Lim Eng Beng alias Lim Jia Le v Siow Soon Kim and Others
[2003] SGHC 146

Case Number : Suit 140/2002

Decision Date : 09 July 2003

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : A Rajandran (A Rajandran Joseph & Nayar) for the plaintiff; Harbajan Singh (Daisy Yeo & Co) for the defendants; Ronald Lee (Daisy Yeo & Co) for the defendants

Parties : Lim Eng Beng alias Lim Jia Le — Siow Soon Kim; Chua Beng Guek; Siow Soon Geok; Siow Soon Lye; Kim Meng Supplier; S S Kim Enterprises Pte Ltd; ASD Trading Pte Ltd

1 The plaintiff, Lim Eng Beng (also known as Lim Jia Le) and the first defendant, Siow Soon Kim registered a partnership firm known as Kim Meng Supplier (the fifth defendant), in Singapore on 25 April 1985. The firm was engaged in the business of supplying various types of frozen food and provisions to restaurants and enterprises. More than 16 years later, following a fracture in the relationship, mainly between the plaintiff and the first defendant, the plaintiff left the partnership on or about 18 July 2001. The present action against the first defendant as well as the other six defendants was for damages as well as for accounts and inquiries in respect of monies allegedly due and owing to him from the undistributed assets and profits of the said partnership. The plaintiff's claim was that at the time he left the partnership, there were only three partners, namely himself, the first defendant and the third defendant. Consequently he was entitled to one-third of whatever sums which were being held presently by the defendants from the partnership assets. The defendants by a joint defence filed on behalf of all of them denied that the plaintiff was entitled to any relief at all.

2 The plaintiff testified on his behalf and called three others to support his claim, including a Chartered Accountant who is presently a member of the academic staff of the accounting and finance department of the National University of Singapore's Business School, to comment on the accounts of the partnership from documents seized from the defendants' premises. The expert's testimony was that the records of the partnership revealed an understatement of sales in the region of S$7.8 million. Surprisingly, however, when it was the defendants' turn to open their case after the plaintiff and his witnesses had completed their evidence, counsel for defendants, after conferring with his clients, informed the court that his clients had elected not to give evidence on their behalf and that he would, instead, be making a submission of 'no case'. He also informed the court that his clients were fully apprised of the consequences of such an election. He then proceeded to make a submission of 'no case' which was followed by a closing address by the plaintiff's counsel.

3 Having considered the closing submissions by counsel and after reviewing the evidence tendered by and on behalf of the plaintiff, I was inevitably driven to the conclusion that the submission of no case by the defence was not only premature and ill-founded but also lacked substance. In my determination, the averments of the plaintiff's witnesses as well as the opinion evidence proffered on behalf of the plaintiff remained unrebutted and uncontroverted. The propositions that were put forward and suggested to the plaintiff and his witnesses by the defendants' counsel during the cross-examination (including a much-vaunted flow chart, prepared and submitted by counsel for the defendants, stating that the said chart showed the disposition and movement of all the monies from the sales and receivables of the firm up to the time the plaintiff withdrew from the firm), remained wholly unproven. In the end, interlocutory judgment was entered in favour of the plaintiff with damages to be assessed. The other orders that followed, including one for accounts and inquiries, will be spelt out later in this grounds.

Parties to the proceedings and their role

4 Before recapitulating the facts that gave rise to the dispute at hand, it would be helpful to give a brief outline of the personalities and entities who featured in this case and the roles played by them, as could be gathered from the pleadings and the evidence adduced by and on behalf of the plaintiff in this trial.

5 The plaintiff and the first defendant formed and registered the fifth defendants, Kim Eng Supplier, on 25 April 1985. The plaintiff and the first defendant were the firm's original partners. According to the plaintiff, the first defendant, in addition to assuming managerial responsibilities, handled the purchasing and inventories of the firm. In the event, the maintenance and upkeep of the firm's accounts, bank transactions and all relevant documentation came under the charge of the first defendant. As for the plaintiff, though he was, in the main, concerned with the delivery of goods, he assisted from time to time in the purchasing of stocks. He said that he trusted the first defendant implicitly.

6 The second defendant was described by the plaintiff as a close associate of the first defendant. She was originally brought into the firm by the first defendant as a part-time accounts clerk, to handle the accounts and business aspects of the firm sometime in 1991 or 1992. Subsequently, she joined the firm on a full time basis and took charge of the firm's accounts and administration. In effect, she was the firm's unofficial manager. For her efforts, she was paid a monthly salary of $3,000 which was on par with the salaries drawn by the first defendant and the plaintiff. According to the plaintiff, the second defendant became the partner of the firm only on 18 July 2001, upon the withdrawal of the plaintiff from the partnership.

7 The third defendant is the brother of the first defendant and became a partner of the firm on or about the 1st of September 1991. He held equal shares in the firm, although he was not involved with the business and operations of the firm.

8 The fourth defendant is another brother of the first and third defendants. Sometime in 1991, the fourth defendant came to be employed by the firm at the instance of the first defendant. He was required to manage the cold room of the firm.

9 The fifth defendant, as stated earlier, is the partnership firm which is in the eye of the storm.

10 The sixth defendant is a private limited company incorporated in Singapore on 7 September 2001, after the withdrawal of the plaintiff from the firm. The registered office of the sixth defendant is located at No 26, Wholesale Centre #01-214 Pasir Panjang, Singapore, the place where the firm had been operating its business. According to the plaintiff, the sixth defendant was incorporated for the purpose of taking over the business of the firm. The promoters and the initial directors of the sixth defendant were the first, second, third and the fourth defendants. The authorised and paid-up capital of the sixth defendant was one million Singapore dollars.

11 The seventh defendant is a private limited company incorporated in Singapore on 5 November 1997 with only a nominal share capital. The said company's first directors were the fourth defendant and one Mr Wong Kok Wah. The business of the seventh defendant was the same as that of the firm. According to the plaintiff the seventh defendant was intended to be a wholly- owned subsidiary of the fifth defendant as was proposed and declared by the first defendant but the first defendant failed to honour that promise. Whilst the first defendant arranged to make himself a director of the seventh defendant as of 21 June 2001, he did not, contrary to the said promise, make the plaintiff a director or a shareholder of the seventh defendant.

Pleadings: statement of claim

12 The plaintiff's claim against the defendants, jointly and severally, was for monies due to him in respect of his share in the firm upon his withdrawal. The plaintiff maintained that prior to his withdrawal from the partnership, there were only three partners, namely, himself, the first defendant and the third defendant. The plaintiff averred (para 4 of the statement claim) that the first and third defendants owed him a duty to act bona fide in relation to the affairs and accounts of the firm but they acted in derogation of their obligations. In para 5 of the statement of claim, the plaintiff particularised the defendants' breaches and obligations. Insofar as is material, para 3.15, 5.1 to 5.8, 5.10, 5.13, 5.18 and 5.20 of the statement of claim bear reproduction and they read as follows:

> 3.15 The Plaintiff will aver that the 1st, 2nd and 3rd Defendants have colluded and conspired in the business, operations and affairs of the firm, to the detriment of the Plaintiff, causing the Plaintiff to withdraw from the firm.
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> …
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> 5. Breaches Of Duties And Obligations
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> 5.1 In summary, the Plaintiff will aver that the Defendants and any of them, jointly or otherwise, are in breach of their obligations in that:
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> a. They have failed to account to the Plaintiff his share in the assets of the firm upon his withdrawal;
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> b. They have sought to reduce the value of his share by failing to give a true and accurate account of the business and assets of the firm;
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> c. They have sought to assert that loans totaling S$1,307,050.48 have been made to the firm by the 1st Defendant and others, when that in fact is untrue;
>
> d. They have sought to assert that the Plaintiff has no share in the monies which have been set aside from the business of the firm and deposited in the account in the names of the 1st and the 2nd Defendants, and part of which monies have been remitted back to the firm for the purpose of the business of the firm, and which have been reflected as "loans" in the accounts;
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> e. They have reneged an agreement that the Plaintiff shall have an equal share in the said monies which have been set aside; and
>
> f. They have sought to dissipate and/or transfer the said monies, and the assets of the firm, for the benefit of the 6th Defendants, without accounting to the Plaintiff.
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> 5.2 In respect of the duties and obligations owing by the 1st Defendant to the Plaintiff, the Plaintiff will aver that the 1st Defendant, with the consent, connivance, collusion and/or acquiescence of the other Defendants, has breached the same by misrepresenting the accounting and book entries so as to give the appearance that the said firm is not profitable, and hence to limit and/or prejudice the just distribution of the assets and properties of the firm in respect of the Plaintiffs's share in the firm upon his withdrawal, and eventual dissolution of the firm.
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> 5.3 Specifically, the Plaintiff will aver that the 1st Defendant, colluding and conspiring with the 2nd

and 3rd Defendant, have diverted monies and receivables owing to the firm generated from the business and operations of the firm, and has misappropriated the said monies, the particulars of which the Plaintiff is unable to give now until discovery and the administration of interrogatories on the Defendants.

5.4 The Plaintiff will aver that in respect of such monies misappropriated by the 1st Defendant, and the Defendants abovementioned, the 1st Defendant has rendered a "purported" account seeking to assert that these monies are "loans" from the 1st Defendant and others, to the extent of $1,307,050.48, thereby rendering the accounts of the firm to appear non-profitable. The said accounts referred to above has been certified correct by the 1st and 3rd Defendants.

5.5 To-date, the Plaintiff has requested for inspection of all relevant documents pertaining to the accounts but the same have not been furnished by the Defendants, especially as regards supporting documents pertaining to this alleged "loans". Prior to the Plaintiff's withdrawal from the firm, the 1st Defendant had categorically made it clear to the Plaintiff that the Plaintiff has no interest in the said monies, or in the bank account(s) which has/have been opened for the purpose of receiving the funds of the 5th Defendants, as described below.

5.6 As regards these alleged "loans", the Plaintiff will aver that sometime in 1993, the 1st Defendant suggested the funds of the firm be set aside periodically, in a separate bank account, as savings and to be drawn out as and when necessary, and to remain as the partners' eventual profits. Further, it was represented by the 1st Defendant to the Plaintiff that the said funds could be utilized for the purpose of effecting cash sale transactions which could result in savings for the firm. The Plaintiff agreed to this arrangement, and accordingly, monies from the business of the firm were set aside. In respect of the manner in which the same was done, apart from averring to the fact that they were handled entirely by the 1st and 2nd Defendants, the Plaintiff is unable at this juncture to provide full particulars until after discovery and/or the adminnistration of interrogatories.

5.7 The Plaintiff will further aver that it was some time subsequently when the Plaintiff was told by the 1st Defendant that this separate bank account which had been opened, had been opened in the names of the 1st and 2nd Defendants, at the Standard Chartered Bank. As represented by the 1st Defendant, the reason for the Plaintiff's name not being included in the said account was purportedly for the sake of convenience for the 1st Defendant represented that as the Plaintiff would not be at the office for most of the time, it would be convenient that the account be opened in the names of the 1st and 2nd Defendants.

5.8 The Plaintiff will aver that the said funds purportedly represented as "loans" in the accounts, from the 1st Defendant and others to the firm is derived from the said savings which has been set aside from the business of the firm.

…

5.10 Further and in addition to the above, the Plaintiff will also aver that the accounts as prepared and presented do not accurately reflect the business transactions of the firm and for this purpose, a full and complete scrutinisation of the accounts and other relevant documents is necessary. The Plaintiff will aver that the 1st, 2nd and 3rd Defendants have conspired to exaggerate the expenses of the business of the firm as well as other matters so as to reduce the profitability of the said firm, to the

detriment of the Plaintiff. The Plaintiff is not aware and/or is unable to give particulars as to the whereabouts of the said monies and/or profits of the firm until discovery and the administration of interrogatories, save to add that at all material times, the accounts, collections, banking transactions, documentations, …

…

5.13 The Plaintiff will aver that subsequent to the incorporation of the 6th Defendants by the 1st, 2nd, 3rd and 4th Defendants, the paid-up capital of the 6th Defendants was increased from the nominal sum of $4.00 to $1 million, with each of the said Defendants referred to above purportedly contributing $250,000.00 towards the paid-up capital. The Plaintiff will aver that the Defendants, namely, the 1st, 2nd, 3rd and 4th Defendants, as known to him personally, could never have raised the said amount and/or have the ability to raise the said amount, but for the assets and monies of the 5th Defendants which they have now sought to dissipate by the transfer of the same to themselves and/or to the 6th Defendants.

…

5.18 In the premises, the Defendants and each of them are liable to account to the Plaintiff for all such monies, and/or the Plaintiff is entitled to trace all such monies into the hands of the Defendants or elsewhere.

…

5.20 Further, by reasons of the matters pleaded above, the Plaintiff is entitled at common law or in equity to trace and recover from the 1st, 2nd and 3rd Defendants, and the other Defendants insofar as they remain in possession of such monies or assets, all monies misappropriated from the business as set out above, or assets acquired directly or indirectly with such monies.

…

Defence

13 The defence which was amended and later re-amended was, in essence, one of denial. At the commencement of the hearing, counsel for the defendants submitted to the court his opening address where he attempted to sketch out the defence case. Although, in the end, the defendants elected not to offer any evidence after the plaintiff had closed his case, the said opening address threw some light on the purported or putative defence of the defendants to the plaintiff's assertions. In it, counsel for the defendants outlined that the defendants would adduce evidence at the trial to establish that there was no collusion or conspiracy amongst the defendants to force the plaintiff out of the firm; the plaintiff withdrew from the firm on his own accord; besides the plaintiff, first and third defendants, the second and fourth defendants were also the de facto partners of the firm since 1994; and upon the plaintiff's withdrawal, the accounting firm of MGI Chan-Ma & Co prepared a set of accounts which computed and determined the monies due to the plaintiff in respect of his share in the partnership but the defendant disagreed and hence the present proceedings. Whilst suggesting that the plaintiff had no valid claim against the defendants and that the defendants would robustly rebut the allegations of the plaintiff, counsel for the defendants purported to summarise what he perceived to be the plaintiff's allegations and framed altogether five issues for the court to determine. Insofar as is material, paras 3 to 5 of the proposed opening address read as follows.

3. Allegations

3.1 The Plaintiff's statement of claim filed on the 7 February 2002 does not state a summary of the material facts upon which the claim is founded.

3.2 The Plaintiff's case against the Defendants is based on a list of allegations which claim the Defendants are in breach of their duties and obligations jointly or otherwise as follows:-

(i) The 1st, 2nd and 3rd Defendants colluded and conspired in the business, operations and affairs of the partnership causing the Plaintiff's withdrawal from the partnership (paragraph 3.15).

(ii) The 1st, 2nd and 3rd Defendants colluded and conspired in diverting and misappropriating monies from the sales and receivables of the partnership's business (paragraph 5.3).

(iii) Part of monies diverted and misappropriated by the Defendants, the sum of $1,307,050.48, is reflected in the MGI Chan-Ma & Co's accounts as a loan owing by the partnership to a Standard Chartered bank account in the name of the 1st Defendant (paragraph 5.1c & d, 5.4 to 5.9).

(iv) The Defendants failed to give to the Plaintiff a true and accurate account of the business and assets of the partnership (paragraph 5.1b, 5.10 and 5.16) in order to:-

* reduce the value of his share.

* reduce the profitability of the partnership.

* transfer assets of the partnership to the 6th Defendants.

(v) The Defendants dissipate and sought to/or transfer the said sum of S$1,307,050.00 and the assets of the partnership for the benefit of the 6th Defendant without accounting to the Plaintiff

4. Pleadings : Lack of particulars

4.1 The Plaintiff states in his statement of claim filed on 7 February 2002 that he was unable to provide particulars or details in respect of his allegations until after discovery and/or the administration of interrogatories.

4.2 The Plaintiff is yet to provide any particulars of his allegations which causes difficulty to the Defendants in knowing the case they have to meet.

5. Issues

5.1 Based on the four allegations above made against the Defendants, the issues before the Court are as follows:-

(i) Allegation 1

Whether there is any or sufficient evidence adduced by the Plaintiff to discharge the burden of proving collusion and conspiracy by the Defendants in the business, operations and affairs of

partnership to cause his withdrawal from the partnership.

(ii) Allegation 2

Whether there is any or sufficient evidence adduced by the Plaintiff to discharge the burden of proving collusion and conspiracy by the Defendants to divert and misappropriate monies from the sales and receivables of the partnership.

(iii) Allegation 3

* Whether the Defendants provide any or sufficient evidence to explain the sum of S$1,307,050.48 (reflected as a loan in MGI Chan-Ma & Co accounts) are monies diverted but not misappropriated from the partnership.

* In this respect, the Court has to determine the question on how the sum of $1,307,050.48 was made as a loan to the partnership pursuant to an agreement and arrangement made between the Plaintiff and the 1st Defendant in 1992 to set aside and divert monies from cash sales and receivables into a separate bank account from the bank account operated and used by the partnership.

* *There are two versions :*

(i) The Plaintiff claims that monies diverted pursuant to the agreement were deposited directly into the separate bank accounts of the 1st and 2nd Defendants (maintained with the Standard Chartered Bank) and subsequently remitted to the partnership as loans.

(ii) The Defendants maintain that monies diverted were distributed to all the partners (including the de facto partners) of the partnership. From the distributed monies, the 1st, 3rd and 4th Defendants deposited their shares in a separate bank account in the name of the 1st Defendant with the Standard Chartered Bank. From this account, which also received monies from other sources, loans were made or advanced to the partnership. [Highlight added]

* The Court shall determine the Defendants' defence that:-

(i) The Plaintiff did not provide any monies into the separate bank account from the monies set aside and paid to him pursuant to the said agreement and arrangement;

(ii) Accordingly, he has no share in the sum of S$1,307,050.48 as reflected as a loan owing by the partnership to the separate bank account in the MGI Chan-Ma & Co's accounts.

(iii) The sum of S$1,307,050.48 belongs to the Defendants who advance the monies to the separate bank account.

(iv) Allegation (iv)

Whether there is any or sufficient evidence adduced by the Plaintiff to discharge the burden of proving that the Defendants fail to give a true and accurate of the business and assets of the partnership to deny him his fair and true share of monies due to him upon withdrawal.

(v) Allegation (v)

Whether there is any or sufficient evidence to show that the Defendants transfer monies and assets of the partnership to the 6th Defendant.

Plaintiff's evidence

14 The evidence of the plaintiff is recapitulated in the following paragraphs, using substantially his own words and expression.

15 He came to know the first defendant sometime in the year 1984 while he was employed as a driver in a company dealing with frozen food. The first defendant was then working for another company also dealing with frozen food. In the following year, he and the first defendant decided to set up their own food supply business together.

16 The partnership business was registered and his eldest sister's private residential address was used as the address of the registered office of the partnership at 14A West Coast Road, #03-01, Singapore. Since they did not have proper business premises, they essentially operated their business through the use of their respective pagers.

17 At the inception of the partnership, both of them had agreed between themselves that they would be equal partners. They started the partnership from scratch, without any assets and neither of them contributed any initial capital towards the partnership business. They operated the business on credit terms, obtaining supplies on credit, and used the receipts from sales to operate the business.

18 In the infancy of the partnership, they did what had to be done to ensure the survival of the partnership and to make the enterprise profitable. Initially, there was no specific allocation of duties and responsibilities. Both of them did what was necessary for the sake of the business and their relationship was one of trust.

19 After two years of hard work, they managed to save enough money to pay for the initial down payment for a delivery van. Subsequently, more vehicles were acquired as the partnership flourished as years went by.

20 Subsequently, sometime in the year 1989 or 1990, they acquired their first business premises at Unit 17-01 Textile Centre located at Jalan Sultan.

21 As their business prospered, the first defendant after persuading the plaintiff to employ a clerk to handle the administrative aspects and the accounts of the partnership, recommended the second defendant for the job. The plaintiff was aware that the first and second defendants were involved in a relationship. In the event, the second defendant was employed, initially on a part-time basis to handle the documentation, accounts and administration of the partnership. Subsequently, she became a full time employee, again at the suggestion of the first defendant. All paper work concerning the business of the partnership (preparation of invoices, delivery orders, etc.) as well as the maintenance and preparation of the accounts and the filing of the requsite returns of the partnership and of the individual partners with the Inland Revenue Authority of Singapore were handled by the second defendant. Later, she also took charge of all the administrative aspects of the partnership such as attending to banking, preparation of cheques, making purchases, as well as attending to retail sales at our subsequent business premises.

22 The second defendant worked closely with the first defendant. With the employment of the second defendant, the first defendant proposed and implemented a system of operations where

specific duties and tasks were allocated. The plaintiff was to take charge of delivery as well as the preparation of the delivery schedules whereas the first defendant took charge of the management and operations of the partnership with the second defendant working under him. With the allocation of duties and responsibilities, the first defendant became the 'brains' of the partnership and the plaintiff became the 'work horse'. Most of the plaintiff's time was spent outside the office whereas the first defendant operated from the office or from the cold room which they rented for the storage of frozen goods.

23 The plaintiff did not quibble or quarrel with this arrangement as he trusted the first defendant for his business acumen and decisions. His trust in the first defendant was such that he would readily sign blank cheques whenever they were presented to him by the second defendant for signature. This he did, as he was told that since he would be out of the office most of the time, it would be prudent for him to pre-sign the cheques for the purposes of the business.

24 Subsequent to the employment of the second defendant, the first defendant also recommended the employment of the first defendant's brother, the fourth defendant, to assist in the business of the partnership. Once again, the plaintiff went along with the suggestion.

25 Sometime in 1991, the first defendant came up with another suggestion. He proposed that his other brother, the third defendant be made a partner of the firm with a capital contribution of a sum of $45,000 which the first defendant said would be used to expand the partnership. Again, the plaintiff trusted the first defendant and agreed to his suggestion. Hence, in September 1991, the third defendant became an equal partner of the business, holding a one-third share. However, the third defendant remained a sleeping partner and did not attend to the business of the partnership.

26 To the best of the plaintiffs' knowledge, the third defendant was paid a monthly allowance of $1,000. He did not know whether the third defendant in fact made the proposed capital contribution of $45,000. As it transpired, steadily over the years, much of the affairs, management and control of the partnership came to rest in the hands of the first defendant. The employees such as the second and fourth defendants as well as the third defendant, were all connected with or related to the first defendant. At the material time, the plaintiff did not see this developing situation as a threat to his position in the partnership.

27 In 1993, the plaintiff borrowed a sum of $15,000 from one of his relatives at the suggestion of the first defendant. The said sum was used for the purpose of renting a shop house at Block 26 Pasir Panjang Wholesale Centre, #01-214, Singapore which became the partnership's new business premises. With the facility of the shop house, they embarked on retail sales, in addition to their existing business of supplying goods on a wholesale basis to restaurants and the like. The second defendant who was always stationed at the office, took charge of the retail sales.

28 In terms of sales, their business was conducted on cash as well as on credit terms. Sometime in 1992/1993, the first defendant approached the plaintiff and suggested that monies received from cash sales be kept aside in a separate bank account. The rationale for this, as explained to him by the first defendant, was that this money could be set aside as a partnership savings for the benefit of the partners and further, that the same could be used from time to time for the purposes of business dealings in cash so that the partnership could purchase stocks at a cheaper rate if payments could be made in cash, as opposed to purchasing goods on credit.

29 Since the firm by then had a partnership bank account at Maybank (A/c No. 0-421-03-1371-5), he did not see the need for a further separate bank account. He, nonetheless, agreed to the suggestion on the assumption that the said separate bank account would also be opened in the name

of the partners. Subsequently, however, the first defendant told him that the said account had been opened in the joint names of the first and the second defendants purely as a matter of convenience since the plaintiff was out of the office most of the time, attending to deliveries. As he trusted the first defendant, he did not object to this arrangement which had already been effected.

30 The plaintiff remarked that in the course of the present proceedings, he came to learn that the new account (Account No 23831724) with the Standard Chartered Bank was opened solely in the name of the first defendant contrary to the first defendant's representations. Further, he also learnt in the course of the proceedings that another account (Account No 230831721-8) was opened contemporaneously in the second defendant's name at the same bank.

31 The plaintiff averred that monies derived from cash sales and from other sources of revenue of the partnership business were deposited into these bank accounts in the respective names of the first and second defendants at the Standard Chartered Bank. Documents discovered in the course of these proceedings revealed that deposits totalling more than $6 million had been made into the said accounts from 1995. He claimed that the deposits into the second defendant's Standard Chartered Bank account alone was close to $1.4 million. He suggested that these monies must have been from the business of the partnership.

32 With respect to the setting aside of funds, the plaintiff claimed that he did not know how it was done or how the sums were reflected in the accounts, for at all material times, the accounts and bookkeeping were handled by the second defendant and she took instructions from the first defendant.

33 At all material times, the partnership accounts and returns were prepared by the second defendant as instructed by the first defendant. For the purposes of the filing of the Annual Returns of the partners, the practice was that the plaintiff was presented with a set of documents be signed by the second defendant. He did not scrutinise the accounts nor did he raise any queries about them as he was told by the second defendant that the first defendant had already approved the accounts and on that basis, he appended his signature to the accounts.

34 Subsequent to the implementation of the arrangement whereby monies from cash sales were channelled into the separate bank accounts, the partnership accounts, as prepared by the second defendant and presented to him for his signature, would include an item classified as 'loans' to the partnership.

35 As he was not aware of any loans taken by the partnership for the purpose of its business, he enquired about it from the first defendant and was told that the said item reflected as 'loans', referred to monies from the first defendant's bank account at Standard Chartered Bank, used for the partnership business in effecting cash transactions.

36 The first defendant did not, at any stage, give any impression that all the monies in the separate accounts were anything other than monies belonging to the partnership in which the partners had an equal interest. The first defendant also explained to him that the use of these funds for the business of the partnership were termed 'loans' for tax purposes so that the partnership need not pay tax on the same and that it would benefit all the partners. On the basis of the representations by the first defendant, he continued to certify the partnership accounts without raising any objections.

37 It was only subsequently, sometime prior to his withdrawal from the partnership, that he happened to learn how the cash sales sums were transferred to the separate bank account in the

names of the first and the second defendants. He explained that on one occasion, when he was at the office, he observed Mr Wong who was also employed by the partnership, keying in entries into the computer based on a certain document. After the entries were made, Mr Wong was seen to be throwing away the said document. The plaintiff being curious, retrieved the said document from the wastepaper basket and noticed that they were ordinary cash sale receipts issued for cash sales, but not bearing the name of the partnership. They were simple forms which could be purchased from any stationery store. It then became apparent to him that cash sales conducted by the partnership had all along been recorded in this ordinary cash sale receipt and subsequently a general entry consolidating all these cash sales were keyed into the computer. However, he could not confirm whether the computer entries accurately reflected the total volume and the actual price of goods sold.

38 The reason for his withdrawal from the partnership was prompted by the conduct of the first, second and third defendants concerning the affairs, management and business of the partnership. From the year 2000, there were several incidents which prompted him to reflect upon his trust and faith placed in the first defendant. He became suspicious of the motives and actions of the first and second defendants and this was specifically precipitated by an incident which occurred in July 2000.

39 In July 2000, an employee of the partnership asked the plaintiff to repay excess money paid to the plaintiff by the partnership for the settlement of his income tax liability. Normally, the Returns for the personal income tax for the partners would be prepared by the second defendant and, after he had signed the same, it would be submitted by the second defendant to the Inland Revenue. The income tax liability would also be met by the partnership. When he was requested to return this excess sum, he did not know what it was about and therefore he requested his wife to settle this matter with the said employee. His wife then set off to his office accompanied by his sister, Lim Eng Luan, who is an accounts assistant, and from their enquiries with the said employee, his sister came to know that the partnership was a very profitable concern having regard to the turnover and the gross revenue generated by it. This aspect was brought to his attention by a casual remark by his sister at a family gathering that the plaintiff would be making a lot of money that year as profits. He was surprised by that remark. He told her that he did not in fact make so much money. It was then, she related to him what she had discovered when she went to the company to sort out his income tax matter. He soon realised how ignorant he had been about the affairs and financial situation of the company. He decided to be more careful.

40 Subsequently, on another occasion on or before mid 2001 when he was asked to sign a few blank cheques by one of the employees of the firm, he requested the said employee to fill in the name of the recipients. When the first defendant came to know of this, he immediately reacted very adversely by scolding the plaintiff and accusing him of being difficult. Then, out of the blue, he also told the plaintiff that the money in the separate bank account did not belong to the plaintiff. It was then, the plaintiff became truly suspicious about the first defendant's intentions and motives.

41 The strain in the relationship between the plaintiff and the first defendant grew worse. The first defendant who included himself as a director of the seventh defendant did not make the plaintiff one of the directors. The plaintiff was surprised and upset that he was not made a director of the seventh defendant, for it was the intention at all material times, as represented to him by the first defendant, that the seventh defendant would be a subsidiary of the partnership and that he would have an equal share in that company.

42 On or about 17 July 2001, the first defendant asked the plaintiff to accompany him the next day to the DBS Bank, World Trade Centre Branch, to open a bank account. He did not tell the plaintiff what sort of account he intended to open and for what purpose. On 18 July 2001, the plaintiff

accompanied the first and second defendants to the said bank. The third defendant was waiting for them at the bank. At the bank, the first defendant dealt with the bank personnel. The plaintiff was then told to sign certain documents which he did. From the conversation the first defendant had with the bank personnel, the plaintiff realised that those documents pertained to the opening of a current account as well as a US dollar account. He was also asked by the first defendant then to sign a guarantee for the purpose of obtaining letters of credit from the bank. He signed the said documents although he was apprehensive about the implications of the same. He was also present when the first defendant sought to open a fixed deposit account in his personal name for a sum of $500,000. The plaintiff observed that the first defendant issued a cheque for the said sum drawn on Standard Chartered Bank. When the plaintiff enquired what it was all about, the first defendant told him that the said $500,000 comprised $150,000 from the partnership, $150,000 from the first defendant and $200,000 from the second defendant. The plaintiff presently realised that all along he had been cheated by the first defendant and other defendants, for there was no way the first defendant and the second defendant could come to possess $350,000 except from the business of the partnership. He concluded that this sum was derived from the cash sales and other revenues of the partnership. Soon, they left the bank and returned to their office.

43 At the office the plaintiff was asked by the first defendant to sign a guarantee in favour of DBS Bank for the purpose of obtaining banking facilities from the said bank. He signed the said document and having done so, he went home with a heavy heart as he felt very apprehensive about the whole matter. It was at this point in time he made up his mind that it would be better for him to leave the partnership. So later that evening itself, he went back to the office and retrieved the guarantee that he had signed.

44 Shortly thereafter, he instructed his former solicitors to send a notice of withdrawal from the partnership addressed to the first and third defendants which was dated 17 July 2001 to take effect immediately so as to avoid whatever liabilities he might have incurred by signing the said documents on 18 July 2001. The said notice was sent on 18 July 2001.

45 Since July 2001, his solicitors had been demanding from the defendants documents to sort out the partnership affairs and to ascertain the plaintiff's rightful share in the partnership. After a long period of vacillation, on 27 December 2001, the first defendant replied to them, stating falsely that all the documents were in the possession of the plaintiff.

46 The plaintiff also alleged that the first, second, third and fourth defendants had since set up another entity namely the sixth defendant herein, to take over the business of the partnership as evident from their circular dated 1 October 2001.

47 According to the plaintiff, the sixth defendant had taken over the assets and goodwill of the partnership and monies belonging to the partnership were in all probability transferred to the sixth defendant. His belief was based on the fact that at the time of the incorporation of the sixth defendant, its paid-up capital was only $4.00 comprising $1.00 each paid by the first, second, third and fourth defendants. Subsequently, however, the paid-up capital had been increased to $1,000,000 with each of the said defendants holding 250,000 shares of a par value of $1.00 in the said company.

48 Further, according to the plaintiff, at all material times, the first, second, third and fourth defendants were, in one way or the other, working for the partnership, and in no way could they have accumulated such sums on their own except from the assets of the partnership which they had diverted for their own use and benefit and to his detriment.

49 Commenting on the balance sheet furnished on behalf of the fifth defendant, which was

signed by the first and third defendants, he said that it was shown in the accounts that the partnership was purportedly liable to the first defendant and others for a sum of $1,307,050.48. He said that this could not be true. According to the plaintiff, the said sum belonged to the partnership. He suggested that substantial sums belonging to the partnership appeared to have been appropriated by the defendants unlawfully.

50 Commenting on the income tax returns obtained from the Inland Revenue, he said that there appeared to be discrepancies in certain items of the accounts particularly with respect to expenses. For example, large sums were purportedly incurred as expenses on account of casual labour but he knew for a fact that the firm did not have so many employees. Further, the expenses of the partnership appeared to be inflated in relation to accounting fees since the accounts were in fact prepared by an accounts clerk. He also opined that expenses of sale appeared disproportionate to the volume of sale. In addition, he noted that there appeared to be disproportionate increases in salaries and bonuses over the years. He averred that he verily believed that the accounts lodged with the income tax returns would not give an accurate reflection of the status of the partnership business, since monies from cash sales which had been transferred to the separate accounts with the Standard Chartered Bank would not be reflected in the accounts. He prayed that it was therefore necessary that all relevant documents pertaining to the partnership be retrieved to ascertain the true status of the partnership accounts and monies due to him.

51 It must be mentioned at this stage that during cross-examination of the plaintiff, Mr Ronald Lee, for the defendants produced a flow chart (annexed to this grounds – page 113 of the NE, line 4 onwards) which according to his instructions, set out the alleged movements of monies from the sale and receivables of the partnership.

52 One of the witnesses for the plaintiff was his sister, Lim Eng Luan, an accounts officer for the past 20 years. Her evidence was that she was requested by the plaintiff to collate and summarise the data from the several bank statements and other documents furnished by the defendants and she produced to the court her computations and analysis (exh P-3)

53 Another witness who testified for the plaintiff was Mr Ameen Ali Salim Talib, a Fellow of the Institute of Chartered Accountant of England and Wales, with fifteen years of experience in auditing, consulting and accounting education. He is currently a member of the academic staff of the accounting and finance department of the Business School at the National University of Singapore where his teaching portfolio includes financial statement analysis module. He was the expert witness for the plaintiff. His opinion, the court was informed, was based on documents given to him by the plaintiff, concerning the fifth defendant's accounts submitted with the income tax returns and data from the defendants' computer database contained in a CD-ROM which was obtained pursuant to the execution of an Anton Piller Order carried out on 28 February 2002. Following an objection taken by counsel for the defendants to the admissibility of the said CD-ROM (as well as a Customer Ledger and a Sales Analysis Report which were seized following the said Anton Piller Order), Mr Ameen's testimony was deferred until I heard the objections raised by defendants' counsel.

Arguments concerning the admissibility of the CD-Rom and other documents

54 Insofar as is material, para 2 (a) to (i) of the submission by defendants' counsel is reproduced below:

a. The Anton Piller order was executed on the Defendants' premises on 28.2.2002.

b. a CD Rom was given to the Defendants' solicitors only on 10.6.2002.

c. Although the obligation was on the Plaintiff to have produced a full extract of the CD Rom, this was not done.

d. The Defendants' solicitors wrote to the Plaintiff's solicitors on 2.12.2002. … No response was forthcoming. Why not? The Defendants were under no obligation to pay for the pages but had volunteered to pay. Yet no response.

e. Under the Directions given by the Registrar all affidavits had to be filed and exchanged by 31.1.2003.

f. In the case of the Plaintiff the Affidavits Evidence-in-Chief were filed and exchanged on 31.1.2003. The affidavits made references to documents not on the Plaintiff's List of Documents. Subsequently, the Plaintiff filed a Supplemental List on 17.2.2003 and served on the Defendant's solicitors. No copies of documents were given however. The Defendants had sight of the documents on the Supplemental List only on 18.2.2003 when the documents were exchanged. This was just one week before the hearing.

g. The Defendants had previously thought that "Sales Analysis Report" and the "Ledger of Customers' Accounts" were property the Defendants' documents.

h. The Defendants have found that there is no ledger of Customers' Accounts in the Plaintiff's List of Documents. Reference to this document by their witness is objected to.

i. The Defendants also upon a reading of item 50 of the Plaintiff's Bundle of Documents and exchanged on 18.2.2003 would dispute that this document was found on the Defendants' premises. The Defendants would dispute this document is the Defendants' document. Admissibility at law of this document is challenged. Reference to this document by Plaintiff's witness is objected to.

55 Plaintiff's counsel in his reply invited the attention of the court to an acknowledgement by defendants' counsel that a copy of the CD-ROM was indeed supplied to the defendants as early as 10 June 2002. As regards the late discovery of the Customer Ledger and Sales Analysis Report, plaintiff's counsel said that it was because he was not certain, until very late, as to which of the documents seized were to be used in evidence. The fact remained that copies of these two documents were not included in the bundle and were not made part of the material to be used in the trial until very late in these proceedings.

Ruling

56 Having considered all the arguments, I came to the conclusion that the objections by defendants' counsel in respect of the Customer ledger and Sales Analysis Report appeared to possess a measure of validity. Their late discovery, in my view, tended to delay the proceedings to enable the defendants to review the material and prepare their response. However, as regards the CD-ROM, the objection by the defence was unmeritorious, as it was an undeniable feature in this case that this item was disclosed a long time ago and a copy provided to defendants' counsel more than eight months before the commencement of the hearings. In the result, I ruled that save for the CD-ROM, a copy of which was provided to the defendants as early as 10 June 2002, the other documents, namely, the Customer Ledger and the Sales Analysis Report, be excluded in evidence. In this connection, I also granted leave to the plaintiff to call an additional witness who could attest to the authenticity of the said CD-ROM and its extracts thereof. It was made clear to the parties that my ruling was without prejudice to the rights of the defendants to make a fresh or further application to

the court to give little or no weight to the admitted material at the appropriate time.

57 The next witness for the plainitff was Mr Lua Kim Teng also known as Lai Kim Teng. He is an Associate Professor at the Department of Computer Science of the National University of Singapore and the brother-in-law of the plaintiff. His evidence was that he was present at the execution of the Anton Piller order at the fifth defendant's premises on 27 and 28 February 2002 and in the course of the execution of the said order, the data retrieved from the computers found at the fifth defendant's premises were stored by him in a CD-ROM.

58 He added that copies of the CD-ROM were made and the relevant data from the CD-ROM could be found in the documents produced to the court as 'dinvoice' from the years 1998 to 2001 (see vol 9 and 10 of the plaintiff's bundle of documents – pages 3336 to 3947). It would appear from the perusal of the said documents that except for the last three columns under the heading 'sales', 'profit and margin', the rest was all from the data captured from the computer database of the fifth defendant.

59 Mr Lua further mentioned that data were stored by the defendants using a computer programme known as Foxpro database and he also utilised the same programme to arrive at the details concerning the sales, profit and margin, following request from the plaintiff's solicitors. He then made reference to the print-out (as contained in plaintiff's bundle of documents vols 9 and 10 (pages 3336 to 3947) and said that save for the columns 'sales', 'profit', and 'margin' appearing in the extreme right of the said print-out, the rest was all from the CD-ROM.

60 The last witness for the plaintiff was Mr Ameen Ali Salim Talib, whose particulars and qualifications can be found in para 54 herein. His evidence was to the following effect.

61 He said that based on his analysis of the fifth defendant's accounts submitted with the income tax returns and data from the defendants' computer database contained in a CD-ROM, the understatement of sales by the fifth defendant was, in his estimate, in the region of S$7.8 million, based on the mark-up from computer database. He said that for the period 1989 to 2000 the understated sales figure by the fifth defendant was $7,826,750. He had not worked out the estimate for the year 2001 as he had not been provided with the income tax returns of the fifth defendant for the year 2001 (page 378 of the NE).

Close of the plaintiff's case

62 After the close of the plaintiff's case, defendant's counsel informed the court that he would be making a submission of 'no case' on his client's behalf. He made it explicit that his clients were fully aware of the effect and consequences of such an election.

Arguments and conclusion

63 Although defendants' counsel made a somewhat expansive oral submission, the central theme of his submission appears at para E 1 to 10 of his written submission. The said para reads thus:

> E. The Defence (See P's BOP – pp 50 to 61)
>
> 1. The Defendants deny P's claim.
>
> 2. The Defendants deny the several allegations of breach of duties, conspiracy and fraud.

3. The Defendants proceeded on the basis that P's entitlement will be determined as at 18.7.2001.

4. Towards this end, accounts were prepared.

5. Basing on the accounts as at 30.6.2001, P would be entitled to a total sum of S$221,894.75 (see calculations attached).

6. The fact that P had not made any claim from 1992 to 2001 for profits would go to show that he had in fact been paid the profits.

7. On one occasion in 1996, there is evidence of P receiving his profits. For 2001 again, there is evidence of P receiving his profits.

8. It is submitted that P had received profits for all the years from 1992 by way of cash other than 2001.

9. P had denied receiving any monies at all. His letter to Income Tax would confirm this. Yet in Court, he admits to receiving the payments for 1996 and 2001. These are payments he cannot deny.

10. It is the Defendants' case that P is lying when he says he did not receive payments for the other years.

64 Another segment of the defendants' submission also requires reproduction. It reads:

1. The Plaintiff's case is based on fraud alleged to have been perpetrated on him by all the Defendants.

2. At the trial, the evidence disclosed that there was massive fraud but not as against the Plaintiffs. The Plaintiff admitted that he was a party to a scheme to defraud the Inland Revenue Authority which could be traced back to 1992/1993. (See Notes of Evidence at page 85, no. 23, 24 and 25.)

3. The Plaintiff now seeks the Court's assistance to help him to recover monies allegedly due to him directly arising from the scheme to defraud the Inland Revenue Authority, which is a criminal offence under the Income Tax Act.

4. It is submitted on the facts of this case, the Court should apply:-

(i) the principle at law that on the grounds of public policy it should not assist a party who had been guilty of illegal conduct of which it should take notice.

65 There were at least two significant statements by defendants' counsel which require spotlighting at this juncture. He submitted (page 424 of the NE, lines 7 to 18; and p 453 lines 22 to 25) that based on the accounts as at 18 July 2001, the plaintiff would be entitled to a payment of $221,894.75. Next, he seemed to be in full agreement with the view that the court should order an inquiry in relation to the dispute at hand (page 458 of the NE, line 1). After stating that an inquiry is 'a proper solution', defendants' counsel added (page 459 of the NE, lines 1 to 3): 'I cannot say the Court should not order inquiry, no, I can't say that. In fact I think the Court, based on what we have,

would want to order inquiry'.

66 The nub of the submission by plaintiff's counsel was that the defendants' election not to come forward and testify on heir behalf strengthened the plaintiff's averments. Counsel contended further that the admission by defendants' counsel that a sum of $221,894.75 is due and owing to the plaintiff as of 18 July 2001 is clearly anachronistic to the bland denials appearing in the defence filed on behalf of the defendants. Adverting further to another admission by defendants' counsel that it would be proper for an inquiry to be conducted, he urged the court for the orders prayed for by the plaintiff in his statement of claim.

Conclusion

67 Having elected not to testify on their behalf, the defendants urged the court to 'non-suit the plaintiff' – to borrow the phrase employed by the defendants' counsel. It is a settled principle of law that a submission of no case can be made either if no case has been established in law or the evidence led is so unsatisfactory or unreliable that the Court should hold that the burden placed on the plaintiff has not been discharged (see 1999 *White Book* para 35/7/3; ***Yuill v Yuill*** [1945] PD 15). In the case before me, the defendants, for reasons best known to them, made a conscious choice and elected not to come forward to present their version.

68 What was then left before me was only the version of the plaintiff. All the challenges thrown to the plaintiff and the much-trumpeted, tri-coloured flow chart produced by the defence during the cross-examination of the plaintiff remained entirely unproven. In the end, I had only one version, as presented on behalf of the plaintiff in this case, which, in my view, was not in any way discredited or rendered nugatory either by cross-examination, applicable principles of law or by any admissible evidence by the defendants. The defendants' purported affidavits of evidence-in-chief, inasmuch as they were not formally presented and tested by cross-examination before the Court, were, decidedly, of no evidentiary value.

69 In my opinion, the defendant's election was ill-conceived. Their chosen course of action left me with a clear impression that the plaintiff's version that he was done in by the defendants and that there were concerted large scale accounting irregularities in the accounts of the fifth defendant which had a direct bearing on his just entitlement to the profits earned, was more probable than not. The decision by the defendants not to offer evidence on their behalf appeared to me to be a calculated ploy. In this regard, I adopt the same view as that of Rajendran J, in ***Central Bank of India v Hemant Govindprasad Bansal & Ors*** [2002] 3 SLR 190 at 196, where he held that 'a decision by a defendant not to adduce evidence in his defence is a decision that ought not to be lightly taken. Where a defendant makes such an election, the result will be that the court is left with only the plaintiff's version of the story. So long as there is some *prima facie* evidence that supports the essential limbs of the plaintiff's claims, then the failure by the defendant to adduce evidence on his own behalf would be fatal to the defendant'.

70 Defendants' counsel urged the court to disallow the claim of the plaintiff on the basis that the plaintiff, admittedly, went along with the first defendant to evade income tax payable on the profits of the fifth defendant. Counsel's submission was that public policy warranted that the Court should not assist a party who had been guilty of an illegal conduct. He invited my attention to ***Euro-Diam Ltd v Bathhurst*** [1988] 2 All ER 23 at 28-29, where Kerr LJ had reviewed the law in relation to illegality. The relevant passages read as follows:

> The law: illegality

The relevant principles and authorities are reviewed in detail in the judgment under the heading 'Tainted with illegality' (see [1987] 2 All ER 113 at 120-128, [1987] 2 WLR 1368 at 1379-1388). A similar discussion is to be found in *Chitty on Contracts* (25th edn, 1983) para 1158 under the heading 'The maxim ex turpi causa non oritur actio and related rules'. I do not think that it is necessary to repeat the judge's helpful analysis of the cases. Subsequent to his decision in the present case, this court had to deal with a somewhat similar problem in *Saunders v Edwards* [1987] 2 All ER 651, [1987] 1 WLR 1116. In the same way as in that case, I propose to refer to the submissions raised on behalf of the defendant in this case compendiously as the 'ex turpi causa defence'. In my view the relevant principles can then be summarised as follows.

(1) ***The ex turpi causa defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if, in all the circumstances, it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts: see para (2)(iii) below.*** (Highlight added – see para 72 herein for comments).

The problem is not only to apply this principle, but also to respect its limits, in relation to the facts of particular cases in the light of the authorities.

(2) The authorities show that in a number of situations the ex turpi causa defence will prima facie succeed. The main ones are as follows.

(i) Where the plaintiff seeks to, or is forced to, found his claim on an illegal contract or to plead its illegality in order to support his claim …

(ii) Where the grant of relief to the plaintiff would enable him to benefit from his criminal conduct. …

(iii) Where, even though neither (i) nor (ii) is applicable to the plaintiff's claim, the situation is nevertheless residually covered by the general principle summarised in (i) above . …

(3) However, the ex turpi causa defence must be approach pragmatically and with caution, depending on the circumstances …

Thus: (i) Situations covered by para (2)(i) above must be distinguished from others where the plaintiff's claim is not founded on any illegal act, but where some reprehensible conduct on his part is disclosed in the course of the proceedings, whether by the plaintiff himself or otherwise: see eg *Pye Ltd v BG Transport Service Ltd* [1966] 2 Lloyd's Rep 300 (to which I refer again later), *St John Shipping Corp v Joseph Rank Ltd* [1956] 3 All ER 683, [1957]1 QB 267, *Belvoir Finance Co Ltd v Stapleton* [1970] 3 All ER 664, [1971] 1 QB 210 and *Saunders v Edwards*. In such cases the ex turpi causa defence will not succeed. Nor will it succeed where the defendant's conduct in participating in an illegal contract on which the plaintiff sues is so reprehensible, in comparison with that of the plaintiff, that it would be wrong to allow the defendant to rely on it: see eg *Shelley v Paddock* [1978] 3 All ER 129, [1979] QB 120. But where both parties are equally privy to the illegality the plaintiff's claim will fail, whether raised in contract or tort, for potior est condicio defendentis: *Ashmore Benson Pease & Co Ltd v A V Dawson Ltd* [1973] 2 All ER 856, [1973] 1 WLR 828 is an illustration of such a situation. And an action on a contract the terms of which are falsely recorded in documents intended to conceal the true agreement between the parties may be defeated by the ex turpi causa defence: see eg *Alexander v Rayson* [1936] 1 KB 169, [1935] All ER Rep 185.

(ii) In situations covered by para (2)(i) and (ii) above the ex turpi causa defence will also fail if the plaintiff's claim is for the delivery up of his goods, or for damages for their wrongful conversion, and if he is able to assert a proprietary or possessory title to them even if this is derived from an illegal contract: see eg *Bowmakers Ltd v Barnet Instruments Ltd* [1944] 2 All ER 579, [1945] KB 65, *Belvoir Finance Co Ltd v Stapleton* [1970] 3 All ER 664, [1971] 1 QB 210 and *Sajan Singh v Sardara Ali* [1960] 1 All ER 269, [1960] AC 167.

71 It must be mentioned at this stage that the segment highlighted above in the judgment of Kerr LJ (*supra*) was doubted by the House of Lords in ***Tinsley v Milligan*** [1993] 3 All ER 65 (see pages 66 g-h; and 77 a-c). The facts in ***Tinsley v Milligan***, as appear in the headnotes, were as follows.

72 Miss Stella Tinsley ('T') and Miss Kathleen Milligan ('M'), who were lovers, jointly purchased a house which was registered in the name of T as the sole legal owner. The house was used as a lodging house which was run as a joint business venture and provided most of the parties' income. Both parties accepted that the house was owned jointly but, as M accepted, it was registered in the sole name of T to enable M, with the knowledge and assent of T, to make false claims to the Department of Social Security for benefits. The money so obtained was shared although it did not form a substantial part of the parties' income. After some years M told the department what she had done, and thereafter continued to draw benefit lawfully without prosecution. Subsequently, T and M quarelled and T moved out, M remaining in occupation. T brought an action claiming possession of the house and asserting ownership of it. M counterclaimed for an order for sale and a declaration that the house was held by T on trust for the parties in equal shares. T contended in regard to the counterclaim (i) that, applying the common law maxim *ex turpi causa non oritur actio*, M was barred from denying T's ownership of the house because the purpose of the arrangement whereby the house had been registered in the sole name of T had been to facilitate the fraud on the Department of Social Security and therefore her claim to joint ownership was tainted by illegality and (ii) that, applying the equitable principle that he who came to equity had to come with clean hands, the court ought to leave the estate to lie where it fell since the property had been conveyed into the name of one party for a fraudulent purpose which had then been carried out and in those circumstances the court ought not to enforce a trust in favour of the other party. The judge dismissed T's claim and gave judgment for M on her counterclaim. T appealed to the Court of Appeal, which dismissed the appeal, holding that when confronted with the defence of illegality the court should adopt a flexible and pragmatic approach in applying the maxim *ex turpi causa non oritur actio* and the equitable principle of clean hands and should determine whether enforcement of the claim with its attendant illegality would be an affront to the public conscience and that, since both parties had collaborated in the fraud and both their claims were tainted with illegality and it would be a disproportionate penalty to deprive M of her share of the house, it would be an affront to the public conscience not to grant her relief. T appealed to the House of Lords.

73 The House of Lords by a majority held that:

> … Where property interests were acquired as a result of an illegal transaction a party to the illegality could recover by virtue of a legal or equitable property interest if, but only if, he could establish his title without relying on his own illegality even if it emerged that the title on which he relied was acquired in the course of carrying through an illegal transaction. Where the presumption of advancement applied, the plaintiff was faced with the presumption of gift and therefore could not claim under a resulting trust unless and until he rebutted the presumption of gift, in which case he had to rely on the underlying illegality and would therefore fail. However, where the presumption of a resulting trust applied, the plaintiff would not have to rely on the illegality because, if he proved that the property was vested in the defendant alone but that he had provided part of the purchase money

or voluntarily transferred the property to the defendant, he would establish his claim under a resulting trust unless either the contrary presumption of advancement displaced the presumption of resulting trust or the defendant led evidence to rebut the presumption of resulting trust. Therefore, in cases where the presumption of advancement did not apply, the plaintiff could establish his equitable interest in the property without relying in any way on the underlying illegal transaction. On the facts, M had established a resulting trust by showing that she had contributed to the purchase price of the house and that there was a common understanding between her and T that they owned the house equally. M had no need to allege or prove why the house was conveyed into the name of T alone since that fact was irrelevant to her claim, and, on the facts, M had raised a presumption of resulting trust which was not rebutted by any evidence to the contrary. In those circumstances M was entitled to succeed in her counterclaim. The appeal would therefore be dismissed. …

74 For the sake of completeness, I must add at this juncture that some of the views expressed by the law lords in ***Tinsley v Milligan*** were criticised by the High Court of Australia in ***Nelson v Nelson*** (1995) 184 CLR 538. In that case, the High Court of Australia applied the presumption of advancement to a mother's purchase of property in the name of her children, but allowed her to rebut such presumption by evidence that it was only for the illegal purpose of enabling her to declare that she owned no house, so as to obtain a housing subsidy on the purchase of another house in her name that would not otherwise have been available. Applying the principle that those who come to equity have to do equity, she was required to pay back the housing subsidy as a condition of the relief sought.

75 In 1998, the Law Commission produced a Consultation Paper No 154 (Illegal Transactions; The Effect of Illegality on Contracts and Trusts), assisted by the Australian High Court's critical view of ***Tinsley v Milligan***. The Commission's provisional view was that there should be a structured statutory discretion to decide the effects of illegality. Factors to be taken into account should be '(a) the seriousness of the illegality; (b) the knowledge and intent of the illegal trust beneficiary; (c) whether invalidity would tend to deter the illegality; (d) whether invalidity would further the purpose of the rule which renders the trust 'illegal'; and (e) whether invalidity would be a proportionate response to the claimant's participation in the illegality.' Such statutory discretion would oust the equitable maxim "he who comes to equity must come with clean hands," but views were sought on a discretion to make relief conditional on a payment or transfer of property that could come within the maxim 'he who comes to equity must do equity.' (See ***Hayton and Marshall*** – Commentary and Cases on The Law of Trusts and Equitable Remedies, page 338, 11th Edn, page 338).

76 It would also be instructive at this stage to make reference to ***Bowmakers, Ltd v Barnet Instruments Ltd*** [1944] 2 All ER 579, a decision of the Court of Appeal in England. The facts of the case as recapitulated in the headnotes of the report were as follows.

77 The appellants hired machine tools from the respondents under three written agreements. The tools were the property of one Smith, who sold them to the respondents in order that the appellants might ultimately obtain possession of the tools provided the hire-payments were made regularly to the respondents. After making only some of the agreed payments, the appellants converted the tools to their own use by selling them. The respondents, thereupon, terminated the contract and claimed the return of the tools or, alternatively, damages for conversion. For the appellants it was contended: (i) that the sale between Smith and the respondents was illegal in that it contravened the Control of Machine Tools Order, 1940, resulting in the agreements between the appellants and the respondents being affected by the illegality arising from the original sale; (ii) that the respondents' claim, therefore, should not be entertained on the ground of public policy. The respondents, whilst not relying on the hiring agreements, claimed that the property in the tools still remained in them at the date of the conversion.

78 In dismissing the appeal and deciding in favour of the respondents, the Court of Appeal held that (a) whether or not the agreements for sale were illegal, the respondents' right to their property was unaffected and (b) no question of public policy therefore arose.

79 Du Parq LJ in delivering the judgment of the Court of Appeal said at pages 582H to 583A:

> In our opinion a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim.

80 Returning to the arguments before me, the plaintiff's claim was not for the refund of any monies paid under an illegal agreement, nor was it for any property infused or employed in any illegal object. He was merely asking for his just entitlements upon his retirement from the partnership which he had entered into with the first defendant and another person. He had, in my finding, established his rights to claim one third shares from the assets of the partnership, both concealed and yet to be accounted for, without relying on his own illegality. Furthermore, the business of the partnership had undeniably been a legitimate one and in my determination, the naive acquiescence of the plaintiff in the scheme contrived by the first defendant to defraud the Inland Revenue could not, on the learning referred to, debar the plaintiff from receiving his lawful entitlement which the defendants themselves quantified presently as amounting to $221,894.75 whereas the plaintiff's position was that it would be a few million dollars in view of the concealment by the defendants.

81 Moreover, from the evidence thus far admitted, it would appear to me that the architect of the scheme to defraud the Inland Revenue was the first defendant; the plaintiff unquestioningly taking the bait. In any event, the court was informed by defendants' counsel that Inland Revenue had been informed of the said scheme and since then the requisite composition and penalty had already been paid to it. It followed then the remaining assets of the fifth defendant were no longer affected by the said scheme to defraud.

82 The principal question that fell for determination in this case was whether the plaintiff was entitled to accounts and inquiries as prayed for by him. In this connection, there was an unambiguous declaration by defendants' counsel that it would be entirely proper for the Court to order such accounts and inquiries (pages 458 to 459 of the NE). Defendants' counsel further conceded that according to the defendants' revised figures, the plaintiff would be entitled to a sum of $221,894.75 (page 424 of the NE).

83 Given the facts and the election by the defendants not to come forward to give evidence at the trial, the evidence proferred by and on behalf of the plaintiff including the aspect that there were only three partners until the defendant left the partnership. remained uncontroverted and whatever suggested and put by the defendants' counsel in cross-examination of the plaintiff and his witnesses, including the labyrinthine flow-chart, remained unproven. In the premises, taking into consideration the open admissions by counsel and my finding that there was substantial accounting irregularities in the fifth defendant's accounts, I deemed it just to make the following orders, which I did.

> (a) A declaration that the plaintiff's share in the assets of the fifth defendant is one-third up to the time the plaintiff withdrew from the partnership ie, 18 July 2001;

(b) An order that damages be assessed by the registrar, in respect of the plaintiff's losses, which shall be limited to the plaintiff's entitlement from the declared as well as the hitherto concealed funds and assets of the fifth defendant. There shall also be an order for accounts and inquiries to trace and recover the assets referred to above, before the registrar;

(c) An order that the defendants do render an account to the plaintiff, of all sums of monies, both accrued and receivable, and belonging to the fifth defendant up to 18 July 2001 and the defendants shall make available to the plaintiff within three weeks from the date of this order, all the accounting records, bank accounts as well as documents relating to the disposition of the assets of the fifth defendant;

(d) An order that the defendants do render an account to the plaintiff of how they had used, employed and/or disposed of the profits and receipts of the fifth defendant. They shall also in this regard make full and frank disclosure of all properties and assets acquired by them either in their individual names or otherwise using or employing funds channelled from the fifth defendant;

(e) An order that the defendants shall deliver up within three weeks from the date of this order, all documents and materials which are in the possession, power, custody or control of the defendants or any of them, pertaining to the business and bank records of the fifth defendant as well as the other defendants, insofar as they are relevant to the present proceedings;

(f) An order for payment by the defendants to the plaintiff, of all monies found to be due and owing to him on the taking of such accounts on the basis that the plaintiff is a one-third partner of the fifth defendant. Pending inquiry, the defendants shall pay the plaintiff a sum of S$221,894.75, within three weeks from the date of this order as admitted to be owing to him in part settlement;

(g) An injunction restraining the defendants and each of them by themselves, their servants or agents or otherwise from dealing with their assets, bank accounts and investments pending the conclusion of the accounts and inquiries, unless sufficient security is provided or until further order;

(h) Costs of this action up to this stage be taxed and be paid by the defendants to the plaintiff, if not agreed. Costs in relation to the taking of accounts and the issue as to interest be reserved to the registrar conducting inquiries and taking accounts; and

(i) There shall be liberty to apply.

Plaintiff's claim allowed.

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