Wong Kia Meng (trading as Smart Tuition Centre) v Seet Siow Luan and Others [2004] SGHC 112

Case Number : Suit 402/2003

Decision Date : 28 May 2004

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Peter Pang Xiang Zhong (Loh Lin Kok) for plaintiff; Arthur Quay and Teh Ee-Von (Wong M Seow and JYP Chia) for defendants

Parties : Wong Kia Meng (trading as Smart Tuition Centre) — Seet Siow Luan; Chan Song Eng; Seet Seo Boon (trading as Smart Link Tuition Centre)

Personal Property – Ownership – Beneficial – Wife as full-time teacher prohibited from running business – Business registered under husband's name – Whether husband held business as trustee for wife – Whether illegal act was committed which prevented claim in equity.

28 May 2004

Tay Yong Kwang J:

1 The plaintiff and the first defendant were husband and wife. They married in 1985. In October 2001, their relationship deteriorated to the extent that divorce was contemplated. On 7 November 2003, the first defendant was granted a decree *nisi* in her uncontested petition (Divorce Petition No 604460 of 2002) on the ground of unreasonable behaviour.

2 The second defendant is the mother and the third defendant is the younger brother of the first defendant. All three defendants are, on record, the partners of a private education business called Smart Link Tuition Centre ("Smart Link").

3 The plaintiff is the registered sole proprietor of a similar private education business known as Smart Tuition Centre ("Smart"). His claim against the defendants jointly and severally was for passing off Smart Link as Smart, for diverting the business of Smart to Smart Link, for breach of confidence and/or unfair enrichment and for accounts to be taken to determine the loss and damages suffered by Smart.

4 The defendants denied his allegations. The first defendant, in her counterclaim against the plaintiff, sought a declaration that she is and was at all material times the beneficial owner of Smart. In addition, she asked that an amount of $64,944.00 taken away by the plaintiff from Smart's bank account be returned to her. She also claimed other damages.

5 I dismissed the plaintiff's claim and granted the first defendant the declaration sought as well as the return of the said $64,944.00.

The plaintiff's case

6 The plaintiff and the first defendant have two children, a son born in January 1989 and a daughter born in October 1992. When they married in 1985, the first defendant was a graduate teacher employed by the Ministry of Education ("MOE"). In March 1993, she applied for no-pay leave for three years in order to look after the two young children. In May 1996, she resigned from her teaching post and joined the plaintiff in running Smart on a full-time basis.

7 The plaintiff was educated up to pre-university level. He had three "A" level passes and two "O" level passes. He was a part-time student in one of the polytechnics doing a course in production engineering. However, due to work commitments, he stopped his studies in the third year.

8 In 1990, the plaintiff was the managing director of a company called Primex Design Pte Ltd ("Primex") whose business was in interior design and renovation. The company was engaged to do renovation works by various businesses involved in private education, namely Patrick Tuition Centre at Serangoon Central Drive, Steven Tuition Centre at Marine Parade Central and Inlingua School of Languages at Cuppage Road. One Wong Yew Fatt, who had his own firm, was involved in the renovation works. As a result of these renovation projects, the plaintiff had to make various submissions to authorities such as the Fire and Safety Bureau, the Urban Redevelopment Authority ("URA") and the Housing and Development Board ("HDB"). He also had the opportunity to mix with people involved in the business of running tuition centres. He could also observe the daily activities at Patrick Tuition Centre, located three units away from the premises of Primex.

9 Having a keen business mind, the plaintiff realised that the tuition centre business was lucrative. He then told the first defendant that he wanted to set up such a centre as he "knew the procedure to start up". His then wife was supportive of his idea. However, the plaintiff was short of funds. He then went to borrow $50,000.00 from the first defendant's elder brother, Eric Seet Seow Huat ("Eric Seet"), who became his partner. The said amount of money was banked into the personal account of the plaintiff. However, on 16 August 1991, the plaintiff registered Smart as a sole proprietorship. A bank account was opened in his name but both he and the first defendant were authorised to sign cheques individually.

10 After getting the approval in principle of the MOE to set up a tuition centre, the plaintiff tendered for various HDB premises apparently using the name "Wong Kia Meng & Partner". He was successful in securing a tenancy for Block 501 Jurong West Street 51, #04-257. In October 1991, the URA approved the change of use for the said premises. On 11 November 1991, the plaintiff and Eric Seet submitted a letter to the HDB to state that Eric Seet "would like to withdraw as co-owner of" the said premises with effect from that date, leaving the plaintiff as "the sole owner". The plaintiff stated that Eric Seet "pulled out for reasons best known to himself".

11 The plaintiff drew up and submitted the design and renovation plans to the HDB for approval. He also submitted the design plans, the application forms and the subject syllabi to the MOE. On 28 February 1992, Smart was registered as a school with the plaintiff registered as a supervisor. In March 1992, Smart began functioning as a tuition centre.

12 The renovations on the premises were undertaken by the plaintiff's company, Primex, at a cost of almost $23,000. This was for material and labour costs only. No profits were made by Primex. This therefore saved Smart some $6,900. The $50,000.00 loan from Eric Seet was repaid on 16 December 1993 ($30,000.00 cheque signed by the first defendant) and on 6 May 1994 ($20,000.00 cheque signed by the plaintiff) using funds from Smart's bank account.

13 The plaintiff designed the publicity leaflets for Smart and arranged for 50,000 copies to be printed. He went about by car and on foot in the Jurong West housing estate to distribute the leaflets. Every two months, another 20,000 copies were printed and distributed. His wife, then a full-time teacher, helped him whenever she was free to do so.

14 The plaintiff did all the planning for Smart. He advertised for and engaged the tutors with the

help of his wife. The syllabi for various subjects for submission to the MOE were obtained from the Marine Parade Library. He prepared the list of tutors, their *curriculum vitae* and their terms of employment. He also prepared the registration book and other records. He did the costing and the price list for the various subjects and the different levels of study, the teaching materials and methodologies. He also obtained supplies of materials and the business information of tuition classes conducted by other tuition centres. He paid the tutors according to their educational level.

15 From the time of commencement of business until May 1996, when the first defendant resigned from her full-time teaching post with the MOE, she was engaged as a tutor by Smart for Mandarin classes at various levels. The plaintiff produced a letter from the Inland Revenue Authority of Singapore dated 17 November 2000 addressed to the first defendant stating that additional assessments would be raised on "tuition fees received by you from Smart Tuition Centre" between 1994 and 1998. He also produced a Form IR8A (Return of Employee's Remuneration) issued to the first defendant (described as "Administrator") by Smart as employer for the year ended 31 December 1997 and three salary vouchers and one payment voucher in the name of the first defendant, handwritten by the first defendant herself and unsigned.

16 The plaintiff claimed that he spent about 80% of his time working for Smart in 1992 as the first defendant was then a full-time teacher with the MOE. In April 1992, he engaged Ngoh Miao Ping as the full-time manageress *cum* tutor. She left after a couple of months and was replaced by Tan Ai Ling, then a part-time tutor. In July 1992, he engaged Theresa Lim Poh Choo to assist Tan Ai Ling in the running of Smart.

17 The staff turnover was very high as the manageresses resigned one after another. That caused him a lot of stress as he had to spend time interviewing and training the new staff. As a result, he had no choice but to ask his wife to take no-pay leave to look after the children and to help him out part-time at Smart. He spent so much time at Smart and neglected his other business (Primex) to the point that it almost collapsed. Later, he left the task of interviewing and engaging tutors entirely to the first defendant in order to minimise matrimonial disputes as they would disagree occasionally on the persons to employ.

18 Around 1995, Joanne Tang Li Ping ("Joanne") was employed by Smart as an administrative assistant. She enjoyed her work and stayed on the job thereby giving stability to Smart. From that time onwards, Smart's business picked up tremendously and the plaintiff could devote more time to Primex whose business also picked up thereafter.

19 In 1996, Smart became very profitable, making profits of more than $100,000. The plaintiff advised his wife to resign from her teaching post in order to work for him as the full-time manageress of Smart. She did resign and joined Smart full-time on 1 May 1996. As she was his wife, he entrusted her to take charge of Smart and to improve the running of the tuition centre, to give valuable advice and to upgrade its facilities. The plaintiff would handle the technical issues such as servicing of the airconditioning unit and clearing toilet blockages. The contractors engaged by Smart knew he was the boss of Smart. Joanne, a Malaysian, sought his help to write a letter to the immigration authority when she wanted to apply for permanent residence here.

20 When the plaintiff was not at Smart, he would sometimes call up to ask about the student intake and about any problems the tuition centre might be facing. He would render advice and decide on measures to take, leaving the implementation of such to his wife who would also update him about Smart constantly.

21 In 1997, the plaintiff went to China to look for more business opportunities. He bought hardware products back here for sale. In June 1997, he started a furniture hardware business here. In November 1997, he set up another tuition centre (Bestlearn Tuition Centre) in Tampines using the profits made by Smart. This time, he registered the business in the name of his wife but it was operated in substance by his younger sister, Cindy Wong. Bestlearn Tuition Centre did not do as well as Smart and was assigned to someone else in March 1999.

22 From 1998 onwards, the plaintiff went to Smart only occasionally as the tuition centre was running well. However, he still gave of his time by driving his wife and her assistants around the housing estate to distribute publicity leaflets. He no longer recruited tutors as that task, along with all the administrative and financial matters of Smart, was left entirely to his wife, who was his employee.

23 The plaintiff and his wife always shared the profits of Smart equally as spouses. The profits were banked into their joint account for household expenses. Cash taken by his wife from the profits of Smart was treated as her salary and tutor fee while that taken by the plaintiff was treated as the net profits of Smart. Maureen Ong of Jin Bee Secretarial Services, not an accountant, provided company secretarial services for Smart by preparing its yearly accounts. She also prepared the personal income tax returns of the plaintiff. The first defendant would fill in the particulars pertaining to herself in those returns and then submit all the accounting documents to the tax authority. The plaintiff and the first defendant were each paid Central Provident Fund contributions by Smart. Their personal income tax was paid by Smart.

24 In late 2001, the plaintiff was surprised that his wife refused to account to him for Smart's profits. Their relationship soured as the first defendant held the view that the entire profits of Smart belonged to her since she was working so hard in Smart. In November 2002, she commenced divorce proceedings. However, as early as January 2002, she started Smart Link (initially known as Smart Kids) surreptitiously with her mother and her younger brother. Smart Link's premises comprised a unit next to Smart on the fourth level and another unit two levels directly below Smart's in the same building. The first defendant tendered for these two units in December 2001. As she chose the name "Smart" and used a set-up similar to Smart's, he believed she had made use of the confidential information of Smart in breach of her fiduciary duty. She even put up a written notice outside Smart's premises asking the students to proceed to the premises of Smart Link.

25 Smart took four years to become profitable whereas Smart Link "prospered within a few months". It was therefore clear to the plaintiff that the first defendant was diverting Smart's business to Smart Link. A private investigator from Harmon's Private Investigation and Consultancy Services hired by the plaintiff confirmed that the staff of Smart Link was informing prospective clients that Smart and Smart Link were one and the same and that Smart Link used Smart's premises whenever there was a need for more classrooms.

26 In late December 2001, the plaintiff de-registered Smart as he was worried then that the first defendant might do him in by running up a huge debt for Smart. After consulting Maureen Ong and thinking the matter over, he re-registered Smart on 3 January 2002, again with himself as its sole proprietor.

27 On 2 January 2002, the plaintiff closed Smart's bank account and withdrew whatever was in the account amounting to $94,944.40. On 3 January 2002, he gave $30,000.00 cash to the first defendant for the running expenses of Smart and kept the rest. The first defendant acknowledged receipt of the said $30,000.00 in writing.

28 On 22 January 2002, the plaintiff went to the premises of Smart with his friend, Will Tan Seng Kee, to look at the books of accounts and to appoint Will Tan to take over the management of Smart. He also asked his carpentry sub-contractor, Wong Yew Fatt, to go along in case he needed to break some doors or locks. At the premises, Joanne refused to hand over the keys, receipts and records of Smart. The plaintiff then instructed Wong Yew Fatt to break the lock of the room occupied by the first defendant. After breaking into the room, the plaintiff took away various receipt books recording the fees collected from students. He also issued a letter to Joanne to terminate her employment as a clerk of Smart with immediate effect "due to your undue behaviour in this Centre". The letter also asked her to hand over all keys and documents of Smart and her work permit to Will Tan. The police was called to the premises. The first defendant, who was notified by someone, also turned up at the premises. Wong Yew Fatt replaced the broken lock with a new one and left. The first defendant refused to have an amicable discussion with the plaintiff. Instead, she merely took some files on the collection of fees from Joanne and "ran away with them".

29 The next day, the plaintiff went to lodge a police report recording the events of 22 January 2002 and alleging that two of the first defendant's brothers, who also went to Smart's premises on 22 January 2002, "ma[d]e a lot of public nuisance".

30 On 26 January 2002, the plaintiff terminated the telephone lines of Smart. He had the lines re-connected sometime later.

31 The first defendant failed to submit the audited accounts of Smart to the tax authority for 2002 resulting in the plaintiff being asked to pay a composition fine. His solicitors managed to persuade the tax authority to waive the composition fine and to have the submission of the accounts postponed until after these legal proceedings were resolved. The HDB served a notice to quit dated 18 July 2003 on the plaintiff and has demanded double rent from 1 September 2003 until the delivery of vacant possession of Smart's premises. On 27 November 2003, the plaintiff's solicitors wrote to the first defendant's solicitors to give them notice to pay up the six months' arrears in rent and to renew the tenancy which was expiring at the end of November 2003, asserting that the first defendant's failure to do so was "inconsistent" with her claim that Smart belonged to her.

32 The plaintiff stated that his claim against the second and the third defendants was premised on the fact that they were the partners of the first defendant whose conduct caused loss and damage to him. He claimed that the first defendant was acting as their agent and representative as they were inactive partners of Smart Link.

33 The plaintiff's younger sister, Cindy Wong, testified that the first defendant helped the plaintiff run Smart. In April 1998, Cindy Wong was asked by the plaintiff to help him at Bestlearn Tuition Centre ("Bestlearn") in Tampines. She became the administrator there until November 1998 when she left as she did not agree with the way the first defendant managed Bestlearn. Bestlearn failed because of the intense competition from other tuition centres in the same area.

34 Wong Yew Fatt, the carpenter, testified that he did carpentry work for Primex as a sub-contractor until 2001. The plaintiff engaged him for the works at Steven Tuition Centre, Patrick Tuition Centre and Smart. He also did maintenance work for Smart as and when called upon to do so by the plaintiff. On some occasions when he went to do work at Smart, he saw the plaintiff there. In cross-examination, however, he said that he had been to Smart's premises more than ten times and each time, he saw the plaintiff there. He also saw the first defendant and Joanne at Smart. On 22 January 2002, when asked by the plaintiff to prise open the lock of one of the doors at Smart, he complied because he knew that the plaintiff was the boss. He was paid for the works by the plaintiff

on some occasions and by the first defendant on other occasions.

35 Maureen Ong, the sole proprietor of Jin Bee Secretarial Services, testified that her firm had been providing secretarial services to Smart since 1991. She was also engaged by the plaintiff as the corporate secretary for Primex. For the first two years, it was the plaintiff who brought her the accounting books and documents written out by the first defendant. From the third year onwards, she received the accounting records from the first defendant. After preparing the profit and loss account and the balance sheet, Maureen Ong would fill in the plaintiff's personal income tax returns for him. For some years, the first defendant filled in her part of the income tax returns herself.

36 Maureen Ong recalled an occasion when the plaintiff consulted her on his act of de-registering Smart as a business entity. She advised him that it was not in his interest to have done that as the business was an ongoing one. The plaintiff then re-registered Smart.

37 Steven Khoo, the sole proprietor of Steven Tuition Centre, testified that he engaged the services of Primex for the interior decoration works of his tuition centre which he set up in August 1990. He dealt with the plaintiff who drew the layout plan and submitted it for approval by the authorities. In the course of the renovation works, the plaintiff discussed with him the subject matter of running a tuition centre as a good business proposition.

38 The plaintiff also called Ong Boon Lee, a certified public accountant of eight years' standing, to give an estimate of the loss of profits for Smart caused by the diversion of its business to Smart Link. Ong did a projection of profits for Smart based on an assumption of 5% increase in profits year on year using 2000 as the base year.

39 During the trial, the plaintiff offered to drop the action if the first defendant accepted that he had a share in Smart.

The defendants' case

40 The first defendant graduated with an honours degree from the National University of Singapore in 1984. She majored in Chinese studies. She also read economics, political science, computer programming and statistics. Her main defence to the plaintiff's claim was that she was the beneficial owner of Smart and of its accompanying goodwill.

41 She testified that as a teacher, she saw the potential in the private education business and wanted to set up a tuition centre. She discussed her plans with the plaintiff who was her husband at that time. He was supportive of the idea and commented that Primex had just completed the renovation works for a tuition centre and that he therefore knew how to fit out such a centre. As she was then a public servant employed by the MOE, she was not permitted to run her own business and could not be registered as the owner of Smart. It was agreed between them that the plaintiff would be named as owner in the records. The plaintiff would continue with his own businesses as he did not know anything about running a tuition centre.

42 She estimated she would require some $50,000 to buy the furniture, equipment and stationery for Smart. Her savings were not sufficient for this purpose and she therefore decided to borrow that amount from her brother, Eric Seet. She was pleasantly surprised when her brother agreed over the telephone to lend her the money without hesitation. Later, she went with the plaintiff to collect the money in five $10,000 notes from Eric Seet. She promised to repay the loan to her

brother and offered him partnership in Smart out of gratitude. However, just before Smart was registered, Eric Seet told her he was lowly educated and knew nothing about the education business and would therefore not be a partner in her new enterprise.

43 She saw advertisements in the press offering HDB premises for rent. She decided to tender for premises in Jurong West and was successful. Primex then carried out the renovation works for Smart and was subsequently paid in full on its invoice.

44 The first defendant then advertised for tutors to join Smart. She interviewed the applicants in her brother's office and did the necessary paper work to get them approved by the MOE.

45 Like all other tuition centres, Smart had to have a supervisor whose duties included submitting syllabi and the proposed course fees to the MOE. The plaintiff, being the registered owner of Smart, was the supervisor in name. All his duties were performed by the first defendant.

46 The first defendant prepared the leaflets and placed advertisements in the newspapers to publicise Smart. She and her friends distributed the leaflets in the housing estates in the Jurong area. Subsequently, she engaged agents to do the distribution work. She signed up the students who went to Smart to register for its courses.

47 She asserted that "Smart was single-handedly run, managed and built up" by her from the very first day of operations. She would go to Smart every day after her full-time teaching duties at a junior college. When she was pregnant with their second child in 1992, she still went to work at Smart every day until the day the child was born. While in confinement, she managed Smart *via* the telephone and returned to work exactly four weeks later. The plaintiff continued with his own businesses and began to travel frequently to China from 1998. He did not devote any time to Smart at all and hardly went to Smart's premises.

48 The first defendant prepared the various syllabi and timetables for the courses, interviewed and engaged the teaching and non-teaching staff, set the terms of employment and signed their contracts of employment. She also took care of the promotional activities for Smart and made all the decisions on purchases for the tuition centre.

49 Her life became so hectic that she decided to take no-pay leave between 1993 and 1996 to take care of her baby daughter and to concentrate on Smart. By 1996, when she was confident that Smart was going to be a success, she resigned from her full-time teaching position with the MOE.

50 After her resignation, she asked the plaintiff on a few occasions to transfer Smart to her but he would always come up with some excuse or other, claiming that it was troublesome to do so. As he was then her husband, she did not press the issue.

51 In contrast, the plaintiff showed no interest at all in Smart and its activities. He did not even possess a set of keys to the premises and that was why he had to break into the first defendant's office in January 2002. Smart's bank account was opened in his name by virtue of the fact that he was the sole proprietor on record. However, before January 2002, he did not withdraw any money from that account. Whenever he wanted money, he would ask her for it. Whatever he signed for Smart was necessitated by the same reason. The plaintiff was therefore no more than a nominee. He was holding Smart on trust for the first defendant.

52 The first defendant paid the bills of Smart and kept the profits. However, Smart's income had to be declared in the plaintiff's tax returns and he would insist on the returns showing him making more money than the first defendant. It made no difference to the first defendant as she kept the money and paid the income tax for the plaintiff from Smart's bank account anyway.

53 They had a joint account and agreed to contribute money into it for use by the family. However, all the money in that account was earned by her through Smart. The plaintiff did not contribute his share as he claimed that his business was not doing well. Subsequently, he even asked her for money. She gave him large sums of cash over the years. From this account, they managed to buy several properties in Australia and in Malaysia for investment.

54 Their relationship began to deteriorate in 2001. In September that year, the plaintiff wrote her a note asking for separation and a division of assets. She discovered that Smart was not listed by him in his list of matrimonial assets for division. She was very angry and they had a heated quarrel.

55 In October 2001, the plaintiff cancelled her authority as a signatory for Smart's bank account. That incensed her. She demanded that her name be reinstated and that was done. Later, she was advised by her brothers to give the plaintiff the money he wanted so as not to ruin their marriage over money. Accepting their advice, she closed a joint account and handed him $83,720.00 which was half of the balance. There was matrimonial harmony for a while.

56 In December 2001, the plaintiff told her he wanted a divorce. She asked him to transfer Smart back to her but he replied sarcastically that it was "not so easy". When she told him angrily that she was not going to give him any more money, he said he would close the business down for good.

57 That threat got the first defendant very worried. Fortuitously, the HDB had premises available in the same location as Smart's premises and she submitted her tenders for those premises.

58 On 31 December 2001, the plaintiff gave the first defendant a letter on Smart's letterhead dated 28 December 2001 through Joanne. In that letter, he asked her as a centre manager of Smart to hand over all cash collected in the past few months and to surrender all account documents and the lists of tutors and of students. She was also told she was not allowed to sign any cheque or to leak out confidential information pertaining to Smart to other parties. She ignored the letter.

59 On 2 January 2002, the plaintiff closed Smart's only bank account and withdrew the amount of $94,944.40. The first defendant found out about this only when she had difficulty banking in cheques. She was very angry and told him he would be answerable to the MOE as the supervisor of Smart if the tutors were to complain about not being paid and classes were cancelled as a result. It was only after this quarrel that he returned her $30,000.00 to pay the tutors, keeping the balance without her consent.

60 On 12 January 2002, the plaintiff went to Smart and informed some of the tutors that he was going to close down the tuition centre and that they should look for work elsewhere. He also told them to relay this information to the students. The first defendant found out about this when the tutors called her to enquire about it.

61 On 22 January 2002, when the plaintiff went to Smart with Will Tan and Wong Yew Fatt and broke into the first defendant's office, Joanne called the first defendant who immediately notified the

police and then rushed to Smart's premises. As a result of the commotion, classes had to be cancelled that day. The plaintiff purported to terminate Joanne's services and he cancelled her work permit.

62 He also terminated Smart's telephone lines subsequently without informing the first defendant. When she wrote to Singtel to have them reinstated, the plaintiff terminated them again. This disruption caused a huge drop in enrolment.

63 On 3 February 2002, the plaintiff returned to Smart and announced to one of the tutors, Woo Chong Yeen, who was conducting a class at that time, that he wanted to stop the class and close down the tuition centre. The first defendant was at the tuition centre. She went into the classroom and ordered the plaintiff to get out. Woo also asked him to talk outside the classroom. The plaintiff left subsequently after Woo told him he was going to carry on with the class that day.

64 Seeing that the plaintiff was bent on destroying Smart, the first defendant registered Smart Kids (later changed to Smart Link) with her mother and her brother as sleeping partners in order to keep her tuition centre business going. She had to incur expenses to set up the new tuition centre. In October 2002, Smart Link obtained the approval of the MOE to operate as a tuition centre. In December 2002, it started operations at its present premises.

65 She maintained that the plaintiff had no interest at all in the tuition centre business. This assertion was buttressed by the fact that he terminated Smart's registration and then, after re-registering it, did nothing about the business. She refused to pay the rental for Smart after the writ of summons was served on her as she was confused and did not know what to do in those circumstances. Similarly, she refused to attend to the renewal of the term of office of Smart's school management committee.

66 Joanne, the former administrative clerk at Smart, is now employed by Smart Link. She joined Smart in 1995 after being interviewed by the first defendant who introduced herself as the principal of the tuition centre. The first defendant decided on her salary and her annual increments and made all the decisions for Smart without having to consult anyone. She signed all the cheques for payment of the tutors' fees and kept all fees collected by Joanne from the students who attended classes at Smart. Occasionally, when the first defendant was abroad, Joanne would bank in the collections for her.

67 Joanne was aware that the plaintiff was the husband of the first defendant. However, she had never seen him or his sister, Cindy Wong, working at Smart. In the nine years she worked at Smart, she saw him at the premises not more than three or four times before September 2001. Although some documents were addressed to him, they were handed to the first defendant for her to deal with. The plaintiff never spoke to Joanne about Smart or asked her any questions about the tuition centre.

68 The plaintiff only started asking Joanne about the collections from September 2001. Late one evening, he called the tuition centre and told her she was to report to him instead of the first defendant from that day onwards. For the first time, he asserted he was the owner of Smart. Later that night, Joanne called the first defendant to ask her about the strange call from her husband and was told to ignore his instructions.

69 On 10 October 2001, Joanne's wedding anniversary, the plaintiff told her everything was back to normal and she should continue reporting to the first defendant. However, the truce between the warring spouses did not last long. In December 2001, the plaintiff told Joanne that he was going to

dissolve his marriage. In January 2002, the plaintiff called her and told her he was going to close down the tuition centre. One day, he went to Smart and told the tutors in the classrooms to look elsewhere for work. She refused to hand over the keys to him and he became very angry. On 22 January 2002, he returned to Smart with the carpentry contractor and another man, terminated her service and broke into the first defendant's office. He then took away some receipt books. Joanne called the first defendant to inform her of the happenings. Apparently, the plaintiff had called for the police as well because two groups of policemen arrived at Smart. Classes were cancelled that day because of this.

70 The first defendant applied for a work permit for Joanne. Joanne confirmed in cross-examination that she did use Smart's premises when Smart Link was short of classrooms, as observed by the private investigator.

71 Various tutors who had taught at Smart at various times testified that they were interviewed for the job by the first defendant, that she signed their appointment letters, that she made all the decisions, gave instructions without having to consult anyone and conducted herself as if she was the owner of the tuition centre. One tutor who worked at Smart between 1993 and 2000, with a one-year break in between, did not even know who the plaintiff was. Another only saw him dropping by the tuition centre to ask her a few general questions when the first defendant was in confinement after the birth of her second child.

72 Eric Seet, the elder brother of the first defendant, confirmed that he lent his sister $50,000.00 in cash and later declined her invitation to be named as a partner of Smart as he had always been poor in studies and was not interested in the education business. His name was therefore removed from the records. He stated that the loan was repaid in instalments but recalled that payment was made in cash.

73 Eric Seet said he was never in partnership with the plaintiff whom he met only about twice a year at family gatherings. He was not close to the plaintiff although the latter had done the renovation works for his flat. Asked why his name appeared as the sole proprietor of another education business firm, STC Tuition & Student Care, registered on 19 December 1991 but defunct, he said it was arranged by the first defendant who had wanted to use his name and the address of his brothers' shop for registration purposes. That business never took off.

The decision of the court

74 There was no dispute that the plaintiff was the registered legal owner of Smart. The crucial question to be determined was who the true beneficial owner of Smart was. Was the plaintiff a trustee holding Smart on trust for his then wife?

75 I found the first defendant's evidence much more convincing than that of the plaintiff. The plaintiff seemed to have confused the submission of renovation plans with the submission of the necessary application to the MOE to operate a tuition centre. There was no doubt that he was familiar with the procedure involved in doing renovation works. However, even an architect who has designed and built a hotel will not profess thereby that he knows how to run a hotel.

76 While the decision and ability to set up and operate a business may have no nexus to one's educational qualifications, the business that was in issue here was a tuition centre. Between a person involved essentially in design and renovation works and a highly qualified and experienced full-time teacher, I had little hesitation in concluding that the one who was keen and able to run a tuition

centre was the first defendant. It was natural that she would discuss her plans with her then husband and ask him to carry out the renovation works. He may have used the drawings done for the other tuition centres that Primex did renovation works for but that was nothing exceptional. Even if the plaintiff had billed Smart nothing more than the basic costs of the renovation, that would be completely understandable in the circumstances. Why should a husband want to make profits from his wife's business? Indeed, the fact that the plaintiff invoiced Smart for the renovation works militated against his assertion that Smart belonged to him.

77 I accepted the first defendant's and her brother's evidence that the loan was asked for by her and was given to her. Smart was never a partnership as alleged by the plaintiff. It was registered as a sole proprietorship from the very start. Since the loan was taken by the first defendant and paid back by her from her earnings in Smart, it followed that the capital for Smart was provided by her. The only part played by the plaintiff was to be the custodian of the $50,000.00 as Smart did not have a bank account then. There was no reason for the first defendant not to trust her husband with the money at that time.

78 As the first defendant was a full-time teacher with the MOE then, she had to use her husband's name to register her business. There was no cause for her to be concerned about ownership issues then. It was argued that she could not come to court to claim a trust in equity when her hands were soiled by this "illegal act" of evading the MOE's prohibition against a teacher running a business. However, while it was true that she was withholding the fact that she was going into business from her then employers, which the plaintiff was very much aware of, that did not mean she committed a crime. At the worst, she was in breach of her contract of employment but a breach of contract made with a government body does not by itself amount to an offence against the law. There was no fraud on the revenue authority as all the profits were declared by them as husband and wife.

79 There was no need for an express agreement that the plaintiff would be holding Smart on trust for his wife. Both of them understood the true position perfectly. This was confirmed by their subsequent conduct when she devoted much of her time to Smart and made all the short-term and long-term business decisions while the plaintiff merely carried on with his own businesses and did nothing more than sign whatever had to be signed by the sole proprietor on record. Clearly, Smart belonged to the first defendant in reality. I believed the first defendant when she testified that she had asked the plaintiff to transfer Smart back to her after her resignation from her teaching post but the plaintiff kept putting off the matter. Their relationship was good then and there was again no cause for concern.

80 The first defendant was obviously an industrious and capable woman. Infused with her energy and enthusiasm, Smart became profitable from the first year although modestly so. It developed into a successful enterprise after she managed it full-time during her three-year leave from the MOE. In contrast, the plaintiff's design and renovation business was not as successful as Smart but that was not due to the fact that he was straddling two different businesses. He contributed nothing to the success of Smart. Primex may have done some maintenance work for Smart but it did so as a contractor and was paid as a contractor. The plaintiff was never in partnership with his wife in Smart and was never involved in the tuition centre's business. He was certainly not his wife's employer! He simply did not have the expertise, the experience nor the enthusiasm.

81 The plaintiff claimed that all profits of Smart were shared between husband and wife equally, thus showing he had at least a financial interest in Smart. However, the records of the money taken by each of them did not bear out what he said. I believed the first defendant's testimony that some

profits had to be declared as his as he was the owner on record and that it did not matter to her at that time anyway as the money was all for their family. It was clear that the first defendant, through Smart, was the one bringing in the money and building up the family's finances while the plaintiff was the one taking money from her. That was how they managed to purchase their investment properties. She did not take issue with him then that she was practically supporting him as they were still on good terms.

82 Perhaps the best evidence that Smart was not the "baby" of the plaintiff could be found in his wanton disregard for the tuition centre in late 2001 and early 2002. His actions were all calculated to disrupt and destroy the business. He even de-registered Smart in his unbridled quest for revenge against his wife's refusal to give him any more money from the profits of Smart. He had absolutely no feelings for this ten-year-old "child" simply because it was never his business offspring.

83 This action was nothing more than a matrimonial dispute passing itself off as an action in passing off. The plaintiff was only the nominal owner of Smart holding the business on trust for the first defendant, undoubtedly the true beneficial owner. It followed that all the claims of the plaintiff must fail while the first defendant's counterclaim should succeed.

84 The other two defendants did not file any affidavit of evidence-in-chief and did not attend the trial. The first defendant ought to have stated, but did not, that she was testifying on their behalf as well. Counsel for the defendants should also have sought the court's permission at the outset for the second and third defendants to be excused from attending the proceedings. In the light of my findings, however, these matters have become academic.

The orders made

85 I made the following orders:

(a) the plaintiff's claim against all three defendants is dismissed;

(b) the court declares that the first defendant is the beneficial owner of Smart;

(c) the plaintiff is to return the $64,944.00 taken by him from Smart's bank account to the first defendant without interest thereon;

(d) the plaintiff is to pay the defendants costs to be taxed or agreed; and

(e) this decision is without prejudice to the issue before the Family Court whether Smart is a matrimonial asset.

86 No interest was ordered on the amount of $64,944.00 as the first defendant decided not to ask for it after the plaintiff's action was dismissed. She also decided to abandon her claim for the costs of setting up Smart Link and for the compensation paid to the students for cancellation of classes caused by the plaintiff's actions on 22 January 2002.

Plaintiff's claim dismissed with costs. First defendant's counterclaim allowed with costs.

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