# Lin Tsang Kit and Another v Chng Thiam Kwee
# [2005] SGHC 10

**Case Number** : Suit 282/2003

**Decision Date** : 17 January 2005

**Tribunal/Court** : High Court

**Coram** : Lai Siu Chiu J

**Counsel Name(s)** : Nicholas Narayanan (Ang and Partners) for plaintiffs; Stanley Wong (Jing Quee and Chin Joo) for defendant

**Parties** : Lin Tsang Kit; Yip Hing Chung — Chng Thiam Kwee

*Civil Procedure – Judgments and orders – Default judgments – Plaintiff obtained interlocutory default judgment in a prior action – Whether first plaintiff precluded from pursuing present action by virtue of having obtained the interlocutory default judgment.*

*Civil Procedure – Rules of court – Proceedings at trial – Whether failure to appear at trial leads to dismissal of claim – Order 35 rule 1(1) Rules of Court (Cap 322, R 5, 2004 Rev Ed).*

*Trusts – Trustees – Shares purchased in the name of company in which defendant was director and shareholder – Whether defendant was in effect trustee of first plaintiff's shares.*

17 January 2005 *Judgment reserved.*

**Lai Siu Chiu J**

**The facts**

1 Lin Tsang Kit ("the first plaintiff") and Yip Hing Chung ("the second plaintiff") are businessmen and friends who reside in Hong Kong. The second plaintiff is the older of the two. The first plaintiff became a Singapore citizen on 10 January 1997, while the second plaintiff became a Singapore permanent resident earlier in 1972. Chng Thiam Kwee ("the defendant") is a Singapore businessman who was introduced to the first plaintiff by the second plaintiff, who, in turn, came to know the defendant through a friend in 1968. The defendant became the plaintiffs' close and trusted friend. The defendant at the material time was a director and shareholder of two Singapore-incorporated companies called Chng Thiam Kwee & Sons Pte Ltd ("CTK") and Koya Wood Industries Company (Pte) Ltd ("Koya Wood").

2 Sometime in 1990, the defendant recommended that the plaintiffs purchase shares in Koya Wood as an investment, representing to them that:

(a) Koya Wood (which was in the business of manufacturing furniture and wood fixtures) owned a valuable piece of land which would reap a tidy profit when sold;

(b) as the plaintiffs were not Singapore citizens and could not therefore hold shares in Singapore-registered companies, he would buy the Koya Wood shares on their behalf and would arrange to transfer the same back to the plaintiffs at any time upon their request.

3 The plaintiffs accepted the defendant's recommendation. The first and second plaintiffs remitted $223,534.50 and $167,650.00 respectively to the defendant for the purchase of the Koya Wood shares. Due to their friendship and their complete faith and trust in him, the plaintiffs did not inquire from the defendant details of the Koya Wood shares, let alone the number of shares each

plaintiff would own.

4 On 3 April 1990 the defendant met up with the plaintiffs in Huizhou, China and gave them written acknowledgements in Chinese[1] for their remittances, stating they were for the purchase of a total of 558,835 Koya Wood shares ("the trust shares"). The acknowledgement in favour of the first plaintiff stated that CTK would purchase 319,335 Koya Wood shares from Kok Kee (Pte) Ltd ("Kok Kee"). The acknowledgement in favour of the second plaintiff stated that 239,500 Koya Wood shares would be purchased from three individuals. Both acknowledgements stated that the trust shares would be purchased in the name of CTK, not in the defendant's name. Based on the plaintiffs' remittances, it meant the price of the trust shares was $0.70 each. When he testified, the first plaintiff revealed that it was the second plaintiff who wrote out the acknowledgements at the defendant's behest and on the latter's instructions. Although the plaintiffs were puzzled as to why their purchase of the trust shares was done in the name of CTK and not the defendant, neither plaintiff questioned him as they trusted him implicitly.

5 Following the purchase of the trust shares, it is not disputed that CTK owned a total of 1,080,414 Koya Wood shares. The defendant also admitted in his pleadings that CTK's shareholdings included the trust shares.

6 In late 1999, the defendant handed to the first plaintiff, when the latter was in Singapore, an envelope purportedly containing the share certificates for the trust shares. Unfortunately, the first plaintiff did not open the envelope to check. Worse, he misplaced the envelope en route to or upon his return to Hong Kong. Despite numerous searches being conducted, the share certificates have never been found. However, nothing turns on the loss of the share certificates.

7 Sometime in February 2000, the defendant telephoned the second plaintiff to say that Koya Wood would be wound up, the trust shares would be sold at a profit and the sale proceeds returned to the plaintiffs. The defendant forwarded to the second plaintiff copies of cause papers in Originating Summons No 1161 of 1997 ("the OS"). He asked the first plaintiff to send him the share certificates for the trust shares. The second plaintiff accordingly informed the first plaintiff of the developments and forwarded to him copies of the documents received from the defendant. The first plaintiff informed the defendant that the share certificates had been misplaced.

8 In a letter dated 28 February 2000 to the plaintiffs, the defendant repeated his request for the share certificates. He informed the plaintiffs that the trust shares had been sold but, because they had lost the share certificates, the proceeds would not be paid to the plaintiffs but would be retained by the court.

9 The plaintiffs subsequently discovered, through cause book searches done by their solicitors, that the OS was an action for oppression of the minority instituted on behalf of CTK against the directors of Koya Wood by the defendant, under s 216 of the Companies Act (Cap 50, 1994 Rev Ed). Further, pursuant to an order of court dated 24 February 2000, Koh Teng Chou ("Koh"), a director of Koya Wood and one of the respondents in the OS, was ordered to buy over CTK's shares for the sum of $913,296.17 within 14 days of the order of court.

10 On or about 15 March 2000, the second plaintiff received a fax from the defendant setting out the total number of trust shares with their respective share certificate numbers. The second plaintiff confirmed on his own behalf and on behalf of the first plaintiff that the trust shares belonged to them. He further stated that the share certificates had been misplaced. The second plaintiff also requested for the sale proceeds of the trust shares based on $0.8017 per share, as represented by the defendant. However, despite further and repeated requests from the plaintiffs, the defendant did

not account for the trust shares nor for their sale proceeds.

11 The plaintiffs subsequently discovered that on 6 April 2000, CTK transferred all its shareholdings in Koya Wood to Koh for a total consideration of $913,296.17 or at $0.845 a share. Based on their respective shareholdings, the first plaintiff should have received $269,838.07 (319,335 x $0.845), while the second plaintiff should have received $202,377.50 (239,500 x $0.845) for the trust shares.

12 The first plaintiff commenced action against CTK in Suit No 1424 of 2001 ("the first suit") on 12 November 2001 for an account of how CTK had dealt with his portion of the trust shares. Interlocutory judgment in default of defence was obtained against CTK on 28 December 2001.

13 On 9 February 2002, the defendant's son, Chng Siong Wee ("Chng"), filed Companies Winding Up No 600056 of 2002 ("the winding-up proceedings") to wind up CTK. From court records, I note that Chng's petition as a creditor was based on an unsatisfied statutory demand, dated 31 December 2001, for an alleged debt (not a judgment) of $644,643.00 owed by the company. A winding-up order was granted against CTK on 8 March 2002. I note further from the cause papers that the defendant filed the subsequent statement of affairs on CTK's behalf with the Official Receiver listing only one unsecured claim of $661,543.00.

**The claim**

14 The plaintiffs commenced this suit on 24 March 2003. In the midst of the trial (after one adjournment), the plaintiffs applied to amend the Statement of Claim *in extenso*. I allowed the amendments requested on terms.

15 In the (re-re-amended) Statement of Claim, the plaintiffs, *inter alia*, alleged that the purchase of the trust shares was evidenced in an undated deed of transfer between Kok Kee and CTK, which the defendant had forwarded to the plaintiffs in April 1990. Reference was made to the two acknowledgements signed by the defendant on 3 April 1990. The plaintiffs alleged that the trust shares were registered in CTK's name on 29 May 1991. They averred that the defendant and/or CTK held the trust shares on trust for the plaintiffs.

16 The plaintiffs alleged that the defendant breached the trust by selling the trust shares without accounting to them for the sale proceeds. They further alleged that the defendant had dishonestly made a secret profit from their purchase of the trust shares. In documents which they discovered in March 2004, the plaintiffs averred that they came to know that the defendant had purchased Koya Wood shares through CTK at $0.50 and not $0.70 a share as he had represented. The defendant had thereby dishonestly profited by $63,867.00 and $47,900 respectively, from the sums paid by the first and second plaintiffs.

17 In the alternative, the plaintiffs averred that if the court should find that a trust was created between the plaintiffs and CTK (which they denied), then the defendant, as CTK's managing director and its controlling mind, acted dishonestly in assisting in CTK's breach of trust. The defendant well knew that the sums of $223,534.50 and $167,650.00 paid respectively by the first and second plaintiffs were for the express purpose of purchasing 558,835 Koya Wood shares. The defendant knew and procured the sale of the said shares held by CTK on trust for the plaintiffs without accounting to the plaintiffs for the proceeds of sale of the shares.

18 The plaintiffs, *inter alia*, claimed an account from the defendant of the first plaintiff's 319,335 and of the second plaintiff's 239,500 trust shares held by the defendant (in CTK's name).

Alternatively, the defendant should be liable to account to the plaintiffs for the sums of $223,534.50 and $167,650.00. The plaintiffs further prayed for an inquiry as to how the sums of $63,867.00 and $47,900.00 received by the defendant had been applied. Damages were also claimed.

19 In the (amended) Defence, the defendant admitted that CTK was the legal owner of the trust shares. The defendant averred that the plaintiffs had previously made investments in Singapore with his assistance, but at all material times, the plaintiffs did not rely on the defendant's judgment but on their own in making their decisions. The defendant pleaded that as Koya Wood was a private limited company, the plaintiffs' attempt to acquire shares from existing shareholders would have been subject to the provisions of the company's memorandum and articles of association. For this and other reasons known only to the plaintiffs, the defendant alleged that the plaintiffs decided to lend money to CTK to acquire shares in Koya Wood. Hence, the first and second plaintiffs remitted of $223,534 and $167,650 respectively to the defendant, who duly transmitted the sums to CTK.

20 The defendant alleged that in making the remittances, the plaintiffs accepted that:

(a) CTK would be the legal and beneficial owner of the shares to be acquired using the loans;

(b) without an order of court, the defendant could not procure registration in the plaintiffs' names of the shares purchased by CTK, as they were non-members of Koya Wood; and

(c) the plaintiffs were unsecured creditors of CTK and repayment of their loans was subject to CTK's financial resources. As CTK had insufficient funds to pay its unsecured creditors when it was wound-up, the defendant was not liable to the plaintiffs for the sums and reliefs they had claimed.

21 The defendant denied the plaintiffs' allegations of misrepresentation, that a trust existed and that he had breached the terms of the trust. He asserted that it was only a goodwill gesture on the part of CTK that the defendant delivered to the first plaintiff share certificates of the shares that CTK had acquired in Koya Wood using the two plaintiffs' loans.

**The evidence**

22 Only two witnesses testified at the trial, both on the plaintiffs' behalf. Citing health reasons through their counsel, neither the second plaintiff nor the defendant appeared in court. I should point out that according to the plaintiffs' counsel, the second plaintiff had applied to court to give his evidence by way of video-conferencing due to his advanced age and medical condition, but the application was denied.

23 As for the defendant, his counsel informed the court that he suffered from hypertension and (during the second half of the hearing) that the defendant had undergone an eye operation. Although I had excused his attendance in court when the plaintiffs' case was being presented, the defendant failed to take the stand to testify after the plaintiffs had closed their case. His counsel informed the court[2] that the defendant elected not to testify but not because he took the stand that there was no case to answer. In the event, no evidence was adduced for the defendant either to substantiate his defence or to rebut the plaintiffs' case.

24 Nothing much turns on the evidence-in-chief of the first plaintiff[3] as, essentially, he deposed to the facts set out in [1] to [13] above. What was more significant was the first plaintiff's testimony adduced in the course of cross-examination.

25 When cross-examined, the first plaintiff admitted that in 1991 he and his wife owned shares in a Singapore company called Sea Star Investment Pte Ltd ("Sea Star"), even though neither were then Singapore citizens. He pointed out, however, that Sea Star was also a company incorporated by the defendant who (with his son, Chng) was also a shareholder and managed the company. As far as the first plaintiff was aware, his and his wife's shares were supposed to be held by the defendant and Chng, and were only transferred to him and his wife after they obtained Singapore citizenship. Prior to the transfer of shares by the defendant and Chng, the defendant held the shares of the first plaintiff and his wife in trust together with two properties owned by Sea Star at Nos 16 and 18, Upper Cross Street, which the defendant had purchased on the first plaintiff's behalf.

26 During cross-examination, it was also revealed by the first plaintiff that Sea Star had sued the defendant and Chng (in Suit No 955 of 2000) for the return of $1,005,653.77 which sum they had wrongfully withdrawn from the company's bank account.

27 By an order of court made on 26 March 2001, the defendant and Chng consented to pay the sum of $1,100,000 in full and final settlement of Sea Star's claim. In the course of cross-examination, the first plaintiff revealed that the sum involved was actually taken by the defendant's daughter, Chng Lay Yong, who had forged the first plaintiff's signature on cheques of Sea Star which were left with the defendant and/or her.

28 I should point out that the defendant's defence, that the plaintiffs' remittances were mere loans extended to CTK for its purchase of Koya Wood shares, was not put to the first plaintiff at all during cross-examination. Consequently, the rule in *Browne v Dunn* (1893) 6 R 67 would apply to preclude the defendant's counsel from making any submission that supports the pleaded defence.

29 The other witness for the plaintiffs was Lo Wei Min ("Lo") an accountant from M/s Lo Hock Ling & Company, who were and still are the auditors of Koya Wood. Lo testified she had inspected, at the office of the company secretaries of Koya Wood (Rising Management Services Pte Ltd), the transfer deeds pertaining to the trust shares sold to CTK by the transferees and confirmed that the consideration stated thereon was calculated on $0.50, not $0.70 a share.

**The findings**

30 I had made it clear from the outset to counsel for the plaintiffs that if the second plaintiff did not testify, I would have no alternative but to dismiss his claim. His written testimony would have no probative value whatsoever, as the contents and his veracity could not be tested under cross-examination. Accordingly, as the second plaintiff failed to testify despite my warning his counsel of the consequences thereof, I am dismissing his claim pursuant to O 35 r 1(1) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed).

31 As for the claim of the first plaintiff, there are two issues to be determined:

(a) Was his claim compromised or prejudiced by the first suit?

(b) If not, did he make out his case that the defendant, not CTK, was a trustee of the trust shares notwithstanding that the shares were registered in the name of CTK?

The first issue was not addressed by counsel for the plaintiffs in his closing submissions.

32 Counsel for the defendant submitted that as the first plaintiff had obtained interlocutory judgment in the first suit against CTK (on the basis that the company was a trustee of his shares),

this suit was a sham. On the other hand, if the first plaintiff's denial (in para 23 of the Statement of Claim) was accepted at its face value, *viz* that CTK was not, but the defendant was, the trustee of his shares, then the first plaintiff had misled the court in the first suit and in the interlocutory judgment he obtained therein. Counsel submitted that the first plaintiff's stand was inconsistent. It indicated that the first plaintiff tailored his case according to how the evidence unfolded. However, the defendant did not plead, nor did his counsel submit, *res judicata* as a defence.

33 In his reply to the above submission, counsel for the first plaintiff pointed out that the interlocutory judgment was obtained by default of defence, pursuant to O 19 of the Rules of Court. (I noted that counsel for the defendant acted for CTK in the first suit). In any case, further action by the first plaintiff in the first suit was pre-empted by Chng's filing of the winding-up proceedings against CTK. Counsel submitted that as there was no adjudication on the merits of the first plaintiff's claim against CTK, the interlocutory judgment did not and does not preclude the first plaintiff from bringing this claim against the defendant.

34 Counsel for the defendant had also submitted that gaps in the evidence of the first plaintiff should not be patched up by drawing an adverse inference against his client. The first plaintiff should have acted with due diligence to cover those gaps himself. Counsel added that where facts were entirely within the knowledge of a defendant or a defendant's witnesses, it was open to the plaintiff to obtain the facts by discovery, by interrogatories and/or by issuing subpoenas to the defendant and his witnesses. Counsel submitted that when a defendant chose not to testify and/or call witnesses, it simply meant that he was prepared to let the court decide the case by weighing the plaintiff's evidence; the court need not consider the defence.

35 Counsel for the plaintiffs, on the other hand, submitted that an adverse inference should be drawn against the defendant for his failure to testify, relying on s 116(g) of the Evidence Act (Cap 97, 1997 Rev Ed). There was not even a need for the first plaintiff to satisfy the court that he had established his case on a balance of probabilities. Counsel submitted that the defendant's absence meant he had effectively abandoned his pleaded case — that the plaintiffs lent to CTK the moneys they remitted to the defendant. He relied on the appellate court's decision in the Malaysian case of *Jafaar bin Shaari v Tan Lip Eng* [1997] 3 MLJ 693 for his submission that as the defendant elected not to give evidence, then all the evidence led by the plaintiff must be assumed to be true.

36 Both counsel referred to the same passages from Simon Goulding, *Odgers on Civil Court Actions* (Sweet & Maxwell, 24th Ed, 1996) ("*Odgers*") for their opposite submissions; it would be appropriate therefore to refer to the textbook at this juncture.

37 The author of *Odgers* had at para 20.14 said (after the plaintiff had closed his case):

> The defendant's counsel must now make up his mind whether to call evidence or whether to submit that the plaintiff has made out no case to answer in law. He will not ordinarily be allowed to submit no case unless he tells the judge that he intends to rely on the submission alone and call no evidence. … Another course which the defendant's counsel may adopt at the close of the plaintiff's case is to state, if such be the fact, that he does not intend to call any witnesses; and in that event the plaintiff's counsel at once addresses the court, summing up his own evidence, and commenting on the defence…

38 In his submissions, counsel for the defendant stated that counsel for the plaintiffs could have immediately (after counsel for the defendant informed the court he was not calling any evidence) applied for judgment instead of requesting the court for time to file submissions. This is an unfair submission as the notes of evidence[4] recorded that counsel for the defendant had said:

> In this case it is clear that [when the] defendant elects not to call evidence but does not go on to make a submission there is no case to answer. What effect does it have on the proceedings? Plaintiffs will address the Court on his evidence on the basis there is only evidence from the plaintiffs. I would then need time to prepare submissions, so too I believe would the plaintiffs. I would like an adjournment.

If counsel himself had asked for an adjournment to prepare his submissions, he should not complain that the plaintiffs' counsel should have applied for judgment immediately after he had informed the court of the defendant's decision.

39 On the first issue, I am of the view that the first plaintiff is not precluded from making this claim by reason of having sued CTK in the first suit. I accept his counsel's submission that a default judgment, particularly an interlocutory judgment, is no determinant on the merits of the trusteeship issue. It bears remembering that CTK deliberately allowed the first plaintiff to obtain default judgment by not filing a defence through the defendant's present solicitors. Further, Chng thereafter took prompt steps to wind up CTK. I have no doubt it was a deliberate ploy to thwart the first plaintiff in any steps he intended to take on his default judgment. I also entertain grave doubts on the merits of Chng's petition, which was based on an alleged debt of $644,643.00 and not a proper judgment obtained from our courts.

40 Whilst I could have exercised my discretion and awarded judgment to the first plaintiff on his claim pursuant to O 35 r 1(2) of the Rules of Court, I prefer to consider the merits of his claim for my decision. Consequently, I move on to determine the second issue. Were the 558,835 Koya Wood shares purchased by CTK with the plaintiffs' remittances of $391,184.50 held on trust for the plaintiffs by the defendant?

41 It would be appropriate at this juncture to look at the acknowledgements issued by the defendant for the plaintiffs' remittances. The English translation of the acknowledgement given to the first plaintiff reads:

> Received from
>
> Lin Tsang Kit a sum of Singapore dollars two hundred and twenty three thousand, five hundred and thirty four and cents fifty for the purchase of 319,335 shares in Koya Wood Industries Co (Pte) Ltd at S$0.70 per share from Kok Kee (Pte) Ltd by Chng Thiam Kwee & Sons Pte Ltd on behalf. Once everything is in order, Chng Thiam Kwee & Sons Pte Ltd will then transfer the same back to the name of Lin Tsang Kit. This document is hereby made as proof.
>
> Signed (illegible)

42 Granted, the acknowledgement was issued by the defendant on behalf of CTK. However, it was also in evidence from the first plaintiff[5] that his remittance and that of the second plaintiff were sent to the defendant personally. The first plaintiff had also confirmed,[6] when questioned by the court, that so long as the shares were held in trust for him, it did not matter to him how the same were held. The plaintiffs did not question the defendant as they trusted him (although that faith turned out to be misplaced). The first plaintiff had also testified ([4] above) that the wording of the two acknowledgements was based on the instructions of the defendant to the second plaintiff.

43 In any case, I am prepared to lift the corporate veil and say that as CTK's managing director, the defendant was the controlling mind of the company which bore his name. He was the trustee of the first plaintiff's shares, not CTK. It is therefore my view that the acknowledgement cannot be viewed as evidence that the first plaintiff knew and accepted that his shares were held in trust for him by CTK, not by the defendant. What the acknowledgement does prove is the price of the first plaintiff's shares was stated to be $0.70 per share.

44 The price of $0.70 is to be contrasted with the actual price of $0.50 per share that CTK paid. In his cross-examination of Lo and in his closing submissions, counsel for the defendant made much of the fact that Lo did not witness the execution of the transfer deeds and had no direct personal knowledge of the transactions; neither was she aware of whether a premium was paid over and above the stated consideration of $0.50 in the transfer deeds. With respect, counsel's argument is misconceived.

45 It was Lo's evidence that she had personally inspected the four share transfer forms filed in the secretarial records of Koya Wood with CTK as the transferee. Under s 65(e) of the Evidence Act Cap 97, secondary evidence of a document includes "oral accounts of the contents of a document given by some person who has himself seen it".The only way Lo's testimony could be successfully challenged would be for the defendant to call contrary evidence to prove that the consideration stated in the transfer deeds (which worked out to $0.50 per share) was not the true price paid to the transferors of the shares. As the defendant elected not to call any evidence at all, I accept Lo's testimony without reservations.

46 Similarly, the defendant was in no position to rebut the evidence reflected in the order of court dated 24 February 2000 obtained in the OS ([9] above) that Koh was ordered to buy over CTK's shareholding (1,080,414 shares) in Koya Wood (which included the first plaintiff's shares) for $913,296.17 or at $0.845 per share.

47 Based on the evidence adduced, I have no difficulty in finding that the defendant:

(a) misrepresented to the first plaintiff that the price of 319,335 Koya Wood shares was $223,534.50 or $0.70 a share when the actual cost was $0.50 a share. The defendant thereby dishonestly pocketed the difference of $0.20 or $63,867.00 for the 319,335 shares; and

(b) failed to disclose to the first plaintiff that he had sold the latter's shareholdings through CTK to Koh at $0.845 per share for a total consideration of $269,838.08.

48 Consequently, the defendant is liable to account to the first plaintiff for the initial overpayment of $63,867.00 for the trust shares, as well as for the sale proceeds of $269,838.08. There is no necessity to hold an inquiry as prayed for in the Statement of Claim, when the evidence is clear that the defendant would have received $269,838.08 for selling to Koh the first plaintiff's 319,335 shares in Koya Wood. As he chose not to testify, the defendant cannot rebut this evidence.

49 Accordingly, there will be final judgment for the first plaintiff in the sums of $63,867.00 and $269,838.08, together with interest at 6% per annum from the date of the writ and costs.

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[1]See 1AB72 and 1AB74

[2]See N/E 43

[3]PW1

[4]P 43

[5]See N/E 7

[6]At N/E9