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OF PROFIT SHARING AND PARTNERSHIPS

The profit element features as a central component in the definition of a partnership. Indeed, profit sharing between the parties has been singled out for statutory *prima facie* presumption of a partnership. As to how important this factor of profit sharing serves as an indicium of a partnership – whether such a presumption can actually stand on its own or whether it has to be placed in its proper perspective as it interacts with other indicia in the totality of the circumstances before one can conclusively infer the existence of a partnership (with all the ancillary advantages and liabilities) – is an issue that will be discussed at length in the present paper.

I. INTRODUCTION

BUSINESS enterprises nowadays require more resources – capital investments, technical expertise and even marketing skills – than what an individual person or company is able to muster. In a situation like this, it may be useful for two or more parties to come together and pool their resources so that each can draw upon the strengths of the others for the furtherance of some mutually beneficial business objectives.

The wealth generated by such an enterprise – usually in the form of profits – will in due course have to be divided and returned to the participants. The question that arises with regard to this joint sharing of the profits, especially when disputes occur, is usually related to the nature of the business relationships existing among the various parties who are involved in the venture. If they had from the outset elected for a formal approach and incorporated a company, there would then be no doubt as to their legal status: They are co-shareholders. However, the structured set-up does not appeal to all (since for certain businesses there is a need for less rigidity of form and more flexibility in decision-making) and they can instead adopt a more informal working arrangement. For the latter approach, it is unfortunate that the parties may not always be correct in their own perception of these inter-relationships and there have in fact been many instances where the courts have arrived at conclusions that are totally at variance with what had originally been specified in the governing agreements.

For partnerships (which constitute a substantial proportion of these less formal business relationships), there remain a number of ambiguities that need to be addressed. Should an employee whose remuneration package includes a share of the profits be deemed a partner in the firm? Should

a sum of money that has been placed at the disposal of the venture be regarded as part of the capital (in which case the investor is indeed a partner and should thus be entitled to a share of the net profits) or merely as a loan (in which case any receipts from the gross profits should be taken as being remittances for interest and principal)? Can the parties who are temporarily collaborating in a joint project and sharing in the resultant profits be considered as separately conducting their own businesses? It is not surprising to find that some of these issues have already been brought before the courts – from the landmark *Cox* v *Hickman*[1] judgment of the English House of Lords during the mid nineteenth century to the recent rulings of the Malaysian High Court in *Aw Yong Wai Choo* v *Arief Trading Sdn Bhd*[2] and the Singapore Court of Appeal in *Chua Ka Seng* v *Boonchai Sompolpong*.[3] The objective of the present article, therefore, is to conduct an evaluation of the relevant partnership decisions so as to examine what really constitutes a partnership; of particular interest is the question of how much the element of profit sharing should be employed as an indicium of a partnership *vis-à-vis* other supporting factors such as contribution of capital and bearing of risks.

II. Sharing of Profits

As has been spelt out under the 'Definition of Partnership' section[4] of the Partnership Act, a "partnership is the relation which subsists between persons carrying on business in common with a view to profit." The interpretation and application of this seemingly simple definition have unfortunately been found to be fraught with difficulties. For a start, it is clear from the phrase "with a view to profit" that there must of necessity be the element of profit motivation (which is common to all business ventures) and one may infer that as a natural corollary the sharing of profits among the parties must also have been contemplated.[5] After all, it is generally

1 (1860) 8 HL Cas 268 (HL).

2 [1992] 1 MLJ 166. The Malaysian cases are based on the Malaysian Partnership Act 1961 which is substantially in *pari materia* with the English Partnership Act 1890 (53 & 54 Vict, c 39). Part II Schedule I and s 4(1)(a) of the Singapore Application of English Law Act (No 33 1993) have specifically continued to apply the said English Partnership Act which has recently been re-enacted, save for some minor amendments, as the Singapore Partnership Act 1994 Rev Ed. As such, the partnership laws of Singapore and Malaysia share a common parentage and the decisions delivered by Malaysian courts should be both helpful and persuasive for the ensuing discussion.

3 [1993] 1 SLR 482.

4 S 1(1), Singapore Partnership Act 1994, (Cap 391, Rev Ed).

5 Controversy surrounds the latter position which was actually the common law stance prior to the enactment of the English Partnership Act 1890, 53 & 54 Vict, c 39; see *Pooley* v

accepted that partners ought to be able to enjoy the fruits of their participation by sharing in any of the net profits generated by the partnership enterprise.

The question that immediately springs to mind is whether one can additionally infer from this line of reasoning that the converse ought also to hold. Consider, for instance, the following scenario: Supposing evidence has been adduced to show that a particular individual in a partnership receives part of the firm's profits, can one then presume that the said person is one of the partners? The import of this is reflected in the wording employed for section 2(3) of the Partnership Act which reads as follows:

> "The receipt by a person of a share of the profits of business is *prima facie evidence* that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, *does not of itself* make him a partner in the business ..."

The fact that only the element of profit sharing has been singled out for statutory presumption does seem to suggest that this feature is to be regarded as a primary attribute of a partnership.

There is, however, a qualification. Inserted before the word 'evidence' in section 2(3) is the adjective '*prima facie*'. Hence, any investigations into the manner profits are to be or have been shared can only yield *prima facie* evidence which accordingly should not be overplayed. To understand why this should be so, one needs to look back in time and consider the legal situation that existed in England prior to the middle of the nineteenth century. The position held then was that the recipient of profits would (from the moment he received his share) be deemed to be a full partner of the business and thus liable for the debts and obligations of the partnership; the rationale proffered for adhering to this extremely uncompromising

Driver (1876) 5 ChD 458 at 472 where Jessel MR instructed that "there could not be a partnership without there being a commercial business to be carried on with a view to profit and for division of profits". The editors in *Lindley on Partnership* (11th ed, pp 11-12) argue that the lack of mention of such a requirement in s 2(3) suggests an intention for a change in the law. However, other authors have maintained that it is essential for a partner to participate to some extent in the profits; *eg,* in *Partnership Law* (2nd ed, p 14) Morse drew support for such a proposition from cases such as *Saywell* v *Pope* [1979] STC 824 and *United Dominion Corp* v *Brian Pty Ltd* (1985) 60 ALJ 741, while Higgins and Fletcher argued in *The Law of Partnership in Australia and New Zealand* (6th ed, pp 38-40) that the wording of the statute was not sufficiently unambiguous to make it clearly inconsistent with the common law. It is submitted that the views of Morse and of Higgins and Fletcher are to be preferred.

[6] (1793) 2 HBL 235.

attitude could be traced to the 1793 case of *Waugh* v *Carver*,[6] one of the leading cases of that period, in which it was asserted that a person who received a portion of the profits had by so doing deprived the creditors of their rights. This was indeed an unsatisfactory situation for it then meant that a creditor who had agreed to be reimbursed through the profits (*eg,* for payments of interest and principal on a loan to help start or develop the business) would be unwittingly saddling himself with a financial burden that was not of his doing. This stand was eventually repudiated in 1860 by the House of Lords whose holding in the *Cox* v *Hickman*[7] case was subsequently incorporated into the Partnership Act. In this landmark case, the owners of an ailing iron-foundry business were compelled to assign (under a deed of arrangement with the creditors) their entire enterprise to a committee of trustees (appointed by the creditors) who then proceeded to run the operations of the foundry under a new business name, with the net profits divided among the creditors until such time when upon the full repayment of all debts the property was to be restored to the original owners. The action against Cox and another of his fellow trustees was lodged by Hickman because the bills of exchange sent by the latter for goods sold to the trustees had not been honoured. Having considered the circumstances as a whole, their Lordships ruled that the business continued to belong to the owners as the trustees did not intend to run it on their own behalf – in contravention of the tenet prevailing then which maintained that profit sharing afforded conclusive evidence for the existence of a partnership – and any participation in the profits by the trustees was limited as the business was to be returned to the owners once the debts had been fully discharged. The common law theme that emerged from this decision (before the English Parliament had even introduced the Partnership Act) was that the existence of a partnership could not be predicated solely on profit sharing and consequently one should not overlook the need to take all the surrounding circumstances into account.

Although intended to reflect the House of Lord's decision in *Cox* v *Hickman*, the section 2(3) provision of the Partnership Act is unfortunately worded rather awkwardly and there may be some resultant ambiguity that ought to be looked at in detail. On the one hand, it does appear to suggest that the receipt of any profits, when adduced by one party to the dispute, has to be regarded as *prima facie* evidence which must then be rebutted by the other party. On the other hand, there is apparently a requirement to present additional supporting evidence since profit sharing is of itself insufficient. Furthermore, it is submitted that the very term '*prima facie*' is susceptible to two possible interpretations: either it merely states that

[7] *Supra*, note 1.

such evidence is admissible in court or it allows one to determine from the evidence, in the absence of other facts, that the business relationship in question is that of a partnership.

Perhaps one can resolve the uncertainty by noting that the burden of proof lies on the party alleging the existence of the partnership. Besides, the courts have already been adopting a more global approach by taking all the facts into consideration (including the circumstances that affect the sharing of profits); in other words, judges ought not to consider profit sharing on its own accord but must instead place it in the total context of the circumstances since the manner in which this particular factor has interacted with all other relevant factors should be taken into account as well. The following oft-cited articulation of North J in *Davis* v *Davis*[8] serves as an exemplification of such a stand:

> "... the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in it, and if the matter stops there, it is evidence upon which the court must act. But if there are other circumstances to be considered, they ought to be considered fairly together; not holding that a partnership is proved by the receipt of a share of the profits, unless it is rebutted by something else; but *taking all the circumstances together, not attaching undue weight to any of them, but drawing an inference from the whole* ..."

Apart from profit sharing, all the surrounding evidence should thus be examined and this must include – as was raised by North J in the underlined portion of the extracted text which has since then been widely adopted – the circumstances by which the profits came to be shared. It has often been asserted that the intention of this so-called global approach is "to get at the real agreement between the parties"[9] and generally the court is prepared to infer a partnership when two or more parties share in the net profits of a business provided that after taking all the facts of the case into consideration there cannot be found any indications of a contrary intention with regard to the conduct of the business.

The global approach has been endorsed by the Singapore courts from as early as 1930. The Straits Settlements Court of Appeal case of *Murray* v *David*[10] (which revolved around the business relationships that existed between the two litigants in the three separate ventures known as the Chemor, Penawat and Tongkah schemes) provides a good example of how this

[8] (1894) 70 LT 265 at 267.

[9] *Per* Lindley LJ, *Badeley* v *Consolidated Bank* (1888) 38 ChD 238 at 358.

[10] [1930] SSLR 229.

approach has been applied in Singapore: Murison CJ reiterated that "... although participation in profits means *prima facie* partnership, it does not establish a presumption of partnership which has to be rebutted by other evidence"[11] and Thorne J also concurred that "... all the circumstances must be considered, and an inference drawn from them as a whole, without attributing undue weight to any of them."[12] It is clear, then, that on its own profit sharing can only furnish *prima facie* evidence, the probity of which may, depending on the context of the particular case, either be strengthened or even weakened.

One ought, nevertheless, not to be too ready to dismiss *prima facie* evidence since it is still relevant evidence of sufficiently significant probity, as can be seen from a study of the appellate judgment with regard to the business relationship between Murray and David in each of their three ventures. For a start, Murison CJ was able to state with neither hesitation nor equivocation that "in both [Chemor and Penawat schemes] there was no agreement as to sharing profits, and therefore no *prima facie* partnership;"[13] and after an examination of the surrounding facts related to these two ventures yielded confirmation of his initial finding, he added the following corroborating observations:[14]

(a) "The receipt by the plaintiff [Murray] of a number of shares without any inquiry ... as to how far they represented his share in the deal does not fit with the idea of a partnership. Nor does the admitted absence of any request by plaintiff for an account [of each of the two ventures]."

(b) "The plaintiff's ... admission that he still never asked for a share of them [the profits] ... again does not indicate the idea of a partnership."

(c) "The fact that the word 'partner' was never mentioned until the actions were in train, and the plaintiff's admission that he never claimed at any time to be a partner, do not support the partnership idea."

The appellate court's judgment has apparently suggested that the overall conduct of the person alleging to be a partner of the venture is another important factor that should be taken into account. Murray had clearly not

[11] *Ibid*, at 231.
[12] *Ibid*, at 244.
[13] *Ibid*, at 235.
[14] *Ibid*, at 235-236 (for all three extracts from the judgment).

exercised any of the functions and rights expected of a partner in respect of the Chemor and Penawat schemes, and hence the appellate judges had to conclude that the inert posture he adopted was inconsistent with his allegation of being a partner in the two ventures.[15] However, one should be cautious when attempting to advance such an assertion. First, the findings derived from an investigation into the conduct of the parties involved must always be placed in proper perspective and related to all other relevant circumstances; for instance, the fact that Murray did not exercise any partnership rights tied in well with the other fact there was no express agreement for any sharing of profits. Second, for those actions involving outsiders where there has been some holding out, the parties may be estopped from denying the partnership regardless of the position actually existing among the alleged partners within the venture.[16]

It so happened that the facts for the remaining Tongkah scheme were different from those of the two ventures discussed earlier. The appellate court accepted Murray's contention that for this particular venture he had directly contributed his monies to the defendant for the purpose of developing and selling a property under what "appears to be an agreement to share profits [on a pro-rata basis], and, therefore *prima facie* a partnership".[17] An investigation into all the other facts and circumstances (including Murray's own conduct) did not uncover any evidence that was inconsistent with the *prima facie* evidence and it was thus ruled that there was indeed a partnership between the two litigants for their third venture. Hence, the variation of certain facts and circumstances in what may otherwise appear to be similar cases can have a significant bearing on the decision reached by the court as to the existence of a partnership – in particular, the presence (or absence) of profit sharing when viewed together with any other factors that are able to shed light on the parties' inter-relationships. The role of the court is, then, to evaluate the totality of the evidence adduced by the various parties and thereafter, determine what is the true status of the contract under dispute.

On the other hand, it can also be argued that there is much sense in not placing undue emphasis on profit sharing *per se*. After all, it is nowadays possible for one to participate in profit sharing without first having, or even

15 It was not as if Murray claimed to be a dormant partner. The court thus concluded that in the circumstances the relationship between the two litigants was more of a trustee beneficiary where "the defendant [David] was a trustee for him in regard to the monies of his used by the defendant". The matter was not further pursued since the plaintiff had not pleaded such a relief.

16 The person making representation of himself as a partner may be either estopped from denying his partnership relationship or held liable for holding out under s 14(1) of the Singapore Partnership Act (*supra*, note 4).

17 *Supra*, note 10, at 238.

wanting, to be a partner of the enterprise and this feature may in fact be found in quite a diverse range of business relationships. Examples of such relationships have already been enumerated in the Partnership Act;[18] the creditor may collect the principal and interests for his loan from the profits; an employee may receive some fraction of the profits as part of his remuneration package; the widow or child of a deceased partner may by way of annuity be entitled to a share of the profits; and a vendor may have been given a portion of the profits in consideration of the sale of goodwill of the business. The fact of profit sharing does not on its own predicate a partnership for otherwise one would be led to the mistaken conclusion that the persons described in these four examples function as business partners.

III. Employer and Employee

It is clear from the material already discussed under the preceding heading that trying to decide whether a particular fact situation falls within the guidelines spelt out in section 2(3)(b) of the Partnership Act is not always an easy task. Such a difficulty also arises when one has to distinguish between true partners who participate in the profits and salaried partners who are actually employees with a remuneration package that consists – in part or in whole – of some portion of the profits. In fact, for certain instances there may only be a tenuous line separating these two categories, as was recently borne out in the Singapore Court of Appeal case of *Chua Ka Seng* v *Boonchai Sompolpong*[19] where the search for evidence of a partnership was preliminary to the real purpose of proving a claim to an entitlement of the firm's assets. In this interesting dispute, Boonchai alleged that he had joined Chua's architect firm on the oral understanding that he would be entitled to a 20% share of the firm's earnings and assets as an equity partner. There was, in addition, an entry in the firm's accounts stating that Boonchai had a capital of $8,000 which amounted to a quarter of Chua's capital of $32,000, and on this basis the first instance judge accepted the junior architect's assertion of being a partner in the firm. The counter-argument that was put forward averred that the $8,000 entry was a genuine accounting error and the said amount was credited back to Boonchai during the subsequent financial year. The appellate court thus had to reject the first instance court's finding that the $8,000 constituted capital contribution. Attention was thereafter, directed to the issue of the 20% profit-sharing feature which in accordance with the section 2(3) provision was *prima facie* evidence

[18] S 2(3) (a)-(d).

[19] *Supra*, note 9, see in particular s 2(3) (b).

that a partnership existed. In order to place such a presumption in its correct perspective, the appellate court then adopted North J's approach of "... taking all the circumstances together, not attaching undue weight to any of them, but drawing an inference from the whole ..."[20] and concluded that profit sharing, though of import, was only one factor and for the case at hand what was more pivotal appeared to be the lack of capital contribution as it would be odd if Boonchai could lay claim to a share of the firm's assets when he had not contributed anything in the first place. It should, on the other hand, be pointed out that the Partnership Act has not specifically included capital investment as an essential factor to be taken into consideration; nevertheless, in certain cases its absence can offer some evidence against there being a partnership. The significance of this particular factor may arguably vary in proportion to the size of the amount in question relative to the amounts invested by those known to be the partners since its presence would be likely to lend weight to the inference of a partnership when its relative size is large.

Furthermore, the lack of capital contribution was not helped by the fact that Boonchai was a relatively young man who had only recently secured his registered architect status. It was thus difficult to understand why Chua would want to offer full partnership to Boonchai unless the latter could demonstrate that he had by then already established a name for himself by virtue of, for example, in-depth expertise in a specialized field or privileged access to an exclusive circle of high-profile businessmen.[21] The other factor arraigned against an inference of partnership included the observation that Boonchai had not been accorded any authority to sign cheques on behalf of the firm. In a larger enterprise (with a clear division of labour and an elaborate management structure) one would not be surprised to find the function of signing cheques in the hands of those in the finance division, but in this case Chua's firm was merely a small outfit and there was no reason why Boonchai should have been denied such an important management authority if he was truly a partner. It should be noted, however, that this lack of authority could not be pleaded against a third party with no notice.[22]

It is submitted that the Court of Appeal had adopted the correct approach

[20] *Supra*, note 7.

[21] If so, an argument could have been made out that (notwithstanding the absence of concrete capital) Boonchai had in fact made contribution in terms of his expertise or goodwill.

[22] Boonchai, having been described as a salaried partner by Chua, was thus deemed by the court to be so, although he was not, as the judge had also pointed out, a "partner properly so called" as to be entitled to the assets of the firm. The term 'salaried partner' is not a term of art. With respect to the outside world he would usually be held out as a partner, but then in law there may technically not be a partnership; see *Stekel* v *Ellice* [1973] 1 WLR 191.

of taking a macro-level perspective of the situation – by balancing all of the relevant factors (*viz,* lack of capital contribution, fewer years of experience and no authority to sign cheques) – and rightly concluded that on the whole the negative indicia far outweighed the *prima facie* evidence of profit sharing. Actually, this confusion would not have arisen if the employee had not been remunerated through participation in the net profits of the business. The lesson learnt, therefore, is that the employer may be courting problems if he chooses to pay his employees by giving them a percentage of the profits. Human beings being what they are, the possibility then exists that some of them may subsequently embark on flights of fancy and, contrary to the intention of the employer, elevate themselves to the status of partner and boss. Besides, should relationships turn sour in the future – a scenario which is not uncommon – the more opportunistic among them may be able to wreak havoc by instituting actions to claim a share of the firm's assets, even when (like Boonchai) they have not made any contribution in the form of capital outlay or technical expertise.

IV. Capital Contribution

One of the matters raised in passing during the preceding discussion is the question of capital contribution, the relative significance of which has long been presumed to serve as an indicium of a partnership although, as has already been pointed out, the Partnership Act did not make any specific mention of such a requirement. By way of illustration, consider the noteworthy case of *Too Tong* v *Lim Eng Tiong*[23] – albeit of venerable vintage – in which O'Malley CJ ruled that "... if you find something called 'capital' is paid into a business before legal proceedings are thought of and you find no payment of interest for a period extending over several years and nothing is placed to the credit of the person advancing the money, the presumption is that is, it is the capital of the partnership and that the advancer is a partner."[24]

The question of capital contribution was also discussed in the 1930 case of *KA Abdul Gaffoor* v *RE Mohamed Kassim, RA Abdul Kader and VK Abdul Kader*.[25] At the centre of this dispute before the Malayan Supreme Court is the nature of the relationship that existed between Mohamed Kassim (founder of a large Indian enterprise with businesses in Malaya, Burma and India) and Abdul Gaffoor (who started off as a delivery clerk in 1912 at Mohamed Kassim's branch at Klang and quickly rose through the ranks to become the branch manager in 1915). Abdul Gaffoor maintained that

[23] (1890) 4 SLJ 46.
[24] *Ibid*, at 46.
[25] [1931-32] FMSLR 19.

he was in partnership with Mohamed Kassim and the other two defendants, and to support his claim he produced a Tamil document (which was signed in 1925 by himself and a number of other people involved in the business but not by Mohamed Kassim) that purported, *inter alia*, the following:

(a) with regard to capital, $5,000 was attributed to Abdul Gaffoor and to each of the other two defendants whereas the first defendant (Mohamed Kassim) was listed as having the lion's share of $500,000

(b) with regard to profits, Abdul Gaffoor was allocated 1H shares (out of a total of 79H shares)

(c) the signatories to the document were described as 'kuttalimargal', a word which was commonly employed in the Tamil districts to denote people who were remunerated by a share in the profits.

The Supreme Court, however, took the view that the capital amount of $5,000 attributed to Abdul Gaffoor only represented his share of profits earned rather than any actual contribution made by him since it was evidently granted to him so that he could exercise greater authority over the other employees; as was noted by Elphinstone CJ, "As regards the share of profits given by Exhibit G [said Tamil document] for capital, it is admitted that none, except the first defendant, made any cash contribution towards capital, nor do the ledgers credit any capital to the plaintiff or to the second or third defendants."[26] It is submitted that the rejection of Abdul Gaffoor's allegation of capital contribution has strongly suggested that the absence of such a contribution would weaken the efficacy of the *prima facie* evidence of profit sharing.

There is, in addition, an interesting comment in Elphinstone CJ's judgment that merits some further discussion: "The only ground that the petitioner has for holding that the [Tamil] document embodies a partnership is a vague reference in the second paragraph to 'kanapatta labhanashtam' ... [which] it is true may be translated into profit and loss ..."[27] Although loss sharing is not necessarily an essential indicium of a partnership, it is a natural attribute which could well have served as a weighty factor in Abdul Gaffoor's favour had the Chief Justice not proceeded to elaborate that 'kanapatta labhanashtam' was also "... very commonly used by merchants

[26] *Ibid*, at 26.
[27] *Ibid*, at 28.

to mean simply the balance and the context shows that there is no question at all of any of the co-workers [*ie,* including the plaintiff himself] bearing any loss."[28]

V. Loss Sharing

Not all businesses are expected to be successful, and partners ought therefore to make provision for the sharing of losses in the event that their venture fails. One of the factors to look for, then, is whether there is an agreement among the parties to share such losses. The relative importance of this factor as an indicium of partnership may be implicity derived from the *prima facie* importance of profit sharing since losses can after all be viewed as net profits that are in the negative (*ie*, when total expenses are in excess of gross income). Any specific agreement to share losses would in fact reflect that the parties are willing to bear the risks of the venture and they should thus be deemed as genuine participants in the business, as can be seen in the Canadian Federal Court case of *Northern Sales (1963) Ltd* v *Minister of National Revenue*[29] which centred around the question of whether a partnership relationship was created when three grain companies in North America decided to enter into an agreement to "contract, purchase, handle, transport, merchandise and sell on a joint basis all rapeseed which they may handle from the production of the Western Canadian crop" during certain crop years and to divide any profits or losses arising from this joint effort in accordance with the appropriate formulas set out in the contract document. The *prima facie* evidence of profit sharing was held to be non-conclusive in view of the rebuttals lodged by the companies that "there was no contribution of capital, no common management, no common assets, no common facilities, no common bank account and no common firm name."[30] After further inquiry into all the surrounding circumstances, however, Collier J was persuaded to rule for the existence of a partnership: "In this case the agreement provides for the sharing of losses as well as

[28] *Ibid*.

[29] 37 DLR (3d) 1973 612.

[30] *Ibid*, at 618.

[31] *Ibid*, at 620. For the present case, additional factors that bolstered the finding of a partnership included the fact that the agreement also provided for consultation among the parties and the fact that some consultation had indeed transpired; this is reflective of joint management power that is usually present in a partnership. One must caution that loss sharing is no conclusive indicium. It so happened that, when placed in the context of the facts of the case, this factor stood out strikingly and even weakened the significance of the lack of capital contribution. In any event, it ought to be noted that if the agreement is silent on the question of loss sharing and if indeed the court deems the relationship to be one of a partnership,

profits. That, in my view, is characteristic of a partnership contract."[31]

Nevertheless, one must be cautious of using loss sharing conclusively as an indicium of a partnership. Its relative importance will have to depend on how it and the other factors interact – individually as well as collectively – with the surrounding circumstances. Consider by way of example the instructive case of *Walker* v *Hirsch*[32] in which the English Court of Appeal decided against the finding of a partnership even though the agreement contained a clause that stipulated that (in addition to his fixed salary) Walker was "to receive one-eighth share of the net profits of the said business and to bear one-eighth share of the losses thereof, as shown by the books when balanced."[33] There was, however, no noticeable sign of elevation in Walker's status after the execution of the agreement. He continued to perform the same clerical duties as before; the firm did not notify any of the bankers and customers that he was a partner; and not once did he sign any letter or receipt in the name of the firm. Cotton LJ thus took the view that this was "... not a partnership with all the consequences flowing from that in general terms without any restriction", but rather "... an arrangement by the firm with an outsider on certain terms as regards his salary."[34] Further insight could be drawn from Baggallay LJ's judgment as well: "If that provision as to a share in profits and losses was to create a partnership, one would expect to find some provision as far as regards the assets of the business and the goodwill of the business. You would hardly expect (unless there were a provision on that point) a partnership to be created this way, which would give to the party entering into it without having been into it before, a right to determine the partnership and thereupon to share in its assets and goodwill."[35] Rightly so was the appellate court wary of allowing any party claiming to be a partner the opportunity to seek dissolution of the partnership enterprise in order to acquire a share of the capital assets. Walker might have supposed that he was entitled to such an action as he still laboured under the impression that the sum of £1,500

there would then be an implication of equal loss sharing – *vide* s 24(1) of Singapore Partnership Act (*supra*, note 4).

32 (1884) 27 Ch D 460.

33 *Ibid*, at 460.

34 *Ibid*, at 471. Once again, the alleged partner here was not exercising any of the rights or dominion that one would ordinarily expect of a partner – a point reminiscent of cases like *Chua Ka Seng* v *Boonchai Sompolpong* (*supra*, note 3) where the younger architect also had no authority to sign cheques.

35 *Ibid*, at 464-465. Implicit in this articulation is a reflection of the court's aversion to allowing those who claimed to be partners the possibility of seeking the dissolution of the enterprise so as to lay their hands on a share of the assets, especially when there had been no evidence of their having contributed any capital in the first place.

which he advanced to the firm – as was stipulated by another clause in the agreement – represented capital contribution on his part, but then the appellate court observed that the said amount attracted interest (which was payed at quarterly intervals) and should therefore be regarded as a loan instead. Hence, as the case has amply demonstrated, it is important to study the inter-play of all the various factors before one can arrive at a full appreciation of the overall situation.[36]

VI. Joint Ventures

The cases that have thus far been reviewed clearly indicate that profit sharing *per se* may in certain instances not give rise to the inference of partnership. Nevertheless, one must place the role of this particular factor in the correct perspective since its relative importance as an indicium of partnership should not be under-rated. As a matter of fact, those who are involved in a collaborative effort often run the risk of being labelled as partners when they participate in the profits generated by the joint enterprise. The Malaysian High Court case of *Aw Yong Wai Choo & Ors* v *Arief Trading Sdn Bhd & Anor*[37] serves to illustrate how this may come about. The dispute started when Arief Trading failed to honour its obligation to construct houses on land owned by Perak State Development Corporation. The news of the dilemma faced by Aw Yong and the other house purchasers caused quite a stir and the state government intervened by directing the statutory corporation to complete the project that was abandoned by the developer. The arguments put forward by the parties centred around the agreement between the developer and the corporation, and in his judgment Peh J had to make a detailed study of this particular document:

> "The court was struck by the provision of 50% of the profits of development for the corporation as opposed to gross returns thus giving rise to a presumption of fact, *ie, prima facie* evidence of partnership, but I must hasten to add that this provision did not conclusively make the corporation a partner. All other relevant factors have to be considered equally, and they could give rise to a contrary presumption of fact or could rebut the first mentioned presumption. The court considered all the provisions – in particular the clause providing for sole financial responsibility of the developer; the provision of vacant land by the corporation; the joint appointment of contractors for the work; the joint

[36] As such, the lack of capital contribution, the absence of elevation of status and the lack of say in the management impelled the court to hold that Walker continued to remain a servant – despite the presence of a profit and loss sharing clause in the agreement.

[37] [1992] 1 MLJ 166.

> appointment of architects, surveyors, *etc*; ... the approval in advance of estimates and specifications; the reserved right to the corporation to inspect the project to ensure all compliance with all specifications; the right of the corporation to inspect all books of accounts and accounts which were required to be properly kept and audited. The court considered also the brochure distributed to potential house buyers with words in bold type announcing a 50/50 joint venture between the corporation as land owner and the developer as developer."[38]

The manner in which the parties to a joint venture represented themselves could in general be quite telling, but unfortunately the facts of the present case did not indicate whether the corporation had consented to the inclusion of the 50/50 joint venture announcement in the publicity brochures distributed by the developer. If the said announcement could be presumed to have been jointly issued, there would then be two possible implications – *either* it signified that the venture was indeed a partnership *or* at the very least it might arguably amount to a representation of a partnership and thereby, create an estoppel against the two defendants (*viz,* both developer and corporation). Although this was not specifically argued out by the parties themselves, Peh J must have been mindful of it when he drew attention to the significance of such a representation in the concluding section of his judgment.

The corporation strenuously denied ever having intended to establish a partnership with the developer when deciding to embark on the joint venture. However, as Peh J had reminded the parties, "the court must find the real intention of the parties in dispute or involved [even when] the real intention is not necessarily the expressed intention of the parties ..."[39] What initially stood out in the agreement was the profit sharing clause which furnished *prima facie* evidence of the partnership (although the court was all too aware that this was in itself not conclusive); further inquiry revealed other positive indicia such as the exercise of management functions and authority generally associated with partners as well as the announcement of the joint venture status in the publicity material. Hence, the factual arrangement which the two defendants had agreed to adopt led the court to decide that they were operating as partners and the fact that they had in all probability never consciously intended to be partners in the first place was dismissed as irrelevant. Peh J also enjoined that the conduct of the parties both before and after the signing of the joint venture agreement was relevant; any attempt to mask a partnership relationship under the guise

[38] *Ibid*, at 180-181.
[39] *Ibid*, at 179.

of a loan or some other arrangement could then be uncovered by the court. Nevertheless, the judge had to concede that "the stated rules cannot be exhaustive at all, for the category of such similar rules is never closed certainly, there [being] far more pigeon-holes than the stated rules for the factors to fit into them."[40]

The emphasis, therefore, is on the global approach of appraising the circumstances in their full totality. After all, any subsequent actions taken by the parties to the joint venture may additionally help to shed light on what had actually been agreed upon earlier. Peh J's decision has in effect sounded the warning that, it is possible for parties to enter unwittingly into a partnership relationship since the court can after an evaluation of all the surrounding evidence reach a different conclusion on the status of the joint venture from what the parties had originally proposed. Seen from another perspective, the court is apparently attempting to construe the intentions of the parties from their overt actions even though the end result is not necessarily the same as that expressly stated at the beginning. It is thus not that easy for one to invest in a business and hope to be able to collect a share of the profits without having to run the risk of learning at some later date that a court has held him accountable as one of the partners of the venture, and the present case has already demonstrated that such an action can also be initiated by a third party trying to foist liability on an investor with deep financial pockets.

A similar conclusion was reached by the English Court of Appeal in the difficult case of *Walker West Developments Ltd* v *FJ Emmett Ltd*[41] which centred around the complex agreement entered into by a housing developer who owned the parcel of land and a builder who constructed the houses. The issue here was whether there were two separate businesses (*ie,* the developer was merely engaging the services of the builder) or whether there was only one business carried on in common with a view to profit (*ie,* the developer and builder were partners in a joint venture which drew upon the resources of both parties). The builder had steadfastly asserted that the terms of the agreement were more appropriate to those commonly found in a building contract rather than to those to be expected of a partnership agreement. Attention was also drawn to clause A3 which stipulated that "the net profit in the total project shall be ... divided between the parties in equal shares"[42] but the builder contended that this profit-sharing arrangement merely described the manner he was to be paid by the developer. However, Goff LJ highlighted that "the clue is really

40 *Ibid*, at 180.
41 (1979) 252 EG 1171 (CA).
42 *Ibid*, at 60.

to be found in clause A3, in the way in which the parties have themselves described what they were doing; that clause says 'the project', *ie,* it deals with it as one and entire, not as two projects or two businesses."[43] In addition, the agreement went on "to say that the project shall be advertised as a joint Walker West and Emmett project."[44] After having weighed all the evidence, the appellate court thus ruled in favour of a partnership relationship (although Goff LJ did admit that his "mind has fluctuated at times during the argument").[45]

VII. Conclusion

It is surprising that there should still be problems with the formation and operation of partnerships, notwithstanding the fact that this mode of business venture has already been in use for such a long time. With the increased complexities brought on by modernization and internationalization, the courts can expect to encounter even more cases on other partnership-related disputes in the future.

As has been pointed out many times in the present article, it is not easy to interpret and apply the basic rule on profit sharing as *prima facie* evidence. For a partnership to exist, the statutory definition presumes that some form of arrangement must have been contemplated for the apportionment of the profits among the partners (provided, of course, that the venture proves to be a success). However, one cannot conclusively infer from the presence of such a mechanism for profit distribution that there is indeed a partnership relationship among the parties involved. In such a situation, there is a need to look out for other tell-tale factors such as contribution of capital, exercise of partnership rights and powers, provision for sharing of losses, representation to third parties, and even the circumstances in which profits are to be allocated. The inter-play of all other such factors with that of profit sharing must therefore, be considered in detail before one can arrive at a full appreciation of the complete situation. The objective of this global approach is "to get at the real agreement between the parties"[46] in order to uncover any charades that may have been adopted to mask the arrangement.

[43] *Ibid*, at 66. This approach is reminiscent of that adopted by Peh J in the case of *Aw Yong Wai Choo* v *Arief Trading Sdn Bhd* (*supra*, note 2). It would thus appear that the way the parties have described their business or project – either in the agreement signed by the parties themselves or in any brochures distributed to outsiders – may have some bearing on whether there is a partnership.

[44] *Ibid*, at 66.

[45] *Ibid*, at 65.

[46] *Supra*, note 9.

This is ever so important in view of the government's call for parties to pool their resources and meet the challenges of forging ahead – locally within our shores as well as venturing forth to the other countries in the region.

YEO HWEE YING*

* LLB (Hons) Singapore; LLM (Lond); Senior Lecturer, Faculty of Law, National University of Singapore.