IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 314

Originating Summons No 863 of 2015

Between

MUKHERJEE AMITAVA

… *Plaintiff*

And

(1) DYSTAR GLOBAL HOLDINGS (SINGAPORE) PTE LTD
(2) RUAN WEIXIANG
(3) XU YALIN
(4) YAO JIANFANG

… *Defendants*

GROUNDS OF DECISION

[Companies] — [Directors] — [Section 199 of the Companies Act (Cap 50, 2006 Rev Ed)] — [Director's right to inspect company's records]

TABLE OF CONTENTS

Mukherjee Amitava
v
DyStar Global Holdings (Singapore) Pte Ltd and others

[2017] SGHC 314

High Court — Originating Summons No 863 of 2015
Vinodh Coomaraswamy J
17 August 2016; 15, 22–23 May 2017

19 December 2017

Vinodh Coomaraswamy J:

Introduction

1 The plaintiff is a director of DyStar Global Holdings (Singapore) Pte Ltd.[1] He brings this application under s 199 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). The relief he seeks is an order that he be allowed to inspect and take copies of certain categories of documents enumerated in a schedule annexed to his application. His case is that: (a) all of these documents are the company's "accounting and other records" within the meaning of s 199(1) of the Act; and (b) the company and certain of its directors have wrongfully prevented him from exercising his right as a director to inspect these documents under s 199(3) of the Act.[2]

---

1 Mukherjee Amitava's affidavit (15 Sep 2015) at paras 3–4.

2 Plaintiff's written submissions (12 Aug 2016) at paras 10–13 and 24–26.

2 The plaintiff brings this application against four defendants. The first defendant is the company itself. The other defendants are three out of the five directors of the company: Ruan Weixiang, Xu Yalin and Yao Jianfang.[3]

3 I have dismissed the plaintiff's application. In my view, the plaintiff's primary or dominant purpose in bringing this application is an ulterior purpose,[4] which is to advance the interests of a minority shareholder of the company in a minority oppression suit against the company and its majority shareholder. Given that that finding goes to the root of the plaintiff's application, reframing or narrowing the categories of documents which the plaintiff has specified in his application cannot salvage it. For the same reason, the plaintiff's offer of an undertaking to the court to maintain the confidentiality of any documents which he inspects pursuant to a court order granted on this application cannot salvage the application.

4 The plaintiff has appealed against my decision. I now set out my grounds.

The factual and legal background summarised

Factual background

The parties' relationship

5 The company is an investment holding company incorporated in Singapore. It holds shares in a number of subsidiaries operating in a number of countries. The company together with its subsidiaries are known collectively

---

3 Mukherjee Amitava's affidavit (15 Sep 2015) at paras 9–11.

4 Certified Transcript (23 May 2017) at pp 1 (lines 37–44) to 2 (lines 1–25).

as the DyStar group.[5] The DyStar group is in the business of providing products and services to the textile industry.

6 As a matter of form, the company has three shareholders: (a) Senda International Capital Limited ("Senda") which owns about 62% of the company;[6] (b) Well Prospering Limited ("Well Prospering") which owns one share in the company; and (c) Kiri Industries Ltd ("Kiri Industries") which owns about 38% of the company. As a matter of substance, however, the company is effectively owned by only two shareholders. Senda and Well Prospering are both wholly-owned subsidiaries of a company incorporated in China and listed in Shanghai known as Zhejiang Longsheng Group Co Ltd ("Longsheng").[7] Longsheng's control of Senda and Well Prospering therefore gives it ultimate control of 62% of the company. Longsheng is, in effect, the company's sole majority shareholder. That makes Kiri Industries, in effect, the company's sole minority shareholder.

7 The legal relationship between the company's shareholders began with, and is now governed by, a share subscription and shareholders' agreement which they entered into in 2010. The shareholders' agreement stipulates, among many other things, that the company's board is to comprise five directors.[8] Three directors are to be appointed by Well Prospering, and therefore ultimately by Longsheng. Two directors are to be appointed by Kiri Industries.[9] The plaintiff and one Manishkumar Pravinchandra Kiri are Kiri

---

5 Mukherjee Amitava's affidavit (15 Sep 2015) at para 8.

6 Mukherjee Amitava's affidavit (15 Sep 2015) at para 7(1)–(3).

7 Mukherjee Amitava's affidavit (15 Sep 2015) at para 7(4).

8 Xu Yalin's affidavit (27 Oct 2015) at p 405, cl 9.

9 Mukherjee Amitava's affidavit (15 Sep 2015) at para 12.

Industries' appointees. Mr Ruan, Mr Xu, and Mr Yao are Longsheng's appointees ("the Longsheng Directors").[10]

The plaintiff applies under s 199

8 In July 2015, the plaintiff wrote a letter addressed to the company and to each Longsheng Director. In this letter, he asked the company's "management [to] make available the documents and/or information as set out in the enclosed schedule … for [his] review, in advance of the next board meeting".[11] The defendants did not, in terms, reject the plaintiff's request. But neither did the defendants make the documents and information available for the plaintiff as he had requested.

9 The plaintiff took out this application in September 2015. The principal relief which he seeks is set out in prayer 1 of this application, *ie*, that:

> The Plaintiff be allowed to inspect and take copies of the accounting and other records of the 1st Defendant as set out in the **Schedule** annexed hereto pursuant to Section 199 of the Companies Act within 3 working days of this order[.] [emphasis in original]

The schedule referred to in prayer 1 of the plaintiff's application is virtually identical to the schedule annexed to his July 2015 letter (see [8] above). I make certain observations about the width of this schedule at [140] to [143] below.

10 At the highest level of generality, the single issue which I have to decide is whether I should exercise my power under s 199 of the Act to compel the defendants, or any one or more of them, to permit the plaintiff to

---

10 Mukherjee Amitava's affidavit (15 Sep 2015) at para 13.

11 Mukherjee Amitava's affidavit (15 Sep 2015) at para 32 and pp 173–174.

inspect the material which he has enumerated in the schedule to his application. But to set out the issues before me with more granularity, it is first necessary to consider the statutory scheme of s 199 and the well-established common law principles which are applicable to that section.

Legal background

11 A director has a right at common law to "see and take copies of documents belonging to his company" (*Burn v London and South Wales Coal Co and Risca Investment* Co (1890) 7 TLR 118 ("*Burn*") at 118) in order that "he might properly perform his duties" (*Conway and Others v Petronius Clothing Co Ltd and Others* [1978] 1 WLR 72 ("*Conway*") at 86D-H). A director has also, in Singapore law, a statutory right to inspect the company's "accounting and other records" under s 199(3) of the Act (*Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 2 SLR(R) 352 ("*Wuu*") at [25] and [31]; *Hau Tau Khang v Sanur Indonesian Restaurant Pte Ltd and another* [2011] 3 SLR 1128 ("*Hau Tau Khang*") at [14]).

12 The plaintiff has invoked in this case only a director's statutory right of inspection. I therefore need not say anything further about the common law right of inspection under Singapore law or about its scope or interaction with the statutory right.

The statutory scheme

13 The starting point in understanding a director's statutory right of inspection is s 199(1) of the Act. This section creates the company's duty to keep accounting and other records in the following terms:

> **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.

As I will show (see [159] below), the phrase "accounting and other records" is a recurring theme throughout the Act and in the case law on s 199. For simplicity, unless the context indicates otherwise, I shall use the word "records" as shorthand for the longer phrase "accounting and other records" within the meaning of s 199(1).

14 A director's statutory right to inspect a company's records arises under s 199(3). That section provides as follows:

> (3) The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place as the directors think fit and *shall at all times be open to inspection by the directors*.
>
> [emphasis added]

15 The curious thing about s 199(3) is that it creates a duty without specifying on whom the duty lies or how the duty is to be enforced. That is the result of the following three observations which I make about s 199(3):

(a) First, the part of s 199(3) which deals with inspection is framed in the passive voice. It therefore does not specify on whom rests the

express duty to permit a director to inspect the records. By necessary implication, the duty must, at the very least, lie on the company (*Wuu* at [25]). It is the company which is, by s 199(1), obliged to keep the records in the first place. It is the company which has property in the records. It is the company which has physical control of the records or, at the very least, *de jure* and very often also *de facto* control of the means by which to assert physical control over the records. It is also the company in general meeting, through its supervisory powers over the company's directors and management, which has the power to make the ultimate decision for the company as to whether to open its records for inspection under s 199(3). The question which then arises is whether s 199(3) by implication imposes an additional personal duty on each director to ensure that the records are open for inspection by the directors at all times. That is a question which I analyse, to the extent necessary to determine this application, at [99] to [123] below.

(b) Second, because s 199(3) expressly creates a duty – imposed at the very least on the company – to keep the company's records at all times open for the directors to inspect, it must also create a right vested in each director to inspect those records. Every duty – to be a duty in the true sense of the word – must have a correlative right. Looked at in that way, s 199(3) creates by necessary implication a correlative right vested in a director.

(c) Finally, s 199(3) – having conferred a right on a director to inspect a company's records – does not set out any means by which a director aggrieved by being refused inspection of a company's records may enforce that right. In particular, s 199(3) does not in terms empower a court to make an order compelling a company to permit an

aggrieved director to inspect its records. That omission is particularly stark when s 199(3) is compared to s 199(5).

16 Section 199(5) expressly empowers the court to order that a public accountant acting for a director be allowed to inspect the records, subject to a confidentiality undertaking:

> (5) The Court may in any particular case order that the accounting and other records of a company be open to inspection by a public accountant acting for a director, but only upon an undertaking in writing given to the Court that information acquired by the public accountant during his inspection shall not be disclosed by him except to that director.

I make two observations on s 199(5). First, this is the only subsection of s 199 which gives the court any power to make an order for inspection. It expressly confers upon the court a power to issue an order compelling an inspection of the company's records by a public accountant acting for a director. This power is a free-standing one in the sense that s 199(5) does not make a breach of any duty under s 199 a prerequisite to the court's exercise of the power. Second, empowering the court in that way is s 199(5)'s only purpose. It does not create a duty to permit a public accountant to inspect the company's records.

17 Section 199(3) is thus unlike s 199(5) in two respects: s 199(3) *does* create a duty to permit inspection but it *does not* empower the court to enforce that duty by ordering inspection. On the other hand, 199(5) *does not* create a duty to permit inspection but it *does* empower the court to order an inspection, albeit by a public accountant acting for a director and not by the director himself.

18 Section 199(6) makes it a criminal offence to breach any of the duties under s 199:

> (6) If default is made in complying with this section, the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months and also to a default penalty.

I make two observations on s 199(6):

(a) First, the offence under s 199(6) extends to a default in compliance with *any* subsection of s 199. That encompasses on its face a default under s 199(3) as well as under s 199(1). So within the express scope of the offence under s 199(6) is the situation where a director is able to bring himself within s 199(3) but is not permitted to inspect the company's records.

(b) Second, criminal liability under that section is the only express consequence which s 199 provides for a default in complying with the duty to keep the company's records open for inspection by a director under s 199(3). But a criminal conviction following such a default does not, in itself, secure for the aggrieved director the inspection which he seeks. There is nothing within s 199(3) – or indeed within s 199 itself – which expressly permits an aggrieved director to secure specific civil relief in the event of a breach of s 199(3). In that sense, there appears to be a gap in s 199.

19 There is one other aspect of the statutory scheme of s 199 which, confusingly, does not appear in s 199. Section 199(3) in terms allows a director only to *inspect* the company's records. It says nothing about *taking copies*. But the plaintiff – as is very common and entirely understandable –

applies in these proceedings for an order that he be permitted not only to inspect the company's records but also to take copies of them (see [9] above). If the plaintiff is correct that he has a right to inspect the company's records under s 199(3), he undoubtedly has a concomitant right to take copies of those records. That right is found, not in s 199, but in s 396A(3). That section is of general application and allows any person who is given by the Act a right to inspect a company's records the right to take a copy of the records. That would obviously apply to a director exercising his right to inspect the company's records under s 199(3) of the Act.

The common law principles

20 A set of fundamental principles have developed in the case law on how s 199(3) is to be interpreted and applied (see, *eg*, *Wuu* at [25]–[33] and *Hau Tau Khang* at [13]–[15]). These fundamental principles are common ground between the parties.[12] It therefore suffices for present purposes simply to state the principles without exposition or analysis:

(a) A director's statutory right to inspect records is an "absolute" right. But it is absolute not in the sense that it is inviolable. It is absolute in the sense that the director has a *prima facie* right to inspect the records and does not have to demonstrate any particular ground or need for inspection (*Wuu* at [27] and [33]; *Hau Tau Khang* at [15(e)]).

(b) The purpose of a director's right to inspect records is to enable him to perform his statutory duties as a director. This extends to all of

12 Plaintiff's written submissions (12 Aug 2016) at para 25; First defendant's written submissions (12 Aug 2016) at paras 5–7; Second to fourth defendants' written submissions (12 Aug 2016) at para 36.

his duties as a director and is not confined to those duties which relate to the accounts (*Hau Tau Khang* at [22]).

(c) A director has no right to inspect records if he is exercising the right, not to advance the interests of the company, but for some ulterior purpose or to injure the company. An ulterior purpose is any purpose which is unconnected to the discharge of the director's duties (*Wuu* at [33]; *Hau Tau Khang* at [15(e)] and [34]).

(d) An ulterior purpose suffices, in itself, to defeat the director's right to inspect the company's records even if that ulterior purpose will not cause any detriment to the company. It is for this reason that the Court of Appeal in *Wuu* used an intention to cause detriment to the company as but an *example* of what would amount to an ulterior purpose (*Wuu* at [32]) and used the disjunctive "or" in holding that a director's right "will be lost where it is exercised not to advance the interests of the company but for some ulterior purpose *or* to injure the company" [emphasis added] (*Wuu* at [33]; see also *Hau Tau Khang* at [34]).

(e) The burden of proving that a director is exercising his right to inspect records for an ulterior purpose lies on those who oppose inspection. Discharging that burden requires "clear proof" which suffices to satisfy the court affirmatively that the director is seeking to inspect the records for an ulterior purpose (*Wuu* at [34]; *Hau Tau Khang* at [15(c)]).

(f) If a director does provide reasons for exercising his right to inspect records, even though he is under no obligation do so, it is open to the court to examine those reasons to see if they reveal an ulterior

purpose. That is the approach which Steven Chong J (as he then was) took in *Hau Tau Khang* at [36].

21 I make a small point about terminology. The cases use the term "ulterior purpose" in some contexts and the term "improper purpose" in other contexts. I have used "ulterior purpose" consistently in the synthesis at [20] above and will do so throughout this judgment. I do not consider any of the cases to have drawn a distinction between the two terms insofar as a director's right to inspect records is concerned. If any distinction can sensibly be drawn, it seems to me that an ulterior purpose, purely as a matter of language, encompasses an improper purpose but is not confined to it. To say that a director is exercising his right of inspection for an improper purpose suggests to me that his purpose is capable of being a wrong in itself, for example, to cause detriment to the company's interests contrary to his duties to the company. Exercising a right for an ulterior purpose suggests, more broadly, that the director is exercising the right for any purpose which is not its intended purpose, *ie*, that the director seeks inspection otherwise than to enable him to perform his statutory duties as a director (see [20(b)] above). That would obviously encompass an improper purpose (as I have defined it), but would also include any purpose which might not otherwise be a wrong but which is nevertheless not the purpose for which s 199(3) confers the right.

The elements of an application to inspect under s 199(3)

22 Returning to the statutory scheme of s 199(3) considered in the light of these fundamental principles drawn from the case law, three elements must be satisfied before a director's right to inspect the company's records arises:

(a) The person who wishes to inspect the company's records must be a director of the company;

(b) The documents which the director wishes to inspect must be the company's "accounting and other records" within the meaning of s 199(1) or a subset of those records; and

(c) The director must seek inspection for a proper purpose.

23 The burden of proving the first element above must rest on the putative director. It is he who asserts that he is a director. In almost all cases, that burden will be discharged so easily that this element will not even be disputed. Whether or not the party seeking inspection is a director of the company is a matter of record, unless he relies on the extended definition of "director" in s 4(1) of the Act. If that is the case, issues of fact may arise on this element. The burden of proof on those issues of fact should rightly rest on the putative director.

24 The burden of proving the second element must also rest on the putative director. If the director asks only to compel the company to permit him to inspect the company's "accounting and other records", thereby tracking the language of s 199(1), then the second element is *ex hypothesi* established and cannot be disputed. However, if the director chooses to specify the documents which he wishes to inspect, either individually or by categories, it is right that he should have to show that the documents which he wishes to inspect do indeed form part of the company's "accounting and other records" within the meaning of s 199(1). After all, it is he who has chosen to go beyond the statutory phrase by enumerating *a priori* the specific documents which he wishes to inspect.

25 The burden of disproving the third element – which is the only element likely to be in issue in the majority of applications – lies squarely on those

who seek to prevent the director from inspecting the company's records (see [20(e)] above).

Issues to be decided

26 With that summary of the factual and legal background, I can now summarise with more granularity the parties' positions and the issues I have to decide.

27 It is common ground that the burden is on the defendants to show why the plaintiff should not be permitted to inspect the company's records (see [20(e)] above). To discharge this burden, the Longsheng Directors on the one hand and the company on the other present separate arguments through separate counsel. The bulk of the arguments for the defendants have been, however, presented by counsel for the Longsheng Directors. Counsel for the company confines his separate submissions to the potential for detriment to the company's interests if the plaintiff's application were to be allowed.[13] In all other respects, counsel for the company associates himself with the Longsheng Directors' submissions. Without intending any disrespect to either counsel for the defendants, I will now summarise the defendants' arguments without drawing a distinction between the separate arguments which each counsel presented to me.

28 The defendants advance four grounds to oppose the application:

(a) First, the court cannot make an order such as that sought by the plaintiff unless there has been a contravention of the Act. None of the defendants have contravened the Act.

---

13 Certified Transcript (17 Aug 2016) at p 22 (lines 20–24).

(b) Second, the plaintiff has wrongly named the Longsheng Directors as defendants to this application.[14]

(c) Third, the plaintiff's request is outside the ambit of s 199(3) of the Act because it is too wide and too vague.[15]

(d) Fourth, the plaintiff seeks inspection for an ulterior purpose.

The focus of the defendants' submissions was on the fourth ground. Nevertheless, I shall consider in turn each of the four grounds which the defendants advance.

29 Before I do that, however, it is necessary to address three incidental but fundamental preliminary questions which arose in the course of submissions. These questions warrant closer examination because the answers to them are not settled:

(a) First, what procedure should an aggrieved director follow in asking the court to compel the company to permit him to inspect its records?

(b) Second, what is the standard of proof to be met by a party opposing an aggrieved director's application for relief?

(c) Third, what if a director seeks to inspect a company's records for mixed purposes which are ulterior in part but legitimate in part?

30 I turn now to analyse these three questions. The analysis which follows assumes that the plaintiff is within s 199(3). In other words, I assume without

[14] Second to fourth defendants' written submissions (12 May 2017) at para 44.

[15] Second to fourth defendants' written submissions (12 Aug 2016) at para 61.

deciding for the time being that each of the three elements I have enumerated at [22] above are satisfied such that the plaintiff's statutory right to inspect the company's records has arisen.

The procedure to be followed

31 The plaintiff brings his application under s 199 of the Act. But he did not, when the application was filed, specify which subsection of s 199 he relied on. Does any subsection of s 199 empower a court to grant the plaintiff the relief he seeks by this application?

The plaintiff's application without procedural basis

32 There are only two subsections of s 199 which deal with inspection of a company's records: s 199(3) and s 199(5). But neither provision empowers a court to grant to the plaintiff the relief which he now seeks (see [9] above): an order permitting him to inspect the company's records.

33 That relief does not come within the scope of s 199(3). That provision obliges the company to make its records available for the directors to inspect. But, as I have observed (see [15]–[18] above), it is clear on the face of s 199(3) – especially by comparison to s 199(5) and s 199(6) – that s 199(3) does not empower the court to grant specific civil relief for a breach of the duty under s 199(3). Further, even if one looks beyond s 199(3) to s 199 as a whole, it contains no provision empowering the court to enforce specifically the duty under s 199(3).

34 The relief which the plaintiff seeks also does not come within the scope of s 199(5). While that section does empower the court to make an order requiring the company to allow a public accountant to inspect its records on

behalf of a director, that is not the relief which the plaintiff asks for in his application as originally framed. He asks for an order permitting him to inspect the company's records personally. Further, it cannot be said (as counsel for the company contended at one point)[16] that the purpose of s 199(5) is to provide the only specific relief for a breach of s 199(3). Certainly it is true that if there is a breach of s 199(3), an aggrieved director may as a consequence ask for an order under s 199(5). But it does not follow that the Act intended an order under s 199(5) to be the *only* remedy available to an aggrieved director. There is no reason why the Act would require a director who has not been permitted to inspect the company's records personally, as his only recourse, to appoint a public accountant and then apply for an order for that accountant to inspect the company's records on his behalf.

35 The only provisions which could conceivably provide specific relief for an aggrieved director are the general enforcement provisions in the Act. These are found in ss 399 and 409A.

The plaintiff amends his application

36 When I put this point to plaintiff's counsel, he conceded that his application was without procedural basis insofar as it relied on s 199 alone.[17] He therefore applied orally to amend his application so as to bring it under ss 399 and 409A in addition to s 199.[18]

37 Although this procedural point was not one which counsel for the Longsheng Directors took, he opposed the plaintiff's application to amend.[19]

16 Certified Transcript (17 Aug 2016) at p 5 (lines 1–4 and 23–24).

17 Certified Transcript (17 Aug 2016) at pp 2 and 8 (lines 26–33).

18 Certified Transcript (17 Aug 2016) at pp 2 (lines 22-25) and 8 (lines 5–6).

19 Certified Transcript (17 Aug 2016) at p 6 (line 29).

After hearing submissions, I allowed the application.[20] The procedural point appeared to me to be entirely technical. Allowing the amendment did not change the factual or legal basis of the plaintiff's application. In particular, the amendment did not require any fresh evidence to be obtained and adduced or any fresh legal arguments to be formulated and presented. It is for that reason that the defendants were able to confirm that they would not require the hearing to be adjourned even if the plaintiff's application to amend were to be allowed.[21]

38 It appeared to me therefore that allowing the plaintiff's application to amend his application and proceeding to hear it, without adjournment, on the footing that it had been brought under s 399 or s 409A in addition to s 199 would not cause any prejudice to the defendants for which they could not be compensated by an award of costs.

39 As a result of the amendment, the plaintiff's application proceeded before me as an application under either or both of s 399 and s 409A of the Act arising from a breach of s 199(3). It was common ground that, for present purposes and on the facts of this case, it is not necessary to distinguish between the scope or effect of these two general enforcement provisions. Either or both of those provisions suffice to give the plaintiff a procedural basis for the relief he seeks.

40 I now turn to consider these two provisions more closely.

---

20 Certified Transcript (17 Aug 2016) at p 11 (lines 10–21).

21 Certified Transcript (17 Aug 2016) at p 7 (lines 11–32).

Section 399 and s 409A

41 Section 399 of the Act expressly empowers the court to compel an immediate inspection of any document when a person, in contravention of the Act, refuses or fails to permit the inspection of that document:

> **Court may compel compliance**
>
> **399.**—(1) If any person in contravention of this Act refuses or fails to permit the inspection of any register, minute book or document or to supply a copy of any register, minute book or document the Court may by order compel an immediate inspection of the register, minute book or document or order the copy to be supplied.

42 Section 409A of the Act expressly empowers any person affected by a contravention of the Act to apply to the court for what is, in effect, either a prohibitory injunction to restrain non-compliance with the Act or a mandatory injunction to compel compliance with the Act:

> **Injunctions**
>
> **409A**.—(1) Where a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of this Act, the Court may, on the application of —
>
> …
>
> (*b*) any person whose interests have been, are or would be affected by the conduct,
>
> grant an injunction restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.
>
> (2) Where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that he is required by this Act to do, the Court may, on the application of —
>
> …
>
> (*b*) any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing,

> grant an injunction requiring the first-mentioned person to do that act or thing.

43 A refusal or failure to permit a director to inspect the company's records under s 199(3) falls within the scope of s 399(1), s 409A(1) and s 409A(2). The first two of these provisions are expressly premised on a contravention of the Act. The third of these provisions, s 409A(2), is premised on a refusal or failure to do what the Act requires to be done. That type of a refusal or failure necessarily amounts to a contravention of the Act. Section 409A(2) is therefore also premised on a contravention of the Act, albeit implicitly. Section 199(3) in terms imposes a duty on a company to permit a director who comes within s 199(3) to inspect the company's records. A failure to comply with that duty is a contravention of the Act for the purposes of both s 399 and s 409A.

44 An academic writer has suggested that it is 409A(1) which provides a means of enforcing a director's statutory right of inspection (Terence Tan, "A Director's Statutory Rights of Inspection of Accounts" (1994) 6 SAcLJ 118 ("Tan, *Director's Statutory Rights*") at 126–127). But it appears to me more natural to say that an aggrieved director is seeking to compel the company to open the company's records for his inspection rather than seeking to restrain the company from failing to keep the records open for his inspection. A mandatory injunction under s 409A(2)(*b*) is therefore likely to be the most appropriate relief in most cases of this type, rather than a prohibitory injunction under s 409A(1)(*b*).

Relief under s 399 and s 409A is discretionary

45 There is one interesting consequence of this analysis. Both s 399 and s 409A use the permissive "may" in empowering the court to grant relief

under each section. No doubt that is by analogy with the equitable remedy of an injunction for which those provisions are the statutory analogue, as suggested by the heading to s 409A. The relief under each section is therefore expressly discretionary in nature.

46 If my analysis is correct, therefore, it means that the court has a residual discretion to decline relief to an aggrieved director even if he is squarely within s 199(3), *ie*, if all three elements set out at [22] above are resolved in his favour. No doubt that residual discretion will be exercised very rarely, given the absolute nature of the director's statutory right to inspect the company's records. But that discretion nevertheless exists, albeit at the point at which the court considers the remedy rather than the right.

47 *Conway* is perhaps an example of an exceptional case where that discretion could be exercised. The English Companies Act has no equivalent of s 399 or s 409A. As a result, in English law, an aggrieved director enforces his right to inspect the company's records by commencing an ordinary civil action which seeks a final, mandatory injunction to compel inspection. The director need not wait for his case to be tried, however, in order to secure inspection. In an appropriate case, and on the usual procedural principles, he can either seek an interlocutory injunction in aid of his final relief or seek summary judgment for his final relief on the basis that there is no triable issue as to his right to inspect. *Conway* was a case in which the aggrieved directors commenced action and applied for an interlocutory mandatory injunction requiring the company to allow them to inspect the company's books of account before trial. Slade J was not prepared to find as a fact that the directors sought inspection for an improper purpose given that the matter before him was interlocutory (at 84A–D). He nevertheless dismissed the application because a meeting of the shareholders was imminent at which those directors

were likely to be removed from office (at 84F–G). That factual scenario is, perhaps, one example where, under our procedure, a residual discretion may sensibly be exercised against a director who is nevertheless within the four corners of s 199(3).

48 However, nothing turns on this point in the case before me. I have made a finding of fact on an application for final relief that the plaintiff is seeking inspection for an ulterior purpose. The result is that he has no right to inspect the company's records. But there are statements in the authorities which might, on one reading, suggest that there is no residual discretion to refuse inspection even if a director brings himself within s 199(3) and it cannot be shown by those opposing inspection that he is seeking to inspect the records for an ulterior purpose (see *Conway* at 90C, *Wuu* at [32]; *Hau Tau Khang* at [15(f)]). If that is the correct reading of those statements, that suggestion may have to be considered more closely when the point arises for decision.

The standard of proof

49 The second preliminary issue is the standard of proof to be met by a party alleging that a director is seeking to exercise his right to inspect for an ulterior purpose. While the parties accept that the authorities are clear that the burden on that issue rests on those who oppose inspection, they also accept that the authorities are "vague" on the standard of proof which that person must meet.[22]

50 I begin by examining the authorities that have touched on this issue. In *Edman v Ross* (1922) 22 SR (NSW) 351, Street CJ held that unless there is

---

22 Certified Transcript (17 Aug 2016) at p 25 (lines 4–6).

"*clear proof* to the contrary" [emphasis added], the court will assume that a director is exercising his right of inspection for the company's benefit (at 361). In *Wuu*, the Court of Appeal accepted that the standard is "clear proof" sufficient "to satisfy the court 'affirmatively'" that the director is exercising his right of inspection for an ulterior purpose (at [34]):

> There is no burden on a director to show any particular reason for his request for inspection – this will ordinarily be assumed: see *Molomby v Whitehead* ([27] *supra*) at 293. It is for those who oppose the director's right to inspect to *show "clear proof"* and to *satisfy the court "affirmatively"* that the grant of the right of inspection would be for the purpose which would be detrimental to the interests of the company.
>
> [emphasis added]

Chong J made the same point in *Hau Tau Khang* at [35], emphasising that the threshold to establish an ulterior purpose is a "high one".

51 I do not read these statements as departing from the well-established rule that the standard of proof on all issues in a civil case is proof on the balance of probabilities. The Court of Appeal restated that rule most recently in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [159]. The references to "clear proof" and the need "to satisfy the court 'affirmatively'" in the authorities on s 199 can best be understood by analogy with cases of fraud. The court has often said that making a finding of fraud in a civil case requires cogent evidence because a finding of fraud has serious consequences. That does not, however, raise the standard of proof for an allegation of fraud beyond the usual civil standard of proof on the balance of probabilities. It is simply a facet of the principle that the more serious the finding which a court makes, the stronger the proof which the court will require to make that finding. That principle does not require a civil court to seek proof going *beyond* the balance of probabilities before

finding fraud. The standard of proof in civil cases remains at all times proof on the balance of probabilities (*Alwie Handoyo* at [161]).

52 That is also the case where a party alleges that a director is exercising his statutory right of inspection for an ulterior purpose. The statutory right arises from his office as a director. It is extended to him in order to enable him to discharge his duties as a director. Proof of an ulterior purpose requires examining subjectively the director's state of mind in seeking inspection. State of mind is not susceptible to direct proof. In all but the most unusual of cases, it can be proven only by inviting the court to draw inferences from circumstantial evidence. It is thus unsurprising that the court should indicate that it will not infer or find too readily from the circumstances that a director is exercising his right for an ulterior purpose. To do so would severely inhibit the director's ability to perform his duties (*Wuu* at [33]).

53 That is all that is meant by the references in the authorities to a requirement of clear proof or affirmative satisfaction. Accordingly, the defendants' burden is to show affirmatively and by clear evidence – but ultimately only on the balance of probabilities – that the plaintiff seeks to inspect the company's records for an ulterior purpose.

Mixed purposes

54 The final preliminary issue is this: what if a director is motivated by mixed purposes, comprising both proper and ulterior purposes, in seeking to exercise his right to inspect the company's records? Should his application succeed or fail?

55 I begin by accepting the analysis of Mahon J in *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 that a director's "right" of inspection under

the New Zealand equivalent of s 199(3) is, at least for present purposes, best analysed as being in the nature of a power to inspect rather than a right to inspect (at 165). A director cannot be said to be have a right to inspect if he seeks to exercise that right for an ulterior purpose. The ulterior purpose extinguishes the right even before it can be purportedly exercised. By contrast, a director can be said to have a power to inspect whether or not he exercises it for its proper purposes. The exercise of a power by a fiduciary for ulterior purposes is controlled by the equitable doctrine of a fraud on the power, not by extinguishing the power. As Mahon J said (at 164–165):

> As a matter of passing comment, it may perhaps be not appropriate to treat a director's right to access to corporate information as being in the strict sense a legal "right". It is quite correct to say, as a matter of simple logic, that if there is an absolute duty enforceable by penal sanction to see that proper accounts are kept, then there must be a corresponding absolute right to see the records which are the basis of those accounts. That may be nothing more than a simple illustration of the Hohfeld theory of jural correlatives. I think it may be more correct, however, to treat what is described as the director's "right" as really a power. Suppose the case of a director who formulated a dishonest scheme to use corporate information for his own personal profit or for the advantage of a competitor and then, with his corrupt intentions unknown, exercised his right to scrutinise the company's confidential records. It seems a fallacy to suggest that his inspection was in pursuance of any "right" because ex hypothesi the "right" was extinguished as from the moment when he began to put in train the fraudulent scheme. It is for that reason that I would prefer myself to describe the director's position as being one involving a "power" to inspect corporate records as and when thought necessary in order to comply with his statutory and fiduciary obligations towards his company. If in the example previously stated, the inspection took place pursuant to a concealed fraudulent scheme, then the director would still be exercising the "power" and his conduct would be analogous to that proscribed in the equity jurisdiction as being a fraud upon a power.

I note in passing that the Court of Appeal in *Wuu* accepted (at [25]) that a director exercising his right to inspect that company's records under s 199(3)

is, for the purposes of the proper purpose principle, in the same position as a director exercising a power vested in him as a fiduciary.

Position in England

56 In England, the position at common law is that a director who exercises a power for a combination of proper and improper purposes does so validly only if his primary or dominant purpose in doing so is a proper purpose (*Howard Smith Ltd v Ampol Petroleum Ltd and Others* [1974] AC 821 at 832F–832G *per* Lord Wilberforce). This was restated most recently by the UK Supreme Court in *Eclairs Group Ltd and another v JKX Oil and Gas plc* [2016] 1 BCLC 1 ("*Eclairs*") at [17]–[19] *per* Lord Sumption and at [51]–[52] *per* Lord Mance. The court will take the purpose which was the weightiest in the director's mind as his primary or dominant purpose. In this context, the weightiest purpose is the purpose about which the director feels most strongly in exercising the power (*Eclairs* at [19]). I shall use the word "weightiest" consistently in this sense.

57 What is notable about *Eclairs* is that Lord Sumption was prepared *obiter* to propose that a director's primary or dominant purpose for exercising a particular power should henceforth be determined, not by looking at what the director's weightiest purpose was, but by applying the "but for" test of causation. On this test, an improper purpose will not be a director's primary or dominant purpose for exercising a power – even if it was his weightiest purpose for doing so – if the director can show that, even if he had had regard only to proper purposes instead of the improper purpose, he would have exercised the power in the same way.

58 Although *Eclairs* was a decision on the general duty of a director exercising a power and not specifically about a director seeking to exercise his power to inspect the company's records under the English equivalent of s 199(3), both counsel before me relied on *Eclairs* as indicating the approach which the court should take where a director acts for mixed purposes under s 199(3).[23] It is therefore necessary to consider that case in a little more detail.

59 In *Eclairs*, a company's directors exercised a particular power under its articles of association by resolving to prevent two minority shareholders from voting at an upcoming general meeting. Each director voted to exercise the power for one or both of two purposes. For convenience, I shall call them purpose A and purpose B. At trial, Mann J found (*Eclairs Group Ltd and another v JKX Oil and Gas plc and others* [2014] 1 BCLC 202 at [235]) that: (a) one director had exercised the power primarily for purpose A; (b) two directors had exercised the power for both purpose A and purpose B giving equal weight to each, *ie*, with neither purpose being the weightiest purpose; and (c) four directors exercised the power primarily for purpose B.

60 The minority shareholders challenged the resolution as being the result of an exercise of the directors' power for an improper purpose. It was common ground at trial that purpose A was a proper purpose for exercising the power. What was in dispute was whether purpose A was the *only* proper purpose for exercising the power. The directors' case was that it was not, and that purpose B was equally a proper purpose. Mann J disagreed. He held that purpose A was the only proper purpose. It followed that purpose B was an improper purpose. The result of Mann J's findings was that the weightiest purpose for a

---

[23] Second to fourth defendants' written submissions (12 May 2017) at para 34; Plaintiff's written submissions (19 May 2017) at paras 19–20.

majority of the board (four out of seven directors) in exercising the power was an improper purpose. Mann J accordingly set aside the resolution.

61 Critically, the directors in *Eclairs* did not advance at trial a causation argument based on the "but for" test. They did not argue in the alternative that, even if purpose B was not a proper purpose, acting for purpose B had had no causative effect on how the directors had exercised the power because they would have exercised the power in precisely the same way even if they had had regard only to purpose A. It was Mann J who raised this as a possible argument for the first time in the course of closing oral submissions. But he rejected the directors' attempt to adopt this argument as part of their case at so late a stage. Because it had not been part of their case in the evidential phase, the directors had given no evidence on this hypothetical scenario and the minority shareholders had had no opportunity to cross-examine the directors on it. However, in case he was wrong in declining to allow the directors to adopt this argument as an alternative, Mann J found on the evidence which was available to him – such as it was – that the directors would have exercised the power in the same way even if they had had regard only to purpose A.

62 Before the Supreme Court, the only live argument arising from Mann J's judgment was his reasoning which I have summarised at [60] above. In particular, the causation argument was not canvassed in argument before the Supreme Court (see *Eclairs* at [49]–[50]) because the directors did not appeal against Mann J's decision refusing to allow them to adopt that argument as part of their case.

63 Lord Sumption delivered the leading judgment in the UK Supreme Court. He agreed (at [41]) with Mann J that: (a) purpose A was the only proper purpose for exercising the power; (b) that purpose B was therefore an

improper purpose; and (c) that the directors' resolution therefore had to be set aside. All of the other Supreme Court justices agreed with Lord Sumption on this part of his judgment. These holdings were all that were necessary to dispose of the appeal in the minority shareholders' favour given the oral arguments presented on appeal.

64 In *obiter dicta*, however, Lord Sumption (with whom Lord Hodge agreed) expressed the view that the causation argument which Mann J had raised and addressed in his judgment was correct in law (*Eclairs* at [21]–[22]). In other words, Lord Sumption was prepared to hold that, where a fiduciary (such as a director) has in mind both a proper and an ulterior purpose in exercising a power, and where the weightiest purpose for doing so is the *improper* purpose, a challenge to the exercise of the power will nevertheless *fail* if the fiduciary can prove that he would have exercised the power in the same way even if he had had regard only to the *proper* purpose. By the same token, where the weightiest purpose for which the fiduciary exercised the power is a *proper* purpose, a challenge to the exercise of the power will nevertheless *succeed* if the party challenging it can prove that the fiduciary would have exercised the power in the same way even if he had had *no* regard to the proper purpose.

65 This amounts to saying that, where a director exercises a power for both a proper and an improper purpose, his primary or dominant purpose ought to be identified by ascertaining the "but for" cause for his exercise of the power rather than by ascertaining the weightiest purpose for his exercise of the power. As Lord Sumption said (at [21]):

> One has to focus on the improper purpose and ask whether the decision would have been made if the directors had not been moved by it. If the answer is that without the improper purpose(s) the decision impugned would never have been

> made, then it would be irrational to allow it to stand simply because the directors had other, proper considerations in mind as well, to which perhaps they attached greater importance. … *Correspondingly, if there were proper reasons for exercising the power and it would still have been exercised for those reasons even in the absence of improper ones, it is difficult to see why justice should require the decision to be set aside.*
>
> [emphasis added]

Put this way, replacing the "weightiest purpose" test with the "but for" test operates bilaterally: both in favour of and against the fiduciary.

66 Lord Sumption accepted that both tests would often lead to the same result in practice. But he opined that the "but for" test was preferable for two reasons, one conceptual and one practical. The conceptual reason was that adopting the "but for" test assimilated the rule applicable to directors exercising a power with the general rule applicable to all other fiduciaries exercising a power. That rule, based on the equitable doctrine of a fraud on the power, is that a fiduciary's exercise of his power is invalid unless *all* of the purposes for which he exercises it are proper purposes. Looked at that way, it is anomalous to uphold the exercise of a director's power on the basis that his primary or dominant purpose was a proper purpose. That means that a challenge to a director's exercise of a power will fail even if one of his less weighty purposes was an improper purpose, whereas a challenge to a fiduciary's exercise of a power in the same context would succeed. By the same token, it is conceptually difficult to justify setting aside a director's decision merely because his weightiest purpose was an improper purpose if that improper purpose had no causative effect on the exercise of the power (*Eclairs* at [21]).

67 Lord Sumption's practical reason for preferring the "but for" test was that that test avoids the forensic difficulty of forcing a director to rank the various purposes for which he exercises a power in order of importance. Not only is it unlikely that a director would actually have done that at the time he exercised the power, any attempt by a director to do so after the fact, in the course of litigation, is likely to be "both artificial and defensive" (*Eclairs* at [20]).

68 Lord Clarke was inclined to agree with this part of Lord Sumption's judgment but preferred not to reach a final conclusion on the issue because it did not arise for decision in that case (*Eclairs* at [46]). Lord Mance too preferred not to express a view on this issue until it arose for decision. But he expressed several doubts about Lord Sumption's alternative analysis (*Eclairs* at [50]–[55]). Lord Neuberger agreed with both Lord Clarke and Lord Mance.

69 As I said, this part of Lord Sumption's judgment in *Eclairs* is *obiter dicta*. In addition, he was in the minority in advocating this approach to identifying a director's primary or dominant purpose as the approach to be applied to future cases. The position at common law in England remains, therefore, that a challenge to the exercise of a power by a director who has exercised the power for both a proper and an ulterior purpose will turn on whether the director's primary or dominant purpose in exercising the power was a proper purpose, *only* in the sense of the proper purpose being the weightiest purpose for which he exercised it (see [56] above).

Position in Australia

70 In *Whitehouse and another v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 ("*Whitehouse*"), the High Court of Australia considered the "but for" test

in the context of a director's exercise of a power. Like *Eclairs*, the issue in *Whitehouse* was also a director's duty to act for proper purposes generally, and not in the context of exercising his right to inspect a company's records under the Australian equivalent of s 199(3).

71 In *Whitehouse*, a director had allotted shares to his two sons. The other shareholders complained that the allotment was for an ulterior purpose, *ie*, to prevent them from exercising control over the company (at 288–289). The High Court of Australia agreed with the other shareholders, finding that the allotment of the shares was to favour one group of shareholders over another and therefore an ulterior exercise of the director's power to allot shares (at 291–292).

72 In coming to their decision for the majority, Mason, Deane and Dawson JJ noted that the case before them was not one in which the director had acted for a combination of proper and ulterior purposes. Nevertheless, they expressed the view *obiter* that where a director exercises a power for multiple purposes, some of which are proper purposes and some of which are ulterior purposes, the exercise of the power will nevertheless be voidable if the ulterior purpose was the "but for" cause of the director exercising the power as he did, even if the weightiest purposes for his doing so were proper purposes (*Whitehouse* at 294):

> As a matter of logic and principle, the preferable view would seem to be that, regardless of whether the impermissible purpose was the dominant one or but one of a number of significantly contributing causes, the allotment will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, "the power would not have been exercised" …

73 The important point about *Whitehouse* is that the majority endorsed the "but for" test as operating only unilaterally, *ie*, either as the only ground for setting aside a director's exercise of a power or as an additional ground for doing so. They did not in terms endorse it operating bilaterally as Lord Sumption did in *Eclairs*, *ie*, as a ground for both upholding and avoiding the director's exercise of the power (see [65] above). Lord Mance made this very point in *Eclairs* (at [53]) when he expressed the need for caution in accepting Lord Sumption's new principle as the principle to be applied going forward in a case in which the issue did not arise for decision.

Conclusion on mixed purposes

74 As I have pointed out, both *Eclairs* and *Whitehouse* are cases on a director's general obligation to exercise his powers for proper purposes. I leave aside for the moment, without expressing any view on it, whether the "but for" test suffices to identify a director's primary or dominant purpose within the sphere Lord Sumption intended his *dicta* to operate and whether it can do so bilaterally. It suffices only to say that Lord Mance pointed to a number of reasons why Lord Sumption's analysis was: (a) difficult to reconcile with the existing case law on the exercise of a corporate power by a director as opposed to the exercise of a discretionary power by a trustee (at [51]–[52]); (b) difficult to reconcile with the existing case law on mixed purposes (at [53]); and (c) created at least as many practical difficulties as it appeared to solve (at [54] –[55]).

75 But even if Lord Sumption is correct in advocating the "but for" test within that sphere, it appears to me that there are three difficulties with trying to apply the "but for" test to a director exercising his power to inspect records under s 199(3) of the Act.

76 First, the power under consideration in *Eclairs* was one which the company's constitution vested in the directors to exercise for and on behalf of the company as its agent. It is to address the principal-agent problem which arises when an agent exercises a power for a principal that equity requires a director to have the power's proper purpose as his primary or dominant purpose for exercising it. Further, the exercise of the directors' power in *Eclairs* actually altered the company's legal rights and obligations. It prevented the aggrieved minority shareholders from exercising their right as against the company and as against the company's other shareholders to vote at the general meeting. That potential to alter a company's rights or obligations is another aspect of the principal-agent problem which is the reason for equity's requirement.

77 The power to inspect the company's records under s 199(3) is not a power which the director exercises for and on behalf of the company as its agent. It is a personal power vested in the director – albeit one given to him to enable him properly to perform his duties as a director – which the director exercises in the first instance for himself alone. Further, a director's power to inspect the company's records under s 199(3) is – as far as the company is concerned – a legally neutral act. A director exercising the power to inspect does not and cannot in itself alter any of the company's rights or obligations, whether as between the company and its shareholders, as between the shareholders *inter se* or as between the company and third parties. Exercising the power merely vindicates the director's statutory right to inspect the company's records. All of this suggests that the test for ascertaining a director's purpose in the usual case of a director exercising a power for and on behalf of the company as its agent to bind the company in its legal relations

with third parties is not a useful guide for ascertaining a director's purpose in exercising the power to inspect records under s 199(3).

78 Second, Lord Sumption's principle makes sense only when it is applied to a power which has actually been exercised. A director's purpose for exercising a power does not become susceptible to sensible forensic examination until that purpose is irrevocably attached to an actual exercise of that power. Until the power is actually exercised, the director's purpose remains entirely amorphous and, most importantly, mutable. Any challenge to a director's *future* exercise of a power on the grounds that the director *intends* to do so for an ulterior purpose is entirely hypothetical. It can easily be defeated simply by the director changing his stated purpose for the future exercise. It is only after a power has actually been exercised that it makes any sense at all to ask what was the director's primary or dominant purpose in exercising the power and to ask Lord Sumption's further question: "Would the director have exercised the power in the same way if he had acted only for a proper purpose?".

79 In practical terms, a director's purpose in seeking to inspect the company's records under s 199(3) will always be analysed before the inspection takes place. If it is found that the director's weightiest purpose for seeking inspection is an ulterior purpose, his application to compel inspection fails. It makes no sense then, given that the director has not actually inspected the documents, to give the director a second bite of the cherry by asking the further question which Lord Sumption's *dicta* in *Eclairs* poses: "Would the director still want to inspect the records if he were acting for a proper purpose?".

80 Third, the incidence of the burden of proof in relation to purpose is different in the two classes of case. In *Eclairs*, as in every case where a director is called upon to justify the exercise of a power for and on behalf of the company, the burden rests on the director to show that he exercised the power for a proper purpose. In the present application, as in every application to inspect a company's records, the burden rests on those opposing the inspection to show that the director seeks to inspect the company's records for an ulterior purpose. The innovation of Lord Sumption's *dicta* in *Eclairs* is to give a director an additional ground on which to *justify* the exercise of a power. But a director on an application under s 199(3) has no burden to justify the exercise of the power to inspect the records at all. Further, even if one views the majority's *dicta* in *Whitehouse* strictly – as recognising the "but for" test of purpose either as the only or an additional ground on which to *invalidate* the exercise of a director's power where the weightiest purpose is a proper purpose – it would mean that a director's right to inspect the company's records would be defeated even if the weightiest purpose for seeking inspection is a proper purpose. That appears to me to be too great an inroad into the director's *prima facie* right to inspect under s 199(3), particularly when the preceding two points I have made are kept in mind.

81 For these reasons, I hold that the test to be applied in determining whether a director's primary or dominant purpose in seeking to inspect the company's records under s 199(3) is an ulterior purpose is to ask whether an ulterior purpose is the weightiest purpose for which he seeks inspection, *ie*, whether the purpose about which he feels most strongly in seeking to inspect the records is an ulterior purpose. I do not consider that there is any scope for the "but for" analysis to apply, either bilaterally in the *Eclairs* sense or

unilaterally in the *Whitehouse* sense, when considering the director's power to seek inspection of a company's records under s 199(3).

82 I now turn to consider the defendants' grounds for resisting this application in the order in which I have set them out at [28] above.

Has there been a contravention of the Act?

83 It is a condition precedent for granting relief under s 399, s 409A(1) and s 409A(2) that there has been a contravention of the Act (see [43] above). The burden of establishing that the condition precedent for relief under this section is satisfied must rest on the director, as the person seeking the relief. However, consistently with the absolute nature of the director's right to inspect the company's records, that burden will be easily discharged where the contravention is a failure to comply with s 199(3).

84 The defendants say that there has been no contravention of the Act on the facts. Those facts are as follows.

85 In June 2015, Kiri Industries commenced a minority oppression suit against Senda and the company seeking relief under s 216 of the Act.[24] That action has been transferred to the Singapore International Commercial Court and is now being tried.

86 In July 2015 (see [8] above), the plaintiff made in writing his request for the documents and information on which this application is founded. He wrote his letter on his personal notepaper and addressed it jointly to the four defendants.[25] In it, the plaintiff expressly stated that he was writing the letter in

[24] Xu Yalin's affidavit (27 Oct 2015) at para 70 and p 602.

[25] Mukherjee Amitava's first affidavit (15 Sep 2015) at p 173.

his capacity as a director of the company and as a member of its audit committee and of its compensation and remuneration committee. His first complaint was that his past requests for further information on the company's finances and business had not been addressed. He then asked the company's management to make available for his review in advance of the next directors' meeting certain "documents and/or information" which he enumerated in a schedule attached to his letter. The plaintiff asserted that he was entitled to the documents and information and that the entire width of his request was necessary for him to understand the transactions and financial position of the company in order for there to be meaningful discussions at the next directors' meeting. He concluded the letter by asking to be allowed to review the documents within 14 days, failing which he would "take all necessary steps to enforce [his] rights, including but not limited to filing an application in the Singapore Courts". I describe the schedule to this letter in more detail at [141]–[143] below.

87 The plaintiff's letter elicited three further letters, all dated 1 August 2015.

(a) The first letter was from Senda to the company. Senda took the position, as against the company, that the plaintiff was seeking to review the enumerated documents and information for an ulterior purpose and that whether the plaintiff should be allowed to do so was a matter for the company's directors to decide as a board in the interests of the company. The implication of that position is that it was not for the company's management to decide unilaterally whether to supply the enumerated documents and information to the plaintiff.[26]

---

[26] Mukherjee Amitava's first affidavit (15 Sep 2015) at p 180.

(b) The second letter was from the company to the plaintiff[27] signed by its chief executive officer setting out management's response. They informed the plaintiff – adopting the position which Senda had taken as against the company – that: (i) whether to accede to the plaintiff's request to review the documents and information was a matter for the company's directors to decide as a board; and (ii) the request had accordingly been referred to the directors.

(c) The third letter was a joint letter from the three Longsheng Directors to the plaintiff. They took the position that: (i) the plaintiff's complaint in his letter that information was being withheld from him was part of the subject-matter of the minority oppression suit which Kiri Industries had commenced against Senda in June 2015; (ii) Senda's concern that Kiri Industries, Mr Manishkumar and entities related to both of them were wrongfully competing against the company was also part of subject-matter of the minority oppression suit; and (iii) the Longsheng Directors were accordingly concerned that the documents and information which the plaintiff now sought to review might not be used to further the interests of the company but instead for the purposes of the minority oppression suit or to compete with the company.

88 The Longsheng Directors' letter concluded by making the plaintiff's request for documents subject to the plaintiff first addressing the Longsheng Directors' concerns about wrongful competition:[28]

> 6. Nevertheless, we are prepared to consider and discuss the request [for documents]. But ahead of that, we ask that

---

27 Mukherjee Amitava's first affidavit (15 Sep 2015) at p 179.

28 Xu Yalin's affidavit (25 Oct 2015) at p 386.

> you respond to the allegations raised and provide information as to any businesses or activities that may conflict with [the company] including any competing activities by Related Business of Kiri and Manish. In this regard, we ask that you let us know of your involvement and interests (if any) in such activities.
>
> 7. We look forward to hearing from you.
>
> 8. Thank you.

89 The plaintiff responded to the company and to the Longsheng Directors by two separate letters, both dated 7 August 2015. He made four points in the two letters:[29] (a) he was statutorily entitled to the "information" enumerated in his July 2015 letter; (b) the fact that the "information" which he sought was the subject of legal proceedings did not defeat his statutory entitlement to it; (c) he denied that either Kiri Industries or Mr Manishkumar were competing with the DyStar group; and (d) he rejected the Longsheng Directors' attempt to make his right to the "information" conditional on his addressing the Longsheng Directors' allegation that Kiri Industries was wrongfully competing with the DyStar group.

90 On these facts, the defendants submit that they have not refused the plaintiff access to the information in question. Instead, what they did was to invite the plaintiff to discuss his request with them after he had addressed their allegations about wrongful competition. The plaintiff failed to respond to that invitation. Therefore the Act has not been contravened[30] and the plaintiff's application ought to be dismissed.

---

29 Mukherjee Amitava's first affidavit (15 Sep 2015) pp 182–183.

30 Second to fourth defendants' written submissions (12 May 2017) at paras 37–43.

91 I do not accept this submission. In the analysis which follows, I assume that the plaintiff sought to review the documents set out in the schedule to his July 2015 letter for a proper purpose.

92 The first point I make is that at least part of what the plaintiff sought to inspect by his July 2015 letter falls within the scope of the term "accounting and other records" of the company within the meaning of s 199(1). Despite that, he has not yet been permitted to inspect *any* of the company's records. That appears to me – at the very minimum – to amount to a "failure" to comply with the Act within the meaning of s 399(1) and s 409A(2)(*b*). A "failure" for the purposes of these provisions can be entirely passive and can be established by an omission to act in the face of a duty to act. That failure suffices, in itself, to enliven my power under both s 399(1) and s 409A(2)(*b*).

93 Second, even if I were to focus on the words "contravention" and "refusal", within the meaning of s 399(1), s 409A(1)(*b*) and s 409A(2)(*b*) of the Act, I consider that there has been a contravention of s 199(3) of the Act or a refusal to comply with it even though the Longsheng Directors' August 2015 letter does not, on its face, refuse inspection. On the assumptions I have made, the plaintiff, acting for a proper purpose, asked by his July 2015 letter to be allowed to review certain documents, some of which at least are the company's "accounting and other records" within the meaning of s 199(1). He has not been permitted to inspect those records to date. The root cause of that is the condition precedent which the Longsheng Directors attached unilaterally in the concluding paragraph of their August 2015 letter to the plaintiff's absolute right to inspect, requiring the plaintiff to address their allegation that Kiri Industries was engaging in wrongful competition with the DyStar Group. There is no legal basis for a company or its directors to attach a condition precedent to a director's exercise of a right to inspect the company's records

under s 199(3) (see *Wuu* at [36]). That right is an absolute right, in the sense I have already described (see [20(a)] above). The Longsheng Directors' response to the plaintiff's letter amounted to a constructive refusal even if it did not amount to an express refusal.

94 Further, it seems to me that all of the parties – and, for present purposes, the Longsheng Directors in particular – were disingenuously taking tactical positions in and from January 2015 in order to bolster their respective cases in a simmering shareholders' dispute. I describe these events in more detail below. That dispute eventually boiled over into litigation in June 2015.

95 For present purposes, it suffices to say that I am satisfied that the Longsheng Directors, when they wrote their August 2015 letter, had no intention of acceding to any part of the plaintiff's request in his July 2015 letter. The Longsheng Directors, through their majority on the company's board, have the power to direct the company's management. I have no doubt that the Longsheng Directors would never have allowed the plaintiff to inspect anything even if: (a) the plaintiff had provided the explanation sought in paragraph 6 of the August 2015 letter; (b) responded to the Longsheng Directors' invitation to discuss his request further; and (c) limited his request only to those documents which indisputably fell within the scope of "accounting and other records".

96 If the position were otherwise, the Longsheng Directors would not have defended this application root and branch as doggedly as they did. The invitation in paragraph 6 of the Longsheng Directors' August 2015 letter was a disingenuous attempt to dress up, for future tactical forensic advantage, a door which the Longsheng Directors intended to hold firmly closed as one which they were holding ajar.

97 I find, therefore, that there has been a contravention of the Act sufficient to enliven my power under s 409A(1)(*b*) and also a refusal – or, at the absolute minimum, a failure to comply with the Act – sufficient to enliven my power under both s 399(1) and s 409A(2)(*b*).

Have the Longsheng Directors been correctly joined?

98 The defendants' second ground of opposition to the plaintiff's application is that the Longsheng Directors have been incorrectly joined to this application.

99 The plaintiff cites *Lim Kok Leong v Seen Joo Co Pte Ltd and others* [2015] 1 SLR 688 ("*Lim Kok Leong*") to argue that the Longsheng Directors have been properly joined as defendants in this application. In *Lim Kok Leong*, Tan Siong Thye J held (at [56]–[63]) that the statutory obligation to permit inspection under s 199(3) is – unlike the common law obligation – an obligation not only of the company but also of its directors and managers. He therefore upheld the plaintiff's decision in that case to bring his application against not only the company but also against its executive directors.

100 The defendants, on the other hand, argue that the statutory basis for Tan J's decision in *Lim Kok Leong* has changed because a material aspect of s 199(1) on which Tan J relied for his decision has since been deleted by amendment. Tan J held (at [61]–[62]) that the class of persons who were obliged to permit a director to inspect the company's records under s 199(3) must be determined by reference to the class of persons who were obliged to keep those same records under s 199(1). Section 199(1), as it stood when *Lim Kok Leong* was decided, imposed the duty to keep those records expressly on *both* the company *and* on its "directors and managers". That was why Tan J

held that the Act imposed a duty not only on the company but also on the directors and managers to permit inspection of those records under s 199(3). Given the wording of s 199(1) then, it was entirely appropriate to hold the directors responsible for contravening s 199(3) and therefore also to join them to an aggrieved director's application for civil relief.

101 But, the defendants go on to point out, s 199(1) was amended with effect from 1 July 2015 by deleting the phrase "and the directors and managers thereof" from s 199(1). The result is that the duty to keep a company's records under s 199(1) now rests on the company alone. As a result, the Longsheng Directors ceased with effect from 1 July 2015 – a date before both the plaintiff's July 2015 letter and this application – to be under any obligation to keep the company's records under s 199(1). They therefore cannot be held to be in breach of s 199(3) for failing to permit the plaintiff to inspect those records. The Longsheng Directors should therefore never have been joined to this application.[31]

102 There is considerable force in the defendants' arguments. As a matter of the plain meaning of language, the current wording of s 199(1) imposes the obligation to keep a company's records on the company itself and on no other person. That plain meaning is reinforced by the fact that the current wording of s 199(1) is the result of deleting the phrase "and the directors and managers thereof" from s 199(1). The deletion is evidence of a clear intent to remove a company's directors and managers from the class of persons subject to the duty to keep the company's records under s 199(1) in its original form.

103 The legislative history of this deletion from s 199(1) further reinforces the plain meaning of the current s 199(1) as its true construction, being the

[31] Second to fourth defendants' written submissions (12 May 2017) at paras 47–48.

intended result of the deletion. The deletion was effected by s 114(a) of the Companies (Amendment) Act (No 40/2014) ("the amendment Act") enacted on 8 October 2014. The amendment Act was the culmination of a seven-year process of law reform which began in April 2007 with the formation of a distinguished steering committee chaired by Professor Walter Woon to review and rewrite the Act.

104 The steering committee's Recommendation 4.31 was that s 199(1) of the Act should not be amended (*Report of the Steering Committee for Review of the Companies Act* (April 2011) at p 29). It took the view that s 199(1) cast the duty to keep accounting records "expressly upon the directors and managers of the company" and that "this duty of directors is still relevant today" (at paras 101–102 on p 4–22.) The steering committee concluded that no reform of s 199(1) was required either to change the class of persons subject to the duty to keep the company's records (at para 102 on p 4–22) or to provide more detail on what accounting records should be kept in order to comply with the duty (at para 103 on p 4–22).

105 The Ministry of Finance ("MOF") accepted the steering committee's recommendation on s 199(1) (*Ministry of Finance's Responses to the Report of the Steering Committee for Review of the Companies Act* (3 October 2012) at paras 237–238). However, MOF's response did not address the steering committee's conclusion that no reform was required of the class of persons subject to the duty under s 199(1). Instead, MOF's response simply accepted the steering committee's conclusion that no reform of s 199 was required to provide a comprehensive list of the type of accounting records that were to be kept.

106 Up to this point, there appears to have been no positive intention on the part of the government stakeholders driving this suite of reforms to the Act to change the class of persons subject to the duty to keep the company's records under s 199(1): the duty was to remain upon the company "and the directors and managers thereof" as recommended by the steering committee.

107 That changed in May 2013. That was when the MOF and the Accounting and Corporate Regulatory Authority ("ACRA") jointly published for public consultation their proposals for amending the Act in order to implement the steering committee's recommendations. One of the annexes to their joint proposals was a draft amendment bill. That draft proposed, in cl 134(a), to amend s 199 by "deleting the word 'managers' in subsection (1) and substituting the words 'the chief executive officer'". This proposed amendment did, contrary to earlier indications, suggest changing the class of persons subject to the duty under s 199(1). It proposed to make a company's chief executive officer the only person subject to that duty in addition to the directors, thereby relieving all other managers from the duty. Another annex to the joint proposals was a table entitled "Implementation of Steering Committee's Recommendations in the Draft Companies (Amendment) Bill 2013". Curiously, point 154 of that table (at p 66) stated again that s 199(1) of the Act was not to be amended, despite cl 134(a). But this statement must be read in the context of the MOF's response in October 2012 (see [105] above) which accepted expressly only the steering committee's conclusion that no reform to s 199(1) was required to specify comprehensively the types of accounting records which were within the scope of the duty it created. That remained the position under this iteration of the draft amendment bill.

108 The next iteration of the draft amendment bill contained a provision which deleted without replacement the phrase "and the directors and managers

thereof" in s 199(1). The stated reason for this change was to align the wording of s 199(1) with that of s 199(2A). The latter provision was an entirely new subsection proposed to impose an obligation on a public company and its subsidiaries to devise and maintain a system of internal controls. Crucially, the new duty under the proposed s 199(2A) was to be imposed only on the corporate entities and not on their "directors and managers".

109 The next step in the law reform process was the reading in Parliament of the proposed amendment bill in its final form. Clause 114(a) of the Companies (Amendment) Bill (Bill 25 of 2014) ("the amendment Bill") was enacted without amendment and is therefore identical to s 114(a) of the Companies (Amendment) Act 2014 (No 36 of 2014) ("the amendment Act"). The Parliamentary debates do not, unfortunately, shed light on Parliament's intention in enacting cl 114(a). The only available source from which to ascertain Parliament's intention is the explanatory statement which accompanied the amendment Bill into Parliament. The explanatory statement makes clear (at p 311 of the amendment Bill) that the intention behind the decision to put cl 114(a) before Parliament was to impose the obligation to keep a company's records upon only the company itself:

> Clause 114 amends section 199 –
>
> (*a*) to provide in subsection (1) that the obligation to keep accounting and other records to explain the transactions and financial position of the company is *imposed on the company* ***only***, for consistency with subsection (2A); …
>
> [emphasis in italics and bold added]

110 This explanatory statement suffices to make patent that Parliament's intent in enacting s 114(a) was to achieve the effect to which the plain meaning of the amended s 199(1) gives rise. And, given that cl 114(a) of the

amendment Bill was enacted as s 114(a) of the amendment Act without amendment and with no further statement of Parliament's intent in doing so, this passage in the explanatory statement remains the definitive and final statement from which Parliament's intention can be gathered.

111 The strongest counterargument which militates against giving s 199(1) its plain meaning rests on the implications which a plain reading of s 199(1) has on the criminal offence under s 199(6) for default in complying with s 199. The counterargument is that interpreting s 199(1) as imposing no duty on the officers of a company to keep the company's records under s 199(1) renders s 199(6) a dead letter as far as the criminal liability of those officers under s 199(6) is concerned. The introductory words of s 199(6) predicate criminal liability under that provision on a default in compliance with s 199. If the company's officers no longer have any duty under s 199, they can never be in default of s 199 and can never commit the offence under s 199(6). But a reading of a statute which renders a provision otiose and meaningless ought to be avoided (*Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [69]) because Parliament "does not legislate in vain" (at [38]) and the courts must accordingly presume that Parliament did not intend "an unworkable or impracticable result" (also at [38]).

112 It is also the case that Parliament, in enacting the amendment Act, took the express view that a natural person responsible for keeping the company's records would, despite the amendment to s 199(1), remain liable for the criminal offence under s 199(6). This is clear from MOF's and ACRA's explanation which accompanied the proposal to align the wording of s 199(1) with that of s 199(2A) by deleting the phrase "and the directors and managers thereof" from s 199(1) (*Table of Proposed Changes in Part 2 of the Draft Companies (Amendment) Bill* (October 2013) at pp 17–18, s/no 32):

> For consistency with the wordings [*sic*] in section 199(2A). The penalty provision under *section 199(6) will adequately cover persons who should be responsible for maintaining proper accounting records*.
>
> [emphasis added]

113 Further, while s 114(a) of the amendment Act relieved directors and managers of their previous duty under s 199(1), s 114(d) of the same amendment Act increased the maximum fine for the offence under s 199(6) from $2,000 to $5,000 and increased the maximum term of imprisonment from three months to 12 months. This indicates that Parliament in passing the amendment Act viewed a failure to keep a company's records as being a more serious breach of duty than it did previously. More importantly, however, only a natural person can be imprisoned. A company cannot be imprisoned and can only be fined. So it appears that in enacting s 114(d) of the amendment Act and enhancing the maximum term of imprisonment in s 199(6), Parliament expressly considered that natural persons, *ie*, a company's officers, would continue to be liable for the offence under s 199(6). Parliament took that position even though, at the same time in the same section of the same amendment Act, it amended s 199(1) to relieve a company's directors and managers of the duty to keep the company's records.

114 To my mind, this counterargument does not lead to the conclusion that s 199(1) should be given a meaning other than its plain meaning. Parliament's statement of intent in passing s 114(a) of the amendment Act (see [109] above) makes clear that Parliament intended the amended s 199(1)'s plain meaning to be its actual meaning. The result is that s 199(1) is not susceptible to the purposive and contextual approach to statutory interpretation which the majority in *Attorney-General v Ting Choon Meng and another appeal* [2017] 1 SLR 373 favoured (at [18]) over a plain reading of a statutory provision.

Giving s 199(1) any other meaning would amount to countermanding the intent of Parliament rather than give effect to it.

115 The answer to this counterargument, therefore, is to be found in applying the purposive and contextual approach to s 199(6) and not to s 199(1). A purposive approach to s 199(6) would allow it to be read as imposing criminal liability on an officer of a company which defaults in its obligation under s 199 simply by virtue of his status as an officer of the company and without regard for his personal culpability for the company's default and despite there being no longer any personal obligation on him to keep the company's records under s 199(1). On this purposive reading, the words "who is in default" in the phrase "every officer of the company who is in default" are to be read as modifying only the word "company" and not the word "officer".

116 That this is how s 199(6) is to be construed is clear from the statutory scheme of the Act. Parliament has consistently relied on the words "every officer of the company who is in default", on some occasions with minor and immaterial adaptations, to impose criminal liability on company officers under the Act. There are 70 such provisions in the Act. Some of these provisions hold officers criminally liable for a failure to comply with a duty which is not stated expressly to fall on any particular person or class of persons (*eg*, ss 32(8), s 123(4), 132(1), 143(2), 146(4), 175(4)(a), 181(2), 186(4), 203(3A), 210(9), 211(5), 245(4), 363(4) and 396(3)). Some hold officers liable for a failure to comply with a duty which is imposed on the company alone, but for which the company cannot be held criminally liable (*eg*, s 76(5)). Some hold officers criminally liable for a failure to comply with a duty which falls on the directors alone (*eg*, ss 210(9) and 211(5)). Some hold directors criminally liable for a duty which falls on the directors alone (*eg*, ss 205(17)

and 205AF(5)). Some make clear that every officer of the company is criminally liable even though it is only the company who is under the duty in question and who is therefore in default of the Act (*eg*, ss 173H, 203A(7), 386, 386AF(12), 386AF(13), 386AG(5), 386AH(5), 386AI(5), 386AL(7) and 386AN(4)). Some hold only directors criminally liable for a failure to comply with a duty which falls on the company, excluding those who are officers of the company without being directors (*eg*, ss 205(17), 205AC(4), 205AD(5), 205A(3) and 206(2)).

117 But by far the bulk of these provisions – over 40 – hold officers criminally liable for a failure to comply with a duty which falls on the company alone (*eg*, ss 22(1AB), 26(2A), 32(6), 40(4), 59(2), 63A(3), 63B(6), 73B(4), 74(5), 75(2), 78B(5) 78C(5), 78F(5), 88(5), 93(7), 93(9), 129(4), 130AB(3), 130AE(3), 133(2), 138(4), 142(2), 164(17), 174(10), 183(7), 186(3), 188(4), 189(3), 190(7), 191(3), 192(4), 196(9), 197(6), 201AA(2), 203(3A), 205(17), 205AC(4), 212(3), 290(3), 296(10), 378(7), 396(3) and 396A(4)). Section 199(6) is one of those provisions. The clear legislative intent of this form of words is that the natural persons identified should be held criminally liable regardless of personal fault and even in the absence of a personal statutory duty to do that which the section requires.

118 In any event, dealing with the respondent's second ground of opposition to the plaintiff's application requires me to conclude only that s 199(1) no longer places an obligation on directors and managers to keep the company's records. That is indeed my conclusion. I need not arrive at any conclusion as to whether directors and managers, as officers of the company, continue to face criminal liability under s 199(6) for the company's default in complying with s 199(1). To that extent, my observations above on s 199(6) are only tentative, being unnecessary for this decision.

119 For the foregoing reasons, it appears to me that there is no longer any substantive basis in s 199 to justify joining the directors as parties to an application under s 399(1) or s 409A to enforce the duty to permit inspection under s 199(3). Given that there is now no personal duty on directors and managers to keep a company's records under s 199(1), it would be anomalous to interpret s 199(3) as continuing to impose a personal duty on the directors and managers to permit inspection of those records.

120 It appears to me also that there is no procedural basis to justify joining the directors as parties to an application under s 399(1) or s 409A to enforce the duty to permit inspection under s 199(3). Any relief which the court, in its discretion, grants under either section will be in the form of an order requiring the company to permit inspection of its records. That order will be enforceable as though it were a mandatory injunction granted by the court in its general civil jurisdiction. The usual way in which a mandatory injunction against a body corporate is enforced is by proceedings for contempt against the body corporate under O 45 r 5(1)(i) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) or against its directors or other officers under O 45 r 5(1)(ii). Of course, it will be necessary to show that the directors or other officers named in the contempt proceedings have a degree of personal responsibility for the company's breach of the order (see *Director General of Fair Trading v Buckland and Another* [1990] 1 WLR 920 and *Attorney-General of Tuvalu and Another v Philatelic Distribution Corp Ltd and Others* [1990] 1 WLR 926). But that is as it should be.

121 If directors are no longer under a personal duty to keep the company's records, are no longer under a personal duty to permit a director to inspect the company's records and can be punished for their personal fault in causing a breach of the court's order as a contempt of court, there is not even a

procedural reason to construe s 199 as permitting an aggrieved director to join any of the company's directors to his application under s 399 or s 409A. Of course, a director who wishes to be heard before any order is made may nevertheless apply to intervene and be heard under O 15 of the Rules of Court on the usual procedural principles. But an aggrieved director who names his fellow directors as co-defendants together with the company to an application such as this will be at risk for those directors' costs even if he succeeds in his application.

122 Having said that, I should point out that my conclusion on the true construction of s 199(1) is not necessary for me to dispose of the plaintiff's application. I say that for two reasons. The first reason is that whether or not the Longsheng Directors have been properly joined to this application cannot be fatal to the application as a whole. The joinder issue affects only two aspects of this application, one substantive and one procedural. Neither aspect is a basis on which to dismiss the application in its entirety. The substantive aspect is which of the defendants is or are to be the subject of any order which I might make. It is only those defendants who will be bound by the decision and its findings, and who will be liable in their own personal capacity for a breach of that order. The procedural aspect which arises from joinder is the issue of costs. That issue arises only if I agree with the plaintiff and make the order which he seeks, but make that order against only some of the defendants. In that event, even though the overall event in this application would be in the plaintiff's favour, the event in relation to specific defendants would not. Those defendants who are not subject to the order would have a legitimate basis on which to seek the costs of the application against the plaintiff. Neither the procedural nor the substantive aspect is a ground for dismissing the application outright.

123 The second reason I do not have to decide this point in order to dispose of the plaintiff's application, of course, is that I have dismissed the plaintiff's application entirely on the defendants' fourth ground of opposition. That outcome makes it unnecessary for me to distinguish between the four defendants either procedurally or substantively.

Is the request is too wide?

124 On the third ground, the defendants argue that the plaintiff's request is too wide, too vague, and outside the ambit of s 199(3) of the Act.[32] I do not consider that that ground can, in and of itself, ordinarily justify dismissing outright an application to compel a company to permit inspection of its records under s 199(3). That consequence could follow if the request is drawn so widely that: (a) the categories cannot be reformed either by the applicant or the court without changing fundamentally and entirely the nature and the basis of the application; or (b) it is possible to draw an inference that the plaintiff seeks to exercise his right of inspection for an ulterior purpose from the excesses of the request. In all other cases, it appears to me, this ground of objection is better addressed by reforming the request to remove its excesses, with the necessary costs consequences, rather than by dismissing the application outright and requiring the plaintiff to incur the time and costs of applying again with a reformed request.

125 The defendants do not suggest that the categories in the plaintiff's request cannot be reformed. And point (b) uses the width of the categories not as an independent ground for dismissing the plaintiff's application but as evidence to support the defendants' fourth ground: that the court ought to dismiss the plaintiff's application because he brings it for an ulterior purpose.

---

32 Second to fourth defendants' written submissions (12 Aug 2016) at para 61.

126 It is therefore the defendants' fourth ground which is fundamental to the outcome of this application. It is to that ground that I now turn.

Does the plaintiff have an ulterior purpose?

127 The defendants submit that the plaintiff seeks to exercise his *prima facie* right to inspect the company's records: (a) to advance Kiri Industries' interests in the ongoing minority oppression suit against Senda;[33] and (b) to assist Kiri Industries in competing with the company and the rest of the DyStar group in breach of its express non-competition obligations under the shareholders' agreement.[34]

128 I accept the defendants' first point. There is compelling circumstantial evidence that the plaintiff's weightiest purpose in seeking to exercise his right to inspect the company's records is to embark on a fishing expedition to gather information to be deployed to advance Kiri Industries' interests in the ongoing minority oppression suit. That information is not necessarily confined to the company's accounting or other records or even to documents already in existence. The plaintiff's purpose is an ulterior purpose because it is unrelated to his duties as a director of the company and is instead directed to advancing Kiri Industries' specific interests in that minority oppression litigation. Further, because the ulterior purpose is the plaintiff's weightiest purpose, it is also his primary or dominant purpose.

129 I do not, however, accept the defendant's second point. I cannot go so far as to find that the plaintiff's ulterior purpose includes assisting Kiri Industries to compete with the DyStar group in breach of the non-competition

33 Second to fourth defendants' written submissions (12 May 2017) at paras 49–51.

34 First defendant's written submissions (12 Aug 2016) at paras 8–12; Second to fourth defendants' written submissions (12 Aug 2016) at paras 57–60.

obligation in the shareholders' agreement. There is insufficient evidence before me to satisfy me affirmatively on that point.

130 Three sets of circumstances lead me to conclude that the plaintiff's primary or dominant purpose is to assist Kiri Industries in its ongoing minority oppression suit against Senda and the company. First, this application has been closely synchronised with the minority oppression suit. Second, the categories of documents and information which the plaintiff originally sought to inspect are so wide and so unrelated to the scope of s 199(3) as to invite an inference of an ulterior motive. Third, the categories of documents and information which the plaintiff now seeks to inspect by his new schedule closely tracks both a failed discovery application by Kiri Industries in the minority oppression suit and the issues in that minority oppression suit.

131 In order to explain why I have found that the plaintiff's primary or dominant purpose in seeking to exercise his right under s 199(3) is an ulterior purpose, it is necessary at this point to sketch the factual background in more detail than I have above. I will then turn to analyse the three sets of circumstances in turn.

Factual background in more detail

Events preceding the minority oppression suit

132 In 2009, Kiri Industries incorporated the company as a wholly-owned subsidiary to be a vehicle to acquire certain assets from an insolvent German company in the textile dyeing industry. Kiri Industries approached the Longsheng Group to participate in the acquisition. The Longsheng Group agreed. As a result, Well Prospering acquired one share in the company together with a convertible bond. The company completed the acquisition with

the proceeds of the bond. Even at that time, when Well Prospering was only a minority shareholder in the company, the shareholders' agreement provided that it was entitled (as I have pointed out at [7] above) to majority representation on the company's board.

133 In 2013, Senda acquired the convertible bond from Well Prospering and exercised the option to convert the debt which it represented into equity in the company. As a result, Kiri Industries' majority interest in the company was diluted into a minority stake, and Senda became the company's new majority shareholder.

134 It is common ground that the company's fortunes turned around between 2010 and 2015. The Longsheng Directors claim that they are responsible for effecting the turnaround by restructuring the company's business. I need not determine whether that is true. Be that as it may, it is the case that from 2010 to 2015, neither Kiri Industries nor its appointed directors voiced any unhappiness about how the Longsheng Directors were managing the company or how Senda was exercising its rights as a majority shareholder.[35]

135 All of that changed when, at the end of 2014 financial year, the company had profits available for distribution by way of dividend. In January 2015, Kiri Industries took the position that the shareholders were justified in seeking distribution of those profits. Mr Manishkumar wrote to the Longsheng Directors as follows:[36]

> [W]e are all proud of the fact that we have been successful in implementing business restructuring and reorganizing package for DyStar … We all appreciate that Lonsen [*sic*] has

---

35 Xu Yalin's affidavit (25 Oct 2015) paras 24–35.

36 Xu Yalin's affidavit (27 Oct 2015) at para 36 and pp 462–463.

> helped and supported DyStar during the time of restructuring.
> …
>
> …
>
> Since "DyStar" has turnaround and has earned profits after wiping off all its past losses of preceding years, we firmly believe that the company can declare dividend for FY 2014 and the shareholders are justified to get dividend. …

The tone of this email is significant: it is cordial and candidly acknowledges the efforts of Longsheng and of the Longsheng Directors. That is an accurate reflection of the relationship between the shareholders and their appointed directors up to that point.

136 The Longsheng Directors replied to Mr Manishkumar three days later. They took the view that it was not appropriate to declare dividends given that the company still had a high level of expenses and required large sums of working capital to maintain its business inventory.[37] Mr Manishkumar did not reply to this email.[38]

137 The decision by the Longsheng Directors not to declare dividends is, on the evidence before me, the root cause of Kiri Industries' unhappiness with the Longsheng Directors and, by extension, with Longsheng itself. What happened next was that Kiri Industries, acting through the plaintiff, began looking for evidence to be used as leverage against Longsheng and the Longsheng Directors in order to position Kiri Industries to be bought out at a favourable price. Thus, from February to May 2015, the plaintiff presented the company and the Longsheng Directors with a series of requests for documents and information:[39]

---

37 Xu Yalin's affidavit (27 Oct 2015) at para 39 and pp 466–467.

38 Xu Yalin's affidavit (27 Oct 2015) at para 40.

39 Second to fourth defendants' written submissions (12 Aug 2016) at paras 22–25.

(a) In February 2015, the plaintiff asked for information about the company's related party loans and transactions with Longsheng and its affiliated companies.[40] The information was provided to the plaintiff in March 2015.[41] The plaintiff remained dissatisfied with the information provided and repeated his request a few days later.[42]

(b) In April 2015, the plaintiff asked for a "monthly breakdown of the related party loans vs the cash margin from Lonsen [*sic*] for 2014 and Q1 2015", and asked to meet the company's auditors. The company's Chief Financial Officer, Viktor Leendertz, responded by sending the plaintiff a monthly breakdown and by attempting to arrange a time for the plaintiff to meet the company's auditors.[43]

(c) In May 2015, the plaintiff asked the company secretary for copies of all 2014 board resolutions.[44]

Kiri Industries commences the minority oppression suit

138 In June 2015, Kiri Industries commenced its minority oppression suit against Senda and the company.[45] This was only four months after the Longsheng Directors had rebuffed Kiri Industries' request to declare dividends. In its suit, Kiri Industries alleges that Senda has been guilty of a number of oppressive acts. These include: (i) withholding information from Kiri Industries;[46] (ii) excluding Kiri Industries from management after the

40 Xu Yalin's affidavit (27 Oct 2015) at para 41.

41 Xu Yalin's affidavit (27 Oct 2015) at para 44–45.

42 Xu Yalin's affidavit (27 Oct 2015) at para 46.

43 Xu Yalin's affidavit (27 Oct 2015) at pp 537–538.

44 Xu Yalin's affidavit (27 Oct 2015) at para 63.

45 Xu Yalin's affidavit (27 Oct 2015) at p 602.

company became profitable in 2013;[47] (iii) mismanaging the company's assets;[48] and (iv) preventing Kiri Industries from earning a return on its investment in the company by, among other things, not declaring dividends.[49]

139 Less than a month after Kiri Industries had commenced the minority oppression suit, the plaintiff asked the company and the Longsheng Directors to produce for his review the documents and information which were enumerated in the schedule to his July 2015 letter.[50] I have summarised the contents of that letter at [86] above. The company and the Longsheng Directors responded in their separate letters dated 1 August 2015. I have summarised the contents of their responses at [87] above.

140 I pause at this point to make three observations about the schedule attached to the plaintiff's July 2015 letter.

141 First, there is considerable force in the concern which the Longsheng directors expressed at the time about the broad-ranging nature of the plaintiff's request for documents and information in his July 2015 letter. It is true that the request was limited in time for most categories to the first six months of 2015. But it extended to 2014 for some categories and for the past three years for one category. The main point, though, is not about the temporal scope of the request but about the width of the categories themselves. The request comprised 21 very wide categories of closely specified documents and information.[51] Further, the plaintiff's request was not confined to the company

---

46 Xu Yalin's affidavit (27 Oct 2015) at pp 616–620.

47 Xu Yalin's affidavit (27 Oct 2015) at pp 621–627.

48 Xu Yalin's affidavit (27 Oct 2015) at p 628.

49 Xu Yalin's affidavit (27 Oct 2015) at pp 628–632.

50 Xu Yalin's affidavit (27 Oct 2015) at pp 51–56.

itself, but extended across the entire DyStar group. Thus, for example, the schedule sought in relation to each parent and subsidiary company in the DyStar group:

> (a) a detailed breakdown of each line item in the profit and loss account and the balance sheet of each company, expressed in US dollars;
>
> (b) details of loans obtained and granted by each company, including copies of the loan documentation, again expressed in US dollars;
>
> (c) details of selling, general and administrative expenses for each company;
>
> (d) an ageing analysis of the debtors and the creditors of each company;
>
> (e) details of product sales and inventory of each subsidiary;
>
> (f) details of interested party and related party sales and procurement transactions between each company and associated or group companies, which the plaintiff defined to capture essentially the Longsheng Group of companies; and
>
> (g) details of the remuneration paid to the board of directors and to management and, in particular, paid to the Longsheng Directors.

142 My second observation is that the plaintiff's stated reason for seeking the documents and information set out in the schedule was because "[i]t is

---

[51] Xu Yalin's affidavit (27 Oct 2015) at pp 53–56.

important [that] board members [are] kept apprised of the financial affairs *and management*" [emphasis added] of the company.[52] It is because the plaintiff's aim in his July 2015 letter was to learn more about the management of the company that he went well beyond asking simply to see the company's existing accounting and other records. Thus, for example, some of the categories enumerated in the schedule to his July 2015 letter – for example (a), (b) and (f) at [141] above – required the company's management to extract, collate, analyse and summarise information for him in wholly new documents which he expected them to bring into existence "for [his] review, in advance of the next board meeting".[53] His request was, by its very nature and width, more akin to a request for discovery and interrogatories than a request to be permitted to inspect the company's records under s 199(3) of the Act.

143 Finally, it is probably for the two foregoing reasons that the plaintiff did not frame his July 2015 letter as a request under s 199(3) of the Act to inspect the company's accounting and other records. The plaintiff began the letter by stating that he wrote it in his capacity as a director of the company and as a member of its audit and compensation committees. He concluded the letter by foreshadowing an application to court if his request was not met. But nowhere in the letter is there any statement of the legal basis of his foreshadowed application. In particular, nowhere in the letter does he assert a right under s 199(3) to inspect the 21 categories of documents and information enumerated in the schedule. His letter does not even allude to s 199 by tracking its language in framing the request as one to inspect the company's "accounting and other records". Instead, what he sought was for the company's management to produce the documents and information to him for

---

52 Xu Yalin's affidavit (27 Oct 2015) at p 52.

53 Xu Yalin's affidavit (27 Oct 2015) at p 52.

his review. Further, the headings in his schedule recognised that he was not merely asking for documents but also for information by characterising each category blandly, albeit accurately, as "Categories of Documents / Information Required".[54]

The plaintiff commences this application

144 In September 2015, about six weeks after the Longsheng Directors' response to his request in his July 2015 letter, the plaintiff took out this application under s 199 of the Act.[55] I have set out at [9] above the primary relief which the plaintiff seeks.

145 The Longsheng Directors filed their substantive affidavits in response by the end of October 2015. They followed that, in November 2015, by applying for this application to be converted into a writ action[56] and for that writ action to be consolidated with Kiri Industries' minority oppression suit, and alternatively for both proceedings to go to trial before the same judge.[57] I heard Kiri Industries' application in January 2016 and April 2016 and dismissed it.

146 The next significant event took place, not in this application, but in the minority oppression suit. In July 2016, Kiri Industries applied[58] for specific discovery from Senda and from the company of a laundry list of documents comprising six main categories broken down into 34 sub-categories.[59] I

54 Xu Yalin's affidavit (27 Oct 2015) at p 53.

55 HC/OS 863/2015.

56 HC/SUM 5654/2015.

57 HC/SUM 5646/2015.

58 HC/SUM 3270/2016 in SIC/S 4/2017 (formerly HC/S 634/2015).

59 Xu Yalin's affidavit (20 Mar 2017) at para 22.

describe these six categories in more detail at [174] below. An assistant registrar heard the application over two days in August 2016 and dismissed it, virtually in its entirety. In September 2016, I heard and dismissed Kiri Industries' appeal against the assistant registrar's decision.[60]

147 The plaintiff's substantive application in these proceedings came up for hearing before me in August 2016. That was when I gave the indications in the course of submissions that led the plaintiff's counsel to apply to amend his application so that it was founded not only on s 199 but also on s 399 and s 409A of the Act. I allowed the amendments[61] for the reasons I have set out at [37]–[38] above.

148 I gave further indications in the course of submissions about the width of the plaintiff's request for inspection compared to the width of the phrase "accounting and other records" in s 199(1) of the Act. As a result, both parties asked that the hearing be adjourned to see if they could arrive at a set of documents which they could agree fell within the plaintiff's *prima facie* right to inspect the company's records under s 199(3) without need for a court order.[62] I allowed the adjournment.[63]

149 During the adjournment, the parties exchanged a number of revised schedules of documents. Unfortunately, they could not agree on a schedule of documents for inspection. Each pointed a finger at the other. The plaintiff took the position that the Longsheng Directors' proposals were too narrow while

---

60 Xu Yalin's affidavit (20 Mar 2017) at para 20.

61 Certified Transcript (17 Aug 2016) at p 11 (lines 15–17).

62 Certified Transcript (17 Aug 2016) at p 35 (lines 5–10).

63 Certified Transcript (17 Aug 2016) at p 36 (lines 14–16).

the Longsheng Directors took the view that the plaintiff's proposals were too wide.[64]

The plaintiff changes the basis of the application in two respects

150 Significantly, the plaintiff took the opportunity during the adjournment to change the basis of this application in two fundamental ways. By a letter dated 11 November 2016 from his solicitors to the Longsheng Directors' solicitors:

(a) the plaintiff stated for the first time that he intended to apply in these proceedings for a public accountant to act for him under s 199(5) of the Act in inspecting the company's records;[65] and

(b) the plaintiff withdrew the schedule which had been originally annexed to this application – filed more than a year earlier – and indicated in that letter that the plaintiff would be satisfied, for the time being, with being permitted to inspect a new set of documents enumerated in a new schedule.[66]

151 With that more detailed account of the factual background in mind, I now turn to analyse the three sets of circumstances which have led me to find that the plaintiff is exercising his right under s 199(3) to inspect the company's records for an ulterior purpose.

---

64 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 88–136.

65 Mukherjee Amitava's affidavit (17 Feb 2017) at p 98 at para 7.

66 Mukherjee Amitava's affidavit (17 Feb 2017) at p 97 at paras 4–5.

This application is synchronised with the minority oppression suit

152 This more detailed account shows that the plaintiff has synchronised his application with Kiri Industries' minority oppression suit. The synchrony is strong circumstantial evidence that the plaintiff's primary or dominant purpose in making this application is to advance Kiri Industries' case in the minority oppression suit rather than any proper purpose. I refer in particular to two aspects of the timing.

153 First, the plaintiff asked for detailed information about the company's related-party loans and transactions with Longsheng for the first time very soon after Mr Manishkumar was rebuffed in his suggestion that the company declare dividends for the financial year 2014 (see [137] above). It is impossible to believe that the plaintiff's requests for information were not linked to Kiri Industries' unhappiness over the Longsheng Directors' refusal to declare dividends. The focused nature of the information which the plaintiff sought in his three requests from February 2015 to May 2015 is also significant: the target of his inquiry was not the general financial state of the company but the company's specific dealings with the Longsheng Group and whether those dealings had been properly approved.

154 Second, the plaintiff's July 2015 letter asking the company to produce a very detailed schedule of documents and information for his review came less than a month after Kiri Industries commenced the minority oppression suit. That schedule was then annexed, with minimal modification, to this application, taken out about three months after Kiri Industries commenced the minority oppression suit (see [138]–[139] above) and when pleadings in that suit were about to close.

Width of categories sought in original schedule

155 That brings me to my second point: the width of categories which the plaintiff originally sought to inspect under this application, as set out in the schedule originally annexed to this application. Although the plaintiff withdrew and replaced the original schedule before I retired to consider my decision, the original schedule remains evidence before me. In particular, I consider it to be valuable evidence of the plaintiff's purpose in seeking to exercise his right under s 199(3) at the time he filed this application in September 2015.

156 I begin my analysis of this set of circumstances by first making some observations about the scheme of s 199 of the Act.

"Accounting and other records"

157 The first observation is that the company's duty to keep records under s 199(1), and therefore the scope of the records which a director has a right to inspect under s 199(3), are inextricably linked to records which explain the company's financial position and which enable the company to prepare its financial statements and have them audited. That observation arises from the context to be gathered both from s 199(1) itself and also from the other sections in the Act which adopt the phrase "accounting and other records".

158 The term "accounting and other records" is introduced by s 199(1) but is defined nowhere in the Act. The starting point to gather the meaning of the term is therefore s 199(1) itself. That section links the phrase to two particular purposes. Those purposes are: (a) to "sufficiently explain the transactions and financial position of the company" and (b) to "enable true and fair financial

statements and any documents required to be attached thereto to be prepared from time to time".

159 After s 199(1) introduces the phrase "accounting and other records", it becomes a recurring theme arising in other provisions in the Act. The meaning of the phrase can therefore also be gathered from the context in which it is used in those other provisions. The phrase appears in s 201A (dormant companies exempt from duty to prepare financial statements), s 205B (dormant company exempt from audit requirements) and s 207 (powers and duties of auditors as to reports on financial statements). What this group of provisions has in common is that they all relate to a company's obligation to prepare financial statements and to have them audited.

160 The connection between "accounting and other records" and the company's financial statements and the requirement to have those financial statements audited is reinforced by the appearance of the term "true and fair financial statements" in s 199(1). That term alludes to the requirement under s 201(2) that the financial statements which the directors of a company are obliged to lay before the members annually under s 201(1) must "give a true and fair view of the financial position and performance of the company". It alludes also to the requirement under s 207(2)(*a*)(ii) that the auditors opine in their report on the financial statements whether those statements give a true and fair view of the company's financial position.

The scope of the phrase is wide but not infinite

161 At the highest level of generality, therefore, "accounting and other records" within the meaning of s 199(1) are records which explain the company's financial position and which enable the company to prepare its

financial statements and to have them audited. I do not make this point to suggest that the meaning of "accounting and other records" in s 199(3) is narrowly confined only to that irreducible core of records which a company's management, under the supervision of its directors, relies upon to draw up its financial statements much less those which a company's auditor reviews in order to prepare its audit report under s 207. The term is undoubtedly wider than that. Judith Prakash J (as she then was) recently considered the scope of s 199(1) of the Act in *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2016] 2 SLR 366 ("*PNG*"). The central issue before Prakash J was the meaning of the phrase "books of account and other records" in a company's articles of association (at [149]). However, she analysed in this part of her judgment a number of English, Australian and Singapore cases on provisions *in pari materia* with s 199(1) of the Act. She noted that the word "accounts" encompasses secondary sources such as ledgers and that the word "records" encompasses primary sources of information such as the underlying source documents (at [162]).

162 The phrase "accounting and other records" is therefore of wide scope. It is not my intention to suggest otherwise. But I make three points about the scope of the phrase.

163 First, although undoubtedly wide, the phrase is not of infinite scope. In *PNG*, Prakash J accepted that the scope of "accounting and other records" is not so wide as to encompass "financial records", being derivative documents prepared using judgment or prediction and involving the interpretation of the underlying financial data (at [169]). *A fortiori*, the phrase does not mean simply any record which the company has in its possession, custody or power, even if the record relates to the company's financial position or its financial statements.

164 It was suggested in 1994 that directors, being the appointed managers of a company, ought to have the right to inspect any document under the company's ownership or control, even if that document is not necessary to understand the company's financial position or to prepare the company's financial statements, and that one way to do this would be by interpreting s 199 to cover even documents which have an indirect financial impact (Tan, *Director's Statutory Rights* at 122). This may be the scope of a director's common law right of inspection as described in *Burn* ([11] *supra*). But in my view, it is not possible to interpret s 199 so widely without doing violence to the scheme of s 199 and of the Act as a whole. A director's statutory right to inspect documents under s 199(3) arises only in respect of an "accounting record" or an "other record", and it must be a record which the company is obliged to keep for one of the two purposes set out in s 199(1). That is why, for example, s 138(1A)(*b*) of the Act was amended with effect from 2016 specifically to deem an instrument which creates a registrable charge to form part of the company's records which it is required to keep under s 199(1). If s 199(1) was so wide as to require no more than an indirect connection to the company's financial position or financial statements for a document to fall within the scope of "accounting and other records", this amendment to s 138(1A)(*b*) would not have been required. A document creating a registrable charge would have come within the scope of the phrase even without a deeming provision.

165 Second, only a "record" falls within the finite scope of the phrase. The word "record" is not defined in the Act. The meaning of that word, of course, goes beyond paper records. It is apt to encompass any permanent representation of information in any medium, whether physical, magnetic, electronic or otherwise. Electronic record-keeping is specifically envisaged

and authorised by s 396A(2) and (4) of the Act. The definition of "document" and "electronic record" in the Evidence Act would probably be a good starting point if it were ever necessary to arrive at an exhaustive definition of the word "record" for the purposes of s 199. But for present purposes, it suffices to note that the word "record" is not apt to encompass pure information, *ie*, information which is not represented in a permanent form. The word "record" therefore excludes information or knowledge which resides only in the heads of the company's directors or the company's management team. It also excludes information which is latent in the "accounting and other records" and which can be made patent only by extracting, analysing or manipulating the information in those records.

166 Third, s 199 requires the accounting and other records actually to exist. Thus, for example, if a company has failed in its duty under s 199(1) to keep "accounting and other records", s 199(3) does not go so far as to empower a director to get a court order under s 399 or s 409A to require the company to bring those records into existence in order to comply with s 199(1) just so the director may then inspect the newly-created records under s 199(3). Such a wide interpretation of s 199(3) is not necessary to support the company's duty under s 199(1) or to deter a breach of it. It is the criminal offence under s 199(6) which performs that function. *A fortiori*, it cannot be the intent of s 199(3) to oblige a company to bring into existence documents which it is not obliged to keep under s 199(1) simply because a director asks it to do so under s 199(3).

167 Counsel for the plaintiff rightly accepted[67] that a director's statutory right of inspection extends only to documents that are in existence. If a

---

67 Certified Transcript (17 Aug 2016) at p 14 (lines 4–16).

director's exercise of his right of inspection reveals any gaps in the company's accounts and records, the remedy for the breaches of duty that have led to those gaps lies elsewhere, for example in s 199(6), under the Act's general enforcement provisions or at common law.

The plaintiff's original schedule went well beyond the width of s 199(3)

168 The schedule which the plaintiff originally annexed to his application went well beyond the width of his right to inspect the company's records under s 199(3). That schedule listed again, verbatim, each of the 21 categories of documents and information that the plaintiff had asked the company to produce for his review by his July 2015 letter. This time, however, the heading in the schedule no longer described each category as "Documents / Information Required". Belatedly tracking the language of s199, the heading described each category as "Categories of Accounting and Other Records Required". In addition, and for good measure, the plaintiff added two new categories.[68]

169 Merely taking the schedule which the plaintiff annexed to his July 2015 letter and amending the heading in this way before attaching it to this application was nothing but a transparent attempt to shoehorn a wide-ranging request for documents and information related to the finances and management of the company which the plaintiff made by his July 2015 letter into a request under s 199(3) of the Act to inspect the company's records.

170 Because the plaintiff's original schedule in this application was (save for the two new categories and the headings) identical to the schedule attached to his July 2015 letter, my comments on the width of that earlier schedule set

---

[68] Schedule to HC/OS 863/2015.

out at [141] above apply equally to the plaintiff's original schedule attached to this application. Drawing on that analysis, I now summarise the respects in which the original schedule went beyond the scope of s 199(3):

(a) The schedule comprised 23 very widely-drawn and closely-specified categories of documents and information. Insofar as it related to information, it was wholly outside the scheme of s 199. Insofar as it related to documents, it was outside the scope of s 199(3) in that some of the documents enumerated had no connection to the company's financial position or financial statements. I point out in particular that the plaintiff's stated reason in July 2015 for seeking to review virtually the same schedule was his desire to be kept "apprised of the financial affairs *and management*" [emphasis added] of the company. Documents which relate to the management of the company and which are not otherwise related to its financial position or its financial statements are not within the scope of s 199(3).

(b) The schedule was not confined to the company itself, but extended across the entire DyStar group seeking, in large part, both documents and information relating to the DyStar Group's dealings with the Longsheng Group. I note that Mr Leendertz has explained that the accounting software used by the company is not used to store supporting documents concerning transactions that the company's subsidiaries have entered into.[69]

(c) The original schedule required the company's management to create wholly new documents for the plaintiff to inspect rather than

---

69 Viktor Leendertz's affidavit (21 Mar 2017) at para 12.

simply to produce for his inspection "accounting and other records" which were already in existence.

(d) The original schedule was not limited to records but extended also to information. A request for information is wholly outside the scope of s 199(3).

171 Any one of these discrepancies between the width of the plaintiff's original schedule and the proper scope of his right to inspect the company's records under s 199(3) would not suffice in itself to raise an inference of a primary or dominant ulterior purpose. But when all the discrepancies are taken together and when they are considered in the round with all the other circumstances which I have identified and will now go on to identify, the inference is irresistible.

172 Just like the schedule which the plaintiff attached to his July 2015 letter, the original schedule which the plaintiff attached to this application was, by its very nature and width, more akin to a request for discovery and to administer interrogatories than a request to be permitted to inspect the company's records under s 199(3) of the Act.

The new schedule

173 This brings me to the final point. As I have mentioned (see [150] above), in November 2016, in correspondence with the defendants' solicitors, the plaintiff withdrew the original schedule which had been attached to his application from the time it was filed and which I have considered in the preceding section. Instead, from November 2016, the plaintiff sought an order that either he or a public accountant acting for him be allowed to inspect an entirely new schedule of documents.[70] Although this new schedule ran to over

30 pages, counsel for the plaintiff presented it to me when the hearing resumed as being "far narrower" than the original schedule.[71] It is not clear to me that it is indeed narrower than the original request. Further, the documents covered by the plaintiff's new schedule closely track both the documents which Kiri Industries sought in its failed discovery application in its minority oppression suit and also Kiri Industries' case in that suit.

The new schedule tracks Kiri Industries' minority oppression suit

174 Kiri Industries' failed discovery application[72] in the minority oppression suit sought discovery from Senda and the company of the following six categories of documents:

(a) all documents relating to the commercial exploitation of a patent ("the Patent") which the company's German subsidiary transferred to a Longsheng subsidiary;[73]

(b) all documents relating to the decisions to enter into *all* related-party sales and procurement transactions between the DyStar group and the Longsheng Group;

(c) all documents relating to the decisions to enter into *all* related-party loan transactions between the DyStar group and the Longsheng Group;

(d) all documents relating to the decisions of the DyStar group to take loans from banks;

---

70 Mukherjee Amitava's affidavit (17 Feb 2017) at paras 5 and 9 and pp 54–86.

71 Certified Transcript (15 May 2017) at p 4 (lines 4–10).

72 HC/SUM 3270/2016 in SIC/S 4/2017 (formerly HC/S 634/2015).

73 Statement of Claim (Amendment No 1) in HC/S 634/2015 at paras 70C–75C.

(e) all documents relating to decisions on remuneration or bonuses paid by the DyStar group to its management and directors; and

(f) all documents relating to the payment of guarantee fees, management fees and consulting fees by the DyStar group to the Longsheng Directors and how those fees had been decided.

175 It is important to record why Kiri Industries' discovery application for these six categories in the minority oppression suit was rejected virtually in its entirety. Discovery of the first category was rejected because Kiri Industries relied only on the fact that the Patent had been transferred as evidence of minority oppression. No aspect of the subsequent commercial exploitation of the Patent was part of Kiri Industries' pleaded case in the minority oppression suit.[74] Discovery of the second, third, fourth and fifth categories was rejected because it was not Kiri Industries' pleaded case in the minority oppression suit that the decision to enter into *all* of the transactions in each of these categories was taken without consulting Kiri Industries or its appointed directors but that only *some* of them were.[75] The third category was allowed, however, insofar as it related to two specific related-party loans extended by the company in 2014 which Kiri Industries had specifically pleaded as part of its case: a loan to Amino-Chem (HK) Co., Limited ("Amino-Chem") and to Well Prospering. So too, the fifth category was allowed insofar as it related to two specific payments to two specific Longsheng Directors which Kiri Industries had pleaded as part of its case. Finally, discovery of the sixth category was rejected because it did not relate to any issue which Kiri Industries had

---

74 Certified Transcript (16 Aug 2016) in SIC/S 4/2016 (formerly HC/S 634/2015) at p 8 (lines 17–27).

75 Certified Transcript (16 Aug 2016) in SIC/S 4/2016 (formerly HC/S 634/2015) at pp 8 (lines 17 to 27); 12 (lines 1–10); and 15 (lines 2–3).

pleaded even though the payment of these fees was an issue in contention on the parties' affidavits.[76]

176 The assistant registrar dismissed the discovery application virtually in its entirety in August 2016.[77] I dismissed the appeal[78] from the assistant registrar's decision in September 2016.[79] I do not consider it a coincidence that the plaintiff sought to replace the schedule to this application just two months after that.

177 The plaintiff's new schedule in this application very closely tracks Kiri Industries' failed application for discovery in the minority oppression suit.[80] The new schedule asks for access to documents – which the plaintiff asserts to be "accounting and other records" – in five broad categories:

(a) Loans extended to or borrowed from four Longsheng Group companies, including Amino-Chem and Well Prospering, between 2014 and 2016;[81]

(b) 17 sets of sale and purchase transactions for goods or services between the Dystar group and Longsheng Group companies entered into between 2014 and 2016;[82]

---

76 Certified Transcript (16 Aug 2016) in SIC/S 4/2016 (formerly HC/S 634/2015) at p 17 (lines 2–22).

77 HC/SUM 3270/2016 in SIC/S 4/2017 (formerly HC/S 634/2015).

78 HC/RA 312/2016 in SIC/S 4/2017 (formerly HC/S 634/2015).

79 Second to fourth defendants' written submissions (12 May 2017) at paras 55–57.

80 Second to fourth defendants' written submissions (12 May 2017) at para 53 and Table A; Statement of Claim (Amendment No 1) in HC/S 634/2015.

81 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 54–65.

82 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 65–79.

(c) the transfer of the Patent from the company's German subsidiary to Longsheng;[83]

(d) remuneration and bonus paid and proposed to be paid to the company's directors and management;[84] and

(e) Longsheng's claim for management, consulting and guarantee fees from the company.[85]

178 Each of these five categories has a clear counterpart in Kiri Industries' failed discovery application in the minority oppression suit. The only category from that discovery application which does not have a counterpart in the plaintiff's new schedule in this application is the category relating to borrowing from banks. The categories in the new schedule which do have counterparts in the failed discovery application go beyond those counterparts in the sense that they repeat the requests in the original broad language, but are now unconnected to the requirement for relevance to Kiri Industries' pleaded case in the minority oppression suit. The lack of such relevance is the principal reason that Kiri Industries' discovery application failed almost in its entirety.

179 Further, each of the five categories in the plaintiff's new schedule tracks Kiri Industries' claims in the minority oppression suit:

(a) Kiri Industries claims in the suit that the Longsheng Directors entered into loan agreements with Amino-Chem and Well Prospering without informing or consulting Kiri Industries or its appointed directors and without proper approval.[86] The plaintiff seeks in his new

---

83 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 80–82.

84 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 82–83.

85 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 84–86.

schedule to inspect documents relating to these related-party loans, amongst others.[87]

(b) Kiri Industries claims in the suit that the Longsheng Directors caused the company to purchase supplies from Longsheng Group companies without consulting Kiri Industries and without proper approval.[88] The plaintiff seeks in his new schedule to inspect documents relating to contracts for the purchase of goods and services from the Longsheng Group.[89] The documents the plaintiff wishes to inspect include documents evidencing due diligence carried out by the DyStar Group company in terms of comparing the prices and credit terms on offer from arm's length suppliers[90] and board resolutions and minutes of meetings relating to sale and purchase agreements with Longsheng Group companies.[91]

(c) Kiri Industries claims in the suit that the Longsheng Directors transferred the Patent without prior approval from the company's board of directors.[92] The plaintiff seeks in his new schedule to inspect documents relating to the transfer of the Patent.[93] This includes minutes of board meetings and resolutions on the transfer of the Patent. This category of documents is not one of the categories in the schedule annexed to the plaintiff's July 2015 letter or in the schedule originally

86 Statement of Claim (Amendment No 1) in HC/S 634/2015 at para 45.

87 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 56–60.

88 Statement of Claim (Amendment No 1) in HC/S 634/2015 at para 47.

89 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 65–79.

90 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 65.

91 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 66.

92 Statement of Claim (Amendment No 1) in HC/S 634/2015 at paras 70C–75C.

93 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 80–82.

annexed to this application. The plaintiff introduced this category into this application only after Kiri Industries' discovery application in the minority oppression suit for discovery of documents relating to the exploitation of the Patent failed.

(d) Kiri Industries claims in the suit that the Longsheng Directors decided on the remuneration of the company's key management personnel without consulting the Kiri Industries' directors and without proper board approval, as a result of which Kiri Industries is unaware how much remuneration was paid to the company's management team, which of course includes the Longsheng Directors.[94] The plaintiff seeks in his new schedule to inspect, among other things, board resolutions and minutes of meeting relating to the payment of remuneration to the company's directors and management team, and copies of their service contracts.[95]

(e) Kiri Industries' amended statement of claim in the suit (amended in December 2016, *after* the discovery application had failed) asserts that the Longsheng Directors caused the company to pay Longsheng management, consulting and guarantee fees which are not commercially justified either in principle or in amount.[96] The plaintiff seeks in his new schedule to inspect documents relating to Longsheng's claims for management, consulting, and guarantee fees.[97] This again includes board resolutions and minutes of meetings relating to these fees. This too is not one of the categories in the schedule

---

94 Statement of Claim (Amendment No 1) in HC/S 634/2015 at paras 49–54.

95 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 82–83.

96 Statement of Claim (Amendment No 1) in HC/S 634/2015 at paras 87A–87B.

97 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 84–86.

annexed to the plaintiff's July 2015 letter or in the schedule originally annexed to this application.

180 The plaintiff has provided no explanation as to why his new schedule tracks so closely Kiri Industries' failed discovery request and the issues in Kiri Industries' minority oppression suit. It is notable that the plaintiff's new schedule also includes a request to inspect documents relevant to a new issue (at [179(e)] above) which was inserted into the pleadings in the minority oppression suit in December 2016, after the plaintiff first put this schedule forward to Longsheng's solicitors in correspondence. All that the plaintiff says is that he cannot "confirm or deny" this coincidence and that the new schedule of documents was prepared with the assistance of his public accountant.[98]

181 Once again, it is stretching credulity beyond breaking point for the plaintiff to suggest, as he does, that he reframed the schedule to his application in this way independently of Kiri Industries and only in order to safeguard the company's interests in light of the allegations of impropriety in Kiri Industries' minority oppression suit.[99]

The new schedule is still too wide

182 In any event, the new schedule continues to be far too wide and to include requests to inspect documents which clearly do not form part of either the company's accounting records or of its other records within the meaning of s 199(1).

183 First, there is the sheer number of categories enumerated in the new schedule. Although the new schedule has only five headline categories (see

[98] Mukherjee Amitava's affidavit (4 Apr 2017) at para 16.

[99] Mukherjee Amitava's affidavit (4 Apr 2017) at para 17.

[177] above), each headline category is broken down into sub-categories headed "Accounting Records (Preliminary)" and "Other Related Records (Preliminary)".[100] The sub-category of "Accounting Records" is then broken down into 39 sub-sub-categories and over 180 sub-sub-sub-categories. The sub-category of "Other Related Records" is broken down into 88 sub-sub-categories. As a result, with all of the description and narrative for the categories, sub-categories, sub-sub-categories and sub-sub-sub-categories, the new schedule runs to some 33 pages.

184 Further, the plaintiff continues to ask for documents which do not form any part of the company's "accounting and other records". Thus, for example, the new schedule asks for the following categories:

(a) "correspondence between the Lender Company" and the borrower;[101]

(b) "[r]ecords and/or documents evidencing due diligence and/or assessment carried out by the Lender Company…";[102]

(c) "[r]ecords and/or documents evidencing the Lender Company's efforts to source for funding options for the proposed Loan and to set a suitable interest rate for the proposed Loan such as quotes from banks and financial instructions or internal cost of funds";[103] and

---

100 Mukherjee Amitava's affidavit (17 February 2017) at pp 54–86.

101 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 54, 56, 58, 61 para i, rightmost column.

102 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 54, 56, 58-59 paras ii and iii, rightmost column.

103 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 55, 57, 59 paras viii, rightmost column.

(d) "[t]he Lender Company's Board Resolutions approving the Loan".[104]

Conclusion

185 The level of detail and the width of the new schedule does not bring to mind a director genuinely trying to understand the transactions and financial position of a company or its financial statements in order to carry out his duty to act in its best interests. Instead, it brings to mind a director who has engaged an accountant to advise him and who has secured from that accountant a laundry list of documents and information which the accountant says he will need to review in order to construct a case of impropriety. Particularly ominous is the suffix "Preliminary" which the plaintiff attaches to both sub-categories in his new schedule.[105] The plaintiff appears to be looking forward to a second round of inspection even before he has had his first.

Conclusion on the fourth issue

186 Considering the above reasons in totality, I find that the plaintiff's application is made for the primary or dominant ulterior purpose of extracting documents and information from the company to advance Kiri Industries' interest in the minority oppression suit it has brought against Senda and the company.

187 The plaintiff's position appears to accept the connection both in timing and in scope between his application under s 199(3) and Kiri Industries' case in its minority oppression suit. But he alleges that any connection arises

104 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 56, 58, 60 paras x, rightmost column.

105 Mukherjee Amitava's affidavit (17 Feb 2017) at pp 54–86.

because he is genuinely concerned about the allegations of impropriety revealed in Kiri Industries' minority oppression suit and wants to inspect the company's records in order to protect the company's best interests.[106]

188 I do not doubt that a director of a company who learns that a minority shareholder has made allegations of oppressive conduct under s 216 of the Act against a company, its directors, shareholders or management may be justified in seeking to ascertain for himself whether those allegations have any credibility by exercising his *prima facie* right to inspect the company's records under s 199(3). I am even prepared to accept that that may be part of this plaintiff's purpose in seeking to inspect the company's records. But I do not accept that that is the plaintiff's primary or dominant purpose in the sense of being his weightiest purpose. For the reasons I have given above, I find that his weightiest purpose is the ulterior purpose I have already adverted to. In the alternative, in the event that I am wrong and the "but for" test can operate to validate the plaintiff's exercise of his power to inspect, I also find that the plaintiff would not have brought this application but for his ulterior purpose.

189 It would be quite different if, for example, the company had three genuinely independent shareholders (A, B and C) with A holding 51% and B and C holding the remaining 49% between them and with each of them having a nominee on the company's board. If, in that situation, B alone were to bring a minority oppression suit against A alone, a director appointed by C may well want to inspect the company's records for himself to ascertain the truth of those allegations and to consider what steps to take in the company's best interest. In ascertaining the company's best interests, he would be perfectly entitled to examine those interests from C's perspective (see *Kumagai Gumi*

106 Plaintiff's written submissions (19 May 2017) at paras 18 and 20.

Co Ltd v Zenecon Pte Ltd and others and other appeals [1995] 2 SLR(R) 304 at [58] cited in *Oversea-Chinese Banking Corp Ltd and another v Justlogin Pte Ltd and another* [2004] 2 SLR(R) 675 at [31]). In that situation, it would be difficult to deny the director appointed by C his *prima facie* right to inspect the company's records under s 199(3).

190 But that is not the case here. In my example, C's appointed director seeks inspection independently of either party to the minority oppression proceedings. In the application before me, and on the facts before me, I do not accept that the plaintiff is acting independently of Kiri Industries. The plaintiff asserts that he is independent of Kiri Industries because Mr Manishkumar is an employee and an executive director of Kiri Industries whereas the plaintiff is neither.[107] That factor alone does not suffice to establish that the plaintiff is independent of Kiri Industries. It is outweighed by three other factors.

191 First, it is significant to me that the plaintiff is Kiri Industries' appointee to the company's board. That indicates both a pre-existing, pre-appointment relationship between Kiri Industries and the plaintiff and an ongoing, post-appointment relationship between them. Second, Kiri Industries could, at any time, remove the plaintiff and replace him with another appointee. I do not, by pointing that out, suggest that Kiri Industries would be acting in any way improperly in doing so. Appointing two directors of its choice to the company's board is its unqualified right under the shareholders' agreement. The same is true as between Longsheng and the three Longsheng Directors. But Kiri Industries' right to remove the plaintiff at any time for any reason does mean that the plaintiff cannot credibly assert that he is independent of Kiri Industries' control, whether in a positive sense or in a

107 Mukherjee Amitava's affidavit (1 Jun 2016) at para 16(2); Plaintiff's written submissions (12 Aug 2016) at para 9(6).

negative sense. Finally, it is significant to me that the plaintiff has on occasion expressly chosen to speak for and on behalf of Kiri Industries. One example is in his response to the Longsheng Directors' August 2015 letter (see [89(c)] above), where he framed his denial of wrongful competition in their letter as a denial made "on behalf of Kiri Industries".

192 For the foregoing reasons, I cannot accept that the plaintiff has acted independently of Kiri Industries or that he is in fact independent of Kiri Industries in bringing this application or that the company's interests alone are the plaintiff's primary or dominant purpose in seeking to inspect the company's records.

Conclusion

193 I have therefore dismissed the plaintiff's application to inspect the company's accounting and other records. I ought to add that I have considered whether it would be more appropriate for me to try and carve out of the plaintiff's request a narrower subset of records which clearly fall within ss 199(1) and 199(3) of the Act. I have decided not to do so for two reasons. First, the ulterior purpose which I have found taints the plaintiff's entire application. Second, the plaintiff's overreach both in his original schedule and in his new schedule (which counsel for the plaintiff claims is a "narrowed" one (see [173] above)) would mean that any further narrowing by the court would amount to rewarding the overreach. A director seeking inspection under s 199(3) cannot come to the court with a laundry list and expect the court to sort, wash and fold his laundry for him so that it comes within s 199(3).

194 I have also considered whether my concerns about the plaintiff's ulterior purpose could be addressed by undertakings from the plaintiff, Kiri

Industries, and even the plaintiff's counsel. But those undertakings will be difficult to police and enforce. That is not least because the plaintiff is not resident in Singapore and also because the same firm of solicitors represents the plaintiff in this application and Kiri Industries in its minority oppression suit. Any undertakings will also not address the real concern, which is not the overt deployment of the records in the minority oppression suit but the covert use of the documents for an ulterior purpose, whether that is the ulterior purpose I have found in advancing Kiri Industries' interests in the minority oppression suit or other connected ulterior purposes, *eg*, to advance Kiri Industries' interests in other litigation brought in relation to the same shareholders' dispute or in negotiations to resolve those disputes without recourse to litigation.

195 Accordingly, I have dismissed the plaintiff's application with costs. The plaintiff shall pay to the company the costs of and incidental to this application, such costs fixed at $10,000 including disbursements. The plaintiff shall also pay one set of costs of and incidental to this application to the Longsheng Directors, with such costs fixed at $25,000 excluding disbursements. Such disbursements are to be taxed if not agreed, save only that the fees of the Longsheng Directors' expert witness shall not be recoverable. That expert gave evidence of the records which an auditor would review in performing an audit. While that evidence was no doubt accurate, it was of no assistance to me in ascertaining the scope of the phrase "accounting and other records" in s 199.

Vinodh Coomaraswamy

Judge

Dinesh Dhillon Singh, Lim Dao Kai, Ivan Lim, and Nigel Yeo (Allen & Gledhill LLP) for the plaintiff;
See Chern Yang and Teng Po Yew (Premier Law LLC) for the first defendant;
Nandakumar Ponniya Servai, Wong Tjen Wee, Lucas Lim, Liu Ze Ming and Daniel Ho (Wong & Leow LLC) for the second, third, and fourth defendants.
