**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[1994] SGHC 73**

OS13/1991

Between

Ng Yu Chee Pte Ltd

*… Plaintiff*

And

Ng Yew Lay

*… Defendant*

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# GROUNDS OF DECISION

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# Ng Yu Chee Pte Ltd v Ng Yew Lay

**[1994] SGHC 73**

OS13/1991
Warren Khoo L H J
23 March 1994

1 **Judgment:**

2 C A V

3 Judgment

4 By this originating summons, the plaintiff company seeks the return from the defendant of all records and documents of the company, specifically the minute books and account books for the years 1983 to 1986. It also sought an account of monies of the company that have passed through the hands of the defendant, but this has not been pursued.

5 The plaintiff company was incorporated in July 1975 by Ng Yu Chee to take over and continue his business of plumbing contractors, which he had started in 1969. The defendant, who was a cigarettes salesman, helped him by keeping the books of the business and in other ways like collecting money and checking tender prices. He started doing this in 1969 and continued after the incorporation of company. The secretary of the company was Mr Lee Soh Hab of a firm known as Loo & Lee Secretarial & Management Pte Ltd.

6 The original shareholders of the company were Yu Chee and his wife Lai Kwee Lan. Later, shares were allotted to Yu Chee's two brothers, i. e. the defendant and Yew Leong, and two sisters, i.e. Bee Keow and Ah Kiow. The shareholdings were as follows:

7 (a) Ng Yu Chee 50,000 shares (b) Madam Lai Kwee Lan 11,000 shares (c) Madam Ng Ah Kiow 11,000 shares (d) Madam Ng Bee Keow 9,000 shares (e) Ng Yew Lay 10,000 shares (f) Ng Yew Leong 9,000 shares

8 Yu Chee died in May 1982. After Yu Chee's death, the defendant, who was the only one who knew about the business, took over the running of it. He described himself as the managing director. Yew Leong was for a time helping in the business of the company, but appears to have played a minor role. He died in 1985. Bee Keow was also helping in the business, but doing only clerical work. This is what she had been doing all along. Kwee Lan was hardly involved.

9 Troubles started between the defendant and the other shareholders not long after Yu Chee's death. There was first a dispute about 50,000 shares which had been transferred to the defendant shortly before Yu Chee's death. Yu Chee's widow Kwee Lan and her co-executor took exception to this and commenced an action in September 1984 to challenge the validity of the transfer. The case was heard on dates in 1987 and 1988. In September 1989, Chan Sek Keong J gave judgment in favour of the estate and set aside the transfer. Then there were disagreements about the draft accounts which the defendant had prepared for the year 1983. These were submitted, through solicitors, to the other shareholders for approval in September 1985. Numerous queries were raised about items in the draft accounts, including entertainment, loans to directors and vehicles maintenance, some showing substantial increases over the previous year. In the event, the 1983 accounts were not passed until November 1992.

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10 It appears that the main business activity of the company in 1984 was to complete existing contracts. There was no new business. It would also appear that by 1985, the company had ceased trading altogether.

11 Some time in 1985 after Yu Leong's death, Kwee Lan had the lock to the company office changed. According to Kwee Lan, this was to keep Yu Leong's widow from having access to the office. However, the defendant was not given a new key. According to Bee Keow, the defendant continued to go to the office after the lock change, but according to the defendant he was locked out and did not go to the office at all, although he admitted to going there on occasions when he had to sign cheques. He continued to sign cheques, together with Bee Keow, sporadically until about the end of July 1987.

12 The change-over in 1987 In August or September 1987, the sisters Bee Keow and Ah Kiow together with Kwee Lan decided to take over the control of the company. They removed the defendant as a cheque signatory. They appointed a new company secretary Mr Kei Ah Wah, in place of Lee Soh Hab of Loo & Lee. They had to file accounts with the Registry of Companies, but this could not be done, because the account books for 1983 to 1986 were not available. The account for each year could not be written up without the closing balance for the preceding year. So the ladies instructed solicitors to seek to get these books from the defendant. Hence this originating summons.

13 History of the search The search for the account books had started in September 1985 when Kwee Lan and her co- executor questioned the 1983 draft accounts. In response to inquiries, the defendant handed over the books and documents for 1983 to his then solicitors P C Tock & Co. By their letter dated 28 February 1986, P C Tock & Co. informed Kwee Lan's and her co- executor's solicitors that these books and documents, after they were returned from the

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auditors, had been kept at the company's office at Tiong Bahru, but that in any event they were now with P C Tock & Co. and could be inspected by arrangement. This offer was never taken up.

14 On 26 August 1987, Mr Kei wrote to Mr Lee Soh Hab requesting the return of the company's statutory books and records and other documents. It is fair to say that there was no specific mention of account books and accounting documents in this request. On 8 September 1987, Mr Lee replied. He said he had the following documents and asked Mr Kei to arrange to collect them:

15 1) 1 Share Register Book 2) Unissued Share Certificate Book 3) Common Seal 4) Form 49 dated 24/10/1982 5) Annual Return Forms for year ended 31/12/1982 6) Latest filing of Statutory Declaration for 1987 to the Controller of Residential Property.

16 Mr Lee also said in his letter that the minute book had been taken by the defendant. I would add here that the minute book must now be in the plaintiffs' possession, because they produced it in evidence.

17 On 5 October 1987, Mr Kei wrote to the defendant calling his attention as one of the executive directors to the need to comply with the requirements of the Companies Act and the Income Tax Act. On 10 October 1987, the defendant's solicitors P C Tock & Co. replied saying that the defendant would render full co-operation.

18 The defendant subsequently went to Mr Kei's office and offered to hand over some account books and documents for the year 1983. However, Mr Kei refused to accept them because they were not complete.

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19 The search resumed in September 1989. On 18 September 1989, the plaintiffs' solicitors wrote to Messrs Cheong Khee San & Co. the company's auditors, who had audited the 1991 accounts. They were asked whether they had any books of account of the company. The auditors in their reply of 27 September 1989 said that they did not have any books of account of the company.

20 On 14 September 1989, a search of the company's premises was undertaken. Mr Kei in evidence said he was there. The place was full of cobweb. But in his letter of 22 September 1989 to the defendant, he said his assistant Iris Quek was there with Kwee Lan and Bee Keow; he did not say that he was there. This point was not clarified in evidence. In any event his letter of 22 September 1989, written after the search, read :-

21 Their search revealed that there were no books of accounts for the years 1983 and 1984, but for the years 1985 to 1987 the following books of accounts at the office were as follows:-

22 Years BOOKS OF ACCOUNTS

23 1985 1. One purchases book 2. One petty cash book

24 1986 1. One petty cash book 2. One purchase book

25 1987 1. One petty cash book

26 It is obvious from this search the books available for each of the aforesaid years are incomplete.

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27 For your reference the books kept by you for the years 1981 and 1982 are as follows:-

28 Years BOOKS OF ACCOUNTS

29 1981 1. One general ledger 2. One purchase book 3. One cash book 4. One petty cash book 5. One sales book 6. One general journal

30 Years BOOKS OF ACCOUNTS

31 1982 1. Two cash books 2. One bank book 3. Two petty books 4. One purchases book 5. One general ledger 6. One register of employees

32 Therefore, I shall be obliged if you could assist to locate or return the complete set of books for the years 1983 to 1987 within 14 days.

33 The defendant's reply of 17 September 1989 is reproduced verbatim below :

34 I refer to your letter dated 22nd Sept 1989.

35 I do not had the book of account for 1983 & 1984 nor had book for 1981 and 1982.

36 All the books should be in the premise of the Company Office which had been lock up by Mdm Lai.

37 At no time, have I ever take procession of the book of account.

38 On 10 October 1989, in response to an inquiry from the plaintiffs' solicitors, Loo & Lee replied stating categorically that they did not have any

books of accounts of the company for any year, that they had written up books of account of the company for 1983, and that after writing up the books of account for 1983, all account books had been returned to the company for auditing purposes. They also stated that they had no documents other than the company's share certificates book and the common seal.

39 Events after commencement of proceedings On 8 January 1991, the present proceedings were commenced. The defendant entered appearance in person on 26 January 1991. On 4 April 1991, his present solicitors Loo & Partners, filed notice of their appointment. On the same day, they filed an affidavit by the defendant exhibiting, among other things, a letter dated 3 April 1991 from the defendant's solicitors to Loo & Lee purporting to record the fact that they had received some account books and documents from Loo & Lee. On the same day, the defendant's solicitors also informed the plaintiffs' solicitors that the defendant had received these books and documents from Loo & Lee. I shall refer to these books and documents loosely as the 1984 books and documents. They were listed as follows:-

40 1 1 book entitled "Purchasers 1984"; 2 1 book entitled "Petty Cash 1984"; 3 1 file entitled "Chye Yew Lian 1984"; 4 1 file entitled "Boon Tat Walford Chuan Seng 1984"; 5 2 files entitled "Payment by cheque 1984"; 6 1 file entitled "Ng Yu Chee Pte Ltd 1984 Cheque Payment Vouchers UOB INDOSUEZ"; 7 9 cheque stubs numbered 12 to 18 (inclusive), 20 and 21; 8 1 file entitled "Jan, Feb, Mar 1984"; 9 1 file entitled "Apr, May, Jun 1984"; 10 1 file entitled "Jul, Aug, Sept 1984"; 11 1 file entitled "Oct, Nov, Dec 1984"; and 12 1 file entitled "Ng Yu Chee Pte Ltd 1985 Chye Yew Lian Walford S'pore Pte Ltd Chuan Seng"

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41 On 24 December 1992, the defendant filed a further affidavit exhibiting correspondence showing that his former solicitors P C Tock & Co. had in their possession the following books and documents:

42 1 1 Cheque Book counterfoil relating to cheque dated 7.12.82 to 31.12.82;

43 2 11 Cheque Books counterfoil containing cheques dated 4.1.83 to 5.12.83;

44 3 1 book containing copy receipt No. 0601 to 0700;

45 4 1 ordinary file containing cheque payment vouchers for the year 1983;

46 5 1 General Ledger for the year 1983;

47 6 1 Purchases Ledger Book 1983;

48 7 1 Cash Ledger 1983;

49 8 1 Petty Cash Ledger 1983;

50 9 1 ordinary file containing payment by cheque Invoice (UOB-1983);

51 10 4 ordinary files containing miscellaneous Invoices 1983.

52 I shall refer to them loosely as the 1983 books and documents. I presume that these are the books and documents which P C Tock & Co. had offered for inspection back in February 1986.

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53 The mystery of Loo & Lee and the 1984 documents How the 1984 books and documents came to be with Loo and Lee has not been satisfactorily explained. The defendant says in his affidavit filed on 24 April 1992 that after the other shareholders and directors failed to respond to the letter of P C Tock & Co. of 28 February 1986 inviting them to inspect, he asked his son to collect the books and documents from P C Tock & Co. He says that his son must have collected them and handed them to Loo & Lee. This explains, according to him, why Loo & Lee had the 1984 books and documents. The son was not called to give evidence.

54 It is to be noted, firstly, that the documents referred to in P C Tock & Co.'s letter of 28 February 1986 were documents required for the verification of the 1983 draft accounts. Presumably only books and documents for the year 1983 would have been handed over to them at that time. There would have been no point in giving them the books and documents for 1984. In any case, the defendant does not say that the 1984 documents had been handed over to P C Tock & Co. In evidence in court, the defendant said that what he meant to refer to in his affidavit were in fact the 1983 books and documents and that what he had said in his affidavit about the 1984 books and documents being taken from P C Tock & Co. and handed to Loo & Lee was a mistake.

55 Secondly, as stated above, in response to Mr Kei's request, Loo & Lee in their letter of Sept 1987 gave him a list of documents in their possession. Although they were not specifically asked about account books and accounting documents, one would expect that if they had such books and documents then, they would have said so. One would also expect that if they subsequently came by these books and documents, they would also have told Mr Kei straightaway. Indeed, in their further letter of 10 October 1989, they had clearly stated that they did not have anything apart from the share certificates book and the

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common seal. It is really strange that after all this, they are now said to have the 1984 books and documents.

56 Thirdly, we do not know when and how Loo & Lee came to have these documents. The defendant does not help. No one from the firm was called to give evidence. Neither is there any letter from them exhibited to any of the defendant's affidavits. All that there is is a letter from the defendant's present solicitors purportedly addressed to Loo & Lee and purporting to say that the defendant had collected the 1984 books and documents from Loo & Lee.

57 So the whereabouts of the 1984 books during all this time when the plaintiffs and the new company secretary had been looking for them remain a mystery. In the absence of a coherent account from the defendant, the impression is irresistible that the defendant himself has had the 1984 books and documents all along.

58 Back to the issue Now back to the issue at hand. The defendant's stand is that he has accounted for the 1983 and 1984 books and documents. He is adamant that he does not himself have any books and documents of the company. The plaintiffs on the other hand say, in gist, that the defendant was in full charge of the company, he should have all the documents or should know where they all are, and they say he has them and know where they are. They ask in their originating summons that the defendant return:

59 "...all records and documents specifically the minute books and account books for the years 1983 to 1986 (both years inclusive) together with all cash books, cheque butts, pay-in slips and bank statements within 14 days from the date of the order."

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60 I have said that plaintiffs already have the minute book, which they produced in evidence. There is no suggestion that there is any other. As for the rest, the defendant's evidence, making allowance for any lack of precision due to interpretation, is that when Yu Chee was alive, he wrote up all the books. Thus the books for 1981 and 1982 which Mr Kei found on the company premises during his search were all done by him. But after Yu Chee's death, he was not sure whether the other shareholders would trust him. So he would leave it to Loo & Lee to write the books, so that if there was anything wrong they could answer for it. What he did was to give them files of the source documents like vouchers and leave it to them to write up the books, e g the general ledger. This was the position in regard to the 1983 accounts. It is his position that the documents for the 1983 accounts were complete as otherwise Loo & Lee would not have been able to prepare the draft 1983 accounts.

61 As for the 1984 accounts, his evidence is a little hazy. He did not say much about it in his affidavits. He said in court that he gave the documents to Loo & Lee for them to write up the books. He did not explain when the documents were given to them, or why Loo & Lee did not write up the books. It is to be noted that Loo & Lee continued to provide services until these were terminated when the ladies took control in September 1987. As can be seen from the list of the 1984 books and documents, there are only two books, i e purchases and petty cash, and the rest were files of documents. The two books could well have been written in-house by Bee Keow, as the defendant said in evidence in court that she did the cash book and one dealing with wages. The defendant did not explain why Loo & Lee did not write up the 1984 books as they were supposed to do. The omission to explain this on the defendant's part, reinforces the impression that in all probability the defendant had these books and documents all the time.

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62 As for 1985, it is clear that no trading activity of any kind took place. The defendant says that there were only a few accounting documents. I see from the list of the 1984 books and documents, that there is a file title with a reference to 1985. The defendant was not asked about the documents in this file. He was not asked whether the documents were the 1985 accounting documents he was referring to.

63 After 1985, no one suggests there is any account to speak of.

64 Conclusion I proceed on the basis that the ultimate burden of proof of the case lies with the plaintiff. In the circumstances of this case, because there is evidence that the defendant was managing the company and was responsible for its accounts, the evidential burden shifts to him to account for the books and documents. Despite the less than straightforward manner in which he has tried to explain the movements and whereabouts of the 1984 books and accounts, he has, at long last, shown in fairly detailed lists what books and documents are available for 1983 and 1984. He has also given some explanation about 1985. It seems to me that if there are more documents which the plaintiffs consider that he might have, then it is for them to define with some precision what they are, and for them to show that there are reasons to believe that the defendant has them. I am afraid the plaintiffs have not done so.

65 It seems to me that the plaintiffs and their advisers have underestimated the burden on themselves of proving their case. On the state of the evidence, it is simply not possible for the court to make an order, especially in the general and all- sweeping terms of the plaintiffs' summons. Neither is it possible on the evidence at hand to order the defendant to account for any specific documents or classes of documents. An order of the nature asked for by the plaintiffs is enforceable by committal, and the court should not make such an order unless

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it is justified by cogent evidence. Take, an example, the 1984 account books, apart from the purchases and petty cash books already disclosed, the fact of the matter is that there is no evidence that they have been written up, let alone that the defendant has them. It would be futile and quite wrong for the court to order that the defendant return them; there is no evidence to think that he would be in a position to comply. These comments apply to everything else claimed by the plaintiffs.

66 It seems to me that the only conclusion one can comfortably come to is that the case has not been proved, and that the summons should be dismissed. I do so.

67 On costs, I think that the defendant should have been much more co-operative with the plaintiffs in their search for the books and documents. He was not helpful at all. No doubt the troubles with the other shareholders had a lot to do with it. It was not until the originating summons was taken out that he took the matter seriously, and disclosed the whereabouts of the 1984 books and documents, and then much later the 1983 books and documents. Even then he said nothing about books and documents for 1985. Had the defendant been more co-operative, these proceedings might not have been necessary. In the circumstances, it is right that he should not get any costs of these proceedings at all, and I do not award any.

Warren Khoo L H J

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G Murugaiyan for the plaintiffs
Tan Siew Hoon for the defendant

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