

Silver Stream Air-Conditional Restaurant (In Receivership) v Ong Kay Eng (Ng Chiow Tong,
Third Party)
[2000] SGHC 147

Case Number : Suit 934/1999
Decision Date : 24 July 2000
Tribunal/Court : High Court
Coram : Lee Seiu Kin JC
Counsel Name(s) : Lek Siang Pheng & Gwendolyn Chellam (Helen Yeo & Partners) for the plaintiffs;
Dwayne Tan & Goh Hui Ling (Chor Pee & Partners) for the defendant; Leslie Yeo
Choon Hsien (LJ Wong & Yeo) for the third party
Parties : Silver Stream Air-Conditional Restaurant (In Receivership) — Ong Kay Eng — Ng
Chiow Tong

JUDGMENT:

Grounds of Decision

1 The Plaintiffs are a partnership that operated a food court at Block 180 Toa Payoh Lorong 2 #01-571 as well as the drinks stall within it ("the Business"). The Defendant, Ong Kay Eng ("Ong") and the Third Party, Ng Chiow Tong ("Ng") are the partners. They formed the Plaintiffs to run the Business in early 1988, having successfully tendered to the HDB for the food court premises. However on the first day of operation of the food court in June 1988, Ong was arrested and subsequently convicted and sentenced to prison. He was released only in October 1993. Ng took over the operation of the Plaintiffs from the commencement of operation in June 1988 until 5 June 1995. From 6 June 1995, Ong took over the running of the Plaintiffs until their dissolution on 29 April 1998.

2 By late 1997 the 2 partners had fallen out and the Ng commenced D.C. Suit No. 50404 of 1997 in the District Court. This eventually resulted in an order made on 29 April 1998 for the partnership to be dissolved. The District Court appointed Chew Kia Ngee, Chan Ket Teck and Watt Wai Mei of M/s Coopers & Lybrand as joint and several receivers ("the Receivers") of the Plaintiffs. The Receivers checked the accounts and other records and identified a sum of \$339,200 which were shown as being withdrawn by Ong from the funds of the Plaintiffs. They demanded payment of this sum from Ong. Upon his refusal to pay, the Receivers commenced this action on 22 June 1999 in the name of the Plaintiffs to recover the money.

3 On 6 August 1999, Ong filed his Defence to the action. At the same time he filed a Third Party Notice naming Ng as the Third Party. The notice required that the question of the accounts of the Plaintiffs and outstanding sums due from the respective partners should be determined not only as between the Plaintiffs and the Defendant but also between either or both of them and the Third Party. Thereafter, pursuant to consequential orders made, Ong filed the Defendant's Statement of Claim against the Third Party ("DSOC") and Ng filed the Third Party's Defence ("TPD") to the DSOC.

4 At the end of the trial on 3 May 2000, I made and gave the following findings and orders:

(i) In respect of the Plaintiffs' claim against the Defendant, I found the Defendant liable to the Plaintiffs for the sum of \$339,200. I therefore gave judgment for this sum, plus interest from the date of writ and costs;

(ii) In respect of the Defendant's claim against the Third Party, I accepted the Third Party's evidence that the accounts kept by him were true and correct. Accordingly, I dismissed the Defendant's claim against the Third Party with costs.

5 Ong has appealed against the second order dismissing his claim against Ng. I now give my written grounds in respect of that

part of my decision.

Defendant's claim

6 Ong claimed that Ng had wrongfully retained a total of \$395,228.11 belonging to the Plaintiffs. This comprised the following:

(i) Profit made by the Plaintiffs in 1993	\$140,497.50
(ii) Profit made by the Plaintiffs in 1994	\$137,010.61
(iii) Deposits collected from tenants of the stalls	\$ 92,100.00
(iv) Proceeds received under insurance claim	<u>\$ 25,620.00</u>
Total	\$395,228.11

7 Ong prayed for an order that the sum of \$395,228.11, or any other sum as the court may find due, be paid by Ng to the Plaintiffs. He also asked for an account of all profits made by the Plaintiffs during the period that Ng was managing the Business.

Third Party's defence

8 In the TPD, Ng essentially pleaded that he had accounted to the Plaintiffs for all such monies. Ng averred that these sums were received by him in repayment of interest-free advances he had made to the Plaintiffs between 1988 and 1991. The advances were as follows:

<u>Year</u>	<u>Advance made</u>
1988	\$ 83,130.15
1988	\$ 60,181.50
1989	\$120,052.42
1990	\$ 78,117.16
1991	<u>\$ 48,814.84</u>
Total:	\$ 390,296.07

The reimbursements for those advances were as follows:

(a) Cash payment from Plaintiffs' funds in 1992:	\$ 21,658.40
(b) Cash payment from Plaintiffs' profits in 1993:	\$ 140,497.50
(c) Cash payment from Plaintiffs' profits in 1994:	\$ 137,010.61
(d) Retention of deposits collected from tenants:	<u>\$ 92,100.00</u>
Total:	\$ 391,266.51

9 In the TPD, Ng acknowledged that he had over-reimbursed himself by \$970.44 and stated that he was prepared to pay this sum to the Receivers. As for the proceeds received under the insurance claim, Ng pleaded that he had personally paid the sum of \$24,348.00 towards rectification costs of the premises following a fire. Upon receipt of the \$25,620 from the insurers he reimbursed himself the sum he had incurred and paid the balance \$1,272.00 into the Plaintiffs' account.

The facts

10 Ong disputed Ng's defence. In particular he pointed out that according to the accounts submitted by Ng on the Plaintiffs' behalf to the Inland Revenue Authority of Singapore, for the years 1988 to 1991 their losses totalled only \$124,802.15 as follows:

<u>Year</u>	<u>Loss reported</u>
1988	\$ 69,559.35
1989	\$ 18,963.60
1990	\$ 15,311.90
1991	<u>\$ 20,967.30</u>
Total:	\$ 124,802.15

In view of this, Ong argued, Ng could not have advanced a total of \$390,296.07 to the Plaintiffs. Ong submitted that Ng should render an account of the monies of the Plaintiffs over the entire period that he was in charge of the Business.

11 Ng gave evidence of the background to the partnership. He said that sometime in early 1988 he, Ong and 5 other persons orally agreed to form a partnership to operate the Business. However Ong denied that the other 5 persons were partners. Ong's position was that only he and Ng were partners and the other 5 persons invested through either him or Ng. But Ng produced a document signed by those 5 persons at a later date which asserted that these 5 persons were also partners of the Plaintiffs.

However it is not necessary for me to determine that issue and I need only point this out by way of background. Whatever may have been the exact terms of the agreement between the parties, Ong and Ng were eventually the only partners on record. On the first day of business on 3 June 1988 Ong was arrested. He was released from prison only in October 1993. Ng managed the Business from that first day until 5 June 1995. Ong took over after that date.

12 Ng said in his affidavit that he had been in the coffee shop business for more than 20 years. He had a coffee shop at Block 186 in Toa Payoh. He came to know Ong because the latter operated a drinks shop at the Toa Payoh hawker centre which was adjacent to Block 186 and frequented Ng's coffee shop. On a few occasions Ong expressed an interest in operating a coffee shop but said he did not have the capital nor the expertise. Therefore when the opportunity came up to tender for the premises at Block 180, Ng approached Ong who agreed to participate. Ng estimated that they would require about \$450,000 for the tender and overheads. They initially agreed to put up \$150,000 each, with the balance to come from the other 5 persons. However eventually Ong could only come up with \$70,000. Because of this, Ng decreased his share of the capital to \$120,000 and the other 5 persons collectively contributed \$140,000, making a total of \$330,000. Ong agreed that this sum was the total capital contribution made. Ng said that this amount was insufficient for the initial expenses which eventually came up to \$413,130.15 and he had to advance a sum of \$83,130.15 to cover the shortfall. Ng exhibited a copy of the opening account from the Plaintiffs' accounting records showing the items constituting the initial expenses totalling \$413,130.15. Ong did not challenge this document; he merely said that he had no knowledge of it.

13 In relation to the accounts for the period June 1988 to December 1991, Ng testified that he kept the records in the following manner:

- (a) The daily takings from the coffee shop were recorded in 2 books, one a soft cover and the other a hard cover book. He termed them the "Daily Account Record (soft cover)" and "Daily Account Record (hard cover)".
- (b) The monthly summaries of the Daily Account Record were recorded in a book he called the "Monthly Account Record".
- (c) The rent collected from the other stallholders in the premises were recorded in a book he called the "Rental Account Record".
- (d) The yearly summaries of the account records were recorded in a book he called the "Yearly Account Record".

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

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

16 Ng said that after Ong took over the management of the Plaintiffs in June 1995, he left all these records in the office at the premises. Ong denied this, but his evidence on this is fraught with contradiction and uncertainty. I preferred the evidence of Ng

in this respect and found that the books concerned were left at the Plaintiffs' premises. In all probability, Ong did not check through them before this action was commenced. In any event, the records were with the Receivers after they took over the matter and Ong had access to them for the purpose of this action. If he had wanted to, he could have checked them. He did not do so. On the other hand, I would have to presume that the Receivers had done so and that they would have taken whatever action they deemed necessary to recover any shortfall.

17 As for the records kept by Ng, the primary documents are contained in the Daily Account Record (soft cover). Ng had said that both he and Ong had a representative in each shift to check on each other and therefore the records of the daily takings and cash expenses would be accurate. Ong did not challenge this aspect of the evidence. The other figures, i.e. monthly and annual statements, are really derived from these primary records and would be purely a matter of arithmetic. On the assumption that the figures in the Daily Account Record were accurately totalled up in the Monthly Account Record, a task that Ong himself did not seem concerned to verify, I examined the monthly and annual tabulations and satisfied myself that the records were correct. I should add that while Ng's accounting system would not constitute standard accounting practice, it was a simple method devised for a business that probably did not require anything more complex. The system he described was not difficult to understand and would have served its purpose fully. I also found that Ng had kept meticulous records of the Business and that Ong had not adduced any evidence to show otherwise. Nor had Ong given any evidence that such records were not accurate. Ong did not even refer to these records in his evidence.

18 Ong's challenge of the veracity of Ng's records was two-fold and as follows:

(i) for the years 1988 to 1992, for the purposes of income tax, Ng had submitted accounts to the Inland Revenue Authority of Singapore ("IRAS") which showed that the losses suffered by the Plaintiffs for those years only totalled \$124,802.15, a sum much less than the \$390,296.07 that he presently claims; and

(ii) the gross margins from the operations of the coffee shop were unusually low.

19 In respect of the accounts to IRAS, Ng said that at that time he got a bookkeeper whom he knew as "Kee Wan" to draw these up for him. He claimed that he was advised by "Kee Wan" that if he reported the large losses incurred, the IRAS officers would query him on his source of funds. He therefore agreed to under-declare the losses for that period. I would have taken a more serious view of this matter if not for the fact that this does not seem to result in any fraud on the revenue. Indeed, as a result of these under-declarations, the Plaintiffs would pay a higher amount of tax if they were allowed to off-set past losses against current profits. Therefore, apart from avoiding the attention, real or imagined, of IRAS officers, I could not see what advantage could be gained by Ng in under-declaring the losses. Nor could Ong's counsel point out any. In my view, it all boils down to whether the Plaintiffs did incur the losses as claimed by Ng.

20 In relation to the gross margins, Ong produced evidence that under his stewardship between June 1995 and April 1998 the Plaintiffs achieved a gross margin of 46.9 to 49.9%. His counsel pointed out that for the period 1988 to 1991, based on the IRAS accounts, the Plaintiffs' gross margin ranged from 35.8 to 38.1%. Under cross-examination, Ng said that a reasonable gross margin would be 42 to 45%. Counsel therefore submitted that this showed that Ng must have made improper withdrawals from the partnership. However this pre-supposes that the IRAS accounts are accurate. Ng had admitted that they were not and had said that the true records were those he had exhibited. According to those records, the gross margin ranged from 38.5% to 50.7%, which figures are not too distant from the margins achieved under Ong.

Conclusion

21 The only question therefore is whether Ng's explanation as to the fabrication of the IRAS accounts is credible and whether this court ought to accept it. From his demeanour on the stand, I found Ng to be a simple and truthful witness. He candidly

agreed about the inaccuracy of the income figures submitted to IRAS. As I had stated earlier, he had acted on misguided advice and had not profited from it. On the other hand, Ong had not bothered to examine the accounting records nor had he given any cogent reason why they are not accurate.

22 It should be borne in mind that the Plaintiffs had been ordered to be dissolved and Receivers had been appointed for the purpose of collecting all their assets. The Receivers are professional accountants and one of their duties was to examine all the accounts and other records of the Plaintiffs. Indeed that was the very basis for their commencing this action to recover the \$339,200 from Ong in the main action. The Receivers have not made a similar claim against Ng. I could therefore infer that they were satisfied that the accounts and other records did not justify making any claim against him.

23 In the premises, I concluded that Ng had told the truth about the accounts. He had made the Daily Account Records as well as the other derivative records available to Ong, who had not bothered to check them. In the event, I hold that Ng had accounted to Ong in respect of the Business for the period June 1988 to December 1991.

24 As Ng had acknowledged that he had over-reimbursed himself by \$970.44, one possible outcome would have been to order him to pay this sum to the Receivers. However counsel for Ong did not ask for such an order. Furthermore, it is a small amount in relation to the sum claimed by Ong and as Ng had acknowledged this in his TPD, I do not see that the lack of such an order would hinder the Receivers in any manner in obtaining repayment from Ng. In any event, they can set off this sum against whatever proceeds that are due to Ng at the end of the receivership.

25 For the reasons above, I dismissed Ong's claim against Ng in this action with costs.

Lee Seiu Kin

Judicial Commissioner

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