IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 157

Suit 1240/1996

Between

ECRC Land Pte Ltd

… Plaintiff

And

Wuu Khek Chiang, George

… Defendant

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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ECRC Land Pte Ltd v Wuu Khek Chiang, George

[1998] SGHC 157

Suit 1240/1996
Judith Prakash J
09 May 1998

Judgment:

Cur Adv Vult

1. The defendant, Mr George Wuu, is a director of the plaintiff company. He is also a substantial shareholder, holding 49% of its issued share capital, with the remaining 51% being held in equal shares by two companies incorporated in Singapore, The Grande Leisure Management Pte Ltd ('Grande') and SAFE Enterprises Pte Ltd ('SAFE'). The plaintiff company claims that in breach of his duty to it, the defendant caused $1.5 million to be paid out of the company. It now seeks the return of that money. The defendant's position is that the claim is groundless since the payment was made bona fide in the interests of the plaintiffs and with knowledge of both Grande and SAFE.

Background

2. The defendant is the moving spirit of a company named East Coast Recreation Centre Pte Ltd ('ECRC'). ECRC was incorporated in 1979 and has an authorised and paid-up capital of $1.5 million. The defendant holds 60% of

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its issued capital and the remaining shares are held by his three brothers. In March 1980, the State granted ECRC a leasehold interest in two plots of land at 1000 East Coast Parkway (collectively the land). Each lease was for 15 years. ECRC developed the land by building on it various structures which together became known as the East Coast Recreation Centre ('the Centre'). Thereafter portions of the Centre were sub-let to various parties and it became a profitable and valuable asset for ECRC.

3. Sometime in 1993, the defendant was approached by one Lawrence Phang Kin Seng, who was then a director of one of the sub-tenants at the Centre. He indicated that if the State was willing to renew the leases for a further 15 years on their expiry on 17 March 1995, his company might be interested in investing with ECRC in the redevelopment of the land. The defendant found this an attractive proposal and subsequently the land was valued. As of 5 July 1993, its value was estimated at approximately $26.4 million.

4. Mr Phang then arranged for a meeting between himself (representing his then employer), representatives of SAFE and Golden Communications Pte Ltd, and the defendant, to discuss matters relating to the redevelopment of the land. As a result of the ensuing negotiations, a memorandum of understanding was signed in December 1993 noting the intention of the four parties to form a joint venture to undertake the redevelopment of the land. The intention at that stage was that the new investors would buy into ECRC.

5. In April 1994, the Land Office, which acts for the State in such matters, informed ECRC that the existing leases would be renewed upon expiry for another 15 years subject to a revised annual rental based on the existing and new uses proposed for the Centre.

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6. Between December 1993 and July 1994, two of the intended investors withdrew. They were replaced by The Grande Group Ltd ('Grande Group'), the Hong Kong company which owns Grande. Grande Group was brought into the picture by SAFE's holding company, Singapore Technologies Industrial Corporation Ltd ('STIC'). In October 1994, Grande Group employed Mr Phang to take charge of the project as he had relevant operational experience in the entertainment business and was known to the defendant. Mr Phang reported to one Shum Sze Keong who in turn reported to Christopher Ho Wing-On, the chief executive officer of Grande Group.

7. On 14 October 1994, a supplemental memorandum of understanding was made between the defendant and the joint venture consortium of Grande Group and SAFE. The parties agreed to participate in a project to provide a family style recreation, leisure and entertainment centre to be known, tentatively, as 'The Entertainment Zone'. As reflected in the memorandum, the consortium was considering two alternative ways of participating in the project. One way was to acquire a 51% interest in ECRC. The other was to incorporate a new company to take over the leases of the land and in which the consortium would own a 51% interest whilst the defendant would own 49%.

8. Thereafter, negotiations continued. In the meetings, the defendant represented himself and ECRC; Mr Phang, one Eric Lian and, sometimes, Mr Shum, represented Grande Group; and one Aaron Tan and, sometimes, Mr Shih, the general manager of SAFE, represented SAFE. Some meetings were also attended by STIC's in-house lawyers, one Wee Choo Peng who was then the assistant general manager in charge of finance in SAFE and his colleague, one Harriet Kwok.

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9. By late 1994, the consortium had decided that it would be preferable to invest in a new and clean company which had been incorporated for the express purpose of being the joint venture vehicle rather than to buy into ECRC and, perhaps, have to deal with liabilities which had not surfaced during the negotiation period. The defendant agreed and the parties' tentative position at that time is reflected in a draft sale and purchase agreement dated 11 November 1994. That document showed that a proposed joint venture company to be called ECRC Land Pte Ltd would be incorporated and would have an authorised and paid-up capital of $1.5 million. The consortium would purchase 51% of its issued share capital from the defendant who was described as being the holder of 1,500,000 shares which had been issued and fully paid-up. It was envisaged that this new company would hold the leases of the land from the State.

10. The defendant proceeded to procure the incorporation of the plaintiff company using the name suggested in the draft document. On incorporation, however, the plaintiffs' authorised capital was put at $100,000 and it had an initial paid-up capital of $2. The company's first directors and shareholders (holding one share each) were the defendant and one of his brothers. These changes reflected a redrafted sale and purchase agreement originally prepared on 23 November 1994. In this document the plaintiff company was described as having an issued share capital of 100,000 shares of $1 each which were held by the defendant and it provided that the consortium was to purchase 51,000 of those shares for $4 million which was the same consideration had been mentioned in the earlier draft.

11. For present purposes, there is no need to recount all the various permutations of the financial and structural terms which the parties considered during the course of their negotiations. What the parties wanted to achieve was for the consortium to obtain an interest in a company which held 15 year leases to the

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land. As far as the financial terms are concerned, these were finalised by mid March 1995. What was decided was that the consortium would pay the defendant $5 million for the 51% interest in the plaintiff company which it was purchasing from him. In addition, there would be a consultancy agreement between the plaintiffs and ECRC whereby the plaintiffs would pay ECRC a consultancy fee of $500,000 a year for 15 years. The plaintiffs would also take over the $3 million overdraft which ECRC had maintained for the operation of its business.

12. By 13 March 1995, the draft sale and purchase agreement reflected a position whereby the consortium through its joint venture company called E-Zone Leisure Pte Ltd ('E-Zone') would purchase 51,000 out of 100,000 issued shares in the plaintiff company from the defendant for $5 million. As a condition precedent to completion, the purchaser was to be given proof that the Land Office agreed to the renewed 15 year leases being issued to the plaintiffs as lessees.

13. Shortly thereafter, however, E-Zone and the defendant entered into a sale and purchase agreement in respect of the plaintiffs' shares which reflected significantly different terms. This document which was signed on or around 16 or 17 March 1995 (the exact date is not clear because the document was never dated) stated that the plaintiffs currently had an authorised capital of $100,000 divided into 100,000 ordinary shares of $1 each and that this authorised and paid-up capital would be increased to $1.5 million. E-Zone agreed to purchase 51% of the shares in the plaintiff company from the defendant at a price of $5 million of which 10% was to be paid as a deposit on signing of the agreement and the balance was to be paid on completion. Among the conditions precedent to completion were the following:

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> (a) the purchaser had to receive satisfactory written proof that the Land Office had agreed to renew the leases to the land for a further 15 years from 17 March 1995 and that such renewed leases would be issued in the name of the plaintiff company; and
>
> (b) the purchaser had to receive satisfactory written proof that the plaintiffs' paid-up capital had been increased to $1.5 million.

On the same day as this agreement (which I shall call the March agreement) was signed, the defendant received his deposit of $500,000 for the shares.

14. The parties were serious about proceeding with the joint venture and, pursuant to their agreement, on 22 March 1995, Mr Phang was appointed a director of the plaintiff company. He was to take charge of the operations of the Centre and the preparations to further develop the land. On 1 April 1995, ECRC transferred all the operations of the Centre to the plaintiffs and from then on, the physical operations were run by Grande Group, mainly in the person of Mr Phang, while the financial operations were run by SAFE. Grande Group also took over responsibility for the books and records of the plaintiff company as well as the work of the company secretary.

15. In the meantime, on 12 March 1995, the defendant, using the letterhead of ECRC, had written to the Land Office informing the latter of the incorporation of the plaintiffs and stating that because certain shareholders of ECRC itself wanted to retire overseas, the plaintiffs had been incorporated to take over the leases of the land. The letter sought the approval in principle of the Land Office for the renewed leases to be issued in the name of the plaintiff company which it said had an authorised and paid-up capital of 100,000 shares of $1 each of which 99% were held by the defendant and the other 1% by his brother, Wuu Kek Ming.

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16. On 7 April 1995, the Land Office notified ECRC that it could not accede to the latter's request that the new leases be issued in the name of the plaintiffs as the plaintiffs were a different legal entity from ECRC. In his reply of the same day, the defendant referred to clause 1.e of the existing leases which allowed the leases to be assigned with the approval of the lessor on the basis that such approval was not to be unreasonably withheld. He stated that he was surprised by the Land Office's refusal 'to allow this assignment to our new company since there is no fundamental change in the company's business and objectives'. The defendant told the Land Office that the plaintiff company would have the same paid-up capital as ECRC (ie $1.5 million) and was prepared to abide by the conditions imposed by the new leases. He asked the Land Office to re-consider its approach and allow ECRC to assign the land to the plaintiffs.

17. The defendant wrote to the Land Office again on 19 April referring to a telephone conversation of that morning. He apologised for what he described as 'the misunderstanding' and confirmed that ECRC's request was to be allowed to assign its leases to the plaintiffs. Here he was obviously resiling from the parties' original intention which had been to have the new leases issued directly in favour of the plaintiffs. The Land Office replied that day itself to state that it had in principle no objection to such an assignment on condition inter alia, that the current directors held the majority of the shares of the plaintiff company. By subsequent correspondence, it was clarified that the Land Office required the defendant himself to be the majority shareholder in the plaintiffs. This meant that Grande Group and SAFE could not hold their interests jointly through E-Zone. Their shares had to be split up and the final make up of the plaintiff company, as approved by the Land Office, was for the defendant to hold 49% of the plaintiffs' shares personally, whilst the 51% originally allotted to E-Zone

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was divided equally between SAFE and (on behalf of Grande Group) Grande (ie they were given 25.5% each).

18. On 21 April 1995, an extraordinary general meeting of the plaintiff company was held at which the authorised capital of the company was increased to $1.5 million divided into 1.5 million shares of $1 each by the creation of 1.4 million shares of $1 each. This was followed by an allotment of a further 1,499,998 shares to the defendant. On 24 April 1995, the defendant issued a cheque for $1,499,998 in favour of the plaintiffs as payment for these additional shares. The very same day, the plaintiff company issued a cheque for $1.5 million in favour of ECRC. This cheque was signed jointly by the defendant and Mr Phang as the authorised signatories of the plaintiffs. It is this payment to ECRC which the plaintiffs now question and which they have instituted this action to recover.

19. The parties continued discussions on the various documents that had to be signed to complete the joint venture. The defendant was becoming impatient for the matter to be concluded and, on 8 May 1995, SAFE made him an advance payment of $2,250,000 being half the amount due in respect of the sale of his shares in the plaintiff company. By 15 June 1995, the documents had been more or less finalised and although the lawyers were not enthusiastic about them being signed since formal approval for the renewal of the leases in favour of ECRC had not yet come from the State, the parties proceeded to execute most of the documents.

20. The defendant entered into a separate sale and purchase agreement with each of SAFE and Grande whereby he agreed to sell each of them 382,500 ordinary shares of $1 each in the plaintiff company for the sum of $2,250,000. For present purposes, it should be noted that in each of these sale and purchase agreements, the parties agreed to rescind the March agreement and the defendant agreed to

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meet certain conditions subsequent. Among these was his obligation to procure that ECRC entered into a deed of assignment in respect of the sale and assignment of the land to plaintiff company. It was provided that such assignment should be in the form of the draft deed of assignment and draft indenture of assignment which were annexed to each sale and purchase agreement. It should also be noted that recital 4 to each draft deed of assignment recited that the assignor (ie ECRC) had agreed to sell and assign to the assignee (ie the plaintiffs) all their rights, benefits and advantages under the leases and all their estate, title and interest in the land for the sum of $1.5 million.

21. Among the other documents concluded were a shareholders' agreement between the defendant, SAFE and Grande, and a consultancy service agreement between the plaintiffs and ECRC. Under this last agreement, the plaintiffs agreed to pay ECRC the sum of $500,000 a year as an annual consultancy fee for a period of 15 years in consideration of ECRC acting as a consultant to negotiate and co-ordinate with the Land Office and other relevant authorities and to give advice on matters relevant to the leases of the land. After these documents were signed, the plaintiffs took over the $3 million overdraft previously operated by ECRC. This take-over which all parties agreed to was not mentioned as a term of the joint venture in any of the documents signed.

22. On 17 August 1995, the State gave its written approval to the renewal of the leases in favour of ECRC. In October 1995, ECRC executed the deed of assignment and indenture of assignment in respect of the leases and the land in favour of the plaintiffs. These documents were each dated 18 October and whilst they were substantially in the form of the drafts annexed to the sale and purchase agreements, in each deed of assignment, the previous recital 4 had been removed and no mention was made of a sum of $1.5 million being the consideration for the assignment. Instead, it was recited that under the sale and

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purchase agreements, the defendant had agreed to procure the assignment of the leases of the land by ECRC to the plaintiffs in consideration of the sale of part of the defendant's shares in the plaintiffs to SAFE and Grande at the prices and upon the terms stated in such sale and purchase agreements.

The proceedings

23. Problems soon arose in the operation of the joint venture. Among them was the accounting treatment of the $1.5 million payment by the plaintiffs to ECRC. The management of Grande Group which eventually took over control of the accounts of the plaintiffs did not understand the basis on which the payment had been made and Mr Ho instructed the plaintiffs' new financial controller to treat that sum as a receivable from the defendant. The defendant did not accept this and subsequently, in an effort to recover the money, the plaintiffs stopped payment of the consultancy fee due to ECRC. This resulted in two High Court actions.

24. First, on 21 March 1996, ECRC commenced an action against the plaintiffs in Suit 546 of 1996 whereby it claimed the sum of $548,333.34 being the instalments of the consultancy fee due but not paid during the months from October 1995 to February 1996. Initially, the plaintiffs' answer to this suit did not mention the $1.5 million payment but instead relied on other matters in dispute between the parties. It was only on 23 May 1996 that they amended their defence and counterclaim to justify the non-payment by the allegation, inter alia, that the sum of $1.5 million had been paid to ECRC without just cause and consideration and in breach of the defendant's fiduciary duties to the plaintiffs. The plaintiffs counterclaimed for the return of this sum from ECRC in Suit 546 of 1996. The plaintiffs then started their own action, the present suit, against the

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defendant, for the return of the same amount, on 7 July 1996. By October 1996, all issues between the plaintiffs and the defendant and between ECRC and the plaintiffs had been adjudicated or settled apart from the issue of the $1.5 million. An order was subsequently made that both suits should be tried at the same time. When this action commenced, the parties had agreed that the evidence admitted in this suit should be deemed to be admitted also in Suit 546 of 1996 and that the determination of the issues in this suit should determine the outcome of the other action as well.

The pleadings

25. The statement of claim herein contains three paragraphs dealing with the disputed payment of $1.5 million. First, in paragraph 30 it is recited that by a cheque dated 24 April 1995 drawn on the plaintiffs' bank, the defendant caused to be paid out of the plaintiffs' account a sum of $1.5 million to ECRC. Paragraph 31 goes on to state that this sum was paid to ECRC 'without just cause or consideration and was made in breach of the defendant's fiduciary duty to the plaintiffs'. Finally, in paragraph 32, the plaintiffs plead that they have been wrongfully deprived of the said sum and the defendant is liable to account for the wrongful payment.

26. The defendant first filed his defence on 5 August 1996. In relation to paragraphs 31 to 33 of the statement of claim, paragraph 33 of the defence recited that it was an agreement between the plaintiffs and ECRC that in consideration of the assignment by ECRC to the plaintiffs of the leases for the land, the plaintiffs were to pay ECRC $1.5 million and in accordance with this agreement that sum was paid on 24 April 1995. The paragraph further stated that the payment had been made with the knowledge of Grande and SAFE and,

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by paragraph 34, the defendant asserted that the payment had not been made in breach of any of his fiduciary duties to the plaintiffs.

27. The defendant amended his defence a year later, in August 1997. He then asserted that the sum of $1.5 million had been duly paid out of the plaintiffs to ECRC with just cause and consideration and without breach of any fiduciary duty on his part and set out the circumstances under which the payment was made in 16 new paragraphs covering some ten pages. To summarise the defendant's position, he asserted that by an oral agreement made sometime in February or March 1995 between the plaintiffs and ECRC, it was agreed that the plaintiffs would pay ECRC the sum of $1.5 million 'for the assignment of the leaserights in the land. The leaserights included the right to be issued the renewed or new state leases in the land in due course'.

28. Particulars of the oral agreement were given and in these the defendant stated that the agreement had been made after the defendant and two future shareholders of the plaintiffs had agreed in February/March 1995 on the assignment of the leaserights to the plaintiffs as part of their joint venture arrangements. The particulars further stated that the parts of the joint venture arrangements relevant to the oral agreement to assign the leaserights for $1.5 million were as follows:

> 'a. the Defendant was to subscribe for an additional 1,499,998 shares in the Plaintiffs at $1 each, thereby increasing the Plaintiffs' paid-up capital from $2 to $1.5 million;
>
> b. the Defendant would arrange for ECRC Pte Ltd to assign the leaserights in the Land to the Plaintiffs for a consideration of $1.5 million. The Plaintiffs would use their newly increased capital and cash holdings of $1.5 million to pay ECRC Pte Ltd the consideration for the leaserights;
>
> c. the appropriate directors' resolution for the Plaintiffs would be passed accordingly …

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> f. ECRC Pte Ltd and the Defendant would vigorously seek Land Office's approval to assign the Leases to the Plaintiffs;
>
> g. the Defendant would remain in the Plaintiff Company as the single majority shareholder (with 49%). However, Grande and SAFE would still be the ones running the show with their 51% control of the Plaintiffs.'

29. As the pleadings stood when the trial commenced before me on 2 March 1998, therefore, the main defence which the defendant had to the plaintiffs' claim was that his actions had been proper because the payment out had been made for good consideration (ie for the assignment of the leaserights to the land) pursuant to an oral agreement between the plaintiffs and ECRC.

30. In their opening, the plaintiffs raised it as a preliminary issue whether parol evidence of the alleged oral agreement was admissible. Founding themselves on ss 93 and 94 of the Evidence Act (Cap 97), the plaintiffs contended that only the joint venture documents (comprising inter alia the two sale and purchase agreements and the shareholders' agreement all dated 15 June 1995) and the subsequent deed of assignment dated 18 October 1995 could be relied on as evidence for the terms of the joint venture and the assignment. The alleged oral agreement was inadmissible unless it fell within one of the provisos to s 94. Counsel asserted that the alleged oral agreement sought to introduce a new and substantial term relating to the increase in the paid-up capital of the plaintiffs and the immediate disposal of this money which was a matter within the scope of the joint venture documents and the deed of assignment. He submitted that the oral agreement was inconsistent with the executed documents and parol evidence should not be allowed to vary those documents.

31. In response, the defendant's submission was that the case fell within one of the exceptions to the rule in that the terms of the agreement between the parties had not been fully contained in the executed documents. Since the documents

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did not evidence the complete contract, extrinsic evidence should be allowed in. He argued that he should not be shut out from putting forward his defence by the application of the parol evidence rule.

32. After hearing the submissions, I ruled that I would allow the evidence of the oral agreement to be adduced for the time being and would reserve my decision on whether it was in fact admissible until the end of the trial when I had had the opportunity to consider the factual circumstances as a whole. Two days later, the defendant applied to further amend his defence in order to put his case in what counsel called 'the correct perspective'. Counsel asserted that the tenor of the case remained the same and that some amendments were rearrangement of the existing pleading and were inserted to make matters clearer. I allowed the application.

33. The re-amended defence reflected a subtle change in the defendant's approach to the oral agreement. By the amended paragraph 39 it was recited that the oral agreement was made some time in February or March 1995 between the plaintiffs, ECRC, the defendant, SAFE and Grande and that this agreement provided that the plaintiffs would be structured in a certain way so as to ensure that the Land Office would approve the assignment of the renewed leases for the land to the plaintiffs.

34. The defendant also amended the particulars of the oral agreement which he had given earlier. In sub-para (3) of these particulars, it was pleaded that although the Land Office had already agreed in principle to renew the leases in favour of ECRC, there was no certainty that it would approve an assignment of the same to the plaintiffs. Sub-para (5) of the particulars, as amended, is particularly material and I will quote it in full indicating what was added by the latest amendments by putting these items in italics. It reads:

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'(5) The oral agreement *for the procurement of Land Office's approval to the assignment was therefore* as follows:

(a) The Defendant was to subscribe for an additional 1,499,998 shares in the Plaintiffs at $1 each, thereby increasing the Plaintiffs' paid-up capital from $2 to $1.5 million. *This meant first raising the authorised capital from $100,000 to $1.5 million.*

(b) The Defendant would pay in the whole $1,499,998 to increase the paid-up capital.

(c) It was also agreed that the Defendant and ECRC Pte Ltd's nett gain in this joint venture from the sale of the shares to SAFE and Grande would remain at $5 million. SAFE's and Grande's outlay in the purchase of the shares was to remain at $5 million.

(d) It was further agreed that the $1.5 million cash in the Plaintiffs from the subscribed shares be paid to ECRC Pte Ltd, before SAFE and Grande bought shares in the Plaintiffs.

(e) The Plaintiffs become [sic] *a company owning only the Lease in the Land, not the cash of $1.5 million as well.*

(f) For convenience at the material time, the payment out of $1.5 million to ECRC Pte Ltd would be labelled a "consideration" for the assignment of the Lease in the Land. However, the main point of the agreement was that by whatever means and mechanisms possible, the $1.5 million would be paid out to ECRC Pte Ltd and not remain in the Plaintiffs by the time SAFE and Grande bought into the Plaintiffs. (underlining mine)

(g) Thereafter, the Defendants and ECRC Pte Ltd were to vigorously seek and procure Land Office's approval to the assignment of the Lease to the Plaintiffs.

(h) The raising of the paid-up capital to $1.5 million and the payment out of the Plaintiffs of $1.5 million was subject to and upon Land Office's approval of the assignment of the Lease to the Plaintiffs.

(i)

The appropriate directors' resolution for the Plaintiffs *authorising the payment out of the $1.5 million from the Plaintiffs was to be passed before Lawrence Phang (Grande's representative) was appointed a director of the Plaintiffs and* prior to the handing over of the management of the Complex to SAFE and Grande on 1 April 1995.'

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35. The major consequence of the amendments is that the oral agreement has become an agreement between five parties instead of between two parties and the consideration for the payment has been altered from being for the assignment of the leaserights to being for the procurement by ECRC of Land Office's approval to the assignment. It is also significant that this pleading indicates that the main purpose of the oral agreement was to find some way of paying out to ECRC the $1.5 million that the defendant would pay up as capital of the plaintiffs.

Issues

36. The issues which I now have to determine are:

> (1) whether there was an oral agreement between the five parties and, if so, what the terms of that agreement were;
>
> (2) whether the terms of the oral agreement provided consideration for the payment of the $1.5 million;
>
> (3) whether oral evidence of the alleged agreement is admissible;
>
> (4) whether the defendant was in breach of his fiduciary duty as a director of the plaintiffs; and
>
> (5) whether, in all the circumstances, judgment in favour of the plaintiffs would be inequitable even though the defendant may have acted in breach of duty.

The issues relating to the oral agreement

37. Whether any oral agreement actually existed and if so what its terms were is a question of fact. To answer this question, the evidence has to be scrutinised. There is a great deal of evidence in this case: there were seven witnesses for the plaintiffs and six witnesses for the defence. Interestingly, four persons who had previously been involved in the negotiations on behalf of Grande Group and

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SAFE gave evidence for the defendant. These were Mr Phang, Mr Shih, Mr Tan and Mr Wee Choo Peng. Their testimony was intended to establish that all had been known and agreed among all the parties way before the actual payment was made and that the present claim had no foundation in either law or equity.

(1) The evidence: (a) for the plaintiffs

38. As stated earlier, a number of persons took part in the various negotiations which led to the joint venture. However, from the beginning of 1995 onwards, it appears that Mr Phang on behalf of Grande Group and Mr Tan on behalf of SAFE were the leading men interacting with the defendant on behalf of the consortium. Mr Phang usually reported to Mr Shum who was no longer involved full time in this matter due to his participation in another project and Mr Shum briefed his boss, Mr Ho. Sometimes Mr Phang briefed Mr Ho directly. On SAFE's part, Mr Tan reported to Mr Shih who himself took part in some of the negotiations. Although Mr Shih was the general manager of SAFE, he had to brief Mr Wong Kok Siew who was then the president of STIC and whose approval of the material terms of the joint venture was required.

39. The evidence of Mr Ho was that Mr Phang had the authority to represent Grande Group at the negotiations but that all material terms and, in particular, the consideration, had to be approved by him. He emphasised that he had so instructed Mr Phang and Mr Shum. Mr Ho stated that throughout the negotiations it was never mentioned to him that the entire capital of the plaintiffs would be taken out by the defendant or by ECRC. He asserted that he was not aware of the oral agreement as pleaded and had never agreed to the payment out which had been made to ECRC.

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40. Mr Wong Kok Siew's position was that of equal ignorance. He said that he only found out some time after 15 June 1995 that a payment of $1.5 million had been made to ECRC by the plaintiffs on the same day as the plaintiffs' capital had been increased. Mr Wong later learnt that the defendant and ECRC alleged that this payment of $1.5 million had been agreed to be made in consideration of the assignment of the leases. As he did not recollect an agreement to this effect, he asked SAFE's then management to check on the approval documentation and no such documentation could be found.

41. Mr Shum is currently a director of the plaintiffs having been appointed to this position on 15 June 1995. He joined Grande Group in July 1994 and was put in charge of its proposed investment in the land at East Coast Parkway. As such he was Grande Group's chief representative at the negotiations until the beginning of 1995 and, thereafter, although he was not present at many of the meetings, Mr Phang reported all developments to him and Mr Shum in turn reported to Mr Ho, the ultimate authority.

42. In his affidavit of evidence-in-chief, Mr Shum stated that some time in March 1995, he signed the March agreement on behalf of E-Zone. The scheme then was for E-Zone to purchase from the defendant 51% of the shares in the plaintiffs and the latter's issued and paid-up capital was to be increased to $1.5 million. At that time, negotiations were not complete. The defendant was constantly pressing for money before contractual documents were signed and continuously threatening to abort the joint venture. The parties agreed to initial the March agreement first, as a sign of good faith on the part of the consortium and secondly, because the defendant wanted money. It was understood between the parties that negotiations would continue.

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43. Negotiations continued and the final scheme was for Grande and SAFE to each purchase from the defendant 382,500 shares in the plaintiffs for a total of $5 million. In addition to this consideration for the purchase of the shares, the plaintiffs would pay ECRC a consultancy fee and take over the $3 million overdraft of ECRC which was secured by mortgage over the land. As a condition subsequent to the sale and purchase, the defendant would procure that ECRC assign the land to the plaintiffs when the State leases were renewed.

44. Mr Shum set out in detail in his affidavit the documents that were signed to bring the joint venture about. He went on in para 38 to refer to the defendant's defence (in the form that it was before the trial started) and to the allegation that it was agreed by the plaintiffs and ECRC, with the knowledge of Grande and SAFE that the plaintiffs would pay ECRC $1.5 million in consideration of the assignment of the lease. Mr Shum averred that the terms of the sale and purchase agreement and the shareholders' agreement did not reflect this alleged agreement and that not a single document in the voluminous documents and draft agreements which had been produced in the course of negotiations showed that the alleged agreement was concluded. Mr Shum also asserted that while Mr Phang had kept him informed of the progress and terms of the negotiations, he did not recall ever it being mentioned that $1.5 million would be paid by the plaintiffs to ECRC.

45. After the defendant amended his defence at the commencement of the trial, Mr Shum filed a further affidavit of evidence-in-chief in which he referred to the alleged oral agreement pleaded by the defendant in para 39 of the re-amended defence. Mr Shum averred that he had never heard of the alleged oral agreement until then.

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46. One other point about Mr Shum's evidence-in-chief should be noted and that is his reference in his first affidavit to the fact that after full discovery there still appeared to be no contemporaneous document supporting or authorising the payment of $1.5 million to ECRC. Mr Shum went on to admit that there had been an unsigned payment voucher of the plaintiffs for the sum of $1.5 million in favour of ECRC. He stated that in about September 1995, the plaintiffs' financial controller, one Ms Magdalene Yong, informed him that this payment voucher had not been authorised. At that time, he had assumed that everything was above board and he signed the payment voucher without making enquiries. He was then unaware of the problem relating to the $1.5 million payment. Mr Shum went on to say that this payment voucher had been misplaced after it was removed from the file to be produced at a meeting of the board of directors of the plaintiffs on 8 May 1996. Mr Shum asserted that the plaintiffs had commenced action against the defendant and ECRC because the $1.5 million payment was highly suspicious and the defendant had failed to provide a satisfactory explanation for it when questioned at the aforesaid directors' meeting.

47. In cross-examination, Mr Shum stated that the issued and paid-up capital of the plaintiffs was increased to $1.5 million because Grande and SAFE would have found it difficult at the time to pay $2.5 million each for shares in a $2 company as this would have meant a very high share premium. He did not recall exactly who suggested the figure of $1.5 million but believed that SAFE had done so and could not explain why $1.5 million had been chosen rather than any other figure. He was asked whether the concern that the Land Office might not approve of the plaintiffs becoming the lessees of the land if the latter remained a company with a paid-up capital of only $2 was the reason for the increase. His reply was that it could have been a reason but that he was not aware of that

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reason at that time. He also stated that he was not aware that one of the reasons for the increase was to use the paid-up capital as consideration for the acquisition of the leases. As far as he was concerned, there was no specific consideration for that acquisition.

48. Under cross-examination, Mr Shum also confirmed that by the time the March agreement was signed, the final financial terms of the joint venture had been agreed. He described these as being the $5 million payment for the shares, the $500,000 annual consultancy fee for 15 years and the assumption of the $3 million overdraft. It appeared from financial projections which Mr Shum produced that in fact the $3 million overdraft had been agreed to as early as 7 March 1995 and at that time, and even subsequently, the Grande Group had not prepared any projections on the basis that the plaintiffs would have available cash of $1.5 million from their paid-up capital with which to carry on their business and the development of the land.

49. Mr Shum was extensively cross-examined on the circumstances in which he signed the payment voucher for the $1.5 million payment. He stated that he did not know whether in April 1995 he had been allowed to sign payment vouchers for the plaintiffs since at that time he was not yet a director of the company. He agreed that there had been no written authority at all in regard to the approving powers of any of the persons who signed the vouchers (being Mr Phang, Mr Tan and Mr Lian) and that he had been the person who was overall in charge of the project but reasserted that he had no authority to sign vouchers for the plaintiffs before 15 June 1995. He then denied the suggestion that he had signed any such vouchers during the month of April.

50. Under questioning, Mr Shum elaborated on the circumstances in which he had signed the voucher in question. He said that Ms Yong had come to his room

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some time in early September 1995 with a whole stack of documents which required his signature and covered everything from stationery requisitions to payment vouchers. She asked him to sign several payment vouchers. One of them was for $1.5 million. He signed that document erroneously thinking that all was in order. He did not recall exactly what was stated on the voucher but recalled that it was for $1.5 million in favour of the defendant. He was asked whether he was sure that the voucher said payment to George Wuu and not to ECRC and his replay was that he recalled only seeing the defendant's name on it and the sum of $1.5 million. It was put to Mr Shum that he would not have signed it unless he was sure that it was all right to do so in view of the amount involved. His answer was that he had signed the voucher erroneously. It was suggested that he signed it because he knew it was a proper payment. His reply was he signed it erroneously. In reply to a question from me, he said that he did not ask Ms Yong what the voucher was for. He explained this omission by reference to the circumstances being that she had brought in a pile of documents for him to sign and not just one voucher so he had thought nothing of the matter. He was then asked whether he had noticed that the amount stated in the voucher was $1.5 million and his reply was yes but that he believed that that amount had been paid out much earlier. I then asked him why he believed that to be so and he replied that he had been through the bank accounts. Immediately thereafter he said that he had made an error and that at that time he did not know that the amount had been paid out.

51. Under further questioning, Mr Shum agreed that from the time Ms Yong had joined the plaintiff company, she had been making investigations in order to put up a report in relation to the $1.5 million payment and that this issue would have been very much on her mind from that time. It was therefore put to him that she would not have asked him to sign the voucher for $1.5 million

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when, as she said later in her report on the matter, the matter had not been resolved. Mr Shum's reply was that he thought that when Ms Yong had come into his office, all that had been in his mind was to regularise as many documents as possible. He was asked how by signing the voucher he had regularised the position and his reply was that to him it was just putting his signature on another payment voucher. The question was repeated and he then said that he had been referring to regularising the paperwork in the process. He then went on to say that he had been thinking about his earlier testimony and he thought that he had erroneously stated that he did not know about the $1.5 million being paid out when he signed the voucher. He corrected himself to say that he knew when the vouchers were brought to him for signature that money had already been paid out on them and that he was signing after the fact. He was immediately asked how he knew that the $1.5 million had been paid out and his reply was that Ms Yong had told him that all these items 'had already been actioned and required someone to sign them'. In reply to a question, Mr Shum explained that he did not ask Mr Phang about the payment out since all the joint venture documents had been signed and there was no reason for him to suspect that there was anything wrong. He said that it did not occur to him to enquire why such a large sum of money had been paid out.

52. The witness was shown a stack of payment vouchers which had been prepared for the plaintiffs for the period 1 April to 31 July 1995. The vouchers were numbered sequentially from voucher 0100 dated 5 April 1995 up to 0181 dated 31 July 1995. Only one voucher was missing from the stack and that was voucher 0110. It was put to Mr Shum that that voucher was the one that related to the $1.5 million payment to ECRC and, after being shown various documents, he admitted that probably this was the voucher in question. Mr Shum then denied counsel's suggestion that the voucher for that payment had been brought

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to him in his office by Mr Phang on or around 24 April 1995 for his signature and that he duly signed it. It was also put that Mr Tan was present when he signed it. Mr Shum denied this and reasserted that he signed the voucher in the presence of Ms Yong some time in September 1995.

(b) for the defendant

53. The defendant's first witness was Mr Phang. At the time he testified, he was no longer an employee of Grande Group having left that company in February 1996. He was, however, somewhat chary of giving evidence on behalf of the defendant and had to be subpoenaed. He did not make an affidavit of evidence-in-chief. Instead, a statement which he had made to the defendant's solicitors in June 1997 was adopted by him as his evidence-in-chief.

54. Mr Phang affirmed that his purpose in making the statement was 'to clarify the facts' relating to the $1.5 million payment and 'to help all parties in resolving any misunderstanding'. He went on to give an account of how the joint venture came about and said that in the course of negotiations, the parties to the joint venture finally decided to incorporate a new company, the plaintiffs, in which SAFE and Grande would acquire a 51% shareholding. He then stated that the leaserights in the land would ultimately be assigned to the plaintiffs from ECRC and subsequently managed and run by SAFE. The assignment of these leaserights was subject to Land Office approval and there was concern that this approval might not be given.

55. Mr Phang went on that therefore, to support the application, it was agreed between Grande, SAFE and the defendant that:

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> '(a) [the plaintiffs] should have the same paid-up capital as the existing lessee, ECRC, which was $1,500,000. This would address any concern the Land Office might have about granting the assignment of the Leases to a $2.00 company.
>
> (b) the increase in the number of shares from 2 to 1,500,000 would also make it more expedient to split the shareholding in [the plaintiffs] into the 3 parts of 49% (735,000 shares), 25.5% (382,500 shares for a consideration of $2.5 million from Grande) and 25.5% (382,500 shares for a consideration of $2.5 million from SAFE) respectively. The aim was to achieve ultimately, a position whereby Grande and SAFE together would hold the majority shareholding in the plaintiffs.
>
> (c) the increase in paid-up capital would also address the concern raised by SAFE that the price paid for the shares in [the plaintiffs] should not reflect a high premium, which would have been the case if [the plaintiffs] remained as a $2.00 company, its original position.
>
> (d) finally, the monies paid by [the defendant] to [the plaintiffs] to increase the paid-up capital would be used to pay ECRC its consideration for the assignment of its leaserights in the land to [the plaintiffs]. This consideration was agreed by all parties to be $1.5 million. This increase in paid-up capital would facilitate the assignment of leaserights as it would enable [the plaintiffs] to have the funds to pay ECRC its consideration, without SAFE and Grande having to expend anything more than their $5 million.'

56. Mr Phang continued that SAFE (through Mr Tan, Mr Wee and Mr Shih) and Grande (through himself and Mr Lian) agreed to the above and all agreed and knew that the $1.5 million was not meant to remain in the plaintiffs as cash in the accounts or for operating capital but to facilitate the above matters. He also explained that Grande and SAFE wanted their representative appointed as a director of the plaintiffs prior to the handing over of the management of the Centre to the consortium on 1 April so that they could run the plaintiffs and the Centre. However, as a pre-condition to his becoming a director of the plaintiffs, in order to commit ECRC to assigning the leaserights to the plaintiffs, Mr Phang informed the defendant that the plaintiffs pass a directors' resolution to reflect the assignment of the leaserights from ECRC. This was duly done. He then

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identified a resolution of the plaintiffs dated 20 March 1995 which reads as follows:

> 'RESOLVED THAT in consideration of the assignment of the lease of 1000 East Coast Parkway by East Coast Recreation Pte Ltd to the company for the second 15 years, the company pays to East Coast Recreation Pte Ltd a sum of Singapore Dollars One million five hundred thousand only (S$1,500,000.00).'

The resolution was a circular resolution and it was signed by the defendant and his brother, Mr Wuu Kek Ming, who were then the only directors of the plaintiff company.

57. Mr Phang went on to talk about his appointment as a director of the plaintiffs on 22 March 1995 and the take over of the Centre and of the plaintiffs' management. He said that after this had been done satisfactorily, the parties carried out the agreement described in para 54 above. First, the defendant subscribed for additional shares in the plaintiffs and paid-up the additional capital. The documentation for the increase and paid-up capital for the new 1,499,998 shares was carried out by Grande personnel. Secondly, the consideration of $1.5 million for the assignment of the leases from ECRC to the plaintiffs was paid to ECRC. Mr Phang confirmed that he countersigned the cheque for $1.5 million in favour of ECRC.

58. Mr Phang then went on to assert that he briefed Mr Shum on the above matters and that Mr Shum approved the payment of $1.5 million to ECRC in accordance with the parties' agreement. Mr Phang handed the payment voucher approving this payment to Mr Shum at Grande Group's office. He signed the voucher in the presence of Mr Tan and Mr Phang himself. Mr Tan and Mr Shih of SAFE both knew that the said payment of $1.5 million had been made.

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59. Towards the end of his statement, Mr Phang described the execution of the joint venture documents on 15 June 1995. The sale and purchase agreement between the defendant and Grande was signed by Mr Phang on behalf of Grande. Among the annexures to this document were the deed of assignment and the indenture of assignment in relation to the leases of the land. Mr Phang stated specifically that he did not sign these latter two documents but instead initialled each page of them to show his agreement to the terms therein, because on that day official approval from the Land Office for the assignment of the leaserights in the land had not been given yet. Mr Phang went on to point out that in the deed of assignment which he initialled, it was clearly stated that the leaserights in the land were being assigned to the plaintiffs from ECRC for a consideration of $1.5 million as per the resolution passed previously and as per the payment already made on 24 April 1995.

60. At the start of his court testimony, Mr Phang gave further evidence-in-chief to supplement his statement. This evidence was that STIC through Mr Wee and Mr Tan at a meeting wanted the defendant to increase the paid-up capital of the plaintiffs to $1.5 million. After a number of meetings, they were able to persuade the defendant to agree by themselves ‘agreeing with a mechanism to pay that same amount to him or to a subsidiary company’. Elaborating on that mechanism he said ‘it was quite simple really. George Wuu was to pay $1.5 million into the plaintiff company and the plaintiffs would pay that same amount either to George or to ECRC. At that point I saw an opportunity to correct a weakness in the deal thus far ... By committing and by paying this $1.5 million to ECRC we essentially bound ECRC, who at that point held the lease, to the deal. My fear before then was that if George defaulted personally, Grande and SAFE would have paid good money for a shell company ... So the mechanism was then done such that the $1.5 million was paid out to ECRC to do all it could

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to procure the transfer of the land to the plaintiffs.' I then asked him why he had not documented all this and his reply was that 'to some extent, this was important but it was not the main event. It was to facilitate the main event which was the purchase of shares'.

61. Mr Phang stated that the terms of the joint venture had been agreed before the mechanism was agreed on. The whole deal was based on the land being transferred and the consideration for the transfer was the payment of $5 million cash for the shares, the assumption of the existing overdraft and the payment of the consultancy fee annually for 15 years. He said that the mechanism was agreed on before the signing of the March agreement.

62. Mr Phang elaborated on the circumstances which led to the signing of the cheque. Around 18-20 April the defendant had showed him a letter from the Land Office giving the in-principle approval to the assignment of the lease. He then told the defendant that the latter now had to keep to his side of the bargain to increase the paid-up capital of the plaintiffs. The defendant did this as requested and at the same time paid out the $1.5 million to ECRC via a cheque drawn on the plaintiffs' bank account. The defendant signed this cheque and it was then sent to Mr Phang in Grande's office for him to add his signature. The payment voucher was attached and Mr Phang took the payment voucher to Mr Shum for him to approve the transaction. Mr Phang agreed that he could have signed the payment voucher himself but said that he did not want to. He wanted another person to be jointly involved and as Mr Shum was the supervisor, he was the most logical person to refer the matter to. He stated that Mr Tan was with him at the time and added that he explained to Mr Shum what the payment voucher was for and the mechanism before Mr Shum signed the voucher. Later in the cross-examination, it was put to him that as Mr Shum was not a director of the plaintiffs in April, he had no authority then to approve the payment. Mr

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Phang disagreed on the basis that Mr Shum's authority was in representing the principal driver of the joint venture, ie Mr Ho, and as far as he was concerned, it was important that Mr Shum be aware of the matter so that he could in turn relate it to Mr Ho.

63. Under cross-examination, Mr Phang stated that on record the plaintiffs would, through the mechanism, have a paid-up capital of $1.5 million even though the money was not intended to remain in the plaintiffs. This was important because it would establish to the Land Office that the plaintiff company was a company of substance. He was later asked what was the reason for paying the money out on 24 April. His reply was that the main reason was to get the defendant to do the leg work and to run and get the rights to the land transferred to the plaintiffs. He added 'really there was a pay-out because we had asked for a pay-in first to create this $1.5 million'. He also agreed with the suggestion that how the mechanism worked was that the defendant was to pay in the money to the plaintiffs, the plaintiffs were to pay it out to ECRC and the parties would then leave it to the defendant as to how he would get the money back into his own hands.

64. At one point in the cross-examination, Mr Phang was agreed that it was his intention that the mechanism agreed upon be incorporated in the contractual documents. He was then taken through various documents and asked why the agreed mechanism had not been spelt out in the text of the sale and purchase agreement. His answer was that the mechanism as contemplated had no financial impact on the deal and was almost like a separate event. He added that because of this minimum impact, it never really took front stage as an item that the negotiating parties focused a lot of attention on. He admitted that he had not spoken to Mr Ho about the mechanism since he had told his supervisor, Mr Shum, about it.

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65. Mr Phang was also asked whether it was in his interest as a director of the plaintiffs to officially record why the $1.5 million had been paid out. His reply was that while it would have been in his interest to have such a record if there had been an impact on the company, in this case the payment out was a side agreement. He stated it was ‘something we had to create in order to have a $1.5 million company without anyone having to benefit or suffer from it’.

66. The witness was also questioned on his statement that he had required the plaintiffs’ resolution of 20 March to reflect the assignment. It was put to him that in the light of his evidence that he had wanted to tie down ECRC to transfer the land rights to the plaintiffs, his concern actually had been to obtain something which he could enforce against ECRC. Mr Phang agreed. He further agreed that to achieve that purpose he in fact needed a resolution from ECRC and that a resolution from the plaintiffs would not be of help.

67. In re-examination, Mr Phang gave a further explanation as to why the $1.5 million had been described as consideration for the assignment of the leaserights. He alleged that this was an idea put into the draft deed of assignment in the draft of 7 June 1995 by Grande’s solicitor, Ms Choi, who had taken over the matter after her colleague who prepared the original draft had gone on leave. He alleged that he had told Ms Choi that the $1.5 million was to be paid in and paid out again. He had briefed Ms Choi on the deal and her reaction was that the financial terms of $5 million, $3 million overdraft and the consultancy fees, did not reflect anything to do with the land. He then briefed her on the mechanism and based on that knowledge she came back with the draft document. In answer to a query he then said that it could have been Ms Choi’s idea that the $1.5 million which had been paid out should be shown as the purchase price for the assignment. He was then asked him how he had been intending to account for or explain the payment out before he saw Ms Choi’s

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draft. His answer was 'as far as structuring the company was concerned, we had to find a legitimate reason for the outflow and the reason was that $1.5 million was paid to ECRC for all the leg work and effort required to procure the land. The next question was whether it was a fee and Mr Phang's reply was that it was treated as such and that he did not know how to treat the item and 'was leaving it to the accountants to devise an appropriate terminology/term for that'.

68. Mr Aaron Tan Saik-Huat's evidence was also based on a statement made to the defendant's solicitors in June 1997. He too had to be subpoenaed to testify. At the beginning of his statement, Mr Tan said that he had been directly involved in the negotiations having been appointed to this task by Mr Shih. When Mr Shih was unable the attend the meetings, he briefed the latter on what had happened. As regards the oral agreement, he gave an account which was practically identical to that of Mr Phang. He stated expressly that the monies paid by the defendant to the plaintiffs to increase the paid-up capital would be used to pay ECRC the consideration for the assignment of the leaserights in the land.

69. When Mr Tan came to court he said, in addition, that he was the person who had first raised the requirement that the plaintiffs' capital be increased to $1.5 million. He said that he had done so after having a discussion with the management of SAFE. The reasons for the increase capital were, he explained, so that the plaintiffs would have the same paid-up capital as ECRC, there would not be too big a share premium for the consortium and they wanted to remove as many reasons as possible for the Land Office to turn down the request for the transfer of the leases to the plaintiffs. He went on to say that the whole deal rested on the condition that the leases be transferred to the plaintiffs. The consortium wanted to make sure that ECRC did this transfer and the $1.5 million was 'an incentive or motivation' for ECRC to do so. The increase in

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paid-up capital was first raised towards the end of 1994 or early 1995 and the agreement in respect of the $1.5 million was made in early March 1995.

70. Mr Tan also said in examination-in-chief that in early 1995 he met Mr Ho and Ms Ruby Lee, in-house counsel for Grande Group, at the Dome Caf in the Promenade and there explained to Mr Ho the main consideration for the joint venture. He also explained the mechanics on how they were planning to take over the fresh shell company which was to make sure that the leases were approved and transferred to the plaintiffs and that the defendant would raise the paid-up capital to $1.5 million and the parties would pay him $1.5 million for the transfer.

71. Mr Tan said something slightly different shortly thereafter. When asked what the payment of the $1.5 million to ECRC was for, his reply was that it was to make sure that the defendant and ECRC obtained the approval from the Land Office, and secondly, for ECRC to transfer that approval to the plaintiffs.

72. Some additional evidence was given in relation to the cheque for $1.5 million. Mr Tan stated that he wrote this cheque. At that stage, SAFE had seconded one of their staff to work as book-keeper for the plaintiffs. Their book-keeper kept the plaintiffs' cheque book. He was not a signatory to the plaintiffs' bank account and when he was asked why he wrote the cheque, his answer was that he 'guessed' he was the senior person from the SAFE side and it was probably Grande's suggestion to involve the senior people who were involved in the joint venture. He could not recall who had written out the payment voucher for the cheque but said that he had had the responsibility of making sure that the payment voucher had been signed before the payment was made. Regarding that signing, he stated that there was a meeting at Grande's office to discuss the joint venture. They were discussing the arrangements for the $1.5

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million at the meeting and then he together with Mr Phang and Mr Shum left the meeting and went to Mr Shum's office where Mr Shum signed the voucher.

73. In cross-examination, his evidence became 'I can't remember' even to straight forward questions regarding identifying the period of negotiation for the oral agreement by reference to letters and drafts; on his own memorandum to the defendant enclosing draft documents; on the permutations that were being discussed in relation to the draft sale and purchase agreements; on whether his initial intention was to get the leases renewed in the plaintiffs' name; and on the defendant's reaction to Mr Tan's requirement on the increase of the paid-up capital.

74. At the start of cross-examination on the second day, his evidence was that the $1.5 million arrangement was more a 'mechanism to facilitate the main deal'. In respect of the oral agreement, although he said that he 'would like to separate it because the $1.5 million was a secondary item' and not part of the $5 million deal, his evidence on the consideration was that it was for the defendant to get the approval from the Land Office and to get the leases transferred from ECRC to the plaintiffs. When asked how the second condition of transfer of the leases could be met, his answer was '[the defendant] had to ensure that ECRC transferred the land to the plaintiffs'. When asked again 'how', he replied 'Either through his lawyers or through his company secretary'.

75. After some wavering and an indication that up to 7 April 1995, the defendant would have preferred to get out of raising the plaintiffs' capital to $1.5 million if he could, on the second day of cross-examination, Mr Tan said that there was firm agreement before 17 March 1995 that the $1.5 million would be paid-up and subsequently paid out. When he was asked why neither he nor the defendant had sent a letter to confirm this payment out arrangement, his response was that

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the spirit of the deal was to get this done and it never crossed their minds that the matter would end up in the way that it had. Mr Tan agreed that at the time when he first put the idea of a $1.5 million paid-up capital to the defendant, he also told the defendant that the latter would have to be the one to make the payment. Mr Tan thought too that on the first occasion he told the defendant that although the defendant would have to pay it up, somehow or other he and Mr Phang would get the money paid back to the defendant. This was because he wanted to make sure that the defendant would be sufficiently motivated to meet the requirements of the transaction. He was asked whether he did not consider the already agreed financial terms to be sufficient motivation and Mr Tan's reply was that the defendant had told them at that stage that there was a competing bid. Mr Tan asserted that after considering all the permutations, the $1.5 million arrangement was probably the least attractive to the defendant.

76. Mr Shih Chih Chung made a statement to the defendant's solicitors in June 1997 which was very similar to the statements made by Mr Phang and Mr Tan. He stated that Mr Tan had told him about the proposed oral agreement and described the terms of that agreement in identical language to that used by Mr Tan. He confirmed that he had had no objection to the proposal and gave approval to Mr Tan to proceed. He also stated that Grande and SAFE had wanted an appropriate directors' resolution to be passed by the plaintiffs to reflect the assignment of the leaserights from ECRC to themselves. At the end of the statement, he pointed out that in the draft deed of assignment dated 15 June 1995 which he initialled, it was stated that the leaserights were being assigned for a consideration of $1.5 million.

77. In court, Mr Shih stated that the major reason for the increase in paid-up capital was the concern of SAFE and Grande that the deal could be frustrated if the Land Office did not approve the transfer of the leases from ECRC to the

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plaintiffs. The paid-up capital of the plaintiffs was grossly inadequate at that time and it needed to be increased to prevent the Land Office from rejecting the application for transfer on the grounds of inadequate paid-up capital. Mr Shih confirmed that SAFE had wanted the defendant to raise the capital and the latter had disagreed as this would dilute the $5 million which he was expecting to receive. Eventually, Mr Shih said 'we came up with an arrangement whereby the money put in by [the defendant] would be paid by the plaintiffs to ECRC to procure the transfer of the leases. In this way [the defendant] would still have his money ... [and] we would have locked in ECRC to effect the transfer when Land Office gave its approval'. He also said that the oral agreement had been finalised prior to the March agreement.

78. In cross-examination, it was put to Mr Shih that he had never informed Mr Wong of STIC about the oral agreement. His reply was that he might have briefed Mr Wong on the structure and that if he had not done so the only reason was because the payment in and out of the money was a separate agreement which did not have any financial impact on the deal which they had made with the defendant. He confirmed, however, that he had not told the other members of the board of SAFE of the oral agreement.

79. Later in cross-examination, he was asked why the defendant had not wanted, initially, to go along with the increase in the plaintiffs' paid-up capital. Mr Shih thought that the answer to this question was obvious - if the defendant had agreed it would have meant a dilution of the money which he was supposed to receive from the sale of the shares. It was then put to Mr Shih that it was because of that objection that the parties had entered into the oral agreement. Mr Shih answered 'yes'. It was next put that the purpose of the oral agreement was essentially to pay the money back to the defendant. Again Mr Shih answered 'yes'.

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80. Mr Wee Choo Peng was, at the material time, the assistant general manager in charge of finance in SAFE. When the trial started, he was employed by another company in the STIC group as the head of its internal audit department. He filed an affidavit of evidence-in-chief in which he stated that he had become involved in the joint venture in early 1995 when the parties had already been discussing the matter for some time and had come to certain agreements. Mr Wee attended some of the meetings and was briefed about the others by Mr Tan and Mr Phang.

81. Mr Wee confirmed that his understanding of the oral agreement was as set out in his memorandum dated 29 September 1995. This memorandum had been written because Mr Wee considered that the plaintiffs' financial controller, Ms Yong, had prepared accounts which indicated the $1.5 million payment out as being a loan to the defendant. The memorandum was intended to set the record straight. In it, Mr Wee wrote, inter alia,:

> '1.2 Background
>
> ECRC Pte Ltd was the legal lessee of the Land at ECRC site. However, it was agreed amongst the JV partners and GW [ie the defendant] that ECRC Land Pte Ltd will be incorporated with $1.5m share capital for the project. ECRC assigned the lease to ECRC Land Pte Ltd, and SAFE and Grande acquired 51% jointly of ECRC Land Pte Ltd. The 3 parties agreed that share capital for ECRC Land to be $1.5 m and GW need not pay for his share in ECRC Land as he has already given us the right to the title of the lease. GW accordingly incorporated the company with paid up capital of $1.5m and transferred the amount out of ECRC Land as deposit for the assignment of lease from ECRC to ECRC Land. At the time of acquisition of ECRC Land, the net worth of the company was $1.5m, representing the leasehold property. It was agreed between the 3 parties that SAFE and Grande pay GW $5m and take over $3m overdraft from ECRC for acquisition of share in ECRC Land Pte Ltd.'

82. Under cross-examination, Mr Wee confirmed that his understanding of the oral agreement was based on what he had been told by Mr Phang and Mr Tan.

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It was pointed out to him that in the defendant's affidavit, the defendant had asserted that Mr Wee, Mr Phang and Mr Tan had discussed the increase in the plaintiffs' paid-up capital and agreed that there were good reasons for the same. Mr Wee's response was that at the time he had been involved in some meetings only. He had joined the meeting on the increase of capital issue half way through it and could not recall whether he had made any contribution to the discussion. At the end of the meeting, Mr Tan, Mr Phang and the defendant himself had briefed Mr Wee on what had happened and told him to treat the $1.5 million paid-up capital as payment for the leaserights. He could not really recall the reasons for this.

83. Mr Wee also said that he could not recall who had originated the idea that the plaintiffs' paid-up capital should be $1.5 million. He confirmed, however, that it had not been his suggestion. He also denied having expressed concern that if the paid-up capital stayed at $2, SAFE would be paying a high premium for its shares. Neither had he been concerned that the Land Office might not agree to an assignment to a $2 company since he was not familiar with its regulations. In these matters his evidence was inconsistent with what other witnesses for the defendant asserted.

84. Mr Wee admitted that when he had written his memorandum of 29 September he had not read the signed joint venture documents. Neither had he read them by the time he made his affidavit. He agreed that generally as an internal auditor he would rely on documents to verify whether any particular payment was proper. In this case, however, he had relied on his understanding gained from the instructions given to him by the three men. When asked whether there had been any reason why he had written his memorandum in such strong language without first checking the contractual documents, Mr Wee's reply was that at that time Mr Phang was supposed to lead the whole project and basically

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he had taken Mr Phang's word for matters without feeling the need to double-check on him. Also at that time, Mr Wee had been reporting to Mr Shih and when he prepared the accounts there was no negative feedback from the latter. So Mr Wee had assumed that everything was in order.

85. Mr Wee stated that the first time he knew about the $1.5 million having been actually paid out was when he saw the plaintiffs' bank statement which was brought to his attention by his assistant, Ms Harriet Kwok. Mr Wee then checked with Mr Phang and Mr Tan and they confirmed that the payment was for the leaserights. Mr Wee affirmed that to him there was no difference between the words 'lease' and 'leaserights' and the latter term could have been used in his memorandum without changing the meaning of the paragraph that I have quoted. It is clear that Mr Wee was not one of the parties who made the oral agreement and that his understanding of it was second-hand. What is significant, however, is that he believed the agreement to be one of payment for a lease or land and not one of payment in return for the procurement of approval.

86. The defendant himself was the last witness on his own behalf. He filed an extremely long affidavit and I will recount only some of the main points. At the beginning of the affidavit, the defendant declared his stand to be that the monies had been properly paid out to ECRC for the assignment of the latter's leaserights in some State land and that the plaintiffs and all parties interested in it knew of and agreed to this payment.

87. The defendant asserted that while many terms were under serious negotiation, the following matters stood out as being understood and agreed upon among SAFE, Grande and himself by February or early March 1995:

> (a) the joint venture was subject to the State confirming its agreement to the renewal of the leases to ECRC;

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> (b) ECRC was to assign the new leases to the plaintiffs subject to the Land Office's approval;
>
> (c) based on the valuation of the leases at $26 million, the consortium would pay $5 million in cash for a 51% share in the plaintiffs;
>
> (d) ECRC would be paid an annual consultancy fee of $500,000 by the plaintiffs;
>
> (e) all existing staff in ECRC would be transferred to the plaintiffs; and
>
> (f) with effect from 1 April 1995, the Centre would be managed jointly by SAFE and Grande and the plaintiffs would have the authority to decide whether to renew the leases of existing tenants.

88. The defendant went on to say that, in addition to the above, once it was decided that the plaintiffs were to be assigned the leaserights in the land, it was understood and agreed to by SAFE and Grande that ECRC would have to be paid for this assignment because it would be giving up a lucrative income earning asset worth about $26 million. It was understood between Mr Shih, Mr Tan, Mr Phang and the defendant that there must be consideration from the plaintiffs to ECRC for the assignment. SAFE and Grande left it to the defendant to arrange things so that whilst there would be monetary consideration from the plaintiffs to ECRC, they themselves would only need to pay $5 million in cash for a 51% share in the plaintiffs.

89. The defendant said 'thus, the parties at the same time also crystallised the arrangement for the assignment of the leaserights'. This sentence was followed by the defendant's description of the agreed scheme of arrangement being:

> (1) that he would subscribe for an additional 1,499,998 shares in the plaintiffs at $1 each to achieve the increased paid-up capital;
>
> (2) he would arrange for ECRC to assign the leaserights in the land to the plaintiffs for a consideration of $1.5 million and the plaintiffs would use their newly increased capital to pay that consideration;

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> (3) the appropriate directors' resolution for the plaintiffs would be passed;
>
> (4) that he and ECRC would vigorously seek the approval of the Land Office to the assignment of the leases; and
>
> (5) he would remain as the single majority shareholder of the plaintiffs but the consortium would run the show.

It would be noted that the above language mirrored that found in the defence as first amended in August 1997.

90. In para 48 of his affidavit, the defendant repeated that SAFE and Grande knew full well that he would be paying an additional $1,499,998 into the plaintiffs to raise its paid-up capital and that this money would go towards buying the leaserights in the land from ECRC. He further asserted that the plaintiffs and the consortium did not expect the paid-up capital to be left in the plaintiff company as cash. If that were the case this requirement would have been reflected in the two sale and purchase agreements and in the shareholders' agreement and it would have meant that the defendant was supposed to receive a net amount of $3.5 million for the sale of his shares to the consortium. This was never the situation.

91. The defendant averred that on 20 March 1995 the directors of the plaintiff company passed a circular resolution to approve the agreed payment of $1.5 million from the plaintiffs to ECRC. This resolution was passed to meet a pre-condition imposed by Mr Phang.

92. On 19 April 1995, the Land Office gave its in-principle consent to the assignment of the leases to the plaintiffs provided that the current directors would still hold the majority of the shares in the plaintiffs. The defendant replied to the Land Office on the same day to agree to the condition and to confirm that he would be the single majority shareholder in the plaintiffs. Consequently, on

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21 April 1995 it was formally resolved that the authorised capital of the plaintiffs would be increased from $100,000 to $1.5 million and that the directors would have the authority to issue the new shares to whoever they chose. On 24 April the defendant issued a personal cheque for the additional capital in favour of the plaintiffs. On the same day he issued as joint signatory with Mr Phang, a cheque for $1.5 million from the plaintiffs in favour of ECRC. The payment voucher supporting the cheque was signed by Mr Shum. In the premises, the defendant asserted that the payment had been made right in the open with full knowledge and agreement from all parties. He said that from the point of view of the plaintiffs, $1.5 million was a more than fair sum for the leaserights in the land.

93. The defendant also made reference to the accounts of ECRC. He pointed out that an entry in these accounts on 30 April 1995 recorded that ECRC treated its leases as having already been assigned, thus resulting in $5 million in assets - the leaserights - 'flowing out' of ECRC. The plaintiffs were treated as a debtor owing ECRC $5 million. This was an accounting mechanism being the treatment for an extraordinary gain from the sale of the leases under which ECRC looked the defendant himself to pay the balance of $3.5 million, the plaintiffs having already paid $1.5 million. He further explained that the figure of $5 million given as the value of the outgoing leases was an appropriate figure in view of the fact that the consortium would be paying him $5 million in cash ultimately and he would be passing $3.5 million onto ECRC after receiving the balance payment due from the consortium.

94. During cross-examination, various inconsistencies in the pleadings and his several affidavits were pointed out to the defendant. He agreed that some of the previous versions, including paragraphs in an affidavit he made in June 1996, had been incorrect and asserted that the correct position was that the payment

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of the $1.5 million was not for an assignment of the leases but for ECRC to procure the Land Office's consent to that assignment.

95. On the second day on which he was in the witness box, the defendant gave a detailed account of the oral agreement. He said that there was one occasion when the consortium called him for a meeting at which Mr Tan raised concerns about the plaintiffs being a $2 company. The consortium wanted to adequately capitalise the company because they were concerned about the high share premium and the way in which the shares would be split. They suggested raising the capital to $1.5 million and the defendant looked back at them 'with a blank expression thinking they surely could not expect [him] to put $1.5 million into the company'. The defendant told them this and then walked away from the meeting. As he moved away, Mr Shum came into the conference room and spoke to the defendant stating that it did not matter to him (ie Mr Shum) whether it was a $2 or $1.5 million company. It was SAFE's decision to increase the paid-up capital to the latter figure and Mr Shum told the defendant to be patient and they would work out a solution whereby he would get his $5 million deal. Two days later there was another meeting. At this, the consortium brought up the issue of how to commit ECRC to transferring the leases to the plaintiffs. They were concerned that after they paid the defendant $5 million for the shares, the other shareholders in ECRC would drag their feet or even change their minds about the transfer of the leases to the plaintiffs. The defendant considered there was some merit in this concern although he was the person who made most of the major decisions in ECRC. Then Mr Phang came out with the suggestion that the defendant put the $1.5 million into the plaintiffs to raise the paid-up capital and after that that capital would be used to commit ECRC into making sure that they obtained Land Office's approval to the transfer of the leases. By this arrangement, all parties would be committed to (1) raising the paid-up capital

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and (2) making payment to ECRC to ensure that the leases for the second 15 years would be procured by ECRC from the Land Office.

96. The defendant further explained the background. The shareholders in ECRC had all along had full knowledge of the joint venture. The $5 million which he was expecting to receive from the consortium would actually be paid to ECRC for distribution to its shareholders. That meant that if the $1.5 million issue had not arisen, the $5 million which the defendant was to receive would be put into ECRC for the benefit of its shareholders. By the defendant taking out $1.5 million from his pocket and the plaintiffs then paying that money to ECRC, the result would be that ECRC would have received $1.5 million earlier. Then later on when the defendant received the $5 million from the consortium he would only have to pay the balance of $3.5 million to ECRC. So there was no financial impact on the parties except for the interest accruing on the $1.5 million which the defendant would have paid out. He did not see that cost as substantial as it would have accrued for only a couple of months.

97. The defendant agreed that by February 1995, it had already been agreed that he would pay $1.5 million which would be used subsequently to commit ECRC into making sure they obtained the necessary Land Office's approval. He was asked why he had not put all this into his previous affidavits and his explanation was that he had forgotten to put it in. He had thought that all this was understood because the other party who tried to sue him knew about it. When it was pointed out that the purpose of the affidavit was to tell the court what had happened, his response was that he himself had misunderstood the agreement that was signed. When he had negotiated and agreed on the terms with the consortium, Mr Phang and Mr Tan had understood everything and he trusted them. He left it to them to tell the lawyers to prepare the agreement and he thought that everything was put into the agreement. He did not tell his own lawyers about the oral agreement

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because they were not involved in it. He simply left it to Mr Phang to communicate with the lawyers. He was busy chasing the Land Office to procure the approval and left all the paperwork to Mr Phang.

Findings

98. As would have been noticeable from the brief account of the evidence which I have set out above, the defendant and his witnesses were unable to put together a coherent and consistent picture of what the oral agreement actually was. This is not surprising bearing in mind the defendant's own confusion over the issue as revealed by his pleadings, affidavits and evidence in court.

99. The first tack taken by the defendant, as shown by the first defence he filed, was that the oral agreement was an agreement between the plaintiffs and ECRC that in consideration of the assignment by ECRC to the plaintiffs of the leases, the plaintiffs were to pay $1.5 million and this payment was made with the knowledge of Grande and SAFE. The defendant elaborated this version in August 1997 and gave, in his amended defence, the following additional details of the agreement ie that it had been made in February or March 1995 after the defendant and the two future shareholders had agreed on the transaction as part of their joint venture arrangements.

100. Another version of the agreement was provided by the amendments made after the arguments on the parol evidence rule on the first day of the trial. In this version, there were five parties to the agreement and its purpose was, as stated in para 39 of the re-amended defence, to ensure that the Land Office would approve the assignment of the leases. Sub-para (5) of para 39 recast the purpose somewhat by stating that it was to procure Land Office approval to the

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assignment. This exegesis of the oral agreement ended by stating that 'for convenience' the payment of $1.5 million would be labelled a consideration for the assignment of the leases but that the main point of the agreement was that 'by whatever means and mechanisms possible' the money was to be paid out of the plaintiffs before the joint venture was effected.

101. Neither of the above versions of the oral agreement was completely supported by the defendant in his affidavits. In one made in June 1996 in Suit 526 of 1996, the defendant while at that time maintaining that the consideration was the assignment of the leases, stated that the agreement had been between himself and Mr Phang of Grande. In an affidavit he made two months later in August 1996, he stated that the $1.5 million was to be paid out to procure the leases in favour of the plaintiffs under the scheme of arrangement agreed to between Grande, SAFE and himself. He went on to say that the issue was part and parcel of the whole joint venture transaction and could not be excised and treated as a separate issue from the transfer of the leases. (This last statement was completely different from the approach taken in court.) The defendant also referred to the draft deed of assignment which all parties had initialled and concluded 'in fact the $1.5 million was part of the $5 million paid to me under the [joint venture] Agreements'. In his affidavit of evidence-in-chief the defendant's stand, to put it briefly, was that ECRC was paid the $1.5 million for an assignment of the leaserights in the land. The statements made by Mr Phang, Mr Tan and Mr Shih all repeated this mantra that the $1.5 million was in consideration of the assignment of the leaserights. These were statements made in 1997 and they, basically, supported the defence as presented in August 1997.

102. By the time the defendant and his witnesses gave testimony the defendant's stand as pleaded had changed radically and as a result he and his witnesses had quite a difficult time. The only exception was Mr Wee who maintained one

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stand throughout and that was a stand which conflicted with the amended pleading. The defendant himself when giving oral evidence denied on many occasions that the consideration was the assignment despite his affidavit of evidence-in-chief being littered with allegations to that effect. He asserted he had 'misunderstood'. He proclaimed that the oral agreement was a separate agreement and that the many previous references to the draft deed of assignment were wrong. Referring to the version that the agreement was only between Mr Phang and himself, his explanation was that when he said Mr Phang it would include Mr Tan because Mr Tan was present. In respect of his affidavit of 6 August 1996, he agreed that it was a different version because it said that the $1.5 million was part of the $5 million paid to him. He explained 'when I wrote this, I misunderstood or confused myself to say that the $1.5 million was part of the $5 million'.

103. As recounted earlier, in court the defendant gave a long speech about the oral agreement and this was in effect that the money would be used to pay ECRC to commit ECRC into making sure they would get the approval from the Land Office to transfer the leases to the plaintiffs. The parties were therefore 'committed' into raising the paid-up capital and the payment was 'to ensure that the leases for the second 15 years would be procured by ECRC from the Land Office'. As the plaintiffs submitted, getting approval, which had been pleaded in the re-amended defence as the purpose for the agreement to pay out, had become an agreement in itself. Yet although this agreement was made in February/March 1995, the defendant did not tell the Land Office about the increase in capital until after it had initially rejected ECRC's request on 7 April 1995.

104. The defendant's latest version given in court was not mentioned in any of the affidavits or statements. When asked about this omission, the defendant

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explained that it was not put in because he forgot to put it in. He did not think it had an impact and he thought it was understood because as a matter of fact, the other parties who tried to sue him knew about it and that was why he had not elaborated it in writing.

105. The credibility of Mr Phang's testimony was also affected by the change in pleadings. In his statement, his evidence was that the increased capital of $1.5 million would be paid out in consideration of the assignment of the leases. He too referred to his initialling of the draft deed of assignment as supporting that assertion. But when he came to court, the oral agreement became a mechanism whereby the defendant would put $1.5 million into the plaintiffs and the plaintiffs would pay the same amount out to either the defendant or to ECRC and this mechanism would correct a weakness in the deal in that it would bind ECRC to the deal. He explained the mechanism was effected such that the $1.5 million would be paid out to ECRC for ECRC to do all that it could to procure the transfer of the land to the plaintiffs.

106. In giving the above evidence, Mr Phang obviously forgot that the scheme which existed at the time the oral agreement was purportedly concluded was, as evidenced by the March agreement, for the Land Office's approval to the renewal of the leases directly in the name of the plaintiffs to be obtained as a condition precedent to the payment of the balance purchase money for the shares to the defendant. There was no question at that stage of procuring a transfer of the land to the plaintiffs. This only came about on 7 April 1995 when the Land Office refused to issue the leases directly to the plaintiffs because they were a different legal entity from ECRC and the defendant then had to resort to the terms in the leases which allowed the lessee to assign on the basis that the Land Office's approval for such assignment would not be unreasonably withheld. At the beginning there was no question of assignment because the

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scheme was either to buy into ECRC directly or procure new leases in favour of the new company.

107. Mr Phang's evidence under cross-examination suggested that instead of the payment being for ECRC to do all they could to procure the transfer of the land, the mechanism was simply to pay the money back to the defendant. He explained that although the main concern was to get the defendant to do the leg work and to run to get the right to the land into the hands of the plaintiffs, there really was a pay out because the consortium had asked for a pay in first to create the $1.5 million company. He agreed that how it worked was that the defendant would pay into the plaintiffs, the plaintiffs would pay out to ECRC and he would leave it to the defendant to get the money into his own hands by whatever means possible. He also stated that the oral agreement was something which had to be created in order that the plaintiffs could have a paid-up capital of $1.5 million without anyone having to benefit or suffer from it. As counsel for the plaintiffs pointed out, no benefit and no detriment mean no consideration.

108. It is also interesting that Mr Phang did not seem to have an idea of how the payment out could be justified. He asserted in court that the reason for the payment out was that ECRC had to be paid for the legwork and effort required to procure the land but said that he did not know how to treat this payment and was leaving it to the accountants to devise an appropriate terminology for it. Also if he is to be believed, the idea for justifying it as a payment for the assignment came from Ms Choi and until she pointed out that the financial terms did not reflect any payment for the land, it had not occurred to him that this could be a reason for the payment out. He then went on to say expressly that it had never been the idea of the parties that the $1.5 million was to be treated as the payment for the purchase of the land because to them the cost of the land was the $5 million for the shares, the $3 million overdraft and the $500,000 fee

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annually for 15 years. In so saying he was completely at odds with the statement he had made and adopted as his evidence-in-chief. His assertion was also contradicted by Mr Wee's testimony that Mr Phang had told him the payment was for the leaserights. Mr Phang's evidence was full of other inconsistencies.

109. Mr Tan's evidence on the payment of the $1.5 million started out in his statement as being in consideration of the assignment of the leases. In court he changed this to say it was an incentive or motivation to make sure that ECRC transferred the rights for the use of the land. He then modified that further to say that it was a consideration for the defendant to get the approval for the Land Office, and secondly, to get leases transferred from ECRC to the plaintiffs. He did not, however, have any clear idea of how the second condition could be met. This evidence of a second condition also contradicted what the defendant and Mr Phang had said since they made no mention of this requirement. In any event, the additional requirement could not furnish consideration for the payment since, as Mr Tan admitted, it had been the defendant's obligation from the beginning to procure the transfer.

110. Before the defence was amended at the beginning of the trial, one of the documents which the defendant was relying on to bolster his case was the 20 March 1995 resolution passed by the plaintiffs whereby it was resolved to pay ECRC $1.5 million in consideration of the assignment of the leases. There is grave doubt whether this resolution was actually passed on 20 March 1995. The evidence was that when the plaintiffs' books and records were handed over by the original company secretary to Grande Group in April 1995, this resolution did not appear in the plaintiffs' minute book. The original company secretary gave evidence and testified that although he usually prepared resolutions for ECRC and the plaintiffs, the defendant occasionally prepared his own resolutions and would thereafter send them to the company secretary for posting

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in the book. The resolution of 20 March was not received by him although the defendant's evidence was that he had asked his secretary to send it on in the normal manner and a further resolution passed on 22 March relating to the appointment of Mr Phang as a director was so passed on and duly received. The circumstances in which this 20 March resolution was discovered are suspicious and, on the balance of probabilities, it appears the 20 March resolution was produced well after that date for purposes of this case.

111. The presence of the resolution became somewhat of an embarrassment after the defence was amended since, the defendant having decided to put forward the explanation that the $1.5 million was paid to procure the approval of Land Office to the assignment, that stand was not supported by the resolution. The defendant maintained that Mr Phang had required the resolution to be passed before he came on board. Mr Phang agreed but he had to admit that if the intention had been to procure a commitment from ECRC as he said it was, such intention was not achieved by a resolution passed by the plaintiffs. It would have made much more sense for ECRC itself to resolve to provide a service to the plaintiffs in return for a $1.5 million fee.

112. I have come to the conclusion that there was no oral agreement as alleged by the defendant in any of his pleadings. All that there was was an internal agreement among the negotiating parties that once the plaintiffs' capital had been increased, the money could be moved out again so that in some manner it would get back to the defendant. Though he did not agree it was an internal arrangement only, Mr Phang admitted that the effect of the agreement was to move the money out of the plaintiffs and back to the defendant. Mr Tan said that he thought that the defendant could just increase the capital and thereafter make a payment out since the plaintiff company belonged to the defendant at the time.

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113. This conclusion is supported as well by the defendant's conduct after he received a copy of a financial report prepared by Ms Yong in September 1995. This report stated that the $1.5 million paid to the defendant was to be treated as a loan to him and not as a purchase for the payment of leaserights until the matter had been further resolved since according to the sale and purchase agreement the defendant had been obliged to assign the leases of the land to the plaintiffs when he was paid the $5 million for his shares in the plaintiff company. The defendant's only response to this was a letter of 9 October 1995 to the plaintiffs referring to a conversation with Ms Yong and asking her whether she would be amending the balance sheet which was incorrect. How the balance sheet was incorrect was not stated. Neither was an explanation given for the payment of $1.5 million. Nor was any mention made of an oral agreement in whatever form be it payment for an assignment of the leases, payment of $1.5 million as part of the $5 million for the shares or payment to commit ECRC to procuring the Land Office's approval. Instead, two days later the defendant signed the deed of assignment which had been amended so as to indicate that he had agreed to procure the assignment of the leases in consideration of the sale of his shares in the plaintiffs to SAFE and Grande. This formulation followed correspondence between the solicitors on whether the purchase price of $5 million for the shares should be stated as the consideration for the deed. I accept the plaintiffs' submission that if at that stage there had existed a firm oral agreement for proper consideration which was intended to be contractually binding, the defendant would have taken the opportunity in October 1995 to put it on record either in the deed of assignment itself or in a separate document since he was by then aware of a potential claim against him for $1.5 million.

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114. There is a difficulty in reconstructing what actually happened as most of the witnesses were not forthright and were, for one reason or another, offering explanations and justifications rather than straight forward factual evidence. I do not think that the evidence of any of the persons who was directly involved in the negotiations can be accepted completely at face value. What probably occurred is that for some reason SAFE was adamant about having a joint venture company which had a paid-up capital of $1.5 million. However, the consortium had already indicated what they were prepared to pay to participate in the joint venture and that did not include an extra $1.5 million. The defendant did not want to pay it up either. So most likely, the defendant, Mr Phang and Mr Tan working together came up with the scheme to have the money paid in and paid out again. They probably thought that since the plaintiff company belonged entirely to the defendant at that stage, there was nothing wrong in what they had proposed. This view would have been bolstered by the financial projections which Grande had prepared which made it clear that a capital sum of $1.5 million was not being taken into account as part of the projections for the running and development of the Centre. Considering therefore that the financial impact of the payment out on the joint venture would be minimal, they must have been of the view that there was no impediment at all to the proposal to pay up and pay out immediately. Mr Phang was the person who was the most enthusiastic about keeping the project on track (he had originated it and thereafter been hired by Grande Group specifically for it), and at that time he thought that the accountants would be able to find some terminology to justify the payment out. So the scheme went ahead.

115. I think that Mr Shum probably knew about this scheme as well. He must have signed the voucher in April or early May 1995 at Mr Phang's request. His explanation about signing it in error in September 1995 is unbelievable. I cannot

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accept that he would have signed a voucher for such a large amount without even asking what the payment was for and simply to regularise some paperwork. Either at the time he signed the voucher or before that, Mr Phang must have told him about the scheme and he must have acquiesced in it probably thinking that there was nothing wrong since the parties' main intention in acquiring the plaintiff company was to acquire the land rather than to acquire a cash rich company. I should say here though, that I do not accept the defendant's evidence that it was Mr Shum who drew him aside and assured him that a solution would be worked out whereby the defendant would receive his $5 million without any dilution. If this had actually happened, I am sure the defendant would have found room to say so in one of his numerous affidavits instead of bringing it up for the first time in open court.

116. The payment out must have been left to the defendant to handle as an internal matter and was not intended to create legal relations between SAFE, Grande, the plaintiffs, the defendant and ECRC as alleged. Mr Shih's evidence supports this inference in that when he was asked whether Mr Tan had the authority to commit SAFE to the oral agreement, his reply was that it was a separate arrangement and that the question of authority did not come about because the parties had agreed that it was the defendant who would have to do the payment up. That would also explain why Mr Shih did not brief Mr Wong or any other board member of SAFE about the scheme. It would also explain why lawyers were not told about it, why no letter was sent out by any of the parties recording the alleged oral agreement and why the Land Office was not told from the very beginning of the intention to increase the paid-up capital. It should be noted the defendant's omission to declare this to the Land Office in mid-March 1995 negatives the defence stand that the parties wanted to have a company with a paid-up capital of $1.5 million mainly to avoid problems in

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getting the Land Office's approval. There is thus grave doubt about one of the much touted aims of the oral agreement.

117. There is a further reason why I cannot accept the existence of the oral agreement. As originally pleaded, it ran headlong into the rule prohibiting the admission of oral evidence to vary an agreement which had been reduced to writing. The original oral agreement was between two parties, the plaintiffs and ECRC, and it was for the payment of $1.5 million by one to the other in consideration of an assignment of certain leases. There existed at that time two documents, a deed of assignment and an indenture of assignment, between the self same parties dealing with the same self same transaction ie the assignment of the self same parcel of land. Those documents would be presumed to contain the entire agreement between the plaintiffs and ECRC regarding the assignment and it would have been very difficult to adduce any further evidence to show that the consideration for the assignment was other than that reflected on the face of the documents. The court treats formal documents such as deeds and indentures very seriously as the final expression of the intention of the parties to them in accordance with the letter and spirit of s 93 of the Evidence Act. The underlying policy of the parol evidence rule is eloquently expressed by *Sarkar on Evidence* as follows:

> 'This is a matter both of principle and policy; of principle because such instruments are, in their nature and origin, entitled to a much higher of degree of credit than parol evidence; of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence.' (see *Sarkar on Evidence*, 4th Ed at p 1153)
>
> and
>
> 'Extrinsic parol evidence contradicting, varying, adding to or subtracting from the terms of a solemn written instrument is inadmissible chiefly because the parties having made a complete memorial of their agreement, it must be presumed

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> that they have put into writing all that they consider necessary to give full expression to their meaning and intention; and secondly, because the reception of oral testimony would create mischief and open the door to fraud' (see *Sarkar on Evidence*, 4th Ed at p 1194)

118. When the defendant realised, after the first day of trial, the formidable difficulty he faced in overcoming that legal principle, he amended his defence and sought to get around its application by making the agreement one which was between five parties. He knew that there was no written agreement between all five parties. The assignments were between ECRC and the plaintiffs whilst the sale and purchase agreements were between him and each of the purchasers. So, one big obstacle to the receipt of the evidence on the oral agreement was, he thought, thereby avoided. He did not think it through. If he had, he would have realised that it did not make sense for the plaintiffs to pay ECRC $1.5 million to procure the approval of the Land Office to the transfer of the leaserights when:

> (1) the original scenario was for the new leases to be issued directly to the plaintiffs;
>
> (2) in any event, in order to obtain his $5 million for the sale of his shares in the plaintiffs, he would have to ensure that the plaintiffs obtained the leases to the land whether directly or otherwise and this would have included obtaining any requisite approval from the Land Office; and
>
> (3) he was the person in control of ECRC and would be able to ensure that it did all that was necessary to procure the desired result especially since he was obliged (or so he said) to pay over to it the $5 million he was to receive from the consortium.

The new oral agreement bore all the signs of being manufactured and tailored simply to justify the payment.

119. My conclusion on the evidence overall is that there was no legal binding oral agreement between the plaintiffs and ECRC or between the plaintiffs, ECRC and ECRC's three shareholders relating to the payment of the $1.5

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million by plaintiffs to ECRC on 25 April 1995. It follows that there was no consideration for it. I have now to consider whether that payment was a breach of fiduciary duty on the part of the defendant and, even if it was, whether it would be inequitable to allow the plaintiffs to recover it from the defendant bearing in mind that at the time it was made, the present and prospective shareholders in the plaintiffs had agreed to it being effected.

The defendant's liability

120. As a director of the plaintiff company, the defendant owed it a duty to cause it to act only in its best interests. Therefore he could not cause it to pay money to any party unless there was due consideration for such payment or it was otherwise authorised under the company's memorandum and articles of association. The defendant did not seek to justify the payment to ECRC on any ground other than the existence of a legally binding contract between the parties which obliged the plaintiffs to make that payment. I have found that the oral agreement in the terms as pleaded by the defendant did not exist. This means that there was no legal reason for the plaintiffs to make the payment and the defendant acted in breach of duty in effecting it. In fact, the circumstances are such that the payment, as counsel for the plaintiffs submitted, amounted to an unauthorised reduction of the plaintiffs' capital.

121. As Woon and Hicks state in their book *The Companies Act of Singapore: An Annotation, 1994* (at para 2354) the general rule is that a company may not return any assets to its members while it is a going concern except in the form of dividends paid out of available profits or in accordance with the provisions in the Companies Act (Cap 50) ('the Act') for the reduction of capital. The authors go on to say:

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> 'The scheme of the Companies Act is that when a company is liquidated, the members are the last people to get the money back. The creditors are entitled to be paid in full first before the members get anything. If the company was allowed to return assets to its members the effect would be to give them a preference over the creditors in the event of a liquidation. Thus the members of a company are prohibited from getting back their capital in any way while the company is a going concern …
>
> … Once a company has received money in payment for its shares, it cannot refund that money without getting the court's leave to reduce capital.'

122. In this case, the defendant's witnesses agreed that the basic purpose of paying out the $1.5 million to ECRC was to return that money to the defendant. That was also the substance of his pleading, to pay it out by whatever means and mechanisms. The defendant confirmed in his affidavit that he was obliged to pay ECRC the $5 million that he would have received for the sale of his shares in the plaintiff company. He also stated that since the plaintiffs paid $1.5 million to ECRC on 25 April 1995, he would only have to pay that company the balance of $3.5 million on completion of the sale and purchase of the shares. Thus, on completion, he would be able to retain $1.5 million which was the same sum of money as he had paid up to the plaintiffs. The defendant frankly acknowledged this and indicated that although there would be some interest cost for him to bear between the date of payment out and the date when completion took place and he could recover the $1.5 million, that interest cost would not be substantial and he was prepared to bear it. Since the plaintiffs' payment to ECRC of $1.5 million operated to reduce the defendant's obligation to pay ECRC $5 million by an equivalent amount, it was in effect a payment to the defendant.

123. As Hicks and Woon make clear (see para 2376), a payment of money to a shareholder by a company operates as a reduction of capital if it can be shown

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that the company has divested itself of part of its undertaking in favour of such shareholder otherwise in the course of a bona fide transaction entered into as a matter of contract. In this case, there was no bona fide transaction justifying the payment of the company's funds to ECRC or, for that matter, to the defendant. Such a reduction of capital requires a special resolution under the company's articles and approval of the court under s 73 of the Act. If a director allows the company's capital to be returned to its members otherwise than in accordance with the Act, he commits a breach of duty and having misapplied the money of the company he is liable to pay it back. I can do no better than to quote para 2401 of Hicks and Woon:

> 'If the directors of a company allow capital to be reduced or assets to be returned to the members otherwise than in accordance with the provisions of the Act they commit a breach of duty. Having misapplied the money of the company, they can be made liable to replace it: *Re National Funds Assurance Co* (1878) 10 Ch D 118. This liability does not depend upon proof of fraud or bad faith. However, if a member receives the money of the company knowing that it is paid out of capital, he can be made to refund the money on the basis of a constructive trust: *Moxham v Grant* [1900] 1 QB 88.'

124. It therefore appears to me that as a matter of strict liability the defendant must repay the money which he caused the plaintiffs to pay ECRC even though when he made the payment he might, to give the most generous interpretation to his actions and those of Mr Phang and Mr Tan, have honestly believed that he was entitled to act as he did since there was no financial impact on the joint venture by the repayment as the consortium had not originally taken the capital of $1.5 million into account in its financial projections. What the financial impact on the plaintiff company would be the parties did not consider. The defendant should have taken legal advice as to whether the scheme which had been suggested was legally feasible. He should also have remembered that the plaintiff company was a separate legal entity from himself and that once it

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existed he owed it duties to act in its best interests which included ensuring that its capital was preserved and utilised for the benefit of its creditors and its business and was not paid out gratis.

125. The defendant has argued that it would be inequitable to make him pay back the money when the payment out was known to all the joint venture partners and was agreed to by them. While this does seem to have been the case on the evidence, the fact is that the plaintiffs themselves cannot be precluded from recovering money that is rightfully theirs because their shareholders or intended shareholders might have agreed to a questionable course of action. This is a claim by a company against its director. It is not a claim by SAFE and Grande qua shareholders of the plaintiffs against the defendant. In the latter situation, the defendant might have defences of waiver and estoppel. He can have no such defences against the plaintiffs. The duty that he owed them was a strict one and its breach cannot be excused by the circumstance that the other shareholders may, at the time, have approved of his proposed course of action. I should add that I do not believe that Mr Ho knew about the scheme or that he approved it. If he had, he would not have acted as he did from July 1995 onwards.

Conclusion

126. In the circumstances there will be judgment for the plaintiffs for the sum of $1,500,000 and costs. I will hear the parties on the issue of interest and on the appropriate orders to be made in Suit 546 of 1996.

JUDITH PRAKASH

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JUDGE

Judith Prakash J

Chia Ho Choon with Andrew Wong (Bih Li & Lee) for the plaintiffs
Tan Soo Kiang with Chiah Kok Khun and Wong Hur Wuin (Wee Swee Teow & Co) for the defendant

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