Alfons Tanumihardja v Thio Su Mien and Others
[2005] SGHC 54

Case Number : Suit 638/2003

Decision Date : 11 March 2005

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Danny Chua and K Murali Pany (Joseph Tan Jude Benny) for the plaintiff; C R Rajah SC, Imran H Khwaja and Christine Lee (Tan Rajah and Cheah) for the first to 23rd and 25th to 42nd defendants

Parties : Alfons Tanumihardja — Thio Su Mien

Legal Profession – Conflict of interest – Whether solicitor from firm subsequently acting against former client can advise such former client

Legal Profession – Conflict of interest – Whether two related actions can be distinguished so defendant solicitors can act for plaintiff in one action and not the other – Whether plaintiff can instruct different solicitors in respect of each action

Legal Profession – Duties – Client – Whether solicitor closed client's file – Whether solicitor having duty to state in covering note that file would be closed after payment of final bill

Legal Profession – Duties – Client – Whether solicitor having implied duty to client in absence of express instructions

Legal Profession – Solicitor-client relationship – Whether relationship terminated when plaintiff consulted independent legal advice due to conflict of interest

Tort – Negligence – Breach of duty – Causation – Whether defendants breaching any duty to plaintiff – Whether plaintiff's loss caused by defendants

11 March 2005

Choo Han Teck J:

1 At the heart of this negligence suit by the plaintiff, Alfons Tanumihardja, against his former solicitors, is the judgment entered against him in Suit No 1191 of 2002. Suit No 1191 of 2002 was commenced on 9 October 2002 by RHB Bank Bhd ("RHB Bank") against Multico-Orchids (S) Pte Ltd ("Multico") as the first defendant, and Alfons Tanumihardja as the second defendant. The claim was for $2,780,108.09 in principal credit advanced under a facilities letter from RHB Bank to Multico dated 17 January 1998. The total claim, inclusive of interest and legal fees, came to $6,098,625.86. The plaintiff was sued as a guarantor under a letter of guarantee dated 12 October 1990 ("the Guarantee"). On 14 March 2003, RHB Bank obtained summary judgment for the sum of $6,098,625.86 against the plaintiff, who did not resist the summary judgment application because his present solicitors advised him that he had no defence to the claim.

2 The plaintiff brought this present action against the defendants who were his solicitors in 1990 when he executed the Guarantee. The Guarantee was given to RHB Bank, known at that time as the United Malayan Banking Corporation Bhd ("UMBC Bank"). At that time, the plaintiff was a director of Multico and its related group of companies. The main shareholders of those companies were, according to the plaintiff, one William Soeryadjaya, and Theodore Rachmat, an old classmate and friend of the plaintiff (collectively "the other parties"). Eventually, a dispute arose between the plaintiff and the other parties, culminating in civil proceedings brought by the plaintiff in Suit No 1401

of 1992 and Originating Petition No 45 of 1992, against Shonan Shoji Pte Ltd, a company in which the other parties had an interest. The dispute was resolved by a deed of settlement dated 26 August 1993 ("the Settlement Deed") executed by the plaintiff, and Tradexim Ltd ("Tradexim"), as agent for the other parties. The defendants acted as solicitors for the plaintiff in that dispute, and helped him in the advice and drafting of the Settlement Deed. The solicitor in charge was the 23rd defendant, Christopher Chuah. Another partner, Leena Sankaran, who is the ninth defendant, was involved in the drafting of the Settlement Deed.

3 By the Settlement Deed, the suit and originating petition were withdrawn, and various other obligations had to be performed by the plaintiff. It was not disputed that all those obligations had been performed. In consideration of all that, the other parties agreed to pay the plaintiff a sum of $1,173,000 in five instalments. The first was to be paid within 14 days of the signing of the agreement, and the balance in four annual instalments. Furthermore, cl 7 of the Settlement Deed provided that Tradexim "shall procure the release of [the plaintiff] from [the Guarantee] given by him to [UMBC Bank] … within one (1) year after the fulfilment [of the obligations by the plaintiff]". The plaintiff averred that he fulfilled his obligations in August/September 1994 whereas the defendants averred that it was on 15 November 1994. This was not made an issue of contention because both sides agreed that it did not matter when the obligations were fulfilled. It followed that there was no dispute that Tradexim was to procure the release of the Guarantee within a year from either August 1994 at the earliest or 15 November 1994 at the latest.

4 Nothing more took place between the plaintiff and the parties represented by Tradexim thereafter, and the former collected all the payments due to him under the Settlement Deed, the last being made in 1997. In the meantime, Christopher Chuah and Leena Sankaran had rendered their respective final bills and closed their files in respect of this matter. The relevant file (Christopher Chuah's) was closed on 1 October 1996. On 21 June 2000, the plaintiff received a letter of demand from RHB Bank through the defendants, now acting on behalf of RHB Bank, but a different solicitor, Tony Yeo, was in charge of this claim. RHB Bank's demand was for a sum of $5,139,307.12 due under the loan facilities to Multico, and which, it was alleged, the plaintiff had guaranteed.

5 The plaintiff contacted Christopher Chuah on the same day. In his testimony in court, the plaintiff appeared outraged that the lawyers whom he had instructed to get him released from the Guarantee became the ones who were suing him on it. Christopher Chuah testified that he immediately realised that the defendants were in a position of conflict of interest. Therefore, he advised the plaintiff that he had to seek independent legal advice. At this juncture, there were disagreements regarding the nature of the discussion between the plaintiff and Christopher Chuah. The former alleged that he was not advised that he had a claim against the parties represented by Tradexim (which were referred to at trial as "the Releasees") for not procuring his release from the Guarantee. He alleged that Christopher Chuah only referred him to an independent lawyer in respect of defending RHB Bank's claim against him, but he, the plaintiff, was still looking to Christopher Chuah to advise and act for him in respect of any claim against Tradexim and its principals in regard to their breach of the Settlement Deed, namely, their failure to procure his release from the Guarantee. Christopher Chuah's version was that he called Peter Chow of M/s Wee Swee Teow & Co immediately to enquire, after briefly explaining the background facts, if he could act for the plaintiff. Peter Chow called back shortly and said that he could. He then met the plaintiff about the same day. It was not known what actually transpired at that meeting because Peter Chow was not called to testify. The plaintiff alleged that the meeting was a short one and nothing concerning his rights against Tradexim and its principals were discussed.

6 It will be helpful to note at this point, that RHB Bank did not commence action after its letter

of demand of 21 June 2000, until 9 October 2002. By that time, the defendants had also ceased to act for RHB Bank. RHB Bank's action was subsequently taken over by its new solicitors, M/s Shook Lin & Bok. The plaintiff, who was then unrepresented, filed his own Defence on 8 January 2003. He instructed his present solicitors shortly after that, and as mentioned, consented to judgment by RHB Bank on 14 March 2003. The plaintiff's claim against the defendants was premised on the fact that he could no longer seek recovery from Tradexim and its principals (for the judgment sum he owed to RHB Bank) because his rights against them had become time-barred, and he blamed that situation on the defendants' negligence.

7 In this context, which is, in my view, the key one, the allegations of negligence were that Christopher Chuah failed to advise the plaintiff of his rights against Tradexim and its principals. This would have included an advice that his rights would soon be time-barred. That would be an undeniable duty had Christopher Chuah been the plaintiff's lawyer. But was he? That was the question. Christopher Chuah testified that he had closed his file in respect of the plaintiff's matter on 1 October 1996. The plaintiff disputed this on the basis that the covering letter merely presented the solicitors' bill but did not mention that they were closing the file. Furthermore, Mr Danny Chua, counsel for the plaintiff, submitted that the work was not completed because there was one more instalment payment to collect. This was not disputed, but Christopher Chuah testified that the defendants collected that instalment and paid it over to the plaintiff without even charging disbursements. On this last point, I think that a reasonable solicitor in practice, and I believe Mr Danny Chua himself, would agree that this is not an unusual occurrence in practice. Odds and ends may be required to be done even after a file has long been closed. Some solicitors may charge for such work, some will not. In respect of the closure of the file, the manner and protocol a solicitor adopts for closing his file may vary, subject only to compliance with the accounts rules, which were not in issue before me. It might have been perfect had Christopher Chuah stated in his covering note that the file would be closed after payment of the bill. But that approach could lead to a misunderstanding by clients. It might require a fuller explanation that if any further work is required, no fee would be charged save disbursements, or perhaps nothing at all, as was the case here. But no solicitor could make that statement without knowing what else might be required. Even if we assume that the ideal protocol (and I am most reluctant to find that to be so) is to state that the file would be closed upon payment of the bill, it does not follow that there is therefore a *duty* in the *Donoghue v Stevenson* [1932] AC 562 sense to do so – otherwise, each time this practice is not followed, the solicitor will be in breach. That does not make sense because in most situations, no harm is done, and it will be seen, even in this case, the plaintiff occasioned no harm or detriment by reason only of his file being closed on 1 October 1996. This fact was underlined by the plaintiff himself in court, where it became clear to me by his evidence that he knew of his rights against Tradexim under the Settlement Deed.

8 I accept that the plaintiff's file with the defendants' firm was in fact closed, otherwise a "conflicts" search within the firm would probably have alerted the defendants to the plaintiff's retainer, and Tony Yeo would probably have alerted Christopher Chuah. It is important, however, to remember that the closing of a file does not, in itself, terminate a solicitor-client relationship, and the duties and obligations that fall within it. The closure of the file in this case indicated, first, that Tony Yeo had not acted improperly in accepting a brief from the RHB Bank. That is why clients pay annual retainers – so that they would not be sued by their favourite lawyers acting on someone else's behalf. Secondly, it indicated that Christopher Chuah was of the view that he had no further substantial service to perform for the plaintiff in respect of that file. That impression may not help him if there was evidence that he ought not reasonably to hold that view. The fact that one more instalment payment remained to be collected was not sufficient. The only issue was whether Christopher Chuah was duty-bound to ensure that Tradexim procured the release of the Guarantee. The circumstances

were not sufficiently clear. A solicitor's bounden duty is to do what *has* to be done; and what that might be depends on the circumstances. In the first place, that would mean that he has to carry out any express instruction from the client. Where there were no express instructions, as in this case, the question would be answered by examining whether it was reasonable to infer that he had to carry out an implied duty in question. The test in such situations is not whether the solicitor would have earned himself special accolades had he carried out what he ought to have done. In this case, the obligation to procure the plaintiff's release from the Guarantee was one of the many obligations exchanged between the parties. It was not envisaged that the solicitors had to ensure the performance of those obligations. If any of the obligations was not performed, the beneficiary would have to instruct his solicitor to give notice of action. The solicitor-client relationship is a professional one, but it spreads over such a wide sphere, that the conduct of it is best left to the client and his solicitor to regulate between themselves. What implied or inferred duties a solicitor might owe, must be implied and inferred only by means of reasonable foresight, and not by perfect hindsight.

9 In any event, even if Christopher Chuah was still to be regarded as the solicitor for the plaintiff in respect of the matter of getting his release from the Guarantee, that relationship was surely terminated when the plaintiff went to consult Peter Chow after Christopher Chuah had informed the plaintiff that he (Christopher Chuah) was unable to act for him because of a conflict of interests. In this regard, I accept Christopher Chuah's evidence that he had done so. The plaintiff did not dispute the fact that he went to consult Peter Chow. Indeed, he had written to Peter Chow shortly after to instruct him not to proceed or continue to act for him until specifically instructed to do so. The plaintiff's case on this point was that since he had not paid the retainer required by Peter Chow, he was not yet his client, and, implicitly, he remained the client of the defendants. That is patently erroneous. If it is clear that the solicitor-client relationship between the plaintiff and the defendants had been terminated when the plaintiff contacted an independent lawyer with the view to having the lawyer advise him on the matter that the defendants had found themselves conflicted out of, there can be no residuary seed from which the solicitor-client relationship can grow. That can only come about from a fresh and express agreement.

10 The second aspect of the plaintiff's case was that a distinction had to be drawn between two different legal situations, namely, that the suit by RHB Bank against him should be kept distinct from his rights against Tradexim and its principals. In other words, he was maintaining that although Christopher Chuah could not defend him against the suit brought by RHB Bank, he could, and ought to, act for him in taking legal action against Tradexim. That is too horrifying a thought for any reasonable lawyer to contemplate. I doubt very much if Mr Danny Chua would have contemplated such a thought had he been in Christopher Chuah's shoes. RHB Bank was suing the plaintiff on the Guarantee, the very one in respect of which he wanted to sue Tradexim for not procuring his release from. While it might remotely and technically have been possible for the plaintiff to have instructed someone else other than the defendants to sue Tradexim, and yet another lawyer to defend him against the RHB Bank claim, it would not have been a wise move. No reasonable solicitor would have advised that course of action. For a start, the dissection of the two actions might result in the loss of opportunity to cross-examine witnesses from the other action. Secondly, Christopher Chuah could hardly have given such advice because it would have been advice against the interests of RHB Bank that the defendants then represented. RHB Bank would not be interested in being involved in third-party actions. It wanted a swift, summary judgment.

11 In the circumstances, I find that Christopher Chuah had acted properly and was not in breach of duty. Furthermore, as we shall now see, the plaintiff's detriment was not caused by, nor could it reasonably be attributed to, Christopher Chuah. The plaintiff, knowing that RHB Bank was suing him on a guarantee that he believed he was no longer liable under, must do what a reasonable man ought to

do in his situation. He ought to tell his lawyer – any lawyer other than one from the defendants' firm – that he was being sued on a guarantee that he ought long to have been released from, because Tradexim and some others had contractually bound themselves to procure his release. It was not disputed that at that point (on 21 June 2000), the plaintiff's cause of action, on any interpretation, was not yet time-barred. If the plaintiff chose not to instruct a new solicitor, or having instructed him, instructed him not to proceed, the consequences were his to bear. The defendants would not be liable for them. Mr Danny Chua had been at his persuasive best, but I cannot accept his submission that the claim by RHB Bank and the plaintiff's rights against Tradexim were separate and distinct and ought to be dealt with separately.

12 In this case, after receiving the letter of demand from RHB Bank on 21 June 2000, the plaintiff went to confront Theodore Rachmat and Gopal Nair, another director of Multico, and he seemed to have gratefully accepted their advice not to seek legal advice. He wrote to Peter Chow to say that he hoped to seek an amicable settlement with all parties concerned "without the involvement of lawyers". Eventually, he reached an agreement with Theodore Rachmat, and signed a deed of release dated 23 December 2002, whereby he accepted a sum of $1,500,000 from Theodore Rachmat in exchange for his releasing Tradexim and its principals from their obligations under the Settlement Deed entered into earlier, where the latter undertook to procure the plaintiff's release from the Guarantee. No mention was made in that deed of release that the plaintiff had lost his rights against Tradexim. However, by executing that deed of release, the plaintiff had assumed all liability in respect of RHB Bank's claim, and absolved Tradexim and its principals from any liability. By that deed, he had surely lost all his rights against them. He cannot thereafter maintain that the defendants caused him to lose his rights against Tradexim. Nothing eventful occurred thereafter until 21 February 2002 when RHB Bank sent a second letter of demand. A long time had elapsed between the two letters of demand. If the plaintiff was concerned about his release from the Guarantee, and if he had thought that Christopher Chuah was still bound to act for him in that regard, logic compels us to conclude that he must have gone back to discuss the matter further with Christopher Chuah. He did not. What appears to have happened was that the plaintiff got in touch with Theodore Rachmat and Gopal Nair, who told him that the matter would be resolved. What transpired was the agreement sealed on 23 December 2002.

13 I revert to the action by RHB Bank. The Writ was filed on 9 October 2002. The plaintiff was bound to prove that his loss was attributable to the defendants. It will be helpful to recall that the loss was the judgment sum obtained by virtue of the Guarantee. The Guarantee was, in turn, executed pursuant to a letter of facility granted by the UMBC Bank to Multico dated 1 October 1990, which specified that the facility be supported by a guarantee by the plaintiff. The claim by RHB Bank, as pleaded in its Writ and Statement of Claim, was based on a facility letter dated 17 January 1998 in which the Guarantee was not one of the listed securities. Instead, it was Theodore Rachmat's guarantee that was listed. The reasonable inference must be that Tradexim had already procured the plaintiff's release under the Settlement Deed. Mr Danny Chua argued that RHB Bank was suing under the Guarantee, and in respect of that, the provisions were "watertight" against the plaintiff. I think it will not be disputed that the Guarantee was watertight if it were still valid. On the evidence, the plaintiff had not persuaded me that Tradexim had not already procured his release. No evidence was adduced at any time, including the application for summary judgment, that that facility letter was also to be supported by the Guarantee. If the facility letter was not required to be supported by the Guarantee, the plaintiff might legitimately challenge RHB Bank on the ground that his guarantee was not for any facility other than that of 1 October 1990, or that in any event, he ought to have been released from the Guarantee. It appears, therefore, that he had a reasonable defence, and cause for a third-party action against Tradexim on 14 March 2003 when RHB Bank's application for summary judgment was heard. In the circumstances, the plaintiff had not proved his case that the loss he

suffered was probably caused by the defendants. On the contrary, it appeared to me that the loss could not possibly have been caused by the defendants, or that the defendants had, in the words of the plaintiff's Statement of Claim, "caused the plaintiff to lose all prospects of taking action against Tradexim and its principals". This was not a *Heskell v Continental Express, Ltd* [1950] 1 All ER 1033 type of situation that Mr Chua submitted, where the tortfeasor hopes to escape liability by pointing to a dominant cause (see at 1047). The evidence amply showed that there was no breach of any duty by the defendants in this case.

14 Mr Chelva Rajah submitted as a further defence that if the plaintiff's claim against the defendants was not time-barred, then, by the same token, his claim against Tradexim would also not have been time-barred. Mr Chua's contention was that the plaintiff's reliance on s 24A(3)(b) of the Limitation Act (Cap 163, 1996 Rev Ed) applied only against the defendants because of the late discovery that the plaintiff had a cause of action against Tradexim, whereas, he argued, the plaintiff's cause of action against Tradexim was an outright claim for breach of contract whereby the date of breach was ascertained differently. I am inclined to accept Mr Chua's view, but that does not help the plaintiff much. So, what the plaintiff really ought have done was to sue Tradexim, and in view of his lawyers' advice, to join the defendants as well. But that is an academic point.

15 For the reasons above, the plaintiff's claim must fail. Accordingly, I dismiss the case with costs to be taxed, if not agreed.