# 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

## EX TEMPORE RULING

(In Chambers)

Date of Hearing: April 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., Attride-Stirling & Woloniecki, for the 2nd Defendant

**Introductory**

1. The present application is yet another application in a matter which has seen full-blooded, highly contentious cross-border litigation in more than one jurisdiction.

2. On March 1, 2011, this Court ordered that:

> "*3. 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 30 days from the date of this Order, for the purpose of transacting the following items of business:*
>
> *a. 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;*

b. *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;*
c. *to appoint the Company's auditor and to fix its remuneration pursuant to Bye-Laws 154 and 156;"*

3. The matter next came before the Court on March 24, 2011 when on the application of the 1st Defendant and in reliance in large part on the First Affirmation of Samuel Mesker Woelm, the Court ordered that:

> "*1. The time provided for in paragraph 3 of the Order of Mr. justice Kawaley dated 1st March 2011, for the convening of an Annual General Meeting be extended to not later than 6 April 2011 on condition that the Annual General Meeting proceeds at that time in regards the business of the election of directors provided that no objection is raised by the Hong Kong Stock Exchange.*
>
> *2. Liberty to apply for further directions at short notice.*"

4. The present application is described as a Time Summons issued on March 30, 2011 and seeks an extension of the time fixed by my March 24, 2011 Order until not later than April 14, 2011. The background to the matter can best be understand by reference to the First Woelm Affirmation in which he helpfully sets a timeline of relevant events:

> "3. *The following events occurred for the purpose of convening the 2010 AGM*
>
> *15 March 2011*
> *The Company sent out the Notice of AGM to its shareholders*
> *17 March 2011*
> *The Company received the nomination notice from the 2nd Defendant in relation to the nomination of 12 candidates as directos of the Company ("**Nomination Notice**").*
> *18 March 2011*
> *The Company dispatched the AGM Circular to its shareholders.*
> *23 March 2011*
> *The Company received legal advice to confirm that the Nomination Notice is valid. Accordingly, the Company issued an announcement to announce the Nomination Notice and that the company will issue a supplemental AGM circular ("**Supplemental AGM Circular")** to inform the shareholders of the details of the proposed directors under the Nomination Notice. There is now produced and shown to me marked exhibit "**SMW-1"** a copy of the aforesaid announcement of the Company dated 23 March 211.*
> *24 March 2011*
> *The Company received a letter dated 23 March 2011 from Messrs. Chiu & Partner, scolicitors for the 2nd Defendant in Hong Kong, to remind the*

*Company to ensure the Supplemental AGM Circular would contain the particular of the directors proposed by the 2nd Defendant. There is now produced and shown to me marked exhibit "**SHM-2"** a copy of the aforesaid letter dated 23 March 2011.*

*The company received a facsimile from The Stock Exchange of Hong Kong Limited ("Exchange" dated 24 March 2011 seeking the Company's reply as to whether the Company considers it necessary to adjourn the meeting of the election of directors to give shareholders at least 10 business days to consider the information relating to the proposed directors nominated in compliance with Rule 13.70 of the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited ("Listing Rules"). There are now produced and shown to me marked exhibit "**SMW-3"** a company of the aforesaid facsimile from the Exchnage dated 24 March 2011 and exhibit "**SMW-4"** a copy of the extract of Rule 13.70 of the Listing Rules."*

5. The final paragraph of the Affirmation upon which the March 24, 2011 Order was based reads as follows:

> "*4. It is expected that the Supplemental AGM Circular, which will contain the information relating to the nominated directors, would soonest be dispatched on 29 March 2011. The Company intends to ask its Financial Adviser to make submissions to the Exchange to the effect that the meeting of election of directors should be held on the day of the AGM, having regard to the judgment of Mr. Justice Kawaley and the Original Order dated 1 March 2011. As at the time of this affirmation, there is no intention to adjourn either the AGM or the business of election of directors. However, the Company is obliged to strictly comply with the Listing Rules and may make a further application to the Court in the light of the reply to the Company's submission in respect of the said Rule 13.70 of the Listing Rules.*

**The Company's steps to convene the AGM between March 24 and the present hearing**

6. In the course of today's hearing I expressed the view that I had been seriously misled by the First Woelm Affidavit. Having considered the matter, I think that the only conclusion that can clearly be draw from the events that followed is that, looking at the matter most favourably from the 1st Defendants perspective, is that the Company failed to grasp the relevant Rules and embarked upon correspondence (through its financial advisers) with the Hong Kong Stock Exchange ("HKEx") which had no practical significance whatsoever.

7. I say that because on March 24, 2011 Hong Kong time before the March 24 application was heard later that day in Bermuda, the HKEx responded to the Company's March 23,

2011 announcement about the 2nd Defendants nomination of directors stating :"We set out below our comment for your handling." The following comment appeared in a box:

> "*No. Listing Rule Rule Reference* *Comment*
> 1. *13.70* *Please advise with basis whether the Company considers it necessary to adjourn the meeting of the election to give shareholders at least 10 business days to consider the information relating to the proposed directors nominated.*"

8. The response which was sent the following day was a letter, sent by the Company's financial advisors (YU Ming Investment Management Limited) to the HKEx, which ran to almost four pages. Nowhere in that letter is it possible to identify a coherent response to the question the Company was requested to answer. Nevertheless, it is only fair to point out that the letter did put before the HKEx the circumstances including the Order of this Court which explained why the Company was unable to comply with the "10-day rule". The letter concluded under the heading "Waiver sought" with a request that the HKEx waive the 10-day requirement.

9. It was conceded before me today that on a simple reading of the relevant Rules it is clear that the HKEx has no power to grant a waiver and that the true position under the Rules is that it is a matter for the Company to form its judgment as to whether or not 10-days notice is required so as to allow the shareholders to properly and fairly consider a nomination of directors issue. What happened next in terms of communications between the HKEx and the Company is that on March 28, 2011, the HKEx responded to the Company's March 25, 2011 fax, stating in paragraph 3 as follows:

> "Your submission stated the sequence of events relating to the nomination of directors by Luck Continent Limited and the court order but did not contain the Company's assessment of whether it is necessary to adjourn the meeting. Please provide the requested information."

10. On March 28, 2011, the Company's financial advisers responded and at this juncture, for the first time, set out the Boards view of the necessity for an adjournment of the AGM. In essence, the letter stated as follows:

> "*The Company wish to further supplement HKEx its view* [sic] *that the board of directors of the Company ("the Board") considers it necessary to adjourn the 2010 AGM to allow at least 10 business days notice to shareholders with the following considerations…*" (And various considerations were then set out)

11. Amongst the matters which the financial advisers for the Company set out were matters of timing, including matters of when the information was likely to be received; also, matters relating to the number of candidates nominated by the 2nd Defendant and the fact that this was likely to have an impact on the Board composition. Those matters in my judgment are matters which ought to have been obvious to the Board, not only on March

24 when the First Woelm Affirmation was affirmed; but also from the beginning of the present Bermuda action. This action has essentially focussed on the desire of the faction behind the 2nd Defendant to force the Company to convene the AGM with a view to gaining control of the Company. That is what the wider commercial dispute is all about.

12. What is difficult to comprehend is why, if it was felt that [less than] the 10-day period was genuinely insufficient for the shareholders to consider the information within the timetable which was already in motion on March 24, 2011, those matters could not have been raised and placed before me at the hearing on that date. On March 24, 2011, the Company was already in possession of the Nomination Notice since March 17 and the Company had already determined that the Supplemental Circular would at the soonest be sent out on March 29, 2011. So the practical considerations relating to the fairness to the shareholders of receiving the nomination information in breach of the 10-day rule should have been in the knowledge of the Board and Mr. Woelm when he affirmed his First Affirmation on behalf of the Company. The Supplemental circular is now in evidence and while it is a document which runs to some 15 pages, I note that the Boards comments on the candidates are not so complex as to require more than 1 ½ pages of print.

13. After the Company advised the HKEx on March 28, 2011 that, despite its previous request for a waiver, in fact 10 days were required, the HKEx replied by letter dated March 29, 2011 which materially stated as follows:

> "*Under Rule 13.70, where an issuer receives a notice from the shareholder to propose a person for election as a director at the general meeting after publication of the notice of meeting, it must assess whether it is necessary to adjourn the meeting to give shareholders at least 10 business days to consider the information relating to the proposed director. The rule does not compulsorily require an adjournment of the meeting.*
>
> *Given that the Company considers it necessary to adjourn the meeting to give shareholders at least 10 business days to consider the information relating to the proposed directors, we expect the Company to take all reasonable actions to fix an earliest possible date giving sufficient time for shareholders to consider the information.*"

14. There was a further communication by the Company on March 29, 2011 (an announcement relating to the meeting and the Supplemental Circular) that the HKEx responded to on March 30, 2011 as follows:

> "*We refer to the Company's announcement of 29 March 2011 supplementing to its notice of annual general meeting to be held on 6 April 2011 and its supplemental circular of 29 March 20111 providing information of the directors proposed by Luck Continent.*
>
> *We understand from your fax of 28 March 2011 that the Company considers it necessary to adjourn the meeting to give shareholders at least 10 business*

*days to consider the information relating to the proposed directors. Please advise why the Company did not adjourn the meeting to give shareholders sufficient time to consider the information.*"

**Findings**

15. In my judgment the crucial question which this Court has to ask is whether the Company does in good faith consider that the 10-day rule cannot fairly be adhered to. In the March 24, 2011 application when an extension of the time for the meeting was sought until April 6, 2011, the Company's position was that the meeting could in fact take place on that date and that the Company would hold the meeting then unless the HKEx prevented it. Giving the Company the benefit of the doubt, it is possible that under the pressures of cross-border litigation the Company did not appreciate the intricacies of the Listing Rules and how they operated. Even assuming that the Court was not deliberately misled, it impossible to fairly conclude that the present application to postpone this meeting, which the Company has been required to hold since March 1, 2011 and has put off once already, is an application that is grounded in objectively credible facts. Looking at it most favourably to the Company, it seems that the Company has conducted this matter in a shambolic fashion. But is impossible to believe that if the Company felt that the 10-day rule could not fairly be waived, the Company would have put evidence before this Court on March 24, 2011 to the effect that it was willing to proceed with the meeting on April 6, 2011, proceeded to ask the HKEx for a waiver and did all of that despite the fact that it well knew that the meeting could not be fairly held unless 10-days notice was given.

16. The crucial factor in drawing me to this conclusion is that counsel for the Company has been unable to draw my attention to any material change of circumstances between March 24, 2011 and today. The mere fact that a new and better and more informed view of how the Listing Rules work cannot explain why the Company would have asked the HKEx to waive compliance with the 10-day rule if it felt that this inappropriate. That would constitute serious misrepresentations to a regulatory body. It seems to me that, assuming the Company communicated (initially) with the HKEx in good faith, it is impossible to conclude that its presently stated view that 10 days is actually required is a genuine one.

17. Accordingly I refuse the application for an extension of time.

18. [After hearing counsel as to costs] I have found that the position which has been advanced today has not been advanced in good faith. I have accepted that the representations made to me on March 24, 2011 and to the HKEx immediately thereafter were made in good faith. It is a situation where I was bound to find that something was done in bad faith. What I have found is that the newly advanced reason (for a postponement of the AGM) has been advanced in bad faith. In any event, indemnity costs only means today that the burden of proving the reasonableness of costs shifts. There is a presumption that the bill of costs presented is a reasonable one.

19. Costs of the application to the 2nd Defendant on an indemnity basis as against the Company. No order as to costs as regards the Plaintiff.

Dated the 1st day of April, 2011 _____

KAWALEY J