

Wong Chong Yue v Wong Chong Thai
[2011] SGHC 3

Case Number : Suit No 1071 of 2009
Decision Date : 11 January 2011
Tribunal/Court : High Court
Coram : Philip Pillai J
Counsel Name(s) : Anthony Leonard Netto (NettoWon LLC) for the plaintiff; Devinder K Rai and Navin Kripalani (Acies Law Corporation) for the defendant.
Parties : Wong Chong Yue — Wong Chong Thai

Equity

11 January 2011

Judgment reserved.

Philip Pillai J:

The action

1 The plaintiff, Wong Chong Yue, brings this suit against his brother, the defendant, Wong Chong Thai, for a declaration that their father Wong Shoa Ching ("Father") had on 30 April 1993 created an express trust over 5311 shares in a company known as Malaya Construction Co (Pte) Ltd ("MCC") in favour of the plaintiff, the defendant and their sister Mary Wong in equal shares. The defendant's defence is that the 5311 shares in MCC (the "shares") were transferred to him by their Father as a gift. The plaintiff also claims for breach of contract to refund the sum of CAN\$60,000.00 and US\$189,250.39 which he paid the defendant. The defendant denies that these were loans.

2 The plaintiff had originally also claimed to be beneficially entitled to a 50% share in 967 shares under a second express trust created in favour of the plaintiff and the defendant. Their Father transferred these in June 2000 to the defendant on trust for the plaintiff and the defendant equally. This was evidenced by a letter produced in the course of discovery dated 13 April 2000 by the Father to the defendant in the following terms:

To: Wong Chong Thai

Re: Malaya Construction Co. Ltd

Concerning the above company. I now informed [sic] you that my share of the proceeds from the liquidation of [MCC], be divided equally between you and Wong Chong Yue.

Dated this 13th day April, 2000.

Sgd

S.C. Wong

This is indisputably an express trust over "my [the Father's] share[s]" which was created in April 2000 and which comprised the 967 shares which he then transferred to the defendant. The defendant has

admitted the same. Accordingly this is not an issue before me.

3 There are two issues to be determined in this action: (i) whether the Father had created an express trust over the 5311 shares he transferred to the defendant on 30 April 1993, in favour of the plaintiff, the defendant and their sister Mary Wong in equal shares; and (ii) whether the plaintiff made the loans to the defendant and if so their recoverability in law.

The family background

4 The family history is a complex one in which the Father, now deceased, had in total four wives in Singapore and Hong Kong. In Singapore his two wives were Ong Siew Yong, with whom he had three children (the "OSY Line"), including one Wong Yue Yu, and Lee Say Dee, with whom he had three children (the "LSD Line"): the plaintiff, the defendant and Mary Wong (the "LSD Line siblings"). The plaintiff, who is the eldest son in the LSD Line, had worked for several years for the Father in the family business in Sabah, Hong Kong and Singapore before migrating to Canada in 1982. The trial revealed the plaintiff's chequered relationship with the defendant, with both of them working closely to defend Wong Yue Yu's lawsuit against the Father and the plaintiff in Originating Summons 1245 of 1996 ("OS 1245") but thereafter becoming estranged. Both the plaintiff and defendant in turn had poor and adversarial relations with Wong Yue Yu, their half-brother from the OSY Line. Wong Yue Yu had had an affair with the plaintiff's wife in Canada, which led to their divorce. This unhappy extended family web cast a long shadow over the entire trial and coloured the oral evidence.

5 The Father, the patriarch of the extended family, owned and controlled MCC until he transferred the shares in the company to his two sons from different wives on 30 April 1993. The Father had at the same time transferred 5311 shares to Wong Yue Yu, who was the eldest son of the OSY Line, and 5311 shares to the defendant, the second son of the LSD Line. The Father retained 1 share, and 1 share was held by his brother (the plaintiff and defendant's uncle). The remaining outstanding and issued shares of MCC comprised 967 shares which the Father had earlier transferred to another wife, Cecilia Brown, in Hong Kong, and 150 shares held by his wife Ong Siew Yong. Upon her decease, 75 shares devolved to the Father and the balance 75 shares devolved to Wong Yue Yu and his OSY Line siblings equally.

6 Subsequently the Father had as part of his divorce settlement with Cecilia Brown procured the return by her of 967 shares. The Father retained 100 shares and transferred 867 shares to the plaintiff. Wong Yue Yu filed OS 1245 against their Father and the plaintiff for a declaration that the Father's transfer of 867 out of these 967 shares to the plaintiff was void, *inter alia*, because it was in breach of MCC's articles of association.

7 The outcome of OS 1245 was that MCC was ordered to be liquidated and its properties distributed amongst the shareholders. The 967 MCC shares came to be registered in the name of the defendant and were, upon the Father's written instructions, held in trust for the defendant and the plaintiff, as the defendant admits (see [\[2\]](#) above).

Preliminary Issue: Limitation Act

8 I first deal with the preliminary issue of whether the plaintiff's claims for breach of trust and for account have been time-barred under ss 22(1) and (2), and 6(2), respectively, of the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act"). Section 22(1) and (2) of the Limitation Act reads as follows:

Limitations of actions in respect of trust property. 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.

(2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.

Section 6(2) of the Limitation Act reads as follows:

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

9 The meaning and scope of s 22(1)(b) was examined in *Soar v Ashwell* [1893] 2 QB 390. Lord Esher MR said (at 393):

If there is created in expressed terms, whether written or verbal, a trust, and a person is in terms nominated to be the trustee of that trust, a Court of Equity, upon proof of such facts, will not allow him to vouch a Statute of Limitations against a breach of that trust. Such a trust is in equity called an express trust. If the only relation which it is proved the defendant or person charged bears to the matter is a contractual relation, he is not in the view of equity a trustee at all, but only a contractor; and equity leaves the contractual relation to be determined by the common or statute law. If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a Court of Equity, the defendant a trustee for the plaintiff, the Court of Equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust; and against the breach which by construction creates the trust the Court of Equity allows Statutes of Limitation to be vouched.

In the same judgment, Bowen LJ stated that (at 395 - 396):

The question therefore arises whether the claim of the plaintiff can be barred through lapse of time, by analogy to the Statute of Limitations. That time (by analogy to the statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust, is a doctrine which has been clearly and long established ...

An express trust can only arise between the cestui que trust and his trustee. A constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour. Such conduct and behaviour the Court construes as involving him in the duties and responsibilities of a trustee, although but for such conduct and behaviour he would be a stranger to the trust. A constructive trust is therefore, as has been said, "a trust to be made out by circumstances". It is not unreasonable in the latter class of cases, where the liability of a stranger to the trust arises from his conduct and depends on the proof of his contemporary acts, that time should run in favour of the person to be charged. In such cases conflicts of evidence are possible or probable, and to deny to the person to be charged the shelter or benefit of a period of limitation would be obviously dangerous and unjust.

The above passages have been cited with approval more recently by the English High Court in *Cattley and anor v Pollard and anor* [2007] 3 WLR 317 at [43] – [47]. A claim for accounting under an express trust would accordingly not be subject to any time bar, whether under s 6(2) or anywhere else in the Limitation Act. Section 22(2) of the Limitation Act is subject to s 22(1) of the Limitation Act, and therefore does not apply.

10 With respect to the plaintiff's claim for repayment of CAN\$ 60,000 and US\$ 189,250.39, such a claim, independent of the trust, would be "founded on a contract" and is thus time barred under s 6(1)(a) of the Limitation Act, which reads as follows:

Limitation of actions of contract and tort and certain other actions. 6. —(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:

(a) actions founded on a contract or on tort.

For completeness I will deal briefly with this claim later (see [\[21\]](#) below).

11 I now turn to the main issue arising in this suit, *ie*, whether the Father had created an express trust over the 5311 shares transferred to the defendant in favour of the LSD Line siblings in equal shares.

12 It is noteworthy that the plaintiff has not produced any document, written communication or letter of wishes of the Father from which an express trust is to be construed. In sharp contrast there was produced in discovery and admitted by the defendant that the Father by his own hand had expressed a trust over the 967 MCC shares he had transferred to the defendant in April 2000 (see [\[2\]](#) above). Further, nothing that was contemporaneous with the relevant instruments of transfer, approval and registration of the 5331 shares by the Father to the defendant in April 1993, and which even remotely suggests that there was a trust intended by the Father then, was produced in evidence. When the Father later transferred the 967 shares to the defendant in April 2000, he took the trouble to expressly write a letter to the defendant expressing a trust over these 967 shares in favour of the defendant and the plaintiff. The Father said nothing in this letter relating back to the 5311 shares he had previously transferred to the defendant in April 1993. The plaintiff admitted under cross examination that there was no evidence of any trust for the benefit of the LSD Line siblings. [\[note: 1\]](#)

13 It is also noteworthy that although the plaintiff's solicitors had informed Mary Wong that they reserved their right to subpoena her in these proceedings, she has not been called as a witness. With respect to Mary Wong's interest in the 5311 shares, the plaintiff's evidence was contradictory. He took the position that the defendant ought to give her something but deducting the value of the mother's house that had been transferred to Mary Wong. [\[note: 2\]](#) Mary Wong's interests in these shares depend on whether or not there is an express trust under which she is to be a beneficiary. It does not in law depend on the decision or exercise of discretion of either the plaintiff or defendant. To the extent that the plaintiff was of the view that the defendant had such a discretion with respect to Mary Wong's entitlement, this would serve as a contra indication of any trust for the three LSD Line siblings.

14 The plaintiff sought to rely on affidavit evidence of the deceased Father filed in OS 1245 as being relevant to his claim. Both the plaintiff and the defendant had been engaged in preparing the drafts of the Father's affidavits in OS 1245 in consultation with the lawyers. The plaintiff's evidence

of his involvement in this process was summarised as follows: [\[note: 3\]](#)

Court: Let me summarise your evidence so far under cross-examination, so that you confirm whether that is correct, and we have understood you. You and your brother prepared two factual narratives to assist your father in drafting—on getting his affidavit in those proceedings, okay? Bobby instructed the lawyers to draft the affidavits based on those narratives. As each draft emerged, you were sent copies of the draft affidavits and you made insertions and corrections in discussion with your father; right?

W: (Nods head affirmatively).

Court: Finally the affidavit was affirmed by your father in Hong Kong before a notary public, right?

W: (Nods head affirmatively).

15 Portions of the first drafts of the Father's affidavit had been handwritten by the plaintiff and the defendant typed further drafts, both of which were used by the lawyers to prepare the Father's draft affidavit which was finally affirmed by the Father in Hong Kong. The affidavit evidence of the Father in OS 1245, in which the Father stated, *inter alia*, a position at variance with the plaintiff's claim of an express trust, was introduced:

8.7 In about June 1992, I had already decided on a gift of 5678 Shares each to WYY and WCT (total 11,356 Shares).

...

10.5 ... I had given to WYY and WCT each 5,311 Shares (which had then greatly appreciated in value). My proposed gift of 867 to WCY was insignificant by comparison.

16 When cross examined on his role in the drafting of paragraph 10.5 above the plaintiff answered as follows: [\[note: 4\]](#)

Q: Very clear. Isn't it correct that you were instrumental in having paragraph 10.5 in this affidavit? This language was approved by you?

A: I wrote it yes?

Q: You wrote it?

A: I wrote it yes.

Q: You wrote it, right?

A: I agreed to that. I wrote it.

Q: In your own words, you said that your father had already given to Wong Yue Yu and the defendant 5311 shares. And in your own words you said, my proposed gift of 867 was insignificant by comparison. Doesn't that clearly capture your father's intention?

A: My father's intention?

Q: Yes.

A: So what-you are asking me to answer "yes" or "no"?

Q: Yes.

A: My father's intention, I don't think so.

The following portion of the plaintiff's evidence under cross-examination is also relevant: [\[note: 5\]](#)

Q: I took you through each one of the pages to ask you, are the handwriting yours.

A: Yes, it is.

Q: I now am looking a paragraph 11.5 and I asked you whether the notation "late 1995" is yours and you said it's yours. I asked you about that arrow that appears on the second part of 11.5 and you said no, that's not yours. So I left that point alone. I'm now asking you: you would have seen the whole of 11.5 read it, understood it, and together with your dad, approved 11.5 as being factually accurate.

A: Yes I've. But I need to explain on this, okay?

Q: You take all your time in the world to explain when the need arises.

A: Of course.

...

Q: If the idea of a gift which your father was talking about was something that you didn't agree with, you would then have said so straightaway that, "Look, this is not a gift, we should change the language straightaway." Would I be correct in saying that?

A: You can be correct in saying that, but I need to explain on that.

Q: You can explain when the time arises. I'll make my submissions based on your evidence. If your father was factually inaccurate in talking about the gift of 867, in comparison to the gift of 5311, you would have straightaway altered that to say "Look, daddy, these are not gifts. I have a one-third interest, don't forget" Isn't that so, Mr Wong?

A: I cannot answer that.

Q: You cannot answer that because—

A: I can't answer that because—

Q: You know that the answer which you give me, and if you agree with me, it will cause your case to collapse Mr Wong.

A: That is incorrect, counsellor.

Q: That is why—

A: That is not the real picture.

Q: You see, you have a very powerful motivation to sit there and spin this web of tales about 5311 shares and trust, and that is the case I'm putting to you. You have a very powerful motivation.

17 The plaintiff first called Wong Yue Yu as a witness who, after being sworn in, stated that he was not going to give any evidence beyond what he had filed in OS 1245. The plaintiff then withdrew this witness.

18 The plaintiff then relied on a letter dated 5 February 1993 from the defendant to him as an admission by the defendant that there exists an express trust as averred. The letter reads as follows:

Dear Chong Yue,

The list of shareholders and their shareholding of [MCC] is enclosed.

For your information, Madam Ong Siew Yong's shares are divided (I suspect) between [Wong Shoa Ching] and Madam Ong's children equally. *If all things remain equal, Tom's [(Wong Yue Yu)] group has more shares than us, meaning Tom's 5386 against our 5311 ...*

[emphasis added]

The plaintiff argued that the defendant, by referring to the 5311 shares as "our 5311", has thereby admitted that the defendant was merely a trustee of the shares for the plaintiff, the defendant, and their sister, Mary Wong. The starting point is that this is not a letter from the Father. Further, the context and tenor of the letter will determine the meaning and scope of the expression, "our 5311". The entire letter relates to the shareholdings in MCC and it arose in the context of the OS 1245 litigation by Wong Yue Yu against the Father and the plaintiff, concerning the 967 shares originally held by Cecilia Brown and out of which the Father had transferred 867 shares to the plaintiff and retained 100 shares in his own name (see [\[6\]](#) above). The plaintiff and the defendant had together assisted their Father in his affidavits and legal defence (see [\[14\]](#) above). In this letter the defendant states clearly that he suspects that the shares originally held by Ong Siew Yong (see [\[5\]](#) above) are divided between their Father and the OSY Line children equally. Then he goes on to say that if all things remain equal, "Tom's [Wong Yue Yu] group", *ie*, the OSY Line, has more shares than "us". The letter is addressed to the plaintiff and makes no reference to Mary Wong. Nothing in this letter construed in context suggests any admission by the defendant that he holds these shares on trust for the three LSD Line siblings equally. On the contrary, it reiterates the defendant's anxiety not to be outvoted by the OSY Line and, in particular, Wong Yue Yu, which presumably was an anxiety shared by the plaintiff at that time.

19 It was in this context that the defendant was urging the plaintiff to convince their Father to transfer Cecilia Brown's shares to the plaintiff so that the plaintiff's and the defendant's combined shareholding in MCC would be not be exceeded by the OSY Line's shareholding.

20 What emerges from the above is that the plaintiff appears to have formed an expectation that, as he was the eldest son in the LSD Line and had worked for the family business before he emigrated to Canada, and because he had helped the Father and the defendant to defend the OS 1245 action and provided some of the litigation costs, the Father ought to have given him a more significant inheritance than what he had already received from the Father, namely, a half interest in 967 MCC shares (see [\[2\]](#) above) and his business and assets in Ningbo, China. In the absence of any

expression of a trust by the Father over the 5311 shares transferred to the defendant in 1993, and given that the Father was fully capable up to the year 2000 of expressing a trust in writing over the 967 shares, on the evidence produced in court, I found no evidence, that would suggest any trust over the 5311 shares transferred absolutely to the defendant.

21 The plaintiff's second claim is for repayment of CAN\$ 60,000.00 in cash and US\$ 189,250.39 which he says he paid to the defendant in connection with the legal costs of OS 1245. The defendant denied that these payments were loans and put the plaintiff to proof thereof. He explained these payments as being funds provided principally by the Father and also funds provided by the defendant for legal costs in OS 1245. Wong Yue Yu had taken legal action in OS 1245 principally against the Father and the plaintiff to block the Father's transfer of 976 shares to the plaintiff and 100 shares to himself. The plaintiff adduced evidence of other payments and remittances from the Father, the relationship of which to the plaintiff's second claim remains unclear. These reveal that payments had been made or procured on behalf of the Father for a multiplicity of purposes including but not limited to the legal costs but also for MCC payables and in respect of the relevant properties. The plaintiff's claim of having given the defendant CAN\$ 60,000 in cash is disputed by the defendant and only admitted to the extent of S\$ 31,000 which was used for purposes of property tax payments. The plaintiff was unable to clearly establish that the US\$ 189,250.39 payment was a loan and not payment of his share of the legal costs in OS 1245. In his own words, had he had known at the time, that he was to have no legal or beneficial interest in these shares he would not have provided these payments. His expectations at the time does not have the effect of creating a trust where none otherwise exists. In the premises I am unable to conclude that the plaintiff made these payments as loans to the defendant, quite apart from their being barred by limitation (see [\[10\]](#) above).

22 The plaintiff's action for a declaration of an express trust in respect of the 5311 shares held by the defendant is dismissed. Costs of this action to be taxed to the defendant.

[\[note: 1\]](#) NE, 11 August 2010 p 10 line 21 to p 11, line 8.

[\[note: 2\]](#) NE, 10 August 2010 p 44 line 9 to p 47, line 1.

[\[note: 3\]](#) NE, 12 August 2010, p 54, line 15 to p 55, line 5.

[\[note: 4\]](#) NE, 11 August 2010, p 163 line 14 to p 164 line 7.

[\[note: 5\]](#) NE, 12 August 2010, p 25 to p 26.

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