

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0031

BETWEEN:

**[1] INTIMERE HOLDINGS LIMITED
[2] HELLICORP INVESTMENTS LIMITED**

Appellants

and

KATINA PAPANIKOLAOU

Respondent

Before:

The Hon. Mr. Eddy D. Ventose	Justice of Appeal
The Hon. Mr. Gerard St. C Farara	Justice of Appeal [Ag.]
The Hon. Mde. Kimberly Cenac-Phulgence	Justice of Appeal [Ag.]

Appearances:

Mr. Paul Fradley and Mr. Andre Mc Kenzie for the Appellants
Mr. Paul Chaisty, KC with him Mr. Richard Evans and Ms. Jane Fedotova
for the Respondent

2024: October 28;
2025: June 4.

Commercial Appeal – Inspection of electronic copies of documents and records of the appellant companies - Sections 100(1) and 184B of the BVI Business Companies Act, 2004 - Documents and records to be inspected including unredacted copies of engagement letters entered into by the appellants and their legal advisors – Disclosure of the party funding the appellants and other companies within the corporate group in various litigation and arbitrations – Whether the learned judge erred in law in finding that the scheme of section 100 of the Business Companies Act did not permit the court to refuse to make an order when satisfied that an applicant was acting for an improper purpose - Whether the learned judge erred as a matter of fact in finding that the respondent was acting for a proper purpose in bringing the application - Whether the learned judge erred as a matter of law in concluding that the application should not be refused on the ground that the respondent was acting for an improper purpose

The appellants, Intimere Holdings Limited (“Intimere”) and Hellicorp Investments Limited (“Hellicorp”), are holding companies registered in the British Virgin Islands and are part of an intricate corporate structure comprising several corporate vehicles. The

respondent, Ms. Papanikolaou, is a director of Intimere and Hellicorp. Ms. Papanikolaou in her capacity as director of the said companies sought orders, pursuant to sections 100 and section 184B of the BVI Business Companies Act, 2004, (the “BCA”) permitting her to inspect certain documents and records of the two companies. The basis of her claim was that she was unable to perform any of her duties as director because she was denied access to any documents of the companies that would present the state of the companies’ affairs and that would allow her to discharge her duty as director, inclusive of assessing the companies’ financial positions.

In response to the respondent’s claim in the court below, the appellants offered to provide non-contentious corporate documentation to her, whereby the appellants’ attorneys wrote to her attorneys on 28th February 2022 providing the non-privileged documentation relating to the legal proceedings in which the companies were involved together with copies of engagement letters with their current solicitors. The said engagement letters had redacted the name of the party funding the appellants (“the Funder”).

The appellants vehemently opposed Ms. Papanikolaou’s claim for disclosure of the identity of the Funder on the basis that it was requested for the improper purpose of seeking to further the litigation interests of Mr. Rabinovich who is the principal of Felix LP, one of the two shareholders of Intimere holding 35% of the shares in the company. The appellants also alleged that the claim was made in the context of an illegitimate campaign being waged against them, other companies in their corporate group and their ultimate beneficial owner, Mr. Magomedov. The appellants’ concern is therefore that, by seeking access to all of the documents and records of the companies, Ms. Papanikolaou was seeking the documents for an improper purpose and that the claim was abusive.

The appellants claimed that there is no good reason why Ms. Papanikolaou needs to know the identity of the Funder in order to perform her duties as a director. They maintained that the application was made for the improper purpose of gaining information about the Funder of the companies’ costs in legal proceedings, so as to seek to stifle those proceedings for the benefit of parties engaged in legal proceedings with the companies. They further stated that the fact that Ms. Papanikolaou has focused so intently on seeking to obtain a copy of the funding agreement tends to support the companies’ original concerns about the application being made for the improper purpose of seeking to further the litigation interests of Ms. Papanikolaou’s principals.

Delivering an *ex tempore* judgment dated 8th March 2022, Wallbank J permitted Ms. Papanikolaou to inspect and be supplied with electronic copies of the documents and records of each of the appellants. The learned judge first considered the statutory regime in sections 96 to 102 of the Business Companies Act and found that the regime was uncompromising and imposed a demanding obligation. The learned judge reasoned that a director must be able to function, however suspicious the opponent of the director feels that that director may be. In relation to whether the application was made for an improper purpose as contended by the appellants, the learned judge found that, pursuant to section 100 of the Business Companies Act, the concern of Ms. Papanikolaou to have material whereby she can assess the exposure or potential exposure to the companies arising out of the litigation was entirely legitimate and that any responsible director would have such concerns.

Dissatisfied with the decision of the learned trial judge, the appellants appealed to this Court advancing three grounds of appeal, namely that: (1) the learned judge erred in law in finding that the scheme of section 100 of the BCA did not permit the court to refuse to make an order when satisfied that an applicant was acting for an improper purpose in bringing the application or part thereof; (2) the learned judge erred as a matter of fact in finding that Ms. Papanikolaou was acting for a proper purpose in bringing the application; and (3) the learned judge erred as a matter of law in concluding that the application should not be refused on the ground that the Ms. Papanikolaou was acting for an improper purpose.

Held: dismissing the appeal with costs to the respondent to be assessed if not agreed within 21 days of today's date, that:

1. Section 100(1) of the Business Companies Act speaks in mandatory terms to the unqualified entitlement of a director of a company to inspect documents and records of that company. Section 100(1) imposes a demanding obligation on a BVI company to allow inspection of the records by a director. Further, a distinction can be drawn between sections 100(1), 100(2) and 100(3). While both section 100(1) and section 100(2) applies, respectively, to a director's entitlement to inspect the company's records and to member's entitlement to inspection, in the case of the member, that entitlement is expressly made subject to the right of the directors to refuse inspection (in whole or in part) of the company's records as listed, which decision may be challenged by the member before the courts. In the case of a director, should this right be refused or not accommodated, the director may seek relief from the court pursuant to the enforcement provision in section 184B, which enables the court to grant relief regarding actual or proposed conduct by a company or a director of a company which contravenes the BCA or the memorandum or articles of the company.

Sections 100 and 184B of the **BVI Business Companies Act, 2004** Act No. 16 of 2004 of the Laws of the Territory of the Virgin Islands applied.

2. In enacting section 100, the Legislature appreciated that an individual director cannot make his full contribution to the management of the corporate business unless given access to the company's books and records. The Legislature empowered the court to order the inspection of the documents and records of a company to make it clear and incontrovertible that directors would have a right to see and inspect the records in order to perform their fiduciary duty and to obtain a true and fair picture of the state of the company's affairs.

Bowview Overseas Limited and Others v Aleman, Cordero, Galindo and Lee Trust (BVI) Limited BVIHCV2017/0156 (delivered 27th February 2020, unreported) applied.

3. The learned judge did not find that there was no place for the improper purpose test in the context of an application under section 184B to enforce compliance with section 100 of the BCA. The learned judge did in fact consider whether Ms. Papanikolaou was acting for an improper purpose. Although the learned judge did not explicitly say this in his oral decision, this finding is manifest or at

minimum implicit in the learned judge's conclusion having regard to his assessment of the purpose for which the inspection was sought. The learned judge's conclusion was also based on the paucity of evidence in support of the assertions and accusations made by the appellants that Ms. Papanikolaou was acting in concert with Mr. Rabinovich and that she was part of some conspiracy with the Russian State Nuclear Energy Authority.

Oxford Legal Group Ltd v Sibbasbridge Services Plc [2008] EWCA Civ 387 applied.

JUDGMENT

Introduction

- [1] **CENAC-PHULGENCE, JA [AG.]**: This is an appeal against an order of Wallbank J dated 8th March 2022 permitting the respondent, Ms. Katina Papanikolaou ("Ms. Papanikolaou") to inspect electronic copies of the documents and records of each of the appellants, Intimere Holdings Limited ("Intimere") and Hellicorp Investments Limited ("Hellicorp"), pursuant to section 100(1) of the **BVI Business Companies Act, 2004**¹ (the "BCA"). The documents and records to be inspected included unredacted copies of the engagement letters entered into by the appellants and their legal advisors, which disclose the party funding (the "Funder") the appellants and other companies within the corporate group in various litigation and arbitrations. The order was made consequent on an application filed by Ms. Papanikolaou pursuant to sections 100 and 184B of the BCA.

The parties

- [2] Intimere and Hellicorp are holding companies registered in the British Virgin Islands ("BVI") and are part of an intricate corporate structure comprising several corporate vehicles:
- (i) Intimere has two shareholders, namely Felix L.P and SGS Universal Investment Holdings Ltd ("SGS"). Felix L.P owns 35% of the issued shares in Intimere and SGS owns the remaining 65%. Felix L.P is ultimately owned by Mr. Rabinovich while SGS is ultimately owned by Mr. Magomedov. Mr. Magomedov is currently

¹ Act No. 16 of 2004 of the Laws of the Territory of the Virgin Islands.

serving a prison sentence in Russia on charges of 'organised crime', 'fraud' and 'embezzlement'.²

- (ii) Intimere holds 100% of the shares in Hellicorp.
- (iii) Hellicorp holds 100% of the shares in Sian Participation Corp ("Sian"), a company incorporated in the BVI and currently in liquidation.
- (iv) Sian holds 100% of the shares in Maple Ridge Ltd ("Maple Ridge"), a company incorporated in Cyprus.
- (v) Maple Ridge owns 100% of the shares in Wiredfly Investments Ltd ("Wiredfly"), a company incorporated in Cyprus.
- (vi) Wiredfly holds 100% of the shares of two companies incorporated in Cyprus: (i) Smartilicious Consulting Ltd ("Smartilicious") and (ii) Enviartia Consulting Limited ("Enviartia").
- (vii) Smartilicious and Enviartia each hold 24.9999% of the shares (together 49.9997%) in Far-Eastern Shipping Co PJSC ("FESCO"), a public joint stock company incorporated under the laws of Russia. FESCO is a company that has strategic investments in ports, rail and shipping. The key asset of FESCO is the Commercial Port of Vladivostok which is said to be "a high value, strategic asset".³

[3] Ms. Papanikolaou is a director of Intimere and Hellicorp. Following a contested hearing on 14th June 2021, Jack J ordered that all necessary steps be taken to appoint Ms. Papanikolaou as a nominee Director of Felix L.P in Intimere and Hellicorp in accordance with a Shareholder's Agreement dated 21st December 2012 among Felix L.P (formerly called TPG Felix L.P), SGS and Intimere.

² Hearing Bundle Volume 2, First Affidavit of Shagav Gadzhiev, p. 694 at paragraph 30.

³ Hearing Bundle Volume 2 First Affidavit of Shagav Gadzhiev, p. 690 at paragraph 13.

Background

- [4] By fixed date claim form filed on 5th October 2021, Ms. Papanikolaou in her capacity as director of Intimere and Hellicorp, sought orders, pursuant to sections 100 and section 184B of the BCA, permitting her to inspect certain documents and records of the two companies. The background to Ms. Papanikolaou's claim is set out in detail in her first affidavit filed in support of the claim on 5th October 2021. In essence, the claim followed from a long history of requests made by Ms. Papanikolaou for inspection of documents of Intimere and Hellicorp which were either refused or provided by the companies in a piecemeal fashion.⁴
- [5] In Ms. Papanikolaou's first affidavit, she deposed that there has been a history of resistance by a fellow director of the companies, Mr. Gadzhiev (who had been appointed by SGS) to provide any documents of the companies to directors nominated by Felix L.P.⁵ Accordingly, the basis of Ms. Papanikolaou's claim was that she was unable to perform any of her duties as director because she was denied access to any documents of the companies that would present the state of the companies' affairs⁶ and that would allow her to discharge her duty as director, inclusive of assessing the companies' financial positions.
- [6] Upon receipt of the claim on 6th October 2021, the appellants offered to provide non-contentious corporate documentation to Ms. Papanikolaou. On 28th February 2022, the appellants' attorneys wrote to Ms. Papanikolaou's attorneys providing the non-privileged documentation relating to the legal proceedings in which the companies were involved together with copies of engagement letters with their current solicitors. These engagement letters redacted the name of the Funder.
- [7] The appellants, however, vehemently opposed Ms. Papanikolaou's claim for disclosure of the identity of the Funder on the basis that it was requested for the improper purpose of seeking to further the litigation interests of Mr. Rabinovich

⁴ Hearing Bundle Volume 2, First Affidavit of Katina Papanikolaou, page 11 at paragraphs 29-44.

⁵ Ibid, at paragraph 8.

⁶ Ibid at paragraph 50.

who is Felix L.P's principal. The appellants maintained that the claim was made in the context of an illegitimate campaign being waged against them, other companies in their corporate group and their ultimate beneficial owner, Mr. Magomedov (the "Corporate Raid"). Indeed, according to the appellants, the context comprises a wider conspiracy by "hostile parties"- the Russian State Nuclear Energy Authority, ROSATOM, acting through Mr. Rabinovich, his companies and associates. According to the appellants the aim of the conspiracy is to further deprive Mr. Magomedov of his assets, as a number of his assets had already been transferred into the control of the Russian State through illegitimate commercial pressure and other means.⁷ Against that backdrop, the appellants' concern is therefore that, by seeking access to all of the documents and records of the companies, Ms. Papanikolaou was seeking the documents for an improper purpose and that the claim was abusive.

[8] Furthermore, during the hearing of the claim in the court below, Ms. Papanikolaou focused on the disclosure of the funding agreement by which a third party is funding the companies' legal expenses. The appellants' position was that no such document existed and that even if it did, it would clearly be contrary to the best interests of the Companies to provide such information to Ms. Papanikolaou who is closely connected to the "hostile parties" who are adverse in interest to Intimere and Hellicorp. Further, they claimed that if those "hostile parties" were to discover the identity of the Funder, there is a real risk that they will target the Funder in an effort to impact the companies' funding for the legal proceedings and stifle its ability to participate in same.

[9] In a nutshell, the appellants claimed that there is no good reason why Ms. Papanikolaou needs to know the identity of the Funder in order to perform her duties as a director. They maintained that the application was made for the improper purpose of gaining information about the Funder of the companies' costs in legal proceedings, so as to seek to stifle those proceedings for the benefit of the parties engaged in legal proceedings with the companies. They further stated that the fact that Ms. Papanikolaou has focused so intently on

⁷ Appellants' Skeleton Argument filed on 21st May 2024 at paragraphs 10-11.

seeking to obtain a copy of the funding agreement (which they say does not exist) tends to support the companies' original concerns about the application being made for the improper purpose of seeking to further the litigation interests of Ms. Papanikolaou's principals.

The judgment below

[10] At the conclusion of the hearing on 8th March 2022, Wallbank J delivered an *ex tempore* judgment. For the purposes of this appeal, the relevant part of the judge's order is that:

"1. Each of the Defendants shall by 4 p.m. on 6th April 2022:

1.1 permit the Claimant to inspect and supply to the Claimant (at the Defendants' expense) electronic copies of the documents and records of each of the Defendants as provided for in Section 100(1) of the Act, by reference to the categories of documents listed in Sections 96 to 98 and 102 of the Act ("**the Defendants' Books and Records**") and which shall include, for the avoidance of doubt but without limitation, unredacted copies of the engagement letters provided to Conyers by letter dated 28 February 2022..."

[11] In arriving at this order, the learned judge first considered the statutory regime in sections 96 to 102 of the BCA and found that the regime was uncompromising and imposed a demanding obligation.⁸ Having so observed, the judge reasoned that "a director must be able to function, however suspicious the opponent of the director feels that that director may be... it must be made to work that this director gets the documents that that (sic) he or she must be able to see in order to fulfil his or her functions as a director".⁹ The learned judge then made plain that if Ms. Papanikolaou is supposed to be a director, she is supposed to be able to have the same sight of documents as the other directors subject to privileged documents.¹⁰

[12] In relation to whether the application was made for an improper purpose as contended by the appellants, the judge had this to say:

"Now in relation to whether or not the application is made for [an] improper purpose, this is based entirely upon conjecture and inference

⁸ Hearing Bundle Volume 1, Transcript of Proceedings at page 112, lines 14-18 and p.128 lines 7-11.

⁹ Hearing Bundle Volume 1, Transcript of proceedings at page 127, lines 14-25.

¹⁰ Hearing Bundle Volume 1, Transcript of proceedings at page 129, lines 17-21.

and cynicism, if I can put it that way. And it's the cynicism that one finds often in cases such as this and perhaps it's a justified cynicism, perhaps it isn't. Somehow or other a director must be able to function, however suspicious the opponent of the director feels that that director may be. So somehow or other, it must be made to work that this director gets the documents that that he or she must be able to see in order to fulfil his or her functions as a director".¹¹

"And that is where the statutory regime comes in...The answer lies in the way the statutory scheme is phrased. It is not for me to try and find some kind of, some kind of exception or watering down of the statute. It is a demanding obligation that the statutory (sic) imposes, but that is what our legislature intended, that is what our legislature decided was the way to go and it is not for me somehow to mitigate the rigors of it."¹²

"...I also accept that it is not for the Company to make a judgment call as to which documents a director should see or needs to see for the purposes of acting as a director."¹³

"It was suggested by Mr. Chaisty that the [respondent] wants to know who the funder is because he may be a man of straw particularly if there is no funding agreement. That, I think, is a very good point...."¹⁴

- [13] The learned judge found that as an incoming director Ms. Papanikolaou ought to know what the full funding arrangement of the company is or who it is with.¹⁵ Ultimately, the learned judge found that the concern of Ms. Papanikolaou to have material whereby she can assess the exposure or potential exposure to the companies arising out of the litigation was entirely legitimate and that any responsible director would have such concerns. Therefore, he concluded that there was utility in the application and Ms. Papanikolaou should have access to the companies' documents and records to which she is entitled under section 100 of the BCA.

The appeal

- [14] Being dissatisfied with the judgment of the learned judge, Intimere and Hellicorp appealed to this Court advancing three grounds of appeal. The grounds, which

¹¹ Ibid at page 127 lines 14-25.

¹² Ibid at page 128 lines 1-11.

¹³ Ibid at page 128 lines 16-19.

¹⁴ Ibid at page 128, lines 20 – 25 and page 129 lines 1-7

¹⁵ Ibid at page 129, lines 8-17.

seek to impugn the learned judge's conclusions of both fact and law, can be distilled/framed as follows:

- (i) The learned judge erred in law in finding that the scheme of section 100 of the BCA did not permit the court to refuse to make an order when satisfied that an applicant was acting for an improper purpose in bringing the application or part thereof. The learned judge ought not to have concluded that the statutory scheme of section 100 was uncompromising and left no room for the court to refuse to order disclosure.
- (ii) The learned judge erred as a matter of fact in finding, to the extent that the learned judge made such a finding, that Ms. Papanikolaou was acting for a proper purpose in bringing the application, in particular in seeking disclosure of the identity of the party funding the appellants and their subsidiaries in the litigation.
- (iii) The learned judge erred as a matter of law in concluding that the application should not be refused on the ground that the Ms. Papanikolaou was acting for an improper purpose.

[15] At the heart of the grounds of appeal is the determination of a singular issue which may be put this way: whether the learned judge erred in ordering that Ms. Papanikolaou, in her capacity as director, should be permitted by the appellants to inspect unredacted copies of the engagement letters between the appellants and their legal advisors, so as to identify the Funder.

[16] The respondent filed a counter notice of appeal indicating that she did not wish to cross appeal against any aspect of the order and requesting that the Court uphold the order in its entirety.

Appellate approach to findings of fact

[17] The issues as distilled from the grounds of appeal, involves a challenge to conclusions of fact made by the learned judge. The general approach of an

appellate court to findings of fact by a judge is well known and has been consistently restated in several cases of this Court. In **Ikana Holdings, S. DE R.L and others v Putney Capital Management Ltd and others**¹⁶ Webster JA [Ag.] stated:

“In summary, an appellate court is generally reluctant to interfere with the findings of fact by a lower court since that court had the opportunity of seeing and hearing the witness give their evidence and to assess their demeanour and credibility. The appellate court will interfere only if the judge erred in principle in his findings or if his decision was clearly or blatantly wrong. If authority is needed for this trite point, it can be found in the seminal judgment of Lord Thankerton in **Watt (Or Thomas) v Thomas** which has been followed on many occasions by this Court.

The degree of reluctance to interfere is less in cases such as the present where the evidence before the Judge was on affidavits and there was no cross examination of the deponents. The judge evaluated the printed evidence and made findings of fact in coming to his decision. He did not have the benefit of seeing the witnesses give their evidence and observing their demeanour and in this respect this Court is in as good a position as he was to evaluate the evidence. But even in this situation the appellate court is reluctant to interfere with the judge’s findings of fact.”

Ikana Holdings, S. DE R.L was later cited with approval in the recent case of **Von der Heydt Invest S.A. v Multibank Fx International Corporation**.¹⁷

[18] I am guided by those general principles and shall bring them to bear in considering the appellants’ contentions that the learned judge committed errors in his fact finding.

The parties’ submissions

[19] The gravamen of the appellants’ case is that the Court should not make an order under section 184B of the BCA requiring compliance with section 100 if it is satisfied that the applicant is acting for an improper purpose. The appellants submitted that the learned judge wrongly held that there was no place for an improper purpose test in the context of an application under section 184B to enforce compliance with section 100 of the BCA. According to the appellants, the proper approach is that adopted by Ellis J (as she then was) in **Bowview**

¹⁶ BVIHCMAP2021/0027 (delivered 24th January 2022, unreported) at paragraphs 25 -26.

¹⁷ BVIHCMAP2022/0008 (delivered 21st February 2023, unreported).

Overseas Limited et al v Aleman, Cordero, Galindo and Lee Trust (BVI) Limited¹⁸ that the Court should refuse to order disclosure of documentation if it is satisfied that the applicant director is acting for an improper purpose, i.e. a purpose other than for carrying out his duties as a director of the company.

[20] The appellants also referred the Court to the English Court of Appeal case of **Oxford Legal Group Ltd v Sibbasbridge Services Plc**¹⁹ where Sir John Chadwick held that, if it is clearly shown that the director was using the right to inspect the books and records of the company for an improper purpose, the court has no power to assist him and that the burden is on those opposing inspection to demonstrate it is sought for an improper purpose.

[21] Further, the appellants submitted that the approach in **Bowview** and **Oxford Legal Group** mirrors that which has been adopted in other common law jurisdictions with materially identical provisions to those in the United Kingdom,²⁰ that the statutory provisions are consistent with the common law right of inspection and are subject to the director acting in a manner consistent with their fiduciary duties. Based on the decided cases, the appellants urged the Court that the decision by the judge was contrary to established authority and principle.

[22] Quite interestingly, the appellants contended that the learned judge did not actually determine whether Ms. Papanikolaou was acting for an improper purpose in seeking the disclosure of the identity of the Funder, because he considered such an argument to be irrelevant. The appellants submitted that judge's sole comment was to say that it was "a very good point" that the respondent might want to know the identity of the Funder to see if he was "a man of straw". The appellants maintained that the evidential picture before the judge gave rise to a clear basis on which to conclude that, in insisting on

¹⁸ BVIHCV2017/0156 (delivered 27th February 2020, unreported).

¹⁹ [2008] EWCA Civ 387.

²⁰ Wuu Khok Chiang George v ECRC Land Pte Ltd [1999] 3 SLR 65; Berlei Hestia (NZ) Ltd v Fernyhough [1980] 2 NZLR 150; Hammond v Quayeyeware Pty Ltd (2021) 389 ALR 248; Tyler v Envacon Inc [2012] AJ No 1072; Ng Yee Wah v Lam Chun Wah [2012] 4 HKLRD 40.

receiving the unredacted engagement letters in order to discover the identity of the Funder, Ms. Papanikolaou was not acting for the purpose of performing her duty as a director of the appellant companies, but instead for an improper purpose. The appellants argued that the judge could not simply dismiss the allegations of an improper purpose as being “conjecture and inference and cynicism” and that he ought to have engaged with them if he was to determine whether Ms. Papanikolaou was acting for an improper purpose.

[23] Without prejudice to this argument, the appellants submitted that to the extent that the judge did determine that Ms. Papanikolaou was not acting for an improper purpose, that decision would clearly be flawed for two reasons. Firstly, the factors on which he relied were incapable of supporting his conclusion. Secondly, the judge omitted relevant evidence relating to the Corporate Raid and Ms. Papanikolaou’s involvement from his consideration and assessment. Simply put, the appellants’ argument was that the judge failed to take into account the fact that, given Ms. Papanikolaou’s clear links to the “hostile parties”, there was a clear basis on which it could be reasonably inferred that Ms. Papanikolaou would pass the identity of the Funder to the “hostile parties” who are likely to take adverse steps against the Funder in order to stymie the progress of the litigation. The appellants assert that passing the identity of the Funder to the “hostile parties” cannot be said to be a proper use of Ms. Papanikolaou’s powers as a director.

[24] In the main, the respondent submitted that the learned judge committed no error of fact or law as the appellants failed to establish that the respondent wanted to know the identity of the funder for an improper purpose. The respondent submitted that beyond the broad-ranging extraordinary assertions and accusations made by the appellants, there was no evidence that she was acting in concert with Mr. Rabinovich and that she was part of some conspiracy with the ROSATOM. Further, there was no evidence of her involvement in what the appellants describe as the “Corporate Raid”. Critically, the respondent submitted that there was no evidence to support the assertion made by the appellants as to the effect of telling the respondent the name of the Funder. The respondent argued that the appellants had failed to explain what “adverse steps”

would be taken “to stymie the progress of the litigation”. The respondent submitted that the question to be asked is “If the Respondent knows the name of the “affiliate” of Mr. Magomedov who is funding the litigation, albeit on unknown terms, what is it that it is said will be done which in some way will stymie the litigation and how and why will that occur?” In essence, the respondent’s submission was that the evidence of the appellants simply could not lead to a conclusion that there was an improper motive which would warrant the dismissal of the application by the learned judge.

[25] The respondent urged the Court not to disturb the findings of the learned judge and reminded the Court of the principle of appellate restraint when dealing with findings of fact.²¹ The respondent argued that the learned judge committed no error of law as the law was common ground. The respondent submitted that the exception of “improper purpose” as a legal principle was common ground before the learned judge and that the learned judge simply did not make his decision on the premise that there was no room for any “improper purpose” exception within the BCA. Neither did he simply decide or hold that the BCA allowed a director to access documents for an improper purpose. The respondent contended that the learned judge considered the prima facie obvious reasons for her wanting to know the identity of the Funder against what he rightly called conjecture, inference and cynicism and concluded in those circumstances that the BCA required the making of an order because that prima facie position had not been displaced by the companies.

[26] The respondent emphasised before this Court as well as the court below her concerns as a director in respect of the finances, risks and liabilities of the companies and her concerns as to the source of the third-party funding. The respondent submitted that she cannot carry out any reasonable checks as she does not know the identity of the Funder.

²¹ Ming Siu Hung and others (Appellants) v J F Ming Inc and another (Respondents) [2021] UKPC 1 and Kwok Kin Kwok v Yao Juan [2022] UKPC 52.

Discussion and Analysis

- [27] A convenient starting point is to consider section 100(1) of the BCA which confers on a director the statutory right to inspect company records. It provides as follows:

“Inspection of records

100. (1) A director of a company is entitled, on giving reasonable notice, to inspect the documents and records of the company—

- a) in written form;
- b) without charge;
- c) at reasonable time specified by the director,

and to make copies of or take extracts from the documents and records.”

- [28] Section 100(1) is in plain and unambiguous terms. As the learned judge rightly put it, the section is uncompromising. It speaks in mandatory terms, to the unqualified entitlement of a director of a company to inspect documents and records of that company. Section 100(1) imposes a demanding obligation on a BVI company to allow inspection of the records by a director. This obligation does not appear later in section 100 as sections 100(2) and 100(3) make provision for the refusal of inspection by members if the directors are satisfied that it would be contrary to the company’s interest to allow a member to inspect a specific category of documents. Section 100(2) states that:

“(2) Subject to subsection (3), a member of a company is entitled, on giving written notice to the company, to inspect—

- a) the memorandum and articles;
- b) the register of members;
- c) the register of directors; and
- d) minutes of meetings and resolutions of members and of those classes of members of which he or she is a member, and to make copies of or take extracts from the documents and records.”

Section 101(3) states:

“(3) Subject to the memorandum and articles, the directors may, if they are satisfied that it would be contrary to the company’s interests to allow a member to inspect any document, or part of a document, specified in subsection 2(b),(c) or (d), refuse to permit the member to inspect the document or limit the inspection of the document, including limiting the making of copies or the taking of extracts from the records. (Amended by Act 26 of 2005)”

[29] It seems to me that a distinction can be drawn between sections 100(1) and 100(2) and 100(3). While both section 100(1) and section 100(2) applies, respectively, to a director's entitlement to inspect the company's records and to a member's entitlement to inspection, in the case of the member, that entitlement is expressly made subject to the right of the directors to refuse inspection (in whole or in part) of the company's records as listed, which decision may be challenged by the member before the courts. In the case of a director, should this right be refused or not accommodated, the director may seek relief from the court pursuant to the enforcement provision in section 184B, which enables the court to grant relief regarding actual or proposed conduct by a company or a director of a company which contravenes the BCA or the memorandum or articles of the company. Section 184B provides that:

"184B. (1) If a company or a director of a company engages in, or proposes to engage in, or has engaged in conduct that contravenes this Act or the memorandum or articles of the company, the Court may, on the application of a member or a director of the company, make an order directing the company or director to comply with, or restraining the company or director from engaging in conduct that contravenes, this Act or the memorandum or articles. (Amended by Act 5 of 2012)

(2) If the Court makes an order under subsection (1), it may also grant such consequential relief as it thinks fit.

(3) The Court may, at any time before the final determination of an application under subsection (1), make, as an interim order, any order that it could make as a final order under that subsection."

[30] The rationale for section 100 of the BCA was considered by the High Court in **Bowview**. Ellis J noted, at paragraphs 33 and 34 that:

"[33] Since the law imposes duties on directors to manage a company in the best interests of the company, its shareholders, creditors and other stakeholders (e.g. employees), and in certain circumstances imposes criminal penalties for failure to discharge those duties, **it cannot be surprising that the law seeks to give directors access to the information that will enable them to carry out such duties.**"

[34] Considered in this statutory context, it is therefore incongruous that a company would seek relief under section 100 of the BCA. The entitlement of directors to inspect a company's records stems from the power vested in the board of directors to run the company in conjunction with their duty to exercise care, skill and diligence. **Indeed, the case law makes it clear that since**

the right to inspect only applies in order to enable the director to carry out his duties in exercising its discretion to order access, the court must consider whether the director was seeking the information for an “improper purpose”. Indeed, it is also established law that the burden is on the company to show why the director should not be permitted to inspect the company’s records.” (My emphasis)

[31] Much reliance has been placed on **Bowview** in the court below and before this Court. In relation to **Bowview**, the learned judge stated that:

“I also don’t read Bowview as authority for the proposition that Mr. Smith seems to suggest that it was, namely, that it is authority for a proposition that allows those in the Company or other directors to go through the documents and records that the Company has and withhold those documents of the Company from a director that they might not agree with on the basis that the particular director should not need them in the exercise of his or her duties...

...What I do get from Bowview is this; and that is that a director, any director, subject of course to any other legal exception, any director is entitled to those listed categories of documents which the company is required to have and if it’s got those documents then whatever those documents are and however much of those documents it’s got, the director is entitled to see them within those particular categories.

There is no second layer of triage, as it were, that the Company can do. If it has got those documents, the director is entitled to see them. There’s no second layer of disclosability [sic] that somebody can decide whether or not the director in question really needs them. That is not their purview.”²²

[32] I agree with the learned judge that **Bowview** does not authorise the withholding of company records from its directors for any reason. Rather, the court in **Bowview**²³ explained that in enacting section 100, the Legislature appreciated that an individual director cannot make his full contribution to the management of the corporate business unless given access to the company’s books and records. The court had no doubt that the Legislature thought it advisable to expressly empower it to order the inspection of the documents and records of a company to make it clear and incontrovertible that directors would have a right

²² Hearing Bundle Volume 1, Transcript of Proceedings at page 120, lines 1-25.

²³ BVIHCV2017/0156 (delivered 27th February 2020, unreported) at paragraph 39.

to see and inspect the records in order to perform their fiduciary duty and to obtain a true and fair picture of the state of the company's affairs.

[33] For this reason, I do not find merit in the appellants' argument that the approach taken by the learned judge was contrary to **Bowview**. In their submissions, the appellants claimed that the learned judge clearly held "that there was no place for an improper purpose test in the context of an application under section 184B of the Act to enforce compliance with section 100 of the Act."²⁴ They further submitted that as a consequence, the learned judge failed to properly engage with the appellants' case that Ms. Papanikolaou was acting for an improper purpose.

[34] Having reviewed the transcript of proceedings, it is not apparent that the learned judge made any such finding as alleged by the appellants. In fact, what is clear is that the learned judge, following **Bowview**, embarked on an assessment of the purpose for which the disclosure was sought. This is in accordance with the approach adopted in **Bowview** where the court expressed that case law makes it clear that since the right to inspect only applies in order to enable the director to carry out his duties in exercising its discretion to order access, the court must consider whether the director was seeking the information for an "improper purpose".²⁵

[35] The appellants also say that the learned judge erred in law by finding that the scheme of section 100 of the BCA is uncompromising and does not permit the court to refuse to make an order when satisfied that an applicant was acting for an improper purpose. However, when I examine the transcript at page 112, lines 10-25 and what the learned judge said, I am unable to agree with the appellants.

[36] In the earlier case of **Oxford Legal Group Ltd v Sibbasbridge Services Plc**,²⁶ the English Court of Appeal considered the pre-existing common law right to inspect a company's books which was later codified in sections 221 and 222 of

²⁴ Appellants' Skeleton Argument filed on 21st May 2024 at paragraph 34.

²⁵ **Bowview**, BVIHCV2017/0156 (delivered 27th February 2020, unreported) at paragraph 34.

²⁶ [2008] EWCA Civ 387.

the English Companies Act 1985. Sir John Chadwick held that the right exists, whether at common law or by statute, for the purpose of enabling the director to carry out his duties as such. At paragraph 23, Chadwick LJ made the following proposition:

“...the right to inspect the company’s books of account is conferred ‘in order to enable the director to carry out his duties as a director’ is not in doubt. Nor is it in doubt, **as it seems to me, that a right which is conferred for one purpose is not intended for use for some other purpose: for a director to invoke the right to inspect for some purpose other than that of carrying out his duties as a director is to seek to use the right for an improper purpose.**” [Emphasis added]

[37] As **Oxford Legal Group Ltd.** underscores, the burden rests on the party opposing the inspection to demonstrate that the director sought inspection for an improper purpose. If it is clearly shown that a director was using the right to inspect for an improper purpose, then the court has no power to assist him.²⁷ The court cannot aid the use of the right for a purpose for which it was not conferred.²⁸

[38] Turning to the learned judge’s decision, it is of some significance that the judge on multiple occasions referred to the purpose for which Ms. Papanikolaou required the documentation being sought. At page 113 of the transcript, the learned judge held:

“It is very clear that the specific requests for litigation material have either directly or indirectly and very largely a motive behind them or a stated motive behind them of being able to see an expense position, what the expense position of the Company would be in relation to this litigation.”²⁹

“And it was brought to my attention that although there is a third party funder involved with whom, rather strangely, there is no Funding Agreement which does suggest some kind of fluid and informal agreement, nonetheless, there is a funding understanding or an unwritten Funding Agreement in place and it would appear to be that the Company’s own liability has not entirely necessarily been removed by the Funding Agreement and it could very well remain the case that the companies should remain liable, not only to pay for their own

²⁷ Oxford Legal Group Ltd. at paragraph 24.

²⁸ Ibid.

²⁹ Hearing Bundle Volume 1, Transcript of proceedings at page 113, lines 12-17.

litigation costs but also eventually to pay the cost of the other side should the companies lose.”³⁰

[39] At page 114 of the transcript, the learned judge stated:

“So the concern of this director to have material whereby she can assess the exposure or potential exposure to these companies, arising out of the litigation, that line of enquiry is entirely legitimate. It is the sort of enquiry that any responsible director would engage upon.”³¹

[40] At pages 128-130 of the transcript, the judge further stated:

“It was suggested by Mr. Chaisty that the [respondent] wants to know who the funder is because he may be a man of straw particularly if there is no funding agreement. That, I think, is a very good point. It is rather unsatisfactory where you’re dealing, it would seem, at least three strands of heavy commercial litigation for there to be some kind of anonymous funding agreement on an unwritten basis with some kind of funder, and as we all know it is often difficult enough to know what parties meant by a written agreement, let alone where you have all sorts of scope for people to have different recollections of what orally had been agreed coming in.”³²

“What I need to do is I need (sic) to ask myself here, for, from the point of view of an incoming director who doesn’t know who the funder is, I mean, for the start, that is a startling enough proposition that a director should not even be allowed to know who is funding the company of which she is a director. That itself is startling, but then it isn’t even supposed to know what the full arrangement is or who it is with. That is simply not a way in which a company can be run.”³³

“If she is supposed to be a director, she is supposed to be able to have exactly the same sight of documents as the other directors subject, of course, to such documents that she doesn’t want to see like privileged documents”.³⁴

[41] In my view, these parts of the transcript when read together lead to the conclusion that the learned judge did in fact consider whether Ms. Papanikolaou was acting for an improper purpose in seeking inspection of the company records to ascertain the identity of the Funder. Further, the learned judge in doing so, had regard to the appellants’ reason for refusing inspection:

³⁰ Ibid, lines 18-25 and page 114, lines 1-5.

³¹ Hearing Bundle Volume 1, Transcript of proceedings at page 114, lines 6-11.

³² Ibid at pages 128-129, lines 20-25 and 1-7.

³³ Ibid at page 129, lines 8-17.

³⁴ Ibid at page 130, lines 17-21.

“The [appellants] have regarded the [respondent] with a great deal of suspicion by virtue of the fact that she has been nominated by a company which is thought by the [appellants] to be controlled by the principle (sic) of their opposing camp. They infer, very readily from that, with perhaps a degree of cynicism which, though understandable and very common, might not entirely be warranted or it may be warranted but that is beside the point. They infer that this director that the Court has ordered to be appointed will feed documentation back to their main opponent and that they are understandably keen that their main opponent should not be able to seek some kind of litigation advantage by such a channel of communication.”³⁵

[42] Whilst the learned judge did not explicitly say in his oral decision that Ms. Papanikolaou was not acting for an improper purpose, this finding is manifest or at minimum implicit in the judge’s conclusion having regard to his assessment of the purpose for which inspection was sought, as considered above. Importantly, the learned judge’s conclusion was also based on the paucity of evidence in support of the assertions and accusations made by the appellants that Ms. Papanikolaou was acting in concert with Mr. Rabinovich and that she was part of some conspiracy with the ROSATOM. Perhaps, it is for this reason that the learned judge commented that ‘in relation to whether or not the application is made for an improper purpose, this is based entirely upon conjecture, inference and cynicism.’³⁶

[43] Indeed, in considering the appellants’ evidence which was before the learned judge on the hearing of the application in its totality, it is clear that the appellants failed to provide cogent evidence to support their assertion of Ms. Papanikolaou’s involvement in the Corporate Raid. The Court will not act upon a mere presumption that a director will act in breach of his fiduciary duty to the company or has an improper purpose without cogent evidence. As the learned judge rightly noted, a director ought to be aware of the financing arrangement of a company which it serves.

³⁵ Hearing Bundle Volume 1, Transcript of proceedings at page 111 lines 16-25 and page 112 lines 1- 4.

³⁶ Ibid at page 127 lines 14-17.

Conclusion

[44] Having reviewed the judge's decision, this Court can discern no error in principle or fact. Neither can it be said that the decision is clearly or blatantly wrong. There is therefore no basis for this Court to interfere with the judge's finding that Ms. Papanikolaou, in her capacity as director, should be permitted by the appellants to inspect unredacted copies of the engagement letters between the appellants and their legal advisors, so as to identify the Funder.

[45] While the learned judge's reasons given in the oral judgment may have been fuller in relation to his assessment of the appellants' evidence, there is no doubt in this Court's mind that he did consider the relevant principles, that he considered the appellants' affidavit evidence and came to a conclusion that it was mere conjecture and suspicion. The learned judge also correctly applied **Bowview**. The learned judge did not find as suggested by the appellants that section 100 did not permit the Court to refuse to make an order when satisfied that an applicant was acting for an improper purpose. Consequently, I do not find merit in the grounds of appeal advanced by the appellants.

Disposition

[46] For the foregoing reasons the appeal is dismissed. The respondent shall have her costs on this appeal to be assessed if not agreed within 21 days of today's date.

[47] I thank counsel for their helpful submissions.

I concur.
Eddy Ventose
Justice of Appeal

I concur.
Gerard St. C Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar