United Overseas Bank Ltd v Bank of China
[2005] SGCA 46

Case Number : CA 20/2005

Decision Date : 28 September 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Siu Chiu J; Yong Pung How CJ

Counsel Name(s) : Alvin Yeo SC, Sim Bock Eng and Sng Sannie (Wong Partnership) for the appellant; Rebecca Chew and Kelvin Poon (Rajah and Tann) for the respondent

Parties : United Overseas Bank Ltd — Bank of China

Equity – Estoppel – Paramount mortgagee sending letter to developer of property with specific representation on terms of discharge – Subsequent letter sent by paramount mortgagee to developer varying terms of discharge – Whether first letter constituting representation to purchaser's financier – Whether reliance on representation reasonable

Equity – Equitable subrogation – Doctrine of subrogation invoked by lender against third party and not borrower – Whether denial of subrogation resulting in unjust enrichment of third party – Applicable principles

28 September 2005

Chao Hick Tin JA (delivering the judgment of the court):

1 This appeal raised the issues of estoppel by representation and subrogation in a tussle between a paramount mortgagee of a development and a subsequent mortgagee of one of the houses in the development which was sold by the developer to a couple. The question was whether, as between the two mortgagees, which mortgagee should, following the default of the purchasers, be entitled to have possession of the house. Belinda Ang Saw Ean J upheld the decision of the assistant registrar who ruled in favour of the paramount mortgagee. We heard the appeal on 26 July 2005 and dismissed it with costs. The following were our reasons.

The background

2 In the action below, the plaintiff was the Bank of China ("BOC"), the respondent in this appeal. BOC was the successor-in-title of the Kwangtung Provincial Bank ("KPB"), which was the paramount mortgagee pursuant to an instrument of mortgage dated 8 July 1995. Hereinafter reference to "BOC" shall include KPB. The first defendant to the action was Yong Tze Enterprise (Pte) Ltd ("YTE"), the developer and the mortgagor of the development land to KPB. Three detached houses were to be built on the land. The mortgage was executed by YTE as security for the facilities granted by KPB.

3 In December 1995, YTE sold one of the houses, identified as "Plot 1" in the development plan and later known as "114 Toh Yi Drive" ("the Property") to Ong Cher Keong ("Ong") and his wife Tan Hwee Cheng Esther (collectively "the Ongs" or "the couple" as may be appropriate). We should mention that Ong was a director of YTE and was in charge of YTE's affairs.

4 The purchase of the Property by the Ongs was in part financed by a loan from OCBC Finance Ltd ("OCBC"), previously known as Focal Finance Ltd. In accordance with the loan arrangement, in October 1996, the Ongs, by a deed, assigned their rights under the sale and purchase agreement with YTE to OCBC. On 5 November 1996, OCBC lodged a caveat, as mortgagee, against the Property. On 18 December 1996, following the grant of additional banking facilities by KPB to YTE, the latter

executed a further mortgage ("the second mortgage") over the development land in favour of KPB. With the consent of OCBC, the second mortgage was registered with priority over the caveat lodged earlier by OCBC.

5 Towards the end of 2000, the Ongs refinanced their purchase of the Property with the United Overseas Bank Limited ("UOB") which offered a loan of $3.1m to discharge the debt owed by them to OCBC. UOB paid off OCBC on 16 January 2001. The UOB loan was to be secured by a legal mortgage of the Property. At the time, since a separate legal title to the Property had not yet been issued, the Ongs executed a mortgage-in-escrow in favour of UOB. The separate legal title to the Property was issued shortly thereafter on 3 March 2001.

6 In January 2002, YTE was in default of its repayment obligations to BOC. In August 2003, the Ongs defaulted on their loan and voluntarily surrendered possession of the Property to UOB.

7 In August 2004, BOC instituted the present originating summons against YTE claiming for possession of the Property as well as the outstanding amount due under the paramount mortgage. About a month later, UOB applied to be added as the second defendant to the proceedings. Though named as the first defendant, YTE took no part in the proceedings.

8 The nub of the problem in the proceedings centred on two letters. The first was dated 20 July 1996, written by M/s Helen Yeo & Partners, the solicitors for KPB, to the solicitors for YTE. This was in response to a request from YTE for partial release of the paramount mortgage over the Property. The letter read:

> Please be informed that [KPB is] agreeable to the sale of [the Property] at $4,230,000 on the following terms:
>
> (1) all sale proceeds are to be forwarded to [KPB] for the Borrower's Account through us;
>
> (2) [KPB] shall give a discharge on the [Property] upon receipt of 85% of the sale price; and
>
> (3) upon discharge of the [Property], the overdraft facility shall be reduced by $1.5 million and the Development Loan shall be reduced by $500,000.00.

9 The second was KPB's letter of 20 May 1999 addressed to YTE. This letter was issued following a review of the loan granted to YTE whereby KPB decided to vary the terms for a partial discharge of the paramount mortgage set out in the earlier 1996 letter. In this letter, KPB stated, *inter alia*:

> Please also be informed that with immediate effect our terms of discharge with regard to the sale of units in the development, including Plot 1 which has been sold are revised, as follows:-
>
> a) All sale proceeds pertaining to each unit shall be forwarded to the Bank for your Account.
>
> b) The Bank will give a Partial Release/Discharge of any unit sold only after the receipt of full 100% of the respective sale prices. *In this connection, kindly review the sale of Plot 1 and ensure that all progress payments due and payable to date have been/will be forwarded to the Bank*.

[emphasis added]

This letter will be referred to as "the 1999 letter" and the earlier letter of 20 July 1996 as "the 1996 letter".

10 It would be noted that the loan by UOB to the Ongs was made well after the 1999 letter had been written by BOC which varied the terms under which a partial discharge of the paramount mortgage would be allowed in respect of the individual units in the development.

11 We ought to mention that in the offer letter of 29 November 2000 from UOB to the Ongs it was stated that "an undertaking by the developer's mortgagee to discharge the property from [its paramount] mortgage" would be required. While it was unclear whether this condition meant that UOB required a direct undertaking given by the paramount mortgagee to UOB, we would have thought, for the reasons which would appear later, that UOB should have asked for a direct confirmation from KPB. However, UOB never approached KPB to confirm the terms of the 1996 letter or give a fresh undertaking.

Hearing below

12 At the hearing below, UOB resisted BOC's application for possession of the Property on two main grounds. First, that the defence of estoppel by representation applied. UOB alleged that the representation was set out in the 1996 letter which stated that KPB would allow a discharge of the Property from the paramount mortgage upon payment of 85% of the purchase price by the Ongs into the account maintained by YTE with KPB ("the 85% payment representation"). UOB argued that the 1999 letter could not apply to it because that letter was never brought to its attention. Second, that the principle of subrogation applied, *ie*, upon UOB paying off the amount which the Ongs owed OCBC, UOB would have stepped into the shoes of OCBC and thereby be entitled to enjoy the benefits under the 1996 letter.

13 At this juncture, we ought to mention that the estoppel which UOB appeared to rely upon was promissory estoppel. The judge seemed to think that this was a case of estoppel by representation. *Halsbury's Law of England* vol 16(2) (LexisNexis UK, 4th Ed Reissue, 2003) at para 956 states:

> An estoppel by representation arises when there has been a representation made by one person on which another person relies and on which he acts so as to alter his own previous position; thus it may be described as 'reliance-based' estoppel. In common law estoppel by representation, the representation relied on is a straightforward statement of fact; in promissory estoppel, which was an equitable development from common law estoppel by representation, the representation is a promise not to enforce the representor's rights. A further category of equitable reliance-based estoppel is proprietary estoppel, where the representation consists of a promise of an interest in land.

There is controversy as to whether for promissory estoppel to arise, there must be a subsisting legal relationship between the parties: see *Spencer Bower, The Law Relating to Estoppel by Representation* (LexisNexis UK, 4th Ed, 2004) ("*Spencer Bower*") at pp 441–443, paras XIV.1.1–XIV.1.2 and p 467, XIV.2.23. However, we did not think that the present case was an appropriate occasion to go into an analysis of the various categorisations of estoppel; neither was it necessary. For our purposes here, we had assumed that the categorisation advanced by UOB was correct.

14 In response, BOC contended that if any representation was made it was by YTE's solicitors.

Moreover, it was unreasonable on the part of UOB to have relied on a representation which was made in a letter more than four and a half years ago, bearing in mind that in the interim, there was a second mortgage, a fact which UOB would have discovered if the latter had made a search. On subrogation, BOC submitted that there was no evidence that OCBC relied on the 1996 letter. More importantly, subrogation should not apply because it had not been shown that BOC had been unjustly enriched at the expense of UOB. Finally, as both estoppel and subrogation are equitable remedies, BOC contended that UOB was not entitled to either relief as UOB was guilty of laches.

15 We should at this juncture state that while UOB claimed that the Ongs had paid about 95% of the purchase price into the account of YTE with BOC, the judge found that BOC had, in fact, only received $3,446,000 (about 81%) of the purchase price. Before us, the appellant could not really show that this finding of the judge was wrong; receipts of the developer showing 95% had been paid did not mean that KPB had received the same amount. The appellant, however, submitted that even if that finding were correct, it was prepared to pay the shortfall on the 85%. It seemed to us that strictly, as UOB could not show that 85% of the purchase price of the Property had been received by KPB at the time the present proceedings were instituted, the defence should fail. So should this appeal.

16 Be that as it may, the judge also went on to reject the two substantive grounds raised by UOB to deny BOC's claim to possession of the Property. On the point of estoppel by representation, the judge found that on the facts, the 1996 letter could not have constituted a representation made by KPB to UOB. First, the letter was addressed to the solicitors for YTE. Second, the letter was a four-year-old communication, and in the meantime the second mortgage in favour of KPB was executed by YTE. Third, the letter was superseded by the 1999 letter. Fourth, notwithstanding that in its facility letter UOB expressly stated that an undertaking be obtained from the paramount mortgagee as to a partial discharge, it failed to ensure that its very own requirement was met.

17 As regards the question of subrogation, the judge did not think that subrogation applied as there was nothing unconscionable in BOC insisting upon compliance with the terms of the 1999 letter before it would give a partial discharge. Moreover, she also did not think that OCBC was even entitled to rely on the 1996 letter; thus subrogation would not have assisted UOB.

Estoppel

18 It is settled law that for a person to successfully raise the defence of estoppel by representation, three elements must be satisfied, namely, representation, reliance and detriment.

19 Therefore, the first question to consider was whether KPB did make a representation to UOB. It was clear that the 1996 letter was addressed not to UOB but to the developer, YTE. However, it did not mean that for a person to be able to rely upon a representation, the representation must be made directly by the representor to the representee. *Spencer Bower* states at pp 135–136, para VI.2.1:

> The onus is on the estoppel raiser to show that the representation was made to him, or else that he is entitled to raise the estoppel as representative of the representee, where, at the date when the estoppel is raised, the representee has died, or has come under any disability. A representee may, of course, receive a representation by an agent, or a partner, but the principal must still (if he is to raise an estoppel) show that he was, by himself or his agent, actually or presumptively intended to act on it. Furthermore, a representee includes not only any person to whom, or to whose agent, the representation was directly and immediately made, but also any person to whose notice the representation was intended to, and did in fact, come. Such intention

may be shown to have been expressed by the representor, when making the representation, in the form of a request or authority to pass it on; or such intention may be inferred from the representor's proved or presumed knowledge that the representation was of such character that in the ordinary course of business, it would naturally and properly be transmitted to the representee.

20 The argument of UOB was that KPB would have known that a letter of the nature as the 1996 letter would not only be for the benefit of the developer, but also for the purchaser of that unit and his financier. The purchaser would obviously want to know at which stage of payment he would be able to have the property that he purchased released from the paramount mortgage. Moreover, it was and is common knowledge that the vast majority of purchasers of a property of such a magnitude in value would require financing to complete the transaction. The financier of the purchase would similarly want to know the point at which the property he was financing would be released from the paramount mortgage as that would affect the security of the loan for which the financier would be extending to the purchaser. Of course, what was clear was that the letter related only to the sale of Plot 1, *ie*, the Property, from YTE to the Ongs. *Prima facie*, YTE, the Ongs and their financier, if they could prove reliance, would be entitled to hold KPB to what it had stated in the 1996 letter.

21 Unfortunately for UOB, that was not all. The terms set out in the 1996 letter had been varied by the 1999 letter and that was not disputed. UOB also did not dispute that KPB could contractually, *vis-à-vis* YTE, change the terms set out in the 1996 letter. The 1999 letter was addressed to YTE for the attention of Ong and another, Billy Ong. YTE was specifically asked to review the sale of the particular unit to the Ongs, and to bring it in line with the terms of the 1999 letter. Thus, when the Ongs sought refinancing of, and the redemption of, the OCBC loan, they were well aware that the terms of the 1996 letter had been varied. However, it would appear that the Ongs did not draw the change to the attention of UOB or its solicitors. YTE's solicitors only forwarded the 1996 letter to UOB's solicitors.

22 In determining whether it was reasonable on UOB's part to assume that the 85% payment representation in the 1996 letter was still valid, the following circumstances must be borne foremost in mind:

(a) More than four years had elapsed from the date the 1996 letter was written up to the date UOB decided to offer refinancing to the Ongs.

(b) UOB conceded that KPB could contractually alter the terms set out in the 1996 letter. This right was, of course, subject to the rights of those who had acted based on the representation in the 1996 letter.

(c) The fact that the second mortgage came into being after the 1996 letter. A search at the Land Titles Registry would have disclosed the second mortgage. If nothing else, any reasonable person would have sought clarification on the effect of the second mortgage on the 1996 letter.

23 Accordingly, in our opinion it was not reasonable on the part of UOB to assume that the representation in the 1996 letter was still operative in November 2000. A simple inquiry on the part of UOB with the paramount mortgagee would have elicited the correct answer. We would point out that in this appeal we were only concerned with the positions of KPB and UOB. Clearly, the Ongs should have brought the existence of the 1999 letter to the attention of UOB. Whether the solicitors for YTE were in breach of their duty would depend on whether the solicitors knew of the existence of the 1999 letter. On the face of it, the 1999 letter did not appear to have been copied to YTE's solicitors.

Whether UOB would have a cause of action against the Ongs or YTE's solicitors was another question which we were not concerned with at this time. But as between KPB and UOB, we did not think UOB was reasonable to take it that the 85% payment representation in the 1996 letter was still good. For the same reasons, neither was it reasonable for UOB to rely on it. UOB's letter of offer clearly evinced the need for obtaining an undertaking from KPB. The law would be imposing an impossible burden on KPB if it were to require KPB to notify all parties who could be affected by the change. KPB would not have known that the Ongs were thinking of refinancing. Neither would KPB know who the new financier of the Ongs would be. In a situation such as the present, and as a general rule, the new financier should always reconfirm with the alleged representor that the representation made earlier was still valid.

24 In the result, we held that BOC had not, at the time UOB granted a loan to refinance the Ongs' purchase of the Property, made a representation to UOB that BOC would give a partial discharge from the paramount mortgage in respect of the Property bought by the Ongs upon payment of 85% of the purchase price into the account of YTE with BOC. Moreover, even if it were correct to hold that a representation was made by KPB, it was, in the circumstances, wholly unreasonable for UOB to have relied on it without obtaining confirmation from KPB. Accordingly, the defence of estoppel by representation failed.

Subrogation

25 The principle of law upon which UOB relied to make its case of subrogation was that expressed by Walton J in *Burston Finance Ltd v Speirway Ltd* [1974] 1 WLR 1648 at 1652 and which was adopted by May LJ in *Eileen Joan Rosina Filby v Mortgage Express (No 2) Limited* [2004] EWCA (Civ) 759 ("*Filby*") at [11]:

> [W]here A's money is used to pay off the claim of B, who is a secured creditor, A is entitled to be regarded in equity as having had an assignment to him of B's rights as a secured creditor … [subrogation] finds one of its chief uses in the situation where one person advances money on the understanding that he is to have a certain security for the money he has advanced, and, for one reason or another, he does not receive the promised security. In such a case he is nevertheless to be subrogated to the rights of any other person who at the relevant time had any security over the same property and whose debts have been discharged, in whole or in part, by the money so provided by him, but of course only to the extent to which his money has, in fact, discharged their claim.

26 From the above passage the important point to note is that subrogation is based on an implied understanding on the part of the new lender that he is to have a certain security for the money he has advanced to pay off the old lender. In the context of the present case, this point would throw us right back to the considerations raised in relation to the issue discussed above on estoppel by representation. In the light of our views above that UOB should have sought confirmation from KPB before assuming that the representation in the 1996 letter was still operative, there would be no basis for UOB to assert that there was an implied understanding as to partial release on 85% payment.

27 An essential prerequisite for the application of the equitable doctrine of subrogation is the presence of unjust enrichment. In *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 ("*Banque Financière*"), Banque Financière de la Cité ("BFC") made an advance of DM30m for the purpose of enabling Parc (Battersea) Ltd ("Parc") to repay part of a loan from another bank secured by a first charge upon its property. The transaction did not contemplate that Parc would provide any security. It was, however, an express condition of the advance that other

companies within Parc's group would not demand repayment of their loans until BFC had been repaid. One such company was OOL, to which Parc owed £26.25m, secured by a second charge over the property. Unfortunately, the persons who negotiated on behalf of Parc had no authority to commit OOL to such an undertaking. Parc eventually became insolvent and if BFC had no priority over OOL's second charge, BFC was unlikely to be repaid. The question was whether, as against OOL, BFC was entitled to be subrogated to the first charge to the extent that BFC's money was used to repay the debt which it secured. The House of Lords, reversing the Court of Appeal, held that subrogation applied. In its opinion, the availability of subrogation as a restitutionary remedy, unlike contractual subrogation, did not depend on the intention of the parties. The important considerations for subrogation in the restitutionary sense were, in the words of Lord Hoffmann (at 234), threefold. First, whether the defendant would be enriched at the plaintiff's expense. Second, whether such enrichment would be unjust. Third, whether there were nevertheless policy reasons for denying such a remedy. Lord Hoffmann further explained why the remedy should be available to BFC as follows (also at 234):

> In this case, I think that in the absence of subrogation, O.O.L. would be enriched at B.F.C's expense and that prima facie such enrichment would be unjust. The bank advanced the DM30m. upon the mistaken assumption that it was obtaining a postponement letter which would be effective to give it priority over any intra-group indebtedness. It would not otherwise have done so.

2 8 *Filby*, in fact, applied *Banque Financière*. In *Filby*, the new lender disbursed a loan to a borrower to discharge an existing mortgage. The English Court of Appeal applied *Banque Financière* and held that subrogation was available to the new lender because otherwise the borrower would be unjustly enriched in that he would effectively become entitled to the same loan without having to provide security.

29 However, the position in the present case was quite different. Here, subrogation was sought to be applied not against the borrower but a third party, the paramount mortgagee. In the circumstances here, we did not think that the denial of subrogation to UOB would give rise to unjust enrichment on the part of BOC. We could not see how UOB could seriously make that contention.

30 Be that as it may, we will consider briefly the arguments of UOB on subrogation. Put simply, it went as follows. As OCBC was entitled, pursuant to the 1996 letter, to call on KPB to release the Property from the paramount mortgage on receipt of 85% of the purchase price, upon UOB refinancing the loan which the Ongs owed to OCBC, UOB would thereby have stepped into the shoes of OCBC and be entitled to require BOC to honour its obligation to OCBC to give a partial discharge on the same terms.

31 Obviously, implicit in this contention was the assumption that OCBC was entitled to call upon BOC to give a partial discharge upon receiving 85% of the proceeds of sale. UOB then argued in its Case[note: 1] that:

> [A]s there is no evidence that OCBC had in fact been notified about the [1999] letter, the Appellants were entitled to rely on the [1996] letter. To hold otherwise would unjustly enrich [BOC] and prejudice [UOB] …

32 At this juncture, we ought to clarify that the claim based on subrogation was not dependent on the sale and purchase agreement ("the SPA") entered into between YTE and the Ongs and the subsequent assignment by the Ongs of their rights under the SPA to OCBC. It was true that the SPA was entered into before the 1996 letter was issued by KPB and the assignment could not assign to

OCBC more rights than what the Ongs had acquired under the SPA. The argument based on subrogation had nothing to do with the SPA. The question was whether in the light of the 1996 letter, BOC was estopped from denying that OCBC was entitled to ask for the discharge of the paramount mortgage over the Property upon the payment of 85% of the purchase price of the Property to KPB.

33 What was OCBC's position *vis-à-vis* the 1996 letter and the 1999 letter? Was the 1996 letter the basis upon which OCBC granted the loan to the Ongs? UOB pointed out that the Ongs did not obtain the loan from OCBC until October 1996, which was well after the 1996 letter had been issued. OCBC lodged its caveat only on 5 November 1996. Thus, OCBC would have relied upon the 1996 letter when it disbursed the loan to the Ongs to purchase the Property as the question of security would be vital to any financier.

34 There was no affidavit evidence from OCBC as to first, the date on which OCBC agreed to grant a loan to the Ongs to complete the transaction; second, whether it had relied upon the representation in the 1996 letter when it disbursed the loan to the Ongs; and third, whether OCBC was aware of the variation in the 1999 letter and had agreed thereto. While the fact that OCBC only lodged its caveat on 5 November 1996 did not necessarily prove that the loan was only disbursed after that date, it was nevertheless a relevant factor. Bearing this in mind, and the fact that the 1996 letter was issued well before the caveat was lodged, and the purpose for which such a letter was requested (as alluded to in [20] above), it would be reasonable to infer that OCBC would have seen or known of the contents of the letter before any sum was disbursed by OCBC to the Ongs to pay for the Property and that OCBC would have relied on the letter.

35 Turning to the third point mentioned in [34] above, it would be recalled that while the 1999 letter was addressed to YTE, it was marked for the attention of Ong. The developer was expressly asked in the 1999 letter to review the sale of the Property to the Ongs in the light of the revised terms for partial discharge of the paramount mortgage. Obviously, besides the Ongs, the other party who would be interested would be their financier, OCBC. This explained why the developer, and in turn the Ongs, were being asked to seek OCBC's consent to the change. Here, it was of interest to note that at no time, while the loan to the Ongs was outstanding, did OCBC approach KPB to procure the discharge of the paramount mortgage over the Property even though OCBC would have known that 95% of the purchase price had been paid to the developer. The judge, in fact, found that OCBC was probably made aware of the variation and had gone along rather than objected. In our opinion, that would be a reasonable inference to draw in all the circumstances, rather analogous to the inference drawn in relation to OCBC's knowledge of the 1996 letter before the loan was disbursed (see [34] above). In the result, even if UOB were to have stepped into the shoes of OCBC, it could not have acquired more rights than what OCBC had before the loan owed by the Ongs was discharged by UOB.

[note: 1]At para 99.