Tsu Soo Sin v Oei Tjiong Bin and Another
[2008] SGCA 46

Case Number : CA 4/2008

Decision Date : 17 November 2008

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Michael Hwang SC and Katie Chung (Michael Hwang) and Brendon Choa (Acies Law Corporation) for the appellant; Indranee Rajah SC and Daniel Soo (Drew & Napier LLC) for the respondents

Parties : Tsu Soo Sin — Oei Tjiong Bin; Siong Guan Company (Private) Limited

Choses in Action – Assignment – Equitable assignment – Whether notice to assignee required to complete equitable assignment – Whether assignees joint tenants or tenants in common

Equity – Maxims – Application of maxim "equity is equality" to common law presumption of joint tenancy

Gifts – Donees – Donee's right to disclaim gift – Whether completeness of gift dependent on donee's acceptance of gift

17 November 2008 Judgment reserved

V K Rajah JA (delivering the judgment of the court):

1 This is an appeal against the decision of the trial judge ("the Judge") in Suit No 514 of 2006 allowing the respondents' claim against the appellant for the return of alleged loans totalling $870,000. The appellant is the legal representative of the estate of her late husband, Oei Boon Wan ("OBW"), who died intestate on 14 April 2002. The first respondent, Oei Tjiong Bin (also known and referred to here as "Tony Oei"), is an accountant by training who runs his own auditing firm, Tony Oei & Company, which he set up in 1972. Tony Oei, OBW's elder brother, sued the appellant in her capacity as the legal representative of OBW's estate for the return of $870,000 in loans allegedly extended to OBW through the second respondent, Siong Guan Company (Private) Limited ("the Company"). The Judge's reasons for her decision in favour of the respondents on this issue are to be found in *Oei Tjiong Bin v Tsu Soo Sin* [2007] SGHC 215 ("the GD"). A further claim by the respondents against the appellant in her personal capacity is no longer a live issue. Accordingly, only the background facts pertinent to the present appeal will be recounted here.

Facts

2 The Company was incorporated on 28 September 1971 by Tony Oei and Wee Swee Hock. Tony Oei resigned as director in December 1972 but was reappointed on 16 March 1998. After the Company's incorporation, Oei Tok Kek (Tony Oei and OBW's father) ("OTK") and Whang Ming Whee (Tony Oei and OBW's eldest brother) ("Whang") were appointed as directors. OTK was the major shareholder and chairman of the Company, and treated it as his own personal business, advancing moneys to the Company when he felt it needed funds and withdrawing moneys when he felt it had sufficient funds. OTK and Whang handled the Company's operations. OTK was the quintessential Chinese family patriarch; he had three sons (Whang, Tony Oei and OBW) and four daughters; he neither involved any of his daughters in the Company's business nor gave them any share of his estate in his will.

3 OTK's favourite son was Whang. When Whang suddenly passed away on 23 September 1995,

he was devastated. Not long after, OTK asked Tony Oei to move his auditing firm to the premises occupied by the Company. Tony Oei agreed and paid rent to the Company for his firm's use of the Company's premises. Whenever OTK made advances or withdrawals from the Company's funds, he would direct the person in charge of the accounts to record the sums in the Company's general ledgers under the name "Oei Tok Kek". The Company's cash books would contain credit and debit entries to reflect payments to or withdrawals from the Company. According to Tony Oei, OBW was never involved in the Company's business although he was a shareholder (at the hearing, counsel informed us that Tony Oei and OBW each held 100,000 shares out of 1,500,000 shares at the time of OTK's death). Tony Oei's understanding was that the moneys advanced by his father to the Company were meant for OTK, Whang and Tony Oei himself as only the three of them were involved in the Company's business. However, after Whang's death, OTK added OBW's name to the Company's books, and between 1996 and 2003 entries were made under the names "Tony Oei/Oei Boon Wan". Entries had earlier been made under two other "ledger accounts" reflected in the Company's books: one in OTK's sole name from 1994 to 1997, and another in the names of "Oei Tok Kek/Tony Oei" from 1995 which, upon the removal of OTK's name in 1998, continued as "Tony Oei" from 1998 to 1999.

4 It is not disputed that OTK had OBW's name added to the ledger in 1996 after Whang's death. There is no evidence of him having expressly informed either OBW or Tony Oei of this addition, nor did he explain his intention for doing so. Tony Oei did not purport to know what his late father had precisely intended by adding OBW's name, and in his testimony only "*surmised* that it was likely that the father included [OBW's] name in case anything should happen to [Tony Oei] and [Tony Oei] died before [OBW]" [emphasis added] (see the GD at [7]). Ironically, it was the converse scenario that materialised when OBW passed away suddenly in 2002, less than three years after his father's demise.

5 OTK's will was dated 28 February 1997.[note: 1] In the will he bequeathed all his shares in the Company and another company, SLC Private Limited, to Tony Oei, with the residue of the estate to be divided equally amongst Tony Oei, OBW and Whang's widow. Pertinently, the will did not provide specifically for the benefit of OTK's advances to the Company, and the Company's ledger continued to reflect credits and debits in the names of "Oei Tok Kek/Tony Oei" and "Tony Oei/Oei Boon Wan" even after the will was made. The first advance to be recorded under the names "Tony Oei/Oei Boon Wan" was a loan of $500,000 from OTK to the Company on 3 April 1996. On 31 December 1997, OTK transferred the remaining credit balance of $1m in his name to those of "Tony Oei/Oei Boon Wan". On 6 March 1998 and 13 August 1999, Tony Oei made an advance of $500,000 in each instance to the Company; on both occasions the advance was recorded under the names "Tony Oei/Oei Boon Wan". It is also relevant to note, however, that the second advance on 13 August 1999 came from a joint bank account in the names of OTK, Whang (who by then had passed away), Tony Oei *and OBW*. The Judge excluded both these advances from consideration on the basis that in each instance there was a resulting trust in favour of Tony Oei (at [104]–[105] of the GD), notwithstanding that OBW was the third surviving joint tenant of the bank account as of August 1999. She appeared to accept Tony Oei's submission that there was a presumption of advancement from OTK to Tony Oei with respect to the moneys in this joint account because "[Tony Oei] recalled that the two signatories were himself and the father. The father had pre-signed cheques before he became ill and had instructed [Tony Oei] to countersign the cheques if [Tony Oei] needed money. [Tony Oei] submitted he had a right to use the moneys from the joint account in any manner he chose" (at [105]). OTK passed away on 12 October 1999. The very next day the Company repaid Tony Oei $300,000, debited against the names "Tony Oei/Oei Boon Wan". Tony Oei appears to have initiated this move without notifying OBW.

6 Four advances from the Company to OBW followed this: first, on 29 December 1999, the Company issued a cheque of $300,000 payable to OBW ("the first loan"). According to Tony Oei, OBW had approached him for a loan though the reasons for this were neither volunteered nor queried. Tony

Oei informed his brother that as the Company owed him substantial sums, he would arrange for the Company to advance the money. When the cheque dated 29 December 1999 was ready, Tony Oei arranged for it and the Company's payment voucher to be passed to his sister, Ng Guat Hwa, who was said to be very close to OBW. OBW duly acknowledged receipt of the cheque by signing the Company's payment voucher also dated 29 December 1999,[note: 2] which stated:

DEBIT A/c	Tony Oei/Oei Boon Wan
Pay To	Mr. Oei Boon Wan
Dollars	Three hundred thousand only.
In payment of	Return of Loan

7 In August 2000, OBW again allegedly approached his brother for a further loan of $300,000 ("the second loan"). As with the first loan and for the same reason, Tony Oei arranged for the Company to make the advance. He passed a cheque dated 15 August 2000 and a payment voucher to Ng Guat Hwa and OBW acknowledged receipt on the payment voucher. This payment voucher was largely similar to the first,[note: 3] stating:

DEBIT A/c	Tony Oei/Oei Boon Wan
Pay To	Mr. Oei Boon Wan
Dollars	Three hundred thousand only.
In payment of	A/C

As with the first loan, the second loan was duly recorded as a debit against the names "Tony Oei/Oei Boon Wan" in the Company's ledger.

8 In September 2000, OBW allegedly requested yet another advance of $300,000 ("the third loan") and received a cheque by the same process, accompanied by a payment voucher identical to that for the second loan. In March 2002, Ng Guat Hwa informed Tony Oei that OBW needed to borrow $270,000 ("the fourth loan"), and Tony Oei arranged for the Company to advance the money, just as he had done with the three previous loans. The fourth payment voucher, like the second and third ones, also indicated next to the printed words "In payment of" the typewritten word "A/C".[note: 4] Shortly after this, OBW passed away suddenly on 14 April 2002. The Company repaid Tony Oei $5,000 and $2,000 on 15 and 17 April 2002 respectively, and he used the moneys for his brother's funeral expenses. At the request of the Company's auditors, OBW's name was eventually removed from the ledger account after his demise.

9 The Company then made three more payments to Tony Oei totalling $57,584.91. The first cheque for $30,584.91 and two cheques for $13,500 each were debited against the names "Tony Oei/Oei Boon Wan". On 7 November 2002, the Company paid $500,000 to Tony Oei, leaving a sum of

$355,415.09 outstanding against the names "Tony Oei/Oei Boon Wan" as at 31 December 2002. On 1 August 2003, the Company ratified the loans amounting to $1,170,000 that had been made to OBW. On 29 December 2003, the Company repaid Tony Oei the remaining outstanding balance of $355,415.09. By then, OBW's name had been removed from the Company's ledger entries, leaving only Tony Oei's name. As at 31 December 2003, the financial statements of the Company showed that no amounts "owed to director" remained.[note: 5]

10 On 11 August 2006, Tony Oei and the Company commenced the subject proceedings claiming against OBW's estate the return of the second to the fourth loans:

Date	**Amount**
15 August 2000	$300,000
25 September 2000	$300,000
14 March 2002	$270,000
Total:	$870,000

11 The respondents did not claim the return of the first loan as it had been made on 29 December 1999 and was thus time-barred. They alleged that OBW had been aware that the loans would be advanced by the Company and set off against moneys owed to Tony Oei by the Company. As a result, OBW would not be liable to the Company. The respondents thus pleaded that Tony Oei had lent OBW $870,000. Alternatively, the respondents pleaded that the loans from the Company had been repaid by Tony Oei at OBW's express or implied request, or that the loans had been made by the Company to OBW, with the right to and benefit of their repayment assigned to Tony Oei. The respondents thus sought an order that the appellant pay Tony Oei or, alternatively, the Company the sum of $870,000.

12 The appellant did not admit the advances made to the Company by OTK or the loans made to her late husband. She contended that even if OTK had made several advances to the Company, these were to be repaid to the persons named or identified in the Company's various accounts, as stated in the handwritten ledgers of the Company for the period from 1994 to 1999, namely OTK, OTK and Tony Oei jointly, and Tony Oei and OBW jointly. [note: 6] She pleaded further that the Company's ledgers and documents indicated that as at the date of OTK's death on 12 October 1999, there was an outstanding sum of $2,500,000 due from the Company to Tony Oei and OBW jointly; accordingly, OBW was entitled to draw on these moneys for his own use. The $870,000 paid by the Company to OBW comprised moneys belonging to OBW which the respondents were not now entitled to claim from his estate.[note: 7]

Decision below

13 The Judge considered it a "significant aspect of the evidence" that the appellant had no idea why the ledger entries were recorded in the manner shown in the accounts, "unlike [Tony Oei]'s detailed knowledge" (at [96] of the GD). It is useful to set out the evidence and her findings (at [115]–[120]):

> 115 It was [Tony Oei]'s evidence (which the defendant [the appellant] could not challenge because she did not know of the three accounts at the material time) that the father intended

any moneys that he (the father) advanced to the company to be repaid to the father and the sons. This was based on [Tony Oei]'s understanding of the father's instructions to the book-keeper (that he overheard) on how the loans were to be recorded. It was only after Whang's demise (on 23 August 1995) that the father created a new account on 18 December 1995 under the names "Oei Tok Kek/Tony Oei" with a credit entry of $200,000. This was followed by the opening of the account "Tony Oei/Oei Boon Wan" by the father on 3 April 1996 with a credit entry of $500,000. However, *both [Tony Oei] and the defendant under cross-examination (at N/E 223) agreed that while the father was alive, he could take back all the moneys in the various accounts as that was his prerogative. Hence, the naming of the accounts in itself was not conclusive.*

116 [Tony Oei] submitted that it was *more likely than not, that the father intended (in the event the father predeceased him) that [Tony Oei] should have priority to and the benefit of the chose in action. [OBW] would only get the benefit if [Tony Oei] predeceased him.*

117 Although no notice of the assignment was given to the debtor [*sic*] (*viz* [OBW]), [Tony Oei]'s closing submissions stated that notice was given to [Tony Oei] prior to the father's death. *[Tony Oei] became aware of the ledger entries when he was reappointed a director of the company in 1998 and that constituted sufficient notice to him to complete the equitable assignment.*

118 In contrast, [Tony Oei] submitted, there was no evidence whatsoever that [OBW] had notice of the assignment. Indeed, the evidence was to the contrary. It was not the defendant's case that [OBW] was told at any time before the father's death that the credit balances in the account "Tony Oei/Oei Boon Wan" had been assigned to him. In fact, there was no evidence that [OBW] was even aware of the existence of the ledgers or of the audit confirmation reports. This meant that the father had never informed [OBW] of the various accounts or that [OBW]'s name was included in one of them. Neither did the defendant herself know until after these proceedings began and she found out in the discovery process.

119 [Tony Oei]'s closing submissions pointed out that the payment vouchers signed by [OBW] to acknowledge the four loans were executed *after* the father's death and could not possibly constitute an effective notice of assignment.

120 In addition to [115] to [119] above which points were raised in [Tony Oei]'s submissions, another significant piece of evidence was the fact that [OBW] himself did not think there were moneys in the company in which he had an interest. He had asked to borrow from [Tony Oei], not from his entitlement in the company. *[OBW] was unlikely to have signed payment vouchers acknowledging he had taken advances if he thought he had a right to the moneys borrowed.*

[emphasis added]

14 The Judge accepted Tony Oei's evidence and the respondents' submissions, finding that OTK had intended Tony Oei to have the sole benefit of the accounts, and that all the necessary legal requirements for a valid equitable assignment to Tony Oei had been fulfilled: (a) OTK's intention to assign; (b) the identification of the legal chose in action; and (c) sufficient notice to Tony Oei as assignee. Further, the Judge accepted Tony Oei's surmise that OBW's name was included in the ledger just in case Tony Oei should predecease him, and thus found that there was neither an intention on OTK's part to assign the loans to OBW, at least during Tony Oei's lifetime, nor did OBW in any case have notice of such assignment.[note: 8] Thus OBW had received the $870,000 via the Company as a loan from Tony Oei, and Tony Oei was entitled to demand repayment from OBW's estate. The salient

part of the Judge's decision (at [121]–[123]) merits reference in full:

> 121 Based on the manner in which the father created and operated the three accounts, I accept [Tony Oei]'s submission that the father intended [Tony Oei] to have the sole benefit of the accounts in the event the father died. The father was a traditional and patriarchal figure. The father believed in the hierarchy of the eldest son having priority before younger sons and he valued sons above daughters. It was only when his eldest son Whang predeceased him, that the father focussed his attention on [Tony Oei]. Had Whang not died earlier, I very much doubt the father would have made [Tony Oei] the executor of his Will. Instead, the father would have appointed Whang and would have given all his shares in the company and in SLC Private Limited to Whang, not [Tony Oei].
>
> 122 I am also satisfied that all the necessary requirements for a valid equitable assignment have been fulfilled *viz*. the intention to assign on the part of the father, the legal chose in action was identified and there was sufficient notice to [Tony Oei] as the assignee.
>
> 123 As my finding disposes of the issue in the first suit, there is no necessity to go on to consider whether the account "Tony Oei/Oei Boon Wan" was a joint tenancy or a tenancy-in-common although the evidence and intention of the father pointed to the former as being the more likely.

Issues on appeal

15 The issues before us are thus whether OBW was an equitable assignee of his late father's loans to the Company, and, if so, whether he was to benefit jointly with Tony Oei or as a tenant in common of the assignment. We would also reiterate that the respondents, being the claimants below, bore the burden of making out their case that the $870,000 claimed was indeed a loan to be repaid to Tony Oei. The GD at [69] states an incorrect proposition of law:

> As the sums claimed in both suits were admitted by her, *the burden shifts* to the [appellant] to prove that she, as the legal representative of [OBW] and personally, did not have to repay the sums of $870,000 and $110,000 respectively. [emphasis added]

While this mistake appears to have had no bearing on the outcome of the other suit against the appellant in her personal capacity (given that the appellant did not appeal against the Judge's decision in that suit), we cannot say with absolute confidence that it did not implicitly influence the Judge's findings in the present case. We now turn to the rival contentions. However, before we review and analyse the legal issues and factual matrix, we think it is appropriate to make two broad observations about the Judge's findings. First, she appears to have accorded too much weight to the apparent credibility of the respondents' witnesses' rather selective testimonies in preference to the testimony of the appellant. Second, the credibility of these witnesses was, in the ultimate analysis, largely irrelevant. There was more than ample objective documentary evidence that helped to illuminate the matter more accurately. We now elaborate.

Whether OBW was an equitable assignee of OTK's chose in action

16 Was OBW an equitable assignee of his father's loans to the Company? This depends on whether OTK intended to assign the benefit of his loans to Tony Oei and OBW, and, if so, whether the assignment was effective. The subsequent question of whether Tony Oei and OBW were joint tenants or tenants in common of the assignment would then determine whether OBW was entitled to all or only part of the $870,000. There appear to be three settled requirements for an effective equitable

assignment (see *Phelps v Spon-Smith & Co* [2001] BPIR 326 at [39]–[41]):

(a) an intention to assign;

(b) clear identification of the chose being assigned; and

(c) some act by the assignor showing that he is passing the chose in action to the alleged assignee.

17 This list accords with the essential features of such assignments discussed in *Snell's Equity* (Sweet & Maxwell, 31st Ed, 2005) (John McGhee gen ed) at paras 3-13 to 3-19, and summarised as follows:

(a) No particular form of assignment is required.

(b) Mandate or authority is not enough; there must be some transaction sufficiently manifesting an intention to assign.

(c) The assignment must sufficiently identify the chose being assigned.

(d) Notice to the assignee may be required depending on the form of assignment in question. An assignment made by a direction given by the assignor to the debtor appears not to be binding without notice to the assignee, while an assignment by a direct transfer to the assignee is effective even if the assignee is unaware of it.

(e) Writing is sometimes required.

(f) Value is sometimes required.

(g) Notice to the debtor is not essential but desirable.

Whether OTK intended to assign to both OBW and Tony Oei

18 OTK's intention was to be discerned from his conduct in creating the "Tony Oei/Oei Boon Wan" account in the Company's ledger in 1996 and subsequently recording a total of $1.5m in advances to the Company under these names, as well as in expressing this intention to his sons or other persons. There was scarce evidence of such conduct, other than Tony Oei's bare testimony, much of which was his own rather partisan perception of what OTK might have been thinking. The respondents assert that OTK intended to assign the benefit of his loans to the Company only to Tony Oei, and that OBW's name was included because he was the other surviving son, and would therefore be provided for in the event that Tony Oei predeceased him. We do not, however, think that these conjectural assertions are, upon closer analysis, even penumbrally supported by the objective facts.

(1) The ledger accounts

19 The indication "Tony Oei/Oei Boon Wan" in the Company's ledger is entirely silent on hierarchy or priority and there is practically no additional tangible evidence to provide the context for construing this ledger account. There is no obvious indication that OBW should only be included after Tony Oei's death. The ledger account certainly did not read "Tony Oei or Oei Boon Wan upon Tony Oei's death", which would have provided unequivocal support for the respondents' case. Even if there was an expectation that the brother who survived the other would benefit from the assignment, this expectation was not mutually exclusive with having Tony Oei and OBW benefit jointly during their

lifetimes.

20 Further, assuming *arguendo* that Tony Oei was a truthful and credible witness, the fact remains that he could only frailly speculate about his father's intention in creating the "Tony Oei/Oei Boon Wan" ledger account. Hearsay issues aside, OTK certainly did not tell Tony Oei expressly of the assignment of the loans, much less explain that OBW was included in the ledger only in so far as he would have rights and responsibilities with regard to the Company in the event of Tony Oei's death. It would also be facetious, to say the least, to speculate that the solidus "/" meant "or" and not "and", or that Tony Oei's name took precedence because it came first, indicating that only one son could benefit and thus that OBW would only benefit if Tony Oei predeceased him. Given that OTK was "devastated" (see the GD at [3]) by his eldest and favoured son Whang's death, he might quite naturally have decided to provide for both remaining sons equally, not being able to predict which would survive the other, or indeed when OTK himself would pass on. Even the most rigidly "traditional Chinese businessman" (see the GD at [52]) could well mellow sufficiently to provide for both sons when being unexpectedly struck by the fragility of life upon losing his eldest son. Indeed, in his will, OTK while leaving his shares in the Company (and SLC Private Limited) to Tony Oei, also left substantial assets to both OBW and Whang's widow (see [27] below]). Upon further scrutiny, Tony Oei's oral testimony, in particular, appeared to be riddled with strained suppositions and was perhaps even coloured, proffering no more than stretched opinions or strikingly improbable hypotheses. The Judge should have been slow to place much weight on either side's testimony especially when it was not supported by the documents. It was also not altogether surprising that the appellant could not explain the ledger accounts and payment vouchers; she did not know anything about their genesis, and it is to her credit that she did not substantially engage in any attempts at conjectures to make her case (at least in this regard). The Judge's pointed remarks about the appellant's "poor" character (at [94] of the GD) were perhaps unnecessarily censorious though it must also be readily acknowledged that the appellant was not averse to embroidering her testimony.

21 In fact, Tony Oei's evidence in cross-examination, upon closer analysis, was not very different in substance. It was wholly based on his supposed "understanding" of his father's intention "to give all the money to the eldest son",[note: 9] regardless of and even contrary to the documentary evidence. This was, objectively speaking, rather puzzling and indeed quite unsatisfactory given his qualification as a public accountant and the fact that his father had never told anyone of his intention. There can be no doubt that his testimony was, by and large, transparently self-serving and selective. When questioned on the first payment voucher that indicated "in payment of: Return of Loan", Tony Oei responded ambivalently as follows:[note: 10]

A [Reads] "In payment of Return of Loan."

Q Okay, good. What---so if---can you explain to the Court what this means?

A This mean[s] that this money is returned and set---er, contra with my loan account because my brother need money and company owe me a lot of money, so I have to advance him the money from my loan account. So this---what we mean in payment of return of my loan is return of my person---er, the loan company loaned to me.

Q But this is a payment voucher to your brother, your brother signed the payment voucher, right?

A Yes, it's a payment voucher signed by my brother, but what I mean---in that the payment voucher, the meaning of "Return of---In payment of Return of Loan" is---what I mean is my loan because this 300,000 is set off from my loan account and I cannot [be] using the company's money to lend him because there are other share---there are minority share---other shareholder.

…

Q If the 300,000 was a loan to your brother, then the description would have been "Loan", not "Return of Loan".

A No, my understanding is "In payment of Return of the Loan" is company owe me money, so I set off against the loan, that's why they---the meaning is "Return of Loan".

Q Now, if you look at the top of the payment voucher, it says "DEBIT A/c Tony Oei/Oei Boon Wan", right. As of the date---as of this date, 29th December, your father had already passed away, right? Okay. Now, why didn't---if he---why didn't you change the account to your name, Tony Oei, to reflect the understanding?

A As mentioned---as I mentioned to you, I cannot or I have no right to change the name because all this mo---this is---all this money is my father's money. He will give it to the eldest son in the---in--- as a hierarchy, very hierarchy in the---in the family. But unfortunately, my bro---my elder brother Whang Ming Whee passed away. That's why---this is why the name is still there---still was there.

…

Q The fact that your payment voucher still had the words "Oei Boon Wan"--- sorry, "Tony Oei/Oei Boon Wan" shows that it was never your understanding at that point of time that the monies were just for you upon your father's death. Do you agree with that statement?

A I disagree.

22 Tony Oei was equally unhelpfully vague about the second to fourth payment vouchers:[note: 11]

Q …

[Reads] "In payment of A/C".

Can you explain what does that mean?

A In payment of account.

Q What does it mean?

A So, same thing, in payment of my account, set off against my account.

Q The Tony Oei/Oei Boon Wan account?

A It---it is my account.

Q Okay. Now I put to you again that the fact that the words "DEBIT A/c Tony Oei/Oei Boon Wan", with the Oei Boon Wan's name still on the payment voucher shows that at the---at the point of time it was never your understanding that your father intended the monies he advanced to be for you upon his death. Do you agree?

A No, I disagree.

23 Finally, Tony Oei was asked to explain his understanding[note: 12] of the audit confirmation form of 2001:[note: 13]

Q This is the audit confirmation slip of 2001, right. This is your description of--- now, my first question to you is, Mr Oei, you are a practising auditor. Am I right?

A Yes.

Q How many years have you been an auditor?

A Over 30 years.

Q As a practising auditor, what do you understand by the significance of the audit confirmation form?

A Significance of audit confirmation is to confirm the money owing to is correct.

Q Owing to whom?

A Owing to the directors is correct.

…

Q … Can you state who it's addressed to, this audit---

A Addressed to Tony Oei/Oei Boon Wan.

…

Q What's the purpose of the names at the top?

A Purpose of the name in top is under this account, amount owing to Tony Oei/Oei Boon Wan account.

Q Accounts?

A Mm.

Q Accounts or the person? I don't see the word "account" there.

A No, you are asking me. I said the---the purpose is to confirm that this account is correct.

…

Q So it's ownership only to you, because based on your understanding, it should not be you and your brother.

A No, but this is what as shown in the account. I cannot change it. I cannot change it that un---to---to my name. And on all these, my father's money.

…

Q So is it your evidence that the name "Oei Boon Wan" has no meaning in this form?

A As I mentioned earlier, to my understanding, my father put his name, my elder brother's name and myself because we are the eldest in the family.

…

Q Okay. "Owing to you", in your evidence, means who?

A Owing to me.

Q Even the top of the form states your brother's name and your name?

A Yes.

…

Q Agree with my statement that---that---that the form was addressed to both of you, that the monies owing to both you and your brother.

A No, I disagree. Even though addressed to my---Tony Oei/Oei Boon Wan, it is my money.

24 Tony Oei's largely self-serving inferential views and conjectural testimony should not have been accepted as reliable evidence to contradict the plain language of the payment vouchers, ledger accounts and audit confirmation form of 2001. On top of these three classes of documents, OBW's name also appeared in the Company's annual trial balance sheets, with a credit amount of $1,900,000 recorded in the names of "Tony Oei/Oei Boon Wan" in 1999, and $1,300,000 in 2000 and 2001. The trial balance sheet of 2002 recorded $355,415.09 credited to the sole name of Tony Oei, which accords with the facts at [9] above. The Company's accounts were systematically kept and the documents tally with one another. OBW's name was plainly not unintentionally, incidentally, accidentally or informally collocated with Tony Oei's name. Rather, the Company's official documents constitute deliberate and unqualified notice to anyone who had access to them that OBW was a creditor. We do not see how OTK's intention could be said to have been anything other than to benefit OBW immediately.

25 At the hearing before us, counsel recognised that because OTK had instructed the bookkeepers in Hokkien to record the loans, it could be argued that the entries were not conclusive as to whether he intended for them to be recorded in his sons' names or in one son's name (assuming that the latter would refer to Tony Oei who was the oldest surviving son and a director of the Company, and not OBW who was not involved in the Company's business). However, the potential ambiguities of the Hokkien dialect do not cast any doubt on the accuracy of the ledger account

names as a reflection of OTK's intention, because the bookkeepers acted upon OTK's instructions in including both his sons' names in the ledger account. OTK must have been aware of the ledger in the three years between its creation and his death, and specifically identified it for the recording of his advance of $500,000 and $1m credit balance (see [5] above). Crucially, there is no coherent reason not to accept that the bookkeepers did anything other than that they faithfully recorded OTK's instructions. It is not insignificant that both bookkeepers recorded during the material period the entries in precisely the same manner. After August 1998, following the demise of the Company's original long-serving bookkeeper, Yeo Bee Lay, a granddaughter of OTK and concurrently a director of the Company, assumed the bookkeeping functions. There can be no question she correctly complied with OTK's instructions in recording the entries in her ledgers. Taken together, the accounts in the ledger, the payment vouchers and the audit confirmation form of 2001 are more than sufficient to conclusively establish OTK's intention to assign to OBW as well as to Tony Oei the benefit of his loans to the Company, and Tony Oei's knowledge and signing of these documents cannot be glibly explained away by an "understanding" that OTK's concern for hierarchy meant that he intended, contrary to these documents, for OBW *not* to get anything unless Tony Oei predeceased him. Furthermore, as Tony Oei had signed in his capacity as director of the Company the audit confirmation form of 2001 stating that $1,300,000 was owing by the Company to "Tony Oei/Oei Boon Wan", the Company would also be estopped from denying that OBW was a creditor and entitled to repayment of part or all of this sum, while he was alive.

26 We also do not accept the respondents' argument that the appellant's purported belief that OTK "owned" the sums recorded under the "Tony Oei/Oei Boon Wan" account destroyed her case that OTK intended to assign the benefit of his loans to Tony Oei and Oei Boon Wan. The appellant's evidence during cross-examination that she *believed* the moneys were legally OTK's is irrelevant and certainly not determinative of OTK's intention. She thought that, since OTK effectively ran the Company as a personal business, and since it was he who had made the advances to the Company, he could, as a practical matter, have done as he wished – *ie*, he was the boss. This has no actual bearing on the present appeal, given that OTK did not in fact make changes to the "Tony Oei/Oei Boon Wan" account that he created after Whang's death. While her "belief" certainly does not advance the appellant's case theory, it is ultimately a question of law whether OTK had made an equitable assignment to Tony Oei and OBW by way of the ledger account. The appellant's own belief cannot be decisive in determining this issue. She was not privy to OTK's intentions. Ironically, if anything, her belief has the same muted legal significance as Tony Oei's own partisan perception of the moneys transferred to the "Tony Oei/Oei Boon Wan" account: they were OTK's moneys.[note: 14] This ultimately posed no obstacle to the respondents' case (at trial), nor to the Judge's finding that OTK had validly assigned his rights to Tony Oei. As counsel for the appellant, Mr Michael Hwang SC, quite rightly argued, once OTK had directed the recording of the advances under the names "Tony Oei/Oei Boon Wan" and the Company's books had been audited and closed for the year, OTK would not have been able to legitimately change the account without at least a journal entry indicating the consent of Tony Oei and OBW. Thus the appellant's unguarded testimony that OTK remained the legal owner of these sums was not just erroneous but in fact both irrelevant and immaterial. Like large swathes of Tony Oei's evidence, such a belief or understanding should not have been relied on by the Judge to vary the clear meaning of the Company's documents in contravention of the parol evidence rule statutorily embodied in ss 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed).

(2) OTK's will

27 OTK made his will on 24 February 1997. In it, he provided for his shares (including dividends) in the Company and SLC Private Limited to be bequeathed to Tony Oei, and the remainder of his estate (comprising mainly shares in several companies as well as cash withdrawn from the United

Overseas Bank Ltd account held jointly with Tony Oei, OBW and Whang) to be divided amongst Tony Oei, OBW and Whang's widow. The shares to be bequeathed solely to Tony Oei amounted to $3,079,803.54. The net value of OTK's estate, according to the Inland Revenue Authority of Singapore's Notice of Assessment of Estate Duty dated 6 June 2002,[note: 15] was $10,740,093.82. Thus Tony Oei would inherit more than double OBW's share under OTK's will. The will was silent on the loans made to the Company and recorded in the Company's ledger. While the parties accepted that the will was not determinative of OTK's intentions with regard to the ledger entries in his sons' names, the respondents argued that the will was evidence of OTK's patriarchal and hierarchical attitude. This may be so, but we note that OTK made a significant credit entry of $1m in the names of "Tony Oei/Oei Boon Wan" on 31 December 1997, after his will was made. This was transferred from his "Oei Tok Kek" account in the Company's ledger to the account in both sons' names, even though there was also another account in the ledger in the names of "Oei Tok Kek/Tony Oei". If OTK had intended that Tony Oei benefit from the $1m credit but did not wish to amend his will, he could just as easily have transferred the credit balance to the "Oei Tok Kek/Tony Oei" ledger account. His decision to transfer it instead to the "Tony Oei/Oei Boon Wan" account can only evidence his intent to benefit both sons together.

28 Thus, we would not infer from the way OTK bequeathed his property in his will that OTK intended for OBW to benefit *pursuant to the Company's ledger account* only in the event of Tony Oei predeceasing him. OTK had already willed the lion's share of his estate to Tony Oei, his oldest surviving son: Tony Oei's inheritance was worth some $3m more than his brother and sister-in-law's inheritance of approximately $2m worth of property. OTK's transfer of his $1m credit balance to the "Tony Oei/Oei Boon Wan" account, rather than leaving it in his own account and/or providing for it under his will, or transferring it to the "Oei Tok Kek/Tony Oei" account, seems to us to clearly manifest an intention to deal with his loans to the Company distinctly from the rest of his property provided for in his will, and to assign the benefit of these loans to OBW as well as Tony Oei. All said and done, there is simply no plausible basis for even suggesting that OTK would have assigned his loans to the account in the joint names if he only wanted Tony Oei to have the benefit of the loans. This intention may have been true of the "Oei Tok Kek/Tony Oei" account but certainly did not extend to the "Tony Oei/Oei Boon Wah" account as well.

(3) OBW's relationship with his family and his involvement in the Company

29 The respondents emphasised that it was Tony Oei who was most closely involved in the Company's business, while OBW was merely a shareholder without any role in the running of the Company. It bears mention, however, that by the time Whang passed away and OTK asked Tony Oei to move his auditing firm to share the Company's premises, the Company was no longer in active business. There was also no evidence, and the parties did not submit, that OBW was in any way estranged from OTK or Tony Oei. Indeed, the terms of the will and the subject accounting entries are an abiding testament to a cordial, if not affectionate, relationship between OBW and his father.

30 Further, we note that OBW paid $360,000 of OTK's estate duty while Tony Oei paid $200,584.91 (see the GD at [57]), despite Tony Oei being the older son, the executor of OTK's estate, and the beneficiary of OTK's legal and beneficial interests in two companies. Tony Oei could not give any satisfactory reason why there was such an arrangement, apart from the cryptic response, "Because [OTK] is my father, so we are the son [*sic*]."[note: 16] He also confirmed that OBW was not reimbursed for the substantial partial payment of their father's estate duty. There is no evidence that any or all of the four loans were given to OBW to be used specifically for the payment of OTK's estate duty. We therefore take OBW's payment as evidence of at least a cordial, if not a close and filial, relationship between him and OTK and indeed Tony Oei as well. It seems to us, all said and done, more than plausible that OTK intended OBW to have the benefit of his loans to the

Company by way of the ledger account assignment, together with Tony Oei, even though OBW was not involved in the running of the Company.

31 In the result, we find that OTK intended to assign the benefit of his $1.5m loan to the Company to both Tony Oei and OBW as at 31 December 1997. As for the requirements for an effective assignment of a chose in action in equity, the choses in action were sufficiently clearly identified, with the two sums of $500,000 and $1m recorded in the Company's ledger on 3 April 1996 and 31 December 1997 respectively. As the English High Court aptly observed in *Finlan v Eyton Morris Winfield* [2007] 4 All ER 143 at [33] (affirming *Phelps v Spon-Smith & Co* ([16] *supra*) which followed *Kijowski v New Capital Properties Ltd* (1987) 15 Con LR 1 at 8):

> [T]here must be some outward expression by the assignor of his intention to make an immediate disposition of the subject matter of the assignment. It must be possible to identify some act on the assignor's part from which his intention then and there to divest himself — in favour of the assignee — of the right or interest to be assigned, on the terms which have been agreed, can be inferred.

32 Since an equitable assignment need not take any particular prescribed form, the consistent pattern of entries without any corresponding debits in the Company's ledger accounts, at the material time prior to OTK's demise, suffice as an expression of OTK's intention to assign. What happened to "Tony Oei/Oei Boon Wan" account thereafter, with Tony Oei's own two purported advances of $500,000 each and various debits, does not change OTK's intention as evidenced by the entire factual matrix. For completeness, we should add that we are also in broad agreement with the view in Marcus Smith, *The Law of Assignment: The Creation and Transfer of Choses In Action* (Oxford University Press, 2007) ("*The Law of Assignment*") at para 7.22 that "in order to effect a transaction that has legal consequences, manifestation of intention and not intention *per se* is the touchstone". We now turn to the issue of whether OBW was required to have had notice of the equitable assignment before it could be complete and effective.

Whether notice to the assignee is necessary to perfect an equitable assignment

33 It is hornbook law that there is no prescribed form for equitable assignments. As Lord Macnaghten noted in *William Brandt's Sons & Co v Dunlop Rubber Company, Limited* [1905] AC 454 ("*William Brandt*") at 462:

> But, says the Lord Chief Justice [in the Court of Appeal below], "the document does not, on the face of it, purport to be an assignment nor use the language of an assignment." *An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain.* All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. [emphasis added]

34 Similarly, Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract, Second Singapore and Malaysian Edition* (Butterworths Asia, 1998) ("*Cheshire, Fifoot and Furmston*") at p 859 states:

> An absolute assignment of an existing *chose in action*, whether legal or equitable, is complete as soon as the assignor has finally and unequivocally indicated that it is henceforth to belong to the assignee. Nothing more is necessary. [emphasis in original]

35 However, this seemingly unequivocal proposition masks the still flickering controversy over whether notice must be given to the debtor or the assignee or to both (or none). *How* may the assignor "finally and unequivocally" indicate that the chose in action "is henceforth to belong to the assignee"? It appears from an appraisal of current legal literature that, depending on the form of the assignment, notice to the assignee may be necessary before the assignment is valid and complete. For example, *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004) (H G Beale gen ed) ("*Chitty*") states at vol 1, paras 19-021–19-023:

> An assignor can assign a contractual right in equity in one of two main ways. He can inform the assignee that he transfers the chose to him; or he can instruct the debtor to discharge the obligation by payment to, or performance for, the assignee. …
>
> … On the other hand, a mere direction by a creditor to his debtor to pay money to a third person is not necessarily an assignment, for such a direction may be nothing more than a revocable mandate to the debtor. …
>
> … Where an assignment is made by instructions to the debtor it is not clear whether it can have any effect at all before the assignee knows of the instructions and therefore has a chance to accept or decline the assignment.

36 Thus the first inquiry is whether OTK's creation of the "Tony Oei/OBW" account in the Company's general ledger was merely a revocable mandate to the Company. While there is no prescribed form of assignment, notice to the assignee may be required depending on what form the assignment takes. On the facts of *William Brandt* there was no doubt that the assignment was complete between the assignor and the assignee. Thus the extract from Lord Macnaghten's judgment must be read in the context of addressing the form of notice necessary to bind the *debtor*. However, it may also be said that the assignment can be equally good in equity if the debtor had notice but the assignee did not. This was the conclusion that Mohamad Azmi J reached in *Malayawata Steel Bhd v Government of Malaysia* [1975] 1 MLJ 22 at 24:

> It seems to me that there are three main ingredients of equitable assignments – an adequate mode, clear intention, and intimation to *either* debtor *or* assignee. As regards mode and form of assignment, no form of words is required for an equitable assignment. (See *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* and *Durham Brothers* v. *Robertson* [[1898] 1 QB 765]. The assignment may be by word of mouth unless writing is required by law. As regards intention, it is necessary for the assignor to use such words so as to make the meaning plain. *With regard to the last ingredient, the intimation to assign must be addressed either to the debtor or the assignee.* Notice to the person owing the debt or to the holder of the fund is not necessary to complete the title of the assignee, but if he omits to give such notice, a subsequent assignee who took without notice of the first charge, may, by giving notice obtain priority over him. [emphasis added]

37 On the other hand, the respondent relied on *Curran v Newpark Cinemas, Ltd* [1951] 1 All ER 295 ("*Curran*") for the proposition that actual notice to the assignee is a prerequisite of a valid assignment. Indeed, *Snell's Equity* ([17] *supra*) at para 3-06 (on statutory assignments, citing *Curran*), also states:

> Subject to these formal requirements it is considered that the validity of an assignment under the Act will be determined according to the same principles as an equitable assignment. Thus *a mere direction to the debtor to pay a third person who knows nothing of the transaction is not a valid assignment.* [emphasis added]

38 However, on the requirements for an equitable assignment, *Snell's Equity* at para 3-16 is much more nuanced:

> *Whether or not notice to the assignee is required would seem to depend on the form of the assignment in question.*
>
> It appears that an assignment made by a direction given by the assignor to the debtor or trustee is not binding on the assignor or the assignee unless it either is made by prior arrangement with the assignee or has been communicated to him. …Where the assignee is made aware of the assignment by a letter sent by post it has been held that the assignment is effective as from the date of posting the letter but this is to be doubted.
>
> It seems that an assignment made by a direct transfer to the assignee is effective even if the assignee is unaware of it. This accords with the general principle that a gift by deed is effective to vest the property in the donee immediately subject to his right to repudiate it when he becomes aware of the gift.
>
> [emphasis added]

39 The law in Australia is perhaps the most mature among the various common law jurisdictions on this point. *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th Ed, 2002) ("*Meagher, Gummow and Lehane*") state without diffidence at para 6‖430:

> [I]t has been held by the Court of Appeal in New South Wales that an assignment may be effective (whether under s 12 of the Conveyancing Act 1919 (NSW) and its equivalents or as an equitable assignment) even if not communicated to the assignee: *Grey v Australian Motorists & General Insurance Co Pty Ltd* [1976] 1 NSWLR 669 … Of course, if, as now seems to be established and as is clearly, it is suggested, the better view, an assignment is effective without communication to the assignee, it is subject to his right to repudiate and disclaim upon receiving notice of it …

40 In *Thomas v National Australia Bank Limited* [2000] 2 Qd R 448, the Queensland Court of Appeal held that an assignment passed title to a chose in action, whether or not notice of the assignment had been given. This was in the context of notice to the debtor, however; the issue before the court was whether, given that an equitable assignment was good between the assignor and the assignee without notice to the debtor, such notice would affect priorities only, or was necessary to pass title. Similarly, *The Laws of Australia* vol 7 (Thomson Lawbook Co, Looseleaf Ed, 2006) (J L R Davis & Nicholas C Seddon eds) at para 7.3.137 states:

> **An equitable assignment can be effective without communication to the assignee.** This is subject, of course, to the right of the assignee to disclaim upon becoming aware of it.

41 This position also seems to comport with *Halsbury's Laws of Singapore*, vol 7 (LexisNexis, 2005 Reissue) at para 80.439 which states:

> Although section 4(8) of the Civil Law Act does not explicitly require this, it has been held that notice must be given to the assignee. This goes against the general rule that a donee or beneficiary need not know of a gift or declaration of trust in his favour, although this is subject to his right to repudiate it when informed of the transfer. *Notice is probably unnecessary in cases of equitable assignments as well.* In such instances, however, the postal rule probably applies so that the notice takes effect when posting occurs. [emphasis added]

4 2 *In the Matter of Way's Trusts* (1864) 2 De GJ & S 365; 46 ER 416 ("*Way's Trusts*"), cited in support of the italicised proposition above, was applied at first instance in *Pennington v Waine* [2002] 1 WLR 2075, but the latter case was upheld on different grounds. *Way's Trusts* concerned an assignment by deed, which had been signed, sealed and delivered in the presence of the assignor's solicitor, who attested to its execution. The assignor then kept the deed in her own possession, and the fact of its execution was never communicated to anyone. Knight Bruce LJ held that, despite having been retained and afterwards destroyed by the assignor, the deed had been duly executed and must be supported in the absence of any evidence of mistake or fraud. Similarly, Clarke LJ held in *Pennington v Waine* that a deed was in principle sufficient to operate as an equitable assignment. In that case, a share transfer form signed by the donor and returned to the company whose staff placed it on file but took no further action prior to the donor's death, was "an appropriate document of assignment" (at [92]). In the present case, while the Company's account ledger is not a deed, given that no form is required for equitable assignments, it is nevertheless an appropriate document of assignment or, more precisely, by creating the "Tony Oei/Oei Boon Wan" account, OTK made an act of assignment in equity.

43 As an aside, the last comment of the extract from *Halsbury's* (see [41] above, regarding the application of the postal rule) merely concerns when notice takes effect, and not whether it is strictly required. On this point the authorities are not clear. *Chitty* ([35] *supra*) at para 19l023 comments:

> It has been held that an assignment made by letter is complete as soon as the letter is posted to the assignee, but the proposition seems doubtful unless postal communication was in some way authorised or anticipated, as in the rules regarding the acceptance of contractual offers.

In any case, the precise point at which the notice takes effect is not in issue here, as both parties appear willing to accept that date as 29 December 1999 when OBW signed the first payment voucher. The respondents, asserting that the assignee's knowledge of the assignment only after the death of the assignor cannot constitute requisite notice, submitted that "whether the requirement is one of notice or knowledge, the Appellant cannot succeed because on the Appellant's own case, [OBW] only had 'knowledge' of the alleged assignment at the earliest when he signed the payment vouchers on 29 December 1999, after [OTK]'s demise".[note: 17] We do not see much force in this contention. Why should the assignor's death be a watershed event? The ownership of the deceased assignor's assets is not lost in a legal "black hole" after his demise. The deceased assignor's administrators or personal representatives can conceptually do everything he could have done when he was alive with his assets. However, if an effective assignment has been made, it matters not whether the assignor is alive or not as neither the assignor nor his estate's representative will be able to revoke the assignment.

44 Another formulation of the test for a valid assignment in equity (more particularly, of a gift) is provided in *Cheshire, Fifoot and Furmston* ([34] *supra*) at pp 858–859:

> The general principle of law is that a gift is complete as soon as everything has been done by the donor that, according to the nature of the subject matter, is necessary to pass good title to the donee. …
>
> Applying these principles to the gift by way of equitable assignment of an existing *chose in action*, all that is necessary is to ascertain ***whether the donee is in a position to pursue the appropriate remedy against the debtor without the necessity of any further act on the part of the assignor***. If so, the gift is complete and its efficacy remains undisturbed by the absence of consideration. Whether the donee is in this position depends upon the nature of the equitable assignment.

[emphasis added in bold italics]

45 As the English Court of Appeal noted in *Pennington v Waine* at [57], the test is somewhat circular: the validity of the assignment depends on whether its form required notice to the assignee, while whether notice is required depends on whether the assignor did all that was necessary for him to complete the assignment (see also *In re Rose* [1949] Ch 78), which in turn begs the question whether one of the necessary things for the assignor to do was to give notice to the assignee. A better approach would thus be to consider why notice to the assignee is important, and whether it is of such importance that the assignment cannot be complete in equity without such notice.

46 Marcus Smith in *The Law of Assignment* ([32] *supra*), remarks at para 7.69 that "notice to the assignee is advisable, if only to apprise him of the right he has and to give him the opportunity of disclaiming, if the assignment is a gift". Indeed the general principle is that a gift vests before the donee gleans notice, subject to his right when informed to repudiate it. Smith again rightly points out at para 7.72 that the fact that the assignment in *Way's Trusts* ([42] *supra*) was by deed was not a factor considered by the Court of Appeal. Further, "the conclusion that notice is generally required, except when there is a deed, is an odd one, particularly given that equity generally does not place much stock on deeds" (at para 7.72 of *The Law of Assignment*, citing *Meagher, Gummow and Lehane* ([39] *supra*) at para 6[430). We will nevertheless consider three oft-cited and rather trite reasons why notice to the assignee may be important, and whether notice must therefore be given to the assignee in order to complete an equitable assignment:

(a) The assignee must have the opportunity to repudiate the assignment.

(b) The assignee must be able to enforce his rights under the assignment.

(c) It would be unconscionable for the assignor to revoke the assignment (*Pennington v Waine per* Arden LJ).

(1) Assignee's right to refuse assignment

47 The assignee's right to disclaim the assignment is not actually related to or determinative of the validity of the assignment itself. Just as a gift vests regardless of the donee's knowledge, provided that when the donee learns of the gift he has the opportunity to disclaim (and not choose not to complete or validate) it, so the assignee's right to disclaim is a separate matter from the efficacy of the assignor's act. As the New South Wales Court of Appeal (*per* Glass JA) astutely reasoned in *Grey v Australian Motorists & General Insurance Co Pty Ltd* [1976] 1 NSWLR 669 ("*Grey*") at 673:

> It is clear that a transfer of property made in proper form vests the title in the transferee at once, notwithstanding his lack of knowledge: *Standing* v. *Bowring* [(1885) 31 Ch D 282]. His remedy, if he wishes to reject the gift, is to transfer it back. Accordingly, the absence of consent cannot invalidate the assignment.

48 It is, in our view, thus wrong to posit that "an assignment, otherwise absolute in its terms, must operate conditionally where the assignee, not having been consulted, has the right to reassign." (as Glass JA pointed out in *Grey* at 673–674). The assignee's possible rejection does not prevent the assignment from being complete; nor is an absolute assignment such as OTK's transfers of the $500,000 and $1m to the names "Tony Oei/Oei Boon Wan" conditional upon the knowledge or consent of the assignee.

(2) Assignee's right to enforce assignment

49 Recalling the test postulated in *Cheshire, Fifoot and Furmston* ([34] *supra*) that the donee be in a position to pursue the appropriate remedy against the debtor without the necessity of any further act on the part of the assignor (see [44] above), it would appear, both logically and practically, that the assignee would not be able to enforce his rights under the assignment until he became aware of them. In principle, however, the assignment having been completed, the right to enforce would already have crystallised, except that if any other equitable interest comes into being before the assignee obtains notice of the assignment, the assignee may have to take subject to such interest (see *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365). *Cheshire, Fifoot and Furmston* at p 861 provides two reasons why "failure to give notice [to the debtor] may seriously prejudice the title of an equitable assignee":

> Firstly, an assignee is bound by any payments which the debtor may make to the assignor in ignorance of the assignment.
>
> Secondly, it is established by the rule in *Dearle v Hall* [(1828) 3 Russ 1; 38 ER 475]that an assignee must give notice to the debtor in order to secure his title against other assignees. An assignee who, at the time when he completes the transaction, has no notice of an earlier assignment and who himself gives notice of the transaction to the debtor, gains priority over an earlier assignee who has failed to give a like notice. The fact that he has discovered the existence of the prior assignment at the time when he gives notice is immaterial, provided that he had no actual or constructive knowledge of it when his own assignment was completed.

5 0 *Chitty* ([35] *supra*) at para 19l023, similarly explains that there will be priority implications that arise for want of notice to the assignee, but notes that it "may be that such an assignment would be valid as against the assignor himself even before the assignee knows of the instructions to the debtor".

51 Thus notice serves the obviously important practical purposes of informing the assignee of his rights and safeguarding priority, but this ought to be clearly distinguished from the validity or completeness of the assignment, which is independent of the assignee's knowledge. The explanation by *Cheshire, Fifoot and Furmston*, that an assignee who (having had no constructive knowledge of a prior assignment when his own assignment was completed) first gives notice to the debtor prevails over an earlier assignee who did not give like notice *even if* the later assignee learnt of the prior assignment before giving notice to the debtor, is premised on the possibility and correctness of both assignments having been complete and effective without notice to either the debtor or the assignee. Both assignments would have to be valid regardless of notice to the debtor or the assignee in order for such an issue of priority to arise.

52 In the present case, OBW presumably did not receive notice before 29 December 1999 of his equitable interest in the ledger account, or of the $1.5m that OTK had assigned to their names. As it turned out, however, he was able to obtain a total of $1,170,000 pursuant to the assignment as a consequence of Tony Oei's consensual arrangements. Even if the payment voucher accompanying the cheque of 29 December 1999 did not give OBW notice (and we note that the subsequent payment vouchers indicated something similar, "In payment of A/C"), the four payments were properly made and meticulously recorded against the "Tony Oei/Oei Boon Wan" ledger account. In receiving each cheque, OBW benefited from his equitable interest in OTK's assignment, simultaneously obtaining notice (if he had not already) and waiving his right to reject the assignment. But the assignment would already have been complete before he cashed the first cheque; given that no issues of priority were involved in the present case, it is really in the final analysis quite immaterial whether or when he

had "formal" notice.

(3) Unconscionability of assignor's revoking assignment

53 G J Tolhurst, "Equitable Assignment of Legal Rights: A Resolution to a Conundrum" (2002) 118 LQR 98, argues that notice of an equitable assignment is not necessary for its efficacy, but notice is necessary to bind the conscience of the obligor. In *Pennington v Waine* ([42] *supra*), the English Court of Appeal (*per* Arden LJ) held at [63]–[64] that the incomplete transfer of shares did not destroy the intended gift because it would have been unconscionable for the donor to resile from her gift:

> There are countervailing policy considerations which would militate in favour of holding a gift to be completely constituted. These would include effectuating, rather than frustrating, the clear and continuing intention of the donor, and preventing the donor from acting in a manner which is unconscionable. …
>
> If one proceeds on the basis that a principle which animates the answer to the question whether an apparently incomplete gift is to be treated as completely constituted is that a donor will not be permitted to change his or her mind if it would be unconscionable, in the eyes of equity, vis-à-vis the donee to do so, what is the position here? There can be no comprehensive list of factors which makes it unconscionable for the donor to change his or her mind: it must depend on the court's evaluation of all the relevant considerations.

54 In that case, the donor had made a gift of 400 shares in a company of her own free will, told the donee about the gift and signed a form of transfer which she delivered to the company's auditors. She also indicated to the donee that she wished for him to become a director of the company, which required holding at least one share in the company. The donee duly signed the consent form to act as a director, and the donor countersigned. The donor died without providing for these 400 shares in her will; the share transfer form was also not delivered to either the donee or the company. In deciding whether such delivery was a prerequisite of an equitable assignment of shares by way of gift, the Court of Appeal held that the donor had clearly intended to make an immediate gift and, in the circumstances, it would have been unconscionable for her to have recalled the gift once the donee had signed the consent form.

55 We note here that, in the present case, the modes of equitable assignment and of gift are practically identical and can be referred to interchangeably. Greg Tolhurst, *The Assignment of Contractual Rights* (Hart Publishing, 2006) at para 7.20 states that it is "now settled that legal interests may be assigned in equity by way of gift". Thus consideration (or the lack thereof) is not an issue here, though it is perhaps more elegant to refer to an assignment, rather than a gift, of rights. It has also been persuasively suggested that *Pennington v Waine* would more appropriately have been analysed on the basis of contract rather than unconscionability (see Assoc Prof Tham Chee Ho's incisive note, "Careless Share Giving" (2006) 70 Conv 411 at 419–420). Indeed, the precise boundaries of this unconscionability are not clear, but we do not think that affects our decision in this case, which is premised on the more basic and logically prior principle that notice to the donee is not necessary to perfect a gift, provided only that the donee has the chance to reject the gift when he learns of it. It should also be borne in mind that "[a]lthough equity will not aid a volunteer, it will not strive officiously to defeat a gift" (*per* Lord Brown-Wilkinson in *T Choithram International SA v Pagarani* [2001] 1 WLR 1 at 12).

56 Nevertheless, considering the usefulness of the concept of unconscionability in equitable discourse, would it have been unconscionable for OTK to revoke the assignment or to strike out

OBW's name from the ledger account? Proper accounting practice (and other legal considerations) aside, for argument's sake, there could surely be nothing unconscionable about OTK changing his mind prior to OBW learning of the assignment in the Company's ledgers. However, assuming that OBW obtained notice of the "Tony Oei/Oei Boon Wan" account upon receiving the first cheque on 29 December 1999 and signing the payment voucher, and that three other payments were made against this account subsequently, it must have been thereafter unconscionable for OTK to change his mind, or more aptly for his estate to demand the return of the moneys paid out (though of course that is not the case here – the claimants below were Tony Oei and the Company). While it was Tony Oei and not OTK himself who arranged these payments to OBW after OTK's demise, because the payments were made pursuant to the account created by OTK's assignment, it would also be wholly improper, let alone unconscionable, for Tony Oei to demand repayment when both he and the Company were responsible for the unequivocal issuance of, *inter alia*, the vouchers and the drawing up of the accounts. The obligor (the Company) would accordingly not be able to resile from its performance to the assignee.

57 Notice is thus relevant on this analysis, but the unconscionability of the assignor's revocation of an imperfect assignment in law (as in *Pennington v Waine*) is also conceptually distinct from, and not determinative of, the completeness of the assignment in equity. We agree therefore, all things considered, with the better view (as advocated by the likes of *Meagher, Gummow and Lehane*, Marcus Smith and Gregory Tolhurst) that notice to the assignee is not required to complete an equitable assignment, subject to the assignee's right to disclaim upon learning of the assignment. While notice does serve important practical functions, it has no bearing on the efficacy of an equitable assignment, which is determined by the assignor's actual intention as sufficiently manifested by some act of assignment, with clear identification of the chose in action. The assignor's intention is the foremost consideration in every such case. It seems to us, from all the above circumstances and, in particular, the consistent and unwavering intention of OTK to assign all the available balances over a period of time to the "Tony Oei/Oei Boon Wan" account, that there was a settled intention to irrevocably effect an assignment. We thus now turn to the issue of Tony Oei and OBW's status as fellow assignees – whether they were to benefit jointly or in common.

Whether Tony Oei and Oei Boon Wan were joint tenants or tenants-in-common of the equitable assignment

58 It is trite law that a joint interest means ownership by two or more persons of the whole, see Theodore W Dwight, *Commentaries on the Law of Persons and Personal Property* (Fred B Rothman & Co, 1997) ("*Commentaries*") at p 458:

> By joint tenancy is meant an ownership of a complex kind, in which two or more persons are supposed each to own the *whole* chattel. It is not an ownership in undivided shares, but of the whole. One of the results of this theory is survivorship. As the owners from time to time die, the chattel belongs to the survivors until the last survivor becomes complete owner, free from the rights of his former associates. …
>
> In creating a joint interest, it is a rule of construction that a grant of a chattel to two or more makes them joint tenants, rather than tenants in common. This rule is modified by the principles of equity jurisprudence, where each of the parties advances a part of the consideration to purchase the chattel. In this case, there is a tenancy in common. … When, however, a chattel is acquired by gift or by will by two or more, equity does not interfere, as there is no consideration on which to base the theory of a trust, and survivorship takes effect.

59 The Judge, having found that Tony Oei was the sole assignee of OTK's debts from the

Company, then made a rather surprising comment (at [122]–[123] of the GD):

> I am also satisfied that all the necessary requirements for a valid equitable assignment have been fulfilled *viz*. the intention to assign on the part of the father, the legal chose in action was identified and there was sufficient notice to [Tony Oei] as the assignee.
>
> As my finding disposes of the issue in the first suit, there is no necessity to go on to consider whether the account "Tony Oei/Oei Boon Wan" was a joint tenancy or a tenancy-in-common although *the evidence and intention of the father pointed to the former as being the more likely*.
>
> [emphasis added]

60 She continued (at [124]):

> Even if I am wrong in my finding in the first suit and the account "Tony Oei/Oei Boon Wan" was a joint tenancy, the fact remains that the last loan [to the appellant] was extended on 27 June 2002, after the demise of [OBW] (14 April 2002). *Under the rule of the right of survivorship in a joint tenancy, all the interest in the credit balances vested in [Tony Oei] upon the death of [OBW]*. [emphasis added]

61 With respect, this cannot be conceptually correct. The Judge appears to have earlier held (at [121]) that there was an assignment only to Tony Oei because it was OTK's intention that Tony Oei "have the sole benefit of the accounts in the event [OTK] died". Based on this intention of OTK, she then found that the necessary requirements for a valid assignment in equity to Tony Oei had been fulfilled, in particular, that Tony Oei had received notice through his involvement in the Company as he had overheard his father telling the bookkeeper to record loans in his name. The Judge decided that OBW was not an assignee because OTK *did not intend* to assign to him, and *not because* the purported assignment to OBW was invalid for want of notice. In fact, she did not appear to consider whether any assignment to OBW could be valid because she found that OTK's intention was never to assign to him. Thus the comment that "the evidence and intention of the father pointed to [joint tenancy] as being the more likely" (at [123]) was in direct opposition to her primary finding. Paradoxically, nevertheless, this particular insight was nearer the mark.

62 The respondents' proffered explanation for this, that the Judge "made this comment in the light of her finding that [OTK] intended [OBW] to receive the benefit of the chose in action in the event that [Tony Oei] predeceased him",[note: 18] was strained and wears an air of particular unreality. An assignment of a life interest to one with the remainder to another is not a joint tenancy at all, nor can a joint tenancy be conceptually stripped of all its usual attributes and be mystifyingly reduced to a bare feature of the right of survivorship, thereby depriving one joint tenant of any interest prior to the death of the other.

63 Nor does the maxim "equality is equity" or the equitable presumption of a tenancy in common render the respondents much aid. *Snell's Equity* ([17] *supra*) at para 5-21 explains quite clearly the reasoning behind the presumption of a tenancy in common, stemming from "equity's dislike of a joint tenancy":

> On the death of one joint tenant, the whole estate belongs to the survivor, and the representatives of the deceased take nothing. *There is here no equality except, perhaps, an equality of chance. Equity, therefore, leans in favour of a tenancy in common.* Hence, in the absence of an express declaration as to the beneficial interests, equity may treat persons who are joint tenants at law as tenants in common of the beneficial interest, so that although at law

the survivor is entitled to the whole estate, he will hold in part as trustee for the representatives of the deceased. [emphasis added]

64 Thus the essence of equity's dislike of a joint tenancy is its objection to the very feature that the respondents did not dispute was intended by OTK: the right of survivorship. It was Tony Oei's untiring, but altogether unconvincing, explanation that both names were included so that OBW would have the benefit of the loans only if Tony Oei predeceased him. We cannot accept this. Such a conclusion would require more than improbable slivers of strained inferences to underpin it.

65 We therefore find that Tony Oei and OBW were joint assignees of their father's loans to the Company. The Judge's incidental impression that the evidence and OTK's intention pointed to a joint tenancy as being more likely than a tenancy in common was right. As pointed out in *Commentaries* (see [58] above), it is a rule of construction that an account named "Tony Oei/Oei Boon Wan", without any provision for how the two persons named should share the account, indicate a joint tenancy rather than a tenancy in common. Since this was an assignment by gift, equity would not interfere to turn it into a tenancy in common, as neither tenant had furnished any consideration in return for which he (or his estate) should be able to retain an interest in the moneys despite predeceasing the other. In the circumstances, it would certainly not be incorrect to view the assignment as having been made to both Tony Oei and OBW with the right of survivorship; in fact it was Tony Oei's understanding and expectation that the surviving brother should take the benefit of the account. The presumption in law of a joint tenancy has therefore not been rebutted in equity on the basis of consideration having been provided by either Tony Oei or OBW, with the entirely unremarkable result that OBW, just like Tony Oei, was entitled to whatever moneys each received from the "Tony Oei/Oei Boon Wan" account during his lifetime, and that upon OBW's death the entire benefit of the moneys credited to that ledger account passed to Tony Oei.

Conclusion

66 We thus conclude that, notice not being an absolute requirement to complete an equitable assignment, OBW was an assignee of OTK's chose in action against the Company. We also find, as the Judge remarked, that OBW and Tony Oei were *joint* assignees upon the creation of the ledger account in the Company's books. When Tony Oei subsequently recorded advances to and withdrawals from the Company against the names "Tony Oei/Oei Boon Wan" in the Company's ledger, he did so as a joint assignee. Hence, when OBW obtained the four cheques from the Company accompanied by payment vouchers indicating that the sums were to be recorded as debits from "Tony Oei/Oei Boon Wan", OBW received moneys that he was entitled to as a joint assignee. Therefore the respondents' claim must fail and the appeal be allowed with costs. The appellant is also to have all the costs of the proceedings below. The usual consequential orders are to apply.

[note: 1] Record of Appeal vol 11 pp 3026–3028.

[note: 2] Core Bundle vol 2C p 721.

[note: 3] Core Bundle vol 2C p 722.

[note: 4] Core Bundle vol 2C pp 723–724.

[note: 5] Core Bundle vol 2C p 832. See also GD at [32].

[note: 6] Defence (Amendment No. 1) at [8A.1].

[note: 7]Defence (Amendment No. 1) at [13A] and [14A].

[note: 8]GD at [117]–[118], though at [117] OBW is erroneously referred to as the debtor, rather than the would-be assignee.

[note: 9]Notes of Evidence p 48 lines 9–10, Record of Appeal vol 1 p 99.

[note: 10]Notes of Evidence pp 39–41, Record of Appeal vol 1 pp 90–92.

[note: 11]Notes of Evidence p 43, Record of Appeal vol 1, p 94.

[note: 12]Notes of Evidence pp 45-48, Record of Appeal vol 1, pp 96–99)

[note: 13]Agreed Bundle vol 2 p 460 (Core Bundle vol 2C p 719)

[note: 14]See Appellant's Case at [63]; Core Bundle at 79, 82, 88.

[note: 15]Record of Appeal vol 11 pp 3051–3055.

[note: 16]Notes of Evidence pp 50–52, Record of Appeal pp 101–103

[note: 17]Respondent's Case at [168].

[note: 18]See Respondent's Case at [118].