Hau Tau Khang *v* Sanur Indonesian Restaurant Pte Ltd and another (Hau Tau Thong, non-party) and another matter
[2011] SGHC 97

Case Number : Registrar's Appeal Nos 491 and 492 of 2010 (Originating Summons No 879 and 1197 of 2010)

Decision Date : 25 April 2011

Tribunal/Court : High Court

Coram : Steven Chong J

Counsel Name(s) : Tony Yeo and Esther Foo (Drew & Napier LLC) for the appellant; Adrian Wong and Nelson Goh (Rajah & Tann LLP) as counsel, Jasmine Foo (Andrew Chua & Co) as instructing solicitors for the respondent.

Parties : Hau Tau Khang — Sanur Indonesian Restaurant Pte Ltd and another (Hau Tau Thong, non-party)

Companies – Accounts

Companies – Directors – Powers

Civil Procedure – Discovery of documents – Application

25 April 2011 Judgment reserved.

Steven Chong J:

Introduction

1 These are two appeals against the decisions of the Assistant Registrar ("AR") in Originating Summons No 1197 of 2010 ("OS 1197") and SUM 5515 of 2010 ("SUM 5515"), where Hau Tau Thong ("the appellant") applied, as director, to enforce the right to inspect the company's accounts pursuant to s 199(3) of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") (the "right to inspect") and for specific discovery of the company's accounts under O 24 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") respectively. The applications, initiated as alternatives to each other, were both dismissed by the AR.

2 Central to both appeals are the issues whether there are any restrictions on the right to inspect and if so, what these are. The appellant readily accepted that he was exercising the right to inspect so as to defend against an intended derivative action instituted by another director, Hau Tau Khang ("the respondent"), for alleged breaches of fiduciary duties arising from the company's accounts. In the respondent's view, this was an exercise of the right to inspect for an improper purpose, an exception following, *inter alia*, the decision of *Oxford Legal Group Ltd v Sibbasbridge Services plc and anor* [2008] EWCA Civ 387 ("*Oxford Legal*"). He contended that the purpose of the right to inspect was for discharge of *present or prospective* director's duties pertaining to the company accounts or at least director's duties in general. In view of this, it would also be improper to use the right to justify the past conduct/performance of director's duties. Lastly, he claimed the appellant was attempting to use the right to inspect to subvert the discovery process.

Factual background

3 The appellant and the respondent are co-directors with equal shareholdings in the companies, Sanur Indonesian Restaurant Pte Ltd ("SIRPL") and Sanur Holding Pte Ltd ("SHPL") (collectively referred to as "the Companies"). The Companies were engaged in the business of running a chain of restaurants serving Indonesian cuisine under the trade name of "*Sanur*". At all material times, the appellant, as the elder brother, was the managing director overseeing the business operations of the Companies though both the appellant and the respondent were co-signatories of all the Companies' bank accounts.

4 Sometime in 2003, the relationship between the brothers began to deteriorate. In 2006, they entered into an agreement to keep the restaurants in operation with a view to selling the business and the properties of the Companies and eventually of an orderly winding up of the Companies ("the 2006 Agreement"). Both sides later accused the other of unreasonable behaviour in managing the winding down process. Specifically, the respondent claimed the appellant deliberately allowed the offer for renewal of the lease for their flagship restaurant at Ngee Ann City to lapse. The respondent also discovered some irregularities in SIRPL's accounts but when he sought an explanation from the appellant, the latter was allegedly evasive. By 2009, all the *Sanur* restaurants had ceased operations, though both brothers remained as directors of the Companies. In October 2009, the appellant and his wife started another Indonesian restaurant, *Pepes*, at the same location at Ngee Ann City.

5 The respondent claimed that while investigating into the affairs of the Companies, he was stonewalled by Ms Cecilia Tan, the Office Manager. The respondent then terminated the services of Ms Tan in September 2009 and took possession of the keys to the Companies' documentation cabinets. There is some dispute over the manner and circumstances under which he came to acquire possession of the keys. However, that is not strictly relevant for the purposes of the appeals. Having had access to the Companies' accounts, the respondent apparently discovered that the cash deposits did not match the daily cash sales of the restaurants. Unknown to the appellant, the respondent then engaged the services of Stone Forest Corporate Advisory Pte Ltd ("Stone Forest") to conduct a forensic examination of the accounts of the Companies so as to investigate the alleged cash discrepancies. Thereafter, a report was issued by Stone Forest ("Stone Forest Report") in which it was reported that "based on the monthly sales summary for all 3 restaurants, the total amount of cash sales not deposited into Sanur's bank accounts amounted to S$153,525.45".

6 In August 2010, the respondent applied for leave of court to commence a derivative action on behalf of the Companies against the appellant for alleged breaches of fiduciary duties pursuant to Originating Summons No 879 of 2010 ("OS 879"). The breaches alleged against the appellant included financial irregularities in SIRPL's accounts based on the Stone Forest Report.

7 In response to OS 879, the appellant instituted a separate application in OS 1197 pursuant to s 199(3) of the CA to exercise his right as a director to inspect SIRPL's accounts. In the alternative, the appellant made a second application vide SUM 5515 in OS 879, for specific discovery of the Companies' accounts.

The decision of the Assistant Registrar

8 Before the learned AR, the appellant accepted that his motivation behind both applications was to gain access to the Companies' accounts in order to prove his defence in OS 879 and exonerate himself from the allegation of financial irregularities and/or breaches of fiduciary duties.

9 The AR agreed with the respondent's submission that the right to inspect under s 199(3) was restricted to enabling a director to carry out his duties. As she found that the application was intended to seek "ammunition" to defend the appellant against the potential derivative action, she

dismissed the application. As for SUM 5515, the AR found that the application was premature given that leave had not been granted for the commencement of OS 879.

The appeals

10 The appellant appealed against both decisions. Before me, parties agreed that if the appellant succeeded in his appeal in Registrar's Appeal No 492 of 2010 ("RA 492") against the AR's decision to dismiss the application under s 199(3) of the CA, there was no need to deal with Registrar's Appeal No 491 of 2010 ("RA 491") as it involved the same set of documents.

11 The appeals concern the following documents (collectively referred to as "the Companies' accounts"):

(a) The accounting and other records of the Companies that sufficiently explained the transactions and financial position of the Companies.

(b) Transaction records of SIRPL's DBS cheque book for the period 1 July 2006 till end November 2007.

(c) Daily cash deposit slips for SIRPL's outlet at Causeway Point for the period 1 July 2006 to March 2009 and for the period 1 July 2006 to September 2009 for the Centrepoint outlet.

12 Before embarking on an examination of the substantive merits of the appeals, I believe it is helpful to begin my analysis by considering the relevant principles applicable to the right of inspection under s 199(3) of the CA. It should be noted that the exercise of the right of inspection, unlike an application for specific discovery under O 24 r 5, does not require the director to establish either relevance or necessity. Therein lies the critical difference in these two "*discovery*" regimes.

The origin and nature of the right to inspect

13 An appropriate starting point will be to consider the precise terms of s 199 of the CA which states, *inter alia*, as follows:

Accounting records and systems of control

(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*** .

(4) If accounting and other records are kept by the company at a place outside Singapore there shall be sent to and kept at a place in Singapore and be at all times open to inspection by the directors such statements and returns with respect to the business dealt with in the records so kept as will enable to be prepared true and fair profit and loss accounts and balance-sheets and

any documents required to be attached thereto.

(5) The Court may in any particular case order that the accounting and other records of a company be open to inspection by a public accountant acting for a director, but only upon an undertaking in writing given to the Court that information acquired by the public accountant during his inspection shall not be disclosed by him except to that director. (6) If default is made in complying with this section, the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $2,000 or to imprisonment for a term not exceeding 3 months and also to a default penalty.

[emphasis added]

14 From the wording, it is immediately apparent that s 199(3) of the CA is couched in mandatory terms. This was observed by the Court of Appeal in *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 2 SLR(R) 352 ("*George Wuu*") at [25]. Less obvious is the origin of this right. Over the years, many judges have disagreed on this including, Slade J in *Conway v Petronius Clothing Co Ltd* [1978] 1 All ER 185 ("*Conway*") who was a proponent of the view that the right was conferred at common law (see 201), and Mahon J in the New Zealand decision of *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 ("*Berlei*") who declared the right was a creature of statute (see 163). However, in *George Wuu*, the Court of Appeal observed that it was immaterial whether the right owed its origin to common law or statute when it approved Kan JC's holding (as he then was) in *Welch and anor v Britannia Industries Pte Ltd* [1992] 3 SLR(R) 64 ("*Welch*") at [32]:

There is nothing in s 199 or elsewhere in the [Companies] Act that suggests that the common law rule reflected in *Edman v Ross*...is modified. The provision should therefore be read in conformity with *Edman v Ross*...

It appears to me that implicit in the Court of Appeal's decision is the acceptance that the right was *initially* conferred at common law and *thereafter* remained unmodified by legislation. It is at least clear that the Court of Appeal treated the rights under common law as co-extensive with the CA.

15 Next, the right to inspect has been described in various terms such as "an absolute right" in *Welch* at [29], *George Wuu* at [33] and "unqualified" in *Berlei* at 163. Whatever the nomenclature used to describe this right, the following principles appear from the decided cases:

(a) The right to inspect the company's accounts flows from the office of the director. Accordingly, that right cannot be exercised once he or she ceases to be a director: *Conway* at 201, *State of South Australia & Anor v Barrett & Ors* (1995) 64 SASR 73 ("*Barrett*") at 76. The rationale is that an ex-director "has no proprietary, managerial or other similar interest in the accounting and other records of a company" (see *Haw Par Bros (Pte) Ltd v Dato Aw Kow* [1971–1973] SLR(R) 813 at [12]).

(b) There is strictly no necessity for the director to furnish reasons or justify himself before he can exercise his right to inspect. This is clear from the facts of *George Wuu*. At the time the application for enforcement of the right to inspect was made, there were various disputes between the applicant director, the respondent company and its joint venture partner over the leasehold interest in two plots of land leased from the Land Office and certain payments which were made in relation to the assignment of the lease. There was initially some ambiguity as to the capacity in which the request for inspection was made. The right was denied and the director applied to court to enforce his right of inspection. At first instance, the court dismissed the director's application principally because he had written to the Commissioner of Land advising

revocation of consent to the assignment of the lease in view that the respondent company had committed several serious breaches of the lease agreement and the joint venture had reached a stalemate ("the Letter"). On the strength of the Letter, the court held that the respondent company was justified in harbouring doubts about the *bona fides* of the application. The Court of Appeal, however, disagreed. In their view, the judge below had erred by placing too much emphasis on the Letter as evidence of *mala fides*. Instead, on the premise that the director had an absolute right to inspect the accounts, it allowed the appeal.

The significance of this decision lies in the fact that the applicant director did not have to state his reasons for the request to inspect. This ties in neatly with the decisions in *Edman v Ross* [1922] 2 SR (NSW) 351 ("*Edman*") at 361 and *Welch* at [29], where it was observed that a director is not required to furnish any reason to inspect the company's accounts in the first place. This principle was applied recently by Pillai JC (as he then was) in *Ng Joo Soon (alias Nga Ju Soon) v Dovechem Holdings Pte Ltd and another suit* [2011] 1 SLR 1155 at [37].

(c) In the absence of proof to the contrary, the court would assume that the right would be exercised for the benefit of the company: *Edman* at 361 and *Welch* at [29].

(d) In exercising the right of inspection, the director can engage external assistance, for instance in the form of an accountant: *Edman* at 361–362.

(e) The right to inspect will be lost where it is exercised for some ulterior purpose *or* to injure the company. This was expressed in clear terms by the Court of Appeal in *George Wuu* at [33]:

> 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, 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* ([28] *supra*) at 361, *Molomby v Whitehead* ([27] *supra*) at 292, *Deluge Holdings Pty Ltd v Bowlay* (1991) 9 ACLC 1,486, 1,488 and *Re Geneva Finance Ltd (Receiver and Manager Appointed)* (1992) 10 ACLC 668, 675 and 676.
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> [emphasis added]

It bears noting at this point that the Court of Appeal did not define what constitutes an "ulterior purpose". This became the pivotal issue for determination in the present appeals.

(f) Where the right of inspection has been disallowed, the denial is not a function of the court's residual discretion but rather an outcome arising from the court's decision that the right was to be exercised in aid of some ulterior or illegitimate purpose (see *Berlei* at 163 which was cited with approval in *George Wuu* at [32]):

> 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*** .

[emphasis added]

It is noteworthy that *Oxford Legal* holds a contrary view at [12] that the court has a residual discretion.

The issues in the appeals

16 The upshot of the principles listed above ([15] *supra*) is that a director's right to inspect, though described as "*absolute*", is subject to certain limitations. As both counsel rightly appreciated, the issue in dispute was thus whether the appellant's disclosed purpose (*viz* exercise of the right to prove that he had not in fact committed any breaches of fiduciary duties) fell within the scope of these restrictions so as to oust the appellant's otherwise "absolute" right to inspect.

17 Counsel for the respondent, Mr Adrian Wong submitted that the appellant's "absolute" right to inspect the company accounts was subject to the following parameters:

(a) The right had to be exercised for performance of director's duties pertaining to the accounts of the company.

(b) The right had to be exercised in relation to performance of a director's present and future duties. It could not be used to justify past conduct/performance of director's duties.

(c) The exercise of the right for any other purpose not pertaining to discharge of a director's duties generally was "improper" and would therefore displace the "absolute" right of inspection.

18 Counsel for the appellant, Mr Tony Yeo adopted the more traditional view that, short of proof that the exercise would be injurious to the Companies, the appellant's "absolute" right of inspection could not be denied.

19 I will now turn to each of the respondent's contentions and examine them in closer detail.

Must the right to inspect be strictly exercised in relation to director's duties pertaining to the company accounts

20 Mr Wong's first submission was that the right to inspect was conferred strictly to enable a director to fulfil his statutory duties in relation to the Companies' accounts, for instance in the preparation of "true and fair profit and loss accounts" pursuant to s 201(3) of the CA. Any other unrelated purpose was, by definition, an improper purpose. In support of this narrow interpretation, Mr Wong directed me to the placement of s 199(3) within Part IV of the CA which governed "Accounts and Audit". With this restricted purpose in mind, he argued that the appeal in RA 492 simply could not succeed given the declared purpose of the appellant's intended inspection.

21 As palatable as the respondent's argument may appear, I note that there is nothing in s 199 that suggests that the right of inspection should be so restricted. In fact, in *George Wuu* (see [14(e)] *supra*), the Court of Appeal specifically held that the right was to enable the director to perform his duties, *including* the duty to ensure that the company complies with the requirements as to accounts. It went on to observe at [25] that the right is "a *concomitant* of the fiduciary duties of good faith, care, skill and diligence which a director owes to the company". In the earlier English case of *Conway*, Slade J similarly pointed out that "the right to inspect documents and, if necessary, to take copies of them is essential to the proper performance of a director's duties..." without stipulating which duties he meant. It bears noting that even under the leading authority relied on by the respondent (*viz Oxford Legal*) a director can exercise the right to inspect for the purposes of carrying out his duties as a director *generally* (see *Oxford Legal* at [37]). This interpretation is supported by the later comment in the same paragraph in *Oxford Legal* that it was inconsistent for the court to, on the one hand, hold a director at risk of liability for breach of his duties and, on the other hand, refuse to enforce the right of inspection *by the exercise of which the director could take steps to avoid liability for breach of those duties*.

22 In light of the above considerations, I reject the respondent's narrow construction of the purpose of the right to inspect and find that inspection was intended to enable a director to discharge *all* his statutory duties, including but not limited to those in relation to accounts. It appears quite foreseeable to me that a director might need to check the company's accounts so as to discharge his duties of reasonable care and diligence pursuant to s 157(1) of the CA. This was precisely what Rodgers J in *Law Wai Duen v Boldwin Construction Co Ltd* [2001] HKCA 284 ("*Law Wai Duen*") was alluding to at [12] when he said:

> Hence, in relation to many matters directors will no doubt rely upon what is done by company officials and their fellow directors in relation to the affairs of a company. But that is not the say that the ultimate responsibility does not lie upon the director. If a director has cause to be suspicious, or reasonably believes there is such cause, then the director may incur liability if he does not satisfy himself in relation to *all matters* relating to the company's affairs. More importantly, even if a director does rely upon other directors or company officials in the conduct of the company's affairs, he must, at all times, be at liberty to satisfy himself as to *any matter* in relation to the company's business.
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> [emphasis added]

Further, a director might also need to check the company's accounts to discharge his duty to act in the interest of the company as, without information on the company's financial position, the director may not be able to exercise his discretion properly.

23 In the circumstances, a wider purpose is, in my view, entirely consistent with the right of the director to inspect the company's accounts as such a right is but a "legal incident of his directorship" (see *Molomby v Whitehead and Australian Broadcasting Corporation* [1985] 63 A.L.R.282 ("*Molomby*") at 293).

Is the right restricted to performance of present and future duties

24 The appellant submitted that there was no logical reason why the right should be restricted to the discharge of a director's present and future duties. Instead the criterion should be whether the intended inspection bore any *nexus* to the performance of any duty as a director – past, present and future. In support of this, Mr Yeo drew my attention to the case of *McDougall v On Q Group Ltd* [2007] VSC 184 ("*McDougall*"), where the right of inspection was invoked in relation to a past event,

ie a loan that was extended some time ago.

25 In *McDougall*, the quantum of a loan pursuant to a loan agreement was subject to revision following audit of the company's accounts. The plaintiff director felt that he had grounds to believe that the accounts were irregular, and for this purpose sought to exercise his right to inspect the company's accounts but was prevented by the board of directors from doing so. The company subsequently brought legal proceedings against him for recovery of the outstanding loan amount. In response, he applied to court to enforce his right to inspect and succeeded.

26 Mr Wong sought to distinguish *McDougall* on two grounds. First, the court enforced the right to inspect because the director had acted early enough. He had sought inspection before commencement of legal proceedings against him but had been stonewalled by the board of directors from making further investigations. In contrast, once legal proceedings had been instituted, his interest to prove that the quantum was excessive would necessarily oppose the company's interest to ensure that the amount did not diminish. Secondly, though the director's purpose was to defend himself against a claim brought by the company, he had other legitimate reasons for the inspection, *ie* to establish irregularities in the administration of the company's accounts. This was in stark contrast to the appellant who admitted that his sole purpose of inspection was to prove his defence against the allegations of financial irregularities.

27 As regards Mr Wong's first argument, I am not convinced that the timing of the application or request to inspect the accounts is particularly relevant, as long as the applicant is still a director at the material time. Mr Wong's second argument also fails to consider the observation in *McDougall* at [30] that:

> "…the mere fact that a director requires access to company documents to defend a claim by the company against the director does not, by itself, establish that the director requires access for an impermissible private purpose. In this case, ***it is just as much in the company's interests, as it is in Mr McDougall's personal interests, that the dispute concerning his indebtedness to the company is resolved, on proper grounds, as soon as possible*** ."
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> [emphasis added]

This, I believe, was the crux behind the court's decision to allow the application in *McDougall*. Similarly, in the present appeals, the appellant submitted that it was in the Companies' interest to allow him to inspect the accounts because if the accounts proved that he had not breached his fiduciary duties, the Companies' limited resources would not be squandered on futile litigation. I agree. There appears to be no principled reason why a company's accounts cannot be inspected to answer allegations against a director in respect of alleged misconduct in the performance of his duties as a director. The accounts are documents belonging to *the Companies*. The respondent should thus have no greater right to the accounts than the appellant since they are *both* existing directors of the Companies with equal rights to the Companies' documents. As such, I find that the respondent was not entitled to restrict discovery to selective documents relied on and referred to in the Stone Forest Report. It is common ground that such documents do not represent the complete set of the Companies' accounting documents. The respondent should not be able to pick and choose the documents for inspection as surely, the right to decide cannot be determined by his fortuitous possession of the keys to the documentation cabinet. In the words of Beaumont J in *Molomby* at 293, the respondent had "wrongly assumed the role of arbiter of [the plaintiff director's right to inspect]" which was "a matter of legal right vested in [him]".

28 To further justify his narrow interpretation, Mr Wong also relied on the decision in *Barrett* where

it was stated at [82] that the right to inspect is "restricted to directors acting in that capacity and for the purposes of the corporation as distinct from private and personal reasons". In his view, this stood for the proposition that a director's use of the right to inspect to account for past conduct constituted a "personal" purpose that would be "improper".

29 I do not agree with the respondent's interpretation of *Barrett*. In that case, the parties seeking to enforce the right of inspection were *former* directors, unlike the appellant in the present appeals. Upon termination of their tenure as directors, the defendants in *Barrett* no longer had duties in relation to the company for which the right could be enforced. It was in those circumstances that the right was described as being exercised in their "*personal capacities*".

30 The respondent's final argument lay in his assertion that the positions of an ex-director and a director of a dormant company were analogous as both no longer owed *present* or *future* duties in relation to the Companies' accounts. There is, however, one significant difference which lies in the fact that a director of a dormant company remains liable as a director with statutory duties. For discharge of those duties, he must continue to hold the right to inspect as recognised in *Re Carry Strong Dyeing Factory Ltd* [2007] HKEC 1140 ("*Re Carry Strong*"). I also note that in *Re Carry Strong*, the Hong Kong court did not consider relevant the fact that the company had ceased business some three years prior to the application to enforce the right of inspection. This reinforces my view that the right of inspection is not in any way curtailed by the dormant or inactive nature of any company as long as the applicant is still a director of the company at the time of the application. There is, therefore, no convincing reason to confine the right of inspection to the performance of present and future duties as a director.

Can the right to inspect be exercised for purposes wholly unconnected to discharge of a director's duties

31 Before dealing with the respondent's last argument, it is helpful for me to examine in greater detail the existing restrictions articulated in case law, the most established of which arises in a situation where a director exercises the right to inspect "with a view to causing any detriment to the company" thereby "abusing the confidence reposed in him" (see *George Wuu* at [32]). Observations of similar tenor were made in *Welch* at [32] – if his intentions were "*materially to injure the company*" and in *McDougall* at [7], if there is "clear proof that a misuse of power is involved (the onus of which lies on those asserting it)".

32 What is less clear from the decided cases is whether the restriction extends beyond that, *ie* does refusal of the right to inspect when it would cause injury or detriment to the company operate as the *only* restraint to the otherwise absolute right of inspection? The respondent argued in the negative and in support, referred this court to the decision of *Oxford Legal* at [34] where the English Court of Appeal analysed *George Wuu* in close detail:

> [34] In *Wuu Khek Chiang George v ECRC Land Pte Ltd* [1999] 3 SLR 65 at [32] the Singapore Court of Appeal referred to the director being refused inspection when the court was satisfied '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'. The court said this (at [33]):
>
> > [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 ... Such a 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 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.

And the court went on to say (at para [34]):

> 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 a 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.

The appellant, of course, relies on that final passage. But, when read in conjunction with the earlier passages which I have cited, it is, I think, reasonably clear that the court did not intend a distinction between 'some ulterior purpose' (not involving injury to the company) and 'a purpose which would be detrimental to the interests of the company'. The true distinction is that drawn in its judgment (at para [33]): a distinction between the director's exercise of the right 'in the proper performance of his duties' and his exercise of the right 'not to advance the interests of the company but for some ulterior purpose'. ***Properly understood, as it seems to me, the decision in Wuu Khek Chiang George v ECRC Land Pte Ltd does not support the proposition that the circumstances in which the court will refuse to enforce the right to inspect are confined to those in which the purpose for which the director sought inspection is to injure the company*** .

[emphasis added]

33 Looking at Rodgers J's judgment in *Law Wai Duen*, the Court of Appeal in *Oxford Legal* also held at [37] that:

> ***I find it difficult to think that [Rogers J] intended to hold that a court would be required to enforce the right in circumstances in which it was demonstrated that the director was seeking inspection for some other improper purpose (not involving injury to the company)*** . First it was unnecessary, in that case, to make a distinction between intention to injure the company and other improper purpose...Second, as I have said, I am not persuaded that there is support for that proposition in the judgment of Street CJ in *Edman v Ross* or in the judgment of Slade J in *Conway v Petronius*, to both of which Rodgers J referred with approval. Third, as it seems to me, that proposition would be inconsistent with his own analysis of the reason why the court ought not to refuse to enforce the right inspection: if the director was seeking to exercise that right, not for the purpose for which it was conferred but for some purpose unconnected with his duties as a director, there was no reason why inspection should not be refused.
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> [emphasis added]

34 Having reviewed the authorities mentioned in [34] and [37] of *Oxford Legal*, I agree with Sir John Chadwick that "properly understood", *George Wuu* and *Law Wai Duen* did not confine the circumstances under which a court would refuse inspection to situations where the exercise of the right would injure the company. I also accept Mr Wong's submission that the exception to the right to

inspect cannot be restricted only to instances where the exercise would be "injurious" or "detrimental" to the company. Obviously if it is "injurious" to the company, it would *ipso facto* amount to an "improper" purpose. But the right to inspect can also be displaced if the director intends to use it for any purposes unconnected to the discharge of his director's duties. This reasoning is consistent with case law and with my finding at [22] (*supra*) that the right to inspect was conferred on directors (whether at common law or by statute or both) to facilitate the discharge of all director's duties in the CA.

35 The next issue in contention is where the burden of proof lies. On the authority of *George Wuu* at [34], it appears to me that the burden squarely lies on the party opposing the right, whatever the exception may be:

> 34 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* (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* ([27] *supra*) at 293. ***It is for those who oppose the director's right to inspect to show "clear proof" and to satisfy the court "affirmatively" that the grant of the right of inspection would be for the purpose which would be detrimental to the interests of the company*** . There must be a "real ground" that the right would be abused and that substantial harm would be caused to the company thereby.
>
> [emphasis added]

Unless this burden is discharged to the satisfaction of the courts, it must be assumed that the director will exercise the right for the benefit of the company (see *Edman* at 163). In other words, the default position is that a director is entitled *as of right* to have access to the company's accounts and other corporate information unless it can be demonstrated that an exception applies. The threshold is a high one, as demonstrated in *Campbell v Jervois Mining Limted* [2009] FCA 316. Here, the plaintiff director admitted that the purpose for which he sought access to the company records was for the lobbying of shareholders who had given proxies. Despite that, the court nevertheless held that the plaintiff director was entitled to inspect all the records of the company and the purpose identified for the inspection would not "abuse the confidence reposed in him" or materially injure the company.

36 Now, although it was not necessary for the appellant to provide reasons for the exercise of his right to inspect, he openly stated on record that his purpose was to address the allegations of breaches of fiduciary duties in relation to the Companies' accounts in OS 879. The question whether such a purpose is "injurious" to the interest of the Companies or unrelated to the performance of director's duties therefore arose. In this regard, the respondent argued that the factual matrix in the present case bore many similarities to *Oxford Legal*, where the English Court of Appeal found that the right to inspect was exercised for an ulterior purpose. With this in mind, I will now examine whether there is any material distinction between *Oxford Legal* and the present case.

Distinguishing Oxford Legal

37 As a starting point, it is helpful to note the facts of *Oxford Legal* in some detail. The appellant company ("OLG") and one Mr Hoyer Millar ("HM") were director-shareholders of the respondent company ("SBS"). OLG was controlled by one Mr Kenneth Brooks ("Mr Brooks") through companies he owned. In 2005, HM presented a petition under s 459 of the UK Companies Act 1985 claiming that Mr Brooks' actions had caused him unfair prejudice as a shareholder. A court order was issued,

requiring OLG to sell its shareholding in SBS to HM. The only outstanding issue was for the share price to be determined. This was to be done at a later date, after establishing SBS's net asset value as at 30 September 2006.

38 In 2007, OLG applied to the court seeking inspection of the SBS accounts from 2002. The Court of Appeal refused inspection on the ground that the right was being exercised for an "improper purpose". In doing so, it accepted the trial judge's inference that Mr Brooks (through OLG) was applying the right to fish for evidence that HM had made wrongful payments out of SBS, causing the company's share value to depreciate. This would allow him to charge HM a higher price for the SBS shares. Unlike a specific discovery application under O 24 r 5 of the Rules of Court, there was no requirement for the director to establish either relevance or necessity to exercise his right of inspection.

39 There were four factors that the trial judge considered in drawing such an inference:

(a) The fact that Mr Brooks was, in substance, synonymous with OLG.

(b) The reasons furnished by OLG for wanting to inspect the company documents mirrored the allegations of impropriety raised in the amended defence by Mr Brooks in the earlier s 459 petition.

(c) OLG had inspected, or been offered inspection of all documents required for completing and approving SBS's financial statements for the period between 30 September 2005 and 30 September 2006 pursuant to the discovery regime under the s 459 petition to enable OLG to deal with the accounts for the year ending 30 September 2006. Nonetheless, OLG still wanted to inspect all the company records since 2002.

(d) OLG had remained a director only because of Mr Brooks' action in delaying the valuation of SBS's shares. Upon sale of its shares, OLG would have ceased to hold its post as director.

40 The respondent relied upon *Oxford Legal* and argued that an improper purpose necessarily arose when the right to inspect was exercised with the intention of subverting the discovery process as it bore no relation to the discharge of director's duties. This was precisely the appellant's intention in instituting OS 1197 whilst the derivative action (*viz* OS 879) was still at the leave stage. The respondent contended that if the appellant wanted access to the accounts, he would have to wait until discovery was ordered at a later stage instead of trying to "usurp the function of the discovery process".

41 The respondent's argument, though convincing, does not recognise two important differences between the factual matrices in *Oxford Legal* and the present appeals. First, it appears to me that part of the English Court of Appeal's reasoning in finding an improper purpose arose because OLG was not exercising the right in furtherance of its obligations as a director. Rather, the application was intended to safeguard Mr Brooks' interest *qua* shareholder by facilitating a better valuation of his shares. In fact, OLG would not have remained a director if not for its refusal to acknowledge the court order and agree to a sensible valuation of the SBS's shares. The trial judge himself considered this when he observed at [15] there was a "serious case that OLG was not pursuing these proceedings through any genuine concern that it was necessary or appropriate to do so in order to discharge its obligations as a director".

42 Second and more significantly, the appellant in the present appeal does not face any restriction in the discovery disclosure as Mr Brooks did in *Oxford Legal*. Whilst the English Court of Appeal found

that Mr Brooks would not have been given the documents he sought as he was unable to fulfil the discovery threshold of relevance and necessity, the appellant in this appeal would be entitled to the Companies' accounts at the discovery stage of the proceedings in any event. The appellant's rationale in making this application now instead of waiting to address the matters at trial was to "nip the problem in the bud". Parties would thus save on time, costs and resources certainly insofar as the allegations relating to financial irregularities. I see no real issue in this. As such, it could not be said that the appellant was exercising the right to inspect in order to obtain documents which would otherwise not be discoverable.

43 As a final observation, in determining whether the exercise is for the performance of director's duties, the court should adopt a broad and liberal interpretation so as not to render the right nugatory. It is a right that comes with the office. In the present case, there is no doubt in my mind that the inspection has a sufficient nexus to the appellant's duties as a director. It would be too narrow to construe the right as limited to duties in relation to accounts or for the performance of present and future duties only, a view which I have rejected above ([20]–[30] *supra*).

44 For the reasons furnished above, I hold that the right to inspect the Companies' accounts is related to the appellant's discharge of his director's duties even if he did so with a view to prove that he had not acted in breach of his duties. As said in *Berlei* at pp163–164:

> "No court will act upon a mere presumption that a director will in a given situation act in breach of his fiduciary duty to the company...it must be proved, either by words or conduct, that there in fact exists an intention on the part of the director to use the information not for the benefit of the company and the shareholders..."

In fact, to suggest that the appellant should be denied the right to inspect accounts accessible by the directors to account for his action is "unthinkable" (see Iles, Nicholas, (1997) *The Corporation, its Former Directors & Legal Professional Privilege* Bond Law Review: Vol. 9: Iss 1, Article 2 at p18).

45 In the premises, I allow the appeal in RA 492. Given my decision in RA 492, there is strictly no necessity to deal with RA 491. However, for completeness, I will briefly explain why I agree with the AR that the application for specific discovery was indeed premature.

Specific discovery

46 The regime governing specific discovery is set out in O 24 rr 5(3) and 7 of the Rules of Court. However, a hurdle which the appellant would need to overcome is O 24 r 5(4), which provides that the court will not order specific discovery *before* general discovery unless it is of the opinion that doing so is *necessary* or *desirable*.

47 The appellant argued that specific discovery was necessary in the circumstances to aid the court in arriving at its decision whether to grant the respondent leave to commence the derivative action in OS 879. Specifically, the appellant alleged that the documents would establish that the respondent was not acting in good faith or in the interests of the Companies (see *Pang Yong Hock & another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 at [20] and *Law Chin Eng & Another v Hiap Seng & Co Pte Ltd* [2009] SGHC 223 at [19]). Bad faith would be demonstrated by establishing that the respondent had cherry picked documents to present to the forensic accountants, thereby furthering his intention of pursuing a "personal vendetta" against the appellant through the derivative action in OS 879. Specific discovery of the Companies' accounts would also permit the appellant to better demonstrate to the court his innocence in relation to the alleged financial irregularities. This would in turn confirm that the respondent was not acting in the interests of the Companies by

wasting the Companies' already limited coffers on unmeritorious litigation.

48 The respondent relied on the trite proposition at law which provides that, at the leave stage, the court should not adjudicate on disputed issues of fact, but merely to determine whether a *prima facie* case has been made out (see *Teo Gek Luang v Ng Ai Tiong and others* [1998] 2 SLR(R) 426 at [15] and *Agus Irawan v Toh Teck Chye & others* [2002] 1 SLR(R) 471 at [6] both approved by the Court of Appeal in *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR(R) 1 at [16]–[19]). The respondent further averred that the appellant was seeking to "usurp" the function of the general discovery process in the derivative action by "fishing" for information to support his defence which was not even due for filing.

49 The question whether the court will grant an order for specific discovery at such an early stage of proceedings (specifically, before pleadings are closed), was considered in *RHM Foods and Another v Bovril Ltd* [1982] 1 WLR 661 where the plaintiff brought an action of passing off against the defendant. The plaintiff subsequently applied for discovery of certain documents after issuing a writ and a motion of its intention to apply for an interlocutory injunction restraining the defendants from continuing to pass off their product, but prior to filing a statement of claim. The English Court of Appeal dismissed the application and held that, although O 24 r 7 (the Singapore equivalent being O 25 r 5) gave the court discretion to order specific discovery prior to filing of pleadings, such discretion would only be exercised in "exceptional" circumstances. The main reason for this was that it would be unfair to compel a party to provide unilateral discovery before the other party has formally pleaded its case (at 665–669). The court also felt that, until at least a statement of claim was delivered by setting out the matters in question in the action, it could not properly exercise its discretion (at 665). The same reasoning *mutatis mutandis* is applicable, and was in fact applied in the Hong Kong decision of *Bank of India v Gobindram Naraindas Sadhwani & Anor* [1994] 2 HKLR 69 to a defendant who had not filed a defence prior to the application. In my view, this must be right: prevention of a "fishing" expedition prior to general discovery must apply both ways in the interests of consistency and fairness.

50 I find that the appellant has clearly failed to discharge the burden to show "exceptional" circumstances to justify discovery at this stage of the proceedings. I note that the respondent has relied on grounds extending beyond allegations of financial irregularities against the appellant in OS 879. Other breaches include, *inter alia*, the following [note: 1] :

(a) Failure to use reasonable diligence in:

(i) filing the Companies' accounts for the financial year ending on 30 June 2008 and sending the said accounts for auditing. As a result, the Companies incurred penalties from ACRA;

(ii) paying fees for services rendered by one M/s Spin Creative Pte Ltd. Consequently, the latter instituted legal proceedings against the Companies and obtained judgment in default of appearance; and

(iii) revoking the respondent's instruction to appoint a solicitor to defend the lawsuit commenced by Cecilia Tan against the Companies for wrongful dismissal.

(b) Usurping corporate opportunities from the Companies by allowing the lease for the flagship restaurant at Ngee Ann City to lapse and subsequently operating a competing restaurant, *Pepes*, at the same location.

(c) Placing himself in a position of conflict against the interests of the Companies by incorporating Ochacha (Singapore) Pte Ltd and Simple Spice Pte Ltd, that ran the principal activities of retail sale of food and beverages and a restaurant business respectively. The appellant also failed to disclose the existence of these companies to the respondent.

(d) Improper management of the restaurant operations, such as the termination of the leases at Causeway Point and Suntec City and the ceasing of operations of the Centrepoint outlet, despite the fact that the business was still profitable. As a result, the Companies breached the Memorandum of Lease entered into with Frasers Centrepoint, which included a covenant binding SHPL to operate an Indonesian restaurant on the unit and to keep the restaurant open daily.

51 In my view, discovery of the Companies' accounts would not be able to summarily address the above non-financial allegations in any event. As such, it is difficult to see how discovery of the Companies' accounts would necessarily dispose of the intended derivative action in OS 879 at the leave stage. It follows that the appellant's argument that the discovery would save time and costs simply cannot stand.

Conclusion

52 I therefore allow the appeal in RA 492 while that in RA 491 is dismissed. Since the bulk of the submissions related to RA 492, the cost orders should be reflected accordingly. I order the respondent to pay the appellant a net cost amount of $3,500 inclusive of disbursements for both appeals.

53 It leaves me now to thank both Mr Yeo and Mr Wong for their helpful submissions together with their citations of relevant case authorities which assisted me in writing this decision.

[note: 1] Affidavit of Hau Tau Khang dated 26.08.10 at [13]–[39]