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Independent State of Papua New Guinea
v
PNG Sustainable Development Program Ltd

[2016] SGHC 19

High Court — HC/Originating Summons No 234 of 2015
Judith Prakash J
6, 19 May; 30 July; 12 August 2015

Civil procedure — Originating processes

Companies — Memorandum and articles of association — Effect

Companies — Accounts

Companies — Capacity — Pre-incorporation contracts

Contract — Collateral contracts

Contract — Consideration

Contract — Ratification

Estoppel — Estoppel by representation

12 February 2016 Judgment reserved.

Judith Prakash J:

Introduction

1 In this originating summons ("OS 234" or "this OS"), the Plaintiff, the Independent State of Papua New Guinea ("the State"), seeks a declaration that it is entitled to inspect and take copies of all true accounts, books of account and/or records of the Defendant, PNG Sustainable Development Program

Limited ("PNGSDP"). This OS is an offshoot of the action in Suit 795 of 2014 ("S 795"), having been commenced after a summons in S 795, which had prayed for the same relief, was dismissed on the ground that the relief prayed for, being final, had to be sought by way of an originating process rather than by an interlocutory application.

2 PNGSDP has mounted a root-and-branch attack on the State's alleged right of inspection. Its argument that the State not entitled to the relief it seeks is threefold. First, it is inappropriate to commence this action by way of an originating summons. Secondly (and this is the most hotly contested ground), the State does not have and may not enforce any alleged right of inspection. In particular, it refutes the State's three arguments, which are based on the Memorandum and Articles of PNGSDP, an alleged collateral contract incorporating the same, and estoppel. Thirdly, even if the State has an enforceable right of inspection, it does not extend to the documents listed in the Schedule to OS 234.

Facts

Parties to the dispute

3 The plaintiff is the Independent State of Papua New Guinea.

4 The defendant, PNGSDP, is a not-for-profit company limited by guarantee which was incorporated on 20 October 2001 in Singapore. It is also registered and operating in Papua New Guinea ("PNG") as an overseas company. It is governed by its Memorandum of Association ("the MA") and Articles of Association ("the AA") (collectively "the M&A"), to which the New Rules of the PNG Sustainable Development Program ("the New Program

Version No 1: 11 Jan 2022 (19:48 hrs)

Rules") are annexed. PNGSDP has four members and its board of directors comprises eight international and Papua New Guinean directors and one independent Singapore director.

Events leading to the incorporation of PNGSDP

The history

5 In 1976, the State entered into an agreement with the predecessor of BHP Minerals Holdings Pty Ltd ("BHP") setting out the parameters for the development of the Ok Tedi Mine ("the Mine"), a gold and copper mine in the Western Province of PNG. The terms of the agreement were reflected in the First Schedule to the Mining (Ok Tedi Agreement) Act 1976 (PNG). In accordance with the agreement, Ok Tedi Mining Limited ("OTML"), a company in which both BHP and the State were shareholders, was nominated in 1984 to undertake, construct, develop and operate the Mine. OTML's primary assets were the Mine and the Special Mining Lease No 1, which afforded mining rights to OTML until 2022.

6 In 2001, BHP informed the State that it wished to close the Mine ahead of its scheduled mine life basically due to concerns regarding the environmental impact of the Mine. At the time, the shares in OTML were held in the following proportions:

BHP	52%
The State	20%
Inmet Mining Corporation	18%
Mineral Resources Ok Tedi No 2 Limited	10%

Version No 1: 11 Jan 2022 (19:48 hrs)

7 After deliberation, the State informed BHP that the Mine had to continue operating in view of its potential to bring social and economic benefits to the State and, in particular, the people of the Western Province. BHP agreed to negotiate terms upon which the Mine would continue operations.

8 After 12 months of negotiations, an agreement was reached. This was essentially BHP's exit plan: under the agreement, BHP would gift its interest in OTML to an independent third party so that mining could continue, in return for certain indemnities and protection from prosecution and a law would be passed to reflect the agreement. In December 2001, the Mining (Ok Tedi Mine Continuation (Ninth Supplement) Agreement Act 2001 (PNG) ("the 2001 Act") was passed reflecting the agreement between the State and BHP Billiton Limited ("BHPB"), an entity which had been formed by a merger around June 2001 between BHP and Billiton plc. The main elements of this agreement included the following:

(a) An independent company (*ie*, PNGSDP) would be incorporated in Singapore to hold BHPB's shares in OTML.

(b) PNGSDP would use the dividend stream from OTML for certain specified purposes and for the benefit of the people of PNG.

(c) BHPB would be given protection against prosecution by the State and an indemnity by PNGSDP against any future proceedings for compensation resulting from the environmental damage caused by the operation of the Mine and this indemnity would be secured by PNGSDP's assets.

Version No 1: 11 Jan 2022 (19:48 hrs)

(d) PNGSDP was to operate its business in accordance with certain rules; it would invest one third of its annual dividends from OTML into a fund ("the Development Fund") to be used for supporting development projects in PNG and the other two thirds into a long-term fund ("the LT Fund") to be used for sustainable development purposes to benefit the people of PNG after the closure of the Mine.

The formation and operations of PNGSDP

9 Shortly after the incorporation of PNGSDP in October 2001, the following agreements were entered into to carry into effect the agreement that had been reached between the State and BHPB:

(a) a Master Agreement dated 11 December 2001 between the State, PNGSDP, BHPB, BHP, OTML and the two other shareholders in OTML ("the 2001 Master Agreement");

(b) a Deed of Indemnity dated 11 December 2001 between PNGSDP and BHPB ("the DOI (BHPB)");

(c) a Deed of Indemnity dated 11 December 2001 between PNGSDP and the State ("the DOI (State)");

(d) a Security Deed dated 7 February 2002 between PNGSDP, OTML and Insinger Trust (Singapore) Limited ("ITSL") ("the Security Deed");

(e) a Security Trust Deed dated 7 February 2002 between PNGSDP, OTML, BHPB, and ITSL ("the Security Trust Deed"); and

Version No 1: 11 Jan 2022 (19:48 hrs)

(f) an Equitable Mortgage of Shares dated 7 February 2002 between PNGSDP and ITSL.

I will refer to the above documents, together with the M&A, as "the Transaction Documents".

10 At its inception, PNGSDP was governed by the M&A and the Rules of the PNG Sustainable Development Program. (The aforesaid rules were replaced by the New Program Rules in April 2004.) In the words of Sir Mekere Morauta ("Sir Mekere"), who was PNG's Prime Minister when PNGSDP was incorporated and who is currently the chairman of PNGSDP's board of directors, safeguards were built into PNGSDP to ensure its corporate integrity. One such safeguard was the decision to incorporate PNGSDP in Singapore. This was, he says, partly motivated by the fact that PNGSDP would remain independent and unaffected by any potential change in the government of PNG. Other safeguards were built into the M&A, to which the State and BHPB specifically agreed, to ensure that funds from OTML would be used to promote sustainable development within PNG and advance the general welfare of its people. In Sir Mekere's words, the M&A placed a particular emphasis on strong governance mechanisms, accountability and transparency. For example, board meetings could be quorate and board resolutions could be approved only with the blessings of at least one of each of the classes of directors (Class "A" directors were appointed by BHPB and Class "B" directors by certain organs or offices of the State: see Arts 24 and 38 of the AA).

11 What is important for the purpose of this OS are cl 9 of the MA, Art 52 of the AA and Rule 20 of the New Program Rules. They, loosely speaking, set out the State's right of inspection and right to information:

Version No 1: 11 Jan 2022 (19:48 hrs)

MEMORANDUM OF ASSOCIATION OF [PNGSDP]

…

9. True accounts shall be kept of the sums of money received and expended by [PNGSDP] and the matters in respect of which such receipts and expenditure take place, of all sales and purchases of goods by [PNGSDP] and of the property, credits and liabilities of [PNGSDP]; and, subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed in accordance with the Articles of Association for the time being, such accounts shall be open to the inspection of the members and by authorised representatives of BHP Billiton Limited (or any successor corporation) and the Independent State of Papua New Guinea.

…

ARTICLES OF ASSOCIATION OF [PNGSDP]

…

52. The Directors shall from time to time determine at what times and places and under what conditions or regulations the books of account and other records of [PNGSDP] shall be open to the inspection of members (not being Directors) and by authorised representatives of the State. No member (not being a Director) shall have any right of inspecting any account or book or document of [PNGSDP] except as conferred by statute or authorised by the Directors or by the members in General Meeting.

[Annotation: Amended by EGM on 30/10/12]

…

NEW RULES of the PNG SUSTAINABLE DEVELOPMENT PROGRAM

(Adopted by Special Resolution passed on 21 April 2004)

…

20. **REPORT TO BHP BILLITON, OTML AND THE STATE**

[PNGSDP] must give annually:

(a) a copy of the annual audited accounts of [PNGSDP];

(b) a report of the Program's activities describing:

Version No 1: 11 Jan 2022 (19:48 hrs)

> (i) the financial status of the Program (including details of payments made under Contractual Obligations; the balance of the [LT Fund] and its investments);
>
> (ii) the Projects supported by [PNGSDP] and amounts committed for or spent on each Project; and
>
> (iii) the amount spent by [PNGSDP] on Operating Expenses and the proportion of that expenditure to amounts spent on Projects; and
>
> (iv) details of any OTML shares subscribed by [PNGSDP],
>
> to [BHPB], OTML and the State.

12 PNGSDP began operations in 2002. That was also the year that Sir Mekere ceased to be Prime Minister of PNG. Since then, PNGSDP has committed the equivalent of US$430m to approximately 650 projects and programs in PNG and kept the Prime Minister regularly updated on the status of those projects. In 2004, the members of PNGSDP adopted the New Program Rules as part of the M&A, and this included a requirement for a triennial, independent review. PNGSDP has since undergone two such reviews: in 2007 and 2011.

The disputes after the change in government

13 In August 2011, there was a change in the government of PNG. Mr Peter O'Neill ("Mr O'Neill") took over as the Prime Minister. In 2012, Mr O'Neill was appointed Prime Minister again after a general election. It was also in 2012 that Sir Mekere retired from politics. Thereafter, disputes relating to PNGSDP arose. The State and PNGSDP paint diametrically opposed pictures of what happened. The State paints an image of a company gone rogue and determined

Version No 1: 11 Jan 2022 (19:48 hrs)

to shut itself away from a government eager to ensure that funds are deployed properly for the benefit of its people. PNGSDP, on the other hand, paints an image of a company driven to desperate measures by a new (and corrupt) government intent on getting at its assets for less than noble means.

14 I begin with the State's version of events. The State says that the new government began to review the manner in which PNGSDP was dealing with its assets. From that review, three main complaints emerged. First, it appeared to the State that PNGSDP had amended the M&A in October 2012, without the State's consent, in ways which diluted the State's oversight of PNGSDP. For example, the requirements for a meeting to be quorate and for a board resolution to be valid were changed and the Class "A" directors (which BHPB had nominated) could now appoint their own successors. Pursuant to these changes, Sir Mekere was appointed as an "A" director and chairman on 30 October 2012. On 1 October 2013, almost a year later, Sir Mekere was purportedly added as a member of PNGSDP. On 3 October 2013, the members of PNGSDP passed a further resolution purporting to amend the AA by deleting Art 24B (*ie*, removing the right of the State or its organs or offices to nominate "B" Directors). Secondly, PNGSDP transferred funds from the LT Fund to the General Fund and the Development Fund, allegedly in breach of the New Program Rules. It also ceased development programmes in PNG in October 2013 on the pretext that it was no longer able to fund the projects. However, at the end of 2012, the Development Fund and LT Fund contained US$158m and US$1.35b respectively. Thirdly (and this is more relevant to OS 234), PNGSDP refused to provide an account of its assets upon the State's request made in March 2014 pursuant to cl 9 of the MA and Art 52 of the AA.

Version No 1: 11 Jan 2022 (19:48 hrs)

15 PNGSDP says quite the opposite. Sir Mekere says that PNGSDP had been acting on recommendations given at the second triennial review in 2011. BHPB had approached PNGSDP with a view to ceasing its nomination of "A" Directors and it was because no other organisations were interested in taking over the role of "A" Directors that PNGSDP and BHPB agreed to allow the incumbent "A" Directors to nominate their successors.

16 After Mr O'Neill took over as Prime Minister, Sir Mekere and Professor Ross Garnaut ("Prof Garnaut") (the then-chairman of PNGSDP) met with him and informed him that Sir Mekere would be replacing Prof Garnaut as the chairman. Sir Mekere says that Mr O'Neill did not object. However, Sir Mekere says that it soon became apparent that the State was interested in getting at PNGSDP's assets and, to this end, started to apply pressure on PNGSDP. On 24 October 2012 (around the same time when BHPB and PNGSDP were exploring the issue of succession planning for PNGSDP's "A" Directors), Mr O'Neill publicly called on BHPB to transfer control over PNGSDP's board appointments to the State. In November 2012, the State banned Prof Garnaut from entering PNG on the pretext that a statement he had made to the Australian press about the State's actions was defamatory. In 2013, the State made known its intention to refuse to grant OTML's application to extend the duration of the mining lease unless PNGSDP sold its shares in OTML to the State. However, negotiations for the sale of PNGSDP's shares in OTML ended in stalemate. Eventually, on 19 September 2013, the PNG Government passed the Mining (Ok Tedi Tenth Supplemental Agreement) Bill 2013 and the Mining (Ok Tedi Mine Continuation) (Ninth Supplemental Agreement) (Amendment) Bill 2013, the effect of which was to:

Version No 1: 11 Jan 2022 (19:48 hrs)

(a) cancel all 122,200,000 ordinary shares held by PNGSDP in OTML and issue 122,200,000 new and fully paid-up ordinary shares in OTML to the State;

(b) grant the Prime Minister the discretion to declare whether compensation would be payable to any person in respect of the legislative amendments and, if so, the amount and terms of compensation;

(c) give the State "all necessary powers to restructure" PNGSDP and its operations; and

(d) amend the Fifth Restated Shareholders Agreement and nullify the charge created by the Equitable Mortgage of Shares Agreement between the Plaintiff and ITSL.

On 24 October 2013, Mr O'Neill sent Sir Mekere two letters purporting to remove all of PNGSDP's directors and PNGSDP's CEO, Mr David Sode, and to appoint a "Transitional Management Team" comprising:

(a) Sir Manasupe Zurenuoc, the Chief Secretary;

(b) Mr Dairi Vele, the Secretary for Treasury; and

(c) Dr Modowa Gumoi, the Provincial Administrator for the Western Province of PNG.

On the same day, Mr O'Neill also caused PNGSDP's bank accounts in PNG to be frozen. The State also deported and threatened to arrest and physically harm persons who were connected to PNGSDP. Sir Mekere also says that Mr O'Neill

Version No 1: 11 Jan 2022 (19:48 hrs)

has, during this period, held many media conferences suggesting that if the State gained control of PNGSDP, it would restructure PNGSDP and apply its assets in ways contrary to PNGSDP's M&A.

The litigation history

17 The manoeuvres of both parties eventually led to litigation in Singapore. I will summarise the pertinent milestones in the proceedings to locate this OS within the broader context.

OS 1036 of 2013 and its conversion to S 795/14

18 On 28 October 2013, PNGSDP filed OS 1036 of 2013 ("the original action") against PNGSDP and the three members of the "Transitional Management Team" of PNGSDP purportedly appointed by the State on 24 October 2013.

19 PNGSDP sought two sets of reliefs. First, it sought declarations that the State's purported removal of PNGSDP's board of directors on 24 October 2013 was legally ineffective and that those directors retained full authority to manage PNGSDP's affairs. Next, it sought injunctions restraining the second to fourth defendants from giving instructions in relation to PNGSDP's property and the management of PNGSDP's affairs.

20 On 25 July 2014, during a pre-trial conference, I ordered that the original action be converted into a writ action with the State as plaintiff and PNGSDP as defendant. The original action thereafter became S 795. In the writ action, the PNGSDP filed a counterclaim in addition to its defence to the State's claim.

Version No 1: 11 Jan 2022 (19:48 hrs)

21 In S 795, the State essentially alleges that there was a collateral contract between the State, PNGSDP and BHPB as contained in or evidenced by (*inter alia*) the M&A, the 2001 Act, the Master Agreement, the DOI (BHPB), the DOI (State), the Security Deed and the Security Trust Deed. One term of this alleged contract was that the structure and constitution of PNGSDP were specifically agreed between BHPB and the State. By this term oversight of PNGSDP was vested equally in BHP and the State ("the Agreed Oversight Structure"). Another term was that the Agreed Oversight Structure could not be amended without the consent of BHP and the State. The Agreed Oversight Structure allegedly provided, *inter alia*, that BHPB and the State are entitled to information in relation to PNGSDP and access to its books of account, accounting records and other records. These entitlements are allegedly borne out in cl 9, Art 52 and rule 20 of the New Program Rules. The State also alleges, based on PNGSDP's object of promoting sustainable development within PNG and advancing the general welfare of her people (as set out in cl 3 of the MA), read with other parts of the M&A and New Program Rules and alleged admissions by PNGSDP, that PNGSDP is also a charitable purpose trust.

22 On this basis, the State makes the three complaints as set out in [14] above. The State alleges that PNGSDP changed the M&A and in particular the Agreed Oversight Structure without the State's consent, failed to provide an account to the State of all its dealings with its assets, and dealt with its assets in breach of the New Program Rules and/or PNGSDP's objects as set out in cl 3 of the MA. On those bases, the State alleges that PNGSDP had acted in breach of the collateral contract and in breach of trust and seeks declarations to that effect. It also seeks damages, an order that Sir Mekere be removed as a member, director and chairman of PNGSDP, the invalidation of certain resolutions, an

Version No 1: 11 Jan 2022 (19:48 hrs)

order that PNGSDP be managed according to its constitution as it existed before 30 October 2012, and an order that the State has the right to appoint three directors of PNGSDP.

23 PNGSDP denies the State's allegations and counterclaims for a declaration that the State's purported removal of PNGSDP's directors and CEO/managing director on or around 24 October 2013 is void and that they have full authority to manage its business.

The injunction application

24 On 2 April 2014 (before the conversion of the original action), the State filed Summons 1669 of 2014 (the "injunction application") against PNGSDP for an injunction restraining it from dealing with or disposing of certain assets, namely, the assets in the General Fund, the Development Fund and LT Fund, and its interests in various joint ventures and subsidiaries including OTML.

25 The injunction application was heard by me on various dates between 30 April 2014 and 31 July 2014. On 28 May 2014, while the matter was still pending, I ordered an interim injunction restraining PNGSDP from changing the M&A and the composition of its Board of Directors, and from removing assets in LT Fund.

26 On 25 August 2014, I dismissed the application for an injunction against dealing with all the assets. I found that the evidence did not show a serious danger of dissipation and considered that the balance of convenience did not call for the extensive injunction sought pending the outcome of the trial. The interim injunction in relation to the alteration of the M&A was, however,

Version No 1: 11 Jan 2022 (19:48 hrs)

ordered to continue until the disposal of S 795. In addition, I ordered that PNGSDP furnish the State with:

> (a) copies of its management accounts on a quarterly or more frequent basis;
>
> (b) copies of reports given by portfolio managers; and
>
> (c) to the extent that the information was not apparent from the management accounts, consolidated statements of PNGSDP's assets and liabilities.

Subsequently, I dismissed the application made by the State for leave to appeal against this decision.

Applications for inspection

27 On 31 October 2014, the State filed Summons 5440 of 2014 ("SUM 5440"), a summons-in-chambers in S 795. In it, the State prayed for an order that it be allowed to inspect and take copies of PNGSDP's true accounts, books of accounts and/or other records specified in a schedule, on the basis of cl 9 and Art 52 of the M&A. PNGSDP responded on 10 November 2014 by filing a summons seeking to set aside SUM 5440. I heard both summonses together and, on 10 March 2015, set aside SUM 5440 on the ground that the relief prayed for, being final, had to be sought by way of an originating process rather than an interlocutory application in S 795.

28 The State responded to that decision by filing this OS on 17 March 2015, as a stand-alone proceeding to obtain substantially the same reliefs as those sought in SUM 5440. PNGSDP has vigorously opposed this OS. The bulk of its

Version No 1: 11 Jan 2022 (19:48 hrs)

submissions relate to whether the State has standing to inspect PNGSDP's books. PNGSDP argues that the State has no rights either under the M&A or under any collateral contract, and any arguments it has as regards estoppel must fail. The State on the other hand argues that it must succeed, especially in light of the many admissions it says PNGSDP has made to the effect that the State has a right of inspection.

Issues before this court

29 The central issues that arise are as follows:

(a) whether the State has a right to inspect PNGSDP's true accounts, and in particular:

(i) whether the State may derive rights under the M&A of a company of which it is not a member;

(ii) whether the State has a right of inspection under a collateral contract with PNGSDP; and

(iii) whether PNGSDP is estopped from denying the State's right of inspection; and

(b) if so,

(i) what classes of documents this right of inspection extends to; and

(ii) whether this right of inspection includes the taking of copies.

Version No 1: 11 Jan 2022 (19:48 hrs)

Issue 1: Whether the State used the appropriate originating process

30 This first issue is not a substantive issue *per se*, but it sets the stage against which the facts are to be found.

31 PNGSDP's foremost objection is that this OS should have been commenced by way of a writ rather than an originating summons because there were disputes of fact. Its two main submissions on this point address two main lines of argument that have been advanced by the State, namely, the arguments on admissions (*ie*, estoppel) and the collateral contract. First, PNGSDP denies having made any admissions; it says that the statements in issue were mischaracterised as admissions and the issue of whether it made admissions is one that should be tested at trial. Secondly, the State denies that there is any pre-incorporation collateral contract that binds PNGSDP. In particular, it argues that the State has failed to provide evidence of the circumstances leading to the collateral contract, what the terms of the contract are, when the contract was formed, what the consideration was, who entered the contract purportedly on behalf of PNGSDP, and on what authority he or she entered the contract for PNGSDP. These issues, PNGSDP says, cannot be resolved by affidavit evidence. At a more fundamental level, PNGSDP argues that the State cannot, as it has done, rely on untested affidavits in interlocutory applications in other proceeding to apply for final relief. According to PNGSDP, the upshot of this is that reliefs which depend on findings of fact cannot be granted in this OS.

32 The State's earlier position that the sole dispute was the proper construction of cl 9 and Art 52 was based on its position that its right of inspection had been admitted and has since been overtaken by its own collateral

Version No 1: 11 Jan 2022 (19:48 hrs)

contract and estoppel argument. The State maintains that converting this OS to a writ action is unnecessary.

33 In my view, the mere fact that the State has used an originating summons is not fatal to its prayer for relief. It is true that an originating summons is appropriate where no substantial dispute of fact exists (O 5 rr 2–4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC")). If disputes of fact arise, the court still has the discretion to allow the originating summons to continue as such rather than converting it to a writ action. In that event, if the summons cannot be decided on the undisputed facts, it will have to be dismissed. In this case, in the light of the State's position that the matter can proceed in its present form, disputes of fact may have to be resolved against them at this stage. However, as will become apparent, I think the relevant facts are either undisputed or ones which PNGSDP is estopped from denying. In particular, as regards the estoppel argument, I note that PNGSDP is not disputing that certain things were said, but only contends that they should not be characterised in a certain way.

34 As for PNGSDP's argument that the affidavits relied on are untested interlocutory affidavits, this does not take it very far. The State filed, on 5 May 2015, a Notice of Intention to Refer to Sir Mekere's first, second and third affidavits, Mr David Sode's affidavit dated 18 June 2014 and Mr Timothy Reid's affidavit dated 7 July 2014. The other affidavits on which it relies are exhibited in the affidavit of Chen Jie'an Jared filed on 17 March 2015 (the same date as the filing of this OS). The affidavits on which the State most heavily relies were filed on behalf of an *adverse* party. In this situation, PNGSDP can hardly complain that the affidavits are untested or that it was taken by surprise.

Version No 1: 11 Jan 2022 (19:48 hrs)

Issue 2: Whether the State has a right to inspect all true accounts, books of account and/or records of PNGSDP

35 I turn now to the most substantive and fiercely contested issue in this OS. As mentioned, the State advances three main arguments:

(a) the State has a right of inspection under the M&A itself;

(b) the State has a right of inspection under a collateral contract comprising the terms of the M&A; and

(c) the State has a right of inspection by virtue of estoppel (whether by representation or convention).

Issue 2A: the M&A argument

Under statute

36 I have concluded that there can be no right of inspection under the M&A itself. PNGSDP is generally correct to submit that the State, as a non-party to the M&A, has no standing to enforce the M&A even if it purports to confer rights on the State. The constitutional documents of a company form a contract between the company and its members *inter se* by virtue of s 39(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"), which reads:

> **Effect of memorandum and articles**
>
> **39.**—(1) Subject to this Act, the memorandum and articles shall when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

Version No 1: 11 Jan 2022 (19:48 hrs)

Crucially, 2 (1) of the Contracts (Rights of Third Parties Act) (Cap 53B, 2002 Rev Ed) ("CRTPA") does not afford third parties any rights under the M&A of a company. This is because s 7(2) of the CRTPA states that s 2(1) shall not confer any right on a third party in the case of any contract binding on a company and its members.

37 The State argues that it does not follow from s 7(2) of the CRTPA that a non-member or a member not acting *qua* member has no standing to enforce the M&A. I agree: s 7(2) *per se* does not rule out the possibility that non-members of a company may nevertheless enjoy a common law right to enforce a company's M&A. However, as I discuss below, I have not been able to find such a right at common law.

At common law

38 As a general proposition, the common law has been extremely reluctant to consider the M&A otherwise than as a contract between the company and its members only. The classic decision is *Hickman v Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch 881 ("*Hickman*") at 900, in which Astbury J articulated three principles:

> … I think this much is clear, **first, that no article can constitute a contract between the company and a third person**; secondly, that no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter, director, can be enforced against the company; and, thirdly, that articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively. [emphasis added]

39 The State's first objection to PNGSDP's reliance on *Hickman* is that *Hickman* was concerned only with the question of whether there was a contract

Version No 1: 11 Jan 2022 (19:48 hrs)

between a member and the company. This question corresponds to the third principle in the extract cited above; the other two principles – in particular the first, on which PNGSDP relies – were strictly speaking *obiter*. That may be true, but the law in Singapore on this point has not stood still. I will return to this point later.

The local position

40 PNGSDP submits that *Hickman* represents the common law position in Singapore, as it has been followed by the Federal Court in *Malayan Banking Ltd v Raffles Hotel Ltd* [1965-1967] SLR(R) 161 ("*Malayan Banking*") at [14] and by Lai Siu Chiu J in *Guoh Sing Leong alias Quek Sing Leong the Administrator of the Estate of Guoh Koh Boey (deceased) v Hock Lee Amalgamated Bus Co (Pte) Ltd* [1995] SGHC 279 ("*Guoh Sing Leong*") at [53]. It was also more recently referred to by the Court of Appeal in *Chee Kheong Mah Chaly v Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR(R) 571 ("*Chaly Chee*") at [24].

41 The State submits that PNGSDP has not stated the law accurately. First, *Malayan Banking* is distinguishable. It concerned a situation where the defendant-appellant (Malayan Banking), to whom the plaintiff-respondent (Raffles Hotel) assigned the reversion of a lease, purported to appoint itself as a director of Raffles Hotel pursuant to Raffles Hotel's Articles of Association and where Raffles Hotel later sought a declaration that this purported appointment was invalid. The State argues that this case is different in three aspects: it did not concern a situation where *both* company and non-member sought to enforce the M&A against each other; it did not deal with the issue of whether a non-member may enforce the M&A of a company *limited by*

Version No 1: 11 Jan 2022 (19:48 hrs)

guarantee; and it did not consider a line of UK cases in which a director, though not party to the M&A *qua* director, was entitled to enforce the M&A. Secondly, *Guoh Sing Leong* concerned a case where the plaintiff, as *administrator of his late father's estate*, sued a company for the balance of dividends due and payable on the shares that had been held by his late father. Lai Siu Chiu J held that the company was entitled, under its Articles of Association, to set-off any dividends payable to a member against any sums owing by that member to it. Thus, Lai J's reference to *Hickman* was clearly *obiter*. Thirdly, the reference to *Hickman* in *Chaly Chee* was strictly speaking *obiter* because the question raised in that appeal was whether an article in the M&A had been incorporated into the contract between the respondent company and the appellants, who were the partners of the respondent's audit firm.

42 In my view, *Malayan Banking* presents insuperable difficulties for the State on this issue as none of the three grounds on which the State seeks to distinguish it is valid.

43 First, *Malayan Banking* simply cannot be distinguished on the basis that Raffles Hotel did not seek to enforce its M&A against Malayan Banking. An attempt by A to enforce a right under the M&A against B cannot by that act give B a right under the M&A; it is at best evidence that A believes B to have obligations (and, by extension, rights) under the M&A. If Raffles Hotel had sought to enforce the M&A against Malayan Banking, Malayan Banking could have argued (as the State in this case could have) that, as a non-party to the M&A, it could not come under any obligations by virtue of the M&A. The point is that the proposition that non-members derive no rights under a company's M&A was *ratio*, both in the High Court (*Raffles Hotel Ltd v Malayan Banking*

Version No 1: 11 Jan 2022 (19:48 hrs)

Ltd (No 2) [1965] MLJ 262 at [20]–[32] *per* Winslow J) and in the Federal Court, and it applies squarely to the present case.

44 Secondly, a distinction founded on whether the company is limited by *shares* or by *guarantee* is a red herring. The State has gone too far in suggesting that the common law is or should be more lenient in affording rights to third parties where the company concerned is limited by guarantee (as opposed to shares) where there are effectively no real members. PNGSDP's reply (with which I agree) is that there is no basis for any such distinction between a company limited by shares and one limited by guarantee. The principal distinction between these two types of companies concerns the liability of members. The legal differences between these two types of companies have been set out in the Act; in particular, ss 35(4) and 38 have listed the differences in the constitutional documents of companies limited by shares on one hand and companies limited by guarantee on the other. Section 38(1) in fact addresses the issue of provisions in M&As of companies limited by guarantee that purport to confer a right on non-members to divisible profits. In the light of these provisions, there is hardly any room to suggest that Parliament intended companies limited by guarantee to be treated differently from companies limited by shares in terms of the enforceability of other rights conferred on non-members.

45 Thirdly, I do not think that the developments in the common law suggest that the position in *Malayan Banking* should be considered afresh and reversed. Those cases (which I explain below at [49]–[62]) at most show that a member can enforce a right conferred by the M&A upon him in another capacity and that a non-member may enforce a right by virtue of a collateral contract.

Version No 1: 11 Jan 2022 (19:48 hrs)

46 The *Malayan Banking* decision was rendered by the Federal Court on 22 December 1965, *ie*, during what is often considered the "anomalous period" where the Federal Court still heard appeals from decisions of courts in independent Singapore. It seems to be well-accepted that decisions of the Federal Court on appeal from Singapore are binding on the basis that such decisions emanated from a court that was at the time of decision part of Singapore's judicial system (see, *eg*, *Mah Kah Yew v Public Prosecutor* [1968-1970] SLR(R) 851 (HC) at [12]–[16] *per* Wee Chong Jin CJ; *Ng Sui Nam v Butterworth & Co (Publishers) Ltd* [1987] SLR(R) 171 (CA) at [50]; *Chin Seow Noi v Public Prosecutor* [1993] 3 SLR(R) 566 (CA) at [48] *per* Yong Pung How CJ; and *Freight Connect (S) Pte Ltd v Paragon Shipping Pte Ltd* [2015] 5 SLR 178 at [53]–[54]). Thus, I am bound by *Malayan Banking* as a matter of *stare decisis*.

47 The State calls in aid that the *Hickman* principles have "given rise to much academic debate" and "may not be wholly desirable" (*Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) ("*Walter Woon*") at paras 4.50–4.52) and have been outflanked by cases which have let members enforce rights afforded to it in other capacities. In my view, these do not bring the State very far. Those cases (and the corresponding comments in *Walter Woon*) relate to the second principle in *Hickman* (which states that a member may only enforce a right in the M&A *qua* member). In any event, these cases may now be explained on the basis that a member has a right to require the company to act in accordance with its M&A even if the result would be indirectly to protect a right given to him in another capacity.

Version No 1: 11 Jan 2022 (19:48 hrs)

The position in other common law jurisdictions

48 In my view, PNGSDP is correct to submit that the position in *Hickman* is representative of the law in other major common law jurisdictions. A closer look at the decisions from each jurisdiction shows that the *Hickman* position is, without exception, good law.

(I) UNITED KINGDOM

49 PNGSDP's point is essentially that *Hickman* remains good law in the UK and the Company Law Review recommended leaving the law as it was. Paul L Davies, *Gower and Davies' Principles of Modern Company Law* (Sweet & Maxwell, 8th Ed, 2008) at paras 3-16 and 3-17 summarises the law at some length but I cite only a short passage below:

> **3-16** *(iii) Who can enforce the contract?*
>
> **The standard answer to this question at common law is: the parties to the contract. Since it is members who are party to the contract with the company, it follows that non-members cannot enforce the contract, even if they are intimately involved with the company, for example, as directors.** Suppose, however, a person is both a member of the company and one of its directors. Can he or she enforce rights conferred by the articles, even if that right is conferred upon the claimant in his or her capacity as director of the company? The answer appears to be in the negative. The decisions have constantly affirmed that the section confers contractual effect on a provision in the articles only in so far as it affords rights or imposes obligations on a member *qua*, or as a, member. The State points to on five English cases (two of which were decided post-*Hickman*) which suggest that directors can enforce the M&A even though they are not party to it *qua* director. In my view, none of these bring the State anywhere. In every case, the director deriving a right or coming under an obligation by virtue of the M&A was in fact a member of the company *and* the court was also careful to state that such rights and obligations arose by virtue of membership and not directorship. I will address these decisions in turn. [emphasis added]

Version No 1: 11 Jan 2022 (19:48 hrs)

50 The State cited five English cases (two of which were decided after *Hickman*) which it says suggest that directors can enforce the M&A even though they are not party to it *qua* director. Having considered them, I think they do not support the State's stand. In every case, the director deriving a right or coming under an obligation by virtue of the M&A was in fact a member of the company *and* the court was also careful to state that such rights and obligations arose by virtue of membership and not directorship.

51 The cases are *Pulbrook v Richmond Consolidated Mining Co* (1878) 9 Ch D 610, *Imperial Hydropathic Hotel Co, Blackpool v Hampson* (1882) 23 Ch D 1, *Salmon v Quin & Axtens Limited* [1909] 1 Ch 311, *Hayes v Bristol Plant Hire Ltd* [1957] 1 All ER 685, and, finally, *Rayfield v Hands and others* [1960] Ch 1. In this last case, the M&A of the company provided that "[e]very member who intends to transfer shares shall inform the directors who will take the said shares equally between them at a fair value …" Vaisey J held that the directors were bound to purchase the plaintiff shareholder's shares upon notice from him. Most crucially, it was made plain (at 6) how the defendant directors were so bound:

> Now the question arises at the outset whether the terms of article 11 relate to the rights of members inter se … or whether the relationship is between a member as such and directors as such. I may dispose of this point very briefly by saying that, in my judgment, the relationship here is between the plaintiff as a member and the defendants not as directors but as members.

(II) AUSTRALIA

52 PNGSDP also points out that *Hickman* represents the position in Australia, citing *Magill v Santina Pty Ltd* [1983] 1 NSWLR 817 ("*Magill v Santina*") and *Australian Securities and Investments Commission v Fuelbanc*

Version No 1: 11 Jan 2022 (19:48 hrs)

Australia Limited [2007] FCA 960 ("*ASIC v Fuelbanc*") as authority. The State's reply is that the issue of whether the M&A of a company confers a contractual right enforceable by a non-member did not arise in either case.

53 The State is correct only in so far as *Magill v Santina* is concerned. However, in *ASIC v Fuelbanc*, what the Federal Court said on this issue was very much part of its *ratio*. The ultimate issue in that case was whether the defendants had contravened s 601ED(5) of the Corporations Act 2001 (Australia) by operating an unregistered managed investment scheme. In concluding that the defendants had been operating a managed investment scheme as defined in s 9 of the Corporations Act 2001 (Australia), the court considered that para (d) of that definition, which exempted a "body corporate" from the scheme, did not apply. Heerey J had this to say:

> 32 The "body corporate" exception … does not apply. The purpose of this exception is to ensure that the ordinary engagement of a company in commercial activities does not come within the managed investment scheme regime. The contract created by a company's constitution (see now Corporations Act s 140(1)) only affords rights or imposes obligations on a member in his or her capacity as a member: *Hickman v Kent or Romney Marsh Sheep Breeders' Association* [1915] 1 Ch 881 at 897. The essence of the FUELbanc scheme is that a participant provides "trade dollars" and cash in return for a promise to provide credit for the purchase of fuel over a future period. **The legal foundation for this arrangement is not membership of the company but the contractual relationship between the company and the participant. Relevantly for present purposes, the participant becomes a member of the scheme whether or not he or she becomes a member of the company. (In any event, ASIC has been unable to discover any membership registers, minutes or other records which might prove that participants in fact became members.)** [emphasis added]

54 It appears that the position articulated in *Hickman v Kent* is entrenched in Australian law. The Full Court of the Federal Court of Australia came to the

Version No 1: 11 Jan 2022 (19:48 hrs)

same conclusion in *Marketing Advisory Services (MAS) v Football Tasmania Ltd* (2002) 42 ACSR 128. The conservative position as regards a company's M&A has also found favour with the High Court of Australia in *Bailey v New South Wales Medical Defence Union Ltd* (1995) 132 ALR 1 and with Australian texts more generally. The Australian authorities can be of no assistance to the State.

(III) HONG KONG

55 The third jurisdiction I consider is Hong Kong. PNGSDP submits that *Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei* [2010] 2 HKLRD 1096 ("*Moulin Global*") is authority for the proposition that a company's M&A affords no rights to third parties. The State's reply is that this case failed to consider *John v Price Waterhouse* [2002] 1 WLR 953 ("*John v PW*") and also reached a different conclusion from that of the Singapore court in *Chaly Chee*.

56 *Moulin Global* concerned cross-appeals against a striking-out application against the plaintiff company by the defendant, its director. The company brought suit against the director for alleged breaches of director's duties. The director in turn relied, *inter alia*, on the plaintiff company's bye-laws (which was in this case its articles) indemnifying her in respect of non-wilful conduct. The Court of Appeal decided that the director's action should not be struck out. In so concluding, Rogers V-P (with whom Tang V-P and Le Pichon JA agreed) decided that whether the bye-laws had been incorporated into a deed of indemnity entered into between the company and director was a matter that should proceed to trial. For present purposes, what is more important is Rogers V-P's other holding:

Bye-law 166

Version No 1: 11 Jan 2022 (19:48 hrs)

> 18. Bye-law 166 provides that the Plaintiff shall indemnify the directors in respect of anything done or omitted to be done as directors and gives the directors immunity from suit except in relation to any wilful negligence, wilful default, fraud or dishonesty. However, as Mr Kosmin QC, who appeared on behalf of the Plaintiff, pointed out, **the articles of a company** (the Bye-laws being in this case the Plaintiff's articles) **do not constitute a contract between the company and a third person, specifically not a contract between a director and the company. This Court's attention was drawn to a number of cases and in particular to the judgment of Astbury J in [*Hickman v Kent*], which was clear to that effect.** [emphasis added]

It is plain from this passage that the Court of Appeal thought *Hickman* to be clear authority that a company's M&A is not a contract with third parties.

57 The case of *John v PW* does nothing for the State here since the rights of the non-member (in that case, the auditors) arose by virtue of a collateral contract. That is an argument for later.

(IV) MALAYSIA

58 The fourth jurisdiction which PNGSDP says has adopted the position in *Hickman* is Malaysia, as seen in *RHB Bank Ltd v Pharmmalaysia Bhd* [1998] 7 MLJ 753. In this case, the plaintiff brought an action against the defendant company to enforce its M&A, *ie*, to compel the company to split a share certificate subsequent to the sale of some shares which had been the subject of that share certificate. An issue as to its standing arose because the shares were registered not in its name but in its nominee's name. The State submits that judgment was found in the plaintiff's favour in this case, as the court rejected the company's technical argument (*ie*, that the proper party should be the plaintiff's nominee) by saying that the plaintiff's nominee could be joined as a co-plaintiff. This argument does not bring the State very far. The plaintiff there

Version No 1: 11 Jan 2022 (19:48 hrs)

was in fact purporting to enforce a right in the M&A which had been granted *qua* member to a member, namely, its nominee. However, in the present case, the State is simply attempting to enforce the M&A as a third party; it is not exercising a right in the M&A conferred on a nominee.

(V) CANADA

59 The fifth jurisdiction which PNGSDP says has adopted the position in *Hickman* is Canada, as seen in *James Young v The Newfoundland Dried Squid Exporters Association, Limited* [1950] 2 DLR 772. For present purposes, what is pertinent is Dunfield J's pronouncement at [40]–[42] that the M&A may be enforced by a member *qua* member only. In holding this, Dunfield J was guided by *Hickman*. Accordingly, the Canadian position is of no help to the State as far as this issue is concerned.

(VI) NEW ZEALAND

60 The State's last hope may be found in a decision of the New Zealand Supreme Court, *Woodlands, Limited v Logan* [1948] NZLR 230 ("*Woodlands*"), which it says stands for the proposition that a non-member may have rights in the M&A. This case requires a closer look.

61 There, one Mr Lowry had been appointed as the plaintiff company's managing director. He was entitled under Art 18(*e*) of the company's M&A to appoint a successor by will, failing which the executors and trustees of his will were apparently entitled to do so under Art 18(*f*). The relevant parts of Art 18 provided:

> Articles 74 to 97 inclusive of the said Table A shall not apply to this company and in lieu thereof the following articles shall apply:—

Version No 1: 11 Jan 2022 (19:48 hrs)

> …
>
> (*e*) If the said Thomas Henry Lowry dies whilst he or his nominee or appointee holds the office of managing director he may by his will or any codicil thereto appoint any person (whether a holder of shares in the company or not) to be managing director in his place and determine what shall be the powers, authorities, and discretions of such managing director and what his remuneration (if any) shall be, and how long he shall be entitled to hold office.
>
> (*f*) In default of such last-mentioned appointment or on the death or resignation or failure of any person so appointed to act as such managing director then the executors or trustees for the time being of his will or the administrator for the time being of his estate may exercise the aforesaid powers vested in the said Thomas Henry Lowry.
>
> …

Mr Lowry never exercised his powers under Art 18(*e*). Thus, after his death, the first defendant, executors and trustees of the late Mr Lowry's will and non-members of the company, purported to appoint (in pursuance of their power under Article 18(*f*)) as managing director one Mr Rolls and, after Mr Rolls' death, one Mr Logan. The company sought a determination of whether the first defendant was entitled to do so. To understand the decision, the judgment of Cornish J at 235–237 must be reproduced at length:

> In support of his contention that art, 18(*f*) confers on the will-trustees no enforceable right to appoint a managing director, Mr *Stanton* cites such cases as *Eley* v. *Positive Government Security Life Assurance Co* [(1876) 1 Ex. D. 88] and *Browne* v. *La Trinidad* [(1887) 37 Ch.D. 1), in which it was held that an "outsider" could not successfully sue a company to enforce rights conferred on him by its articles of association. The effect of these and other relevant authorities was stated by *Astbury, J.*, in *Hickman* v. *Kent or Romney Marsh Sheep-breeders' Association* [[1915] 1 Ch. 881] as follows: "I think this much is clear, first, that no article can constitute a contract between the company and a third person; **secondly, that no right merely purporting to be given by an article to a**

Version No 1: 11 Jan 2022 (19:48 hrs)

person, whether a member or not, in a capacity other than that of a member, as, for instance, as solicitor, promoter, director, **can be enforced against the company**; and, thirdly, that articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively" [[1915] 1 Ch. 881, 900].

Mr. *Stanton* relies on the second of these propositions. **But *Astbury*, J., when using the term "enforced," meant "*enforced by legal proceedings*." In the case now under consideration, the trustees have no need** (as the plaintiff had in *Eley* v. *Positive Government Security Life Assurance Co* [(1876) 1 Ex. D. 88] or *Browne* v. *La Trinidad* [(1887) 37 Ch.D. 1]) **to take legal proceedings against the company. They are able to enforce their rights by merely exercising them. They appoint a managing director, and he proceeds to act in accordance with the provisions of cl. (*b*)**. The company cannot challenge what he does in the *bona fide* exercise of his powers. As managing director, he is in full control of the affairs of the company. He appoints its servants and agents, and, if they fail to carry out his instructions, he dismisses them. He decides whether the company shall institute or defend legal proceedings. His authority is paramount; and, while the articles remain unaltered, any attempt to dispossess him would be an attempt by irregular means to vary the constitution of the company.

By its articles a private company may hand over the management of its business to a stranger. The shareholders and the company are bound by those articles so long as they remain in existence: *Re Bulawayo Market and Offices Co., Ltd.* [[1907] 2 Ch 458].

… ***Salmon* v. *Quin and Axtens, Ltd.* [[1909 1 Ch. 311; aff. on app. [1909] A.C. 442]** …

… **decides that a company cannot deprive directors of the powers conferred on them by the articles. The effect of the decision was, to quote *Stiebel's Company Law and Precedents*, 3rd Ed. 298:**

> **to protect the rights of the directors, in effect giving them specific performance of a contract which was only to be found in the articles.**

In view of these authorities, I cannot think that while the articles of this company remain in their present form any attempt by company or shareholders to act in

Version No 1: 11 Jan 2022 (19:48 hrs)

> **contravention of them would be supported by the Court. I cannot see how either could found a successful suit on repudiation of the company's constitution.**
>
> …
>
> None of the shares in plaintiff company belongs to the late Mr. Lowry's estate. The trustees of the shares are (with one exception) different persons from the trustees of the estate. **But, if enforcement of their rights by the trustees may be effected by resort to self-help, without recourse to legal proceedings, their not having the status of members is immaterial.**
>
> [emphasis added in bold]

62 With respect, it is unclear what Cornish J had in mind. At face value, *Woodlands* supports the proposition that non-members may enforce rights supposedly conferred on them if they may do so by self-help and without resorting to legal proceedings, but not otherwise. However, *Woodlands* differs from the present case. *Woodlands* was not a case of a non-member trying to enforce a right against an unwilling company. Notwithstanding the fact that the non-member (the executors and trustees of the late Mr Lowry's will) was named as the first defendant, the case was really one which concerned a dispute between two groups of shareholders (the second and third defendants) regarding the effect of a non-member's conduct on the contract as between themselves. As such, the case did not venture beyond the bounds of *Hickman v Kent*. This view can also be seen from the prefatory remarks by Cornish J at 234:

> There seems to be a deadlock in the conduct of the company's affairs, owing to the fact that the shareholding is equally divided between two parties who have different views as to the proper method of selecting the managing director. One party (represented by Mr. *Stanton*) consists of Mrs. Lowry (widow of deceased) and Mr. R Lowry (one of his sons), who consider that the managing director should be appointed by the shareholders in general meeting. The other party (for which Mr. *Biss* appears) consists of the trustees of the settled shares, who wish the managing director to be appointed by the trustees of the late

Version No 1: 11 Jan 2022 (19:48 hrs)

> Mr. Lowry's estate. The objection of Mr. *Stanton's* clients to this latter method of appointment is, as I understand it, that it has the effect of disfranchising them. This originating summons has been taken out with a view to resolving the deadlock.

Further, there is much force in the critique in *Walter Woon* at para 4.41:

> … The basis of this decision seems to be that the sole question was whether the appointment was valid, not whether the right to appoint could be enforced by the trustees. Cornish J held that as the articles gave the power of appointment to the trustees, the appointment of a managing director by the trustees was valid, and that the managing director could act for the company and bind it by its acts. One wonders whether the learned judge would have reached the same conclusion if the trustees had been suing to enforce their right to appoint the managing director. …

Viewed from this perspective, this case does not help the State since the State is not attempting to assert its right of inspection with the blessings of a member of PNGSDP. Even if *Woodlands* stands for the proposition that the State contends for, it is an outlier and it is not capable on its own of displacing *Hickman*, nor, what is more to the point here, permitting me to disregard the binding effect of *Malayan Banking*.

63 None of the authorities in the common law jurisdictions I have considered show that third parties can derive rights from the M&A, and the State's argument based on the M&A itself must therefore fail.

Issue 2B: The collateral contract argument

64 The next main argument run by the State is that there was a collateral contract which gives the State a right to inspect PNGSDP's books. I should note that part of the collateral contract argument rests on whether an estoppel may be raised – this is an issue I discuss below.

Version No 1: 11 Jan 2022 (19:48 hrs)

65 Even though the M&A itself does not afford rights to third parties, the State is correct that an enforceable collateral contract may exist between the company and third parties that incorporate the M&A of that company as part of its terms. This point is relatively uncontroversial. It can be seen, for example, from *Moulin Global* and *Young v Newfoundland Dried Squid Exporters Assn*. It can also be seen from *In re Anglo-Austrian Printing and Publishing Union* [1892] 1 Ch 158 (CA) and *In re New British Iron Company* [1898] 1 Ch 324 (where the Court held that the M&A was enforceable by non-member directors as its provisions were embodied in the contract between the company and the director), as well as in *Chaly Chee* at [22]–[24] and *John v PW* at [26] (where the auditor was entitled to enforce the indemnity provisions in the relevant M&A on the basis of its contract of engagement with the company).

66 The State's case on the collateral contract is that the alleged contract has the following attributes:

(a) the contract was made between the State, BHPB and PNGSDP;

(b) its terms are in the provisions of the M&A;

(c) the agreement was reached at the time of PNGSDP's incorporation and would have come into existence by 19 October 2001 (being the date on which the terms of the M&A were finalised and signed by PNGSDP's first two subscribers) or, at the latest, on 20 October 2001 (being the date of PNGSDP's incorporation); and

(d) it is collateral to the M&A itself.

Version No 1: 11 Jan 2022 (19:48 hrs)

Preliminary sub-issue: whether a finding of a collateral contract here will create an issue estoppel in S 795

67 During the hearing I expressed concern that an issue estoppel will be raised if there is a finding in this OS that a collateral contract exists. I suggested that this OS be heard and decided at the same time as S 795. The State was not agreeable to this proposal and indicated that it preferred for this OS to be heard independently. I am, therefore, deciding this OS on the basis of the facts before me at this stage. The impact, if any, that my decision here may have on the arguments and evidence and decision in S 795 is something that will have to be dealt with when that matter comes on for hearing. I do not propose to consider it now.

Whether the requirements for a collateral contract were satisfied

68 It is common ground between the parties that a collateral contract requires a promissory (rather than representational) statement, certainty of terms, separate consideration and intention to be legally bound (*Goldzone (Asia Pacific) Ltd (formerly known as Goldzone (Singapore) Ltd v Creative Technology Centre Pte Ltd* [2011] SGHC 103 ("*Goldzone*") at [45]).

69 The parties have stated some general principles regarding collateral contracts that should be borne in mind:

(a) The key motif and advantage of collateral contracts generally is the ability to achieve a substantively just and fair result (*Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 ("*Ang Sin Hock*") at [75]).

(b) On the other hand, it has been cautioned that "there may be more than a whiff of artificiality as the courts strain to locate the presence of

Version No 1: 11 Jan 2022 (19:48 hrs)

a collateral contract in order to do justice in the case at hand" (*The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 15.050.

(c) There is also the supposed danger of commercial uncertainty, which makes courts generally reluctant to find a collateral contract (it being a finding of last resort) and requiring clear proof that the requirements of a binding contract have been met (*Dynasty Line Ltd (in liquidation) v Sukamto Sia and another appeal* [2014] 3 SLR 277 ("*Dynasty Line*") at [18]).

(1) Whether a collateral contract was precluded by the Transaction Documents

70 The foremost attack advanced by PNGSDP is that the alleged collateral contract is precluded by the Transaction Documents. It relies on *Dynasty Line* at [23]–[24], where the court stated that a collateral contract that *precedes* the main agreement would be rendered void if the latter contained a term inconsistent with the former and, in particular, if the latter contained an entire agreement clause.

71 On the basis that the collateral contract *preceded* the main contract, PNGSDP argues that the Transaction Documents preclude the existence of the collateral contract. I think PNGSDP's view is wrong.

72 PNGSDP first relies on cl 8.7 of the Master Agreement to argue that the M&A confers no rights on the State. This reads:

8.7. Third Parties

Version No 1: 11 Jan 2022 (19:48 hrs)

> This document confers rights only upon a person expressed to be a party, and not upon any other person.

The State points out (rightly, in my view) that this clause does not preclude the collateral contract that is said to exist. This clause merely provides that the Master Agreement confers no rights on third parties. There is no equivalent clause in any of the other Transaction Documents or, crucially, the M&A.

73 PNGSDP next relies on cl 12 of the DOI (State), an entire agreement clause, to argue that any collateral contract would be precluded. The clause provides:

> **12. Entire Agreement**
>
> This Deed contains the entire agreement between the parties with respect to its subject matter and supersedes all prior agreements and understandings between the parties in connection with it.

This brings PNGSDP nowhere. The effect of an entire agreement clause is a matter of contractual interpretation and necessarily depends on its precise wording and context (*Lee Chee Wei v Tan Hor Peow Victor and another appeal* [2007] 3 SLR(R) 537 at [25]). As the State points out, this clause merely provides that the DOI (State) contains the entire agreement between the parties *about its subject matter*, which is the indemnity provided by PNGSDP in favour of the State in respect of environmental liabilities. It does not concern any right of inspection under the M&A or right to information more generally. This argument also applies to the Security Trust Deed, cl 16.5(a) of which reads:

> **16.5 Operation of this document**
>
> (a) This document contains the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to that

Version No 1: 11 Jan 2022 (19:48 hrs)

> subject matter is replaced by this document and has no further effect.

This is because the Security Trust Deed concerns the establishment of the security trust and the mechanism by which it may be enforced.

74 I thus take the view that the Transaction Documents do not preclude the existence of a collateral contract of the type asserted by the State.

(2) Whether there was consensus

75 The State argues that there was agreement on the terms. Given that the alleged terms of the contract are those found in the M&A and that the contract was a pre-incorporation contract, this element seems relatively uncontroversial as a brief recapitulation of the facts will make clear. It is undisputed that in early 2001, BHP indicated an intention to exit as a shareholder in OTML. The formation of PNGSDP on 20 October 2001 resulted from negotiations between the State and BHPB (by this time, BHP had merged with Billiton plc to become BHPB). The very fact that PNGSDP was incorporated must have meant that the State and BHPB had agreed on the terms of the M&A. This much was also admitted in Sir Mekere's second affidavit. In my view, the State and BHPB would have purported to contract on PNGSDP's behalf because they must have intended PNGSDP to be bound by the obligations in the M&A.

76 The State argues that the terms are sufficiently certain and PNGSDP has not taken issue with this point.

77 What PNGSDP takes issue with is that the alleged terms were not promissory or contractual in nature and effect. To this end, it relies on *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 2 SLR(R) 50

Version No 1: 11 Jan 2022 (19:48 hrs)

("*Lemon Grass*"). There, the plaintiff operated a restaurant in premises leased from the defendant. A doorway leading to a corridor separated the restaurant from an adjacent café. This doorway was used by the plaintiff's patrons as a short cut to the toilets until the tenants who took over from the café sealed up that part of the corridor. The plaintiff sued, alleging, *inter alia*, a collateral contract giving the plaintiff the right of access through the corridor on the basis of representations made by the defendant's director, one Mr Ong. This was rejected by Belinda Ang Saw Ean JC (as she then was), who held:

> 121 Nowhere in closing submissions was it put forward that what Mr Ong allegedly said were contractual in character or effect, an essential requirement to establishing the existence of a collateral contract. In fact, the plaintiffs had essentially argued that the alleged statements were representations and nothing more.

On this basis, PNGSDP argues that the State has characterised PNGSDP's statements/documents not as promises but as "admissions". The State takes the opposite view.

78 In my view, PNGSDP's argument is ill-conceived. The statements which PNGSDP says do not have contractual effect are not part of the contract; they are supposedly admissions or subsequent conduct which amount to *evidence* of an *earlier contract*. The statements which are actually relevant are the clauses, articles and rules contained in the M&A; those are promissory in nature. PNGSDP's strongest argument in this respect is perhaps that the agreement was *not* that PNGSDP would owe the State a contractual duty to comply with the terms of the M&A, but simply that PNGSDP would be incorporated on those terms. However, such an argument would fail to account for PNGSDP's conduct which I examine at [96]–[121] below.

Version No 1: 11 Jan 2022 (19:48 hrs)

(3) Whether a collateral contract can exist even if its date of creation cannot be precisely identified

79 PNGSDP stated in its earlier submissions that the State could not identify a date on which the collateral contract was entered into. Based on this, it made two main arguments. First, the fact that the State's case was unclear raised factual disputes that made it inappropriate for the matter to be heard as an originating summons. Secondly, PNGSDP could not respond properly to the State's case.

80 A failure to identify the creation of a contract would mean a failure to identify the date on which the agreement was given. However, this is a non-issue. First, in its latest submissions, the State has stated clearly its case that the collateral contract would have come into existence by 19 October 2001 (*ie*, the date on which the terms of the M&A were finalised and signed by PNGSDP's first two subscribers) or, at the latest, on 20 October 2001 (*ie*, the date of PNGSDP's incorporation). Read charitably, this could be said to be consistent with its previous submissions which stated that agreement was given "at the formation of" PNGSDP. Secondly, the particulars are sufficient. It appears that stating the date of the alleged agreement is a requirement of pleading rather than a substantive legal requirement (since it overlaps with acceptance). In *Singapore Civil Procedure 2015* (G P Selvam ed) (Sweet & Maxwell, 2015) at para 18/12/5, it was written:

> **18/12/5**
>
> ***(2) Agreement***—The pleading should state the date of the alleged agreement … Where a contract is alleged to be implied from a series of letters or conversations or otherwise from a number of circumstances, the contract should be alleged as a fact, and the letters, conversations or circumstances set out generally, and further particulars requiring details will not

Version No 1: 11 Jan 2022 (19:48 hrs)

> generally be ordered. For instances of implied contracts, see *Brogden v. Metropolitan Ry.* (1877) 2 App. Cas. 666, *Hussey v. Horne-Payne* (1879) 4 App. Cas. 311.

I agree with the State that it is hard to identify a precise moment of agreement and the court's task, ultimately, is to uphold the reasonable expectations of honest men (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [40]). This may involve eschewing the textbook approach to offer and acceptance and instead examining the documents as a whole to decide if parties agreed on all the material terms (*Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 1 SLR(R) 798 at [16], citing Lord Denning MR in *Port Sudan Cotton Co v Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep 5 at 10). The requirements as to the date of contract have, in my view, been satisfied in this case.

(4) Whether there was separate consideration

81 The issue of whether the State provided good consideration for PNGSDP's promise to allow inspection of its documents is a thorny one in this case. The parties accept that a collateral contract requires separate consideration but the State, relying on *Lemon Grass* at [119], says that such consideration is easily proven.

82 The State's primary argument is that consideration is provided for by the subsequent incorporation of PNGSDP on the provisions of the M&A. The State argues, in the alternative, that consideration moved from the various parties to the agreement in the following fashion:

(a) BHP was able to transfer its shares in OTML to PNGSDP to exit the Mine;

Version No 1: 11 Jan 2022 (19:48 hrs)

(b) the State was able to ensure the continued operation of the Mine;

(c) the State (pursuant to the Ninth Supplemental Act) forbore from pursuing civil, administrative or criminal actions in respect of any environmental claims it may have had against BHPB; and

(d) PNGSDP indemnified the State and BHP for any environmental claims.

The State also seems to allude to a third possible form of consideration, *ie*, the entry into the Transaction Documents. This is based on its reliance on *Shanklin Pier v Detel Products* [1951] 2 KB 854 and on Lord Moulton's speech in *Helibut, Symons & Co v Buckleton* [1913] AC 30 at 47, where it was established that there may be a contract the consideration for which is the making of some other contract.

83 PNGSDP takes issue with the primary argument on the basis that this would have been a pre-incorporation contract which had not been ratified in accordance with s 41 of the Act. This argument will be dealt with below. However, PNGSDP does not otherwise seem to dispute that causing the incorporation of PNGSDP is good consideration. There may be discomfort about the fact that the consideration given for a company's promise is the incorporation of that company, in other words, that one is contracting with a non-entity for its creation. However, I think the objections fall away upon scrutiny. Such alleged consideration moving from the State appears to be a detriment to it in so far as it is put to expense in causing the incorporation of PNGSDP. Although the State is a promoter of PNGSDP, a promoter has no legal duty to bring into existence a company it promotes even if it is said to be

Version No 1: 11 Jan 2022 (19:48 hrs)

a fiduciary of the company. Sufficiency of consideration is, accordingly, not a problem. What is more questionable is whether the requirement that consideration be requested by the promisor is met. In this case, it would be strange to say that, prior to its incorporation, a company has asked for its incorporation as consideration for a promise made by it. This difficulty can, however, be overcome if one considers that the more appropriate (and natural) analysis is that the consideration was asked for by a party contracting on the (pre-incorporated) company's behalf *qua* promoter. After all, promoters of companies may purport to enter contracts on behalf of pre-incorporated companies, which may then ratify such contracts upon incorporation (s 41 of the Act).

(5) Whether there was intention to be legally bound

84 Another of PNGSDP's objections is that there was no intention to be bound, which is a requirement for a legally binding collateral contract (*Goldzone* at [46]). The State appears to be arguing that the requisite intention was present as the collateral contract formed part of the suite of agreements (including the M&A and the other Transaction Documents) which were entered into as a result of negotiations between the State and BHPB and which appeared to be legally binding in the sense that both parties intended that if "the contract was not honoured subsequently, the aggrieved party could invoke the assistance of the court" (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [71]). PNGSDP appears to make three arguments. First (and in an earlier set of submissions), the State's consistent characterisations of PNGSDP's conduct as "admissions" relates to an admission as to a pre-existing state of affairs, *ie*, that the State may enforce the M&A despite being a non-member and does not suggest how the collateral

Version No 1: 11 Jan 2022 (19:48 hrs)

contract was intended to be binding. Secondly, even if the M&A and Transaction Documents are binding on the parties thereto, the State has not shown how the separate collateral contract itself was intended to be binding; in fact, it was not an oversight that the Transaction Documents did not provide for the alleged rights to be legally binding. Thirdly, cl 8.7 of the Master Agreement contemplates that third parties cannot derive rights under it.

85 The law recognises however that there is a presumption of contractual intention which is raised in a commercial setting (*Gay Choon Ing* at [72]; *Hongkong & Shanghai Banking Corp Ltd v Jurong Engineering Ltd* [2000] 1 SLR(R) 204 ("*HSBC v Jurong Engineering*") at [43]). This presumption can be displaced by clear evidence and the onus is a heavy one (*Edwards v Skyways Ltd* [1964] 1 WLR 349 at 355 *per* Megaw J). Often, the evidence required is an express exclusion (*eg*, "honour clauses" in *Rose & Frank Co v J R Crompton and Brothers, Limited* [1923] 2 KB 261); an implied exclusion of contractual intent is found in narrow circumstances, *eg*, where the alleged terms of the contract are uncertain or incomplete (*HSBC v Jurong Engineering* at [56]). This is not the case here, especially since PNGSDP did not even try to argue that the terms of the contract were uncertain. PNGSDP has admitted that the Transaction Documents and M&A bind the parties thereto but says the State has not discharged its onus of showing "clear evidence" that a collateral contract was not meant to be binding. I do not think that PNGSDP's first argument on the characterisation of PNGSDP's conduct as admissions adds anything substantial to its argument. I have already expressed my views on cl 8.7 of the Master Agreement above. The only point worth making is that such an entire agreement clause is not found in the M&A; the analysis might be different if the M&A itself had a clause stating that third parties may derive no rights under it.

Version No 1: 11 Jan 2022 (19:48 hrs)

86 In the circumstances, I think that a valid contract has been made between the State and BHPB.

Ratification

87 As the State's primary case is that the collateral contract was made no later than the day on which PNGSDP was incorporated, an issue arises as to whether the contract was ratified by PNGSDP. In this regard, s 41(1) of the Act provides that:

> **Ratification by company of contracts made before incorporation**
>
> **41.**—(1) Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of a company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it had been in existence at the date of the contract or other transaction and had been a party thereto.

The parties are in agreement that s 41(1) requires two conditions to be satisfied before a pre-incorporation contract is binding on the company: first, there must be a contract which has purportedly been entered into by or on behalf of the company prior to its incorporation and, secondly, the company must have subsequently ratified that contract. *Walter Woon* has this to say on the second requirement:

> **3.60** Regarding the second requirement, ratification may be express or implied. It is express where the company passes a resolution (either of the board or of the general meeting) specifically adopting a particular contract. It is implied where the company does some act indicating unequivocally that it considers the contract to be binding. For instance, if goods ordered under the contract were used by the company, that would probably amount to implied ratification. In the case of implied ratification, the conduct must be unequivocal. If the company's conduct (as manifested by its corporate organs or

Version No 1: 11 Jan 2022 (19:48 hrs)

> duly authorised agents) could equally be interpreted in some other way not implying ratification, such conduct is unlikely to amount to ratification.
>
> **3.61** Once a contract is effectively ratified, the company is bound as if it was in existence when the contract was first made. A company does not have to ratify a pre-incorporation contract. Ratification is an entirely discretionary and voluntary act on the part of the company. Until it does so, the person who made the contract (the contractor, for ease of reference) will be liable upon it and will be entitled to enforce it. This means that in the absence of ratification the contractor is bound, even if the proposed company is never incorporated. The contractor may avoid being personally bound only if there is an express term to that effect.

88 PNGSDP raises two main objections. First, there was no pre-incorporation contract which could have been entered into on behalf of PNGSDP, as the State and BHPB were parties in their own right and there is no evidence to show that the only other possible contracting party (*ie*, the subscriber, DrewCorp Services Pte Ltd ("DrewCorp")) had acted on PNGSDP's behalf. Secondly, even if such a contract existed, it was not ratified. The collateral contract was not the M&A *per se* and what the State has done is to rely on PNGSDP's conduct and statements to contrive a case of ratification.

89 PNGSDP's first objection misses the point, as the State has clarified its position that DrewCorp was never a party to the collateral contract; it was simply discharging its professional duties by acting on the instructions of BHPB and the State, from whose agreement PNGSDP ultimately came about. The collateral contract could be and was in fact entered on PNGSDP's behalf by the State and/or BHPB. That they could is, the State says, borne out in *Rafferty v Madgwicks* [2012] FCAFC 37 ("*Rafferty*"), where two promoters of a company were inferred to have entered a pre-incorporation contract that bound the company.

Version No 1: 11 Jan 2022 (19:48 hrs)

90 The dispute in *Rafferty* concerned a business venture to manufacture and sell certain goods entered into by two groups of persons who, for convenience, were represented by Mr Rafferty and Mr Donovan respectively. The business venture was established by three instruments: a Heads of Agreement ("HOA"), a Joint Venture and Shareholders' Agreement ("JVSA") and a Rights Agreement ("RA"). The issue was whether T2W, the company which was incorporated subsequently, was a party to the HOA. The relevant passages read:

> 138 The first submission made by the Donovan parties and Madgwicks was that the HOA was not an agreement between Embleton and T2W to enter into a franchise agreement because T2W was not a party to the HOA and therefore did not agree to enter into a franchise agreement.
>
> 139 T2W was plainly not a party to the HOA at the time it was made. Indeed, when Mr Rafferty signed the HOA, T2W had not been incorporated. Rather, **the HOA contemplated that T2W would be incorporated to "establish the venture business to market, sell and install [MAUs] in the Industry Markets within the Territory": cl 7. The HOA provided that the venture was to be subject to further definition in what was to become the JVSA (cl 5.1) and contemplated that T2W and Embleton would enter into a "Rights Agreement as contemplated by clause 8" – anticipating what was to become the RA (cl 5.2)**.
>
> 140 A pre-incorporation contract may bind a company in the circumstances set out in s 131 of the *Corporations Act 2001* (Cth), a provision referred to by the trial judge and in argument to support the proposition that T2W was bound by the HOA and had therefore agreed to enter into it. Section 131(1) relevantly provides:
>
> > If a person enters into, or purports to enter into, a contract on behalf of, or for the benefit of, a company before it is registered, the company becomes bound by the contract and entitled to its benefit if the company, or a company that is reasonably identifiable with it, is registered and ratifies the contract:
> >
> > (a) within the time agreed to by the parties to the contract; or

Version No 1: 11 Jan 2022 (19:48 hrs)

(b) if there is no agreed time – within a reasonable time after the contract is entered into.

141 The trial judge apparently took the view that cl 2 and cl 7 of the HOA placed obligations on T2W and that it became bound by them on its incorporation by virtue of s 131. His Honour did not elaborate on this proposition further. **The Donovan parties argued on appeal that there was no evidence that anyone had entered into, or purported to enter into, the HOA on behalf on T2W, or for its benefit, and there was no evidence of ratification. For the reasons stated below, we reject this proposition.**

142 **It must be inferred from the circumstances attending the HOA that, at the time the HOA was entered into, Mr Donovan (and possibly T2SA) and Mr Rafferty were seeking to contract on behalf of, or for the benefit of, T2W. The HOA was, as the Donovan parties said, essentially between the promoters of T2W – Mr Donovan (and his company, T2SA) and Mr Rafferty. By entering into the HOA, they made a pre-incorporation agreement imposing rights and obligations on the company to be formed pursuant to the HOA. Obligations were imposed on the new company by cl 2 and cl 7 and rights arose by virtue of cl 5.2 and cl 6.3. These rights and obligations were central to the creation of the joint venture. Furthermore, Mr Donovan and Mr Rafferty were, under the HOA, to hold the shares in and constitute the directors of the new company. Had they been asked, at the time they entered the HOA, whether they were intending to contract on behalf of, or for the benefit of, the company to be formed (which became T2W), there can be little doubt that they would have answered affirmatively. The HOA and the circumstances in which it was made leads to the conclusion that they sought to enter the HOA on this basis.** The circumstances of this case are very different from the situation in *Scuderi v Morris* (2001) 39 ACSR 592; [2001] VSCA 190 at [81]–[84], where the other party had no knowledge of any intention to create a pre-incorporation contract.

143 Ratification for the purposes of s 131 may be express or implied: see *Aztech Science v Atlanta Aerospace (Woy Woy)* [2005] NSWCA 319 at [81]–[83], [86]–[90] per Basten JA (Handley JA agreeing). **Whilst the matter is not entirely free from doubt, in the circumstances of the case, T2W should be taken to have impliedly ratified the HOA for the purposes of s 131 by the company subsequently entering into the JVSA and the RA as contemplated by the HOA. This**

Version No 1: 11 Jan 2022 (19:48 hrs)

> **proposition is justified by the fact that Mr Donovan and Mr Rafferty were not only parties to the HOA but were together the guiding mind of T2W on its incorporation.**
>
> 144 Accordingly, T2W was bound by the HOA and entered into an agreement to enter into a franchise agreement (assuming that the HOA is properly so described).
>
> [emphasis added]

91 The State says that BHPB and the State must have been contracting on PNGSDP's behalf, considering the circumstances leading to PNGSDP's incorporation, the rights conferred by PNGSDP on BHPB and the State and PNGSDP's subsequent conduct and admissions. In rebuttal, PNGSDP argues that the State's reliance on *Rafferty* is misplaced because the present action is an originating summons and, crucially, the court is unable to make three findings of fact that the court in *Rafferty* did. These were that certain parties were the promoters of the company, that the promoters had entered into an express written agreement, and that the written agreement expressly contemplated that the company would establish a business venture.

92 In my view, it is possible to say that the State and BHPB entered a collateral contract in their own right *and* on behalf of PNGSDP. It is possible to infer on the facts that BHPB and the State were promoters of the company. A "promoter" is not defined in the Act and judicial definitions have varied, but for present purposes I think it suffices to say that the State (or BHPB) is "one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish this purpose" (*Twycross v Grant* (1877) 2 CPD 469 at 541 *per* Cockburn CJ). It is hard to see why the State and BHPB would not be promoters. Next, PNGSDP is right if there was no written agreement contemplating that the company would establish some business venture. However, this problem is easily overcome. The collateral

Version No 1: 11 Jan 2022 (19:48 hrs)

contract in this case may not itself be written, but it is based on a written document, in this case the constitution of PNGSDP. There is one last concern in *Rafferty* which I highlight. The court said that Mr Donovan and Mr Rafferty were, under the HOA, to hold the shares in and constitute the directors of the new company (at [142]). In this case, neither the State nor BHPB ever became members of PNGSDP. This, however, does not present much difficulty considering the circumstances under which PNGSDP was formed. PNGSDP was formed as part of BHPB's exit plan from the Mine and while PNGSDP was meant to be operationally independent of the State, it was contemplated that the State would retain some oversight. Ultimately, this was just a factor going towards the question of whether the State and BHPB could have been contracting on behalf of (the pre-incorporated) PNGSDP at the time of contract.

93 The State's reply to PNGSDP's second objection (*ie*, lack of ratification) seems unsatisfactory. The State simply repeats its position, to which PNGSDP has already objected. In my view, however, ratification can, in the circumstances here, be implied. PNGSDP has, through its conduct, considered the obligation to permit inspection to be binding on it. In my view, such conduct could not be explained on the basis that the company was acting under a misapprehension that it was obliged to respect third party rights under the M&A because at that stage it was aware that third parties enjoyed no rights under the M&A. The source of the obligation had to be somewhere other than the M&A itself – the most plausible explanation by far is that the source of this obligation was a collateral contract which included a right of inspection as part of its terms. PNGSDP is, in my judgment, estopped from asserting otherwise. This will become clearer in my discussion on estoppel below.

Version No 1: 11 Jan 2022 (19:48 hrs)

Issue 2C: The estoppel argument

94 The third line of argument raised by the State is, essentially, that PNGSDP had made admissions on which the State relied to its detriment and from which it would be inequitable to allow PNGSDP to resile; accordingly, PNGSDP is estopped from denying the State's right of inspection. This argument took shape only in the third and fourth round of submissions and, even so, remains unclear. The State appears to be relying on estoppel as a cause of action. The traditional view is, of course, that estoppel cannot be so used except in the case of proprietary estoppel. That species of estoppel is not involved here. Since I have found that there is a collateral contract, it is not necessary for me to decide whether there is present here any type of estoppel that is capable of granting the plaintiff a cause of action. Thus, the discussion on estoppel that follows is conducted strictly in the context of whether PNGSDP is estopped from denying ratification of the collateral contract. The kinds of estoppel that will be considered in this connection are estoppel by representation and estoppel by convention. I will first consider whether the elements of the same exist in this case.

Whether there was a representation (or a shared assumption on the basis of which parties conducted themselves)

95 The State relies on a whole series of matters which allegedly show that PNGSDP admitted that the State had a right of inspection. The matters raised comprise affidavits, submissions, pleadings, correspondence and conduct over a 17-month period.

Version No 1: 11 Jan 2022 (19:48 hrs)

(1)(I) The original action (OS 1036 of 2013)

96 The first two alleged admissions relate to the institution of the original action on 28 October 2013.

97 First, there is the very fact that PNGSDP commenced the original action seeking relief in respect of the M&A and, crucially, naming the State as the defendant in that action. The State submits that PNGSDP must have thought that the M&A was enforceable by PNGSDP *as against the State* for it to have named the State as defendant and, correspondingly, it must have accepted that the M&A was enforceable against PNGSDP by the State. PNGSDP submits that it was not trying to enforce the M&A against the State or asking the court to prescribe or proscribe the State's conduct; instead, it was simply seeking a declaration that its board of directors was entitled to manage it.

98 On balance, I think the institution of the original action was *not* equivocal. PNGSDP's prayers for injunctive relief and for a declaration that the State's purported removal of PNGSDP's board of directors is legally ineffective are not inconsistent with PNGSDP's denial of the State's alleged right of inspection. However, this is less true of the prayers for declarations that the then-directors of PNGSDP retained full authority to manage its business, that PNGSDP may not be restructured in a manner inconsistent with its M&A, and that PNGSDP's assets shall be applied in accordance with its M&A. In these aspects, PNGSDP arguably fails to address the State's point, *ie*, that PNGSDP must have named the State as the defendant because it intended the outcome of the OS to be binding on the State and, consequently, it must have believed or at least accepted that the State had a right to enforce the M&A against it.

Version No 1: 11 Jan 2022 (19:48 hrs)

99 Next, the State points to Sir Mekere's first affidavit, which was also sworn on 28 October 2013:

> 52. Notably, the Constituent Documents **place a particular emphasis on strong governance mechanisms, accountability and transparency**. The Government of Papua New Guinea had also entrenched stringent measures for good governance in [PNGSDP] when it enacted the Ninth Supplemental Agreement Act.
>
> 53. In this regard, [PNGSDP] is **obliged to conduct itself** and to administer its resources **in accordance with the Constituent Documents**. [PNGSDP] The Plaintiff is governed by the Program Rules in respect of governance, fund management, transparency and accountability.
>
> 54. Crucial to this is the preservation of the Development Fund and the [Long Term Fund]. In particular [PNGSDP's] governance structure is specifically intended to guard against illegal or inappropriate investments or wrongful use of money in the Development Fund and the [Long Term Fund]:
>
> (a) The relevant Papua New Guinea legislation at the time and the [M&A of PNGSDP], including the Program Rules, were all designed to **promote accountability and transparency in the management and operation** of [PNGSDP].
>
> …
>
> [emphasis as found in the State's submissions in bold and bold underline]

The State submits that this amounts to an admission by PNGSDP that the State has a right to enforce the terms of the M&A. Additionally, the State emphasises the fact that PNGSDP's M&A differs from the standard M&A provisions found in the Fourth Schedule of the Act in terms of, *inter alia*, the right of the State to inspect PNGSDP's true accounts, books of account and/or records. However, as PNGSDP submits, the fact it accepts that the M&A promotes accountability and transparency is not an admission of the State's alleged right to enforce the terms of the M&A. In particular, Sir Mekere did not state the class of persons

Version No 1: 11 Jan 2022 (19:48 hrs)

to whom PNGSDP owed an obligation to conduct itself in accordance with its M&A. However, this affidavit was sworn for what was then OS 1036 of 2013. In that context, PNGSDP's statement may have at least amounted to an allusion to the State's right of inspection.

(1)(II) S 795, the summons for amendment and the appeal

100 When the original action was converted to S 795 on 25 July 2014, PNGSDP filed pleadings which the State says contained admissions of its right to inspect. To give some context, the State's Statement of Claim reads:

> 13. In particular, the Agreed Oversight Structure provided that:
>
> …
>
> (c) BHP and the State are entitled to information in relation to PNGSDP and access to its books of accounts, accounting records and other records.
>
> …
>
> 37. PNGSDP is obliged to account to the State for all its dealings with its assets, pursuant to:
>
> (a) The State's rights under the Agreed Oversight Structure; and/or
>
> (b) PNGSDP's duty to account to the State, who represents the people who would benefit from the Purpose.
>
> 38. In relation to paragraph 37(a) above, the State's rights can be found in the following provisions of the Constitution Documents:
>
> (a) Clause 9 of the MA:
>
> …
>
> (b) Article 52 of the AA, which provides that the books of account and other records of PNGSDP shall be open to inspection by authorised representatives of BHPB and the State …

Version No 1: 11 Jan 2022 (19:48 hrs)

> (c) Rule 20 of the Program Rules, which provides that PNGSDP is obliged to provide the State with a copy of audited annual accounts and a report of the Program's activities (describing the financial status of the Program (including details of payments made), the projects supported by PNGSDP and amounts committed for or spent on each project, and the amount spent by PNGSDP on operating expenses). …

PNGSDP then stated in its Defence and Counterclaim, which was filed on 8 September 2014:

> 17. As to paragraph 13(c) of the Statement of Claim:
>
> (a) **It is admitted that BHP and the State are entitled, under PNGSDP's Constitution Documents, to inspect true accounts kept by PNGSDP** of the sums of money received and expended by PNGSDP and the matters in respect of which such receipts and expenditure take place, of all sales and purchases by PNGSDP and of the property, credits and liabilities of PNGSDP;
>
> (b) The relevant provisions of PNGSDP's Constitution Documents are as follows:
>
> (i) Article 9 of PNGSDP's MA provides …
>
> (ii) Article 52 of PNGSDP's AA provides …
>
> (c) Save as aforesaid, paragraph 13(c) of the Statement of Claim is denied.
>
> …
>
> 52. Paragraph 37 of the Statement of Claim is denied.
>
> 53. **The full extent of the State's right to information is contained [in] Article 9 of the MA, Article 52 of the AA and Rule 20 of the Program Rules**.
>
> 54. As to paragraph 38 of the Statement of Claim:
>
> (a) **It is admitted that Article 9 of PNGSDP's MA provides that the State is entitled to, through its authorised representatives, inspect "*true accounts* …** *of the sums of money received and expended by [PNGSDP] and the matters in respect of which such receipts and expenditure take place, of all sales and*

Version No 1: 11 Jan 2022 (19:48 hrs)

> *purchases of goods by [PNGSDP] and of the property, credits and liabilities of [PNGSDP] … subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed in accordance with the [AA] for the time being*";
>
> (b) **The State's right to inspect the accounts as set out in [Clause] 9 of the MA is subject to Article 52 of PNGSDP's AA** which provides that: …
>
> (c) Rule 20 of the Program Rules provides that …
>
> (d) Save as aforesaid, paragraph 38 of the Statement of Claim is denied.
>
> [emphasis added]

In addition, PNGSDP also claimed, at para 96 of its Defence and Counterclaim:

> (b) A DECLARATION that the board of directors of PNGSDP as appointed from time to time in accordance with PNGSDP's M&A have full authority to manage the business of PNGSDP in accordance with its M&A.

101 The State argues that, there, PNGSDP repeated its unequivocal, unqualified admission that the State has a right of inspection and, additionally, sought to enforce the M&A against the State. Although PNGSDP denies that paras 17 and 53 in the Defence and Counterclaim amount to admissions, the State argues that the words "save as aforesaid" (which appear in the last sub-paragraph) mean that the admissions qualify the denials. In addition, the State also argues that PNGSDP did not plead that the State was a non-party to the M&A or that its right of inspection was not enforceable. PNGSDP's explanation is that the State mischaracterised these paragraphs, which had been pleaded in the context of a denial of para 13 of the State's Statement of Claim and *simply reflect what the M&A says* and which were supposedly amended to save time and costs dealing with the State's arguments. I consider that paras 17, 53 and 54 of the Defence and Counterclaim do more than simply reflect what the M&A

Version No 1: 11 Jan 2022 (19:48 hrs)

says. That has been done in paras 17(b) and 54(b); paras 17(a), 53 and 54(a) must mean something more.

102 However, events then took an interesting turn. After commencement of this OS, PNGSDP filed an application in S 795 to amend the Defence and Counterclaim there to remove what were alleged to have been admissions. These amendments were allowed by the Assistant Registrar on 9 June 2015 and I upheld that decision on appeal. The amendments, however, do not render moot the State's arguments that the Defence and Counterclaim contain admissions. First, the amendments cannot erase the fact that PNGSDP once pleaded that the State had the right to inspect its true accounts. I do not think that it is a good enough reason to say that these amendments were made because the State was mischaracterising them in SUM 5440 (the State's summons to inspect PNGSDP's accounts). Secondly, the circumstances in which the amendments were allowed are crucial. The gist of the State's claim in S 795 is not that the State has a right of inspection, but that there is an agreement which contains the Agreed Oversight Structure. The amendment was allowed as it would help to enable the true controversy in the suit to be decided and as it caused no irreparable prejudice in S 795. Thirdly, PNGSDP has kept its prayer for a declaration at para 96(b) of its Defence and Counterclaim (Amendment No 1), which reads:

> 96. **AND PNGSDP COUNTERCLAIMS:**
>
> (a) A DECLARATION that under Singapore law:
>
> (i) the purported removal of all of the directors of PNGSDP on or around 24 October 2014 is of no legal effect; and
>
> (ii) the purported termination of the appointment of Mr David Sode (Papua New Guinea Passport No. B288348) as

Version No 1: 11 Jan 2022 (19:48 hrs)

> Managing Director of PNGSDP on or around 24 October 2014 is of no legal effect.
>
> (b) A DECLARATION that the board of directors of PNGSDP as appointed from time to time in accordance with PNGSDP's M&A have full authority to manage the business of PNGSDP in accordance with its M&A.
>
> …

These prayers remain substantially the same as prayers 1 to 3 in the original action which indicates that PNGSDP thinks that the State can be bound by a determination of matters relating to the management of PNGSDP.

(2) SUM 1669 – the injunction application

103 The next set of alleged admissions relates to PNGSDP's conduct in relation to the State's application for an injunction to restrain PNGSDP from dealing with or disposing of the assets in its various funds.

104 The State first points to Sir Mekere's second affidavit, which was sworn on 22 April 2014 and for the purposes of resisting the injunction application:

> **D. Safeguards through [PNGSDP's] structure, objects and corporate governance**
>
> 57. As I explained above, [PNGSDP's] structure was specifically designed to safeguard its assets, objects and corporate governance and to protect the money in the Development Fund and the [Long Term Fund].
>
> …
>
> 59. **First, at the formation of [PNGSDP], the M&A, which was specifically agreed by the State and BHPB, contained safeguards to** ensure that funds from OTML would be used to promote sustainable development within, and advance the general welfare of, the people of PNG, particularly those of the Western Province (see article 3(i) of [PNGSDP's] Memorandum:

Version No 1: 11 Jan 2022 (19:48 hrs)

> (a) In this regard, [PNGSDP's] "objects" in its M&A expressly include, among other things, carrying out a program known as the "***PNG Sustainable Development Program***" in accordance with the Program Rules.
>
> (b) Notably, **the M&A, in accordance to which [PNGSDP] is obliged to conduct itself, places a particular emphasis on strong governance mechanisms, accountability and transparency**.
>
> 60. **Second, in addition to the above**, [PNGSDP's] governance structure is specifically intended to promote **transparency and accountability**. In this regard, [PNGSDP's] Memorandum provides that the Articles of Association of the Plaintiff "*shall not be altered so as to amend the Program Rules in any respect without the prior approval in writing of: (i) [BHPB] … and (ii) the [State]*". The Program Rules includes provisions on good governance, transparency and accountability and on how both the Development Fund and [the Long Term Fund] are to be invested:
>
> …
>
> [emphasis as found in the State's submissions in bold and bold underline only; other emphases in original]

The State submits that this amounts to an admission by PNGSDP that the State has a right to enforce the terms of the M&A in particular. PNGSDP argues that none of the safeguards mentioned in para 60 of Sir Mekere's second affidavit included the State's right of inspection. However, this is a weak point as the paragraph begins with "in addition to the above", which means that the safeguards listed there were *in addition to* what was stated in para 59.

105 Next, the State submits that Mr Nish Shetty, counsel for PNGSDP, admitted at the hearings of the injunction application on 28 May 2014 and 30 July 2014 that the State was entitled to information from PNGSDP's books and records and, crucially, that this admission was material in the court's

Version No 1: 11 Jan 2022 (19:48 hrs)

decision to dismiss the State's prayer for an injunction. The State relies on the following excerpt from the 28 May 2014 Notes of Arguments:

> **Shetty**: If one wants to assert that, it would effectively have oversight over the company. The idea was that this would be run independently of the government and BHP. Second, they were **entitled to information from the company's books and records**.

The excerpt from the 30 July 2014 Notes of Arguments reads:

> **Shetty**: Not unusual for Mareva injunction to be accompanied by order for disclosure of assets in question. That order has been sought and given and provided. This is much wider – see p 84 – looking for a forensic account at an interlocutory stage before their case has been established.
>
> State relying on a clause in M&A – 5DB.109 at p 113, cl 9. They **have a right to inspect the accounts**. They wrote to us asking for "an account". Seek "an account". **Entitled to "inspection of accounts"**.
>
> **If they want to inspect, they should ask in the right way and come and inspect them**. They want "an account" which, in most respects, is a final remedy after they establish why they need this.
>
> [emphasis as found in the State's submissions in bold and bold underline]

106 It is notable that by this time Mr Shetty was aware of the legal consequences of the State being a non-party to the M&A. This can be seen from PNGSDP's submissions tendered on 28 April 2014:

> **III. PRELIMINARY OBJECTIONS ON JURISDICTION**
>
> …
>
> **(B) In any event, the State has no *locus standi* to bring any claim against [PNGSDP]**
>
> …

Version No 1: 11 Jan 2022 (19:48 hrs)

> (i) *The State is not a member, director or even creditor of [PNGSDP]*
>
> 46. In the first place, the State is not a member, director or even creditor of [PNGSDP], i.e. it is an outsider.
>
> 47. It is a fundamental principle of company law that the Memorandum and Articles of Association of a company cannot be enforced by outsiders as they are third parties to the Memorandum and Articles. Indeed, the principle is made abundantly clear when one considers s 39 of the Companies Act (Cap 50) … read with s 7(2) of the Contracts (Rights of Third Parties) Act (Cap 53B) …

The same point was repeated in its supplemental submissions tendered in July 2014.

(3) The actual inspection of documents in September 2014

107 The third set of admissions is a series of correspondence between the parties' solicitors which culminated in an actual inspection of certain documents at PNGSDP. The State says that the correspondence between the parties shows that PNGSDP effectively admitted the State's right of inspection. The salient portions are reproduced below:

(a) First, the State's solicitors (whom I shall call WP) wrote on 6 August 2014 for the exercise of the rights of inspection under cl 9 and Art 52. The relevant paragraphs read:

> 2. At the hearing [of the Summons on 30 and 31 July 2014], it was submitted on your client's behalf that our client had not exercised its rights to inspection under clause 9 of the Memorandum.
>
> 3. While we disagree with this (and are of the view that our client had exercised such rights pursuant to the above letters), **our client** wishes to reiterate (for the avoidance of doubt) that it **seeks to exercise its rights to inspection under clause 9 of the Memorandum and Article 52 of the Articles of Association**.

Version No 1: 11 Jan 2022 (19:48 hrs)

> [emphasis added]

In response, PNGDSP's solicitors (whom I shall call CL) did not dispute that the right to inspection existed; instead, they simply wrote to inform WP that they were taking instructions and in the meantime their client's rights were reserved.

(b) Secondly, WP wrote again on 18 August 2014 asserting that the State's right of inspection under cl 9 and Art 52 was undisputed and pressured CL to respond. WP wrote:

> 3. It is, to say the least, surprising that you are unable to take instructions on our client's simple request to inspect your client's books of accounts, accounting records and other records (from 1 January 2013 to date) (**indeed it is not disputed that our client has such rights to inspection under clause 9 of the Memorandum and Article 52 of the Articles of Association**), when you are able to do so on the above substantive matters, including obtaining a 265-page witness statement from Sir Mekere Morauta (both text and exhibits) for the Reply Observations. We trust your client is not seeking to delay matters pending the hearing of the Summons before the Honourable Justice Judith Prakash on 25 August 2014 at 3.30pm.
>
> [emphasis added]

CL's reply on 19 August 2014 did not dispute the State's right of inspection, but asserted instead that PNGSDP's directors were entitled under Art 52 to determine the conditions under which an inspection pursuant to cl 9 could be made. CL wrote:

> 2. … As you are well aware, **Article 52 of the Articles of Association empowers the Directors to determine the time and location as well as the conditions or regulations concerning an inspection made pursuant to Art 9 of the Memorandum**. Evidently, given the Directors' travel commitments, it

Version No 1: 11 Jan 2022 (19:48 hrs)

> will take time to convene a meeting for the Directors to make the aforesaid determination.
>
> 3. Your client's request has been communicated to our client's Board of Directors, and arrangements are being made for the Board to meet in the week of 25 August 2014.
>
> [emphasis added]

(c) Thirdly, CL sent WP a further letter on 3 September 2014 stating that PNGSDP's directors would notify WP of the date, time and conditions or regulations concerning the State's request for an inspection. CL wrote:

> 1. …
>
> 2. **The board of directors of our client will be holding a meeting on 5 September 2014 to consider your client's request for an inspection.**
>
> 3. **We will notify you of the date, time and conditions or regulations concerning your client's request for an inspection** after the meeting of our client's board of directors.
>
> 4. In the meantime, please let us have the details of your client's authorised representatives who will be conducting the inspection of the accounts, including their name, designation, contact number and evidence of their authorisation by your client by noon on 5 September 2014.
>
> 5. …
>
> [emphasis added]

108 In the light of the correspondence, PNGSDP makes two arguments. First, since it granted the request, the issue of whether the State was entitled to enforce the terms did not arise. Second, as litigation is not done by correspondence, it was mischievous for the State say that PNGSDP admitted the State's right of inspection based on CL's letters. However, while PNGSDP is right that the issue of whether the State had a right of inspection did not arise

Version No 1: 11 Jan 2022 (19:48 hrs)

for the court's consideration, its decision to grant the request was clearly based on a belief that the right of inspection existed. Similarly, CL would only have sent their letters of 19 August 2014 and 3 September 2014 after having taken instructions from PNGSDP.

109 I turn next to a resolution passed on 5 September 2014 by PNGSDP's Board of Directors. This, the State says, is the clearest acknowledgment of the State's right of inspection. The text of the resolution reads:

> WHEREAS:
>
> (A) **Clause 9** of the Memorandum of the Company states the Company's **true accounts shall be open to inspection by the authorised representatives of The Independent State of Papua New Guinea** (the "State");
>
> (B) The State has, by its solicitors' letter dated 6 August 2014, asked to inspect the true accounts of the Company;
>
> …
>
> (E) The directors are of the view that the State is likely to abuse **its right to inspect the true accounts of the Company (as provided for in clause 9 of the Company's memorandum)** by treating the inspection as a fishing expedition to obtain information which it will use for improper and collateral purposes, including harassing the Company and its officers and/or employees;
>
> …
>
> IN VIEW OF THE ABOVE, it is RESOLVED THAT:
>
> The authorised representatives of the State **shall be permitted to inspect the true accounts of the Company (as provided for in clause 9 of the Company's Memorandum)** for the period 1 January 2013 to date in the month of September 2014 at a specific date and time and at a location in Singapore to be determined by the General Manager Commercial (for administrative convenience) …
>
> [emphasis as found in the State's submissions in bold and bold underline]

Version No 1: 11 Jan 2022 (19:48 hrs)

In fact, the State was also notified of the resolution in a letter dated 8 September 2014, which also stated that PNGSDP was "making logistical arrangements for its true accounts to be made available for inspection".

110 PNGSDP argues that Art 52 empowers the Board of Directors to consider a request, but the fact that it exercised its power to permit a request for inspection did not amount to an admission that the State had a right of inspection, much less afford the State standing to enforce the M&A, add the State as a party to the M&A, or create a contract with the State. I cannot comprehend PNGSDP's claim that the resolution does not amount to an admission of the State's right of inspection. It is clear from recitals (A), (B) and (E) of the resolution that the request for inspection was believed to have been made under cl 9 and the approval was granted pursuant to cl 52. This was further confirmed in CL's letter dated 9 October 2014 stating that the State's request was made under the Memorandum. Moreover, the use of the word "abuse" in recital (E) suggests that the State's right is enforceable.

111 After the board resolution, arrangements were made for an inspection to be carried out. The inspection was scheduled for 24 September 2014 but took place on 30 September 2014 instead, owing to some disagreements over the confidentiality deeds (which formed part of the conditions of inspection) and the personnel who were to conduct the inspection. In the event, the State was able to inspect (but not take copies of) the following:

(a) PNGSDP's FY2013 Annual Report; and

(b) management accounts for the following periods:

(i) for the three months ended 31 March 2013;

Version No 1: 11 Jan 2022 (19:48 hrs)

(ii) for the six months ended 30 June 2013;

(iii) for the nine months ended 30 September 2013;

(iv) for the year ended 31 December 2013;

(v) for the three months ended 31 March 2014; and

(vi) for the six months ended 30 June 2014.

Copies of the documents were extended to the State only on 15 October 2015 after two further requests from the State.

112 Two other letters, which preceded the inspection and the giving of copies respectively, are said by the State to constitute admissions of its right of inspection.

113 The first is a letter from CL dated 22 September 2014 commenting on the condition of a confidentiality deed imposed by PNGSDP's Board of Directors, stating that PNGSDP "categorically denies any suggestion that the confidentiality deed is to stymie [the State's] **rights of inspection under clause 9 of the Memorandum**. [emphasis added]". PNGSDP says that this letter was sent in the context of a denial of the State's accusation that the confidentiality deed was meant "to stymie the purpose of providing [the State] the rights of inspection under cl 9 of the Memorandum and Art 52 of the Articles of Association". However, CL's letter presupposed that the rights of inspection existed.

114 The second letter is dated 9 October 2014. There, PNGSDP implicitly acknowledged the State's right to inspect the documents; its real complaint

Version No 1: 11 Jan 2022 (19:48 hrs)

pertained to the *scope of documents* that could be inspected and the *right to take copies*. The relevant parts read:

> 2. … Having failed to obtain the full account your client sought in [SUM 1669/14], your clients appears [*sic*] to be **attempting to expand the ambit of our clients' Memorandum and Articles of Association** as a backdoor approach to fish for information.
>
> …
>
> 4. As to the various assertions made in your letter dated 1 October 2014:
>
> …
>
> d. … we should highlight that your client's request to inspect was made under our client's Memorandum, and is **strictly governed by our client's Memorandum and Articles of Association**. On a plain reading of our client's Memorandum and Articles of Association, there is **nothing which provides that your client is entitled to not only inspection but also to take copies of the documents inspected**.
>
> …
>
> f. Further, your client's demand that it be allowed to "inspect" the documents set out at paragraph 8 of your letter is disingenuous:
>
> iii. … [the State] attempted to rely on Article 9 of the Memorandum as well as Article 52 of the Articles of Association in order to expand the ambit of the inspection [to include the taking of copies]. This is misconceived.
>
> (1) **The scope of the documents (i.e. "true accounts") which your client is entitled to inspect is set out in Article 9 of [PNGSDP's] Memorandum**. [PNGSDP] has already permitted [the State] to inspect [PNGSDP's] true accounts on 30 September 2014.
>
> (2) Article 52 of the Articles of Association, on the other hand, is clearly concerned with the directors' discretion to impose conditions for any such

Version No 1: 11 Jan 2022 (19:48 hrs)

> inspection, and does not confer upon your client any entitlement to inspect.

[emphasis added]

PNGSDP's only reply is that this letter simply paraphrases the language in cl 9 and does not confer standing to sue. That, however, ignores the point.

(4) SUM 5440 and SUM 5593/14 ("Sum 5593")

115 The last set of alleged admissions relates to the filing of SUM 5440 and SUM 5593 and how their disposal led to the filing of this OS.

116 The State filed SUM 5440 on 31 October 2014 to inspect PNGSDP's true accounts pursuant to cl 9 and Art 52. However, CL sent a reply arguing only that SUM 5440 was procedurally irregular as it did not state the grounds of the application. Similarly, when PNGSDP filed SUM 5593 on 10 November 2014 to set aside SUM 5440, it did not specifically raise any other argument in the summons or its supporting affidavit. In Sir Mekere's sixth affidavit, which was filed by PNGSDP in reply to SUM 5440, it was clear that PNGSDP accepted the State's right of inspection and the dispute related only to the *classes of documents* that fell within that right. The relevant portions highlighted by the State read:

> 9. … The preamble makes it clear that **the State's rights of inspection are pursuant to Article 9 of the Memorandum** which refers to PNGSDP's "true accounts" and not the expanded phrase "*books of account and other records*" used on Article 52. Evidently, from the clear wording of Article 52 that article is only concerned with empowering the Directors to impose conditions and regulations for an inspection including **that by the State under Article 9** of PNGSDP's "true accounts" …
>
> …

Version No 1: 11 Jan 2022 (19:48 hrs)

> 31. At present, I only need to point out that the State has cast the net so widely to ask for documents which clearly do not fall within the meaning of "true accounts" such as minutes of meetings of PNGSDP's Board and sale and purchase agreements *relating to* <u>*subsidiaries*</u>.
>
> [emphasis added in bold; emphasis as found in the State's submissions in bold underline; other emphases in original]

117 The State also states that there are repeated references to its right of inspection in PNGSDP's submissions dated 7 January 2015. In particular, PNGSDP submitted that it had "more than satisfied its obligation under Cl 9" – the State argues that an obligation must have a corresponding right. PNGSDP says that what the State has cited are PNGSDP's "substantive objections", which are logically *subsequent* to PNGSDP's "preliminary objections", which sets out its primary case that SUM 5440/14 was defective because the State had no standing. The relevant parts of PNGSDP's submissions read:

> **III. PRELIMINARY OBJECTIONS**
>
> …
>
> ***D. The Plaintiff has not established locus standi to seek such relief***
>
> 29 **Furthermore, [the State] is seeking to enforce rights in PNGSDP's M&A to which it is not a party. As a non-party, it may not enforce such rights. Even under the Contracts (Rights of Third Parties) Act (Cap 53 B) under which non-parties may avail themselves of contractual rights in certain circumstances, s 7 specifically excludes the operation of the statute to memorandum and articles of association. Accordingly, [the State] has failed to establish *locus standi* to pursue such relief**.
>
> **IV. SUBSTANTIVE OBJECTIONS**
>
> 30 SUMS 5440 is premised on *both* clause 9 and Article 52. [The State's] reliance on Article 52 *in addition* to clause 9 is misplaced.
>
> (a) **Clause 9 confers on [the State] the right of inspecting the "true accounts" of PNGSDP.** It does

Version No 1: 11 Jan 2022 (19:48 hrs)

> not extend to other records *beyond* PNGSDP's "true accounts". This is made clear by the words in clause 9:
>
> [Clause 9 of the MA is reproduced]
>
> (b) Article 52 on the other hand is concerned with the *empowering* of the Directors to impose conditions or regulations for the inspection of books of account and other records. This is made clear by the very opening words of Article 52:
>
> [Article 52 of the AA is reproduced]

31 Hence, Article 52 and Clause 9 serve different purposes and [the State] cannot seek to rely on the broader wording in Article 52 to try to expand on its inspection rights which are clearly and expressly delineated in Clause 9. To read Article 52 in the way purported by [the State] would render Clause 9, and the delineation of the scope of [the State's] inspection rights therein, otiose.

32 There are further difficulties with [the State's] reliance on Article 52. In addition to the opening words of Article 52 which clearly show that it is directed at empowering the Directors and not conferring rights on [the State], the second sentence of Article 52 also makes it clear that the right of inspection in Clause 9 is not expanded by Article 52:

> (a) **Clause 9 refers to "*true accounts*" being open to inspection by members and authorised representatives of [the State]** (and [BHPB]).
>
> (b) The second sentence in Article 52 … makes it clear that Directors are empowered to impose conditions and regulations for all inspections. Article 52 is not intended to expand on the privileges of members (and [the State]) as to the documents which they may inspect.

33 In any event, **even if [the State] is entitled to inspect "*books of account and other records*" in addition to "*true accounts*" (which is denied), any such books of account and other records must relate to the "*true accounts*" as clause 9 is the primary clause which confers the privilege of inspection on [the State]**. In this regard, PNGSDP has already permitted [the State] to inspect, *inter alia*, the various categories of documents …

…

38 … **Clause 9 very clearly limits [the State's] right to inspect to "*true accounts*" which has been more than**

Version No 1: 11 Jan 2022 (19:48 hrs)

> **satisfied by the scope of documents already allowed for inspection** … Even if [the State] were permitted to rely on Article 52, the words "*books of account and other records*" therein must be read harmoniously with Clause 9 and therefore must pertain to "*true accounts*". Accordingly, **PNGSDP has more than satisfied its obligation under Clause 9 by providing a wide-ranging scope of documents for the State's inspection**.
>
> [emphasis added]

118 The State also submits that Mr Shetty admitted, during the hearing of SUM 5593 on 10 March 2015, that he had relied on the right of inspection as one of the safeguards available to the State to resist the State's application for an injunction; accordingly, the impression given to the State was that the only dispute related not to whether there was a right of inspection, but to what the *scope* of that right was. PNGSDP argues that Mr Shetty disagreed when Ms Koh Swee Yen, counsel for the State, submitted that the State was protected because it had access to information and therefore there was no danger to PNGSDP's assets. The relevant parts of the Notes of Argument read as follows:

> **Ms Koh**: …
>
> **See the Defence and Counterclaim, para 17(a). [PNGSDP] admits that [BHPB] and [the State] are entitled to inspect "true accounts" under M&A. They recite the provisions that we rely on in the grounds of this application.**
>
> …
>
> **Court**: Can I decide this issue without hearing facts?
>
> **Ms Koh**: I say our application for inspection can succeed without taking circumstances into account, purely as a question of construction. …
>
> …
>
> Every reason to do it now. **Because this is on the defendant's own case, a right to information which the State is entitled to.** We sought to

Version No 1: 11 Jan 2022 (19:48 hrs)

> exercise this entitlement in 2014. Over 4 to 5 months that this right has been denied.
>
> …
>
> **My learned friend submitted that the State is protected because it has access to information and therefore no danger to assets**.
>
> (**Mr Shetty**: **I did not say that**.)
>
> Mr Yeo said the inspection rights had not been complied with fully and therefore we were not protected and we needed to seek this injunction.
>
> In this case: We have an absolute and it is admitted. Scope of that right is in issue. To give effect to right of inspection, we need documents that explain. Drawing analogy to cases of directors who are impugned.
>
> Why is [PNGSDP] putting the State through hoops?
>
> …

Mr Shetty:

> (1) Delay:
>
> As early as November last year we told opponents application was flawed. Before we took out striking out application.
>
> If we wanted to delay matters, would have kept quiet and argued it today only.
>
> Then took out summons in November 2014. Gave them submissions. Wrote to them in January 2015. Offered discontinuance. Delay was of their own making.
>
> **Point: that in the course of injunction application I suggested that State was protected by access to information. I submitted that the relevant contractual relationships included the Security Trust Deed which they could enforce. In addition, in context of wide ranging requests for documents in their summons, I had said that if they want documents of that nature they should look at their rights under M&A.**

Version No 1: 11 Jan 2022 (19:48 hrs)

…

[emphasis added]

119 The State thus takes the position that PNGSDP sought to resile from its previous positions only on 26 March 2015 via a letter from Cavenagh which stated that the State had no standing to bring this OS.

Conclusion on representation/shared assumption

120 In my view, PNGSDP has by its conduct, made *representations* that the State has a right of inspection pursuant to cl 9 of PNGSDP's MA. This is especially evident from its conduct of the injunction application and the subsequent board resolution and inspection of accounts that took place. I do not accept that PNGSDP and CL were acting under the mistaken impression that the State had an enforceable right of inspection. They could not have done so since they were fully aware that the State was not a party to the M&A and, as such, derived no rights in it under the CRTPA. On the contrary, I am tempted to think that PNGSDP considered the State to have an enforceable right of inspection and thus allowed one such inspection to take place shortly after the injunction application had been dismissed. The best case that PNGSDP could tenably put forward is that an unequivocal and specific representation was made no earlier than 28 May 2014 (*ie*, the first hearing of the injunction application), and retracted no later than 7 January 2015 (*ie*, in PNGSDP's submissions in SUM 5440 and SUM 5593). This still leaves a 7-month period during which PNGSDP was acting consistently with the specific proposition that the State had a right of inspection pursuant to cl 9 of the M&A.

121 Similarly, the evidence also shows that the parties conducted themselves on the basis of such a *shared assumption*. In particular, the parties' conduct of

Version No 1: 11 Jan 2022 (19:48 hrs)

the injunction application, including their conduct and correspondence leading up and subsequent to the inspection of accounts in September 2014, shows that the parties had treated the *existence* of the right of inspection as a non-issue, and that the main dispute related to the *scope* of that right.

Whether the representation is one of "fact"

122 For the purposes of estoppel by representation, the representation must be one of fact.

123 PNGSDP asserts that its admission is one of law and not of fact. The State says that the admission is one of fact or, at most, mixed law and fact. The State further suggests that the distinction between law and fact can be very fine and, perhaps, illusory. For example, it was stated in *Halsbury's Laws of Singapore* vol 10 (LexisNexis, Singapore, 2013) at para 120.200 n 2 that a "representation of law is easily characterised as a representation as to the fact that the legal effect is of the nature represented". Similarly, Jessel MR in *Eaglesfield v Marquis of Londonderry* (1876) 4 Ch D 693 at 702–703 observed that statements about an individual's private rights are statements of fact which involve underlying statements of law:

> It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to £10,000 Consols involves all sorts of law. …

124 In my view, the admissions above are admissions of mixed law and fact. This is because a proposition that the State may inspect PNGSDP's true

Version No 1: 11 Jan 2022 (19:48 hrs)

accounts is premised on facts giving rise to that right such as the existence of an agreement.

125 It appears that a representation of mixed fact and law is sufficient to found an estoppel by representation (Wilken & Ghaly, *The Law of Waiver, Variation, and Estoppel* (OUP, 3rd Ed, 2012) ("*Wilken & Ghaly*") at para 9.28, the reason being that restricting the doctrine to pure representations of fact would be overly restrictive, since it is difficult to delineate issues of fact and law clearly and since the contexts in which the doctrine arises often give rise to legal questions.

126 Accordingly, PNGSDP's admission that the State has a right of inspection is in my view capable of supporting an estoppel by representation.

Whether admissions in separate proceedings may be relied on

127 PNGSDP objected that admissions in S 795 cannot be taken into account for OS 234. It relies on *Singapore Civil Procedure 2015* at para 27/2/2, which states that an admission of facts is binding only within the action in which it was made. That paragraph, however, was dealing mainly with an admission which is made in response to a notice to admit facts served in that action itself. The commentary does cite an English authority for the proposition that an admission in a pleading is not binding in a subsequent action but it also notes that admissions may operate as an estoppel.

128 Further, in this case, the admissions in the pleadings are only a small part of the alleged admissions and hardly detract from the State's overall argument. The State also relies on the affidavits (which are now part of the

Version No 1: 11 Jan 2022 (19:48 hrs)

evidence in this OS and the conduct of PNGSDP (*ie*, the inspection of documents in September 2014).

129 Thirdly, as the State points out, the court has considered admissions in separate actions. In *Lee Siong Kee v Beng Tiong Trading, Import and Export (1988) Pte Ltd* [2000] 3 SLR(R) 386 ("*Lee Siong Kee*") the court referred to averments made in a suit between the respondent and a third party to raise an estoppel in the suit between the appellant and respondent. Further, it even seems possible to point to inconsistencies between pleadings in local and foreign courts. In *ARS v ART* [2015] SGHC 78, the defendant relied on inconsistencies between pleadings in proceedings in Singapore, Israel and the US to cast doubt on the existence on certain agreements (at [114]). Those inconsistencies related to the parties and terms of the agreement. Loh J was firm in using these inconsistencies against the plaintiff. He held that the inconsistencies related to facts which were fundamental and not inconsequential, and that there was no indication that they were the result of mistakes or inadvertence.

Whether the representations may be disregarded

130 The last sub-issue that arises is whether, on the basis that there have been admissions by PNGSDP, such admissions may be disregarded.

131 The parties have made extensive submissions on whether PNGSDP may *resile from* its admissions on the basis of cases which largely concern applications by parties to amend or withdraw certain portions of the pleadings, submissions or affidavits.

Version No 1: 11 Jan 2022 (19:48 hrs)

132 I have some difficulty with these submissions. First, these arguments fail to take into account PNGSDP's conduct in permitting the inspection in September 2014. Secondly, these arguments are also not immediately relevant since the application here is not an application to amend the pleadings or the evidence, but an application for final relief based on the evidence presently on the record. The only way these arguments could be relevant is if the parties' arguments regarding the *withdrawal* of admissions should now be treated as arguments on whether the admissions should be *disregarded* for the purposes of determining this OS. I will proceed on this basis.

133 The State argues that the representations cannot be disregarded since there was no explanation of the circumstances in which the admissions were made, no evidence that they were erroneous, and no evidence on how they were erroneously made. To this end, it relies on three Australian cases which show that these matters have to be satisfied in order for a party to withdraw admissions. In my view, these cases are indeed helpful in enunciating the considerations that should apply in a situation where admissions in legal proceedings are sought to be withdrawn.

134 The first case is *Re Rocco Celestino v Antonio Celestino* [1990] FCA 299. The defendant had admitted liability by way of letter in 1982 in respect of a motor accident in 1980. The trial, which commenced in 1987, thus proceeded as an assessment of damages. On the sixth day of trial, however, the defendant applied to withdraw its admission of liability. This was refused by the trial judge, whose decision was upheld by the Federal Court of Australia on the basis that the explanation of the circumstances leading to the admission was insufficient. The court held:

Version No 1: 11 Jan 2022 (19:48 hrs)

> 11 If the admission of liability had been made in the pleadings, this principle [of whether an amendment would cause injustice to the other party] would have direct application. Here the admission was made outside the pleadings, but in our opinion the principle is equally applicable. The admission by letter was formally made for the purpose of narrowing the issues at trial, and had effect as if the pleadings had been amended to incorporate the admission.
>
> 12 **The statement of principle assumes that an error or mistake by or on behalf of the party seeking the amendment has been demonstrated. Where the proposed change involves the withdrawal of an admission, a further matter arises for consideration.** In Langdale and Anor v. Danby (1982) 1 WLR 1123 Lord Bridge of Harwich, speaking for the House of Lords, said at 1134 that in the absence of clear evidence to the contrary, **a court is entitled to assume that counsel who makes an admission in the course of the conduct of a trial, has satisfied himself that the admission was, on his client's version of the facts, a proper admission to make.** In our opinion a court, and other parties to litigation, are similarly entitled to make that assumption about admissions made by solicitors on their client's behalf in the course of litigation whether in pleadings or in correspondence. **For this reason, where leave to withdraw an admission is sought, a court will require an explanation for the making of the admission. The explanation must be a sensible one based on evidence of a solid and substantial character**: Langdale v. Danby at 1134; Hollis v. Burton (1892) 3 Ch 226; and Cumper v. Pothecary (1941) 2 KB 58 at 70.
>
> 13 …
>
> 14 … Even where sufficient explanation for the erroneous or mistaken making of an admission is provided, **the admission may only be withdrawn where no injustice will be occasioned thereby to the other party. … if the other party has in good faith relied on the admission to his detriment so as to give rise to an estoppel the court will not permit the admission to be withdrawn**: H. Clark (Doncaster) Limited v. Wilkinson (1965) 1 Ch 694, Langdale and Anor v. Danby at 1135-1136, Clough and Rogers v. Frog. … [emphasis added]

PNGSDP tries to distinguish this case on two bases. First, the admissions in the present case were not based on any "version of facts" since they were not

Version No 1: 11 Jan 2022 (19:48 hrs)

admissions of facts. That point can be disregarded in view of my holding on the nature of the admissions. Secondly, the Assistant Registrar allowed the amendment application in SUM 1615 because the State would suffer no irreparable prejudice whereas in *Re Rocco Celestino* the five-year delay would have caused irreparable prejudice. The second point lacks force because the admissions on pleadings were but a small part of the overall picture and because the amendment was allowed on the basis that the State would suffer no irreparable prejudice in S 795 (rather than in this OS).

135 The next case is *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738. There, the High Court refused to grant the defendant leave to withdraw admissions made in a letter by its former solicitors and which was repeated in court by its solicitors. Rogers CJ did not accept the explanation that the admissions were made in error and, in any event, the reasons given for originally making the admission did not justify its withdrawal. PNGSDP tries to distinguish this case on the ground that Rogers CJ found that the admissions had been "correctly made" based on the evidence before him whereas the alleged admissions in this case concern the ultimate issue which I have to decide, *ie*, whether the State may enforce its right of inspection. This distinction is not very convincing. I struggle to find a principled basis to distinguish admissions depending on whether they relate to an intermediate conclusion or the ultimate conclusion.

136 The third case is *Bank of Western Australia Ltd v Coppola* [2011] NSWSC 1326 ("*Coppola*"). The defendant there filed, in response to a Notice to Admit Facts, a notice admitting that he signed a document but claiming that he was misled as to its nature and effect. The Supreme Court of New South

Version No 1: 11 Jan 2022 (19:48 hrs)

Wales refused the defendant's application to amend its defence and withdraw its previous admission in that and other proceedings, even though there was no evidence put forward by the plaintiff of having changed its position and it was uncontested that the solicitors' admissions were made without instructions. In considering whether a party may withdraw its admissions, the Court stated that it would consider:

> … The circumstances in which an admission was made must be examined. **There is usually a need for the applicant to explain the circumstances in which the admission was made and satisfy the Court a grant of leave will not prejudice an opponent's right to a fair trial**: Maile v Rafiq [2005] NSWCA 410 at [42] (per Tobias JA with whose reasons Brownie AJA agreed). It has also been said that **where leave to withdraw an admission is sought, a court will require an explanation for the making of the admission. The explanation must be a sensible one, based on evidence of a solid and substantial character**: *Langdale v Danby* [1982] 3 All ER 129; *Hollis v Burton* [1892] 3 Ch 226 and *Crumper v Pothecary* [1941] 2 KB 58 at 70; *Celestino v Celestino* [1990] FCA 299 at [12]; *Jeans v Commonwealth Bank of Australia Ltd* [2003] FCAFC 309; (2003) 204 ALR 327 at [17]-[19…
>
> [emphasis added in bold]

Further, *Coppola* is cited in *Singapore Civil Procedure 2015* at para 27/2/6 for the proposition that a party seeking to withdraw an admission must provide a sensible explanation supported by substantial evidence, some of which must show that the admission was erroneous. However, PNGSDP points out that the admission in the Notice was "completely consistent with the undisputed evidence showing that [the defendant] signed the [document]" and that there was no evidence on affidavit showing that the admission of fact was erroneous (at [41]) whereas the admission here does not relate to a factual dispute. I have already held that the admissions here are, at least, partly factual in nature and I do not find PNGDSP's suggested distinction convincing.

Version No 1: 11 Jan 2022 (19:48 hrs)

Intention that representation should have been acted upon

137 For the purposes of estoppel by representation, it appears that the representation must have been made with an intention that it be acted upon; a representation made innocently or mistakenly does not operate as an estoppel (*Halsbury's Laws of Singapore* vol 10 (LexisNexis, Singapore, 2013) at para 120.200). Neither party made submissions on this requirement. However, it seems to me that this is quite easily satisfied on the facts, especially in the light of the admissions made at the hearing of the injunction application and the inspection of books in September 2014.

Reliance (or the injustice of letting a party go back on a shared assumption)

138 The third requirement of estoppel by representation is reliance by the representee to its detriment. The State submits that it has been prejudiced because these admissions led to the dismissal of both the injunction application and the application for leave to appeal against the dismissal. PNGSDP refutes this on two grounds. First, there is no evidence on affidavit or in the submissions that the State relied on any admissions to its detriment. In particular, PNGSDP argues that I dismissed SUM 4351 despite Mr Yeo's submissions suggesting that material was not forthcoming. Mr Yeo had argued:

> **Mr Yeo**: To us, it was clear that under Art 9 we get to see books of accounts and records. Court may have been under the apprehension that we would get such material.

Secondly, the State's argument does not show how it relied on PNGSDP's admissions to its detriment.

Version No 1: 11 Jan 2022 (19:48 hrs)

139 In my view, the element of reliance is satisfied. It seems unnecessary to show that the State performed a positive act; it suffices if it refrained from acting in a particular way as a result of the representation (see *Wilken & Ghaly* at para 9.82). In this case, the State, in arguing that there was a risk of dissipation of assets when the injunction application was heard, refrained from arguing that it did not have a right of inspection. It is likely that this was because PNGSDP had argued that the State had such a right despite saying generally that the State had no rights under the M&A. The State's impression was reinforced by the subsequent inspection and it could be said that there was further reliance in the sense that the State neither applied to make further arguments in the injunction application nor argued in SUM 4351 that, contrary to PNGSDP's position, the State did not have a right of inspection.

140 The element of detriment presents more difficulty, but on balance I am of the view that it is satisfied. The difficulty is that the State has merely suffered a loss of chance in the sense that the injunction application and SUM 4351 may still have been dismissed even if the State did not have a right of inspection under the M&A. On this point there are competing authorities. On one side of the debate is *Knights v Wiffen* [1870] LR 5 QB 660 (CA). There, A sold some goods to B who sold them on to C. A told C that he had appropriated goods to the contract (this would have passed title in them to C). B later became bankrupt. A was estopped from denying that he had appropriated goods to C's contract even though he had not done so. If C had not received A's assurance, he would have terminated the contract and asked for his money back, although "very likely he might not have derived much benefit if he had done so" (at 665 *per* Blackburn J). Such an approach was also taken in *Hammersmith and Fulham Borough Council v Top Shop Centres* [1990] 1 Ch 237 (*Hammersmith &*

Version No 1: 11 Jan 2022 (19:48 hrs)

Fulham BC), where Warner J held at 261A–261C that a tenant suffered detriment by forgoing an opportunity to negotiate for a new sub-underlease or to apply for relief against forfeiture of a sub-underlease, whether or not such conduct was likely to result in a successful outcome. A contrary view was taken in by Brett LJ (in *Simm v Anglo American Telegraph* [1879] 5 QBD 188 (CA)) who expressed some doubt as to the correctness of *Knights v Wiffen*. There, the alleged detriment was the failure to pursue a third party who had executed a forged transfer of shares to the representee. However, it seemed crucial to the Court of Appeal's decision that the representee suffered no prejudice because the stock exchange rules gave it a cogent alternative claim against the dealer through whom the third party had sold the shares. This was the first of four ways that *Wilken & Ghaly* at para 9.105 analysed this conundrum:

> **9.105.** There are four possible views on this issue. First, the rationale behind *Knights* rests simply on the Courts' reluctance to engage in speculation as to the outcome of hypothetical proceedings. Once the representor has allowed the opportunity to be lost to the representee, uncertainty should be resolved in the latter's favour and detriment is assumed. The result of *Simms* may be reconciled with such an approach because there was no such uncertainty in that case. The Court of Appeal was not required to assess what would have happened had the original claim been prosecuted, since it was clear that there was an alternative and cogent remedy against a third party. Second, the representee might be said to have suffered prejudice because it lost forever the opportunity to take a reasoned decision on the transaction, in the light of all the circumstances, unfettered by the misapprehension caused by the representation. The loss of a chance, in itself, might amount to detriment, regardless of the prospects of success. Third, in *Dixon v Kennaway & Co* [[1900] 1 Ch 833 at 839–840], Farwell J analysed the problem in terms of onus of proof. The burden fell on the representee to prove that it had refrained from prosecuting its claim. Once it had done this, the onus shifted to the representor to prove that no prejudice or detriment resulted from the delay, ie that the wrongdoer had never been worth suing in the first place. Fourth, *Knights* is wrongly decided. On balance, the first view appears to be the most convincing explanation of the case law.

Version No 1: 11 Jan 2022 (19:48 hrs)

Although *Wilken & Ghaly* preferred the first analysis of *Knights v Wiffen*, it also thought that the second analysis could explain *Hammersmith & Fulham BC*. The correctness of either the first or the second analysis will suffice to establish detriment in the present case.

141 An analogy could also be made to *Lee Siong Kee*, a case on which the State relies. There, the defendant-respondent ("BTPL") had appointed the plaintiff-appellant ("Lee") as its agent to secure the purchase of certain properties from a group of third parties. An advance payment of $240,000 was given by Lee to the third parties ($108,000 of which had been advanced even before BTPL and Lee entered negotiations in late May 1993 with a view to securing the agency agreement). The agency agreement which BTPL and Lee signed in August 1993 provided that if the sale agreement was not executed by a certain date, the agency agreement would become null and void and monies paid by BTPL to Lee had to be refunded to BTPL. Certain events led to a suit between BTPL and the third parties in which BTPL obtained a declaratory judgment after averring that advance payments made to them by Lee were made on its behalf. BTPL sought to recover these payments from Lee, claiming that the advance payment was actually on Lee's account. The Court of Appeal at [42] held that BTPL was estopped from putting forth such an inconsistent plea, having relied on its previous averment to obtain a declaratory judgment. It held:

> 42 However, Beng Tiong were not entitled to recover the total advance of $360,000. It was common ground that a sum of $240,000 was paid to the beneficiaries, and the receipt of $240,000 was made out in the name of Beng Tiong. The money was disbursed from Lee's account and originated in part from the advance made to Lee by Beng Tiong. **In their action against the beneficiaries in Suit 1225/1996, Beng Tiong relied on the beneficiaries agreement and averred that they had paid the beneficiaries "a total of $240,000 as advance payment of the agreed purchase price". On this basis,**

Version No 1: 11 Jan 2022 (19:48 hrs)

> **among others, Beng Tiong obtained a declaratory judgment against eight of the beneficiaries. Having relied on their averment that they had paid $240,000 to the beneficiaries and obtained a declaratory judgment in that suit, Beng Tiong were estopped from now putting forth an inconsistent plea that the sum was paid on Lee's account.** Further, by electing to take the position that they had paid the sum of $240,000 to the beneficiaries, Beng Tiong implicitly acknowledged that Lee had paid $240,000 to the beneficiaries on behalf of Beng Tiong. It was clear that Beng Tiong could not recover the sum of $240,000 from Lee.

It is unclear what species of estoppel was being raised here, but it appears to be most akin to an estoppel by convention. One proposition that emerges strongly is that detrimental reliance by the party raising the estoppel is unnecessary. On the face of the judgment, the reason that BTPL was estopped from recovering the advance from Lee was that *BTPL* itself had made an averment to the opposite effect in legal proceedings *against the third parties*. There are difficulties if one tries to explain the judgment on the basis that Lee had relied on this averment. The relevant averment was made in a suit commenced only in 1996 whereas Lee's payments to the third parties took place in 1993. That suit was also against the third parties and not Lee. A closer look at the events in 1993 also shows a lack of reliance. First, Lee had already advanced $108,000 to the third parties in early February 1993. That was *before* BTPL and Lee entered negotiations in late May 1993 with a view to securing the agency agreement and also before the signing of the agency agreement in August 1993 (see [3]–[4]). Lee could not have relied on BTPL's averment in advancing this $108,000 to the third parties. Based on the agency agreement (see [40]), it seems that Lee could be said to have borne the risk of wasted expenses should the transaction with the third parties fall through. Precluding BTPL from recovering this sum meant that reliance by Lee was not necessary.

Version No 1: 11 Jan 2022 (19:48 hrs)

142 This is a clear example of how courts treat averments in legal proceedings as statements which are not made lightly and from which one cannot easily resile. If the respondent in *Lee Siong Kee* could not resile from an averment made in a legal proceeding against other parties, then all the more it would be unjust for PNGSDP to resile from an averment made in related legal proceedings against the same party, *ie*, the State.

143 In the circumstances, PNGSDP is estopped from denying that the State has an enforceable right of inspection, at least for the purposes of ratification of the collateral contract.

Issue 3: Whether the State's right to inspect all true accounts, books of account and/or records of PNGSDP extends to the documents sought to be inspected

144 Having decided that the State has a right of inspection delineated by cl 9 of the MA and Art 52 of the AA, the next question that arises is what the actual content of this right is.

145 For ease of reference, the list of documents the State has sought to inspect (as set out in the Schedule of this OS) is reproduced below:

a. General Ledger as at 31 March, 2013, 30 June 2013, 30 September 2013, 31 December 2013, 31 March 2014, 30 June 2014, 30 September 2014;

b. Full Management Accounts for the 12 months ended December 2013;

c. **Minutes of Meetings of the Defendant's Board of Directors from 1 October 2012 to date;**

d. **Documents related to all impairments made since 1 January 2013, including**

Version No 1: 11 Jan 2022 (19:48 hrs)

i. Detailed list of all assets that have been impaired;

ii. Information regarding the impairment process;

iii. Full supporting details and computations of all impairment expenses and fair value losses;

iv. The current location of the impaired assets; and

v. **Key assumptions on how the impairments were determined, including the valuation techniques used, the cash flow projections adopted and the discount rates applied.**

e. **Documents related to the gifting/sale of the Defendant's subsidiaries and assets since 1 January 2013, including:**

i. Detailed cost of subsidiary companies and assets sold;

ii. Detailed information regarding the sales process, including the details of the purchaser, the valuation of the subsidiary companies and assets, and the justification/reason for sale;

iii. Full supporting details and computations of the sales, including information as disclosed to auditors;

iv. **Sale and purchase agreements; and**

v. **Rationale and computation of the prices that subsidiary companies and assets were sold for;**

f. **All other documents related to:**

i. **The drawdown/use of the Long Term Fund, Development Fund and the General Fund since 1 January 2013; [and]**

ii. **The Defendant's expenditure since 1 January 2013, including:**

a. Cash expenditure on development projects/programs since 1 January 2013; [and]

b. **All other expenses incurred since 1 January 2013, including**

Version No 1: 11 Jan 2022 (19:48 hrs)

> **consultancy fees, direct grant, legal expenses, payment of salaries to staff and directors, rental for offices, travel and hotel stays, and any other expenses.**

146 This list reflects (save for item (f)(ii)) the list provided by Mr Timothy Reid, the expert for the State, and appears to enumerate what, in Mr Reid's understanding, the meaning of "true accounts, books of account and other records" is.

147 Some of these items sought have become moot. In particular:

(a) Item (a) does not appear to have been disputed by the parties.

(b) Item (b) is moot as I have, previously, ordered PNGSDP to furnish the State with its management accounts on a quarterly or more frequent basis.

(c) Items (d)(i) to (iv) appear to be moot as PNGSDP has furnished them to the State either voluntarily or pursuant to a court order.

(d) Items (e)(i) to (iii), according to PNGSDP, may be found in either the management accounts or the audited accounts.

What the right of inspection entails

148 The issue of what the State's right of inspection entails raises three interrelated questions:

(a) whether the State's right of inspection extends to "books of account and other records" as referred to in Art 52;

Version No 1: 11 Jan 2022 (19:48 hrs)

(b) if so, what the meaning of "true accounts" is; and

(c) if not, what the meaning of "books of account and other records" is.

Whether the right of inspection includes "books of account and other records"

149 PNGSDP takes the position that the State's right of inspection is only limited to "true accounts" as stated in cl 9. The State says that it is *also* entitled to the "books of account and other records" as provided in Art 52.

150 In support of its position, PNGSDP makes two arguments. First, relying on Art 52 to expand its inspection rights would render cl 9 otiose because cl 9 and Art 52 serve different purposes. In particular, cl 9 gives the State the right to inspect only PNGSDP's true accounts and not more; it describes "true accounts" and provides that "such accounts" may be inspected by the State. Conversely, Art 52 only empowers PNGSDP's directors to impose conditions or regulations for the inspection of books of account and other records. The converse position (*ie*, that the scope of inspection includes "books of account and other records") is less plausible because it renders cl 9 otiose to the extent that the scope of documents to which Art 52 refers is broader than the scope of documents of which true accounts are kept under cl 9. In addition, PNGSDP's position is consistent with r 20 of the New Program Rules and does not render otiose the reference to "other records" in Art 52. This is because PNGSDP's directors may still determine the conditions under which the *members* may inspect the *other records* of the company. There are references in the Act which permit this and this situation is also contemplated by the second sentence of Art 52, which provides that no member has the right of inspection "except as

Version No 1: 11 Jan 2022 (19:48 hrs)

conferred by statute or authorised by the Directors or by the members in General Meeting".

151 Secondly, the second sentence of Art 52 clarifies that it does not expand the right of inspection in cl 9 and thus confirms that Art 52 was meant to delineate the directors' powers rather than to expand on the rights of inspection.

152 The State makes three arguments in reply. First, it says that PNGSDP's pedantic approach to interpretation makes its right of inspection illusory. I do not see how limiting the right of inspection to "true accounts" of certain financial events renders that right illusory.

153 Secondly, the State says that it was in the letter dated 9 October 2014 that PNGSDP first took the position that State may inspect only "true accounts"; prior to this, PNGSDP in fact referred to Art 52 in its Defence and Counterclaim and in its letters dated 16 September 2014 and 22 September 2014. I cannot agree fully with this. Although PNGSDP has made multiple references to Art 52 in its representations, these have always been part of general statements that the State's right of inspection was contained in cl 9 and Art 52, and do not suggest a particular interpretation of these two provisions. On the contrary, on the occasions that PNGSDP was specific about the State's right of inspection, it referred to the right in cl 9. Thus, on 5 September 2014 when PNGSDP passed the resolution permitting the inspection, reference was made to the right in cl 9 but not to Art 52. Similarly, in paras 17 and 54(a) of PNGSDP's original Defence and Counterclaim filed on 8 September 2014, PNGSDP admitted that the State was entitled to inspect the classes of documents in cl 9. Paragraph 54(b) also stated that the State's right in cl 9 was *subject to* Art 52. In fact, as early as August 2014, CL had in its correspondence set out its position

Version No 1: 11 Jan 2022 (19:48 hrs)

that Art 52 was meant to empower directors to determine how the inspection would take place.

154 Thirdly, the State argues that reading cl 9 without reference to Art 52 would be artificial; even if Art 52 does not confer a substantive right to inspect, it is probative in interpreting the scope of inspection, since "accounts" are regarded as synonymous with "books of account". In my view, this adds little; the most that can be said is that "true accounts" and "books of account" can be read interchangeably.

155 It is my view that the State's right of inspection extends only to what is in cl 9, *ie*, "true accounts … of the sums of money received and expended by [PNGSDP] and the matters in respect of which such receipts and expenditure take place, of all sales and purchases of goods by [PNGSDP] and of the property, credits and liabilities".

The meaning of "true accounts", "books of account" and "other records"

156 The phrases "true accounts", "books of account" and "other records" are not defined in the M&A itself nor in the statute, and most of the parties' arguments focus on cases that discuss the meaning of "accounts and other records" (or words of a similar nature) in the applicable statutes.

157 The State makes two other submissions that I will address first. First, it submits that "true accounts" and "books of account" are interchangeable. This seems to be correct and PNGSDP has not explicitly argued otherwise. It would be meaningless to give the State a right to mere financial accounts in the M&A if the State can already purchase the same from ACRA.

Version No 1: 11 Jan 2022 (19:48 hrs)

158 Secondly, it submits that even if the right of inspection is found only in cl 9, a purposive interpretation would lead to the same interpretation as if the right of inspection extended to "books of account and other records", *ie*, the scope of cl 9 must be wide enough for the State to understand, verify and carry out a full and proper analysis of PNGSDP's financial position. I do not agree. First, such an approach has the effect of rendering otiose the words of cl 9 and the distinction between cl 9 and Art 52. Secondly, while the circumstances leading to the formation of PNGSDP suggest that the State was to have some oversight over PNGSDP, they do not compel the conclusion that the State must be entitled to information sufficient for it to *verify* PNGSDP's financial position. That purpose is met through the audit requirements. I do not think that the scope of cl 9 was intended to include "other records" as stated in Art 52.

159 I will now turn to the rest of the parties' arguments. My view is that the phrases "books of account" and "true accounts" are interchangeable and refer to ledgers, whereas the word "records" has a broader meaning and ordinarily encompasses the underlying source documents. However, the precise scope of "records" is determined by its context, *ie*, where certain classes of economic events or documents are particularised or where the purpose of a particular provision is made explicit. These are borne out by the authorities from the various jurisdictions which I now examine.

(1) United Kingdom

160 The English cases are helpful in determining what "books of account" means. The first decision referred to by the parties is *Conway v Petronius Clothing Co Ltd* [1978] 1 WLR 72, which dealt with s 147 of the UK Companies Act 1948 (11 & 12 Geo 6, c 38). The statute reads:

Version No 1: 11 Jan 2022 (19:48 hrs)

> **147.**—(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 …
>
> (2) For the purposes of the foregoing subsection, proper books of account shall not be deemed to be kept with respect to the matters aforesaid if there are not kept such books as are necessary to give a true and fair view of the state of the company's affairs and explain its transactions.
>
> (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;
>
> …

On the right of inspection in s 147(1) of the UK Companies Act 1948, Slade J commented that it was "clear for this purpose the expression 'proper books of account' [was] intended to have a wide meaning" because of what was provided in s 147(2) (at 85G–85H). The State says that Slade J specified certain classes of documents that fell within s 147(1). PNGSDP however contends that reliance on this case is misplaced. That case concerned an application to inspect a company's books by a director who was said to be interested in the information as potential competitors of the company. What the State says are documents within the meaning of "books of account" are actually information that could be derived therefrom and which would be valuable to a competitor; Slade J was not suggesting that these had to be produced for inspection. What Slade J said at 91B–91D was this:

> … there is at least a triable issue in regard to the defendants' assertion that the plaintiffs are interested as competitors of

Version No 1: 11 Jan 2022 (19:48 hrs)

> Petronius and that their motives for seeking inspection are to obtain information as actual or potential competitors of Petronius. … If the allegations are well founded, it is possible that an immediate order for inspection could cause irremediable damage to Petronius and to the other defendants by virtue of their interests in Petronius or in Manwith. Mr. Oppenheimer states in an affidavit that the **information which could be derived** from the books, accounts and records which the plaintiffs which to inspect would **include (i) information about the pricing structure, profit margins and costs of Petronius; (ii) information about its allocation of expenditure and turnover to cover overheads; (iii) its policy in relation to credit given to customers; (iv) the sources of supply used by it**. … [emphasis added]

161 The language of s 147(1) is almost identical to the right of inspection set out in cl 9 of the M&A. Although PNGSDP points out (rightly in my view) that the "books of account" were not intended to include the specific parcels of information listed by Slade J, I found two points to be relevant. First, s 147(2) makes it necessary to keep "books as are necessary to give a true and fair view of the state of the company's affairs and explain its transactions". The choice of the word "books", as opposed to "records", suggests that the documents referred to here were not source documents but ledgers. Secondly, the references Slade J made to pricing structure, allocation of overheads and credit policy suggest that the information must include internal accounts (*ie*, management accounts) and that the accounts must be sufficiently detailed to derive information about such matters.

162 This contrasts with *DTC (CNC) Ltd v Gary Sargeant & Co (a firm)* [1996] 1 WLR 797, a case which explored the successor provision to s 147(1) of the (repealed) UK Companies Act 1948. Section 221 of the UK Companies Act 1985 (c 6) as amended by s 2 of the UK Companies Act 1989 (c 40), reads:

Version No 1: 11 Jan 2022 (19:48 hrs)

> **221.**—(1) Every company shall keep accounting records which are sufficient to show and explain the company's transactions and are such as to —
>
> (*a*) disclose with reasonable accuracy, at any time, the financial position of the company at that time, and
>
> (*b*) enable the directors to ensure that any balance sheet and profit and loss account prepared under this Part complies with the requirements of this Act.
>
> (2) The accounting records shall in particular contain –
>
> (*a*) entries from day to day of all sums of money received and expended by the company, and the matters in respect of which the receipt and expenditure takes place, and
>
> (*b*) a record of the assets and liabilities of the company.

The question in this case was whether an accountant could assert a lien over certain classes of documents for unpaid fees. The High Court held that the lien was unenforceable as it conflicted with s 221 of the UK Companies Act 1985. In particular, even though the judge dealt with a closed list of documents as the dispute before him was limited, he thought that the scope of s 221 was very wide and that accounting *documents* did not cease to be *records* after they had been converted into a secondary form. Mr Michael Crystal QC, sitting as a deputy High Court judge, said of the dispute at 799G–799H, 802H–803A and 803C:

> … Paragraph 4 of the statement of claim is more specific. It refers to the following categories: **"(a) sales invoices, (b) purchase invoices, (c) cheque books, (d) paying-in books, (e) bank statements** and (f) other accounting record documents." … Paragraph 7(e) of the statement of claim introduced two further specific categories of documents: "Periodic management accounts and trial balance documents." Although there was some discussion about the categories pleaded in paragraphs 4(f) and 7(e) of the statement of claim, I did not understand Mr. Machell in the end to contend that the court could deal with those categories on this motion. …
>
> …

Version No 1: 11 Jan 2022 (19:48 hrs)

> The **question which therefore arises is whether all or any of the categories of documents identified in paragraph 4(a) to (e) of the statement of claim are accounting records within the meaning of section 221**. … In my judgment, **each of these classes of documents is not only capable of being but ordinarily would be accounting records within the meaning of section 221**.
>
> Mr. Handyside's submission, however, was this. … the documentation already returned to the plaintiff contains full details of the information contained in the documentation which has been withheld by the firm. Therefore, he says, the withheld documents are no longer accounting records within the meaning of section 221.
>
> … **The fact that documents which are accounting records have been reviewed by an accountant, and summarised in other documents, does not mean that the source documents thereby cease to be accounting records within section 221**. As Mr. Machell observed, the logical conclusion of such an argument would be that **once final accounts had been prepared** all the source documentation would cease to be accounting records within section 221. This cannot be right. …
>
> [emphasis added]

In my view, this case alludes to a distinction between "records" as being primary sources of information and "accounts" as secondary sources.

163 In fact, the mere word "records" itself may not be an all-encompassing reference to every primary document, for its scope can be expanded with the right words, as was demonstrated in *Transport for Greater Manchester v Thales Transport & Security Limited* [2012] EWHC 3717. There, the court enforced wide-ranging informational rights in Part 8 proceedings (*ie*, summary proceedings with no substantial disputes of fact) on the basis of different considerations. First, the relevant clause there had been drafted in terms which permitted a broad scope of disclosure (specifically, using the words "relating to" twice over). Clauses 27 and 28, which relate respectively to the retention and inspection of documents, provided:

Version No 1: 11 Jan 2022 (19:48 hrs)

> 27.1 [The defendant] shall for a period of at least 12 years … maintain accurate, up-to-date and complete **records relating to** its obligations under this Agreement ("Records") …
>
> 28.1 In addition to the information otherwise to be submitted or provided to [the plaintiff] under any other provision in this Agreement, [the defendant] shall submit to [the plaintiff] … such **other information, records or documents** in its possession or control or in the possession or control of any auditors, agents or Sub-contractors as [the plaintiff] … may reasonably request … and which **relates to the Records**
>
> [emphasis added]

Secondly, the right of inspection had been expressly contemplated to be for the purposes of an audit whereas its purpose in the M&A is not explicit. There, cl 28.2(c) of the M&A read:

> 28.2 [The plaintiff] … shall be entitled … to inspect and make copies of:
>
> (a) [documents]
>
> (b) [documents]
>
> (c) … in each case as [the plaintiff], the Secretary of State for Transport and any such Auditor may reasonably request **for the purpose of auditing** any information supplied to [the plaintiff] the Secretary of State for Transport or such Auditor under the Agreement or verifying [the defendant's] compliance with its obligations under this agreement;

PNGSDP submits that the words "books of account and other records" is a basic right of inspection and must be read harmoniously with and relate to "true accounts" in cl 9 and, in light of these cases, I think there is force in this argument.

Version No 1: 11 Jan 2022 (19:48 hrs)

(2) Singapore

164 I now turn back to the local cases. The only clue as to the meaning of "records" is found in s 199 of the Act, the current version of which reads:

> **Accounting records and systems of control**
>
> **199.**—(1) Every company 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 financial statements 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.
>
> [emphasis added]

The present s 199(1) was introduced via Act 36 of 2014 and took effect from 1 July 2015. Before the amendments, s 199(1) contained very similar language in relation to the keeping of "accounting and other records".

165 It was observed by the Court of Appeal in *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 2 SLR(R) 352 ("*George Wuu*") that:

> 33 The right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director, including the duty to ensure that the company complies with the requirements as to accounts set out in the Companies Act: see s 204(1) of the Act. … Such right is an important one, as the books and records of a company are a primary, and sometimes the only, source of information as to the state of affairs of a company. It follows that unless a director has access to these sources of information, he would be severely inhibited in the proper performance of his duties. …

The court in *George Wuu* was (tangentially) concerned with the phrase "accounting and other records" in s 199 and it appeared to draw a distinction between books and records.

Version No 1: 11 Jan 2022 (19:48 hrs)

(3) Malaysia

166 Section 167 of the Malaysia Companies Act 1965 (Act 125, Revised 1973) sets out the analogous provision for keeping and inspection of accounts:

> **Section 167. Accounts to be kept.**
>
> (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) The Court may … order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, …

167 Section 167, the State effectively suggests, has a very wide scope, and includes resolutions and statements of affairs. The decision of the Malaysian High Court in *Shorga Sdn Bhd v Amanah Raya Bhd (as administrator of the Estate of Raja Nong Chik bin Raja Ishak, deceased)* [2004] 1 MLJ 143 ("*Shorga Sdn Bhd*") is relevant. There, the plaintiff company had sought the repayment of an allegedly friendly loan it gave to the defendant, and its case rested solely on a document which merely showed that monies had been paid by the plaintiff to the defendant and bare allegations on affidavit that such monies had been paid as a friendly loan. Abdul Malik Ishak J noted that:

> 35 … ss 167 and 168 of the [Companies Act 1965] impose on the plaintiff as a company a duty to keep accounts. Section 169 of the said Act also imposes a duty on a company like that of the plaintiff to have a profit and loss account and its balance sheet audited and laid before the company at its Annual General Meeting. Everything must be documented. So the plaintiff ought to have contemporaneous documents in its custody like the resolutions or the statement of affairs or the

Version No 1: 11 Jan 2022 (19:48 hrs)

> accounting statements in order to show the prima facie evidence of a friendly loan. Sadly, none was tendered by the plaintiff. …

PNGSDP says that this must be read in context. In particular, it says that the Court was making a general observation that the plaintiff should have had more documentation and not that resolutions were "accounts" as a general matter. Be that as it may, it cannot be denied that resolutions are *capable of* being, in the language of s 167, "accounting and other records".

(4) Australia

168 It seems from the Australian authorities that the words "financial records" have a broader meaning than "accounting records". While s 161A of the Australian Companies Act 1961, from which s 199 of the Singapore Companies Act had been derived, has been superseded by s 286 of the Australian Corporations Act 2001, it appears that Australia retains the same approach in terms of interpreting the scope of accounting/financial records and, for guidance, refers to cases decided on its predecessor provisions (at *ASIC v Rich* [2005] NSWC 417 at [283]–[292]).

169 In *ASIC v Rich*, the term "financial records" was understood to extend beyond documents of prime entry such as the cashbook and journal to derivative documents that have been prepared using judgment or prediction and involving the interpretation of financial data (at [292]–[295]). First, Austin J considered that the weight of the judicial observations was against the approach of Mullighan J who said in *Duke Group Ltd (in liq) v Pilmer* (1994) 15 ACSR 255 at 263 that there should be a distinction between primary accounting records (which were required to be kept) and "derivative records" such as management accounts, which interpret the primary records and entail judgments as to such

Version No 1: 11 Jan 2022 (19:48 hrs)

matters as depreciation and amortisation (which need not be kept). Secondly, the shift in statutory language from "accounting records and accounts" to "financial records" suggests that it was meant to be broadened. Thirdly, para (c) of the definition of "financial records" extended to "other documents needed to explain" the methods by which financial statements were prepared, *ie*, matters that inevitably involved judgment. Fourthly, the definition of "financial records" was inclusive and broad.

170 However, the Australian approach has to be read against the broader wording in its statutory scheme.

Conclusion on the meaning of "books of account" and "other records"

171 I conclude that the authorities show that the phrase "books of account" refers to the ledgers and is a perfect subset of "records", which has a broader meaning and encompasses underlying source documents. The words "other records" would relate to "accounting records" rather than "financial records".

Whether the classes of documents sought fall within the right of inspection

General ledger and management accounts

172 It is undisputed that the general ledger and management accounts fall within the term "true accounts" and "books of account".

Meeting minutes

173 There is no support in precedent to say that item (c) (*ie*, the *minutes* of meetings) form part of the accounts or records of a company. The furthest support there is in the case law examined above is *Shorga*, which shows that

Version No 1: 11 Jan 2022 (19:48 hrs)

resolutions are capable of being "accounting and other records". As a matter of principle, I think the minutes of meetings are capable of being records only to the extent that the assumptions or bases underlying the preparation of financial statements were discussed. Generally, minutes of meetings would deal with matters of internal management and operations, which are matters far removed from the scope of bookkeeping.

Documents concerning impairments

174 Items (d)(i)–(iii) have been furnished voluntarily. In my view, items (d)(i) and (ii) (*ie*, a detailed list of all assets that have been impaired and information regarding the impairment process) could conceivably fall under "accounts". The latter information is necessary to sufficiently explain the figures on the accounts and should form an integral part of it. Items (d)(iii) and (iv) (*ie*, full supporting details and computations of all impairment expenses and fair value losses and the location of the impaired assets) should form only part of the "records".

175 The live dispute under this category is item (d)(v), the key assumptions on how the impairments were determined, including the valuation techniques used, the cash flow projections adopted and the discount rates applied. In my view, any written records on this would form part of "accounting records". It is not enough for PNGSDP to simply say that the principles for impairment are set out statutorily, because the law does not provide any specific assumptions. Instead, these assumptions are to be made by management in line with principles under the prevailing financial reporting standards.

Version No 1: 11 Jan 2022 (19:48 hrs)

Documents concerning the gifting/sale of PNGSDP's subsidiary and assets

176 Item (e)(i) (*ie*, the detailed cost of subsidiary companies and assets sold) will form part of the "accounts", whereas most of items (e)(ii) to (iii) (*ie*, detailed information regarding the sales process, including the details of the purchaser, the valuation of the subsidiary companies and assets, and full supporting details and computations of the sales, including information as disclosed to auditors) will form only part of the accounting records. However, part of item (e)(ii), the justification/reason for the sale of assets, is more properly within the province of management decisions and should not fall within the meaning of "records".

177 The live disputes under this category pertain to items (e)(iv)–(v) (*ie*, the sale and purchase agreements and the rationale and computation of the prices that subsidiary companies and assets were sold for). The sale and purchase agreements could be accounting records because they evidence the price at which the subsidiary companies and assets were transferred.

Other documents relating to certain expenditures

178 The matters to which these other documents relate are matters related to the expenditures by PNGSDP and would generally be "accounting records".

Issue 4: Whether the State may take copies of all true accounts, books of account and/or records of PNGSDP

179 I turn to the final issue. The State submits, on the basis of *George Wuu*, that the right of inspection entails the right to take copies, especially considering the nature of the accounting documents. This is a relatively uncontroversial point which PNGDSP has not taken issue with.

Version No 1: 11 Jan 2022 (19:48 hrs)

180 In *George Wuu*, the Court of Appeal cited, at [28], *Edman v Ross* (1922) 22 SR (NSW) 351 ("*Edman v Ross*") for the proposition that the right of inspection entails the right to take copies:

> 28 In *Edman v Ross* (1922) 22 SR (NSW) 351, the plaintiff and the two defendants were shareholders and directors of a company. Disputes arose between them, and the plaintiffs took out an application for an interlocutory injunction restraining the defendants from, among other things, preventing him from having access to the books and accounts of the company. Street CJ of the Supreme Court of New South Wales held that the plaintiff as a director of the company was entitled to have access to the books and accounts of the company and the defendants were wrong in refusing him such access. The learned Chief Justice said at 361:
>
> > **The right to inspect documents and, if necessary, to take copies of them is essential to the proper performance of a director's duties**, and, though I am not prepared to say that the court might not restrain him in the exercise of this right if satisfied affirmatively that his intention was to abuse the confidence reposed in him and materially to injure the company, it is true nevertheless, that 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.
>
> [emphasis added]

181 In the present case, the State is right to suggest that the nature of accounting documents makes the taking of copies necessary. The accounting documents are some of the most information-intensive documents in a company's records and often require detailed and lengthy study that is not achievable during the physical inspection of documents.

Conclusion

182 For the reasons given above, I find that:

Version No 1: 11 Jan 2022 (19:48 hrs)

(a) The State has a right of inspection on the terms of cl 9 and Art 52 of PNGSDP's M&A by virtue of a collateral contract, the ratification of which PNGSDP is estopped from denying.

(b) That right of inspection relates to "true accounts" under cl 9 of PNGSDP's M&A. In particular, as regards the disputed categories of documents:

(i) the general ledger and management accounts fall within the meaning of "true accounts";

(ii) the disputed documents concerning impairments and other documents concerning expenditure (*ie*, items (d)(v) and (f)) fall within the meaning of "other records"; and

(iii) the meeting minutes and disputed documents concerning the gifting/sale of subsidiaries and assets (*ie*, items (c) and (e)(iv) to (v)) generally fall outside the meaning of both "true accounts" and "books of account and other records".

(c) That right of inspection includes the right to take copies.

183 There will be an order in terms of my decision above. I award the costs of the application to the State, to be taxed if not agreed.

Judith Prakash
Judge

Version No 1: 11 Jan 2022 (19:48 hrs)

Koh Swee Yen, Yin Juon Qiang and Joel Quek
(WongPartnership LLP) for the plaintiff;
Nish Shetty, Joan Lim-Casanova, Jordan Tan, Lim Chingwen
and Sarah Hew (Cavenagh Law) for the defendant.

Version No 1: 11 Jan 2022 (19:48 hrs)