IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 17

CA 156/1998

Between

Wuu Khek Chiang George

… *Plaintiff*

And

ECRC Land Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Companies — Directors

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

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Wuu Khek Chiang George v ECRC Land Pte Ltd

[1999] SGCA 17

CA 156/1998
Tan Lee Meng J; L P Thean JA; Yong Pung How CJ
12 March 1999

Judgment:

LP THEAN JA

(delivering the grounds of judgment of the court): This was an appeal from the decision of High Court in which it was held that the appellant, a director of the respondent company, in breach of his fiduciary duty had caused the company to pay to East Coast Recreation Centre Pte Ltd, a company in which he holds the majority shares and which he controls, a sum of $1.5m without just cause or consideration, and he was ordered to account and repay to the respondent the said sum. Against the decision, the appellant appealed. We allowed the appeal and now give our reasons.

2. ***Background facts***

The background facts that led to this appeal were not in dispute and may be summarised as follows. The appellant, George Wuu Khek Chiang, was the managing director and majority shareholder of the company, East Coast Recreation Centre Pte Ltd (`ECRC`). In 1980, the State granted to ECRC two

leases over two plots of land, Lots 6250 and 6251, respectively of mukim 26 situate at the East Coast Parkway (collective referred to as `the Land`). The leases were each for a term of 15 years from 17 March 1980 to 17 March 1995. The Land had since been developed by ECRC into a recreation complex known as the East Coast Recreation Centre (`the Centre`) in which ECRC operated a very successful and profitable business by having portions of the Centre sublet to various parties.

3.Sometime in 1993, the appellant was approached by one Mr Lawrence Phang Kin Seng, a director of Regent Bowl Pte Ltd (`Regent`), which was a sub-tenant of ECRC at the Centre and a subsidiary of Pico International Pte Ltd (`Pico`). Mr Phang indicated that if the State was prepared to grant a renewal of the leases to ECRC, Regent or Pico might be interested in investing in ECRC and joined in further development of the Land. Negotiations then ensued, and as a result a memorandum of understanding involving ECRC, Pico and two other partners, SAFE Enterprises Ltd (`SAFE`) and Golden Communications Pte Ltd (`Golden`) was executed on 15 December 1993. Under the memorandum, it was contemplated that the consortium consisting of SAFE, Pico and Golden would, after the renewal of the leases, acquire a majority interest of 51% in ECRC for $4m plus an annual payment of $1m for 15 years.

4.During the period between December 1993 and January 1994, Golden and Pico dropped out of the proposed deal, and their place was taken over by Grande Leisure Management Pte Ltd (`Grande`), a subsidiary of Grande Group Ltd. On 6 April 1994, the Land Office on behalf of the State informed ECRC that the leases would be renewed for a further term of 15 years subject to a revised annual rent based on the existing and new uses proposed for the Centre. The memorandum of understanding expired on 1 October 1994. Negotiations, however, continued between ECRC, SAFE and Grande. ECRC was represented

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by the appellant, SAFE by Mr Aaron Tan, Mr Wee Choo Peng and Mr Shih Chih Chung and Grande by Mr Phang (who had left Pico), Mr Eric Lien and occasionally Mr Shum Sze Keong. A supplemental memorandum of understanding was executed between the ECRC, SAFE and Grande on 14 October 1994, reiterating the scheme by which the consortium (now consisting of SAFE and Grande) would acquire a majority interest in ECRC.

5.Shortly thereafter, SAFE proposed that a new company be incorporated as the joint venture vehicle so as to avoid the consortium becoming entangled in ECRC`s other projects and liabilities. Under this proposal, the leases would be renewed directly in the name of the joint venture company, and ECRC would be eased out of the picture. The appellant and Grande agreed. Accordingly, on 17 December 1994, the appellant incorporated the proposed joint venture company, ECRC Land Pte Ltd, with an authorised capital of $100,000. The company is the respondent in this appeal. It had only two shareholders, the appellant and his brother, Wuu Khek Ming, each holding one subscriber`s share.

6.By early March 1995, the main terms of the deal were agreed upon. It was agreed that the leases would be renewed in the name of the respondent. The consortium consisting of SAFE and Grande would then acquire 51% of the shares in the respondent for $5m. The remaining 49% would be held by the appellant or ECRC. The respondent would pay an annual consultancy fee of $500,000 to ECRC for 15 years. The Centre would be managed jointly by the consortium. A further term, which was never documented, was that the consortium would assume the liability of ECRC in respect of the $3m overdraft facility obtained from The Oversea-Chinese Banking Corporation Ltd. In conformity with the agreement the appellant, by a letter dated 12 March 1995, asked the Land Office to issue the renewed leases in favour of the respondent.

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7.Around 16 or 17 March 1995, the appellant and E-Zone Pte Ltd (`E-Zone`), a company jointly owned by SAFE and Grande, executed an agreement (`the March Agreement`) under which it was agreed that (i) the leases would be renewed directly in the name of the respondent; (ii) the appellant would sell 51% of the shares in the respondent to E-Zone for $5m; and (iii) the appellant would increase the respondent`s paid up capital from $2 to $1.5m. Pursuant to the agreement, the appellant received a down-payment in the sum of $500,000 representing 10% of the sale price of the shares. Nothing, however, was said as to how the increase in the paid up capital was to be effected.

8.Soon thereafter, on 22 March 1995, Mr Phang was appointed a director of the respondent and he was to take charge of the operations of the Centre and the preparations for carrying out further development of the Land. On 1 April 1995, ECRC transferred the entire operations and administration of the Centre to the respondent; thenceforth, the physical operations were run by the Grande group, mainly in the person of Mr Phang, while the financial operations were run by the SAFE group. The Grande group also took over the responsibility for the books and records of the respondent as well as the work of the company secretary. The control of the respondent had thus effectively passed over to the consortium.

9.However, the Land Office, by a letter dated 7 April 1995, informed the appellant that the State would not renew the leases in the name of the respondent, because it was a different legal entity from ECRC. As a result, the arrangement contemplated in the March Agreement that the land be renewed directly in the name of the joint venture company and that the consortium be represented through their own vehicle, E-Zone, no longer became viable. On the same day, the appellant wrote to the Land Office proposing that there be an

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assignment of the leases from ECRC to the respondent, highlighting that the respondent would have same paid up capital as that of ECRC (ie $1.5m).

10.On 19 April 1995, after discussing his proposal over the telephone with the officer in charge at the Land Office, the appellant wrote another letter repeating his request for approval for an assignment of the leases from ECRC to the respondent. The Land Office granted in-principle consent on condition that the current directors of ECRC would hold the majority of the shares in the respondent. As a result of this stipulation, it was no longer possible for E-Zone to become a 51% shareholder of the joint venture company. In order to comply with this condition, the deal was restructured for the appellant to hold 49% and SAFE and Grande each to hold 25.5% of the shares in the respondent. SAFE and Grande, acting in concert, would still have the majority control.

11.On 21 April 1995, pursuant to the March agreement, the appellant took steps to increase the paid up capital of the respondent from $2 to $1.5m. An extraordinary general meeting of the respondent was held at which it was resolved that the authorised capital of the company be increased to $1.5m by the creation of 1,400,000 shares of $1 each and authority be given to the directors to issue further 1,499,998 shares. On 24 April 1995, the appellant subscribed for the 1,499,998 shares and issued a cheque for $1,499,998 in favour of the respondent as payment for the shares, and the latter in turn on the same day issued a cheque for $1.5m in favour of ECRC. The latter cheque was written by Mr Aaron Tan (of SAFE) and was signed jointly by the appellant and Mr Phang as directors and authorised signatories of the respondent. An annotation was made on the cheque stub for this payment as follows: `East Coast Recreation Centre for lease assignment`. There was also a payment voucher authorising such payment which was signed by Mr Shum (of Grande). It is this

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payment of $1.5m which the respondent subsequently sought to recover from the appellant and succeeded in so doing in the court below.

12.Following the take-over of the Centre by the consortium on 1 April 1995, the accounts for the respondent were prepared by one Ms Magdalene Yong, the accountant of Grande. Between then and September 1995, no objection was raised on the $1.5m payment. The accounts treated the sum as payment for the assignment of the leases.

13.On 15 June 1995, the joint venture documents were executed, and they comprised, inter alia, two agreements (`the sale and purchase agreements`) for the sale and purchase of the shares in the respondent, both in identical terms, one made between the appellant and Grande and the other between the appellant and SAFE, and each was for the acquisition from the appellant of 25.5% of the shares in the respondent. Annexed to each sale and purchase agreements were, inter alia: (a). annexure 2 which was shareholders` agreements between the appellant, Grande and SAFE; and

(b). annexure 4 which was a draft deed of assignment of the two leases of the land from ECRC to the respondent (`the draft deed`).

The draft deed was not executed then as it was premised on the final approval for the renewal of the leases to ECRC and as of that date the Land Office had yet to give the formal approval. However, each page of the draft deed was initialled by representatives of all the three parties who thus signified their agreement to the terms. The draft deed contained references to $1.5m as the consideration for the assignment of the leases to the respondent. Paragraph (4) of the recital to the draft deed stated that it was agreed that $1.5m was to be paid

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by the respondent to ECRC as consideration for the assignment of the leases. Clause 1 of the draft deed provided:

> *In consideration of the sum of Dollars One Million five hundred thousand ($1,500,000.00) paid by the assignee to the assignor (the receipt whereof the assignor hereby acknowledges) the assignor hereby assigns ...*

Under the terms of the sale and purchase agreements, the March Agreement was rescinded.

14.On 17 August 1995 the Land Office gave formal written approval for the renewal of leases in ECRC`s name.

15. ***Events leading to the suit***

In September 1995, Ms Yong on the direction of Mr Shum prepared the accounts for August which treated the payment of $1.5m to ECRC not as a payment for the assignment of the rights to the leases, but as a loan to the appellant. Mr Wee Choo Peng on reading the accounts wrote to Mr Wong Kok Siew, the managing director of SAFE, a memorandum dated 29 September 1995 concerning the accounts. In this memorandum, Mr Wee clarified as follows:

> *The three parties agreed that share capital for ECRC land to be $1.5m and GW [the appellant] 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 the 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...*
>
> *Impact of Present Accounting Treatment*
>
> *...*
>
> ***GW owes ECRC Land $1.5m** as a loan to him (no mention of interest rate and repayment terms).*

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> *This is against the agreement with GW that he need not make any additional payment.*

16.The accounts were delivered by Ms Yong to the appellant who wrote a letter dated 9 October 1995 asking her to amend the balance sheet as it was incorrect. He did not, however, state how it was incorrect. Nor did he register any specific objection to the statement that the sum of $1.5m was then treated as a loan to him.

17.On 18 October 1995, ECRC executed a deed assigning the leases to the respondent (`the October assignment`). The deed was substantially the same as the draft deed contained in Annexure 4 of the sale and purchase agreements. However [para] (4) of the draft deed, which stated that the consideration for the assignment was the sum of $1.5m to be paid by the respondent, was omitted from the executed deed. Further, the assignment by clause 1 thereof provided:

> *In consideration of the premises and for the consideration stated in the Agreements (receipt of which the Assignor [ECRC] here by acknowledges...*

It was unclear why these material changes were made to the October assignment, as no explanation was given by any party.

18. ***Proceedings below***

About nine months later, on 9 July 1996, the respondent commenced this action against the appellant claiming, inter alia, the sum of $1.5m. In respect of this claim, it alleged that the appellant in breach of his fiduciary duty as a director of the respondent caused and procured the respondent to pay this sum to ECRC without just cause or consideration and therefore was liable to refund this amount to the respondent. This claim was allowed below. The trial judge held that there was no agreement underlying the payment of $1.5m, and that the

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payment was made in breach of the appellant`s fiduciary duty and was an unlawful return of capital, and that the appellant was accordingly liable to repay the sum to the respondent.

19. ***The appeal***

The respondent`s claim as pleaded in the statement of claim was that by a cheque date 24 April 1995 drawn on the respondent`s account the appellant caused to paid out of the respondent`s account the sum of $1.5m to ECRC and that this payment was made `without just cause or consideration` and was made in breach of the appellant`s fiduciary duty to the respondent. The respondent had therefore been wrongfully deprived of this sum and the appellant was liable to account for this wrongful payment.

20.The appellant`s defence, as pleaded in the re-amended defence, was extremely lengthy and verbose running into no less than 16 paragraphs, [para] 36-51, some of which in turn contained various sub-paragraphs of particulars. The gist of the defence was essentially this. There was an oral agreement made in February or March 1995 between the five parties, namely: the appellant, ECRC, the respondent, Grande and SAFE, to the effect that (i) the respondent would be restructured by an increase in the paid up capital from $2 to $1.5m and the appellant would subscribe and pay for the additional 1,499,998 shares; (ii) that the respondent in turn would pay $1.5m to ECRC with the result that the respondent would then be holding the leasehold interest in the Land and not the cash of $1.5m; (iii) that the payment by the respondent would be `labelled` as the consideration for the assignment for the leases; and (iv) that the appellant and ECRC would seek and procure the approval of the Land Office for the assignment of the leases to the respondent. Thereafter, the appellant and ECRC vigorously sought and procured the approval from the Land Office for the

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assignment, and on 19 April 1995 the Land Office gave in-principle consent to the assignment of the leases from ECRC to the respondent subject to, inter alia, the condition that the appellant would hold the majority shares in the respondent. Following that, the paid up capital of the respondent was increased by the appellant paying for the 1,499,998 shares, and in turn the respondent paid ECRC the sum of $1.5m on the same day. Thus the parties` obligations under the oral contract for the procurement of the approval for the assignment of the leases and the payment of the sum of $1.5m was carried out and this was reflected in the draft deed on which the appellant relied. The appellant also relied on the October assignment and in particular the expression `consideration as stated in the Agreements` and averred that the term `Agreements` referred to the sale and purchase agreements including the draft deed annexed thereto. This plea by implication meant that the terms of the draft deed were incorporated by reference into the October assignment. In other words, the consideration for the October assignment was the same consideration as provided in the draft deed.

21.One of the main arguments raised on behalf of the respondent was that the appellant`s initial defence was that the sum of $1.5m was the consideration for the assignment of the leases and that this defence was amended at the trial. The amended defence was that the sum was the consideration for the procurement of the approval from the Land Office for the assignment of the leases and by making this amendment the appellant had abandoned his initial defence and he was now strictly bound by his amended defence.

22.The learned judge appeared to take the view that the appellant by his latest amendments had changed tack in his defence and that he no longer raised the defence that the consideration for the payment was the assignment of the leases but that the consideration for the payment was obtaining the approval from the Land Office. She said at [para] 99-100:

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> 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 $1.5m and this payment was made with the knowledge of Grande and SAFE.
>
> 100 Another version of the agreement was provided by the amendments made after the arguments on the parol evidence 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 assignment. This exegesis of the oral agreement ended by stating that `for convenience` the payment of $1.5m 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.

23.With respect, we were unable to agree. We do not read the re-amended defence of the appellant either in the way as contended on behalf of the respondent or the way as found by the learned judge. We did not find that by the latest amendments the appellant had abandoned the contention that there was an oral agreement for the payment of the sum of $1.5m and that the payment was the consideration for the assignment of the leases. The defence pleaded, albeit not concisely, the facts on how the oral agreement was arrived at and the circumstances in which the payment was made and what was reflected in the draft deed and the October assignment. We did not find that by the re-amended defence the appellant relied specifically on the plea that the consideration for the assignment was obtaining approval from the Land Office for the assignment of the leases. In other words, the appellant pleaded a host of facts and matters in defence to the claim of the respondent.

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24.There was no dispute that the payment of $1.5m was made by the respondent to ECRC, a company virtually owned and controlled by the appellant, and that as a director of the respondent the appellant was involved in causing or procuring the payment of that sum to ECRC. The case of the appellant was that there was an oral agreement made for such payment and there was consideration for such payment. Accordingly, the payment was proper and legitimate. The learned judge held (at [para] 112 of her judgment) that there was no oral agreement as alleged by the appellant in any of his pleadings. All that there was was an internal agreement among the negotiating parties that once the respondent`s capital had been increased, the money could by moved out again so that in some manner it would get back to the appellant. She said:

> 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 I 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.

With great respect, we were unable to agree with this conclusion.

25.In our judgment, there was a preponderance of evidence pointing to the existence of an oral agreement for the payment of $1.5m by the respondent to ECRC and the fact that there was consideration for such payment. At the risk of repetition, we revert to the key facts on this issue.

26.First, Grande and SAFE were interested in acquiring 51% of the shares in ECRC and the latter held the leasehold interest in the Land which was a valuable

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and profitable asset. Initially, Grande and SAFE were agreeable to acquire 51% of the shares of ECRC, but subsequently SAFE required a new joint venture vehicle to be formed which would then hold the leasehold interest in the Land and in which Grande and SAFE would acquire 51% of the shares with ECRC or the appellant holding the balance of 49%. This was agreed to by the appellant, and the joint venture vehicle, the respondent, was incorporated on 17 December 1994 with an authorised capital of $100,000 and the appellant and his brother were the sole shareholders, each holding only one share.

27.Secondly, in the negotiations with the appellant, Grande was represented mainly by Mr Phang and Mr Shum, and SAFE was represented Mr Aaron Tan and Mr Shih and sometimes by Mr Wee. In fact, from January 1995 onwards, the leading men in the negotiations with the appellant were Mr Phang of Grande and Mr Tan of SAFE. Arising from the negotiations, by the middle of March 1995 or thereabouts the following financial terms were agreed to between the parties: (i). the appellant would receive $5m for the sale of a 51% interest in the respondent;

(ii). the respondent would pay ECRC a total of $7.5m, over 15 years, as consultancy fees; and

(iii). the respondent would take over ECRC`s outstanding liabilities arising from the $3m overdraft facility granted by The Oversea-Chinese Banking Corporation Ltd.

The March Agreement signed on or about 16 or 17 March 1995 showed that the sum of $5m was the consideration for the 51% interest in the respondent. The agreement also provided that the paid up capital of the respondent would be increased to $1.5m. Nothing, however, was said there as to how the increase

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was to be effected. But this much was absolutely clear - and it was accepted by the learned judge - neither the appellant nor the consortium was willing to come out with any additional sum of money needed to increase the paid up capital of the respondent to $1.5m.

28.Thirdly, soon after the March agreement, on 22 March 1995, Mr Phang was appointed a director of the respondent obviously with a view to enabling the consortium to take over control of the administration and operations of the Centre. From 1 April 1995, ECRC transferred the entire the operations of the Centre to the respondent and the respondent was allowed to retain the benefit of the income from the Land. The consortium was in full control of the respondent.

29.Fourthly, on 19 April 1995, the Land Office gave in-principle consent to an assignment of the lease to the respondent. Following that, on 21 April 1995, the respondent resolved that its authorised capital be increased to $1.5m. On 24 April 1995, the appellant subscribed for 1,499,998 shares in the respondent and paid to the company the sum of $1,499,998. Subsequently, on the same day, the sum of $1.5m was paid by the respondent to ECRC by a cheque dated 24 April 1995. The payment was approved by Mr Shum, who signed the payment voucher of the respondent authorising the payment. The cheque was written by Mr Tan and was signed by both the appellant and Mr Phang, as the authorised signatories and directors of the respondent. A note was made contemporaneously on the cheque stub which said: `East Coast Recreation Centre for lease assignment`.

30.Fifthly, the accounts prepared by the consortium for the respondent for the period from April 1995 to July 1995 made specific reference to the $1.5m payment to ECRC and described it as payment for the lease rights. The consortium had not taken the sum of $1.5m into account in its financial

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projections and had not prepared any financial projections on the basis that the respondent would have the cash of $1.5m representing the paid up capital with which to carry on their business and the redevelopment of the Land. This was the position which prevailed until late September 1995. There was no explanation why such a large sum, if it was indeed improperly paid to ECRC, was not missed until September since the consortium had taken full control of the Centre with effect from April. The inexorable conclusion was that the sum was not missed because it was never expected to remain in the company and was intended to be treated as payment for the rights to the leases.

31.Lastly and most importantly, there were the joint venture documents which formed the heart of the matter. The documents were signed by the parties on 15 June 1995. The persons signing on behalf of Grand and SAFE were Mr Phang and Mr Shih respectively. This set of documents included the sale and purchase agreements (for the shares). The agreements, inter alia, stated that the paid up capital of the respondent was $1.5m and that the consideration for the 51% of the shares in the respondent acquired by the consortium from the appellant was $5m. Each of the agreement had annexed to it as Annexure 4, the full terms of the draft deed that was to be executed by ECRC in favour of the respondent. The draft deed made specific references to the payment of $1.5m as consideration for the assignment of the leases from ECRC to the respondent. Paragraph (4) of the recital stated that it was agreed the leases would be assigned by ECRC to the respondent for $1.5m and cl 1 provided as follows:

> *In consideration of the sum of Dollars One Million five hundred thousand ($1,500,000.00) paid by the Assignee to the Assignor (the receipt whereof the Assignor hereby acknowledges) ...*

32.The draft deed could not be executed on that date itself as it was structured on the premise that final approval for the renewal of the leases had already been

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received from the Land Office, and at that stage the Land Office had only given the in-principle approval for the renewal of the leases and the parties were still awaiting the formal approval. As such, instead of signing the document, each page of the draft deed was initialed by the appellant, Mr Phang and Mr Shih which confirmed the parties` agreement to the terms there. It is also significant that the draft deed emanated from the respondent or its solicitors and not from the appellant or ECRC. This was clearly evidenced by the letter dated 23 May 1995 from the solicitors for the respondent to the solicitors for ECRC which, for the first time, enclosed the draft deed `on [their] clients` instructions`. If the draft deed did not constitute an agreement in writing, it did, at the very least, evidence the oral agreement between the parties.

33.At this point in time, looking purely at these objective facts, which were not in dispute, and the contemporaneous documents, namely: the cheque stub, the accounts of the respondent and the draft deed, without taking into account for the time being the evidence of the witnesses who testified for the appellant, the inference is irresistible that there was an oral agreement for the payment of the $1.5m by the respondent to ECRC on 24 April 1995 and that the payment was the consideration for the assignment of the leases.

34.We now turn briefly to the evidence of the witnesses who testified for the appellant and that of the appellant himself. Mr Phang of Grande and Mr Aaron Tan, Mr Shih and Mr Wee of SAFE gave evidence for the appellant and all of them gave evidence to the effect that there was an oral agreement for the payment of the sum of $1.5m to ECRC and the payment was in consideration for the assignment of the leases. The learned judge criticised their evidence as inconsistent and contradictory and did not find it credible. She rejected their evidence partly on the ground that their evidence did not support or was inconsistent with the pleaded case of the appellant. She held that the appellant

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and his witnesses `were unable to put together a coherent and consistent picture of what the oral agreement actually was`.

35.We have the following observations on their evidence. These witnesses who testified for the appellant were all active participants in the negotiations with the appellant and at all material time they represented the opposing side. They appeared to be quite independent and had no interest in the subject matter of the proceedings. Although their evidence was not satisfactory as found by the learned judge, the nub of their evidence was that (i) there was an oral agreement for the payment of the $1.5m, and (ii) the consideration was the leases of the Land. The question then was who were the parties to the oral agreement. We do not think that, taking a legalistic view, there could be any dispute that there were five parties involved. On the appellant`s side there were the appellant, ECRC and the respondent. The appellant apart from acting for himself represented ECRC and the respondent at the material time. He virtually owned and controlled the two companies. On the opposing side there were the two parties, Grande and SAFE. It would be too much to expect these witnesses to say with legal precision whether the oral agreement was made only between appellant and the respondent or between the five parties. All they could really say, which they did, was that there was an agreement reached between the parties negotiating the joint venture. As for the consideration for the payment, all of them said or, in the language of the learned judge, repeated the mantra that the consideration was the assignment of the leases. It is true that at certain stage, when they were being cross-examined, they each said something different, such as that the payment was to obtain the approval for the assignment from the Land Office; to do all that could be done `to procure the transfer of the land` to the respondent; or to get the appellant `to do the leg work and to run to get the right to the land into the hands of the respondent` or that the payment was `an

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incentive or motivation to make sure that ECRC transferred the rights for the use of the land`. It seems to us that all these variations of their evidence had the same theme, namely: the payment was for the leases of the Land. Translating this into legal term, the sense and effect of it is that the payment was the consideration for the assignment of the leases. What was compelling was that the substance of their evidence was corroborated by the documentary evidence, namely the annotation on stub of the cheque for the payment, the treatment of this amount in the accounts of the respondent for the period between April and July 1995 and the draft deed - a draft prepared by the solicitors for the respondent and initialled by the signatories to the sale and purchase agreements.

36.We now turn to a strange event that bears mentioning which took place in September 1995. On or about 20 September 1995, the accounts of the respondent for the month of August 1995 prepared by Ms Magdelene Yong were released. These accounts, for the first time, sought to revise the treatment of various entries in the previous accounts and in particular the entry relating to the payment of $1.5m to ECRC. Whilst the earlier accounts had all accepted and treated the $1.5m as payment towards the acquisition of the leases from ECRC, the August accounts treated the amount as a loan to the appellant. It appeared from the evidence that this treatment was so made by Ms Yong on instructions from Mr Shum. No reason at all was given by Mr Shum for this sudden change, which, in our view, was completely unjustified and had no basis whatsoever. It is significant that Mr Wee of SAFE on seeing the accounts wrote to the managing director of SAFE a memorandum, the material part of which, in his layman language, read as follows:

> *The three parties agreed that share capital for ECRC land to be $1.5m and GW [the appellant] 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*

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> *of $1.5m and transferred the amount out of ECRC Land as deposit for the assignment of the lease from ECRC to ECRC Land.*

37.The accounts were delivered to the appellant who also wrote to Ms Yong pointing out that the balance sheet was incorrect. The learned judge criticised the appellant for not explaining in what way the balance sheet was incorrect and for not mentioning the oral agreement. With respect, it seemed to us that the incorrectness was obvious and Ms Yong knew precisely what the appellant meant. The burden was on Ms Yong or Mr Shum to explain the departure from the treatment in the accounts for the previous months.

38.We now come to the October assignment dated 18 October 1995 executed by the parties. For some reasons, which were wholly unexplained, the assignment did not adopt the full terms of the draft deed as agreed to by the parties. The most material changes were: (i) the deletion of [para] (4) of the recital, and (ii) the amendment to cl 1 of the deed which now provided as follows:

> *In consideration of the premises and for the consideration stated in the Agreements (receipt of which the Assignor hereby acknowledges) the Assignor hereby assigns ...*

No reason for these changes was given by anyone. Most significantly, the engrossment of the deed was prepared by the solicitors for the respondent and in their letter enclosing the deed for execution `on a very urgent basis` the changes were not in any way highlighted, explained or referred to. No one from the respondent`s side explained or gave any reason for the change. Be that as it may, looking again at the objective facts, our inference is that these changes were made by the solicitors for the respondent on the latter`s instructions as a result of the different treatment of the payment of $1.5m made in the August accounts of the respondent on instructions of Mr Shum.

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39.It was the October assignment that fundamentally formed the basis for the respondent`s claim against the appellant for the sum of $1.5m. There was no other evidence, documentary or otherwise, in support of the claim. In our judgment, the claim on that basis must fail. First, whether there was an agreement for the payment of $1.5m depends on the surrounding circumstances prevailing at the time at which the payment was made and not on what the assignment said which was some six months later. The salient facts which we have set out above clearly support the basis for the oral agreement and the consideration for such payment. At most, the October assignment could be relied on, as the respondent did, to show that the payment of $1.5m was not the consideration for the assignment of the lease. As against that, there were the documents which showed overwhelmingly the contrary.

40.Secondly, the October assignment on a strict construction does import a reference to the $1.5m payment. First, [para] (3) of the recital expressly referred to the sale and purchase agreements, and those agreements each contained the Annexure 4 which was the draft deed. Next, cl 1 provided: `In consideration of the premises and for the consideration stated in the Agreement (the receipt of which the Assignor [ECRC] hereby acknowledges)`. The draft deed being the Annexure 4 to each of `the Agreements`, ie the sale and purchase agreements, was part of the agreements and draft deed stated that the sum of $1.5m was the consideration of the assignment. The October assignment was made between ECRC as the assignor and the respondent as the assignee, and the only consideration that ECRC received, the receipt of which it acknowledged, was the consideration of $1.5m as stated the draft deed. Such a construction does necessarily give full effect to the terms of cl 1 of the October assignment. There is nothing there that militates against such a construction. This point was pleaded by the appellant in [para] 48-50 of the re-amended defence.

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41.It is true that the sale and purchase agreements referred also to the consultancy fees payable to ECRC, but those fees were payable under the consultancy agreement and were not paid on or before 18 October 1995, as under cl 3.1 of the sale and purchase agreements the first payment contemplated was to be made only at the end of October 1995. Hence, the consideration referred to in cl 1 of the October assignment could not possibly mean the consultancy fees.

42.We accept that it is unnecessarily circuitous for the parties to say that `the consideration stated in the Agreement` was the consideration as that stated in the draft deed, when it would have been so much simpler and clearer for the parties just to repeat the same terms in the October assignment. Further, if it were truly the parties` intention that the sum of $1.5m was to be the consideration for the October assignment, the easiest way to give effect to such intention would have been to say so expressly, as had been provided in the draft deed. The short answer to this is that the matter was really in the hands of the respondent and it was for the respondent to spell out the intention clearly and if it failed to do so, there should be some explanation from its representatives who could clarify this ambiguity; unfortunately none was given by Mr Shum who apparently was in charge or by anyone else, and in these circumstances the doubt must be resolved against the respondent.

43.Even if this strict construction should not be adopted, at its lowest, cl 1 of the October assignment gives rise to a doubt whether the consideration referred to there was in fact the consideration received by ECRC and referred to in the draft deed. The question was what consideration in the October assignment the assignor, ECRC, received, the receipt of which it acknowledged. Any doubt that might arise here must be resolved against the respondent, as the document was prepared by its solicitors.

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44. ***Refund of capital***

It was argued on behalf of the respondent that if we were to allow the appeal, this would make significant inroads into the law on the reduction of capital. In our view, this argument was plainly unsustainable. The sum of $1.5m was paid to ECRC bona fide in a genuine commercial transaction. It was a proper and legitimate payment and did not amount to a return of capital. It follows that there was no question of breach of fiduciary duty on the part of the appellant.

45.Lastly, it was suggested that since the appellant had persuaded the Land Office to consent to the assignment of the leases to the respondent on the strength of the representation that the respondent was a substantial company, to allow the respondent to remit $1.5m to ECRC would have amounted to a fraud on the Land Office. We were unable to accept this contention. Even on the basis that this sum had been paid out to ECRC, the respondent was a substantial company. Its underlying assets included the rights to the leasehold interest in the Land which was a valuable and profitable asset. Little wonder that even at that time the consortium had agreed to pay $5m to the appellant for 51% of the shares in the respondent.

Tan Lee Meng J
L P Thean JA
Yong Pung How CJ

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Stephen C Soh (Bernard Rada & Partners) for the appellant
Chia Ho Choon and Tan Yeow Hiang (Bih Li & Lee) for the respondent

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