IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 34

CA 201/1998

Between

Wuu Khek Chiang George

… *Appellant*

And

ECRC Land Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Companies — Accounts

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Wuu Khek Chiang George v ECRC Land Pte Ltd

[1999] SGCA 34

CA 201/1998
Karthigesu JA; L P Thean JA; Yong Pung How CJ
07 May 1999

Judgment:

LP THEAN JA

(delivering the grounds of judgment of the court): The appellant is a director of the respondent company and sought to inspect its accounting and other financial records. The respondent refused him such inspection. In consequence, on 11 June 1998 he took out an application under s 199 of the Companies Act (Cap 50, 1994 Ed) (`the Companies Act`) for an order requiring the respondent to produce for inspection by him all its accounting and other financial records. The application was resisted and was heard before a judge in chambers who dismissed the application. The appellant appealed against the learned judge`s decision. We allowed the appeal and now give our reasons.

2. ***Background facts***

We begin with the background facts. Some of the material facts have been set out in our judgment in CA 156 of 1998 [reported at [1999] 2 SLR 166] and may be briefly stated here as follows. The appellant is the managing director and

majority shareholder of a company, East Coast Recreation Centre Pte Ltd (`ECRC`). The company held a leasehold interest in two plots of State land situate at 1000 East Coast Parkway (`the land`) which had been developed into a recreation complex known as East Coast Recreation Centre (`the Centre`). The operation of the Centre was a success and the land became a valuable asset. The lease was for a term of 15 years and expired in March 1995; but prior to its expiry, the Land Office had indicated to ECRC that the lease would be renewed for a further term of 15 years. The lease was eventually renewed.

3.Meanwhile, the appellant entered into negotiation with two companies, Grande Leisure Management Pte Ltd (`Grande`) and SAFE Enterprises Ltd (`SAFE`), with a view to forming a joint venture with them to take over the lease (when it was renewed) and redevelop the land. In anticipation of an agreement to be concluded with Grande and SAFE, the appellant caused to be incorporated on 17 December 1994 the respondent company with an authorised capital of $100,000 divided into 100,000 shares of $1 each. The appellant and his brother, Wuu Khek Ming, were the first directors and shareholders, each subscribing for one share. It was envisaged at that time that the respondent would be the joint venture vehicle and that the lease would be renewed directly in the name of the respondent, thus easing ECRC out of the operation of the Centre.

4.By March 1995, the main terms of the joint venture were agreed upon. The respondent was to pay ECRC an annual consultancy fee of $500,000 for 15 years, and the Centre would be managed jointly by the consortium consisting of Grande and SAFE. On 16 or 17 March 1995, the appellant and a company, E-Zone Leisure Pte Ltd (`E-Zone`), which was a joint venture company of Grande and SAFE, entered into an agreement (`the March agreement`) whereby it was agreed (a) that the lease of the land would be renewed in the name of the

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respondent; (b) that the appellant would sell 51% of the shares in the respondent to E-Zone for $5m; and (c) that the appellant would increase the respondent`s paid-up capital from $2 to $1.5m. Pursuant to the agreement, 10% of the sale price of the shares amounting to $500,000 was paid to the appellant as a deposit. A further term, which was never documented, was that the respondent would assume the liability for the $3m overdraft facilities which ECRC then maintained with Oversea-Chinese Banking Corporation Ltd (`OCBC`) for the operation of the Centre.

5.Following the execution of the agreement on 22 March 1995, one Lawrence Phang who was then in the employ of Grande was appointed a director of the respondent. He was placed in charge of the operations of the Centre and the redevelopment 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 Grande, mainly in the person of Phang, while the financial side of the operations was looked after by SAFE. Grande also took over the responsibility of maintaining the books and records of the respondent as well as the work of the company secretary.

6.However, in the meantime, the Land Office, by a letter dated 7 April 1995, informed the appellant that it could not accede to the request for the lease to be renewed in the name of the respondent, as the latter was a different legal entity from ECRC. Accordingly, the terms agreed upon in the March agreement could not be implemented. Upon representations made by the appellant, the Land Office agreed to an assignment of the lease by ECRC to the respondent but on condition that the current directors of ECRC would hold the majority shares in the respondent. In order to comply with this condition, the deal was restructured so that the appellant would hold 49% while Grande and SAFE would each hold 25.5% of the shares in the respondent.

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7.On 21 April 1995, the respondent by an ordinary resolution increased its authorised capital to $1.5m by the creation of an additional 1,400,000 shares of $1 each and authorised the directors to allot and issue 1,499,998 shares. Following that, a further of 1,499,998 shares were allotted and issued to the appellant on 24 April 1995 and the appellant issued a cheque for the sum of $1,499,998 in favour of the respondent in payment for the shares. On the same day, the respondent paid to ECRC the sum of $1.5m for the assignment of the lease and the payment was made by way of a cheque jointly signed by the appellant and Phang as the authorised signatories of the respondent. This payment later gave rise to a dispute between the parties which formed the subject matter of a claim by the respondent against the appellant in Suit No 1240 of 1996.

8.On 15 June 1995, fresh joint venture documents were executed by the parties: they comprised, inter alia, two 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. At the same time, the parties executed a shareholders` agreement made between the appellant, Grande and SAFE. At or about the same time, a consultancy agreement was made between the respondent and ECRC, under which the respondent agreed to pay ECRC an annual consultancy fee of $500,000 for a period of 15 years in consideration of consultancy services to be rendered by ECRC in respect of the lease of the land. Although not expressly provided for in any documents signed by the parties, the respondent also took over ECRC`s liability in respect of $3m overdraft facilities maintained with OCBC. Under the terms of the sale and purchase agreements, the March agreement was rescinded.

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9.On 17 August 1995, the Land Office gave written approval for the renewal of the lease in the name of ECRC, and following that on 18 October 1995, ECRC executed a deed of assignment of the lease in favour of the respondent.

10.Problems soon arose in the operation of the joint venture. Among them was the accounting treatment of the $1.5m payment made by the respondent to ECRC. The management of Grande, which had taken over control of the respondent`s accounts, did not agree to the basis on which the payment was made, and the respondent`s new financial controller was instructed to treat the sum as a receivable due from the appellant. The appellant did not accept this. Subsequently, in an attempt to recover the money, the respondent stopped payment of the consultancy fee due to ECRC. There was also a dispute centred on the transfer of the lease to the respondent. The new lease was issued to ECRC by the State in December 1995. It appeared that the land had been brought under the Land Titles Act (Cap 157) and a certificate of title was issued to ECRC on or about 10 February 1996. However, ECRC did not inform the respondent of this, and refused to execute an instrument of transfer of the leasehold interest of the land to the respondent when asked to do so.

11.On 16 May 1996, the appellant wrote to the Commissioner of Lands informing the Commissioner about the differences which had arisen between the parties to the joint venture such that it was becoming increasingly clear that it would be best to `abort the joint venture`. He also told the Commissioner that the respondent had committed serious breaches of the lease (such as carrying out renovations without the prior consent of the relevant authorities, allowing new outlets to be established without approval from the authorities and erecting billboards) and urged the Commissioner to revoke his previous consent given for the assignment of the lease. A copy of the letter was not forwarded to the respondent or the other shareholders; however, the respondent came to know of

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it from a copy of the Commissioner`s reply which was extended to the respondent`s solicitors. The respondent was also informed by the Commissioner that he was withdrawing his earlier consent for the mortgage of the land to OCBC to secure the credit facilities. The respondent took the view that in writing the letter to the Commissioner of Lands the appellant committed a breach of his fiduciary duty as a director.

12.All these disputes resulted in two High Court actions. On 21 March 1996, ECRC commenced an action against the respondent in Suit No 546 of 1996 claiming the sum of $548,333.34 being the instalments of the consultancy fee due but not paid covering the period from October 1995 to February 1996. Initially, the respondent`s defence to the claim did not refer to the $1.5m payment but instead relied on other matters in dispute between the parties. It was only on 23 May 1996 that the respondent amended its defence by alleging, inter alia, that the sum of $1.5m was paid to ECRC without just cause and consideration and in breach of the appellant`s fiduciary duty, and counterclaimed for the repayment of this sum. On 9 July 1996, the respondent instituted its own action in Suit No 1240 of 1996 against the appellant for breach of his obligation to procure the transfer of the lease to the respondent and for breach of his fiduciary duty as a director in respect of the payment of $1.5m to ECRC, and claimed the payment of the same amount.

13.On 11 July 1996, on an application for summary judgment by the respondent in Suit No 546 of 1996, ECRC was ordered to execute the transfer of the lease in the land to the respondent. ECRC appealed against this decision but the appeal was withdrawn in August 1996. On 11 October 1996, a settlement agreement was entered into between ECRC, the appellant and the respondent (`the settlement agreement`). By this agreement, all the disputes between ECRC and the respondent, and between the appellant and the respondent, were settled

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except the issue of the $1.5m payment. Subsequent to the settlement agreement, an order was made that the two suits be consolidated and tried at the same time and the only issue for trial was the payment of $1.5m to ECRC. The claim for this sum by the respondent was allowed by the High Court but on appeal the decision was reversed and the claim was dismissed by this court: see the judgment in CA 156 of 1998.

14. ***The appellant`s earlier requests for inspection***

It was during the period while the consolidated suits were in progress that the appellant began requesting for access to the accounting and other financial records of the respondent. There were actually two sets of requests made by the appellant, one prior to the hearing of the suits and the other subsequent thereto.

15.The earlier requests took place from November 1997 to January 1998 in the form of several letters. In particular, on 13 and 24 November 1997, the appellant wrote to the respondent requesting for, inter alia, the following information: (a) details of the sub-tenancies granted by the respondent; (b) the 1996 and 1997 accounts of the respondent; (c) monthly bank statements of the respondent from April 1995 to October 1997; and (d) a breakdown of (i) the salaries of all staff and directors of the respondent including CPF payments and (ii) various expenses and all income of the respondent. In his letters, the appellant expressly stated his entitlement to receive the information in his capacity as a director and shareholder of the respondent. Unfortunately, the letters were written on ECRC`s letterhead and signed `for and on behalf` of ECRC. In subsequent letters, the appellant continued to use ECRC`s letterhead and signed either as a `director` of ECRC or `for and on behalf of` ECRC`. This opened the way for the respondent, no doubt acting on advice, to respond that it was unclear in what capacity and under what authority the appellant was making these requests. The

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respondent did not answer any of the appellant`s queries but instead in the letter dated 16 December 1997 replied:

> *On the face of it, it appears that your requests/queries are ambiguous and there does not seem to be any basis for the same.*
>
> *As such, it would be inappropriate for us to accede to your requests.*

16.In response, the appellant sent to the respondent a letter dated 12 January 1998 which again was written on ECRC`s letterhead and which he signed as a `director`. In that letter, he stated:

> *As stated in my letter dated 24 November 1997, as a director and shareholder of [the respondent], I am entitled to the information requested ... . Please therefore furnish the information requested immediately.*

On 15 January 1998, the appellant sent yet another letter to the respondent in which he highlighted his right of inspection pursuant to cl 24 of the shareholders` agreement. Again, he signed the letter `for and on behalf of ECRC`. Subsequently, lengthy correspondence between the appellant and respondent ensued, but no accounting or other record was produced to the appellant for inspection, and nothing further developed until May 1998. As a matter of convenience, we shall refer to the requests made by the appellant during this period as `the earlier requests`.

17. ***The appellant`s subsequent requests***

After the conclusion of the hearing of the consolidated suits in May 1998, the appellant renewed his request for production of the respondent`s accounting and other records for inspection. On 20 May 1998, the appellant attended at the respondent`s registered office and asked to inspect the respondents` minute books and accounts for the period 1995 to 1997. He was refused access and

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instead was handed a copy each of the respondent`s two letters dated 22 January 1998. On the same day, however, the appellant received a facsimile from the respondent in which it was stated that the respondent was agreeable to his request to inspect their minute books `as a gesture of goodwill`. On the next day, the respondent sent a further letter to the appellant in which it reiterated that it would accommodate his request for inspection `purely as a gesture of goodwill` and would allow him to do so on that basis, but that, as he believed that he was entitled to do so in any event, it had to `stand by the position taken in [its letters of 22 January 1998]`.

18.The appellant sought legal advice. His solicitors then wrote to the respondent`s secretary on 23 May 1998 referring to the respondent`s refusal to allow the appellant to inspect the minute books, and stating: (a) that the appellant was entitled to inspect (i) the minute books and (ii) the accounting and other records pursuant to ss 189 and 199(3) respectively of the Companies Act, and that non-compliance with these provisions constituted an offence under ss 189(3) and 407 of the Companies Act; (b) that, accordingly, the appellant be allowed to inspect the documents in question in his capacity as a shareholder and director of the respondent; and (c) that the appellant was unable to accept that the respondent was entitled to allow inspection purely `as a gesture of goodwill`. We shall, for convenience, refer to these requests as `the subsequent requests`. There followed a lengthy exchange of correspondence between the respondent`s secretary and the appellant`s solicitors. The end result was that the respondent allowed the appellant to take copies of the minutes in the minute books but continued to deny him access to the accounting and other financial records. On 11 June 1998 the appellant filed the OS 714/98 for an order that he be allowed to inspect the respondent`s accounting and other financial records.

19. ***The decision below***

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The learned judge accepted that a director has the right, by virtue of the fact of his being a director, to have access to the company`s records, but there is a residual discretion vested in the court to deny such access where it is sought for an ulterior purpose inimical to the interests of the company. He referred to **Conway & Ors v Petronius Clothing Co Ltd & Ors** [1978] 1 All ER 185[1978] 1 WLR 72, **State of South Australia v Barrett** [1995] 13 ACLC 1369, **Haw Par Brothers (Pte) Ltd v Dato Aw Kow** [1972-1974] SLR 183 [1973] 2 MLJ 169 and **Edman v Ross** [1922] 22 SR (NSW) 351, and said at [para] 16:

> *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 inimicable 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 other than for the benefit of the company.*

20.Turning to the case before him the learned judge made the following findings at [para] 18:

> *There was clear evidence that [the appellant] 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 [the appellant] would use the information he sought, not in aid of discharging his duty as a director of the company, but for an ulterior purpose of his own, including a possible use of the information to the detriment of the company.*

The learned judge noted that the respondent did not refuse outright the appellant`s request for access to the records. It was prepared to allow full access, if the appellant gave an undertaking in terms as required. The question was whether it was reasonable for the respondent to require such an undertaking and the learned judge held at [para]18:

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> *In the light of what [the appellant] had done, it [was] reasonable for the [respondents] 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 and* ***ASC v Woods & Johnson Developments Pty Ltd*** *[1991] 9 ACLC 1,492. As the undertaking was not forthcoming, ... [the respondent was] quite justified in denying access.*

The learned judge accordingly dismissed the application with costs.

21.The appellant appealed against this decision. Before the appeal was heard, the respondent went into receivership, and when the appeal came on for hearing the respondent did not instruct any counsel to appear on its behalf.

22. ***Contentions of the appellant***

Before us counsel for the appellant raised two main arguments. First, he submitted that there was no evidence that the appellant intended to misuse the information required to the detriment of the respondent. To begin with, while the appellant`s conduct in writing to the Commissioner of Lands might not have been commendable, it should nevertheless be read in the context of his dispute with Grande and SAFE in connection with the joint venture. More importantly, the appellant`s breach of fiduciary duty to the respondent, if there was such a breach, was covered by the terms of the settlement agreement, which clearly provided that all disputes between the parties were resolved, except the question of the $1.5m payment. It was not open to the respondent to rely on an issue which had already been settled. As for the payment of $1.5m, it had since been decided by this Court that the payment of $1.5m to ECRC was not a breach of the appellant`s fiduciary duty to the respondent.

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23.Turning to the requests, counsel contended that the earlier requests might have given rise to some ambiguity as to the precise capacity in which the appellant was making his requests, but even then those letters on the whole indicated that he was requesting the information in his capacity as a director and/or shareholder of the respondent. In any event, the appellant`s application was based essentially on his subsequent requests for inspection, and these were clearly made in his capacity as a director of the respondent. Moreover, these requests were made after the conclusion of the trial in Suit No 1240 of 1996, and there was no basis for the respondent`s demand that the appellant should explain or justify the purpose of his inspection.

24.The second argument of counsel was in relation to the view taken by the learned judge that it was reasonable for the respondent to require an undertaking to be furnished by the appellant, and that as no such undertaking was forthcoming the respondent was justified in denying the appellant`s right to access. Counsel argued that on the facts before the court the respondent was not entitled to demand for such an undertaking. At any rate, the correspondence between the appellant`s solicitors and the respondent showed that the latter was not prepared to resolve the matter but instead sought to impose new terms and conditions on the appellant before he would be allowed have the inspection. The respondent thus appeared to have misled the learned judge as to the purported readiness to allow inspection in exchange for an undertaking in the appropriate terms.

25. ***The appeal***

Before we turn to arguments of counsel, we should deal briefly with the nature and extent of the right of a director of a company to inspect the accounting and other records of the company. At common law, a director has the right of

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inspection of any documents such as the accounting and other records of the company and such right is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company. As such, this right like other rights and powers of a director must be exercised for the benefit of the company. This right is recognised in s 199 of the Companies Act which, so far as relevant, provides:

> (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.
>
> (2) …
>
> (3) The records referred to in subsection (1) shall be kept at the registered office of the company or at such other place as the directors think fit and ***shall at all times be open to inspection by the directors*** . [Emphasis added.]

The language of this provision clearly shows the obligation of the company to allow inspection by its director as mandatory.

26.The right of a director to inspect the accounting and other records of the company has been described as being `absolute`: see **Dato Aw Kow v Haw Par Bros (Pte) Ltd** [1972-1974] SLR 391 [1972] 2 MLJ 225 (HC), **Haw Par Brothers v Dato Aw Kow** [1972-1974] SLR 183 [1973] 2 MLJ 169 (CA) and ***Leong Sun Wing v Wah Hup Engineering Works Sdn Bhd (No 2)*** [1977] CSLR VII [1003]. In ***Haw Par Bros*** , the issue before this court was whether an order for inspection which had been made by a court under that section (then s 167(5)), continued in full force and effect after a director of the company had

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ceased to be a director. Wee Chong Jin CJ, delivering the judgment of the court, said at [1972-1974] SLR 183, 186; [1973] 2 MLJ 169, 170:

> *It seems to us clear that s 167(3) [now s 199(3)] gives an absolute right to inspect the accounting and other records required to be kept by a company and its directors under s 167(1) [s 199(1)] only to persons who are the then directors of the company. It is clear that s 167(3) cannot be successfully invoked by an ex-director. In our opinion where an ex-director wishes to inspect such accounting and other records of a company he cannot rely on s 167(3) and must rely on other grounds because it is clear law that an ex-director, as such, has no proprietary, managerial or other similar interest in the accounting and other records of a company.*

In that case, the court was concerned with the right of inspection of a former director of a company under s 167(3), and the question whether the right of inspection was absolute did not really arise in that case. Therefore, the learned Chief Justice did not lay down that the right of inspection was `absolute` in the sense that it was unlimited or unqualified. Similarly, there was no real consideration by the Malaysian High Court of the ambit of the right of inspection in ***Leong Sun Wing*** . The court adopted and approved the passage from the judgment of Wee Chong Jin CJ quoted above.

27.Another authority for the proposition that the right of inspection under s 199(3) of the Companies Act is an absolute right is **Welch & Anor v Britannia Industries Pte Ltd** [1993] 1 SLR 673 . In that case, the plaintiffs who were directors of the defendant company made an application to court under s 199 of the Companies Act for an auditor to inspect the company`s accounting and other records of the company on their behalf. In allowing the application, Kan Ting Chiu JC (as he then was) said at p 680:

> *I am inclined to agree that the right of inspection under s 199(3) is an absolute right. However, by absolute, it does not mean that a director is entitled to inspect in all circumstances without restriction, but rather that the right flows from his office and he*

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> *does not have to justify his desire to inspect. As Street CJ said in* ***Edman v Ross****, the director cannot be called upon to furnish his reasons before being allowed to exercise the right, and in the absence of clear proof to the contrary, the court must assume that he will exercise it for the benefit of his company.*

In that same passage, the learned judge immediately qualified what he meant by `absolute right`. It seems to us that what the learned judge meant was that a director by virtue of his office is prima facie entitled to inspection and ex hypothesi he has the right of access and is not required to demonstrate any particular ground or `need to know` as a basis. In **Molomby v Whitehead and Australian Broadcasting Corp** [1985] 63 ALR 282, 291, Beaumont J of the Federal Court of Australia said:

> *In my opinion, in declining access to Molomby [the director requesting for inspection], Whitehead [the managing director] fell into an error of law. The error consisted of a failure to recognize that, as a director of the Corporation, Molomby had a prima facie entitlement to access to the corporate material and that, in the absence of good cause to the contrary, and none existed here, Molomby should be permitted to inspect the documents nominated by him.*

28.In **Edman v Ross** [1922] 22 SR (NSW) 351, the plaintiff and the two defendants were shareholders and directors of a company. Disputes arose between them, and the plaintiffs took out an application for an interlocutory injunction restraining the defendants from, among other things, preventing him from having access to the books and accounts of the company. Street CJ of the Supreme Court of New South Wales held that the plaintiff as a director of the company was entitled to have access to the books and accounts of the company and the defendants were wrong in refusing him such access. The learned Chief Justice said at p 361:

> *The right to inspect documents and, if necessary, to take copies of them is essential to the proper performance of a director`s duties, and, though I am not prepared to say that the court might not restrain him in the exercise of this right if satisfied*

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> *affirmatively that his intention was to abuse the confidence reposed in him and materially to injure the company, it is true nevertheless, that its exercise is, generally speaking, not a matter of discretion with the court and that he cannot be called upon to furnish his reasons before being allowed to exercise it. In the absence of clear proof to the contrary the court must assume that he will exercise it for the benefit of his company.*

29.The right as expounded by the learned Chief Justice is one existing at common law and the learned Chief Justice did not base it on any statute in force at the time. The nature of such director`s right was considered in some depth by Slade J in **Conway & Ors v Petronius Clothing Co Ltd & Ors** [1978] 1 All ER 185[1978] 1 WLR 72. The learned judge was there considering s 147 of the Companies Act 1948 of the United Kingdom, which is in pari matria with s 199 of our Companies Act. In particular, the material provision, namely sub-s (3), is in the following terms:

> *(The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and* ***shall at all times be open to inspection by the directors*** *... [Emphasis is added.]*

The learned judge said, at [1978] 1 All ER 185, 197-198; [1978] 1 WLR 72, 85-86:

> *There appears to be remarkably little authority relating to the question whether directors of a company have a right to inspect the books of a company, either by virtue of s 147 or at common law or on some other grounds. There can be no doubt that s 147 places a statutory obligation on a company to make its books of account open to inspection by the directors and that any director of a company who fails to take proper steps to secure compliance by the company with this duty is liable to criminal sanctions in accordance with s 147(4). It does not, however, necessarily follow that s 147(3) confers any civil right of action whatever on a director against a company which refuses him inspection.*

Having examined numerous authorities including ***Edman v Ross*** , the learned judge came to the following conclusion at [1978] 1 All ER 185, 201; [1978] 1 WLR 72, 89-90:

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> *I reach the following conclusions in relation to the nature of the right of a director to inspect the books of account of a company:*
>
> (1) The right exists but it is a right conferred by the common law and not by statute. Though the legislature in s 147 of the Companies Act 1948, and its predecessors, implicitly recognised the existence of this right at common law, it conferred no new right; the purpose of that section and its predecessors was to impose criminal sanctions in the event of proper books of account not being kept or not being made available for inspection or in the event of a breach of any of the other duties imposed by the section [see our s 199(6)].
>
> (2) The right of a director to see his company`s books of account, which is exercisable both at and outside meetings, is conferred by the common law in order to enable the director to carry out his duties as a director: see the ***Burns*** case, 7 TLR 118 ...
>
> (3) The right of a director to inspect the company`s books of account must determine upon removal of the director from office.
>
> (4) The right not being a statutory right, the court is left with a residue of discretion as to whether or not to order inspection. However, in the case where there is no reason to suppose that the director is about to be removed from office, the discretion to withhold an order for inspection will be very sparingly exercised. Though a director will not in general be called upon to furnish his reasons before being allowed to exercise his right of inspection the court would in my judgment in such a case restrain him in the exercise of the right, if satisfied affirmatively that his intention was to abuse the confidence reposed in him as director and materially to injure the company. In my judgment, however, in the absence of clear proof to the contrary, the court would in such a case assume that he was exercising it for the benefit of his company ....

30.A slightly different view on the nature of this right was expressed by Mahon J of the Supreme Court of New Zealand in **Berlei Hestia (NZ) Ltd v Fernyhough** [1980] 2 NZLR 150. In that case, an Australian company held 40% of the shares in a New Zealand company (`the Company`) and was represented on the board by three directors, and the other directors also three in number represented certain interests in New Zealand (`the New Zealand directors`). The Company began exporting its products to Australia and

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competed with the Australian company in Australia. Differences arose between the Australian company and its nominated directors on the one hand and the Company and the New Zealand directors on the other. The New Zealand directors assumed control of the affairs of the Company to the exclusion of the Australian directors. The Australian company and the Australian directors took action against the Company and the New Zealand directors and applied for interlocutory reliefs. One of the reliefs sought was an injunction to restrain the New Zealand directors from refusing the Australian directors access to the records and accounts of the Company. Mahon J granted the injunction holding that there was no evidence that the Australian directors would use the corporate information for the benefit of the competitors. There the statutory provision involved was s 151 of the New Zealand Companies Act 1955, which is in all material respects similar to s 147 of the United Kingdom Companies Act and s 199 of our Act. The material provision is s 151(2) which is as follows:

> *The books of account shall be kept at the registered office of the company or at such other place as the directors think fit, and* ***shall at all times be open to inspection by any director****. [Emphasis is added]*

The learned judge said, at p 163:

> *Whilst I agree with Slade J that there was not in the UK statute, and not in the relevant 1976 amendment thereto, any positive declaration that a director has the right of inspection of company records, in contrast with a shareholder`s right to inspect the register of members, which is specifically provided for, yet it seems difficult to say, reading the New Zealand s 151(2), that no statutory right of inspection is thereby created. I have quoted the subsection already. Its terms are substantially identical with s 147(3) of the UK Act as it then stood. When read with the other provisions imposing penal sanctions upon directors in respect of false accounts, the subsection seems clearly to create a statutory right of inspection. This was the opinion expressed by DD Prentice in (1978) 94 LQR 184 in a case note on* ***Conway v Petronius****, and I agree with that opinion.*

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31.For our purpose, it is immaterial whether the right of the director to inspect the books and other records of a company is a statutory right or is a right existing at common law. Rather, the important question is whether the right, being a right existing at common law, has been modified by statute in the process of enactment. In ***Welch v Britannia*** , Kan Ting Chiu JC held (at p 681) that there is nothing in s 199 or elsewhere in the Companies Act which suggests that the right at common law as reflected in ***Edman v Ross*** has been modified. We respectfully agree.

32.Mahon J in ***Berlei*** also disagreed with Slade J that there was a residual discretion in the court to refuse inspection. He said at p 163:

> *In the course of his judgment Slade J relied to a considerable extent, with reference to the extent of the director`s rights, upon the quotations just made from the two reported cases referred to, but I venture to suggest, with great respect, that neither of the cases in fact justifies the conclusion of Slade J that there is a discretion as to whether or not a court will permit a director to have access to corporate records and accounts. The correct construction of the authorities relied upon by Slade J seems to me to be that the right of inspection is unqualified, but that where it is proved that a director is acting or is about to act in breach of his fiduciary duty to the company and intends to aid that process by inspecting the books, then his right to inspection disappears.*

We respectfully agree with Mahon J. Where the court disallows a director his right of inspection of the books and other records of the company, the court in effect is not exercising `a residual discretion`. The court in such an event is satisfied on the basis of the evidence before it that the intention of the director in inspecting the books and records is to make use of the information for ulterior purposes such as with a view to causing detriment to the company and that the director is thus abusing the confidence reposed in him as a director.

33.The right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director,

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including the duty to ensure that the company complies with the requirements as to accounts set out in the Companies Act: see s 204(1) of the Act. Such right is an important one, as the books and records of a company are a primary, and sometimes the only, source of information as to the state of affairs of a company. It follows that unless a director has access to these sources of information, he would be severely inhibited in the proper performance of his duties. So long, therefore, as such right is exercised for that purpose and not with a view to causing any detriment to the company, the right to inspect is `absolute`. In this sense and to that extent, the right may be termed `absolute`. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but for some ulterior purpose or to injure the company: ***Edman v Ross*** (supra) at p 361, ***Molomby v Whitehead*** (supra) at p 292, **Deluge Holdings Pty Ltd & Anor v Bowlay & Ors** [1991] 9 ACLC 1,486, 1,488 and **Re Geneva Finance Ltd (Receiver and Manager Appointed)** [1992] 10 ACLC 668, 675 and 676.

34. ***Burden of proof***

The onus of establishing that the right is being, or will be, exercised for an improper purpose lies on the person who asserts it: per Isaacs J in **Australian Metropolitan Life Assurance Co Ltd v Ure & Ors** [1923] 33 CLR 199, 219. There is no burden on a director to show any particular reason for his request for inspection - this will ordinarily be assumed: see ***Molomby v Whitehead*** (supra) at p 293. It is for those who oppose the director`s right to inspect to show `clear proof` and to satisfy the court `affirmatively` that the grant of the right of inspection would be for the purpose which would be detrimental to the interests of the company. There must be a `real ground` that the right would be abused and that substantial harm would be caused to the company thereby.

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35.We now revert to the facts in the instant case and to the question whether the appellant`s conduct in the present case was sufficient to justify the court denying him his right of inspection. In this respect, the appellant`s letter dated 16 May 1996 to the Commissioner of Lands in which the appellant urged the Commissioner to revoke his consent to the assignment of the lease from ECRC to the respondent was relied on by the respondent as the main ground in opposing the appellant`s application before the learned judge. The learned judge observed that this was a fundamental breach of fiduciary duty as the appellant had tried to `destroy the very substratum of the [respondent`s] existence`. But the material fact was that the parties had already reached a settlement on 11 October 1996 and the breach was covered by the terms of the settlement agreement. In particular, by cl 7 of the settlement agreement all disputes between the parties were deemed to be resolved, except the question of the $1.5m payment. It was therefore not open to the respondent to rely on an issue which had already been resolved.

36.Although the respondent might be entitled to refuse to accede to the earlier requests made by the appellant to inspect the respondent`s records on the grounds that there was an ambiguity in the capacity in which the appellant had made the requests and that at that time there was a clear breach of fiduciary duty on the part of the appellant as a director of respondent which gave rise to a belief that the appellant might make use of the information to the detriment of the respondent, there was no ground whatsoever for the refusal of the subsequent requests. There were at least two such requests made: one by the appellant himself personally at the office of the respondent on 20 May 1998, and the second in writing by his solicitors on 23 May 1998 and repeated on 2 June 1998. It was abundantly clear that at that time that the requests for inspection were made by the appellant or on his behalf as a director of respondent and the

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secretary of the respondent was manifestly wrong in refusing to allow him the inspection sought. Clearly, at that point in time the appellant was entitled to inspect the accounting and other financial records of the respondent without any need to give any reason, and the undertaking or assurance demanded by the secretary was completely unjustified.

37.In our view, the learned judge, with respect, was largely influenced by the appellant`s letter to the Commissioner, the decision of the High Court in Suit No 1240 in favour of the respondent, and the terms of the appellant`s earlier requests. With respect, he placed undue weight on these matters when in fact there was no clear evidence which would have warranted his conclusion that the appellant was seeking access to the information in question for a purpose inimicable to the interests of the respondent.

38. ***Conclusion***

For the foregoing reasons, we allowed the appeal and ordered the respondent to produce all its accounting and other records for the inspection of the appellant.

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Stephen C Soh (Bernard, Rada & Partners) for the appellant
Respondents unrepresented

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