

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN DAGANG)

GUAMAN NO: D9(D1)-22-86-1995

ANTARA

FOO KHOON LONG

... PLAINTIF

DAN

FOO KHOON LIM & 4 LAGI

... DEFENDAN-DEFENDAN

ALASAN PENGHAKIMAN

OLEH YANG ARIF HAKIM

DATO' TENGKU MAIMUN BINTI TUAN MAT

The plaintiff's claim against the 1st, 4th and 5th defendants have been withdrawn. The trial proceeded only against Mr. Foo Khoon Wong, as the 2nd defendant in his capacity as the executor and trustee of Madam Chen Choi Tai, deceased and in his personal capacity as the 3rd defendant.

The plaintiff (Mr. Foo Khoon Long) and Mr. Foo Khoon Wong are natural brothers. Madam Chen Choi Thai is their mother. Mr. Foo Khoon Long is a businessman having several businesses in Thailand where he spent considerable time there. He also had a family business dealing in tin ore known as Foo Holdings Sdn Bhd. He was one of the co-founders of Central Malaysia Finance. Madam Chen was living with Mr. Foo Khoon Long in Bangkok until 1984 and then moved to Ipoh to live with Mr. Foo Khoon Wong until her demise in early 1989. The operational and financial aspect of the family business of Foo Holdings was undertaken by Mr. Foo Khoon Wong, the younger brother of Mr. Foo Khoon Long.

In 1984 one Mr. Leong Sau Pan, the brother in law of Mr. Foo Khoon Long and Mr. Foo Khoon Wong suggested forming an information technology business in Singapore and Malaysia. He had no capital but he had a group of friends (the working group) who had the expertise. He approached Mr. Foo Khoon Wong for investment in the proposed companies. Meetings were held and it was finally agreed that the initial investment should come from the Foo family but the equity should be held equally between the working group and the Foo family. The capital investment by Foo family came in the form of collateral provided by the banks for loan

to be granted to the companies. Pursuant to this agreement a company was incorporated in Singapore known as Infotel Technologies Pte Ltd (Infotel) and a company in Malaysia known as Infocom (M) Sdn Bhd (Infocom, the 4th defendant).

It is common ground that Infotel and Infocom are incorporated at the same time with the same arrangement i.e 50% shares in both companies would be held by the Foo family and 50% by the working group consisting of Leong Sau Pan, Leong Sau Lian, James Han and Lee Gim Teik.

At the time of incorporation, the shareholders of Infocom were as follows:-

1.	Foo Khoon Wong	28,002 shares	14%
2.	Chen Choi Tai	50,000 shares	25%
3.	Datuk Nik Hussain	102,000 shares	51%
4.	Leong Sau Lian	20,000 shares	10%

The shareholding of Datuk Nik Hussain (the 5th defendant) would make Infocom a Bumiputra owned company to facilitate procurement of government contracts. In fact, the 51% shareholding of Datuk Nik Hussain was held on trust for Mr. Foo Khoon Wong and also for the working group. The dispute in this case relates to the 25% shares held by Madam Chen in Infocom. Mr. Foo Khoon Long contended that the shares were held by Madam Chen as his nominee whereas Mr. Foo Khoon Wong also contended likewise.

THE CLAIM

The shares held under the name of Madam Chen had since been transferred to Mr. Foo Khoon Wong and Infocom has since been wound up. Mr. Foo Khoon Long claims that Madam Chen held the said shares on trust for his benefit; that Madam Chen had breached her duties as trustee and/or that Mr. Foo Khoon Wong had induced Madam Chen to breach her duties as trustee; that Madam Chen had acted fraudulently in transferring the said shares to Mr. Foo Khoon Wong; that Mr. Foo Khoon Wong had wrongfully induced and/or assisted Madam Chen in committing the breach. Mr. Foo Khoon Long is seeking for damages for the loss of the shares in Infocom.

THE EVIDENCE

It is the evidence of Mr. Foo Khoon Long that:-

1. he and Mr. Foo Khoon Wong provided the capital for Infocom;
2. he contributed RM100,000.00 to the share capital;
3. 50% of the shares in Infocom would reflect the interest of Mr. Foo Khoon Long and Mr. Foo Khoon Wong and the balance 50% would be held by the working group;
4. upon registration of the Infocom shares in the names of the working group members and Datuk Nik Hussain they were to

return the relevant share certificates together with the share transfer forms duly executed to Mr. Foo Khoon Wong and Mr. Foo Khoon Long for safekeeping until such time when the working group members reimbursed them for the par value of these shares;

5. as between him and Mr. Foo Khoon Wong, it was agreed that all share certificates and transfer forms returned by the working group members and Datuk Nik Hussain would be divided into 2 equal portions and that one portion would be kept by Mr. Foo Khoon Wong and the other portion by him and that they would be returned to the relevant registered shareholders upon receipts of payment for the par value of the shares;
6. in respect of the 25% of the shareholding in Infocom, he appointed his mother as his nominee and that Mr. Foo Khoon Wong knew about this;
7. there was a threat of bankruptcy against him in Thailand;
8. that the relevant share certificates were kept by him;
9. after his mother's demise, he decided to give the shares as a gift to his son;
10. he went to the company secretary's office and was told that the shares had already been transferred from his mother to Mr. Foo Khoon Wong.

Madam Chen Yoke Lan the niece of both Mr. Foo Khoon Long and Mr. Foo Khoon Wong gave the following evidence:-

1. that from time to time she would visit her grandmother Madam Chen who was staying with her uncle Mr. Foo Khoon Wong at No. 10, Canton Drive, Victoria Park, Ipoh to help her as and when the need arose;
2. on or about 1987, while she was sitting at the side table preparing a shopping list for her grandmother in her bedroom, Mr. Foo Khoon Wong walked into the room and handed a document to Madam Chen for her to sign. Madam Chen signed the document without asking any question;
3. thereafter Mr. Foo Khoon Wong asked her to witness her grandmother's signature;
4. she signed without any question as she trusted Mr. Foo Khoon Wong not only as her employer but as her uncle (she was then working as a clerk for Mr. Foo Khoon Wong);
5. she recognized that the document was a blank transfer form for shares in Infocom;
6. sometime in early 1989, she heard her grandmother mumbling about the mistake she made in signing the document;
7. some time later, her grandmother passed away.

The evidence of Mr. Foo Khoon Wong is essentially that:-

1. he was the sole investor of Infocom;
2. Mr. Foo Khoon Long is not involved in the incorporation of Infocom;
3. that even though he was the sole investor, his shareholding in Infocom is 50%, the other 50% of the shareholding was held by the working group;
4. Datuk Nik Hussain held the 51% and his mother held the 25% shares in Infocom for and on his behalf as his nominee;
5. that sometime in 1986 his mother informed him that the share certificates were stolen from her locked drawer;
6. that Mr. Foo Khoon Long stole the shares from his mother's locked drawer;
7. that his mother instructed him to draft a letter to the Board of Directors of Infocom to make an application for a duplicate share certificate to replace the stolen share certificates and to prepare an Indemnity and Statutory Declaration in early 1987.

ISSUES

1. whether the entire capital of Infocom was provided for by the plaintiff and the 3rd defendant in equal portion.

2. whether the plaintiff appointed his mother Madam Chen as his nominee with respect to the registered shareholding of 25% of 50,000 shares in Infocom.
3. whether the 2nd and 3rd defendants have full knowledge and consent of the said nomination and dealt with the said shares in the full knowledge that they formed trust property which had been transferred in breach of trust.
4. whether the 3rd defendant induced and/or assisted Madam Chen in committing the following acts and/or breaches.

FINDING

Learned counsel for Mr. Foo Khoon Wong submitted that there was no written document to support Mr. Foo Khoon Long's case that he invested in Infocom and that the 25% of the shares held by his mother were his. Further it was the submission for Mr. Foo Khoon Wong that the intention of Madam Chen is clearly evidenced by the statutory declarations, the letters of indemnity and share transfer forms wherein in her capacity as the registered owner of the shares, she transferred the said shares to Mr. Foo Khoon Wong.

Indeed the only evidence to support Mr. Foo Khoon Wong's contention that his mother had intended the shares to be transferred to him is those documents mentioned above. Those documents are however being challenged as false and it is upon the court to look at

the evidence of the witnesses in totality to determine which version is more probable.

Mr. Foo Khoon Long gave evidence that he was approached by Mr. Foo Khoon Wong for financial assistance in the incorporation of Infotel and Infocom and he wanted to know more about the proposed business, its viability and whether the Foo family's investment would be safe, which resulted in the meeting with the working group at Hotel Le Meridian Singapore. If the version of Mr. Foo Khoon Wong is correct that Mr. Foo Khoon Long was not involved, then there is no reason for Mr. Foo Khoon Long to attend a meeting and wanting to enquire about the company.

Further, the version of Mr. Foo Khoon Long that both he and Mr. Foo Khoon Wong invested in Infocom is supported by the evidence of Mr. Lee Gim Teik (PW4), the director, shareholder and founder of Infocom. Mr. Lee's evidence is that Mr. Foo Khoon Wong and Mr. Foo Khoon Long were introduced to him at the Hotel Le Meridian as the Foo family who are the investor shareholders.

It was further the evidence of Mr. Lee that the shareholding belonging to the Foo family in Infotel was held 25% in the name of Mr. Foo Khoon Wong and 25% in the name of Mr Foo Khoon Long's son while the shares in Infocom was 25% in the name of Mr. Foo Khoon Wong and 25% in the name of Madam Chen. Although Mr. Lee had no knowledge whether Mr. Foo Khoon Wong had cheated his mother into transferring the shares to himself and had not sighted any document to show the investment of Mr. Foo Khoon

Long, Mr. Lee confirmed that the share ownership of both Infocom and Infotel reflected the same owners and percentage in shareholdings. If the version of Mr. Foo Khoon Wong is to be believed that the shares held by Madam Chen were not for Mr. Foo Khoon Long but for himself, it would mean that Mr. Foo Khoon Long has no shareholding in Infocom and this version is inherently improbable given the fact that the ownership of the shares in Infotel and Infocom is the same. In view of all the above, I find that Mr. Foo Khoon Long had provided the capital for the incorporation of Infocom together with Mr. Foo Khoon Wong.

Mr. Foo Khoon Long's contention that his mother is holding the 25% shares as his nominee is corroborated by the evidence of Madam Chen Yoke Lan. According to Madam Chen Yoke Lan she heard her grandmother mumbling in Hakka about the mistake she made wherein Madam Chen said that "The thing that I had signed to Ah Wong actually belonged to Ah Long. Ah Long used my name to hold the shares. I shouldn't have signed the transfer form". There is no reason for Madam Chen Yoke Lan to take sides as both Mr. Foo Khoon Long and Mr. Foo Khoon Wong are her uncles.

Further, it was the evidence of Mr. Foo Khoon Wong that even though he was the sole investor, his shareholding in Infocom is only 50% as the other 50% was held by the working group. However Mr. Foo Khoon Wong also testified that Datuk Nik Hussain held 51% of the shares for and on his behalf as his nominee. Given the above admission by Mr. Foo Khoon Wong and given that Mr. Foo Khoon Wong is also asserting that the 25% shares held by Madam Chen

belonged to him, if his testimony is to be believed, that would make him the owner of 76% of the shares. This evidence therefore cannot be right and it raises question as to the credibility of Mr. Foo Khoon Wong.

Mr. Foo Khoon Wong admitted that Mr. Leong Sau Pan was involved in the incorporation of both Infotel and Infocom. Mr Leong had affirmed a statutory declaration wherein he states that the shareholders of both companies are the same. Mr. Leong was also interviewed by one Miss Gurmit Kaur from Messrs Shearn Delamore & Co, the solicitors for Mr. Foo Khoon Long. When asked whether it is correct that he had told Mr. Leong that he was holding 25% beneficial shareholding in Infocom for Mr. Foo Khoon Long as per the minutes of the interview (pg 33 of Common Bundle Of Document), Mr. Foo Khoon Wong took a very long time to answer that what he informed Mr. Leong was in respect of Infotel. There was a clear reference to Infocom but Mr. Foo Khoon Wong chose not to agree and his stand is obviously inconsistent with the document.

Mr. Foo Khoon Wong also gave evidence that Mr. Foo Khoon Long had stolen the share certificates from his mother's locked drawer. No police report was lodged in respect of the alleged theft. Although the reason for the absence of the police report could be that Mr. Foo Khoon Wong did not want to embarrass the family with the accusation of theft, there is no reason why Mr. Foo Khoon Wong did not request or demand that Mr. Foo Khoon Long return the share certificates if indeed the shares belonged to him and if indeed

it was wrongfully taken by Mr. Foo Khoon Long from his mother's locked drawer. The reason why Mr. Foo Khoon Wong never demanded Mr. Foo Khoon Long to return the shares in my view goes to support Mr. Foo Khoon Long's version that the shares were held by Madam Chen for him.

It is also to be noted that Mr. Foo Khoon Wong gave evidence that the share certificate was stolen from his mother's locked drawer which would be in his house at Canton Drive, Victoria Park, Ipoh. That the share certificate was stolen was not disclosed in the statutory declaration. What was stated in the statutory declaration is that Madam Chen was unable to locate the share certificate and it is not even at his house but at No. 7 (Tingkat Satu), Jalan Sultan Yussuf, Ipoh. This conflicting version in my view supports Mr. Foo Khoon Long's contention that the statutory declaration was false and that his mother was being influenced by Mr. Foo Khoon Wong into signing the same.

Learned counsel for Mr. Foo Khoon Wong submitted that the claim ought to be dismissed as the purported trust was created for the purpose of defrauding or defeating the creditors of Mr. Foo Khoon Long. The issue of illegality in my view does not arise given the absence of any evidence that Mr. Foo Khoon Long was in fact adjudged a bankrupt. Learned counsel for Mr. Foo Khoon Wong had also raised the issue of delay. It was submitted that Mr. Foo Khoon Long knew about the shares being registered in Mr. Foo Khoon Wong's name in March 1990 but had only filed this suit in August 1995. Learned counsel contended that it had prejudiced Mr.

Foo Khoon Wong as he is not able to call Madam Chen as a witness. I am of the view that delay is not fatal to Mr. Foo Khoon Long's case and that the issue of prejudice is without merit. Even if Mr. Foo Khoon Long were to file the writ soon after March 1990, Mr. Foo Khoon Wong would not be able to call Madam Chen (who died in 1989) as a witness. On the balance of probabilities I find that Mr. Foo Khoon Long has proven his case. Judgment is entered against Mr. Foo Khoon Wong with damages to be assessed and costs.

**(DATO' TENGKU MAIMUN BINTI TUAN MAT)
HAKIM
MAHKAMAH TINGGI MALAYA
BAHAGIAN DAGANG
KUALA LUMPUR.**

Dated 26th May 2009

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