

Toh Kim Chan v Toh Kim Tian and Others
[2004] SGHC 161

Case Number : Suit 117/2002, RA 90/2004
Decision Date : 02 August 2004
Tribunal/Court : High Court
Coram : Tay Yong Kwang J
Counsel Name(s) : Cheong Gay Eng (Cheong and Koh) for appellant / first defendant; Peter Low (Peter Low, Tang and Belinda Ang) for respondent / plaintiff
Parties : Toh Kim Chan — Toh Kim Tian; Ang Kiang Hua; Guan Joo Engineering Works and Building Pte Ltd

Partnership – Partners inter se – Accounts – Business of partnership transferred to company – Appeal against findings of Assistant Registrar regarding accounts and inquiries made in respect of assets of partnership.

2 August 2004

Tay Yong Kwang J:

1 This is an appeal by the first defendant against the findings of an assistant registrar made in an inquiry into accounts directed by Woo Bih Li JC (as he then was, henceforth “Woo J”). The following facts are derived substantially from Woo J’s judgment dated 11 November 2002 ([2003] 1 SLR 839).

The factual background

2 The Toh family comprised eight brothers and five sisters. The eldest brother passed away in February 1995. The action arose out of a dispute among some members of the Toh family. The plaintiff and the first defendant are brothers, the plaintiff being the fifth son and the first defendant being the third son in the family. The second defendant (Ang Kiang Hua) is the wife of the first defendant. The third defendant is a company known as Guan Joo Engineering Works & Building Pte Ltd (“the company”) in which the first and second defendants are directors and shareholders.

3 In 1977, five members of the family agreed to start a business together with each of them contributing \$5,000 as the initial capital of the partnership. The five consisted of the father, Toh Kim Hwee (eldest son, now deceased), the first defendant, Tock Kim Yock (fourth son) and the plaintiff. On 1 February 1977, the firm was registered. Although the partnership (originally called Guan Joo Hardware Co) was not registered in the names of all the five named members of the family, it was common ground that they were partners with each holding an equal share in the partnership.

4 In July 1984, the name of the partnership was changed to Guan Joo Engineering Works. The first defendant was running the business, at least, from July 1984 onwards. The partners who worked for the business received fringe benefits such as cars, which were paid for by the partnership. They also received payment for their work. There were also advances made to the partners. Those were recorded as loans. The father received monthly sums of money from the business. The first defendant was in charge of all such money matters.

5 On 4 April 1996, the company was incorporated upon the instructions of the first defendant for the purpose of limiting liability. The business of the partnership was transferred to the company

and the partnership ceased business on 30 April 1996. The first two shareholders of the company were the first defendant and the widow of the eldest brother, the remaining registered partners of the partnership, with each holding one share. The first defendant's wife (the second defendant) became a director of the company on 2 May 1996. Sometime in 1999, the first defendant bought over the beneficial interest of the widow of the eldest brother.

6 The plaintiff, who had been working in the partnership and subsequently the company, from 1991, had his services terminated by the first defendant in July 2001. Their relationship had been strained for some time.

7 On 31 January 2002, the plaintiff commenced this action against the three defendants. Among other reliefs, he sought a declaration that the first and second defendants were holding on trust for him a 20% interest in the partnership and the company. He also prayed for an order that accounts be taken and inquiries be made in respect of the assets of the partnership and the company, and that the first and second defendants give him access to the firm's and the company's accounting books and documents.

8 Woo J made the following orders at the conclusion of the trial:

- (a) a declaration that the first defendant held a 20% share in the partnership on trust for the plaintiff;
- (b) an order that the first defendant "give an accounting and there is to be an inquiry as stated in paragraph 57" (I have set out below the said [57] of the judgment in full);
- (c) an order that the first defendant give the plaintiff and any accountant appointed by him access to all accounting records and supporting documents and allow them to make copies thereof;
- (d) an order that the first defendant transfer to the plaintiff 20% of the issued shares of the company;
- (e) liberty to apply.

9 Paragraph 57 of Woo J's judgment reads (with the plaintiff referred to as "Kim Chan", the first defendant as "Kim Tian" and the company as "GJEWB"):

57 In the circumstances, I will order Kim Tian to account for all the assets of the Partnership from 31 January 1996. This will be within six years prior to the filing of the Writ on 31 January 2002 and, even if s 6(2) of the Limitation Act does not apply, I am not prepared to order the accounting period to be extended to any period before 31 January 1996 in view of laches on the part of Kim Chan. However, the \$200,000 cash balance is to be deemed to be part of the assets of the Partnership as at 31 January 1996. There will also be an inquiry as to what has become of such assets. I will also order Kim Tian to pay Kim Chan 20% of the assets so accounted unless the inquiry concludes that the assets have been transferred to GJEWB or given to any of the partners other than Kim Tian or have been reasonably used to pay Kim Tian in view of the time he spent in managing the Partnership. To the extent that they have been so transferred or given to other partners or have been reasonably used to pay Kim Tian, Kim Tian need not pay Kim Chan 20% thereof, but the burden of establishing any of these qualifications is on Kim Tian. The accounting is to be taken before and the inquiry is to be undertaken by the Registrar of

the Supreme Court who shall make such directions and orders as he thinks fit, including orders in respect of interest and costs of the accounting and inquiry.”

The so-called missing \$200,000 came about because the judge believed the evidence of a younger brother (not one of the partners), who testified for the plaintiff that he noticed a cash balance of \$200,000 from one set of accounts but found that item missing when he reviewed another set of accounts. That was in 1994, 1995 and when the business was to be transferred to the company.

10 Woo J did not make an order for accounts to be taken in respect of the company. As the second defendant was not a named partner of the business, the judge felt it was not appropriate to seek a declaration that she was a trustee of the plaintiff’s share in the partnership (see [22] of the judgment). Accordingly, he dismissed the claims against the second defendant. On the question of costs, he awarded the plaintiff 30% of the costs of the proceedings against the first defendant and ordered the plaintiff to pay the second defendant \$4,000 in costs. He made no order, both on the substantive claims and on costs, against the company.

The taking of accounts and the inquiry before the assistant registrar

11 The assistant registrar, in analysing the said [57], set out the parameters of the taking of accounts and the inquiry in the following manner:

- (a) the period of accounting was to commence from 31 January 1996;
- (b) a cash balance of \$200,000 was deemed to be part of the partnership assets as at 31 January 1996;
- (c) the first defendant had to account for all the assets of the partnership as of that date and pay the plaintiff 20% of the assets so accounted unless he could prove three qualifications. These were that the assets had been:
 - (i) transferred to the company; or
 - (ii) given to partners other than the first defendant; or
 - (iii) reasonably used to pay the first defendant in view of the time he spent managing the partnership.

12 At the hearing, counsel for both parties informed the assistant registrar that they had agreed that the second and the third qualifications were not in issue. Accordingly, she confined the inquiry to the first qualification on whether the first defendant could show that the assets of the partnership as at 31 January 1996, had been transferred to the company when it took over the business on 1 May 1996. The first defendant filed two affidavits for the purposes of the hearing before the assistant registrar while the plaintiff filed an affidavit by Lee Nyen Fatt, an accountant engaged by the plaintiff to advise him on the accounts to be examined.

13 The assistant registrar acknowledged that many of the documents produced by the first defendant were not substantiated but she considered that the authenticity and reliability of those documents relied upon by the plaintiff would be taken as unchallenged by the plaintiff. As for the rest of the documents, she decided that their reliability would be determined by taking into account all the circumstances of the case, including the fact that the partnership was a small, family-run business with the consequence “that there might not be a rigorously adhered proper standard of documenting

transactions or systemizing the accounts". The plaintiff had complained that there was failure by the first defendant to give access to all accounting records and supporting documents while the first defendant's explanation was that he had provided whatever was available and that many of the documents had already been destroyed or discarded due to the lapse of time between the accounting period and the commencement of this action. The assistant registrar held that this fact alone did not mean that the burden of proof in relation to the first qualification stated above was an impossible one to discharge.

14 As the partnership closed its accounts on a yearly basis on 31 December, it did not have a list of assets as at 31 January 1996. In view of the impracticality of reconstructing the accounts, there was virtually no evidence of what constituted the partnership assets as at the cut-off date other than the stated \$200,000. She therefore took the approach of confining the inquiry only to the disputed assets which were seemingly unaccounted for. These were identified by the plaintiff's accountant as:

(a)	differences arising from trade debtors	\$227,705.26
(b)	other debtors	\$277,378.62
(c)	cash at bank not taken over	\$ 42,812.12
(d)	cash balance deemed part of the assets	\$200,000.00
		\$747,896.00

15 Upon analysing the documents produced, the assistant registrar came to the conclusion that the first defendant had accounted for \$214,605.72 of assets in the form of trade debts. The remaining \$13,099.54 was repaid by a trade debtor by way of two cheques deposited into the partnership's bank account on 10 June and 9 July 1996. She dealt with this sum together with "cash at bank not taken over".

16 Under "other debtors", there were 25 debtors. The first defendant explained that the debts comprised mainly loans to family members. However, the assistant registrar was of the view that showing money had gone to family members did not detract from the fact that the money was part of the partnership assets which had not been transferred to the company. She did not accept that these were expenses of the partnership as they were recorded as loans. Having found that \$88,888 was paid out by the partnership into the company's bank account, that \$27,996.52 in the first defendant's current account reflected his drawings and that the plaintiff had an outstanding loan of \$41,994 owing to the partnership, she deducted these three amounts from the stated sum of \$277,378.62 and held that the first defendant had not discharged his burden of proof in respect of the remaining \$118,500.10.

17 In respect of the cash balance in the partnership's bank account after 30 April 1996, the assistant registrar noted that the company did not take over any bank balances from the partnership at all. Payments to the partnership after 30 April 1996, as late as in June and July (see [15] above), went into the partnership's bank account. She found no reason why those payments should have gone into that account. Together with the original bank balance of \$42,812.12 as at 30 April 1996, the total amount in that account was \$57,161.03 as at 23 December 1996. However, she accepted that the sum of \$12,724.85 paid out of that account between May and August 1996 was for GIRO

payments for various utilities and for rental paid by the partnership on behalf of the company. She did not accept that the rest of the payments were for trade creditors and other sundry matters, as claimed by the first defendant. Accordingly, she found that the first defendant had not proved that the difference of \$44,436.18 had been transferred to the company or had been utilised for its benefit.

18 Where the allegedly missing \$200,000 was concerned, the assistant registrar, while accepting that cash balance could mean either cash in hand or in the bank account, found it difficult to say with any degree of certainty that it was part of the bank balance of \$247,983.13 as at 31 January 1996. Since the burden of proof was on the first defendant, she found that the \$200,000 remained unaccounted for up to the time, and even after, the company took over the business of the partnership.

19 The assistant registrar therefore concluded that a total of \$362,936.28 (comprising \$118,500.10, \$44,436.18 and \$200,000) was unaccounted for. Pursuant to Woo J's directions, she ordered the first defendant to pay the plaintiff 20% of this sum, amounting to \$72,587.26, together with interest awarded at 6% per annum from the date of service of the writ of summons to the date of judgment.

The decision on appeal

20 As correctly pointed out by the assistant registrar, the partnership was a small, family-run business. The person who was employed to take charge of the accounts was a niece (the daughter of the deceased eldest brother) who worked for the partnership and then the company from 1982 to 1997. One should not be surprised, therefore, that the documentation and methodology in relation to the transactions and the accounts were not a model for excellence in business practice. In such a business, the relationship among the partners is governed more by the warm ties of kinship than by the cold, hard dictates of commerce. It was unfortunate, of course, that that warmth turned into divisive heat.

21 As noted by Woo J in his judgment (at [28]), neither the plaintiff nor any of the other partners asked for an account of the business before 1992. Indeed, the plaintiff acknowledged that the first time he asked for such an account was in 1992 or 1993, some 15 or 16 years after the inception of the partnership. The judge also noted (at [41]) that the plaintiff knew that the first defendant had been managing the business. The plaintiff had been working for the business for about a decade between 1991 and 2001. He was provided with a car and, subsequently, a replacement car. He knew that the first defendant had provided for himself a better or more valuable car. He was also aware that various personal expenses of the partners were paid from the funds of the business, that advances were given to various partners from time to time and that their father was given money from the business on a monthly basis, even if he was not aware of all the details.

22 After the plaintiff and some of the other family members asked the younger brother (mentioned in [9] above) to review the accounts for them between 1992 and 1996, the plaintiff took no action until after his services were terminated in 2001. The subject matter of the taking of accounts and the inquiry related to events and transactions that took place five to six years before any threat of litigation. The fact that supporting documents were missing or no longer available was therefore unexceptional.

23 The burden of proof in the hearing before the assistant registrar may have fallen on the first defendant but his evidence and the available documents must be examined in the light of all these incontrovertible facts.

24 Where the amount under "other debtors" was concerned, the \$118,500.10 found to be unaccounted for comprised mainly loans taken by the other partners, with the loan taken by the father going back to 1989. These loans amounted to \$88,239.00. The balance was apparently taken as loans by other family members (some of whom were employees in the business), the firm's other employees and some sub-contractors. Such loans were acknowledged by Woo J. The assistant registrar also accepted this fact and said (at [34] of her grounds of decision):

I discounted a further sum of \$41,994.00, being the loan owed by Kim Chan to the Partnership as I did not think that Kim Chan could, in good conscience, claim that this asset was unaccounted for.

25 Following this reasoning, there would be no basis to distinguish the loans taken by the other partners. Although stated as loans, it was quite obvious that the money was taken by them as drawings from the family coffers and there was no expectation that the money would have to be returned to the firm. Such loans should be considered as money given to the other partners within the meaning of the second qualification stated by Woo J, despite the parties' common position that that qualification was not in issue.

26 However, it was unclear why money was taken by people who were not partners and why they were not asked to repay the money. Those debts have become time-barred. They amounted to \$30,261.10. I therefore held that only this amount remained unaccounted for by the first defendant and not the entire sum of \$118,500.10.

27 I now come to the item "cash at bank not taken over". The bank statements showed that two amounts were transferred from the partnership's bank account to the company's bank account (both with Tat Lee Bank Ltd). \$88,888 was transferred on 28 April 1996 and \$30,000 on 4 May 1996. Although the partnership ceased business on 30 April 1996 and the company commenced business on 1 May 1996, and it was professed that the partnership's bank balances were not taken over by the company, it was clear that there was no distinct line drawn between the money belonging to the partnership and that belonging to the company because they were in fact the same business entity. This was amply demonstrated by the GIRO payments made out of the partnership's bank account for the benefit of the company for several months after 30 April 1996. Similarly, the payments by one trade debtor in June and July 1996 were paid into the partnership's bank account because it would not otherwise have sufficient funds for the said GIRO payments. By 30 May 1996, that account had only \$795.92 in it. On the other hand, other payments to the partnership after 30 April 1996 were deposited into the company's account. The \$30,000 transferred on 4 May 1996 should therefore have been treated as money accounted for.

28 The remaining \$14,436.18 found unaccounted for comprised four amounts of \$5,000, \$3,000, \$1,400 and \$5,036.18. The documents showed that the \$5,000 was taken by the plaintiff as a loan while the rest were expended as petty cash and loans to employees. This was accepted by the plaintiff's witness (the niece who took charge of the accounts between 1982 and 1997) at the trial before Woo J but who was not called as a witness in the hearing before the assistant registrar. There was therefore no reason to regard this remaining amount as unaccounted for. In the result, I found that the entire amount of \$44,436.18 was accounted for by the first defendant.

29 The allegedly missing \$200,000 arose out of the comment made by the litigants' younger brother, who reviewed the accounts in 1994, 1995 and when the business was about to be transferred to the company, that a cash balance of that amount, which existed in one set of

accounts, had disappeared when he reviewed another set of accounts. He asked the first defendant about that amount but did not receive any reply. He also had a heated argument with the first defendant over this accounting problem. However, he did not raise any other concerns about the accounts. The first defendant had invited the plaintiff to examine the accounts books but that was not taken up. The said niece also did not allege that the accounts were not in order and there was no allegation that the postings in the books had been altered by the first defendant in any way.

30 The bank balance as at 31 January 1996 stood at \$247,983.13. The first defendant's position was that the said \$200,000 was part of that balance as it could not be possible that such an amount in cash was lying around. The realisation accounts of the partnership dated 1 May 1996 (which showed what partnership assets would be taken over by the company) did not show that such an amount in cash was taken over by the company. The company also did not take over the bank balance of the partnership. The partnership's bank statements as at 30 April 1996 reflected only a balance of \$60,699.17 and the accounts books showed a balance of \$42,812.12, the discrepancy being due to cheques having been issued in April 1996 but which had not been presented for payment yet. It was therefore possible that a person perusing the realisation accounts would come to the view that some \$200,000 was missing. The partnership's bank account had been used for various purposes relating to the business and it was therefore entirely believable that the depletion in the bank balance, as contended by the first defendant, was a result of paying wages, trade creditors and other operating expenses. In my opinion, the \$200,000 was accounted for.

31 In summary, I found that the "cash at bank not taken over" (\$44,436.18) and the "cash balance deemed part of the assets" (\$200,000) were accounted for by the first defendant. Out of the \$118,500.10 under "other debtors", I found that \$88,239 taken by the other partners should be deducted as having been accounted for, leaving a balance of \$30,261.10. Although the first defendant succeeded in most of the issues on appeal, I thought it right that I should not exacerbate the brothers' relationship further and therefore made no order as to costs for the appeal.

First defendant's appeal allowed in part with no order as to costs for the appeal.