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Director's Right To Inspect Documents – Is It Absolute?

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Sections 245(1) and 245(4) of the Companies Act 2016 provide that a company and its directors and managers should keep the accounting and other records of the company. These records should at all times be open for inspection by the directors.

A director's right to inspect records of a company pursuant to Sections 245(1) and 245(4) have been described to be an absolute right. However, there is a caveat to this absolute right, namely, the right has to be exercised for the proper performance of the director's duties to the company and not with a view to causing any detriment to the company. This principle was revisited in the recent High Court decision of *Low Ean Nee v SNE Marketing Sdn Bhd*.

Background Facts

The Plaintiff is a director of the company, i.e. the Defendant. The director requested for a set of the company's documents, which included the management accounts, all resolutions of the board of directors, general ledgers, profit and loss accounts and balance sheets for the financial years 2016 to 2019 (Documents). However, the director's request was refused by the company for the following reasons:

- (a) The director played no role or part in the management of the company's business.
- (b) The Documents had always been available to the director but she did not show any interest in the past.
- (c) The director did not provide a reason or purpose for her request for the Documents.

As a result of the company's refusal to provide the Documents, the director filed an originating summons seeking amongst orders for an order that she be allowed to inspect and make copies of the Documents.

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Legal Principles

The High Court having referred to cases such as *Dato' Tan Kim Hor & Ors v Tan Chong Consolidated Sdn Bhd*, *Liaw Yeou Huah v Wong Kee Kian & Ors* and *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd*, summarised the legal principles on the right of a director to inspect documents as follows:

- (a) Section 245(4) imposes a mandatory requirement on a company to ensure that accounting and other records of the company are available for inspection by its directors.
- (b) This requirement to make available records for inspection is in line with the fiduciary duties of a company director. These duties can only be carried out if directors are allowed full access to records of the company.
- (c) Following from this, the right to access documents, though absolute, must be exercised for the proper performance of a director's duties. It should not be exercised for any purpose that may be detrimental to the company.
- (d) If it is clearly shown that a director is using the right to inspect for an improper purpose, the court has no power to assist him to obtain access to the documents. The right is given to allow the proper performance of a director's duties and the court should not facilitate the right being invoked for a purpose for which it was not conferred.
- (e) In cases where the right to access documents is refused, all that a director needs to show to enforce his right is that he is a director of the company, he has demanded inspection and that the right has been refused.
- (f) The burden then shifts to the company to rebut the presumption that the request is being made in the discharge of the director's duties. The company must show clear evidence of impropriety in the director's purpose or that the purpose is unrelated to the discharge of the director's duties.

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Decision

Based on the evidence before the court, the High Court found that the company had established that the director's request for inspection of the Documents was made in bad faith and with an ulterior, improper or collateral purpose. The court also held that the request in this case was unrelated to the duties of the plaintiff as a director of the defendant for amongst others, the following reasons:

- The company had on multiple occasions enquired the reason the director required access to the Documents and requested for an undertaking that the director will not use the Documents for any ulterior and/or improper purpose that would be detrimental to the interest of the company. However, the director failed to provide any reason and also did not provide the undertaking that was requested.
- The director had, when previously given access to the Documents, used them to expose the company to unnecessary litigation.

Commentary

It is trite law that a director's right to inspect documents of the company will be lost if such right is exercised for any purpose unrelated to the discharge of the director's duties or for any ulterior motive which would be detrimental to the interest of the company. Hence, if there is reason to suspect that a director's request to inspect documents falls within any of the aforementioned scenarios, companies have to properly examine the same and may refuse access if such ulterior motive or purpose unrelated to the discharge of the director's duties is proven.

Authored by Lim Khey Ken, associate with the firm's Corporate & Real Estate Transactions practice.

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