6. Commercial Law

1. Demand for inspection and copy of a corporation's list of shareholders by a shareholder for no proper purpose.

Decision by the Eighth Civil Division of the Tokyo District Court on July 14, 1987. Case No. (*wa*) 8604 of 1986. 1242 *Hanrei Jihō* 118.

[Reference: Commercial Code, Article 263 (2).]

[Facts]

X (plaintiff), the representative director of an advertising corporation which had done mainly intermediary business for a telephone directory advertisement, was a shareholder of Y Corporation (defendants). Y Corporation's issued and outstanding shares amounted to more than 500,000,000 and its shareholders numbered more than 50,000. Its shares were listed on the first division of the Tokyo Stock Exchange. X held 1,000 shares (the minimum number of shares per unit under the unit share system), and brought this suit because Y Corporation, on June 19, 1986, refused X's request to inspect and copy Y Corporation's list of shareholders.

Y Corporation insisted as follows: The purpose of Article 263 of the Commercial Code was to realize the protection of shareholders' rights by means of giving shareholders the rights of inspection and copy of the list of shareholders. However, X claimed a right to inspect for the purpose of using the copy of Y Corporation's list of shareholders for matters irrelevant to the protection of a shareholder's rights. For example, X intended to sell his information about shareholders' names and addresses to direct mail dealers or to make a list of customers for his own advertising business, etc. Therefore, X's demand was contrary to the above-mentioned purpose of Article 263, and, thus, would constitute an abuse of rights.

On the other hand, X insisted as follows: The shareholder should be allowed to freely enjoy his rights of inspection and copy, irrespective of his purpose, because Article 263 had no restrictions or qualifi-

cations regarding the enjoyment of these rights. Moreover, X's demand for inspection and copy of the list of shareholders was aimed at soliciting the other shareholders in order to encourage them to jointly exercise their rights as minority shareholders. Thus, X's demand does not constitute an abuse of rights.

[Opinions of the Court]

Judgment for defendants.

(1) First, the Court stated as follows:

"Article 263 (2) gives shareholders and creditors of a stock corporation the rights of inspection and copy of the list of shareholders. It is thought that Article 263 (2) allows them these rights in order to permit them to freely inspect and copy the list of shareholders, which carries the name, address, number of shares and other legal matters regarding the shareholders; Article 263 (2)'s purpose is to assure or to facilitate the enjoyment of their rights as shareholders or creditors, respectively. Therefore, if shareholders and creditors demand an opportunity to inspect and copy the list of shareholders, not for the purpose of assuring or exercising their rights which they have as shareholders or creditors, but without a proper purpose, e.g. in the event that they demand an opportunity to inspect and copy the list of shareholders in order to divert it to some other purpose, the corporation should be able to refuse their demand."

(2) After stating the above general opinions, the Court then examined in detail the facts about X's past behavior so as to be able to decide whether Y Corporation could refuse X's demand for the inspection and copy of the list of shareholders.

"Y Corporation was a company with a total of 516,113,368 issued shares and 54,336 shareholders as of March 31, 1986. X had only 1,000 shares at the time when he demanded the opportunity for inspection and copy, the issue in dispute in this suit. Consequently, in order to enjoy the rights of inspection and copy of the account books by joint-exercise of minority shareholder rights, Article 293.6 requires the collection of one-tenth of all issued shares, which in this case equals 51,611,337 shares, i.e., more than 50,000 times as many shares as X had. (Thus, more than 50,000 shareholders, each with

1,000 shares would be necessary.) However, though X had copied the list of shareholders in the past, stating that his purpose was the joint-exercise of minority shareholder rights, he did not actually solicit other shareholders. Furthermore, he had no experience regarding the joint-exercise of minority shareholder rights even though he had demanded an opportunity to inspect and copy the list of shareholders of a number of corporations. Thus, it is not reasonable to think that X's demand was for the purpose of soliciting other shareholders for the joint-exercise by minority shareholders of the rights of inspection and copy of the account books. (X deposed that he didn't regard shareholders of artificial persons as objects of solicitation, but, rather, he was concerned with only natural persons.) On the contrary, in this case, there are good reasons to presume that X's purpose in requesting inspection and copy was to offer information about shareholders of Y Corporation who were natural persons to direct mail dealers and otherwise, or to use the lists for his own business. X demanded the opportunity to copy all lists of shareholders, expressing the purpose "solicitation for the joint-exercise of rights by minority shareholders." However, this couldn't be accepted as the real purpose for inspection and copy, because, in addition to the great copying expenses, it seems that in the past X offered information about the shareholders of other corporations to a direct mail dealer or to someone connected with direct mailing. These other corporations include Kao Co., Hitachi Seisakujo Co. and Mitsubishi Shoji Co. from whom X obtained copies of the lists of shareholders by the above-mentioned exercise of rights. There is not enough evidence to override this presumption.

Therefore, in this case, the court can conclude that X demanded an opportunity to inspect and copy the list of shareholders without having a proper purpose."

[Comment]

The Commercial Code provides that shareholders and creditors of a corporation can inspect and copy the list of the shareholders (or its copy) at any time during business hours (Article 263 (1) and (2)). Under this provision, it appears that shareholders (or creditors),

without giving a reason, can demand an opportunity to inspect and copy the list of shareholders for any purpose. However, most scholars and precedents have long held that it is necessary for shareholders to have a proper purpose in order to make such a demand, and that the demanding shareholder should not interfere with the operations of the corporation. Therefore, when a corporation proves that the shareholder does not have a proper purpose, it can refuse his demand for inspection and copy.

Regarding the propriety of purpose in a demand for inspection and copy of the list of shareholders, there were previous decisions. For example, one decision held that even if there were conflicts between the demander on the one hand, and the corporation and its representative director on the other hand, such that the demander brought many suits against the corporation, etc., most of which were dismissed or abandoned, it was not sufficient to immediately decide that the demand for inspection and copy was not proper. (Decision by the Tokyo District Court on September 30, 1980. 992 *Hanrei Jihō* 103.) Another decision held that even if the demand for inspection and copy was aimed mainly at getting information about the names and addresses of shareholders with a view towards buying shares in order to strengthen the shareholder's right to speak critically of management or inform other shareholders about the demander's opinions, it was not enough to say that the purpose of the demand was not proper. (Decision by the Yamagata District Court on February 3, 1987. 1233 *Hanrei Jihō* 141.)

As in this case, when the purpose of the demand for inspection and copy of the list of shareholders aims at offering information about shareholders who are natural persons to direct mail dealers, in return for some value, or using the information for one's own business, it goes without saying that the purpose is not proper. No one objects to the conclusion of this court. This judgment was given on an up-to-date problem, which is the offering of information to direct mail dealers, in return for some value to the seller.

2. A nominal director's liability to a third party when the director's registration of resignation has not yet been completed.

Decision by the First Petty Bench of the Supreme Court on April 16, 1987. Case No. (*o*) 678 of 1983. 1248 *Hanrei Jihō* 127; 1170 *Kinyū Hōmu Jijō* 29; 646 *Hanrei Taimuzu* 104.

[Reference: Commercial Code, Articles 12 and 14, and Article 266.3(1) (before its reform by the Act, Ch. 74 of 1981).]

[Facts]

S Corporation, not a party to this suit, was a family corporation organized with capital of 4,000,000 yen in 1967; A, also not a party to this suit, was the representative director of S Corporation. Defendant Y_1, who was the representative director of T Corporation, accepted S Corporation's offer of financial help sometime around April 1972. When S Corporation increased its stated capital from the then 10,000,000 yen to 16,000,000 yen, T Corporation subscribed for 5,000,000 yen to S Corporation and Y_1 himself was inaugurated as a director of S Corporation. At the same time, defendant Y_2 and the decedent B (who were both then directors of T Corporation) were inaugurated as directors of S Corporation, too. These three persons (Y_1, Y_2 and B) completed the registration of inauguration on July 6, 1972. Defendant Y_3 was inaugurated as a director of S Corporation upon the death of B. Y_3 completed his registration of inauguration on July 17, 1972, the same time as the registration of reinauguration of Y_1 and Y_2.

Y_1, Y_2 and Y_3 didn't participate in the management of S Corporation at all. It was as much as they could do to attend an officers' meeting once a year and to express their opinions about documents of accounts which were drawn up by A. Thus they knew absolutely nothing about the deterioration in the management of S Corporation. At the end of August 1975, S Corporation went bankrupt. When the first meeting of creditors was held on August 13, 1975, Y_1, Y_2 and Y_3 offered their resignations, which were accepted. After that, they never did work as directors of S Corporation. In addition, defendant Y_4 had dealings with S Corporation in the capacity of tax expert since the time of S' incorporation. Sometime around June 1972,

Y_4 accepted A's request that Y_4 should serve as a titular auditor on the condition that Y_4 lent only his name. Y_4 never performed any services whatsoever in the capacity of auditor. Later, in February 1975, Y_4 offered to resign as auditor and requested removal of his name from the registry. In August 1975, Y_4 heard of the bankruptcy of S Corporation. Y_4 inspected the registration; thus, he knew that his reinauguration had been registered in July 1975. Instantly, Y_4 again expressed his intention to resign, and demanded that his resignation should be immediately registered. However, A did not take care of the matter because he was pressed with the matter of how to keep S Corporation in business. Moreover, A had little knowledge of commercial law and registration procedures.

The plaintiffs, X Corporation, had established contact with S Corporation before its bankruptcy but began to deal directly with S Corporation sometime around October 1976 after its bankruptcy. X Corporation knew about S Corporation's circumstances, specifically that S Corporation had been placed under the control of creditors; thus, X Corporation was well aware of the risks of dealing with S Corporation. Sometime around December 1976, defective goods were found in stock which S Corporation had received from X Corporation. Some of these defective goods were delivered to some vendee, who claimed damages against S Corporation, leading to greater financial difficulties for S Corporation. Following the advice of X Corporation, S Corporation began to dump its goods at a price lower than the cost price. Nevertheless, sometime around April 1977, S Corporation's financial difficulties became even worse when another vendee, who had used defective goods which had come from X Corporation, claimed damages against S Corporation. In around May 1977, the dumping got into full swing. During this time, X Corporation considerably admitted these circumstances.

On February 28, 1978, two promissory notes made by S Corporation were dishonored, and S Corporation then went into its second bankruptcy. Accordingly, X Corporation brought this suit against Y_1, Y_2, Y_3 and Y_4 ("the defendants") as being accountable under Articles 266.3 and 280 of the Commercial Code, for damages of 59,028,417 yen which X Corporation suffered when it couldn't col-

lect its account receivable (with S Corporation) in that same amount. In response, the defendants pleaded that there was no breach of duty as director(s) or auditor, because all of them had completed the legal procedures for resignation before dealings between X Corporation and S Corporation began in around October 1976. X Corporation gave a counterplea that the defendants were liable for damages under Article 266.3, because their resignations were registered on March 28, 1978, after service of X Corporation's complaint, and, under Article 14, they were barred from using the fact of their resignation as a defense.

The court of first instance (Decision by the Tokyo District Court on April 16, 1982) decided that when a director who had resigned (a) negligently allowed a false registration to remain in the registry, i.e. where the director knew that the registration of his resignation was not complete, or (b) unknowingly allowed the incomplete registration to stand because he was grossly negligent, i.e. where the director should have known that the registration was incomplete, the director could not set up against a third party in good faith the fact that the registration was false; therefore, even if the defendants were not at all engaged in the operations of the corporation and, moreover, had no duty of observation and loyalty, under Article 14, the defendants should be considered to be in the position of directors. Thus the court affirmed the plaintiffs' demand in part even though it had found a considerable degree of contribution on the part of the plaintiffs.

To the contrary, the *koso* appellate court held as follows: Article 14 does not apply in this case; thus, it is not proper to say that the defendants can not assert their resignation under this article because a delay in the registration of resignation is not the same as making a false registration. Rather, the delay in registration of the resignations comes under Article 12. However, originally Article 12's purpose was to regulate the relation between the party who effects the registration (i.e., in this case S Corporation) and a third party (its customer). Thus, Article 12 should not be applied to a relation between one who is entered into the registration and a third party (customer). Even if this is not so, i.e., perhaps it is possible to apply

Article 12 to such a relation, X Corporaton's demand should be rejected because the resigned has no authority and duty internally so long as there is no vacancy in board of directors and there is a successor at auditor.

X Corporation, discontented with the decision of the *koso* appellate court, filed a *jokoku* appeal with the Supreme Court.

[Opinions of the Court]

Jokoku appeal dismissed.

Under Article 266.3 (1) it may be accepted that a person who resigned as director is not liable for damages to a third party even though the third party dealt with the corporation believing, due to the incomplete registration, that the person still held his position as director; the only exception would be the situation where the "resigned" director affirmatively performed an act, either within the corporation or vis-à-vis an entity outside the corporation, as a director. (Decision by the Third Petty Bench of the Supreme Court on August 28, 1962.) However, when there are special circumstances such as when the director did not demand that the corporate representative in charge of registration should register the director's resignation, and expressly consented to allow the false registration to continue in the registry, the "resigned" director can not set up against a third party in good faith the fact that he is not a director of the corporation given an analogical application of Article 14 . Thus the director should assume liability as a director under Article 266.3 (1).

There was no allegation, and no proof, in the *koso* appellate court that such special circumstances vis-à-vis Y_1, Y_2 and Y_3 existed in this case, i.e. that before or after the directors made it known that they intended to resign as directors, they expressly consented to allow the false registration to stand without demanding registration of their resignation. Therefore, the conclusion of the *koso* appellate court is approved. The same reasoning and conclusion apply regarding Y_4.

[Comment]

A director can freely resign from his position at any time because the relation between a stock corporation and directors is regulated

by the provisions of the Civil Code concerning mandate (Commercial Code, Article 254 (3); Civil Code, Articles 651 (1) and 652). Most scholarly opinions and judgments have recognized that a director's resignation comes into effect by the director's unilateral expression to the corporation. In other words, the resignation is effective within the corporation before its registration, and the resigned director is not liable afterwards as a director, except that he is charged with the duty of remaining at his post (Commercial Code, Article 258 (1)). The judgments of this Court and the *koso* appellate court in this case have adopted the same position in principle.

On the other hand, if the registration of resignation has not been completed yet, there remains the problem of how to protect a third party who relies on the registration. There is a precedent that affirms that one is liable as a director under the Commercial Code, Article 14, where the director has not been formally elected but he has consented to the registration of his assumption of office. (Decision by the First Petty Bench of the Supreme Court on June 15, 1972. 26 *Minshū* 984.) From this point of view, when a resigned director is in any way responsible for an inaccurate/false registration remaining in the registry, it can be affirmed that he may be held liable under the Commercial Code, Article 266.3 (1). On that point, the Supreme Court, affirming that a resigned director is not legally a director, has decided, in light of Article 12 of the Commercial Code, that "if the resigned director, before the registration and public announcement of his resignation, affirmatively represents himself as a director as seen in his actions either within the corporation or vis-à-vis those outside the corporation, a third party in good faith who suffers damage as a result of the resigned director's acts may claim damages under Article 266.3 of the Commercial Code, regarding those acts as a performance of director's duties, on the ground that the resigned director can not set up the fact of his resignation against the third party, due to nonexistence of the registration and public announcement of his resignation." However, the Supreme Court concluded that the Commercial Code, Article 266.3, didn't apply because it was not proper to consider the fact that the resigned director did not work to be an omission of duties on the director's part. (De-

cision by the Third Petty Bench of the Supreme Court on July 28, 1962.) The Supreme Court, presupposing the posture of those two Supreme Court decisions, decided the current case under review in light of the Commercial Code, Article 14, stating that when there are special circumstances such as a resigned director expressly consenting to allow the false registration to remain in the registry, the resigned director is liable for damages under Article 266.3 by analogical application of Article 14. The Court expressed an opinion that there may be a limited interpretation as to the requirements for the resigned director's liability to the third party.

Furthermore, regarding the director whose registration of resignation is not completed, the view that protests against the analogical application of Articles 12 or 14 so long as the resigned director does not perform any acts as director after his resignation, and that, consequently, denies liability under Article 266.3 (1) or construes liability to be very limited, has gotten stronger in the latest scholarly opinions and judgments of lower courts.

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7. Labor Law

1. Employer's order to change the date of annual vacation with pay.

Decision by the Second Petty Bench of the Supreme Court on July 10, 1987. Case No. (*o*) 618 of 1984. 41 *Minshū* 1229.

[Facts]

X (*jokoku* appellant) was an employee, shift worker, of Y (*jokoku* respondents). On September 4, 1978, X required Sunday September 17, as one of his annual vacation days. X had been scheduled to work the day shift on that day. It had been established through labor-