

Toh Kim Chan v Toh Kim Tian & Others
[2002] SGHC 266

Case Number : Suit 117/2002
Decision Date : 11 November 2002
Tribunal/Court : High Court
Coram : Woo Bih Li JC
Counsel Name(s) : Peter Low and Khoo Guan Chuan (Peter Low Tang & Belinda Ang) for the plaintiff; Cheong Gay Eng and Koh Boon Hai (Cheong & Koh) for the defendants
Parties : —

Companies – Accounts – Ordering of account – Right of plaintiff to demand accounting

Companies – Shares – Purchasing of plaintiff's shares – Jurisdiction of court to make order

Limitation of Actions – Particular causes of action – Account – Applicable limitation period – Laches on part of plaintiff – ss 2(6)(a), 6(2), 22(1), 26, 32 Limitation Act (Cap 163, 1996 Rev Ed)

Partnership – Partners inter se – Ordering of account – Assets to be included in account

Judgment

Cur Adv Vult

GROUND OF DECISION

Background

1. This is a dispute among some members of the Toh family although only one member is the plaintiff i.e Toh Kim Chan and only one member is a defendant i.e Toh Kim Tian, who is the first defendant. The second defendant Ang Kiang Hua is the wife of Kim Tian. Both of them are at present the registered shareholders and the directors of a company known as Guan Joo Engineering Works & Building Pte Ltd ('GJEWB' or 'the Company') which is the third defendant.

2. In 1975 of 1977, five members of the Toh family agreed to start a business together with each contributing \$5,000 as the initial capital of the Firm. The five were:

- | | | | |
|-----|---|---|---|
| (a) | Toh Chuan Seng | - | the father |
| (b) | Toh Kim Hwee (passed away in February 1995) | - | the eldest son (his wife is Mdm Nou Siou Hue) |
| (c) | Toh Kim Tian | - | the third son (who is also the first defendant) |
| (d) | Tock Kim Yock | - | the fourth son |
| (e) | Toh Kim Chan | - | the fifth son (who is also the plaintiff) |

3. On 1 February 1977, a firm/partnership was registered for this business under the name 'Guan Joo Hardware Co' ('the Firm' or 'the Partnership'). The registered partners were Kim Yock and Kim Tian. On 2 March 1977, the wife of Kim Hwee, Mdm Nou Siou Hue, was registered as a partner of the Firm. Mdm Nou explained that her name was used because her husband was a partner of another business which was in financial difficulties. He did not want those financial difficulties to affect the Firm's business (see para 5 of her AEIC). However she was not involved in the Firm's business except to assist Kim Hwee (para 6 of her AEIC).

4. On 29 April 1981, Kim Yock's name was withdrawn as a registered partner although it is common ground that he remained a partner in substance. Kim Yock explained that his name was removed as a partner because his own business had closed down and he had several creditors. He did not want the Firm's business to be affected by his own failure (NE 49).

5. On 13 July 1984, the name of the Firm was changed to 'Guan Joo Engineering Works'.

6. It was not disputed that at all material times, the five individuals I have named were partners who had an equal interest in the business. As regards who was running the business, the evidence was not very clear. According to Kim Tian's AEIC (para 5), he had run the business. According to Kim Chan's statutory declaration, the business was initially managed by Kim Hwee and Kim Tian until its name was changed to Guan Joo Engineering Works, after which Kim Tian managed the business. Then according to Kim Chan's AEIC (para 12), the business was initially managed by Kim Hwee only. This point was not investigated in cross-examination. It seems to me that Kim Tian was running the business from the time its name was changed to Guan Joo Engineering Works, on 13 July 1984, if not earlier. However, it was not disputed that the partners who worked for the Firm received fringe benefits, like cars which were paid by monies of the Firm, in addition to payments for their work. Whether such payments were in substance salaries or not is another matter. There were also advances to partners which were recorded as loans. They were not of equal amounts and it was Kim Tian who was in charge of the fringe benefits, payments for work done and advances. In addition, the father received monthly sums of money from the business.

7. On 4 April 1996, GJEWB was incorporated on the instructions of Kim Tian. Although Kim Chan suggested that this was done without consultation with anyone else (see his AEIC para 17), his own statutory declaration of 13 December 2001 states that the reason Kim Tian gave for converting the Firm to a private limited company was for limited liability (see his AEIC p 9). This was repeated in Kim Chan's solicitors' (Loke & Co) letter dated 28 December 2001 to Kim Tian and Mdm Ang (see Kim Chan's AEIC p 16). Indeed that letter also states, inter alia, 'You have managed to convince the rest to only registering it [the company] in two names only ... for convenience purposes'. Furthermore, Kim Chan's witness Toh Kim Chiew said that he did advise Kim Tian to convert the Firm into a private limited company (NE 75).

8. Kim Chiew is the seventh son. He was not a partner of the Firm and has no direct interest in the present dispute. However, apparently, he is the most highly educated and has the widest working experience among the siblings. He has worked for multi-national corporations and overseas. He is on amicable terms with his siblings and he has been used as an intermediary by the opposing camps.

9. At this stage, I would mention that of the five partners, the father Chuan Seng appears to be neutral. Kim Hwee passed away in February 1995 and his interest was treated by all as having vested in his wife Mdm Nou. She has sold her interest to Kim Tian but she was a witness for Kim Chan. Kim Yock is on the side of Kim Chan. The fifth partner is Kim Tian himself. However, some other siblings, although not partners of the Firm, are taking the side of Kim Chan. In total, there were eight sons and five daughters (before Kim Hwee passed away in February 1995) in Chuan Seng's family.

10. Coming back to GJEWB, the company was incorporated on 4 April 1996. According to Kim Tian, the business of the Firm was transferred to GJEWB and the Firm ceased business on 30 April 1996. The first two shareholders of GJEWB were Kim Tian and Mdm Nou each holding one share. These were the same two persons who were the remaining registered partners of the Firm, since Kim Yock's name was removed as a partner on 29 April 1981. Mdm Ang, who is Kim Tian's wife, became a director on 2 May 1996.

11. According to para 11 of the Amended Statement of Claim, Kim Tian had promised that once GJEWB was 'stabilised', he would make the father (Chuan Seng), Mdm Nou, Kim Yock and Kim Chan directors and equal shareholders of GJEWB. In so far as Mdm Nou is concerned, this alleged promise cannot be correct because she was holding one share out of two shares when GJEWB was incorporated and she was already one of two directors at the date of incorporation.

12. In para 18 of Kim Chan's AEIC, he says that as Kim Tian and his wife refused to accede to his requests, he had no choice but to instruct a lawyer (meaning Loke & Co) to send a letter of demand to them. Eight statutory declarations from eight people, including one from Kim Chan, were enclosed with the letter of demand. In Kim Chan's statutory declaration, he said that Kim Tian promised that he would make the father and Kim Chan directors and shareholders after GJEWB stabilised. The father and Kim Chan trusted Kim Tian to honour his words. However, there is no mention in Kim Chan's statutory declaration about the promise to make Kim Yock a director and shareholder of GJEWB.

13. Furthermore, Loke & Co's letter dated 28 December 2001 only referred to a promise of Kim Tian that the father and Kim Chan would be made shareholders once GJEWB had stabilised. There was no mention in Loke & Co's letter of making these two persons directors

and again no mention about making Kim Yock a director or shareholder.

14. In cross-examination, Kim Chan said he could not remember when the promise (as alleged in the Amended Statement of Claim) was made. He initially said that the promise was made to four of his elder brothers but then said that it was made to their father, Mdm Nou and Kim Yock. He claimed to be present when Kim Tian made the promise to Kim Yock and Mdm Nou (NE 12 to 13). However, the father did not give any evidence. As for Kim Yock, his AEIC did not elaborate on this alleged promise. Neither did his oral evidence. Mdm Nou's AEIC also did not elaborate on this alleged promise. Neither did her oral evidence.

15. Coming back to Kim Chiew, it was his evidence during cross-examination that when there was a discussion about carrying on the business of the Firm through a company, he asked Kim Tian whether he was going to include the names of the other partners as shareholders. Kim Tian's reply was that it would be easier to effect the transition by using the names of the same two persons, who were named as partners of the Firm, as shareholders of the Company (NE 77 and 78). There was no suggestion by Kim Chiew of any promise by Kim Tian at that time to make the rest of the partners directors in the Company.

16. According to Kim Tian, there was no such promise of making the others directors or registered shareholders. He claimed that he did not give any thought to the question of making the other partners registered shareholders as he had never denied that they were beneficial shareholders in the Company (para 10 of his Amended Statement of Claim and para 12 of his AEIC).

17. I prefer the evidence of Kim Chiew that he did ask Kim Tian as to whether the other partners would be registered as shareholders and Kim Tian's response was that it would be easier to effect the transition by using the same names of those who had been the registered partners. However, I also find that Kim Chan has not made out his allegation that Kim Tian had promised to make the other partners directors, as well as shareholders, once GJEWB had stabilised. For example, there would be no reason to make that promise in respect of the father who did not appear interested even in being a registered shareholder, let alone a director. I also doubt if either Kim Yock or Kim Chan himself had any interest then, i.e 1996, in being a director when all along neither was involved in management of the business.

18. After GJEWB was incorporated, it took over the business of the Firm. Mdm Ang became its third director on 2 May 1996. Although Kim Tian sought to explain why he made her a director instead of one of the other partners, I need not decide whether I believe his explanation. On 11 June 1996, 89,999 new shares in GJEWB were issued to Kim Tian and 9,999 shares were issued to Mdm Nou which meant that Kim Tian had a total of 90,000 shares and Mdm Nou 10,000 shares registered in their respective names. On 9 June 1997, Kim Tian transferred 30,000 of the shares registered in his name to Mdm Ang.

19. In or about October 1999, Kim Tian bought out Mdm Nou's beneficial interest for \$30,000. I presume that she then transferred the 10,000 shares in her name to Kim Tian. Then, in July 2001, Kim Tian terminated the services of Kim Chan who had been working for GJEWB. Their relationship had been strained for some time. On 31 January 2002, Kim Chan's present action was filed by way of a Writ of Summons.

20. Kim Chan's various claims were presented in a rather haphazard and convoluted manner. For example, in para 18 of his Amended Statement of Claim, he sought an order for GJEWB to be wound up on the grounds of oppression and unfair discrimination as well as the just and equitable ground. Presumably he was relying on s 216(1)(a) and (b) of the Companies Act as well as s 254(1)(i). However, there appeared to be no regard then to the fact that an action under s 216 should be commenced by way of an Originating Summons and an action under s 254 should be commenced by way of a Petition. Then, in closing submission, his Counsel Mr Peter Low, did not pursue these claims or seek a winding up of GJEWB. Indeed he said that Kim Chan was not even a registered shareholder of GJEWB, which is true.

21. In closing submission, Mr Low sought various reliefs. For present purposes, I will refer to the reliefs stated in his Section F which appears to be a summary of reliefs sought and the reasons. The reliefs sought were:

(a) A declaration that Kim Tian and Mdm Ang are trustees of Kim Chan's 20% share in the Partnership (even though Mdm Ang was never a named partner or held any management position in the Partnership).

(b) A declaration that Kim Chan is entitled to 20% of the business, assets and profit of the Partnership and of GJEWB.

(c) An order that an account and inquiry be taken and made of the matters prayed for in para 22(6) of the Amended Statement of Claim and para 1(4) of his closing submission. In short, he was seeking an order in terms of para 22(6)(a) to (c) and (e) to (g) but (g) deals with payment of CPF contributions and should be treated separately.

(d) An order that Kim Tian and Mdm Ang purchase Kim Chan's 20% share in the Partnership and in GJEWB (notwithstanding that the business of the Partnership had been taken over by GJEWB) and consequential orders on valuation.

(f) Consequential orders to protect the interests of the other partners and Kim Chan, and access to documents. Access to documents is already covered under (c) above (i.e para 22(6)(e) of the Amended Statement of Claim) but it was not clear what consequential orders were being sought to protect the interests of other partners and Kim Chan.

(g) Costs.

Claim for a declaration that Kim Tian and Mdm Ang are trustees of Kim Chan's 20% share in the Partnership

22. As Mdm Ang was not a named partner, it is not appropriate for Kim Chan to seek a declaration that she is a trustee of his share in the Partnership.

23. As for Kim Tian, I will make a declaration that he holds Kim Chan's 20% share in the Partnership in trust for Kim Chan but that does not mean that Kim Tian is a trustee for all matters in connection with the Partnership. I will elaborate on this point later.

Claim for a declaration that Kim Chan is entitled to 20% of the business, assets and profit of the Partnership and of GJEWB

24. I will treat the claim for a declaration that Kim Chan is entitled to 20% of the business, assets and profit of the Partnership and of GJEWB together with the claim for an accounting and an inquiry.

Claim for an accounting and an inquiry

25. This claim for an accounting and an inquiry is set out in para 22(6)(a) to (c) of the Amended Statement of Claim. Paragraph 26(e) is a claim for an order regarding access to documents and 26(f) is in respect of an order for interim payment. These provisions seek:

(a) an account of the credits, property, assets and effects belonging to:-

(i) GUAN JOO ENGINEERING WORKS; and

(ii) GJEWB;

(b) an account of all receipts and payments, dealings and transactions of Kim Tian and Mdm Ang in respect of the businesses of:-

(i) GUAN JOO ENGINEERING WORKS; and

(ii) GJEWB;

(c) an inquiry as to what has become of the property, assets and effects of:-

(i) GUAN JOO ENGINEERING WORKS; and

(ii) GJEWB;

(d) ...

(e) an order that Kim Tian and Mdm Ang do give Kim Chan access on demand to and a copy each of (as may be desired) all books, vouchers and other documents in their possession or power relating to the said accounts;

(f) an order that Kim Tian and Mdm Ang do pay Kim Chan the sum of \$500,000.00 as an interim payment on account of the sums payable in respect of the above mentioned accounts (the claim for \$500,000 as an interim payment has been reduced to \$50,000) ...

It was not clear how far back Kim Chan was seeking the accounting and inquiry to extend to.

26. Mr Cheong Gay Eng, Counsel for Kim Tian, resisted the claim for an accounting and an inquiry on the basis that Kim Chiew had been asked by the other partners to look at the accounts since 1992 or 1993 and Kim Tian had acceded to this. Alternatively, if Kim Tian was required to account, this should be limited to no more than six years from the date of the Writ in view of s 6(2) and 2(6)(a) of the Limitation Act (Cap 163).

27. Mr Cheong also relied on acquiescence and delay under s 32 of the Limitation Act. He submitted that it was 25 years later, i.e from 1977, when Kim Chan instituted the present action and Kim Chiew had been reviewing the accounts at the request of his father and brothers every year. However, I note that Kim Chiew clarified in cross-examination that he reviewed the accounts from 1992 or 1993 only (NE 76). It was also Kim Chiew's evidence that when he reviewed the Firm's accounts in 1994 and 1995 and when the business was to be transferred to the Company that he noticed that a cash balance of \$200,000 had disappeared from the accounts. I will say more about this later.

28. I also note that there was no suggestion that Kim Chan or any of the other partners had asked for an account before 1992. Even Kim Chan himself said that the first time he asked for an account was in 1992 or 1993 (NE 14).

29. To counter Mr Cheong's alternative argument that any account should be restricted to no more than six years prior to the commencement of the Writ, Mr Low relied on s 22(1) of the Limitation Act regarding an action by a beneficiary under a trust.

30. Secondly, Mr Low submitted that there had been no termination of the Partnership and that Kim Tian did not say that the Partnership had been terminated and no particulars thereof had been given. Relying on Halsbury's Laws of England, 4th Ed, Vol 28, para 699, he submitted that when an account is claimed between partners, the statute of limitation does not run until the partnership is determined.

31. Thirdly, Mr Low submitted that since Kim Tian claims that there have been payments to the other partners, time begins to run only from the date of the last payment under s 26 of the Limitation Act. However, Mr Low did not elaborate as to when the last payment by Kim Tian was and he said this was supposed to be in the knowledge of Kim Tian.

32. As for acquiescence, Mr Low submitted that there was no acquiescence as there were quarrels because Kim Tian refused to give an account. He relied on the fact that there was a family meeting in or about 1997 to resolve differences. Mr Low also submitted that acquiescence is no defence to a claim by beneficiaries for an account by trustees of trust property.

33. In my view, Mr Low's submissions have lumped the Partnership and the Company together. They should be considered separately as the Company is a separate legal entity from the persons purportedly to be its shareholders.

34. As regards the Partnership, I am of the view that Kim Chan's position cannot be better than that of a sleeping partner whose name has been registered as a partner. What Kim Chan may be entitled to is an account by Kim Tian of the Partnership's assets, but the prima facie liability to account does not make Kim Tian a trustee of whatever he may be liable to pay to Kim Chan, after the taking of an account.

35. For example, Partnership Law by Geoffrey Morse, Fifth Edition, p 134, states:

‘In modern terms partners are said to be in a fiduciary position towards each other, which is to say that, in addition to their common law duties of care to each other, they owe each other duties as if each were a trustee and the other partners were beneficiaries under a trust. They are not actual trustees of course, although in special cases they may be, but they have similar obligations. Sometimes such fiduciaries are described as being constructive trustees but this may not always be accurate since it suggests that the trustee/partner is always the legal owner of something of which the other partners are the beneficial owners (as under a trust), whereas in reality a fiduciary liability often only gives rise to a duty to account for profits etc. made in breach of those duties. The distinction is important - if the partner concerned becomes insolvent and he is a constructive trustee for another his creditors will be unable to claim the relevant asset. This is not so if he merely has a duty to account which is an equitable remedy and not a proprietary right.’

[Emphasis added.]

36. Lindley & Banks on Partnership, Eighteenth Edition, p 612 and 613 states:

‘Account normally required between partners

It is a well recognised rule that, whenever money allegedly belonging or owing to the firm in respect of a partnership transaction is sought to be recovered from a partner, an action for an account is required, unless an account has already been taken between the partners or, exceptionally, taking an account would serve no useful purpose. In such an action, it will, of course, be open to the defendant partner to show that the money is his or even that a larger sum is due to him.

Where, on the other hand, a claim is made by one partner against another in some other capacity, e.g as trustee, this principle may not apply. Such was the position in *Hurst v. Benneth*. There, following a dissolution, four partners who were trustees of the firm’s lease sought to enforce an express indemnity against one of the other partners (H) by means of a statutory demand. An attempt to have the statutory declaration set aside on the basis that money might be due to H on the taking of dissolution accounts was rejected.’

37. Therefore, it is not sufficient for Kim Chan to assert that Kim Tian is a trustee of Kim Chan’s share in the partnership. In my view, the prima facie liability of Kim Tian is to account but not as a trustee. Following from this, it seems to me that the applicable provision regarding limitation is s 6(2) of the Limitation Act and not s 22(1). Secondly, I do not agree with Mr Low that there had been no termination of the Partnership. True, there was no formal termination of the Partnership but, in my view, that was not necessary. All the partners must have known about the incorporation of GJEWB and the transfer of the business from the Partnership to GJEWB as this was done openly, and indeed, on the advice of Kim Chiew as I have mentioned. In my view, the Partnership had effectively ceased or had been effectively terminated in April 1996. Thirdly, as regards payments to other ‘partners’, I am of the view that Kim Chan’s case on limitation is not better just because the payments were continued. The Partnership had ceased and other payments were made from the monies or profits of the Company, not the Partnership. Even if I were wrong about the application of s 6(2), s 32 of the Limitation Act preserves the court’s equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise. For convenience, I set out the provisions which are s 6(2), s 22(1) and s 32:

Section 6(2)

‘(2) An action for an account should not be brought in respect of any matter which arose more than 6 years before the commencement of the action.’

Section 22(1)

‘22. (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a

trust, being an action -

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.'

Section 32

'32. Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.'

[Emphasis added.]

38. As for acquiescence, I do not accept Mr Low's argument that acquiescence is no defence to a claim by beneficiaries for an account by trustees. It can be a defence, just as delay with knowledge or laches can be a defence. Mr Cheong relied on a few cases regarding acquiescence or delay but I need refer only to one i.e *In re Jarvis, Decd. Edge v Jarvis* [1958] 1 WLR 815.

39. In that case, a testator by his will appointed his daughters E and J, the plaintiff and the defendant respectively, to be his executors and trustees, and gave them his business as a tobacconist, confectioner and newsagent at No 7 W. Road. The Will provided that the gift of the business was subject to the payment by E and J of annuities to the testator's wife and, on her death, to another of his daughters. The will did not give any power to the executors to carry on the business. I now quote from the rest of the headnotes:

'At the date of his death, on September 17, 1941, the testator was in occupation for a term of three years expiring on March 25, 1944, at a rent of 70 per annum. The premises had been badly damaged by enemy bombing in 1940 and virtually no business was carried on until they were completely restored in 1944. The plaintiff took little part in the administration of the estate, but the defendant paid the business debts out of her own pocket as far as necessary, the business being insolvent at the date of the testator's death and the debts exceeding the assets by about 350. The defendant had her own business of a similar nature at No. 230, T. Road, which was nearby. The landlords of No. 7, W. Road sued the plaintiff and the defendant for arrears of rent and possession and obtained judgment by default in 1943. The defendant paid off the judgment debt by instalments. In May, 1944, the landlords granted her a new tenancy on substantially the same terms as the testator's tenancy, and she ran the business jointly with that at No. 230, T. Road. In April, 1951, the plaintiff issued a writ claiming an account in respect of the defendant's occupation of No. 7, W. Road, and of the profits of the business carried on there. The defendant conceded that she was a constructive trustee of the leasehold interest for herself and the plaintiff in equal shares but argued that the plaintiff's claim was barred by her laches, acquiescence and delay:-

Held, (1) that the plaintiff was entitled, in spite of her delay, to an inquiry as to what rent, if any, the defendant ought to be charged year by year in respect of her beneficial occupation of No. 7, W. Road.

(2) That, subject to laches, the defendant was accountable as a constructive trustee for the business and its profits subject to all just allowances for her own time, energy and skill, for the assets she had contributed, the testator's debts she had paid and for her mother's annuity.

(3) But that the plaintiff was barred by laches from relief on the claim to the business, since, although she was fully aware of her rights, she took no step to assert them until the issue of the writ in 1951, and the principles applicable were quite different from those applicable in the case of a specific asset, such as a lease.'

40. At p 820 and 821, Upjohn J said:

‘Then as to laches, acquiescence and delay for six years before the issue of the writ, the plaintiff has stood by and observed her sister running the business, incurring debts and liabilities, paying her mother 10 a month, and in 1948 transferring assets and business from No. 230, Trafalgar Road to No. 7, Woolwich Road. In that connexion, it is, of course, a remarkable circumstance, strongly relied on by the plaintiff, that the last transfer of assets took place after the issue and service of the writ. The defendant’s venture at No. 7, Woolwich Road has in fact proved remarkably successful. Until the issue of the writ in 1951, the plaintiff, I am satisfied, made no claim whatever but was paid a weekly wage as a counter assistant at No. 230, Trafalgar Road. It is possible that she took some small part in the administration of No. 7, Woolwich Road by helping with the accounts, but that was a very small matter. Furthermore, although permitting her sister and Edge to reside at No. 230, Trafalgar Road may be attributed to sisterly love on the part of the defendant, it is in my judgment a circumstance which I ought to bring into the scales that the defendant permitted the plaintiff to open her own business at No. 230. All this time the plaintiff was fully aware of her rights but took, I am fully satisfied on the evidence, no step to assert them or to claim at all until the issue of the writ.

...

The plaintiff is seeking to say that the defendant has been a trustee for her of one moiety of this highly successful business, although she has never been at risk for one penny. I have been referred to a number of textbooks and authorities on this question of laches, acquiescence and delay, but I forbear from referring to them, for in this realm of law each case depends so much on its own facts that the citation of other cases having some points of similarity and some of difference does not really assist. I do not overlook the circumstance that the plaintiff has said she could not afford a solicitor; but I have to try to do justice to both sides. In my judgment, on the whole of the circumstances of this case, in relation to the business the plaintiff by waiting until 1951, has not been sufficiently prompt in seeking her remedy, and this part of the action fails.’

41. In the case before me, Kim Chan knew that Kim Tian had been managing the business of the Partnership. Indeed Kim Chan himself was working for the business since 1991 until 1999. He had received remuneration. He was provided with a car and then a replacement car. I find that he knew that Kim Tian had provided himself a better or more valuable car. He also knew that various personal expenses of the partners were paid from monies of the business, advances were given to various partners from time to time and his father was receiving monies from the business on a monthly basis, although Kim Chan probably did not know all the details. Kim Chan did not complain or ask for an account until 1992 or 1993 or so he says. What he, and the others did, was to ask Kim Chiew to review the accounts for them from 1992 or 1993 and even after GJEWB was incorporated. Kim Chan did not take any action until after his services were terminated in 1999.

42. As for Kim Chiew’s review of accounts, there was no evidence as to how much time he had spent or the details he had gone into, if at all. I am of the view that it was probably a simple exercise which might pick up a deficiency which was obvious but not if it was otherwise. I do not think it constituted a settled account as between the partners such as to preclude Kim Chan from seeking an accounting at all.

43. Lindley & Banks on Partnership, Eighteenth Edition, p 626 states:

‘Nature of settled account

An account which has been agreed between the partners, conventionally referred to as a "settled account" or, more inaccurately, as an "account stated," naturally constitutes a good defence to an action seeking a further account of any transactions or dealings covered thereby. Lord Lindley summarised the requirements for a settled account as follows:

"No precise form is necessary to constitute a stated and settled account; but

an account stated, unless it be in writing, is no defence to an action for a further account. It is not, however, necessary that the account should be signed by the parties, if it can be shown to have been acquiesced in by them; and an account may be stated and settled, although a few doubtful items are omitted."

However, merely rendering an account is clearly not sufficient to deprive the claimant of his right to have the same account taken under the direction of the court: he must be shown both to have received and acquiesced in the account. Moreover, such acquiescence must relate not only to the principles on which the account was prepared, but also to be items included in it.'

44. Besides, Kim Tian's Amended Defence did not plead that Kim Chan was precluded from seeking an account because Kim Chiew had been reviewing the accounts. On the contrary, paragraph 12(2) of his Amended Defence pleads that at no time did the others request for an account.

45. I have mentioned above Kim Chan's evidence that when he reviewed the Partnership accounts in 1994 and 1995 and when the business was to be transferred to the Company, he noticed that a cash balance of \$200,000 had disappeared from the accounts. I would add that in Kim Chiew's AEIC, he also said that he asked Kim Tian of the whereabouts of the \$200,000 but did not receive any reply. He said he warned Kim Tian that he would be held liable and responsible for the \$200,000. In cross-examination, he elaborated at NE 81:

'Q Put: Your AEIC para 9. You did not say this.

A Disagree. Because of this accounting problem, I had a heated argument with Kim Tian in his office. His eldest son was also present as he was helping out in the office then. Kim Tian was so heated up and it looked like he wanted to fight with me. His son had to calm him down. With the loud noise caused by Kim Tian banging on the table, Kim Ann who was working downstairs in the factory heard the noise and came upstairs to check whether we were fighting or not.'

46. Mr Cheong sought to persuade me that I should not accept Kim Chiew's evidence about the missing \$200,000. Mr Cheong's first point was that there was a discrepancy in Kim Chiew's evidence because in Kim Chiew's AEIC, he had said that he had learned about the missing \$200,000 after the Partnership was converted into a company but in cross-examination, his evidence was that he noticed this when he went to an accountant's office with Kim Tian before the Company was incorporated and Kim Tian was presenting the accounts of the Partnership to a new accountant.

47. Mr Cheong's second point was that Kim Chiew's evidence was that the document from which he saw the \$200,000 cash balance was prepared by an accountant by the name of Kim Seng. However, the Partnership was registered as a GST business in 1994 and the accountant had been changed since then as Kim Seng was not qualified to do accounts for GST registered businesses. So, according to Mr Cheong, it could not be Kim Seng who had prepared the Partnership accounts from which Kim Chiew allegedly noticed the \$200,000 cash balance.

48. Mr Cheong's third point was that Ms Toh Chwee Kian, who was in charge of the accounts of the Partnership, did not corroborate Kim Chiew's evidence in that she did not assert that there had been a cash balance of \$200,000.

49. Mr Cheong's fourth point was that there was no documentary evidence of the \$200,000 which supposedly went missing.

50. In my view, the discrepancy in Kim Chiew's evidence as to when he noticed the \$200,000 balance was missing is not material bearing in mind that the event occurred several years ago and Kim Chiew is not involved in the business.

51. As regards the question of who prepared the document from which Kim Chiew first noticed a cash balance of \$200,000, Kim Chiew believed it was prepared by Kim Seng but admitted candidly that he was not sure whether it was Kim Seng. In my view, the real question is whether Kim Chiew did see a cash balance of \$200,000 in the accounts of the Partnership when he was reviewing them, irrespective of which accountant or book-keeper prepared the accounts. If he did see that cash balance, Kim Tian cannot disavow the accounts reviewed by Kim

Chiew as it was Kim Tian who allowed Kim Chiew to review the accounts. In my view, Kim Chiew was the most objective witness before me. Not only is he a neutral party whom everyone else in the family would otherwise trust, his demeanour and the substance of his evidence on the whole showed that he was sincere and was not given to making such an important assertion lightly. True, he did also make mistakes in some other parts of his evidence but he did not hesitate to accept the truth when the mistakes were pointed out to him. However, he was certain about the existence of the \$200,000 cash balance from one set of accounts which item went missing when he reviewed another set of accounts. I see no reason to reject Kim Chiew's evidence on this point.

52. The fact that Ms Toh Chwee Kian did not notice a cash balance of \$200,000 is neither here nor there. She was only a general clerk for the Partnership and later the Company. Her duties included recording of all sales, whether cash or credit. However, she would make a record based on invoices passed to her by Kim Tian. As she herself said in her AEIC, if no invoice was rendered for a transaction, she would not be aware of the transaction. It is clear to me that she is not privy to all the transactions or all the financial details of the Partnership or the Company. For example, she does not know the true extent of the revenue and expenses and hence the profit or the cash balances from time to time.

53. As for the absence of documentary evidence regarding the \$200,000 cash balance, it is not surprising that Kim Chiew could not produce any documentary evidence as Kim Tian is the one who controls access to documents. Now that there is litigation, Kim Tian is not going to produce a document which will prove wrongdoing on his part.

54. I find that the Partnership had a cash balance of \$200,000 but this went missing before the Partnership was converted to the Company. This brings me to another point. Kim Chan alleged that Kim Tian had not accounted for the profits from the sale of scrap metal. Kim Tian did not dispute that there were such sales but he denied they were of the magnitude suggested by Kim Chan. Kim Tian alleged that such sales should have been recorded but 'there must be times that some of these were not recorded unintentionally' (see his AEIC at para 13).

55. According to Chwee Kian, the accounting records which were produced to her did not reveal all the sales. She said she had seen a small notebook with '555' written on it in which the cash sale of scrap metal was recorded (NE 70 and 71). In response during the trial, Kim Tian produced some notebooks with '555' on them but these notebooks contain entries of a different nature, like advances to various persons. They did not have any entry of cash sales of scrap metal. Moreover, Kim Tian did not elaborate as to where the notebooks or other source documents of such sales were kept or how one could try and match the sales recorded in the books or other source documents with those recorded in the formal accounting records of the Partnership or vice versa.

56. Kim Tian had also said in cross-examination that cash had been deposited into the bank account of the business but later retracted his evidence when a bank statement of account for 1996 showed no evidence of any cash deposit (NE 96). In my view, whether the cash derived from the sale of scrap metal or other activities of the business make up the \$200,000 and whether there is some more cash unaccounted for is a matter which is within Kim Tian's knowledge but not in the knowledge of the other partners or Kim Chiew.

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.

58. I now come to the question of an accounting in respect of GJEWB. I am of the view that Kim Chan's rights as an unregistered shareholder cannot be better than those of a registered shareholder. Had he been a registered shareholder, he would not be entitled to an accounting or be entitled to be given access to accounting records and supporting documents other than the usual financial statements required by law, although it may be sensible for Kim Tian to allow such access in view of the background leading to the business being transferred to

the Company. If Kim Chan is pursuing an action for oppression and/or unfair discrimination under s 216(1)(a) and/or (b) of the Companies Act or an action to wind up GJEWB on the ground that it is just and equitable to do so under s 254(1)(i) of the Companies Act or under some other relevant ground, he may then apply to court for an accounting or access to accounting records and supporting documents and at that time the court will decide whether to grant his application. I need not decide whether Kim Chan must be a registered shareholder before he is entitled to pursue such actions because, at present, he is not pursuing such actions.

59. Aside from any of the actions I have mentioned, Kim Tian owes a duty to act in good faith and a duty of care to GJEWB but not to Kim Chan. As Mr Cheong has rightly pointed out, it is GJEWB, and not Kim Chan, who is entitled to take any action against Kim Tian for any default of his vis-à-vis GJEWB.

60. Likewise, as a shareholder, whether registered or not, Kim Chan is not entitled to be paid 20% of the profits or the assets of GJEWB, unless the Company is wound up. For example, it is for the directors to decide how much of the profits is to be distributed to the shareholders by dividends. As I have mentioned, there was no agreement to make Kim Chan a director. In the absence of an agreement, a shareholder has no right to be appointed as a director of a company. Whether the failure to appoint Kim Chan as a director is an oppressive act in the light of the background leading to the incorporation of the Company is a matter I need not go into at present.

61. In the circumstances, I will also not direct Kim Tian, or GJEWB to make Kim Chan or Kim Yock co-signatories of the cheques of the Company or injunct Kim Tian from disposing of or dealing with the assets of GJEWB as was suggested under Section A of Mr Low's closing submission (it is not clear whether these were the consequential orders sought under Section F of Mr Low's closing submission in the context of protecting the interest of other partners and Kim Chan). Should Kim Tian be minded to act in a manner contrary to his, and Mdm Ang's duty, to the Company, he, and Mdm Ang, will have a civil liability and, perhaps a criminal one as well. On the other hand, if Kim Chan is still concerned about wrongdoing by Kim Tian, then Kim Chan and his solicitors should get their act together and focus on the correct steps to be taken to protect Kim Chan's interest.

Claim for an order for access to be given to Kim Chan to all books, vouchers and documents

62. In the light of the orders that I will be making, as stated above, I will also be ordering Kim Tian to give Kim Chan and any accountant appointed by him access to all accounting records and supporting documents and to allow them to make copies or provide copies to them upon reasonable copying charges being paid, subject to the cut-off date I have mentioned. Kim Tian is also to give such consent as may be required by any auditor and/or accountant and/or book-keeper of the Partnership to divulge information or disclose documents to Kim Chan and his accountant as may be reasonably required for the purpose stated above.

Claim for an order for interim payment of \$50,000 to Kim Chan

63. I am of the view that it is pre-mature to make an order for interim payment to Kim Chan.

Claim for an order that Kim Tian and Mdm Ang do pay Kim Chan CPF

64. As regards the Partnership and the Company, I am of the view that Kim Chan was really an employee and not a sub-contractor, as alleged by Kim Tian. However, I am also satisfied from the evidence before me that Kim Chan had agreed to receiving and did receive cash in lieu of the employer's CPF contributions and there was no deduction from his salary for the employee's portion of CPF contribution. For example, Exhibits P2 and P3 are envelopes which contain cash received by Kim Chan. There are figures written on each envelope. For Exhibit P2, the envelopes have a figure for CPF. For Exhibit P3, the envelopes do not have the word 'CPF', but Kim Chan nevertheless admitted that the payment he received, included CPF (NE 35). Although this payment arrangement is contrary to the law, Kim Chan should not be allowed the relief he seeks in respect of employer's CPF contribution since he was, as I find, a willing party to it. I also note that he did not offer to return the cash he had received that was in lieu of the employer's and employee's contribution.

65. Besides, any payment of CPF contribution is to be made by the Partnership or the Company, as the case may be. It is not the personal liability of the person managing the business. Whether the manager is in breach of his duty of care is another matter. I would add that nothing I say here is to affect the right of the relevant statutory authority to act under the relevant law.

Claim for an order that Kim Tian and Mdm Ang purchase Kim Chan's 20% share in the Partnership and GJEWB

66. As I have mentioned, the business of the Partnership has been taken over by the Company. Since Kim Chan is not pursuing an action under s 216 Companies Act, I do not have any jurisdiction to compel Kim Tian or Mdm Ang to buy Kim Chan's 20% stake in GJEWB. The case of *Yeo Hung Kiang v Dickson Investment (Singapore) Pte Ltd and Ors* [1999] 2 SLR 129, which Mr Low relied on, is based on oppression. Although Kim Tian had indicated a willingness to buy Kim Chan's stake, I note that this was to be based on a valuation of certain physical assets which valuation Kim Tian had obtained and, as regards the rest of the assets, it seemed that Kim Tian did not want any investigative audit and the figures in the accounting records of GJEWB were to be accepted at face value. Kim Chan has not accepted that suggestion.

67. However, I will make an order that Kim Tian is to transfer or cause to be transferred to Kim Chan 20% of the issued shares of GJEWB, with the transfer expenses including any valuation for stamp duty and the stamp duty itself being paid by Kim Chan. The transfer is to be effected within 14 days of a notice from Kim Chan (or his solicitors) to Kim Tian (or his solicitors) that Kim Chan wishes to have the shares transferred to him or such other extended time as Kim Chan (or his solicitors) may agree to in writing. Kim Tian is then also to take all necessary steps to procure the issuance of a share certificate or certificates to Kim Chan for his shares and to ensure that he is registered as a shareholder of GJEWB for his shares in the share register of GJEWB.

Summary

68. In the circumstances:

- (a) I declare that Kim Tian holds Kim Chan's 20% share in Guan Joo Engineering Works in trust for Kim Chan.
- (b) I order Kim Tian to give an accounting and there is to be an inquiry as stated in paragraph 57 above.
- (c) I order that Kim Tian is to give access to documents and to give his consent as stated in paragraph 62 above.
- (d) I order Kim Tian to transfer or cause to be transferred to Kim Chan 20% of the issued shares of GJEWB on the terms stated in paragraph 67 above.
- (e) Liberty to apply.

69. The claims against Mdm Ang Kiang Hua are dismissed. I make no order against GJEWB. I will hear the parties on costs of the action.

Sgd:

WOO BIH LI

JUDICIAL COMMISSIONER

SINGAPORE

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