IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 373

OS No 714 of 1998

Between

GROUNDS OF DECISION

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Wuu Khek Chiang George v ECRC Land Pte Ltd

[1998] SGHC 373

OS No 714 of 1998
Warren Khoo L H J
16 November 1998

Judgment :

GROUNDS OF DECISION

1. This is an application for an order to compel the defendant company to produce for the inspection by the plaintiff, who is a director of the company, all the accounting and financial records of the company.

2. S 199 of the Companies Act provides as follows:

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

…….

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

On the face of it, a director of a company has an unfettered right to inspect the company's financial, accounting and other records. This application raises the question whether there is a limit to such a right.

The background

3. The background facts are admirably set out in Judith Prakash J's judgment in Suit 1240 of 1996 between the defendant company and the plaintiff Mr Wuu. They are, briefly, as follows. Mr Wuu and his three brothers were the owners of a company called East Coast Recreation Centre Pte Ltd ("ECRC"). ECRC had developed recreation facilities on land at East Coast Parkway on a 15-year lease from the state, known as the East Coast Park Recreation Centre. The centre was quite successful and became a valuable asset of ECRC. The lease was to expire in March 1995, but was expected to be renewed. Mr Wuu was interested in having investors come in to help redevelop the land. Through the introduction of Mr Lawrence Phang, a director of one of the sub-tenants at the centre, two corporate investors were found – the Grande group of Hong Kong and the SAFE group of Singapore. Negotiations took place between Mr Wuu and representatives of the two corporate investors with a view to forming a joint venture to undertake the redevelopment and subsequent operations. As to be expected, the negotiations on the modalities of the joint venture took time. While the negotiations were going on, the joint venture company was formed in December 1994 with a nominal paid-up capital of $2 and with Mr Wuu and his brother as the subscribers and initial directors. The joint venture company, ECRC Land, was to become the defendant in this case. It is not to be confused with ECRC, Mr Wuu's company.

4. It appears to have been the intention of the parties throughout that the investors together would hold 51% of the shares in the joint venture company.

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It was intended that the investors would buy these shares from Mr Wuu. This would involve raising the issued capital from the nominal $2 to a substantial amount. In March 1995, a share sale agreement was concluded between them and Mr Wuu. This contemplated that the paid-up capital of the company would be increased to $100,000 (100,000 shares) and that the investors would buy 51,000 of Mr Wuu' shares for $5m. However, another agreement a few days later provided for the paid up capital to be raised to $1.5m (1.5m shares) and for the purchase of 51% of these shares at the same price of $5m. How this change came about is not clear, but it is of no relevance to these proceedings. The 51% shares would be purchased in the name of the investors' own joint venture company, E-Zone Pte Ltd. I must mention that it was also contemplated and agreed in principle that the company and ECRC would enter into a consultancy agreement by which ECRC would receive $500,000 a year as consultancy fee.

5. The parties were serious about proceeding with the joint venture. On 22 March 1995, Mr Phang was appointed a director of the company. He was put in charge of the operations of the centre and preparatory work towards its redevlopment. On 1 April 1995, the company assumed all the operations of the centre. From then on, the physical operations were run by the Grande Group, mainly in the person of Mr Phang, while the financial operations were run by SAFE. Grande also took over responsibility for the books and records of the company, as well as the company secretarial work.

6. On 21 April 1995, an extraordinary general meeting of the company was held. It was resolved that the authorised capital of the company be increased to $1.5m by the creation of an additional 1.4 million shares of $1 each. This was followed by the allotment of a further 1,499,998 shares to Mr Wuu. I assume that the earlier agreement to increase the issued capital to $100,000 had been effected before this date.

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7. On 24 April 1995, Mr Wuu issued a cheque for $1,499,998 in favour of the company as payment for these additional shares. However, on the very same day, by a cheque signed by him and Mr Phang, a sum of $1.5m was paid out of the company to ECRC, Mr Wuu's own company. This payment was to give rise to difficulties between the parties later on.

8. The defendant set about getting the lease renewed and having it vested in the defendant company. The Land Office agreed to the renewal of the lease to ECRC and to the assignment of it to the company. However, the Land Office required Mr Wuu to be the majority shareholder in the company. This resulted in the 51% shareholding of E-Zone being split equally between SAFE and Grande. The result was that Mr Wuu would hold 49% while SAFE and Grande would each hold 25.5.%. In compliance with this requirement of the Land Office, the share sale agreements previously entered into were revised. Mr Wuu also undertook to procure the assignment of the lease from ECRC to the company. At the same time, the consultancy agreement was finalised. The company agreed to pay ECRC a sum of $500,000 a year as consultancy fee for a period of 15 years. The consideration was expressed to be for consultancy services to be rendered by ECRC in respect of the leases of the land. Although not provided for in any documents signed, the company also took over a $3m overdraft liability from ECRC.

9. In August 1995, the Land Office gave written approval to the renewal of the lease in favour of ECRC. In October 1995, ECRC executed an assignment of the lease in favour of the company. It also executed an indenture of assignment in escrow pending the issue of the new lease by the State.

The problems and the litigation

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10. Problems soon arose in the joint venture. Among them was the accounting treatment of the $1.5m payment by the company to ECRC earlier mentioned. The management of the Grande Group, which had taken control of the company's accounts, did not understand the basis for the payment. The financial controller was instructed to treat that sum as a receivable from Mr Wuu. This Mr Wuu refused to accept. As a result of this disagreement, the company stopped payment of the consultancy fee due to ECRC. There was also difficulty in regard to the transfer of the land to the company. It appears that the new lease was issued by the State in December 1995. It also appears that the land had been brought under the Land Titles Act and a certificate of title had been issued to ECRC on or about 10 February 1996. But ECRC did not inform the company of these facts, and refused to execute the instrument of transfer in favour of the company when asked to.

11. In fact, on 16 May 1996 Mr Wuu wrote to the Commissioner of Lands. He told the Commissioner about the difficulties between him and the other shareholders of the company. He also told the Commissioner that the company had committed serious breaches of the head lease (carrying out renovations, allowing new outlets to be established, erecting billboards etc.). He urged the Commissioner in no uncertain terms to revoke his previous consent to the assignment of the lease. The letter was not copied to the company or to the other shareholders. The company got to know of it from a copy of the Commissioner of Land's reply which was extended to the company's solicitors. The company not only found out about the letter, it was told by the Commissioner that he was withdrawing his earlier consent to the company for the mortgage of the land to the OCBC to secure credit facilities for the company. The company took all this as a breach of Mr Wuu's fiduciary duty as a director, and told him so.

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12. The disputes between the parties led to two High Court actions. In March 1996, ECRC issued a writ in Suit No. 546 against the company for payment of the recovery of the fee due. The company pleaded in its defence and counterclaim ECRC's wrongful refusal to transfer the land to the company and wrongful receipt of the sum of $1.5m. On 9 July 1996, the company issued a writ in Suit No. 1240 against Mr Wuu for breach of his obligation to procure the transfer of the land to the company and for breach of fiduciary duty in respect of the payment of the $1.5m sum. The company also alleged breach of fiduciary duty in respect of Mr Wuu's letter of 16 May to the Commissioner.

13. On 11 July 1996, on a summary judgment application by the company in Suit 546, ECRC was ordered to execute a transfer of the land to the company. ECRC appealed against this decision. The appeal was withdrawn in August 1996. In October 1996, a settlement agreement was entered into between ECRC, Mr Wuu and the company. All disputes between the parties, including those in the two suits, were settled except for the issue concerning the $1.5m payment. The two suits were ordered to be consolidated. The suits were not disposed of until May 1998, when in a reserved judgment Prakash J found that the payment had been made without consideration and amounted to an unauthorised reduction of capital.

Request for information

14. It was while the consolidated suits were still pending that the correspondence which gave rise to the application in this original summons started. On 24 November 1997, Mr Wuu wrote to the company. He referred to the 1996 and 1997 accounts of the company, which appear to have been supplied to him. He asked for a breakdown of various incomes and expenses of the company, and also monthly bank statements between April 1995 and

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October 1997. He said that as a director he was entitled to the information. But the letter was written on ECRC's letterhead. He purported to sign it for and on behalf of ECRC. In his subsequent letters, he continued to use ECRC's letterhead and signed the letters simply as director or for ECRC. Officers of the company, no doubt acting on advice, insisted that he should make clear the capacity in which he requested the information. They also told him that in view of the pending litigation in which his fidelity to the company was in issue, the company was concerned to guard against confidential information of the company being used for an improper purpose. They told him that if he would give an undertaking that the information would not be used otherwise than for the purpose of his office as a director, his request would be acceded to. Mr Wuu refused to provide this undertaking. The company allowed him to inspect the minute books, but would not allow him to have access to any financial and accounting books and documents.

15. Counsel for the company submitted that the company had good reason to be concerned about Mr Wuu's loyalty and fidelity, and about the information he requested being used for an improper purpose. Apart from the payment of the $1.5m to ECRC, Mr Wuu had committed a serious breach of his duty of fidelity to the company in trying to get the Commissioner of Lands to revoke his consent to the assignment of the lease. Counsel submitted that there is a limit to the right of a director to access to company documents, and Mr Wuu by his actions had gone beyond the limit. Mr Wuu's counsel submitted that Mr Wuu had always maintained that he was seeking the information as a director of the company. He said that the company should not rely on Mr Wuu's past conduct to question his bona fides in relation to the use of the information he sought.

The Law

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16. The authorities, I think, establish the following propositions. A director has the right, by the fact of his being a director, to have access to the company's records. The purpose of this is to enable him effectively to carry out his duty as a director. See **Conway & Ors v. Petronius Clothing Company Ltd** [1978] 1 All E R 185 ; **State of South Australia v. Barrett** [1995] 13 ACLC 1369. The right is co-terminous in extent and time with this purpose, so that once a person ceases to be a director, his right ceases with it. **Haw Par Bros Pte Ltd v. Dato Aw Kow** [1973] 2 MLJ 169. Despite dicta describing the right as "absolute", there is a residual discretion in the court to deny access where it is sought for an ulterior purpose, that is to say, for a purpose imicable to the interests of the company The court will not, however, in the absence of clear proof, assume that a director is exercising his right otherwise than for the benefit of the company. **Edman v. Ross** [1922] 22 S.R. (NSW 51).

17. In the instant case, the company did not refuse outright Mr Wuu's request for access to the records. It was prepared to allow full access if Mr Wuu would give the undertaking in the terms I have mentioned. The question is whether it was reasonable for the company to require such an undertaking.

18. There was clear evidence that Mr Wuu had tried to destroy the very sub-stratum of the company's existence by urging the Commissioner of Lands to revoke the consent to the lease assignment. Although the parties had later entered into a settlement agreement, the litigation about the $1.5m was still much alive. In the event, it was to proceed to a full-blown trial. Against this background, it seems to me that the company was justified in entertaining doubts that Mr Wuu would use the information he sought, not in aid of discharging his duty as a director to the company, but for an ulterior purpose of his own, including a possible use of the information to the detriment of the company. In the light of what he had done, it seems to me reasonable for the

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company to ask him for an assurance so as to dispel doubts about his intentions. Although it might hurt his pride, it was not something that was too onerous for him to give. In circumstances in which there is reasonable apprehension that the information gained might not be used for the legitimate purpose of enabling the applicant to discharge his duty as a director, it is not uncommon for such an undertaking to be offered, or imposed. See **Re Geneva Finance Ltd** [1992] 10 ACLC 668, **ASC v Woods & Johnson Developments Pty Ltd** [1991] 9 ACLC 1492. As the undertaking was not forthcoming, it seems to me that the company was quite justified in denying access. I therefore dismissed the application with costs.

Dated this 16th day of November, 1998.

Warren L H Khoo

Judge

Warren Khoo L H J

Roy Yeo (Lee & Lee) for the plaintiff
Chia Ho Choon (Bih Li & Lee) for the defendants

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