

Edward Wong Finance Co. Limited

Appellants

v.

Johnson Stokes & Master (a firm)

Respondents

FROM
THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 7TH NOVEMBER 1983

Present at the Hearing:

LORD DIPLOCK
LORD ELWYN-JONES
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN

[Delivered by Lord Brightman]

This appeal is concerned with the standard of care owed by a solicitor to his client, an intending mortgagee of property, under the conveyancing practice prevalent in Hong Kong. The subject matter of the intended mortgage was the ground floor of a factory building known as No. 76 Hung To Road, Kowloon. The building was owned by Ho Sau-ki subject to a mortgage to the Hang Seng Bank to secure borrowing facilities up to a maximum sum of \$4,400,000 and interest. By an agreement dated 17th December 1975 Ho Sau-ki agreed to sell the building to Lucky Time Finance Co. Limited ("Lucky Time") for \$3,800,000 free from the mortgage. On the same day Lucky Time agreed to sub-sell to Chan Sun-Ming ("Mr. Chan") and Kai Ming Investment Co. Limited for \$5,250,000. The sub-purchasers agreed between themselves to appropriate the ground floor to Mr. Chan at \$1,740,000 and the upper floors to Kai Ming Investment Co. Limited at \$3,510,000.

Po Fung Finishing Works Limited ("Po Fung") was the tenant of a part of the ground floor for a term expiring on 31st August 1976, and an associated company was the tenant of the remainder for a term expiring a month later. Shortly after the execution

of the sale agreements Mr. Chan approached Shum Ka-ching ("Mr. Shum") the managing director of Po Fung and its associated company, and offered to sell the ground floor of the building for \$1,850,000. On 30th December 1975 agreement was reached for the sale thereof to Po Fung for that figure. A first deposit of \$100,000 was paid, and a further deposit of \$85,000 was to be paid on 15th January 1976, leaving a balance of \$1,665,000 due on completion. Mr. Shum approached Edward Wong Ching-mal ("Mr. Edward Wong") for finance. He was the managing director of the appellants Edward Wong Finance Company Limited. Mr. Edward Wong agreed that his company would lend a sum of \$1,355,000 against a mortgage of the property and the personal guarantees of Mr. Shum and his co-directors. This arrangement left a shortfall of \$310,000 to be found from other sources.

On 21st January 1976 the appellants instructed the respondents, a long established and highly respected firm of Hong Kong solicitors, to act for them in the mortgage transaction. The work was entrusted by the firm to Miss Leung Wai-ling ("Miss Leung"), a member of their staff who had qualified as a solicitor in 1970 and had joined the firm in 1973. On or about the same day the respondents initiated a land search against the property. This revealed charges in favour of the Hang Seng Bank to secure banking facilities up to \$4,400,000 and interest. They also wrote to Mr. Danny Yiu, the solicitor acting for the vendors, informing him that they had instructions to prepare a mortgage over the property in time for completion on 26th January. They requested the title deeds and a completion statement. The tight time-table envisaged for the completion of the purchase and mortgage is not exceptional in Hong Kong, as their Lordships will explain more fully at a later stage. Mr. Danny Yiu was "a one-man firm". Nothing was known to the respondents against his integrity.

It was the intention of Mr. Shum that the assignment of the property should be taken in the name of a "shelf" company then belonging to him, but on the advice of Miss Leung another shelf company Bovill Investments Limited (later re-named Pomay Investments Limited and here referred to as "Bovill") was substituted. On 22nd January the respondents informed the appellants of the change in the identity of the proposed mortgagor, to which the appellants took no objection.

On 23rd January 1976 Mr. Danny Yiu sent to the respondents copies of the documents of title, other than the charges in favour of the Hang Seng Bank, and also a copy of the proposed assignment by Ho Sau-ki to the shelf company. This assignment was rejected

by Miss Leung, because Mr. Chan, the sub-vendor, was not a party to it. In the upshot, Miss Leung arranged in the course of a telephone conversation with Mr. Danny Yiu that the transaction should take the form of a direct sale from Ho Sau-ki and Lucky Time to Bovill. This arrangement, which may or may not have had contractual force, is a complication without significance in this appeal. So far as the appellants were concerned, they were only interested in obtaining a valid security over the property in question and personal covenants from the correct parties.

On 27th January the following events happened:-

1. The respondents wrote to Mr. Danny Yiu in the following terms:-

"We refer to your letter of the 23rd instant and our subsequent telephone conversation.

We shall ask our clients to put us in funds with the mortgage proceeds of \$1,355,000 towards payment of the purchase price of these premises upon receipt of your undertaking that:-

(1) You will within ten days upon receipt from us of our cheque for \$1,355,000 send us

(a) the assignment of these premises from Ho Sau-ki and Lucky Time Finance Co. Limited to Bovill Investments Limited

(b) attested copy of cancellation of agreement between Lucky Time Finance Co. Limited and Kai Ming Investment Co. Limited and Chan Sun-Ming

(c)

(d)

(2) You will arrange for the re-assignment of these premises from Hang Seng Bank Limited to Ho Sau-ki [and] the first assignment to be registered with the Land Office as soon as possible

(3) If you are not in a position to send us all the documents as stated above within the above mentioned period, you will hold the said sum of \$1,355,000 to our order and will not release the same to your clients.

Please give us your undertaking as suggested above by signing and returning to us the duplicate of this letter by the bearer of this letter."

2. A copy of this letter was returned to the respondents countersigned by Mr. Danny Yiu.

3. The respondents wrote to the appellants requesting their cheque in favour of Mr. Danny Yiu for \$1,355,000 towards payment of the purchase price.

4. The appellants handed to the respondents bankers' drafts in favour of Mr. Danny Yiu totalling

\$1,665,000. The additional \$310,000 was the result of a private arrangement between Mr. Wong and Mr. Shum that that further sum should be lent against post-dated cheques. These proceedings are not concerned with the additional \$310,000.

5. The respondents delivered the appellants' cheques to Mr. Danny Yiu.

Under the terms of his undertaking, Mr. Danny Yiu now had until 6th February to send to the respondents (inter alia) a duly executed assignment to Bovill and an attested copy of the cancellation of the agreement for sub-purchase by Kai Ming Investment Company and Mr. Chan. Mr. Danny Yiu was also under an obligation, not apparently subject to a specific time limit, to register a re-assignment of the premises from the Hang Seng Bank to Ho Sau-ki, so as to record that the property was freed from the bank charges.

Within a few days of the events of 27th January rumours spread, which proved well founded, that Mr. Danny Yiu had de-camped from Hong Kong with the appellants' money and money belonging to other victims. On 20th February the solicitors acting for the Hang Seng Bank confirmed that the Bank had not received any redemption money and had not executed any re-assignment. In the result, the appellants' intended charge over the land was worthless.

In November 1976 the appellants issued proceedings against Bovill and the guarantors for repayment of the money advanced and interest. A year later the appellants added the respondents as defendants to the proceedings, claiming that they had failed to exercise due care, skill and judgment in the performance of their duty to take the necessary steps to protect the appellants' interests. The alleged shortcomings of the respondents are spread over 20 paragraphs of the much amended statement of claim. So far as the present appeal is concerned, they can be summarised as a failure to secure that the appellants' money would be applied only (i) to the release of the property from the incumbrances in favour of the Hang Seng Bank, and subject thereto (ii) in payment of any balance of the purchase money to the vendors.

The normal method of completing a contract for the sale of land in England is for the purchaser's solicitor to deliver to the vendor's solicitor a draft for the balance of the purchase money in exchange for an executed grant of the land or interest in land contracted to be sold; if the property is subject to a mortgage, the mortgagee will either be a party to the grant and receive the whole

or part of the purchase money by way of redemption; or he will execute a separate release of his charge in return for the redemption money; if the property purchased is to be financed by a new mortgage, the loan will be made against delivery of the executed grant and instrument of charge. In other words the payment of money and perfection of title are simultaneous transactions. This procedure is merely a reflection, in the context of a contract for the sale of land, of the common sense principle that, in the absence of an agreement for credit, the purchase money is not handed over to the vendor or anyone else except in exchange for the delivery of the subject matter of the sale, whether it be a loaf of bread or a parcel of land; and, if a loan is made on security, the money advanced is not handed over save in exchange for a charge executed by a person who can show a good title to the intended security. In the instant case this simple and fraud-proof procedure was not followed.

The defence of the respondents is that it was the normal and customary conveyancing practice in Hong Kong for the purchase money to be handed to the vendor's solicitor in reliance upon undertakings such as were given in this case; and that the respondents were entitled to consider that the appellants' interests were adequately protected by such undertakings. (See in particular paragraph 23(vi) of the defence).

There was compelling evidence both from the appellants' expert witness, Mr. Cheung, the then President of the Law Society of Hong Kong, and from Mr. McElney, the senior partner of the respondents' firm, of the existence and merits of that practice, and there are concurrent findings of fact by the trial judge and the Court of Appeal to the same effect. In the lower court Mr. Justice Pennington said this:-

"There has been evidence, which I accept, that conveyancing transactions in Hong Kong are almost inevitably done, not in accordance with the traditional way of an actual exchange of money for documents but by one solicitor forwarding cash against another solicitor's undertaking to produce, within a reasonable time, registrable documents of title. Clearly this is a procedure which, particularly if there are several parties involved, most of whom may have mortgages which have to be discharged, makes the task of the conveyancers much easier. It also, and I accept the evidence given by Mr. McElney on this point, results in that conveyancing being done more speedily and this is for the benefit of the public. Mr. Edmond Cheung,

President of the Hong Kong Law Society, gave evidence for the plaintiff and he said that transactions that he had been involved in in which an 'English style' completion had been required formed a tiny minority, perhaps 1% of the total, and over many years he had only had about 12. He also said, and this seems to be uncontradicted, that while some solicitors had defrauded their own clients and made off with their money, this case was the first time a conveyancing transaction had not been completed due to a solicitor defaulting on his undertaking."

When the matter went to the Court of Appeal, the Chief Justice, who delivered the leading judgment, said this:-

".... virtually every conveyance and mortgage completed in Hong Kong within living memory has been effected by what has become known as the 'Hong Kong style' of completion; I shall refer to it as such.

The essence of the Hong Kong style is that the solicitor who is acting for the purchaser/mortgagor forwards the purchase price to the vendor's solicitors (whether by cash, cashier's order, certified cheque or ordinary cheque) in return for an undertaking by the latter to forward the necessary documents of title, duly executed, to the purchaser's solicitor within a stated period.

The evidence, which was not disputed, was that this was the first occasion on which the use of the Hong Kong style had ever resulted in loss to a purchaser, by reason of the dishonesty of a solicitor acting for the vendor.

In England, by contrast, the customary method of completion of a conveyance has required a simultaneous handing over by the purchaser's solicitors of the purchase price, in return for the receipt from the vendor's solicitors of the necessary documents of title."

Mr. Justice Silke added:-

"The 'Hong Kong Style' of conveyancing emerged many years ago when Hong Kong was a 'sleepy place' with a small number of practising solicitors each known one to the other.

It has obvious practicalities in the present day in the light of the property dealings current in this city. A large number of conveyances relate to multi-storey buildings or involve a number of confirmors intervening as between the original vendor and the ultimate purchaser. The gathering together of all the parties general to the English style completion is difficult; though I note that

the advanced style of completion used here is being introduced, through the post box so to speak, in England today."

Lastly, it is worth recording this question and answer towards the end of Mr. Cheung's evidence:-

"Question: In Hong Kong is this speed with which conveyancing is transacted a matter highly praised by the lawyers and by their clients?

Answer: Yes, very much so, a speed which cannot be matched elsewhere."

Their Lordships have no reason to doubt the truth of that assessment.

The trial judge nevertheless came to the conclusion that the respondents were liable in negligence. He held that the circumstances of the particular transaction were such as to involve risk, and that a "proper English style settlement" should have been called for. The principal circumstances which spelt danger were the facts that Mr. Danny Yiu was a one-man firm only recently established, that the amount of money involved was substantial, and that the mortgage to the Hang Seng Bank was very large in relation to the purchase price. For these reasons "the transaction called for some precautions". In the result, judgment was entered for the appellants for damages in the agreed sum of \$1,295,000 and interest, representing (presumably) the advance of \$1,355,000 less the value of the claim in debt against the guarantors and Bovill.

The majority of the Court of Appeal took a different view. The Chief Justice, with whom Mr. Justice Silke agreed, reached the conclusion that a prudent solicitor would have followed the Hong Kong style of completion in the same way as Miss Leung had done, and that this style of completion did not oblige the prudent solicitor to take any precautions, unless there were "warning bells", which were absent in the instant case. Accordingly, the appellants had failed to establish negligence.

A dissenting judgment was delivered by Justice of Appeal Li, who said this:-

"The test for negligence or otherwise in this case means whether a reasonable, diligent and competent solicitor could foresee in January 1976 that damage could result by adopting the Hong Kong practice of completion....

Applying this test to the present case I find Miss Leung, as a solicitor when adopting the Hong Kong practice for completion in January, 1976, complied with the general practice which had been practised for years without ill result of the form

of damage as in this case flowing from it. That goes a long way to show that she was not negligent.

However, that is not conclusive. The further question to be asked is: could she foresee the risk or ill result at the material time as an ordinary, reasonable prudent person? I am afraid the answer must be in the affirmative.

As a solicitor, even in January, 1976 she should know that her client, the plaintiff, would not obtain what it lent its money for unless and until the vendor had executed the assignment and delivered the title deeds. If she parted with the money without such delivery she did not receive what her client had paid for apart from an undertaking or a promise by a fellow member of her profession. As a reasonable person of ordinary prudence she should or ought to have foreseen the risk of parting with the money before obtaining the property one bought in any ordinary transaction. It was not her skill that was put to test. It was her common sense, her prudence of any ordinary person that is put to test. The so called Hong Kong practice has an inherent risk in the ordinary sense. The fact that practically all her fellow solicitors adopted this practice is not conclusive evidence that it is prudent.... Acting in accordance with the general practice she took a foreseeable risk for her client while there was no necessity to do so. The fact that other solicitors did the same did not make the risk less apparent or unreal."

As already indicated, the prevalence of the Hong Kong style of completion is established beyond a peradventure. It is peculiarly well adapted to the conditions in Hong Kong. It has obvious advantages to both solicitors and their clients. Their Lordships intend to say nothing to discourage its continuance. However, in assessing whether the respondents fell short of the standard of care which they owed towards the appellants, three questions must be considered; first, does the practice, as operated by the respondents in the instant case, involve a foreseeable risk? If so, could that risk have been avoided? If so, were the respondents negligent in failing to take avoiding action?

In the opinion of their Lordships, the risk of loss to the appellants by placing the money at the disposition of the vendors' solicitor unquestionably involved a foreseeable risk, the risk of an embezzlement by the recipient. Such a risk is usually remote, but is none the less foreseeable. The foreseeability of the risk is proved by the fact that it had indeed been foreseen by the profession.

In October 1959 a sub-committee was appointed by the Law Society of Hong Kong to consider, and if thought fit, make recommendations on a number of matters including whether any and what changes should be made in the conveyancing practice prevailing in Hong Kong, and particularly to consider and make recommendations for the prevention of frauds and for safeguarding the interests of members of the public and of the Society in conveyancing matters. The sub-committee reported in 1965 and, in relation to the completion of conveyancing transactions, the report was in the following terms:-

"The practice adopted by solicitors in the matter of completions has grown up in Hong Kong merely as a matter of convenience and it is felt that solicitors should be alerted to the fact that mere compliance with what had been the practice first established, when Hong Kong was a far smaller place than today, nevertheless may leave a practitioner open to claims if completion in the fullest sense miscarries.

Whilst it is agreed that it would be quite impracticable to expect that lay parties should attend in person and whilst at the other end of the scale, the Sub-Committee does not suggest that solicitors should cease to accept undertakings and rely upon the integrity of their fellow practitioners, if they choose, the following practice suggestions are put forward:-

(i) That if any solicitor concerned in a completion wished for reasons of greater security to have a completion as is commonly practised in England, then it is unethical for any of the other solicitors concerned to object or refuse to comply with such request;

.....

(v) The Committee has considered the present practice of sending the consideration money or executed document against the undertaking of the solicitor on the other side to send the executed document or the consideration money, as the case may be, in due course. It is of the opinion that such a practice is one of courtesy and convenience only, and that, therefore, any solicitor in any transaction may properly require in any particular case that the completion of the transaction be effected by delivery of title deeds and the executed document only against cash, a banker's draft or certified cheque."

It is abundantly plain from these passages that some solicitors, at least, foresaw the risk of a Hong Kong style of completion miscarrying. The practice depended upon trust. It was "one of courtesy and

convenience only", (i.e. courtesy as between the solicitors on each side of the transaction, because the conception of courtesy as between vendor and purchaser would be a nonsense). It would not be unethical for a solicitor to insist on English style of completion notwithstanding the possible implication that the solicitor so requesting was not trusting his colleague. Furthermore, Mr. McElney said himself in cross-examination that he supposed that the risk inherent in a Hong Kong style completion was self-evident.

In the opinion of their Lordships the recommendations of the sub-committee were clearly made on the basis that the risk inherent in the Hong Kong style of completion (in the absence of precautions to guard against embezzlement) is one which was likely to fall on the solicitor rather than his client. Such a conclusion would not be unexpected, because it is the solicitor and not the client who has the better opportunity to assess the gravity or remoteness of the risk involved in a particular case, and it is the solicitor and not the client who has the necessary expertise to analyse and guard against the risk.

Their Lordships turn to the question whether the risk could have been avoided in the instant case. The answer, in their Lordships' view, is that it could readily have been avoided without in any way undermining the basic features of the Hong Kong style of completion. For example all that is needed in such a case is that the purchaser's or lender's solicitor should take reasonable steps to satisfy himself that the vendor's or borrower's solicitor has authority from his client to receive the purchase money or loan; and, in the case of property already subject to a mortgage which is to be discharged, so much of the purchase price or loan as is needed to discharge the prior mortgage could be paid by cheque or draft in favour of the mortgagee or his duly authorised agent, and not by a draft in favour of the vendor's solicitor. Simple precautions such as these would ensure that the purchaser or lender was placed by his solicitor in the favourable position which he ought to occupy when he parts with his money, that is to say, he would have an unanswerable claim against the other side for specific performance of that party's obligation to execute the appropriate assurances.

Their Lordships feel confident that simple steps such as these would not undermine the basic principles of the Hong Kong style of completion because they are in fact those advocated by the Law Society itself in a circular to members dated 25th November 1981 which was helpfully produced during the

hearing of this appeal. The important provisions of the circular are these:-

"3. The Council is of the view that Sale and Purchase Agreements should contain a clause stating clearly that payment by the purchaser of the balance of the purchase price to the vendor's solicitor constitutes a full discharge of the purchaser's obligations. A vendor should have drawn to his attention that, by the Sale and Purchase Agreement, he has appointed his solicitor as his agent for the purposes of collecting the instalments, (if any), and balance of the purchase price due to him. If the vendor and purchaser are separately represented and the vendor objects to this clause being included, then it may, of course, be omitted but the solicitor acting for the purchaser will then be upon notice that he should insist upon a formal completion or otherwise satisfy himself that the cheque will be received by the vendor.....

4. The Council is further of the view that a solicitor acting for a purchaser should split the completion cheque between the vendor's solicitor and the vendor's mortgagee. In a typical instance, where the property is subject to a registered Mortgage, the vendor's solicitor should give to the purchaser's solicitor a written memorandum showing the principal and interest required to discharge the Mortgage. The purchaser's solicitor should, on completion, send to the vendor's solicitor his cheque for this amount payable to the mortgagee direct. The balance of the sum payable upon completion should be paid to the vendor's solicitor....."

The risk inherent in the Hong Kong style of completion as operated in the instant case being foreseeable, and readily avoidable, there can be only an affirmative answer to the third question, whether the respondents were negligent in not foreseeing and avoiding that risk. Their Lordships respectfully agree with the dissenting judgment of Justice of Appeal Li. They differ from the trial judge only to the extent that he considered that the validity of the appellants' claim was dependent upon the existence of what were described in the courts below as "warning bells".

Their Lordships wish to add that they do not themselves attach blame to Miss Leung for the calamity that occurred. In entrusting the vendors' solicitor Mr. Danny Yiu with the whole of the money she was merely following the normal practice of her firm, and she had never been instructed to act otherwise in such a case or to take any special precautions.

There is one final point which their Lordships desire to make. Their Lordships were referred to the agreement of 17th December 1975 for the sale of the factory building by Ho Sau-ki to Lucky Time as a representative example of the standard form of agreement for the sale of land prevalent in Hong Kong. After providing for the sale of the property free from encumbrances, the agreement read:-

"6. On payment of the balance of the purchase price at the time and in manner aforesaid the vendor and all other necessary parties (if any) shall execute to the purchaser or its nominee or nominees or sub-purchaser or sub-purchasers a proper assignment or assignments of the said premises...."

This clause must mean, in the opinion of their Lordships, that there is to be a simultaneous payment of the purchase money by the purchaser and delivery of the executed assignment by the vendor, and (if there be a mortgage outstanding) simultaneous or prior release of that encumbrance to enable the assignment to take place free from encumbrances. It follows that in such a case the Hong Kong style of completion would involve a departure from the agreement as signed by vendor and purchaser, and a departure which would not necessarily be to the advantage of the purchaser although often to the advantage of the vendor. The question therefore arises whether the purchaser's solicitor is, strictly speaking, justified in departing from the contract by permitting a Hong Kong style completion without seeking the authority of his client, and if he does so depart without authority, whether he might expose himself to liability in the event of the completion miscarrying, whatever precautions he may have taken. The solution to this problem may perhaps be found in an adjustment to the standard form of contract for sale, assuming that their Lordships have been correctly informed that the Lucky Time sale agreement is representative of the standard form.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed. The order of the Supreme Court of 13th August 1980 will be restored so far as the payment of damages, interest and costs by the respondents is concerned, with an appropriate adjustment to the period over which interest is directed to be paid. The respondents will pay the costs of the appellants in the Court of Appeal and before the Board.



