

**BRITISH VIRGIN ISLANDS**

## IN THE COURT OF APPEAL

CIVIL APPEAL No.3 of 1996

BETWEEN:

**[1] TELE-ART INC and [2] ELMER YUEN**

Appellant

and

**MING KOWN KOCH**

Respondent

Before:	The Rt. Hon. Sir Vincent Floissac	-	Chief Justice
	The Hon. Mr.C.M. Dennis Byron	-	Justice of Appeal
	The Hon. Mr. Satrohan Singh	-	Justice of Appeal

Appearances:

Mr. G. St C. Farara for the Appellants  
 Mr. M.D. Reigels for the Respondent

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1996: June 25;  
 September 16

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**JUDGMENT****SIR VINCENT FLOISSAC, C.J.**

The first-named Appellant [the Company] is a company incorporated under the International Business Companies Ordinance 1984 [Cap 291] of the Laws of the Virgin Islands. The second-named Appellant [Mr Yuen] is the sole director of the Company and is alleged to be the holder of more than 50 % of the shares in the capital of the Company. The Respondent holds 1500 shares in the said capital.

On 1st December 1995, the Respondent instituted suit No 160 of 1995 against the Appellants. The suit is expressed to be a derivative action but purports to be a representative action brought on behalf of all the shareholders of the Company with the exception of Mr Yuen. In his Statement of Claim in suit no 160 of 1995, the Respondent

alleges that Mr Yuen has committed various acts of mismanagement including criminal and other unlawful acts and breaches of fiduciary duty. The Respondent claims "[1] damages; [2] an enquiry into the dealings of the Second Defendant with the assets of the Company; [3] an account of all sums found to be due to the Company from the; Second Defendant on the taking of the enquiry; [4] an order for payment of all sums found due by the Second Defendant on taking such an account; [5] further or alternatively the appointment of a receiver of the property of the Company; [6] an injunction restraining the Company from unlawfully selling or in any way disposing of any assets of the Company; [7] further or other relief; [8] costs."

By summons filed on 22nd December 1995, the Respondent applied for an order under R.S.C Ord.24 r12 for the production to the Court of the share registers of the Company. The summons was supported by an affidavit sworn by Fiona A Bade [a barrister and associate lawyer in the Respondent's solicitors' firm]. In paragraph 2 of the affidavit, it is stated that "the Plaintiff wishes to have sight of the share register of Tele-Art Inc. in order to communicate with the shareholders of Tele-Art Inc. about this action."

The summons was heard by Georges J. By judgment delivered on 7th May 1996, the learned judge made an order in the following terms:

"In the result, I would upon the plaintiff giving a written undertaking not to use the information contained in the company's register(s) except for the purpose of this action ORDER that the defendants do within 14 days hereof produce to the Court each and every of its share registers for the purpose of inspection and making copies by the plaintiff's solicitors.

And IT IS FURTHER ORDERED that the defendants pay plaintiff's costs of and occasioned by this application to be taxed unless agreed otherwise. Liberty to apply."

The Appellants are dissatisfied with the judgment and have appealed against it. The issues in this appeal are [1] whether the order for the production of the share registers is authorised by and was properly made under R.S.C Order 24 rules 12 & 13[1] and [2] whether the order for the production of the share registers is saved by section 67 of the International Business Companies Ordinance 1984.

**[1] R.S.C. Ord 24 rules 12 & 13[1]**

R.S.C. Order 24 rules 12 & 13[1] provide as follows:

" 12. At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit.

13. (1) No order for the production of any documents for inspection or to the Court shall be made under any of the rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs."

According to Order 24 rule 13(1), no order for the production of a document shall be made unless "the order is necessary either for disposing fairly of the cause or matter or for saving costs." By judicial interpretation of the English Order 24 after which one Order 24 is patterned, an order for the discovery [either by way of disclosure, production or inspection] of a document is necessary for disposing fairly of a cause or matter if and only if the document is likely to contain information which would give substantial support to the applicant's contention on an issue which arises in the case and for that reason, the order would probably ensure or facilitate the applicant's success in the proceedings.

In **Science Research Council V Nasse** 119801 AC 1028 at

1071 Lord Salmon said:

"The law has always recognised that it is of the greatest importance from the point of view of public policy that proceedings in the courts or before tribunals shall be fairly disposed of. This, no doubt, is why the law has never accorded privilege against discovery and inspection to confidential documents which are necessary for fairly disposing of the proceedings. What does "necessary" in this context mean? It, of course, includes the case where the party applying for an order for discovery and inspection of certain documents could not possibly succeed in the proceedings unless he obtained the order; but it is not confined to such cases. Suppose, for example, a man had a very slim chance of success without inspection of documents but a very strong chance of success with inspection, surely the proceedings could not be regarded as being fairly disposed of, were he to be denied inspection."

In **Air Canada v Sec. of State for Trade** [1983] 2 AC 394 at 434, Lord Fraser said:

"In an adversarial system such as exists in the United Kingdom, a party is free to withhold information that would help his case if he wishes - perhaps for reasons of delicacy or personal privacy. He cannot be compelled to disclose it against his will. It follows in my opinion that a party who seeks to compel his opponent, or an independent person, to disclose information must show that the information is likely to help his own case. It would be illogical to apply a different rule at the stage of inspection from that which applies at the stage of production."

Lord Fraser added [at p435]:

"The most that can usefully be said is that, in order to persuade the court even to inspect documents for which public interest immunity is claimed, the party seeking disclosure ought at least to satisfy the court that the documents are likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them he might be "deprived of the means of ...proper presentation" of his case: see *Glasgow Corporation v Centra/ Land Board*, 1956 S.C(H .L.) 1, 1 8, per Lord Radcliffe. It will be plain that formulation has been mainly derived from the speech of my noble and learned friend, Lord Edmund Davies, in the *Burmah Oil* case [1980] A.C. 1090, 1 129, and from the opinion of McNeill J. in *Williams v Home Office* [1981] 1 All E.R. 1151, 1154A. It assumes, of course, that the party seeking disclosure has already shown in his pleadings that he has a cause of action, and that he has some material to support it. Otherwise he would merely be "fishing"."

Lord Edmund-Davies said [at p 441]:

"It is common sense that the litigant seeking an order for discovery is interested, not in abstract justice, but in gaining support for the case he is presenting, and the sole task of the court is to decide whether he should get it. Applying that test, any document which, it is reasonable to suppose, contains information which may enable the party applying for discovery either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of those two consequences, must be disclosed:..... It follows that, at every stage of interlocutory proceedings for discovery, the test to be applied is: will the material sought be such as is likely to advance the seeker's case, either affirmatively or indirectly by weakening the case of his opponents....."

The fundamental issue in suit no 160 of 1995 is whether Mr Yuen committed the various acts of mismanagement alleged in the Respondent's statement of Claim so as to entitle the Respondent to the damages and other relief claimed in the suit. Consequently, the question to be decided in regard to the production of the share registers is whether the information contained in the share registers could possibly illuminate that fundamental issue.

The share registers would merely reveal the identity of the shareholders of the Company and the extent of their respective shareholdings. Such identity and extent are not issues in suit no 160 of 1995 and could not in any way affect the outcome of the fundamental issue in that suit. Accordingly, the information contained in the share certificates is not likely to help or give substantial support to the Respondent's case or to the Respondent's contentions on any issue which arises in his case. Nor is the information likely to damage Mr Yuen's contentions in reply to the Respondent's allegations against him. The result is that an order for production of the share registers would not ensure or facilitate the Respondent's success in suit no. 160 of 1995.

Similarly, an order for the production of the share registers cannot properly be said to be necessary for the purpose of saving costs.

In his judgment, the learned judge said:

"Because this was a derivative action brought not only on behalf of the Company but also on behalf of all the other shareholders of the company, Mr Richards submitted that it was the plaintiff's wish to communicate with the other shareholders to inform them of the action and to ascertain their views. Their response would be crucial to the future course of the proceedings he pointed out as a positive response could very well elicit vital information to enable the action to be prosecuted more effectively whilst a negative reaction could well result in early termination of the case thus saving costs."

In my judgment, if a negative reaction from the other shareholders of the Company results "in an early termination of the case," the saving of costs is the product of the negative reaction and not the consequence of any information revealed by the share registers. Otherwise, it has not been shown how and why an order for production of the share registers is necessary for the purpose of saving costs.

I would therefore conclude that the order for production of the share registers was not authorised by or properly made under R.S.C. Order 24 rules 12 and 13(1). The order was not so authorised or made because the order was not necessary either for disposing fairly of suit no 160 of 1995 or for saving costs.

## **[2] Section 67 of Cap 291**

The order for production of the share registers was sought to be justified by reference to section 67 of the International Business Companies Ordinance 1984. Section 67 reads as follows:

"(1) A member of a company incorporated under this Ordinance may, in person or by attorney and in furtherance of a proper purpose, request in writing specifying the purpose to inspect during normal business hours the share register of the company or the

books, records, minutes and consents kept by the company and to make copies or extracts therefrom.

(2) For purposes of subsection (1), a proper purpose is a purpose reasonably related to the member's interest as a member.

(3) If a request under subsection (1) is submitted by an attorney for a member, the request must be accompanied by a power of attorney authorising the attorney to act for the member.

(4) If the company, by a resolution of directors, determines that it is not in the best interest of the company or of any other member of the company to comply with a request under subsection (1), the company may refuse the request.

(5) Upon refusal by the company of the request under subsection (1), the member may before the expiration of a period of 90 days of his receiving notice of the refusal, apply to the court for an order to allow the inspection."

Section 67 of the International Business Companies Ordinance 1984 does not confer upon a member of a business company any statutory right to inspect the share register of the company. Section 67 merely authorises a member to apply for such inspection in furtherance of a proper purpose. Section 67 then confers upon the High Court a statutory power or discretion to allow such inspection after the company's refusal thereof.

Significantly, section 67 does not authorise the High Court to order production of the share registers to the Court. Section 67 therefore does not purport to enlarge the process of discovery (disclosure, production and inspection) of documents in the course of litigation. That process is defined and remains governed by Rules of Court particularly R.S.C. Order 34. Consequently, the Respondent could not circumvent R.S.C. Order by recourse to section 67 which does not purport to create any procedural rule by which litigation should be governed.

**Conclusion**

I would allow the appeal and set aside the learned judge's judgment ordering production of the company's share registers. I would award the appellant his costs here and in the Court below.

FLOISSAC

SIR VINCENT

Chief Justice

BYRON

I concur

C.M.DENNIS

Justice of Appeal

I concur

SATROHAN SINGH

Justice of Appeal