Yongnam Development Pte Ltd v Somerset Development Pte Ltd
[2004] SGCA 35

Case Number : CA 142/2003

Decision Date : 18 August 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : C R Rajah SC (instructed) and Brendon Choa (Acies Law Corporation) for appellant; Tan Chuan Thye (Wong and Leow LLC) for respondent

Parties : Yongnam Development Pte Ltd — Somerset Development Pte Ltd

Agency – Construction of agent's authority – Powers of attorney – Power of Attorney granted by one company to another – Whether managing director had authority to sign contract not contemplated by power of attorney

Equity – Estoppel – Estoppel by acquiescence – Whether company estopped from denying that it was bound by sale contracts

18 August 2004 Judgment reserved.

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

1 This appeal is against the decision of S Rajendran J who dismissed the appellant's claim in contract for specific performance and/or refund of money against the respondent, Somerset Development Pte Ltd, and one other party: see *Yongnam Development Pte Ltd v Springleaves Tower Ltd* [2004] 1 SLR 348. Somerset Development was previously known as Liang Court Development Pte Ltd ("LC"). For consistency with the judgment below, we will use the abbreviation "LC" to refer to the respondent.

The background

2 In 1996, LC and Springleaves Tower Ltd ("STL") embarked on a joint development of a project known as the "Springleaf Tower". They owned the land on which the building was to be erected as tenants-in-common in the proportion of 30% for LC and 70% for STL. Towards that end, they entered into a joint development agreement ("JDA") dated 13 June 1996 under which they would each contribute towards the costs of the development in the same ratio.

3 Under the JDA, the two parties also agreed to co-operate to obtain separate credit facilities to finance their respective portions of the development. Accordingly, both LC and STL obtained financing from the Overseas Union Bank Ltd ("OUB"). As security, and as required by OUB, the parties mortgaged the entire project to OUB and each covenanted with the bank that each would, in the event of default by the other, repay the other's indebtedness to OUB.

4 Tuan Kai Construction Pte Ltd ("TKC") was appointed by LC and STL as the main contractor of the project. In turn, TKC appointed Yongnam Engineering and Construction Pte Ltd ("YEC") as the nominated sub-contractor for the structural framework of the project.

5 TKC and STL were related in the sense that they were part of the Ban Hin Leong group of companies, whose controlling shareholder was Mr Richard Lim. By a later supplementary agreement,

TKC agreed that in respect of the construction cost LC and STL would each be liable only to the extent of that party's interest in the project, *ie*, in the ratio of 30 to 70.

6 On 19 January 1998, following the allotment of share values in respect of the units of the project pursuant to the Land Titles (Strata) Act (Cap 158, 1988 Rev Ed), LC and STL entered into a supplemental joint development agreement ("SJDA") which appropriated the strata units in Springleaf Tower between LC and STL. The SJDA also provided that LC and STL were each entitled to sell their own units ("the LC units" and "the STL units") even before the completion of the project.

7 Clause 4 of the SJDA sets out the detailed arrangements to facilitate the sale of their respective units. It reads:

> 4(1) Each option to purchase and sale and purchase agreement (collectively the "S&P Documents") naming both STL and LC as joint vendors shall be in the forms set out in Appendices B and C respectively, which forms are prescribed under the Sale of Commercial Properties (Amendment) Rules 1997 incorporating amendments approved by both STL and LC and approved by the Controller of Housing;
>
> (2) Both STL and LC shall be parties to the S&P Documents as joint vendors for the sale of each STL Unit and each LC Unit;
>
> (3) To enable LC to co-ordinate, carry out and complete the sale of the LC Units, STL shall issue a power of attorney to LC (the "STL Power of Attorney") in respect of the LC Units, in the form set out in Appendix D;
>
> (4) To enable STL to co-ordinate, carry out and complete the sale of the STL Units, LC shall issue a power of attorney to STL (the "LC Power of Attorney") in respect of the STL Units, in the form set out in Appendix E;
>
> (5) STL and LC shall maintain the two project accounts which have been opened in their joint names with Overseas Union Bank Limited, namely Project Account No 89-41506-3 which shall be operated solely by STL ("STL Project Account") and Project Account No 34-41907-5 which shall be operated solely by LC ("LC Project Account");
>
> (6) The entire sale proceeds from the sale of the STL Units shall be deposited into the STL Project Account for the sole benefit of STL;
>
> (7) The entire sale proceeds from the sale of the LC Units shall be deposited into the LC Project Account for the sole benefit of LC;
>
> (8) On legal completion of the sale and purchase of each sold Strata Unit, STL and LC shall jointly execute and deliver:
>
> (a) the transfer of the strata title of each sold STL Unit to the purchaser thereof, as directed by STL; and,
>
> (b) the transfer of the strata title of each sold LC Unit to the purchaser thereof, as directed by LC.

8 Two matters with regard to cl 4 should be noted. First, each party was required to execute a power of attorney in favour of the other to facilitate the sale of the units belonging to the other

party. In pursuance thereof, LC and STL executed their respective powers of attorney in favour of each other on the day the SJDA was signed. Second, both LC and STL were required to deposit the sale proceeds of their units into their respective project accounts with OUB.

9 As TKC was slow in making progress payments to YEC, the latter, knowing that TKC was related to STL, requested STL to guarantee the progress payments due to YEC under the sub-contract. Although STL gave the guarantee requested, TKC continued to default in making prompt payment to YEC.

10 Following discussions between YEC, TKC and STL, and with encouragement from OUB through its Senior Vice-President Sam Tan, YEC agreed to take a floor of the project appropriated for STL in lieu of payment by TKC. Thus, on 13 February 1999, YEC, TKC and STL entered into a settlement agreement whereby STL assumed the liabilities of TKC to YEC under the sub-contract and agreed to transfer the 23rd floor of Springleaf Tower ("the 23rd floor"), valued at $13.96m (inclusive of a compensatory credit of $2.73m), to YEC or its nominee.

11 In the settlement agreement, STL warranted that it was entitled to sell the 23rd floor to YEC. In the recital, as well as in the main body of the settlement agreement, express references were made to the JDA and the SJDA. The trial judge found that YEC was conversant with the contents of the JDA and SJDA.

12 Clause 7.5 of the settlement agreement acknowledged as paramount the mortgagee's interest, *ie*, OUB's interest, over the development and provided that:

> … STL hereby agrees and undertakes to [YEC] that STL shall procure that [OUB] shall release its mortgage over the [f]loor on or before [30 June 1999].

13 In cl 7.6 of the settlement agreement, STL warranted to YEC that the floor "shall be free and clear of all caveats, security interests, liens, encumbrances …"

14 Because consideration for the proposed transfer of the 23rd floor from STL to YEC was not in the form of cash payment but provided by a set off, the standard terms of sale and purchase set out in the SJDA ("standard form contract") had to be varied. This was recognised in the settlement agreement which provided that YEC's solicitors, M/s Yeo Wee Kiong & Partners, would, on behalf of STL, LC and YEC, apply to the Controller of Housing ("the Controller") for the necessary amendments to be made to the standard form contract.

15 On 17 March 1999 the Controller gave his consent to the standard form contract being amended to enable the sale of the 23rd floor to be made to YEC on the basis set out in the settlement agreement. Subsequently, the Controller also agreed to the substitution of a related company of YEC, Yongnam Development Pte Ltd ("YDP"), as the purchaser in place of YEC.

16 On 31 March 1999, a standard form contract was executed between STL, LC and YDP. On the same day, a supplemental sale and purchase agreement, with those variations approved by the Controller ("the amended contract"), was executed by the same parties. These two documents will be hereinafter referred to as "the sale contracts". STL executed the sale contracts in its own capacity, as well as in its capacity as the attorney of LC pursuant to the power of attorney granted by LC to STL ("the LC/PA").

17 Clause 8 of the standard sale contract provided as follows:

If the land on which the Unit is built is subject to an encumbrance, the Purchaser must, instead of paying the instalments of the Purchase Price due under clause 5 to the Vendor, pay the instalments to the encumbrancer, and the Purchaser shall be regarded as duly performing his obligations under clause 5 by making payment in that manner.

18 This clause was replaced in the amended contract to bring it into line with the obligation assumed by STL pursuant to the settlement agreement (see [10] above). Clause 8 of the amended contract reads:

> 8.1 If the land on which the Unit is built is subject to an encumbrance, the Vendor *shall procure that the mortgagee (the "Mortgagee") shall release and discharge its mortgage over the Unit* immediately upon the Purchase Price being fully paid and *in any event by 30th June 1999*.
>
> 8.2 The Vendor represents and warrants to the Purchaser that upon the release and discharge of the mortgage by the Mortgagee:
>
> > 8.2.1 the Unit shall be free and clear of all caveats, security interests, liens, encumbrances, pledges, defects in title, restrictions and other burdens save and except those which are or would be in favour of the Purchaser, its assignor or its mortgagee …
>
> [emphasis added]

19 In the meantime, OUB was kept posted of what was being agreed upon between STL, TKC and YEC. On 15 April 1999, copies of the sale contracts were forwarded to the bank.

20 As far as LC was concerned, while it knew by late 1998 that STL had some cash flow problems, it was not aware of the negotiations between STL, TKC and YEC for a settlement agreement. It was only in early March 1999, after the settlement agreement had been executed, that Patrick Koh ("Koh") of STL rang and informed Ng Liang Seng ("Ng"), the Vice-President of LC, that STL, TKC and YEC had struck a deal involving the sale of the 23rd floor to YEC by offsetting the progress payments due to YEC under the sub-contract against the purchase price of that floor. As the matter did not concern LC, and as the 23rd floor effectively belonged to STL and LC had no interest in it, Ng did not raise any objection.

21 The oral conversation was followed by a letter, dated 5 March 1999, from Koh to Ng where, *inter alia*, the following was stated:

> … There will be no cash payment for this purchase as the monies due to YEC by TKC will be offset against the purchase price for the floor. This arrangement resolves certain difficulties encountered in the project by ensuring that YEC gets paid and by enabling us to proceed smoothly to completion. STL's cash flow would also improve. As this is a non-cash offset transaction, the standard approved sale and purchase agreement ("S&P Agreement") cannot be used. We are applying to the Controller of Housing to amend the S&P Agreement …
>
> [LC] will not be directly involved in this application for amendment as the Unit (23rd floor) belongs to STL. [LC's] contractual obligations with STL remain unchanged. However, as joint owners of the entire property, [LC's] agreement to this amendment is necessary. We understand you have no objections and we are therefore proceeding accordingly.

22 LC was generally kept informed by STL and its solicitors of the communications with the

Controller. But apparently LC was not notified of the substitution of YDP in place of YEC as the purchaser. While the judge found that a copy of the settlement agreement was not forwarded to LC, he held that LC would have been informed of the salient features of the settlement agreement from the conversations between Koh and Ng, as well as the communications between the heads of Ban Hin Leong group and LC, namely, Mr Richard Lim and Mr Koh Boon Hwee respectively. LC also did not know, until 4 May 1999, that STL and YDP had already executed the sale contracts on 31 March 1999.

23 In any case, in a letter of 29 April 1999 to STL, LC noted that the proposed contract of sale in relation to the 23rd floor (LC being then ignorant that the sale contracts had been executed) was to be different from the standard form contract and that no sale proceeds would be deposited into the STL's project account with OUB. The letter concluded that LC's agreement to the changes was conditional upon (a) STL furnishing a letter of indemnity to LC, and (b) STL obtaining OUB's consent to the sale on the amended terms.

24 We would, at this juncture, make two observations on this letter of 29 April 1999. First, LC would not have been surprised, having been informed of the nature of the transaction, that the contract for this transaction was different from the normal and that no cash would be deposited into STL's project account with OUB pursuant to the sale. Second, we think that it was reasonable for LC to have imposed the two conditions for the sale of the 23rd floor to YEC: see [42].

25 The first condition was satisfied by STL who furnished the indemnity on 28 June 1999. However, no consent from OUB was forthcoming.

26 Pursuant to the settlement agreement and the sale contracts, YEC continued with the sub-contract work. Thereafter progress payments due to YEC were offset against the purchase price of the 23rd floor. The sub-contract work was completed by YEC in 2000. On 11 January 2001, the solicitors for STL forwarded to OUB for execution a draft deed of release of the mortgage on the 23rd floor. Notwithstanding many reminders, OUB refused to execute the deed of release.

27 As YDP could not obtain the transfer of the 23rd floor from STL, it instituted the present action against both STL and LC, seeking specific performance of the sale contracts. In the alternative, it prayed for a refund of the purchase price of $13,964,600. As STL had become insolvent, it did not defend the action and default judgment was entered against it. YDP continued with the action against LC because STL could not satisfy the judgment.

28 At the trial below, LC resisted the claim on the ground that notwithstanding the LC/PA, LC was not bound by the sale contracts which STL purportedly executed on LC's behalf. The trial judge upheld this defence. He further held that estoppel could not arise in the circumstances of this case.

Appeal

29 In this appeal, very much the same arguments were canvassed before us. Therefore, the two issues on which we have to offer an answer are:

(a) Is LC bound by the sale contracts?

(b) If the answer to (a) is in the negative, is LC nevertheless bound by virtue of the doctrine of ratification or the principle of estoppel?

We will examine each of these issues in turn.

First issue: is LC bound?

30 The judge held that LC is not bound by the sale contracts because (a) the person who executed the sale contracts as the attorney of LC was not duly authorised to do so by STL, and, (b) in any case, the execution of the amended contract was outside the scope of the authority conferred upon STL under the LC/PA.

31 In both the sale contracts, Richard Lim who, as stated earlier, was the managing director of STL, signed for LC. In the standard form contract, Richard Lim signed as "a director of [STL] acting as Attorney for [LC] pursuant to a Power of Attorney dated 19 January 1998". In the amended contract, he signed as "attorney for [LC] pursuant to a Power of Attorney dated 19th January 1998".

32 The LC/PA expressly stated in the recital that the power of attorney was given pursuant to the arrangements set out in the JDA and the SJDA. The opening operative paragraph of the LC/PA provided that STL was appointed to be the attorney of LC "to act … for and in the name of … LC to do and execute all or any of the following acts … in respect of the STL units", and this was followed by nine clauses. The pertinent ones, for our present purposes, are the following:

> 1. To sign on behalf of LC as the joint vendor of each STL Unit, the option to purchase and the sale and purchase agreement, in the forms set out in Annexures B and C respectively, at the sale price(s) determined by the Attorney and to receive and give valid receipts for all or any part of the sale price or any sums due from each purchaser of the STL Unit.
>
> …
>
> 7. Generally to act in relation to the sale of the STL Units as fully and effectually in all respects as LC itself could do if personally present.
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> …
>
> 9. For the better doing, performing and executing of the matters and things aforesaid, to appoint in writing under the common seal of the Attorney pursuant to a resolution of the Board of Directors of the Attorney any director, secretary or manager of the Attorney to be an attorney of LC, to exercise in the name of LC or of the Attorney the powers of the Attorney hereunder and to revoke such appointment at any time in a like manner provided that any person dealing with a person purporting to be appointed by such resolution by the Board of the Attorney may accept as conclusive proof of such appointment a copy of the resolution of appointment certified as a true copy under the hand of a director or the secretary of the Attorney.

33 Relying on cl 9 of the LC/PA, the judge held that the sale contracts purportedly entered into on LC's behalf by Richard Lim could not be binding on LC because Richard Lim was not authorised by a resolution of the board of STL to execute the contracts on behalf of LC and the rule in *Royal British Bank v Turquand* (1856) 6 E&B 327; 119 ER 886, otherwise known as the indoor management rule, was not applicable. He said, [1] *supra*, at [41]:

> … the "indoor management rule" only applies where a director or other employee of a corporation, having apparent authority, enters into a contract or makes a representation on behalf of that corporation. It would, for instance, apply with respect to Richard Lim signing the Sale Contracts on behalf of STL as Richard Lim was the managing director of STL. There is, however, no mandate to extend that rule to situations where a corporation is exercising powers given to it under a PA [power of attorney]. Where a corporation/individual is exercising powers under a PA,

the mode of exercise of that power and the scope of the authority given under the power are governed solely by the terms contained in the PA.

34 The first question one must ask here is what the scope and effect of cl 9 is. Is it a clause that prescribes that there must be a formal resolution of STL before a person can be duly authorised by STL to act as the attorney of LC pursuant to the LC/PA? In this regard, it is important to bear in mind that cl 9 of the PA begins with the words "For the better doing, performing and executing of the matters and things aforesaid" and ends with "provided that any person dealing with a person purporting to be appointed by such resolutions by the Board of [STL] may accept as conclusive proof of such appointment a copy of the resolution of appointment certified on a true copy under the hand of a director or the secretary of [STL]." Counsel for YDP argued that the object of this provision was to widen the range of persons who could execute S&P agreements of the STL units on behalf of LC beyond those who would readily be recognised as having the apparent authority to act on behalf of STL.

35 It seems to us that cl 9 of the LC/PA is essentially a facilitative provision. It does not appear to be a stipulation of a prescriptive nature. The opening words of the clause are not those which are associated with laying down a definite procedure. This sense is further reinforced by the ending words that a copy of the resolution of appointment certified by a director is conclusive as far as a third party is concerned. The ending words, in effect, meant that a director of STL was empowered to act for STL and, in turn, as attorney for LC. Richard Lim was more than a director. He was the managing director, and was thus deemed to be in a position to act for STL. There was no assertion by STL that Richard Lim was not authorised to execute the sale contracts as attorney of LC. There is nothing in the clause which could be construed to exclude the operation of the *Turquand* rule.

36 If the donor of the power, LC, had intended that every person so authorised by STL to act as the attorney of LC had to authorised by a formal resolution of STL, para 9 would have been worded more positively instead of just "for the better doing …" It would have begun with words such as "A person who executes a S&P agreement on behalf of LC pursuant to this power of attorney shall be authorised by a resolution of the board of STL".

37 Accordingly, we do not share the judge's opinion that Richard Lim was not properly authorised by STL to execute the sale contracts as attorney of LC.

38 However, a more problematic matter concerns the question of whether STL, and, in turn, Richard Lim, was empowered by the LC/PA to execute the amended contract. Clause 1 of the LC/PA authorised STL to sign on behalf of LC "the option to purchase and the sale and purchase agreement in the forms set out in Annexures B and C". The scope of this clause is clear and leaves no room for doubt. As attorney of LC, STL could only sign a sale agreement in the form set out in Annexure C to the LC/PA, which is the standard form contract. The amended contract is not in the form of Annexure C and thus it is a document which falls outside the authority granted to STL in the LC/PA.

39 On this aspect, the contention of counsel for YDP is as follows. At the time the LC/PA was executed, there could only have been one form of the sale agreement and that form was statutorily prescribed. Any amendment to the form would have required the approval of the Controller. The whole object of the LC/PA was to enable STL to "co-ordinate, carry out and complete the sale of the STL units". As the amended contract was approved by the Controller, it was not unreasonable, and indeed it was correct, to construe cl 1 of the LC/PA to include any supplementary agreement approved by the Controller, like the amended contract in the present case. Clause 1 did not expressly say that STL was only empowered to execute on LC's behalf a sale agreement in the form prescribed in Annexure C.

40 The principles governing the construction of a power of attorney are set out in *Bowstead and Reynolds on Agency* (17th Ed, 2001) at para 3-010 as follows:

> Powers of attorneys are strictly construed and are interpreted as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction:
>
> (1) The operative part of a deed is controlled by the recitals where there is ambiguity.
>
> (2) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts.
>
> (3) General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers only when necessary for that purpose.
>
> (4) A deed must be construed so as to include all incidental powers necessary for its effective execution.

41 Clause 1 of the LC/PA specifically empowered STL to sign, on LC's behalf, the sale agreement in the form set out in Annexure C in respect of each STL unit. The clause is clear and there is no room for doubt as to the sort of a document which STL was empowered to sign as the attorney of LC. It was wholly unnecessary for the LC/PA to also expressly provide that STL was not empowered to sign any other document which was at variance with Annexure C. Neither was it necessary to use the word "only". Where there is no ambiguity, effect must be given to what is the plain meaning of a clause.

42 While it is true that the 23rd floor had been appropriated for STL and LC had no claim to it, and the power in the PA was conferred upon STL specifically in relation to the disposal of STL's units in the Springleaf Tower, it does not follow that LC would thereby have no further interest in the sale agreement which STL would be entering into in respect of each of those units. This is because under the mortgage granted to OUB, LC and STL were each liable for the debts of the other party to the bank. There is no reason why amendments to the standard form contract approved by the Controller should *ipso facto* bind LC when the considerations which were relevant to the Controller in granting approval were not necessarily the same as those for LC. In giving his approval, the Controller was not acting as an agent for LC nor in the latter's interest. Therefore, it was not unreasonable for LC to take the stance that its approval was required if any changes were to be made to the standard sale agreement, as the amendments could have implications for LC.

43 As no approval was obtained by STL from LC to the execution of the amended contract, LC is not bound by that contract. Thus, on this issue, we agree with the trial judge. If YEC/YDP had taken the trouble to verify the terms of the LC/PA to determine the scope of STL's authority, which they should have, they would have realised that the execution of the amended contract by STL (through Richard Lim) on behalf of LC was in excess of the power conferred under the LC/PA.

Second issue: ratification and estoppel

44 The second issue is whether LC had by conduct ratified the amended contract or whether LC should, by virtue of its conduct, be estopped from denying that it is bound by the amended contract.

45 It is trite law that ratification may be express or by conduct. There will be no difficulty with regard to the case of express ratification. Where it is by conduct, it is often treated synonymously with estoppel. As noted by *Bowstead and Reynolds on Agency* at para 2-075:

> Ratification merges almost imperceptibly into estoppel. When the silence or inactivity is known to and relied on by the third party, an estoppel may in appropriate cases arise against the principal, who may be estopped from saying that he has not ratified.

46 The trial judge held that there could be no ratification by, or estoppel arising against, LC because LC had by its letter of 29 April 1999 expressly stated that it would only agree to the changes to the standard sale agreement subject to two conditions, one of which was that STL would obtain OUB's consent to the sale of the 23rd floor on the amended terms.

47 Counsel for YDP submitted that there was ratification. In the alternative, estoppel arose because after LC received copies of the sale contracts, LC never informed YEC or YDP of its objection to the sale contracts. Merely communicating with STL and raising the two conditions with STL was not good enough. STL was LC's agent and not the agent of YEC/YDP, and STL never communicated those concerns to YEC or YDP who proceeded to act on the basis that the sale contracts were valid and binding on LC. Loans were obtained by YDP pursuant to the rights under the sale contracts. Believing that its nominee, YDP, would be getting the 23rd floor, YEC completed $11m worth of work, of which $8,145,255.35 was carried out after the settlement agreement was made.

48 Estoppel by acquiescence, sometime referred to as proprietary estoppel, was described by Lord Cranworth LC in *Ramsden v Dyson* (1866) LR 1 HL 129 at 140–141 and explained by Robert Goff J in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 1 QB 84 at 103 as a doctrine "precluding a person, who stands by and allows another to incur expenditure or otherwise act on the basis of a mistaken belief as to his rights, from thereafter asserting rights inconsistent with that mistaken belief".

49 In the later case of *Willmott v Barber* (1880) 15 Ch 96, Fry J set out five prerequisites for acquiescence to constitute estoppel. He stated at 105–106:

> It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

50 The problem in the present case of establishing estoppel is the fact that there was no contact at all between YEC/YDP and LC. Such contact is essential for estoppel to arise. As noted by Evans LJ in *Orion Finance Ltd v JD Williams & Company Ltd* [1997] EWCA Civ 1:

In all the cases to which we have been referred, the estoppel was raised by a party with whom the other party had had some previous dealings. In *Henrik Sif* [*Pacol Ltd v Trade Lines Ltd (The "Henrik Sif")* [1982] 1 Lloyd's Rep 456] the charterers' agents had misled the plaintiff cargo owners into believing that the charterers rather than the shipowners were the party liable under the bills of lading. Even in cases of acquiescence (*Willmott v Barber*) and proprietary estoppel (*Spiro v Lintern* [[1973] 1 WLR 1002]) there have been some direct dealings between the two parties. One of the five requirements set out by Fry J [in *Willmott v Barber*] was that the party sought to be estopped had "encouraged" the other party in his mistaken belief. The conduct of the defendant in *Spiro v Lintern* was such that he was found to have made an unequivocal representation to the plaintiff personally.

[Counsel for Orion's] submission breaks new ground. He submits that on receiving the notice of assignment from Atlantic, the assignor, the defendants came under a duty to communicate with Orion, the assignee, because they would have realised that Orion mistakenly believed that the assignment was valid. There was no direct communication between the defendants and Orion and the submission comes close to suggesting that a party can be estopped as the result of failing to act as a volunteer; but [counsel for Orion] does not take it so far. His primary submission is that notice of the assignment placed the defendants under a duty to the purported assignee. A response to Atlantic, from whom the notice was received, would not be enough.

I do not find this convincing. In my judgment, if any estoppel is to arise as the result of failing to respond to a communication, then it can only be alleged by the person from whom the communication was received. I therefore would reject the primary submission.

51 In *Orion Finance*, the lessor of computer equipment purported to assign the benefit of the lease to Orion. The terms of the lease provided that the lessee's consent was required before the lease could be assigned. The lessee's consent was not sought or obtained. Orion alleged that the lessee was estopped from denying the validity of the assignment because it failed to object to the assignment after it became aware of the assignment through the assignor. It was held that no estoppel could arise as Orion did not communicate directly with the lessee.

52 In the present case, there is no dispute that YEC/YDP did not at any time communicate with LC on the matter. This aside, in considering whether YEC/YDP could seriously allege that they had relied upon the silence of LC to their detriment, the following factors or circumstances must be borne in mind:

(a) YEC/YDP were aware of the terms of the JDA and SJDA. YEC/YDP would have known that, under these two agreements, LC and STL had no interest in the units appropriated for the other party and that the power of attorney granted by one party to the other was for the purpose of facilitating the disposal of units of the other party. YEC/YDP would also have known that LC was made a party to a sale agreement in respect of a STL unit only to satisfy formal requirements.

(b) Having regard to how the parties had apportioned the costs of the project under the JDA and SJDA, and the terms of the joint mortgage to OUB to secure their respective loans (each party to bear the debt owed by the other to OUB), YEC/YDP would have realised that the proposed deal involving the 23rd floor would have a direct adverse bearing on LC.

(c) This probably explains why in the settlement agreement between STL and YEC it was expressly provided in cl 7.5 that STL "agrees and undertakes to [YEC] that *STL shall procure* that [OUB] shall release its mortgage over the floor on or before [30 June 1999]" [emphasis added].

(d) Consistent with this understanding, the amended contract had also in cl 8.1 provided that the "vendor shall procure that the mortgagee … shall release and discharge its mortgage over the unit immediately upon the purchase price being fully paid and in any event by 30th June 1999." While the term "vendor" in this clause included LC, YEC/YDP would have known that LC was made a party thereto as a formality, pursuant to the arrangement set out in the JDA and SJDA. YEC/YDP would also have realised that it would be STL who would be seeking from OUB the discharge of the mortgage over the 23rd floor as LC had no interest in that floor.

(e) For reasons of their own, YEC/YDP never pursued STL to ensure that the latter discharged its obligation under cl 7.5 of the settlement agreement.

(f) At no time did LC make any utterance to YEC/YDP. The evidence of LC was that it was made to understand that the proposed deal between STL and YEC/YDP would have no adverse impact on LC. Therefore, even before LC received copies of the sale contracts from STL, LC wrote on 29 April 1999 to inform STL that it would agree to the proposed changes to the standard terms only on two conditions. First, there had to be an indemnity from STL. Second, STL was to obtain OUB's consent to the sale on the amended terms. Although this letter of 29 April 1999 was only between LC and STL, its contents were wholly consistent with what STL and YEC had already anticipated and provided for in their settlement agreement. Therefore, although on 4 May 1999 LC received copies of the sale contracts, there was nothing in those two documents which would require LC to take any further action, especially in the light of cl 8.1 of the amended contract. It would have been reasonable for LC to assume that STL would seek the consent of OUB to the amended contract and that, if STL failed to do so, YEC/YDP would have followed up.

53 Having carefully considered the circumstances enumerated above, it is clear to us that two elements essential to establishing estoppel have not been proved. First, we are unable to see how it could be alleged that there was representation by conduct that LC would accept the amended contract. Second, YEC/YDP could not have relied on the alleged representation by LC. YEC/TDP knew of the purely technical role which LC played in the sale of a STL unit to a third party. If YEC/YDP had diligently sought STL's compliance with cl 7.5 of the settlement agreement, they would not have found themselves in this unfortunate state. They could have helped themselves, but failed to do so. In our judgment, as between LC and YEC/YDP, equity is clearly on the side of the former.

54 Another essential requirement to establishing estoppel is the element of detriment. In the present proceeding, YEC is not a party. It is not in dispute that the sub-contract works were all carried out by YEC. The point may appear technical as YEC and YDP are related and YDP was nominated by YEC to receive the 23rd floor. Be that as it may, in the light of our decision on the substantive merits, we do not need to go further into this.

55 Before we conclude, we ought to refer to an erroneous factual reference made in the judgment of the court below. In two places, in [1] *supra*, at [63] and [68], the judge stated that YEC and YDP were part of the Ban Hin Leong group. This is incorrect and those references were clearly inadvertent slips. They appeared towards the end of the judgment, after the judge had dealt with the question of estoppel. The other parts of the judgment clearly showed that the judge was aware that the interests of YEC and YDP were opposed to those of STL and TKC who belonged to the Ban Hin Leong group. The slips were wholly immaterial to the decision made by the judge.

Judgment

56 In the result, this appeal is dismissed with costs. The security for costs, together with any

accrued interest, shall be released to the respondent to the account of the respondent's costs.

Appeal dismissed.