In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 411

BETWEEN:

UPRISE CORPORATION LIMITED
WISE SPIRIT INTERNATIONAL LIMITED
TAISHAN CAPITAL MANAGEMENT LIMITED

Applicants

-and-

MINGYUAN MEDICARE DEVELOPMENT COMPANY LIMITED

Respondent

GREATER ACHIEVE LIMITED

Applicant

-and-

GET NICE LIMITED & ORS

Respondent

REASONS FOR DECISION

(in Court)[1]

[1] This Judgment was circulated without a formal hearing to hand it down.

Companies Act 1981 sections 72, 76 and 79-failure to convene annual general meeting-relief sought by person lacking standing as a 'member'-power of court to grant relief to beneficial owner of shares-inherent jurisdiction of court

Date of Decision: February 29-March 1, 2016
Date of Reasons: March 22, 2016

Mr Delroy Duncan and Ms Lauren Sadler-Best, Trott & Duncan Limited, for the Applicants and Greater Achieve Limited and Get Nice Limited ("the Joinder Applicants")

Mr Christian Luthi and Mr Rhys Williams, Conyers Dill & Pearman Limited, for the Respondent ('the Company")

Introductory

1. By an Originating Summons issued on October 12, 2015, the Applicants sought the following principal relief:

   "

   (1) An Order under Section 76 (alternatively Section 72(3)) of the Bermuda Companies Act 1981 to compel the Respondent to forthwith give notice of the 2015 Annual General Meeting of the Respondent to be held on a date not more than 25 days from such notice (or on such date as to the Court seems fit) for the purpose of considering the resolutions set out in schedules II and III to Exhibit 'HKM 10' of the First Affirmation of Hung Kin Ming in support of this Originating Summons (and such other business as the Court shall direct).

   (2) An Order that, if by close of business at 5.00pm Hong Kong time on the following day after the expiration of two clear business days in Bermuda, following the court's order. The Defendant has failed to comply with the order sought at paragraph 1 above by giving such notice, the applicants shall be permitted themselves to convene the 2015 Annual General Meeting of the Company.

   (3) *An Order that the Company, acting by its board of directors, shall give effect to all resolutions passed at the 2015 Annual General Meeting held pursuant to the Court's order…*"

2. This Summons was initially supported by the First Affirmation of Hung Kin Ming, a director of the 1st and 3rd Applicants. He deposed that trading in the Company's shares had been suspended by the Hong Kong Stock Exchange ("HKSX") since April 1, 2015, that the Company's audited financial statements for 2014 had not published when due by March 31, 2015, and that its auditors ("Deloitte") had resigned in

December 2015. The Company's main business was investing in the medicare sector in the People's Republic of China ("PRC"). None of these matters were in dispute.

3. Other assertions made by the Applicants which were not disputed included the following:

    (a) US$66 million had been found by the auditors to be missing from a subsidiary;

    (b) Mr Yao the Chairman of the Company is a registered "dishonest person" in PRC (which the Court was told meant that he was simply a delinquent debtor);

    (c) the brother of the Chairman, known as Mr Iu, remains legal representative of most of the Company's PRC subsidiaries, despite having been convicted of rape (after which he resigned as a director of the Company) and being an undischarged bankrupt in Hong Kong;

    (d) an annual general meeting ("AGM") had not been held within the 15 months period required by the Bye-laws and could not be convened without the intervention of either the Court or the Registrar of Companies. The last AGM was held on June 12, 2014. The Company had been in breach of Bye-law 67 since September 13, 2015.

4. Prior to the commencement of the present proceedings, a subsidiary of the Company commenced and discontinued proceedings in Hong Kong against Greater Achieve Limited ("Greater Achieve") challenging Greater Achieve's beneficial interest in its purported shareholding in the Company. Shortly before the present proceedings were commenced, on October 6, 2015, the Company announced the formation of an independent board committee to investigate what was euphemistically described as the 'Unresolved Matter'. After the commencement of the present proceedings, which were explicitly designed to remove Mr Yao from the Company's Board, Mr Yao and Mr Iu obtained an ex parte injunction on November 23, 2015 from the British Virgin Islands Commercial Court ("the BVI Court"), *inter alia*, restraining Greater Achieve Limited ("Greater Achieve") "*from exercising any voting rights or passing any resolution in its capacity as shareholder of*" the Company. This was significant, because the Applicants lacked sufficient standing to propose resolutions at the AGM they had the power to ask this Court to compel the Company to convene.

5. On January 15, 2016, Mr Yiu was forced to discontinue the proceedings before the BVI Court because of his initially undisclosed bankruptcy. Justice Gerard Farara QC also discharged the injunction, stating at page 25 of the transcript:

"*This is really a case of egregious breaches of duty of full and frank disclosure on the part of the Claimants/Applicants. To date the Second Defendant* [Mr Yao] *has not offered any explanation or apology for the non-disclosures. The Court is left to conclude that they were deliberate and designed to ensure that the Claimants obtained a most distinct advantage against the Defendants and seemingly to prevent the calling of the AGM of the* [Company]."

6. Thereafter, Greater Achieve contacted Computershare, operators of the Company's branch registry, to get the shares held in a nominee's name transferred into its own name with a view to exercising its right to propose resolutions changing the Company's Board at the AGM the Applicants were requesting this Court to order. This request was refused by Computershare on the grounds that the Company had instructed the agent not carry out any share transfers pending an investigation into suspected fraud.

   On the second day of the hearing of the present application, evidence was filed on behalf of Computershare admitting that the transfer request had been refused in the course of a telephone conversation, but attributing this to a mistake on the part of a switchboard operator rather than an accurate reflection of the Company's instructions.

7. On February 19, 2016, Greater Achieve and Get Nice Securities Limited ("Get Nice") issued a Summons seeking to be joined as parties to the Applicants' Originating Summons with a view to obtaining a direction that the annexed resolutions be placed on the agenda for the next AGM. This Summons was issued returnable for the same date as the Applicants' Originating Summons.

8. In the final analysis, the Company effectively conceded that Greater Achieve was entitled to become a registered shareholder and had been impeded from doing so in time for the hearing of the Applicants' Originating Summons. However, the Company attributed these impediments to unintended administrative impediments rather than, as Greater Achieve contended, malign intent.

9. With the underlying facts essentially common ground, the main controversy centred on whether or not the Applicants and/or Greater Achieve and Get Nice were entitled to any relief because legitimate concerns existed about leaving the Company to belatedly convene the AGM itself. The Company disputed the merits of these concerns. It contended that it should be left to convene the AGM itself and noted that the Company had now (on February 29, 2016, the first day of the effective hearing of the Originating Summons) requested the Registrar of Companies to authorise the convening of the AGM under section 72(2) of the Act.

10. Against this background, on March 1, 2016 I ordered, *inter alia*, that:

    (a) the Applicants were entitled to an Order under section 76 of the Companies Act 1981 directing the convening of the AGM;

    (b) the Company should convene an AGM between May 16 and 20, 2016;

    (c) the Company should include on the AGM agenda any resolution proposed by Greater Achieve and circulate any statement provided by it in accordance with section 79 of the Companies Act 1981;

    (d) the Company should pay the Applicants' costs;

    (e) the costs in relation to Greater Achieve's joinder application were reserved.

11. I now give reasons for that decision.

Issue 1: was it "impracticable" for the AGM to be held in the requite section 76 of the Companies Act sense?

12. The Applicants referred to three statutory provisions. Firstly, section 72 of the Companies Act which provides as follows:

> "***Failure to hold annual general meeting or to elect directors***
> *72 (1) If default is made in calling or holding a general meeting in accordance with section 71(1) the directors shall use their best endeavours to call or hold the meeting at the earliest practicable date.*
>
> *(2) If an annual general meeting is not held within three months of the date it should have been held or the required number of directors required to be elected, if any have not been elected at such a meeting the company may apply to the Registrar to sanction the holding of a general meeting to put the affairs of the company in order. Upon receipt of such an application the Registrar may in his discretion make an order allowing the application under such conditions as he thinks fit to impose including ordering the date by which the affairs of the company shall be put in order.*
>
> *(3) Subject to subsection (2) if default is made in calling an annual general meeting in accordance with section 71 or to elect the required number of directors at such meeting the Registrar, any creditors or member of the company may apply to the Court for the winding up of the company and the Court on such application may order the company to be wound up or make any order that the Registrar might have made under subsection (2)...*" [emphasis added]

13. This section provides one primary mechanism for convening an AGM when three months after the latest time for convening it has expired which is available only to the company itself. That is an application to the Registrar of Companies (ss.(2)).The Registrar's sanction is clearly an essentially administrative remedy. The alternative application to the Court is a potentially draconian remedy in which the primary relief sought is winding up. This remedy is available to the Registrar and any creditor or member of the company as soon as statutory delinquency occurs and before the expiration of the three month period applicable under subsection (2). However, the Court can instead regularise a company's affairs by making any order the Registrar is empowered to make under subsection (2).

14. The Applicants substantively relied upon section 76:

> "***Power of Court to order meeting***
> *76 (1) If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in manner prescribed by the bye-laws or this Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is made may give such ancillary or consequential directions as it thinks expedient.*
>
> *(2)Any meeting called, held and conducted in accordance with an order under subsection (1) shall for all purposes be deemed to be a meeting of the company duly called, held and conducted.*" [Emphasis added]

15. Mr Duncan submitted in the '*Skeleton Argument of the Applicants*':

> "*41. In the present case, the Applicants rely on two factors as showing that it is impracticable to call a meeting: first, the board's evident reluctance to convene a meeting despite their obligation to do so, and, secondly, the fact that, just as in Ng Pui Lung, it is now too late to convene an AGM without the assistance of the Court or Registrar.*"

16. The Applicants' counsel relied in particular on the following finding I made in *Ng Pui Lung-v-CY Foundation Ltd and Luck Continent Ltd* [2011] Bda LR 12 on the meaning of "impracticable" in section 76(1):

> "*28. On a straightforward reading of section 76, it appears clear that the Court in the present case has the jurisdiction to make an order. This is because it is unarguably impracticable in a legal sense (absent a curative order from the Court-or the Registrar under section 72) for the Company to validly convene the AGM, as the time for so doing under both the Act and the*

Bye-laws has expired. It does not follow that the Court has an unfettered discretion to make an order it deems fit; an order made must be designed to further the objects of section 76 in its wider statutory context."

17. By way of demonstrating that legal impracticability was operative in all the circumstances of the present case, reference was made to the following third statutory provision in the Companies Act:

> "*71 (1) Subject to section 71A, a meeting of members of a company shall be convened at least once in every calendar year; this meeting shall be referred to as the annual general meeting.*"

18. In addition, reference was made to the following provision in the Company's New Bye-laws:

> "*67. The Company shall in each year hold a general meeting as its annual general meeting in addition to any other meeting in that year and shall specify the meeting as such in the notice calling it.; and not more than fifteen months shall elapse between the date of one annual general meeting of the Company and that of the next…*"

19. It was not only common ground that no meeting had been held since June 2014 so that the Company was in breach of Bye-law 67 and section 71(1) of the Act. The Company was bound to concede that it could not legally convene the AGM without a curative direction from the Registrar or Order from this Court. Because on February 29, 2016 (the first day of the hearing), its corporate attorneys wrote to the Registrar stating in salient part as follows:

> "*…Our client has advised that the Company will not hold its 2015 (AGM) within three months of 31 December 2015 and have requested that, in anticipation of this, that we make application pursuant to section 72(2) of the Companies Act 1981, to put the affairs of the Company in order in respect of the AGM of the Company for the year 2015…*"

20. The letter conveniently ignores the inconvenient truth that section 72(2) by its terms is only engaged when three months after the time for holding the AGM has expired. Even if there is an implied statutory power to make a prospective application (which is subject to argument), it is impossible to construe section 72(2) as empowering the Registrar to give any direction before the requisite three month period has expired. When I expressed surprise in the course of the hearing that this letter had only been sent on the first day of the hearing, Mr Luthi indicated that instructions to send the letter had been given some time before. It would be unsurprising if the Company's Bermuda corporate administrators were not initially perplexed by receiving instructions to send a letter at a time that made neither legal nor common sense.

21. Mr Duncan invited the Court to adopt the view I expressed provisionally in *Ng Pui Lung* that a company is in breach when an earlier Bye-law-mandated time period for convening an AGM has expired:

> "*29. The need to consider relief under section 72(3) (under paragraph (2) of the 2nd Defendant's Amended Summons) does not strictly arise. I see no need to decide whether it is possible for the Court to make any order the Registrar could have made under section 72(2) otherwise than on an application for winding-up. It seems doubtful, having regard to the purpose of these remedies, that they can only be invoked after the expiry of three months from the latest date when the AGM could have been statutorily held (i.e. December 31, 2010). The phrase 'If an annual general meeting is not held within three months of the date it should have been held' should very arguably be construed so that the three month bar to invoking the Registrar's assistance when a default has occurred runs from the earliest applicable date for convening the meeting, under either the Bye-laws or the statute, as the case may be.*"

22. I was required in the present case to decide when the delinquency in convening the AGM occurred because the Applicants' case was premised on a delinquency since September 13, 2015 while the Company's case (by the beginning of the hearing) was that no delinquency would occur until April 1, 2016. I accepted Mr Duncan's submission that the earlier time limit fixed by the Bye-laws applied so that the Company was in breach of its contractual obligation to convene an AGM from September 13, 2015.

23. Mr Luthi did not directly submit that a breach of the Bye-law requirements as to when an AGM should be held was of no legal effect in terms of triggering the right of a shareholder to invoke section 76 with a view to convening an AGM. Rather, he argued that no impracticability existed because the Company itself was now willing to take curative steps to address a prospective delinquency. That submission, in effect, invited me to depart from the analysis of section 76 in *Ng Pui Lung-v-CY Foundation Ltd and Luck Continent Ltd* [2011] Bda LR 12. I rejected that submission because legal impracticability, as defined in that case, exists whether or not the Company is willing to take curative action. The Company's argument blurred the distinction between (a) whether or not the preconditions for granting relief have been met, and (b) whether or not the Court should exercise its discretion to grant relief to a third party applicant on the facts of the particular case. The Company's February 29, 2016 application to the Registrar was relevant to (b) but not to (a).

24. Indeed the Respondents' counsel in his 'Skeleton Submissions' advanced an argument (in support of a different proposition) which in my judgment indirectly supports the view that a breach of the Bye-law time requirements for convening AGM does engage the provisions of section 76 of the Act:

> "*17. The rationale underlying the section is to enable the Company to get on with its business. The provisions of section 76…are not in place to enable a member to circumvent the contract that exists between the Company and its members under section 16 of the Act…*"

25. The argument that there was no impracticability on the facts of the present case was inherently inconsistent, because it relied on authorities where the applicant was seeking to obviate the contract evidenced by the bye-laws, not to enforce it, e.g. *Monnington-v-Easier plc* [2005] EWHC 2578 (Ch) (Rimer J, at paragraph [40]). Section 371 of the Companies Act 1985 (UK), is, for present purposes, identical to our own section 76. The UK section is also engaged where the following conditions are met:

> "*If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in manner prescribed by the bye-laws or this Act...*"

26. It is true that the statute may be said to contemplate two spheres of impracticability. The first relating to the "*manner in which meetings of that company may be called*"; the second relating to the manner in which meetings are prescribed to be conducted. Express mention of the bye-laws is only made in relation to the conduct of meetings, but not in relation to conduct impracticability. *Monnington* concerned 'meeting conduct' impracticability, not 'meeting calling' impracticability at all. But the scope of the jurisdiction conferred in relation to 'meeting calling' impracticability is expressed in broader terms still, and not limited to Bye-law or statutory concerns. It is potentially available if calling the meeting is "*for <u>any</u> reason impracticable*" (emphasis added) and in relation to "*<u>any manner</u> in which meetings of that company may be called*" (emphasis added).

27. It is impossible to fairly read into such broad language, by necessary implication, (a) the legislative intention to exclude bye-law impracticability, and (b) the legislative intention that statutory impracticability alone should qualify for relief as regards calling a meeting of a company. Construing section 76(1) in the context of the provisions of the Act as a whole, it requires clear words to justify the conclusion that statutory provisions override the bye-laws rather than complement them. Section 16 provides:

> "(1) *Subject to this Act the memorandum of association when registered and the bye-laws when approved shall bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the bye-laws.*"

28. Section 71 clearly imposes a mandatory minimum requirement which cannot be contracted out of: "*(1)Subject to section 71A, a meeting of members of a company shall be convened at least once in every calendar year; this meeting shall be referred to as the annual general meeting*". Nor, on the other hand, can section 71(1) be sensibly read as invalidating bye-law provisions which require annual general meetings to be held within a potentially more compressed time-frame (e.g. once every 15 months). Section 72(1) complements section 71(1) by requiring the directors to use their best endeavours to call the meeting as soon as possible where a section 71(1)

default has occurred. Section 72(3) provides the 'draconian' remedy of winding up, subject to subsection (2), explicitly where a failure to comply with section 71 has occurred. Section 72(2) is expressed in broader terms which do not mention section 71 at all:

> "(2) *If an annual general meeting is not held <u>within three months of the date it should have been held</u>* …" [Emphasis added]

29. If this subsection was intended to be limited in scope to circumstances where a breach of section 71(1) had occurred, it is difficult to see why no express mention of section 71(1) is made as in section 72(1). If section 72(2) only applies to non-compliance with the statutory AGM requirement, the "*date when it should have been held*" will be the same date in each and every case. A more natural way of expressing such legislative intent would have been for the draftsman to say:

    (a) 'within three months of the end of the year in which the failure to comply with section 71(1) occurred'; or (more simply still)

    (b) 'within three months of the end of the year in which it should have been held'.

30. The structure of section 72 suggests that the remedy of seeking a direction from the Registrar is deliberately more flexible than that of seeking a winding up order from the Court. Unless the Act can sensibly be construed as impliedly prohibiting bye-law provision for AGMs to be held within a tighter timeframe than once every calendar year, it makes no sense to construe section 72(2) as:

    (a) affording relief where a breach of section 71(1) has occurred; and

    (b) affording no relief where the AGM has not been held within such shorter time as may be required by the bye-laws, effectively forcing a bye-law delinquent company to wait for statutory delinquency before being access the assistance of the Registrar under section 72(2).

31. Such a construction would produce absurd results. It makes commercial sense to construe section 72(2) as providing a remedy for bye-law delinquency (when the time involved is less than the statutory minimum) and statutory delinquency in convening an AGM, with the extraordinary remedy of winding up being available under section 72(3) only when a calendar year without a meeting has expired. If the Respondents are correct in contending that the Company's Bye-law delinquency under Bye-law 67 does <u>not</u> trigger jurisdiction under section 72(2), this would produce another absurd result:

(a) the Applicants would have standing under section 72(3) to seek a winding up of the Company for failure to comply with section 71(1) of the Act as of January 1, 2016; however

(b) the Company would not have standing to seek an effective curative direction from the Registrar under section 72(2) until April 1, 2016 (as opposed to as of September 13, 2015 as the Applicants contended).

32. Section 76 falls to be construed against the background of this wider statutory context. It was ultimately clear that there was no valid legal reason for construing section 76 as unavailable to the Applicants seeking in February 2016 the Court's assistance to convene an AGM at a date when:

(a) the Company had been in breach of the Bye-law time limit for convening the AGM since September 13, 2015;

(b) the Company had been in breach of the statutory time limit for holding the AGM since December 31, 2015; and

(c) the Applicants had enjoyed the standing to seek the more draconian remedy of winding up under section 72(3) for breach of section 71(1) as of January 1, 2016.

Issue 2: did the Company's willingness to convene the AGM with the assistance of the Registrar's direction under section 72(2) of the Act constitute grounds for declining to grant relief under section 76?

33. The steps taken at the direction of key figures connected with the Company's management, in Hong Kong and BVI[2], to ward off the 'evil day' when an AGM is held at which proposals to replace the current Chairman can be tabled, are unimpressive in the extreme, bearing in mind that:

(a) the auditors have resigned;

(b) a substantial sum is missing from a PRC subsidiary;

(c) trading in the Company's shares has been suspended;

(d) the PRC subsidiaries' Legal Representative is an undischarged bankrupt and a brother of the Chairman;

(e) the Chairman of the Company is himself a delinquent debtor and as such is registered as a 'dishonest person' in PRC.

[2] The Hong Kong Proceedings were brought by a subsidiary controlled by Mr Yao and Mr Iu. The BVI proceedings were brought by Mr Yao and Mr Iu.

34. Mr Luthi protested that the legal proceedings designed to prevent Greater Achieve from requisitioning a General Meeting could not be laid at the Company's door. He also pointed out that reputable directors were last year added to the Board. That does not negate the fact that an unsuitable Chairman remains at the helm, there are legitimate concerns about the way the Company has been managed under his stewardship, and the Company has shown no willingness to convene the AGM before being threatened with the effective hearing of the Applicants' Originating Summons.

35. The undisputed facts painted a clear picture of a Company whose shareholders ought to be given the opportunity to appoint fresh management as soon as possible. Leaving it to the Company's existing management to convene the meeting after March 31, 2016 with the assistance of the Registrar of Companies did not appear to me to be an option which any reasonable court, properly directing itself, would prefer to granting immediate relief to the Applicants under section 76.

Issue 3: did the Joinder Applicants have standing to obtain an Order compelling the Company to table their proposed resolutions?

36. The facts crucially relevant to the Joinder Applicants' attempt to obtain an Order compelling the Company to table resolutions at the AGM were also essentially agreed. The Applicants' shareholding was 1.197% of the Company's issued shares. Greater Achieve's shareholding was 18.59%, registered in the name of its nominee, Get Nice through the Hong Kong Central Clearing and Settlement System ("CCASS"). Because the shares were held through CCASS, neither the name of Greater Achieve nor Get Nice appeared on the Company's share register.

37. The governing statutory provisions[3] are as follows:

> "**Circulation of members' resolution, etc.**
>
> *79(1)Subject to this section it shall be the duty of a company, on the requisition in writing of such number of members as is hereinafter specified, at the expense of the requisitionists unless the company otherwise resolves—*
>
> *(a) to give to members of the company entitled to receive notice of the next annual general meeting notice of any resolution which may properly be moved and is intended to be moved at that meeting;*
>
> *(b) to circulate to members entitled to have notice of any general meeting sent to them any statement of not more than one thousand words with respect to the matter referred to in any proposed resolution or the business to be dealt with at that meeting.*
>
> *(2)The number of members necessary for a requisition under subsection (1) shall be—*

[3] Section 80 ("***Conditions to be met before company bound to give notice of resolution***") also applies.

(a) either <u>any number of members representing not less than one-twentieth of the total voting rights of all the members having at the date of the requisition a right to vote at the meeting to which the requisition relates</u>; or

(b) not less than one hundred members.

(3)Notice of any such intended resolution shall be given, and any such statement shall be circulated, to members of the company entitled to have notice of the meeting sent to them by serving a copy of the resolution or statement on each such member in any manner permitted for service of notice of the meeting, and notice of any such resolution shall be given to any other member of the company by giving notice of the general effect of the resolution in any manner permitted for giving him notice of meetings of the company:

Provided that the copy shall be served, or notice of the effect of the resolution shall be given, as the case may be, in the same manner and, so far as practicable, at the same time as notice of the meeting and, where it is not practicable for it to be served or given at that time, it shall be served or given as soon as practicable thereafter." [Emphasis added]

38. It was not in dispute that, if the shares beneficially owned by Greater Achieve were transferred into its name, it would be entitled under section 79(2)(a) to require the Company under section 79(1) to circulate its proposed resolution with an accompanying circular. The cumulative shareholding of the Applicants and the Joinder Applicants was almost 20%. The threshold for exercising section 90 rights was only 5%. Controversy centred on whether, before that transfer occurred, Greater Achieve possessed the standing to enforce the crucial section 79 rights.

39. Mr Duncan invited the Court to have regard to the commercial realties of the situation and to compel the Company to circulate Greater Achieve's proposed resolutions if the Company stood on legal technicalities and refused to do so. He referred the Court to a Hong Kong Court of First Instance decision which illustrated that where shares held through CCASS are formally registered in the name of a broker, such broker is in substance a mere agent of the beneficial owner. In *Re CA Pacific Finance Ltd (in liquidation) and another* [2000] 1 BCLC 494,Yuen J stated:

"*This is consistent with the purpose and the practice of CCASS. The stated purpose of its establishment was to provide more efficient and more secure trades which would be of benefit to investors. There would be less, not more, security for investors if securities acquired on their instructions and with their funds have become, by a side-wind, the property of their brokers or HKSCC*[4]*, neither of whom have paid the money in exchange for these securities.*"

40. Very broadly, this authority supported the proposition that courts analysing disputes in relation to the shares of listed companies which for commercial convenience are registered in the beneficial owners' names should not allow technicalities of nominal

[4] Hong Kong Securities Co Ltd operated the CCASS clearing system.

ownership to obscure altogether the commercial realities in terms of beneficial ownership. This broad principle ultimately shaped the form of relief granted in respect of this limb of the case.

41. Mr Luthi, however, submitted that the company law principle that only a registered member can exercise the rights of a member is sacrosanct. The principle derives fundamentally from section 19 of the Act which provides:

> "*(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company.*"

42. It followed (it was further argued) that Greater Achieve lacked the standing to seek relief under section 76 as read with section 79 of the Act at the present time. This conclusion was said to be clearly supported by the conclusion reached by the English High Court in relation to a similar application in *In re DNick Holding plc* [2014] Ch 196. Norris J struck out the beneficial shareholder's claim for an order cancelling a resolution, a right which holders of shares amounting to 5% of a company's shareholding were entitled to exercise:

> "*31. I accordingly am persuaded that the proceedings commenced by the claim form have no real prospect of success. I am conscious that my reading of the Act does deprive the claimants as indirect investors of the sort of protection which those who formulated the 2006 Act thought ought to be extended to minority shareholders. That is not a particularly comfortable conclusion at which to arrive: but I consider that I would have to embark upon what Lord Collins of Mapesbury JSC called in Enviroco Ltd-v-Farstad Supply A/S [2011] Bus LR 1108, para 49 'an impermissible form of judicial legislation' to reach any other conclusion.*"

43. This passage prompts a minor digression. Lord Collins' antipathy for 'judicial legislation'[5], by way of cautioning judges against adopting excessively liberal approaches to the task of statutory interpretation, properly understood, is grounded in sound principle. However, it should not obscure the fact that in common law jurisdictions the courts do 'make law' in a variety of areas. The law of contract and tort is largely based on judge-made law. So are the rules of private international law. The Bermudian courts have been empowered by the UK and local Parliaments, respectively, to strike down legislation which is inconsistent with the Constitution and the Human Rights Act. Where courts are given by Parliament broad discretionary powers, it is through judge-made law that the parameters within which the discretionary statutory power may be exercised are typically defined and developed. Another area of the law the content of which is determined wholly by judges is the scope of the Court's inherent jurisdiction. The prohibition on 'legislating from the bench', properly understood, is a narrow principle which should never be used to stifle the common law's greatest strength; its capacity to deliver justice tailored to the

[5] In a *dictum* to which I referred in the course of the hearing of the present applications (in *Re Singularis* [2014] UKPC 36 at paragraph 108), Lord Collins appropriately used similar language in bitingly criticising views which I had unhappily expressed, technically *obiter*, at first instance. Based on far more refined reasoning than my own, the Privy Council majority found the relevant common law power did exist, approving Deemster Doyle's decision to be a 'bold spirit' rather than a 'timorous soul'.

facts of the particular case which the litigant has asked the court to justly adjudicate. Two decisions in the company law field help to illustrate this point.

44. In *Re Impex* [2004] BPIR 564, a Manx decision which was 10 years later approved by the Judicial Committee of the Privy Council[6], Deemster David Doyle helpfully explored the difference between a liberal and restrictive approach to common law decision-making when he observed:

> "*[60] Against the flexible development of the common law have been arguments addressing the need for certainty and the point that the courts should not assume the mantle of the legislature (see Deemster Luft's judgment in Miles Waverley Ltd (in Liquidation) (1978-80) MLR 256; and Deemster Corrin's judgment in Avondale Developments Ltd (1996-98) MLR N5). In Gordon Pacific Developments Pty Ltd v Conlon [1993] 3 NZLR 760 in answer to a submission that principles of comity should be extended to meet modern conditions, Henry J (whom no doubt Lord Denning would have regarded as a timorous soul) said:*
>
> *'Desirable and timely as change may be, the assumption and the recognition of extra-territorial jurisdiction of foreign courts is better left to the governmental arm of the state rather than ad hoc decisions of the Court.'*
>
> *[61] Lord Denning drew a distinction between what he called timorous souls and bold spirits. The timorous souls left it to Parliament. The bold spirits developed the common law according to the needs of the times (see Lord Denning's famous dissenting judgment in Candler v Crane, Christmas & Co [1951] 2 KB 164). To the bold spirits arguments about the novelty of the point does not appeal in the least. They maintain such arguments have been put forward in all the great cases which have been milestones of progress in our law.*"

45. After Lord Collins most recent and trenchant catechism on the sins of judicial legislating in *Re Singularis*, the Isle of Man Staff of Government Division (the Manx Court of Appeal) in *Re The Spirit of Montpelier Limited (in liquidation)*(judgment dated June 18, 2015) held:

> "***65***. *We have carefully borne in mind the warning of Lord Collins as to not trespassing on the proper role of the legislature and that to do so might be `profoundly unconstitutional` but we are satisfied that it is appropriate to address this issue of inherent jurisdiction in a context where Tynwald has not taken any opportunity to amend the Act or the 1934 Rules, notwithstanding the provisions in England of the Companies Act 1985 and the Insolvency Rules 1986.*

[6] In *Re Singularis*, *supra*, based on far more refined reasoning than my own first instance ramblings, the Privy Council majority found the relevant common law power did exist after all, approving Deemster Doyle's brave decision to be a 'bold spirit' rather than a 'timorous soul' in *Re Impex*.

> ***66***. *We are thus satisfied that the Manx courts have an inherent jurisdiction at common law to review, rescind or vary a winding-up order where such an order is necessary in the interests of justice. In our judgment such a jurisdiction should only be exercised where there has been a material change in circumstances since the making of the order, or if the facts on which the original order had been made were mistaken, innocently or otherwise, or if there had been a manifest mistake on the part of the judge in formulating the order.*"

46. This distinction between impermissible judicial legislation and what I have extra-judicially described as Bermuda's 'common law, common sense' approach to judging was (in a very general sense) relevant to how to deal with the conundrum which the Joinder Applicants' clear lack of standing to enforce their section 76 as read with section79 rights presented to the Court. On the one hand, the Company held the deadly sin of 'legislating from the Bench' like a sword of Damocles over my head. On the other hand, the Joinder Applicants raised commercial pragmatism like a torch lighting an escape route to freedom, from a dark prison, in the air.

47. I accepted the submission that the Joinder Applicants were not presently qualified as "members" to seek relief under section 76 as read with section 79 of the Act. But I also found that the Court nevertheless possessed the inherent jurisdiction to grant in substance corresponding relief by way of sensible case management without impermissibly expanding the ambit of the legislative scheme. I further found that substantive justice required that this inherent jurisdiction should be exercised. Although the two Isle of Man decisions referred to above were not directly in point, they formed part of my subliminal thought processes and help to explain why I chose to be a 'bold spirit' rather than a 'timorous soul' and to grant relief in the face of what, narrowly and superficially construed, were valid standing arguments advanced by the Company.

48. However, having considered the terms and effect of section 76 in greater depth in the context of supplying reasons for an initially instinctive decision on this aspect of the case, it is clear that even a 'timorous soul' would have been entitled to arrive at the same result. Because if one construes section 76 in an otherwise than artificially wooden way, it is clear that the statutory provision itself contemplates a flexible approach designed to achieve a substantively just result. What were the crucial factual matrix and the relevant statutory regime?

49. Mr Luthi himself conceded that the CCASS scheme was intended to operate in such a way that the beneficial owners of shares could very simply require their shares to be registered in their names to facilitate their exercising those statutory and bye-law rights which could only be exercised by registered shareholders. This was consistent with the dictum in *Re CA Pacific Finance Ltd (in liquidation) and another* [2000] 1 BCLC 494 (Yuen J) upon which Mr Duncan relied. The Company's counsel further explained that in the ordinary course of business, this process should take in the region of six weeks. Mr Duncan urged the Court to find that the Company had deliberately and obviously thwarted Greater Achieve's efforts to execute the transfer of its beneficially owned shares into its own name. This was a case tried on the Affidavits without cross-examination. I felt bound to give the Company the benefit of

the doubt about the highly suspicious circumstances in which Greater Achieve had been prevented from implementing the transfer of its beneficial shareholding into its own name.

50. On this factual basis, I found that Greater Achieve lacked standing because of an administrative hiccup in circumstances where there was no reason to doubt that it would possess the requisite standing in roughly six weeks' time. I placed little weight on the Company's argument that Greater Achieve did not act promptly (after the BVI Court discharged the Ex Parte Injunction) in requesting the transfer. It was impossible to be sure that it would not have met similar impediments, had it acted earlier, in any event.

51. The most obvious options facing the Court were:

    (1) dismissing the joinder application altogether on the grounds that it was premature and requiring Greater Achieve to make a fresh application in some six weeks' time; or

    (2) adjourning the Joinder Summons to be listed for rehearing after Greater Achieve had become a registered member of the Company; or

    (3) effectively declaring that Greater Achieve was entitled to compel the Company to circulate its proposed resolutions at such time as it became a registered member, with a view to saving the costs of future proceedings, be they fresh proceedings or a continuation of the present action.

52. In *In re DNick Holding plc* [2014] Ch 196 was a case where the claim was struck out and Norris J held there was no power to adjourn the proceedings to enable the claimant to acquire the requisite registered shareholder status. It was a case upon which the Company's counsel heavily relied. However I found that this case was distinguishable from the present one in two important respects. Firstly, in terms of the essential character of the relief being sought, the application in that case was made under section 98 of the Companies Act 2006 (UK). That section opens with the following crucial words:

> "*(1) Where a special resolution by a public company to be re-registered as a private limited company has been passed, an application to the court for the cancellation of the resolution may be made-*
>
> *(a) by the holders of not less in the aggregate than 5% in nominal value of the company's issued share capital…but not by a person who has consented to or voted in favour of the resolution…* " [Emphasis added]

53. The essence of the decision made by Norris J in that case was that an applicant who was not a registered shareholder at the time in the past when the impugned resolution was passed had no standing to seek the dissenting minority shareholder relief

provided for under the statute. The nature of the remedy presupposed that the dissenter had been qualified to vote at the relevant meeting and had voted against it. As the claimants were not even registered shareholders at the date of the application before the English court, they could not credibly seek to argue that the statute entitled them to seek relief as beneficial owners who had not voted in favour. Norris J's decision was clearly sound.

54. In stark contrast to that case, however, the Joinder Applicants in the present case were seeking:

    (a) relief ancillary to the relief the Applicants were as at the date of the hearing entitled to be granted under section 76;

    (b) relief to which the Joinder Applicants would become entitled to exercise at the AGM the Court was directing to take place.

55. The terms of section 76, carefully scrutinised, could not be more different than section 98 of the Companies Act 2006 (UK). Section 76 (1) of the Companies Act confers the following broad discretionary powers on the Court where the preconditions of the section are met:

> "…*the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is made may give such ancillary or consequential directions as it thinks expedient."* [Emphasis added]

56. Not only is it obvious that section 76 empowers the Court to give directions with respect a future meeting. It is equally clear that the Court can order a meeting to be called and give ancillary directions "*of its own motion*". This is statutory language which is more commonly found in the Rules of the Supreme Court. For instance Order 15 rule 6(2) (joinder/misjoinder of parties); Order 20 rule 8(amendment); Order 25 rule 3 (summons for directions); Order 33 rule 2A (split trials in personal injuries cases); Order 52 rule 5 (committal for contempt); Order 72 rule 6 (removal of matter from Commercial List); Order 89 rule 1 (power to stay actions under the Law Reform (Husband and Wife) act 1977; Order 114 rule 2(contents of summons under section 15 of the Bermuda Constitution). The common thread which runs through all of the "*own motion*" powers conferred on this Court is an empowerment of the Court to better manage logistical aspects of proceedings before it without being solely reliant on an adversarial application made by one of the parties to the various proceedings. A similar legislative intent is reflected in the language of section 76, which empowers the Court to:

    (a) make an order "*of its own motion*", as well as on the application of an eligible director or member(s); and

(b) in ordering that a general meeting be held the Court is conferred with the supplementary jurisdiction to "*give such ancillary or consequential directions as it thinks expedient*".

57. Section 76 according to its plain terms is not a section pursuant to which relief must necessarily be denied altogether because an applicant (be they a director or member) is met with a technically valid but substantively unmeritorious standing objection. Section 76(1) preserves rather than excludes the inherent jurisdiction of the Court to manage applications brought under the section in service of the overarching policy imperatives of the legislative enactment. Accordingly, I found that:

(1) there was no justification for dismissing the Joinder Summons and refusing relief altogether simply because it was premature, in circumstances where it was clear that the Applicants were seeking to convene the AGM at a time when the Joinder Applicants would be eligible to both enforce their section 79 rights and vote at the relevant meeting;

(2) it made no sense in case management terms having regard to Order1A of the Rules to adjourn the Joinder Summons until such time as the Joinder Applicants were qualified to seek relief in their own right as their prospective entitlement to do so was no longer in dispute;

(3) the most efficient way of disposing of all matters before the Court was to direct the Company, further to the main relief granted to the Applicants in relation to the convening of the AGM between May 16 and May 20 2016 under section 76(1) of the Act, to include in the AGM agenda any resolutions proposed by Greater Achieve in accordance with section 79; and

(4) the meeting was directed to be held at a date designed to afford sufficient time for Greater Achieve to become a registered shareholder and submit its proposed resolutions in accordance with section 79 as read with the Bye-laws and to vote at the AGM.

58. These directions were ordered under the Court's inherent jurisdiction and/or under section 76(1) of the Companies Act to supplement the primary relief sought by the Applicants under their Originating Summons, notwithstanding the fact that the Joinder Applicants lacked standing as at the date of the hearing to formally obtain relief in their own right. In addition I gave liberty to apply in relation to any unforeseen matters which might arise in connection with the convening of the AGM and the implementation of the relief granted upon the present Originating Summons.

Conclusion

59. For the above reasons, on March 1, 2016 I gave directions for the convening an AGM pursuant to section 76(1) of the Companies Act 1981. This was the primary relief sought by the Applicants.

60. Ancillary to this primary relief, I directed the Company to include on the agenda any resolutions proposed by Greater Achieve pursuant to section 79 of the Act. I also gave general liberty to apply.

61. As I reserved the costs of the Joinder Summons, I will hear counsel, if required, as to those costs. However, my provisional view is that as Greater Achieve has obtained substantial success, the Company should pay the costs of the Joinder Summons.

Dated this 22nd day of March, 2016 _____
IAN RC KAWALEY CJ