

Sheikh Noordin bin Sheikh Mohammad ... **Appellant**

AND

Baiduri Bank Berhad ... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 1 of 2011)

Hj Mohd Iskandar Zulkarnain bin Haji Omar Ali ... **Appellant**

AND

Baiduri Bank Berhad ... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 2 of 2011)

Before: Mortimer, P.; Davies and Rogers, JJ.A.
25th May, 2011.

Lawyers instructed by bank to search the Bankruptcy Register for person with title Pengiran or Pg to whom they wished to advance money. Common knowledge that before marriage in Brunei such a person may use the title Awangku or Ak. Lawyers failed to search for Awangku or Aw. The person was bankrupt listed under title Ak. Lawyers informed bank that the person was not on Bankruptcy Register. Bank advanced money to bankrupt and nothing repaid. Judge held lawyers in breach of contract and negligent for failing to search with the skill and care expected of a reasonably competent and careful lawyer and awarded damages. Judge's finding upheld on appeal.

Mr Christopher Sawan of Messrs. Sheikh Noordin Mohammad for the Appellants.
Mr Nava Palaniandy of Messrs. Ahmad Isa & Partners for the Respondent.

Mortimer, P.:

At the conclusion of the hearing on 21 May 2011 we dismissed these appeals with costs. They relate to the same action. We now give our reasons.

These are appeals from a judgment of Judge Lim in the Intermediate Court given on 14 December 2010. The judge found in favour of the plaintiff bank (the bank) in their claim for professional negligence against the appellant 1st and 3rd defendants (the partners), who were the practising partners of Ihsan Associates (IA), a law firm in Bandar Seri Begawan.

Judgment in default was signed against the 2nd defendant who was also a partner in the firm AI. The action proceeded against the remaining two partners.

The facts

The basic facts were not in dispute. The bank had an agreement with IA to retain the firm to conduct its bankruptcy searches for a fee of B \$50 for each name searched. This fee was considerably less than the normal \$200 paid for this service. These searches were asked for by the bank before advancing money to customers. About 100 searches were requested per month.

In early July 2002 Pg Mohd Amin bin Pg Mahmud applied to the bank for a personal loan of B\$58,700. On 4 July 2002 the bank wrote to IA asking for "a verification" in respect of several named borrowers including Pg Mohd Amin bin Pg Mahmud (Pg Amin) Identification Number 00-072894. This was a request for a bankruptcy search at the Bankruptcy Registry.

On 6 July 2002 IA reported back to the bank that no bankruptcy proceedings had been brought against Pg Amin. Having received this clearance the bank advanced the money to the customer.

On 24 April 2004 the Official Receiver informed the bank that contrary to the verification by IA a receiving order had been made against Pg Amin on 6 March 1999 in Bankruptcy No 127 of 1998. He was then known as Ak Mohd Amin bin Pg Mahmud.

The issue

The central issue in this appeal is whether the judge was right in holding that when IA was retained to conduct a name search at the Bankruptcy Registry and to discover whether any bankruptcy proceedings had been taken against 'Pg Mohd Amin bin Pg Mahmud' as described in the letter 4th of July 2002 it was the firm's duty not only to search this name but also to search the variant name beginning Awangku or Ak as well as Pengiran or Pg.

The evidence on the search

The evidence is clear that the only search undertaken was for the name supplied. The bankruptcy proceedings against the same person but under the name beginning Awangku or Ak were not found and the bank was not informed. The consequence was that the bank advanced money to that person when he was bankrupt. The bank lost the whole sum advanced.

The judge's finding

The unqualified employee of the partners who conducted the search, as well as each of the partners, were well aware of a relevant custom peculiar to Brunei. They accepted that a person who has the right to the title Pengiran only assumes this title after he is married. Before marriage he uses the title Awangku. All those entitled to Pengiran can be expected to have been formerly known as Awangku. The judge noted the evidence that the employee who conducted the search as well as each partner knew of the custom and additionally the judge felt able to take judicial notice of it as "notorious and well-known".

The expert witness called by the bank was of the opinion that a failure to search for such an obvious variant of the title Pengiran as Awangku or Ak was a breach of the partners' contractual duty and was also professional negligence. The judge agreed and held:

“The duty of a solicitor is to use reasonable care and skill and in so doing take such action as the facts of a particular case demand. When a solicitor is given a name which is prefixed with Pg., he should know that this is a man who was an Ak before he became a Pg. The change of this title is very common in Brunei and it is a widely known fact that the change takes place upon the marriage of an Awangku. DWI said he was not guided by the lawyers in IA to search for Ak (Awangku) when the name given to be searched is Pg (Pengiran). He was not required to search any other variant as this would take time. With respect, I think since this is a common variant of all Awangkus and Dayangkus in Brunei, a search would not be complete or thorough without leafing through the pages of the Index Book for names with these prefixes.

.....

I am satisfied that the defendants, through their agent, were in breach of their duty of care to the plaintiff for their failure to properly search the Index Book for the borrower's name. They were also negligent in tort. As a result of this breach of duty, the plaintiff suffered loss in that they granted the loan facility to the borrower who defaulted in making any monthly payments.”

The partners' case on appeal

Mr Sawan, who appears for the partners, says that the judge was wrong because the letter of request asked for a bankruptcy search on the specific name 'Pg Mohd Amin bin Pg Mahmud' without any mention of searching for Awangku or Ak. He contends that the partners' retainer was only in respect of the exact name specified in a letter of request and they have complied with their duty having made the search and having reported correctly that there were no bankruptcy proceedings under that name. He argues that this is not a general retainer and the lawyers had no wider duty. Some reliance is also placed upon the small fee being charged for this service.

Mr Sawan was tempted to raise a question as to whether the judge was entitled to take judicial notice of the practice of the using Awangku before and Pengiran after marriage but could advance no foundation for such a submission.

He relies also upon the fact that the bank had in its possession a salary slip with the prefix Awangku or Ak of the customer. As the bank did not inform IA and ask for a search under Awangku or Ak he says the responsibility for the failure of the search was the bank's alone. Had they asked for a search under Ak a useful search would have been done.

These are Mr Sawan's central points on liability.

On the level of damages the judge awarded the bank the full sum advanced to Pg Amin and Mr Sawan suggests that some repayments may have been made to reduce this loss. But he must have overlooked Mr Tan who gave evidence on behalf of the bank

explaining that it had no benefit from any repayment because Pg Amin was bankrupt and all the repayments went to the trustee.

Discussion

Mr Sawan was correct in saying that the retainer here was not a general retainer. It was limited to making a bankruptcy search. But the bank retained lawyers to make the search. They are entitled to expect that search to be properly and professionally carried out so that they do not advance money to a bankrupt.

The suggestion that the lawyers had done all that was necessary under the retainer having limited the search to Pengiran when it was both common knowledge and known to them that this title may only have been assumed after marriage is difficult to accept. They must have known that the search was incomplete. It did not reasonably exclude the existence of bankruptcy proceedings against the person to whom the bank was intending to advance money.

The judge's finding in these circumstances that the search was both a breach of contract and negligent is almost too obvious to bear contrary argument.

Suggestions that the low fee charged is of any relevance is unworthy. This is quite irrelevant to any question of breach of professional duty. Even if a lawyer undertakes work without fee he still must exercise the reasonable care and skill expected of a competent and careful lawyer.

On liability this leaves the point made that the bank had in its possession the pay slip bearing Pg Amin's former title Ak or Awangku. Whereas it may have avoided the problem and the loss had the bank asked for a further search, this fact does not in any way excuse the contractual breach of duty. On the information supplied IA's duty was to make a proper search including a search for the obvious variant Ak.

On the judge's assessment of damages the evidence was clear and unchallenged that all the money advanced was lost and she awarded damages accordingly.

The judgment below was clear and correct.

Conclusion and Order

For the reason we have given we had no hesitation in dismissing these appeals with costs and we so ordered.

Mortimer, P.

Davies, J.A.

Rogers, J.A.