

Toh Kim Chan v Toh Kim Tian and Others
[2004] SGHC 66

Case Number : Suit 117/2002
Decision Date : 31 March 2004
Tribunal/Court : High Court
Coram : Amy Tung Chew Ming AR
Counsel Name(s) : Peter Cuthbert Low (Peter Low Tang & Belinda Ang) for the plaintiff; Cheong Gay Eng (Cheong & Koh) for the 1st defendant
Parties : Toh Kim Chan — Toh Kim Tian; Ang Kiang Hua; Guan Joo Engineering Works and Building Pte Ltd

31 March 2004

AR Amy Tung:

Brief facts

1 The plaintiff ("Kim Chan") and the 1st defendant ("Kim Tian") were two brothers involved in a small family-run business, known as 'Guan Joo Engineering Works' ("the Partnership"). Kim Chan, Kim Tian and three other family members had each contributed \$5,000 to set up the business in 1977 and thus had an equal share of 20% in the Partnership. The Partnership was terminated on 30 April 1996 and its business taken over by the 3rd defendants, 'Guan Joo Engineering Works & Building Pte Ltd' ("the company") from 1 May 1996.

2 The business of the Partnership and of the company (after the Partnership ceased) had been managed and run by Kim Tian. He was one of the two registered shareholders and a director of the company. Kim Chan did not hold any shares in the company, but worked for the family business from 1991 until 31 July 2001, when his services were terminated by Kim Tian. The relationship between the two brothers had been strained for some time.

3 On 31 January 2002, Kim Chan commenced an action, claiming for, *inter alia*, a declaration that he was entitled to 20% of the business, assets and profits of the Partnership and the company and an order that an account and inquiry be taken and for access to documents.

4 The action was heard by Woo Bih Li JC (as he then was) and the following reliefs were granted to Kim Chan:

(a) a declaration that Kim Tian holds Kim Chan's 20% share in the Partnership on trust for Kim Chan;

(b) an order that Kim Tian gives an accounting of all the assets of the Partnership from 31 January 1996 and there be an inquiry as to what has become of these assets;

(c) an order that Kim Tian gives access to accounting records and documents and to give consent as may be required by any auditor and/or accountant and/or book-keeper of the Partnership to divulge information or disclose documents to Kim Chan and his accountant;

(d) an order that Kim Tian transfers or causes to be transferred to Kim Chan 20% of the issued shares of the company on certain terms (as per para 67 of the judgment).

The taking of accounts and the inquiry

5 The hearing of the taking of accounts and the inquiry came before me on 11 November 2003. Counsel for both parties were desirous of filing written submissions and requested for a longer period of time to prepare the written submissions. I directed for written submissions to be filed by 10 January 2004. The written submissions of counsel for Kim Tian were filed by 10 January 2004 while counsel for Kim Chan did not file any written submissions until 30 January 2004. In a letter dated 3 February 2004, counsel for Kim Tian objected to the late filing of the written submissions and stated his client's position that Kim Chan should be considered as having made no submissions on 10 January 2004. I found this to be unnecessarily technical and having regard to the complexity of the matter, I was unwilling to wholly disregard the submissions filed by counsel for Kim Chan, based on such a technical objection.

The parameters

6 It is important right at the beginning to set the parameters of the taking of accounts and the inquiry as ordered by Woo JC. Paragraph 57 of his judgment reads as follows:

In the circumstances, I will order Kim Tian to account for all the assets of the Partnership from 31 January 1996. This will be within six years prior to the filing of the Writ on 31 January 2002, and even if s 6(2) of the Limitation Act does not apply, I am not prepared to order the accounting period to be extended to any period before 31 January 1996 in view of the laches on the part of Kim Chan. However, the \$200,000 cash balance is to be deemed to be part of the assets of the Partnership as at 31 January 1996. There will also be an inquiry as to what has become of such assets. I will also order Kim Tian to pay Kim Chan 20% of the assets so accounted unless the inquiry concludes that the assets have been transferred to Guan Joo Engineering Works & Building Pte Ltd or given to any of the partners other than Kim Tian or have been reasonably used to pay Kim Tian in view of the time he spent managing the Partnership. To the extent that they have been so transferred or given to other partners or have been reasonably used to pay Kim Tian, Kim Tian need not pay Kim Chan 20% thereof, but the burden of establishing any of these qualifications is on Kim Tian. The accounting is to be taken before and the inquiry is to be undertaken by the Registrar of the Supreme Court who shall make such directions and orders as he thinks fit, including orders in respect of interest and costs of the accounting and inquiry.

7 The period of accounting was to commence from 31 January 1996. Kim Tian had to account for all the assets of the Partnership as of that date and pay Kim Chan 20% of the assets so accounted unless he could prove three qualifications, namely that the assets had been:

- (a) transferred to the company OR
- (b) given to other partners other than Kim Tian OR
- (c) reasonably used to pay Kim Tian in view of the time he spent managing the Partnership.

8 A cash balance of \$200,000 was also to be deemed as part of the assets of the Partnership as of 31 January 1996.

9 At the hearing, the parties informed me that they had agreed that the second and third qualifications were not in dispute and that they would not be making any contentions with respect to them. As such, in the inquiry, I need only concern myself with the 1st qualification *ie* whether Kim Tian could show that the assets of the Partnership as of 31 January 1996 had been transferred to the

company when it took over the business on 1 May 1996.

Preliminary objections

10 Counsel for Kim Chan raised two preliminary objections. The first objection related to Kim Tian's filing of two affidavits on 12 September 2003 and 31 October 2003 respectively. It was argued that not only was this in breach of an order of court limiting each witness to one affidavit, the 2nd affidavit had been filed after the filing of the affidavit by Kim Chan's expert witness, Mr Lee Nyen Fatt ("Mr Lee"). Mr Lee was the accountant engaged by Kim Chan to examine the accounts of the Partnership and to advise him on the accounts in relation to this action. Counsel for Kim Chan contended that in the circumstances, he did not have an opportunity to deal with any new issues raised in the 2nd affidavit and that the 2nd affidavit should therefore not be admitted as evidence.

11 After hearing brief submissions from counsel for both the parties, I allowed the 2nd affidavit to be admitted as evidence. Insofar as the matters in the 2nd affidavit were clarifications of the 1st affidavit, both the affidavits would be considered together. I also granted leave for Mr Lee to address the issues in the 2nd affidavit during his testimony. In my view, there was no prejudice caused to Kim Chan by the admission of Kim Tian's 2nd affidavit.

12 The second objection of counsel for Kim Chan related to the documents exhibited in Kim Tian's affidavits. He marked out a substantial number of documents and argued that they were hearsay and totally unreliable. It was contended that there was nothing whatsoever to substantiate the contents of these documents.

13 While I acknowledged that many of the documents were not substantiated, I could not uphold the objection of counsel for Kim Chan, particularly with respect to documents which he had relied upon in his written submissions. For example, the figures of \$227,705.26 and \$42,812.12 stated at paragraph 27 of his written submissions had been obtained from certain documents which he had, in fact, marked out as hearsay. In my view, he could not be allowed to reject those documents as hearsay and yet, at the same time, rely upon them. In the circumstances, insofar as he had relied upon those documents, their authenticity and reliability would be taken as unchallenged by him. As for the rest of the documents produced by Kim Tian, their reliability would be determined by taking into account all the circumstances of the case, including the fact that the Partnership was a small family-run business and as a consequence, that there might not be a rigorously adhered proper standard of documenting transactions or systemizing the accounts.

The approach in this inquiry

14 In his written submissions, counsel for Kim Chan argued that Kim Tian had breached the order of court, ordering him to give access to *all* accounting records and supporting documents. As a result of Kim Tian's failure to give access to *all* the documents, he could not give an account of *all* the assets and no meaningful inquiry could be undertaken as to what had become of these assets. It was contended that in the circumstances, the court should find that Kim Tian had failed to discharge his burden of proof in relation to the 1st qualification.

15 I must say that I could not agree with this submission by counsel for Kim Chan. The court acknowledged that there was a lack of documents produced by Kim Tian. The evidence of Kim Tian was that many of these documents had been destroyed or discarded.

16 However, this fact, by itself, did not mean that the burden of proof in relation to the 1st qualification was an impossible one to discharge. I noted Mr Lee's complaints that the documents given to him by Kim Tian were insufficient and the absence of many source documents to support the entries in the accounts prevented him from doing any meaningful work on the accounts. Nevertheless, the court could not shirk its responsibility to conduct an inquiry as best as it could just because there was a dearth of documents and proper accounts before it.

17 As the Partnership closed its accounts on a yearly basis on 31 December, Kim Tian gave evidence that he did not have a list of assets of the Partnership as at 31 January 1996, the cut-off date for the inquiry. Mr Lee gave evidence that in such an instance, in order for a list of assets to be drawn up as of 31 January 1996, the accountants would have to use source documents to construct the profit and loss accounts and the balance sheet. However, he also admitted that if there were no source documents, it would be very impractical for Kim Tian to write to all his customers and suppliers in order to reconstruct the accounts. In view of the impracticality of reconstructing the accounts, there was virtually no evidence of what constituted the assets of the Partnership as of 31 January 1996, other than the \$200,000 cash balance which was deemed to be part of the assets of the Partnership, pursuant to Woo JC's judgment.

18 In the circumstances, the approach that had to be taken by the court was to confine the inquiry only to the disputed assets, which were seemingly unaccounted for. These assets had been identified by Mr Lee in his affidavit and during his cross-examination (at page 22 of the Notes of Evidence) as follows:

(a) differences arising from trade debtors	\$227,705.26
(b) other debtors	\$277,378.62
(c) cash at bank not taken over	\$ 42,812.12
(d) cash balance deemed to be part of the assets	<u>\$200,000.00</u>
	<u>\$747,896.00</u>

19 The task of the court was to determine whether Kim Tian could prove that these four assets had been transferred to the company. For the purposes of this inquiry, there were two significant dates to keep in mind; 30 April 1996 when the Partnership ceased and 1 May 1996 when the company took over the Partnership's business.

Differences arising from trade debtors

20 The balance sheet of the Partnership as of 30 April 1996 reflected the value of current assets in the form of trade debtors as \$532,047.48. According to Mr Lee who had examined the general ledger of the Partnership, the value of trade debtors should have been \$759,752.74 as of that date. This amount was reflected in his working accounts, which was admitted and marked as P1. It was thus his evidence that in the accounts of the Partnership as at 30 April 1996, there was a discrepancy of \$227,705.26 arising from the trade debtors, which could not be reconciled.

21 From the realisation accounts of the Partnership as at 1 May 1996, it appeared that the assets in the form of trade debtors valued at \$532,047.48 had been taken over by the company. I

had also examined the company's 'other journal entry validation list as at 31 October 1996' which reflected the company's opening balance as at 1 May 1996. This list confirmed that \$532,047.48 (in the form of trade debtors) was in the company's opening balance as at 1 May 1996. The issue for the court was therefore whether the remaining \$227,705.26 (the discrepancy which Mr Lee spoke about) had also been transferred to the company.

22 Kim Tian had, in his 1st affidavit, admitted that part of the assets in the form of trade debtors were not taken over by the company on 1 May 1996 but alleged that monies collected from these trade debtors were subsequently deposited into the company's bank account with Tat Lee Bank Ltd ("TLB"). He stated that these monies were not deposited in the Partnership's account as by 30 April 1996, the Partnership had ceased business and all business transactions thereafter were conducted in the name of the company.

23 A list was exhibited at page 13 of Kim Tian's 2nd affidavit to show the values of the assets in the form of trade debtors which were not taken over by the company on 1 May 1996 but which were subsequently received by the company. The following table shows the names of those various trade debtors and the amounts owed by them:

Trade debtors	Amounts owed (\$)	Kwee Ling had owed the Partnership an additional sum of \$13,099.54, on top of \$22,870.58
AJK Enterprise	37,625.90	
Dembicon	15,944.40	
Kwee Ling	22,870.58	
Pillar	120,840.97	
Masin Jaya	150.82	
Eng Hoe Engineering	151.41	
<i>Total</i>	197,584.08	

24 On page 14 of the same affidavit, there was a further breakdown of the various amounts paid by the six trade debtors and the corresponding cheque numbers for each amount was also shown.

25 I examined the company's sales ledger for the period 1 May 1996 to December 1996 at Tab "TKT-K" of Kim Tian's 1st affidavit and found corresponding entries, which supported the breakdown as tabled by him on page 14 of his 2nd affidavit. This sales ledger showed that the trade debts were incurred before 1 May 1996 and repaid by the trade debtors only after that date.

26 I then examined the bank deposit slips in relation to the company's bank account with TLB exhibited at Tab "TKT-J" of Kim Tian's 1st affidavit. In my view, the bank deposit slips corroborated the tables at page 14 of Kim Tian's 2nd affidavit and the sales ledger of the company. The cheque numbers and the amounts owed by the various trade debtors which were reflected in the bank deposit slips matched those tabled on page 14 of Kim Tian's 2nd affidavit as well as the sales ledger. There were only two discrepancies in relation to Masin Jaya and Eng Hoe Engineering. The Partnership's trade debt in relation to Masin Jaya was \$150.82. However, the bank deposit slip only reflected an amount of \$150 being repaid by Masin Jaya. As for Eng Hoe Engineering, it had owed the Partnership \$151.41 but the bank deposit slip reflected that it had issued a cheque in the amount of \$1,813.20 to the company. I found Kim Tian's explanation for the discrepancies to be reasonable. In my view, the bank deposit slips confirmed that a total of \$197,583.26 from these six trade debtors of the Partnership (other than \$0.82 owed by Masin Jaya) had been banked into the company's bank account.

27 The list on page 13 of Kim Tian's 2nd affidavit had also shown the amounts of unrecoverable trade debts as follows:

Bad debts	Amounts (\$)
Hong Construction Lai	86.52
Prefect 99	971.81
Sim Huat	2,966.40
Wey Contractor Keong	12,996.91
<i>Total</i>	<i>17,021.64</i>

28 I accepted that there were such bad debts, which were unrecoverable by the Partnership in the sum of \$17,021.64. The company's sales ledger showed that these sums were written off. Additionally, there were two letters of demand dated 23 March 1996 and 26 April 1996, sent by Hameed & Co on behalf of the Partnership, demanding the sum of \$12,996.91, being the balance for goods sold and delivered to Wey Keong Contractor.

29 In the circumstances, I found that Kim Tian had accounted for **\$214,605.72** (\$197,584.08 + \$17,021.64) of assets in the form of trade debtors.

30 I shall deal with the remaining \$13,099.54 (\$227,705.26 – \$214,605.72) under "*Cash balance in the Partnership bank account after 30 April 1996*". This sum had been repaid by Kwee Ling in the form of two cheques and deposited into the Partnership's bank account on 10 June and 9 July 1996

respectively, instead of the company's bank account.

Other debtors (mainly loans)

31 In Mr Lee's working accounts, a list of 25 debtors and the sums owed by them were recorded. According to Mr Lee, these assets were found in the Partnership's general ledger but not in the Partnership's accounts, and hence there was a discrepancy of \$277,378.62, which was unaccounted for.

32 In Kim Tian's 2nd affidavit, he stated that these were mainly loans to family members. He exhibited two samples of duplicated postings in the Partnership's general ledger to show that they served as a personal record of expenses incurred by family members and should not have been included in the general ledger as part of the assets of the Partnership. The two samples exhibited related to payments made to hire purchase companies for motor vehicles for two of the family members. Kim Tian's counsel asserted in his written submissions that Kim Tian was able to show categorically where the bulk of the monies of \$277,378.62 went to.

33 That might be so. However, in my view, showing that the monies had gone to family members did not detract from the fact that these were assets of the Partnership, which had not been transferred to the company. I did not accept that these were expenses of the Partnership. They were recorded as loans and hence formed a part of the assets of the Partnership. During cross-examination, Mr Lee maintained that the overall effect of the Partnership paying on behalf of someone else was that there was an asset, appearing as a debt owing to the Partnership. The relevant portions of his evidence were as follows:

D/C: Can you look at paragraph 14 of the 2nd affidavit? To explain this figure of \$277,378.62. Tried to countercheck. Tab TKT-O : there is a double posting. Page 16 – figure of \$2,101. Page 17 - \$1,058 and \$1,043. What we are saying is that there is a duplication. Either have pages 16 or 17 – shouldn't have both. Your comment?

W: Now the Partnership buys the vehicle for this person. Resulting consequence – TKY owns the vehicle. Overall effect – *TKY owed the Partnership assets*.

D/C : Duplication?

W: Partnership accounts – sums of money. Assets of the Partnership. Cannot account for these.

D/C: No, what I am saying is that there is duplication?

W: No, this is what the Partnership owing to the finance company – page 16 shows that TKY owing to the Partnership. *He still owed the Partnership this sum of money*. Hire purchase will appear in the column instead.

D/C: The posting may not be correct. We are trying to show that the posting may not be correct but substantively the monies are accounted for. Pages 19 and 20 – it looks like a duplicity. The figure of \$2,756.

W: The overall effect of the Partnership paying on behalf of someone is that there is an asset owing to the Partnership, *appearing as a debt owing to the Partnership*. To me this debt has to be recorded in the Partnership – a missing entry.

D/C: Can it be recorded elsewhere?

W: No, unlikely. [Emphasis mine]

34 Mr Lee had admitted during his testimony that \$88,888 was paid out by the Partnership and had "gone into the company". I noted that this had been duly reflected in his working accounts as well. As such, I accepted that this amount of monies had indeed been transferred to the company. I also accepted that since Kim Tian was one of the two registered partners, any amount (in this case, it was a total of \$27,996.52) in his current account would be reflected as his drawings in the balance sheet. I discounted a further sum of \$41,994.00, being the loan owed by Kim Chan to the Partnership as I did not think that Kim Chan could, in good conscience, claim that this asset was unaccounted for. In relation to the remaining amount of \$118,500.10 [$\$277,378.62 - (\$88,888 + \$27,996.52 + \$41,994.00)$], there was no evidence, however, to show that it had been transferred to the company, and I found that Kim Tian had not discharged his burden of proof in this regard.

Cash balance in the Partnership's bank account after 30 April 1996

35 The balance sheet of the Partnership as at 30 April 1996 showed "cash at bank" standing at \$42,812.12. The bank statements produced by Kim Tian revealed, however, that there was actually a bank balance of \$60,699.17 as at 30 April 1996.

36 Kim Tian explained that the reason for this difference in the figures (in the balance sheet and the bank statements) was due to unrepresented cheques. Unrepresented cheques were cheques issued by the Partnership in April 1996 but which were only presented after the month of April 1996. An examination of the May 1996 bank statement and the Partnership's cash book for the period from 4 April to 30 April 1996 showed that the four cheques (cheque nos. 369055, 369060, 369063 and 369061) were indeed issued in April 1996 and presented only in May 1996. The sum total of these four cheques was \$17,887.05. Discounting this amount for the month of April 1996, the cash balance in the bank account as at 30 April 1996 would have been \$42,812.12, as reflected by the balance sheet.

37 In my view, the evidence relating to the unrepresented cheques went merely towards establishing that there was indeed this amount of \$42,812.12 in the Partnership's bank account as at 30 April 1996. It did not show that these monies had been transferred over to the company. In fact, the realisation accounts of 1 May 1996 showed that the company did not take over any bank balances from the Partnership at all.

38 On top of the bank balance of \$42,812.12 in the bank account as at 30 April 1996, there were further sums of monies which had been deposited in the Partnership's bank accounts. There were two cheques from Kwee Ling (cheques nos. 130021 and 130055) which were cleared on 10 June and 9 July 1996 respectively. The sum total of the two cheques was \$14,267.05. Out of this amount, \$13,099.54 belonged to the Partnership, as evidenced by the sales ledger. The remaining presumably belonged to the company for sales to Kwee Ling incurred after 30 April 1996 but was deposited into the Partnership's bank account. There was also an additional \$81.86 which went into the Partnership's bank account on 14 June 1996.

39 I found that there was no reason why all these monies should have gone into the Partnership's bank account, especially since Kim Tian had sought to explain that \$197,583.26 worth of "trade debtors" were not deposited into the Partnership's account as by 30 April 1996, the Partnership had ceased business and all business transactions were conducted in the name of the company. Together with the original bank balance of \$42,812.12 as at 30 April 1996, the total credit

amount from 30 April to 23 December 1996 was \$57,161.03.

40 Counsel for Kim Tian contended that the majority of these monies in the account after 30 April 1996 were utilised for GIRO payments to TAS, PS and HDB. As for the rest of the payments, it was argued that they were made to trade creditors and for other sundry matters. He contended that it must not be forgotten that the company started off without any contribution from any members of the Partnership and would therefore have to utilise monies of the Partnership for its daily transactions.

41 An examination of all the bank statements of the Partnership produced before me revealed that the Partnership had made certain payments to PUB, TAS, PS and HDB every month through GIRO, presumably for rental, utilities, etc. These payments continued to be made out of the Partnership's bank account even after the Partnership had ceased on 30 April 1996 (until August 1996). In my opinion, it was not unreasonable to assume that payments through GIRO after 30 April 1996 were made on behalf of the company, considering the consistency of such payments and the parties to whom the payments were made.

42 As for the rest of the payments out of the bank account, I did not accept counsel's argument that monies of the Partnership had to be utilised for the benefit of the company as it did not start out with any contribution from the partners. I found it difficult to believe that when the company took over the business of the Partnership, it was as "cashless" as depicted by counsel for Kim Tian. Kim Tian himself had contended that a sum of \$88,888 was transferred from the Partnership to the company and the bank statements evidenced that the transfer was made in April 1996. Furthermore, there was no evidence before the court to establish who were the recipients of these payments.

43 In the circumstances, I was of the view that Kim Tian had not proven that payments out of the Partnership's bank account *after 30 April 1996* in the sum of \$44,436.18 (after discounting the GIRO payments *ie* \$57,161.03 – \$12,724.85) had been transferred to the company or utilised for the benefit of the company.

Deemed cash balance of \$200,000 as at 31 January 1996

44 Woo JC found that the Partnership had a cash balance of \$200,000, which went missing before the Partnership was converted to the company. He had believed the evidence of Kim Chiew (a brother of Kim Chan and Kim Tian) that he noticed the existence of a cash balance of \$200,000 from one set of accounts. When he reviewed another set of accounts, this item was missing. As a result, in ordering for an accounting and an inquiry into the assets of the Partnership, Woo JC further ordered that the \$200,000 cash balance was to be deemed as part of the assets of the Partnership as at 31 January 1996.

45 The realization accounts did not show a sum of \$200,000 in cash being taken over by the company. Counsel for Kim Tian sought to convince me that there was no possibility of a sum of \$200,000 lying around and that the sum of \$200,000 referred to monies in the Partnership's bank account, which was normally in the region of two hundred thousand dollars. The bank balance as at 31 January 1996 had stood at \$247,983.13. He argued that this sum of monies had already been utilised for various purposes such as paying wages, trade creditors, rental, utilities, etc.

46 In my view, I found it difficult to say with any degree of certainty that the \$200,000 cash balance was a part of the bank balance of \$247,983.13 as at 31 January 1996. According to Mr Lee, from a partnership's point of view, cash balance could mean either cash in hand or in the bank

accounts. When cross-examined on the \$200,000 cash balance, Mr Lee categorically stated that he was unable to say whether this \$200,000 was part of the \$247,983.13 in the bank account.

47 It must not be forgotten that the burden of proof in this case rested on Kim Tian. I found that Kim Tian was not able to show on a balance of probabilities that the \$200,000 referred to in the judgment was part of the bank balance of \$247,983.13 in the bank account. As such, in my opinion, this \$200,000 remained unaccounted for up till and even after the company had taken over the business of the Partnership.

Conclusion

48 In conclusion, I found that Kim Tian had failed to discharge the burden of proof required of him for the following amounts:

(a) other debtors	\$118,500.10
(b) cash at bank not taken over	\$ 44,436.18
(c) cash balance as at 31 January 1996	<u>\$200,000.00</u>
	<u>\$362,936.28</u>

49 The total amount unaccounted for was thus \$362,936.28. As such, Kim Tian would have to pay Kim Chan 20% of this amount *ie* **\$72,587.26**. I award interest on this sum at 6% p.a from the date of service of the writ of summons to the date of judgment. I shall now hear the parties on costs.