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Heament Kurian
v
Lian Foo Kuan David

[2016] SGHC 43

High Court — Suit No 1111 of 2014
Debbie Ong JC
27, 28, 30 October; 18 December 2015

Partnership — Breach of fiduciary duty — Accounting

22 March 2016

Debbie Ong JC:

1 This case concerned a business venture (“the Business Venture”) between two close friends which, like the relationship between them, eventually broke down. The Business Venture was built on a relationship of close friendship and mutual trust, where matters tended to be conducted in an informal manner. Proper formal records were not kept and investment developments were discussed in somewhat casual ways.

Background facts

2 The plaintiff was the managing director of a multi-national company in Singapore. It is unclear as to when the plaintiff came to be acquainted with the defendant; the plaintiff said that he had been introduced to the defendant by a

mutual friend in 2009 when he was looking to sell his car, while the defendant stated that it was in 2006. In any case, it was not disputed that they became close friends over time. Their close friendship is demonstrated by the content of their exchange of messages over the WhatsApp platform, amongst other circumstances. The defendant had also assisted the plaintiff on numerous occasions, such as arranging for contractors to perform repairs to the plaintiff's home, mediating in respect of a dispute that the plaintiff had with his landlord, and helping the plaintiff to find a place to stay.

3 Through their interactions, the plaintiff came to know about the defendant's investments. The parties explored the idea of collaborating on other investments. Between February and April 2012, the parties met up multiple times, during which they discussed in greater detail the investment opportunities they could undertake. These did not appear to be meetings at which formal proposals were discussed. Instead, they were usually conducted at fast food restaurants, and involved the defendant sharing about his investment experiences and the parties exchanging views on investment opportunities. Eventually, in April 2012, they agreed to undertake the Business Venture on the following terms, amongst others:

- (a) The capital for the Business Venture would be provided by the plaintiff and the defendant in equal shares.
- (b) The plaintiff's share of the capital contributions would be limited to the funds that he could raise or obtain from the credit facilities obtained from the banks.

(c) None of the plaintiff's share of the capital contributions would be utilised or applied for the acquisition of assets other than for the Business Venture jointly agreed to by the plaintiff and the defendant.

(d) Any investment yields from any asset acquired for the Business Venture would be accountable to the partnership and divided equally between the plaintiff and the defendant.

4 Pursuant to the Business Venture, the plaintiff obtained credit facilities from a number of banks, through which \$536,000 was disbursed to his bank account between April and June 2012 ("the Loans"). At the same time, the plaintiff transferred at least \$497,830 of the Loans sums ("the plaintiff's contributions") from his bank account to a bank account held in the joint names of the defendant and his wife, for use as funds for the Business Venture. In turn, the defendant also transferred at least \$97,800 to the plaintiff between April and September 2012 which the plaintiff used to service the Loans. The defendant continued to transfer money to the plaintiff regularly until the parties fell out with each other sometime in March 2013.

5 How the plaintiff's contributions were applied was the major point of dispute between the parties, but it was agreed that at least some of this money was used for investments in properties in Malaysia. This included the acquisition of two cluster homes in a residential property development located at Taman Mount Austin in Johor Bahru, Johor, which were held by the plaintiff and the defendant as joint tenants ("the Austin Residences"), as well as a share in a commercial shop-house located at Kempas Town Centre in Johor Bahru,

Johor (“the Kempas Property”). A company, Global KPP Pte Ltd (“Global KPP”), was also incorporated in Singapore as part of the Business Venture.

6 Sometime in March 2013, the plaintiff and the defendant had a disagreement over the plaintiff’s plans to purchase a plot of land in a development in Johor known as the Leisure Farm. The defendant then stopped the transfers to the plaintiff who, through his solicitors, then sought an account of the assets acquired with the plaintiff’s contributions. This eventually culminated in the present suit being filed.

The parties’ respective cases

7 Initially, the parties appeared to dispute whether they were in a partnership relationship. Subsequently, this was no longer an issue as both parties proceeded on the basis that they were in a partnership relationship. The plaintiff alleged that the defendant had breached the duties he owed as a partner to the partnership and/or the terms of the partnership agreement. The acts which were said to be in breach included, amongst others, the following:

- (a) The sale of five gold bars (“the Gold Bars”), which the plaintiff said were investment property, by the defendant without the knowledge and consent of the plaintiff.
- (b) The defendant’s refusal to continue repayment of the Loans through the transfer of money to the plaintiff’s account.
- (c) The defendant’s failure to account for the application and receipt of the partnership funds and his unauthorised use of the funds for his personal benefit. Specifically, the defendant had failed to show that he

had matched the plaintiff's capital contribution as agreed between the parties.

(d) The defendant's misrepresentation to the plaintiff that virtual gold in the form of "shares" had actually been purchased from Virgin Gold Mining Corporation ("VGMC") as part of the Business Venture.

8 The plaintiff sought a number of orders, including:

(a) An order that the defendant pays and indemnifies the plaintiff for the repayment of the Loans;

(b) An order that the defendant accounts for the investment yields and the sale proceeds of the Gold Bars;

(c) An order to account for any assets acquired with partnership funds and investment yields derived from the plaintiff's contributions, and the remainder of the plaintiff's unutilised contributions;

(d) An order that the accounts of the partnership be determined and finalised; and

(e) An order for damages for the breaches alleged.

9 The plaintiff also sought an order that the partnership be dissolved and for such further and consequential orders, including orders that the Kempas Properties and the Austin Residences be sold and the proceeds distributed upon the accounts of the partnership being determined and finalised.

10 The defendant did not object to the partnership being dissolved and the accounts of the partnership being determined and finalised, but disagreed that he had breached any partnership terms or duties. The defendant asserted that the Gold Bars were his capital contribution to the business venture. There was therefore no obligation for him to make repayments for the Loans, as his contribution to the partnership capital was by way of the Gold Bars while the defendant's capital contribution was by way of the sums from the Loans. The defendant acknowledged that the Gold Bars were assets belonging to the Business Venture, but that the plaintiff had authorised his dealings in them. As for the VGMC shares, the defendant said that there was no misrepresentation as the Business Venture had in fact acquired at least 70,000 shares.

The issues

11 The plaintiff's case could be described as comprising two broad aspects – one relating to the terms of the Business Venture and the other relating to how the funds of the Business Venture were applied.

12 I observed that there was in fact a large area of agreement in terms of how the issues could be resolved. Both parties agreed to the partnership being dissolved and the accounts of the partnership to be determined and finalised. They also agreed to the Austin Residences and their share in the Kempas Properties being sold and the proceeds distributed thereafter. The partnership assets would then be distributed in accordance with the final accounts. Thus, what remained for determination were in respect of items (a) and (e) of the orders sought at [8] above and matters which would enable the accounting

report to be meaningful so that parties can receive the gains and bear the losses in accordance with their agreement.

13 A major point of contention between the parties that had to be resolved was the terms of the Business Venture, which would determine whether the defendant was in fact liable for the repayment of the Loans and the manner in which the partnership assets would be distributed. An ancillary point which also had to be determined was the quantum of the parties' capital contributions to the Business Venture.

14 There was also the matter of damages arising from the defendant's breaches as alleged by the plaintiff, but as the defendant pointed out, the plaintiff had, as at the end of the trial, led no evidence on losses suffered by the plaintiff outside of what would be reflected in the final accounts of the Business Venture. Indeed, the plaintiff's submissions only raised the prospect of damages being awarded in respect of the repayment of the Loans, which my findings on the terms of the Business Venture would deal with. Ultimately, the remedy that the plaintiff sought in respect of the application of the Business Venture funds was simply an account of the partnership dealings, which the defendant had already agreed to.

15 The trial spanned two and a half days. I noted that the evidence in respect of the application of the partnership funds was given in the main by the defendant because the defendant took the lead in investing the partnership monies. As a result of a close relationship of trust and confidence between the parties, the plaintiff entrusted the defendant with wide discretion to invest the money. Additionally, the parties did not institute a formal system for the

defendant to report to the plaintiff on how the monies were spent. Rather, any report to the plaintiff was made on an informal basis and often with little details. This left the plaintiff unable to challenge the defendant's evidence. Neither did the defendant always keep supporting documents for the expenditures; in some places, there was only the defendant's bare record of the expenditures.

16 Consequently, much of the evidence was given by the defendant. On the whole, I found that he was a credible witness who had been forthright in terms of the transactions that had transpired. However, not all of his account was supported by documentary evidence and I was of the view that the order of accounting of the partnership would assist the parties in obtaining and producing further relevant evidence as to the assets to be distributed. I therefore gave my observations on the usage of partnership monies which I felt the accounting report should address.

My Findings

The terms of the Business Venture

Capital contribution

17 The plaintiff said that the arrangement between the parties was such that he would first contribute the capital to the Business Venture through credit facilities that he secured, and that the defendant would pay towards the credit facilities until his capital contribution "matched" the plaintiff's. According to the plaintiff, the defendant would also bear half of the losses incurred by the Business Venture, as well as half of the plaintiff's losses over and on top of that. The cumulative effect of this was that the defendant would bear three quarters

of the losses. The defendant, on the other hand, said that they had agreed that he would match the plaintiff's capital contribution by way of 1kg gold bars that the defendant beneficially owned. One of such gold bars would be handed to the plaintiff whenever a sum equivalent to its value was transferred from the plaintiff to the defendant. The defendant's evidence was that five gold bars were ultimately handed over to the plaintiff (the Gold Bars referred to in [7] above). The defendant's position on their agreement on the sharing of profits or losses is that any gains or losses arising out of the Business Venture would be shared equally between the plaintiff and the defendant.

18 I found the plaintiff's account, both in relation to their respective contributions and to the profit or loss-sharing arrangement, to be unconvincing. In respect of the former, the plaintiff clarified during cross-examination that what he meant by the defendant matching his capital contribution was that the defendant would make the instalment payments for the Loans until the principal amount of \$536,000 was repaid. Therefore, according to the plaintiff, the obligation to repay the Loans lay solely with the defendant. This would mean, contrary to their agreement that capital would be provided in equal shares, all of the capital would be contributed by the defendant and the plaintiff stood to reap the rewards without having to put in a single cent. Between the parties' respective accounts, it was far more likely, as the defendant said, that the defendant would match the capital contribution of the plaintiff as ordinarily understood. The plaintiff contributed to the capital through obtaining the Loans, for which he retained the obligation to make repayments. Some of the Loans sums were transferred by the plaintiff to the defendant as the plaintiff's capital contribution to the Business Venture. The defendant, on his part, matched the plaintiff's contribution by contributing the Gold Bars.

19 I noted that the Gold Bars were held in the name of the defendant's mother, Ms Ong Choon Wan Francesca. Her evidence was that the defendant had merely borrowed her Identity Card to buy the Gold Bars in her name and that she had not contributed at all to the purchase. She acknowledged the defendant to be the beneficial owner of the Gold Bars, and there was little basis for the plaintiff to contend otherwise. It was important to note that some of the Gold Bars had already been purchased by 28 February 2012, before the parties entered into the Business Venture and before the plaintiff had obtained the credit facilities. This was incongruent with the plaintiff's account that the Gold Bars were acquired using his capital contribution.

Sharing of profits and losses

20 It was not disputed that the profits would be shared equally. As for how the losses would be borne by the parties, the plaintiff pointed to a written agreement between the parties, which stated:

LIAN FOO KUAN DAVID is liable to half of any losses in all investments inclusive AND HOLDING CASH OF SGD\$550,000 whether personal or partnership or under GLOBAL KPP PTE LTD.

21 The plaintiff argued that the above should be interpreted to mean that the defendant would bear half of the business losses and further, half of the portion of the plaintiff's losses. I disagreed with such an interpretation. A plain and reasonable reading of the term was that the parties would share the business losses equally, whichever form they may take, including losses personally incurred by the parties on behalf of the partnership. In my view therefore, the parties had agreed to share the profits and losses of the partnership equally. This

was also supported by a “WhatsApp” message from the plaintiff’s wife to the defendant, in which she stated that “[a]ll profit and los[s] are shared equally between both parties on the pool of 536k” and that the parties “own the risk and return together”.

22 Ultimately, I observed that the arrangement that the plaintiff claimed was entered into would have effectively resulted in him only having to obtain the credit facilities without bearing the obligation to repay or to contribute substantively to the Business Venture by providing funds. In return, he would receive half of the profits, but bear only 25% of the losses with the remaining 75% borne by the defendant. In the absence of any documentary evidence of such an agreement, I found it unlikely that an agreement between two equals would have resulted in such unequal terms. Accordingly, I held that the defendant had not breached any duty or the terms of the partnership agreement by his failure to repay or contribute to the repayment of the Loans.

The quantum of the parties’ capital contributions

23 The plaintiff submitted and the defendant agreed that the plaintiff had obtained credit facilities of the sum of \$536,000. Notwithstanding this, I was satisfied by the evidence adduced that the plaintiff had transferred more than this sum to the defendant. This total sum of \$591,830 consisted of:

- (a) \$497,830 transferred from the plaintiff to the defendant in six tranches between 30 April and 28 June 2012,
- (b) \$45,000, which the defendant accepts was transferred to him by the plaintiff in three tranches between 10 and 14 December 2012; and

- (c) \$49,000 transferred by the plaintiff to the defendant on 22 June 2012.

24 As for the sum of \$38,170 that the plaintiff claimed was also transferred to the defendant, I found that there was insufficient evidence to support it. The plaintiff had admitted during cross-examination that this sum of \$38,170 was “a balancing number”. This was derived from the difference between the sum of \$536,000 which the plaintiff borrowed from the banks and the sum of \$497,830 which the plaintiff transferred to the defendant during the first half of 2012. The plaintiff’s case was that he must have transferred all the money he borrowed from the banks to the defendant. However, in contrast to the above transfers, there was no documentary evidence of him having transferred \$38,170 to the defendant. All that the plaintiff could point to was a deposit slip evidencing a deposit of \$18,600 which, as he conceded during cross-examination, could not have come from the credit facilities given that it predated the credit facilities. I therefore disregarded this alleged sum in assessing the plaintiff’s capital contribution, which I found to be \$591,830 in total.

25 As for the defendant, my finding at [18]-[19] above meant that his capital contributions would be measured by the value of the Gold Bars. The “unit price” and “future buy-back value” of the Gold Bars as reflected in the invoices from Genneva Pte Ltd (“Genneva”) supported the defendant’s submission that they were worth \$95,000 each at the time of his contribution. Thus I found that the defendant had contributed \$475,000 (the combined value of the Gold Bars) to the Business Venture.

26 In view of my finding that the agreement between the parties was to make equal contributions to the partnership, in so far as one party had not met that agreement, he remained liable to make good the shortfall. Based on my findings as to the parties' respective capital contributions, I found that the defendant had not contributed a value equal to that contributed by the plaintiff. The defendant contributed \$116,830 (\$591,830 – \$475,000) less than the plaintiff. This amount should be taken into account in the distribution of the partnership assets as a sum owed by the defendant to the partnership.

My orders

27 With the consent of both parties, I ordered that the accounts of the partnership be determined and finalised and that the partnership be dissolved. An accounting or auditing firm that both parties agreed on would be appointed to produce a report of the accounts of the partnership. Once the accounts have been finalised, the parties would share the partnership's profits and assets and bear the losses equally. The aspects of the partnership accounts that the accounting report shall include are set out further below in my observations.

28 Similarly, I ordered that the shares of the partnership in the Austin Residences and the Kempas Properties be sold and the proceeds divided equally between the parties.

29 Finally, the plaintiff had not proven that he had suffered any losses outside of what would be reflected in the final accounts of the Business Venture. I therefore made no order for damages.

Observations on the use of the Business Venture assets

Austin Residences

30 The documentary evidence showed that the downpayments made in respect of the Austin Residences were in the sums of RM 189,000 (for Lot 499091) and RM 187,400 (for Lot 499082) respectively. The costs of the purchases, including commission, legal fees and the like, amounted to RM 36,119.65 (for Lot 499091) and RM 36,111.65 (for Lot 499082) respectively.

31 The accounting report should determine whether partnership monies or the parties' personal funds were applied towards these sums.

Kempas shophouse

32 The partnership purchased a 47.5% stake in the Kempas shophouse from Rowmark (M) Sdn Bhd. The documentary evidence showed that the sums of RM 45,362.50 and RM 8,210.21 were paid to Rowmark (M) Sdn Bhd. These sums constituted its share of the downpayment of RM 91,500 and the costs of the purchase respectively.

33 Again, the accounting report should determine whether partnership monies or the parties' personal funds were applied towards these sums.

VGMC shares

34 The plaintiff suggested that the defendant may not have acquired any VGMC shares for the partnership because there was no documentary support of

the same, but I found this to be without merit. I referred in particular to a text message sent by the defendant to the plaintiff on 12 July 2012 which read: “Sold back today to increase cash... We need 2 million cash for 10 million loan. V g faster... But we got enough... Of v g... We need to put it as liquid cash...”. This was followed by another text message on an unrelated matter of “get[ting] the company up” and to which the plaintiff responded “I meet the lawyers on mon and will set it up. I will scout around for the prospective properties in the meantime.” The lack of response by the plaintiff to the defendant’s reference to “v g”, which in this context clearly related to VGMC shares, showed that they had contemplated the purchase of the VGMC shares and that the purchase was eventually made with the plaintiff’s knowledge and without his objection. More importantly, the memoranda signed by both parties also referred to at least 70,000 shares being purchased and managed by the defendant. The messages and memoranda also indicated, contrary to what the plaintiff appeared to have suggested, that the VGMC shares were bought on behalf of the Business Venture and not for the plaintiff in his personal capacity.

35 There was nevertheless uncertainty as to the exact number of shares that had been purchased. The accounting report should therefore determine the number of VGMC shares acquired and how much was paid for these shares, as well as the dividends received in respect of these shares.

The Gold Bars

36 As set out at [18] above, I found that the defendant had contributed the Gold Bars as capital for the partnership. I also accepted that the Gold Bars had been sold – payment vouchers adduced by the defendant showed that they were

sold on 22 and 23 October 2012 for the combined sum of \$336,100. Additionally, pawn receipts adduced by the defendant also indicated that the Gold Bars had been pawned off and redeemed on more than one occasion.

37 The plaintiff contended that he did not authorise the defendant to deal in the Gold Bars in any way save for the presentation of the Gold Bars to Geneva for the purpose of receiving dividends. But this is inconsistent with the contemporaneous text messages. On 12 July 2012, the Plaintiff sent the Defendant a text message “All ok Bro. Was it pawned or sold back to [Geneva]”. It appears that the plaintiff was responding to information earlier communicated to him that the partnership might need to liquidate the Gold Bars, and was merely enquiring about the details after knowing that the transaction had been done. In my view, the fact that the plaintiff did not even know if the Gold Bars were pawned off or sold supports the defendant’s account that he had been authorised to deal in the Gold Bars as he saw fit.

38 An account should therefore be taken of the yields from the Gold Bars by way of the dividend payments and the sums involved in each pawn transaction. The use of the proceeds from the sale of the Gold Bars should also be the subject of the accounting report.

Global KPP

39 Although it appeared to be common ground that none of the investments were transacted through Global KPP, it was not without assets and the defendant accepted that they belonged to the Business Venture. An account should therefore be taken of the financial position of Global KPP.

Monies transferred by the defendant to the plaintiff

40 The defendant’s evidence, which was supported by confirmations sent electronically, was that he had transferred a total of \$285,625.99 to the plaintiff’s personal account. Indeed, it was not disputed by the plaintiff that he had received the money. However, the plaintiff’s position was that they were not loans. The defendant, on the other hand, said that they were to “help [the plaintiff] to service his loans and his other personal financial commitments”.

41 Given the above uncertainty, an account should be taken of whether the sum consisted of partnership monies, partnership investment yields and/or the defendant’s personal funds.

Conclusion

42 On 26 February 2016, I heard parties on the appointment of the accountant as well as further arguments on costs. I appointed Reanda Adept PAC to undertake the accounting exercise and ordered costs fixed at \$37,500 to be paid to the Defendant.

43 Apart from what will be reflected in the accounting report, I found that the plaintiff had, as at the end of the trial, not proved that he had suffered any losses arising from the defendant’s breaches as alleged. I therefore made no order for damages. Once the accounts are finalised, the parties shall share the partnership’s profits and assets and bear the losses equally.

