

Ong Tiong Oh

... **Appellant**

AND

Supercrete Sdn Bhd

... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 5 of 2010)

Mortimer, P.; Davies and Leonard, JJ.A.
25th November, 2010.

Assignment by Deed by a 3rd party to a creditor in respect of a debt. Issue -- whether the original debt was released by the creditor. Whether the assignment is absolute or by way of charge only is nothing to the point. The debtor promisee may choose with whom he contracts and the burden of a contract may not be assigned to another without his agreement. The creditor did not release the original debt in the deed and the debtor was not a party to it. There was no evidence that the creditor agreed otherwise to release the original debt which had not been satisfied. The creditor could therefore seek the money from either the debtor or the assignor but could only recover it once. Such recovery is performance of the contract.

Mr Lim Boon Khai of Messrs. K Lim & Co. for the Appellant.

Ms. Hj Rokiah Hj Swed of Messrs. Abas Serudin & Partners for the Respondent.

Mortimer, P.:

The appellant Plaintiff's (Mr Ong's) claim is for \$905,546.65 for cement and other goods sold and delivered to the defendant (Supercrete) between 2004 and 2005. On 6 October 2010 Hairol Arni J dismissed Mr Ong's claim on the grounds that this debt had been satisfied by an assignment in circumstances to which we will refer. Mr Ong now appeals.

The background

The 3rd party (ITS) was a contractor to the government in respect of a housing development known as the Rimba scheme (the scheme). ITS purchased ready mixed concrete from Supercrete for the scheme and in turn Supercrete purchased raw materials for the cement from Mr Ong.

A certificate of practical completion was issued in respect of the scheme on 31st of October 2005 and the defect liability period ran from the 1 November 2005 and ended on the 30 November 2006. At this time ITS was owed considerably more than B\$900,000.00 by the government but by the time of trial this had not been paid.

On the evidence the state of indebtedness between the parties at the completion of the scheme was that the government owed the developer ITS over B\$900,000.00, ITS owed over B\$900,000.00 to Supercrete for ready mix concrete and Supercrete owed Mr Ong more than B\$900,000.00 for raw materials.

It seems that ITS was unable to pay Supercrete until it had been paid by the government and in its turn Supercrete was unable to pay Mr Ong until it had been paid by ITS. As time passed after the date of completion each party began to press for payment from its respective debtor.

In order to persuade Mr Ong to hold his hand from taking proceedings against Supercrete an arrangement was made that if and when ITS was paid by the government it would pay B\$900,000.00 owed to the Supercrete directly to Mr Ong in satisfaction of Supercrete's debt to Mr Ong. Initially this arrangement was discussed and referred to in correspondence but formalised between ITS and Mr Ong in a deed of assignment signed on 12 June 2007.

To date the government have not paid ITS. We are unaware of the reasons.

The issue

There are two issues in front of this court. First, whether Supercrete's admitted debt to Mr Ong had been released by Mr Ong and satisfied by the deed of assignment of the B\$900,000.00 by ITS to Mr Ong when ITS received payment from the government. Second, whether Mr Ong had agreed orally, in writing and by his conduct to release the debt once the assignment had been made.

The judge's ruling

The judge ruled that Mr Ong's action against Supercrete failed. He considered that the deed of assignment effected an absolute assignment of the right to the money by ITS as payment, not simply as security. Therefore, as the assignment by deed was absolute he concluded the Supercrete's debt to Mr Ong had been discharged. The contract had been performed. The judge accepted submissions made to this effect.

The submissions

Mr Lim appears for Mr Mr Ong. His case on appeal is that the assignment did not release the debt. Nor had the contract been performed. The assignment was by way of security, it was the right to money only if and when it was paid by the government to ITS. It was a contractual right to the money but the contract could not be enforced against the government. Moreover Mr Ong never agreed to release Supercrete and points out that he continued asking for guarantees from Supercrete's directors both before and after the deed of assignment. As to the letter of 3 August 2006 (to which we will refer) he was under no obligation to reply and no inference that he had agreed to release Supercrete can arise.

On the other hand, Mdm Rokiah for Supercrete contends that the judge rightly decided that ITS had absolutely assigned the B\$900,000.00 to Mr Ong who has accepted the assignment in discharge of Supercrete's debt and the contract had been

performed. The consequence is that Mr Ong was not entitled to recover the money twice and his action must fail. In any event Mdm Rokiah contends that an agreement to release Supercrete can be inferred from the evidence that the assignment was made on the instructions of Supercrete (see paragraph (D)), that Mr Ong failed to answer the letter of 3 August 2006, and furthermore he failed to give evidence at trial on matters with which he was intimately connected.

The law

It is necessary to consider the law briefly. Supercrete had the burden of its contract with Mr Ong. Its intention was to make an arrangement whereby the burden of that contract was assigned to ITS in the manner we have already set out. However, the burden of a contract cannot be assigned by a party so as to discharge his obligations under the contract without the consent and agreement of the promisee -- in this case Mr Ong. After all, a person may choose with whom he wishes to contract. For a promisee it may be an important decision.

Whether an assignment is absolute is nothing to the point. The question is whether the debtor agrees to accept an assignment as performance or otherwise agrees with the debtor to release the debt.

Of course, if a debt is assigned and the debt is paid by the assignee, the contract is performed and the party owed may not recover twice. This is the position both at common law and under section 42 of the Contracts Act, cap.106:

"42. When a promisee accepts performance of the promise from a 3rd person, he cannot afterwards enforce it against the promisor."

Discussion

Having heard counsel's submissions the judge was concerned to decide whether the assignment of the \$900,000.00 was an absolute assignment to Mr Ong. No doubt it was an absolute assignment of the right to the money if and when it was paid. But ITS's right to the money was a bare contractual right which could not be enforced and as events have shown it was an assignment only of future possible benefit. We were informed by Counsel that ITS even now has not received payment. If we find that the assignment did not amount to performance of the contract we will consider the second issue.

The deed of assignment

We turn to the deed of assignment. We note that inter-alia the deed provides as follows:

(D) with the agreement of the parties and on the instructions of the subcontractor, the Assignor agreed to assign to the assignee the sum of Brunei Dollars 900,000.00 (\$900,000.00) due and receivable by the assignee from the government in respect of the project.....

(E) the provisions of this assignment shall be in addition to and shall not be in derogation of any security which the assigned the may now or hereafter hold in respect of the subcontractor's indebtedness to the assignee.

.....

1. The assignor acknowledges that the assignee has agreed to accept the assignment of the assigned monies as security in full reliance on the representations by the assignor in the following terms and the assignor hereby represents and warrants to the assignee that;

(a) the contract underlying the said matters constitute valid, binding and enforceable obligations of the parties thereto, are in full force and effect and have not been terminated or varied in any way;

.....

3. The assignor may, at its costs, call for a reassignment of the property referred to in clause 2.2 upon payment in full of the said debt and pay the legal costs and expenses incurred in connection with the said debt.

There is no provision in the deed by which Mr Ong agrees to release Supercrete or undertakes not to pursue his rights against it in respect of the debt. Indeed in these passages there are indications to the contrary. Note the references to Mr Ong accepting the assignment as security, to the underlying contracts remaining enforceable and to ITS's right to call for reassignment if the debt is paid.

Did Mr Ong agree to release Supercrete?

But the deed is not the only matter relied upon and it is necessary to examine whether there is any other evidence which shows that Mr Ong agreed to surrender or waive his rights to recover the debt from Supercrete.

At trial Mr Ong's contention throughout was that he signed the assignment as security for Supercrete's debt and that at no time agreed to accept it in full and final settlement. What is more he points out that he continued to demand guarantees from Supercrete's directors before and after the assignment was signed and until the letter before action was written on his behalf.

Both Mr Wong who gave evidence on behalf of Supercrete and Mr Ho who gave evidence for ITS thought that the arrangement leading up to the signing of the assignment had discharged both ITS's debt to Supercrete as well as Supercrete's debt to Mr Ong. However, an examination of their evidence shows that they were mistaken in thinking that the debts had been released as a consequence of the assignment. Misled by this mistake they contended in evidence that an agreement, partly oral and partly in writing, had been made by Mr Ong to release Supercrete.

Mr Wong Nyen Fook of Supercrete initiated the discussions but it was Mr Ho of ITS who conducted the negotiations with both Mr Ong and Supercrete which led to the

assignment. Mr Wong's evidence on this matter appears in his affidavit of the 25 August 2009. Particularly paragraphs 13, 14, 15 and 16:

13. Having achieved that understanding, I then wrote to the 3rd party on 20th July, 2006 to confirm that the defendant had no objections to the direct payment to the plaintiff of the entire sum of B\$900,000.00 when the 3rd party received its payment from the Rimba project as the full and final settlement of the debt owed by the defendant to the plaintiff and also to reduce the debt owed by the 3rd party to the defendant accordingly.

14. This was later confirmed and followed up with the letter from the 3rd party to the plaintiff on 3rd August, 2006. I believe the terms contained therein are very clear as the intentions of the defendant and the 3rd party. The 3rd party in the same letter had also written to Baiduri Bank Bhd to effect the payment of the said B\$900,000.00 upon receipt of the payment from the Rimba project from the government of Brunei.

*15. The plaintiff did not object to the contents of the aforesaid letter and I am not aware of any letters and/ or conversations to that effect as it was clearly spelt out in the letter that the assignment was **"to settle the outstanding account owed by Supercrete Sdn Bhd to you for their purchases on their behalf directly. This transaction is also to be treated as a settlement of our outstanding account owed to Supercrete in the said sum of B\$900,000.00 for our purchases of ready mixed concrete from them for account NO. (1)."***

16. Thereafter, I did not hear from the plaintiff/3rd party on the said B\$900,000.00 any more as I was under the impression that the matter had been resolved between all parties and that the plaintiff was happy with the said assignment of the payment.

Mr Ho gave evidence for ITS. In paragraphs 3 and 4 in his affidavit of 25 August 2009 he deals with an agreement in June and July 2006 reached between the 3 parties as follows:

3. Sometime in July 2006, an agreement was reached between the plaintiff, Mr Wong Nyen Fook, the defendant's director and myself on the half of the 3rd party that:

(a) the defendant's debt of B\$900,000.00 due to the plaintiff would be paid by the 3rd party upon the 3rd party's receipt of a sum of B\$900,000.00 from the Brunei government for the final account and retention money in respect of the project known as ... (Rimba Project payment); and

(b) the defendant would accept the 3rd party's said payment of B\$900,000.00 to the plaintiff in full and final satisfaction and discharge other 3rd party's debt of B\$900,000 due by the 3rd party to the defendant ("The Agreement")

The agreement was made orally and evidenced in writing, alternatively, was partly oral and partly in writing by virtue of a series of letters between the parties, namely: -

- (a) letter dated 19th of July 2006 from the 3rd party to the defendant;*
- (b) letter dated 20 July 2006 from the defendant to the 3rd party;*
- (c) letter dated 3 August 2006 from the 3rd parties for the plaintiff, copied to the defendant; and*
- (d) letter dated 25 August 2006 from the defendant to the 3rd party.*

Although later in his affidavit the witness argues that the deed of assignment transferred B\$900,000.00 absolutely to Mr Ong and therefore he could not seek to recover the debt from Supercrete it is noteworthy that he gives no evidence that Mr Ong released the debt. Where the witness indulges an argument it is not evidence in the case.

He refers to the content of the only relevant letter, that of 3 August 2006 from ITS to Mr Ong. There is a possible inference that Mr Ong's failure to answer that letter amounted to an acceptance of the assignment in settlement of the debt. The letter states:

"The said sum of B \$900,000.00 is to settle their outstanding account owed by Supercrete Sdn Bhd to you for their purchases on their behalf directly."

However, such a conclusion is quite contrary to Mr Ong's conduct immediately before and after the execution of the deed of assignment: see letters to Supercrete dated 11 June 2007, 19 June 2007 and 20 June 2007 in which Mr Ong seeks personal guarantees from Supercrete's directors of the debt in return for Mr Ong granting the company time to pay and in order to support the assignment. Moreover, the letter does not call for a reply and the failure of Mr Ong to refute that statement cannot be construed as an admission by him of its correctness.

Finally, Mr Ong was not called to give evidence at trial and the judge noted that no explanation was advanced. He considered, "At the very least his testimony would shed some light as to why the deed was assignment of debt was actually signed." Mdm Rokiah submits that this is support for the inference that Mr Ong agreed to release the debt. Had there been some other evidence this may have assisted her but as it is this is not a contention which enables her to succeed.

Conclusion

For these reasons we are satisfied that when Mr Ong accepted this assignment of a bare unenforceable contractual right to money due in the future he did not agree with Supercrete to release the original debt. He accepted the assignment as security and at the same time continued to seek further security by way of guarantees from Supercrete's directors. Further, there is no evidence upon which the judge could act which showed Mr Ong had made an agreement partly oral and partly in writing to grant such a release.

The consequence is that Mr Ong can pursue his rights against both Supercrete and, when and if paid by the government, ITS. The only effect of having a right to recover the same sum against two parties is that it cannot be recovered from both. Once one contract has been performed the other is released.

Order

We order that the appeal be allowed with an order nisi that costs will follow the event.

Before we finalise the orders we will list the appeal to hear counsel further as to whether the consequence of the appeal being allowed is that judgment should be given for Mr Ong, there being no dispute about the amount owing.

Mortimer, P.

Davies, J.A.

Leonard, J.A.