In The Supreme Court of Bermuda

CIVIL JURSDICTION
COMMERCIAL COURT
2010: No 424

BETWEEN:

NG PUI LUNG

Plaintiff

-v-

1. CY FOUNDATION GROUP LIMITED

1st Defendant

2. LUCK CONTINENT LIMITED

2nd Defendant

JUDGMENT

(In Court)

Date of Hearing: February 22, 2011
Date of Judgment: March 1, 2011

Mr. Paul Smith, Conyers Dill & Pearman, for the Plaintiff
Mr. Cameron Hill, Sedgwick Chudleigh, for the 1st Defendant
Mr. Victor Lyon Q.C. and Mr. Rod Attride-Stirling,
Attride-Stirling & Woloniecki, for the 2nd Defendant

Introductory

1. The Plaintiff is an Independent Non-Executive Director of the 1st Defendant ("the Company"), a Bermudian company. The 2nd Defendant, a British Virgin Islands company, is the largest single shareholder of the Company, with a stake of approximately 46.153%. Ms. Yung, wife of Chairman Mr. Cheng Chee Tock Theodore and companies she controls ("the Yung Camp") own some 25.21% of the Company's shares. Public shareholders are believed to hold approximately 28% of the shares. There has been a battle for control of the Company since in or about November 2009, with the main

protagonists being former allies, the incumbent Chairman Mr. Cheng (and the Yung Camp) and the challenger Mr. Poh Po Lian (the 2nd Defendant's sole director).

2. It is common ground that the Company is delinquent in failing to convene its 2010 Annual General Meeting ("the AGM"). The Plaintiff applies by Originating Summons dated December 3, 2010 for the following substantive relief, namely an Order that:

> "*1. Pursuant to section 76(1) of the Companies Act 1981, that an annual general meeting of the Company for the year 2010 be convened within 30 days of (a) restatement (upon advice of Messrs KPMG) of the Company's audited financial statements for the year ended 31 March 2010 audited by Messrs. Shinewing (HK) CPA Limited ('09/10 Financial Statements'), or (b) a decision by the Board of Directors (following review by KPMG) that the Company's 09/10 Financial Statements should not be restated, whichever is earlier, for transacting the general business of the Company as stipulated under the Company's Bye-law 61 and such special business as the Board of Directors may see fit.*
>
> *2. That the Court may give directions as to the manner in which the meeting is to be called, held and conducted and all such ancillary and consequential directions as it may think expedient.* "

3. By an Amended cross-Summons issued on January 5, 2011, the 2nd Defendant seeks:

> "*1. An order under section 76 of the Bermuda Companies Act 198[1] to compel the 1st Defendant [t]o forthwith give notice of the 2010 Annual General Meeting of the 1st Defendant to be held on a date not more than 25 days (or such date as this Honourable Court may see fit) from such notice, for the purpose of transacting the businesses set forth below (and/or any other business as this Honourable Court may see fit):*
>
> *a. to receive and consider the audited financial accounts of the 1st Defendant (including profit and loss accounts and balance sheets) for the year ended 31st March 2010 together with the reports of the directors and auditors;*
> *b. to nominate, appoint and vote on the directors to fill the vacancies arising from the retirement by rotation of part of the directors of the 1st Defendant pursuant to Bye-laws 87 and 88 of the 1st Defendant;*
> *c. to appoint the auditor for the 1st Defendant and to fix its remuneration pursuant to Bye-Laws 154 and 156 of the 1st Defendant; and /or*
>
> *2.An order under section 72(3) of the Bermuda Companies Act 1981 seeking the substantive relief aforementioned in 1(a),(b), and (c) above...*"

4. Evidence was filed making various allegations about the conduct of the two factions in the underlying shareholder dispute. At the pre-trial review I refused an application made by the 1st Defendant for leave to cross-examine the 2nd Defendant's deponents on the basis that the merits of the competing allegations did not fall to be determined in the present action. It is customary to determine applications for orders relating to general meetings on the basis of affidavits because the relevant facts are rarely in serious dispute and the Court can ordinarily make the limited requisite factual findings based on a review of the documentary record.

The key evidence

Substantially agreed facts

5. As set out in the First Ng Affirmation, the Company is listed on the Hong Kong Stock Exchange. The 2nd Defendant commenced litigation against, *inter alia*, Ms. Yung in Hong Kong in November 2009. On April 14, 2010, minority shareholder oppression proceedings were commenced in Hong Kong against the Company by the 2nd Defendant. Various transactions since 2007 are challenged, as well as the 09/10 Financial Statements. On April 30, 2010, the 2nd Defendant applied in the same proceedings for the appointment of independent investigating accountants. On May 14, 2010, the Company engaged Ernst & Young Transactions Limited ("EYT") to review allegations made in the Petition and reported in mid-July 2010. The Company's auditors finalized their 09/10 report shortly thereafter and gave an unqualified opinion. The 09/10 Annual Report was sent to shareholders on July 30 2010 in anticipation that the AGM would be convened.

6. As a result of a complaint made by the 2nd Defendant to the Hong Kong Independent Commission Against Corruption ("ICAC"), the Company's premises were searched and Mr. Cheng and Ms. Yung were arrested and briefly detained. The allegations that they "accepted advantage" in connection with the 2007 "17F Property transaction" are vigorously denied (it being contended that the 2nd Defendant knew the complaint to be unfounded) although the investigation is still pending[1]. As a result of the ICAC investigation, the Company requested a suspension of trading in its shares on August 31, 2010.

7. The foregoing is common ground. While what the Company next did is not factually disputed as such, whether or not the action taken constitutes valid grounds for not convening the AGM form the central controversy in the present application. On September 10, 2010, the Board and the Audit Committee met in the wake of the share trading suspension. The Committee recommended and the Board resolved to consider engaging an independent firm of accountants to verify the propriety of the Company's accounts. As it was felt that such a review would (a) assuage shareholder concerns and

[1] On February 28, 2011, just before a final draft of this Judgment was circulated to counsel for editorial corrections, the Court was notified by counsel of articles which were published in the South China Post and Apple Daily News on February, 26, 2011. These articles appear to suggest that Mr. Cheng has been charged with certain criminal offences in connection with the 2007 property transactions concerning the Company. In light of the approach I have taken to the applications before the Court, this additional information has no impact on the findings reached.

avoid the 2nd Defendant voting against the 09/10 accounts, (b) persuade the HKEx to permit trading to resume, and (c) generally restore the Company's image, on September 13, 2010 the Company announced that it would postpone the convening of the AGM pending further consideration of possibly obtaining such independent accounting review. Of the three grounds posited at the September 10 meeting for seeking an independent review, only (a) related directly to the convening of the AGM.

8. On December 2, 2010, KPMG agreed to conduct a review of various matters of which Mr. Poh had complained. In paragraph 26 of the 2nd Ng Affirmation, it is deposed that the complaints about the excessive level of administrative expenses "*are entirely without foundation*". KPMG's review of the other complaints is therefore of primary relevance to the directors forming a considered view as to whether or not it can rely upon the audited 09/10 accounts.

9. It is unclear when the second of two phases of work outlined in KPMG's retainer letter ("the Retainer Letter) will be completed. The first phase it is hoped will be completed by the end of March; thereafter the time of Phase 2 will be discussed. The Plaintiff accordingly seeks to postpone the AGM for an indefinite period of time.

10. Finally and most significantly, apart from the directors' avowed concerns about the accuracy of the audited financial statements, there are no other practical reasons why the AGM cannot be held. Nevertheless, as the AGM should have been held by October 31, 2010 to comply with the Company's Bye-laws and December 31, 2010 to comply with section 71(1) of the Act, the meeting cannot now be convened in the ordinary way without a dispensation from the Registrar or the Court under section 72 (2),(3) and or under section 76.

Findings: contentious facts

11. The principal reason asserted for postponing the AGM was the need to resolve the concerns of the 2nd Defendant (and public shareholders) about the audited accounts so that either (a) the AGM would consider the existing accounts as verified by an independent review, or (b) restated accounts. Mr. Lyon QC submitted that it was obvious that the purported reason for postponing the AGM was "a lie" and that this decision was made in bad faith. In the absence of cross-examination, I decline to make any such finding, despite the fact that it may be open to me to reach such a conclusion by way of inference from the documentary evidence. In my judgment, having regard to the extraordinary events of August, 2010, it is entirely plausible based on the documentary record that the AGM was initially postponed for the reasons asserted by Mr. Ng acting in good faith.

12. The motives of the various individuals involved in a shareholder battle are always likely to be somewhat opaque. Unless relief is sought which positively requires the Court to determine whether or not a party or witness is acting in good faith, it will rarely be a useful exercise to expend time on such an enquiry. For the legal reasons which are explained below, I consider that the present application does not require the Court to

make any findings on the issue of good faith. An application for an order to convene a general meeting requires the Court to carry out a legal analysis of whether largely undisputed facts justify the intervention of the Court and, if so, to what extent. This is not a moral enquiry.

13. The crucial question is as follows. Is the KPMG review likely to achieve the objects identified by the Board on September 12, 2011 as justifying postponing the AGM, namely removing any possible shareholder concerns about the audited 09/10 financials ? I find that there is no convincing evidence that the stated goal is likely to be achieved. This issue falls to be determined against a background, by the Plaintiff and 1st Defendant's own account, of the 2nd Defendant (a) refusing to accept the EYT independent review in the summer of 2010, and (b) being committed since November 2009 to launching a series of allegedly unfounded attacks on the integrity of the Company's present management.

14. Although the latter point could not be advanced by the 2nd Defendant for obvious reasons, I find that it is inherently improbable on the respective cases of the Plaintiff and the Company themselves that the proposed KPMG review will assuage the 2nd Defendant's concerns and cause them to approve the audited financials in their present or restated terms. It is possible that independent public shareholders might have been influenced by the KPMG review to an extent which it is impossible to quantify in any meaningful way at this stage, <u>if the Company was free to disclose the report contents at or prior to the AGM</u>. Having regard to the terms of the retainer letter, there is no realistic prospect of such disclosure ever taking place.

15. However, the best available evidence of what the KPMG review is likely to achieve is to be found in the firm's retainer letter. Mr. Smith submitted that this document should be read purposively, taking into account the fact that accountants are understandably keen to minimize their liability to third parties. That was, in the abstract, a fair submission. However, even adopting such an approach, it is impossible to see how the retainer letter can be sensibly read as supporting the assertion made by Mr. Ng that KPMG's advice will either (a) provide independent support for the accuracy of the audited 09/10 accounts, or (b) the need to restate the accounts if they are not accurate.

16. Apart from the fact that KPMG have expressly been retained on the basis that "*the report will only be used for internal discussion for understanding the Allegations and the Transactions and improving the financial performance of the Company in the future*" (paragraph 2.5), KPMG's terms of reference simply do not avert to any analysis of the audited accounts as presently stated. Any decision to affirm or restate the 09/10 accounts would have to be based on the Company's own extrapolation from a private report; it could not be "sold" to doubting shareholders or the public generally by reference to the independent review.

17. Accordingly, there is no credible evidence that the KPMG review is likely to achieve the objects it was originally hoped the independent review might achieve in terms of justifying the postponement of the AGM.

18. I reject the suggestion that the original postponement decision was obviously motivated by a desire to deny the 2nd Defendant its statutory and contractual rights to elect fresh directors at the AGM, however. It is quite plausible that it was only after negotiations with KPMG concluded on or before December 2, 2010 that it became apparent that the scope of independent review the Company desired simply could not be achieved. This is supported by First Ng, which references approaches to 11 accounting firms between September 11, 2010 and November 10, 2010, interviews with six firms and proposals from three firms including KPMG (paragraph 36). The postponement announcement had already been made, perhaps somewhat precipitously, on September 13, 2010; but the announcement accurately reflected the fact that at that juncture no commitment to an independent review had yet been reached by the Company.

19. It is now obvious, however, that the proposed independent review is not likely to resolve to any or any material extent any concerns which the 2nd Defendant and any public shareholders may presently have about the accuracy of the Company's 09/10 audited accounts.

Legal findings: does the Court possess the jurisdiction and/or may it exercise its discretion under section 76 of the Companies Act to postpone the AGM on the terms the Plaintiff seeks?

20. My primary finding is that, assuming the Court possesses the jurisdiction to make the Order the Plaintiff seeks, there is no sufficient evidential basis for exercising the discretion conferred by section 76 of the Act in the way the Plaintiff requests. There is no or no reasonable prospect that the KPMG review will provide an independent basis which the Company can publicly rely upon to either affirm or restate the 09/10 audited accounts. As Mr. Lyon rightly submitted, the Order sought would amount to indefinitely postponing the AGM.

21. However, there are in any event legal objections to invoking the Court's powers under section 76 of the Act with a view to alleviating the Company's concerns about whether or not the audited accounts already sent to shareholders should be laid before the shareholders at the AGM. These objections arise primarily from the statutory scheme, secondarily from the contractual Bye-Law provisions and thirdly from judicial decisions illustrating how the statutory and/or contractual rules have been interpreted in other cases.

The statutory regime applicable to annual general meetings

22. The primary purpose of an annual general meeting is to elect directors. Section 70 provides in salient part as follows:

"*(1) As soon as convenient after any of the share capital of a company has been subscribed, the provisional directors shall convene the statutory meeting which shall be a general meeting of the members of the company for the purpose of electing the first board of directors...*

(6) A meeting called under subsection (1) shall be deemed to be the annual general meeting for the year in which it is convened."

23. The first statutory meeting at which the provisional directors are elected is deemed to be an annual general meeting for the year in question. Section 71 provides so far is relevant as follows:

> "*71 (1) 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.*"

24. The key statutory function of the annual general meeting becomes apparent when the above provisions are read together with the following provisions of section 72:

> **"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]

25. Section 72(3) makes it clear that the dominant purpose of the AGM is to elect the directors; failure to do so gives rise to the same legal consequences as failure to convene the annual general meeting altogether. As Mr. Lyon pointed out, the fact that a company which fails to convene an annual general meeting in accordance with section 71 may be wound-up, assuming the Registrar does not cure the defect under subsection (2), signifies the seriousness of the statutory obligation to permit shareholders to elect directors. It also

illustrates the importance of the directors' obligation under section 72 (1), where default in convening the meeting has occurred, to "*use their best endeavours to call or hold the meeting at the earliest practicable date*". Where an application is made under section 76 in relation to convening an annual general meeting, the provisions of that section must be read with those of, *inter alia*, sections 70-72. Section 76 provides as follows:

> "*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.*"

26. I accept the submissions of Mr. Smith and Mr. Hill to the effect that the jurisdiction conferred by section 76 is engaged by the continuing inability of the Company to convene the AGM in accordance with the Act and/or the Bye-laws, the deadline being October 31, 2010 under the Bye-laws and December 31, 2010 under the Act. In my judgment, however, the Court's discretionary powers under section 76 can only be exercised in relation to an annual general meeting in a manner which is designed to ensure that the meeting takes place as soon as possible, as required by section 72(1). The suggestion that the Court can use its section 76 facilitative powers in an open-ended fashion, designed to ensure the fairest conduct of business which is not in statutory terms required to be dealt with at the AGM is misconceived. Section 84 of the Act expressly deals with how the business of accounts is to be dealt with at a general meeting:

> "***Financial statements to be laid before general meeting***
> *84 (1) The directors of every company shall subject to section 88 at such intervals and for such period as this Act and the bye-laws of the company provide lay before the company in general meeting —*
>
> *(a) financial statements for the period which shall include—*
>
> *(i) a statement of the results of operations for the period;*
>
> *(ii) a statement of retained earnings or deficit;*
>
> *(iii) a balance sheet at the end of such period;*
>
> *(iiiA) a statement of changes in financial position or cash flows for the period;*
>
> *(iv) notes to the financial statements and the notes thereto shall be in accordance with subsection (1A);*

(v) such further information as required by this Act and the company's own Act of incorporation or its memorandum, and its bye-laws; and

(b) the report of the auditor as set out in section 90(2), in respect of the financial statements described in paragraph (a). .. (2) Financial statements shall before being laid before a general meeting of a company be signed on the balance sheet page by two of the directors of the company.

(3) Notwithstanding subsection (1) if at a general meeting at which financial statements should be laid the statements have not been so laid, it shall be lawful for the Chairman to adjourn the meeting for a period of up to ninety days or such longer period as the members may agree.

(4) Subject to subsection (3) if any director of a company fails to take all reasonable steps to comply with subsection (1) he shall be liable to a fine of one thousand dollars:

Provided that in any proceedings against a person in respect of an offence under this section, it shall be a defence to prove that he had reasonable ground to believe and did believe that a competent and reliable person was charged with the duty of seeing that this section was complied with and was in a position to discharge that duty..." [emphasis added].

27. Not only is there no express statutory link between company accounts and the annual general meeting under section 84(1)[2]. Section 13(2)(c) obliges companies by their bye-laws to prescribe the laying of financial statements before members in general meeting; how often this must happen does not appear to be mandated by the Act itself. Section 84(3) expressly contemplates that it may not be possible to lay financial statements when required and empowers the chairman to adjourn the meeting (implicitly for consideration of the accounts) for up to 90 days and the shareholders to authorise a further postponement. No offence is committed by the directors in failing to file the financial statements provided they take reasonable steps to do so. It would be inconsistent with the letter and spirit of section 84 for this Court, at the instance of the directors, to potentially usurp the right of the shareholders to decide whether a meeting should be postponed to enable financial statements to be laid for longer than 90 days, in circumstances where it is not impracticable (in a logistical sense) to convene an annual general meeting for its primary purpose of electing the directors.

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

[2] Contrast the case of the appointment of auditors, which is explicitly linked to the annual general meeting: sections 88(1), 89(1).

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.

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 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.

The Bye-laws

30. Bye-law 61 provides that the following business conducted at an annual general meeting shall not be deemed special. In other words, the following matters must be dealt with at the AGM:

> "*...considering and adopting of the accounts and balance sheet and the reports of the Directors and Auditors and other documents required to be annexed to the balance sheet, the election of Directors and appointment of Auditors and other officers in the place of those retiring, and the fixing of the remuneration of the Auditors, and the voting of remuneration or extra remuneration to the Directors.*"

31. It appears that the directors are required by the Bye-laws to lay the financial statements of the Company at the AGM. Section 84 allows the Bye-laws to prescribe at what intervals the accounts must be laid before a general meeting of any description. Bye-law 61 appears to prescribe that this should happen at each AGM, which section 71(1) of the Act mandates must be at least each calendar year[3]. However, the Bye-laws also provide liberal powers of adjournment subject to the approval of the relevant general meeting. Bye-law 64 provides as follows:

> "*The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place as the meeting shall determine, but no business shall be transacted at any adjourned meeting other than business which might lawfully have been transacted at the meeting had the adjournment not taken place. When a meeting is adjourned for fourteen (14) days or more, at least seven (7) clear days' notice of the adjourned meeting shall be given specifying the time and place of the adjourned meeting but it shall not be necessary to specify in*

[3] Bye-law 56, in purportedly authorizing intervals between annual general meetings of 15 months and longer is inconsistent with section 71(1) of the Act, although nothing turns on this for present purposes.

> *such notice the nature of the business to be transacted at the adjourned meeting and the general nature of the business to be transacted. Save as aforesaid, it shall be unnecessary to give a notice of an adjournment. No business shall be transacted at any such adjourned meeting other than the business which might have been transacted at the meeting from which the adjournment took place.*"

32. Section 84(3) of the Act makes it "*lawful*" for the Chairman to adjourn for up to 90 days without the approval of the meeting, as Mr. Smith rightly submitted. This seems to be designed to empower the Chairman of the meeting to adjourn without the support of a motion if necessary to facilitate the laying of the accounts taking place within that 90-day period. Nevertheless, there is no apparent impediment in the Company's internal constitution to the convening of the AGM to deal with the mandatory statutory business of electing directors, while adjourning the meeting to allow the accounts to be dealt with at a later date. After all, if the accounts are not laid at all, it is difficult to see in what other way the relevant agenda item could be dealt with.

33. The AGM must under the Bye-laws be convened "*by not less than twenty-one (21) clear days' Notice*": Bye-law 59(1).

Case law

34. As far as the existence of jurisdiction to invoke section 76 of the Act is concerned, decided cases are of limited import because "[w]*hether or not it is so impracticable is a question which has to be answered by examining the circumstances of the particular case": Lee Gai Poo-v-Asia Pacific Wire & Cable Corp* [2006] Bda L.R. 73, at page 3. Impracticability may relate to calling a meeting in a permissible manner and conducting a meeting in the requisite manner. In my judgment no cases were cited which explicitly supported a construction of section 76 which would limit the application of the section to cases where impracticability relates solely to the administrative and logistical mechanisms of calling and conducting the meeting, although those cases cited where orders were made fell into such a category. Impracticability must also embrace circumstances where, as in the present case, mandatory statutory requirements relating to the time within which an annual general meeting must be held have not been complied with so that a valid meeting cannot be convened.

35. If the Court can order the convening of the AGM under section 72(3) as an alternative to winding-up a company in breach of section 71(1) (on the petition of a creditor or shareholder), it is difficult to see why the Company or a shareholder should not be able seek similar relief from this Court more directly through a less draconian application than a winding-up petition under section 76(1).

36. It was common ground between Mr. Lyon and Mr. Smith that the following passage from the Judgment of Wynn-Parry J in *Re El Sombrero* [1958] 1 Ch 900 at 906-907 was a

pertinent guide to the construction and application of section 76(1) of the Companies Act 1981[4], as far as the exercise of the discretion is concerned:

> "*I therefore arrive at the stage where I hold that I have jurisdiction in this case, and there is nothing to prevent me exercising the discretion which is given under the section if I choose to exercise it. It is true that I am sitting as an appellate court, but I am entitled to consider the question of discretion, because, in my view, as I have held, the registrar has misdirected himself on a question of law. In my judgment, this is eminently a case in which the court ought to exercise its discretion; first, because if the court were to refuse the application it would be depriving the applicant of a statutory right, which, through the company, he is entitled to exercise under section 184 (1), to remove the respondents as directors; secondly (and I think this is a proper matter to take into account as part of the reasons for deciding to exercise my discretion), the evidence disclosed that the respondents are failing to perform their statutory duty to call an annual general meeting. The period within which they should have held an annual general meeting expired at some date in October, 1957. Their excuse in the evidence is that there would be no use in convening and holding an annual general meeting, because the accounts for the first period of the company's history are not yet available. I have read the evidence with care, and I do not accept it as bona fide evidence. There is a clear statutory duty on the directors to call the meeting whether nor not the accounts, the consideration of which is only one of the matters to be dealt with at an annual general meeting, are ready or not. It cannot possibly serve as an excuse for failing to perform that statutory duty. It is quite obvious that the only reason why the respondents refuse to call an annual general meeting is because the inevitable result of convening and holding that meeting would be that they would find that they had ceased to be directors.*"

37. There is nothing in the latter case or other cases referred to in argument to suggest that the discretion to convene a meeting which cannot otherwise be convened without a curative order can only be exercised where an excuse for not convening the meeting is advanced by the directors in bad faith. On remarkably similar facts, Wynn-Parry J in *Re El Sombrero* crucially held that there was " *a clear statutory duty on the directors to call the meeting whether or not the accounts, the consideration of which is only one of the matters to be dealt with at an annual general meeting, are ready or not*". Having regard to this analysis of the English statutory provisions, which hold good for the Bermudian statutory regime, it matters not whether the decision to delay the meeting was reached in good or bad faith.

38. Postponing the convening of an AGM for an indefinite period with a view to seeking to resolve concerns about the accuracy of audited financial statements already mailed to shareholders is, on the facts of the present case, simply a legally inadmissible reason for failing to convene a meeting. This conclusion takes into account the most relevant

[4] This case considered section 135(1) of the Companies Act 1948 (UK) from which section 95(1) is derived.

statutory obligation imposed on the directors when the period for convening the AGM has passed, namely to "*use their best endeavours to call or hold the meeting at the earliest practicable date*" (section 72(1)). The position might be different in other factual scenarios, for instance where the financial statements were in the process of being audited, a shareholder was seeking to unreasonably avoid a short delay and the costs of adjourning the meeting were shown to be prohibitive.

39. I therefore reject the submission that the Plaintiff's application must be acceded to in the absence of a finding that the Company's attempts to obtain the independent review are tainted with bad faith.

Summary

40. The Court has jurisdiction under section 76(1) to give directions for the convening of the AGM because it is impracticable to convene the meeting within the time specified by section 71(1) of the Act and the Bye-laws. However, the only appropriate way in which the Court's discretion can be exercised is to give directions for the convening of the AGM "*as soon as practicable*" with a view to giving effect to the directors' duties under section 72(1). This is because of the importance the statutory scheme attaches to enabling the shareholders to elect directors at the AGM, albeit that the Company's internal constitution means that not all the directors' seats are "up for grabs".

41. The Plaintiff's request for directions sanctioning the postponement of the AGM pending the resolution of the directors' concerns about the accuracy of the audited financial statements falls beyond the scope of the Court's lawful discretion under section 76(1) of the Act, read in its wider statutory context. It is clear from section 84(3) of the Companies Act 1981 that matters relating to the laying and approval of financial statements at general meetings fall within the proper province of the shareholders. The Chairman of the AGM can adjourn the meeting for up to 90 days without shareholder consent, should the directors wish to postpone the laying of the accounts; such consideration can be postponed for even longer if a majority of shareholders assent. It is for the shareholders to make a commercial judgment, having already received the relevant audited accounts, as to how this item of business should proceed.

42. No need to consider whether or not the Court has jurisdiction to grant relief under section 72(3) of the Act, in circumstances where no winding-up petition has been presented, arises.

Conclusion: Relief

43. The Plaintiff's application is accordingly dismissed. The 2nd Defendant's application for an Order under section 76(1) of the Companies Act is granted. This decision has not required the Court to consider the merits of any of the allegations of misconduct alleged against each side by the parties to the ongoing shareholder struggle (between the so-called Yung and Poh camps) which is primarily being played out in Hong Kong.

44. Subject to hearing counsel on the precise form thereof, the 2nd Defendant is entitled to an Order in the following terms:

> "The 1st Defendant shall forthwith give notice of the 2010 Annual General Meeting in accordance with its Bye-laws to be held on a date not more than 35 days from the date of this Order, for the purpose of considering the following items of business:
>
> (1) to nominate, appoint and vote on the directors to fill the vacancies arising from the retirement by rotation of part of the directors of the Company pursuant to Bye-laws 87 and 88 of the Company's Bye-laws;
> (2) to receive and consider the audited financial accounts of the Company for the year ended 31st March 2010 together with the reports of the directors and auditors;
> (3) To appoint the Company's auditor and to fix its remuneration pursuant to Bye-laws 154 and 156."

45. I will hear counsel as to costs.

Dated this 1st day of March, 2011

KAWALEY J