Ong & Co Pte Ltd v Lai Siew Ping Vivien
[2001] SGHC 358

Case Number : Suit No 1049 of 2000

Decision Date : 29 November 2001

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Andrew Ong Hock Sing and Kendall Tan (Rajah & Tann) for the plaintiffs; Chia Ti Lik (Chia Ngee Thuang & Co) for the defendants

Parties : Ong & Co Pte Ltd — Lai Siew Ping Vivien

Contract – Contractual terms – Indemnity clause in appointment letter – Whether indemnity clause valid – Whether law is different for dealers as compared with remisiers

Contract – Contractual terms – Indemnity clause in appointment letter – Whether plaintiffs negligent so that defendant not liable under indemnity clause

Judgment

Cur Adv Vult

GROUNDS OF DECISION

1. The plaintiffs, Ong & Co, a firm of stockbrokers, instituted this action to recover from their former dealer, Ms Vivien Lai Siew Ping, losses arising from transactions handled by her on behalf of three of her clients. Ms Lai, who contended that she was not obliged to indemnify the company for the losses, also asserted that the bulk of the losses would not have occurred had Ong & Co not released to one of her clients money which she had arranged to be put into the company's clients' account as collateral for that client's transactions.

A. BACKGROUND

2. By a letter of appointment dated 9 September 1996, Ong & Co offered to employ Ms Lai as an Assistant Dealing Director (Dealer Grade). One of the terms of the letter of appointment was that she would indemnify the company for losses resulting from her own clients' trading activities. On the same day, Ms Lai accepted the terms and conditions set out in the letter of appointment. Until 31 May 2000, she was a dealer at Ong & Co. However, from 1 June 2000 to 8 October 2000, Ms Lai traded as a remisier pursuant to an agency agreement dated 1 June 2000 with Ong & Co.

3. Ong & Co's claim concerns losses incurred while Ms Lai was a dealer. As at 30 September 2000, an amount of $720,062.00 in contra losses was owed by three of her clients. The first, Mr Yuan Xu, owed the company $7,835.31. The second, Mr Tay Kong Kiong, owed the company $1,152.80. The third, Mr New Aik Keong, owed the company $711,073.89. Ong & Co failed to recover its losses from these clients. Not having been indemnified by Ms Lai, who resigned from the company on 8 October 2000, the company instituted this action and claimed the sum of $720,062.00 plus interest.

4. In her counterclaim against Ong & Co, Ms Lai sought to recover, inter alia, unpaid bonuses, her salary for May 1999 and damages. During the trial, she withdrew her counterclaim as well as her assertion that she had been promised a letter of release from her obligation to indemnify the company for the losses in question upon her resignation from the company. Her counsel, Mr Chia Ti Lik, also confirmed that she accepted that the three clients in question were her own clients even though they were initially "walk-in clients", who opened trading accounts with the company.

B. WHETHER THE INDEMNITY IS VALID

5. Ms Lai's assertion that the indemnity furnished by her to Ong & Co is invalid will first be considered. The relevant part of clause 10 of Ms Lai's letter of appointment, which concerns her obligation to indemnify the company for her clients' losses, states as follows:

> You shall be answerable and responsible to the Company and will keep the

> Company fully indemnified and harmless against any and all losses or damage the Company may sustain as a consequence of or in connection with or howsoever arising from any and all transactions dealt by or through you (hereinafter called "the Losses" which expression shall not include losses arising from or in connection with transactions by institutional clients as defined and excluded hereinafter) except where such transactions are pursuant to instructions of and for such clients as are designated by the Company as Institutional Clients, i.e banks, financial institutions, stockbroking companies and firms public listed companies and its subsidiary companies government related companies Statutory Boards Venture Capital Funds Licensed investment Advisors and insurance companies so long as such Institutional Clients trade within the trading limits approved by the Company in writing and notified to you from time to time. If any Institutional Client trades over the trading limit approved by the Company, you shall be answerable and responsible to the Company and will keep the Company fully indemnified and harmless for all Losses incurred under such … transactions which were entered into in excess of the trading limit.

6. Ms Lai's position on the effect of the indemnity furnished by her to the company is summed up in para 2 of her amended Defence as follows:

> The Defendant, however, avers that the Plaintiffs are not entitled to rely on clauses 10 to 15 of the said contract on the reason that the Defendant was employed as a dealer and not a remisier. The Defendant further avers that under the Rules and Bye-Laws of the Stock Exchange of Singapore (SES), the SES intended that dealers:-
>
> a. be treated as employees by their broking houses;
>
> b. be distinguished from remisiers who were not employees but were independent agents; and
>
> c. not be held liable to indemnify their employers for any losses whatsoever.

7. No evidence was tendered as to how the rules of the Stock Exchange forbade dealers from indemnifying their employers for losses arising from the handling of their own clients' transactions. Ms Lai merely said that when she signed the letter of appointment containing the indemnity clause, she thought it "weird" that a dealer had to indemnify a broking house for losses. In her affidavit of evidence-in-chief, she claimed that her former general manager at Lum Chang Securities told her that an indemnity clause is inapplicable to dealers because they are different from remisiers. However, the general manager in question, Mr Yeung Pak Nang, testified that what Ms Lai said was untrue. He said that he did not hold the view that an indemnity clause is not applicable to dealers. He added that in the past, dealers at Lum Chang Securities were orally informed that they were required to indemnify the company against losses incurred by their own clients and that this is now a written rule.

8. It is evident that there are differences between dealers and remisiers. Some of the differences were referred to by Yong Pung How CJ in *Associated Asian Securities Pte Ltd v Lee Kam Wah* [1993] 1 SLR 585. All the same, it must be borne in mind that apart from dealing with institutional clients, a dealer may also act on behalf of his or her own clients. In paras 14 and 15 of his affidavit of evidence-in-chief, Mr Charles Tan, Ong & Co's credit manager, explained:

> 14. Apart from institutional clients of the firm, the Dealers are also allowed to service certain other individual clients who open an account with them. These clients are usually the Dealer's own contacts and are not institutional clients of the Plaintiffs.

> 15. As these non-institutional clients are essentially the Dealer's own contacts who are individuals, the stockbroking company will require the Dealers to keep them fully indemnified against any loss or damage which the stockbroking house may sustain as a consequence of any transactions dealt with by the Dealer concerned for such non-institutional clients.

9. The indemnity clause in Ms Lai's contract clearly distinguishes institutional clients from her own clients. In respect of institutional clients, such as banks, insurance companies, financial institutions, fund managers, statutory boards and public listed companies, who are recognised as creditworthy, the company's risk is lessened and Ms Lai is not held responsible for losses arising from their transactions so long as the approved trading limits for the institutional clients have not been exceeded. On the other hand, Ms Lai, who benefits financially from her own clients' transactions, is expected to ensure that her own non-institutional clients' transactions do not cause loss to the company.

10. Contrary to what Ms Lai asserted, there is no rule that a dealer cannot be required to indemnify a stockbroking firm for losses arising from the handling of his or her own client's transactions or for the unauthorised handling of the transactions of institutional clients. As such, dealers have been held liable to indemnify their employers in many cases, including *Kim Eng Securities Pte Ltd v Lee Kia Khen* (Suit No 940 of 1993), *Lee & Co (Stock & Sharebrokers) Pte Ltd v Chia Kwok Yun* (Suit No 2254 of 1996) and *RHB-Cathay Securities Pte Ltd v Shapy Khan s/o Sher Khan* (Suit No 1704 of 1999).

11. The terms of the indemnity clause in Ms Lai's contract are unambiguous. The approach to be taken in the face of such clear contractual terms was outlined in *Associated Asian Securities Pte Ltd v Lee Kam Wah* [1993] 1 SLR 585, 587 by Yong Pung How CJ, who said as follows:

> Normally when contractual terms are clear and unambiguous they are taken at face value unless there is some compelling reason why they should not be. The fact that a term may put what appears to be a disproportionate or unfair burden upon one party is not regarded as a sufficient reason to interfere with its interpretation if it is in itself clear, because parties who contracted on equal terms must be left free to apportion risks as they see fit.

12. In view of the aforesaid, Ms Lai's contention that the terms of the indemnity are inapplicable cannot be countenanced.

C. WHETHER ONG & CO WAS NEGLIGENT

13. In relation to two of her clients, namely Mr Yuan Xu and Mr Tay Kong Kiong, the invalidity of the indemnity is Ms Lai's only defence. However, in relation to Mr New Aik Keong ("NAK"), Ms Lai contended that even if the indemnity clause in her contract of appointment is valid, she is not liable to Ong & Co because NAK's losses would not have accrued but for the company's negligence.

14. In her Defence and Counterclaim and in her affidavit of evidence-in-chief, Ms Lai alleged that Ong & Co erred in handling NAK's account in a number of ways. However, her counsel, Mr Chia, confirmed during the trial that notwithstanding what had been pleaded, it was not part of Ms Lai's case that the company was negligent when interviewing NAK before allowing him to open a trading account or when approving Ms Lai's numerous applications for an increase of his trading limits. He said that Ms Lai would rely on her assertion that the company misapplied money that should have remained in or ought to have been put into the clients' account as collateral for NAK's debts.

15. At this juncture, a few words ought to be said about the clients' account. Stockbroking firms are not allowed to mix money belonging to their clients with their own funds. As such, they place money belonging to clients in a clients' account. Ms Lai said that the company would have had sufficient collateral to cover NAK's losses if it did not misapply three sums of money which should have remained in or should have been banked into the clients' account. The three sums are as follows:

> (a) A sum of $473,312.43 which was handed over to NAK by Ong & Co on 5 July 1999;

(b) NAK's cheque for $116,184.51, which was used to pay for 100,000 Scotts shares purchased by him; and

(c) NAK's cheque for $200,000, which was used to pay for three lots of shares awaiting collection by him.

Ong & Co's cheque for S$473,312.43

16. On 5 July 1999, a sum of S$473,312.43 in the clients' account was released by Ong & Co to NAK. Ms Lai, who said that this was done without her knowledge and consent, contended that the company acted without prudence or logic when it handed over this sum to NAK. She pointed out that NAK had signed a document authorising the company to utilise money in the clients' account to satisfy any sum owed by him in connection with his trading activities and added that had this sum not been handed over to NAK, the company would have reduced its loss by this amount.

17. Ong & Co, which contended that money in the clients' account was not treated as collateral for a client's trading activities, asserted that Ms Lai's assertions were baseless as she gave instructions to its Finance Department to release the S$473,312.43 to NAK. Ms Lau Mui Ling, the company's deputy finance manager, stated as follows in paras 11-16 of her affidavit of evidence-in-chief:

> 11. The phone call from the Defendant's client, NAK, was directed to me by the operator on 5 July 1999. This was the first time I was speaking to this client….
>
> 12. [NAK] complained to me that …. he did not know why the monies were placed into trust instead of being released to him. I told him that I would have to check with the Defendant and would get back to him on his request.
>
> 13 I immediately called the Defendant and told her about NAK's request for a refund of his trust monies. The Defendant told me that she will only release a figure of about $100,000….
>
> 14. After this conversation with the Defendant, I called NAK and told him that I will issue a cheque for the figure as indicated by the Defendant. NAK was upset and commented that the monies belonged to him and insisted that he wanted the full sum. I told him to call the Defendant directly as I cannot release the full sum without her approval….
>
> 15. I believe it was after lunch that NAK called me again and simply informed me that he would come down at about 4 p.m. to collect the cheque. I asked him whether he had contacted the Defendant about releasing the full amount of the trust monies but he claimed he could not get hold of her. I told him that I will have to call the Defendant again and will get back to him if I still cannot get the Defendant's approval.
>
> 16. I then called the Defendant again … I also told her that NAK had insisted that he was coming down at 4 p.m. and that she should make a decision quickly …. The Defendant paused for a short while and then gave her approval to release the full amount.

18. Madam Lorinda Soong, the company's finance manager, confirmed that Ms Lau spoke to her on 5 July 1999 about NAK's demand for the release of his money in the clients' account and her conversation with Ms Lai. When cross-examined, she said:

> Q. What did Ms Lau tell you?

> A. Just before lunch, she told me that NAK had called her, insisting on a full refund of the trust money but the dealer was only willing to release $100,000. She said that she asked the client to call the dealer himself to sort this out as she could not release the full amount unless the dealer approved….
>
> Q. Did she speak to you before and after the release of the trust money?
>
> A. Both.

19. Ms Lai categorically denied that Ms Lau or anyone from the Finance Department had spoken to her about the release of the money in the clients' account. In para 73 of her affidavit of evidence-in-chief, she stated:

> The general manager alleged that Ms Lau Mui Ling spoke to me thrice on the refund and that I had agreed to it. This was untrue. Lau Mui Ling had never consulted me and therefore I could not have consented to the release.

20. Ms Lai also alleged that Ms Lau had negotiated with NAK for some time over the release of the trust money without her knowledge. In para 45 of her affidavit of evidence-in-chief, she said as follows:

> … I went back and called Lau Mui Ling and asked her why she did so. She said that [NAK] had approached her over several days demanding that the money be refunded threatening to complain to the authorities if she did not comply. After trying unsuccessfully to bargain with [NAK] to retain half of the trust account monies, she gave in and refunded the entire sum of trust monies.

21. When cross-examined, Ms Lai reiterated that she knew nothing about the release of the money in the clients' account at the material time. She said as follows:

> Q. Is it still your evidence that you did not know that NAK had asked for the release of the trust money?
>
> A. Yes.
>
> Q. Is it still your evidence that no one from the Finance Department called you on 5 July 1999 about the release of the trust money?
>
> A. Yes.

22. To prove that Ms Lai lied when she said that she did not know about NAK's request for a refund of the money in the clients' account and that no one from the Finance Department spoke to her about this matter, the company's counsel, Mr Andrew Ong, arranged for a tape recording of Ms Lai's conversation with NAK on 5 July 1999 to be heard in court. Both parties accepted the authenticity of the tape recording and that the said conversation between Ms Lai and NAK took place on the afternoon of 5 July 1999. The following part of the taped conversation certainly undermines the credibility of Ms Lai's evidence:

> NAK: You turn off the bloody line, how am I going to call you to sell?
>
> Ms Lai: Oh, not that I turn off. I didn't turn off. Was at a meeting. Just came out. *You called the Finance Department, is it? The Finance Department called me.*
>
> (emphasis added)

23. When questioned about the taped conversation, Ms Lai finally admitted that she knew that NAK had called the Finance Department on 5 July 1999 and that the Finance Department's staff called her on the same day. As for who from the Finance Department had called her, Ms Lai, who had earlier denied that Ms Lau had called her, subsequently shifted her position and admitted that Ms Lau or her assistant could have called her.

24. As for what NAK had called the Finance Department about, the following part of the transcript of the taped conversation sheds some light on the position:

> NAK: I am requesting to pull out the thing also, because since you can't do also I cannot just leave the money with you….
>
> Ms Lai: They said they can only re ….
>
> NAK: No, they did not say…. Because its my money…. What do you mean they say they can… there's no can or cannot, its my money.
>
> Ms Lai: Uh Huh.
>
> NAK: I have the full authority to say that I want to pull out, you see? I think it's a very clear cut kind of situation.
>
> Ms Lai: Uh Huh.

25. Although it was obvious that NAK had called the Finance Department about the release of his money in the clients' account, Ms Lai claimed that she could not remember what his call was about. When questioned by me, she said as follows:

> Ct. What did NAK call the Finance Department about?
>
> A. I cannot remember. He could have called to enquire about the movement of his trust funds.
>
> Ct. If this was so, did the Finance Department call you to discuss this matter.
>
> A. Yes.
>
> Ct. Are you saying that the Finance Department called you about the movement of NAK's trust funds?
>
> A. They could have called.

26. Having conceded that NAK and someone from the Finance Department called her about the movement of funds in the clients' account, Ms Lai tried to salvage her position by saying that by "movement", she meant the transfer of money in the clients' account to pay for NAK's contra losses. This cannot be so because it is clear from the taped conversation that NAK was only talking about the release of money in the clients' account and not payment of contra losses.

27. Ms Lau, the company's deputy finance manager, is an experienced senior staff member who knew that it is the company's policy to have the dealer's consent before releasing trust money to his or her client. The defendant's own witness, Mr Tang Loon Kong, a former credit officer in Ong & Co, agreed that it was up to the dealer whether to refund the money in question. In para 17 of his affidavit of evidence-in-chief, he said:

> Thus, a decision to refund cannot be unilaterally taken by either party. Therefore,

> in that situation, not only is the consent of the remisier/dealer required, I would go further to say that the remisier/dealer has the final say as to whether to refund trust monies. If the sanctity of this rule is not jealously guarded, the entire system will fail like in this case.

28. When cross-examined and when questioned by me, Mr Tang reiterated that it was Ms Lai who had the final say as to whether the $473,312.43 should have been refunded to NAK.

> Q. In paragraph 17 of your affidavit of evidence-in-chief, you state that the dealer has the final say in the release of trust money?
>
> A. Yes.
>
> Ct. Are you saying that if Ms Vivien Lai had instructed the Finance Department to pay the $473,000 to NAK, the money could be paid to him as she had the final say?
>
> A. Yes.

29. Having had the opportunity to listen to the witnesses, I have no doubt whatsoever that Ms Lai knew about NAK's request for the release of the $473,312,43 in the clients' account and that she had agreed to release the said sum to him. Both Ms Lau and Ms Soong were truthful witnesses and I accept that there is no reason whatsoever for Ms Lau to negotiate with NAK and take the risk of releasing money in the clients' account to NAK without Ms Lai's consent. In contrast, Ms Lai's evidence on this issue left much to be desired. As Ong & Co released the sum of $473,312.43 to NAK on 5 July 1999 on Ms Lai's instructions, her complaint regarding the misapplication by Ong & Co of this sum of money must be dismissed.

NAK's cheque for $116,184.51

30. Ms Lai next contended that a cheque for $116,184.51, which she collected from NAK and handed to the company on 8 July 1999, was misapplied when it was used to pay for Scotts shares bought by NAK on 1 July 1999. In para 53 of her affidavit of evidence-in-chief, she stated:

> When I handed over the [cheque for $116,184.51] to Ms Lorinda Soong, I relinquished all control and influence over the monies to the Plaintiffs. The Plaintiffs alone had the power to decide what to do with the money to reduce their risk. However, after taking possession of the [cheque], Lorinda Soong … used the cheque for $116,154.51 to pick up … shares….

31. Ms Lai's assertion made no sense at all. When cross-examined, she confirmed that she had told Ms Soong that the cheque for $116,184.51 was intended to pay for the Scotts shares in question. There can be no doubt that NAK gave her the cheque to pay for these shares, which cost him exactly $116,184.51. Ms Lai was in fact suggesting that although her client had given her a cheque to pay for Scotts shares purchased on 1 July 1999 and she had informed Ms Soong about this, Ong & Co should have disregarded her instructions and the client's wishes by banking the said cheque into the company's clients' account as collateral for NAK's trading losses. It is surprising that she made such an assertion when in reply to my question as to whether Ong & Co had acted correctly, she stated as follows:

> Ct. Did the company act correctly when it used the cheque for $116,184.51 to pay for the Scotts shares?
>
> A. Yes, because NAK wrote on the back of the cheque that it was for this purpose.

32. Ms Lai's contention that Ong & Co caused its own loss by using NAK's cheque for $116,184.51 to pay for the Scotts shares in question must thus be rejected.

NAK's cheque for $200,000

33. When Ms Lai handed over NAK's cheque for $116,184.51 to Ms Soong on 8 July 1999, she also handed her another cheque given to her by NAK. This second cheque for the sum of $200,000 was banked into the clients' account on Ms Lai's instructions. Four days later, $271,972.74 of NAK's money in this account was used to pay for the following shares purchased by him:

(a) 193,000 Kian Ann shares - $177,504.45

(b) 50,000 Kian Ann shares - $ 46,024.20

(c) 45,000 Scotts shares - $ 48,444.09

34. Ms Lai contended that the use of the $271,972.74 from the cliients' account to pay for the above shares purchased by NAK negated her effort in collecting the cheque for $200,000 from NAK. Ms Lai initially claimed that NAK had given her the cheque for $200,000 for the purpose of putting the funds in the clients' account. When cross-examined, she said:

Q. What did you tell NAK the $200,000 was for?

A. For trust account.

Q. Was it to cover the shares which he had already bought and were awaiting collection?

A. No, it was for trust account.

35. It is most unlikely that NAK would have handed over a cheque for $200,000 to Ms Lai for the purpose of having it put into the clients' account when he had insisted in rather abrasive terms a few days earlier, on 5 July 1999, on his right to withdraw all his money from the clients' account. Ms Lai subsequently changed her position altogether and conceded that NAK had given her the $200,000 to pay for shares which he had purchased earlier on. When cross-examined, she said:

Q. Was the $200,000 cheque given to you to pick up the shares of NAK that were awaiting collection?

A. Yes.

Q. Was the $200,000 cheque given to you by NAK to cover the $473,999 that was released to him?

A. No.

36. Ms Lai's *volte face* is most unsatisfactory. When cross-examined, she also changed her original position as to whether she had given instructions for the money to be used to pay for NAK's shares when she said as follows:

Q. I put it to you that the company would not have picked up NAK's SAC position without consulting you.

A. I do not recall whether they consulted me.

Q. I put it to you that the 3 transactions in question were picked up on your instructions.

A. I do not recall whether I gave any instructions or not.

37. I have no doubt that Ms Lai gave instructions for NAK's money in the clients' account to be used to pick up the three lots of shares awaiting collection on 12 July 1999. By doing so, she was carrying out NAK's specific instructions. As such, her assertion that she did not know about the withdrawal of $271,972.74 on 12 July 1999 to pay for the said three lots of shares cannot be believed.

D. CONCLUSION

38. For reasons already stated, Ms Lai is obliged to indemnify Ong & Co for the losses incurred as a result of the trading activities of Mr Xuan Yu, Mr Tay Kong Kiong and Mr New Aik Keong. She is also liable for interest on the amount due to the company.

39. As for costs, in accordance with clause 14 of Ms Lai's letter of appointment, the company is entitled to costs on an indemnity basis.

Sgd:

TAN LEE MENG

JUDGE