

Caltong (Australia) Pty Ltd (fka Tong Tien See Holding (Australia) Pty Ltd) and Another v
Tong Tien See Construction Pte Ltd (in liquidation) and another appeal
[2002] SGCA 28

Case Number : CA 600124/2001, 600130/2001
Decision Date : 29 May 2002
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ
Counsel Name(s) : N Sreenivasan and Sharon Chia (Straits Law Practice LLC) for the appellants in CA 600124/2001 and respondents in CA 600130/2001; Foo Maw Shien and Deborah Koh (Ang & Partners) for the respondent in CA 600124/2001 and appellant in CA 600130/2001
Parties : Caltong (Australia) Pty Ltd (fka Tong Tien See Holding (Australia) Pty Ltd); Anor – Tong Tien See Construction Pte Ltd (in liquidation)

Civil Procedure – Costs – Principles – Parties only partially succeeding – Costs to award

Equity – Fiduciary relationships – Breach – Liability of third party knowingly receiving moneys obtained by breach of fiduciary duty – Criteria for liability – Liability of third party dishonestly assisting fiduciary to breach fiduciary duties – Criteria for liability – Whether appellant guilty of knowing receipt or dishonest assistance

Tracing – Common law – Mixing of tainted moneys with others – Legal effect of such mixing – Nature of tracing exercise – Whether necessary to identify traceable proceeds in order to obtain tracing order – Whether to grant tracing order

– Whether leave to appeal against judgment in favour of bankrupt is necessary when leave to commence proceedings already obtained

Equity

– Fiduciary duties – Breach – Accessory to breach – Liability of third party to account for dishonestly assisting fiduciary to breach fiduciary duties – Elements that have to be proved to establish liability – Whether appellant rendered any assistance in breach

Equity

– Fiduciary duties – Breach – Liability of third party who knowingly received sums traceable to breach of fiduciary duties – Elements that have to be proved to establish liability – Whether elements proved

Equity

– Tracing – Nature of tracing exercise – When a tracing order will be granted – Circumstances that a court will take into account when determining whether to grant a tracing order – Whether necessary to identify traceable proceeds in order to obtain a tracing order

Trust and Trustees

– Breach of trust – Identification of trust property – Effect of trustee mixing his/her personal funds with the trust funds

Facts

Tong Tien See Construction Pte Ltd ('TTSC') was a major player in the building construction industry. In 2000, TTSC was wound up on the ground of insolvency, it being unable to pay its debts of some \$53.3 million. The liquidator, after examining the

affairs of the company, came to the conclusion that the directors had breached their fiduciary duties to the company and commenced actions against the founder of the company, Tong Tien See ('Tong'), some of his family members, as well as associated companies and parties who had wrongfully received assets from TTSC.

In the court below, the trial judge found that Tong, his wife ('Koo') and daughter ('Angela') had breached their fiduciary duties. Not only had they deceived TTSC's creditors by manipulating the company's accounts, the Tongs also siphoned large sums of money for their personal benefit. Furthermore, the evidence showed that they caused TTSC to transfer a total of \$984,899.60 to Caltong (Australia) Pty Ltd ('Caltong'). With these funds, Caltong purchased three properties in Australia, one of which was 70 Barker Road, Sydney. This property was sold in 1999 for A\$800,000. Koo's sister, Sally, was Caltong's sole shareholder and director and despite her claim that one of her properties, No. 17 Woodward Avenue (the 'Woodward property'), had nothing to do with TTSC or its funds, the trial judge found that the property was bought using proceeds from the sale of 70 Barker Road.

At the end of the trial, the trial judge ordered Tong, Koo and Angela to pay TTSC \$53.3 million in damages. He also held that they were constructive trustees in respect of this sum of money and the properties bought by them using the company's funds. With regard to Caltong and Sally, the trial judge declared that they were constructive trustees of the \$984,899.60 which Caltong received from TTSC as well as the Woodward property and the two Australian properties owned by Caltong. Dissatisfied with the ruling against them, Caltong and Sally appealed against the trial judge's decision, arguing, *inter alia*, that Sally should not be personally liable to account for the \$984,899.60 and that the trial judge erred in declaring that Sally held the Woodward property on trust for TTSC. TTSC also appealed, contending that the trial judge erred in refusing to grant it the tracing orders that it sought against the Tongs, Caltong and Sally.

Held

, allowing both appeals in part:

(1) Sally was not guilty of dishonest assistance or of knowing receipt vis--vis the sum remitted from TTSC to Caltong. As such, she should not be held to be personally liable for this sum. To be liable for knowing receipt, three elements must be proved. First, the plaintiff must show a disposal of his assets in breach of fiduciary duty. Secondly, there must have been the beneficial receipt by the defendant of assets traceable to the assets of the plaintiff. Finally, it must be shown that the defendant had knowledge that the assets are traceable to a breach of fiduciary duty; *El Ajou v Dollar Land Holdings* [1994] BCLC 464 followed. In the present case, Sally did not receive the money and there was no evidence to indicate that she knew that the money received by Caltong from Tong was improperly siphoned off from TTSC (see 30 – 31).

(2) The elements which must be proved to establish dishonest assistance are (a) that there has been a disposal of assets in breach of trust or fiduciary duty; (b) in which the defendant has assisted or which she/he has procured; (c) the defendant acted dishonestly; and (d) resulting loss to the claimant; *Royal Brunei Airlines v Tan* [1995] 2 AC 378 followed. There was no evidence that Sally had dishonestly assisted Tong, Koo or Angela in siphoning off the funds of TTSC to Caltong. That she was a nominee director of Caltong did not per se mean that she would also know of the Tongs' wrongdoings. (see 33 - 35).

(3) When a trustee mixes trust funds with his own funds, the whole is subject to the trust, except so far as he is able to distinguish what is his own; *Firth v Cartland* (1865) 71 ER 525 and *Re Tilley's Will Trust* [1967] 1 Ch 1179 followed. In this case, Sally used proceeds from the Barker Road property to buy the Woodward property and knew that the proceeds were tainted. Having knowingly mixed trust monies with her own when purchasing the property, the burden was on her to show which portion of the purchase price came from her own resources. However, having regard to the nature of the pleadings, and the manner in which the trial had proceeded, it was fairer to afford Sally the opportunity of showing the extent to which she and/or her husband had contributed towards that portion of the purchase price of the Woodward property in excess of the amount obtained from the

sale of the Barker Road property.

(4) Once leave is obtained to commence an action against a bankrupt under s 76(1)(c)(ii) of the Bankruptcy Act, that leave should hold good until the final determination of the proceeding, including any appeal. There is really no good reason why leave should be obtained at every stage; *Overseas Union Bank v Lew Keh Lam* [1999] 3 SLR 393 distinguished (see 51 – 52).

(5) Tracing is a process rather than a remedy. It enables a plaintiff to trace what has happened to his property, identify the persons who have handled or received it and justify his claim that the assets/property which they handled or received can properly be regarded as representing his property.; *Foskett v Mckeown* [2000] 3 All ER 97 followed (see 53). For a tracing order to operate, the assets from which a tracing exercise is to begin must be identified. However, it is not necessary to identify the traceable proceeds, as one of the objects of a tracing exercise is to establish this (see 57).

(6) The court is entitled to take all the circumstances of a case into account in determining whether a tracing order should be granted. While TTSC's prayer for a tracing order was inadequately formulated, this did not preclude a court from granting an appropriate tracing order if the case warranted it (see 58).

(7) No tracing order based on the \$53.3 million, which Tong, Koo and Angela were held to be accountable, would be granted. This was because there would be great difficulties in identifying the specific sums from which tracing was to be initiated, bearing in mind the numerous transactions which would have taken place (see 59).

(8) The same could not be said of the \$984,899.60 received by Caltong from Tong/TTSC as this was a starting point from which tracing could begin. While proceedings would be extended by such a tracing exercise, this was inevitable. Furthermore, a tracing order was not redundant as it could compel third parties to assist in the exercise. This could be useful as Caltong was not very cooperative in disclosing its records (see 60 – 61).

Per Curiam

A party may be liable to another for damages on account of a tort the former had committed, but that does not render that party a constructive trustee of the same. It remains a personal debt (see 27).

Case(s) referred to

Browne v Dunn

[1893] 6 R 67 (distg)

El Ajou v Dollar Land Holdings [1994] BCLC 464 (folld)

Frith v Cartland (1865) 71 ER 525 (folld)

Foskett v McKeown [2000] 3 All ER 97 (folld)

HL Bolton (Engineering) Co Ltd v T.T Graham & Sons Ltd [1957] 1 QB 159 (folld)

Khan v Khan [1982] 2 All ER 60 (refd)

Overseas Union Bank v Lew Keh Lam [1999] 3 SLR 393 (distg)

Re Montagu's Settlement Trusts [1987] Ch 264 (folld)

Re Tilley's Will Trust [1967] Ch 1179 (folld)

Royal Brunei Airlines v Tan [1995] 2 AC 378 (folld)

Selangor United Rubber Estates Ltd v Craddock (No. 3) [1968] 2 All ER 1073 (distg)

Legislation referred to

[Delivered by Chao Hick Tin JA]

Judgment

GROUND OF DECISION

1. These two related appeals arise from a decision of the High Court in an action instituted by the liquidator of a company, Tong Tien See Construction Pte Ltd ((TTSC), against primarily its former directors and shareholders for conspiracy, fraud, and breach of fiduciary duties, and for the necessary reliefs. At the conclusion of the trial, judgment and various reliefs were granted in favour of TTSC. However, the High Court refused to grant a tracing order to TTSC and this formed the subject matter of the appeal by TTSC in CA 600130/2001.
2. Some of the orders made in favour of TTSC were against Caltong (Australia) Pty Ltd (Caltong) and Wei Fong Rasiah, Sally (Sally), the 8th and 12th defendants respectively in the action below. Both Caltong and Sally have appealed against the orders on the ground that their scope is too wide.

The facts

3. TTSC was in the building construction business. It was a major player in the industry, having attained the highest grade (G8) under the HDB ranking system for building contractors. It was a family owned company, started by the patriarch Tong Tien See (Tong), the first defendant. It was initially a sole-proprietorship and was converted into a private limited company in 1985. Tong controlled TTSC with the help of his wife, Koo Yoke Fong (Koo), the second defendant, and a daughter, Tong Hui Chee, Angela (Angela), the third defendant.
4. On 26 May 2000, TTSC was wound up on the ground of insolvency, it being unable to pay its debts amounting to some \$53.3 million. In fact, earlier, on 2 March 2000, TTSC was placed under interim judicial management.
5. The liquidator, having examined the affairs of the company, came to the conclusion that breaches of fiduciary duties had occurred on the part of the directors, among others, which included the improper disposal of the assets of the company. He also discovered that TTSC was, in fact, insolvent from the financial year 1995/96. What happened was that in order to maintain the "G8" status of TTSC, a hallmark of credit worthiness which required TTSC to have a net worth of \$5 million, a scheme was hatched by Tong and others. This involved transferring losses of TTSC to an affiliated company, Tong Joo Aik Construction Pte Ltd (Tong Joo), the sixth defendant, by the raising of sham bills over a period of some years, amounting in total to about \$25 million.
6. As part of the scheme to siphon money from TTSC, bills were also raised by Tong Joo to TTSC to enable large sums of money to be transferred from TTSC to Tong Joo. It should be noted that Tong Joo did not carry out any business of its own other than being so made used of. The moneys of TTSC received by Tong Joo were used by Tong and Koo to purchase residential properties under their personal names.
7. Tong and Koo also transferred in total a sum of some \$194 million from TTSC and placed them on

interest bearing accounts, with Tong and Koo keeping the interest earned and returning only the capital sums to TTSC. Even after the winding up order was made, Tong withdrew a total of \$482,000 from TTSC for his own personal use.

8. One of the properties which Tong bought with monies from TTSC was a plot of land at No. 4 Kew Drive. It was subsequently subdivided into four plots where four new houses were constructed and they were later known as Nos 4 and 4A Kew Drive and Nos 755 and 757 Upper East Coast Road. These four properties were registered in the names of Koo and Angela. The building costs were funded from a loan from OCBC Bank but the interest due was paid by Tong Joo, using funds from TTSC.

9. Between 1996 and 2000, TTSC's funds of up to \$3.7 million were utilized by Tong, Koo and Angela ('the Tongs' where appropriate) for their personal benefit. The Tongs also bought holiday homes in Perth and Sydney.

10. Thirteen persons were identified by the liquidator as having dealt with or received moneys from TTSC and were made defendants to the action. They were:-

First defendant – Tong Tien See (Tong)

Second defendant

– Koo Yoke Fong (Koo), the wife of Tong. While she was never formally appointed a director of TTSC, she was effectively the number two person in the company, next to Tong. She was a *de facto* director.

Third defendant

– Tong Hui Chee, Angela (Angela), the second daughter of Tong and Koo. She is an accountant by profession and was very much involved in the affairs of TTSC.

Fourth defendant

– Koo Say Hee, Raymond (Raymond), a younger brother of Koo. He was the Deputy Managing Director of TTSC and took care of things at work sites.

Fifth defendant

– Chia Siew Keng (Chia), a director of TTSC. She started work with Tong in 1975 when TTSC was a sole proprietorship. She resigned from TTSC in March 2000.

Sixth defendant

– Tong Joo Aik Construction Pte Ltd (Tong Joo), an affiliated company of TSSC. It has also become insolvent.

Seventh defendant

– Tong Development Pte Ltd (TDPL), another affiliated company of TTSC, being wholly owned by Tong Joo.

Eighth defendant

- Caltong (Australia) Pty Ltd (Caltong), another affiliated company incorporated in Australia. It was an investment company set up by Tong, Koo and Angela.

Ninth defendant

- Tong Hui Li Linda (Linda), the eldest daughter of Tong and Koo. She was a director and shareholder of Tong Joo and a director of TDPL.

Tenth defendant

- Tong Hui Chuen, Carol (Carol), the third daughter of Tong and Koo. She was a director of Tong Joo.

Eleventh defendant

- Tong Hui Fung, Cindy (Cindy), the fourth daughter of Tong and Koo. She became a director of TTSC only in February 2000.

Twelveth defendant

- Wei Fong Rasiah, Sally (Sally), the younger sister of Koo. She is an Australian citizen. She and her husband operated two McDonald's restaurants in Sydney.

Thirteen defendant

- Lee Han Chye Alvin (Alvin), the husband of Angela, the third defendant.

11. Before the commencement of the trial below, Tong was, on 23 February 2001, adjudicated a bankrupt. Earlier, in the beginning of 2000, after having sold their properties here, Tong, his wife and daughters, Angela and Carol, moved south to settle in Australia.

12. The evidence showed that by 1998, because of the way Tong and Koo had been fiddling with the accounts and moneys of TTSC (treating its moneys very much as their own), TTSC was no longer able to meet its commitments to its sub-contractors. As a result, supplies and services needed for TTSC projects were disrupted because payments due to the sub-contractors were not made. On account of the manipulations, TTSC was able to maintain its G8 status and continue to receive big construction contracts. As a result, sub-contractors were deluded into contractual arrangements with TTSC.

13. TDPL was a housing developer, and had borrowed various sums of money from TTSC for its business. Repayments of the loans were made from time to time but as at the date of liquidation of TTSC, TDPL was owing the former some \$1.5 million. Between 1995 and 2000, Tong Joo had also transferred about \$8.66 million to TDPL.

14. From November 1994 to April 1997, TTSC transferred a total of \$984,899.60 to Caltong. By a directors' resolution of TTSC, the debt was switched from Caltong to Tong. With the funds, Caltong purchased two properties in Australia – 39A Hydebrae Street, Sydney and The Stamford, 5256 Goderich Street, Perth. A third property, 70 Barker Road, Sydney, was also bought by Caltong but

sold in 1999 for A\$800,000. Until November 1998, the first three defendants, Tong, Koo and Angela, held 1/3 share each in Caltong. Thereafter, Sally became the sole shareholder and in November 1999, the sole director.

15. Sally and her husband owned several properties in Australia. One property which was of concern to the present action was No. 17 Woodward Avenue (Woodward property), which was a rather large house, purchased by Sally in March 2000 in her sole name at a price of A\$1.47 million. She claimed that to purchase that property she borrowed A\$670,000 from Tong and the remainder came from the resources of herself and her husband. However, some months after the purchase, the property was mortgaged for A\$800,000. The evidence pointed to the fact that Sally bought this rather large house because Tong and Koo and their family were coming over to live in Australia. That was the finding of the judge below although Sally claimed that the house had nothing to do with TTSC or its funds. She said she rented it out to the Tongs but there was no fixed rental.

16. As for Alvin, he worked full time as a fuel oil broker earning a substantial salary of \$12,000. He and Angela lived with her parents at 2 Kew Drive until 755 East Coast Road (No. 755) was completed. He bought over No. 755 from Koo and Angela for \$1.7 million, using \$170,000 from his CPF and \$340,000 in cash and the rest, \$1.19 million, came from a bank loan. Of the \$340,000 in cash, \$230,000 was a three-year interest free loan which he obtained from one Peggy Koo, the youngest sister of Koo (the second defendant). The records indicated that the 10% due on the exercise of the option to purchase No. 755 was never paid, though eventually the full purchase price was paid.

Findings of trial judge

17. For several years prior to the winding up of TTSC, no formal Annual General Meetings or Directors' Meetings were held. Raymond and Chia would sign whatever documents were placed under their noses by the first three defendants. The trial judge did not make Raymond and Chia accountable for the wrongdoings in relation to the disposal of the assets of TTSC because he felt that they were under considerable duress. The judge also did not make any order against Linda, Carol and Cindy, the three daughters of Tong because they were not really involved in the day-to-day running of TTSC, Tong Joo or TDPL.

18. The judge held that the real culprits of the entire scheme were Tong, Koo and Angela. They had, knowingly, carried on the business of TTSC with intent to defraud its creditors. He held them to be personally liable pursuant to s 340 of the Companies Act without any limitation of liability for all the debts of TTSC.

19. We have earlier mentioned four houses being erected on No 4 Kew Drive. One of the four houses, No. 757 Upper East Coast Road, was sold by Koo and Angela in July 1996, reaping a profit of \$501,000. In January 2000, the remaining 3 houses were purportedly sold to Tong Joo at 10% above valuation, with a view to reducing Tong and Koo's indebtedness to Tong Joo. Although this transaction was recorded in the books of Tong Joo, Koo and Angela remained the owners of the three properties. Indeed, the property at No. 755 was sold to Alvin.

20. Interestingly, to support the application for judicial management, the three properties, Nos 4 and 4A Kew Drive and No. 755, together with No 2 Kew Drive (the residence of Tong and Koo), an Ocean Park apartment (bought by Tong in 1990), and the balance of sale proceeds of the Eastwood Lodge developed by TDPL, were treated as assets of TTSC in the computation of dividends payable to unsecured creditors. It was anticipated that the balance of the sale proceeds of the Eastwood Lodge development would be some \$1.024 million. There was no record as to what happened to this sum.

21. As TTSC's funds were used to develop the four houses on No. 4 Kew Drive and the Eastwood Lodge, the court held that TTSC would have an interest in them or their proceeds of sale.

22. As for the Woodward property, the judge found it was bought by Sally as Tong and Koo were then about to migrate to Australia and needed a large house. The funds for the purchase came from the proceeds of sale of 70 Barker Road (see 14 above). The judge did not believe that Sally bought the Woodward property for her own purposes because, *inter alia* -

If (Koo) did not have enough funds to purchase a larger house, it was indeed strange that her husband (Tong) could then give (Sally) a loan of A\$670,000 for the purchase of 17 Woodward Ave. Further, this was the only property in her sole name, unlike 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 S\$1.47 million?

23. In reaching this conclusion, the judge also drew an adverse inference against Sally on account of her reluctance to produce the records of Caltong. He viewed the alleged burglary and vandalism of her accountant's office in Australia (see 41 below) as mere excuses to avoid having to produce Caltong's records.

24. However, as regards the sale of No. 755 to Alvin, the judge found that the disposal was not made with an "intention to defraud creditors". Moreover, the sale was at a price approved by the mortgagee, OCBC Bank. In any case, it would be unjust, in all the circumstances, to invalidate the transaction, as Alvin had borrowed from the bank and taken money from his CPF account to pay for the property.

25. In the light of the above, the judge made, *inter alia*, the following orders:-

(i) that Tong, Koo and Angela repay the sum of \$53.3 million as damages on the ground that (a) they were guilty of conspiracy to injure by unlawful means and (b) that they were in breach of their fiduciary duties to TTSC.

(ii) that on account thereof they were constructive trustees in respect of the said sum.

(iii) that Tong, Koo and Angela held the four properties developed on No. 4 Kew Drive in trust for TTSC and they were to account for the use of these assets.

(iv) Caltong and Sally were constructive trustees in respect of the sum \$984,899.60 received from TTSC and were to account for the same and were also constructive trustees in respect of the following properties.

(a) No. 39A Hydebrae Street, Sydney;

(b) Stamford Apartment, Goderich Street, Perth;

(c) No. 17 Woodward Avenue, Sydney.

Appeal of Caltong and Sally

26. We will first consider the appeal of Caltong and Sally. In order to determine whether the orders made against them are or are not too wide, it is necessary that we set out their precise terms:-

"The Eighth and Twelfth Defendants are –

(i) To hold the sum of S\$984,899.60 paid by the Plaintiff as constructive trustees for the Plaintiff;

(2) To account to the Plaintiff for the sum of S\$984,899.60, including:

(a) the use of such monies (which includes details of to whom such monies were paid, when such monies were paid, the quantum of payment and reasons for payment);

(b) all properties and/or benefits and/or assets obtained from the use of such monies;

(3) To pay to the Plaintiff monies, and all profits and/or benefits and/or assets, including simple interest;

(4) To hold the following properties as constructive trustees for the Plaintiff:

(a) 39A Hydebrae Street, Sydney;

(b) Stamford Apartment, Perth; and

(c) 17 Woodward Avenue, Sydney.

...

(3) The Twelfth Defendant do pay to the Plaintiff 25% of the Plaintiff's costs in these proceedings ..."

27. At this juncture, we would like to make this observation. The judge seemed to think that on account of the damages which Tong, Koo and Angela were required to pay TTSC because of their conspiracy, Tong, Koo and Angela were thereby rendered constructive trustees of the same. A party may be liable to another for damages on account of a tort the former had committed, but that does not render that party a constructive trustee of the same. It remains a personal debt.

28. We would comment that while the appeal is taken by both Caltong and Sally, it is really an appeal by Sally. It was never disputed that Caltong received the sum of S\$984,899.60 from TTSC. Sally's contention is that as she was in control of Caltong only after November 1999, when she became the sole director, she should not be made to account for events before that. The sum never passed through her hands. There was no reason to make her personally liable. Furthermore, the Woodward property had nothing to do with Caltong. She also contends that the order on costs requiring her to bear 25% of the action is excessive and unreasonable.

29. What Sally is basically arguing is that until she became the sole director, she was really only a nominee director of Caltong. She did not know what was happening there, which was effectively being managed by Tong and Angela, particularly the latter. She did not touch the sum of S\$984,899.60 which came into the account of Caltong. This aspect of the matter did not appear to have been specifically addressed by the judge below. He did not find that when the money was

received by Caltong, Sally knew that the money was remitted by Tong in breach of trust. Neither did he find her guilty of dishonest assistance.

30. While the knowledge of Tong and Angela may be imputed to Caltong (see *HL Bolton (Engineering) Co Ltd v T.T Graham & Sons Ltd* [1957] 1 QB 159), they being the controlling mind of Caltong, there is no evidence to indicate that Sally knew that the money received by Caltong from Tong was improperly siphoned off from TTSC. There is also nothing to suggest that Sally dishonestly assisted the Tongs in siphoning money from TTSC.

31. To be liable for knowing receipt which would render the recipient a constructive trustee, three elements must be proved, and in the words of Lord Hoffman in *El Ajou v Dollar Land Holdings* [1994] BCLC 464:-

"the plaintiff must show, first a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and, thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty."

What were missing in relation to Sally are the second and third elements. She did not receive the money. Neither was it shown that she knew the money received by Caltong was tainted. Thus, she could not be liable under the principle of knowing receipt, even though Caltong, by virtue of the knowledge of Tong and Angela, would be liable to account for knowing receipt.

32. The fact that she agreed to be a nominee director in Caltong did not mean that she had assisted the Tongs in committing a breach of fiduciary duty towards TTSC. Sally's duty as a director (though nominee), was to Caltong, not to TTSC. The case *Selangor United Rubber Estates Ltd v Craddock (No. 3)* [1968] 2 All ER 1073 merely established the principle that just because a person was a nominee director, it did not mean that he did not owe a duty of care to the company of which he was a director.

33. The elements which must be proved to establish dishonest assistance are (see *Royal Brunei Airlines v Tan* [1995] 2 AC 378):-

- (a) that there has been a disposal of his assets in breach of trust or fiduciary duty;
- (b) in which the defendant has assisted or which she/he has procured;
- (c) the defendant has acted dishonestly;
- (d) resulting loss to the claimant.

34. There is no evidence that Sally had dishonestly assisted Tong, Koo or Angela in siphoning off the funds of TTSC to Caltong. In fact, she played no role in remitting TTSC's moneys to Caltong. She was merely a nominee director of Caltong.

35. This association *per se* could not mean that she would also know what was done by the Tongs as far as siphoning of TTSC's moneys to Caltong was concerned. In short, there was nothing to implicate Sally to the wrongdoings of the Tongs.

36. Accordingly, Sally could not be guilty of dishonest assistance or of knowing receipt that the sum was remitted from TTSC to Caltong in breach of trust. She should not be held to be personally liable. To this extent, the order made by the court below would have to be modified.

Woodward property

37. We now turn to the Woodward property, which Sally says the court was wrong to have declared that she held it on trust for TTSC. She argues that TTSC had not pleaded anything with regard to this property. The pleadings only touched on the S\$984,899.60 received by Caltong from TTSC. Therefore, she did not allude to this property, or on how she acquired it, in her affidavit. While this may be so, there is considerable weight in the counter-argument of TTSC that it did not so plead because it only became apparent in the cross-examination of Sally that the Woodward property had been purchased with moneys which originated from TTSC. This also explains why, when Tong and Koo were giving evidence, they were not cross-examined by TTSC on this aspect. In any case, during the cross-examination of Sally, TTSC gave notice that it was claiming the property as trust property. She was cross-examined on it.

38. Moreover, TTSC had also pleaded that it would claim against any assets which were purchased with the S\$984,899.60 or their proceeds. That should suffice to notify Sally that a tracing was being asked for. It would have been easy for Sally to show, from the bank records of Caltong, that none of the moneys of Caltong were used to purchase the Woodward property. It would also have been a matter within her knowledge as to the sources of funds which she had utilized to effect the purchase.

39. The judge below came to the conclusion that the sale proceeds of 70 Barker Road, which was one of the properties purchased by Caltong from the \$984,899.60 remitted by TTSC/Tong, were probably used to purchase the Woodward property. Among the factors which the judge took into account in deciding this question were - (i) the Barker Road property was sold in September 1999 for about A\$800,000; (ii) the Woodward property was bought at a time when the Tong family was moving to live in Australia and required a large home; (iii) it was the only property bought in Sally's sole name whereas her other properties were in the joint names of herself and her husband; (iv) after the purchase, the Tongs were living there allegedly as tenants; (v) it was strange that Tong was able and would lend to Sally a sum of A\$670,000 to purchase the property when Tong did not have enough money to buy his own house; (vi) there was no reason why Sally should buy this large house with borrowed money when she was already owing substantial loans in respect of her other properties.

40. While an explanation was offered by Sally in respect of each of these points, they were not sufficiently persuasive to the judge. This being a finding of fact, there is hardly any sufficient basis for us to overturn this finding. Indeed, we agree with it. We would add that in making this finding the judge also took into account Sally's conduct at the trial.

41. As stated above, the Barker Road property was sold for some A\$800,000. It would have been a straightforward matter to show where the proceeds had gone. Yet, there was considerable reluctance to disclose the bank records of Caltong. They were eventually not produced because of an "alleged" burglary at Caltong's accountant's office and the records were reportedly lost as a result. The judge felt it was too much of a coincidence. On 2 May 2001 he made the order requiring Sally to disclose the records by 8 May 2001. It was on 8 May 2001 that Caltong's counsel informed the court of the "burglary" which occurred on 4 May 2001. Counsel could not give further details. Interestingly, Tong's evidence was that the proceeds of the Barker Road property were spent on "living expenses" during the period of some six months from September 1999 to March 2000. Bearing in mind their financial circumstances then, it certainly seemed like a very tall story, squandering such a large sum in such a

short time.

42. In cross-examination, Sally said that matters relating to the financing of the purchase of the Woodward property were handled by her husband, Thava. In the circumstances, she asserted that TTSC should have called Thava to clarify those matters. Yet it did not do so. Accordingly, Sally submits that TTSC is precluded from contending otherwise now. But it is important to note that Thava did not say anything on this in his affidavit at all. What he did state was not disputed by TTSC. If indeed Thava did possess the relevant information as Sally had asserted, then the information should have been set out in a supplemental affidavit of Thava. This is a matter exclusively within her knowledge. She must go further and get that person to depose to those facts. This issue has nothing to do with the principle in *Browne v Dunn* [1893] 6 R 67, which precludes a party from asserting otherwise if he fails to cross-examine a witness as to what the latter stated in his affidavit or in his evidence-in-chief.

43. There is another aspect which casts doubts on the credibility of Sally. Caltong's counsel tendered to court its tax returns and balance sheets relating to the years 1995-1999. On these documents, Caltong's name appeared on the tax assessments in respect of those years. But Caltong only took this name on 24 January 2000. Previously, it was known as "Tong Tien See (Australia) Pty Ltd". Similarly the documents also bore the new address of Caltong's accountants but the accountants only moved to their new offices in 2000 or 2001. Sally was not able to explain these discrepancies. Thus, there was the suggestion that perhaps Sally fabricated these documents.

44. Ordinarily, when a trustee mixes trust funds with his own funds, the law assumes that the whole is subject to the trust. In *Frith v Cartland* (1865) 71 ER 525 at 526, Page Wood VC observed: "... if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own." See also *Re Tilley's Will Trust* [1967] Ch 1179 at 1182.

45. However, in the present case, while there is no direct evidence to show that, in using the proceeds of the Barker Road property to buy the Woodward property, Sally knew that the proceeds were tainted, we nevertheless find, on balance, that she did have the knowledge. First, she denied having used the proceeds of the Barker Road property to purchase the Woodward property. Second, unlike all her other properties, she purchased the Woodward property in her sole name. Thirdly, she submits tax documents to court which appeared to be fake and she was unable to explain the clear discrepancies (see 43 above). Fourthly, her reluctance to produce the records of Caltong. All these indicate a guilty mind. Thus, it appears to us that she had knowingly mixed trust money with her own when purchasing the Woodward property. The burden was on her to show which portion of the purchase price came from her own sources and was not tainted by the breach of trust committed by Tong and Angela. However, having regard to the nature of the pleadings, and the manner in which the trial had proceeded in the court below, it would probably be fairer if an opportunity be afforded to Sally to show the extent to which she and/or her husband had contributed (from their own funds) to the purchase of the Woodward property.

46. The final point raised by Sally relates to the order on costs. She says that even if she were to fail in this appeal, the 25% costs awarded against her for the trial is plainly excessive as the points she raised would probably have taken only two days to hear. She submits that her role in the whole matter was minor, whereas the trial took a total of 39 days.

47. From the grounds of judgment, it is clear that in arriving at its decision on costs, the court below did give careful consideration to Sally's contention that costs awarded against her should be limited. The question of costs is a matter of discretion. It has not been shown that the judge had

erred. The court is entitled to take all the circumstances into account, in determining the appropriate apportionment as to costs. But whether this order on costs should be varied, in the light that this appeal would, for the reasons indicated above, be allowed in part, will be dealt with later.

TTSC's appeal on tracing

48. Although the appeal by TTSC would affect Tong, Koo, Angela, Tong Joo, TDPL and Caltong, only Caltong is defending it as the other parties are either bankrupt or are being wound up.

49. A preliminary point was raised by Caltong that TTSC cannot proceed with this appeal against Tong and Angela without the leave of court as required under s 76(1)(c)(ii) of the Bankruptcy Act as they are both bankrupt:-

"no action or proceeding shall be proceeded with or commenced against the bankrupt, except by leave of the court and in accordance with such terms as the court may impose."

50. Quite apart from the question whether Caltong has the *locus standi* to raise this point on behalf of Tong and Angela, there is really nothing in the point as leave of court to commence the action against Tong and Angela had already been obtained prior to the trial. Caltong seems to be arguing that leave of court is required at every stage, the trial stage as well as the appeal stage, and that an appeal is no doubt a "proceeding" within s 76(1)(c)(ii).

51. This court had in *Overseas Union Bank v Lew Keh Lam* [1999] 3 SLR 393 stated that the purpose of s 76(1)(c)(ii) was to prevent the liquidators or administrator's task from being made more difficult due to a scramble among creditors in taking action or obtaining decrees against the debtor or his assets. The requirement to obtain leave is to ensure that the court could guard against any inequity on account of such a scramble. It must follow that once leave is obtained to commence an action against a bankrupt debtor, that leave should hold good until the final determination of the proceeding, including any appeal. There is really no good reason why leave should be obtained at every stage.

52. With respect, we think counsel for Caltong has misconstrued *Lew Keh Lam*. In that case there was an application to strike out the creditor's appeal on the ground that the creditor had failed to obtain the requisite leave. This Court ruled that leave was required but granted retrospective leave. But that case is no authority for the proposition that you need leave for the action at the trial and you need leave again for any appeal therefrom. The significant aspect of that case which must be borne in mind is that there the bankrupt was so adjudicated only after the trial. An appeal was pending. Obviously, an appeal is a "proceeding" and leave must be obtained if bankruptcy intervenes.

53. Turning next to the substantive issue, it should be noted at the outset that "tracing", as pointed out by Lord Millett in *Foskett v McKeown* [2000] 3 All ER 97, is really a process rather than a remedy. It enables a plaintiff to trace what has happened to his property, identify the persons who have handled or received it and justify his claim that the assets/property which they handled or received can properly be regarded as representing the plaintiff's property. It also seeks to identify which new asset is the substitute for the old or the traceable proceeds of the plaintiff's property and enables the plaintiff to substitute the traceable proceeds for the original asset as the subject matter of his claim. Thus, normally tracing is the precursor to a claim.

54. It is true that perhaps TTSC should have first only asked for a declaration of a breach of trust

and a tracing order against Caltong and the other defendants before proceeding to ask the court for a declaration of constructive trust in relation to specific properties. In this case, while the court below accepted that there were breaches of trust and made declarations of constructive trusts against some of the defendants, it nevertheless refused to grant any tracing orders. It gave three reasons. First, there would be great difficulties involved in identifying the sources of funds and the way they were used or rolled over. Second, the proceedings would be unnecessarily prolonged. Third, tracing orders would be unnecessary in the light of the orders to account which the court had made.

55. The main ground advanced by TTSC in asking for a tracing order is to identify and establish potential proprietary claims that may exist. When a constructive trust is imposed due to a breach of fiduciary duties, the beneficiary is entitled to elect between an *in personam* action against the errant fiduciaries and/or a proprietary action to claim the property or its traceable proceeds. Again, in the words of Lord Millett in *Foskett v McKeown* (supra) at 119 "A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds, except a *bona fide* purchaser for value without notice."

56. Bearing in mind that the key individuals and the companies involved in the conspiracy in the present case are either bankrupt or wound up, an *in personam* action would not be of much assistance. If a proprietary claim could be established, then TTSC would be able to claim the assets from an indefinite class of persons, rather than just the trustees who, in the present case, would not be able to compensate TTSC for its losses.

57. As far as Caltong is concerned, it contends that a tracing order would not be appropriate as neither the moneys to be traced nor the traceable proceeds have been identified. It is clear that for a tracing order to operate, the assets (either of physical property or moneys) for a tracing process to begin must be identified. It is plain logic that one can only trace from a specific thing, be it a specific property or a sum of money, otherwise it would be impossible to begin. It is not at all necessary to identify traceable proceeds, as that is the very object of a tracing exercise, to establish into what form the original assets have been converted. It is, in our judgment, incorrect to suggest, as Caltong does, that the traceable proceeds must first be identified before a tracing order may be made. If that were so, it would turn logic on its head as that is the very object of a tracing order. Of course, a tracing order would not necessarily lead to a proprietary claim. For example, if a particular asset has gone into the hands of a *bona fide* purchaser for value without notice of the breach, then in so far as that asset is concerned, the tracing must end, and no claim may be made by the beneficiary against that *bona fide* purchaser: per Megarry V-C in *Re Montagu's Settlement Trusts* [1987] Ch 264 at 276

58. The court is entitled to take all the circumstances of a case into account in determining whether a tracing order should be granted. It is true that in one of the prayers, TTSC asked for an -

"order that the plaintiff is entitled to trace the monies (which are held in trust for it by the various respondents) into the hands of the (respondents) or elsewhere."

It did not ask the court to compel a party to do or refrain from doing something. While this prayer may be inadequately formulated, this should not preclude a court from granting an appropriate tracing order if the case warrants it. As mentioned before, the court below refused to grant a tracing order not because the pleadings were inadequate (54).

59. The first ground indicated by the judge in refusing to grant a tracing order is certainly pertinent in relation to the breaches committed by the Tongs. There would be great difficulties in identifying

the specific sums from which tracing is to be initiated. The sum of \$53.3 million for which Tong, Koo and Angela were held to be accountable represented the total amount of the creditors' claims against TTSC. This is the total of the debts owing by TTSC to its creditors. It may not represent the net total sum which the Tongs had siphoned off from TTSC. What was siphoned off could have been more or it could have been less. Bearing in mind the numerous transactions which would have taken place between TTSC and these three defendants and Tong Joo and TDPL, a tracing exercise would be an extremely daunting, if not an impossible, one. It would not be in order to make a tracing order based on the \$53.3 million which is owing to creditors.

60. However, the same is not so with regard to the sum \$984,899.60 which was admittedly received by Caltong from Tong/TTSC. While we recognise that this sum was not received in one remittance, it is the starting point from which tracing may be made. Obviously when tracing is carried out, proceedings will be extended. That is inevitable.

61. Then, there is the third reason given by the judge. He felt that a tracing order is unnecessary in view of the order made requiring Caltong to account. In a sense an order to account is similar to that of a tracing order: see *Khan v Khan* [1982] 2 All ER 60. But an order to account is personal in nature, binding on the party named. An appropriate tracing order, on the other hand, could compel third parties, such as a bank, to assist. In relation to Caltong, a tracing order might well serve a purpose as Caltong has not been very cooperative in disclosing its records.

62. It is also true that a tracing order would also mean the incurring of further costs. But this is unavoidable. Who, ultimately, would have to bear the additional costs would depend on the outcome of the exercise. If the tracing leads to a dead end then TTSC would have to bear the costs. But if the exercise should lead to a third party or lead back to Caltong (because it withheld information) then the additional costs would have to be borne by the latter.

Judgment

63. Accordingly, the appeal in CA 600130/2001 is allowed to the extent that Sally is not to be held personally liable to return the \$984,899.60.

64. The appeal in CA 600124/2001 is also allowed to the extent that a tracing order shall be made in respect of the sum \$984,899.60 received by Caltong.

65. Paragraph 4 of the order made by the court below on 17 September 2001 shall be amended to read as follows:-

"The eighth defendant and the twelfth defendant, in her capacity as the director of the eighth defendant, are –

(1) To hold the sum of S\$984,899.60 paid by the Plaintiff as constructive trustees for the Plaintiff;

(2) To account to the Plaintiff for the sum of S\$984,899.60, including:

(a) the use of such monies (which includes details of to whom such monies were paid, when such monies were paid, the quantum of payment and reasons for payment);

(b) all properties and/or benefits and/or assets obtained from the use of such monies;

(3) To pay to the Plaintiff monies, and all profits and/or benefits and/or assets, including simple interest;

(4) To hold the following properties as constructive trustees for the Plaintiff:

(a) 39A Hydebrae Street, Sydney;

(b) Stamford Apartment, Perth; and

(c) 17 Woodward Avenue, Sydney, except in relation to the part represented by the portion of the purchase price which was paid from sources of the twelfth defendant and/or her husband as may be established by her.

There shall be an inquiry to trace the assets or proceeds into which the sum \$984,899.60 received by Caltong had been converted, with liberty to apply to the court below."

66. As regards the question of costs of the two appeals, they ought to be approached separately. In respect of CA 600130/2001, Sally, the twelfth defendant, has succeeded in part in the sense that she is not to be personally liable for the \$984,899.60. She, however, failed as regards her contention that the Woodward property is entirely her personal property and has nothing to do with Caltong or the sum of \$984,899.60 received by Caltong from TTSC/Tong. She shall, therefore, be entitled to only half the costs of this appeal. The security for costs, with any accrued interest, shall be refunded to the twelfth defendant or her solicitors.

67. Turning to CA 600124/2001, TTSC succeeded against Caltong to the extent that a tracing order is granted herein in respect of the sum \$984,899.60 received by Caltong. TTSC shall have the costs of the appeal against Caltong. Sally is, in no way, involved in that, other than as a director of Caltong. The security for costs, together with any accrued interest, shall be refunded to TTSC or its solicitors.

68. As regards the order for costs at the trial, the question is whether it ought to be modified in the light of the decisions in these appeals. It is true that by virtue of our decision in CA 600130/2001, Sally is no longer personally liable in respect of the sum \$984,899.60 received by Caltong. The receipt by Caltong of that sum was never in dispute. But she should nevertheless bear the costs in relation to the issue concerning the Woodward property. Taking a broad view of things, we would reduce the proportion of the costs to be borne by the twelfth defendant personally to 15%.

Sgd:

YONG PUNG HOW
CHIEF JUSTICE

Sgd:

CHAO HICK TIN
JUDGE OF APPEAL

Sgd:

TAN LEE MENG
JUDGE

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