EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0041

BETWEEN:

GREEN ELITE LIMITED

Appellant

and

DELCO PARTICIPATION BV

Respondent

Before:

The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. John Carrington, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Philip Jones, QC, and with him, Mr. Nicholas Brookes for the Appellant
Mr. Simon Hall for the Respondent

2017: July 13;
2018: January 15

Commercial appeal - Company law - BVI Business Companies Act 2004 - Requisition by shareholders of a meeting – Whether requisition sought for a lawful purpose - Exercise of power of court to summon meeting of shareholders - Legality of regulation in articles of association whereby shareholders may compel company to disclose to them its financial statements - Ability of a company to waive confidentiality in such statements in favour of shareholders - Whether section 100 of the BVI Business Companies Act states the complete rights of shareholders to corporate information - Attribution of statements of legal representatives to company is a matter of fact - Costs - Whether court entitled to impose sanction of contempt at the time of making costs order

The respondent, Delco Participation B.V. ("Delco") is a 50% shareholder in the appellant company, Green Elite Limited ("the company"). The other 50% shareholder is HWH Holdings Limited ("HWH") of which Mr. Fang Ankong, a director of the company, is the beneficial owner of HWH. Delco issued a written requisition, dated 31st August 2016 pursuant to regulation 7.2 of the company's articles of association, for a shareholders'

meeting to be convened. The purpose of the meeting, as stated in paragraph 2 of the requisition, was to consider whether to pass a resolution pursuant to regulation 19.2 of the company's articles of association which allows the company by resolution of shareholders to call for the directors to prepare and make available a profit and loss account and a balance sheet for the period from incorporation to the date of the notice.

The requisition provoked several exchanges of correspondence between Stephenson Harwood, Hong Kong (SH) solicitors for Mr. Fang Ankong and Maples & Calder (M&C), BVI solicitors for the respondent, SH made a request, that was repeated in written correspondence to M&C by another director of the company, that the respondent provide a new written requisition setting out clearly all the resolutions which it proposes to be passed at the shareholders meeting so that the Board can fully and properly consider the respondent's requisition, and to set out questions of the company which do not call for the passing of any resolution separately in writing.

The respondent, which had already filed an application in the High Court pursuant to section 86 of the **Business Companies Act 2004** for the court to order a meeting of shareholders to be held at the time of this last correspondence from SH and the director, nevertheless responded through M&C on 28th October 2016 providing the new requisition (the October Requisition) which repeated the initial requisition and further requested that the company pass a Supplemental Winding Up Resolution at the meeting.

The respondent's application was heard and the learned judge ordered that the meeting of shareholders be held within 28 days of the order and that the meeting should consider the matters raised in paragraph 2 of the requisition of 31st August 2016, and repeated in the October Requisition, and pass any necessary and consequential resolutions, and consider whether the company should be wound up. The learned judge further ordered that the appellant pay costs to the respondent within 28 days of the order, failing which, the appellant shall be in contempt and shall not be entitled to be heard until such time that sum is paid.

The company appealed against the learned judge's decision on the following grounds: (i) the learned judge erred in attributing the statements made by SH to the company rather than merely to Mr. Fang in his capacity as beneficial owner of HWH; (ii) the learned judge erred in concluding that the purposes for which the meeting had been requisitioned were lawful; and (iii) the learned judge had acted disproportionately in attaching a sanction of contempt to the costs order made.

Held: allowing the appeal in part; upholding the findings of the learned judge save for the finding that the appellant would be in contempt if costs were not paid within the stipulated period and awarding costs of the appeal to the respondent summarily assessed at two-thirds of the costs awarded by the learned judge in the court below pursuant to rule 65.13 of the **Civil Procedure Rules 2000**, that:

1. Based on the correspondence from Stephenson Harwood, there was sufficient evidence on which the learned judge could have reached the conclusion that said correspondence was made on behalf of Mr. Fang and the other directors of Green

Elite Limited and not merely on behalf of HWH, its shareholder or Mr. Fang in his capacity as beneficial owner of 50% of the shares in Green Elite Limited.

2. A judge has a wide discretion in making an award of costs. However, in the circumstances, it was not open to the learned judge to make an order stating that the appellant would be in contempt for failing to pay costs within the stipulated time. This is because a finding of contempt is a conclusion to be arrived at after a hearing of which the alleged contemnor is entitled to be given notice and at which he is entitled to make representations in his defence to the allegations made against him.

3. It would be improper for directors to decide that meetings should not be called merely because the language used in the request may be difficult to understand or difficult to implement as stated. If there is some way in which the substance of the request can be dealt with properly at a meeting of shareholders, the meeting should be called for the matter to be raised and voted on by the shareholders. It is only when there is no conceivable lawful way in which the substance of the request can be put to the shareholders in general meeting that the requested meeting can be refused. The matter that the shareholders were being asked to consider was whether the company should be wound up after they had considered matters such as the continuing purpose of the company and whether it had retained certain assets. In the instant case, the meeting could be properly called and a resolution to wind up the company could be properly and legally passed by the shareholders of the company.

   Isle of Wight Railway Co. v Tahourdin (1883) 25 Ch. D. 320 applied.

4. The challenge to regulation 19.2 arises in the context of whether it can legitimately be a matter for which a meeting may be requested under section 82 of the **BVI Business Companies Act 2004** ("**BCA**"). The scheme of the **BCA** is to give a company the right to refuse access to its internal information except where mandated otherwise. As the right to confidentiality is the company's, it is entitled to waive this right by agreement. Regulation 19.2 of Green Elite Limited's articles of association can be read as entitling the members of the company to compel the company to waive such confidentiality. Therefore, the learned judge was correct in finding that the regulation was valid and formed a valid basis for the requisition of the meeting of shareholders.

   Sections 11, 28, 100, 118B of the BVI Business Companies Act 2004 Laws of the Virgin Islands (as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands) considered.

JUDGMENT

[1] **CARRINGTON JA [AG.]:** This is an appeal from the judgment of Wallbank J [AG.] in the Commercial Division of the High Court which raises a short but important issue concerning the rights of shareholders of companies incorporated under the **BVI Business Companies Act 2004**[1] ("**BCA**") and the validity of what appears to be a standard clause in the articles of association of such companies.

Background

[2] The factual background can be shortly stated and is one that is not unfamiliar to persons practising in the Territory of the Virgin Islands ("the Territory"). The respondent, Delco Participation B.V. ("**Delco"**), is a Dutch company which holds 50% of the shares issued by the appellant, Green Elite Limited ("the Company"). The other 50% of the shares are held by HWH Holding Limited ("**HWH"**) as the nominee for Mr. Fang Ankong ("Mr. Fang"). Mr. Fang is also a director of the Company. Mr. Fang and the three other directors of the Company are all based in Shanghai, People's Republic of China.

[3] Although we were not told the purpose of the Company, we can infer that some part of its business has been to hold shares in other companies, specifically a company called Chiho-Tiande Group Limited.

[4] The dispute that eventually led to this appeal has its genesis in the written requisition dated 31st August 2016 issued by the respondent pursuant to regulation 7.2 of the Company's articles of association for a shareholders' meeting to be convened. The material provision is contained in paragraph 2 of the requisition:-

> "To consider whether, pursuant to Article 19.2 of the Company's Articles of Association, to call for the Directors to prepare and make available a profit and loss account and a balance sheet for the period from incorporation to the date of this notice, so as to give a true and fair view of

[1] Act No. 16 of 2004, Laws of the Virgin Islands (as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands).

> the profit and loss of the Company for that financial period and a true and fair view of the current assets and liabilities of the Company."

[5] Regulation 7.2 states that, "Upon the written request of Shareholders entitled to exercise 30 per cent or more of the voting rights in respect of the matter for which the meeting is requested the directors shall convene a meeting of Shareholders". This regulation is uncontroversial and reflects the statutory provision of section 82(2) of the **BCA**.

[6] Regulation 19.2 of the Company's articles of association states:

> "The Company may by Resolution of Shareholders call for the directors to prepare periodically and make available a profit and loss account and a balance sheet. The profit and loss account and balance sheet shall be drawn up so as to give respectively a true and fair view of the profit and loss of the Company for a financial period and a true and fair view of the assets and liabilities of the Company as at the end of a financial period."

This is a standard provision in the articles of association of companies incorporated under the **BCA**. As far as I am aware, the lawfulness of this regulation is being challenged for the first time in these proceedings.

[7] The requisition provoked several exchanges of correspondence between Stephenson Harwood, Hong Kong solicitors, and Maples & Calder (Maples), BVI solicitors for the respondent that I refer to in more detail at paragraph 11 of this judgment. As will be seen, one of the issues before this court is whether Stephenson Harwood acted for Mr. Fang and/or **HWH**. Eventually, by their letter dated 29th September 2016, Stephenson Harwood requested the respondent to provide "a new written requisition setting out clearly all the resolutions which it proposes to be passed at the shareholders meeting so that the Board can fully and properly consider [respondent's] requisition" and to set out questions of the Company which do not call for the passing of any resolution separately in writing. These requests were also made by the appellant through one of its directors, Mr. Gu Liyong, by letter dated 25th October 2016. By the date of receipt of these

letters, however, the respondent had already filed its application to the High Court pursuant to section 86 of the **BCA** for the court to order a meeting of shareholders to be held.

[8] Nevertheless, the respondent's solicitors responded on 28th October 2016 providing the information sought by the appellant. In this correspondence, Maples repeated at paragraph 1 the matters raised at paragraph 2 of the initial requisition which have been set out above. Maples also made the following statement:

> "If your client fails to provide the information requested ahead of the meeting, or, if it provides information that is unsatisfactory to our client, then we would expect that information to be provided at the shareholders' meeting. In addition we would request that the Company pass the following resolutions at the meeting:
>
> > "THAT, subject to the Company confirming that there is no continuing purpose for the Company and that the accrued dividends in respect of its shareholding in CT, and the sales proceeds received on its disposal of CT shares to Tai Security in April 2014 are still held by the Company:
> > 1. The Company is wound up.
> > 2. The proceeds of the winding up are distributed accordingly to HWH Holdings Limited and Delco Participation B.V. each the holder of 50% of the issued share capital of the Company"

This resolution has been referred to by the appellant as the "Supplemental Winding Up Resolution" and I will adopt that nomenclature in this judgment.

[9] The respondent's application was heard on 10th and 15th November 2016 and Wallbank J [Ag.] delivered an oral ruling on 30th November 2016 directing that the meeting of shareholders be held within 28 days of the order and that it should consider the matters raised in paragraph 2 of the requisition of 31st August 2016 and pass any necessary and consequential resolutions and consider whether the appellant should be wound up. This order was stayed by this Court pending the determination of the appeal.

Grounds of Appeal

[10] The appellant advanced three grounds of appeal from the learned judge's decision, namely that: -

(1) the learned judge erred in attributing HWH Holdings Limited's conduct to the Company;

(2) the learned judge erred in concluding that the Supplemental Winding Up Resolution was valid; and

(3) the learned judge erred in finding that regulation 19.2 of the articles of association was valid.

Attribution of HWH's Conduct to the Company

[11] The initial requisition was sent by the respondent to the appellant at the address of its registered office in the British Virgin Islands. The response to this correspondence from Stephenson Harwood was to acknowledge that the letter had been sent to the Company's address and to add "The letter has only just reached our client's, Mr. Fang Ankong's attention. We are taking instructions from our client, who is the beneficial owner of HWH Holdings Limited, the other shareholder of Delco Participation BV".[2] This was their first letter dated 9th September 2016. Thereafter, in letters of 20th and 23rd September 2016, Stephenson Harwood wrote to the respondent indicating that they were seeking urgent advice from BVI lawyers and that their **clients** (emphasis added) "plainly have the right to be able to seek legal advice".

[12] In their letter of 29th September 2016, Stephenson Harwood categorically rejected Maples' suggestion that the Board of the appellant was deliberately delaying **Delco's** requests and asked for clarification from **Delco** of the proposed resolutions for the meeting and questions of the Company that did not require a resolution. In its letter of 14th October 2016, Stephenson Harwood reiterated that

[2] The latter reference was erroneous and was meant to be a reference to Green Elite Limited.

they did not agree with Maples' suggestion that the Company's board of directors was playing for time and indicated that "the Board will consider your client's request for a shareholder's meeting once you have provided your reply to the 29th September Letter".

[13] Reading the correspondence from Stephenson Harwood in the round, it was clearly open to the learned judge to conclude, as he appeared to do, and in fact I find that the conclusion was inevitable, that Stephenson Harwood was acting for Mr. Fang in his capacity as director and for the other members of the Board of the appellant.

[14] First of all, if the requisition was addressed to the company at its registered office, the presumption must be that it would be sent to the directors or their agent, and not to the other shareholder. The appellant did not lead evidence to rebut this presumption.

[15] Second, from their first letter, Stephenson Harwood made it clear that they were taking instructions from Mr. Fang. There was no indication that Mr. Fang was a director of **HWH**. His description only as the "beneficial owner" of **HWH** suggests that he may not so be. As the beneficial owner of a shareholder of the appellant, he would have had no locus to intermeddle in the business of the appellant. Mr. Jones, QC who appeared with Mr. Brookes for the appellant submitted that the first letter from Stephenson Harwood stated that their client was Mr. Fang in his capacity as beneficial owner of **HWH**. The critical words "in the capacity of" actually do not appear in that letter nor can they be implied into that letter. The letter states that they act for Mr. Fang (to whose attention **Delco's** requisition was brought by the registered agent) and who is the beneficial owner of **HWH**. Any inference that this was the capacity in which he was instructing Stephenson Harwood was easily dispelled by the subsequent correspondence from that firm.

[16] Third, the subsequent correspondence from Stephenson Harwood, including the reference to clients (in the plural) demonstrated that they were purporting to advance the position of the Board rather than the other shareholder, especially as they responded directly to the allegations of time wasting by the Board and indicated that the Board would consider the request for a meeting if clarification were provided.

[17] Fourth, the tenor of the responses from Maples especially their letter of 28th October 2016 was that they considered that they were responding to the legal representatives of the appellant and not merely the legal representatives of the beneficial owner of a shareholder. Stephenson Harwood's responses did not attempt to correct this impression or clarify for whom they were acting.

[18] Further, there was a belated attempt by the appellant through correspondence dated 25th October 2016 from another director, Mr. Gu Liyong, to state that Stephenson Harwood only represented **HWH**. I consider that the learned judge was correct to give little weight to this letter in light of the earlier correspondence from Stephenson Harwood.

[19] I therefore find that there was evidence on which the learned judge could reach the conclusion, as he appeared to, that the correspondence from Stephenson Harwood was made on behalf of Mr. Fang and the other directors of Green Elite Limited and not merely on behalf of **HWH**, its shareholder or Mr. Fang in his capacity as beneficial owner of 50% of the shares in Green Elite Limited.

Sanction Attached to Costs Order

[20] The other complaint by the appellant under this ground of appeal was that the learned judge acted disproportionately when he attached a sanction to the costs order made against the respondent to the application before him. The relevant paragraph of the order was "Unless the respondent (the appellant before us) pays that sum to the applicant within 28 days of the date of this order the respondent

shall be in contempt and shall not be entitled to be heard until such time as that sum is paid".

[21] Rule 69B.11(5) of the **Civil Procedure Rules 2000** ("**CPR**") requires that costs determined in the Commercial Division be paid within 14 days of the making of the order. Therefore, the learned judge actually extended the time within which costs should have been paid.

[22] A judge has a wide discretion in making an award of costs. However, I find that it was not open to him to make an order stating that the appellant would be in contempt for failure to pay within this time. This is because a finding of contempt is a conclusion to be arrived at after a hearing of which the alleged contemnor is entitled to be given notice and at which he is entitled to make representations in his defence to the allegations made against him. The general rules of fairness demand no less and I find they were not observed in the making of this order that the appellant would be in contempt for not paying costs within the stipulated period which would have expired in the future without provision for further hearing of any representations by the appellant. I find therefore that the learned judge erred in principle in making this part of his order and that it should be set aside.

Validity of Supplemental Winding Up Resolution

[23] The second ground of appeal concerns the Supplemental Winding Up Resolution referred to earlier in this judgment. Mr. Jones, QC submitted that the Supplemental Winding Up Resolution was tied to the requisition for information made by **Delco** at paragraph 1 of the letter of 28th October 2016 (i.e. paragraph 2 of the initial requisition) which the learned judge had accepted could not be the basis for a meeting and was incapable of surviving on its own as an object for which a meeting can be called. There was no cross-appeal against this finding by the learned judge.

[24] The power to requisition a meeting is contained in section 82(2) of the **BCA** which states that:

> "Subject to a provision in the memorandum or articles for a lesser percentage, the directors of a company shall call a meeting of the members of the company if requested in writing to do so by members entitled to exercise at least thirty per cent of the voting rights in respect of the matter for which the meeting is requested".

[25] The authorities that have considered the similar provision under the English Companies Act support a wide interpretation of this section. In **Isle of Wight Railway Co v Tahourdin**[3], directors had applied to the court to restrain requisitionists from holding a meeting of shareholders to consider two matters which the directors considered to be illegal and vague. The directors had given notice of a meeting to consider only part of one of the objects raised in the notice from the requisitionists who then proposed to call a meeting on their own. On appeal by the requisitionists against the grant of an injunction restraining their proposed meeting, Cotton LJ stated the following at page 330:

> "Now I am of the opinion that if the object for which it is proposed to call the meeting is one which can be carried out in a legal way, then, although the notice may be so expressed that resolutions following its precise terms would be illegal, it is not right for the directors to limit the notice so as to prevent the meeting from entering into the question simply because the terms of the notice would justify a resolution which would be ultra vires."

[26] Lindley LJ agreed with Cotton LJ and stated at page 333, "It appears to me that it must be a very strong case indeed which would justify this Court in restraining a meeting of shareholders". With respect to the particular object of the meeting, he added:

> "I quite agree that this notice is not happily worded, because it is capable of being construed so as to lead to the inference that they wanted to do this by delegating the powers of the company to a committee, the legality of which may be fairly questioned. But assuming that this be the true construction, it does not at all follow that under a notice of this kind a meeting would be precluded from

[3] (1883) 25 Ch. D. 320.

> passing resolutions substantially effecting the objects of the requisitionists in a way open to no objection on the score of illegality."

[27] Fry LJ also agreed with Cotton LJ and stated at page 334:

> "If the object of the requisition to call a meeting were such that in no manner and by no machinery could it be legally carried into effect, the directors would be justified in refusing to act upon it. But if the object stated in the requisition be such that by any form of resolution or by any machinery sanctioned by the Act, it can be carried into effect, then it is the bounden duty of the directors to call the meeting."

[28] Section 82(2) of the **BCA** speaks of the "matter for which the meeting is requested". The matter is discernable from an analysis of the request and this analysis is not limited by the wording of the request. This is moreso as the **BCA** is the basic tool by which the Territory is enabled to attract persons from all over the world to incorporate companies in this jurisdiction. It is likely that English may not be the first or even a spoken language of many such persons and that perhaps even many more are not trained in the niceties of legal language. It would therefore be wrong for directors to decide that meetings should not be called merely because the language used in the request may be difficult to understand or difficult to implement as stated. If there is some way in which the substance of the request can be dealt with properly at a meeting of shareholders, the meeting should be called for the matter to be raised and voted on by the shareholders. It is only when there is no conceivable lawful way in which the substance of the request can be put to the shareholders in general meeting that the requested meeting can be refused. This seems to me to be the ratio of **Isle of Wight** and similar cases.

[29] The language of this part of the clarification letter shows that **Delco** did refer to the provision of information to the shareholders (which the judge ruled was not a proper matter for a meeting) immediately prior to the Supplemental Winding Up Resolution but critically, a new sentence that dealt specifically with the resolution was introduced by the words "In addition …". This shows that **Delco** considered

this as a separate, even if related, concept to the provision of information on the Company and its assets.

[30] What therefore was the matter for which the meeting was being requested? The matter that the shareholders were being asked to determine was whether the Company should be wound up after they had considered matters such as the continuing purpose of the Company and whether it had retained certain assets. I have no doubt that a resolution to wind up the company could be properly and legally passed by the shareholders whether or not the Company, i.e. the directors, cooperated by providing the confirmations being sought by **Delco**.

[31] I therefore agree with the learned judge below that this was a separate matter from the requisition of information sought by **Delco** under paragraph 1 of its initial requisition and that a meeting could be properly called to consider the Supplemental Winding Up Resolution.

Validity of Regulation 19.2 of the Company's Articles of Association

[32] The third ground of appeal questioned the legality of regulation 19.2 of the articles of association in light of the provisions of section 100 of the **BCA**. If regulation 19.2 is illegal, then it cannot form the basis of the request for the general meeting to consider whether the directors should be called upon to prepare and make available financial statements in accordance with this regulation. In other words, there would be no legal method of carrying out this particular matter for which the meeting was requested.

[33] The attack on the regulation, which appears to be a fairly standard regulation adopted by BVI business companies, was based on the fact that the regulation requires the directors to "make available" the financial statements to the shareholders whereas shareholders are limited by section 100(2) of the **BCA** with respect to the company documents to which they can have access. The list of

documents under that section does not refer to financial statements of the company.

[34] Section 100 of the **BCA** deals with the inspection of corporate records. Directors are allowed to inspect and copy all records of a company, but under sub-section (2), members are only entitled to inspect certain categories of documents, and by sub-section (3), directors may limit or refuse to permit the inspection of these documents if they are satisfied that such inspection would be contrary to the company's interests.

[35] However, section 100(2) of the **BCA** is not expressed to be "subject to the memorandum and articles of association" as are other sections of the **BCA**. The appellant therefore argued that a company has no power to extend the categories of documents to which shareholders can have access and regulation 19.2 which purports to do so is therefore contrary to the **BCA**.

[36] An officious bystander would probably exclaim in surprise at hearing that the owners of a company would not be entitled to information on its financial position. Mr. Jones, QC, however, explained that this is in keeping with the policy of the **BCA**, as distinct from other Companies Acts, of confidentiality of the company's operations, even from its shareholders.

[37] That confidentiality, he submitted, is sacrosanct as the company cannot, in its articles of association, agree to give the member access to this information as any such agreement would be contrary to section 100(2) of the **BCA** as section 11(3) of the **BCA** states that the memorandum and articles have no effect to the extent that they contravene or are inconsistent with the Act. Further, section 11(2) of the **BCA** only permits modification of statutory rights of members by the articles where permitted by the Act and there is no permitting provision in the **BCA** that allows the extension of the categories under section 100(2).

[38] The respondent submitted on the other hand that the appellant placed no reliance in the court below on section 11(2) and so should not be allowed to do so before this Court, and that in any event, section 11(2) does not apply as there is no attempt by regulation 19.2 to negate or modify the rights of a member under the Act. The respondent further submitted that the reliance on section 11(3) of the **BCA** is of no assistance to the appellant as regulation 19.2 does not contravene and is not inconsistent with section 100(2) of the **BCA**.

[39] The challenge to regulation19.2 arises in the context of whether it can legitimately be a matter for which a meeting may be requested under section 82 of the **BCA**. The regulation deals with two conceptually distinct matters, namely: (a) the preparation of profit and loss account and balance sheet by the directors; and (b) the making of such statements available to members of the company. There appears to be little dispute that the members have the authority to call upon the directors to prepare these statements and so a meeting to pass a resolution to do so does not appear to be a meeting in respect of an object that could not be lawfully effected.

[40] The real area of dispute between the parties is whether the members can call upon the directors to make those statements available to the members of the Company. On the face of the Act, there is no such prohibition. The appellant submitted, however, that the Act should properly be interpreted as containing such a prohibition in light of the underlying policy of confidentiality.

[41] I am prepared to assume, without deciding the point, that section 100(2) of the **BCA** is premised on confidentiality as between the company and the members. The question, however, remains whether the Company is prohibited from waiving or limiting that confidentiality by agreement with the members in respect of matters not covered by that section. In theory, the answer should be no. If the confidentiality is the company's, it should be able to waive it unless prohibited by the Act from so doing as a company incorporated under the **BCA** is given, by

section 28(1) of the Act, the full capacity, powers and right to carry out any (lawful) activity. The appellant agreed with this proposition by submitting that a company can agree by shareholders' agreement to make financial statements available to its members but submitted that the members could not compel production of these documents by way of regulation 19.2.

[42] The long title of the **BCA** is "An Act to provide for the incorporation, management and operation of different types of companies, for the relationships between companies and their directors and members and to provide for connected and consequential matters". The Act seeks to strike a balance between the obligations of companies to have in place all matters required for their proper functioning and their right to restrict access to such matters. There is nothing in the **BCA** that prohibits a company from granting access to its information. It may choose to file for registration and thereby give the public access to its registers of directors, members and charges. It is required to keep financial records that will enable its financial position to be determined with reasonable accuracy. However, there is no prohibition against the publication of such records. There are companies that are listed on stock exchanges, the rules of which require publication of financial statements. A company incorporated under the **BCA** could not comply with such listing requirements if the **BCA** were to be read as implying a prohibition on publication of these statements because of an underlying policy of confidentiality. By publication, the company is making these documents available to members.

[43] In my opinion, the scheme of the **BCA** is to give a company the right not to grant such access to its internal information save where mandated otherwise, for example, under section 118B where it is required to file, for registration, a copy of its register of directors. As the right is the company's, it is able to waive this right by agreement. I therefore find that in reality as in theory, a company is entitled to waive the confidentiality of its records. Regulation 19.2 can be read as entitling the members to compel the Company to waive such confidentiality but this regulation would have come into existence either by the decision of the promoters of the

Company at the time of its incorporation or by the act of an organ of the company, i.e. either the directors or members of the company to amend the articles of association to provide for such a regulation. The company should be bound by this regulation.

[44] Section 11(2) of the **BCA** provides, inter alia, that the company and each member have the rights and obligations as set out in the Act except to the extent that they (i.e. such rights and obligations) are negated or modified, as permitted by the Act, by the memorandum and articles

.

[45] Section 100 of the **BCA** confers the right on the members to inspect and copy certain documents and creates a corresponding obligation on the company to give the member access to those documents save where the company has notified the member of a restriction on that right of access under section 100(4). Section 100(2) of the **BCA** does not make reference to the profit and loss account and balance sheet of a company. It therefore confers neither a right on a member to inspect such documents nor an obligation on the company to make such documents available to its members. It follows, therefore, that when the company and the members have entered a binding statutory contract as provided for under section 11(1)(a) of the **BCA** whereby the company permits the members to request that these documents be prepared and made available to them, the member's right of access and the corresponding obligation of the company are created by the relevant regulation of the articles of association. These rights or obligations are not based on the statutory provision contained in section 100(2) of the **BCA**, and therefore such a regulation does not purport to negate or modify this statutory provision.

[46] Even if the rights under regulation 19.2 directly affect those under section 100(2) of the **BCA**, the wording of section 11(2) on which the appellant relies is consistent with a construction of "modified" as eiusdem generis with "negated". Regulation 19.2 does not negate or alter to their detriment the rights of a member under

section 100(2). The regulation, if anything, augments these statutory rights. Section 100(2) is primarily concerned with rights of members. It is a truism that once any rights are increased, there is an inevitable increase in the obligations that correspond to such rights but section 100(2) is not framed as an obligation, only as a right. In my view, if section 11(2) does not apply because the rights of the members under section 100(2) are not negated or modified by virtue of regulation 19.2, it must follow that it is irrelevant that the Company's obligation is thereby affected.

[47] In my view, section 100(2) of the **BCA** cannot be read as a compendium of all shareholder rights of access to corporate documents but as only a minimum standard of such rights. Otherwise, to revert to the example of the listed company, a company will be able to refuse to furnish members with the financial statements which the company is obliged by its listing to prepare.

[48] Mr. Jones', QC final submission was that regulation 19.2 allows members to compel the Company to provide information even where it may be against the interests of the Company to provide such information. There are two responses to this argument. First, while it is true that where the regulation operates, the Company loses the statutory right to restrict access under section 100(3), the simple response is that the Company can provide for an equivalent right to section 100(3) in the articles of association if it so chooses. Second, the regulation in any event cannot purport to take away the directors' obligations to exercise their powers for proper purposes and in the best interests of the Company. The directors could therefore refuse on proper grounds to make the financial statements available notwithstanding the resolution passed in general meeting for this purpose.

[49] I am therefore of the view that regulation 19.2 is not unlawful per se and that it is a matter on which a requisition for a meeting may be based.

Conclusion

[50] I would therefore dismiss all three grounds of the appeal and uphold the findings of the learned judge below save for the finding that the appellant would be in contempt if costs were not paid within the stipulated period. As the respondent was the substantial winner on this appeal, I would award the costs of the appeal to the respondent, summarily assessed at two-thirds of the costs awarded by the judge below pursuant to rule 65.13 of the **CPR**.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar