Hillfield International Ltd and Others v Chew Lai Yoke Bettina and Another Appeal [2003] SGCA 35

Case Number : CA 124/2002, CA 125/2002

Decision Date : 29 August 2003

Tribunal/Court : Court of Appeal

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

Counsel Name(s) : Joseph Fok and Morris Yow (David Chong & Co) for the appellants in CA 124/2002 and respondent in CA 125/2002; Tan Chee Meng, Jenny Chang Man Phing and Cho Pei Lin (Harry Elias Partnership) for the respondent in CA 124/2002 and the appellant in CA 125/2002

Parties : Hillfield International Ltd; Silver Falcon Holdings Ltd; Whitham Enterprises Ltd; Michael David Selby — Chew Lai Yoke Bettina

Civil Procedure – Costs – Whether substantially successful party at trial should nevertheless bear own costs – Factors to be taken into account

Tort – Conversion – Claims arising from breakdown in marriage between parties – Construction of deed of separation

Delivered by Judith Prakash J

Introduction

1 The breakdown of the marriage between Michael David Selby ('Mr Selby') and Bettina Chew Lai Yoke ('Ms Chew') gave rise to two separate actions in the High Court. The divorce proceedings themselves had gone smoothly. The decree nisi made on 15 June 2001 incorporated a consent order providing that, in relation to the issues of custody, maintenance and the division of the matrimonial assets, the parties were to abide by the terms set out in the document executed by them entitled 'Deed of Separation and Financial Arrangement in Contemplation of Divorce' and dated 24 May 2001. Annexed to the Deed was a 'List of items to be removed by the husband' which enumerated those objects that Mr Selby was entitled to take away from the matrimonial home. That document, referred to as 'the Annexure', played an important part in the civil proceedings.

2 The first action, Suit 1200 of 2001, was started by three companies incorporated in the British Virgin Islands, namely Hillfield International Ltd, Silver Falcon Holdings Ltd and Whitham Enterprises Ltd, against Ms Chew. The companies had been set up by Mr Selby for the purpose of holding and managing a substantial portion of the matrimonial assets. At the time of the divorce, he was in possession of all the bearer shares issued by the companies and therefore their sole shareholder. Prior to the divorce, Ms Chew had been the sole director of each of the companies. The deed provided for Ms Chew to resign from those directorships upon the deed being approved by the court and for Mr Selby to indemnify her against any loss, claim or liability arising out of her involvement in the companies. Thus, upon the divorce, Ms Chew was to relinquish any interest that she might have had in the companies.

3 The statement of claim recited that as director, Ms Chew had had possession and control of the respective 'company kits' and 'documents files' of the three companies. The 'company kits' were stated to include the original memorandum and articles of association of each of the companies; their respective official seals; their respective certificates of incorporation and their respective company records. As for the 'documents files', these were said to include 'all banking and financial documents of the respective plaintiffs' and 'correspondence files of the respective plaintiffs'. It was alleged that Ms Chew had refused to return the 'company kits' and 'documents files' to the companies and the

companies therefore claimed the return of these items.

4 The second action, Suit 1349 of 2001, was instituted by Mr Selby against Ms Chew. He claimed the return of a number of items which he said he was entitled to remove from the matrimonial home by virtue of the Deed but which Ms Chew had refused to deliver up to him. In addition, Mr Selby claimed for an account of all wine bottles retained by Ms Chew and an order for delivery up of any wine found to be in excess of her share of the wine collection.

5 The suits were consolidated on 22 April 2002 and the consolidated trial was heard by Lee Seiu Kin JC. The companies were wholly successful in their action and Mr Selby succeeded in most of his claims. No one, however, was wholly satisfied.

6 Two appeals were filed. In Civil Appeal no. 124 of 2002, the appellants are the three companies and Mr Selby. The companies are appealing against a direction in respect of the 'company kits' made by the trial judge subsequent to his judgment. Mr Selby's appeal is against the holding that he was not entitled to certain bronze items claimed by him in the action. The companies and Mr Selby are also appealing against the trial judge's order in respect of the costs of the consolidated actions.

7 Ms Chew is the appellant in Civil Appeal no. 125 of 2002. She is appealing against the holdings of the trial judge in respect of:

(1) all invoices, documents and photographs taken of the art objects and sculptures;

(2) the wine; and

(3) the 'company kits'.

The credibility of the parties

8 Whilst the proceedings before the High Court were not matrimonial proceedings in the true sense, as they arose out of the breakdown of a matrimonial relationship they were burdened with all the emotional difficulties that commonly accompany such break-ups. Each party thought poorly of the other and, as the judge observed, the evidence of the protagonists was at polar extremes in important areas. Further, they were often unable to adduce contemporaneous documents or oral evidence from third parties in support of their differing stands. On matters like the Art Documents, the judge had to make a decision based only on the oral testimony of the parties themselves. The credibility of each party was therefore a very material matter. The judge accordingly made specific findings on credibility in his judgment. Ms Chew has contested those findings and it is necessary for us to deal with them before going on to the more substantive matters appealed on.

9 Having evaluated the consistency of the evidence given by Mr Selby and Ms Chew and having observed their demeanour in the witness box, the judge came to the conclusion that neither of them had been completely frank and truthful in their evidence. Having said that, however, he found himself 'driven to conclude' that Ms Chew's evidence 'had been most unreliable'. He also found that there were 'a sufficient number of clear contradictions in her evidence as would lead [him] to the conclusion that it is not safe to believe her evidence on substantial issues of fact'. He then went on to state:

> 11. Nevertheless, and particularly in view of my finding that Selby has also been prone to exaggeration in some areas, it is not sufficient for me to simply say, as his counsel urges me to

do, that therefore he has been telling the truth in all the matters and she has not. It is necessary for the Plaintiffs to overcome the burden of proof that rests on them as claimants. Where the evidence hinges on the words of the parties, I have preferred Selby's to Chew's in view of the finding that I have made in respect of their relative credibility However in respect of any item claimed it is possible for both parties to be correct in that neither has that item and it is simply lost due to the act of a third party. If there is evidence that the loss could be due to this possibility, it would be incumbent upon Selby to produce evidence to discount it.

10 On appeal, counsel for Ms Chew contended that the judge was plainly wrong in finding Mr Selby to be more credible than she was. He highlighted a number of inconsistencies in the evidence given by Mr Selby with respect to items claimed by him. It was alleged that Mr Selby was a contradictory, dishonest and unreliable witness and that his untruthfulness far outweighed any inconsistencies on the part of Ms Chew.

11 It is well known that an appellate court does not lightly disturb the findings that a trial judge has made based on the witnesses' credibility or for that matter, the findings on credibility themselves. In this case, it appears to us that there is no basis at all upon which we can overturn the findings made below on the relative credibility of the parties. They were findings made not only on the judge's observation of the behaviour of the witnesses but also on the basis of the internal consistency of the evidence given. Further, the judge did not totally disregard the inconsistencies in Mr Selby's testimony in his evaluation of the evidence of both the protagonists. He was well aware that Mr Selby had not been entirely frank and that he had made some exaggerated claims. Nevertheless, the judge came to the conclusion that Mr Selby was more credible than Ms Chew. That was a conclusion he was entitled to draw.

Mr Selby's appeal against the dismissal of his claim for the Bronzes

12 The bronzes in question consisted of two items being:

(1) a Han Dynasty bronze horse and cart; and

(2) a set of 5 pre-Han Dynasty bronze bells.

Mr Selby's claim for the bronzes was based on the tort of conversion. It was his case that he had purchased both these items and they were his own personal property. Accordingly, he was entitled to them as against Ms Chew, who had admittedly retained them.

13 The judge dealt with the bronzes at ¶¶ 22 to 24 of his judgment. Although he found that Ms Chew's version of events relating to the acquisition of the bronzes (she averred that they were part of the assets of an oriental art business that she ran) was 'rather inconsistent' and that she had demonstrated a 'parsimonious attitude towards revelation of the true picture', he rejected Mr Selby's claim on the basis that these items had not been named in the Annexure which he considered exhaustive of the items which Mr Selby was entitled to. The judge held therefore that 'it was clearly within the contemplation of the agreement embodied in the Deed that the Bronzes would not go to him'. This finding was also based on ¶ 17(J) of the Deed.

14 Clause 17 of the Deed appears in a section entitled 'Matrimonial Assets'. By the first three lines, the parties acknowledged that they were aware of each other's financial position and that they had agreed to 'the following full and final financial settlement in contemplation of divorce'. That last phrase was followed by ten sub-paragraphs dealing with various matrimonial assets and stating which of the parties was to keep those assets. Sub-paragraph (J), the last of these, read:

> The Husband agrees to only remove all his personal belongings, such art collection and moveable property as described in the annexure hereto by 31 July 2001.

Clause 18 re-emphasised the intention of cl 17 by providing that the division of assets stated in ¶¶ 17(A) to (J) was to be in full and final settlement of the parties' financial claims and Ms Chew's claim for maintenance under the Women's Charter (Cap 353).

15 Upon appeal, it was contended on behalf of Mr Selby that the evidence established that the bronzes were part of his personal belongings and as such they fell within the meaning of the phrase 'personal belongings' in ¶ 17(J) of the Deed. It was argued that the judge had made a mistake in holding that the bronzes were part of the 'art collection' within the meaning of that phrase in ¶17(J) and had further erred in holding that the 'art collection' described in the Annexure was exhaustive as to the art objects that Mr Selby was entitled to remove. Counsel submitted that the Annexure was not exhaustive of the items, whether of art or otherwise, that Mr Selby was entitled to remove from the matrimonial home. First, Mr Selby did not participate in the drafting of the Annexure and did not agree to its contents being exhaustive. Secondly, the Annexure was a unilateral document emanating from Ms Chew and Mr Selby had no realistic chance of negotiating its contents or checking the document. Further, Ms Chew herself had added items such as the 'Genta Moon Watch', 'Laotian Bronze Drum', '4 Japanese Wood Block Prints' and 'Antique Books' to the Annexure and handed these items to the movers employed by Mr Selby. Mr Selby had also taken away from the matrimonial home his valuable collection of model aeroplanes and various pieces of electronic/radio equipment without Ms Chew having registered any objection. These actions showed that the Annexure was not intended by the parties to be exhaustive and complete.

16 In our view, the actions of the parties when the physical distribution of the moveable matrimonial assets took place are not relevant to the determination of the appeal on this issue. The issue is essentially one of construction of the Deed and the Annexure. In this process of construction, the court must be concerned only with the objective intention of the parties as derived from those documents. The fact that Ms Chew allowed Mr Selby to remove some items that were not described on the Annexure and voluntarily added a few others to it after its execution cannot detract from the finality of the Deed and the exhaustive nature of the Annexure if on its true construction it is determined that the parties intended the Annexure to be exhaustive.

17 From a perusal of the Deed, it appears that this document was intended to provide for a clean break between Mr Selby and Ms Chew on all ancillary matters including the division of the matrimonial assets. Clause 4 of the Deed recited that each party had taken separate and independent legal advice on the matters contained in the Deed. Clauses 17 and 18, as appears from the discussion above, dealt with a 'full and final settlement' of the parties' financial claims and it is significant that that phrase 'full and final settlement' was repeated in both clauses. Thirdly, cl 24 provided for the Deed to be 'a complete agreement' between the parties. During cross-examination, Mr Selby himself had given evidence to the same effect. He stated that he 'agreed to what was signed, no more no less' and that he had 'signed an agreement and intended to abide by it'. When it came to ¶ 17(J), Mr Selby agreed to '<u>only</u> remove' the items mentioned thereafter. (emphasis ours)

18 Even though the Annexure might have emanated from Ms Chew, Mr Selby had ample opportunity to consider its contents and propose changes to it before he signed the Deed. Ms Chew signed the Deed with the Annexure annexed and her solicitors sent it over to Mr Selby's solicitors for his signature on 18 May 2001. There was no evidence of any pressure on Mr Selby to sign the Deed in a hurry. He had lawyers and every opportunity to take their advice before signing the Deed. He went ahead to sign it and it was returned to Ms Chew's solicitors on 21 May, three days after his solicitors had received it. In these circumstances, Mr Selby's complaints that the Annexure was a

unilateral document and that he had no opportunity to make any changes to it ring hollow.

19 We must now examine ¶ 17(J) of the Deed more closely. It provided for Mr Selby to remove 'all his personal belongings, such art collection and moveable property as described in the annexure'. Mr Selby's argument both here and below was that the bronzes had to be classified as 'personal belongings' and were thus removable by him. The judge took the view that the bronzes were not personal belongings but 'art objects' and since they were not described in the Annexure they were not intended to be given to him. The issue here is what was meant by 'personal belongings'. On the one hand the bronzes could, if the term is used widely, be said to be the personal belongings of any person who purchased them. On the other hand, the parties chose three distinct terms to describe the chattels within the matrimonial home and were careful to put the word 'all' before 'personal belongings' and to precede the other terms by the word 'such'. These words made it clear that as regards the 'art collection and moveable property' Mr Selby was allowed to take only those items listed in the Annexure whereas in relation to his personal belongings, he could take all of such items. Therefore, it must have been intended that the term 'personal belongings' would refer to the narrower category of items that persons usually regard as personal belongings such as clothing, jewellery, other accessories and certain limited objects like for instance a musical instrument that was only played by that person. In common parlance, the term would not usually cover valuable antiques like the bronzes.

20 It is clear to us from the drafting that in this case it was not intended to give a wide definition to 'personal belongings' because a distinction was drawn between them and those objects comprising the art collection or that would otherwise be considered as moveable property. The bronzes fall more naturally into the categories of art collection and moveable property (a very wide-ranging category) than they do into the category of 'personal belongings'. The fact that Mr Selby may have purchased the bronzes cannot change this interpretation as what the parties were trying to do was to divide their matrimonial assets. Since the bronzes were purchased during the marriage, they were matrimonial assets no matter who paid for them and were subject to division upon divorce. Any objective construction of the Deed and the Annexure would conclude that the Annexure was to be exhaustive as far as the division of the 'art collection and moveable property' in the matrimonial home was concerned. That being the case, since the bronzes were not mentioned in the Annexure, the objective intention of the parties was that they would go to Ms Chew and were not to be removed by Mr Selby. Accordingly, there is no ground to interfere with the decision of the judge on this issue.

The 'company kits' etc: the appeal by the three companies and Ms Chew's cross-appeal

21 The claim of the three companies against Ms Chew was for the return of their 'company kits' and 'documents files'. In the section of his judgment dealing with this issue, the judge did not distinguish between 'company kits' and 'documents files' although the statement of claim had made it clear that these terms referred to different categories of property. He referred to the evidence showing that Ms Chew had had possession of bank statements, income tax returns, documents relating to transfer of company money and also Mr Selby's evidence that she had kept company records, namely registers, articles of association and company seals under lock and key in the study of the home. The judge concluded that he was 'satisfied on a consideration of all the evidence … that Chew had converted the company kits'. He therefore ordered her to hand over the 'company kits' to the three companies and directed that if she failed to do so within one month of the judgment, there should be an inquiry as to damages and an order for payment of the sum assessed. The judgment was delivered on 10 October 2002.

22 There was no mention in the judgment as to whether or not Ms Chew had converted the

'documents files'. Therefore, Messrs David Chong & Co, the solicitors for the three companies, wrote to the court on 11 October seeking clarification from the judge as to whether the phrase 'company kits' in his judgment was intended by him to include all banking and financial documents and files of correspondence of the three companies. On 12 October, the Registry of the Supreme Court sent a reply to all parties stating that the judge had directed that the 'company kits' mentioned in his judgment included 'all banking and financial documents and files of correspondence of the three companies'.

23 On 14 October, Ms Chew's solicitors, wrote to the judge asking him to reconsider his direction and requesting to see him in chambers. David Chong & Co responded on the same day placing on record their strong objection to what they considered to be Ms Chew's attempt to vary the order made by the judge. On 17 October, the Registry informed the parties that the judge was withdrawing his previous direction. Instead he had directed that there should be 'an inquiry before the Registrar as to the exact nature of the items that comprised the 'Company Kits' of the three companies'. In the event, although dates were given for the inquiry, the hearing was vacated pending the outcome of the parties' appeals.

24 The three companies' appeal is against the order of the 17th October. They want the order of 12 October to be reinstated. Ms Chew, on the other hand, has appealed both against the finding that she had retained the 'company kits' and against all consequential orders.

25 It is relevant to both appeals that 14 October 2002 was the last day that the judge held the position of judicial commissioner. From 15 October 2002, he has been the Second Solicitor-General. There are thus two aspects to the appeals: the procedural aspect regarding the judge's power to issue the direction of 17 October and the substantive aspect of whether he reached the correct conclusion on the alleged conversion by Ms Chew.

26 We will deal with the procedural matter first. It is the companies' submission that the judge was out of office at the time the Registry issued the second direction on 17 October 2002. Order 42 r 7(1) of the Rules of Court 1996 provides that an order takes effect from the day of its date. The direction came into effect after the judge's term of office as judicial commissioner terminated and therefore must be void and of no effect. Counsel further submitted that the direction was not saved by s 10(4) of the Supreme Court of Judicature Act (Cap 322) ('the Act'). This section provides:

> (4) If a Judge reserves judgment in any proceedings and his appointment as a Judge expires or is terminated before his judgment is delivered, he shall have power to deliver judgment in respect of those proceedings, notwithstanding that his appointment as a Judge has expired or has been terminated.

27 We agree that the direction of 17 October 2002 was void as the judge was no longer in office when it was delivered. We further agree that it could not be saved by s 10(4) of the Act. That section would have given the judge power to deliver his reserved judgment in the consolidated suits after he left office on 14 October if by that date he had not been able to finish it. As of that date, however, his judgment had already been delivered and, to the extent necessary, clarified by way of the Registry's letter of 12 October. The judge had done all that he needed to do in respect of the suits whilst he was still in office. Thus, s 10(4) of the Act could not operate to give him any further powers in relation to the actions once he relinquished his judicial office.

28 Turning to the substantive issue, what we have to determine is whether the judge was plainly wrong in coming to the conclusion that Ms Chew had converted the 'company kits' and then subsequently directing that that phrase was to include all banking and financial documents and files of

correspondence relating to the three companies.

29 Ms Chew mounted a strong attack on the decision relating to the conversion of these items. While some criticism of the judgment was justified, the overall conclusion of the judge was not plainly wrong.

30 Ms Chew's contentions were these. In the first place, it is clear from the statement of claim of the three companies that 'company kits' were to be distinguished from 'documents files'. Indeed, the judge himself had acknowledged in ¶ 7 of his judgment that the 'company kits' consisted only of the memoranda and articles of association, the company seals, the certificates of incorporation and the company records whilst the claim for the banking and other documents was a separate claim. This being the case, at the end of his judgment when the judge found that the 'company kits' had been converted, he must have had in mind only those four specific items that he had enumerated in ¶ 7. The direction of 12 October 2002 that the 'company kits' were to include all banking and financial documents and files of correspondence must therefore have been made in error. What was required was a separate finding that these items too, the 'documents files', had been converted and had to be returned by Ms Chew.

31 Additionally, it was incorrect for the judge to state that he relied purely on the factors enumerated in the judgment to hold that Ms Chew had converted the 'company kits'. This is because the evidence relied on was basically that showing that Ms Chew was in possession of bank statements, copies of tax returns and documents relating to transfer of monies from the three companies' bank accounts all of which were banking and financial documents and therefore fell under the subset 'documents files' rather than the subset 'company kits' as defined in the statement of claim. That criticism is, however, one of the way in which the decision was explained, it is not a criticism of the decision itself.

32 Having considered the evidence and the arguments, it appears to us that the totality of the evidence before the judge showed that Ms Chew had converted both the 'company kits' and the banking and financial documents or 'documents files'. Despite the fact that Ms Chew asserted, through her solicitors in a letter dated 17 January 2002, that she was no longer a director of the companies and '[did] not have possession of the documents nor the power to obtain the same' the evidence had shown this to be otherwise: she had in her possession banking and financial documents belonging to the three companies. Her claim that she was not in possession of the three companies' documents was, therefore, untrue. Bearing in mind also the judge's finding on the relative credibility of the parties, Mr Selby's evidence with regard to the 'company kits' has to be preferred over Ms Chew's. His evidence was that she kept these items in the matrimonial home 'under lock and key'.

33 In addition, it must be noted that Ms Chew, and not Mr Selby, was the sole director of each of the companies. She had been involved in their management even though her counsel sought to portray her as merely a 'puppet director' with a minimal role in the running of the companies. He had argued that all the documents relating to the companies were prepared and administered by Ms Pauline Han, Mr Selby's secretary, and that Ms Chew's role was merely to sign documents as and when requested by Ms Han. Ms Han, however, gave evidence that her involvement in the three companies was slight. She had only assisted in the initial purchase of the companies, prepared the initial documents and paid the annual fees. Ms Chew was well qualified to run the companies as she had qualifications in finance and business administration. It is also telling that in an affidavit filed in the divorce proceedings in September 2002 she had referred to 'Copies of all tax returns through the years showing that I was the one who managed the funds/profits of the 3 companies all these years and planned their investments'. (emphasis ours) At that stage, Ms Chew was not reluctant to claim credit for managing the companies.

34 It is clear from the judgment and the direction of 12 October 2002 that the judge considered that both the 'company kits' and the 'documents files' had been converted by Ms Chew. There was sufficient evidence to support that conclusion and we cannot find that he was plainly wrong. The appeal by Ms Chew must be dismissed.

Ms Chew's appeal on the art documents

35 Mr Selby claimed the return of various documents relating to those items of the art collection which had been allocated to him by the Deed. These documents, called 'Art Documents' by the judge, comprised invoices, receipts, photographs, a catalogue of all the sculptures, written appraisals and test certificates.

36 On 22 June 2001, Mr Selby's solicitors asked for the delivery up of the Art Documents. Ms Chew's solicitors replied that they would be made available. On 3 July 2001, Ms Chew handed over a bundle of documents comprising some 20 pages to Mr Selby's movers. Three days later, his solicitors alleged that the bundle was incomplete and demanded the return of the complete set of Art Documents. No further documents were returned. Ms Chew gave evidence that she did not have any more Art Documents. The judge found her evidence in relation to the Art Documents inconsistent and stated at ¶ 19 of his judgment:

> She said that as far as she was aware, Selby had removed all his personal belongings including his documents and files from the matrimonial home. She recalled that Selby had returned to the matrimonial home on one occasion on 29 May 2001 specifically to collect his files and other documents. However, in the next breath, she said that she had handed over a file containing some documents and photographs to the movers. Selby pointed out that if Chew could produce part of the Art Documents, it confirmed that she had the complete set of the documents in her possession.

37 The judge therefore found that Ms Chew had retained part of the Art Documents and ordered that she hand them over to Mr Selby within one month from the date of the judgment, failing which there should be an order to pay such damages as shall be assessed by the registrar.

38 Counsel for Ms Chew argued that the judge was wrong to have accepted Mr Selby's logic that Ms Chew's production of part of the Art Documents confirmed her retention of the complete set. The judge was alleged to have 'put the cart before the horse' especially since Mr Selby had not discharged the burden of proving that he owned more Art Documents than those that had been returned by Ms Chew to him. Mr Selby had not adduced any evidence identifying the missing Art Documents and the judge did not make a finding as to the definite contents of the term 'Art Documents'. In addition, counsel alluded to the many opportunities Mr Selby had had to remove such documents from the matrimonial home.

39 Mr Selby's evidence was that he kept a folio file that contained all invoices, documents and photographs taken of the art objects and sculptures including the Khmer sculpture. The file, which provided him with a complete record of every art piece in his collection, was kept in the main building of the matrimonial home. It contained the following:

(1) photographs of each object taken in three different views;

(2) invoices;

(3) a catalogue of all the sculptures;

(4) TL test certificates of certain ceramic pieces; and

(5) written appraisals of certain pieces.

He commented that Ms Chew's claim that she did not have the requested documents was inconsistent with the fact that the Annexure contained values of the items of the art collection mentioned in it and that these figures had been provided by Ms Chew herself. She must have referred to the documents in his folio file when she attached the values to such items. Annexed to Mr Selby's affidavit of evidence-in-chief were copies of all the documents from the stack handed over to his movers by Ms Chew on 3 July 2001. These documents were part of the complete set of Art Documents.

40 The judge believed Mr Selby's assertion that he had not removed any of the Art Documents from the matrimonial home and that from 14 May 2002 onwards he had no idea where the folio file containing the Art Documents was as Ms Chew had removed all of the files or locked them up. The judge also believed Mr Selby's assertion as to the contents of his folio file. The logical result of those two findings was that the whole file was still in the matrimonial home when Ms Chew handed some documents over to the movers and that she must have obtained those documents from that file. Bearing in mind the judge's finding on Mr Selby's credibility, a finding that we cannot overturn, the strongest point of the appeal on the Art Documents was the assertion that Mr Selby had not proved what documents had been retained by Ms Chew. Closer examination, however, shows the point is not as strong as it seems. Mr Selby had produced all the Art Documents that Ms Chew had handed over and he had also testified as to what the complete set would have contained, basically, photographs and invoices of all the art items listed in the Annexure, a catalogue of the sculptures and certain test certificates and appraisals. By comparing the items listed in the Annexure with the documents handed over, one can easily determine what is missing in terms of photographs and invoices. The catalogue has also been specifically identified. All that is unclear is which, if any, test certificates and appraisals were not handed over since the documents exhibited by Mr Selby include some such certificates and appraisals and he has not specified what others exist. To that extent only did Mr Selby fail to discharge the onus of proof.

41 On the basis of the evidence that was before the judge, he was entitled to make the order that he did for the delivery up of the Art Documents except that he should have limited the description of those documents to invoices, photographs and the catalogue. Apart from a slight variation to the order of the judge to reflect this limitation, Ms Chew's appeal on the Art Documents must be dismissed.

Ms Chew's appeal on the wine collection

42 Mr Selby claimed that the parties had orally agreed on 24 May 2001 to divide their wine collection between them in the ratio 3:1 based on the value of the wines. Ms Chew agreed with that ratio but asserted that it was based on the number of bottles rather than on their value. The judge found for Mr Selby. In coming to his conclusion, he took into account the parties' credibility and the fact that there was a considerable variation in the values of the bottles in the collection. He ordered Ms Chew to render an account of the wines retained by her and if it was found that their value exceeded 25% of the value of the entire collection, she would have to deliver up wine in excess of this value or, at her option, pay a sum equivalent to such excess value.

43 On appeal, counsel for Ms Chew argued that the judge had misunderstood her evidence. She had not contended that the division was to be by 'random bottles'. Instead, it had been agreed between Mr Selby and herself that he would take the approximately 600 bottles stored in the guest

bungalow of the matrimonial home whilst she would take the remaining 200 bottles stored in the main house. Such a division would make it easier for Mr Selby's share of the wine to be removed from the matrimonial home.

44 There was, however, no evidence that there was such an agreement as Ms Chew had contended. Additionally, Ms Chew's explanation that the parties had agreed to a division by the number of bottles in order to make removal easier was not entirely convincing in view of the admittedly considerable variation in the values of the bottles. Nevertheless, it appears from the evidence that the judge erred in concluding that the division of the wines was to be by value. This was because he placed undue weight on the fact that the bottles were of differing values and did not sufficiently take into account other pieces of evidence.

45 First, the judge did not take into consideration the fact that the division of the wine by the number of bottles rather than by value was more in accordance with the Deed and the Annexure which were binding on the parties. The first item on the Annexure reads '614 bottles of vintage wine – worth approximately US$307,000'. Mr Selby had signed the Deed without objecting to the statement that he was to receive 614 bottles of wine. He could have amended the Annexure such that it stated '75% of the value of the total wine collection' but he did not do so.

46 Secondly, it was for Mr Selby to prove that by the alleged oral agreement on 24 May 2001, the parties had chosen to disregard the Annexure and instead agreed to divide the wine according to value. Mr Selby did not adduce any evidence in this respect. The Deed was signed by him on 21 May 2001 and it was incorporated as part of the decree nisi on 15 June 2001. During the period that elapsed between those two dates, Mr Selby did not do anything to indicate that there had been a change in the manner of distribution of the wine or that what had been agreed either initially or subsequently was a distribution by value. On the contrary, at the time his actions indicated that he accepted the fact that he was entitled only to 614 bottles of wine. In a letter dated 30 May 2001 from Ms Chew's solicitors to his solicitors, Mr Selby and his friends were accused of consuming several bottles of wine after the Annexure had been drawn up. In their reply of 31 May 2001, David Chong & Co stated that 'Our client has no hesitation in accounting for the wine he had consumed from the said 614 bottles'. There was no mention in this letter of the value of the wine consumed. That being the case, it would seem that the accounting was by number, not value.

47 There was also independent evidence as to how the wine bottles were to be distributed. One of the witnesses called by Mr Selby was one Mr Danny Lim who was employed by the movers Mr Selby used to remove his property from the matrimonial home. Mr Lim stated that Mr Selby had taken him to the guest bungalow on 25 May 2001 to show him some of the things that were to be packed and removed. Mr Selby had pointed out the wine refrigerator and the wine bottles inside it and said 'That's going, this is mine' or words to that effect. There was no mention that the bottles to be removed must add up to a certain value. Mr Selby did not give the movers any list of the wine bottles to be removed and this is significant as one would have assumed that if the agreement had indeed been for the wine to be divided by value, he would have obtained a proper accounting of all the bottles before he shipped any off to his new home in Thailand. At no time during the negotiations in respect of the Deed or the divorce was an independent professional called in to value the bottles of wine. Neither set of solicitors was given any instructions on such valuation.

48 Taking all relevant circumstances into account, we have concluded that Mr Selby did not discharge the onus on him of proving that the division of the wine bottles was to be by value rather than by number as indicated by the Annexure. There was a subsidiary finding of fact by the judge that Mr Selby did receive 614 bottles of wine. There is no basis for overturning this finding of fact, nor has it been contended that we should do so. It therefore appears that Mr Selby, having received

his share of the wine collection, is not entitled to an account of the bottles retained by Ms Chew. Her appeal in this connection must succeed.

Appeal on costs

49 The trial judge ordered each of the parties to the consolidated suits to bear their own costs. He reasoned:

> 47 … On the question of costs, I am of the view that the primary consideration should be the children in view of the fact that both Selby and Chew have enough money to take their quarrels to the courts for a long time to come. This will aggravate the emotional harm already inflicted upon their children and I have no wish to see that happen, nor to pander to any inclination on the part of either of them to resort to the legal process unnecessarily. Accordingly the most appropriate order for costs to make in this case would be to order that all parties in these consolidated action bear their own costs.

50 Mr Selby and the three companies appealed against that holding. They relied on the general principle of civil litigation that, in the ordinary course, costs follow the event. The three companies had succeeded entirely in their conversion claim in Suit 1200 of 2001. In Suit 1349 of 2001, Mr Selby had succeeded in four out of six claims based on conversion and on two further claims relating to Ms Chew's use of his American Express charge card and the wine collection. It was contended that as the successful litigants, Mr Selby and the companies should have been awarded costs and that in taking into account the position of 'the children' and their 'emotional harm', the judge erred in that he took into consideration materials wholly unconnected to the case. We were reminded that in *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579, this Court had held at ¶ 73 that a 'court ought not to exercise its discretion against a successful party except for some reason connected with the case'.

51 The assertion that the judge relied on factors that were not connected with the case when making his decision on costs is not justified. Neither of the consolidated suits was a normal High Court action involving a breach of contract or a tort. This was as true of the three companies' action against Ms Chew as it was of Mr Selby's action since the three companies were only Mr Selby in different attire (he was the holder of their bearer shares and, once Ms Chew resigned as the sole director, the person who ran them). The suits arose as much from the breakdown of the marriage as the divorce proceedings did and involved issues that would have been decided by the divorce proceedings had it not been for the execution of the Deed. The judge noted that although the total value of the claims (US$442,500) was a large sum by normal standards, it was dwarfed by the value of the matrimonial assets that the parties had divided between themselves. He observed:

> The present dispute does not concern these "big ticket" items, but comparatively minor items, although some of them are allegedly of considerable sentimental value … Chew claims that Selby initiated these actions to harass her because of bitterness on his part, and the supposition that she had obtained a good deal in the division of assets. Selby on the other hand claims that Chew was an embittered woman who, in her rage and fury, had gone out of the way to deny Selby certain items that were of great sentimental value to him, as well as to inconvenience him. (at ¶ 9)

The judge was clearly of the view that the parties' conduct in the proceedings was unreasonable. It appears to us too that the parties were acting out the emotions generated by the failure of their marriage and the divorce. The judge was not wrong in these circumstances to take into account the effect such battling would have on the children despite the seeming lack of connection between them and the proceedings. We see no reason to interfere with his decision on costs.

Conclusion

52 For the reasons given above, the result of these appeals is as follows:

(1) Mr Selby's appeal in respect of the bronzes is dismissed;

(2) the companies' appeal in respect of the direction of 17 October 2002 is successful and that direction is declared null and void;

(3) Ms Chew's appeal in relation to the 'company kits' is dismissed;

(4) for the avoidance of doubt, we make the following order in relation to the 'company kits' and the 'documents files':

That Ms Chew deliver up the following to the three companies:

(a) their original memoranda and articles of association;

(b) their official seals;

(c) their certificates of incorporation;

(d) their company records ie register books and other records, if any, statutorily required to be maintained;

(e) all banking and financial documents of the three companies; and

(f) all correspondence relating to the three companies

and if she fails to do so within one month of the judgment, there shall be an inquiry as to damages and an order for payment of the sum assessed.

(5) Ms Chew's appeal against the order that she deliver up the Art Documents to Mr Selby is dismissed except to the extent that that order shall be varied to read:

'Ms Chew shall return to Mr Selby all invoices relating to, and photographs of, the art objects and sculptures belonging to Mr Selby and also the catalogue of sculptures within one month of this judgment and if she fails to do so, there shall be an order that she shall pay him such damages as may be assessed by the registrar.'

(6) Ms Chew's appeal in respect of the wine collection is allowed and the order below requiring her to render an account of the wine bottles retained is set aside; and

(7) the appeal by Mr Selby and the three companies in relation to the costs of the trial is dismissed.

Costs of the appeals

53 Mr Selby has failed in respect of his appeal on the bronzes and on costs. The companies have failed in their appeal against costs but have succeeded in relation to the direction. Ms Chew has failed in relation to the Art Documents and the 'company kits' but has succeeded in respect of the wine collection. We consider that making each party bear his/her/its own costs would most fairly

reflect the extent to which he/she/it has failed and/or succeeded in these appeals and we so order. The security deposits provided by the appellants in each appeal shall be released to their respective solicitors.