

Silver Steam Air-Conditional Restaurant (In Receivership) v Ong Kay Eng (Ng Chiow Tiong,
Third Party)
[2003] SGHC 127

Case Number : Suit 934/1999
Decision Date : 18 June 2003
Tribunal/Court : High Court
Coram : Toh Han Li SAR
Counsel Name(s) : Leslie Yeo Choon Hsien (Abraham Low LLC) for the plaintiffs; Dwayne Tan (Khattar Wong & Partners) for the defendant
Parties : Silver Steam Air-Conditional Restaurant (In Receivership) — Ong Kay Eng — Ng Chiow Tiong

1. The Defendant and the Third Party were, until 1998, partners in the firm Silver Stream Air-Conditional Restaurant (the partnership). The partnership was set up in 1988 and was in the business of running a food court at Block 180 #01-571 Toa Payoh Lorong 2 as well as operating a beverage stall in that food court. Its main sources of income were (i) cash sales of beverages; (ii) rental of stalls (iii) coin-a-phone collection.

2. On the first day of operation of the food court, which was in June 1988, the Defendant was arrested and subsequently convicted and served his sentence in prison. The Defendant was only released from prison in October 1993. During that period, and up to 5 June 1995, the Third Party was managing the business. Only from 6 June 1995 did the Defendant take over from the Third Party the management of the business. The Third Party then commenced an action in DC Suit No. 50404/1977 praying for, inter alia, an order that the partnership be dissolved and its affairs wound up. This was granted on 29 April 1998 by a district court order which was affirmed by the High Court on appeal.

3. In the light of the records which came to the receivers of the partnership namely Coopers & Lybrand, it was discovered that there was a shortfall of \$339,200. The receivers then brought the present action against the Defendant to recover this amount due to the partnership. The Defendant subsequently commenced Third Party proceedings on the basis that the Third Party had made unauthorised withdrawals from the partnership. The High Court tried the action and awarded judgment against the Defendant for the sum of \$339,200 and dismissed the Defendant's claim against the Third Party. The Defendant appealed against that part of the High Court's judgement which dismissed his claim against the Third Party. One of the alternative prayers sought by the Defendant was that the Third Party be ordered to render an account of the profits of the partnership for the years 1988-1991.

4. The Court of Appeal allowed the appeal on this alternative prayer and ordered that the Third Party render an account of the profits of the partnership for the years 1988-1991 as he was Managing Partner during that period. The Court of Appeal gave two grounds for ordering the account. Firstly, the reason giving by the Third Party for under-declaring his losses to the IRAS did not make any business sense. Secondly, that the loss figures of the partnership did not tally with the amount which the Third Party says that he loaned to the partnership. As the Court of Appeal stated:

"A managing partner [ie the Third Party during the years 1988 to 1991]] is under a duty to keep proper accounts at all times. If a managing partner says that a partnership suffers a loss, the burden is on him to establish that."

The system of accounts

5. In relation to the accounts for the period June 1988 to December 1991 (the relevant period for the taking of accounts), the Third Party stated that the accounts of the partnership were kept in the following manner:

(a) The daily takings from the coffee shop were recorded in 2 books, a soft cover and a hard cover book. He termed them the "Daily Account Record (daily soft cover)" and "Daily Account Record (daily hard cover)".

(b) The monthly summaries of the Daily Account Record were recorded in a book he called the "Monthly Account Record".

(c) The rent collected from the other stall holders in the premises were recorded in a book he called the "Rental Account Record".

(d) The yearly summaries of the account records were recorded in a book he called the "Yearly Account Record".

6. The coffee shop was manned in 2 shifts, the first from 6 a.m. to 3 p.m. and the second from 3 p.m. to midnight. In each shift there were 2 persons and one of them would be a person who represented the Third Party's interests and one who represented the Defendant's. The persons in each shift would collect money on all sales of drinks, food and cigarettes. They would also make cash payments to their suppliers as necessary. At the end of the first shift there would be an informal handing over of the cash to the persons on the second shift. At the end of that shift, the amount of cash remaining and expenses paid out would be recorded on the Daily Account Record (daily soft cover). One Gan Peck Kiam, was in charge of totalling the figures in the Daily Account Record (daily soft cover) and transferring them into the Daily Account Record (daily hard cover). This was their means of counter-checking to ensure that the accounts for the day corresponded with the cash collected.

7. At the end of each month, the Third Party extracted the daily figures for takings and expenses from the Daily Account Record (daily hard cover) and transferred them into the Monthly Account Record. By adding figures for each day, the Third Party would arrive at the total takings and cash expenses for the month. The Third Party would also extract figures from other records to prepare the monthly balance sheet. The annual accounting statements were also prepared from these records.

Partnership revenue

8. At the conclusion of the taking of accounts, I was satisfied that the Third Party has accounted for the revenue figures (consisting of stall rental and sales) as reflected in the partnership accounts. In any event, the Defendant was willing to accept the Third Party's revenue figures. In arriving at this conclusion, I note that the records of the income receipt were meticulous, such that when the Third Party was cross-examined at length on the basis of why there was no record of coinafon income, it was then discovered that the coinafon income has indeed been recorded – See D-18.

The IRAS returns

9. The Third Party's evidence was that there was no basis for the figures in the IRAS returns. These returns were prepared by his bookkeeper who was not called to testify at the taking of the accounts as he could no longer be located. The Third Party was cross-examined by Defendant's

counsel and taken to task for the fictitious figures in the IRAS returns. I was invited by the Defendant to draw all sorts of adverse inferences as a result of these false IRAS returns.

10. As stated above, the Court of Appeal was concerned with the discrepancy in the IRAS returns and the partnership accounts. This was one of their grounds for ordering the present taking of accounts to ascertain what were the true accounts of the partnership for the years 1988 to 1991. At the end of the day, a submission by the Defendant on how incredible the explanation of the bookkeeper's conduct is in falsifying the IRAS returns does not answer the question of what the true accounts are. It was clear that there was absolutely no supporting evidence for the figures in the IRAS returns. The consequences of submitting false returns to IRAS (which incidentally was signed by both the Defendant and the Third Party) are not the subject matter of the present proceedings.

11. Turning to the partnership records, there is no evidence to suggest that the partnership's record books or invoices were falsified. As stated above, the system envisaged that the first entries into the daily accounts were not by the Third Party but by the other partners. The Third Party then transferred the daily entries into the monthly and yearly records.

12. The Defendant asked me to accept the expense figures in the IRAS returns as the expenses of the partnership. I decline to do as since that there are no supporting documents for these figures.

Gross Margin

13. The Defendant made an alternative submission that I use the Third Party's figure of 42-45% as a reasonable gross margin for the partnership. In my view, there could be many reasons (apart from the Defendant's submission that the Third Party was cooking the books) as to why the partnership's gross margin was not 42-45%, including the Third Party's evidence that the stall rental income was poor for the first few years. It also served no useful purpose to compare what the gross margin for the partnership was during the Defendant's time as managing partner as compared to Third Party's time. As such, I decline to use the concept of reasonable gross margin, as it was only as estimation with no empirical basis for using such a figure.

Expenses of the Partnership

Cash expenses

14. A large part of the taking of accounts was focussed on this area. On cash expenses, the system of recording these expenses has been outlined above. It should be emphasised that the first recordings of the cash expenses were not by the Third Party but by the other persons working in different shifts (and apparently in different camps). The Third Party came into the picture by totalling the daily accounts into the monthly and yearly accounts.

15. It is, of course possible that in the course of the transfer of figures from book to book, an error could have been made resulting in some discrepancies. Turning to D-21 which was the cash expenses for June 1988, in some instances there were no supporting figures either from the daily soft cover or invoices for the Third Party's monthly account. This was the case for 3 June, 4 June and 26 June 1988.

16. In the case of 15 June the daily soft cover entry was lower than the Third Party's figures and for 16 June both the daily soft cover entry and the supporting invoice was lower than the Third Party's figures. For 28 June and 29 June, there were no daily soft cover entries and the supporting figures were lower than the Third Party's entries.

17. These discrepancies are set out in the table below.

June 1988	Third party's entries (A)	Amount stated either in soft cover supporting invoice (where the amounts differ, high amount is taken) (B)	Difference between A and B	Remarks
3	3,339.75	-	3,339.75	No soft cover entry or supporting invoices
4	631.40	-	631.40	No soft cover entry or supporting invoices
15	603.10	108.10	495.00	Soft cover entry is lower amount
16	1090.90	982.80	108.10	Soft cover and supporting invoice entry are lower amounts
26	29.50	-	29.50	No soft cover entry or supporting invoices
28	593.70	445.50	148.20	Supporting Invoice amount is lower

29	3760	3741	19.00	Supporting Invoice amount is lower
Total			4770.95	

18. Due to the passage of time, I was willing to accept that some invoices may have been misplaced. As such, I was willing to accept the Third Party's figures where there were entries in the daily soft cover even if there were no supporting invoices. As stated above, the fact that the cash expenses were recorded by persons other than the Third Party in the daily soft cover operated as a check on the system. Conversely, I was also willing to accept the Third Party's figures where there were supporting invoices even if there were no daily soft cover entries reflecting the amounts stated in the invoice.

19. Where there were no invoices or daily soft cover entry to back the Third Party's figures, the Third Party explained that in the few days when the partnership first started out, the accounts would not have been as meticulous as it might have been. In particular, I noted that the very first two days (3 & 4 June 1988) where case expenses of \$3339.75 and \$631.409 were incurred, there were no entries in the daily soft cover or supporting invoices. Subsequently there were (save for 26 June 1988) either daily soft cover entries or supporting invoices, although in some cases, the amounts therein were lower than what was stated in the Third Party's entries.

20. As such, I discounted the discrepancies for 3 and 4 June 1988. The discrepancies for cash expenses for June 1988 after discounting 3 and 4 June 1988 would be \$4770.95 - \$3339.75 - \$631.40 = \$799.80.

21. Given that total amount reflected by the Third Party for cash expenses for June 1988 is \$33,285.25, \$799.80 would represent a 2.4% discrepancy.

22. I should also add that in the interests of saving time and costs, parties were prepared to accept a selective sampling of the cash expenses, which in this case was June 1988. However, for the reasons cited above, especially since the Third Party was not the first person to record cash expenses and that June 1988 may not be entirely representative since that was when the food court first opened when the records may not have been as meticulous, I would take a figure of a 1.5% discrepancy for the cash expenses for the entire accounting period of June 1988 to December 1991.

23. All the cash expenses for that period have been set out in D-32, totalling \$1,550,404.13. 1.5% of this total amount would amount to \$23,256 (rounded off) which would be the amount of cash expenses disallowed for the period June 1988 to December 1991.

Credit expenses

24. The system of recording credit expenses was different from that of cash expenses. These were not recorded in the daily soft cover. The credit invoices would be given by the suppliers to the persons working at the partnership and subsequently forwarded to the Third Party who would then pay the suppliers himself. In such an instance, the only check and balance would be either evidence

in the form of a an invoice, statement of account or a receipt that payment was made. I was thus willing to accept any evidence from the supplier in the form of a receipt, statement of account or an invoice. In some cases, there were rebates given by suppliers which was why the amount paid by the Third Party to the supplier would be less than the statement of account or other documents. If the Third Party paid less than the amount reflected in the statement of account or other documents, it may be inferred that a rebate would be given and the lower figure would be used. If the Third Party had paid more than what was stated in the statement of account or other documents, this would be a cause for concern since the credit expenses would then be overstated which consequently meant that he had over reimbursed himself and I would disallow any excess amount overpaid.

25. The Defendant had raised discrepancies with regard to the credit expenses involving the suppliers Jee Chin, Kiam Seng, Luan Tiang and Yang Seah.

26. Having examined the evidence, the amounts I would disallow would be where there was no supporting evidence at all for the Third party's entries. Where the Third Parties amounts were higher than the supporting documents, I would allow the amounts stated in the supporting documents.

Luan Tiang

27. I found that there was supporting evidence either in the form of a receipt, statement of account or an invoice for the Third party's entries.

Jee Chin

28. In the case of Jee Chin, there were no supporting evidence for July, October, November and December 88. In the case of August 1988, I noted that the statement of account for September 1988 reflected an amount of \$27,827.10 brought forward which matched that of the Third Party's entry for August 1988. I therefore accepted that there was supporting evidence for August 1988.

29. Jee Chin was the coffeeshop's main supplier of beer and supplied beer for every month all the way to December 1991. As such, it would be totally unrealistic to say that there was no expenditure on for those months which the Third Party has paid but had no supporting evidence. In the circumstances, I took the lowest monthly expenditure for 1988 as the starting point which was November 1988 at \$20,643.60 and disallowed any expenditure above that for the months of July, October and December 88.

30. In the circumstances, the amounts disallowed would be

		Amount disallowed
July 88	25,639.55 – 20,643.60	4995.95
October 88	23,199.90 – 20,643.60	2556.30
December 88	31,172.90 – 20,643.60	10,529.30
Total		18,081.55

The total amount of credit expenses disallowed for Jee Chin would be \$18,081.55.

Kiam Seng

31. In the case of Kiam Seng, there were no supporting documents for the Third Party's entries for August, October, November, December 1988. For December 1991, the Third Party had paid \$709.80 whilst the supporting evidence totalled up to \$708. Unlike Jee Chin, the amounts supplied by Kiam Seng were far smaller. Further, in the months of July and September 1988, no payment was made by the Third Party to them. As such, where there was no supporting evidence or where the amount paid was higher than the supporting evidence, I disallowed the amounts as set out below:

	Amount	Remarks
August 88	3811.70	No supporting evidence
October 88	2500.90	No supporting evidence
November 88	1665.20	No supporting evidence
December 88	767.50	No supporting evidence
December 91	1.90	Amount paid higher than supporting evidence
Total	8747.20	

Yang Seah

32. In the case of Yang Seah for January 1989, the Third Party had paid \$900 whilst the supporting evidence totalled up to \$750. The amount disallowed would be \$150.

33. The total amount of credit expenses disallowed would be

	Amount disallowed
Kiam Seng	8747.20
Yang Seah	150.00
Jee Chin	18081.55

Total	26,978.75
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HDB rental and rental deposit

34. I was satisfied that the Third Party has rendered a proper account of the amounts paid to HDB as rental.

35. The Defendant however contended that a sum of \$122,700 which represented the HDB rental deposit had not been properly accounted for by the Third Party and there was no proof that the money was refunded into the partnership's OCBC bank account.

36. The 1994 accounts are strictly not within the purview of the present taking of accounts. In any event, I note that the record of the deposit for the sum of \$122,700 was recorded in the entry for the month of April in the Yearly account of 1994 as being paid into OCBC.

Discrepancies between the reimbursed amount and the partnership expenses

37. The total expenses for the partnership for the years 1988 to 1991 was \$266,449.67. Yet the Third Party had reimbursed himself a sum of \$368,637.67. This was the second ground which caused the Court of Appeal to order the taking of accounts as there did not appear to be any answer for this large discrepancy.

38. The Third Party's counsel submitted that the figures could be reconciled as follows:

i.	Court of Appeal figures for expenses for 88-91	\$266,449.67
ii.	Amount advanced by the Third Party in excess of the initial capital contribution by the partner	\$ 83,130.15
iii.	Losses in year 1992	\$ 333.04
iv.	Errors and Additional Expenses	<u>\$ 15,082.51</u>
v.	Business Losses	\$364,995.37
	<u>ADD</u>	
vi.	Amount with Gan	<u>\$ 3,642.29</u>
vii.	Amount claimed by Third Party	<u>\$368,637.67</u>

39. The Third Party's explanation for the sum of \$83,130.15 is explained in his affidavit of evidence in chief of 10 April 2000 where he states at paragraph 7 that as the sum of \$330,000 advanced by the partners was insufficient to meet the partnership's business requirements of \$413,130.15, he advanced an additional amount of \$83,130.15 to the partnership as reflected in the

opening account at NCT-3 and also in NCT-13..

40. However, there was no affidavit or oral evidence by the Third Party on the Errors and Additional Expenses amounting to \$15,082.51 albeit that these figures could be gleaned by the Third Party's counsel referring me to extracts here and there in the accounts. Similarly, although the business losses of \$333.04 and the amount with Gan at \$3,642.29 were reflected in NCT-13, there was no explanation of the Third Party as to why they should be taken into account since they were not reflected under the Third Party's name where the sum of \$368,637.67 appears. Without there being any specific explanation by the Third Party in his evidence or affidavit, there is no reason why these two amounts should be considered part of the \$368,637.67. I should emphasise that the Court of Appeal's had expressly highlighted this discrepancy and it was incumbent on the Third Party as accounting party to reconcile the figures. It would now not be right to accept Third Party's counsel submission from the Bar on how these amounts were derived at without the Third Party's own evidence on this issue.

41. As such, the amount disallowed shall be \$333.04 (Losses in year 1992) + \$15,082.51 (Errors and Additional Expenses) + \$3642.29 (Amount with Gan) = \$19,057.84.

Miscellaneous issues

42. Some of the other "discrepancies" raised by the Defendant with regard to the Third Party's evidence were either fanciful, speculative or had some reasonable explanation. For instance, the allegation that the Defendant was charging the partnership for supplies to his other coffee shop business (where the Third Party's other coffee shop address may have been stated in the invoice) could be explained that that was his mailing address and not a deliberate mis-billing. I was satisfied that there was no evidence of a systemic charging by the Third Party to the partnership for supplies meant for his other coffee shop business. I did not impute any sinister motive on the Third Party's part for the late production of 7 files and 4 notebooks. I accepted his explanation that he had viewed these documents as his personal documents and not those of the partnership, which he therefore kept to safeguard his rights to reimbursement. Further, there was no evidence to conclude that any of the documents in these 7 files and 4 notebooks were falsified.

43. I noted that during cross-examination, the Third Party was frequently asked questions pertaining to entries which he himself did not make or had no personal knowledge of, for instance why a supplier had prepared an invoice in a certain way or failed to state the partnership's name as addressee (D-22 and D-23), and his difficulties in answering these questions could not be held against him.

Conclusion

44. In conclusion, I find that the Third Party has failed to satisfactorily account for the following amounts:

	Amounts not accounted for	\$
a)	Cash expenses	23,256.00
b)	Credit expenses	26,978.75

c)	Losses in year 1992	333.04
d)	Errors and Additional Expenses	15,082.51
e)	Amount with Gan	3,642.29
	Total	69,292.59

45. The total amount not accounted for is thus \$69,292.59. This amount together with interest at 6% pa from the date of service of the Defendant's Statement of Claim on the Third Party to today's Judgment must be reimbursed by the Third Party to the partnership. For the remaining accounts, I find that the Third Party has discharged his burden of accounting for the period June 1988 to December 19991. I shall now hear the parties on costs.

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