Projection Pte Ltd v The Tai Ping Insurance Company Limited
[2000] SGHC 146

Case Number : Suit 1301/1999
Decision Date : 21 July 2000
Tribunal/Court : High Court
Coram : Lai Siu Chiu J
Counsel Name(s) : Tan Liam Beng & Yap Pett Chin (Drew & Napier) for the plaintiffs; Low Tiang Hock & Jack Lee Tsen-Ta (Chor Pee & Co) for the defendants
Parties : Projection Pte Ltd — The Tai Ping Insurance Company Limited

JUDGMENT:

Cur Adv Vult

The facts

1. The plaintiffs are a company incorporated in Singapore and are builders and contractors. At the material time, they were the main contractors for a proposed sports and recreation centre (the project) to be constructed at Jurong East Street 31, Singapore by the Singapore Sports Council (SSC).

2. The defendants are an insurance company with whom the plaintiffs took out a Contractors' All Risks policy numbered DGCRSP0045149600 (the policy) for the project for the period 13 June 1996 to 10 December 1997 naming themselves, SSC and the plaintiffs' subcontractors as the assured; the policy also covered a maintenance period from 11 December 1997 to 10 December 1999. Under the policy, the limit of liability for any one accident was $2m. The defendants had also furnished to SSC, on behalf of the plaintiffs, a performance bond dated 13 June 1996 for the project, in a sum equivalent to 10% of the contract value.

3. On or about 8 July 1997, while the plaintiffs were carrying out work on the project, a part of the retaining wall collapsed and damage was caused to a canal belonging to the Ministry of the Environment (MOE). On the same day, the plaintiffs gave the requisite notice of claim to the defendants.

4. The defendants appointed loss adjusters Cunningham International Private Limited (Cunningham) on or about 11 July 1997 to investigate the damage to the wall and canal. More than a year later, Cunningham assessed the plaintiffs' claim at $679,065.95 (the assessed amount) and in their letter dated 1 October 1998 to the plaintiffs' solicitors, they gave a breakdown of the figure. Cunningham qualified their assessment with the statement that it was *'subject to the approval of the insurers, policy terms, conditions and exclusion'*. They added that if the plaintiffs did not object, they would proceed to forward their report to the defendants.

5. Not hearing from the defendants thereafter, the plaintiffs wrote to their brokers OCW Insurance (Brokers) Pte Ltd (OCW) on 26 October 1998 requesting the latter to expedite their claim with the defendants. From time to time, the plaintiffs' director Ong Poh Pieow (Ong) would also telephone Douglas Ong (Douglas) of OCW to inquire as to the progress on the plaintiffs' claim. Douglas repeatedly assured Ong he need not worry. However, as neither OCW nor the defendants contacted the plaintiffs (who were becoming increasingly anxious), the plaintiffs themselves wrote to the defendants on 11 November 1998 asking for payment of the assessed amount or the reasons for the non-payment.

6. Pursuant to the plaintiffs' aforesaid letter and after several telephone conversations between Ong and Douglas, the latter finally informed Ong in mid-November 1998 that the defendants were processing the plaintiffs claim. The plaintiffs promptly wrote to the defendants on 21 November 1998 to record what Douglas had told them and stated they expected to receive the defendants' cheque *'within the next few days'*.

7. The plaintiffs then received a copy of the defendants' letter to OCW dated 9 December 1998 (the first offer) stating they would

pay the plaintiffs $523,912.68 on their claim, subject to confirmation from the SSC that it did not object. The plaintiffs by their letter dated 18 December 1998 questioned why the defendants were paying $155,153.27 less than the assessed amount; they requested a breakdown of the sum offered. Ong also called Douglas several times to press for early settlement of the plaintiffs' claim. Apparently he was told that the defendants' assistant general manager (Richard Li Zheng Ming) who was in charge of the matter was away.

8. Finally, on 9 March 1999, Ong with his fellow directors Eio Hock Chuar and Michael Lim met with Richard Li (Li) and Douglas over lunch for a discussion. According to the plaintiffs, the purpose of the meeting was to reach agreement on a figure acceptable to both parties for the plaintiffs claim. Ong said the parties finally agreed on $553,560.98 (the compromise sum) as a compromise in full and final settlement of the plaintiffs' claim. Contrary to the defendants' subsequent assertion, Ong contended that no conditions were attached to the compromise sum and no mention was made of SSC.

9. In their subsequent letter dated 31 March 1999 to OCW (the second offer), the defendants stated:

> We are pleased to advise that we agree to adjust the proportion borned by Insured under Section II from 30% to 20% of the loss. After adjustment, the final figure payable is $553,560.98.
>
> We enclose herewith a discharge for your onward transmission for Insured's signature.
>
> We thank you for your co-operation.

The discharge voucher addressed to the defendants stated:

> WE, PROJECTION PTE LTD & SINGAPORE SPORTS COUNCIL hereby acknowledge having received from THE TAI PING INSURANCE CO LTD, the sum of Singapore dollars FIVE HUNDRED FIFTY-THREE THOUSAND FIVE HUNDRED SIXTY AND CENTS NINETY-EIGHT ONLY, being full and final settlement of all claims and disbursements arising from loss or damage to properties sustained by us as a result of an incident of DAMAGE TO RETAINING WALL & CANAL ON 08.07.97.
>
> Dated this 31 MARCH 1999
>
> AMOUNT: S$553,560.98
>
> | Company Stamp & Signature | Company Stamp & Signature |
> | --- | --- |
> | PROJECTION PTE LTD | SINGAPORE SPORTS COUNCIL |

10. The plaintiffs returned the discharge voucher to the defendants under cover of their letter dated 8 May 1999 pointing out that SSC was only the nominee for the receipt of money and not the claimant; therefore there was no need for SSC to sign the discharge voucher. Accordingly only the plaintiffs signed the defendants' discharge voucher to which they had added the following words after the last sentence:

This full and final settlement shall be limited to the aforesaid incident only.

11. Unknown to the plaintiffs (who only found out in the course of discovery for this trial), SSC had written to the defendants separately on 19 May 1998 to request that the defendants expedite payment to the contractors (the plaintiffs) *'in order for the contractors to rectify the damaged works as soon as possible to avoid further damages to the surrounding works and the canal lining'.*

12. As they neither received payment nor a response to their letter dated 8 May 1999, the plaintiffs sent a reminder to the

defendants on 8 July 1999 with an ultimatum. At the same time, they pressed Douglas to expedite payment from the defendants. Douglas however apparently did nothing apart from giving oral assurances that the defendants were preparing the cheque for payment.

13. Consequently, in July 1999, Ong visited Li who showed him a letter from the defendants' solicitors advising the defendants to disclaim liability. Li then offered the plaintiffs $300,000 as a goodwill settlement in view of the fact that they were valued clients with whom the defendants wished to maintain a business relationship. Not unexpectedly, Ong did not accept Li's offer and in due course these proceedings were commenced after the plaintiffs' solicitors had first sent a letter to the defendants dated 25 August 1999 demanding the compromise sum. By a letter dated 27 September 1999 to the plaintiffs' solicitors, the defendants' solicitors withdrew any offer of settlement previously made.

The pleadings

14. In the (amended) statement of claim, the plaintiffs alleged that there was a compromise agreement between the parties as reflected in the defendants' second offer and the discharge voucher enclosed therewith. Consequently, the defendants breached that agreement when they failed to pay to the plaintiffs or to SSC the compromise sum.

15. In the defence, the defendants denied there was a compromise agreement. They alleged that the plaintiffs put tremendous pressure on the defendants to settle the plaintiffs' claim. The defendants therefore placated the plaintiffs by forwarding a discharge voucher to the latter in anticipation of a possible settlement pending which the defendants took legal advice and waited for the final reports from Cunningham and professional engineers Harris & Sutherland (H & S). It was the parties' common assumption that any settlement would be on the premise that the plaintiffs were entitled to be indemnified by the defendants and the defendants were obliged to indemnify the plaintiffs, under the terms of the policy.

16. The defendants contended that the common assumption turned out to be untrue and by reason thereof there was a fundamental mistake of fact which rendered any alleged agreement to settle void. Consequently the defendants denied there was any agreement to settle. The alleged agreement failed for want of consideration. In the alternative, the alleged second offer from the defendants was to be accepted by the plaintiffs and SSC, as set out in the defendants' discharge voucher sent together with the alleged second offer. The alleged second offer was not accepted in accordance with the terms as only the plaintiffs, not SSC, signed the discharge voucher.

17. The defendants further denied liability on the ground that the claim did not fall within the cover extended by the defendants. They pleaded that H & S were of the view that damage to the whole of the retaining wall (including the foundations) was due to design error. The defendants relied on Section II (which covers third party liability) of the policy and in particular clause (d) which states:

> The insurers shall not be liable for.the cost of replacement.of loss or damage to items due tofaulty design, but this exclusion shall be limited to the items immediately affected and shall not be deemed to exclude loss or damage to correctly executed items resulting from an accident due to such .faulty design.

The defendants contended that the plaintiffs' claim fell under Section II for which the defendants were liable to indemnify the plaintiffs only if it was due to accidental loss

> .occurring in direct connection with the construction of or erection of the items insured under Section I and happening on or in the immediate vicinity of the site during the period of cover.

They averred that faulty design cannot be considered to be something accidental. As the faulty design was produced by

Maunsell Consultants Singapore Pte Ltd (Maunsell) and it was the direct cause of the damage to the canal belonging to the MOE, Maunsell, not the defendants, were liable to MOE. Neither were the defendants liable to indemnify the plaintiffs.

The evidence

(i) the plaintiff's case

18. Ong was the plaintiffs' only witness. I have in paras 3 to 13 above, essentially set out his evidence in chief. I now turn to the testimony adduced from him under cross-examination.

19. Ong elaborated on the discussion at the meeting on 9 March 1999 which purpose he said was to settle the sum payable to the plaintiffs. He succeeded in persuading Li to increase the defendants' offer to $533,560.98 which was the 'maximum' sum Li said the defendants could pay. However, he denied he was shown Cunningham's letter to the defendants dated 2 December 1998 (see AB242) which showed that $523,912.68 was the recommended sum after adjustment. Ong also denied that Li had told him at the meeting that there could be no decision on a settlement without the final report from Cunningham (which was dated 20 August 1999 and showed that the plaintiffs' claim had been further reduced to $107,132.63). He agreed that Li did say that the defendants required a letter of authorisation from SSC to make payment to the plaintiffs. Ong admitted that SSC did not know about the meeting or the settlement but added it was not necessary to inform SSC as, it left it to the plaintiffs to resolve the claim with the defendants. In any case, SSC had confirmed to the plaintiffs by letter dated 22 October 1999 (AB45), that it had been fully informed of the settlement. However, Ong acknowledged that SSC was the party to whom the claim was payable under the 'Loss Payee' clause even though SSC had requested the defendants to expedite payment to the plaintiffs by its letter dated 19 May 1998 (AB24). Ong however would not commit himself on whether SSC had to sign the defendants' discharge voucher before it could receive payment under the policy.

20. In an earlier affidavit filed (on 15 September 1999) for the plaintiffs' unsuccessful O 14 application, Ong had deposed (in para 10) that the defendants had agreed to pay the plaintiffs the compromise sum on 31 March 1999. He explained that was because the defendants' discharge voucher and second offer bore that date. He agreed that both the offer and discharge voucher must be read together. Ong also admitted that after he had returned the signed discharge voucher to the defendants, he was informed by Douglas that Li insisted on SSC signing the discharge voucher as otherwise SSC may turn around and make another claim on the defendants for the same incident. However, Ong denied he was told by Li (soon after the report of H & S dated July 1999) that the plaintiffs' claim was not payable.

21. In his evidence in chief (as well as under cross-examination), Ong had asserted that the compromise agreement was reached at the meeting on 9 March 1999. If indeed there was an oral agreement reached on 9 March 1999, counsel for the defendants questioned Ong why the plaintiffs did not press for payment of the compromise sum as, their conduct showed that they were pressing the defendants repeatedly through OCW to expedite their claim; yet, they did nothing in the three (3) week interval before they received the defendants' second offer. Ong was also questioned on the time lapse between the defendants' second offer and the plaintiffs' reply dated 8 May 1999. He explained it was because he had approached SSC to endorse the discharge voucher but SSC declined to do so; they left it to the plaintiffs to settle with the defendants.

22. Although Douglas was the plaintiffs' insurance agent/broker and had attended the crucial meeting on 9 March 1999, he was not called by them to testify. The court and counsel for the defendants inquired as to the reason; we were told that Douglas refused to be a witness and had even indicated to counsel that if called, he would give testimony which would be unfavourable to the plaintiffs. I should also add that although counsel for the defendants indicated he would subpoena Douglas to appear as the defendants' witness, that intention did not materialise either. Without Douglas, the court was in no position to verify the statements attributed to him by both Ong and Li. Curiously, the plaintiffs chose not to call Eio Hock Chuar or Michael Lim to testify either even though they could or should have corroborated Ong's version of what transpired at the meeting on 9 March 1999, in the absence of Douglas as a witness.

(ii the defendants' case

23. I turn next to the testimony adduced from Li. As was to be expected, his version of what transpired at the meeting on 9 March 1999 greatly differed from Ong's. Li contended that the alleged compromise agreement failed for want of consideration. Further, the 'Loss Payee' clause under the Schedule of the policy states:

> Singapore Sports Council are interested in any moneys which.would be payable to the Insured.in respect of loss or damage to the Insured works. Such moneys shall be paid to Singapore Sports Council.

The plaintiffs through Douglas had also informed him that any payment under the policy had to be made to SSC. Accordingly, the discharge voucher signed by the plaintiffs alone and with the wording altered by the plaintiffs was not in accordance with the defendants' second offer.

24. Li denied that the defendants' second offer (of which he was the maker) was a record of the compromise agreement he had reached with the plaintiffs. If indeed an agreement had been reached, there was no need for Ong to have visited him in July 1999 to inquire about the plaintiffs' claim. He alleged that both the plaintiffs and Douglas resorted to threatening him with the possibility of the defendants being called upon to make payment of the sum ($3,686,822.55) under the plaintiffs performance bond, unless the plaintiffs were paid.

25. As for the meeting on 9 March 1999, Li confirmed that the discussion centred on the quantum of the plaintiffs' claim, in relation to the assessed amount and the defendants' first offer. In his written testimony, Li had exhibited a hand-written note (AB5) which he said he had prepared that day after the meeting. In that note, it was recorded that Ong had requested Li to improve on the defendants' offer to which Li's response was, that he would try to reduce the proportion of liability of the plaintiffs under Section II of the policy. Li recorded he had explained the defendants' position -- as the matter was so technical, the defendants had to wait for the final reports from Cunningham. However, because he wanted to maintain the defendants' cordial relationship with the plaintiffs, he recorded that he placated them by making the first offer back in December 1998.

26. Li said he had made known to the plaintiffs at the meeting that his offer to settle was subject to the final reports of Cunningham and H & S and, to the terms and conditions of the policy although this was not stated in his two letters of offer. He disagreed with counsel's suggestion that once the plaintiffs had confirmed the first offer and had given SSC's letter of authority, the defendants were obliged to pay $523,912.68. Li contended that even though it was not stated in his letter, it was 'understood' by people in the insurance industry that settlement of insurance claims was subject to receipt of final reports from the insurers' adjusters/experts and to the terms and conditions of the policy concerned. In any case, the plaintiffs well knew as it was also made clear in Cunningham's letter dated 1 October 1998 to their solicitors. He added that before the March meeting, he had requested for a representative from SSC to be present but he did not insist when Douglas told him it was not necessary. He explained that when the defendants made their first offer to the plaintiffs in December 1998, he had already heard that SSC had deducted the plaintiffs' payments, the defendants were therefore worried that new disputes may arise concerning this claim; hence Li wanted SSC's participation. He had also told the plaintiffs to discuss with SSC the issue of payment when he was informed that the plaintiffs could not receive the money. However these two discussions were inadvertently omitted from his note (probably because he did not think they were important) as well as from his written testimony and his earlier affidavits filed to oppose the plaintiffs' application for summary judgment. Li said he only recollected the two (2) matters when he read the plaintiffs' affidavits before the trial.

27. After his March meeting with the plaintiffs, Li contacted Cunningham to inquire whether he could compromise on the percentage (30%) of loss to be borne by the plaintiffs under Section II; Cunningham indicated that decision was for the defendants to make. He did make the decision; hence his second offer wherein he offered to reduce the percentage of loss to be borne by the plaintiffs under Section II from 30% to 20%.

28. Contrary to the plaintiffs' contention, Li said that although he was the assistant manager of the defendants in charge of claims, he could not settle large claims without approval from his superiors. Further, the defendants were the regional office for Thailand, Indonesia, Australia and New Zealand and he had additional duties arising therefrom. Because of the regional crisis in 1988, he was extremely busy and hard-pressed at the material time. Even so, while waiting for the final reports from Cunningham, Li said he was prepared to accommodate the plaintiffs by negotiating with them first so as to expedite their claim since, Cunningham had already given a tentative figure and the defendants knew that Bakau piles were then the only item excluded from the plaintiffs' claim but, they were uncertain as to the cause of the damage. Li revealed that at the time of negotiation with the plaintiffs, he was aware from correspondence between H & S and Cunningham, that design fault was a possible cause of the damage but, he did not inform the plaintiffs. In any case he believed they knew of this possibility since it was their project and the plaintiffs had their own site engineer who should know the reasons for the collapse of the wall. The defendants were prepared to negotiate on quantum first and put aside liability until such time as they received Cunningham's final report because OCW was the defendants' biggest broker (whose Douglas kept chasing him for payment) and the defendants considered the plaintiffs their valued clients; the plaintiffs had taken out policies with the defendants all along. Moreover, in 1998 alone, the defendants paid out more than $9m on performance bonds and they did not want the plaintiffs' performance bond to be called upon. Questioned what would happen if the final figure for the plaintiffs' claim turned out to be less than Cunningham's initial assessment of $525,912.68, Li said the defendants would then renegotiate with the plaintiffs.

29. Li revealed that after he received the amended discharge voucher from the plaintiffs under cover of their letter dated 8 May 1999, he telephoned Douglas pointing out that the plaintiffs had not complied with the terms of the defendants' second offer. Before receipt of the plaintiffs' said letter, he had received several telephone calls from Douglas requesting that the defendants dispense with SSC's signature in the discharge voucher which request Li refused pointing out that without SSC's signature, it meant the plaintiffs were making a counter-offer to the defendants' offer. In any event, by then he had seen SSC's letter dated 19 May 1998 requesting the defendants to expedite payment to the plaintiffs -- there was therefore no reason why SSC would not sign the discharge voucher. When the defendants made the first offer, the plaintiffs requested that they be paid for which Li said he required a letter of authority from SSC. However, before the defendants made the second offer, the plaintiffs requested that SSC be paid instead. As time had lapsed between SSC's aforesaid letter and the defendants' first offer, Li said he wanted confirmation as to who should receive the payment bearing in mind that the 'Loss Payee' clause required the defendants to pay to SSC. If no letter of authorisation came from SSC, it meant that the defendants could not pay the plaintiffs. Li disagreed with counsel's suggestion that the discharge voucher only served as a record of settlement and the plaintiffs' amendment of its wording did not change its nature.

30. Besides Li, the defendants also called two (2) representatives from H & S to testify. Tan Teck Cheng and Philip Jones testified that their company was appointed by Cunningham on the defendants' behalf to investigate a slope failure at the site of the project and to report on the cause. They confirmed that the collapse was due to the design of the retaining wall done by Maunsell. Consequently, the claim fell outside the cover provided under the policy. In their final submissions, the plaintiffs dealt with the testimony of H & S at considerable length. With respect, the evidence from H & S has no bearing on the only issue which required my determination in this case -- was there or was there not a compromise agreement reached between the parties on 9 March alternatively on 31 March, 1999?; the dispute did not touch on whether the plaintiffs' claim came within the ambit of the policy. Although their assessment of the plaintiffs' claim featured prominently in this litigation, the defendants surprisingly chose not to call anyone from Cunningham to testify.

The findings

31. Considerable time was also spent by counsel in cross-examining Li on the extent of his authority to settle claims on behalf of the defendants. Again, the extent of Li's mandate from the defendants does not help to determine the issue in question. What needs to be resolved is, what is the purport of the defendants' two offer letters to OCW dated 9 December 1998 and 31 March 1999? To answer that question, it is necessary to consider the basic principles as to when an offer is said to be accepted and an agreement concluded. In this regard, I refer to the following extracts from *Chitty* on Contracts (28 ed vol 1 at pp 89, 90 and 100):-

2-001 General principles.

There may be said to be three basic essentials to the creation of a contract: agreement, contractual intention and consideration.

The normal test for determining whether the parties have reached agreement is to ask whether an offer has been made by one party and accepted by the other

In deciding whether the parties have reached agreement, the courts normally apply the objective test, which is further discussed in 2-002 below.

2-002 Offer defined.

The offer is an expression of willingness to contract made with the intention (actual or apparent) that it is to become binding on the person making it as soon as it is accepted by the person to whom it is addressed. Under the objective test of agreement, an apparent intention to be bound may suffice *i.e.* the alleged offeror may be bound if his words or conduct are such as to induce a reasonable person to believe that he intends to be bound, even though in fact he has no such intention.

2-024 Acceptance defined

. An acceptance is a final and unqualified expression of assent to the terms of an offer. The objective test of agreement applies to an acceptance no less than to an offer. On this test the mere acknowledgement of an offer would not be an acceptance; nor is there an acceptance where a person who has received an offer to sell goods merely replies that it is his 'intention to place an order.'

32. Turning next to the defendants' first offer in the sum of $523,912.68 Li had written as follows:

> We will make payment to the insured Projection Pte Ltd. However considering the Loss Payee clauses in the schedule, before we release our Draft, we need a letter from Singapore Sports Council to confirm that they have no objection to this payment arrangement
>
> Please convey the same to Projection Pte Ltd and let us have their confirmation of the payment so that we are able to effect our payment

The plaintiffs' reply by their letter dated 18 December 1998 inter alia stated:

> We are therefore surprised to note your letter preparing to pay us only $523,912.68 a shortfall of $155,153.27 from that assessed by your appointed professional loss adjuster.
>
> Please provide us within the next 7 days, with detailed breakdown of your assessment of $523,912.68 and identify the items (or amounts) recommended by the loss adjuster that you have rejected..

Nothing could be clearer from the above extract of the plaintiffs' reply than that the defendants' offer of $523,912.68 had been rejected.

33. Now for the second offer which full text I have already set out in para 9 above. Li had said (with which I fully agree), that this letter represented a fresh offer from the defendants. All that was needed by the plaintiffs by way of acceptance was, to sign (together with SSC) the discharge voucher enclosed therewith and return the latter document to the defendants in order to obtain payment of $553,560.98. This they failed to do because: firstly, the plaintiffs did not obtain SSC's requisite signature and secondly, they took it upon themselves to unilaterally amend the text of the discharge voucher. Again, applying the basic principle that there must be *consensus ad idem* before an offer and acceptance can culminate in a contract, the defendants'

second offer had been impliedly rejected by the plaintiffs. Consequently, the plaintiffs' contention that the second offer from the defendants reflected a compromise agreement having been reached between the parties, cannot be sustained.

34. It bears remembering that Ong had admitted under cross-examination (as Li testified) that Douglas had indeed informed him that the defendants insisted on having SSC's signature on the discharge voucher as the latter was the 'Loss Payee' under the terms of the policy. In this regard the plaintiffs' subsequent attempt to overcome the lack of consent by obtaining SSC's letter dated 21 October 1999 stating it was willing to receive payment under the 'Loss Payee' clause came a little too late as, the writ of summons had by then been filed (on 3 September 1999).

35. At this juncture I need to revert to the fateful meeting of 9 March 1999 to ascertain whether a compromise agreement had been concluded then, as Ong asserted in his written and oral testimony. Incidentally this was a departure from the plaintiffs' pleaded case that the compromise agreement was evidenced in the defendants' letter dated 31 March 1999; no mention was made of the meeting. It is common ground that the purpose of the meeting was to discuss and negotiate on the defendants' then offer of $523,912.68. Other than that however, the parties differed in their versions of what was said by Li to Ong and vice versa. The only record of what transpired at that meeting was Li's handwritten note which counsel for the plaintiffs roundly assailed as having been manufactured for purposes of this trial since, it was not disclosed at the O 14 proceedings or earlier but only in the course of discovery for this trial. While I am mindful that the document emanated from the defendants and can be considered to be self-serving in that sense, it is significant that Li's note of what transpired at the meeting is consistent with the defendants' second offer. Li had testified that in the course of the discussion, he had raised the possibility of reducing the plaintiffs' portion of liability under Section II of the policy in response to Ong's request that the defendants improve on their offer of $523,912.68; the second offer proved that he made the adjustment.

36. Earlier (see para 22) I had alluded to the plaintiffs' omission to call Douglas as their witness because the latter had made it clear that he was reluctant to get involved and if forced to testify, he would be a hostile witness. Counsel for the defendants conveyed the same message when he informed the court he had changed his mind about issuing a subpoena to compel Douglas to attend court. Under the circumstances, it would be unfair to draw an adverse inference against the plaintiffs for not calling Douglas as their witness as counsel for the defendants suggested.

37. However, the absence from court of Ong's fellow directors Eio Hock Chuar and Michael Lim merit different considerations altogether. Ong had testified that they accompanied him to the lunch meeting and this was confirmed by Li's handwritten note. In the absence of Douglas, one would have thought that the plaintiffs would call either or both these persons to buttress Ong's testimony that a compromise agreement was reached at the meeting. The plaintiffs' failure to do so coupled with the lack of any explanation from their counsel and or Ong is a telling omission from which I must necessarily draw an adverse inference -- if called to testify, they would not have corroborated Ong's testimony.

38. I am fortified in my view that no compromise agreement was reached on 9 March 1999 by another significant omission on the part of the plaintiffs. In his written testimony, Ong had deposed (se para 6 above) that when he was told by Douglas that the defendants were processing the plaintiffs' claim, he had written to the defendants promptly on 21 November 1998 to record what was told to him. Yet, if his testimony is to believed, he did not do the same when the parties reached a compromise agreement on 9 March 1999. The omission to write is so completely out of character with the plaintiffs' conduct, especially when the plaintiffs had been pressing the defendants repeatedly since October 1998 for payment, that the only conclusion one can draw therefrom is, that no compromise or any agreement at all was reached on 9 March 1999. In addition, Li had testified and which was not challenged, if indeed there had been a compromise agreement reached in March 1999, why would Ong still visit him four (4) months later (in July 1999) to inquire about the plaintiffs' claim?

39. What happened was (and which Ong admitted as much under cross-examination), the plaintiffs met with the obstacle of SSC being unwilling to sign the discharge voucher when they intended to accept the defendants' second offer dated 31 March 1999. Ong admitted that (as conveyed to him by Douglas from Li) the defendants on their part were unwilling to make payment without SSC's signature. This problem would not have arisen in the first place had the plaintiffs adhered to the terms of the policy and allowed the defendants to pay SSC as the 'Loss Payee' instead of requesting payment to themselves direct. I can only speculate that one reason why they did not want SSC to be paid was because the plaintiffs were afraid SSC may retain the

monies to set-off claims SSC had against them. The plaintiffs' problem was compounded by the fact that they decided to amend the wording of the discharge voucher to protect themselves against compromising future claims under the policy. Unfortunately, this resulted in the plaintiffs making a counter-offer to the defendants' second offer. I can only surmise that realising the legal quandary they had got themselves into, the plaintiffs then changed tack and in Ong's testimony, claimed that a compromise agreement had already been reached on 9 March 1999 -- therefore their rejection of the defendants' second offer did not affect their pre-existing rights. Apart from the cryptic assertions that the plaintiffs' case was not restricted to the compromise agreement being reached on 9 March 1999 but it was reached between the parties *sometime in March 1999*, the plaintiffs did not elaborate on paras 1 and 2 of their written submissions.

The law

40. It would be appropriate at this juncture to look at the requirements at law for a valid compromise to come into being; I refer to the textbook *The Law and Practice of Compromise* (4 ed 1996) which was cited by the defendants. At para 3-01 (p 14) the learned author had this to say:

> Since a compromise is merely a contract, the ordinary principles of contract law apply with as much force as in other contractual contexts. Under the ordinary law, a contract will not be found to have arisen unless:
>
> (i) consideration;
>
> (ii) an agreement can be identified which is complete and certain;
>
> (iii) the parties intend to create legal relations and;
>
> (iv) in some cases, certain formalities have been observed..

At para 3-03 (at p 15) the learned author continued:

> In compromise, consideration is often furnished by the promised or actual forbearance of one party to pursue a claim against another in return for some promised or actual act by the other. Such act may constitute a benefit to the claimant or a detriment to the performer or indeed both. The promised or actual forbearance may be for a specified time or, where no time is specified, for a reasonable time.

41. With the above extracts in mind, I turn to paras 5 to 7 of the (amended) statement of claim which pleaded as follows:

> 5. By a letter dated 31 March 1999, the defendants recorded their agreement to the sum of $553,560.98 as payable to the plaintiffs in respect of the said claim and/or said damage. A discharge voucher dated 31 March 1999 (the Discharge Voucher) was enclosed with the said letter for the plaintiffs' signature.
>
> 6. The Discharge Voucher was duly executed by the plaintiffs and returned to the defendants some time on 8 May 1999. The plaintiffs will rely on the discharge voucher for its full purport and effect at trial.
>
> 7. In the premises, there is a compromise agreement (the Agreement) between the parties for the said claim and/or said damage in that the defendants have agreed to pay the sum of $553,560.98 as full and final settlement of the said

claim and/or said damage.

No particulars were furnished for the above paragraphs in particular for para 7 as to when the compromise agreement was made, the reasons therefor and the terms thereof. Above all, nothing was pleaded on the issue of consideration; nor was it elaborated on in para 99 of the plaintiffs' submissions as to what constituted good consideration for this case. All that counsel for the plaintiffs did was, to refer to an extract from *Cheshire Fifoot & Furmston's* Law of Contract (1998) which included a comment that the compromise of a doubtful claim was upheld by the courts. I consider the paucity of the plaintiffs' pleadings and submission on this very essential ingredient for a compromise agreement as another indication of its non-existence as at March 1999, particularly when the issue of want of consideration was specifically pleaded in the defence. As an aside, I would add that it was wrong of the plaintiffs to include in the Agreed Bundle (at AB40) as well as make reference to it in their final submissions (para 86) the without prejudice letter from the defendants dated 31 August 1999 offering to pay them $322,649.14, even if counsel for the defendants raised his objections late in the day.

The conclusion

42. In the light of my findings, there is no necessity for me to determine the alternative defence put forward by the defendants -- that there was a fundamental mistake which rendered any alleged agreement to settle void. I would only venture to say that the evidence suggests that such a defence would be difficult to succeed. I therefore dismiss the plaintiffs' claim with costs to the defendants.

Lai Siu Chiu

Judge

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