Alagappa Subramanian v Chidambaram s/o Alagappa
[2003] SGCA 20

Case Number : CA 106/2002

Decision Date : 06 May 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Molly Lim SC, Eunice Ng (Wong Tan & Molly Lim) for the Appellants; Ms Deborah Barker SC, Ang Keng Ling (Khattar Wong & Partners) for the Respondents

Parties : Alagappa Subramanian — Chidambaram s/o Alagappa

Civil Procedure – Appeals – Whether the findings of the trial judge were against the weight of evidence.

Civil Procedure – Costs – Whether the trial judge's exercise of discretion to award costs was manifestly wrong.

Delivered by Judith Prakash J

1 The parties to this appeal are brothers. Chidambaram s/o Alagappa ('Chidambaram') who was the plaintiff below, is the eldest son of VCT Alagappa Chettiar and executor of the latter's estate ('the Estate'). His claim against Alagappa Subramanian ('Subramanian'), the third son, was for monies allegedly overdrawn by Subramanian from a trust fund set up pursuant to a family arrangement and for various other orders. Subramanian disputed these claims and filed a counterclaim in respect of amounts allegedly due to him from the Estate and also amounts due to him under the family arrangement. After a long trial, Lai Kew Chai J allowed Chidambaram's claims and dismissed Subramanian's. Hence, this appeal by Subramanian.

Background

2 VCT Alagappa Chettiar died in November 1977 leaving substantial assets in Malaysia, including businesses and immovable property. The Estate was bequeathed to his five sons in equal shares. Apart from the parties hereto, these are Venkatachalam, the second son, Annamalai, the fourth son and Arunachalam, the youngest. At all material times, Chidambaram was the sole executor of the Estate.

3 By 1981, Chidambaram had sold the bulk of the immovable assets of the Estate for about 16 million ringgit. In 1983, Venkatachalam commenced proceedings in the High Court of Malaya disputing deductions amounting to about 2 million ringgit that Chidambaram had made in his own favour from the funds of the Estate. In these proceedings, Chidambaram submitted accounts for the Estate as at December 1983. A sum of money covering the items disputed by Venkatachalam was deposited with lawyers in Kuala Lumpur to await the outcome of the dispute. After all the debts had been settled, about 14 million ringgit was left for distribution amongst the beneficiaries. Distribution was completed by 1991.

4 In the meantime, in late 1983, there were discussions between Chidambaram, Subramanian, Annamalai and Arunachalam. These led to an agreement to pool their inheritance from their father and use the common pool ('Family Account') to make various investments in Singapore. The investments subsequently made under this family arrangement included two flats, one that was referred to as the Liho property (registered in Subramanian's name) and the other as the Kuhio property (registered in

Chidambaram's name), fixed deposits and foreign currency investments. It was agreed that Chidambaram would make investments on behalf of the Family Account and that he and Subramanian would jointly administer the Family Account on behalf of all four beneficiaries. It should be noted that in their testimony the brothers usually referred to the Family Account as 'the 4 Brothers Account'.

5 Pursuant to this arrangement, four bank accounts were opened in the joint names of Chidambaram and Subramanian. They were:

(1) a Singapore dollar current account with Indian Overseas Bank ('IOB');

(2) an IOB fixed deposit account;

(3) an IOB US dollar account; and

(4) a multi-currency account with the ING Bank ('ING') comprising:

(a) fixed deposits placed with ING;

(b) loan facilities secured by the Kuhio and Liho properties.

6 It was agreed that each of the four brothers was entitled to make withdrawals from the Family Account for his personal expenses and investments. The accounts were kept by Chidambaram with the assistance of Subramanian. From 1986 onwards, the accounts were kept in computer records. All the computer records and banking documents relating to the joint bank accounts were kept in the office of Alambon Tools Pte Ltd ('Alambon Tools'), a company belonging to Chidambaram. At all material times Subramanian shared this office.

7 At the date of the trial, the only assets remaining under the family arrangement were the Liho and Kuhio properties and the credit balance of the IOB fixed deposit account which had been withdrawn and which was being held by the parties' solicitors pending outcome of the dispute. As at December 1999, this amounted to $97,210.64.

The action

8 Chidambaram's claims in the court below were that:

(1) Subramanian was in an overdrawn position as far as the Family Account was concerned in that the amount of his withdrawals exceeded his contributions by $1,781,913.02;

(2) Subramanian was liable to pay back that sum plus interest at the rate of 9% per annum compounded monthly;

(3) by reason of Subramanian being in an overdrawn position, he no longer had any beneficial interest in any of the assets acquired by the Family Account; and

(4) accounts be taken of all other monies owing by Subramanian.

9 Subramanian on the other hand contended that:

(1) the agreement made amongst the four brothers was for the Liho and Kuhio properties to be purchased for the benefit of all of them in equal shares. Each of the four brothers had made an equal contribution towards the purchases and as such Subramanian had a beneficial interest of 25% in each of the properties;

(2) the fixed deposits with IOB and ING were from funds contributed by himself and Chidambaram and therefore he had a 50% interest in the same;

(3) the statement of accounts prepared by Chidambaram as the accounts of the Family Account were incomplete and as such Chidambaram had not accounted to Subramanian for all the investments made;

(4) the said accounts were inaccurate in that the amount overdrawn by Subramanian was only $106,499.04 and not $1,781,913.02 as alleged by Chidambaram;

(5) there was no agreement made amongst the four brothers for interest to be paid on withdrawals from the Family Account at the rate of 9% per annum or at all whether on a compound basis or otherwise; and

(6) he was entitled to be paid by Chidambaram one fifth of the expenses incurred by the latter in relation to the Estate and which Chidambaram had wrongfully deducted from the funds of the Estate in breach of his duties as executor.

10 The learned judge found that the terms of the family arrangement were as follows:

(1) each of the four brothers would contribute funds into a joint account (the Family Account) which would be held and administered on behalf of all of them;

(2) the Family Account would be administered by Chidambaram with the assistance of Subramanian as trustees for the benefit of all four;

(3) for the purpose of administering the Family Account, Chidambaram could open such account or accounts at such bank or banks as he deemed fit and obtain such credit facilities for the Family Account as he deemed fit;

(4) monies contributed into the Family Account would be deposited in or held in such bank account(s) as might be selected by Chidambaram in his discretion;

(5) each of the four brothers could make withdrawals from the Family Account, provided that the brother making the withdrawal had contributed enough to allow for the withdrawal without overdrawing;

(6) an overdrawing (ie a withdrawal exceeding the amount of that brother's contribution) could be made by any brother from the Family Account subject to the consent of the other brothers;

(7) investments made utilising funds in the Family Account would be shared by the four brothers in proportion to the amounts of their respective contributions to the Family Account;

(8) for the purpose of achieving and putting into practical effect the agreement as to the proportional sharing of accretions set out in paragraph (7) above, the following would apply:

(a) as between the four brothers, interest would be calculated on each contribution into the Family Account at the rate of 9% per annum compounded on a monthly basis ('the family rate') from the date of the contribution and would be payable to the brother making the contribution;

(b) as between the four brothers, interest would be calculated at the family rate on any overdrawing on the Family Account from the date of the overdrawing and would be payable by the brother making any such overdrawing; and

(c) in determining the share of each brother in the assets or monies held under the account, the contributions would be taken into account;

(9) Chidambaram had fulfilled his obligations to render accounts to Subramanian having verified his original accounts produced to the court a document marked 'New 5PWB' which reflected all monies available in the Family Account for investments over the years and all income received on the investments;

(10) Subramanian had overdrawn the sum of $1,781,913.02 from the Family Account;

(11) Subramanian was not entitled to receive any further payment out of the Estate; and

(12) Subramanian was liable to pay annual rent of $72,800 for the Kuhio property with interest thereon for the period during which he occupied that property.

11 Consequent upon the above findings, the judge ordered Subramanian to pay Chidambaram, as administrator of the Family Account, the sum of $1,781,913.02 and accrued interest of $872,084.07 and further interest on the principal sum from 30 September 1998 up to the date of payment at the family rate. He declared that Subramanian had no beneficial interest in either the Liho property or the Kuhio property and that the same were held on trust for Chidambaram, Annamalai and Arunachalam. The judge ordered that the sums held in escrow by the parties' solicitors and derived from the IOB fixed deposit were to be paid to Chidambaram to be held on trust for himself, Annamalai and Arunachalam. He further declared that Subramanian had no beneficial interest in any of the fixed deposits placed with ING. Finally, he ordered that accounts be taken from Subramanian of all monies taken by him from IOB and ING and otherwise from the Family Account.

Issues arising in the appeal

12 Before us, the issues raised by Subramanian are as follows:

Under the family arrangement

(1) whether he is entitled to a 25% share in the beneficial interest in the two properties;

(2) whether he is entitled to a 25% share in the beneficial interest in the fixed deposits with IOB and ING;

(3) whether Chidambaram is liable to account to Subramanian for his share of all the joint investments made for the benefit of the four brothers;

(4) whether he is liable to pay interest on the sum overdrawn and, if so, at the family rate;

(5) whether the trial judge was wrong in holding that the sum overdrawn by Subramanian was $1,781,913.02;

Under the Estate

(6) whether Chidambaram was liable to account to Subramanian for the latter's one fifth share of certain deductions made by Chidambaram from the funds of the Estate;

Miscellaneous

(7) whether Subramanian's liability to pay rental for the Kuhio property should be reduced by 25%;

(8) whether Chidambaram is liable to account for all rentals received on the Kuhio property from 1 September 1998 to date; and

(9) whether Chidambaram should be awarded only 80% of the costs he incurred in relation to the trial in view of the dismissal of his claim for a share in a flat at Jurong registered in Subramanian's name.

13 Before we go on to deal with these issues, it is important to note that they arise from disputes of fact. The holdings of the judge are not challenged on the basis that they are wrong in law. They are challenged on the basis that he came to wrong conclusions of fact. An appellate court will not reverse the findings of fact made by the judge of first instance unless such findings are plainly wrong or against the weight of the evidence. See *Seah Ting Soon t/a Sin Meng Co Wooden Cases Factory v Indonesian Tractors Co Pte Ltd* [2001] 1 SLR 521. Further, where a judge at a trial has come to a conclusion as to which witnesses are creditworthy and which are not, an appellate court will generally defer to such conclusions. However, in deciding whether the trial judge was plainly wrong, the appellate court will evaluate the quality of the evidence given by the witnesses by testing it against inherent probabilities or against uncontroverted facts. See *Peh Eng Leng v Pek Eng Leong* [1996] 2 SLR 305.

Issue (1) - Is Subramanian entitled to a 25% share in the two properties in spite of his overdrawn position?

14 The underlying question in relation to this issue is on what basis investments in the Family Account were to be divided amongst the brothers when that fund was terminated. Chidambaram's position was that the brothers had agreed that they would share in the Family Account on a pro-rata basis. This meant that each individual's share would be in proportion to his net contribution. The net contribution would be the amount contributed by each brother less the amount drawn by him. Thus, while the Family Account was running, each brother's share would vary from time to time depending on his net contribution. The cut-off point would come when a brother decided to leave the arrangement and then his share would be determined and dealt with. Subramanian disputed this. In the court below, he contended that there was an agreement between himself and Chidambaram only for the pooling of funds pursuant to which joint accounts in the names of the two of them were to be opened and, at the same time, there was a separate agreement among the four brothers to invest and share in the Kuhio and Liho properties equally.

15 Before us, Subramanian accepted the judge's finding that there was an agreement among all four brothers for the pooling of funds pursuant to which the joint accounts in the names of Chidambaram and Subramanian were opened and the Kuhio and Liho properties were purchased. He was dissatisfied with the further ruling that he was not entitled to any share in the two properties. His counsel, Ms Molly Lim, SC, contended that the judge's conclusion contradicted the evidence available because:

> (1) Chidambaram had conceded that the two properties were purchased on the basis that they would be shared among the four brothers; and
>
> (2) Chidambaram had in the accounts which he prepared for the Estate debited from each brother's share in the Estate the sum of 110,000 ringgit towards the purchase of the two properties. As such, Chidambaram was estopped from denying that each of the brothers had made an equal contribution towards the purchase of the properties.

16 The resolution of this issue depends on the view we take of the sharing arrangement in relation to the Family Account. The judge accepted the evidence of Chidambaram and Annamalai that the four brothers had agreed on 'a sharing formula' whereby any brother who overdrew from the Family Account would not be entitled to any share in the investments and properties. On the other hand, Subramanian and Arunachalam gave evidence that no such sharing formula was agreed. It appears that the judge was impressed by the testimony of Annamalai and therefore concluded in Chidambaram's favour. He found that Annamalai was a neutral party in the action and that his evidence in court was most impressive.

17 Annamalai did not deal with this point directly in his affidavit of evidence in chief although he did say that investments made utilising funds in the Family Account would be divided amongst the four brothers in proportion to the amount of their respective contributions. His main evidence on the sharing formula was given during re-examination. He was asked to explain how, according to his understanding, an investment in the Family Account was to be divided. His answer was that the investments made utilising the funds in the account would be divided amongst the four brothers in proportion to the amount of the contributions. Each of them had contributed different amounts on different dates and all the interest must be taken into account. The accountant would have to make his calculations on that basis. He also specifically confirmed that the Liho and Kuhio properties were to be divided in the same way. Later, when asked to clarify, he stated:

> Q But you said in cross-examination that the flats were to be divided 25%, can you clarify?
>
> A I want to clarify to make sure: contributions are made into the 4 Bros a/c and they are in different amounts. If anyone of us should receive the interest on the contributions from the day we put in the money and would pay interest for any amount overdrawn. First, we have to divide the capital depending on the contributions. The interest is calculated according to the proportion of the contributions. The rest of the money should be divided equally.

18 Annamalai's evidence was not always consistent. While under cross-examination, he did say at various points that the two properties were to be shared equally and once said that 'There was no fixed sum for each to contribute but for the 2 flats our share would be 25% each'. Further, it was suggested by Ms Lim that his evidence under re-examination should be disbelieved because Annamalai had been staying with Chidambaram during the trial and the re-examination took place a day after the

admissions in cross-examination had been made. The suggestion was that Annamalai had been coached by Chidambaram and was therefore less credible as a witness. These discrepancies must have been put to the trial judge who would in any case have been aware of them. Notwithstanding those inconsistencies, he found Annamalai to be 'a most impressive' witness. Quite apart from our being reluctant to interfere with the judge's assessment of a witness whom he has seen and we have not, there was also uncontroverted evidence to support a finding that the properties were part of the Family Account.

19 Subramanian's case was that the ability of each brother to overdraw from the Family Account was akin to a loan arrangement which was separate and distinct from the investments made under the Family Account. He alleged that the overdrawing from the account should not affect a brother's share in the investments and therefore he should still be entitled to a 25% share in the properties. In effect, he was asserting that the properties had to be kept wholly separate from the Family Account and its investments and one could not affect the other. This contention was not supported by the evidence. The properties were actively used as part of the investments of the Family Account in that they were mortgaged to support borrowings from ING used for the purposes of currency trading for the benefit of the Family Account. Further, Annamalai stated during cross-examination that there were no monies specifically earmarked for the purchase of the two properties. From his point of view, it could not be said that each brother had contributed 25% specifically towards the purchase price of the two properties.

20 Next, Subramanian's claim that each brother should get a 25% interest in the two properties is untenable because each of the brothers contributed a different amount to the Family Account. Annamalai testified that the brothers agreed that each of them could contribute different amounts to that account. The accounts produced by Chidambaram bore out that assertion. To find that each brother gets the same share in the two properties would be unfair to the brothers who had contributed more to the common pool. It would also be unduly partial to that brother who had withdrawn more than he had contributed.

21 As stated above, Subramanian made two submissions in support of his contention that the four brothers had contributed equally to the purchase of the two properties and that as a result he himself had a 25% interest in them. First, there was a contradiction by Chidambaram in his evidence. His original position was that he did not collect equal amounts from any of the brothers at the time the properties were bought or thereafter. Later, however, when shown the Estate's accounts he agreed that he had remitted 110,000 ringgit from each brother's entitlement in the Estate to himself in reimbursement of what he had paid towards the properties. He explained that he had intended these monies to be paid into the Family Account but since no bank accounts had yet been opened to receive the funds of the Family Account, he had remitted the 440,000 ringgit to his personal bank account. It was contended that this admission by Chidambaram that he took 110,000 ringgit from each brother was evidence of an agreement on the part of the four brothers that they would share equally in the two properties.

22 Clearly Chidambaram gave contradictory evidence on how he was reimbursed for the purchase price of the properties. This in itself does not, however, mean that the sharing formula had not been agreed at that time. Even if the brothers had each contributed an equal amount to the purchase of the properties, given that these contributions were made subsequent to their agreeing to put the two properties into the pot of the Family Account such contributions must have been made on the basis

that they would be treated in the same way as all other contributions to the Family Account. Further, at the time the Estate had not yet been wound up and while the brothers knew that under the will of their father they were equal beneficiaries, they did not know exactly how much money each would get. The Estate did, however, have enough funds to allow each of them to make an initial contribution to the Family Account and use this money to acquire the two properties for the Family Account. As Chidambaram explained, he had originally intended to pay the 440,000 ringgit into the Family Account but since none of the accounts had yet been opened for the purpose of the Family Account, he had to remit the funds to his personal bank account. At that point of time when the Estate had not been distributed it was reasonable and easiest for them to each contribute a similar amount from his inheritance towards the purchase of the properties and thereby to the Family Account. That the brothers may have intended that each of them should make an equal contribution initially does not in itself run counter to an agreement to eventually divide the Family Account on the basis of the sharing formula.

23 The second point raised in relation to the debiting of the Estate's accounts with the sum of 110,000 ringgit in respect of each brother was that such debit operated to estop Chidambaram from denying that each of the four brothers had made an equal contribution to the purchase of the two properties. There are two answers to this. First, for estoppel to operate vis-à-vis Chidambaram, there must be reliance and detriment on Subramanian's part. No such reliance and detriment were put forward. Secondly, as stated above, it does not follow from the fact that each of the brothers made an equal contribution to the purchase, that each of them had a 25% interest in the properties. It was open to the parties to agree on a different method of determining their respective interests in the assets of the Family Account and this was what the trial judge found as a fact had happened.

24 The sharing arrangement with respect to the Family Account was a question of fact. That question was determined by the trial judge. We are not convinced that his decision was against the weight of the evidence or plainly wrong. Accordingly, the appeal on this issue must be dismissed. Before we move on to the next issue, however, we would like to comment on Ms Lim's submission that the sharing formula was inherently unfair to Subramanian. She sought to give examples of different scenarios where applying the formula would have results that were absurd and unfair and argued that no reasonable person would have agreed to such a formula. We see no merit in this argument. The scenarios given were hypothetical and none of them eventuated. More importantly, Annamalai had given evidence in favour of the formula and in the end whether it operated unfairly or not is really a matter of perspective rather than a matter that is objectively verifiable. Subramanian's plight might invite sympathy as he has to repay the sum he has overdrawn, he has to pay interest and yet he is not entitled to any share in the two properties. One must not forget, however, that he has had the benefit not only of all the money that he originally contributed to the Family Account and then took out, but also the benefit of the sum that he had overdrawn from the account. To ask him to repay the overdrawn amount is not unfair. To deny him a share in the properties bearing in mind that he had taken out even what he said he put in to pay for them is not unfair either since there was an agreement from the beginning as to how the investments were to be shared at the end of the day.

25 In the course of our consideration of this issue, one matter has come to our attention. During cross-examination, Chidambaram admitted that the 440,000 ringgit which had been remitted to his personal bank account from the Estate's account in December 1983 had subsequently been credited as part of his contribution to the Family Account. As he had been repaid all monies expended for the two properties, he should not have been credited with 440,000 ringgit in the Family Account when the properties were put into the investment portfolio. He should only have been credited with 110,000 ringgit. Also, the accounts produced seem to show that the other three brothers had not been given

a credit of the equivalent of 110,000 ringgit each in the Family Account even though they had each paid Chidambaram this sum towards the Family Account. Thus, Chidambaram appears to have obtained a double benefit from the decision to put the properties into the Family Account. It would seem that in this respect at least the Family Account must be amended to show Subramanian's contribution of 110,000 ringgit in 1983.

Issue (2) – Is Subramanian entitled to a 25% share in the fixed deposits with IOB and ING?

26 As at December 1999, there was a credit of $97,210.64 in the IOB fixed deposit account which forms part of the Family Account. Pursuant to an order of court this sum of money is currently held by the parties' solicitors in equal share as stakeholders pending the resolution of this case. It was submitted for Subramanian that he is entitled to 25% of this money. In support of this submission, Ms Lim sought to show that over the years identical sums of money were regularly taken from each of the four brothers' personal accounts on the same day and deposited into Chidambaram's account. It was argued that such a pattern of withdrawal supported his case that the agreement was for investments to be shared equally and paid for equally by each of them.

27 As submitted by Ms Deborah Barker, SC, counsel for Chidambaram, the judge's finding that there was an agreement for investments under the Family Account to be divided in proportion to net contributions must apply both to fixed deposits as well as to property. Since we have upheld that finding in relation to the properties, the appeal in relation to the fixed deposits must be dismissed as well. In any case, whilst in relation to the properties, Subramanian could rely on an admission by Chidambaram that he had debited sums from the Estate's funds with the intention that each of the four brothers was to contribute equally to the acquisition of the properties, here there is no such admission. All Subramanian can rely on is a 'pattern of withdrawal'. This so-called pattern is too innocuous to establish that there was indeed an agreement that equal contributions were to be made for the investments and, consequently, the investments should also be divided equally. The burden was on Subramanian to prove that, on a balance of probabilities, there was such an agreement to contribute equally to the investments and in turn to benefit equally from them. The judge held that he failed to discharge this burden of proof and the so-called pattern is not a sufficient basis for us to hold that the trial judge's finding on the facts was wrong.

Issue (3) – Is Chidambaram liable to account to Subramanian for his share of all the joint investments made for the benefit of the four brothers?

28 Subramanian is asking for an order that Chidambaram account to him for his share of all investments made on behalf of the Family Account. What he wants is a substantiated statement showing the investments that were made, the income earned from these investments, the capital appreciation of the investments, if any, and the capital depreciation (losses incurred) of the investments, if any. This account is required in particular to disclose the position of the Family Account in relation to currency trading transactions undertaken by Chidambaram.

29 Before this action commenced, Subramanian had asked Chidambaram from time to time to account to him for all the joint investments made but no such accounts were provided. In the course of the trial, Subramanian applied to the judge to order Chidambaram to provide a summary of the profit and losses of the joint investments. The judge held that Chidambaram had to account for the funds in the Family Account from the very beginning, detailing every gain and every loss and furnishing a balance sheet of the assets and liabilities. On 23 January 2002, after the close of Subramanian's case,

Chidambaram produced the accounts in a bundle of documents which was marked as 5PWB. Subsequently Chidambaram submitted a revised set of documents, labelled by the court below as 'New 5PWB'.

30 At ¶44 of his judgment, the trial judge held:

> Finally, I address Chidambaram's obligations to render accounts to the 2 brothers. He has verified his original accounts marked as exhibit "5PWB". He has verified all accounts and has taken in all the inadvertent but minor 'errors and omissions' and has produced to the court a revised exhibit, the "New 5PWB". They reflect all monies available in the 4 Brothers Accounts for investment over the years and all income received on the investments just before the conclusion of the hearing. In my judgment, he has fulfilled his obligation to account to Arunachalam.

31 The essence of Subramanian's complaint is that Chidambaram did not, in the New 5PWB, include Subramanian's share of the joint investments and thus when the judge accepted the New 5PWB, he did not complete the proper taking of accounts between the parties. Further, the New 5PWB was filed at a late stage and Subramanian did not have an opportunity to verify the accuracy or completeness of the accounts. Hence, it should be rejected and new accounts should be filed.

32 With respect to the judge, we do not consider that the documents labelled New 5PWB should have been admitted as satisfying the obligation that the judge himself recognised on the part of Chidambaram to give proper accounts of all investments carried out and how these had to be attributed to Subramanian without Subramanian having had the opportunity of examining and verifying the accounts. The question that had to be considered in the accounts was whether Chidambaram had properly taken into account the various sums contributed by Subramanian to the Family Account and his share of the investments at the time when he was not in an overdrawn position. This was not answered as the New 5PWB did not take into account the interest earned and the profits made by the investments during the time when Subramanian had a positive balance in the accounts. As the judge had held that the sharing formula had been agreed upon by the brothers, it would have been fair and consistent with that holding for the interest and profits to be taken into account in calculating the amount that Subramanian had truly overdrawn from the Family Account. It was premature to conclude that Subramanian had overdrawn some $1.78 million from the Family Account when he had not yet been able to challenge the New 5PWB and the court had not ruled on its accuracy in the light of his challenges.

33 We therefore agree that the New 5PWB should not have been accepted. The appeal on this issue must be allowed.

Issue (4) – Is Subramanian liable to pay interest on the overdrawn amount and if so, at what rate?

34 The judge found that there was an agreement between the brothers to charge interest on sums overdrawn on the Family Account. He further held that the parties had agreed that the rate of interest chargeable would be the family rate. In effect, he accepted the evidence of Chidambaram and Annamalai supporting the existence of these two agreements in preference to that of Subramanian and Arunachalam who denied any such agreements had been made.

35 On appeal, Ms Lim submitted that the judge's finding was against the weight of the evidence. Apart from the testimony of Subramanian and Arunachalam, she relied on the fact that there were no accounts or records with respect to the computation of interest prior to October 2000 when the suit was brought. She also argued that at the time of entering the arrangement, the brothers contemplated receiving large sums of money and therefore could not have contemplated overdrawing, much less considered the issue of paying interest on overdrawn sums.

36 In our judgment, there was sufficient evidence to support the judge's finding. Whilst it was odd that a meticulous man like Chidambaram did not keep accounts of the interest accruing on amounts overdrawn by Subramanian until the action was started, that in itself cannot mean that there was no agreement to pay interest. Further, the failure to keep a detailed set of accounts with regard to interest could be considered as consistent with the sharing formula which was that the calculation of each brother's share in the account would float until the point that the brother wanted to leave it. Prior to the exit of a particular brother, there would be no need to calculate the interest component. Further, Subramanian himself had acted in a manner that was consistent with an agreement to pay interest. On various occasions, he wrote out cheques from his personal account and indicated on the cheque stub that the amount was being paid as 'interest to 4 Bros A/c'. He was not able to give a satisfactory explanation of why he had written words which indicated that the cheques were used to pay interest for the purposes of the Family Account. Finally, Annamalai put the case for an agreement on interest very well when he testified that it would be of no benefit to him to have a Family Account from which any brother could withdraw sums (and thus reduce the amount available for investment) without being responsible for paying interest on the amount withdrawn. Logically, therefore, there was every reason for an agreement on interest.

37 The finding on the existence of an agreement to pay interest was a finding of fact which was well within the judge's province in view of the evidence before him. We see no reason to disturb this finding.

38 The second part of this issue relates to the applicable interest rate. Here again, the judge's finding was based on the evidence of Chidambaram and Annamalai. He accepted the account that the four brothers had sat down, considered that the rate of 1% per month compounded hitherto charged by one family member when another had sought to borrow money from him was too high and therefore came to the conclusion that, for the Family Account, interest of 9% per annum would be charged instead. There is no reason to disturb this finding. Subramanian's contention was that no interest at all was payable. His own documents gave the lie to that assertion. No doubt there was some discrepancy between the rate claimed by Chidambaram and the rate paid by Subramanian (12% per annum as reflected in the cheque stubs). The judge, however, was entitled to find that the applicable rate was the lower rate claimed by Chidambaram especially since Subramanian's quarrel was with the concept of interest payment itself and not with the particular rate.

Issue (5) – Did Subramanian overdraw $1,781,913.02 from the Family Account

39 In view of our holdings at ¶25 and 32 above, it is not possible to uphold the judge's finding that the sum overdrawn by Subramanian was exactly $1,781,913.02. We have now to consider whether apart from taking into account those holdings in the calculations any other amounts should be added to or taken away from the same. In the court below, Subramanian took issue with a number of deductions made against him in the Family Account. He also contended that he had not been credited with various sums paid out from his personal account and paid into accounts belonging to

Chidambaram solely or to Chidambaram and his wife. Subramanian raised these issues again on appeal.

(a) The withdrawals from OCBC Bank

40 The first of these issues involves monies totalling $348,277 which were withdrawn from Subramanian's OCBC account and deposited into either Chidambaram's own account or into the joint account of the latter and his wife. The withdrawals can be grouped into four categories:

(i) cheque no. 056553 for the sum of $200,000;

(ii) cheque for the sum of $29,375;

(iii) cheque nos. 056556, 056560, 056564 and 056566 for the total sum of $109,902; and

(iv) cheque no. 56565 for the sum of $9,000.

We will take these in turn.

41 Subramanian alleged that Chidambaram had asked him to sign a stack of blank cheques so as to facilitate the movement of funds from the Estate's account to Subramanian's personal OCBC account and then to the Family Account. His case was that upon discovery of documents, he had found that various cheques drawn on his personal OCBC account had been deposited in the joint account of Chidambaram and his wife. The first of the cheques listed above, that for $200,000, was one such cheque. Subramanian claimed that this particular cheque was intended as a contribution from him to the Family Account and should have been credited as such even though the money actually went into Chidambaram's personal account.

42 Chidambaram's position was that he had never collected pre-signed blank cheques from Subramanian. In respect of this first cheque, he admitted that this sum of $200,000 had been paid into his joint account with his wife and claimed that it was given to him in repayment for monies he had advanced to Subramanian:

(a) for living expenses, totalling some $700,000; and

(b) by way of the deposit of a sum of $250,000 with the Economic Development Board in the late 1970s to facilitate Subramanian's application to be a Singapore permanent resident ('PR').

43 This is an issue which falls to be decided on the burden of proof. Subramanian, having alleged that although his money had been paid into Chidambaram's personal account it should have been credited to him in the Family Account, has the burden of proving this. Subramanian admitted that he himself had not provided the deposit to support his PR application. Initially he asserted that he had borrowed the necessary amount from his father. His father had had sufficient funds to make the loan because he had received about $1.7 million in compensation for the compulsory acquisition of land that he owned in Kuala Lumpur. Under further cross-examination, however, when it was put to Subramanian that it was Chidambaram who had made the $250,000 deposit on his behalf, he replied:

> I do not know about that. I know about the opening of the account. I was told that money had been put into this account. Plaintiff [ie Chidambaram] and my father put money into this account. I do not know any details about this.

When asked again whether the source of the money was Chidambaram, his reply was equally equivocal:

> I can't say if this money was put in, but my father was alive then. My father could have deposited it.

44 It appears to us that Subramanian had not met his burden of showing on a balance of probabilities that his father was indeed the source of the funds. He was equivocal about whether his father or his brother had provided the money and the fact that the father might have had enough money from the land acquisition compensation to provide the deposit on Subramanian's behalf does not mean that he actually did. Further, whilst the father's estate duty affidavit records small loans owing from Venkatachalam and Annamalai to him, there was nothing stated about a loan of $250,000 made to Subramanian. The only loan to Subramanian which the father recorded was in respect of a sum of 260 ringgit. Considering that a record was kept of such a small loan, it is inconceivable that a larger loan would not have been recorded by the father. Accordingly, no adjustment needs to be made to the accounts in respect of the sum of $200,000.

45 As regards the second amount of $29,375, the statement from OCBC Bank produced by Subramanian shows that on 2 July 1987 a cheque payment for $29,375 was paid into his personal account. On the same day, cheque no. 056558 in the sum of $29,375 was paid out and the amount debited against the account. On 3 July, the account was re-credited with $29,375 against the notation 'RTN CHEQUE'. Finally, on 4 July 1987, cheque 056558 for $29,375 was paid out again and the account debited with that amount. It would seem from the foregoing that cheque 056558 originally paid out on 2 July, was returned on 3 July and then paid out again on 4 July.

46 On the other hand, the statement issued by IOB in respect of Chidambaram's personal account shows that on 1 July 1987, three sums of $29,375 each were credited into this account. On 2 July 1987, a fourth sum of $29,375 emanating from a cheque drawn on another bank was paid into the account. It could be contended that this fourth sum came from Subramanian since on 2 July 1987, his OCBC account had reflected the payment out of $29,375. Chidambaram's statement, however, does not show that that same sum was debited against his account on 3 July and repaid into it on 4 July. After 2 July, for the whole month of July, Chidambaram did not receive any further payment in the amount of $29,375. The bank statements do not support Subramanian's case that cheque no. 056558 was paid to Chidambaram on either 2 or 4 July 1987. Accordingly, he has not discharged the onus of proof in relation to this payment.

47 The next four cheques were cash cheques dated on various dates in 1987 and 1988 for sums ranging between $25,090 and $29,362. The total paid was $109,902. Subramanian said these were all paid to Chidambaram and referred to the latter's bank statements for the relevant periods to show that there were sometimes two (and at other times three) other entries for exactly the same amount on the same date. Subramanian therefore contended that these amounts were actually his contributions to the Family Account and that he should be given credit for the same.

48 Chidambaram acknowledged receipt of these monies but under cross-examination, contended that they were repayments for loans which he had obtained from his business associate, Mahmood, from

time to time and passed on to Subramanian and the other two brothers. That was why the other three brothers had paid him similar amounts from time to time ie so that he could repay Mahmood accordingly. Under cross-examination, Chidambaram admitted that he did not have any documents evidencing the loans he had taken from Mahmood. He said that Mahmood was an old friend of his father who had seen him grow up. He had lent money for Chidambaram's education at Harvard University.

49 Overall, Chidambaram's evidence on why Subramanian had paid him these four sums of money was not consistent nor credible. In his first affidavit of evidence in chief he had denied receiving the monies on the basis that there were no documents supporting the payments and that even if they had been made to himself or his wife they would have had nothing to do with the Family Account. Then, in his supplementary affidavit he went on to say that even if the amounts had been received by him, they must have been payments made by Subramanian pursuant to his promise to repay the $250,000 deposit placed with the Economic Development Board. It was only under cross-examination that he recalled that these were payments that he had had to reimburse to his business associate, Mahmood. The original assertion that the payments had nothing to do with the Family Account did not sit well with the later assertion that he had borrowed money on behalf of all four brothers from Mahmood. If there had been such an arrangement, surely it would have been mentioned in his first affidavit and would not have come out only in cross-examination? The admission that no accounts were kept of the loans between Chidambaram and Mahmood was a further indication that no loans had been made bearing in mind that Chidambaram was a meticulous man in regard to accounts. Chidambaram's stand was further undermined by Annamalai's evidence during cross-examination that there were no loan arrangements between himself and Chidambaram between 1986 and 1990. Arunachalam too did not support Chidambaram's assertion of loans taken from Mahmood.

50 On the balance of probabilities therefore, Subramanian succeeded in proving that he had paid the total sum of $109,902 to Chidambaram to be used by the latter for the purposes of the Family Account. Chidambaram's alternative defence to this claim was that it was time barred as the payments were made in 1987 and 1988. However, this was not a straightforward case of a debt which could not be recovered more than six years after repayment fell due. For one thing, the Family Account was a running account and in such a case time would not start to run until the account was closed. That happened only in 1998. Having received Subramanian's funds for this account, Chidambaram could not unilaterally change the nature of the receipt by failing to credit the monies to the account and keeping them for his own use. Alternatively, considering the circumstances of the payments to Chidambaram, he became trustee of the same (under a resulting trust) rather than a debtor. Therefore the appropriate section of the Limitation Act (Cap 163) to be considered would be s 22 which provides:

> 22. – (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action –
>
> …
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any

other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.

The cheques were paid into Chidambaram's personal account and the sums of money so received cannot now be distinguished from his personal funds. This situation therefore falls squarely under s 22(1)(b) of the Limitation Act and not s 22(2). On either view of the matter, Subramanian's claim is not time barred.

51 We now come to the question of how this claim should be dealt with. The money should have been paid into the Family Account and Subramanian should have been given credit for it. As Chidambaram retained it for his own benefit, we consider that he must be treated as having borrowed this sum of $109,902 from the Family Account and as being liable to repay it together with interest at the family rate. The repayment must be made forthwith. Thus, the new accounts to be rendered by Chidambaram to Subramanian must reflect these payments in by Subramanian and also the interest payable on the same by Chidambaram from the dates of the respective cheques until the date(s) when he makes repayment of the principal amounts into the Family Account.

52 Next was the claim for $9,000 being the amount of cheque no. 056565 which was debited from Subramanian's OCBC account on 28 June 1988. Subramanian was not able to produce the cheque itself. The evidence of the payment came solely from his bank statement. The basis on which Subramanian said this money had been paid into the account of Chidambaram and his wife was that, on or about the same day, amounts of $9,000 each were also deducted from Arunachalam's account, Annamalai's account and a joint account held by Chidambaram and Subramanian. During cross-examination, Chidambaram's attention was drawn to the statement of the joint account of himself and his wife which showed two credit entries of $18,000 each on 28 June 1988 and he was asked whether he accepted that one of those entries of $9,000 came from Subramanian's cheque for $9,000. His eventual answer was 'Yes'. His explanation as to why he received these sums from the other brothers was the same as for the $109,902 ie that the sums were for repayment of loans made by Mahmood.

53 This sum of $9,000 must therefore be treated in the same way as the $109,902. Chidambaram must repay the same with interest to the Family Account and Subramanian must be credited with a contribution of $9,000 in the accounts of the Family Account.

(b) No credit for US$200,000 paid from Subramanian's personal IOB US$ account

54 Subramanian claimed in the court below that he should have been given credit for a contribution of US$200,000 which he made to the Family Account in August 1986.

55 The undisputed facts relating to this claim were that on 20 August 1986, Chidambaram made a distribution from the Estate and accordingly two sums of US$200,000 each were remitted from the Estate's account to the personal US dollar bank accounts of Chidambaram and Subramanian. On 22 August 1986, two sums of US$82,500 each were credited into the Family Account. One of these sums was recorded as being the contribution of Chidambaram to the Family Account. The other sum was not attributed to any brother.

56 Subramanian claimed that the sum of US$200,000 had been transferred out of his US dollar

account on the instructions of Chidambaram and that US$82,500 of the amount transferred out was put into the Family Account whilst the balance was retained by Chidambaram. Chidambaram denied those allegations on the basis that Subramanian had full control over his personal US dollar account with IOB and that any dealings with funds in that account would have been done by Subramanian himself.

57 Ms Lim submitted that the US$82,500 must have represented a contribution from Subramanian since only he and Annamalai had personal US dollar accounts and no such sum was debited from Annamalai's US dollar account at that time. In this regard, it should be noted that Annamalai's position was that his total contribution in US dollars aggregated US$106,817.14. He produced bank statements showing that this total was derived from contributions made in July 1987 and August 1991. Annamalai did not produce any statement of account for August 1986. The clear inference is that he did not claim to be the originator of the second sum of US$82,500 deposited on 22 August 1986.

58 Under cross-examination, Chidambaram agreed that it was possible to make a logical argument that the amount of US$82,500 should be credited to Subramanian but asserted that he had no means of verifying whether the amount had actually come from Subramanian.

59 Subramanian further claimed that Chidambaram had thereafter transferred the entire sum of US$165,000 from the Family Account into his personal joint account with his wife. There was no documentary evidence of this. When an order was made that IOB produce bank statements for the relevant period in respect of the joint account of Chidambaram and his wife, one Mr Ranjantheeran, an officer from IOB, affirmed that the bank could no longer find records for the relevant period.

60 Subramanian was not able to produce any statement of account to show either the receipt of the US$200,000 on 20 August or the outward remittance of US$82,500 and US$117,500 on 22 August 1986. While this lack made it more difficult for him to prove his case, we consider that he did discharge the onus on him in respect of the US$82,500 deposit into the Family Account. This is because the bank statements of the Family Account show receipt of the two sums of US$82,500 on that day and it was accepted that whilst one of these came from Chidambaram, the other one could have come only from Annamalai or Subramanian. Annamalai made no claim to have contributed that money to the Family Account. Chidambaram recognised the logic of the argument that in the circumstances the contribution came from Subramanian but asserted that he had no way of verifying whether the money had actually come from Subramanian. This assertion was disingenuous on Chidambaram's part as he was the one who kept the accounts and was responsible for recording the contributions accurately. He was able to record his own contribution. He should have known the source of the other US$82,500 deposited on the same day. If it was not immediately apparent to him at the time whom it came from, he should have made enquiries. Accordingly, since in the circumstances the only logical and probable explanation is that this money came from Subramanian it should be credited to his balance in the Family Account.

61 As far as the remaining US$117,500 is concerned, however, there is nothing to indicate where it went to. Subramanian has not made out a case to show that Chidambaram received it.

(c) Payments from the Family Account to Phillip Commodities

62 In 1988 or 1989 Chidambaram and his wife opened accounts with Phillip Commodities (Pte) Ltd

('PCPL') so that they could trade in commodities. Subsequently, Subramanian and his wife also established trading accounts with PCPL. Subramanian said that this had been done at the suggestion of Chidambaram so as to enable Chidambaram to trade in higher volumes and on the understanding that all trades done would be for their joint benefit and in equal shares. Subramanian had agreed and therefore he and his wife gave Chidambaram their respective powers of attorney to trade and operate their accounts. Monies from the Family Account were used for this trade. Over the years Chidambaram paid out $704,164.78 from the Family Account for the trade and only paid in $203,627 as receipts of the trade. The net result was that the Family Account paid out $500,537.78 more than it received. This last sum was debited to Subramanian as being his withdrawal from the Family Account. Subramanian challenged that debit and asserted that he should only have been debited with 50% of the net amount.

63 Subramanian's case was that he had an agreement with Chidambaram whereby Chidambaram would trade on Subramanian's joint account with his wife for the joint benefit of Chidambaram and Subramanian. He alleged that since there was an agreement for joint benefit there should similarly be joint liability in the event that the trading resulted in loss. Further, Subramanian alleged that Chidambaram had, without authority, moved funds from Subramanian's trading account to the accounts of members of Chidambaram's family. He wanted Chidambaram to account for him for the losses sustained when Chidambaram used these monies to trade on behalf of himself and his family members.

64 Chidambaram asserted that there was never any agreement between Subramanian and himself that transactions carried out under his or his wife's account with PCPL would be for the benefit of Subramanian and himself or for the Family Account. Further, there was no agreement or understanding that he would be free to trade using the accounts of Subramanian and his wife for the benefit of Subramanian and his wife or for the Family Account and he had never done this. He further said that at times Subramanian had asked him to arrange for the deposit of monies into the accounts of Subramanian and his wife with PCPL. In dealing with such requests, Chidambaram had either arranged for the transfer of money from the accounts of himself and his family members with PCPL or, if there were no available funds in such accounts, had arranged for money to be remitted from ING to the Family Account and then to the account of Subramanian or his wife with PCPL. Chidambaram went on to say that he was not authorised to give instructions for trading in respect of the accounts of Subramanian and his wife. As a matter of convenience, however, Subramanian did authorise him from time to time to give instructions to PCPL to transfer monies out of his account and that of his wife. The shift in Chidambaram's evidence is apparent.

65 Subramanian did not produce copies of the powers of attorney that he and his wife had given to Chidambaram. He did, however, adduce the evidence of an employee of PCPL, one Mr Chan Kong Ming, who testified that more than 99% of the instructions for trade in relation to accounts of Subramanian and his wife had come from Chidambaram. Mr Chan had dealt with Subramanian himself only three times during the course of the relationship. This evidence from an independent party showed that Chidambaram had been untruthful in his assertions that he had not traded on behalf of Subramanian.

66 The fact that Chidambaram gave instructions on Subramanian's account, however, does not necessarily lead to the conclusion that all trading done with PCPL was for their joint benefit. Even without an agreement for joint benefit to accrue, Subramanian could have allowed Chidambaram to

trade on his account for a variety of reasons. As was pointed out during the trial, Chidambaram was much better educated than Subramanian and was highly respected by Subramanian because he was the eldest brother and also because of his education and abilities. Subramanian could well have felt inadequate about how or when to trade and therefore relied on the business acuity of Chidambaram to carry out transactions on behalf of himself and his wife. In our judgment, Subramanian had not proven the existence of the alleged agreement between himself and Chidambaram in relation to PCPL accounts.

67 The remaining issue is whether the transfers of funds from Subramanian's and his wife's accounts with PCPL to accounts of Chidambaram and other members of his family were authorised. Chidambaram's position on this was somewhat odd. He admitted having transferred funds into the accounts of Subramanian and his wife from the accounts of himself and other members of his family. He also asserted that from time to time Subramanian authorised him to give instructions to PCPL to transfer monies out of the accounts of Subramanian and his wife. He then said that he used the power of attorney given to him by Subramanian only to transfer specified amounts with his consent to 'our' PCPL accounts. Since Chidambaram admitted having effected such transfers to the accounts of third parties (ie accounts not belonging to Subramanian or his wife) we take the view that it was up to him to prove that the transfers were authorised. He has not produced the power of attorney nor given specific evidence as to which transfers were the subject of specific authorisations rather than the general authorisation under the power of attorney or how the transfers were justified in relation to the powers given to him to trade and manage Subramanian's and his wife's accounts under their respective powers of attorney. In the absence of such evidence, our view is that Chidambaram must account to Subramanian for all transfers of funds from the accounts of Subramanian or his wife to third parties and deduct the amount of these monies from the withdrawals made from the Family Account on Subramanian's behalf to support the PCPL trades. However, Subramanian did admit that monies from these other parties were also put into his and his wife's account. To be fair, such monies must be set off against the monies paid out to the third parties (the set-offs to operate on a one-to-one basis) and only the net debit in each case re-credited to Subramanian. The total of these net debits must be treated as Chidambaram's borrowings from the Family Account and must be repaid to the Family Account with interest.

(d) $159,640.95 debited from the Family Account in relation to Alambon Tools

68 From the inception of Alambon Tools in 1977 Chidambaram was its managing director. Subramanian became an alternate director of the company in 1978 and a full director in June 1982. From 1989, the only business activity of the company was managing certain properties it owned and collecting rental. In the accounts rendered by Chidambaram, a sum of $159,640.95 was debited to Subramanian's account in relation to certain transactions involving Alambon Tools. Subramanian challenged this debit. His position was that the payments that he took from Alambon Tools, which amounted to an average of $400 per month for the period when he worked at Alambon Tools, represented his drawings in lieu of salary as agreed with Chidambaram and had nothing to do with the Family Account.

69 Chidambaram disagreed and justified that debit from the Family Account in a rather complicated fashion. He asserted that at all material times he had had a credit balance of least $300,000 with Alambon Tools arising from advances that he had made to the company. Subramanian had from time to time asked to be allowed to withdraw sums of money from the company. Chidambaram alleged that he acceded to these requests on a particular basis, what we will call 'the circular scheme'. Using a hypothetical situation where Subramanian withdrew $10,000 from Alambon Tools, the circular scheme was supposed to operate as follows:

Subramanian withdrew $10,000 from Alambon Tools

Chidambaram's credit balance with Alambon Tools was reduced by $10,000

Subramanian deemed to have withdrawn $10,000 from the Family Account

Chidambaram deemed to have contributed $10,000 into the Family Account

Net effect:

	Chidambaram	Subramanian
Alambon Tools:	credit balance - $10,000	Gets benefit of $10,000 (ie +$10k)
Family Account:	+$10,000	-$10,000

70 Chidambaram claimed that there were two tranches of withdrawals totalling $159,640.95. The first tranche arose from his agreement on 8 August 1981 that Alambon Tools would provide Subramanian with a credit facility of $55,000. Subramanian had utilised this credit facility by making withdrawals through a series of 13 cheques drawn on the company between 21 March 1995 and October 1997. As regards the second tranche, it was done through the drawing of cheques from 1 May 1995 to 3 May 1998. Chidambaram had the burden of proving that the debit in the Family Account was correct. In our view, he did not discharge that burden in relation to either of the two tranches.

71 As regards the first tranche, his claim was that the credit facility of $55,000 was agreed in 1991 on the basis that it would be treated as a withdrawal from the Family Account by Subramanian and a contribution to the Family Account by Chidambaram. A perusal of the accounts submitted by Chidambaram himself does not show any entry in 1991 where he was given a credit of $55,000. In fact, nowhere in his accounts can such an entry be found. Secondly, the claim that the amount of this loan was $55,000 was inaccurate. As stated earlier, Chidambaram had asserted that this sum was utilised by Subramanian through the cashing of 13 cheques. From the cheque stubs, it appears that the sum total of these cheques was $60,000 and not $55,000. Thirdly, it was not believable that Subramanian would ask for a credit facility in 1991, presumably because he needed money then, but only start using that facility four years later.

72 As regards the second tranche, Chidambaram had alleged that these payments, were also part of the circular scheme. To establish this, Chidambaram had to show that the accounting entries reflected that scheme. He was not able, however, to show that these withdrawals were sufficiently linked to the Family Account. When his accounts are compared with the accounts of the monies received for the Singapore dollar account of the Family Account, one is not able to find the sums withdrawn by Subramanian being credited to Chidambaram as his contributions. As the circular scheme was not reflected in the accounts, the likelihood is that it never existed.

73 The judge did not deal in detail with this issue when he found that the accounts accurately reflected Subramanian's overdrawings from the Family Account. His only reference to it was the statement that 'Subramanian had overdrawn substantially from the [Family Account], directly from the bank accounts designated for the [Family Account] or indirectly from Chidambaram vide Alambon

Tools'. No reasons for this finding were given. In our judgment it was against the weight of the evidence and Subramanian's appeal on this issue should be allowed.

(e) Debit of $147,415

74 This issue relates to four cheques drawn on the IOB current account for the Family Account between December 1988 and March 1990. The total amount involved is $147,415. The amounts of these cheques have been entered into the Family Account as withdrawals made by Subramanian. Subramanian disputed these entries as the cheques had been paid into the joint account of Chidambaram and his wife. Chidambaram accepted having received the monies. He asserted that the four cheques represented repayment by Subramanian of monies the latter owed him and that was why the debit entries in Subramanian's account in the Family Account had been correctly made.

75 Chidambaram having taken the money bore the burden of proving he was entitled to it. The paragraphs of the respondent's case dealing with these cheques averted to Chidambaram's explanation that his brothers had, at his request, made payments to him in respect of their outstanding commitments to him. Chidambaram would request them to make a payment towards their liabilities when he was himself requested to make such a payment by Mahmood. Ms Barker pointed out that two of the four cheque stubs in question were filled in by Subramanian himself (the other two were filled in by Chidambaram) and contended that this action showed that Subramanian was fully aware that all these cheques were being debited against his name in the Family Account and that he was agreeable to the debits.

76 In our judgment, Chidambaram has not succeeded in explaining why amounts put in to his bank account should be recorded as withdrawals by Subramanian from the Family Account. He has not adduced any evidence to establish the outstanding loans due to Mahmood. In the absence of such evidence he cannot establish that these amounts were paid to him to repay Mahmood. As regards the argument that two of the four cheque stubs were written in Subramanian's handwriting, with due respect to counsel, this argument proves nothing. First, it was not established that it was Subramanian's handwriting on those cheque stubs. Secondly, even if it had been, that does not mean that he was aware that the amounts paid out would be debited against his account or that he consented to this. It is quite possible that Subramanian simply acted in accordance with Chidambaram's instructions without knowing what accounting entries would be made.

77 The sum of $147,415 must therefore be treated as having been borrowed from the Family Account by Chidambaram who must repay it to the Family Account together with interest at the family rate. At the same time, the accounts must be corrected so that the sum is no longer debited against Subramanian's account.

(f) Debit of $28,836.66

78 This sum of $28,836.66 that was debited against Subramanian in the Family Account was the amount of a cheque drawn on the IOB current account and paid to one Sankaralingam in May 1997. The cheque was signed by Subramanian but he asserted that he had made this payment to Sankaralingam on Chidambaram's instructions. Allegedly Chidambaram had been trading on Sankaralingam's trading account on the latter's behalf and the $28,836.66 was the amount due to Sankaralingam when the account was closed. As Chidambaram was in Kuala Lumpur at the material time, Subramanian paid out this cheque on his brother's behalf.

79 In support of his assertion, Subramanian tried to rely on a letter dated 28 February 1999 from Sankaralingam. Unfortunately, by the date of the trial, Sankaralingam had died and was unable to prove the authenticity of the letter and its contents. The letter was therefore inadmissible, as hearsay. There was, however, other independent evidence which supported Subramanian's allegation. This came from two bank officers from ING. One of them produced a copy of the power of attorney that Sankaralingam had given Chidambaram to authorise the latter to deal with his trading account with ING. The other officer, one Geraldine Siew, testified that Chidambaram had traded on Sankaralingam's account on eight occasions.

80 Chidambaram's evidence was that he had never traded on behalf of Sankaralingam. He admitted that he had on one occasion given Sankaralingam a cheque for $51,710.64 but did not agree that that cheque was given in connection with his foreign exchange investments on Sankaralingam's account. His explanation was that the cheque represented a personal commitment he had to Sankaralingam. Subsequently, however, Chidambaram agreed that he had had communications with officers of ING about Sankaralingam's account and that he had introduced many friends of his to ING of whom Sankaralingam was one. He also admitted having helped Sankaralingam explain his requirements to the bank.

81 On this issue, Subramanian's evidence was more credible than that of Chidambaram. He showed that, contrary to Chidambaram's sworn statement, Chidambaram had had authority to operate Sankaralingam's account with ING and had in fact traded in that account. Chidambaram's evidence on the account with Sankaralingam was, to put it mildly, unreliable. We find that Subramanian had, on the balance of probabilities, established that the $28,836.66 was paid to Sankaralingam on Chidambaram's instructions. This amount must be treated as a loan taken by Chidambaram from the Family Account and must be repaid by him to the Family Account with interest at the family rate.

(g) Debit of $17,775 representing rupee payments

82 The appeal under this head pertains to two cheques issued from the IOB current account on 1 and 8 August 1988 respectively. Chidambaram claimed that Subramanian had the benefit of the proceeds of the two cheques. His claim was based on the fact that the initials 'AS' appeared on each of the two cheque stubs as well as on his assertion that Subramanian had asked for these cash cheques to be made out to himself to facilitate some rupee payments for Arunachalam. It should be noted that the handwriting on the cheque stubs was that of Chidambaram himself. Subramanian denied that these cheques were for his benefit and argued that Chidambaram had not adduced sufficient evidence to prove that the proceeds of the cheques went to him. He said that he believed that the two sums had been withdrawn upon Chidambaram's instructions that the money be converted into rupees and sent to Arunachalam in India to meet the latter's expenses.

83 Chidambaram was inconsistent in his evidence on this. At one point he acknowledged that there had been a practice of sending rupee remittances to Arunachalam in India by a so-called 'black market' method. Then he corrected himself by saying that he had simply handed over the cash to Subramanian and that he did not know whether the money had been sent to Arunachalam. Apart from this inconsistency, Chidambaram was not able to prove that the money went into Subramanian's hands or bank account. He had no receipt from Subramanian. All he had were the initials 'AS' in his own handwriting on the cheque stubs. In all the circumstances, he was unable to establish that the monies were paid to Subramanian. The total sum of $17,775 therefore should not have been debited against Subramanian's account. Chidambaram must repay it with interest to the Family Account.

Issue (6) – Is Chidambaram liable to account to Subramanian for one-fifth of the commission and interest deducted by Chidambaram as expenses from the funds of the Estate?

84 When Chidambaram drew up the accounts of the Estate, he included among the expenses of the Estate a sum of 255,000 ringgit which he had allegedly paid to one Mr Sethu as commission in respect of the sale of part of the Estate's property and a further sum of 856,373.82 ringgit being interest due to him arising from amounts which the Estate owed him. These expenses were what motivated Venkatachalam to start the proceedings in Kuala Lumpur challenging the Estate's accounts. In 2001, the High Court in Malaysia upheld Venkatachalam's challenge. The matter is apparently under appeal by Chidambaram.

85 Subramanian contended that the Singapore court should similarly hold that Chidambaram was not entitled to claim these amounts from the Estate as the Malaysian court had had the benefit of trying the issues in full and had had all accounts made available to it. The trial judge ruled on the merits that Subramanian could not make this claim. In arriving at this decision, he held that Subramanian had had notice of the final Estate accounts in that he had been given them by Chidambaram. Subramanian challenged this holding.

86 Chidambaram's evidence which was accepted by the judge was that by February 1991 the Estate's assets had been realised and substantially distributed. The accounts of the Estate were finalised on 30 June 1991. Chidambaram was not able to give the exact date on when he had given these accounts to Subramanian. At first, he said that he had handed the document over in the last week of July 1991. Subsequently, he stated that the accounts were handed over at the Alambon Tools' office which the brothers shared. He was shown evidence that between the end of June and the beginning of September 1991, Subramanian was in Canada and the United States. Chidambaram then said that he did not remember the exact date of handing over the accounts to Subramanian. He only remembered giving him the final set sometime in the third quarter of 1991. The trial judge noted the discrepancy in the evidence but held that it was minor and not important and in all likelihood Chidambaram had handed Subramanian the accounts as they were sharing the same office. Having examined the evidence, in our view it cannot be said that the trial judge was manifestly wrong in holding that the discrepancy as to when Subramanian was given the accounts was a minor one. The incident had taken place some 11 years before the parties appeared to testify in court and it would be unreasonable to require exactitude in the dates from the witnesses after such a long lapse of time. We also note that in various parts of the evidence, Subramanian conceded that he had taken part in the administration of the Estate's accounts. Thus, he must have known something about them. The judge's finding of fact as to the giving of accounts to Subramanian, was essentially one based on the credibility of the witnesses on this issue. There is no reason to disturb it.

87 Given that Subramanian had possession of the Estate's accounts by the end of 1991 at the latest, he had the means then to ascertain what amounts had been taken by Chidambaram from the Estate and to object to them. Such objections should have been raised within six years of Subramanian becoming aware of them. Further, these were among the very matters that Venkatachalam objected to in his action against Chidambaram. Subramanian admitted having been briefed on some of Venkatachalam's objections by Chidambaram before he gave evidence in the Malaysian courts but denied he had been briefed on the specific ones now in issue. That was an unlikely scenario. In any case Subramanian did nothing to investigate or challenge any matters in the Estate's accounts until this case was brought. Ms Barker submitted that as a consequence, time bar had set in and he was prohibited from bringing up these issues now. We agree. Accordingly, the appeal against the

deductions made in the accounts of the Estate must be dismissed.

Issue (7) – Should Subramanian's liability to pay rental on the Kuhio property be reduced by 25%?

88 Subramanian occupied the Kuhio property during the period from 4 January 1986 to 3 June 1990. The judge held that Subramanian was liable to pay rent for this occupation. Subramanian accepted his liability in principle but appealed against the quantum of the rental which was fixed at $72,800 per annum with interest at the family rate. His argument was that as he had a 25% share in the Kuhio property and as any rental income from the property would have been received as joint income to be shared by all the brothers, his liability should be reduced by his 25% share of the gross rental. Therefore, he submitted he should only be liable to pay 75% of the rental which would be $54,600 per annum.

89 We have upheld the judge's finding that Subramanian does not have a 25% share in the Kuhio property. His share in that property is governed by the sharing formula. When Subramanian terminated his participation in the Family Account, he was, even on his own best case, in an overdrawn position. At that stage therefore, he had no share at all in the Kuhio property. There is, however, a possibility that Subramanian may have had some share in the Kuhio property during the time that he was occupying it. When the accounts are redone, they may show that during this period of occupation or parts of it, Subramanian was not in an overdrawn position. If he was in a positive position during any period of occupation and thus at the time had a proportionate interest in the Kuhio property, then he would be entitled to a corresponding reduction in the rental payable. The determination of this issue must therefore be dependent on the recast accounts.

Issue (8) – Does Chidambaram have to account for rentals received on the Kuhio property from 1 September 1998 to date?

90 The appellant's case dealt with this issue in only one sentence. It said that just as Subramanian was liable to account for the rental income received from the Liho property, Chidambaram should similarly account to the other three brothers for all rentals received by him for the Kuhio property and the trial judge should have made an order to this effect as prayed for in Subramanian's counterclaim. Ms Barker submitted that Chidambaram had already met his obligation to account for the rentals to the other brothers. This submission was fully substantiated by reference to both the original 5PWB and the New 5PWB. There was no substance in this issue and no reason for the trial judge to make any order in respect of it.

Issue (9) – Whether the trial judge should have awarded Chidambaram only 80% of his costs

91 The trial judge awarded Chidambaram the full costs of the action. This decision was attacked on the basis that since Chidambaram had failed in his claim for a share in a property (referred to as 'the Jurong property') owned by Subramanian, he should have been awarded only 80% of his costs.

92 It is well established that (see for example this court's decision in *Tullio v Maoro* [1994] 2 SLR 489) a trial judge's decision on costs should not be disturbed unless there was a manifestly wrong exercise of the trial judge's discretion or the discretion was exercised on wrong principles. In this case, while the judge found for Subramanian on the Jurong property issue, he found against Subramanian on all other issues including the main crux of the suit which was the establishment and framework of the Family Account and the basis on which each brother's share in it was to be determined. Further, the

Jurong property issue did not take a significant portion of the time spent at trial. In those circumstances, it is not possible for us to hold that the judge exercised his discretion wrongly in making the original costs order. As, however, we have now come to a decision which is different from that of the trial judge on many of the accounting issues, there may be reason to change the costs order in respect of the trial to reflect the determination of this court on those issues. We deal with this below.

Conclusion and orders

93 For the reasons given above, this appeal must be allowed in part. Accordingly, we set aside the following orders made below:

(1) the order that Subramanian do pay Chidambaram as administrator of the Family Account the sum of $1,781,913.02 and accrued interest amounting to $872,084.07 (both as at 30 September 1998);

(2) the order that Subramanian do pay Chidambaram as administrator of the Family Account further interest on the sum of $1,781,913.02 from 30 September 1998 up to the date of full payment at the family rate; and

(3) the order that Chidambaram be awarded the full costs of the trial.

94 Further, we make the following orders:

(1) that an account shall be taken from the respondent in respect of:

(i) the appellant's contributions to and withdrawals from the Family Account;

(ii) the respondent's contributions to and withdrawals from the Family Account including amounts found by this court to be taken by him as loans from the Family Account; and

(iii) all the joint investments made in respect of the Family Account, the profits and losses arising therefrom and the manner in which such profits and losses impacted the appellant's contributions to and withdrawals from the Family Account;

(2) that the appellant is entitled to have the following sums credited to him as his contributions to the Family Account:

(i) the sum of 110,000 ringgit in December 1983;

(ii) the total sum of $109,902 representing the four cash cheques issued in 1987 and 1988;

(iii) the sum of $9,000 paid on 28 June 1988; and

(iv) the sum of US$82,500 paid on 22 August 1986;

(3) that an account shall be taken from the respondent of all sums transferred to and from the accounts of Subramanian and his wife with PCPL from and to the accounts of the respondent, his wife and other relatives with PCPL and that the credit balance, if any, in favour of Subramanian and his wife shall be paid and credited by Chidambaram to Subramanian's account with the Family Account;

(4) that the following sums should not be debited against the appellant's account in the Family Account:

(i) the sum of $159,640.95 paid to the appellant by Alambon Tools;

(ii) the sum of $147,415 being amounts paid into the account of the respondent and his wife with IOB;

(iii) the sum of $28,638.66 being payment to Sankaralingam; and

(iv) the sum of $17,775;

(5) that the respondent shall repay the following sums to the Family Account with interest at the family rate from the respective dates the sums were received by him:

(i) the proceeds of the four cash cheques totalling $109,902;

(ii) $9,000;

(iii) $147,415;

(iv) $28,836.66; and

(v) $17,775;

(6) in the course of taking the accounts pursuant to order (1) above, it shall be determined whether the appellant was a net contributor to the Family Account during the period he occupied the Kuhio property and if so by what percentage the rental payable by him for that period should be reduced; and

(7) that on the completion of the taking of accounts pursuant to order (1) above, the appellant shall pay all amounts found due from him to the Family Account together with interest at the family rate until the date of payment.

95 We invite the parties to make their written submissions on the appropriate orders in respect of the costs of the appeal and the costs of the action in view of the partial success of the appellant herein. Such submissions shall be filed within 14 days of the date of this judgment.