Lim Kok Leong *v* Seen Joo Company Pte Ltd and others
[2014] SGHC 239

Case Number : Originating Summons No 638 of 2014

Decision Date : 14 November 2014

Tribunal/Court : High Court

Coram : Tan Siong Thye J

Counsel Name(s) : Ismail bin Atan (Salem Ibrahim LLC) for the plaintiff; Gregory Vijayendran and Dhiviya Mohan (Rajah & Tann LLP) for the defendants.

Parties : Lim Kok Leong — Seen Joo Company Pte Ltd and others

Companies – directors – powers

14 November 2014

Tan Siong Thye J:

Introduction

1 The plaintiff, Lim Kok Leong, had been a "sleeping" director of the first defendant, Seen Joo Company Pte Ltd ("the Company") since 1997. [note: 1] He had not been involved in the management, or the day to day operations, of the Company.

2 On 1 July 2014, the plaintiff sought to inspect the accounting and other records of the Company for the last five years. This was not acceded to. Thereafter, his other similar requests were also unsuccessful. Accordingly, the plaintiff took out an application under s 199 of the Companies Act (Cap 50, 2006 Rev Ed) ("the CA") to compel the Company and its directors to allow him access to the Company's accounting and other records. I granted his application.

3 The defendants were dissatisfied with my decision and they lodged an appeal against it. I shall now give the reasons for my decision. As a preliminary point, the background facts of this judgment are taken from the defendants' submissions. The plaintiff did not dispute the facts.

The background facts

4 The Company was incorporated in 1996. It was in the general wholesale business, which included trading in electronic components, as well as electrical and network cables and accessories. It was a family run business. Prior to the Company's incorporation, the business was a partnership founded by the fourth defendant and his wife, the third defendant. [note: 2] During the partnership, the business was led and managed by the fourth defendant. [note: 3]

5 The plaintiff worked for the partnership as a salesperson from 1990 to 1993. [note: 4] He then joined HLC Enterprises Pte Ltd ("HLC") which was incorporated in 1993. [note: 5] The second, third and fifth defendants were shareholders of HLC and they appointed the plaintiff as the managing director of HLC. The plaintiff was also a shareholder of HLC. [note: 6]

6 In 1996, after the Company was incorporated, the fourth defendant gave 10,000 shares in the Company to the plaintiff for free, in recognition of the plaintiff's hard work for the partnership. [note: 7] The plaintiff was also appointed as a director of the Company. [note: 8] The plaintiff, however, was a sleeping director as he was not involved in the management and daily operations of the Company. This could be seen from the following: [note: 9]

(a) he was not present in most of the directors' meetings;

(b) he was not present at the Annual General Meetings of the Company;

(c) he did not show any interest in the Company;

(d) he did not ask to see the accounting and other records of the Company until July 2014; and

(e) he had neither undertaken on any financial liability on the Company's behalf nor had he signed any official documents on behalf of the Company.

7 The defendants alleged that sometime on 26 July 2014, the plaintiff discovered that he was removed as director of HLC. [note: 10] Soon after, he asked to be allowed to inspect the accounting records and other records of the Company. [note: 11] When this was not acceded to, the plaintiff filed the present summons against the defendants on 7 July 2014, seeking to compel them to allow him inspection of the Company's records. [note: 12]

The issue

8 The issue was whether the plaintiff should be granted inspection of the Company's records. The germane portion of s 199 of the CA, which he proceeded under, reads as follows:

> **Accounting records and systems of control**
>
> **199**. —(1) Every company and the directors and managers thereof shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance-sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause those records to be kept in such manner as to enable them to be conveniently and properly audited.
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> …
>
> (3) *The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place as the directors think fit and shall at all times be open to inspection by the directors*.
>
> …
>
> [emphasis added]

The plaintiff's case

9 The plaintiff submitted that s 199(3) of the CA gave the directors an *absolute* right to inspect the accounting and other records of the Company. Therefore, he did not have to justify his request to inspect the records. It was presumed that the plaintiff's request to inspect the records was made in the best interests of the Company. The onus was on the defendants to rebut this presumption, and the plaintiff argued that the defendants had failed to do so.

10 Second, the plaintiff submitted that the defendants had also failed to show that he was acting pursuant to an improper purpose. The defendants alleged that the plaintiff had breached his fiduciary duty to the Company as he was in two other entities, namely Acmetec Corporation Pte Ltd ("Acmetec") and Tricess Enterprise ("Tricess") that had similar businesses as the Company. The plaintiff argued that he had ceased his involvement in those two ventures more than ten years ago. Thus that allegation was without basis. [note: 13]

11 Third, the plaintiff submitted that although he was a sleeping director, s 199(3) of the CA did not prohibit him from the inspection of the accounting and other records of the Company.

The defendants' case

12 The defendants submitted that the plaintiff's right to inspect the accounting records flowed from his office as a director. Any refusal by the Company could not confer a civil right of action on a director against itself, much less against another director.

13 Second, the plaintiff's request was not made *bona fide*. For the past 18 years, since the plaintiff had been made a director of the Company, he made no request to inspect the records. Now, all of a sudden, he wanted to inspect the accounting records for the last five years. The application against the defendants was frivolous and unmeritorious.

14 Third, the request to inspect the accounting records for the last five years was a fishing expedition for evidence so that the plaintiff could start a lawsuit against the defendants. The records over the last five years were voluminous and an inspection would result in unnecessary cost and expense to the Company. Therefore, the plaintiff's request should not be granted.

15 Fourth, there was no legitimate basis to use the plaintiff's removal as a HLC director as a ground to inspect the accounting records of the Company, although the directors of HLC and the Company might be similar. HLC and the Company were separate legal entities.

16 Last, the claim should only be against the Company and not against the second to sixth defendants who are directors of the Company. That was because the directors owed fiduciary duty to the Company, not to other directors or shareholders. Thus the action against the second to sixth defendants ought to be dismissed with costs.

My decision

17 I allowed the plaintiff's application for the reasons set out below.

Did the plaintiff have a right to inspect the Company's documents?

The law under s 199(3) of the CA

18 In my view, s 199(1) of the CA imposes a statutory obligation on "every company and the directors and managers of the company" to keep and maintain accounting and other records of the

company. Failure to comply with this statutory duty would expose not just the company but also every company officer to a penal sanction under s 199(6), which is a fine not exceeding $2,000 or to imprisonment for a term not exceeding three months, and also to a default penalty.

19 Following from s 199(1), s 199(3) is the critical provision in this case. It clearly states that the company's records "… shall at all times be open to inspection by the directors." The word "shall" denotes that Parliament has prescribed a mandatory obligation on the part of the Company to allow the plaintiff to inspect the Company's records under s 199.

20 This appears to be the position taken by the cases that have discussed s 199 of the CA. In *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 2 SLR(R) 352 ("*Wuu's* case") at [26], it was held by the Court of Appeal that a director's right to inspect the accounting and other records of the company under s 199(3) is an absolute one:

> The right of a director to inspect the accounting and other records of the company has been described as being "absolute" …

21 Flowing from this, the Court of Appeal in *Wuu's* case at [27] held that:

> … a director by virtue of his office is *prima facie* entitled to inspection and *ex hypothesi* he has the right of access and ***is not required to demonstrate any particular ground or "need to know" as a basis*** . In *Molomby v Whitehead & Australian Broadcasting Corp* (1985) 63 ALR 282, 291, Beaumont J of the Federal Court of Australia said:
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> > In my opinion, in declining access to Molomby [the director requesting for inspection], Whitehead [the managing director] fell into an error of law. The error consisted of a failure to recognize that, as a director of the Corporation, Molomby had a *prima facie* entitlement to access to the corporate material and that, in the absence of good cause to the contrary, and none existed here, Molomby should be permitted to inspect the documents nominated by him.
>
> [emphasis added in bold italics]

22 This statutory right of inspection by a director of the company also existed under the common law as explained in *Wuu's* case at [25]:

> At common law, a director has the right of inspection of any documents such as the accounting and other records of the company and such right is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company. As such, this right like other rights and powers of a director must be exercised for the benefit of the company. This right is recognised in s 199 of the Companies Act ...

My findings with respect to the parties' arguments

23 On the abovementioned portions of *Wuu's* case, I found that the plaintiff had an absolute right as a director of the Company to inspect the accounting and other records, notwithstanding the fact that he was a sleeping director. The plaintiff's directorship was recognised by the defendants, who also acknowledged that a director could inspect the company's accounting and other records regardless of whether he was active or inactive. The right flowed from his office as a director of the company: *Welch and another v Brittania Industries Pte Ltd* [1992] 3 SLR(R) 64 ("*Welch*") at [29]. However, the defendants submitted that the plaintiff had previously not shown any interest in the

Company. Thus there was no nexus between the plaintiff's discharge of his director's duties and his application to inspect the Company's accounting and other records.

24 In my view, the defendants' argument was flawed. The defendants had conceded at the hearing that even a "sleeping" director could ask to inspect the accounting and other records of the Company. It was disingenuous to then argue that the plaintiff should not be allowed to inspect those records as he had been disinterested in the past. It was clear to me that the Court of Appeal in *Wuu's* case drew no distinction between the different categories of directors. In *W&P Piling Pte Ltd (in liquidation) v Chew Yin What and others* [2007] 4 SLR(R) 218, Lai Siu Chiu J held (at [80]) that:

> The law makes no distinction between fiduciary duties owed by different categories of directors – a nominee director (as the third defendant described himself) owes the same duties to a company as any other director (*per* Stanley Burnton J at [2] in *Globalink Telecommunications Ltd v Wilmbury Ltd* [2003] 1 BCLC 145).

25 Furthermore the purpose of the right to inspect was given a wide interpretation. In *Hau Tau Khang v Sanur Indonesian Restaurant Pte Ltd and another (Hau Tau Thong, non-party) and another matter* [2011] 3 SLR 1128 ("*Sanur Restaurant*"), Steven Chong J held at [22]–[23] that:

> … I reject the respondent's narrow construction of the purpose of the right to inspect and find that inspection was intended to enable a director to discharge *all* his statutory duties, including but not limited to those in relation to accounts. It appears quite foreseeable to me that a director might need to check the company's accounts so as to discharge his duties of reasonable care and diligence pursuant to s 157(1) of the CA. This was precisely what Rogers J in *Law Wai Duen v Boldwin Construction Co Ltd* [2001] HKCA 284 ("*Law Wai Duen*") was alluding to at [12] when he said:
>
> > Hence, in relation to many matters directors will no doubt rely upon what is done by company officials and their fellow directors in relation to the affairs of a company. But that is not the say that the ultimate responsibility does not lie upon the director. If a director has cause to be suspicious, or reasonably believes there is such cause, then the director may incur liability if he does not satisfy himself in relation to *all matters* relating to the company's affairs. More importantly, even if a director does rely upon other directors or company officials in the conduct of the company's affairs, he must, at all times, be at liberty to satisfy himself as to *any matter* in relation to the company's business. [emphasis added]
>
> Further, a director might also need to check the company's accounts to discharge his duty to act in the interest of the company as, without information on the company's financial position, the director may not be able to exercise his discretion properly.
>
> 23 In the circumstances, a wider purpose is, in my view, entirely consistent with the right of the director to inspect the company's accounts as such a right is but a "legal incident of his directorship" …

26 The defendants also questioned the timing of the inspection, which was soon after the plaintiff discovered that he was removed as HLC's director. However they were unable to show how the plaintiff's request for inspection was *mala fide* or would be injurious to the Company. *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) ("*Walter Woon*") at para 10.46 commented that it is extremely difficult for a company to refuse inspection:

> ... The court has no residual discretion to refuse inspection unless it is satisfied that 'on the basis

of the evidence before it that the director's intention is to use the information obtained for ulterior purpose such as with a view to causing detriment to the company and that the director is this abusing the confidence reposed in him'. This was also the view held in the earlier case of *Welsh v Britannia Industries Pte Ltd*. That said, it is hard to see how in practice the company could prove such a thing. A director need only say that he desires to inspect the accounts in order to fulfil his statutory duty. It would be extremely difficult for a company to refuse inspection in such a case.

27 It was therefore my view that the plaintiff had the legal right to inspect the accounting and other records of the Company even though he was a passive director.

Could the defendants refuse the plaintiff's inspection of the accounting and other records?

28 I am of the view that the defendants could refuse the plaintiff access to the accounting records if they could show that the plaintiff wanted them for an improper purpose. This point was dealt with in *Wuu's* case at [33]:

> The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but for some ulterior purpose or to injure the company …

29 *Walter Woon* expressed the same views at para 10.46:

> Of course, if it could be proven that the director in question did in fact abuse the information obtained, he might be sued by the company after the event; but *mere suspicion in the absence of concrete proof would be insufficient to deny a director his statutory right to inspect the accounting records*. The company would need to show 'clear proof' and to satisfy the court 'affirmatively' that the grant of the right of inspection would be for the purpose detrimental to the interests of the company and there must be a 'real ground' that the right would be abused and that substantial harm would be caused to the company thereby.
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> [emphasis added]

30 However, the defendants could not show that the plaintiff wanted the accounting records for an improper purpose. It is trite law that the onus to prove that the plaintiff had an improper purpose lay on the defendants. This was explained in *Wuu's* case at [34]:

> The onus of establishing that the right is being, or will be, exercised for an improper purpose lies on the person who asserts it … There is no burden on a director to show any particular reason for his request for inspection - this will ordinarily be assumed … It is for those who oppose the director's right to inspect to show "clear proof" and to satisfy the court "affirmatively" that the grant of the right of inspection would be for the purpose which would be detrimental to the interests of the company. There must be a "real ground" that the right would be abused and that substantial harm would be caused to the company thereby.

31 The defendants alleged that the plaintiff had breached his fiduciary duty as he was involved in two other enterprises with a similar type of business as the Company. The defendant's first allegation was that the plaintiff was a director of Acmetec. The second allegation was that the plaintiff was the sole proprietor of Tricess. In short, the defendants alleged that the former directorships of the plaintiff showed that the plaintiff was trying to act against the Company's interest or, alternatively, intended to breach his fiduciary duty to the Company.

32 I found these allegations unmeritorious. The defendants had accepted that the plaintiff was a director of Acmetec from 16 January 2003 to 3 August 2004. Hence, it had been about ten years since the plaintiff was Acmetec's director. As for the sole proprietorship of Tricess, this was from 1989 to 1991. His involvement in Tricess had ceased about 23 years ago. I failed to see how the plaintiff's past directorships could, in any way, evidence his intention to act to the detriment of the Company or show that his intentions to breach his fiduciary duty to it. They were bare and baseless allegations.

33 I therefore held that the defendants had failed to show that the plaintiff had an improper purpose, or was acting *mala fide*, when he applied to inspect the accounting and other records of the Company.

Could the plaintiff join the directors in his application for inspection under s 199(3) of the CA?

The defendants' submissions

34 The defendants submitted that the plaintiff's right to inspect the accounting and other records came from his office as a director, relying on the proposition in *Wuu's* case at [33]. Therefore, the plaintiff's right to inspect the accounting and other records of the Company was *only* against the Company as it was the Company that was obliged to keep records. Furthermore, company directors owed a fiduciary duty to the company and not to other directors or shareholders. Thus the plaintiff's right could be enforced against the Company but not against the other directors. [note: 14]

The plaintiff's submissions

35 The plaintiff, on the other hand, submitted that it was proper for him to proceed against the Company and all the directors. This was to ensure that the order of the court also bound the Company's directors. The plaintiff cited *Sanur Restaurant* as an example in which the plaintiff sued not just the company but also its directors.

My views on s 199 of the CA

36 It is clear from s 199(1) of the CA that every company and its directors and managers should keep and maintain the accounting and other records of the company. The penal sanction under s 199(6) of the CA is applicable against the company and every company officer. The dispute, however, is whether company officers should be joined in an action under s 199 of the CA. The plaintiff's position was yes. The defendants disagreed.

37 Having regard to the submissions of the parties, I noted that the plaintiff cited the case of *Sanur Restaurant* as authority for the proposition that an action could also be taken against the company and its directors. However, the issue of whether it was appropriate to include the directors in the action was neither challenged nor discussed in *Sanur Restaurant*. Conversely, the defendants relied on *Wuu's* case at [29], and submitted that the Court of Appeal in *Wuu's case* followed the position in *Conway and others v Petronius Clothing Co Ltd* [1977] 1 WLR 72 ("*Conway*"). In the defendants' view, Slade J held in *Conway* at 86 that s 147 of the Companies Act 1948 (c 38) (UK) ("the UK Act") imposed a statutory obligation on companies to allow its account books open for inspection by the directors. But it did not follow that s 147(3) conferred any civil right of action against any director of the company who refuses to grant permission for inspection to take place. I am of the view that *Conway* did not stand for the proposition that directors could not be included in the action. I shall explain this in greater detail below.

(I) The statutory right to inspect under s 199 of the CA originated from a common law right

38 Section 199 of the CA was taken from s 147 of the UK Act and s 161A of the Companies Act 1961 (No 6839 of 1961) (Vic) ("the Australian Act"). Prior to those two provisions, the right to inspect a company's records existed as a common law right: *Conway* at 89–90. The right stems from a director's need to be able to perform his director's duties properly and it is absolute to that extent: *Woon's Corporation Law* (LexisNexis, Looseleaf Ed, 2014, July 2013 release) ("*Woon's Corporation Law*") at para 51. No reasons need to be given by the director when he seeks inspection. *Edman v Ross* (1922) 22 SR (NSW) 351 ("*Edman*") at 360–361 held that:

> The right to inspect documents … is essential to the proper performance of a director's duties … its exercise is, generally speaking, not a matter of discretion with the Court and that *he cannot be called upon to furnish his reasons before being allowed to exercise it*. In the absence of clear proof to the contrary the Court must assume that he will exercise it for the benefit of his company.
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> [emphasis added]

(A) The approach of the UK and Australian/New Zealand courts

39 It seems that the courts in UK and Australia approached s 147 of the UK Act and s 161A of the Australian Act, which are *in pari materia* with s 199 of the CA, differently. However, both jurisdictions arrived at the same conclusion that the director has a right to inspect the accounting and other records of the company provided it is done *bona fide*.

40 In the UK, Slade J appeared to take the view that s 147 of the UK Act was primarily to impose penal sanctions on companies and directors. There was no statutory provision that empowered the court to compel the company or director to allow a director to inspect the accounts (see *Conway* at 88–89):

> The wording of section 147 of the Companies Act 1948 … contains no provision empowering the court to order any inspection. In these circumstances, this wording, viewed in its context and in light of the preceding law, drives me to accept [the] submission that section 147(3) *does not itself* confer upon directors of a company a statutory right, enforceable by injunction, to compel a company or any directors of a company to make available its books of account for inspection by that director.
>
> [emphasis added]

41 Nevertheless, Slade J in *Conway* acknowledged that the director has a right to inspect accounting and other records of the company under the common law [89]:

> (1) *The right exists but it is a right conferred by the common law and not by statute. Though the legislature in section 147 of the Companies Act 1948, and its predecessors, implicitly recognised the existence of this right at common law, it conferred no new right* …
>
> [emphasis added]

42 Slade J commented on the possibility of a "civil right of action" in his judgment: *Conway* at 86. That was relied on by the defendants in their submission that "[a]ny refusal by a company of such an inspection does not confer a civil right of action on a director against a company, much less another

director". [note: 15] Given the ambiguity of the reference to civil action in *Conway*, it is opportune for me to express my views on the issue.

43 In my opinion, Slade J used the term "civil right of action" in the context of parties obtaining an inspection order from the court. To fully appreciate his statement it is necessary to consider other aspects of his judgement. I shall first set out the relevant passage at 86:

> There appears to be remarkably little authority relating to the question whether directors of a company have a right to inspect the books of a company, either by virtue of section 147 or at common law or on some other grounds. There can be no doubt that section 147 places a statutory obligation on a company to make its books of account open to inspection by the directors and that any director of a company who fails to take proper steps to secure compliance by the company with this duty is liable to criminal sanctions in accordance with section 147 (4). It does not, however, necessarily follow that section 147 (3) confers any civil right of action whatever on a director against a company which refuses him inspection. The answer to such a question whether a right is conferred
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> > "… must depend upon a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted": see Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 398, 407 *per* Lord Simonds.

44 Slade J's discussion of the issue about a director's civil right of action comes later: see *Conway* at 87–90. It is evident that Slade J was referring *specifically* to whether the director could get an inspection order from the court under s 147 of the UK Act: at 87. This is because he contrasted s 147 with s 27 of the UK Act. The former did not have a specific provision empowering the court to grant an inspection order. The latter did. The passage that follows reads (*Conway* at 87):

> … I can, however, see no justification for reading [section 147] as being intended to confer a statutory right of civil action on a director from whom inspection was withheld. *Its wording was in significant contrast with that of section 27 of the same Act.* Section 27 (1) provided that the books containing the minutes of any general meeting of the company should be kept at the registered office of the company and should during business hours be open to the inspection of any member. Section 27 (3) provided for fines against the company and its officers in the event of a refusal to allow inspection (or to provide copies on request) and concluded with the words
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> > "… and the court may by order compel an immediate inspection of the books in respect of all proceedings of general meetings or direct that the copies required shall be sent to the persons requiring them."
>
> [emphasis added]

45 Slade J then goes on to explain the difference between s 27 and s 147 at 87–88. In his view, the difference existed because in enacting s 147, legislature had thought it unnecessary to include an explicit provision empowering the court to grant inspection orders. It would have been clear if s 147 indicated that the court had a right to order inspection. Slade J held that the right was one that arose from common law, and the relevant portions of his judgement are as follows (*Conway* at 87–89):

> The legislature, I have little doubt, thought it necessary or advisable expressly to empower the court to order an immediate inspection of the books because, but for the section, it would not have been clear that a member had any right to see them or that the court had the power to

compel inspection. ***In contrast, I think that the legislature, in enacting section 39 [of the Companies Act 1928], presupposed, as was the case, that a director had a right at common law to inspect the books of his company and that accordingly it was not necessary to confer on directors a statutory right of inspection enforceable by civil action;*** *all that was necessary was to provide for criminal sanctions in the event of proper books not being kept or not being made available for inspection to the directors.*

…

With the limited assistance available … I reach the following conclusions in relation to the nature of the right of a director to inspect the books of account of a company:

(1) The right exists but it is a right conferred by the common law and not by statute. Though the legislature in section 147 of the Companies Act 1948, and its predecessors, **implicitly recognised the existence of this right at common law**, it conferred no new right; the purpose of that section and its predecessors was to impose criminal sanctions in the event of proper books of account not being kept or not being made available for inspection or in the event of a breach of any of the other duties imposed by the section.

[emphasis added in italics and bold italics]

46 In summary, Slade J in *Conway* explained that in enacting s 147 of the UK Act, the legislature did not intend for any new statutory rights to be conferred on the directors. The right to inspect was still the common law position and was merely codified by s 147. The significance of it being a common law right was that the court retained the discretion in deciding whether or not to grant the inspection order (see *Conway* at 90):

(4) *The right not being a statutory right, the court is left with a residue of discretion as to whether or not to order inspection.* However in the case where there is no reason to suppose that the director is about to be removed from office, the discretion to [withhold] an order for inspection will be sparingly exercised. [emphasis added]

47 The Australian and New Zealand positions appear to be different. The courts there seemed to favour the interpretation that the right to inspection had become a statutory one. In *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 ("*Berlei*") at 163, Mahon J held that:

Whilst I agree with Slade J that there was not in the UK statute, and not in the relevant 1976 amendment thereto, any positive declaration that a director has the right of inspection of company records, in contrast with a shareholder's right to inspect the registry of members, which is specifically provided for, yet it seems difficult to say, reading the New Zealand s 151(2) [of the Companies Act 1955], that no statutory right of inspection is thereby created. … When read with the other provisions imposing penal sanctions upon directors in respect of false accounts, the subsection seems clearly to create a statutory right of inspection …

48 Similarly, in Australia, Murray J in *Deluge Holdings Pty Ltd v Bowlay* (1991) 6 ACSR 36 ("*Deluge*") at 38 held that:

... It is arguable I think, although I do not need to resolve the question to decide this application, that upon that basis there *can be no consideration of a discretionary character* …

In *Welch* at [26], I note that Kan Ting Chiu JC shared the same view in relation to the Australian and

New Zealand approach. In short, the UK courts have treated the right to inspect as a common law right, while the Australian and New Zealand courts appear to favour seeing it as a statutory right.

(B) The Singapore position

49 The present Singapore position seems to be a hybrid between *Conway* and *Berlei*. In *Wuu's* case, the Court of Appeal recognised two things. First, it recognised that s 199 acknowledged the director's common law right to inspection of the company's documents. It held at [25]:

> … At common law, a director has the right of inspection of any documents such as the accounting and other records of the company and such right is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company. As such, this right like other rights and powers of a director must be exercised for the benefit of the company. This right is recognised in s 199 of the Companies Act …

50 Second, while there was nothing in s 199 to suggest that the right at common law had been modified (see *Wuu's* case at [31] and *Sanur Restaurant* at [14]), Mahon J was correct in *Berlei* to hold that the court did not have a residual discretion to refuse inspection. At [32], the Court of Appeal held as follows:

> 32 Mahon J in Berlei also disagreed with Slade J that there was a residual discretion in the court to refuse inspection. He said at 163:
>
> > In the course of his judgment Slade J relied to a considerable extent, with reference to the extent of the director's rights, upon the quotations just made from the two reported cases referred to, but I venture to suggest, with great respect, that neither of the cases in fact justifies the conclusion of Slade J that there is a discretion as to whether or not a court will permit a director to have access to corporate records and accounts. The correct construction of the authorities relied upon by Slade J seems to me to be that the right of inspection is unqualified, but that where it is proved that a director is acting or is about to act in breach of his fiduciary duty to the company and intends to aid that process by inspecting the books, then his right to inspection disappears.
>
> *We respectfully agree with Mahon J. Where the court disallows a director his right of inspection of the books and other records of the company, the court in effect is not exercising "a residual discretion". The court in such an event is satisfied on the basis of the evidence before it that the intention of the director in inspecting the books and records is to make use of the information for ulterior purposes such as with a view to causing detriment to the company and that the director is thus abusing the confidence reposed in him as a director.*
>
> [emphasis added]

51 In short, the Court of Appeal said two things: first, that the common law position was left unchanged and second, that the court had no residual discretion to refuse a director inspection if he was exercising that right properly. In my view, *Wuu's* case was simply a reflection of the difference in the way Slade J and the Court of Appeal conceived of the common law right to inspection. Both agreed that s 147 of the UK Act and s 199 of the CA respectively left the common law position untouched. The right to inspection was to be effected unless it was exercised for an improper purpose.

(C) The difference is as a matter of practice immaterial

52 The above highlighted the differences in the UK, Australian/New Zealand and Singapore approaches towards s 147 of the UK Act, s 161A of the Australian Act/the New Zealand equivalent and s 199 of the CA respectively. As a matter of practice, there is little difference. First, D D Prentice highlights in his article, "A Director's Right of Access to Corporate Books of Account" (1978) 94 LQR 184 at p 196 that:

> … [W]hat Slade J. took away with one hand [the statutory right to inspect the records] he gave back with the other. Although rejecting a statutory right of inspection he held that a director had a "common law" right "to see his company's books of account, which is exercisable both at and outside meetings …" ([1978] 1 W.L.R. at p. 89H). The right, conferred on a director to enable him to carry out his duties, was not absolute but the court's discretion to withhold an order of inspection should be "very sparingly exercised." …

53 In Australia and New Zealand, the right to inspect the company records is subject to the director seeking to comply with his statutory and fiduciary obligations towards his company. Mahon J held in *Berlei* at 164–165 that:

> I think it may be more correct … to treat what is described as the director's "right" as really a power. Suppose the case of a director who formulated a dishonest scheme to use corporate information for his own personal profit or for the advantage of a competitor and then, with his corrupt intentions unknown, exercised his right to scrutinise the company's confidential records. It seems a fallacy to suggest that his inspection was in pursuance of any "right" because ex hypothesi the "right" was extinguished as from the moment when he began to put in train the fraudulent scheme. It is for that reason that *I would prefer myself to describe the director's position as being one involving a "power" to inspect corporate records as and when thought necessary in order to comply with his statutory and fiduciary obligations towards his company*. … [emphasis added]

54 The example given by Mahon J seems to suggest that if the right to inspect was being used for an improper purpose, that right would not be given effect to. The Australian position, which may appear to use a different test, also seems to be that if there appears to be "substantial harm" to the company, the balance of convenience would not favour the making of an inspection order: *Deluge* at 41.

55 Therefore, it is clear that the right to inspect is not an absolute one in the sense that the director can inspect the records whatever the circumstances may be. In Singapore, the director's exercise of his right is subject to his fiduciary duty to the company. He is not allowed to use it for any improper purpose: *Wuu's* case at [33].

(II) The right to inspect is against the company at common law and against the fellow directors by statute

56 What then, is the legal position in relation to the second to sixth defendants? Should they have been joined to the proceedings? I was of the view that, having regard to the legislative purpose of s 199, it was justifiable to include the directors as defendants as they were personnel specifically mentioned under s 199(1) of the CA. While the common law position with respect to the right to inspect has not been changed, it is my view that in Singapore, by virtue of s 199, the right to inspect has been extended statutorily against the fellow directors of the company as well.

(A) The defendant's reliance on *Conway* was misplaced

57 I first address the defendant's reliance on *Conway* for the proposition that the second to sixth defendants should not be joined in the proceedings. In my view, the defendant's reliance on that case was misconceived. *Conway* was not *strictly* concerned with whether directors could be joined to legal proceedings so that they were bound under the judgment. It was concerned with the nature of the director's right to inspect the documents under s 147 of the Companies Act 1987. Nowhere did the court in *Conway* express the view that other directors should not be joined to the proceedings. All it did was to confirm the position that the right to inspect was subject to the judge's discretion as it was a right that originated from common law. Therefore, *Conway* did not stand for the proposition that the second to sixth defendants should not be joined to the action.

(B) A statutory right exists against the fellow directors such that they can be ordered to produce the company's records

58 The Company's directors were officers of a company. They were persons whom s 199 intended to be held responsible for compliance, which includes making records of the company available for inspection by the directors. In my view, while the common law right of a director to inspect the company's documents is preserved and remains unchanged under s 199, this provision also provides a statutory right for an aggrieved director to compel his fellow directors to produce the documents. This is due to a significant difference in the way s 199 is worded when compared to s 147 of the UK Act and s 161A of the Australian Act. I shall first reproduce the relevant portions of these statutes.

(i) The UK provision

59 The relevant portions of s 147 of the UK Act are set out as follows:

> **147 Keeping of books of account**
>
> (1) *Every company shall* cause to be kept proper books of account with respect to—
>
> (*a*) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;
>
> (*b*) all sales and purchases of goods by the company;
>
> (*c*) the assets and liabilities of the company.
>
> …
>
> (3) The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and shall at all times be open to inspection by the directors:
>
> …
>
> (4) *If any person being a director of a company fails to take all reasonable steps to secure compliance by the company with the requirements of this section, or has by his own wilful act been the cause of any default by the company thereunder, he shall, in respect of each offence, be, liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred pounds*:
>
> …

[emphasis added]

(ii) The Australian provision

60 The relevant portions of s 161A of the Australian Act are set out as follows:

161A Accounts to be kept

(1) *A company shall—*

(a) keep such accounting records as correctly record and explain the transactions and financial position of the company;

(b) keep its accounting records in such a manner as will enable true and fair accounts of the company to be prepared from time to time; and

(c) keep its accounting records in such a manner as will enable the accounts of the company to be conveniently and properly audited in accordance with this Act.

…

(8) A company shall make its accounting records and any statements and records referred to in subsection (4) available in written or printed form in the English language at all reasonable times for inspection without charge by the directors of the company and by other persons authorized or permitted by or under this Act to inspect the accounting records of the company.

…

(10) If default is made in complying with a provision of this section other than subsection (9) the company, a director of the company who failed to take all reasonable steps to secure compliance by the company with the provision *and every officer of the company who is in default shall be guilty of an offence*.

Penalty: $1000 or imprisonment for six months; Default penalty: $50.

[emphasis added]

(iii) The Singapore provision

61 I note that the UK and Australian provisions above are worded differently from s 199 to the extent that the duty to maintain proper company records applies *only* to the company and does not extend to the directors and managers. The position is different under s 199(1) of the CA, which statutorily extends the responsibility *personally* to the directors and managers of the company. The relevant portions of s 199 are set out as follows:

Accounting records and systems of control

199.—(1) *Every company and the directors and managers* thereof shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance-sheets and any documents required to be attached thereto to be prepared from time to time, and shall cause

those records to be kept in such manner as to enable them to be conveniently and properly audited.

…

(6) If default is made in complying with this section, the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $2,000 or to imprisonment for a term not exceeding 3 months and also to a default penalty.

[emphasis added]

Therefore while I note that the Court of Appeal in *Wuu's* case held that s 147 of the UK Act was *in pari materia* with s 199 of the CA, it is my view that the Court of Appeal's comments were only made insofar as both sections concerned the nature of the right of inspection.

62 The UK and Australian provisions are clear that the duty to maintain proper accounts applies only to the company. However, the wording of s 199 in Singapore extends that duty to the directors and managers as well. In my view, for a harmonious reading, s 199 has to be read as a whole (*Haw Par Bros (Pte) Ltd v Dato Aw Kow* [1971–1973] SLR(R) 813 at [12]) as well as to understand the common law right of a director to inspect the company's documents (see *Welch* at [30]; *Arthur Bokenham* (1708) 88 ER 957 at 958). Parliament must have intended to statutorily extend an aggrieved director's right to inspect the company records such that he can get a court order to compel his fellow directors to produce the records. This possibility of extending the right to inspect to fellow directors was alluded to in *Conway* at 88 when Slade J appeared to consider the possibility of s 147(3) of the UK Act applying to the "directors of a company". After all, a company can only operate through it directors and managers.

63 Therefore, I am of the view that with regard to the wording of s 199, the Singapore position must be that Parliament intended for directors to be able to apply to court for an inspection order against not just the company but also their fellow directors. I disagreed with the defendants' submission that the action against the second to the six defendants ought to be dismissed with costs.

Conclusion

64 For the above reasons, I allowed the plaintiff's application to inspect the accounting and other records of the Company. The defendants further submitted, in the alternative, that should the court grant the plaintiff's application, they urged that the plaintiff observe three conditions, namely:

(a) The plaintiff must preserve the confidentiality relating to the information.

(b) The plaintiff must bear the costs of retrieving and transporting the documents for his own inspection.

(c) The plaintiff must complete the inspection within six weeks.

65 The plaintiff agreed to the first two conditions but disagreed with the third. Instead of six weeks, he wanted a total of ten weeks (*ie*, two weeks for every year) for his auditor to inspect all the documents. In light of their disagreement, I ordered that the inspection be completed within eight weeks.

66 Finally, I ordered the defendants to pay the plaintiff's costs of the application fixed at $3,000.

[note: 1] Defendants' bundle of documents ("DBOD") at Tab 2 p 13.

[note: 2] DBOD at Tab 3 para 9.

[note: 3] DBOD at Tab 3 para 9.

[note: 4] DBOD at Tab 3 para 10.

[note: 5] DBOD at Tab 3 para 10.

[note: 6] DBOD at Tab 3 para 10.

[note: 7] DBOD at Tab 3 para 11; Tab 3 p 19.

[note: 8] DBOD at Tab 3 para 11; Tab 3 p 20.

[note: 9] DBOD at Tab 3 paras 12–15.

[note: 10] DBOD at Tab 3 para 25.

[note: 11] DBOD at Tab 2 paras 11–17; Tab 3 para 26.

[note: 12] DBOD at Tab 3 para 26.

[note: 13] DBOD Tab 3 at paras 19–20.

[note: 14] D1 to D6's written submissions at para 26.

[note: 15] D1 to D6's written submissions at para 26.