

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

3 **CAUSE NO. FSD 161 OF 2010**

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5 **BETWEEN:**

6 (1) **SAMAR TELECOMMUNICATIONS LIMITED**
7 (2) **WAFIC RIDA SAID**
8 **Plaintiffs**

9
10 **AND**

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12 **TELE INVEST LIMITED**
13 **Defendant**

14
15 **AND**

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18 **BETWEEN:**

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21 (1) **SAMAR TELECOMMUNICATIONS LIMITED**
22 (2) **WAFIC RIDA SAID**
23 **Plaintiffs**

24
25 **AND**

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28 **ABDULLAH SALEH KAMEL**
29 **Defendant**

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33 **Appearances:** **Mr. Michael Brindle, Q.C. for the Plaintiffs instructed by**
34 **Mr. Jeremy Walton & Ms. Marit Hudson of Appleby**

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36 **Mr. Vernon Flynn, Q.C. for the Defendants instructed by**
37 **Ms. Laura Hatfield of Solomon Harris**

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39 **Before:** **Hon. Justice Henderson**

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41 **Heard:** **May 17 & 18, 2011**

RULING

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1. On this application, the plaintiffs apply for specific discovery of certain documents. Those documents are admittedly privileged but the plaintiffs say they are relevant and the privilege has been waived. On March 15, 2011, I ordered the defendants to serve an enumerated list of these documents, which has been done. The defendants say that the documents are not relevant when the plaintiffs' case is properly construed and understood.

2. The plaintiff Wafic Rida Said says that he entered into an oral agreement with the defendant Abdullah Saleh Kamel for an investment by both parties in a project known as the BOT Project. Mr. Kamel and his company, the defendant Tele Invest Ltd., were to acquire 30 percent of the shares in this project. It was agreed initially that five percent of these would be owned beneficially by the plaintiff Samar Telecommunications Limited, Mr. Said's vehicle. Mr. Said says he was told during the discussions that Tele Invest would own beneficially five percent of the shares and that Prince Abdul Aziz would own the other 20 percent. Eventually, Tele Invest acquired 25 percent of the shares rather than 30 percent; however, no shares were ever registered in Samar's name.

3. The prayer for relief advances as the primary claim an entitlement to five percent of the shares. It also contains an alternative claim to one-half of the shareholding

1 acquired by Tele Invest on its own account. In context that claim is for two and a
2 half percent of the shares.

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4 4. The defence admits that Samar was to receive five percent of the shares. It alleges
5 that the issuer, known as Investcom, decided to retain Samar's five percent
6 shareholding "until the time was right to transfer the shares to Samar."

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8 5. The reply repeats the plaintiffs' original assertion that the gist of the bargain was a
9 purchase by Samar of a five percent shareholding.

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11 6. In correspondence between solicitors, the defendants' former attorneys, Maples
12 and Calder, advised the plaintiffs on February 16, 2011 that Tele Invest was
13 holding 20 percent of the shares on behalf of Prince Abdul Aziz. The plaintiffs
14 say they expect to adduce this letter in evidence at trial as it will tend to confirm
15 the evidence of Mr. Said about the terms of the oral agreement. Shortly after that
16 letter was sent, the defendants changed solicitors.

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18 7. Mr. Kamel has been the subject of an Oral Examination for Discovery at which he
19 asserted that the Prince owns none of the shares and was never intended to own
20 any.

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1 8. The person providing instructions to Maples and Calder has been a Mr. Nackvi,
2 who has now sworn an affirmation saying that the letter of February 16th was
3 incorrect and the result of a misunderstanding. He did not, he says, instruct
4 Maples and Calder that the Prince owned any of the shares. He asked them to
5 clarify whether the plaintiffs were asserting that the Prince owned 20 percent and,
6 if so, whether the plaintiffs were claiming an interest in the shares which they
7 assumed, mistakenly, were being held for the Prince. The plaintiffs now anticipate
8 that when they enter in evidence the letter of February 16th the defendants will
9 call Mr. Nackvi to prove that it was the product of a misunderstanding.

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11 9. The plaintiffs may wish to challenge the credibility of Mr. Nackvi. They say that
12 the letter effects a waiver of the privilege which would otherwise attach to
13 communications between Mr. Nackvi and Maples and Calder on the subject of the
14 Prince's shareholding or, at least, on the subject of Mr. Nackvi's understanding of
15 it. I make this latter distinction because Mr. Nackvi asserts that he has no personal
16 knowledge at all of the terms of the agreement. All of his knowledge, he says,
17 comes from his principal, Mr. Kamel.

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19 10. First, I must determine if the communications between Mr. Nackvi and Maples
20 and Calder are relevant in the sense that they "relate to matters in issue in the
21 action": See *Berkley Administration Inc. v. McClelland* [1990] FSR 381, CA.

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1 11. On a narrow view informed only by the pleadings, it may be said that the Prince's
2 participation is in issue. The statement of claim alleges his involvement in
3 paragraphs 16, 17 and 18. The defence (in paragraphs 13 and 14) denies the
4 participation of the Prince and alleges that a company known as Dallah Albaraka
5 was to hold 25 percent of the shares with Mr. Said or Samar holding five percent.
6 Thus, the parties have joined issue on this assertion of fact. It cannot be said that
7 the documents are irrelevant. As long as it is open to the plaintiffs to deploy the
8 Maples and Calder letter, communications between Mr. Nackvi and Maples and
9 Calder do relate to a matter in issue.

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11 12. Nevertheless, it must be recognised that the identity of the party who was to take
12 20 percent of the shares can in no sense be considered of central importance. The
13 issue at this juncture is whether Tele Invest is accountable to Samar for the
14 promised five percent shareholding or whether Samar must look to Investcom, if
15 possible, for relief. Whether the 20 percent portion was held by Dallah Albaraka
16 or held by Tele Invest on behalf of the Prince is no more than a part of the
17 background or factual matrix within which the alleged oral agreement must be
18 examined. This controverted fact is of relatively minor importance.

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20 13. Clearly, the requested documents are privileged. It is equally clear that the letter
21 of February 16, 2011 amounts to a waiver of privilege over communications

1 between Mr. Nackvi and Maples and Calder on the subject of Mr. Nackvi's
2 understanding of the Prince's role, if any, in the transaction.

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4 14. There is another decision I should mention. The Court of Appeal has held in
5 *Thorpe v. Chief Constable of Greater Manchester* [1986] 1 WLR 665 that
6 documents which "go solely to cross-examination as to credit" are not
7 discoverable. Of course, not having seen the documents requested here, I cannot
8 say definitively that they go only to credit. I do find it more probable than not that
9 the documents would have no greater utility than that.

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11 15. During argument, Mr. Brindle suggested that the plaintiffs may seek to amend
12 their statement of claim. If, as now appears, no shares have ever been held on
13 behalf of the Prince then, says Mr. Brindle, the correct claim may be for one-half
14 of Tele Invest's entire shareholding, i.e., for 12½ percent. However, if the claim is
15 recast in that light, then the question of the Prince's participation and Mr. Nackvi's
16 understanding of it becomes moot and it could reasonably be said that the
17 requested documents are simply not relevant. In this regard, I do not accept the
18 argument that the plaintiffs would be at liberty to prove that the Prince was also
19 "cut out" of the arrangement.

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21 16. In conclusion, attorney-client privilege plays an important role in our legal system
22 as it fosters frank communication between an attorney and his or her client. Frank

1 communication will reveal to an attorney at an early stage the weaknesses in the
2 client's case, which in turn promotes timely settlements.

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4 17. The modern authorities demonstrate that fairness in the trial process is an
5 important consideration on applications of this type: See *Brennan v. Sunderland*
6 *City Council* [2009] ICR 479, per Elias, J sitting as President of the Tribunal. To
7 achieve fairness, a measure of flexibility is necessary.

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9 18. The documents are of marginal relevance at present, may become irrelevant if the
10 pleadings are amended substantially, and in any event are likely to go only to Mr.
11 Nackvi's credibility. Their disclosure would constitute an intrusion upon a
12 privilege of considerable importance. On balance, the request for disclosure
13 should be refused.

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16 19. The application is therefore dismissed.

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20 Dated this 18th day of May, 2011

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Henderson, J.
Judge of the Grand Court