Tong Tien See Construction Pte Ltd (in liquidation) v Tong Tien See and Others [2001] SGHC 381

Case Number : Suit 824/2000

Decision Date : 31 December 2001

Tribunal/Court : High Court

Coram : Tay Yong Kwang JC

Counsel Name(s) : Belinda Ang SC, Foo Maw Shen, Keoy Soo Khim and Deborah Koh (Ang & Partners) for the plaintiffs; BM Singh and Chan Jin Han (Engelin Teh & Partners) and YR Jumabhoy for all the defendants (except the first, third, fourth and fifth defendants); Chee Wai Pong (Ng Ong & Chee) for the fourth defendant; Tan Cheng Kiong and Bernard Chao (Chung Tan & Partners) for the fifth defendant

Parties : Tong Tien See Construction Pte Ltd (in liquidation) — Tong Tien See

Companies – Directors – Fiduciary duties – Breach – Personal liability for breach of director's duties – Whether D2 a shadow director – Whether salary to be disgorged – When it has to be disgorged – Liability of 'shadow director' for breach of fiduciary duties – Establishing person as shadow director – ss 4(1), 340(1) & 340(5) Companies Act (Cap 50, 1994 Ed)

Companies – Members – When shareholders' interest not to take precedence

Insolvency Law – Winding up – Whether proof that creditor's debt unpaid amounts to inability to pay debts – s 254 (2) (c) Companies Act (Cap 50, 1994ed)

Trusts – Constructive trusts – Directors – Liability of company directors as constructive trustees for company's loss or damage

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Background

The plaintiff company was a Grade G8 construction company in Singapore before it was ordered to be wound up on 26 May 2000 on the ground of insolvency. It was unable to pay debts amounting to $53.3m. This action was commenced by its liquidator, Yin Kum Choy, on 7 October 2000, followed by a Mareva injunction shortly thereafter. The defendants were either former directors and/or shareholders, affiliated companies or relatives of the key person in these proceedings, Tong Tien See (the first defendant). The claims against the defendants were under various heads - breach of duties as directors, conspiracy to injure by unlawful means, breach of trust, knowing assistance in the breaches and conspiracy and/or knowing receipt of moneys resulting from such breaches and conspiracy - in aggregate amounting to $53.3m. The plaintiff company also claimed a declaration that the property known as 755 Upper East Coast Road was disposed of by the second and the third defendants to the thirteenth defendant (husband of the third defendant) in breach of s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Ed) and sought a rescission of the sale and purchase agreement in respect of that property.

When the trial commenced, the first and third defendants had been adjudicated bankrupt (on 23 February 2001) and the action against them was stayed automatically under s 76(1)(c)(ii) of the Bankruptcy Act. Towards the conclusion of the trial, upon the plaintiff company`s application, the action against both of them was ordered to proceed. The first defendant had been a key witness at the trial and was present practically throughout the proceedings. The third defendant had filed her

affidavit of evidence-in-chief and the indications were that she was going to testify at the trial. However, in the course of the trial, it emerged that she was not going to return from Australia to testify here and her affidavit of evidence-in-chief was therefore not admitted in evidence. It was clear that the third defendant was in constant contact with the first defendant and/or the second defendant (her parents) throughout the trial.

The relationship of the various Tong family defendants can be described quickly by reference to the following diagram annexed to the amended statement of claim:

Please refer to the hard or pdf file for the diagram in this page.

The sixth and seventh defendants were Singapore companies affiliated to the plaintiff company. The eighth defendant, an Australian company, was also affiliated to the plaintiff company. In late 1999/early 2000, the first, second and third defendants left to settle in Australia after making arrangements to sell away their residential properties and their cars and to ship their belongings to their new home. They were joined by the tenth defendant.

On 2 March 2000, the plaintiff company was placed under interim judicial management. On 25 April 2000, Yin Kum Choy was appointed its provisional liquidator. He was confirmed as the liquidator on 26 May 2000 upon the winding-up order being made.

The liquidator`s first interim report dated 6 October 2000 showed that the plaintiff company had been insolvent since financial year 1 May 1995 to 30 April 1996. However, the directors and shareholders held the plaintiff company out as a solvent G8 (the highest grading) construction company at the material times, thereby allowing the plaintiff company to carry on business, take on new projects and sink further into debt. Accounting entries were falsified using the sixth defendant, an affiliated company, as one of the instruments of falsification. Losses were transferred from the plaintiff company to the sixth defendant by the raising of sham bills in respect of accounts payable and project/administration overheads. Bills were in turn raised by the sixth defendant (purportedly the plaintiff company`s sub-contractor and whose sole client was the plaintiff company) to the plaintiff company, thereby allowing large amounts of money to be transferred periodically from the plaintiff company to the sixth defendant between 1 May 1995 and 30 April 2000. Accounting information was also misleading in that the plaintiff company deliberately deferred recognising its losses of $3.4m in financial year ending 30 April 1995 so as not to fall below the minimum requirement of $5m net capital worth, a criterion of the Building and Construction Authority for G8 grading. The grading was reviewed every three years.

The sixth defendant was totally dependent on the plaintiff company for financial support and had no infrastructure or manpower of its own. It was also insolvent. All indebtedness of the sixth and seventh defendants to the plaintiff company was on no fixed repayment terms, was interest-free and unsecured.

The plaintiff company and its affiliates were treated by the first and second defendants as their and the family`s personal assets. The plaintiff company`s money was used by them for purchasing and building residential properties registered in personal names. Such money was also used by them to earn interest for themselves in interest-bearing deposits. In the words of Mr BM Singh in an email, they `used the company as a ATM`.

It was conceded that the plaintiff company`s losses were transferred to the sixth defendant through the raising of some $25m worth of bills to the sixth defendant. It was also conceded that the transactions between the two companies leading to the sixth defendant billing the plaintiff company

were not arm`s length transactions but it was denied that those transactions and billings were sham ones.

Defendants

FIRST DEFENDANT

The first defendant, 71 years of age, the patriarch of the Tong family, used to reside at 2 Kew Drive. He left for Australia in early 2000 and returned here for the trial. He came from China around 1948. In 1957, he married the second defendant. The ninth defendant was born in 1958, the third defendant in 1964 and the twin sisters (the tenth and eleventh defendants) in 1968. He worked hard and in 1973, registered a construction firm, employing the fifth defendant soon thereafter as the sole employee.

He had basic education in Chinese and was practically illiterate in English. He said he had no idea about accounts. He was a hot-tempered, traditional Chinese businessman who ruled his family with a strong arm. All properties bought or registered in the names of the family members were regarded by the first defendant as belonging to himself. He appointed and removed directors of his companies as he pleased and changed the shareholdings of his daughters depending on whether he was pleased or angry with any of them.

As his construction business grew and flourished, the firm was incorporated as a private limited company in 1985 with the first defendant as managing director and majority shareholder. The company had many public sector construction projects. The fourth defendant (his brother-in-law) joined his business in 1984 as a foreman and, after a short period of absence, rejoined it in 1987. In 1992, the fourth defendant was made a director of the plaintiff company. He became the deputy managing director in 1995/1996 as the Tong family wanted to `give him face`.

The first defendant bought properties and a plot of land formerly known as 4 Kew Drive on which he constructed four houses - 4 and 4A Kew Drive and 755 and 757 Upper East Coast Road. He also bought holiday homes in Perth and in Sydney and developed a penchant for golf and fine wine, which he kept in a wine cellar in his former home at 2 Kew Drive and in 755 Upper East Coast Road (the home of the third defendant and her husband, the thirteenth defendant). The plaintiff company held annual golf tournaments. The first defendant also commissioned and affixed wine labels bearing the plaintiff company`s name on bottles of wine as gifts for his business associates.

He claimed that he was in semi-retirement since 1995 and had left the running of the company to the fourth defendant. However, the evidence showed quite clearly that he was still the final decision-maker in all things pertaining to the companies - from tenders to negotiations with sub-contractors and award of sub-contracts. He was also actively monitoring the progress at the various worksites, travelling about in a vehicle driven by his wife.

SECOND DEFENDANT

The second defendant, 61 years of age, was an intelligent, astute and capable wife, mother and

businesswoman. She received formal education in Chinese up to Secondary 4 level, quite a rarity in the days of old for a girl. She controlled the companies` finances, invested in shares and in foreign currencies. She was trusted completely by the first defendant and was practically her husband`s alter ego save for his hot temper. Only she and the first defendant were authorised to be sole signatories in respect of the bank accounts. Although she was the managing director in the sixth defendant only, the second defendant received monthly remuneration from both the plaintiff company and the sixth defendant. She transferred progress payments from the HDB in respect of the construction projects to personal accounts to earn interest instead of depositing the large amounts into the plaintiff company`s account which, she said, earned no interest. She transferred the principal amounts back to the plaintiff company subsequently, retained the interest and paid income tax on the same. Over the years, the principal amounts involved added up cumulatively to $194m.

The second defendant, together with the third, fourth and fifth defendants, exercised functions in the plaintiff company like an executive committee. They discussed when to pay, whom to pay first and how much to pay. When they were not able to resolve a particular matter, they would refer it to `the boss`, the first defendant. The second defendant also used money transferred from the plaintiff company to the sixth defendant to pay the interest on bank loans taken out by her and the sixth defendant for purchasing and developing the land (by constructing the four houses) at Kew Drive.

She left for Australia in early 2000 with her husband and the third defendant`s elder son, Calvin, then aged 8, after making arrangements to sell away their properties and to ship their belongings there.

THIRD DEFENDANT

The third defendant was the favourite daughter of the Tongs. She was a graduate in accountancy and had working experience in an international accounting firm. She joined the plaintiff company around 1995 and headed the accounts departments of the plaintiff, the sixth and the seventh defendants. She was a signatory to the companies` accounts and worked closely with the then auditor, SK Lai. She resigned as a director of the plaintiff company on 27 January 2000.

She left Singapore for Sydney, Australia in December 1999 and appeared to have decided to settle down permanently there, even if reluctantly. Her husband (the thirteenth defendant) and their other younger son remained in Singapore, the husband having bought over 755 Upper East Coast Road from the second and the third defendants.

In her affidavit of 25 May 2000, the third defendant acknowledged that the accounts of the plaintiff company and the sixth defendant had been fiddled with to alter the actual loss situation in the plaintiff company to that of a profitable one by transferring the losses to the sixth defendant in order to preserve the net worth of the plaintiff company at or above $5m and consequently its G8 status. She claimed, however, that all this was done on the advice of the company`s auditor, SK Lai. Incidentally, SK Lai used to be a partner of the liquidator in an accounting firm at the relevant time but the liquidator was not involved in the audit of the plaintiff company or its affiliates then.

In her very telling email sent on 4 May 2000 from Sydney to Mr BM Singh, she asked the family`s lawyer what would happen if she decided to return to Singapore to `face the music`. She also stated:

> *Life holds no meaning for me here. I`m living a lie here, I can`t tell people the real reason that I`m in Sydney, and I have to cook up stories as to why my*

husband is in S`pore while I`m in Sydney with my son. I even have to resort telling people that I have only 1 son to save the hassle of having to explain to them why I have only one son with me ...

I owe my life to my parents ...

I`d rather go back to S`pore, get a job and live a simple life. Never mind about luxuries. Calvin can fit into the S`pore education with no problem. There was never a need to bring him here - he was doing very well in school in S`pore ...

Please tell me it`s possible to come back to S`pore. I don`t mind being a bankrupt. I have no face to lose.

FOURTH DEFENDANT

The fourth defendant is the younger brother of the second defendant. He is the third youngest sibling among the nine in the Koo family. He was essentially the man on the ground, spending almost all his working time at the sites supervising the works and liaising with the numerous sub-contractors. He authorised and approved the certification of the value of work done by the sub-contractors but the accounts department would invariably pay them less than the certified amounts.

When the plaintiff company`s funds could not meet all the claims for payments, the fourth defendant would be consulted by the second, the third and the fifth defendants (the de facto `executive committee`) on whom should be paid first and in what amounts so that the works on the sites could carry on. He was, however, never involved in the financial matters beyond being asked to rubber stamp the accounts prepared by the accounts department by signing directors` resolutions approving them. He was never shown the audited accounts and there was never any formal meeting held.

By the middle of 1998, the problem of non-payment or underpayment became more serious when the sub-contractors affected began to delay their supplies and services. In May 1999, the electrical contractor went to the extent of shutting off the power supply at a site. The fourth defendant reckoned that the five HDB projects awarded to the plaintiff company ought to have been profitable to the extent of $10m to $15m.

The fourth defendant was promised some shares in the plaintiff company by the first and the second defendants but, as the second defendant had consistently told him that the plaintiff company was losing money, he did not bother to pursue the matter.

On 26 February 2000, the fourth defendant`s services were suddenly and unceremoniously terminated by the first defendant upon the fourth defendant`s return from leave. However, he remained a director of the seventh defendant. No reason was given for the termination. The first defendant explained in his testimony in court that it was essentially due to his discovery that the fourth defendant was corrupt in his dealings with the plaintiff company`s sub-contractors and also that he had been spreading rumours about the Tong family siphoning the company`s money to Australia. Until then, the fourth defendant had been having a good relationship with the first and the second defendants, with the Tongs and the Koos regularly meeting for dinner at 2 Kew Drive.

FIFTH DEFENDANT

The fifth defendant had been working for the first defendant since she was 19 years old in 1975. She was appointed a director of the plaintiff company when it was incorporated in 1985. She was completely trusted by the Tong couple and was also involved in the sixth and the seventh defendants and in the Tong family`s personal matters. She held no shares in the companies and was appointed a director to facilitate the running of the plaintiff company only. She was not a trained accountant but would deputise the third defendant in her absence. She was in fact the head of both the administration and the accounts departments before the third defendant took over the accounts department in 1995. Whatever she signed in her capacity as director was at the first defendant`s express or implied instructions given to her directly or through the second defendant. She signed contracts and documents relating to the annual accounts and the bank accounts.

The fifth defendant knew when payments were made by the HDB to the plaintiff company and was aware of the transfers of the money into the personal accounts of the first and the second defendants to earn interest for themselves. She did not know why the plaintiff company did not maintain an interest-bearing account.

On 15 March 2000, she resigned as a director of the plaintiff company.

SIXTH DEFENDANT

The second, ninth and tenth defendants were the directors of the sixth defendant with the second defendant holding about 53% of the shares and the first defendant about 24%. The rest of the shares were held by the third and the ninth defendants. Like the plaintiff company, the sixth defendant was insolvent.

The sixth defendant developed residential projects until 1995/1996 when it became the purported sub-contractor for the plaintiff company`s HDB projects. The sixth defendant was in truth only a sub-contractor in name as it had no resources of its own and was effectively the plaintiff company`s alter ego. The first defendant testified that he incorporated the sixth defendant in 1984 as he wanted to have more than one company to provide for the eventuality that one of his companies could be barred from tendering for construction jobs. As indicated earlier, the sixth defendant became the vehicle for the plaintiff company to dump its losses, with the purported accounts showing the sixth defendant owing the plaintiff company some $19m as at April 2000. SK Lai, the auditor, testified that the third defendant had misrepresented to him that the transactions between the plaintiff company and the sixth defendant had a valid commercial basis. As a result, his audit report did not reflect the true position that emerged during the trial.

SEVENTH DEFENDANT

The seventh defendant was wholly owned by the sixth defendant. Its directors were the first, fourth and ninth defendants. It developed a housing project known as Eastwood Lodge using the plaintiff company`s funds. The units in the project were allegedly sold at a loss. As at 30 April 1999, the seventh defendant was shown as owing the plaintiff company slightly more than $7m. In May 1999,

some $5.55m of proceeds of sale were returned to the plaintiff company, reducing the balance outstanding at about $1.5m. Between May and July 2000, the first defendant took $482,000 from the seventh defendant as the first and second defendants required `living expenses` although the liquidator of the plaintiff company was told by the first and second defendants when he met them in August 2000 in Australia that the seventh defendant had no money.

EIGHTH DEFENDANT

The eighth defendant used to be known as Tong Tien See Holding (Australia) Pty Ltd. It was incorporated in Sydney, Australia in October 1994. By a deed dated 5 October 1994, it became a trust corporation for the Tong family.

The first, second, third and the twelfth defendants (the younger sister of the second defendant) were the directors of the eighth defendant. The first, second and third defendants used to hold 33.3% of the shares each. In November 1998, the twelfth defendant became the only shareholder and in November 1999, she became the sole director. In January 2000, it adopted the present name.

The eighth defendant had two properties in its name. One was 39A Hydebrae Street in Sydney and the other was an apartment at The Stamford, 52-56 Goderich Street in Perth.

When the court ordered the disclosure of the accounting records and the bank statements of the eighth defendant, the twelfth defendant claimed that they were in the accountants` office for the preparation of accounts and that the said office had unfortunately just been broken into and vandalised. Although the twelfth defendant informed the court in May 2001 during her testimony that she had written to the eighth defendant`s banks for a copy of the bank statements, nothing has been made available to the plaintiff company so far.

NINTH DEFENDANT

The ninth defendant was a director and shareholder of the sixth defendant and a director of the seventh defendant. She was also a co-signatory for the plaintiff company`s bank accounts. She studied music in Australia in 1982. In 1991, she married and then moved to Hong Kong to work for two years. In 1993, she returned to Singapore and was the Managing Director of a trading and forex company owned by her and her husband which operated for three years. She claimed that she only did basic records and was not conversant at all with accounting and financial matters.

The ninth defendant managed the first defendant`s bank accounts in Australia, opened in the name of Francis Tong. The first defendant had initially denied having such a name or such accounts when cross-examined by counsel for the plaintiff company but when he returned after the lunch break, he claimed to have spoken to the ninth defendant who told him that she had chosen a Western name for him.

The ninth defendant was the plaintiff company`s Human Resource Manager. She was in the office for only a few hours a day. She claimed that her appointment was in name only and that she was actually paid by the plaintiff company to be at the beck and call of the first defendant 24 hours a day, seven days a week.

TENTH AND ELEVENTH DEFENDANTS

These were the 33-year-old twin daughters of the Tongs. The tenth defendant is not married. She was a director of the sixth defendant. The eleventh defendant is married to Er Chuan Lee who also worked for the plaintiff company. The eleventh defendant and her husband were appointed directors of the plaintiff company on 28 February 2000. The twin sisters appeared to be less favoured by their parents than the third and the ninth defendants. They worked as site clerks in the plaintiff company.

On 18 February 2000, the tenth defendant left for Sydney as instructed by her parents, to help out with household chores and to look after the third defendant`s elder son, Calvin.

Like the others, she said that she signed documents as a director without question or thought.

In February 2000, the second and the eleventh defendants opened a joint bank account so that the latter could pay for the outgoings of 2 Kew Drive as her mother was not going to be around for some time. She was also given a power of attorney by the third defendant to sell the third defendant`s residential properties. However, she did not seem to know anything about the sales besides having to go to the solicitors` office to sign some documents.

On 27 April 2000, when the then provisional liquidator and his team entered the plaintiff company`s premises, the eleventh defendant was instructed by her father, the first defendant, to call the police to evict them. The tenth defendant and the ninth defendant`s husband were also present at the office that evening. After the police arrived and advised the provisional liquidator and his team to leave, the fifth, the tenth and the eleventh defendants, with the assistance of some others, removed the files of the sixth and the seventh defendants from the plaintiff company`s office. The sixth and the seventh defendants have commenced an action against the liquidator arising from the events that evening.

TWELFTH DEFENDANT

The twelfth defendant undertook a nursing course in England and then moved to Australia where she met and married her husband, Thava Rasiah. She became an Australian citizen. They operated two McDonald`s restaurants in Sydney. The twelfth defendant claimed that they had six such outlets previously. She was very dear to the first and the second defendants and was their nominee in the eighth defendant.

The twelfth defendant and her husband owned one property held in the name of their company. They also owned jointly several other properties. They had loans amounting to some A$3.5m. Their companies` tax returns showed losses from 1996 to 1999 and a small profit of A$21,000 in 2000.

The twelfth defendant claimed that she was told in November 1999 by her sister, the second defendant, of their intention to move to Australia because of Calvin`s enrolment in a school in Sydney. She claimed she had no knowledge of the financial woes of the plaintiff company. The second defendant asked her for financial help to purchase a larger house as the one at 39A Hydebrae Street was too small for the family and too far from Calvin`s school.

The twelfth defendant said that in November 1999, when the second defendant visited Sydney, the

twelfth defendant contemplated purchasing a rather large house at 17 Woodward Avenue. The following month, she agreed to purchase it for A$1.47m. The deal was completed in March 2000 and the house was registered in her sole name. The twelfth defendant claimed that she borrowed A$670,000 from the first defendant for the purchase and the remaining A$800,000 came from her and her husband. The evidence showed that the property was mortgaged for A$800,000 several months after the completion.

The twelfth defendant claimed that she then rented the house to the Tongs. According to the Tongs, the rental was not a fixed amount. The twelfth defendant also claimed that she did not rent out one of her properties which was vacant to the Tongs as the first defendant did not like to live in old houses.

THIRTEENTH DEFENDANT

The thirteenth defendant is the husband of the third defendant. He worked as a fuel oil broker earning about $12,000 gross salary per month. They married in 1990 and lived in her parents` home at 2 Kew Drive until 1996 when they shifted to the newly built 755 Upper East Coast Road, next door.

The thirteenth defendant claimed that he had no interest in the Tong family`s affairs and did not discuss such matters with his wife. He said his working hours caused him to be away from home most of the time anyway. He claimed his wife left for Australia in December 1999 as it was her dream to send Calvin to study abroad. He only knew that she was leaving about one week before her departure. He also said that he discovered the true reason for her departure only in March 2000 as he and his wife were going through a bad patch before that. He did not even know that his wife had sold her car until after the sale as she used to park it next door at her parents` home.

The thirteenth defendant bought over 755 Upper East Coast Road from the second and the third defendants in March 2000 for $1.7m as he needed a home for his second son, his father and his brother. He took a bank loan of $1.19m, withdrew $170,000 from his CPF savings and paid $340,000 (or 20% of the purchase price) in cash. The amount of cash came from his savings, winnings from illegal gambling and loans from family members, including Peggy Koo, the youngest sister of the second and the fourth defendants, who lent him $230,000 for three years free of interest. Although he claimed that 10% of the price was paid upon exercise of the option and the remaining 10% upon completion, the solicitors` completion accounts indicated that no money was paid until completion. He claimed that he did pay in the manner stated by him but did not know how his solicitors dealt with the matter.

Acts complained of

The directors formally appointed in the plaintiff company were the first, third, fourth and fifth defendants. It was not disputed that the relevant defendants, as directors, were under a fiduciary duty and had to act honestly and in good faith in the best interests of the company.

When a company is solvent, its interests and those of its shareholders are one. In this case, there would not even be divergence of interests between the company and its shareholders as they were in reality the first and the second defendants. But when a company is insolvent, the interests of its

creditors become the dominant factor in what constitutes the benefit of the company as a whole (**West Mercia Safetywear v Dodd** [1988] BCLC 250).

A company is insolvent or unable to pay its debts when it is unable to meet current demands, irrespective of whether the company is possessed of assets which, if realised, would enable it to discharge its liabilities in full. Insolvency in this commercial sense is principally a question of fact which may be established in a number of ways. However, proof that a creditor`s debt has not been paid per se does not establish an inability to pay debts within the meaning of s 254(2)(c) of the Companies Act (Cap 50, 1994 Ed). A temporary lack of liquidity does not tantamount to insolvency (see **Re Sanpete Builders (S)** [1989] SLR 164 [1989] 1 MLJ 393).

From the evidence adduced, the plaintiff company was plainly insolvent from about 1995 and this fact was well known to the first, second and third defendants. The fourth and the fifth defendants learnt of the consistent losses in the projects from the second defendant. However, the accounts of the plaintiff company were manipulated to show profitability and to maintain falsely the G8 grading so that the company could continue to be awarded multi-million dollar jobs. The first and the second defendants claimed that they were in fact trying to save the company by hoping to reap enough profits from the later projects to pay off the company`s debts. In truth, they were robbing Peter to pay Paul by using the new projects` proceeds to pay the debts of the old projects and even then, not all of Peter`s money went to Paul. In the meantime, far from trying to trim the expenses of the plaintiff company, they continued as if the company was riding the crest of prosperity and projected a completely false image to the certifying authority, the owners of the projects and the company`s sub-contractors and suppliers. They also continued to use the plaintiff company`s funds for their personal benefit. They needed a continuous stream of new projects to feed the debts of the old ones and when the drought descended upon the company after 1997 (when no new major project was forthcoming), they realised they had run out of Peters while the number of Pauls continued to increase.

The auditor, SK Lai, denied that he had advised the third defendant in the `creative accounting` that she had done with the books of the plaintiff company and the sixth defendant. His accuser refused to come to court to substantiate her statements. I had no reason to doubt his testimony. The third defendant was quite capable of writing or rewriting the accounts herself.

The sub-contractors and suppliers that dealt with the plaintiff company were not deceived so much by the false accounts as by the consequences arising from the false accounts. The plaintiff company was able to maintain and renew its G8 status and tender for public projects of unlimited value because of this and, to those in the building industry, the G8 grading must surely be the hallmark of creditworthiness. They were therefore deluded into entering contracts with the plaintiff company and would be more indulgent when told by the plaintiff company to wait for payment or full payment.

No formal annual general meeting or directors` meeting was held in the plaintiff company or its affiliates for the past several years. The fourth and the fifth defendants were told to append their signatures to the company`s records. If they should protest or refuse to comply in any way, it was certain they would incur the wrath of the first defendant and be removed as directors and most probably as employees of the plaintiff company as well. The two directors who knew exactly what was going on and who could exercise their mind in the matter were the first and the third defendants, who were clearly in breach of their duties as directors. Bearing in mind the peculiar circumstances of this case and the omnipotence of the overbearing first defendant in the plaintiff company, I did not think that the fourth and the fifth defendants should be held accountable as directors for the false accounts of the plaintiff company.

Similarly, where the ninth, tenth and eleventh defendants (the other three daughters) were concerned, they were also subject to the overbearing influence of the first defendant (more so for the twin sisters than the ninth defendant) and should not be held accountable as having knowingly assisted the first and the third defendants in their breach of duty. The twin sisters were not in the office most of the time and certainly were not involved in management decisions. The ninth defendant was more a fun-loving and carefree person than someone involved in account-twisting and intrigue.

The sixth and seventh defendants were in truth the alter ego of the first and the second defendants and had obviously been used to facilitate the first and third defendants` breaches of duty.

The second defendant was not formally appointed a director of the plaintiff company but was patently the first defendant`s alter ego in the company. She was active in the business and was known to be the boss`s wife. She was the true deputy managing director of the plaintiff company and controlled the purse strings. Her words would be obeyed by those in the plaintiff company as unquestioningly as if they emanated from the first defendant himself. She would fall squarely within the extended meaning of `director` (as underlined) in s 4(1) of the Companies Act which reads:

> *"director" includes any person occupying the position of director of a corporation by whatever name called and* ***includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act*** *and an alternate or substitute director. [Emphasis is added.]*

The words emphasised in the definition above are also the `shadow director` mentioned in s 149(8) of the Companies Act.

Millett J in **Re Hydrodam (Corby)** [1994] 2 BCLC 180 said at 183:

> *To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others.*

Although the second defendant consulted and discussed company matters with the third, fourth and fifth defendants, there could be no doubt who would be the decision-maker and that they would carry out whatever she instructed them to do. She was therefore also under the same duties along with the first and the third defendants and, like her husband and her daughter, was equally guilty of a breach of those duties.

The first, second and third defendants were the ones with intimate knowledge of how the plaintiff company was faring over the years and the ins and outs of the plaintiff company`s money. Knowing that the plaintiff company was in dire financial straits, they nevertheless used the false accounts to create the G8 veil to shield the true state of the plaintiff company from the eyes of the sub-contractors and suppliers. They knew that the existing creditors could only be paid by the `rob Peter to pay Paul` scheme described earlier and that at any one time, there would be some creditors who

could not be paid in full or at all. They had thereby carried on the business of the company with intent to defraud its creditors. The three of them were clearly parties to the carrying on of the business in that manner knowingly. Indeed, they were the directing minds. They should therefore be personally liable without any limitation of liability for all the debts of the plaintiff company (in this case $53.3m) pursuant to s 340(1) of the Companies Act which reads:

> *If, in the course of the winding up of a company or in any proceedings against a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.*

The imposition of a criminal sanction in s 340(5) does not bar the declaratory relief sought by the liquidator here (see s 39 of the Interpretation Act (Cap 1, 1999 Ed)).

Before the financial year 1995/1996, the plaintiff company purportedly used the `full completion method` in its accounts for the projects, recognising and recording revenue only when the projects in question were fully completed. The liquidator has shown that such an accounting policy was not adhered to for the financial years of 1993/1994 and 1994/1995 and if such a policy had been observed, the plaintiff company would not have the $5m net worth necessary for a G8 grading. For financial year 1995/1996, the plaintiff company then moved the losses back to the previous financial years by means of a prior year adjustment on the basis that the `percentage of completion` method of accounting introduced by the third defendant was more appropriate.

A `one-off` revaluation of the plaintiff company`s plant and machinery was carried out for the financial year 1995/1996 by valuers appointed by the plaintiff company and based on the report dated 26 September 1996, a `Revaluation Reserve` of some $2.6m was reflected in the audited accounts. The liquidator questioned the bona fides of this exercise which, in his view, was necessitated by the prior year adjustment in order to maintain the $5m net worth of the company. The liquidator`s valuer testified as an expert witness and the essence of his evidence was that the revaluation appeared to have confused and combined the two concepts of fair market value and existing or continuing use and that the values given were on the high side. However, the plaintiff company`s valuer had the advantage of inspecting the plant and machinery at the relevant time. Even if his valuation was erroneously high in some aspects, there was no evidence to show that it was deliberately so and that it was a result of collusion between the plaintiff company and the valuer.

Between 1995 to 2000, the first and second defendants also periodically caused to be transferred amounts totalling cumulatively $194m from the plaintiff company to their personal accounts to earn interest. While they did return the principal amounts and did pay personal income tax on the interest earned, this practice was done when the plaintiff company was insolvent. There was no reason why the plaintiff company could not open an interest-bearing account. The plaintiff company was therefore deprived of income that should have gone into its coffers. The cumulative amount of interest earned this way was about $280,000 calculated on the basis of the number of days the funds were in the first and second defendants` personal accounts and an average interest rate of 4%p[thinsp]a.

The first and second defendants also made use of the plaintiff company`s funds to purchase land to

develop residential properties in Singapore. These properties were registered in the names of the second and the third defendants. As indicated earlier, 4 Kew Drive was bought and four houses were built thereon. The land cost for the plot of land was $3.1m, out of which $2.5m were from overdraft facilities provided to the second and third defendants by OCBC Bank and the balance was said to be from the first and the second defendants. The building costs were also funded with a loan from the same bank. Although the second and the third defendants were the purported borrowers, the interest payable was paid by the sixth defendant using the plaintiff company`s funds. One of the four houses (757 Upper East Coast Road) was sold in July 1996 for $3m reaping in profits of about $501,000 for the second and the third defendants. 755 Upper East Coast Road was occupied by the third defendant and her husband, the thirteenth defendant and their family.

The plaintiff company also accepted, through the first defendant, an additional facility from the same bank in March 1997. The remaining three houses, together with 2 Kew Drive and an Ocean Park apartment, were mortgaged to OCBC Bank at the material times.

In January 2000, 4 and 4A Kew Drive and 755 Upper East Coast Road were purportedly sold to the sixth defendant at 10% above valuation to reduce the first and second defendants` indebtedness to the sixth defendant. Although the transaction was recorded in the accounting books of the sixth defendant, the properties remained in the names of the second and the third defendants.

In the following month, those three properties together with 2 Kew Drive and the Ocean Park apartment and the balance sale proceeds of Eastwood Lodge developed by the seventh defendant were treated as assets of the plaintiff company in the computation of dividends payable to unsecured creditors for the purposes of the judicial management application.

The Ocean Park apartment (528 East Coast Road [num]19-03 Ocean Park) was bought by the first defendant in March 1990. He said he could not recall whether he had borrowed the plaintiff company`s funds in the purchase. As this property was way outside the period in question in these proceedings (1995 to 2000) and the evidence was not compelling, I did not find that this apartment was in truth the plaintiff company`s. My comments apply equally to 2 Kew Drive, the home of the first and the second defendants.

The Eastwood Lodge project was sold in April 1999. The liquidator claimed that the seventh defendant owed the plaintiff company some $7m while the seventh defendant admitted having received only $5.755m from the plaintiff company. However, the fourth defendant as a director of the seventh defendant had confirmed in writing that the seventh defendant was owing the plaintiff company about $7m in April 1999. Between 1995 and 2000, the sixth defendant also transferred about $8.66m to the seventh defendant. After the sale of the apartments in Eastwood Lodge, some $5.55m were paid to the plaintiff company, leaving about $1.5m outstanding.

It was subsequently discovered by the liquidator that $482,000 had been withdrawn by the first defendant between 28 May and 24 July 2000 after the winding-up order on 26 May 2000. The second defendant testified that they needed this amount as their `living expenses`. In February 2000, the directors were also expecting $1.024m as `balance receivable from sale of Eastwood apartments (receivable after CSC)` and treated that amount as the plaintiff company`s asset in its computation of dividends payable to unsecured creditors. It was not shown what had happened to the $1.024m.

Clearly, therefore the plaintiff company`s funds had been used through the instrumentality of the sixth and the seventh defendants to develop the four houses and Eastwood Lodge and the company had an interest in them or in their sale proceeds.

On 2 March 2000, the third defendant appointed the eleventh defendant (her sister) as her attorney to sell 4, 4A and 755 Upper East Coast Road. Her role was only to sign for the third defendant. Every aspect of the sale was apparently taken care of by the first, second and the third defendants and their solicitors. All the five mortgaged properties were sold between 15 March 2000 and 9 May 2000 after a letter of demand dated 15 March 2000 was received from OCBC Bank. The proceeds were used to discharge the loan from the bank. However, there appeared to be a surplus of about $500,000 unaccounted for after the indebtedness to the bank (about $11m) was discharged.

Between November 1994 and April 1997, the plaintiff company transferred a total of $984,899.60 to the eighth defendant in Australia. By a directors` resolution in April 1998, the debt was transferred from the eighth defendant to the first defendant. The first and the second defendants used the plaintiff company`s funds to purchase properties in Australia in the name of the eighth defendant. Two have been identified - 39A Hydebrae Street, Sydney and the Goderich Street apartment in Perth. 39A Hydebrae Street was one of the two houses built on the property known as 39 Hydebrae Street. The other was sold in 1996. Another, 70 Barker Road, was said by the first defendant to have been sold and the proceeds spent for living expenses. The twelfth defendant (the second defendant`s younger sister in Australia) testified that 70 Barker Road was sold in September 1999 for about A$800,000.

In all likelihood, the sale proceeds of 70 Barker Road were used to purchase 17 Woodward Avenue in December 1999, the large house in Australia which the Tongs are now living in. The twelfth defendant`s evidence was self-contradictory. If her sister (the second defendant) did not have enough funds to purchase a larger house, it was indeed strange that her husband (the first defendant) could then give the twelfth defendant a loan of A$670,000 for the purchase of 17 Woodward Avenue. Further, this was the only property in her sole name unlike the others which she had purchased earlier with her husband. Being so highly geared financially already, what was her purpose in purchasing such a large house at A$1.47m?

The timing was also uncanny - the agreement was entered into at the time when the Tongs were obviously preparing to move permanently from Singapore to Australia. The size of the house also coincided with the desire of the Tongs for more spacious accommodation and the rental that they claimed they were paying to the twelfth defendant was nebulous. The loan of A$800,000 came about only in August 2000, some five months after the completion of the purchase. Together with the facts that the name of the eighth defendant was changed in January 2000 and the rumours that were rife in Singapore that the first defendant had siphoned off lots of money to Australia, I had no doubt whatsoever that 17 Woodward Avenue was bought by the twelfth defendant under the instructions of the first and the second defendants and that the funds for that purchase were from the eighth defendant which was in turn funded by the plaintiff company. Adverse inferences must be drawn against the twelfth defendant for her reluctance to produce the eighth defendant`s records. The alleged untimely burglary and vandalisation in the twelfth defendant`s accountants` office were nothing more than a lame excuse towards this end.

It was also clear that the plaintiff company`s funds of up to $3.7m were utilised by the first, second and the third defendants for their personal benefit between 1996 and 2000 when the plaintiff company was having difficulties paying its creditors. Examples of such personal benefit were detailed by the liquidator as payment of income tax, payment for share transactions and for personal investments in Australia.

Where remuneration paid to the first, second and third defendants by the plaintiff company and the sixth defendant was concerned, I did not think it right to hold that once a person is found to have acted in breach of his fiduciary duties, he has to disgorge all payments made to him by way of salary.

The question must be asked whether the salary of the first, second and the third defendants was something they would have been entitled to if they had not breached their fiduciary duties. Plainly, they could not be expected to work for free once the company became insolvent. The payment of the salary was not the breach itself, unlike unjust enrichment situations where the money in the hands of the person who has breached his duties would not have been there but for the breach.

The liquidator also alleged conspiracy on the part of the defendants to injure and/or damage the plaintiff company by the use of unlawful means. In the light of what I have discussed above, clearly the first, second, third and the sixth defendants were involved in such a conspiracy and should be liable for the loss/damage suffered to the extent of $53.3m.

The claim against the thirteenth defendant was for a declaration that 755 Upper East Coast Road was sold by the second and the third defendants to him in breach of s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Ed) which provides:

> *(1) Except as provided in this section, every conveyance of property, made whether before or after 12th November 1993, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.*
>
> *(2) This section does not affect the law relating to bankruptcy for the time being in force.*
>
> *(3) This section does not extend to any estate or interest in property disposed of for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the disposition, notice of intent to defraud creditors.*

The liquidator argued that the sale in March 2000 at $1.7m when the second and the third defendants had already left Singapore was consistent with their intention to make themselves judgment-proof.

The sale at that price was approved by OCBC Bank, the mortgagee, even if it appeared to be below open market valuation. The documentary evidence pertaining to the completion emanating from the thirteenth defendant`s solicitors showed that no payment was made for the option or upon its exercise until completion on 14 July 2000. This contradicted the thirteenth defendant`s evidence that he paid $10,000 for the option, 10% of the purchase price (including the $10,000) upon the exercise of the option and another 10% on completion.

There was no dispute that the thirteenth defendant utilised $170,000 of his CPF savings and took a bank loan of $1,190,000. The bone of contention was the source of the 20% cash outlay ($340,000). He stated it was from his savings and later amplied that to his savings, winnings from gambling, a loan from one of his brothers, money left to him by his deceased mother and a three-year loan of $230,000 from the second defendant`s youngest sister, Peggy Koo. He denied that it had anything to do with the $350,000 withdrawn by the first defendant from the seventh defendant in May 2000. The fourth defendant expressed surprise that Peggy Koo had lent $230,000 to the thirteenth defendant. When he was required to put up bail of $350,000 after he was charged for criminal offences by the CPIB and approached Peggy Koo (his sister) for a loan, she said she could only afford to lend $10,000. Secondly, he did not think that the thirteenth defendant and Peggy Koo were very close to each other. It should be noted that his bail money was required only in February 2001, about 10 or 11 months after Peggy Koo was said to have made the loan to the thirteenth defendant. No party called Peggy Koo to testify in court.

The thirteenth defendant`s gross salary was about $12,000 per month. His take-home pay was $10,799. He was paid a bonus of one and a half months for 2000. The monthly instalments of about $4,200 were paid from his CPF savings and with cash of $1,863 per month.

The liquidator also alleged that the sale price of $1.7m was an undervalue. A valuation report by Jones Lang La Salle in December 1999 stated the open market value of 755 Upper East Coast Road as $1.92m and the forced sale value at $1.7m. Further, 4 and 4A Kew Drive, which had land areas of about 50sq m smaller than 755 Upper East Coast Road were sold in May 2000 at $1.66m and in April 2000 at $1.8m respectively. Hence, despite the avowed intention of the first defendant not to have the properties sold at a forced sale by the mortgagee bank, 755 Upper East Coast Road was nonetheless sold as if it were a forced sale. Accordingly, the liquidator asked that the sale be declared void and that the property be reconveyed to the plaintiff company free of encumbrance with the thirteenth defendant having to discharge the existing mortgages before reconveyance. He asked that 755 Upper East Coast Road be sold subsequently and the net proceeds be distributed equally between the liquidator and the Official Assignee (because of the bankruptcy of the third defendant).

The thirteenth defendant alleged that the liquidator was aware of the sale of 755 Upper East Coast Road to the thirteenth defendant as the details of the sale of all the five properties were clearly set out in the third defendant`s affidavit of 25 May 2000 in the winding-up proceedings. However, he did nothing about it until 22 June 2000 when he instructed his solicitors to write to the solicitors for the second and the third defendants demanding that all the proceeds of sale be paid to him or be held by the solicitors for the second and the third defendants as stakeholders. The said defendants` solicitors could not accede to his demand. The proceeds of sale were paid to OCBC Bank as the mortgagee bank.

While the thirteenth defendant`s evidence as to the source of the $340,000 was far from satisfactory, it was not shown by the liquidator that the money had come from any of the defendants or from the plaintiff company`s funds. The property was sold at a forced sale value but that was done with the approval of the bank. It was one of the five properties sold to discharge the outstanding loan and it could not be said that the proceeds from the other four would be used first by the bank and that there would therefore be a surplus. Indeed, it was the first of the five to be sold and if the first-in, first-out principle was applied, the entire proceeds would have gone to the mortgagee-bank in any event, even if the price was for much more than $1.7m.

However, I rejected the thirteenth defendant`s claim of ignorance about the Tong family`s financial woes and that he was unaware of their plans to take flight to Australia. After all, his young son (Calvin) was involved and his younger son would be separated from his mother for a considerable period of time. It was too much of a coincidence that he would also be having such a `bad patch` with the third defendant then that she would keep him totally in the dark about what was going on.

In the financial analysis, the bank was not defrauded and the other creditors of the second defendant, the third defendant or the plaintiff company could not have been defrauded. It was therefore difficult to infer an `intent to defraud creditors` in the circumstances. The liquidator therefore failed in his claim against the thirteenth defendant. In any event, it could not be right to make the thirteenth defendant pay the bank and the CPF the amounts he had borrowed in order that the plaintiff company or the Official Assignee could benefit.

This case has demonstrated the great difficulties involved in identifying the sources of funds and the way they were used or rolled over. Having made the conclusions set out above and with the consequential orders that would follow therefrom, I did not think it necessary that these proceedings should be further extended by making tracing orders against the first, second, third, sixth, seventh

and the eighth defendants.

Orders made

The orders made are set out in the sequence in which the relevant prayers for relief appeared in the amended statement of claim. I granted judgment against the first, second, third and sixth defendants for the loss/damage suffered by the plaintiff company by reason of the conspiracy to injure by unlawful means in the sum of $53.3m. Alternatively, the said defendants were liable to the plaintiff company for the said loss/damage as constructive trustees.

I gave judgment against the first, second and third defendants for the loss/damage suffered by the plaintiff company by reason of their breaches of fiduciary duty in the sum of $53.3m and granted the declaration sought that the said defendants were constructive trustees for the plaintiff company in respect of the said sum and that they should account to the plaintiff company for this sum and pay it to the plaintiff company accordingly. I also granted a declaration that the four properties developed on the land previously known as 4 Kew Drive were held in trust for the plaintiff company.

I granted a declaration that the first, second and third defendants were knowingly parties to the carrying on of the business of the plaintiff company with intent to defraud its creditors and that they were liable to the plaintiff company for the said $53.3m. Alternatively, the said defendants were liable as constructive trustees.

Judgment was ordered against the eighth and the twelfth defendants for a declaration that they held $984,899.60 as constructive trustees for the plaintiff company and that they should account to the plaintiff company for the said sum. They were also declared the constructive trustees for the plaintiff company in respect of the following Australian properties:

(1) 39A Hydebrae Street, Sydney;

(2) Stamford Apartment, Goderich Street, Perth; and

(3) 17 Woodward Avenue, Sydney.

Should all or any portion of the said $984,899.60 have been expended on any of the abovementioned three properties, the amount due would be extinguished or diminished to that extent.

The plaintiff company was also given a declaration that the seventh defendant received $7m from the plaintiff company as constructive trustees and it should account for the use of this $7m including the outstanding amount of $1.5m.

The total amount due to the plaintiff company in respect of all the above orders should be $53.3m and any amount realised from any of the defendants pursuant to the above orders would reduce the total to that extent.

The injunction dated 9 October 2000 should continue against the first, second, third, sixth, seventh, eighth and the twelfth defendants.

Simple interest awarded on all sums due was to run from the date of the writ of summons.

The plaintiff company was also awarded taxed costs against the first, second, third, sixth, seventh, eighth and twelfth defendants. In view of the more limited role played by the twelfth defendant and

the insolvency of most of the other defendants, I acceded to the request that her liability for the plaintiff company`s costs be limited to a fair proportion which I fixed at 25%.

The plaintiff company`s claims against the fourth, fifth, ninth, tenth, eleventh and thirteenth defendants were dismissed and the injunction against them was discharged accordingly. There was no order to assess any damages suffered as a result of the injunction as the liquidator, with the knowledge gleaned from the documents made available to him, had rightly taken out the injunction against all of them. I awarded taxed costs to these defendants but directed that such costs be paid by the first, second, third and sixth defendants as these proceedings were essentially the result of what they had done.

I also awarded a certificate for two counsel to both Ms Belinda Ang SC and Mr B Mohan Singh.

The defendants had taken out various applications to set aside the injunction but these were adjourned to be dealt with at the trial. In view of the above orders, I made no order on these applications except that costs be in the cause.

Appeals

In CA 600124/2001, the eighth and the twelfth defendants are appealing to the Court of Appeal against those parts of my decision affecting them. In CA 600128/2001, the first, second and the third defendants are appealing against those parts of my decision affecting them. Civil Appeal No 600130/2001 is the appeal by the plaintiff company against the dismissal of its claim against the thirteenth defendant and the refusal to make tracing orders against the first, second, third, sixth, seventh and eighth defendants.

Outcome:

Order accordingly.