Chua Kwee Chen, Lim Kah Nee and Lim Chah In (as Westlake Eating House) and Another v Koh Choon Chin
[2006] SGHC 92

Case Number : Suit 586/2004, 587/2004, 588/2004, OS 583/2004

Decision Date : 16 June 2006

Tribunal/Court : High Court

Coram : Andrew Phang Boon Leong J

Counsel Name(s) : Tito Shane Isaac and Justin Chan Yew Loong (Tito Isaac & Co) for the plaintiffs; N Sreenivasan and Collin Choo Ching Yeow (Straits Law Practice LLC) for the defendant

Parties : Chua Kwee Chen, Lim Kah Nee and Lim Chah In (as Westlake Eating House); Chua Kwee Chen, Lim Kah Nee and Lim Chah In (as New Westlake Eating House) — Koh Choon Chin

Civil Procedure – Pleadings – Plaintiffs making alternative claim for an account from defendant – Plaintiffs failing to plead claim for account – Whether court may consider case not pleaded

Evidence – Proof of evidence – Standard of proof – Plaintiffs alleging fraud and dishonesty on part of defendant – Standard of proof applicable for allegations of fraud and dishonesty in civil proceedings – Whether plaintiffs meeting required standard of proof

16 June 2006

Andrew Phang Boon Leong J:

Introduction

1 The consolidated proceedings in the present case represented yet another unfortunate instalment in an ongoing family saga. The earlier proceedings were in fact commenced by the defendant's son. That case, which initially involved the present defendant as one of the defendants as well, was settled. The defendant had apparently decided to take his son's side in those previous proceedings. In the present proceedings, the plaintiffs brought an action against the defendant. Although only three plaintiffs were expressly named (two from the Lim family and one in-law), they are in fact suing the defendant on behalf of themselves as well as on behalf of all the partners in both Westlake Eating House and the firm formerly trading as New Westlake Eating House (I will collectively refer to them as "the plaintiffs"). Indeed, barring Chua Kwee Chen, all the plaintiffs are siblings, with the defendant being the husband of their late sister. The late sister, Lim Kah Yan ("KY"), had, as controlling partner, overseen the business. She had, in turn, taken over from her father, Lim Tong Law ("TL"), who had (unfortunately) encountered medical problems not long after he had begun the business (which took the form of a partnership). Nevertheless, TL was clearly the patriarch of the family. It is significant that he got along well with the defendant who was of course his son-in-law. TL passed away in 1999. After KY passed away in October 1992, her sister, Lim Kah Nee ("KN") took over. She has been in charge of the business ever since and is in fact one of the plaintiffs in the present action.

2 Before proceeding further, it would be apposite to set out the gist of the plaintiffs' claims.

3 The first related to a claim for a total sum of $195,000 allegedly withdrawn by the defendant by way of seven partnership cheques and banked into a joint account held by him and his late wife, KY.

4 The second related to a claim for a total sum of $167,000. This figure was arrived at by the alleged banking of partnership funds in two alleged tranches – the first comprised $155,000, which was banked into the defendant's late wife's (KY's) account, and the second comprised $100,000, which was banked into the defendant's and KY's joint account. Of this total of $255,000, the plaintiffs say that a total of $88,000 was legitimately paid to KY as her salary during the material period (between 1989 and 1992) – hence, the claim for the difference of $167,000.

5 The third was a claim for an estimated amount of between $2,008,006 and $2,526,430 allegedly withdrawn by the defendant for a period of over a decade from the partnership – more specifically, between 28 October 1992 and the period in and around 2003.

6 The fourth was a claim with respect to two properties – 189 Selegie Centre #05-04 and No 29 West Coast Park, Parkview Condominium #03-02 ("the Selegie property" and the "Parkview property", respectively). In particular, the plaintiffs allege that the defendant had wrongfully and in breach of his duties as a partner failed to account to them in so far as the sales proceeds of these two properties were concerned.

7 The defendant has also brought a counterclaim for, *inter alia*, the recovery of sums of moneys which he and his late wife had allegedly paid on behalf of the partnership to the other partners, as well as for an inquiry as to damages or for an account of profits for alleged use, by the plaintiffs, of the trade name "Westlake" and/or alleged breach of fiduciary duties by the plaintiffs. There was also a claim with respect to another partnership, which operated as a beauty centre. The focus of the present proceedings was, however, on the plaintiffs' claims as opposed to the defendant's counterclaim.

The burden of proof

8 I begin with the simple, yet pivotal, proposition that the legal burden of proof lay throughout on the plaintiffs to prove the various allegations that they had levelled against the defendant.

9 Indeed, the plaintiffs' principal allegations, based on their pleadings, were premised on an alleged breach of fiduciary duty and/or breach of trust by the defendant in his capacity as an accountant (or as the person in charge of the accounts) and/or as a partner. This alleged breach was, in turn, based on various alleged acts of *fraud and/or dishonesty* on the part of the defendant. Although, as we shall see, the civil standard of proof continues to apply, it was imperative that the plaintiffs adduce sufficient evidence, given the gravity of the allegations. There was in fact a sudden – and radical – shift in the plaintiffs' case, which I shall deal with below. As it became clear that the initial basis of their allegations became less and less tenable as the hearing proceeded, the plaintiffs shifted their ground and sought to seek an account from the defendant instead. I shall have more to say about the chameleon-like nature of the plaintiffs' case. For the present, however, I deal with the claim based on an alleged breach of fiduciary duty and/or breach of trust.

The standard of proof for fraud in civil proceedings

10 As I have mentioned in the preceding paragraph, the plaintiffs' claim, at least in its initial incarnation, was not merely couched in the form of an alleged breach of fiduciary duty and/or breach of trust. The very pith and marrow of the plaintiffs' case imported something rather more sinister; it was focused on an alleged fraud perpetrated by the defendant against the partnership. How else could one possibly characterise an allegation centring on the illegal siphoning of partnership funds – the bulk of the funds having allegedly been spirited off by the defendant over a period of more than a decade? Indeed, if true, this was conduct most foul, constituting dishonesty of the highest order set

against the canvass of an otherwise convivial family backdrop.

11 Looked at in this light, the standard of proof, which was laid down recently by the Singapore Court of Appeal in *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR 263 ("*Tang Yoke Kheng*"), is a not inconsiderable one. From the perspective of logic, common sense and fairness, this is only to be expected. After all, an allegation of, *inter alia*, fraud and/or dishonesty is an extremely serious one. Any reasonable person would acknowledge that that would be the case. Indeed, as Lord Steyn put it in the House of Lords decision of *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, "as between the fraudster and the innocent party, moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes directly caused by his fraud" (at 280). Hence, in that case, the House held that in so far as fraudulent misrepresentation or deceit was concerned, the damages awarded against the fraudster would include all loss that flowed directly from the entry into the contract in question, *regardless of* whether or not such loss was foreseeable, *and* would include all consequential loss as well. Indeed, Lord Steyn did proceed to state thus (see *ibid*):

> I make no apology for referring to moral considerations. The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality. And, as *Oliver Wendell Holmes, The Common Law* … observed, *the very notion of deceit with its overtones of wickedness* is drawn from the moral world. [emphasis added]

12 Hence, allegations of fraud and/or dishonesty ought not – indeed, could not – be made lightly, given the moral overtones as well as implications briefly mentioned in the preceding paragraph. Such allegations had to be proved. More than that, they could not be proved by mere assertion – not even, I would add, by the adducing of merely *some* proof. In a related vein, Mokhtar Sidin JCA, in the Malaysian Court of Appeal decision of *Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 pertinently pointed out (at 499) that "[g]rave suspicion … is no proof of fraud".

13 Prior to the clarification of the law in *Tang Yoke Kheng* (which I am of course bound by), the situation with regard to the standard of proof required in situations of fraud and/or dishonesty was in fact none too clear. In general, there are of course two clear standards of proof – one obtaining in the criminal sphere, the other in the civil. They are well known even amongst many members of the public as well. The first, in the criminal sphere, requires proof beyond a reasonable doubt. The second, in the civil sphere, requires proof on a balance of probabilities. The criminal standard of proof is therefore higher – and rightly so, since an individual's life or liberty is at stake. Hence, if the accused is able to raise merely a reasonable doubt as to his or her guilt, the Prosecution would not be treated as having discharged its burden of proof. On the other hand, in the civil sphere, the plaintiff need only demonstrate that it is more probable than not that his or her case is the correct one in order to prevail.

14 It can, perhaps, be readily seen why situations of fraud and/or dishonesty have engendered the difficulty they have. In the first place, such fraud and/or dishonesty occur (as is alleged in the present proceedings) in the *civil* sphere. Thus, and in accordance with what has been stated in the preceding paragraph, the standard of proof ought to be on a balance of probabilities. The conceptual as well as practical difficulty that arises is this: Fraud and/or dishonesty connote something that does not sit at all well in the context of *civil* proceedings *per se*. Indeed, fraud and/or dishonesty are often associated with *criminal* proceedings. *However*, given the fact that the allegations of fraud and/or dishonesty have, as in the present proceedings, arisen in the *civil* sphere, the *criminal* standard of proof beyond a reasonable doubt is inappropriate. In truth, the situation of fraud and/or dishonesty alleged in the civil sphere appears to lie *somewhere between* the strictly civil sphere and the strictly criminal sphere. But if this is the case, then is there not, conceptually at least, a *third* standard of proof that lies somewhere *between* the criminal and civil standards of proof?

15 The answer given by the Singapore Court of Appeal in *Tang Yoke Kheng*, however, is that there is *no* such third standard of proof (*cf* also the (also) Singapore Court of Appeal decision of *Ching Mun Fong v Peng Ann Realty Pte Ltd* [1995] 2 SLR 541 at 554, [42]). Choo Han Teck J, delivering the judgment of the court in *Tang Yoke Kheng*, observed thus (at [14]):

> The real problem thus, is more a semantic one than one of logic. There are, indisputably, only two standards of proof. For criminal cases, the standard is proof beyond reasonable doubt; for civil matters, the standard is that of a balance of probabilities, where, minimally, the party charged with the burden of proving will succeed if he can show just that little more evidence to tilt the balance. The prosecutor in a criminal case will have to furnish more evidence than just that little more to tilt the balance. So when fraud is the subject of a criminal trial, there is no difficulty appreciating what burden falls on the prosecutor. But since fraud can also be the subject of a civil claim, the civil standard of proving on a balance of probabilities must apply because there is no known "third standard" although such cases are usually known as "fraud in a civil case" as if alluding to a third standard of proof. However, because of the severity and potentially serious implications attaching to a fraud, even in a civil trial, judges are not normally satisfied by that little bit more evidence such as to tilt the "balance". They normally require more. That *more* is commonly described as "a burden that is higher than on a balance of probabilities, but lower than proof beyond reasonable doubt", see, for example, *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [[2004] 4 SLR 174] at [30], or, as stated in the English cases mentioned above, "proof is required on a preponderance of probabilities", or in reliance of the "different degrees of probabilities" notion that was discredited by Lord Nicholls [in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563] and Lord Hoffmann [in *Aktiesel Skabet Dansk Skibsfinansiering v Brothers* [2001] 2 BCLC 324]. All these descriptions of the test would, in essence, produce the same effect. While it is not a test, the following short passage from the judgment of Morris LJ in *Hornal v Neuberger Products Ltd* [[1957] 1 QB 247] at 266, quoted with approval by Lord Hoffmann, explains with great clarity what judges do in weighing evidence of fraud:
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> > Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities.
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> Therefore, we would reiterate that the standard of proof in a civil case, including cases where fraud is alleged, is that based on a balance of probabilities; but the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case.
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> [emphasis in original]

16 The approach as outlined above is buttressed further, in my view, by A V Winslow J's reference, in the Singapore High Court decision of *Eastern Enterprises Ltd v Ong Choo Kim* [1969–1971] SLR 206, to the present s 3(3) of the Evidence Act (Cap 97, 1997 Rev Ed), which reads as follows:

> A fact is said to be "proved" when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

17 Winslow J observed thus (at 215, [40]):

> Although at first sight no distinction seems to be drawn between different standards of proof by the Evidence Ordinance it seems to me that the wording of the definition of 'proved' itself gives the clue to the degree of probability which a prudent man should set himself before he finds any particular fact to be proved. A court should, after considering the matters before it, either believe it to exist or consider its existence so probable that a prudent man ought, under the circumstances of the particular case to act upon the supposition that it exists. The emphasis is therefore on the expressions 'after considering the matters before it', 'so probable' and 'under the circumstances of the particular case'. As Whitley A-G CJ said [in *PP v Alang Mat Nasir* [1938] MLJ 147] at p 149, 'the definitions in s 3 are so worded as to render possible a reasonable degree of elasticity in applying them, and when considering how we should apply them in any particular case, it is proper that we should invoke the assistance of authoritative decisions in England.' His Lordship did not, however, refer to the decisions of the Privy Council. In 1938, however, the Privy Council had not yet propounded the observations which Lord Atkin later made in 1939 and in 1941 and in any case those observations were irrelevant to the question of the standard of proof for insanity on the part of an accused person. But *Doe d Devine v Wilson* [(1855) 10 Moo PC 502; 14 ER 581], if considered, could well have reinforced his view.

18 The Privy Council decisions referred to in the above quotation are *The People of the State of New York v Heirs of the late John M Phillips* [1939] 3 All ER 952 and *A L N Narayanan Chettyar v Official Assignee, High Court Rangoon* AIR 1941 PC 93, respectively. The standard of proof laid down in these decisions was the criminal standard (*viz*, proof beyond a reasonable doubt). Winslow J, correctly, in my view, declined to follow them and, in any event, the present position under Singapore law is now firmly established by the Singapore Court of Appeal decision of *Tang Yoke Kheng* as noted above. In the event, Winslow J was of the view that, in a situation where fraud is alleged, "the degree of proof which must be attained by the plaintiffs need not be as high as that of proof beyond reasonable doubt as is required by a criminal court but the degree of probability required is one which must be commensurate with the occasion and proportionate to the gravity of the issue involved" ([16] *supra* at 216, [43]). The learned judge then proceeded to observe perceptively, yet practically, thus (at 216, [44]–[45]):

> I would therefore conclude for purposes of this action that the plaintiffs must establish their allegation against the defendant *on a balance of probability* as laid down by *Doe d Devine v Wilson subject to the qualification that in tilting the balance against the defendant, they must attain a higher degree of probability than is required in an ordinary case of civil negligence though not the very high standard of the criminal law*. Although the difference in the standards of proof in civil and criminal cases 'may well turn out to be more a matter of words than anything else' (per Denning LJ in *Bater's* case [see [20] *infra*]), the Australian High Court in the *Rejfek* case [*Rejfek v McElroy* (1965) 39 ALJR 177] held that it was no mere matter of words but a matter of critical substance.
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> The *crux of the matter* seems to me that, in deciding how high the standard of proof should be short of proof beyond reasonable doubt, *the court should act on its own good sense, having regard to the realities of the situation and apply that standard short of certainty which enables it to be reasonably satisfied that a grave allegation in the course of civil proceedings has been substantiated since there is obviously no precise mathematical formula which it can apply.*
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> [emphasis added]

19 The above observations (made as far back as 1969) were prescient and in fact foreshadowed the present position laid down over a quarter of a century later in *Tang Yoke Kheng* (see, especially, [15] above). The same could possibly also be said of the decision of the Singapore Court of Appeal in

Yogambikai Nagarajah v Indian Overseas Bank [1997] 1 SLR 258, where Lai Kew Chai J, delivering the judgment of the court, observed as follows (at [39]):

> The first observation we make in this context is that the burden of proof is on the party alleging the forgery. This raises the question of the standard of proof which the party has to satisfy. At one time, the authorities were unclear and espoused conflicting views as to whether the proper standard was the criminal standard (*New York v Heirs of Phillips Decd* [1939] 3 All ER 952 (PC)) or the ordinary civil standard (per Sir John Patterson in *Doe de Devine v Wilson* (1855) 14 ER 581 at p 592 (PC)). In *Hornal v Neuberger Products* [1957] 1 QB 247, the Court of Appeal of England adopted the latter approach *but with a significant qualification*. *The Court of Appeal interpreted the civil standard as one which varied depending on the gravity and seriousness of the allegation. The more serious the allegation, the higher the required standard of proof.* In that case, there was a claim based on fraud. The trial judge held that on a balance of probability, a fraudulent misrepresentation had been made. However, he would not have been satisfied if the standard was the criminal standard of beyond reasonable doubt. Nevertheless, he was of the opinion that the correct standard to apply was the civil one. [emphasis added]

20 *Conceptually*, of course, it might be possible to argue for the contrary proposition to the effect that there is in fact a third (or intermediate) standard of proof inasmuch as even in *Tang Yoke Kheng* itself, it was acknowledged that the court would "normally require more" evidence, and not just merely "that little bit more evidence such as to tilt the 'balance'". *However*, the court in *Tang Yoke Kheng* adopted a different approach – preferring to draw a distinction between a third standard of proof and the civil standard of proof *within which more* proof is required than that in a standard civil case where fraud is not an issue, and rejecting the former in favour of the latter. As Choo J pointed out in *Tang Yoke Kheng* itself, the difficulty may well be "more a semantical one than one of logic" (see also *per* Denning LJ in *Bater v Bater* [1951] P 35). In the famous words of William Shakespeare in *Romeo and Juliet* (Act 2, Scene 2):

> What's in a name? That which we call a rose
>
> By any other name would smell as sweet.

21 And, in the English Court of Appeal decision of*Hornal v Neuberger Products Ltd* [1957] 1 QB 247, Morris LJ rightly pointed out (at 266) that "the words which are used to define [an] approach are the servants but not the masters of meaning". In a similar vein, Lord Lloyd of Berwick, in the House of Lords decision of *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, observed (at 578) that "there is a danger that the repeated use of … words will harden into a formula, which, like other formulas (especially those based on a metaphor) may lead to misunderstanding".

22 Indeed, in the *practical* sphere of *application*, the court is well equipped and able to draw the necessary lines, *regardless* of the specific formula adopted. In the circumstances, and contrary to the proposition set out above (at [20]), it might well make for more *conceptual* clarity if the courts adhere to *just two* standards of proof, *viz*, the civil and criminal standards, respectively – *provided that this will not make a difference to the amount of proof required by the court concerned, especially in situations of fraud where more evidence would be required compared to a normal civil case because of the seriousness inherent in an allegation of fraud*. In this, we find the *balance* between theory and practice, between concept and application. It is not something which academic theory can capture – not fully, at least. The sphere of practical application is not susceptible of comprehensive theoretical analysis simply because theory tends, by its very nature, towards static frameworks. The sphere of practical application, on the other hand, is dynamic. But it is a dynamism

that can run riot and confuse for the future without the framework which theory and its concomitant concepts provide. Hence, both *interact and are integrated* with each other, but *no one can claim superiority or precedence over the other*. The *residuary tension* that results reflects the imperfection and dynamism that constitute a kind of paradox which we live with but can never fully explain.

23 The position laid down in *Tang Yoke Kheng* seeks, in fact, to combine theory and practice. The court has, quite correctly if I may be permitted to say so, drawn the line at the point where theory would threaten practice. In the final analysis, theory must serve practice in order that justice and fairness is achieved. And justice and fairness is all about *actual* people and events, not flights of academic fancy. Hence, the promulgation of a *third* standard of proof would only serve to confuse the situation where the courts were already always doing what they ought to be doing *in practice* – which is to require more evidence in situations where fraud has been alleged. Indeed, it might be asked: If a third standard of proof is permissible, why not recognise more standards of proof as the facts of each case will obviously vary from each other (see also *PJTV Denson (M) Sdn Bhd v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136). At this point, in fact, theory pulls us back, ironically perhaps, to legal *terra firma* – simply because the question just posed *conflates* theory with practice. In other words, the framework of the civil and criminal standards of proof, whilst *guiding* lawyers and courts in the sphere of application to the *facts* concerned, is *not the same as the facts themselves*. This, I hope, illustrates the *interactive* nature of theory and practice. When one escapes its "boundaries", the other reins it in – and *vice versa*.

24 Indeed, it is, in the final analysis and as already mentioned, the *substance* rather than the form or label which is of the first importance although, as I have been at pains to point out, both theory and practice do interact and it is *this interaction* which constitutes the *substance* of the matter.

25 I would just add this: *legal practice* (*viz*, the sphere of practical application) *necessarily* involves *discretion*. In this particular sphere, discretion is in fact not only necessary but also *a great strength*. It is the wisdom exercised by the court in assessing whether or not the amount of evidence adduced is sufficient to establish the allegation of fraud and/or dishonesty that is all-important. The theoretical proposition-cum-structure, to this extent, is only an overall guide at best. It must be. To state that where an allegation of fraud and/or dishonesty is raised, more evidence than that required in an ordinary civil proceeding is helpful. But it is clearly insufficient, in and of itself. The proof of the legal pudding lies in its eating (or, in the present context, its application, rather). I should hasten to reiterate that the exercise of judicial discretion is generally not only unavoidable but is also desirable, especially in situations such as these. As I observed in *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 117 at [102], "[t]he courts also exercise discretion virtually all the time and exercise such discretion in a structured and fair manner", citing the very pertinent observations of Chao Hick Tin JA (as he then was) in the Singapore Court of Appeal decision of *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502 at [81] in relation to the application of equitable principles, and where the learned judge opined that "[t]he courts here, as well as in other common law countries, have been applying equitable principles from time immemorial"; he added that "[w]hile certainty is desirable, it is not an object which should prevail in all circumstances, even against the dictates of justice" and that "[i]t is not more difficult to determine what is 'equitable' than what is 'reasonable' at common law".

26 In so far as *legal antecedents* were concerned, the Singapore Court of Appeal in *Tang Yoke Kheng* in fact adopted the *English* position on the matter (and see generally *Phipson on Evidence* (Sweet & Maxwell, 16th Ed, 2005) at paras 6-54–6-55 and Colin Tapper, *Cross and Tapper on Evidence* (LexisNexis, 10th Ed, 2004) at pp 171–173). Indeed, the two leading English Court of Appeal decisions of *Bater v Bater* ([20] *supra*) and *Hornal v Neuberger Products Ltd* ([21] *supra*) were cited

by the court. An even cursory search will reveal that these cases have in fact been applied in the local context on numerous occasions (see, for example, the Singapore High Court decisions of *Nederlandsche Handel-Maatschappij NV v Koh Kim Guan* [1959] MLJ 173 at 174; *Eastern Enterprises Ltd v Ong Choo Kim* ([16] *supra*); *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 SLR 735 at 776, [88]; *Ng Choon Hoo t/a Overseas Union Radio & Electric Co v The Nippon Fire & Marine Insurance Co Ltd* [1996] 3 SLR 180 at 204, [113]; and *Yogambikai Nagarajah v Indian Overseas Bank* [1997] 1 SLR 258 at [39]; as well as the Singapore Court of Appeal decision in *Tang Yoke Kheng* itself). In *Bater v Bater*, Denning LJ (as he then was) observed thus (at 36–37):

> The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be *more a matter of words than anything else.* It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is *no absolute standard* in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be *degrees of proof within that standard*.
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> … So in civil cases, the case may be proved by a preponderance of probability, but there may be *degrees of probability within that standard. The degree depends on the subject-matter.* A civil court, when considering a charge of fraud, will naturally require for itself *a higher degree* of probability than that which it would require when asking if negligence is established. It does not adopt *so high a degree* as a criminal court, even when it is considering a charge of a criminal nature; but still it does require *a degree of* probability which is commensurate with the occasion.
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> [emphasis added]

27 In a similar vein, Denning LJ, in *Hornal v Neuberger Products Ltd* ([21] *supra*), observed as follows (at 258):

> [The trial judge] reviewed all the cases and held rightly that the standard of proof depends on the nature of the issue. The more serious the allegation the higher the *degree* of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law. [emphasis added]

28 The above statements of principle are of course consistent with having only two standards of proof. The focus is, instead, on the *degree* of probability required which will (in turn) impact on the amount of evidence required. Indeed, this was also the position adopted by the House of Lords in its recent decision in *In re H (Minors) (Sexual Abuse: Standard of Proof)* ([21] *supra*), where Lord Nicholls of Birkenhead observed thus in an important passage that merits quotation in full (at 586 and 587):

> Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. This is the established general principle. There are exceptions such as contempt of court applications, but I can see no reason for thinking that family proceedings are, or should be, an exception. By family proceedings I mean proceedings so described in the Act of 1989, sections 105 and 8(3). Despite their special features, family proceedings remain essentially a form of civil proceedings. Family proceedings often raise very serious issues, but so do other forms of civil proceedings.
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> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is

appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in *In re Dellow's Will Trusts* [1964] 1 W.L.R. 451, 455: "The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."

This substantially accords with the approach adopted in authorities such as the well known judgment of Morris L.J. in *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247, 266. This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.

No doubt it is this feeling which prompts judicial comment from time to time that grave issues call for proof to a standard higher than the preponderance of probability. Similar suggestions have been made recently regarding proof of allegations of sexual abuse of children: see *In re G. (A Minor) (Child Abuse: Standard of Proof)* [1987] 1 W.L.R 1461, 1466, and *In re W. (Minors) (Sexual Abuse: Standard of Proof)* [1994] 1 F.L.R. 419, 429. So I must pursue this a little further. The law looks for probability, not certainty. Certainty is seldom attainable. But probability is an unsatisfactorily vague criterion because there are degrees of probability. In establishing principles regarding the standard of proof, therefore, the law seeks to define the degree of probability appropriate for different types of proceedings. Proof beyond reasonable doubt, in whatever form of words expressed, is one standard. Proof on a preponderance of probability is another, lower standard having the in-built flexibility already mentioned. If the balance of probability standard were departed from, and a third standard were substituted in some civil cases, it would be necessary to identify what the standard is and when it applies. Herein lies a difficulty. If the standard were to be higher than the balance of probability but lower than the criminal standard of proof beyond reasonable doubt, what would it be? The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences. A formula to this effect has its attraction. But I doubt whether in practice it would add much to the present test in civil cases, and it would risk causing confusion and uncertainty. As at present advised I think it is better to stick to the existing, established law on this subject. I can see no compelling need for a change.

This decision was, in fact, also cited in *Tang Yoke Kheng* (see [15] above). Indeed, I should add that reference may also be made to the following observation by Millett LJ (as he then was) at the Court of Appeal stage in *Re H and R (Child Sexual Abuse: Standard of Proof)* [1995] 1 FLR 643, as follows (at 659):

In civil cases, contempt proceedings apart, there is *only one standard of proof: proof on the*

balance of probabilities. It is never necessary to prove facts to a standard beyond the balance of probabilities. …

The difference lies in the cogency of the evidence needed to tip the balance, not in the degree to which the balance must be tipped.

[emphasis added]

29 The position adopted both in Singapore as well as in England appears to be that adopted in other Commonwealth jurisdictions as well. In the leading Supreme Court of Canada decision of *Regina v Oakes* (1986) 26 DLR (4th) 200, for example, Dickson CJC observed (at 226, and citing, *inter alia*, *Bater v Bater* ([20] *supra*)) that "*[w]ithin* the broad category of the civil standard, *there exist different degrees of probability depending on the nature of the case*" [emphasis added]. In a similar vein, reference may also be made to the earlier Supreme Court of Canada decision of *Continental Insurance Co v Dalton Cartage Co Ltd* (1982) 131 DLR (3d) 559 at 563–564 (where *Bater v Bater* was also cited).

30 There is some Malaysian authority, however, that suggests that, in situations where fraud is alleged, the standard of proof is the *criminal* standard (*viz*, proof beyond a reasonable doubt): see, for example, the (leading) Malaysian Privy Council decision of *Saminathan v Pappa* [1981] 1 MLJ 121 at 126; the Malaysian Supreme Court decision of *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34 at 38; the Malaysian Federal Court decision of *Chong Kee Seng v Che Chik* [1964] MLJ 144 at 145; as well as the Malaysian Court of Appeal decisions of *Wu Shu Chen v Raja Zainal Abidin bin Raja Hussin* ([12] *supra*) at 499 and *Lee Wai Fay v Lee Seng Ein* [2005] 4 MLJ 701 at [13]. And, in the Malaysian High Court (Kota Kinabalu) decision of *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming* [1995] 4 MLJ 328 ("*Hock Hua Bank*"), Ian Chin J was of the view that the authorities were none too clear, although the learned judge was of the view (at 355) that:

It is best left to the higher court to give an authoritative statement as to which of the Federal Court or Supreme Court cases are to be considered no longer law. For now, the standard to prove is proof beyond reasonable doubt.

31 If, as appears to be the case, the approach in the Malaysian context is to require proof beyond a reasonable doubt, such an approach is *clearly at variance* with that laid down by the Singapore Court of Appeal in *Tang Yoke Kheng*. Quite apart from the fact that I am bound by this last-mentioned decision, it is (as I have already elaborated upon above) well-grounded from the perspectives of concept, logic and rationality, as well as justice and fairness (see generally [23] above).

32 It has, in addition, been held (also in the Malaysian context) that a *further distinction* ought to be drawn between *civil* and *criminal* fraud. This was established in the leading Malaysian Federal Court decision of *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu* [1997] 2 MLJ 45 ("*Ang Hiok Seng*"), and now appears to be a well-established principle under Malaysian law (see, for example, the Malaysian Court of Appeal decision of *Ong Ban Chai v Seah Siang Mong* [1998] 3 MLJ 346 at 358). In *Ang Hiok Seng*, Mohd Azmi FCJ, delivering the judgment of the court, observed (at 61) that:

[W]here the fraud alleged in civil proceedings is based on a criminal offence, the criminal burden of proof beyond reasonable doubt must be applied. But where the fraud alleged is purely civil in nature, there is no reason why the civil burden should not apply.

Earlier in his judgment, Mohd Azmi FCJ did in fact refer to the former (*viz*, criminal fraud) as

encompassing offences "such as conspiracy to defraud or misappropriation of money or criminal breach of trust" (see at 60).

33 Whilst the distinction just drawn between criminal and civil fraud in the context of civil proceedings is attractive, it is, with the greatest respect, likely to give rise to a not insignificant amount of confusion. Let me elaborate.

34 In the Malaysian Federal Court decision of *PJTV Denson (M) Sdn Bhd v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) observed thus (at 138):

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean "actual fraud, i.e. dishonesty of some sort" for which the registered proprietor is a party or privy. "Fraud is the same in all courts, but such expressions as 'constructive fraud' are ... inaccurate;" but "'fraud' ... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled." (*per* Romilly M.R. in *Green* v. *Nixon* [(1857) 23 Beav 530 at 535; 53 ER 208 at 210]). Thus in *Waimiha Sawmilling Co. Ltd.* v. *Waione Timber Co. Ltd.* [[1926] AC 101 at 106] it was said that "if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent. ..."

And in *Hock Hua Bank* ([30] *supra*), Chin J defined fraud as follows (at 352):

> To sum up, fraud implies some base conduct and moral turpitude and a person is taken to have acted fraudulently or with intent to defraud if he acts with the intention that some person be deceived and by means of such deception that either an advantage should accrue to him or injury, loss or detriment should befall some other person.

35 In a similar vein, Mohd Ghazali bin Mohd Yusoff J, in the Malaysian High Court (Johor Baru) decision of *Magnum Finance Berhad v Tan Ah Poi* [1997] 3 AMR 2265 at 2279, observed that "[f]raud is simply, dishonesty and there is no magic in that word".

36 Given the definitions of fraud set out above, the potential for an overlap – or even coincidence – between the civil and criminal spheres is enormous. Put another way, every allegation of fraud in a civil proceeding will virtually always contain within it the at least potential (often, actual) seeds of a criminal offence. If this is indeed the case, then there is a very persuasive case for arguing that, given this overlap or even coincidence, the *criminal* standard of proof of beyond a reasonable doubt ought to apply. This potential – even actual – blurring of the lines is, with respect, both conceptually as well as practically undesirable. Although *Tang Yoke Kheng* does not deal directly with this particular issue, it is suggested that the content as well as tenor of the judgment in that case is inherently at variance with the distinction presently being considered – not least because the court there drew a clear distinction between the civil and criminal standards of proof. In any event, I would respectfully decline to follow this distinction between criminal fraud and civil fraud in the context of civil proceedings for the reasons I have just stated. In this regard, I am glad to note the following observations by Ian HC Chin J in the High Court of Sabah and Sarawak (Kuching) decision of *Eric Chan Thiam Soon v Sarawak Securities Sdn Bhd* [2000] 4 AMR 3784 ("*Eric Chan*") at 3798–3799:

> Since "civil fraud" comprised cases of "criminal fraud" under the Penal Code (by virtue of s 17(e) of the Contracts Act), this distinction of "civil fraud" and "criminal fraud" cannot hold and it is, in my humble opinion, *an attempt at distinguishing the undistinguishable since "fraud" by its incorporation of the offences under the Penal Code where fraud is an element has the same*

meaning whether in criminal or civil cases and they are "criminal fraud".

…

It is difficult to find purely "civil fraud" since fraud involves dishonesty which forms the basis of many criminal offences. Take the allegation in *Ang Hiok Seng* that someone had misrepresented the contents of a document and thus induced the signing of it resulting in the signatory losing his right under a lease. Such conduct is "cheating" within the meaning of s 415 of the Penal Code. The end result of *Ang Hiok Seng* would be that in civil proceedings taken out for the avoidance of a contract alleged to have been induced or deceived by fraud, facts which amount to the commission of a crime, have only to be established on a balance of probabilities except for facts that amount to: (1) conspiracy to defraud; (2) misappropriation of money; and (3) criminal breach of trust. *The legislature should step in and pass a law to say that in all civil proceedings the burden of proof in respect of all matters is that of on a balance of probabilities. This would put an end to the irreconcilable decisions of the highest court instead of leaving the matter to successive courts to try and extricate itself from the insoluble problem and which leads to more problems and more uncertainty in the law. I am all for a single standard of proof on a balance of probabilities in civil proceedings* and I said so in *Hock Hua Bank (Sabah) Bhd v Lam Tat Ming* [1995] 4 MLJ 328 where I have referred to the various conflicting decisions of our courts.

[emphasis added]

37 The learned judge then proceeded to consider specific examples or illustrations. For instance, he was of the view that *forgery* necessarily involved fraud, with an overlap between the civil and criminal spheres being present in so far as the element of fraud also featured in the *criminal offence* of forgery (at 3799). This, of course, appears contrary to the Malaysian Court of Appeal decision of *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 at 75, where a distinction is drawn in civil proceedings between proof of forgery on the one hand and fraud on the other. Hence, in so far as the former is concerned, the standard of proof is the civil standard of a balance of probabilities. With respect, I prefer the view of Chin J in *Eric Chan*. Even if forgery takes place in the context of civil proceedings, it must, in my view, necessarily involve (as Chin J himself emphasised) an element of fraud. It is, in other words, very difficult to envisage a situation where there is a situation of forgery that does not involve the element of fraud.

38 Returning to *Eric Chan*, Chin J observed that where there is a civil claim for *conversion*, "[t]his would be akin to criminal breach of trust within the meaning of s 405 of the Penal Code"; hence, "[a]pplying *Ang Hiok Seng*, it would mean that this is 'criminal fraud' requiring proof beyond a reasonable doubt since it involves misappropriation or criminal breach of trust" and "[t]his means where a claim is dependent on establishing conversion it must be proved beyond a reasonable doubt" (at 3800). Indeed, the learned judge followed this (criminal) standard of proof as the proceedings before him involved an allegation of conversion (*Ang Hiok Seng* being, it should be noted, binding upon him). However, his observations on the existing state of the law are of more than passing interest in the light of the views I have expressed above.

39 In summary, the standard of proof in civil proceedings where fraud and/or dishonesty is alleged is the civil standard of proof on a balance of probabilities. However, where such an allegation is made (as in the present proceedings), *more* evidence is required than would be the situation in an ordinary civil case. Such an inquiry lies, therefore and in the final analysis, in the sphere of practical application (rather than theoretical speculation). In this regard, a distinction ought not, in my view, to be drawn between civil fraud and criminal fraud.

40 I turn now to apply these general principles to the facts of the present proceedings.

The allegations based on fraud and/or dishonesty resulting in an alleged breach of fiduciary duty and/or breach of trust on the part of the defendant

The alleged siphoning of $195,000 through seven partnership cheques

41 The sum that had allegedly been siphoned off from the partnership funds by the defendant comprised, as mentioned above, seven cheques totalling $195,000. These cheques were drawn between 6 August 1991 and 19 October 1992 and were deposited into an account opened jointly in the names of the defendant and his late wife (KY).

42 I believed the defendant when he stated that he had forgotten the purpose for which the said cheques were drawn as it had been such a long time ago.

43 I pause here to observe, in a more general vein, that I found the defendant to be a witness of truth. He gave his evidence in a straightforward manner. Unlike the plaintiffs' testimony (which I will come to in a moment), his testimony had the ring of truth. I found him to be a little diffident at times. Incidentally, this is consistent with his testimony to the effect that he had resigned from his previous job as bank manager as he found the job to be very stressful.[note: 1] Indeed, the plaintiffs, in their closing submissions, themselves acknowledged that "[t]he Defendant joined the Partnerships in 1989 because of difficulties in his then occupation as a bank manager with the BOS [Bank of Singapore]".[note: 2] It was easy to understand this after having observed closely the defendant giving his testimony over a not insignificant stretch of time. At this point, I should note that, having regard to my assessment of the defendant as a witness of truth, I accept his explanation with regard to the relevant salary increases, which increases were of course vigorously disputed by the plaintiffs.

44 In contrast, the plaintiffs simply expected the court to draw, by virtue of the *fact* that the seven cheques concerned were banked into the accounts concerned *alone*, that the *defendant* had *siphoned off* the money concerned. This was woefully inadequate and a mere assertion without more, especially if we bear in mind the fact that the onus of proof lay throughout, as I have mentioned, on the plaintiffs. This is, *a fortiori*, the case when we also bear in mind what the requisite standard of proof is, as outlined above.

The alleged siphoning of $167,000 of the partnership funds

45 Once again, I believed the defendant when he stated that he could not remember what had happened. Indeed, it seemed to me that this particular claim stood on even more tenuous ground. More than half the gross amount concerned ($155,000) was in fact banked into *the defendant's late wife's (KY's) account*. It is unreasonable, in my view, to assume that, as the controlling partner at the material time, KY did not know what was happening. The impression I received was that she was firmly in charge of all the affairs of the partnership and knew precisely what was going on. It is difficult to believe that she did not know about sums that were being deposited into her own bank account. Indeed, I also find it difficult to believe that she did not know about sums that were being deposited into her and her husband's (the defendant's) joint account (allegedly to the tune of $100,000). She was, to reiterate, a businesswoman of considerable ability and acumen. I hasten to add that I did not understand the plaintiffs to be suggesting that *she* had been taking liberty with the partnership's assets. In any event, it is too late for them to do so. Indeed, it would, in my view, be an abuse of the process of the court for the plaintiffs to suggest this even in fresh proceedings. Add to this the fact that, for this particular claim at least, the plaintiffs were willing to take into account KY's salary and we have, with respect, a very muddled and speculative claim indeed. I therefore have

no hesitation in dismissing this particular claim.

The alleged siphoning off of an estimated amount of between $2,008,006 and $2,526,430 of partnership funds between 28 October 1992 and 2003

46 I turn now to the plaintiffs' claim with respect to the defendant's alleged and systematic siphoning off of partnership funds between 28 October 1992 and 2003. Significantly, perhaps, this covers the period after the defendant's late wife (KY) had passed away. Even if we allow for the fact that the said funds had been allegedly siphoned off over a relatively lengthy period of time, this still works out (at the lower end of the estimated amount) to a dishonest and fraudulent withdrawal of an average sum of *approximately $200,000 per annum*.

47 Whether or not the defendant in fact siphoned off such funds depends on what are, in my view, the starting-points one accepts. Indeed, both the plaintiffs as well as the defendant called their respective expert witnesses. And the expert witnesses on both sides utilised different starting-points. Not surprisingly, if one accepts the starting-point of the plaintiffs' expert witness, Mr Peter Jacob ("Mr Jacob"), then one must conclude that the plaintiffs' claim has been made out. If, on the other hand, one accepts the starting-point of the defendant's expert witness, Mr Tam Chee Chong ("Mr Tam"), then one must conclude that the defendant has to succeed. Both witnesses, I might add, have impeccable qualifications and both struck me as being earnest and diligent, eager to give their respective testimonies to the best of their respective abilities. Hence, the most significant question I had to address was one that I have just alluded to: Which starting-point was to be preferred? At this juncture, it is important to note that, as a matter of general principle, starting-points are generally important – even vital. There is no point in arguing that the logic flowing from a particular starting-point is impeccable when that starting-point *itself* was *inappropriate* to begin with. The logic may well be impeccable, but if one commences a journey by heading in the *wrong direction*, the *ultimate destination will be the wrong one.* And the whole point of making the journey in the first place would be totally lost – which is a massive understatement, if I may say so.

48 The key question then is this: What were the respective starting-points of the parties? In so far as the *plaintiffs* were concerned, the (primary) starting-point focused on *the annual partnership accounts* (although, as we shall see, they did seek to rely on the defendant's cashbooks when it suited them). In so far as the *defendant* was concerned, the starting-point focused on the *defendant's cashbooks*. It is, as I mentioned, of the first importance to examine these respective starting-points, focusing on the underlying principles and purposes therein.

49 Turning, first, to the plaintiffs' reliance on the annual partnership accounts, one major issue centred, in substance, on the question of reliability. To this end, I had queried more than once why only the annual partnership accounts from 1989 onwards were available since the business stretched much further back than that. It is true that the plaintiffs were only concerned with these accounts from late 1992, which (to reiterate) was after KY had passed away and when the defendant had in fact first joined the business as a partner (having first joined as an employee in 1989 (see [43] above)). Nevertheless, partnership funds were in fact also lent prior to 1992 to TL's youngest son (and the youngest sibling), Lim Tsia Yong ("TY"). The funds lent were not inconsiderable. There was in fact another loan to a company called Yick Lee Trading Pte Ltd, in which Lim Cha Seng (the second son of TL and the husband of Chua Kwee Chen) was a director and shareholder. Again, the funds lent were not inconsiderable. It would have been helpful to the court to have known how such loans were in fact reflected in the annual partnership accounts. I do not rely primarily on this point, although such conduct seemed to me to be *consistent with a general pattern that permeated the plaintiffs' conduct of their litigation throughout these proceedings – the selective adducing of evidence*. I shall have more to say about this later in respect of illustrations that *did* impact directly on the present

proceedings. I will only observe that TY himself was rather coy about these loans to him. But, then again, he was the one upon whom the rest of the partners relied to go through the partnership accounts and it was, presumably, he who (in no small part at least) contributed towards the present proceedings by his findings. Yet, it was also he who admitted, under cross-examination by counsel for the defendant, that *he stood to gain a share of the amount recovered in the present proceedings if the plaintiffs were successful, even though he was not even a partner of the business* as he is a bankrupt and is hence only an employee of the business; indeed, he has never been involved in the partnership business as such. Even leaving this aside, I found him to be an evasive witness.

50 More importantly, we must (as I have mentioned above) have special regard to the *starting-point* itself. Indeed, the plaintiffs had, in effect, more than one starting-point. As I have mentioned above, the *primary* starting-point is *the annual partnership accounts* (referred to as the "annual unaudited financial statements of the partnerships" in Mr Jacob's report, although I utilise the terminology "annual partnership accounts" because this was the rubric utilised throughout the hearing before me). In this regard, it is clear that the overall documentation that Mr Jacob worked with *was given to him by the plaintiffs themselves*. There is of course nothing wrong with this. Indeed, the overall documentation that the *defendant's* expert witness (Mr Tam) worked with *was also given to him by the defendant himself*. But herein lies an important practical conundrum with respect to the adducing as well as analysis of expert evidence generally. Let me elaborate.

51 I have already pointed out that both Mr Jacob and Mr Tam were impeccable in their professionalism. They did not give the impression of being mere "hired guns". They were unfailingly helpful towards the court at all times. But the significant question that arises, then, is this: *How did they come to diametrically opposed conclusions?* Mr Jacob found that there was a discrepancy in excess of $2,000,000, which the plaintiffs now require the defendant to account for. On the other hand, Mr Tam found that there had been no discrepancy, save for a relatively small amount which he could not completely reconcile. The puzzle resolves itself when we probe further into the *respective starting-points* – a point to which I have alluded above.

52 In so far as the *plaintiffs* are concerned, the *primary* starting-point is *the annual partnership accounts*. *However*, this is primarily for the purpose of detailing *the amount of salaries and wages paid* (I refer to this as "the salaries outflow"). In so far as the *cash receipts* are concerned, they rely (*like the defendant*) on *the defendant's cashbooks* (I refer to this as "the overall cash inflow"). *Mr Jacob had no choice but to work from*, inter alia, *these documents*. This was *his* starting-point.

53 In so far as the *defendant* was concerned, the starting-point was (as I have already noted) *his cashbooks*. *However, unlike the plaintiffs*, this was, in *substance*, the defendant's *only* starting-point. In other words, he relied on his cashbooks for *both the amount of salaries and wages paid* (the salaries outflow) *as well as* the *cash receipts* (the overall cash inflow). Here again, *Mr Tam had no choice but to work from,* inter alia, *these documents*. This was *his* starting-point.

54 It can be seen now *how and why* the *large discrepancy* (in so far as this particular head of claim is concerned) between the respective reports of Mr Jacob and Mr Tam has occurred. The overall cash inflow being more or less agreed between them, the large difference is due to the fact that the salaries outflow under *the annual partnership accounts* (which is *Mr Jacob's* starting-point) is *much less* than the salaries outflow under the *defendant's cashbooks* (which is *Mr Tam's* starting-point). Indeed, this is an understatement; the difference between the two is, in effect, the amount now claimed by the plaintiffs, which is (as we have seen) in excess of $2,000,000.

55 *What this boils down to, in my view, is whether or not, in so far as the salaries outflow over the material period is concerned, the annual partnership accounts or the defendant's cashbooks*

should constitute the legitimate starting-point. In this regard, we can then understand why, despite their professionalism, both Mr Jacob and Mr Tam could have arrived at such *radically different* conclusions with respect to the claim under this particular head. *They* could *only* work with *what they were given by their respective clients*. Although it is not (at least wholly) conclusive, *the credibility of the key witnesses for the respective parties in these proceedings is crucial*. *In other words, who is more likely to be believed – especially with regard to the claimed starting-points. This seems to me to be the nub of the matter and helps the court to cut through the thicket of figures and assess the claim from the perspective of substance – the substance of logic, principle and fairness*. Looked at in this light, it is clear (as I have already found) that *the justice of the case was with the defendant*. *And this is further buttressed by an analysis of the particular factual matrix* – to which our attention must now turn.

56 Turning now to the specific factual matrix, an extremely pertinent point in so far as the annual partnership accounts are concerned was in fact highlighted by counsel for the defendant. This was the fact that throughout the period during which the defendant was alleged by the plaintiffs to have systematically siphoned off partnership funds into his own accounts (from late 1992 to 2003) *the annual partnership accounts* – the very documents the plaintiffs were relying upon to establish their case – showed that *the total profits* for the partnerships was *$1,005,175*. Yet, it will be recalled, the claim was for an alleged siphoning off (by the defendant) of *in excess of $2,000,000*. How, then, could the defendant have siphoned off the sum which the plaintiffs alleged that he (the defendant) did? Or is it the case that the annual partnership accounts were *inaccurate*? But if this is the case, why were the plaintiffs relying upon them? This was because they did not want to rely on the defendant's cashbooks. But why did they not want to rely on the defendant's cashbooks? As I have already mentioned above, this was because the defendant's cashbooks would demonstrate that there had been *no siphoning of the partnership funds as alleged by the plaintiffs*. Indeed, *this* was why the defendant was relying on the cashbooks in the first instance. The fact of the matter is that the plaintiffs could not have their cake and eat it, as the old adage goes. Hence, since they had committed themselves to reliance on the annual partnership accounts, their case had to stand or fall by the persuasiveness of such reliance. *However*, as I have just pointed out, *the annual partnership accounts themselves appear to support the defendant's case instead, based on the amounts concerned and as referred to earlier in this paragraph.* Counsel for the defendant rightly points out that *even Mr Jacob* was compelled to concede that there was *a major inconsistency present* in so far as these amounts were concerned. Incidentally, Mr Jacob's concession was but one instance of what I had earlier referred to as his (and Mr Tam's) commendable as well as objective professionalism. This is of course only right in view of the fact that an expert's overriding duty is to assist *the court*. Unfortunately for the plaintiffs, however, their own expert's testimony did not support their case and (worse still) pointed in the *opposite* direction. Another important factor, which I deal with later (at [65]) is the *defendant's* own (possible) role in the preparation of the annual partnership accounts.

57 In addition, the various *cheques* which the plaintiffs relied on in their attempt to demonstrate that the defendant had thus effected the alleged siphoning off of partnership funds did not themselves constitute unambiguous evidence of siphoning off. Indeed, a significant portion of the trial was spent by the plaintiffs in establishing that these cheques were the instruments through which fraud had been committed on the partnerships by the defendant, whilst (as expected) the defendant was committed to explaining what (in his view, and not surprisingly) were the legitimate purposes for which the same cheques were drawn. In point of fact, however, much time could have been saved and confusion avoided *if the plaintiffs had simply applied to the bank for the bank statements of the partnership in the first instance*. It was not as if they did not recognise this point. Indeed, I had asked more than once whether this could be done. *After all, the consolidated bank statements could not only have been matched to all (and not merely some) of the cheques issued but could also have been correlated to the annual partnership accounts themselves. However, the plaintiffs continued to*

be very coy about my inquiries. *Unfortunately, this was not the end to the matter.* In this regard, I note, with grave concern, the attempt by the plaintiffs to ostensibly introduce these bank statements *almost a month after the trial had concluded and a few days after final reply submissions had been filed and served*. The letter by counsel for the plaintiffs to the court was in fact worded rather curiously; the material parts read as follows:

> Your Honour has at various junctures during the trial of these matters … queried parties as to the availability of bank statements pertaining to the Partnerships from 1989 to 2003.
>
> We write to inform your Honour that we have today forwarded an open letter to [counsel for the defendant], offering to disclose the said bank statements. As your Honour has indicated that he would not be minded to adduce further evidence, we respectfully do not propose to tender any copies to your Honour unless your Honour otherwise directs.

58 This evidence with regard to the bank statements, if it indeed exists (as the plaintiffs themselves now in fact acknowledge), could (and ought) to have been discovered, *at the latest, by the time of the trial itself*. *Indeed, the plaintiffs did not seem to me to be serious about introducing such evidence in any event.* This is why I have utilised the word "ostensibly". No court application was contemplated, let alone forthcoming. It seemed that this letter was just a half-hearted attempt to meet my inquiries about the bank statements without actually meeting them by the concrete production of these documents. Such conduct by the plaintiffs merely confirms the *selective* adducing of evidence by the plaintiffs and (more importantly) also confirms my own assessment of the relative credibility of the relevant witnesses for the plaintiffs.

59 Indeed, in so far as the credibility of the witnesses was concerned, the witnesses for the plaintiffs were, with respect, not convincing. This is in stark contrast to the defendant's testimony, the general assessment of which I have already given above (at [43]) and will therefore not repeat. I generally found them to be unhelpful with respect to the objective facts needed to prove their case. On occasion, the witness concerned was even evasive. This was, for example, the case with TY, whose evidence I have referred to briefly above (at [49]). Indeed, the objective facts, where they came to light, were in fact in favour of *the defendant*. Let me elaborate.

60 The defendant testified that he would report the total cash expenditure as well as the total expenditure made by cheque to *KN*. Further, as counsel for the defendant was at pains to point out – correctly, in my view – *KN was in charge of the business and would have known if substantial amounts were being siphoned off*. Even if such alleged siphoning off of funds had been undertaken surreptitiously by the defendant (as we assume they must, in the nature of things, have been if the defendant was indeed guilty of such dishonest conduct), it is unreasonable to accept (as KN maintained) that KN had no knowledge whatsoever of such actions. KN came across as a businesswoman not unschooled in the ways of the world in general and the ways of business in particular. This is, of course, not surprising. However, her *stock excuse* was to claim ignorance whenever a question of this nature was put to her by counsel for the defendant. She repeatedly claimed that the defendant was the "accountant" of the partnership and that he should answer the questions. This was not merely obstructive; it was most convenient as well as evasive. In fairness to KN, it did appear, on occasion at least, that she did subjectively believe that the defendant had perpetrated such fraud. However, that is insufficient. Human beings are, if I may say, exceptionally adept at rationalising and convincing themselves – on a purely subjective basis – that they are correct in holding the views they do. But such views must be consistent with the objective factual matrix. Further, it is not inconceivable that KN's views were coloured by that of her siblings and other partners, as well as the fact that the defendant had apparently "defected" to his son's side when the latter had sued the partnership in the earlier proceedings. As I have noted at the outset of this

judgment, that particular matter has been settled. But I sensed throughout that it had left a bitter aftertaste for all concerned. I would not go so far as to say that the present litigation was initiated by the plaintiffs as a reprisal of sorts for the earlier litigation and (in particular) the defendant's role in it. However, there is no denying that this must have been at least a factor which coloured KN's testimony – a fact that was revealed by her answers when cross-examined on this point by counsel for the defendant. On a general level, there appeared to be a tremendous amount of ill will felt by the plaintiffs towards the defendant personally. I have no doubt that the plaintiffs would say that this is because the defendant had cheated them. However, the objective evidence did not bear this out. The fact of the matter is that, in what are in effect family disputes such as that found in the present proceedings, there is an unpleasant history. Unfortunately, this is often not expressly stated, but nevertheless exists as a poisonous undercurrent. However, my task is to deal only with the objective facts before me, and I do not – and ought not to – speculate on the precise family history. What is clear, however, is (as I have mentioned) the fact that the previous proceedings brought by the defendant's son seemed to me to plant, in part at least, the seeds of the present acrimony. This much was clear on an objective basis. On the other hand, the objective fact of the matter was that the defendant had, within the constraints of the very rough system that existed within the business, done his level best. It must be reiterated that it was KN who called all the shots. As I have also noted earlier (at [43]), the defendant was by no means an assertive person possessing exceptional initiative, although he was clearly not incompetent either. I should also note that, even in a claim based on an alleged breach of a duty of care (which was not pleaded by the plaintiffs in any event in the present proceedings), it is clear that the manner in which the firm concerned carried on its business is an important factor to be taken into account (see Geoffrey Morse, *Partnership Law* (Blackstone Press, 5th Ed, 2001) at p 138).

61 I must emphasise, once again, that the plaintiffs' claim under this (as well as the other) heads was for an alleged breach of fiduciary duty and/or breach of trust which were, in turn, based on allegations of fraud and/or dishonesty. I would also emphasise that the nature of the evidence required was not light. Given the numerous difficulties with the plaintiffs' own testimony and the overall logic of their case (which I have described and analysed briefly above), they have, in my view, *clearly not* discharged the burden of proof which they must necessarily bear as claimants in the present proceedings.

62 The conclusion I have arrived at in the preceding paragraph is in fact more than supported by an examination of the *defendant's* reliance on *his cashbooks*, instead of the annual partnership accounts.

63 As I have already explained above, it is clear why the defendant was relying on his cashbooks. Relying on the figures in the cashbooks, it is clear that there has been no siphoning of the partnership funds. However, the plaintiffs, not surprisingly, argue that the figures in the defendant's cashbooks are inaccurate and in effect cover the defendant's dishonest tracks, so to speak.

64 It is important to note at the outset that the authenticity of these cashbooks is not in dispute as they are contained in the agreed bundle. It is true this fact alone does not confirm the truth of the contents contained therein – which is of course a separate and distinct issue from that of the authenticity of the said documents. One important factor is, of course, my general view of the defendant himself as a witness. As I have already emphasised earlier in my judgment (at [43]), I generally found him to be a reliable witness of truth. It will also be recalled that *KN*, in particular, had ample opportunity on both an intuitive as well as an objective business level to verify the accounts of the business over a very lengthy period of time and did not raise any queries. Indeed, the figures in the cashbooks were shown to her. The salary figures, which constituted the largest amounts flowing out from the business, were there for her to see. More importantly, given her overall control and

understanding of the business, if the defendant had in fact been surreptitiously "cooking the books", her suspicions ought – indeed, would – have been aroused; yet they clearly were not, not at least until the present claim which has been brought over a decade down the road.

65 Another important point to note is that *the plaintiffs themselves* allege that *the defendant* had also helped to prepare the *annual partnership accounts* (in their very own pleadings, the plaintiffs state that one of the defendant's main duties in the partnership was "[p]reparing the yearly statement of accounts"). I note, however, that the defendant, in *his* pleadings, *denies* that he had prepared the annual partnership accounts and alleges that these accounts had been prepared by the bookkeeper instead. Indeed, this point was not, in my view, clearly resolved in these proceedings. But let me take the plaintiffs' case at its highest or at its best. Leaving aside the fact that the partners were content to accept the figures therein, *the question arises as to whether or not the defendant would have been foolish enough, having had more than a dab hand in preparing the accounts in both his cashbooks and the annual partnership accounts, to have left such a large discrepancy between the two. Indeed, one would have thought that the defendant would have been astute to have covered his tracks*. He was not a bold spirit, as I have already noted, but he was certainly not unintelligent. Certainly, if, as the plaintiffs say, the defendant is devious and dishonest, he would not have been so careless. After all, the plaintiffs are, as we have seen, *relying on the annual partnership accounts*. Incidentally, they have *also* relied on *some* of the figures in *the defendant's cashbooks*. This is itself odd since it smacks of the plaintiffs wanting to have their cake and eat it. Further, although the annual partnership accounts were prepared by the defendant, they were vetted by an accountant. There was no concrete evidence led to the effect that this accountant was in cahoots with the defendant. If so, what, then, accounts for the radical divergence between the figures in the annual partnership accounts on the one hand and those in the defendant's cashbooks on the other? Indeed, it bears repeating that it was this enormous difference (amounting to some $2,000,000) that formed the basis for the plaintiffs' claim under this particular head. It will be noticed that this large difference is due largely to a difference in the amount of salaries and wages that were paid out over the period in question. Put simply, the annual partnership accounts recorded the lower figure whilst the defendant's cashbooks recorded a higher figure. The plaintiffs of course argue that the defendant had manipulated the figures in his cashbooks and pocketed the excess money. However, as I have already pointed out in some detail, the objective facts (ranging from the preparation of both sets of accounts to the daily oversight of the business to the credibility of the respective witnesses' evidence, amongst other factors) do not support this line of argument adopted by the plaintiffs. But we are then back to the question as to why there was this discrepancy between both sets of accounts? There are many possibilities but one that is plausible but which I do not want to pursue because there was no proof and because, if true, there would be implications that go beyond the parameters of the present proceedings, is that the amount of salaries and wages paid out was simply understated in the annual partnership accounts.

66 As a relatively minor (but by no means wholly irrelevant) point, I also note that the defendant's cashbooks were not the only cashbooks available. There was another cashbook that would have given a more accurate picture, if nothing else, because it would not record merely what cash was handled by the defendant alone pursuant to the partnership business (which was recorded of course in the defendant's cashbooks) but would record *all* the cash transactions of the business itself. This cashbook was never produced. No explanation was given as to why it was not produced. Yet again, there is a dearth of crucial evidence when it is most needed.

67 When all is said and done, it must be reiterated that the burden of proof lay throughout on the plaintiffs to prove their case and the standard of proof was, in the circumstances, not a light one. They had clearly *not* satisfied it.

The alleged failure to account for the proceeds of sale of the Selegie and Parkview properties

68 The plaintiffs also claimed that the defendant had wrongfully and in breach of his duties as a partner failed to account to them in so far as the proceeds of sale of the Selegie and Parkview properties were concerned. The defendant of course denies this and, on the contrary, has applied (via Originating Summons No 583 of 2004) to remove the caveats lodged by KN, based on this head of the plaintiffs' claim, on two of his present properties – the Fulton and Palm Garden properties, respectively.

69 It is significant, in my view, that both the aforementioned properties were registered in the defendant's late wife's (KY's) name, although the Selegie property was registered in both her and the defendant's names (with the Parkview property being registered *solely* in KY's name). I believed the defendant when he stated that it was his wife, KY, who in effect purchased both these properties and that he was not involved at all. In addition to the defendant's own credibility as a witness as well as his general disposition (see [43] above), it was clear that KY was the person who was calling the financial and other shots both within the household and within the partnership itself. Again, I pause to note that at no time was there any allegation on the part of the plaintiffs to the effect that *KY* was responsible for breach of trust or any other duty as a partner, or otherwise. Indeed, it would, as I have already mentioned in another context, now be an abuse of process of the court to raise this point – even in fresh proceedings. In the circumstances, and bearing in mind the fact that the plaintiffs not only bore the burden of proof throughout but also that the standard of proof required more than mere assertion on their part, I do not, with respect, see how the plaintiffs have proved their case with regard to this head of their claim against the defendant. On the other hand, given the many different claims brought by the plaintiffs against the defendant in the present proceedings, I am not in the least surprised that this was "thrown into the pot" as well, so to speak. To return to the specifics of the present proceedings, there was simply no evidence in my view to prove that the defendant had utilised the partnership funds to purchase the Selegie and Parkview properties.

70 Indeed, the relevant provisions of the UK Partnership Act (c 39) ("Partnership Act", which Act is applicable in Singapore *via* the Application of English Law Act (Cap 7A, 1994 Rev Ed) and reprinted as Cap 391, 1994 Rev Ed), *viz* ss 20 and 21, read as follows:

> **Partnership property.**
>
> **20.**—(1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement:
>
> Provided that the legal estate or interest in any land which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.
>
> (2) Where co-owners of an estate or interest in any land, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

Property bought with partnership money.

21. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

71 The aforementioned provisions, however, presuppose (as I have already emphasised) that *partnership funds* were in fact utilised (here, by the defendant) to purchase the Selegie and Parkview properties if the plaintiffs are in fact to succeed in the claim under this particular head. Then, and only then, could it be said that the properties constitute partnership property, with the proceeds of sale arising therefrom being subject to a duty on the part of the defendant to account for. Indeed, as Wan Suleiman FJ put it in the Malaysian Federal Court decision of *Mat Shah bin Mohamed v Foo Say Meng* [1984] 1 MLJ 237 at 239:

> It is of great importance to know whether the property is partnership property for the three main reasons. One is the position of the partners themselves. This may be wholly governed by the terms of the partnership agreement. *It should be remembered that an increase in the value of partnership property belongs to the firm, whereas if the property is the property of an individual partner the increased value belongs to him only* … The second is the position between the creditors of the firm and the creditors of the individual partners in the event that the firm becomes insolvent. The third is the position of those persons who take the partner's real estate and those who take his personal estate. Whether the property has become partnership property or not is a question of fact. [emphasis added]

72 It has also been pertinently observed thus (see Yeo Hwee Ying, *Partnership Law in Singapore* (Butterworths Asia, 2000) at p 229):

> When the asset is purchased through an individual partner's funds, the natural inference would, in general, be that it was intended to be the property of the purchaser. *When considering each particular case, there is still the need to look at the partners' intention and other pertinent facts*, bearing in mind this helpful judicial injunction from *Ponnukon v Jebaratnam* [*per* Salleh Abbas FJ in [1980] 1 MLJ 282 at 283]:
>
> > … the question as to who pays for the property is important. The mere use of the property for the purpose of partnership without any evidence that the property was purchased with partnership fund, nor evidence as to the intention to treat the property as such, will not change the ownership of the property from separate to partnership property.
>
> [emphasis added]

73 The plaintiffs did not, in my view, adduce any real evidence to prove that the properties in question were in fact purchased with partnership funds. In contrast, the defendant did in fact adduce evidence that, in my view, proved that the properties were purchased with his and his late wife's personal funds. In particular, evidence was given of the *precise* source of funds utilised for the said purchases which was not controverted in any way by the plaintiffs. The plaintiffs did harp on the fact that, for an extremely brief period of time after KY's passing, partnership funds were utilised to pay for the property tax and maintenance of the Parkview property. I accepted the defendant's explanation that this was due to the fact that KN had approached him very shortly after KY's passing and had claimed that the Parkview property belonged to the partnership and had agreed to the utilisation of the funds of the partnership for this purpose. It is significant, in my view, that there is no other evidence whatsoever to similar effect, bearing in mind the fact that the Parkview property had in fact been purchased as far back as 1984, which in fact supports the defendant's explanation

of what had happened. I note, also, that the defendant had sought, in good faith, to retrieve the conveyancing files for both the Selegie and Parkview properties. Unfortunately, however, the solicitors concerned had destroyed the said files as they were more than 12 years old. In the circumstances, I hold that the plaintiffs had not proved, on the evidence, that the two properties in question (the Parkview and Selegie properties) belonged to the partnership. In the circumstances, therefore, the caveats lodged by the plaintiffs over the defendant's and his wife's properties were lodged wrongfully and/or vexatiously and/or without reasonable cause and the defendant and his wife are therefore entitled to the appropriate remedies.

Conclusion

74 In summary, based on my evaluation of the objective evidence adduced (including, but not limited to, the credibility of the respective witnesses), I find that the plaintiffs have not discharged the requisite onus of proof. Indeed, I found, in addition, remarkable (and convenient) "omissions" in terms of the relevant evidence which a reasonable person would have expected the plaintiffs to have adduced in order to establish their case in so far as the defendant's alleged siphoning of partnership funds was concerned – particularly with respect to the necessary bank statements. I have already considered this point above (at [57]–[58]) and will therefore not repeat it again. In my view, and for the reasons given in my analysis above, I find in favour of the defendant on all counts.

The alternative claim for an account

75 The plaintiffs also alleged that the defendant had, alternatively, been guilty of a failure to account. Such an allegation was not based on a breach of fiduciary duty and/or breach of trust as such. There may well, in my view, be insuperable difficulties in the plaintiffs' path from the perspective of pleadings.

76 Looking closely at the plaintiffs' re-re-amended statement of claim, it is clear that the plaintiffs not only had more than sufficient opportunities to set out the basis of their claims but had also (and more importantly) rested their entire case on an alleged breach of fiduciary duty and/or breach of trust which were (in turn) based on various specific allegations of fraud and/or dishonesty. Hence, where there appear to be ostensibly "neutral" claims for an account, these have to be read in the *context* of the pleadings as a whole. It is clear that it was *not* the plaintiff's *pleaded* case that there be an alternative claim for an account. As I have alluded to above, and will be elaborating upon in more detail below, this was a last-ditch attempt by the plaintiffs to save a faltering – indeed, failing – case. It is clear that this court cannot consider a case that has not in fact been pleaded. Although I acknowledge that one cannot sacrifice justice and fairness at the altar of technicality, it is equally clear that one cannot ignore the clear rules as to pleadings where to do so would in fact result in the sacrifice of justice and fairness. Indeed, to allow the plaintiffs to "slip in" an unpleaded case literally at the eleventh hour would be to cause irreparable damage to the defendant's case. All that the rules as to pleadings seek to achieve (including defining with clarity the precise issues at hand, avoiding the element of surprise and of prejudice to the other party and, above all, achieving justice and fairness) would go by the board in this case if I were to hold otherwise.

77 If authority is required regarding the nature, scope and role of pleadings in the context of the court's need to achieve justice and fairness *vis-à-vis* the parties concerned, then one need look no further than Jeffrey Pinsler, *Singapore Court Practice 2005* (LexisNexis, 2005), especially at pp 386–388.

78 Even assuming that difficulties centring on pleadings can be surmounted (which I do not think they can for the reasons just given), it is important to emphasise, once again, that the legal burden

of proof in this particular regard also lay throughout on the plaintiffs, albeit in this particular instance on the balance of probabilities. I held that that burden of proof had not been discharged. As a matter of logic, if nothing else, such a failure to account must have a legal as well as a factual basis in order for the plaintiffs to claim a legal right to have the defendant render an account to them. I find that there was neither a legal nor a factual basis for these alternative allegations, based (once again) on my evaluation of the objective evidence (including, but not limited to, the credibility of the respective witnesses). Indeed, the overall impression I had of this alternative was that it was almost like an afterthought, the main tack adopted by the plaintiffs being one of alleged breach of fiduciary duty and/or breach of trust on the part of the defendant. Let me now elaborate on the points just made.

79 In the first instance, the law must be consistent with logic and common sense. The plaintiffs' pleaded case throughout centred on an alleged breach of fiduciary duty and/or breach of trust. More importantly, as I have already mentioned earlier in this judgment, the *factual substratum* of the plaintiffs' allegations was premised on fraud and/or dishonesty. How else could the partnership funds have been allegedly siphoned? How else could partnership funds have been allegedly utilised for the Parkview and Selegie properties? This surely could not have been characterised as negligent or even reckless conduct. Still less could it have been characterised as innocent, albeit mistaken, conduct. Whichever way one looks at the factual substratum, it is clear and unchangeable – and rightly so. But if this is the case, and I have found that there has been woefully inadequate proof of the allegations of fraud and/or dishonesty on the part of the defendant, on *what basis* are the plaintiffs asking the defendant to account as an alternative cause of action? It is true that s 28 of the Partnership Act does state that "[p]artners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives". *However*, in order for that duty to arise, there must be both a legal as well as factual substratum – the absence of either of which is fatal to the success of any claim for a duty to account. These were clearly missing in the present case.

80 As I have alluded to above, I was particularly perturbed by the fact that there was a subtle shift in the manner in which the plaintiffs framed their cause of action. I hasten to add that the subtlety lay in the *mechanics* of the shift; the *result* of the shift was, in contrast, *radical*. Returning to the *manner* in which the plaintiffs' case shifted, it was (as I have just mentioned) almost subtle – an almost sleight of hand, although I am loathe to put it that way. But the court's eye is always on the ball, if I may use a somewhat crude colloquialism but which (in my view) makes the point clearly in the context of what transpired in the present proceedings. Indeed, that is the function of all courts – to, *inter alia*, sift the evidential wheat from the otherwise distracting chaff.

81 I pause here to observe, in a related vein, that even the plaintiffs' closing submissions did not really emphasise the alleged duty on the part of the defendant to account although, as I have pointed out in the preceding paragraph, the ground had already been hastily prepared for a last-ditch attempt at alleging such a duty which was, as I have found, never within the plaintiffs' pleaded case in the first instance. However, after both the plaintiffs' and the defendant's closing submissions had been filed and served, the plaintiffs launched their initiative along these lines with aplomb. This is particularly telling since I found the defendant's closing submissions to be consistent with my assessment of the evidence – in particular, the credibility of the respective witnesses. I have already dealt with this finding earlier in the present judgment and will therefore not belabour the point.

82 But let me, for the moment (albeit *contrary to* what the law and facts allow), assume that there *was* such a duty on the part of the defendant to account to the plaintiffs. Even so, more than a decade had passed with respect to the bulk of the moneys allegedly siphoned off by the defendant from the partnership. I pause here to remind myself of the absence of logic in the plaintiffs' case once again. Since I had found that there was no fraud and/or dishonesty on the part of the defendant, on

what (even) factual basis was the defendant liable to account to the plaintiffs? But let me leave that difficulty aside for the moment. It is clear – and this was not disputed – that the plaintiffs at no time raised any objections whatsoever to the partnership accounts as they were prepared and presented year after year. Even if they did not sign off on these accounts, they must be taken to have approved them. But, it might (and ought) legitimately to be asked, what if the defendant had in fact perpetrated a fraud on the plaintiffs? Surely, from the perspective of justice and fairness, if nothing else, the plaintiffs would have been entitled to an account from the defendant? And the answer to this, in my view, must be a resounding "Yes!". And that is indeed the law. However, the crucial point here is that fraud or dishonesty must be shown. In one of the leading textbooks on the law of partnerships, the law is stated clearly, as follows (see RC I'Anson Banks, *Lindley & Banks on Partnership* (Sweet & Maxwell, 18th Ed, 2002) ("*Lindley & Banks*") at para 10-73):

> It is obviously desirable that, once the annual accounts have been approved and signed by the partners, they should be regarded as conclusive: this is normally provided for in the agreement, subject to the proviso that each partner is entitled to have obvious or "manifest" errors corrected within a set period. However, such provisions do not provide absolute finality, as Lord Lindley explained:
>
> > A provision to this effect is extremely useful, and should never be omitted; but, however stringently it may be drawn, no account will be binding on any partner who may have been induced to sign it by false and fraudulent representations, or in ignorance of material circumstances dishonourably concealed from him by his co-partners. Where, however, all parties act *bona fide*, such clauses are operative; but the usual provision as to manifest errors applies only to errors in figures and obvious blunders, not to errors in judgment, *e.g.* in treating as good debts which ultimately turn out to be bad, or in omitting losses not known to have occurred. All errors are manifest when discovered; but such clauses as those referred to here are intended to be confined to oversights and blunders so obvious as to admit of no difference in opinion.

83 It is also observed, in the same work, as follows (see *Lindley & Banks* at para 23-19):

> It has long been recognised that proceedings for an account may be defeated by laches or acquiescence. Moreover, the court will not, in the absence of fraud, re-open an erroneous account which has been rendered and thereafter acquiesced in, even if it has not been finally settled.

84 And in the English decision of *Oldaker v Lavender* (1833) 6 Sim 239; 58 ER 583, Sir L Shadwell VC delivered the following judgment (at 245–246; 585–586):

> The stipulations in the articles as to the mode in which the executors of a deceased partner are to be dealt with proceed on the supposition that the stipulation that just and true accounts shall be made out has been complied with. If, however, by reason of the *fraud* of one of the partners, just and true accounts have not been made out, the ground on which the subsequent stipulations are founded totally fails; *and the want of truth and justice in the accounts lays a foundation for taking a general account.* [emphasis added]

85 And it has been observed by the Lord Chancellor in the High Court of Chancery decision of *Maund v Allies* (1840) 5 Jur 860 thus (at 861):

> The object of this suit was to open accounts settled between partners on the ground of error. *I have had frequent occasion to observe, that, in cases of this description, the party seeking to*

open the account seems to think he has done enough, if he alleges and proves the existence of what some accountant points out to him as an error, and which a court of equity would probably consider as an improper charge, or an improper omission, if there had been nothing in the conduct of the parties to sanction it, *without sufficiently considering how far his own conduct may have deprived him of the right of complaining; for, in the absence of fraud, or abused confidence, or pressure, every item in an account, of which the parties were fully cognizant at the time they settled it, may be considered as the subject of agreement between them, which they are no more at liberty to repudiate than any other contract or undertaking into which they may deliberately have entered*. If, instead of the usual memorandum on the settlement of the account, there had been a memorandum signed by the parties, referring to any particular item, and stating they had agreed such item should form part of such account, no attempt could have been made to open the account on proof that such item ought not to have formed part of the account; and yet the ordinary mode of settling the account containing such items, all parties being aware of the circumstances connected with it, cannot well be distinguished from such special agreement. [emphasis added]

86 The emphasis is on good faith, with the converse (*viz*, bad faith in the form of fraudulent or dishonest conduct) being subject to the sanctions of the court (see also Yeo Hwee Ying ([72] *supra* at p 174), where, significantly, s 28 of the Partnership Act (see [79] above) is referred to). As *Lindley & Banks* aptly put it (at para 10-75):

> Bona fide accounts drawn up on the usual basis may be binding on a partner even if he has not signed them, provided that he has seen a copy and has not suggested that they are erroneous.

87 The above proposition does not, of course, hold if there has been fraud or dishonesty – which (as I have alluded to above) is the very antithesis of the concept of good faith. This is not only consistent with legal principle but also with justice, fairness and common sense. Indeed, the duty of good faith is a given in partnership law (see generally *Lindley & Banks* at ch 16). However, absent fraud or dishonesty, to allow a blanket right to call for an account without more smacks of arbitrariness and will almost invariably be unsettling and disruptive (and see, for example, the English decision of *Stupart v Arrowsmith* (1856) 3 Sm & G 176 at 184; 65 ER 613 at 617, *per* Sir John Stuart VC, which involved a company but where the general principles enunciated by the learned judge were equally applicable to partnerships).

88 That fraud or dishonesty is indeed the antithesis of good faith has in fact been established in the case law. In the English Court of Appeal decision of *Medforth v Blake* [2000] Ch 86, where Sir Richard Scott VC (as he then was, and with whom Swinton Thomas and Tuckey LJJ agreed) observed thus (at 103):

> *I do not think that the concept of good faith should be diluted by treating it as capable of being breached by conduct that is not dishonest or otherwise tainted by bad faith.* It is sometimes said that recklessness is equivalent to intent. Shutting one's eyes deliberately to the consequences of what one is doing may make it impossible to deny an intention to bring about those consequences. Thereapart, however, the concepts of negligence on the one hand and fraud or bad faith on the other ought, in my view, to be kept strictly apart. [emphasis added]

89 The views just quoted have in fact been endorsed in subsequent cases (see, for example, the (also) English Court of Appeal decision of *Starling v Lloyds TSB Bank Plc* [2000] Lloyd's Rep Bank 8).

90 On a related note, I should add that it has been observed in *Lindley & Banks* (at para 22-07)

that "[t]here is no general statutory requirement that firms must produce annual accounts in a certain form (or at all), although this will normally be the subject of an express provision in the agreement".

91 Returning to the facts of the present proceedings, and I am loathe to emphasise the point once again but for the fact that it is absolutely necessary, I have found that there was in fact *no* fraud and/or dishonesty on the part of the defendant.

92 It is also clear that, given the extremely lengthy passage of time, the arguments from laches and acquiescence relied upon by counsel for the defendant are, in my view, very persuasive, even at first blush. Indeed, as has been observed, although "[n]o statutory limitation period applies to the claim … laches may provide a defence" (*per* Nicholls J (as he then was) in the English High Court decision of *Elton John v Richard Leon James* [1991] FSR 397 at 456, who also observed (at 457) that in that particular case, "no distinction falls to be drawn between laches as so described and acquiescence, and the touchstone [he proposed] to apply is whether, having regard to all the circumstances, the balance of justice or injustice is in favour of setting aside the agreements or not". Indeed, Lord Selborne LC, delivering the judgment of the Board in the Privy Council decision of *The Lindsay Petroleum Company v Prosper Armstrong Hurd, Abram Farewell, and John Kemp* (on appeal from the Court of Error and Appeal of Ontario in Canada) (1874) LR 5 PC 221, observed as follows (at 239–240):

> Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be *practically unjust* to give a remedy, either because the party has, by his conduct, *done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material*. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. *Two circumstances*, *always important* in such cases, are, *the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy*. [emphasis added]

93 And, given my finding that the defendant was not guilty of fraud and/or dishonesty, the arguments centring on laches and acquiescence are, in my view and in accordance with the principles just set out above, not merely persuasive but are in fact driven home (reference may also be made to *Stupart v Arrowsmith* ([87] *supra*); *Sherman v Sherman* (1692) 2 Vern 275; 23 ER 778; as well as *Scott v Milne* (1843) 7 Jur 709).

94 It follows, therefore, that, even taking the plaintiffs' case at its highest (and that entails *ignoring* the clear factual matrix), the partnership accounts could *not* now be *re-opened* in any event.

Conclusion

95 In the premises, I find in favour of the defendant, with costs to be agreed, or taxed if not agreed.

96 In so far as Suit No 587 of 2004 is concerned, I grant a declaration that the partnership between the plaintiffs and the defendant trading as Bestomed Beauty Supplies be dissolved. The costs of these proceedings are fixed in favour of the defendant in the present proceedings.

97 However, I dismiss the defendant's counterclaim with costs to the plaintiffs, as I find that it has not been proved on a balance of probabilities.

98 In the context of the dispute over the Parkview and Selegie properties, having regard to the conclusion I have arrived at, I also grant an order in terms of prayers 2 to 6 in so far as Originating Summons No 583 of 2004 is concerned. The costs of these proceedings are fixed in favour of the defendant in the present proceedings and his wife, who are the plaintiffs.

99 Finally, I should observe that even though the sole task of this court was to deal with the legal issues in an objective manner, it was clear (as I in fact alluded to at the outset of this judgment) that these proceedings constituted, at bottom, one more unfortunate "instalment" in a family feud which is rife with bitterness and misunderstanding, and which happened to play itself out in the legal arena. Whilst they were alive, both TL and his daughter, KY, constituted the glue that bound the entire family (including the in-laws) together. How the family began to unravel after their deaths we will never really know. What we do know, however, is that the parties' respective destinies and future happiness depend, in the final analysis, on how they resolve their ongoing differences quite apart from the sphere of the law itself. In this, maturity and forgiveness will need to figure prominently if a successful outcome is to be ultimately achieved. One can only hope that this will be the case in the fullness of time.

[note: 1] See NE at p 446.

[note: 2] At para 12.