 6 October 2008 was addressed to Agus Anwar. It appears that Agus Anwar was negotiating with SocGen directly. Hence, SocGen wrote to Agus Anwar by letter dated 13 October 2008 asking for the two Devonshire properties in the names of the first and second plaintiffs, as well as the two Scotts properties to be offered as additional collaterals, and it also required a guarantee to be executed by each of the owners of those properties.

5 Ng wrote to A&G on 14 October 2008 regarding SocGen's letter and the instructions of Agus Anwar in which he stated that Agus Anwar agreed to having the four properties put up as additional security, and also procuring the corporate guarantees of SSTPL and SITPL, however, "*he (Agus Anwar) urges your clients (SocGen) to re-consider asking for [the personal guarantees of the (first and second plaintiffs)]. The two young boys are hardly able to provide any real security to your clients. In particular, (the second plaintiff) is still pursuing his degree in the United States of America. For all intents and purposes, the guarantees from the two boys are not going to be worth anything. In the circumstances, our client will be grateful if your clients can agree to accept [the four properties and the corporate guarantees] and drop [the requirement for (the first and second plaintiffs') personal guarantees].*" However, SocGen was not prepared to waive their request for the personal guarantees of the first and second plaintiffs unless Agus satisfied certain conditions, including paying US$4m by 15 October 2008. Agus was unable to comply with the conditions so SocGen wrote on 16 October demanding the full debt due, namely, US$17,092,955.16.

6 Strangely, within four days of that letter Ng proceeded to re-commence fresh negotiations. In a letter that ensued, A&G requested for various fresh collaterals in consideration of SocGen forbearing its right to sue. One of the additional security requested was the Devonshire #21-05, which was purchased directly in the name of Agus Anwar. Ng wrote to tell A&G that that was out of the question because Agus was holding Devonshire #21-05 in trust for a third party (whose identity was not disclosed). It appears that in the meantime Agus Anwar was still negotiating personally with SocGen. Ng claimed that he was not privy to that negotiations save for what Agus Anwar told him. Consequently, Ng received a Forbearance Agreement from A&G on 23 October 2008. The letter from A&G was dated 22 October 2008 and the Forbearance Agreement was in SocGen's cover also dated 22 October 2008 and addressed to Agus Anwar. In this agreement SocGen no longer insisted on having the personal guarantees of the first and second plaintiffs. But Agus Anwar had to pay US$2.5m

by 31 October 2008 and secure the Devonshire properties (excluding #21-05) and the Scotts properties as additional collaterals.

7 The events after A&G's letter of 16 October 2008 not only included the offer of the forbearance by SocGen, but the entry of another law firm – Tan Peng Chin LLC – instructed by SocGen to execute the legal process for the additional collaterals. Tan Peng Chin LLC sent the documents for the mortgage of the Devonshire properties to the first and second plaintiffs for their signatures. The mortgage documents contained personal covenants by the first and second plaintiffs for the debts of their father Agus Anwar to SocGen. The documents were duly executed. Agus Anwar defaulted. SocGen issued fresh demands through A&G between November 2008 and April 2009. References were made to the first and second plaintiffs' personal liability under the mortgage documents. On 28 April 2009 SocGen sued Agus Anwar, the first plaintiff, the second plaintiff, SITPL, and SSTPL under the Forbearance Agreement. SocGen obtained default judgment in that suit, Suit No 365 of 2009, against Agus Anwar and the Scotts companies. It also obtained summary judgments against the first and second plaintiffs after Steven Chong J allowed SocGen's appeal against the registrar's order granting leave to defend. The Court of Appeal restored the registrar's order. The result was the prospect of trial, but that did not materialise because the first and second plaintiffs settled SocGen's claims in Suit No 365 of 2009. Essentially, SocGen agreed to limit their claim against the first and second plaintiffs to US$2m jointly with the incentive that if half that sum was paid by a certain date SocGen would forgo the other half. The first and second plaintiffs paid in time and the remaining US$1m was waived by SocGen.

8 The first and second plaintiffs sued Ng and NC&H in this action for damages for negligence that resulted in their having to pay off SocGen. The main thrust was that Ng and NC&H failed to alert A&G or Tan Peng Chin LLC that SocGen had already agreed not to ask for their personal guarantees when the Devonshire properties were given as additional security under the Forbearance Agreement between SocGen and Agus Anwar. That neglect thus caused loss and damage to them. They are also claiming the sum of $325,287.71 being the legal costs incurred in defending Suit No 365 of 2009. The first and second plaintiffs are also claiming in this action that Ng did not advise them that he was in a position of conflict when he initially defended all the defendants in Suit No 365 of 2009. Furthermore, the first and second plaintiffs are also claiming that Ng and NC&H were in breach of professional duties when they acted for them (the plaintiffs) in the negotiations with SocGen in 2008 leading to the Forbearance Agreement and the execution of the mortgages of the Devonshire properties. Both defendants denied liability. Ng averred that he was not acting for either plaintiff because both the first and second plaintiffs were at all times the nominees of their father Agus Anwar. The plaintiffs testified at the trial and so did Agus Anwar, and the substance of their testimonies was the narrative set out above. Agus testified that he was assured by Ng that his sons would not be personally liable.

9 The first and second plaintiffs were the legal owners of the Devonshire properties and in that regard, Ng and NC&H would have been obliged to render advice directly to them. In any other circumstances, Ng would also have been obliged to advise them that they could seek separate advice because of the possibility of conflict with Agus Anwar's interests. However, as Agus Anwar stated in October 2008 to SocGen, through NC&H and A&G –

> The two young boys are hardly able to provide any real security to your clients. In particular, (the second plaintiff) is still pursuing his degree in the United States of America. For all intents and purposes, the guarantees from the two boys are not going to be worth anything.

If that were so in 2008, it would have been clear that the two young boys were nominees in 2006 when the Devonshire properties were purchased. I do not accept the testimonies of the first and second plaintiffs that they bought the properties in their own right and not as nominees of their

father. The second plaintiff stated under cross-examination that he signed the mortgage documents out of filial piety. He said that Agus was their father and when he was in trouble they (the sons) had to help. The first plaintiff also declared that he signed the documents because he was filial. When confronted with his defence in Suit No 365 of 2009 in which he and his brother averred that they signed under the undue influence of Agus Anwar, the first plaintiff replied that he did not understand the defence. He admitted that the defence filed was vetted by Geraldine Andrews QC.

10 There is some significance to be attached to Agus Anwar's private negotiations with SocGen when Ng was simultaneously negotiating with A&G. The full details of what transpired or agreed between Agus Anwar and SocGen were not adduced in evidence before me, but I accept that Ng did not know the details then. This was clear from the email Ng sent to Agus Anwar when defending him in the subsequent action by SocGen in Suit No 365 of 2009. In that email Ng asked Agus Anwar for those details. The intention and actions of Agus Anwar, his sons the first and second plaintiffs in the lengthy course of litigation from 2008 to the present were ambiguous and contradictory in the best of parts, and unfathomable in the rest such that in considering their evidence in court against what they had said in their affidavits here and in the Suit No 365 of 2009 proceedings, I am left with the clear impression that their evidence before me was self-serving and unreliable. I shall not be overly harsh by setting out each one of that evidence. I will only refer to a sampling.

11 The first and second plaintiffs instructed Tan Kok Quan Partnership in November 2009 (after Steven Chong J set aside the registrar's order for leave to defend) asserting that the first and second plaintiffs acted on the advice of Ng and Ng was thus put on notice that they might be looking to him for redress. However, when they appealed to the Court of Appeal against Steven Chong J's decision, both of them filed affidavits categorically stating that that they were not advised. The first plaintiff's affidavit stated –

> I was not represented by any solicitors notwithstanding that the documents that I signed were sent to me by [NC&H]. I signed the documents in my father's office where they were sent to me. I was not advised on the documents before signing it.

The second plaintiff swore a similar affidavit with the minor difference that the documents were sent to him from his father's office to USA where he was then studying. They did not join Ng or NC&H as third parties in 2009. The first and second plaintiffs compromised with SocGen in April 2010 but only looked to Ng and NC&H on 9 November 2011. The second plaintiff deposed in his affidavit of evidence-in-chief that he assumed that his father Agus Anwar would be working with Ng and NC&H on the material matters with SocGen, and further stated that he had expected that Ng would have checked the documents. The evidence on the whole indicated that the two 'young boys' relied only on their father Agus Anwar.

12 I am of the opinion that throughout the relevant times when SocGen and Agus were in negotiations in 2008, Ng and NC&H's client was Agus alone. Accordingly, Ng and NC&H did not have a solicitor-client relationship with the first and second plaintiffs, and neither did Ng and NC&H owe the plaintiffs a duty of care. Agus Anwar alone gave instructions and directed the course of events personally with SocGen and indirectly through Ng and NC&H. Even in the course of the trial, Agus Anwar was the principal witness even though he was not a party, whether as co-defendant or as a third-party (counsel only explained that it was because he was a bankrupt). Nonetheless, he was clear and forceful in matters that aid his sons' claims, but where they do not he suffered from acute bouts of amnesia. He testified that he could not remember going to SocGen to negotiate the terms of the Forbearance Agreement. If there was any event that he should have remembered that would be it. There is a sense of facetiousness and disdain in that answer, and that affected his credibility. Similarly, he chose to say that he could not remember whether he had sent SocGen's demands to his

sons. Those demands were sent to him, and as counsel for Ng submitted, if he did not, it only showed that he was the only principal actor in the story and his sons were mere nominees.

13 If the first and second plaintiffs had succeeded in their defence in Suit No 365 of 2009 there would have been no basis to sue Ng and NC&H in this action. They claimed that the settlement was in their best interests because by paying US$1m they averted a potentially larger judgment debt. But if they are right in their arguments before me, they would not be liable, or, if liable, have an indemnity claim against Agus Anwar (who they did not sue). They cannot have it both ways. In this regard, the testimonies of the two brothers were inconsistent and if they appeared unable to present a consistent and coherent account of the material events, it was probably due to the fact that it was their father Agus Anwar who was involved. The sons were merely handed a script to recite, a task they performed without conviction or persuasion. In justifying his loss, the second plaintiff testified that his father loaned him $300,000 but when asked, he could not say whether it was in US or Singapore dollars. Agus' account of his sons' loss was remarkable. He claimed that he borrowed from a friend who said that the money need not be repaid. The money, according to Agus, was not repayable and was not repaid. Where then was the loss of $1m? As regards the claim for legal costs, it was not clear what the true amount was, or who paid the costs. The first and second plaintiffs' solicitors had written to say that Agus Anwar paid on behalf of his sons, but the sons claimed that they had to find funds to pay the costs. Could they not just say 'Dad paid for us and we should pay him back'? As to the first plaintiff's claim for loss of income, I have difficulty accepting the letter of David Soetyadjaya. Not only was it produced late, and close to trial, but the writer was not called for the claims to be verified. David Soetyadjaya was the Chief Executive Officer of Ramba Energy that the first plaintiff claimed had withdrawn its offer of a job after SocGen had commenced action in Suit No 365 of 2009. The job was that of an Executive Director with an annual pay of $250,000. David Soetyadjaya's letter was undated and not on Ramba Energy's letterhead. In other documents, the CEO of Ramba Energy was named as 'Aditya Wisnuwardana Seky Soetyadjaya'. I am unable to know if they are one and the same.

14 Hence, notwithstanding that Ng was not careful to be clear about who he really acted for in 2008, and in not spotting the inclusion of the personal liability clauses in the mortgage documents, I am of the view that he and NC&H are not liable for the loss claimed by the first and second plaintiffs in this action. The plaintiffs have failed to prove their case and the action is therefore dismissed with costs to be taxed if not agreed.

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