

**Lee Hiok Woon and Lee Hiok Tng (sued as the
Executors and Trustees of the Estate of
Lee Wee Nam, deceased) and Others**

Appellants

v.

Lee Hiok Ping and Others

Respondents

FROM

THE COURT OF APPEAL OF SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 27th March 1996

Present at the hearing:-

Lord Keith of Kinkel
Lord Mustill
Lord Nicholls of Birkenhead
Sir John May
Sir Ralph Gibson

[Delivered by Sir Ralph Gibson]

In this appeal, the appellants, Lee Hiok Woon ("Woon") and Lee Hiok Tng ("Tng"), who are the sons of Lee Wee Nam, deceased, appeal from the decision of the Court of the Republic of Singapore given on 22nd July 1993. By their decision, the Court of Appeal confirmed the judgment of Justice Chao Hick Tin of 24th January 1992 in proceedings in which the appellants were sued as executors and trustees of the estate of Lee Wee Nam ("Nam") and in their personal capacity. By his order, among various declarations, the learned judge held that certain shares once held in the name of Nam were not the separate beneficial property of Nam, as the appellants contend, but were beneficially owned in certain proportions by the partners, including Nam, in the Wee Kee Kongsu partnership.

This appeal is part of the final stages of protracted and complex litigation about the ownership of the assets of Nam's estate and that of his brother, Wee Kheng, deceased. The assets were of very large value.

The facts out of which the disputes have arisen, and the essential matters in the course of the proceedings, appear from the judgment of S. Rajendran J. in giving judgment in the Court of Appeal. They were as follows:

1. Kheng, Nam and their younger brother Kiat, went to Singapore from China at the end of the last century to seek their fortune. In early 1927 the brothers entered into partnership in the Kongsì on the terms of a written agreement dated 31st January 1927. The agreement listed various items of property, including shares, which were to be the partnership property but they did not include the particular shares of which beneficial ownership is in issue in these proceedings.
2. The agreement provided that all appreciation or depreciation in the value of the partnership property and all profits and losses from it would only affect or concern the Kongsì and not the brothers in their personal capacity; it also provided for yearly accounts and for profits to be distributed to the partners although half of the distributable profits would be retained to each partner's account.
3. The shares in the partnership were divided as follows: Sze Teck Tng Chye Kee ("STTCK"), a trust fund for the worship of the brothers' ancestors: 2 shares; Kheng: 4½ shares; Nam: 4 shares; Kiat: 3 shares.
4. Kiat died in 1927. In 1940, on terms agreed with Kheng and Nam, the estate of Kiat relinquished all interests in the Kongsì.
5. The shares in the Kongsì were then readjusted as follows: Kheng, 9/21; Nam, 8/21; and STTCK, 4/21. Kheng and Nam continued to treat the 1927 agreement as binding. Clause 8 of the agreement, which has received much attention in the argument at each stage of these proceedings, provided as follows:-

"It is agreed that should the company desire to increase its shares in other firms or have a share in other firms or in any new firm or establish new business under new firms, such venture shall be carefully considered by the three Wee Kheng brothers and shall only be carried out upon unanimous agreement having been reached among them. Should there be disapproval by any one of the three brothers, no such venture shall be carried out. In the event of any one of the brothers being desirous of embarking on such venture, he may do so of his own volition whereby it shall have nothing to do with the company."
6. In 1950, the Kongsì's immoveable properties were transferred to a limited company, Lee Brothers (Wee Kee) Pte. Ltd. ("Lee

Brothers"). The two brothers and their families were the only shareholders in it. The moveable properties, including company shareholdings, were at all times held in the name of Nam. The reason for that was that Kheng had moved to Bangkok in 1909 and returned to Singapore in 1954 where he lived until his death on 18th July 1962. Nam lived and worked in Singapore and managed the interests in Singapore of the Kongsi. There was no evidence of any dispute between the brothers over that arrangement.

7. Upon the death of Kheng in July 1962 the Kongsi partnership was dissolved. It became the duty of Nam to wind-up the partnership and to account for the assets to those entitled in their due shares including the estate of Kheng and the STTCK. There is no evidence that Nam did anything in his lifetime to discharge that obligation. Nam continued in control and management of the assets and business of the Kongsi. He was assisted in that management by Woon and Tng who in 1962 were aged about 36 and 34 years.

8. On 15th March 1963 Nam incorporated LHK Pte. Ltd., of which company the shareholding was held entirely by Nam's sons and grandsons, including Woon and Tng.

9. Before his death there were registered in the name of Nam shares in various companies which he held on behalf of the Kongsi including shares in Oversea Chinese Banking Corporation Limited ("OCBC") and in Overseas Union Bank Limited ("OUB"), two leading banks in Singapore. The shareholdings and movements in shares in OCBC as appears from copies of the share register obtained by the respondents for the proceedings were as follows:-

<u>"Date</u>	<u>Movement</u>	<u>No.</u>	<u>Remarks</u>
12.11.62		50,000	
		50,000	
		20,000	
		8,000	
12.12.62	Bonus	102,810	
	Rights	12,220	
	Rights	13,490	
9.7.63	Transfer out	12,220	To LHK Pte Ltd
	Transfer out	20	To LHK Pte Ltd
	Transfer out	500"	

There was no evidence before the court as to the date of acquisition of the shares held on 12th November 1962. The first block of shares of which the beneficial ownership was in issue at the trial was the 12,240 shares transferred on 9th July 1963 to LHK Pte. Ltd.: see paragraph 7 above. The remaining OCBC shares were acknowledged to be the beneficial property of the Kongsi.

10. The second block of shares in issue at the trial consisted of two lots of shares in OUB. The shares in OUB registered in the name of Nam appeared from copies of the share register as follows:-

<u>"Date</u>	<u>Movement</u>	<u>No.</u>	<u>Remarks</u>
22.10.48		100	
10.7.56	Transfer in	50	
2.4.62	Allotment	225	
10.4.62	Allotment	27	
8.8.63	Transfer out	100	To LHK Pte Ltd
	Transfer out	25	To LHK Pte Ltd
	Transfer out	27	To Lee Hiok Tng"

Again there was no evidence before the court as to the date of acquisition of the shares held in October 1948. The shares in issue were the 125 shares transferred on 8th August 1963 to LHK Pte. Ltd. and the 27 shares transferred on that date to Tng. The remaining 250 OUB shares were, at the trial, acknowledged to be the beneficial property of the Kongsi.

11. As to the acquisition of and payment for the shares in issue, there was no evidence before the court as to the 12,240 OCBC shares, claimed as the separate property of Nam, save that they were listed in the share register as derived in at least some small extent from a rights issue of 25,700 shares which Mr. McCombe Q.C., counsel for the appellants, accepted were paid for in full by Lee Brothers: see paragraph 6 above. Mr. McCombe further acknowledged that the consequential accounting between Nam and the Kongsi which should have taken place, on the basis that all the 12,240 shares were the separate beneficial property of Nam which he could transfer to LHK Pte. Ltd., never took place during Nam's lifetime.

12. Revenue and Tax Returns.

(i) The case for the appellants with reference to the disputed shares rested at the trial upon certain documents for the years 1960-63 which showed how those in charge of the Kongsí, i.e. Nam and those acting under his direction, treated the dividends paid on those shares both for distribution and for tax. It is not necessary to repeat the figures set out in the judgment of the Court of Appeal as to the OCBC dividends. The ratio of the division was 1-20 which arithmetically is consistent with the appellants' case that of the OCBC shares held by Nam in 1962 Nam was beneficially entitled to 1/21st of them and had been so entitled since before 1960. The respondents have not disputed the arithmetic or the figures.

(ii) As to the OUB shares the documents for the years 1960-63 showed that the dividends were divided 2:1 between Nam and the Kongsí except in 1963 when the division was 250-152 or 1875-1150. The appellants contended that the change in 1963 was explained by the fact that in April 1962, following a rights issue, an additional 225 shares were registered in Nam's name and on 30th April 1962 a further 27 shares were registered in his name. These last shares were said to have been a personal acquisition by Nam so producing the division of 1875:1140. Again the ratios of the division were consistent with the appellants' case that of the OUB shares held by Nam he was beneficially entitled to 152 of them, and the respondents have not disputed the figures or, save for one matter of detail arising on the 1963 division which their Lordships regard as of no significance, the arithmetic.

(iii) The point made on these figures for the appellants was that such a division of income by Nam, if it did not reflect the true beneficial ownership, must have been made either by error or by dishonest misappropriation. No suggestion of dishonesty was made against Nam. Error extending over four accounting years was, it was said, not reasonably possible and therefore Nam's beneficial ownership in the disputed shares was conclusively proved.

13. Soon after the transfer by Nam of the disputed shares on 9th July 1963 and 8th August 1963 (see paragraphs 9 and 10 above) for the benefit of Woon and Tng and his descendants, Nam died on 23rd January 1964. Thereupon the obligation to wind-up the Kongsí partnership and to account for the assets to those entitled in their due shares devolved upon Woon and Tng as the executors of Nam. The proceedings which later were taken included applications intended to compel them to carry out their obligation. After the death of Nam the affairs of the Kongsí, of Lee Brothers and of STTCK, were controlled and managed by Woon and Tng.

14. Proceedings were commenced in 1973 by the beneficiaries of the estate of Kheng as plaintiffs against the estate of Kheng and his executors, Kwee and Kher, for accounts and enquiries regarding the property belonging to the estate on the death of Kheng, alleging failures to realise and account for the assets. By separate proceedings commenced in 1981 and later consolidated with the 1973 action, the same plaintiffs sued Woon and Tng as executors of Nam, and in their personal capacity, for similar relief. Over the years, various orders were made for the distribution of certain assets of the Kongs, including shareholdings which had been disclosed, between the plaintiffs, Kwee, Kher, and the estates of Nam and Kiat. The assets so disclosed and distributed included shares in OCBC and OUB. The plaintiffs discovered that there were additional shareholdings in the name of Nam which had not been disclosed. They claimed in respect of those shares and in April 1984 the plaintiffs settled their entitlement in respect of those assets for a sum of S\$1m. paid by the estate of Nam and/or Woon and Tng. The continuing interest of the plaintiffs in the undisclosed shares was through STTCK which had 4/21 shares in the Kongs.

15. In August 1984 the High Court ruled that STTCK was not a valid charitable trust and in consequence the assets of STTCK were held in trust for the estates of Kheng, Nam and Kiat in equal shares.

16. In 1988, Kwee and Kher, the executors of Kheng, having discovered the undisclosed shares, issued proceedings against Woon and Tng, both personally and as executors of Nam, to claim the share of Kheng in those assets on the ground that they were the property of the Kongs which had not been taken into account when the orders for distribution were made. That separate action was included in the consolidated action as a claim between the defendants.

17. The consolidated action came on for trial on 11th November 1991 before the learned judge. During the course of the hearing it was conceded for the first time by the appellants that, of the undisclosed shares, the 378,000 UOB shares taken up by LHK Pte. Ltd. in 1973 and 125 OUB shares acquired by LHK Pte. Ltd. in 1964 were the beneficial property of the Kongs.

18. The hearing extended from 11th November to 21st November 1991. No evidence was given by either Woon or Tng. The judge in holding that the disputed shares were the property of the Kongs did not regard the documentary evidence as to the division of dividends and interest as proving that Nam was beneficially entitled to them. He gave a number of supporting reasons.

The appeal to the Court of Appeal.

The Court of Appeal upheld the judge's order. In summary their reasons were as follows:-

(i) Clause 8 did not prohibit any brother from entering into a business venture outside the Kongsí without the concurrence of the other brothers. The evidence before the trial judge was that at 31st December 1964 257,829 OCBC shares registered in the name of Nam were reflected in the balance sheet of the Kongsí as belonging to the Kongsí; and there was no evidence to show how it came about that 12,240 of those shares came to be beneficially owned by Nam so as to enable him to transfer them to LHK Pte. Ltd. It was in that context that the trial judge had referred to clause 8. The Court of Appeal accepted the submission for the respondents that the judge had found against the appellants because there was no evidence before him of any relevant personal investment by Nam.

(ii) As to the burden of proof, and the submission that the trial judge had erred in his understanding of *Re Tilley's Will Trust* [1967] 1 Ch. 1179, the Court of Appeal, after reference to *Armory v. Delamirie* (1722) 1 Stra. 506 and to *Lupton v. White* (1808) 15 V.E.S. 432, held:-

"In our view, for the principle in these cases to apply it matters not that the trustee did not give an express undertaking that he would keep the trust property separately and not mix them with his own. In our view, the correct approach is that the burden arises where there is a breach of an obligation either expressly undertaken or implied by law to keep the property of another distinct. In the present case, the inception of the fiduciary relationship brought with it duties and these included keeping an account of property subjected to the trust. If the trustee mixed the trust property with his own, he is at fault and bears the burden of showing clearly which assets are his beneficially. It is to be noted that 'fault' in the present context is used without any sense of moral culpability since there can be breach of trust without dishonesty."

(iii) As to the OCBC shares, the Court of Appeal set out the figures of division of revenue and interest for tax purposes and noted the submission for the respondents that the trial judge had refused to treat those figures as decisive for valid reasons including: (a) the explanation had not been put forward by way of evidence before the trial and was "only a theory of counsel"; (b) there was no evidence that Kheng had accepted the division as correct; (c) the division showed only that Nam had treated

1/21 of the shares as his own and not that he was correct in so doing; (d) there had been a rights issue of 25,700 shares on 12th December 1962 (which were added in the register in 1964) for which the Kongsu had paid fully and not merely 20/21 of the costs; (e) Woon and Tng had not given evidence on the returns though they had been working in the Kongsu at the material time; (f) there was no evidence that there were share purchases made by Nam with his own money for his own account; (g) the appellants had consented to the inclusion of the shares in the 1984 settlement with the 1st to 4th respondents, the plaintiffs, and had not claimed ownership when asked about the shares in 1988. A further point was noted but was discounted by the Court of Appeal. The conclusion of the Court of Appeal was that, apart from minor aspects which they disregarded, the trial judge's grounds of decision on the OCBC shares were sound.

(iv) As to the OUB shares, the Court of Appeal again set out the figures of division of dividends and noted the points made for the appellants in reliance upon them. They noted also points made for the respondents, namely the fact that in April 1982 the appellants' then solicitors had informed the Commissioner of Estate Duty that the 152 disputed OUB shares (125 plus 27) were held on trust for the Kongsu, and there was no evidence to support the contention that that had been a mistake; and the fact that the appellants had agreed to settle with the plaintiffs in respect of those shares and there was no evidence from the appellants as to why they had so settled if the shares did not belong to the Kongsu. Upon a review of the evidence the Court of Appeal held that the trial judge had been justified in his conclusion upon the OUB shares.

Before their Lordships, Mr. McCombe has, in effect, repeated the submissions which he made to the Court of Appeal. In brief summary, his contentions included the following:-

(i) The decisions on the disputed shares turned upon events which occurred between 1927 and 1964 upon which the evidence of the principal participants, Kheng and Nam, was not available at trial;

(ii) Their Lordships are, it was said, in as good a position to decide the issues of fact as was the trial judge or the Court of Appeal since the decisions turned solely upon documentary material.

(iii) The provisions of clause 8 provide no assistance whatever in determining the ownership of the disputed shares and were irrelevant to the present issues. Both the trial judge and the Court of Appeal were mistaken in this regard.

(iv) The Court of Appeal was wrong to hold that the burden of proof was on the appellants to prove that the disputed shares were the property of Nam. The burden, in law, was on the respondents to prove their claim. The Kongsì investments were taken by Nam in his own name by mutual agreement and for convenience and there was no breach of any obligation by him in so doing. It was not necessary to look for condonation by Kheng.

(v) As to the OCBC shares, Mr. McCombe submitted that there was no substance in the points noted by the Court of Appeal. In particular, he contended that it was not surprising that there was no direct oral evidence as to the mode of acquisition of shareholding before 1960 or in 1964 and that the judge and the Court of Appeal were wrong to infer that Woon and Tng could have thrown any light upon the origin of their father's personal shareholding in OCBC in the period before his death.

(vi) Essentially similar arguments were advanced with reference to the OUB shares. The solicitors' letter of April 1982 to the estate duty office was inconsistent but the tax returns should be preferred.

Conclusion.

At the end of Mr. McCombe's submissions, it seemed to their Lordships that, while some apparently effective contentions had been advanced against some aspects of the reasoning of the trial judge which had not been expressly disapproved by the Court of Appeal, there was nevertheless, giving full force to those contentions, no ground whatever for disturbing the findings of fact by the Court of Appeal and, accordingly, they did not hear argument for the respondents.

Having regard to the history set out above, and the circumstances in which the issues as to the disputed shares came to trial before the trial judge, there was fully sufficient material upon which the court could conclude that the disputed shares were the beneficial property of the Kongsì in the absence of further evidence indicating that in probability they were the separate property of Nam.

It is true that Nam held the shares of the Kongsì in his own name pursuant to agreement with Kheng but he was obliged to keep proper accounts and to provide accounts yearly to the partners. Having regard to the level of financial activity at which the affairs of the Kongsì were conducted, and to the intelligence and knowledge which must fairly be attributed to Nam and to his sons, Woon and Tng, who assisted him in the management of such an enterprise, it may be fairly assumed that

records and accounts existed which would explain the origin of the disputed shareholdings if, as was contended, they were separate investments by Nam alone. If, as Mr. McCombe submitted, there were, or might have been, difficulties in producing such records and accounts as might be expected to have been available, evidence could have been given to that effect and it was not.

The fact that the original acquisition of the disputed shares occurred in 1963, or before 1960, upon which Mr. McCombe placed emphasis, has in their Lordships' view no real force. Upon the death of Kheng in 1962 it must have been obvious to Nam, and to his sons, Woon and Tng, that the Kongsu must be wound up and the assets distributed. If misfortune caused the loss of records, or if the passing of time caused information to be no longer available, an explanation might have been given. The need, in the interest of all parties within the extended family, to prepare and deliver a satisfactory account of the affairs and properties of the Kongsu, reinforced the clear obligation to that effect upon Nam while he survived and upon Woon and Tng as his executors who assumed effective control of those affairs and properties.

So to hold is not to attribute dishonesty to Nam in proceedings in which dishonesty has not been alleged or suggested against him. The fact is that, while the totality of information put before the court by Woon and Tng with reference to the circumstances of the acquisition and ownership of the disputed shares left those circumstances unclear, and with no explanation as to why they were unclear, the plain probability is that the shares were Kongsu property. Nam treated the shares as his separate property for a period of time. If he had survived, he would no doubt have carried out the consequential accounting either to demonstrate his separate ownership, if that in truth were the position, or to make due allowance for the transfers out to his newly formed company in favour of his section of the family.

Their Lordships accordingly dismiss this appeal. The appellants must pay the respondents' costs before their Lordships' Board.