The Company Law and Division of Powers

Philip Smart examines the recent judgment in *Miracle Chance Ltd v Ho Yuk Wah* and argues that it serves as a useful reminder to practitioners not to assume that the provisions of the Companies Ordinance apply in the same way to foreign incorporated companies as they do to locally incorporated companies

The division of powers, and hence control of a company between its shareholders and the board of directors, has long been a topic of interest to both academic and practising company lawyers. From the academic perspective the division of powers debate raises key issues as to the nature of a modern company. Whereas practitioners are well aware that if an action is commenced in the company's name but without proper authorisation – the question being whether due authorisation comes exclusively from the board or may also derive from the shareholders – not only is that action wrongfully brought but there may be personal liability as to costs. It is therefore of interest to note that the division of powers controversy recently received the attention of Rogers JA in *Miracle Chance Ltd v Ho Yuk Wah, David* [1999] 3 HKC 811.

Miracle Chance

Gao and Ho were respectively the majority and minority shareholders in Miracle Chance Ltd, a BVI company formed as a joint venture vehicle for projects contemplated by Gao and Ho. There were no other shareholders. After a while the relationship between Gao and Ho broke down and, in particular, Ho refused to co-operate with Gao's attempts to convene directors' or shareholders' meetings. Ultimately, proceedings were commenced in Hong Kong in the name of the company against Ho alleging, inter alia, breaches of fiduciary duty. Ho sought to have the action struck out on the basis that the company had not duly authorised the proceedings – there having been no resolution of the board of directors to commence the action in question.

... the relevant point is that s 114B concerns the calling of 'a meeting of a company' and 'company' prima facie means a Hong Kong incorporated company ...

The Court of Appeal held that whereas management powers – including the power to use the company's name in litigation – would under the company's constitution normally be regarded as vested in the board and could not be usurped by the shareholders in general meeting, the position was otherwise where there was no effective board of directors. In such a situation, management powers reverted to the shareholders (see [1999] 3 HKC 811 at 815 D-F, per Rogers JA):

> 'It seems to me that the line of cases which is exemplified in the case of *Breckland Group Holdings Ltd v London and Suffolk Properties & Ors* [1989] BCLC 100, exemplifies the ... proposition that where there is an effective board, the company in general meeting cannot usurp its powers but if the board is ineffective, the power which in effect has been delegated by the articles to the directors reverts to the person or persons who delegated, namely the company in general meeting.'

Having held that management powers reverted to the shareholders on account of the total deadlock on the board, the court looked at the express terms of the company's articles, which provided that a written consent by an absolute majority of the shareholders (ie Gao) would be regarded as an effective shareholders' resolution. Such a document – ratifying the commencement of the action against Ho – apparently existed (see [1999] 3 HKC 811 at 816A), therefore, the action against Ho was not struck out.

Comment

There is no doubt that the Court of Appeal was on firm legal ground in holding that the absence of an effective board of directors resulted in management powers reverting to the shareholders (see *Alexander Ward & Co Ltd v Samyang Navigation Co* [1975] 2 All ER 424). It might also seem that the approval by Rogers JA of *Breckland Group Holdings* is not remarkable – for there is a long line of English cases (see, in particular, *Scott v Scott* [1943] 1 All ER 582, *Shaw v Shaw* [1935] 2 KB 113 and, more recently, *Mitchell & Hobbs (UK) Ltd v Mill* [1996] 2 BCLC 102), which assert that an exercise of management powers by the directors cannot be 'overruled' by a resolution of the shareholders in general meeting. In particular, Harman J in *Breckland Group Holdings* refused to follow the much debated decision of Neville J in *Marshall's Valve Gear Co Ltd v Manning Wardle & Co Ltd* [1909] 1 Ch 267, where the opposite view had been

maintained. Yet while the English judges appear to have abandoned *Marshall's Valve* completely, Neville J's view – namely that the shareholders in general meeting can overrule a validly taken decision of the board – was once supported by another decision of the Court of Appeal in Hong Kong. Rogers JA in *Miracle Chance* makes no reference to the earlier decision in *Tang Kam-yip v Yau Kung School* [1986] HKLR 448. In summary, Rogers JA has adopted *Breckland Group Holdings*, yet *Marshall's Valve* is supported by *Tang Kam-yip* and that case was apparently not dealt with by Rogers JA.

Of course, the approval of *Breckland Group Holdings* in *Miracle Chance* was merely obiter – for the facts in *Miracle Chance* did not involve any decision taken by the board of directors. Yet, as has been argued elsewhere (see Smart, Lynch and Tam, *Hong Kong Company Law: Cases, Materials and Comments* (1997) at p 157), the approval of *Marshall's Valve* in *Tang Kam-yip* was itself obiter and perhaps not consistent with comments that were made by Lord Wilberforce in the Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 837. In short, this commentator would argue that the status of *Marshall's Valve* has yet to be conclusively determined in Hong Kong, but that there is every reason to hope that a Hong Kong court would distinguish the decision in *Tang Kam-yip* and reject *Marshall's Valve* – certainly the attitude of Rogers JA in *Miracle Chance* points this way. (For a review of all the earlier Hong Kong cases on this point, see Tyler (1987) 17 HKLJ 230.)

BVI Companies: A Note of Caution

In *Miracle Chance* a valid decision was taken by the shareholders since, it will be recalled, the company's articles provided that written approval by a majority of the shareholders was to be regarded as an effective shareholders' resolution. If there had not been such a provision in the company's articles, Rogers JA expressed the view that the 'proper course':

> '...would have been for the court to have stayed the proceedings but to have ordered a meeting of the company to see whether any resolution of the matter could have been arrived at by the company in general meeting'. (see [1999] 3 HKC 811 at 815G)

This comment, which was only made in passing, must be treated with caution.

The court has a broad discretionary power to convene a shareholders' meeting under s 114B of the Companies Ordinance (Cap 32) and, in particular, may exercise that power where a quorum cannot be obtained because the minority shareholder refuses to attend any proposed meetings: see *Re Opera Photographic Ltd* [1989] 1 WLR 634 and *Manfield Coatings Co Ltd v Springfield Coatings Co Ltd* [1995] 1 HKC 74. However, the relevant point is that s 114B concerns the calling of 'a meeting of a company' and 'company' prima facie means a Hong Kong incorporated company (see s 2). This commentator would suggest that any reading of the Companies Ordinance provisions on meetings (including s 114B) make it unarguable that the prima facie meaning of 'company' has been displaced. In brief, the court has no power to convene a meeting of a BVI or other foreign company pursuant to s 114B of the Companies Ordinance.

It may well be that when mentioning the calling of a meeting, Rogers JA had in mind not s 114B but rather the court's inherent power to regulate the conduct of litigation before it. Nevertheless, it is not clear to this commentator how the court could rule what the quorum at such a meeting should be without relying on s 114B. In any event, *Miracle Chance* serves a useful reminder that although the use of BVI companies has been popular in Hong Kong in recent years, practitioners should not assume without question that all the provisions of the Companies Ordinance apply to such companies in just the same way as they do to locally incorporated companies.

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公司的權力劃分問題

Philip Smart 細看近期一宗由上訴法庭審理的案件，並認為該案有助提醒執業律師們不能假設《公司條例》的條文像適用於本地成立的公司一般適用於海外成立的公司

公司股東和董事局之間的權力以至控制權劃分，向來是學者和執業律師都相當關注的課題。從學者的角度去看，權力劃分涉及一些關於現代公司性質的關鍵問題。另一方面，執業律師們都清楚知道，倘若在未經妥為授權的情況下以公司名義提出法律訴訟，不但會令訴訟出現錯誤，更可能令律師本身負上支付訟費的責任。問題是：是否只有公司董事局才可妥為授權？抑或公司股東們也可授權？最近，在 *Miracle Chance Ltd v Ho Yuk Wah, David* [1999] 3 HKC 811 一案中，上訴法庭法官羅傑志便要解決一宗關於權力劃分的糾紛。

案情和判決摘要

Miracle Chance Ltd（以下簡稱 'MCL'）是一家在英屬維爾京群島成立的合資公司，目的是協助進行 Gao 先生和何先生二人所盤算的計劃。Gao 先生和何先生分別是 MCL 的大股東和小股東，而該公司沒有任何其他股東。過了一段時間，Gao 先生和何先生的關係轉壞，何先生更拒絕與 Gao 先生一起召開董事會議和股東會議。結果 Gao 先生以 MCL 的名義在香港控告何先生，訴因之一是何先生違反受信責任。何先生尋求將訴訟剔除，理由為 MCL 的董事局未有議決展開訴訟，因此訴訟未獲 MCL 妥為授權。

上訴法庭裁定，根據公司憲章，公司的管理權（包括使用公司的名字進行訴訟的權力）通常被視為歸屬公司董事局，股東不能藉股東大會而篡奪該等權力；然而，若然公司實際上沒有董事局，管理權將歸復予公司股東：

> 「依我看來，*Breckland Group Holdings Ltd v London and Suffolk Properties & Ors* [1989] BCLC 100 一案引證的連串案例，似乎說明了，若公司有董事局，股東大會不能篡奪其權力，但若公司董事局失效，那些事實上是由公司章程細則轉授予董事們的權力，將歸復予轉授者，即公司股東大會。」（見 [1999] 3 HKC 811，在第 815 頁 D-F）

法庭裁定，MCL 董事局陷入僵局，因此公司管理權歸復予股東。法庭接而考慮 MCL 的章程細則的明示條款，當中規定，由絕大多數股東（即 Gao 先生）作出的書面同意，須被視為有效的股東決議。案中顯然存在著這樣的文件，追認針對何先生而展開的訴訟（見第 816 頁 A），因此法庭拒絕剔除該訴訟。

評論

上訴法庭裁定公司管理權在缺乏有效董事局的情況下將歸復予股東，這一點無疑有著充分的法理依據（見 *Alexander Ward & Co Ltd v Samyang Navigation Co* [1975] 2 All ER 424 一案）。此外，羅傑志法官認同上述 *Breckland* 一案的判決，似乎也不足為奇，因為英國有連串案例（尤其是 *Scott v Scott* [1943] 1 All ER 582 及 *Shaw v Shaw* [1935] 2 KB 113 兩案，以及近期的 *Mitchell & Hobbs (UK) Ltd v Mill* [1996] 2 BCLC 102 一案），表明了公司股東不能藉大會決議而「否決」董事對公司管理權的行使。在 *Breckland* 一案中，法官 Harman J 曾拒絕跟隨一項持相反觀點但備受爭議的判決，即 *Marshall's Valve Gear Co Ltd v Manning Wardle & Co Ltd* [1909] 1 Ch 267 一案中法官 Neville J 的判決。然而，儘管英國的法官們似乎已把 *Marshall's Valve* 一案完全拋諸腦後，但 Neville J 認為股東可藉大會而否決由董事局妥為通過的決定的說法，曾獲得香港上訴法院的支持：見 *Tang Kam-yip v Yau Kung School* [1986] HKLR 448 一案。在 *Miracle Chance* 一案中，羅傑志法官沒有提及 *Tang Kam-yip* 一案。總括來說，羅傑志法官採納了 *Breckland* 一案，但 *Marshall's Valve* 一案卻得到 *Tang Kam-yip* 一案的支持，而羅傑志法官未有提述 *Tang Kam-yip* 一案。

法院無權根據《公司條例》第 114B 條命令英屬維爾京群島公司或其他海外公司召開會議

誠然，*Miracle Chance* 一案並不涉及董事局作出任何決定的問題，而羅傑志法官認同 *Breckland* 一案，也只能說是附帶意見。然而，正如學者曾經主張（見 Smart, Lynch 及 Tam 著 *Hong Kong Company Law: Cases, Materials and Comments* (1997 年) 第 157 頁），*Tang Kam-yip* 一案中上訴法院認同 *Marshall's Valve* 一案，也只是附帶意見，而且可能與樞密院法官 Lord Wilberforce 在 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821一案中所作的意見（見第 837 頁）不相一致。簡言之，筆者認為，*Marshall's Valve* 一案在香港的地位還有待最終定斷，但我們有充分理由期望香港法院會對 *Tang Kam-yip* 一案作出議別並且拒絕接納 *Marshall's Valve* 一案。事實上，在 *Miracle Chance* 一案中，羅傑志法官也是抱著這種態度。（由 Tyler 所著、載於 (1987) 17 HKLJ 230 的文章，回顧了有關這個問題的所有早前香港案例。）

一點警告

正如上文提到，在 *Miracle Chance* 一案中，MCL 的章程細則規定，由大多數股東作出的書面同意，須被視為有效的股東決議，故此 MCL 大股東所作的決定有效。但若公司的章程細則沒有這樣的規定，情況會是怎樣？羅傑志法官認為，在該情況下，「恰當的做法」是：

> 「 … 由法庭擱置有關的法律程序，但同時下令公司舉行會議，以確定公司大會可否就事情達成決議。」（見第 815 頁 G）

我們務須小心對待這個順帶提出的意見。

根據《公司條例》（第 32 章）第 114B 條，法庭有廣闊的酌情權，命令公司召開股東大會；特別是當小股東拒絕出席任何擬舉行的會議而令會議無法達到法定人數的要求時，法庭可行使該酌情權：見 *Re Opera Photographic Ltd* [1989] 1 WLR 634 及 *Manfield Coatings Co Ltd v Springfield Coatings Co Ltd* [1995] 1 HKC 74 兩案。然而，問題是第 114B 條關乎「公司的會議」，而根據同一條例第 2 條，「公司」表面上指在香港成立的公司。筆者認為，不論怎樣去理解《公司條例》內有關會議的條文（包括第 114B 條），我們都不能說該些條文改變了「公司」的表面意思。簡單來說，法院無權根據《公司條例》第 114B 條命令英屬維爾京群島公司或其他海外公司召開會議。

羅傑志法官在提及召開會議的一點時所考慮到的可能不是第 114B 條，而是法庭監控其審理的訴訟的固有權力。縱然如此，筆者不清楚法院如何能在不依賴第 114B 條的情況下決定此等會議的法定人數應是多少。不管如何，*Miracle Chance* 一案提醒了我們，雖然近年來香港不少人使用英屬維爾京群島公司，但執業律師不應毫不猶豫地假設《公司條例》的條文像適用於本地成立的公司一般適用於海外成立的公司。

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