Chan Emily v Kang Hock Chai Joachim
[2005] SGHC 37

Case Number : Suit 303/2004

Decision Date : 18 February 2005

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Michael Khoo SC, Josephine Low and Andy Chiok (Michael Khoo and Partners) for the plaintiff; Peter Cuthbert Low and Mark Goh (Peter Low Tang and Belinda Ang) for the defendant

Parties : Chan Emily — Kang Hock Chai Joachim

Evidence – Weight of evidence – Plaintiff alleging breach of trust by defendant – Testimony of parties primary evidence in trial – Testimony of parties equally plausible – Whether peripheral and background facts establishing plaintiff's case on balance of probabilities – Relevance of defendant's conduct in criminal proceedings to civil proceedings – When testimony of one witness to be preferred over testimony of another – Section 54 Evidence Act (Cap 97, 1997 Rev Ed)

18 February 2005

Choo Han Teck J:

The claims

1 This is an action by the plaintiff to recover various moneys and property, which she claimed to have been given by her to the defendant on trust. The plaintiff is a 74-year-old retiree and was at the material times a parishioner in the Church of St Theresa, where the defendant was, during those times, the parish priest. The plaintiff's claims may be referred to in the following terms for convenience. There are four items of claim, namely:

(a) 394,000 shares in a Malaysian public company called Guinness Anchor Sdn Bhd ("the Guinness shares").

(b) RM350,000 in cash given to the defendant in October 1994.

(c) $30,000 given to the defendant in May 2002. This money was given in three $10,000 notes and kept in a safe deposit box in the Hongkong and Shanghai Banking Corporation ("HSBC") opened in the name of the defendant in May 2002 ("the safe deposit box").

(d) $12,000 paid by the plaintiff to HSBC for unit trusts purchased in the name of the defendant when she opened the safe deposit box.

The plaintiff had also made various ancillary or alternative claims in respect of the Guinness shares, including asking for an order that the defendant provide an account of the sale of any of the shares, and any dividends received, and for an order for damages for wrongful conversion.

2 The plaintiff, a Catholic since the 1960s, attended mass at the Church of St Theresa from 1991 because her father's ashes were interred in that church. She testified that she founded her trust in the defendant over the years mainly on the office the defendant held as a priest, but she did not know, until she read his amended Defence, that he had regarded himself as her "spiritual director", and "regular priest-confessor". The defendant was the parish priest at the Church of St Theresa from 1989 to 2002. He was transferred to the Holy Trinity Church in 2002. However, the

plaintiff continued to attend mass at the Church of St Theresa with her usual regularity.

3 The plaintiff testified that she was shocked to learn, on 1 April 2003, that the defendant was under investigation by the Commercial Affairs Department ("CAD") for criminal offences involving money donated to the church for its building fund. The plaintiff and her family had also donated to this fund. Eventually, the defendant was charged and convicted in the District Court for various offences involving the breach of trust of church money and was sentenced to imprisonment. The plaintiff's claims in this action were not the subject of the criminal proceedings although she testified in the defendant's criminal trial and was cross-examined in relation to these items claimed. I digress here to make a quick point which will become clearer as the facts and issues of this care unfold in this judgment, namely, that if the plaintiff's evidence is accepted, then the defence of laches must fail. In other words, the plaintiff would not have sat on her rights and done nothing for an inordinately long time.

The Guinness shares

4 The plaintiff testified that she had the Guinness shares since the 1960s, and her stock had been enlarged by purchases made by her father for her, as well as through bonus and rights issues. In 1994, when she had decided to open a trading account in Kuala Lumpur, she had asked the defendant "whether he could hold some shares for [her] in his name", and he had agreed. She explained that she did not know her broker in Kuala Lumpur well, and therefore, had preferred not to let him know that she had so many shares in Guinness Anchor Sdn Bhd. She admitted that she could not remember the exact words she had used when she handed the shares to the defendant, but she was "absolutely certain" that she had asked for his help, and he had agreed to help. The plaintiff testified that she only found out that the defendant had appropriated her Guinness shares to his own use when the CAD told her this in April 2003. The plaintiff did not then wish to "complicate matters" for the defendant and had instructed her solicitors to withhold her claims until after the defendant's criminal proceedings had ended.

5 The defendant's version was that the shares were given to him as a personal gift because he had agreed to act as the executor and trustee of the plaintiff's will in 1994. These shares were worth about a million dollars by counsel's reckoning. It is not known what the full worth of the plaintiff's assets were at the time, but she had named the Catholic Church as the beneficiary of her house at Holland Road. In any event, the Guinness shares would form a large part of her assets. She had handed the two share certificates covering the 394,000 Guinness shares to him in the compound of the Church of St Theresa on the evening of 12 July 1994, after mass. He testified that she had told him that she had a gift for him, and had handed him a white envelope. She had told him that it contained some of her bonus shares in Guinness Anchor Sdn Bhd which were worth about $1m. He stated that he "could hardly believe [his] ears as never in [his] life before had he received such a large gift". The plaintiff disputed this version. The defendant further elaborated that the plaintiff had written "92,000 bonus" on the envelope. He explained that it was not unusual in those days for companies to give one-for-one shares and that he had got such bonus shares from other companies such as Sime Darby, Shell, and Genting Berhad. The plaintiff's claim presently is for the return of 364,000 of the Guinness shares because the defendant had sold 30,000 of the shares (for which the plaintiff claims for an account to be taken). According to the plaintiff, she did not know about the sale until sometime in 1995, after she had recovered from surgery on her eye. She was peeved that the defendant had sold her shares without consulting her. However, she was somewhat mollified when he said that he had used the sale proceeds in aid of charity. She thought that it might appear rude then to ask that he return all the other shares. She felt that her displeasure had shown through sufficiently and that the defendant would be unlikely to sell any more of her shares without her permission. Indeed, he did not do so.

The RM350,000

6 The plaintiff testified that sometime in 1994, she had wanted to transfer some of her Malaysian money to the defendant's account in Malaysia so that he could use the money for her benefit in time of need. She had written him a cheque drawn on her Citibank account in Kuala Lumpur. She later learnt that the defendant had deposited this cheque into an account in Malayan Banking Bhd that he held jointly with one Chia Li Ling. It will be seen why the facts in the defendant's criminal case are relevant in this regard. There, the defendant had pleaded guilty to a charge of misappropriation by transferring money from the parish church's account into the joint account he held with Chia Li Ling. The defendant's case in this action before me was that the plaintiff had given him the money as a generous gift. The submission made on his behalf by his counsel, Mr Low, was entirely to show that there were no good reasons for the plaintiff to create a trust of this money. Furthermore, Mr Low questioned rhetorically why the plaintiff did nothing for years after knowing that the defendant had sold 30,000 of her shares. One answer could be that it was because she had already given the shares to the defendant and he could do with them as he pleased. Another reason could be that she believed the defendant when he told her that he had sold the 30,000 shares to raise funds for charity. The questions raised by counsel were, independently, reasonably sound; but if the plaintiff's account were true, that would be a sufficient answer to Mr Low's question.

The $30,000 in $10,000 notes

7 The plaintiff had rented the safe deposit box on 14 May 2002 at HSBC in the name of the defendant and had deposited three $10,000 notes into the box. She said that this arose from a chain of events. She had drawn up a will in which the defendant had been named as the sole executor and trustee. When he told her that his papers in his church office were accessible to third parties, the plaintiff had become concerned that her will might not be kept in the privacy that she wanted. Hence she had opened the safe deposit box for the defendant to keep her will. She had also given him the three notes of $10,000 each to be used for her in case of urgent need. At that time, she also appointed the defendant as the alternate account holder of her own safe deposit box. She explained in court that although he was the alternate account holder, there was only one key and she kept it. Thus, she wanted to leave some ready cash in her executor's safe deposit box for his convenience. The defendant claimed that the $30,000 deposited into the safe deposit box was a present by the plaintiff to him. His case was that the plaintiff had already made him the joint account holder to her own safe deposit box, and hence, he had access to anything kept there so that there was no need to make provision for an emergency, so to speak. The plaintiff's answer to this was that although the defendant was a joint account holder, she held the only key to that safe deposit box. The defendant did not challenge this evidence, but that might only mean that his access to the box would be more difficult – not that it would be impossible.

The $12,000 deposit

8 The plaintiff testified that HSBC was only willing to let her open the safe deposit box (which was opened in the defendant's name) if she placed a $12,000 deposit with the bank as an investment. The defendant disputed that, and claimed that the safe deposit box was opened by the plaintiff and maintained by her solely for his personal benefit, to do as he pleased, because she was sorry for him that he did not have one. He claimed that the $12,000 deposit was intended by the plaintiff to be a gift to him.

Evaluation of the evidence

9 The competing versions of the plaintiff and defendant, on each of the claims, are reasonably

credible. For example, in the one, it is possible that the plaintiff had given the shares and money to the defendant, at the time when their relationship was at its strongest, intending them to be given as personal gifts to the defendant. The plaintiff was a wealthy person who had donated millions of dollars to the church and other charities. She testified that she had given $10,000 to one Sister Lau, whom she did not know then, when Sister Lau made a personal appeal to her for financial aid towards her studies abroad. The plaintiff testified that when Sister Lau was in charge of the De LaSalle School, she had made an appeal for funds for the school and the plaintiff had responded by donating $50,000. Subsequently, when Sister Lau became the principal of Catholic Junior College and appealed to her financially, the plaintiff had given a $10,000 contribution in the form of a $10,000 note that was handed to the defendant to be given to Sister Lau. The defendant had kept the note and written a cheque for $10,000 from the Church's account. The defendant, on the other hand, claimed in this trial that the plaintiff had given him money in the form of $10,000 notes previously, and cited this occasion as an example. The defendant admitted that Sister Lau had written a receipt made out to the Church and handed it to him, but he had not handed it over to the plaintiff. Thus, the plaintiff's counsel, Mr Michael Khoo SC, suggested to the defendant that the receipt would have put the plaintiff on inquiry as to why Sister Lau had made out the receipt to the parish church, and not to her. The defendant's version (that he had given the $10,000 note to Sister Lau) was, therefore, not supported by this fact.

10 It may not be unreasonable for a person of such a generous disposition as the plaintiff to lavish her generosity in the way the defendant alleged, that is, on her priest who was also her confidant and friend (if that were the case). On the other hand, it is also possible that she had intended to keep some cash and stock in the care of her trusted priest, and friend, to her use in a time of need. The plaintiff is now 74 years old. At the time she handed the Guinness shares to the defendant in 1994, she was 63. Although she had siblings who were also wealthy, she was the main person looking after her mother and keeping her company. In 1994, her own health was threatened by a mysterious growth in her left eye that required surgery, and consequently, she made arrangements in respect of her financial assets in case she were to become incapacitated after her surgery. Her reasons for handing over the shares to the defendant, helping him open and maintain a safe deposit box, and depositing large sums of money with him for safe keeping would seem reasonable enough in the circumstances. The defendant's version in respect of the opening of the safe deposit box and the advance of the $12,000 necessary to open it, if true, would show, in a sense, the generosity of the plaintiff to the defendant to the extreme. But, if she was happy to give him the Guinness shares, then $12,000 pales immediately in comparison. The issues are thus not as straightforward or unconnected as one might think.

11 This court has to decide which of the two possibilities, each reasonable in itself, is the more probable. The core of the two competing versions of the story, that is, whether the money and shares were handed over as gifts or given upon trust, emanated from only two witnesses – the plaintiff and the defendant. There was no independent corroboration of either story. There were no other witnesses to bear testimony to either account. Apart from the testimony of the two protagonists, I am left with only the peripheral and background facts from which counsel urged me to draw various inferences – inferences that would incline me to one result or the other. Some of these facts are undisputed and incontrovertible – such as the fact that the defendant had pleaded guilty to various criminal charges involving the misappropriation of money belonging to the Church of St Theresa. But even so, some aspects of these facts remain open to question, for example, the reasons as to why the defendant decided to plead guilty midway through the criminal trial. The defendant averred that he had personal reasons, not least prompted by eminent members in the high echelons of the Catholic Church, to do so. Mr Khoo, however, suggested that no such thing occurred, and the conclusion he urged me to form, from his cross-examination of the defendant, was that (to put it bluntly) the defendant had pleaded guilty because he was in fact guilty. But what does that

guilt mean in this case before me?

12 Section 54 of the Evidence Act, (Cap 97, 1997 Rev Ed) provides that:

> In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

I would be putting myself in danger of oversimplifying s 54 were I to paraphrase this section, as saying that "character" in a civil trial is irrelevant unless the facts show that it is relevant. There is a long route through which the origin and permutations of the stiffly-worded language of this legislative provision have slowly meandered until it can be read in that short form that I have set out above. But I think that it is not necessary for me, for the purposes of this case, to provide a lengthy exculpation of my reading of s 54. In his cross-examination of the defendant, Mr Khoo relentlessly reminded him of evidence from the criminal trial relating to his misappropriation of church funds. It was evident from the cross-examination what Mr Khoo had hoped to emphasise. He made that emphasis clear by his choice of words that the defendant was "surreptitiously siphoning out $5.1 million" from church funds towards his personal use in the purchase of condominium flats in Penang and Singapore, and not, as the defendant asserted, something he did "in accordance with canon law". The question, thus, is whether these are the kinds of facts that would make the defendant's character relevant within the meaning of s 54. I do not think so in this case. The key issue here is whether the property and money were gifts or not.

13 Nonetheless, I am of the view that there is one aspect concerning the defendant's handling of the church funds that is a matter of interest to this court, although I am not required here to judge whether, and if so why, the moral compass of this priest became maladjusted. Those are not relevant questions for this court even if they do remain viable, or of interest, so far as the defendant's church and his parishioners are concerned. The relevant connection between the defendant's conduct in the criminal proceedings and the present action is this. The matters relating to the criminal case, including the acts for which he was charged, his plea of guilt, as well as his present testimony about them, such as his "reasons for pleading guilty", set out at some length in his evidence-in-chief, are relevant in determining whether the defendant's understanding of the meaning of fiduciary duty, and the doctrines of trust, was conventional or not. That has a direct bearing in this case because the defendant denied that he was holding the money and assets in trust for the plaintiff. The issue, hence, is whether he had a reasonable or correct understanding of that term and concept. It goes towards credibility. The facts established in the previous criminal proceedings are also relevant in establishing the manner in which the defendant was accustomed in dealing with money that had been entrusted to him for safekeeping. But to regard these as relevant for consideration does not necessarily lend assistance to the exercise of determining how much weight ought to be attached to them – that is another exercise.

14 In response, the defendant testified that he did no wrong in respect of the matters in the criminal proceedings because he had acted in accordance with canon law. Mr Low produced excerpts from two commentaries on canon law to support the defendant's justification of his conduct there. One was entitled *The Canon Law – Letter & Spirit*, published by the Canon Law Society of Great Britain and Ireland. The second was *New Commentary on the Code of Canon Law*, a publication of the Canon Law Society of America. The defendant testified that the parish church did not have a legal status to hold property in its own name, and since he was the parish priest of the Church of St Theresa, he was bound to invest excess church funds. But he could only do so by making the investments in his name. He testified that his interpretation of the relevant canon law justified his conduct, and which would have absolved him from any ecclesiastical as well as secular misconduct.

Before proceeding further, I should address Mr Khoo's objection to the reference to canon law. He submitted that canon law should only be admitted through expert witnesses. In so far as canon law is not the applicable law in our courts, it must be regarded just like a foreign law, admissible upon proof by experts. However, in the present case, the parties have not put these laws in issue in the sense that I am required to make a finding as to what principle or rule in canon law applied in the present case. On the contrary, neither counsel wished to quarrel over the force and effect of that law. Thus, the only relevance of the reference to canon law was to show that the defendant had relied on some of those principles in order to maintain his stand that he had done no wrong in respect of the matters in which he had been convicted. Whether he was right to do so (that is, to rely on those principles) is a separate matter, and one that is not in issue before me. However, the defendant faced a second problem. He had pleaded guilty and admitted to the Statement of Facts, which referred to the conduct that he now renounced. He therefore tried to explain to me why he had pleaded guilty. The clear impression he made in his evidence-in-chief was that he did so because various parties, including the local church authority, coerced him into it. Unless the plea and admissions are set aside, the defendant is bound by them.

15 Mr Khoo submitted that many instances of Mr Low's submissions were in breach of the rule in *Browne v Dunn* (1893) 6 R 67 in that those aspects were not put to the plaintiff in cross-examination. I have considered those passages in Mr Low's submissions that Mr Khoo referred me to, and am of the view that I should not disregard them. I would prefer to consider them together with the entirety of the evidence. *Browne v Dunn* is a very old case, decided during a time when the evidence of the opposing parties was not disclosed to each other. The exchange of affidavits of evidence-in-chief in the modern civil trial ameliorates the mischief described by Lord Herschell LC in *Browne v Dunn*, at 70. That case may still be relevant where a litigant wishes to rely on a hitherto undisclosed fact that is crucial and might on its own swing the favour of the court one way or the other. The matters raised by Mr Khoo do not, in my view, fall into this category. By way of example, Mr Khoo objected to Mr Low's submission that the plaintiff ought to have handed Singapore or Australian currencies instead of Malaysian shares to the defendant if she really wanted to have ready funds. I take this as a submission as to what inference I ought to draw. I think that Mr Low was entitled to make that submission. As it was, Mr Khoo had a ready reply to the inference that Mr Low had in mind. So I had taken the opposing arguments into consideration.

16 Throughout the trial, many questions were raised about the motives and the intentions of the plaintiff as well as the defendant. Some of the questions have been explicitly answered, though many of the answers given by the two litigants were diametrically opposed. Why would a person in the plaintiff's circumstances wish to give a million dollars to a priest? Conversely, one might also ask: What did the plaintiff hope to achieve by asking the defendant to hold her money and property in trust for her? The plaintiff said that she thought that her money would be safe in the hands of a priest, especially one whom she had come to know and like. Intentions and motives of this nature cannot be ascertained by logic alone. On the contrary, some transactions between friends, as well as people who believe they know each other well, are like leaps of faith; they can be notoriously illogical. We can detect an inconsistent line when we ask why someone in the defendant's situation and circumstances would resist the plaintiff's claim. The defendant's counsel opened his case by reading a passage from the Bible found in ch 10 of the Gospel of Matthew to the plaintiff – in that passage, the Christ of their common faith had exhorted the rich to forsake all their worldly goods, saying that it is easier for the camel to go through the eye of the needle than for the rich man to go to heaven. It was read by counsel for the purpose of emphasising the gift of generosity inherent in the plaintiff's nature. To that extent, that emphasis was relevant because the plaintiff was indeed a generous person, and part of my duty in this case, is to determine the extent of that generosity. I find it difficult, however, to understand the above passage from the Bible fully, without seeing how it exempts the defendant himself. Ought not the same precept to apply to the one who ministers as it

does the person ministered to? There may be a good, perhaps philanthropic, reason why the defendant fought so tenaciously to keep the wealth in question; but he had not told this court what that might be. So, with generosity and avarice, so inextricably intertwined in this case, encasing the plaintiff and defendant alike, the true motive and intention of the parties – and here I am referring to the full, undisguised state of mind – is not clearly discernible; yet that is the heart of this case, and finding that intention is what this court has to do. There are no fixed rules as to how this might be done, but one must not be too quick to ill-judge a person's intention, or to dismiss a possibility on the basis that a right-thinking person would have intended otherwise, without making allowance for the possibility that even the most sure-footed may slip and stumble from time to time.

17 For example, in respect of one of the factual issues in this case, it will be seen that there could be two possible reasons why the plaintiff's list of assets in her will did not include the Guinness shares. One possibility is that she had already given those shares away to the defendant. The other is that she had only listed those assets that were within her own possession, excluding those held in trust. What did the plaintiff have in mind when she wrote out that list? She said that it was only to let her executor know what assets she had with her. Since the defendant was to be her executor, he did not need to be reminded that he held some of her assets. Since the inferences to be drawn from the incontrovertible facts of the transfer of property and money can reasonably be in favour of either party, and there being no corroboration of the litigants by independent witnesses, on the balance, I am more inclined to accept the uncorroborated evidence of the plaintiff than that of the defendant. Much of what the defendant asserted in his evidence might possibly be true, but many established facts are against him. He had testified that he was holding money jointly with Chia Li Ling in trust for the parish church because the parish church could not make investments on its own. Chia Li Ling was not called to explain her role in those episodes. Her evidence would be relevant because it would have corroborated, and perhaps clarified that of the defendant's own evidence, and to help me understand the defendant's perception of trust property and gifts. That omission, taken together with the absence of support from the Catholic Church in respect of his idea of trust property, left me with only his word. Thus, faced with the simple, but crucial, question, "Do I believe the plaintiff or the defendant?", I find myself reluctant to accept the defendant's evidence without corroboration. Between the two uncorroborated testimonies, I would incline towards that of the plaintiff's. I come to this conclusion without giving any piece of evidence special significance, or giving any specific evidence more weight than another, which is often possible, but not in this case.

18 For the reasons above, I find that the balance of probabilities lies in the plaintiff's favour, and I, therefore, allow the plaintiff's claim in full. Costs are to follow the event, and be taxed if not agreed.