

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 134

Suit 2457/1991

Between

Eng Kheng (Singapore) Pte
Ltd

... Plaintiff

And

Kenneth Kwan & Co (sued as
a firm)

... Defendant

GROUND OF DECISION

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

**Eng Kheng (Singapore) Pte Ltd v Kenneth Kwan & Co (sued
as a firm)**

[1998] SGHC 134

Suit 2457/1991
Christopher Lau JC
23 April 1998

1

Judgment:

2 **GROUND OF DECISION**

3 Summons for Direction No. 9427 of 1997 (except for certain items of documents which the plaintiffs were to comply with) for further hearing in the interim

before the Assistant Registrar. These are my reasons.

4 2. The plaintiffs are a company incorporated in Singapore and carry on business as commission agents for companies holding timber concessions in the South East

perpetrated a scheme to misappropriate the plaintiffs' monies by way of cheques,

drawn by KK Tan and signed by the plaintiffs' directors. These cheques fell into the

following categories, namely :

(a) cheques which were drawn payable to companies or firms in which KK

Tan had an interest but which had no business dealings with the plaintiffs : Schedule 1 of

the Amended Statement of Claim.(b) cheques which were drawn payable to stockbroking firms in payment

of the share tradings carried out for KK Tan and/or his wife. These share transactions

were strictly that of KK Tan and/ or his wife and were not connected to any of the

plaintiffs' business : Schedule II of the Amended Statement of Claim.(c) cash cheques which were not authorised by the plaintiffs. The

monies under these cash cheques were withdrawn pursuant to an elaborate Scheme to conceal

the withdrawals. This scheme included the manipulation of the plaintiffs' accounts

and books such as the failure to record monies/remittances which were made to the

plaintiffs by their customers. This was to enable the withdrawal of monies paid pursuant

to these cheques to be also unrecorded.

8 6. As a result, the plaintiffs instituted legal proceedings by way of Suit No. 2347 of 1990 ("the Related Action") against, inter alia, KK Tan to recover the monies which had been misappropriated from the plaintiffs in the aforesaid

manner, on the basis of breach of duty, fraud and as a constructive trustee.

9 7. Further in the Related Action, the plaintiffs had claimed against the companies and partners of the firms for specific sums of monies paid to them out of

the plaintiffs' account. This claim was on the basis of monies had and received as

payment made without any consideration. Alternatively the plaintiffs' claim was based

on a tracing action.

10 8. The defendants were the plaintiffs' auditors during the period of KK Tan's misappropriation of the plaintiffs' funds. The plaintiffs' claim in this action against the defendants is for the sum of S\$786,085.50 or

alternatively for damages in respect of the defendants' alleged negligence or breach

of duty in acting as the plaintiffs' auditors. The plaintiffs also sought a

declaration that they are entitled to recover from the defendants any awards/sums which

the plaintiffs may be awarded in the Related Action but which remain unsatisfied by KK Tan

in the Related Action.

11 9. The chronology of events in respect of this proceeding and in the discovery of documents was :

12 The Applicable Law

13 10. It is settled law that even if there is non-compliance with an Unless Order (which the plaintiffs disputed), the Court nevertheless retains the power to

extend the time within which such act should be complied with.

14 11. The issue was whether the failure if any, on the part of the

Eng Kheng (Singapore) Pte Ltd v Kenneth Kwan & Co (sued as a firm) [1998] SGHC 134

plaintiffs, was intentional and contumelious. If a party is able to demonstrate that there

was no intention to ignore or flout the order and that the failure to obey was due to

extraneous circumstances, such failure would not be treated as contumelious and did not

disentitle the litigant to rights which he would otherwise have enjoyed : see *White*

Book paragraph 3/5/5 at page 19; Samuels v Linzi Dresses Ltd [1980] 1 AER 803; *Re Jokai*

Tea Holdings Ltd (Note) [1992] 1 WLR 1196.

15 12. But a party is held to be in contumelious default if he is deliberately suppressing documents. See *Manilal & Sons (Pte) Ltd v Bhupendra KJ*

Shan (t/a JB International) [1990] 2 MLJ 282.

16 13. Order 24 Rule 10 which governed the basis on which the Unless Order

was made in respect of the Notice to Produce, is intended to give the opposite

party the

same advantage as if the documents referred to therein had been fully set out in the

pleadings : see *Discovery by P. Matthews and H.M. Malek* paragraph 7.03 at page 145.

17 The Striking Out Order

18 14. The Order had been made pursuant to the Third Application of the

defendants (by way of Summons for Further Directions No. 148 of 1998) on the basis that

the plaintiffs had not complied with the Unless Order of 19.12.97. I set out below the

documents which the defendants alleged the plaintiffs had not given discovery of in breach

of the ‘Unless Order’ and the plaintiffs’ response.

14.1. Item 3 of the Notice dated 17.11.97

14.1.1 In paragraph 11.4.3.1 of the Amended Statement of Claim, it was

pleaded that "The authorised withdrawal of items 1 in

Schedule III of the Amended

Statement of Claim was concealed by KK Tan in the following manner :

"KK Tan delayed the recording of the withdrawal in the Cash Book

and Bank Payment/Journal Book It being a fictitious entry, there was no deposit

reflected in the Bank of America's statements....."

The defendants had requested discovery of the page or entry in the Cash

Book and Bank Payment Journal Book indicating that there was a transfer of funds from the

plaintiffs' account in Banque National de Paris ("BNP") to the

plaintiffs' Bank of America ("BOA") account.

14.1.2 The plaintiffs however said they had previously already

furnished discovery of the Cash Book and Bank Payment Journal Books in their List of

Documents filed in March 1997 and inspection of all such books/records had been given to

the defendants. It was the plaintiffs' case that the aforesaid pleading in paragraph

11.4.3.1 of the Statement of Claim was incorrect and that this was only discovered during

the time the plaintiffs were preparing their documents to comply with the Unless Order.

The allegation in the Related Action was that the cheque was cashed by the plaintiffs' office boy. The withdrawal from the cheque was concealed as the total amount of this cheque (\$4,853.91), together with the unauthorised cheque withdrawn in favour of Kay Hian & Co (Pte) in item 1 of Schedule II (\$43,300.20) corresponded to an unrecorded receipt in the amount of \$48,154.11 on 30.11.81. These withdrawals were also not recorded. So the plaintiffs said, the pleading was incorrect and they alleged it could not be a basis for the defendants' allegation that the plaintiffs were suppressing documents or otherwise tailoring their claim to avoid giving discovery of particular documents. In paragraph 7 of the affidavit of Chan Xiao Li filed on 15 January 1998, the plaintiffs had stated that they would amend this part of the pleading.

14.2. Item 6 of the Notice dated 17.11.97

14.2.1 This item was in reference to paragraph 14.13 of the Amended

Statement of Claim, with regard to the defendants' request for production of BOA cheque No. 370165 for the sum of \$30,000.00.

14.2.2 The plaintiffs said this cheque is and was not at any time in

the physical possession of the plaintiffs, and had not been sighted by the plaintiffs or

their special auditors. It merely existed as a record in the plaintiffs' Cash Book,

Bank Payment Book and Bank Reconciliation Statement. It only was a book entry. In the

premises the plaintiffs said it was not possible for them to produce this for inspection.

This was confirmed in the Notice Where Documents May Be Inspected as well as the affidavit

of Chan Xiao Li filed on 2 January 1998 and also in paragraphs 8 to 10 of the further

affidavit of Chan Xiao Li filed on 15 January 1998.

14.2.3 Furthermore the said cheque was not specifically referred to in

the pleadings.

14.3. Item 9 of the Notice dated 17.11.97

14.3.1 This request again referred to a cheque, namely BOA cheque

376556, which was referred to in the Further and Better Particulars of the plaintiffs in

respect of their Statement of Claim (see "Particulars of Unrecorded Cheques..").

14.3.2 The said cheque the plaintiffs say was however never presented

and appeared only as an entry in the plaintiffs' books. The
cheque the plaintiffs

alleged was never in their possession and it was referred to
in their explanation of the

manner in which the withdrawal under BOA cheque No.
376558 for the sum of \$50,000.00 (as

referred to in No. 9 of Schedule IV) was concealed. This was
stated in the Notice Where

Documents May Be Inspected and confirmed in the affidavit
of Chan Xiao Li filed on 2

January 1998 and again in the affidavit of Chan Xiao Li
filed on 15 January 1998.

14.3.3 In the plaintiffs' Bank Payment Book, an entry was
made to

show that a transfer was made in respect of a sum of
\$172,951.38 from the plaintiffs'

BOA account to the Cash on Hand account. However the
entry in the Bank Payment Book showed

the said BOA cheque No. 376556 but with two amounts of
\$50,000.00 and \$122,951.38

respectively making a total sum of \$172,951.38. However
the said cheque No. 376556 was

never presented and did not appear in the BOA bank
statements. The said cheque was

reflected as an outstanding unpresented cheque in the
Bank Reconciliation Statements,

although the amount under BOA cheque No. 376556 was
then reduced to \$122,951.38 in the

Bank Reconciliation Statements for 31.03.84 and 30.09.84.
Another cheque, namely BOA

cheque No. 376558, was then issued to withdraw a sum of
\$50,000.00. This withdrawal was

not recorded in the 1984 Bank Payment/ Journal Book.

14.4. Bank Payment Vouchers

14.4.1 In the Unless Order, the plaintiffs were to offer for discovery,

the Bank Payment Vouchers for 1980, 1981 and 1982.

14.4.2 The plaintiffs alleged they had only been able to locate the

Bank Payment Vouchers for 1980. In the affidavit of Chan Xiao Li filed on 02.01.98, it was

deposed that although the Bank payment Vouchers for 1981 and 1982 were previously in the

plaintiffs' possession, they had been misplaced when the plaintiffs moved their

office in November 1992 and again in October 1996. The plaintiffs alleged they were unable

to locate these documents despite their enquiries with their special auditors and the CID

(who had conduct of the criminal proceedings).

14.5. Invoices and Payment Vouchers in Respect of Cheques in

Schedule V or Schedule IV of the Amended Statement of Claim

14.5.1 The cheques referred in Schedule V of the Amended Statement of

Claim were cash cheques.

14.5.2 The plaintiffs alleged that the cash cheques under this Schedule were not recorded in the plaintiffs' cash books or supported by vouchers. In the scheme perpetrated by KK Tan, there were no invoices and payment vouchers accompanying these cheques. The withdrawals under these cheques were made from unrecorded receipts of monies. This was referred to in the affidavit of Chao Xiao Li filed on 2 January 1998.

14.6. Invoices and Payment Vouchers for 1980 to 1984 for presentment

to plaintiffs' directors
Similarly it was the plaintiffs' case that no such documents accompanied the plaintiffs' cheques when the cheques were presented to the directors for signing. It was the case of the plaintiffs that the cheques would be handed to the plaintiffs in large batches and arranged in an overlapping manner without supporting documents. The plaintiffs' directors would then sign on the designated space. This was referred to in the affidavit of Chan Xiao Li filed on 2 January 1998 and 15 January 1998.

19 15. I did not think, in these circumstances, that it could clearly be said the plaintiffs had intentionally and contumeliously been in default of the

Unless

Order. It would have been unfair, oppressive and impossible to expect the
plaintiffs to

offer for discovery documents referred to in a pleading which the plaintiffs
alleged was

incorrect and would be amended. It would also have been impossible for the
plaintiffs to

have produced cheques recorded in the plaintiffs' documents such as Cash
Book, Bank

Payment/Journal Book and Bank Reconciliation Statements, the Bank Payment
Vouchers, the

Invoices and Payment Vouchers when the plaintiffs have alleged by way of
affidavit that

such documents had either not been sighted by the plaintiffs or were no longer
in the

plaintiffs' possession, custody or control. Such affidavit in such circumstances
is

conclusive as to its contents : See *P. Matthews and H.M. Malek on Discovery*
at

Eng Kheng (Singapore) Pte Ltd v Kenneth Kwan & Co (sued as a firm) [1998] SGHC 134

paragraph 5.31; Lonrho plc v Fayed and Others (No. 3) 1993 The Times Law Reports page 347.

20 16. It was in these circumstances that I allowed the appeal.

21 Dated the 23rd day of April 1998.

Christopher Lau JC

Johnny Cheo for the appellants/plaintiffs
Thio Ying Ying and Chris Wong for the respondents/defendants
