not, of itself, invalidate the amendment if the amendment is made in good faith in the interests of the company.

(6) A power to amend will also be validly exercised, even though the amendment is not for the benefit of the company because it relates to a matter in which the company as an entity has no interest but rather is only for the benefit of shareholders as such or some of them, provided that the amendment does not amount to oppression of the minority or is otherwise unjust or is outside the scope of the power.

(7) The burden is on the person impugning the validity of the amendment of the articles to satisfy the court that there are grounds for doing so.



# CHAPTER 3

# THE ADMINISTRATIVE STRUCTURE



## 1. INTRODUCTION

**3-1** A direct consequence of the incorporation of a company is that the company has a legal personality of its own which is distinct from its corporators. This means that a company has its own legal capacity to enjoy rights, assume obligations, incur liabilities and perform duties independently of the corporators.[1] However, as a corporation is an abstraction or artificial person, its capacity can only operate through some human agency. Walton J in *Northern Counties Securities Ltd v Jackson & Steeple Ltd*[2] said:

> ... the company as such was only a juristic figment of the imagination, lacking both a body to be kicked and a soul to be damned. From this it followed that there must be some one or more human persons who did, as a matter of fact, act on behalf of the company, and whose acts therefore must, for all practical purposes, be the acts of the company itself.[3]

**3-2** More recently, Lord Hoffmann made the same point in *Meridian Global Funds Management Asia Ltd v Securities Commission*[4] in the following manner:

> It is worth pausing at this stage to make what may seem an obvious point. *Any statement about what a company has or has not done, or can or cannot do, is necessarily a reference to the rules of attribution (primary and general) as they apply to that company. Judges sometimes say that a company 'as such' cannot do anything; it must act by servants or agents. This may seem an unexceptionable,*

1 See chapter 1, section 4.
2 [1974] 2 All ER 625.
3 ibid at 634.
4 [1995] 3 WLR 413 (PC).



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> *even banal remark. and of course the meaning is usually perfectly clear. But a reference to a company 'as such' might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no* ding an sich, *only the applicable rules.* To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company. [Emphasis added]

**3-3** The human agency through which a company can operate or manage and conduct itself lies in the two principal organs of a company, namely, the shareholders acting together in general meeting and the board of directors. Both organs have an organic quality of their own. In theory, they can exercise all powers of the company conferred upon it by statute pursuant to the company's memorandum and articles.

**3-4** This chapter discusses the structure of board of directors, the basic principles that are applicable to them as a collective body and to directors individually, including the rules relating to their appointment, removal and remuneration. It also discusses some important aspects of membership in a company.

# 2. Directors and the Board Generally

**3-5** Every public company and company limited by guarantee shall have at least two directors.[5] Every private company, on the other hand, need only have at least one director.[6] The term 'director' is defined under the Companies Ordinance (Cap 622) ('the Ordinance') to mean 'any person occupying the position of a director by whatever name called'.[7] The Ordinance looks at the substance and not the title of the position a person occupies in a company. There are three concepts of 'director' under the Ordinance. These are *de jure* directors, *de facto* directors and shadow directors. There are important differences in law between the first and the latter two concepts of directors and these differences are discussed in chapter 28. Here, we are only concerned with *de jure* directors – persons who have been validly appointed as directors of a company and who are not disqualified from continuing to occupy office as director before the natural expiration of their term of office.

**3-6** A company, being a fictitious person, can only perform its functions by vesting the powers which it has under the Ordinance and the articles of association in its human agencies. The vesting or delegation of powers in favour of its board of directors whether pursuant to the Ordinance or the articles of association completes itself the moment the company is incorporated and the articles of association is registered. The delegation of powers by a company to its board of directors is commonly referred to as 'primary delegation' of powers.[8]

**3-7** The extent of the powers of a board of directors to direct, manage and conduct the affairs of a company is determined by the provisions of the Ordinance,

5 Section 453(1) of the Ordinance.
6 Section 454(1).
7 Section 2.
8 See chapter 4, section 3.2.





the articles and whenever applicable, the Listing Rules of the SEHK or the GEM Rules. These instruments divide the powers of a company and determine the kind of powers each organ possesses. For legal as well as commercial reasons, the majority of the powers to direct, manage and conduct the affairs of a company are vested in the board of directors and not the company in general meeting.[9] Consequently, the sum total of the daily activities of a company is generally not entrusted to the general meeting.[10]

## 2.1 Legal characterisation of directors

**3-8** Various descriptive labels are used to characterise the legal nature of the office of director. Which label is most convenient and legally accurate depends on the facts and circumstances of each case. When any particular label is used in any given case, it is not meant to characterise directors as persons falling within that label in an exclusive manner. Rather, that label is meant to focus attention to the applicable law which governs directors in the factual circumstances of that particular case. Therefore, directors are sometimes described as 'agents' when the facts are concerned with the issue of their authority to bind the company,[11] as constructive 'trustees' when the property of the company is in issue,[12] and as 'fiduciaries' when the issue concerns the exercise of powers which are delegated to them by the company[13] or when dealing with the company,[14] or with corporate opportunities which in law may properly be described as belonging to the company.[15]

## 2.2 Position of alternate directors

**3-9** There is no specific provision in the Ordinance regulating the appointment of alternate directors. However, most articles of association empower a director to appoint a person to act as an alternate director to take his place to exercise all

9 See chapter 5.
10 ibid.
11 *Ferguson v Wilson* (1866) LR 2 Ch App 77; *Freeman & Lockyer v Backhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480.
12 *CMS Dolphin Ltd v Simonet & Anor* [2001] 2 BCLC 704.
13 *Blackwell v Moray* (1991) 5 ACSR 255; *Infinity Development (Holdings) Co Ltd & Anor v Bank of China & Ors* [2001] HKCU 489 (unreported, CACV 1069/2000, 12 June 2001); *Re Peregrine Investments Holdings Ltd* [1998] HKCU 189 (unreported HCCW 20B/1998, 27 February 1998). See also Millett LJ in *Bristol and West Building Society v Mothew* [1997] 2 WLR 436 '[one] is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.'
14 *Aberdeen Rly Co v Blaikie Bros* [1843–60] All ER Rep 249.
15 *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162; *Re Allied Business and Financial Consultants Ltd* [2009] 2 BCLC 666; *Poon Ka Man Jason v Cheng Wai Tao* [2015] 2 HKC 143 (CA) (NB leave to appeal to the CFA has been granted).



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functions as director subject to the approval of the board.[16] The power on the part of a director to appoint an alternate director is bestowed for sake of convenience, that is, to take the place of the appointed director when he is for whatever reasons unable to attend to his duties and functions as director. Under s 478(1), unless the articles contain any provision to the contrary, an alternate director so appointed is deemed to be the agent of the director who appoints the alternate director and director who appoints an alternate director is vicariously liable for any tort committed by the alternate director while acting in the capacity of alternate director. This provision does not alter the position of an alternate director as, for all intents and purposes, a fiduciary of the company but only when he is called upon to act in place of the director.[17] As such, an alternate director enjoys no powers or rights as director when he is not called upon to act. By the same token he has no duties and responsibilities when he is not acting as alternate director. In the New Zealand case of *Strathmore Group Ltd v Fraser,*[18] Robertson J in the High Court held that an alternate director is a person who is designated and acceptable as a director, but who has powers, rights, duties and responsibilities only when he is acting in place of the director for whom he is an alternate. This is well-established under the Australian jurisprudence as well.[19]

**3-10** When an alternate director is called upon to act, he acts not only as an agent of the director[20] but in his capacity as a director of the company in his own right. He is required to act independently of the views, if any, of his appointor. In *Anaray Pty Ltd v Sydney Futures Exchange Ltd,*[21] an alternate director voted in favour of a resolution in which the primary director was interested. Without the attendance of the alternate director there would have been no quorum because of the disqualification of one of the directors under the articles to be counted in the quorum. It was held that in the absence of agency provisions in the articles making an alternate director an agent, an alternate director acts in his own right as director when discharging functions and duties he is called upon to attend to. Accordingly, the meeting was a quorate meeting.[22] On parity of reasoning,

16 Companies (Model Articles) Notice (Cap 622H), Sch 2 (Private Companies Limited by Shares), arts 28–30.

17 See also Cap 622H, Sch 2 (Private Companies Limited by Shares), art 29.

18 (1991) 5 NZCLC 67 at 163.

19 *Markwell Bros Pty Ltd v CPN Diesels (Qld) Pty Ltd* (1982) 7 ACLR 425; *Playcorp Pty Ltd v Shaw* (1993) 11 ACLC 641 (Vic: SC); *Australian Institute of Fitness Pty Ltd v Australian Institute of Fitness (Vic/Tas) Pty Ltd (No 3)* [2015] NSWSC 1639.

20 Section 478 of the Ordinance.

21 (1988) 6 ACLC 271.

22 *Anaray* also provides support for the proposition that the alternate director is *not required to disclose adverse interests* in a transaction nor are disqualified from voting or being counted towards a quorum, *if the interest is not their own but that of the appointor*. The basis of this decision was that there were no provisions in the articles making an alternate director an agent of his appoint, nor was there any suggestion of any collusion between the alternate and his appointor. However, it should be noted that s 478(1) deems that the alternate director is an agent of the appointing director. Whether this means that *Anaray* would be decided differently in Hong Kong is unclear.





an alternate director who has personal interests in a subject matter must also be subject to the same rules[23] as are set out in the articles of a company relating to quorum and disclosure of interests.

**3-11** It is not in all cases that an alternate director will be empowered to exercise all powers which are vested in his appointor. The extent of the powers of an alternate director depends upon the construction of the articles. In some cases, the powers of an alternate director may just be confined to attending and participating in board meetings in the absence of the primary director: *Zanda Investment Ltd v Bank of America National Trust and Savings Association & Ors.*[24]

## 2.3 Position of nominee directors

**3-12** A person may be nominated for appointment as director to represent the interests of a sectional group of shareholders. This often happens in joint venture companies and group companies where the parent company nominates persons to act as directors in its subsidiary or associated companies. It also often happens that a director is appointed to represent the interests of a lender or debenture holder. Such directors are commonly referred to as 'nominee directors' and they represent external interests or interests outside the company. The idea that directors may be appointed to represent interests outside the company contradicts the general principle that directors must act in interests of the company as a whole, or directors should not place themselves in a 'duty to duty' conflict situation. However, the law, as a matter of commercial reality, recognises the existence of nominee directors and when advancing external interests they may also be advancing internal interests or the company's interests as well. In *Levin v Clark,*[25] Jacobs J said:

> It is not uncommon for a director to be appointed to a board of directors in order to represent an interest outside the company: a mortgagee or other trader or a particular shareholder. It may be in the interests of the company that there be upon its board of directors one who will represent these other interests and who will be acting solely in the interests of such a third party and who may in that way be properly regarded as acting in the interests of the company as a whole.[26]

**3-13** To resolve the apparent conflict that nominee directors may act to advance the interests of their appointor or interests outside the company, as opposed to the general principle that directors must act in the interests of the company as a whole, a balance is struck between the law and commercial reality – nominee directors may act to advance interests outside the company so long as the company's interests do not conflict with the outside interests which they represent. Where the company's interests conflict with the external interests represented by the nominee directors, the interests of the company prevails. This principle is

23 *Australian Securities and Investments Commission v Boyle & Anor* (2001) 38 ACSR 606 (reversed in part by the High Court of Australia on a separate point).

24 [1994] 2 HKC 409.

25 (1962) NSWR 686.

26 ibid at 700.



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captured in a passage in the judgment of Lord Denning in *Scottish Co-operative Society Ltd v Meyer & Anor.*[27] Lord Denning said:

> What, then, is the position of the nominee directors here? Under the articles of association of the textile company the co-operative society was entitled to nominate three out of the five directors, and it did so. It nominated three of its own directors and they held office, as the articles said, 'as nominees' of the co-operative society. These three were therefore at one and the same time directors of the co-operative society – being three out of 12 of that company – and also directors of the textile company – three out of five there. So long as the interests of all concerned were in harmony, there was no difficulty. The nominee directors could do their duty by both companies without embarrassment. But, so soon as the interests of the two companies were in conflict, the nominee directors were placed in an impossible position. Thus, when the realignment of shareholding was under discussion, the duty of the three directors to the textile company was to get the best possible price for any new issue of its shares (see per Lord Wright in *Lowry v Consolidated African Selection Trust Ltd*), whereas their duty to the co-operative society was to obtain the new shares at the lowest possible price – at par, if they could. Again, when the co-operative society determined to set up its own rayon department, competing with the business of the textile company, the duty of the three directors to the textile company was to do their best to promote its business and to act with complete good faith towards it; and in consequence not to disclose their knowledge of its affairs to a competitor, and not even to work for a competitor, when to do so might operate to the disadvantage of the textile company (see *Hivac Ltd v Park Royal Scientific Instruments Ltd*) whereas they were under the self-same duties to the co-operative society. It is plain that, in the circumstances, these three gentlemen could not do their duty by both companies, they did not do so. They put their duty to the co-operative society above their duty to the textile company in this sense, at least, that they did nothing to defend the interests of the textile company against the conduct of the co-operative society. They probably thought that 'as nominees' of the co-operative society their first duty was to the co-operative society. In this they were wrong. By subordinating the interests of the textile company to those of the co-operative society, they conducted the affairs of the textile company in a manner oppressive to the other shareholders.[28]

**3-14** The decision in the *Scottish Co-operative Society Ltd* case puts the position of nominee directors in exactly the same position as ordinary directors. This represents a very rational step in the development of the law relating to directors in the field of company law. Like alternate directors, nominee directors are directors in their own right such that where the private interests of their appointors conflict with the interests of the company, their paramount duty is owed to the company.[29] This principle is also entirely consistent with other company law principles – a company is a legal entity which is distinct from its shareholders and is perfectly capable of having its own interests; and that directors cannot act to advance sectional interests within a company; and that directors cannot fetter their

27 [1959] AC 324.

28 ibid at 366–367.

29 There is however some dicta in *Re Southern Countries Fresh Foods Ltd* [2008] EWHC 2810 (Ch). Suggesting that in principle, in relation to 'specific areas of interest', a director may not be released from his fiduciary duty to give his best independent judgment to the company.





discretion as to how they should act in the affairs of the company by entering into any arrangement or agreement with third parties.[30]

**3-15** In *Re Neath Rugby Ltd*,[31] the stricter English approach was summarised by the Court of Appeal:

> The fact that a director of a company has been nominated to that office by a shareholder does not, of itself, impose any duty on the director owed to his nominator. The director may owe duties to his nominator if he is an employee or officer of the nominator, or by reason of a formal or informal agreement with his nominator, but such duties do not arise out of his nomination, but out of a separate agreement or office. Such duties cannot however, detract from his duty to the company of which he is a director when he is acting as such.

**3-16** In Australia and New Zealand, there are cases which suggest that normal fiduciary duties might be modified where a company had been set up as a joint venture between two or more participants upon the basis that the nominee directors would represent their respective interests.[32] In *Gwembe Valley Development Co Ltd v Thomas Koshy*, Lord Justice Mummery held that a modification of the fiduciary duties owed to the company cannot be implied from the special joint venture nature of the company. His lordship, however, left open the possibility that a director might be able to, by express agreement with the company, modify the fiduciary duties owed by him.[33] This proposition has received support at High Court level in the UK.[34]

## 2.4 No indemnification for negligence, etc

**3-17** Section 468 of the Ordinance makes void any provision in the articles or contract which seeks to exempt or indemnify any officer of the company from liability attaching to him under any rule of law for negligence, default or breach of duty or trust. Provisions to the like effect are found in the Companies Act 2006 (UK) ss 232–233, Corporations Act 2001 (Australia) ss 199A–C[35] and Companies Act 2016 (Malaysia), s 288. The obvious statutory purposes of s 468 are to raise standards of conduct and to prevent a company from applying its property to indemnify the very officers who are duty bound to protect the company's interest.

**3-18** However, s 468(4), notwithstanding sub-s (3), allows the company to take out an insurance policy for a director of the company against any liability to any person attaching to the director in connection with any negligence, default, breach

30 Nominee directors can be disqualified, similar to normal directors, for unfitness: *Official Receiver v Vass* [1999] BCC 516.

31 [2009] EWCA Civ 291, [2009] 2 BCLC 427. See also *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635; *Kuwait Asia Bank v National Mutual Life Nominees Ltd* [1991] 1 AC 187 (PC).

32 *Lewin v Clark* [1962] NSWR 686; *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 at 165–166.

33 [2003] EWCA Civ 1048, para [56]. See also *Kelly v Cooper* [1993] AC 205 (PC); *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145.

34 *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 521 (Ch).

35 See s 205, Companies Act 1948 (UK), s 310 of the Companies Act 1985 (UK).



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of duty or breach of trust (except for fraud) in relation to the company or an associated company and the liability in defending these proceedings. In Singapore, s 172(2) of the Companies Act (Cap 50) expressly allows for the purchase and maintenance of insurance against liability except where the director's liability arises out of conduct involving dishonesty or wilful breach of duty.[36] Insurance aside, s 469(1) of the Ordinance provides that an indemnity by the company against liability incurred by the director to a third party is not normally void unless it fall fouls of s 469(2). This is aimed at shielding directors from liabilities arising from claims not brought against them by their own company but claims by third parties that should be properly borne by the company.

## 2.5 Director as secretary

**3-19** A person may be a director and a secretary at the same time except where the company is a private company having only one director and that a private company having only one director cannot have as company secretary a body corporate whose sole director is the sole director of the private company.[37] Section 479 of the Ordinance provides that where an act or a thing is required to be done by or to a director and secretary, the act or thing cannot be said to have been effected if the person is a single person acting in a dual capacity.[38] An example is the affixation of the common seal of a company. In affixing the common seal, a director who is also the secretary cannot countersign as secretary against his signature as director.[39] A further example is found in s 190(2) of the Ordinance – a director who is also a secretary cannot submit and verify a statement of affairs in a winding up to the Official Receiver.

# 3. Directors' Powers Generally

**3-20** Powers vested in directors are meant for the purpose of enabling them to discharge their functions in directing, managing and conducting the business and affairs of a company. Members defer to their authority to exercise powers on the company's behalf on the basis of accountability. The rules of accountability set out in the written constitution of a company and the provisions of statutes are express rules of accountability. In addition to the express rules, there are rules developed by the court which are applicable to directors having regard to the fiduciary nature of directors' powers and the fiduciary character of the office of director. Many of the express rules of accountability contained in the Ordinance are codified from the rules of accountability formulated by the court in governing the exercise of corporate powers by directors.

**3-21** The principal judicial rule of accountability is that directors' powers must be exercised *bona fide* in the interest of the company as a whole and not for any

36 In respect of Australia, see ss 199A and 199B, Corporations Act 2001.
37 Section 475.
38 This section is in *pari materia* with Companies Act 2006 (UK), s 280 and Companies Act 2016 (Malaysia), s 242. See also s 171(5), Companies Act (Cap 50) (Singapore).
39 See Cap 622H, Sch 2 (Private Companies Limited by Shares), art 81.





collateral purpose.[40] Other judicial rules of accountability are that directors are required to exercise some degree of care, skill and diligence in the performance of their functions,[41] directors must not place themselves in a position of conflict whether with their personal interests or their duty to a third party[42] and directors cannot fetter their discretion.[43] Many of the judicial rules of accountability have either been expanded upon or strengthened by statutory provisions, notably powers may not be exercised in ways which have the effect of unfairly prejudicing the interests of members.[44]

## 3.1 Powers exercisable collectively

**3-22** The general principle is that all the powers of a company reserved to be exercised by directors are vested not in any particular director or a fraction of them but in directors as a collective body, or as a board of directors.[45] Consequently, Article 7(1) in Schedule 2 of the Model Articles (Private Companies) provides that a decision of the directors may only be taken by a majority of the directors at a meeting or by unanimous agreement under Article 8.[46] It is at a duly convened and constituted meeting that directors exercise their powers as a collective body.[47] The corollary principle is that if directors entitled to attend a meeting are deliberately excluded from participating in the meeting by his fellow directors, such improperly constituted meetings would in appropriate circumstances be struck down as invalid meetings and acts done at improperly constituted meetings are not in law acts of the company.[48]

**3-23** A 'meeting', in the conventional sense of that term, is not the only way in which powers may in law be said to have been exercised collectively by the board. Articles may provide that the power to make decisions may be made by the board by way of circular resolutions. When the rules in the articles governing the making of decisions by way of circular resolutions are complied with and the rules in the articles do not infringe some overriding external rules as may be contained in the Ordinance or regulatory rules imposed by regulatory bodies having jurisdiction over the company concerned, powers are deemed to have been exercised collectively by the directors at a duly convened and constituted meeting.[49]

**3-24** The written rules governing meetings and circular resolutions of directors, whenever complied with, provide documentary proof that powers delegated to

40 See chapter 7.
41 See chapter 12.
42 See chapters 14 and 15.
43 See discussion in this chapter at section 3.3.
44 See chapter 9.
45 *Re Westmid Packing Ltd* [1998] 2 All ER 124; *SAL Industrial Leasing Ltd v Hydorlmech Automation Services Pty Ltd & Ors* [1998] 1 SLR 702.
46 See Cap 622H, Sch 2 (Private Companies Limited by Shares), arts 7–8.
47 See chapter 18.
48 See discussion in this chapter at section 4.2.
49 See chapter 24.



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the board as a collective body have in effect been exercised collectively. In some cases, powers might, in reality, have been exercised collectively though not by way of formal documentation. In such cases, the court will uphold the validity of the powers exercised and decisions made by the board as a collective body such as to bind the company despite the absence of compliance with formal requirements. This is an application of the principle of unanimous consent.[50]

## 3.2 Sub-delegation of powers

**3-25** Articles of association usually empower directors to sub-delegate any or all of their powers. This does not deviate from the common law rule *delegatus non potest delegare* (one to whom power is delegated cannot himself further delegate that power, *unless* the instrument of delegation itself authorises further delegation). Sub-delegation, however, does not absolve the board of its overall responsibility or any of its members from individual responsibility: *Re Barings plc (No 5)*[51] and *Advance Finance Ltd v Pang Sze Mui, Loretta.*[52] The underlying reason is that collective responsibility is based on individual responsibility. Accordingly, if a director is given a particular function to perform, or even if he has no particular function to perform, the director is still accountable in law. In *Law Wai Duen & Anor v Boldwin Construction Co Ltd*,[53] Mr Yip was a project director. Matters relating to financial matters and records were left to other directors. There was a request to inspect books of account by one of the directors. Mr Yip did not think that the duty to allow access to books of accounts concerned him. As such, he did nothing and left the matter to be sorted out by the director in charge. Rogers VP rejected Mr Yip's explanation and held that there was dereliction of duty on his part. It was said:

> Mr Yip is the third defendant in the BF Construction case. His title in that company is project director. His affidavit sets out that he became a director of the company in April 1999. Apparently the invitation was extended with a view to there being compliance with the Building Regulations. There is no reason to doubt the fact that Mr Yip was appointed a director because of his technical expertise in relation to building construction. There is no dispute that he has no interest in the company, in the sense that he is not a shareholder of the company. Nevertheless, he is a director. In his affirmation he says 'I have nothing to do with the books and the accounts of the company, not even of financial transactions between the company and its sub-contractors'.
>
> Whilst, no doubt, on general principles, Mr Yip was entitled to leave the handling of various matters relating to the accounts to those officials or other employees of the company who were well-qualified to deal with it, for reasons which have already been explained, Mr Yip was not, as a director, at liberty to absolve himself entirely from responsibility in relation to the company's financial affairs. Still less could Mr Yip absolve himself from responsibility in relation to the management of the company…
>
> Mr Yip's attitude in relation both to his duties and position as a director and to the plaintiffs' request for access to company documents is, I regret, flawed. Whereas Mr Yip may regard himself as performing a purely technical role he was, nevertheless, a director of a company. When it came to the exercise by directors of the undoubted right of access to company documents, he could not take a neutral role. His deference to Mr Chan was misplaced. He could not simply act as a messenger and do nothing. His duties as a director obliged him to use such power as he had as a director to enable other directors to exercise their right and position as directors. If he had exercised such voting rights as he had in favour of allowing inspection but as a practical matter that had been refused by Mr Chan, then no complaint could be made. But by deferring to Mr Chan's refusal of the plaintiffs' request for access to company records, Mr Yip has himself failed in his duties as a director.[54]

**3-26** Under the principle of *delegatus non potest delegare*, directors, prima facie, cannot sub-delegate their powers, or functions or duty to persons under common law: *R v Lo Hon Yiu Henry*.[55] In that case, it was held that, notwithstanding the fact that *delegatus non potest delegare* applies to directors, delegation may be authorised by statute and is commonly authorised for certain purposes under a company's articles of association. On the facts, the learned judge rejected the argument that directors can delegate his statutory duties to the company's auditors and solicitors in private practice to lay financial documents before the company in the general meeting because they are professional advisers, not employees of the company. This should not be interpreted as laying down a general rule that directors can never sub-delegate their powers, functions or duties to persons who are not employees of the company. The proper interpretation of the ratio of the case is that:

> … in the absence of any special arrangement that has been made, a director can[not] properly be regarded as having acted reasonably by assuming that everything required by s 122 [the then equivalent of s 429] would be done by the auditors.[56]

**3-27** Whether a delegation of power, function or duty was proper and whether the duty to supervise the discharge of delegated functions was discharged is ultimately dependent on the facts of each individual case in light of the statutory provisions and the articles of the company.[57]

50 See chapter 23.
51 [1999] 1 BCLC 433. See further discussion in this chapter at section 5.2.
52 [1986] 1 HKLR 523. See also *Re Copyright Ltd* [2004] 2 HKLRD 113, [2003] HKCU 1062; *Re Regal Motion Industries Ltd* [2005] 1 HKLRD 461.
53 [2001] 4 HKC 403.
54 ibid at 410–411.
55 [1985] 1 HKC 183. See also discussion in this chapter at section 5.2.
56 *Re Hong Kong Times Investments Ltd* [2014] 2 HKLRD 29, [2014] HKCU 279 per G Lam J at para [27].
57 *Re Regal Motion Industries Ltd* [2005] 1 HKLRD 461; *R v Yung Leonora* [1994] 3 HKC 141; *Re Copyright Ltd* [2004] 2 HKLRD 113, [2003] HKCU 1062.





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## 3.3 No fetter of discretion[58]

**3-28** Most of the powers of directors are discretionary in nature – to do or not to do a particular act or to bind a company to a course of action. The principle that a director cannot fetter his discretion is derived from the principle that he must act *bona fide* in the company's interest. If a director acts unthinkingly without having regard to relevant facts and circumstances, or just acts according to what he has been told to do by a fellow director or third party, he is not acting *bona fide* for want of independent discretion or judgment: *Blackwell v Moray & Anor*.[59]

**3-29** The case of *Blackwell v Moray* dealt with a situation where discretion was required to be exercised at a board meeting to decide whether to cause the company to enter into a transaction to release debts owing to it. The transaction, once entered into, would not require further acts to be done by the directors in the future. In respect of transactions which require further performance in the future, a distinction is drawn between two categories of cases. The first category of cases relates to situations where future performance of a transaction only goes to implementation of the transaction already entered into by the directors in good faith and in the interests of the company. The second category of cases relates to situations where the directors obligate themselves in advance as to how they would behave in the future. In the first category of cases, there is no fetter of discretion but not so in the latter category. The distinction between these two categories of cases is best explained by the judgment of the High Court of Australia in *Thorby v Goldberg*.[60] In this case, Kitto J said:

> The argument for illegality postulates that since the discretionary powers of directors are fiduciary, in the sense that every exercise of them is required to be in good faith for the benefit of the company as a whole, an agreement is contrary to the policy of the law and void if thereby the directors of a company purport to fetter their discretions in advance…There may be more answers than one to the argument, but I contend myself with one. There are many kinds of transactions in which the proper time for the exercise of the directors' discretion is the time of the negotiation of a contract, and not the time at which the contract is to be performed. A sale of land is a familiar example. Where all the members of a company desire to enter as a group into a transaction such as that in the present case, the transaction being one which requires action by the board of directors for its effectuation, it seems to me that the proper time for the directors to decide whether their proposed action will be in the interests of the company as a whole is the time when the transaction is being entered into, and not the time when their action under it is required. If at the former time they are bona fide of opinion that it is in the interests of the company that the transaction should be entered into and carried into effect, I see no reason in law why they should not bind themselves to do whatever under the transaction is to be done by the board.[61]

Owen J said:

> The remaining matter on which I wish to add something relates to the submission made on behalf of the defendants that one effect of the document pleaded was to fetter the directors in the future exercise of their discretion and that, for this reason, the agreement was contrary to public policy and unlawful. While I agree with the reason given by Menzies J for rejecting the argument, there is, I think, a further ground upon which it fails. For all that appears from the plea, the directors of the company may, before the execution of the agreement, have given proper consideration to the desirability of entering into it and decided that it was in the best interests of the company that it should be made. If so, it would be impossible to argue that they had, by executing the document, improperly fettered the future exercise of their discretion. In fact they would already have exercised it and, in the absence of an allegation that they had done so improperly, the suggested defence could not be sustained.[62]

58 This is closely connected with a separate duty to exercise independent judgment, which has been codified in the UK (s 173 CA 2006), but not in Hong Kong.
59 (1991) 5 ACSR 255. See discussion in chapter 7, section 5.1.
60 [1964] 112 CLR 597.
61 ibid at 605–606.





**3-30** The decision in *Thorby v Goldberg* was applied by the English Court of Appeal in *Fulham Football Club Ltd & Ors v Cabra Estates plc*.[63] In this case, the directors gave an undertaking to use all their powers and right to support the commercial development of land by the appellant. In return, the company were to receive substantial benefits. It was held that since the directors had exercised independent judgment and discretion when giving the undertaking in connection with the subject matter, the undertaking did not amount to a fetter of discretion with respect to their future conduct. Neill LJ said:

> In the present case the undertakings given by the directors were part of the contractual arrangement made on 28 January 1990 which conferred substantial benefits on the company. In those circumstances it cannot be said that the directors improperly fettered the future exercise of their discretion, nor is there any scope for the implication of any such terms as is suggested by the plaintiffs.[64]

**3-31** The earlier cases of *Rackham v Peek Foods Ltd*[65] and *John Crowther Group plc v Carpets International plc*[66] were distinguished. These two cases dealt with undertakings given by directors in the context of take-overs to use their best endeavours to support the proposed transactions. Subsequently, the directors changed their minds because of changed circumstances. It was held that the undertakings were unenforceable. The distinguishing fact appears to be that the undertakings in those cases were to make recommendations should a takeover bid be made in the future. Thus, when the takeover bid was made but the terms of the offer were not in the company's and shareholders' interests, the directors could not be held to its earlier conduct to make recommendations to support the takeover. *Fulham Football Club* is an important decision because the application of the 'no fettering' rule to avoid the contract would render companies unreliable parties and would also deprive companies of the opportunity to enter into long-term contracts which would be commercially beneficial to the companies.

**3-32** It should also be noted that the duty to exercise independent judgment does not prevent directors from seeking and acting on advice from others insofar as the directors do not blindly follow the advice. Indeed, the board might have breached its statutory duty to take reasonable care, skill and diligence under s 465 if it does not

62 ibid at 617–618.
63 [1992] BCC 863.
64 ibid at 876.
65 ibid at 876.
66 [1990] BCLC 460.



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obtain professional advice in reaching certain decisions. The board must, however, regard itself as being ultimately responsible for the business decision reached after their independent judgment has been exercised. The board is also not prevented from delegating its functions provided that the duty to supervise is discharged.[67]

## 3.4 Acts of directors

**3-33** Acts of directors of a company, whether acting collectively as a board or individually, binds a company pursuant to the rules of attribution.[68] The rules of attribution are based upon agency principles applicable to natural persons which are applied with appropriate modifications to companies. Rules of attribution may be divided into two broad categories. The first category consists of those rules contained in the articles detailing out the requirements which are required to be fulfilled by agents when committing a company. The second category are those rules formulated by the court – the principle of unanimous consent, the doctrine of ostensible authority and exceptional cases for the purpose of carrying out the policy of statutes in fixing liability upon a company as an entity for offences: *Meridian Global Funds Management Asia Ltd v Securities Commission*,[69] *El Ajou v Dollar Land Holdings plc*[70] and *Hong Kong Niiroku Ltd v Kyokuto Securities (Asia) Ltd*.[71]

### 3.4.1 Defective appointment, valid acts

**3-34** Where there are some defects in the appointment of a director, s 461 of the Ordinance operates to save the validity of acts done by such a director. This section does not operate if there had been no appointment at all: *Morris v Kanssen & Ors*.[72]

### 3.4.2 Excess of powers, invalid acts

**3-35** The law draws a distinction between an act which is *ultra vires* the company and an act which is *intra vires* the company but carried out by directors in excess of their powers or authority. Directors are said to have acted in excess of their powers or authority in circumstances where they utilise their powers to do an act which is not within the scope of the empowering provision, or which

67 See this chapter, section 3.2. For the position of nominee directors, see this chapter, section 2.3.

68 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC).

69 [1995] 2 AC 500.

70 [1994] 2 All ER 685.

71 [2002] HKCU 325 (unreported, HCA 4122/2000, 18 March 2002). See further chapter 4 section 4.

72 [1946] AC 459. See also discussion in chapter 6, section 6.2.3. See also *Re Boldwin Construction Co Ltd* [2003] 2 HKLRD 237, [2003] 4 HKC 156 (CFI) where this principle was applied. Section 461(1)(c) limits *Morris v Kanssen* to the extent that the acts of a person who ceased to hold office as a director would be valid despite there being no additional appointment.





is beyond or foreign to the purpose of the power. A common example is where directors utilise the resources or property of a company to carry out their private purposes which result in damage to the interest of the company. In circumstances where a third party has knowledge that directors are acting in excess of powers or authority, the third party cannot hold the company to the transaction: *Rolled Steel Products (Holdings) Ltd v British Steel Corp & Ors*[73] and *Criterion Properties plc v Stratford UK Properties LLC & Ors*.[74]

# 4. Individual Rights of Directors

**3-36** Directors, whether collectively or individually, do have rights conferred upon them. The sources of their rights are either derived from the common law, the articles or the Ordinance. Some of their rights are linked directly to their powers. Common examples are their right to exercise powers on behalf of the company to the exclusion of members[75] pursuant to powers reserved for them under the articles and their right to make commercial judgments free from judicial interference in the absence of breach of duties. Other rights are directly linked to the rules of accountability, namely rights which must necessarily be conferred upon them to enable them to properly discharge their responsibilities.

## 4.1 Inspection of financial records: common law or statutory right

**3-37** Section 374(1) of the Ordinance provides that books of account of a company shall be kept at the registered office of the company, or at some other place approved by the directors within Hong Kong or not.[76] The books of account shall at all times be open to inspection by the directors without charge. The directors must also be allowed to make a copy of the company's accounting records or request a copy without charge from the company.[77]

**3-38** There are differing views as to whether the right to have access to and inspect books and accounts of a company is a right existing at common law, or is a right conferred by statute. In *Conway & Ors v Petronius Clothing Co Ltd & Ors*,[78] Slade J (as he was then) after reviewing earlier authorities came to the conclusion

73 [1984] BCLC 466. See discussion in chapter 6, section 6.

74 [2004] 1 WLR 1846 (CA, Eng). See discussion of this case in chapter 7, sections 9.2.1 and 9.2.2.

75 Except to the extent that the articles allow the shareholders to instruct the board of directors. Eg Cap 622H, Sch 2 (Private Companies Limited by Shares), art 3(1) 'The members may, by special resolution, direct the directors to take, or refrain from taking, specified action'.

76 *Re Fareast Realty Development Ltd* [2002] HKCU 715 (unreported, HCMP 4823/2001, 11 June 2002).

77 Section 375. See *Lam Kit Sing v Chungshan Commercial Association* [2011] 3 HKLRD 323, [2011] 3 HKC 535.

78 [1978] 1 All ER 185.



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that s 147(3) of the Companies Act 1948 (UK) did not create a statutory right in favour of directors.[79] The right is a common law right. It was said:

> The right exists but it is a right conferred by the common law and not by statute. Although the legislature in s 147 of the 1948 Act (and its predecessors) implicitly recognised the existence of this right at common law, it conferred no new right: the purpose of that section and its predecessors was to impose criminal sanctions in the event of proper books of account not being kept or not being made available for inspection or in the event of a breach of any of the other duties imposed by the section. The right of a director to see his company's books of account, which is exercisable both at and outside meetings, is conferred by the common law in order to enable the director to carry out his duties as a director (see *Burn v London and South Wales Coal Co*). I leave open the question whether this right conferred on him at common law is to be regarded on the one hand as a right incident to his office and independent of contract or on the other hand as a right dependent on the express or implied terms of his contract of employment with the company, so that it may be excluded by express provision to the contrary; no such express provision to the contrary appears in the present case and counsel for the defendants accepts that the right at common law exists. The right of a director to inspect the company's books of account must determine on removal of the director from office. The right not being a statutory right, the court is left with a residue of discretion whether or not to order inspection.[80]

**3-39** The last point made in Slade J's judgment was overturned in *Oxford Legal Group Ltd v Sibbasbridge Services Ltd.*[81] It was made clear that the court is not exercising its discretion in deciding whether a director's common law right to inspect should be exercisable.[82] In Hong Kong, the decision of Slade J (as he was then) in *Petronius Clothing Co Ltd* was accepted by the Court of Appeal in *Law Wai Duen & Anor v Boldwin Construction Co Ltd & Ors*[83] with a slight hint of caution. Rogers VP said:

> Whilst I would not question the formulation of the propositions, I would emphasise that they can only be properly understood when considered in the light of the underlying legal principles.[84]

**3-40** The slight hint of caution expressed by Rogers VP is justifiable. The case of *Petronius Clothing Co Ltd* proceeded upon an acceptance by the defendants that the right exists at common law and is a right which is incidental to the office of director. Since, on the facts of the case, the plaintiffs were about to be removed as directors, the court should not enforce that incidental right until the wishes of the general meeting were known. This was in response to the arguments of the plaintiffs that s 147(3) of the Companies Act 1948 (UK) 'confers on directors a

79 The relevant words in s 147(3) of the Companies Act 1948 (UK) are exactly the same as those contained in the relevant portion of s 374 (no longer identical) of the Ordinance.
80 *Conway & Ors v Petronius Clothing Co Ltd & Ors* [1978] 1 All ER 185 at 201.
81 [2008] 2 BCLC 381, [2008] EWCA Civ 387.
82 See this chapter, section 4.1.1.
83 [2001] 4 HKC 403.
84 ibid at 408.





mandatory and unqualified statutory right'.[85] The cases of *Edman v Ross*[86] and *Burn v London and South Wales Coal Co*[87] relied on by Slade J for the proposition that the statutory provision did not create a statutory right were cases not based on any statutory provision. In arriving at the conclusion, Slade J noted the absence of statutory power on the part of the court to compel inspection in s 147 in contrast to ss 87(5),[88] 105(3)[89] and 113(4)[90] and 146(4)[91] of the Companies Act 1948 (UK). It was said:

> The wording of s 147 of the 1948 Act, in striking contrast to the four other sections of the Act which I have just mentioned, contains a provision empowering the court to order any inspection. In these circumstances, this wording, viewed in its context and in the light of the preceding law, drives me to accept counsel for the defendants' submission that s 147(3) does not itself confer on directors of a company a statutory right, enforceable by injunction, to compel a company or any directors of a company to make available its books of account for inspection by that director.[92]

**3-41** The statutory provisions relied upon by Slade J in support of the decision that the right is not a statutory right are not statutory provisions dealing with directors. The provisions deal with debenture holders, creditors, members or other authorised persons. Additionally, the right to inspect the register of debenture holders, register of charges, register of members and minute books of general meetings is subject to the payment of the prescribed fee. Evidently, these categories of persons do not owe any duty to a company and do not have any statutory responsibilities to perform. Strictly, they are outsiders to management. In contrast, directors are charged with many statutory duties under the Ordinance with respect to financial records, all of which were pointed out by Rogers VP in *Law Wai Duen & Anor v Boldwin Construction Co Ltd & Ors*:[93] the then equivalents of ss 429, 431, 610 and 379. The underlying significance of these statutory provisions is that the financial records of a company must give a 'true and fair view' of the financial affairs of a company. This duty is a collegiate responsibility which is based on individual responsibility. It is perhaps for these reasons that Rogers VP in *Law Wai Duen & Anor v Boldwin Construction Co Ltd*, in giving deference to Slade J (as he was then) in *Pretonius Clothing Co Ltd*, said that the right of inspection must nonetheless be 'properly understood ... in the light of underlying legal principles.'

**3-42** The point that the right in s 374 of the Ordinance is not a statutory but is a common law right incidental to the office of a director goes beyond academic interest. If it is indeed a common law right, then it may be capable of modification

85 [1978] 1 All ER 185 at 197.
86 (1922) 22 SR (NSW) 351.
87 (1870) 7 TLR 118.
88 Cap 622, s 310; see also Company Records (Inspection and Provision of Copies) Regulation (Cap 622I), s 9.
89 Cap 622, s 355; see also Cap 622I, s 9.
90 Cap 622, s 631; see also Cap 622I, s 9.
91 Cap 622, s 620; Cap 622I, ss 7, 9.
92 [1978] 1 All ER 185 at 199–200.
93 [2001] 4 HKC 403.



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or exclusion by the articles but not otherwise since no provision in the articles can offend the statute. In the New Zealand case of *Berlei Hestia (NZ) Ltd v Fernyhough*,[94] Mahon J in interpreting s 151(2) of New Zealand Companies Act 1955, disagreed with the view of Slade J in *Petronius Clothing Co Ltd.* After laying emphasis on the words 'shall at all times be open to inspection by any director' in the section, Mahon J said:

> Whilst I agree with Slade J that there was not in the UK statute and not in the relevant 1976 amendment thereto, any positive declaration that a director has the right of inspection of company records, in contrast with a shareholder's right to inspect the register of members, which is specifically provided for, yet it seems difficult to say, reading the New Zealand, section 151(2), that no statutory right of inspection is thereby created. I have quoted the subsection already. Its terms are substantially identical with s 147(3) of the UK Act as it then stood. When read with the other provisions imposing penal sanctions upon directors in respect of false accounts, the subsection seems clearly to create a statutory right of inspection. This was the opinion expressed by DD Prentice in (1978) 94 LQR 184 in a case note on *Conway v Petronius*, and I agree with that opinion.[95]

**3-43** In the Court of Appeal of Singapore, the question was raised in *Wuu Khek Chiang George v ECRC Land Ptd Ltd*.[96] However, the court declined to give an opinion as to whether the right is a statutory or common law right. LP Thean JA said that question in the context of the facts was immaterial as the common law right has not been modified by statute in the enactment process. This, however, does not answer the larger issue.

**3-44** In *Tsai Shao-Chung v Asia Television Ltd*,[97] the defendant director failed to call board meetings, and denied ATV's other directors access to its documents and records. The plaintiff directors thus sought an order allowing the plaintiff to inspect and take copies of ATV's books of account, board papers and management committee meeting minutes. The defendant resisted the application on the grounds that, *inter alia*, the articles prevented a director from having individual access to the company's books of account and only permitted the board to have such access and that the plaintiff would misuse the documents by using them for purposes other than those connected with the business of the company (ATV). The Hong Kong Court of Appeal, in granting the order for inspection, approved as correct the principles in Kwan J's judgment (as she then was) in *Ng Yee Wah v Lam Chun Wah*.[98] It was held that the right of a company director to inspect the company's documents is well-established at common law. This right flows from the director's general duties to the company and any individual director does not have to explain why the inspection is sought or demonstrate any particular ground or 'need to know' as a basis in order to exercise this right. The court, however, did not unequivocally decide whether s 121(3) under the predecessor Companies

94 [1980] 2 NZLR 150.
95 ibid at 163.
96 [1999] 3 SLR 65.
97 [2012] 4 HKLRD 52, [2012] 6 HKC 22.
98 [2012] 4 HKLRD 40, [2005] HKCU 957.





Ordinance (Cap 32) ('predecessor Ordinance') (largely equivalent to s 374(1) under Cap 622) adds a statutory right to the common law right.

**3-45** On the proper interpretation of *Tsai Shao-Chung v Asia Television Ltd,* there is a common law right of directors to inspect company documents that is restated, insofar as 'accounting records' are concerned,[99] in s 374(1), and thereby gain a statutory foothold. As previously suggested, the main difference between the nature of a common law right and a statutory right lies in whether the right is capable of being modified and excluded by the articles in substance. Fok JA stated, *obiter*, in *Tsai Shao-Chung* that, since the right is restated under s 374(1), there is no reason why it is not open to the court to conclude that any article seeking to restrict/limit the right is contrary to public policy and therefore void.[100] The learned judge adopted the rule in *Re Fook Lam Moon Restaurant Ltd*[101] that an article or a resolution passed by the directors or the shareholders can lay down procedural rules relating to the manner of exercise of the right of inspection by the directors, but it cannot substantially deprive the director of the right as restated in s 374(1). This should be contrasted with the wider common law right which, while there can be procedural rules dictating the manner of exercise of the right, might also be capable of being restricted substantively by the articles or a resolution passed by a proper organ of the company.[102] Whether a restriction is procedural or substantive in nature is a fact-specific question. The proposition that the wider common law rights may be restricted is defensible since directors only have the right to inspect in order to fulfil their duties to the company for the benefit of the company. The right exists not for any individual shareholder who may have a separate right to inspect under s 740 or for the personal interests of the directors. It is therefore reasonable to allow the company, in the articles or by resolution, to restrict directors' right to inspect documents depending on what the best interests of the company requires.

**3-46** By analogy with the principle that scope of a fiduciary's duties is determined by the terms of the underlying contract,[103] a company should be, insofar as allowed by statute, able to *define* the director's duties to act in the company's best interests in its articles or even in a resolution passed by a proper organ of the company. The director's right to inspect, as it flows from the director's duties to the company, should be capable of being restricted accordingly.

99 See s 373(2) and (3) as to what 'accounting records' must contain.
100 [2012] 4 HKLRD 52, [2012] 6 HKC 22 at para [39].
101 [2011] 1 HKLRD 964, [2011] HKCU 25.
102 *Re Fook Lam Moon Restaurant Ltd* [2011] 1 HKLRD 964, [2011] HKCU 25 at para [46]: 'I see no reason in principle why the company may not, by a resolution passed by a proper organ of the company, lay down procedural rules relating to the manner of exercise of such right by the directors. I leave open for further consideration whether the company may, by a board (or shareholders) resolution, seek to restrict the substantive right of the directors to inspect company documents or to take copies of them.'
103 *Kelly v Cooper* [1993] AC 205 (PC); *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145. See also *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 521 (Ch).



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**10-162** This is somewhat reflected in the English case of *Re Woven Rugs Ltd*,[272] a case which involved facts that really amounted to unfairly prejudicial conduct.

In this case, the petitioners presented a petition seeking the winding up of a solvent company under s 122(1)(g) of the Insolvency Act 1986 (equivalent to s 177(1)(f) of Cap 32) on the ground that it was just and equitable to do so, without also seeking remedy under the equivalent of ss 724–725 of Ordinance. This was despite two open offers having been made by the applicants in the striking out action/respondents in the winding up proceedings to buy out the shares of the petitioner at a fair value. The court upheld the striking out order granted by the registrar, holding that the registrar rightly concluded that the petitioners' allegations *amounted in substance to allegations of unfair prejudice*. Having regard to those allegations, there was no reasonable prospect that the petitioners would obtain a winding-up order.

On the other hand, there was, if their allegations were well-founded and leaving on one side the offers made by the respondents, a very reasonable prospect of their obtaining an order under ss 994–996 of the Companies Act 2006 (UK) against unfairly prejudicial conduct (equivalent to ss 724–725 of the Ordinance). The petitioner sought to argue that offers made to buy out their shares were not unreasonably refused since they were based on a discounted value on the basis that the holding was a minority holding. This, however, failed to convince the court that there was any reasonable prospect that a winding up order could be obtained, in light of the broad remedial discretion available to the court in an unfair prejudice action (at [56] and [69]).[273]

272 [2008] BCC 903.

273 See also *Re Botterill Builders* [2001] All ER (D) 181 (Apr) where the court refused to strike out the petition since there was no reasonable existing offer to buy out the petitioner's shares.



# CHAPTER 11

# POWERS AND ACCOUNTABILITY IN THE CROSS-BORDER CONTEXT: UNFAIR PREJUDICE AND WINDING UP PETITIONS AGAINST FOREIGN COMPANIES



## 1. INTRODUCTION

**11-1** The previous chapters focus on the limitations of powers concerning Hong Kong companies. In the modern era, business transactions frequently involve a foreign dimension. Companies are increasingly transformed into cross-border entities. It is now very common to find companies incorporated in one place (such as offshore jurisdictions like the BVI or the Cayman Islands), listed in another jurisdiction and conducting business transactions in yet a third jurisdiction.

**11-2** A winding up petition or an unfair prejudice petition may be brought against a company which encounters financial difficulties, and/or where disputes arise between its shareholders so that it is no longer feasible for the company to continue in its status quo.

**11-3** In the case of a petition brought by creditors, the purpose of a winding up order is to impose a collective regime to protect the interests of creditors, to prevent a 'race to the bottom' amongst the unsecured creditors, and to prevent some unsecured creditors from getting significant recoveries whereas others get nothing at all.

**11-4** In the case of shareholder's disputes, an unfair prejudice petition and/or a winding up petition on just and equitable grounds will be the usual remedy to enable a minority shareholder to exit the company where mutual confidence amongst the shareholders has broken down and/or the substratum of the company has failed.

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**11-5** The chapter discusses how these rules apply in such cases involving cross-border elements.[1] This raises issues that will have to be handled properly in order to ensure the effectiveness of the insolvency regimes of the different jurisdictions involved.

## 2. Unfair Prejudice Petitions

**11-6** Previously, only the Financial Secretary had the *locus standi* to petition in respect of non-Hong Kong companies in the interest of the public under s 168A of the predecessor Companies Ordinance (Cap 32) ('predecessor Ordinance'). Pursuant to the recommendation of the Standing Committee on Company Law Reform ('SCCLR') in 2001, the position has been altered by the Companies (Amendment) Ordinance 2004 which includes non-Hong Kong companies within the scope of unfair prejudice actions. The new Companies Ordinance (Cap 622) ('the Ordinance') adopted the amendment in s 722(1).

**11-7** As defined under s 722 of the Ordinance, company includes a non-Hong Kong company for the purpose of bringing an unfair prejudice petition. 'Non-Hong Kong company' is defined in s 2(1) as a company incorporated outside Hong Kong that establishes a place of business in Hong Kong on or after the commencement date of Part 16 or has established a place of business in Hong Kong before that commencement date and continues to have a place of business in Hong Kong at that commencement date. It is thus crucial for members of companies incorporated outside of Hong Kong to demonstrate that the companies have 'established a place of business' in Hong Kong.

### 2.1 'Place of business'

**11-8** Section 774(1) defines place of business to include a share transfer office and a share registration office but excludes a local representative office established, or maintained, with the Monetary Authority's approval, under s 46 of the Banking Ordinance (Cap 155).[2] It has been held that a broad common sense approach should be applied to the interpretation of 'place of business'.[3]

**11-9** The issue of whether the court has jurisdiction to make an order under s 725 for foreign companies incorporated outside of Hong Kong has recently been

1 The jurisdiction concerning derivative actions issued on behalf of foreign incorporated companies is discussed under chapter 26.

2 Previously, the proviso is more restrictive to exclude 'a place not used by the company to transact any business which creates legal obligations': see *Elsinct (Asia Pacific) Ltd v Commercial Bank of Korea Ltd* [1994] 3 HKC 365. This has again been removed by an amendment under the Companies (Amendment) Ordinance 2004: see *Re Gen2 Partners Inc* [2012] 4 HKLRD 511, [2012] HKCU 1284 at [36].

3 *Elsinct (Asia Pacific) Ltd v Commercial Bank of Korea Ltd* [1994] 3 HKC 365, still recognised as the correct approach notwithstanding the amendment in its statutory definition: *Singamas Management Services Ltd v Axis Intermodal (UK) Ltd* [2011] 5 HKLRD 145, [2011] 6 HKC 29 at [30]–[31] per Sakhrani J.





considered by the Court of Final Appeal in *Kam Leung Sui Kwan v Kam Kwan Lai* sub nom *Re Yung Kee Holdings Ltd*.[4]

The company concerned, Yung Kee Holdings Limited, was incorporated in BVI with the sole function as a holding company. It carried no business and its sole asset consisted of the shares in its wholly owned subsidiary, which in turn held subsidiaries that were incorporated and carried on businesses in Hong Kong. The petitioner sought a buy-out order under s 168A of the predecessor Companies Ordinance and alternatively, a winding-up order on the just and equitable ground. The Court of Final Appeal, affirming the lower courts' decisions, held that the courts of Hong Kong have no jurisdiction to make an order under s 168A as the company had not established a place of business in Hong Kong.

Firstly, the Court of Appeal rejected the petitioner's argument that the definition in s 774(1)[5] includes share transfers and registration of office as place of business indicates that 'a place of business' may include a place where company carries on purely administrative business. The court held that the section extends the ordinary meaning to include places which would otherwise not normally be regarded as places of business. As a result, it worked against the petitioner's submission.[6]

The Court of Appeal then considered what activities would be sufficient for finding of 'established a place of business'. The court held that 'place of business' means a place where or from which the company either carried on or possibly intends to carry on business. As for the definition of 'business', the Court of Appeal accepted that it is not confined to commercial transactions or transactions which create legal obligations.[7] However, 'business' cannot be interpreted to cover purely internal organisational changes in the governance of company itself.[8] The fact that company directors discussed its affairs and held their board meetings in a particular place is not sufficient by itself.[9]

**11-10** It should be noted that the Court of Final Appeal expressed no opinion as to the following test applied in the Court Appeal:

> [T]he "business" carried on in the present context must be activities connected with the company's paramount or subsidiary objects. As stated in *Elsinct* at 371A to B, after considering *Actiesselskabet Dampskib 'Hercules' v Grand Trunk Pacific Railway Co* [1912] 1 KB 222 at 227 to 228 and *South India Shipping Corporation Ltd v Export-Import Bank of Korea* [1985] 1 WLR 585 at 592: "The establishment of an office within the jurisdiction where activities connected with its subsidiary object and incidental to the main business are conducted would be sufficient to constitute the office a 'place of business' within that provision." And at 373C, it

4 (2016) 18 HKCFAR 631, [2016] 4 HKC 186, (2016) 21 HKPLR 363 (CFA).

5 Then s 341 of the predecessor Ordinance, as referred to in the judgment.

6 *Re Yung Kee Holdings Ltd* (2015) 18 HKCFAR 501, [2015] 6 HKC 644 (CFA) at [12].

7 See also the Court of Appeal's dicta vide *Re Yung Kee Holdings Ltd* [2014] 2 HKLRD 313, [2014] 2 HKC 556 (CA) at [84], and its discussion on *Elsinct (Asia-Pacific) Ltd v Commercial Bank of Korea Ltd* [1994] 3 HKC 365.

8 The court also noted that it is not required in fact or law for a company which does not carry on business at all to have a place of business.

9 Applying *Re Oriel Ltd* [1985] BCLC 343 at [14].



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> is necessary to consider the office's main activities in the light of the company's paramount and subsidiary objects, in order to ascertain if these activities would bring the office within the meaning of a "place of business" in s 341. These observations in *Elsinct*, though made in respect of s 341 which was worded differently at the time, are still relevant and applicable to the present provision as amended.[10]

**11-11** Further, it has been noted that[11] the Court of Final Appeal did not deal with the petitioner's argument that it is permissible to take into account the activities and affairs of the subsidiaries for the purpose of establishing a place of business in Hong Kong.[12] The Court of Appeal had rejected the argument by recounting the fundamental principle that each company in a group of companies is a separate legal entity.[13]

## 2.2 'Establishing' a place of business

**11-12** With regards to the word 'establish', the Court of Appeal in *Re Yung Kee Holdings Ltd* held that:

> [...] "business" in the inclusive definition of "place of business" in s 341 (which defines "place of business" to include a share transfer or share registration office, to close the loophole in *Badcock v Cumberland Gap Park Co* [1893] 1 Ch 362) should be interpreted in the general sense to mean activities, and not be confined to the narrow sense of commercial transactions (*Elsinct (Asia-Pacific) Ltd v Commercial Bank of Korea Ltd* [1994] 3 HKC 365 at 372F to I). The deletion of the words "but does not include a place not used by the company to transact any business which creates legal obligations" in s 341 by the Companies (Amendment) Ordinance 2004 (which came into effect on 14 December 2007) indicates that it is not necessary that the place of business is used to transact business which creates legal obligations.[14]

**11-13** The Court of Final Appeal agreed with the courts below that the word 'establish' indicates some degree of regularity and permanence of location is required.[15] On the facts, the requirement was not satisfied. The court pointed to the following facts that:

(a) there was no evidence that the company had or needed an office or to keep its books and records there;

10 [2014] 2 HKLRD 313, [2014] 2 HKC 556 (CA) at [85].

11 Victor Joffee QC and James Man, 'The *Yung Kee* Case: The Court of Final Appeal Decides', *Hong Kong Lawyer*, January 2016, at 5.

12 Whereas a company's 'sufficient connection' with Hong Kong, one of the three 'core requirements' for exercising the discretionary jurisdiction to wind-up a foreign company in Hong Kong, could be established through the affairs of the company's shareholders or subsidiaries, see discussion in (2015) 18 HKCFAR 501, [2016] 4 HKC 186, (2016) 21 HKPLR 363 (CFA) at [33]–[34].

13 The Court of Appeal dismissed the argument summarily in [2014] 2 HKLRD 313, [2014] 2 HKC 556 (CA) at [97] by referring to its discussion on the issue of sufficient connection with Hong Kong under the winding-up petition: see discussion at [51]–[65].

14 [2014] 2 HKLRD 313, [2014] 2 HKC 556 (CA) at [84].

15 (2015) 18 HKCFAR 501, [2015] 6 HKC 644 (CFA) at [15].





(b) it did not keep a share transfer or share registration office in Hong Kong;

(c) the company only had 8 resolutions which all concerned internal matters such as payment of dividends or changes to the composition of the board;

(d) many of the resolutions were paper resolutions signed solely by the Respondent on behalf of himself and other corporate shareholders, and that he could have signed it anywhere.

Accordingly, the court held that the company had not established a place of business in Hong Kong.

### 2.2.1 Listed company

**11-14** The Court of First Instance in *Re Yung Kee Holdings Ltd* noted,[16] in relation to listed companies, that often they will have sufficient activities within the jurisdiction so as to have established a place of business in Hong Kong. The observation was not disturbed on appeal:

> There will be foreign incorporated holding companies, which do not themselves transact business in Hong Kong, but do carry out significant activities here and establish a place of business in Hong Kong even if the premises from which they do so are owned or rented by subsidiaries. These will commonly be holding companies of large groups, some perhaps listed on The Stock Exchange of Hong Kong Limited. The board of directors may meet in Hong Kong, consider papers reporting on the activities of various divisions of the group, consider group strategy, raising debt financing or, in the case of listed companies, accessing capital markets, form audit, remuneration and sub-committees of the board and approve, in the case of listed companies, public announcements. Such companies will normally be registered under Part XI of the Companies Ordinance and even if they are not for some reason, there will be little room for dispute that they have established a place of business in Hong Kong. ...

**11-15** In *Re Gen2 Partners Inc*,[17] the court held that once a place of business was established, there is no requirement for the place of business to continue to exist in order to maintain the status of a non-Hong Kong company. Once a company becomes a non-Hong Kong company, it remains one and does not thereafter lose that status. The only exception is where the company established the place of business prior to the commencement of the Ordinance, the place of business would then need to be maintained up until the commencement of the Ordinance.

**11-16** Further, the failure to register as non-Hong Kong company within one month after the establishment of place of business under s 776, despite being a breach of the Ordinance, does not deprive the company of its status as non-Hong Kong company.[18]

16 *Re Yung Kee Holdings Ltd* [2012] 6 HKC 246 (CFI) at [42].

17 [2012] 4 HKLRD 511, [2012] HKCU 1284.

18 ibid at [40].



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# 3. Winding Up Petitions

## 3.1 The existing statutory framework for winding up petitions in Hong Kong

**11-17** Pursuant to s 177 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ('CWUMPO'), a company incorporated in Hong Kong may be wound up by the court under the following situations:

(a) the company has by special resolution resolved that the company be wound up by the court;
(b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
(c) the company has no members;
(d) the company is unable to pay its debts;
(e) the event, if any, occurs on the occurrence of which the articles provide that the company is to be dissolved;
(f) the court is of opinion that it is just and equitable that the company should be wound up.

**11-18** The grounds available for winding up is however different when it comes to companies that are not incorporated in Hong Kong. This is provided for under s 327(3) of CWUMPO, which provides that an 'unregistered company' may be wound up:

Ground (a): if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
Ground (b): if the company is unable to pay its debts;
Ground (c): if the court is of opinion that it is just and equitable that the company should be wound up.

**11-19** An 'unregistered company' (非註冊公司) bears a wide definition under s 326 of the CWUMPO. With the exceptions of: (1) a company registered under the current or previous Companies Ordinances in Hong Kong, (2) a partnership, association or company which consists of less than 8 members and is not formed or established outside Hong Kong and (3) a partnership registered in Hong Kong under the Limited Partnerships Ordinance (Cap 37), an 'unregistered company' includes any partnership, whether limited or not, any association and any company.[19] Thus, it includes the following;

(a) A company not registered under the Companies Ordinance of Hong Kong, including a company incorporated outside Hong Kong;
(b) A company incorporated outside Hong Kong that has established a place of business in Hong Kong and is registered in the Companies Register as a registered non-Hong Kong company.

19 For the width of the term 'association', see *Re St James' Club* (1852) 2 De GM & G 383 (members' social club not an 'association'); *Re International Tin Council* [1989] Ch 309 (CA, Eng) (international organisation established by treaty not an 'association'); and *Re Construction Confederation* [2009] EWHC 3551 (Ch) (commercial unincorporated associations).





**11-20** Among the three grounds for winding up an unregistered company under s 327(3), Ground (a) is relatively straightforward: it applies where the company is actually no longer in business or has actually been dissolved elsewhere.

**11-21** The focus of the discussion below would therefore be on Ground (b), which is brought by a creditor, and Ground (c), which is mainly relied upon by shareholders.

**11-22** It is important however to distinguish between the question of the existence of jurisdiction, and when the jurisdiction will be exercised. In other words, just because the statutory provisions set out the grounds on which a foreign company can be wound up does not mean the court will necessarily make a winding up order once the ground is present. The statutory provision is silent as to when the court will exercise its discretion pursuant to those grounds.

**11-23** As noted by Harris J in *Joint Official Liquidators of A Co v B & C*:[20]

> 11. Hong Kong is not a party to the UNCITRAL Model Law on cross-border insolvency and at the time of writing there is no prospect of it becoming so in the near future. Hong Kong's insolvency legislation contains no provisions dealing with cross-border insolvency. However, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. …

**11-24** It is to the question as to when the court will exercise its discretion in the case of a winding up of a foreign company that we now turn.

## 3.2 Petition by a creditor

**11-25** It is useful to explain by way of an example scenario:

> Company A is incorporated in the Cayman Islands, and is listed in Hong Kong. Creditor C is a creditor of Company A. Company A is unable to pay its debts, and Creditor C wants to bring a winding up petition against Company A.
>
> Will the Hong Kong court grant the winding up order?

**11-26** To answer this question, two propositions must be borne in mind.

(1) As a general principle, the Hong Kong courts has held that it is the domiciliary law of a company, namely that of its State of incorporation, which governs its status and would be the appropriate law and system under which to liquidate a foreign company[21] (the 'Domiciliary Principle'). Hong Kong private international law recognises that generally the proper jurisdiction in which to seek a

20 [2014] 4 HKLRD 374, [2014] 5 HKC 152 at [11].
21 *Re Pioneer Iron and Steel Group Co Ltd* [2013] HKCU 507 (unreported, HCCW 322/2010, 6 March 2013) at [29]; *Re G Ltd* [2016] 1 HKLRD 167, [2015] HKCU 2611 at [4].



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winding-up order of a company is that of its incorporation.[22] There must therefore be good reasons for the Hong Kong courts to wind up a company incorporated not in Hong Kong even though the discretionary jurisdiction is expressly conferred under s 327.[23]

(2) The Hong Kong courts, like the English courts, have adopted what is called the 'modified universalism' approach. In essence, this means that the Hong Kong courts have ascribed a universal effect to its own insolvency proceedings. Hong Kong law, like English law, assumes that such proceedings will take effect in relation to all of the company's assets, no matter where they are located in the world. The making of a winding-up order under Hong Kong law is regarded as having worldwide effect. This is to be contrasted with a 'territorialist' approach under which each country applies its own insolvency rules to administer the company's assets within its jurisdiction.

**11-27** The reasons for adopting 'modified universalism' have been explained by Lord Sumption in *Singularis Holdings Ltd v PricewaterhouseCoopers*[24] in the Privy Council:

> 23. The principle of modified universalism … is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally.

**11-28** As explained by Lord Hoffmann in *Re HIH Casualty and General Insurance Ltd*:[25]

> 6. … English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.
>
> 7. This [the principle of universalism] was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration … Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of 'modified universalism': see also Fletcher, *Insolvency in Private International Law*, 2nd edn (Oxford, OUP, 2005), at pp.15–17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one.

22 *Re Yung Kee Holdings Ltd* [2012] 6 HKC 246 (CFI) (this point was affirmed on appeal: [2014] 2 HKLRD 313, [2014] 2 HKC 556 (CA) and (2015) 18 HKCFAR 501, [2015] 6 HKC 644 (CFA) at [19]).

23 See this chapter below.

24 [2015] AC 1675 (PC).

25 [2008] 1 WLR 852 (HL).





…

> 30. That principle [the modified universalism] requires that English courts should, so far as is consistent with justice and UK public policy, *co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.* [Emphasis added]

**11-29** And in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc*,[26] Lord Hoffmann said, speaking for the Privy Council:

> The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.

**11-30** The US Bankruptcy Court accepted in *In re Maxwell Communication Corpn*[27] that the United States courts have adopted modified universalism as the approach to international insolvency:

> [T]he United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors.

**11-31** Thus, it appears that while the Hong Kong court is quite willing to exercise its powers to assist foreign winding up proceedings, it will also be conscious to avoid inconsistent results. Using the example of Company A above, Creditor C has two routes which it can adopt to seek a winding up order against Company A:

(a) The first route is to seek a winding up order against Company A in the Cayman Islands, and then if necessary, invoke the Hong Kong court's inherent jurisdiction and seek the Hong Kong court's assistance by granting specific relief or by recognizing powers of the foreign liquidator in Hong Kong.[28] This will be done where (i) the foreign substantive law to be applied is broadly similar to local insolvency law, and (ii) the specific relief which is sought is available under local law.

(b) The second route is by seeking a separate winding up order in Hong Kong pursuant to s 327 of the CWUMPO. If an unregistered company is already in liquidation in its State of Incorporation, a liquidation in Hong Kong will generally be treated as ancillary to it in the sense that the functions of the liquidator would be framed by court order to provide that he is to collect in the Hong Kong assets, to settle a list

26 [2007] 1 AC 508 (PC) at [16].

27 (1994) 170 BR 800 (Bankr SDNY).

28 *Joint Official Liquidators of A Co v B & C* [2014] 4 HKLRD 374, [2014] 5 HKC 152.



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of Hong Kong creditors and to transmit the assets and the list to the principal liquidators to enable a dividend to be declared and paid.[29]

### 3.2.1 Route 1: seeking relief or recognition to assist foreign winding up proceedings pursuant to the court's inherent jurisdiction

**11-32** The first route is for Creditor C to go to the Grand Court of the Cayman Islands to seek a winding up order against Company A. The liquidator appointed in Cayman Islands may then come to Hong Kong to seek recognition of his powers if necessary.

**11-33** The legislative framework in Hong Kong does not provide a mechanism whereby a foreign liquidator seeking insolvency-related relief may be recognised or assisted in Hong Kong, and in the past an overseas liquidator wishing to act in Hong Kong as a liquidator would have to be appointed in the domestic liquidation of the company in Hong Kong.[30] This has however changed recently, with the decision of Harris J in *Re Joint Official Liquidators of A Co v B & C*,[31] whereby it was confirmed that the Hong Kong court has inherent jurisdiction in favour of recognising and giving assistance to an overseas liquidator.

**11-34** The process of recognition and seeking relief in aid of a foreign jurisdiction is generally commenced by the foreign liquidator. In practice, the liquidator appointed in the foreign court will seek a letter of request from that court under a similar substantive insolvency law to make an order of a type which is available to a provisional liquidator or liquidator under Hong Kong's insolvency regime. This letter of request will then be presented to the Hong Kong court.

**11-35** In deciding whether to grant assistance to the foreign liquidator, the Hong Kong court will ask two questions:

(a) Whether the foreign substantive law to be applied is broadly similar to local insolvency law. This is because the assistance granted to foreign court is subject to local law and local public policy.
(b) Whether the relief/recognition sought is available under local law. The court can only act within the limits of its own statutory and common law powers.

**11-36** The reasons why a liquidator would seek relief from the court or would seek recognition of its powers include the following:

(a) To remit assets to a foreign insolvency, being the principal place of winding up: a foreign liquidation has no automatic consequences in relation to the property of a foreign company in a local jurisdiction.[32]

29 *Re Pioneer Iron And Steel Group Co Ltd* [2013] HKCU 507 (unreported, HCCW 322/2010, 6 March 2013) at [30].
30 *Re Irish Shipping Ltd* [1985] HKLR 437, [1985] HKCU 39.
31 [2014] 4 HKLRD 374, [2014] 5 HKC 152.
32 *Joint Official Liquidators of A Co v B & C* [2014] 4 HKLRD 374, [2014] 5 HKC 152 at [6].





(b) To obtain the co-operation of banks and auditors.[33]
(c) To obtain the production of oral or documentary evidence, and/or to seek an oral examination of officers of the company pursuant to s 221 of the predecessor Ordinance (now s 286B of Cap 32).[34]

#### *3.2.1.1 Distinction between assistance concerning information v assistance concerning assets*

**11-37** An order from the Hong Kong courts is not a prerequisite for each and every action by a foreign liquidator, and an application for a recognition order should not be made routinely lest there be costs consequences. A distinction is drawn between information and assets. It was held in *Re Joint Official Liquidators of A Co v B & C*[35] that, in relation to information, if a person in Hong Kong receives a request or instruction from a liquidator of a foreign company, with which if it had come from the board of directors of that foreign company, he would have complied, he should act upon the request or instruction once he is satisfied that the liquidator was properly appointed in the place of incorporation without seeking a court order. On the other hand, if a foreign liquidator wishes to deal with the assets of the company in Hong Kong and/or to vest title to local property in himself, for example, if the liquidator seeks to transfer money standing to the credit of the company into a bank account, whether to new company accounts or into a liquidation account, he should obtain an order from the court authorising him to do so and, if relevant, vest him with title.[36]

**11-38** In *Bay Capital Asia Fund LP*,[37] the liquidators attempted to justify their seeking of a recognition order from the court by arguing that (a) the court should clarify how and in what circumstances a lay person in Hong Kong should be satisfied that a liquidator was properly appointed in the company's place of incorporation, and (b) the court should address the question whether as a matter of principle once a lay person is satisfied that a foreign liquidator has been properly appointed in the place of incorporation, he should accord automatic recognition to the foreign liquidator and accede to his request for information and documents even in the absence of a recognition order. The documents sought in that case from the bank, which the bank initially refused to produce, were described as 'routine' by the court, and were as follows:

33 ibid at [4]–[5].
34 *Joint Official Liquidators of A Co v B & C* [2014] 4 HKLRD 374, [2014] 5 HKC 152; *Re BJB Career Education Company Ltd* [2016] HKCU 2797 (unreported, HCMP 1139/2016, 18 November 2016) (where the court granted an order for oral examination of the company's officers pursuant to s 221 of the predecessor Ordinance). Note that s 221 of the predecessor Ordinance has been repealed and replaced by s 286A of Cap 32 with effect from 13 February 2017.
35 [2014] 4 HKLRD 374, [2014] 5 HKC 152 at [4]–[6].
36 *Bay Capital Asia Fund LP v DBS Bank (Hong Kong) Ltd* [2016] HKCU 2627 (unreported, HCMP 3104/2015, 2 November 2016) at [5] to [6].
37 *Bay Capital Asia Fund LP v DBS Bank (Hong Kong) Ltd* [2016] HKCU 2627 (unreported, HCMP 3104/2015, 2 November 2016).



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(a) A list of all accounts in the name of the company including details of the current balance of each account;
(b) A listing of all transactions (ie deposits and withdrawals) for the past 12 months for each account. If any accounts were closed by the company, a listing of all transactions for the 12 months preceding the closure of the accounts;
(c) A list of all documents in the name of the company held by the bank for safe custody;
(d) Information on any security the bank may hold from the company or confirmation that the bank held no such security;
(e) Up-to-date details of the bank's claims against the company, if any;
(f) Copies of Guarantee Documents, if any.

The court however found that these were really attempts to deflect criticism away from the liquidators and their solicitors. It was found that 'an international bank in Hong Kong asked to provide a liquidator appointed in the Cayman Islands with bank statements is in a very different position and if advised responsibly should have no difficulty in establishing quickly that they should comply with the request', even in the absence of any court order.[38] On the other hand, the court did recognise that there may be jurisdictions with less familiar systems and as a result, cases in which it is reasonable for a bank to request a recognition order. As for the second question which was framed as a matter of general principle, the court held that it did not arise for determination on the facts and left the question opened, although that should not be read as an invitation to argue otherwise given the sentiment expressed in the authorities towards routine, unproblematic requests for information.[39]

#### *3.2.1.2 Limits on the courts' powers of recognition*

**11-39** Despite the willingness of the Hong Kong courts to respect judicial comity and to assist winding up in foreign jurisdictions, there are limits to the exercise of its power. One of them is that the relief sought must be a relief that is available in Hong Kong law. An illustrative case is the case of *The Joint Administrators of African Minerals Ltd (in admin) v Madison Pacific Trust Ltd.*[40] The brief facts of the case are as follows:

- In that case, the company, African Minerals Limited ('African Minerals'), was incorporated in Canada on 26 March 1986, and then continued and registered in Bermuda on 6 January 2004. It is a mineral exploration and development company, with significant iron ore interests in Sierra Leone, West Africa. These interests are held through its full ownership in four Bermudian Companies. African Minerals granted charges over the shares it owned in two of the Bermuda companies, for the purpose of obtaining loan facilities.

38 ibid at [8] to [10].
39 ibid at [11].
40 [2015] 4 HKC 215.





- In 2014, African Minerals encountered financial difficulties owing, it is suggested, to a fall in iron ore prices in international markets and the Ebola epidemic in Sierra Leone. On 26 March 2015 joint administrators were appointed over the company by the High Court in London. Pursuant to paragraph 43(2) of Schedule B1 to the Insolvency Act 1986 (UK),[41] a moratorium was imposed on the making of an administration order.
- On 13 April 2015 an application was made and granted by the London court for a letter of request to be issued to the Hong Kong court, asking for, amongst other things, that pending the final determination of the question as to whether the moratorium set out in paragraph 43(2) of Schedule B1 to the English Insolvency Act 1986 applies extra-territorially, no step be taken by the Respondent to enforce security over the property of the company except (a) with the consent of the Applicants or (b) with the permission of the High Court of England. The purpose was to prevent the enforcement of the charges over the shares in the two Bermudian companies owned by African Minerals.

The Hong Kong court refused to accede to the letter of request. The reasoning of Harris J was mainly as follows:[42]

- There is no equivalent statutory, common law or equitable powers in Hong Kong as that under the administration regime in the UK to grant a moratorium to prevent the enforcement of security. The court was particularly concerned that the creditor was a secured creditor and was enforcing its proprietary rights. This should be contrasted with a later case, *Joint Official Liquidators of Centaur Litigation SPC (in liq)*,[43] where the foreign liquidators sought the court's recognition of an order made by the Grand Court of the Cayman Islands that requires any person wishing to commence proceedings in Hong Kong against any of the companies to obtain first the court's leave. It was held that there is nothing objectionable with such an order since the term was consistent with an equivalent statutory rule under s 186 of the CWUMPO.
- A Hong Kong company or its liquidator could only seek an order which would achieve the effect of the order sought by the Administrators in limited circumstances. They could do so if it could be demonstrated that the proposed enforcement would improperly prejudice the equity of redemption. It might also be possible to do so if it could be demonstrated that the company after having failed to meet its payment obligations had become able to do so and thus it would be inequitable to allow enforcement of the security. Applications made on either

41 Paragraph 43(2) provides that, 'no step may be taken to enforce security over the company's property except (a) with the consent of the administrator, or (b) with the permission of the court.'
42 [2015] 4 HKC 215 at [12].
43 [2016] HKCU 560 (unreported, HCMP 3389/2015, 10 March 2016).



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of these grounds would be for injunctions and it would be necessary for the applicants to establish an arguable case and comply with the requirements normally imposed on an applicant for an injunction such as the need to provide an undertaking in damages. This was not however the basis for the application made.

**11-40** On the other hand, the flexibility of the powers of the court under common law ought not to be underestimated. While the courts' statutory powers are fixed by the terms of the relevant statutory provision (and it is now clear that there is no ability to apply such provisions in aid of a foreign insolvency 'by analogy'), the common law powers of the court are inherently more flexible and capable of development.

**11-41** In *Singularis Holdings Ltd v PricewaterhouseCooper*[44] the Privy Council recognised that common law powers in this area are capable of development:

> What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise.

**11-42** In this respect, in *Singularis* the Privy Council identified a new common law power to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. However, this power is subject to a number of limitations: (a) it is only available to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers; (b) it does not enable the officeholders to do something which they could not do under the law under which they were appointed; (c) it only applies when the information is necessary for the performance of the officeholder's functions; (d) the order sought must be consistent with the substantive law and public policy of the assisting state; and, (e) its exercise is conditional on the applicant being prepared to pay the third party's reasonable costs of compliance.

**11-43** In *The Joint Provisional Liquidators of BJB Career Education Co Ltd*,[45] the court confirmed that its power of assistance extends to ordering an oral examination of a director of a company and to order production of documents by a director of a company to assist a foreign liquidator, as the power existed in the jurisdiction of liquidation (in that case Cayman Islands), and that the power also existed in Hong Kong being the assisting jurisdiction under s 221 (now s 286B of the CWUMPO). The argument that a request for oral examination infringed A.96 of the Basic Law was also rejected, as reciprocity was not a necessary component

44 [2014] UKPC 36, [2015] 2 WLR 971, [2015] BCC 66 (PC). See also *Joint Official Liquidators of Centaur Litigation SPC* [2016] HKCU 560 (unreported, HCMP 3389/2015, 10 March 2016).

45 *The Joint Provisional Liquidators of BJB Career Education Co Ltd* sub nom *Re BJB Career Education Company Ltd* [2016] HKCU 2797 (unreported, HCMP 1139/2016, 18 November 2016).





of recognition and assistance.[46] The court cited the judgment of Lord Sumption in *Singularis* concerning the nature and limits of the principle of modified universalism. It was held that since the power to provide judicial assistance was founded firmly in the common law, Article 8 of the Basic Law[47] became relevant, and since the common law power of recognition and assistance was clearly part of the laws in force in Hong Kong prior to 1997 and given their character in my view there is no reason to suggest that they contravene the Basic Law.[48]

**11-44** In summary, the position for recognition and assistance to a foreign winding up is as follows:

(a) the principle of 'modified universalism' is accepted to form part of the common law;
(b) relief will be available at common law to support a foreign insolvency including, in particular, the remittal of assets to a foreign insolvency and the stay of actions against the debtor's assets in the local jurisdiction;
(c) other forms of relief may also be available, and there is a recognised ability for the common law to develop in this respect; but,
(d) in every case, such powers will be subject to the substantive law and public policy of the local jurisdiction *and* the limitation that they will go no further than the powers available to the officeholder in his home jurisdiction.

### 3.2 2 Practice and procedure for seeking recognition/granting assistance to liquidators appointed by foreign court

**11-45** The practice concerning recognition in Hong Kong for a foreign liquidation order would usually be as follows:[49]

(a) It is for its liquidators to consider whether or not it is necessary to seek recognition and potentially assistance from the court in Hong Kong.
(b) If they do, the most straightforward way for them to proceed is to obtain a letter of request from the local court and then apply ex parte by way of written application for a recognition order.
(c) If a matter is straightforward, an order recognising a foreign appointment will be granted very swiftly. Applications should comply with Practice Direction 3.5 and be accompanied by a paginated and indexed hearing bundle to assist the court in processing them quickly.

46 ibid at [11]–[13].

47 'The laws previously in force in Hong Kong, that is, the common law... shall be maintained, except for any that contravenes this Law and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.'

48 ibid at [14]–[15]

49 *L v G Ltd* [2016] 1 HKLRD 167, [2015] HKCU 2611; *Re Pacific Andes Enterprises (BVI) Ltd (in liq)* [2017] HKCU 245 (unreported, HCMP 3560–3/2016, 27 January 2017).



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**11-46** Insofar as the form of a recognition and assistance order pursuant to foreign letter of request is concerned, the court has stated that the standard form of order ought to be as follows, although it may be possible to refine its provisions and practitioners should not feel bound to precisely use the same language if they consider that amendments are appropriate:[50]

1. The appointment of [name of liquidator] of [firm] as Joint Official Liquidators (the "Liquidators") of [name of company] (the "Company") be recognised by this Court.
2. The Liquidators have and may exercise such powers as are available to them as a matter of Cayman Islands law and would be available to them under the laws of Hong Kong as if they had been appointed liquidators of the Company under the laws of Hong Kong and in particular, but without prejudice to the generality of the foregoing, for the following purposes:
   - 2.1 to locate, protect, secure and take into their possession and control all assets and property within the jurisdiction of this Court to which the Company is or appears to be entitled;
   - 2.2 to locate, protect, secure and take into their possession and control the books, papers and records of the Company including the accounting and statutory records within the jurisdiction of this Court and to continue their investigations into the assets and affairs of the Company and the circumstances which gave rise to its insolvency;
   - 2.3 to retain and employ barristers, solicitors or attorneys and/or such other agents or professional persons as the Liquidators consider appropriate for the purpose of advising or assisting in the execution of their powers and duties; and
   - 2.4 so far as may be necessary to supplement and to effect the powers set out at paragraphs 2.1 and 2.2 above, to bring legal proceedings and make all such applications to this Court, whether in their own names or in the name of the Company, on behalf of or for the benefit of the Company including any applications for ancillary relief such as freezing orders, search and seizure orders in any legal proceedings commenced, and/or for orders for disclosure, the production of documents and/or examination of third parties which it is anticipated may be made by the Liquidators to facilitate their ongoing investigations into the assets and affairs of the Company and the circumstances which gave rise to its insolvency.
3. Anything that is authorised or required to be done by the Liquidators is to be done by all or anyone or more of the persons appointed.
4. For so long as the Company remains in Liquidation in the Cayman Islands, no action or proceeding shall be proceeded with or commenced against the Company or its assets or affairs, or their property within the jurisdiction of this Court, except with leave of this Court and subject to such terms as this Court may impose.
5. The Liquidators do have liberty to apply.
6. The costs of the application be paid out of the assets of the Company as an expense of the liquidation.

50 *Re Rennie Produce (Aust) Pty Ltd (in liq in Australia)* (unreported, HCMP 1640/2016, 26 August 2016) at [3]–[4], referring to and reaffirming the form set out in the appendix to the judgment in *Re Centaur Litigation SPC (in liq)* [2016] HKCU 560 (unreported, HCMP 3389/2015, 10 March 2016).





**11-47** On the other hand, insofar as specific orders are sought for third parties (in that case, banks) to produce documents pursuant to a letter of request of assistance issued by a court whose own insolvency regime contains provisions substantially similar to s 221 (now s 286B of the CWUMPO), the following terms ought to be used as a starting point:[51]

1. The Respondent produce copies of the following documents to the Applicants' Solicitors by Monday, 19 September 2016:
   - a. Documents identifying the account holders, contact details, contact persons, addresses and signatories, of the account listed in Schedule 1 [not included in this Decision], including copies of the signatures of each of the signatories to that account.
   - b. Documents identifying any accounts held by X in the name of or to the benefit of the persons or entities in Schedule 2 [not included in this Decision], including documents identifying the account numbers, account names, account holders, contact details, contact persons, addresses and signatories of each such account including copies of the signatures of each of the signatories to those accounts.
   - c. Statements or other documents recording or evidencing the movement of funds into and out of the account listed in Schedule 1 and any other accounts held in the name of or to the benefit of any of the persons listed in Schedule 2, for the period from 1 to 31 March 2013.
2. The Respondent keep the documents sought in paragraph 1 in safe custody until copies of the documents are produced to the Applicants' Solicitors.
3. There be liberty to apply by letter to the Clerk of the Honourable Mr Justice Harris.
4. The Applicants pay the reasonable photocopying costs of the Respondent for the production of the documents sought in paragraph 1, at a rate of no more than HK$7 per page.

**11-48** In *Re Pacific Andes Enterprises (BVI) Ltd (in liq)*,[52] the liquidators sought an additional power 'to obtain from third parties such documents and information as concern the company, including its promotion, formation, business dealings, accounts, assets, liabilities or affairs in order to facilitate the liquidators investigations into the assets and affairs of the company and the circumstances which gave rise to its insolvency'.[53] The court, while agreeing that such power would probably assist the liquidators, declined to grant such power. It was thought that the proposed wording might be read as giving them a right to obtain from third parties documents that the liquidators are not entitled to without an order of the court pursuant to s 221(3) (now s 286B(1)(d) of the CWUMPO), or some

51 *Re Rennie Produce (Aust) Pty Ltd* (ibid) at [5]; cf *Bay Capital Asia Fund LP v DBS Bank (Hong Kong) Ltd* [2016] HKCU 2627 (unreported, HCMP 3104/2015, 2 November 2016), where the court held that no court order was required. The difference presumably was that the documents sought in *Bay Capital Asia Fund LP* were for identifications of bank accounts of the company itself, whereas in *Re Rennie Produce (Aust) Pty Ltd* the bank accounts concerned were not held in the name of the company.

52 [2017] HKCU 245 (unreported, HCMP 3560–3/2016, 27 January 2017).

53 ibid at [7]



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# CHAPTER 20

# GENERAL MEETINGS UNDER THE ORDINANCE



## 1. INTRODUCTION

**20-1** The Companies Ordinance (Cap 622) ('the Ordinance') provides for several kinds of meetings, each capable of being categorised by reference to the nature of the business and the circumstances under which these meetings are or may be convened, or by reference to the body of persons who are entitled to attend and vote on the business of the meeting. As a general rule, the repository of powers to make decisions is either in meetings of the shareholders or the board of directors, depending on which organ the decision-making power is reposed in. While the Ordinance contains several provisions regulating general meetings, it does not provide for the regulation of directors' meetings. Directors' meetings are provided for and regulated by the articles of association.

**20-2** General meetings other than annual general meetings are commonly referred to as 'extraordinary general meetings'. The distinction is between general meetings which must be held within the times specified under the Ordinance, and those which must be held as and when the approval of shareholders is required in order to give validity to the proposed acts of the company which are not within the competence or power of the directors, or when the shareholders themselves desire a course of action to be taken by the company with respect to its affairs which are within their competence or power. This division of powers between the board of directors and the body of shareholders acting in general meetings is a fundamental concept of company law.[1]

**20-3** This chapter discusses the general meetings of companies, meetings of directors and highlights issues which practitioners are likely to encounter.

1 See chapter 5.

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# 2. The Annual General Meeting

**20-4** The predecessor Companies Ordinance (Cap 32) ('predecessor Ordinance') provides that shareholders in annual general meetings are entitled to consider and approve the accounts, balance sheet, reports of directors and auditors, the declaration of a dividend, the election of directors in place of those retiring and the appointment of, and the fixing of the remuneration of the auditors.[2] These items are classified as ordinary business under art 54 of Table A in the predecessor Ordinance.

**20-5** Under the new Companies Ordinance regime, consideration of some of these items becomes mandatory. For example, directors must at its annual general meeting lay before a company the reporting documents (including financial statements and directors' report for that financial year and the auditors' report on those financial statements[3]) of the company. The failure of which constitutes a criminal offence on the part of the company and each and every responsible person.[4]

**20-6** It is also mandatory for a company to appoint auditors and fix their remuneration at each annual general meeting, who will hold office from the conclusion of that annual general meeting till the next annual general meeting.[5]

**20-7** Depending on its articles, a company will also often consider the question of dividends,[6] as well as the rotation and re-election of directors, at annual general meetings.

## 2.1 Time to hold

**20-8** Section 610(1) of the Ordinance provides:

> (1) Subject to subsections (2) and (3), a company must, in respect of each financial year of the company, hold a general meeting as its annual general meeting within the following period (in addition to any other meetings held during the period)—
>
> (a) in the case of a private company or a company limited by guarantee, 9 months after the end of its accounting reference period by reference to which the financial year is to be determined; and
>
> (b) in the case of any other company, 6 months after the end of its accounting reference period by reference to which the financial year is to be determined.[7]

2 See s 114C(7) and arts 52 and 54 of Table A of the predecessor Companies Ordinance.

3 Sections 357(2), 429(1) of the Ordinance.

4 Section 433(1).

5 Sections 394, 396(1) and 404(1).

6 Companies (Model Articles) Notice (Cap 622H), Sch 1 (Public Companies Limited by Shares) art 23; Sch 2 (Private Companies Limited by Shares) art 22.

7 Cap 622H, Model Articles, Sch 1 (Public Companies Limited by Shares), art 44(1); Sch 2 (Private Companies Limited by Shares), art 40(1).





**20-9** Thus, all annual general meetings must be held once in every calendar year. For the purpose of s 610(1), 'a private company' does not include a private company which, at any time during the financial year, is a subsidiary of a public company.[8]

**20-10** Generally, the function of an annual general meeting is to provide opportunity for members to question the stewardship of the company in the preceding year and to influence future policy and management: *Caparo Industries plc v Dickman & Ors*.[9] In terms of commercial practicality it is a cost burden. From local experience, most institutional investors in large companies, including listed companies, do not participate in annual general meetings but rely on briefings by corporate officers, apply pressure behind the scenes and vote by proxy. As for smaller companies, holding annual general meetings may just be unnecessary and onerous. Further, the statements and reports to be considered are at least 6 months old by the time of meeting and members are likely to be more interested in the current position of the company than in reviewing the previous accounts. The legislature took into account these matters when enacting the current Companies Ordinance.

**20-11** Under the current Companies Ordinance, companies may dispense with the physical holding of an annual general meeting under ss 612 to 614.[10]

**20-12** Section 612 provides:

> (1) A company is not required to hold a meeting in accordance with section 610 if –
>
> (a) everything that is required or intended to be done at the meeting (by resolution or otherwise) is done by a written resolution; and
>
> (b) a copy of each document that under this Ordinance would otherwise be required to be laid before the company at the meeting or otherwise produced at the meeting is provided to each member, on or before the circulation date of the written resolution.
>
> (2) A company is also not required to hold an annual general meeting in accordance with section 610 if—
>
> (a) the company has only one member; or
>
> (b) all of the following are satisfied—
>
> (i) the company has by resolution passed in accordance with section 613(1) dispensed with the holding of the annual general meeting;
>
> (ii) the company has not revoked the resolution under section 614(1), or the company has revoked the resolution under that section but is not required to hold an annual general meeting under section 614(2)(b);

8 Section 610(4).

9 [1990] 2 AC 605 (HL) at 661–662.

10 For the previous position, see predecessor Ordinance, s 111(6).



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(iii) no member of the company has required the holding of the annual general meeting under section 613(5).

**20-13** Alternatively, a company may pass a resolution to dispense with the holding of an annual general meeting in accordance with s 610. Such resolution can however only be passed with the unanimous consent of all members entitled to vote.[11]

**20-14** Dispensation of the need to physically hold an annual general meeting does not excuse a company from compliance with the timeframes within which statutory businesses must be carried out and completed.

## 2.2 Adjournment and statutory business

**20-15** Any statutory business required to be transacted at an annual general meeting for a particular year must be transacted within the statutory period for the holding of that annual general meeting. A company cannot adjourn an annual general meeting beyond the prescribed period to transact statutory business and thereafter claim that the statutory business was transacted within statutory time. In *Guss v Veenhuizen*,[12] the company held its annual general meeting in the calendar year 1972. On that date, the accounts were not ready and the meeting resolved to adjourn the annual general meeting to the next calendar year. A meeting was in fact held on 8 August 1973 and the accounts were presented for the year 1972. A complaint was lodged that the accounts presented on 8 August did not give a true and fair view of the state of affairs of the company for the financial year ending 30 June 1972 and, as such, an offence was committed. In deciding the question, the court had to consider whether the adjourned annual general meeting held on 8 August 1973 was a general meeting for the year 1972, and if so, whether the accounts would therefore form part of the accounts 'required for the purposes of Act' under s 375(2) of the Australian statute.[13] The learned magistrate dismissed the charge on the ground that the meeting of 8 August 1973 was not part of the annual general meeting of the company for the year 1972, and therefore, the accounts presented on that date did not form part of the accounts required to be transacted or tabled for the annual general meeting for the year 1972. The learned magistrate reasoned that the annual general meeting could not adjourn itself beyond the calendar year. On appeal, the High Court of Australia affirmed the decision of the learned magistrate. In the High Court, Barwick CJ said:

> The propriety of the magistrate's action in dismissing the complaints must turn on whether an annual general meeting of a company must complete within the calendar year the business the Act requires it to do (see s 136(1) of the Act). It is quite evident, to my mind ... that it was the legislative intention that companies should, within the calendar year, take all the steps which are required to be taken at an annual general meeting. To allow those things which ought to be done at an annual general meeting to be done at any indefinite time after the conclusion of the calendar year quite obviously would open the door to considerable abuse and

11 Section 613 of the Ordinance.
12 [1976] 2 ACLR 337.
13 The modern Hong Kong equivalent is s 304 of the Ordinance.





> would, indeed, in my opinion, defeat what I have indicated was the legislative intention. The draftsman has secured the effectuation of that intention by providing that the annual general meeting shall be held before the expiry of the calendar year ... In my opinion, the word 'held' in this connection means called and concluded within the calendar year. It is to a meeting which will have concluded its business before 31 December of the year that the balance sheet must be produced with auditors' certificates and directors' endorsements. The question is not really whether a company has power to adjourn its annual general meeting but whether, if it does not conclude its meeting within the confines of the calendar year, it performs the obligation placed upon it by s 136 of the Act.[14]

Stephen and Mason JJ, in response to the argument that there was no impediment to the company's power of adjournment, said:

> The respondent also points to the existence of the ordinary power to adjourn a meeting, in this case conferred by art 58, and to the absence of any express provision in the Act prohibiting the adjournment of an annual general meeting beyond the period mentioned in s 136(1). So much may be conceded, but the question for decision is whether that section impliedly abrogates or cuts down the power to adjourn. A complete abrogation of the power to adjourn beyond the calendar year would deny to shareholders the advantage of instituting inquiries in relation to the accounts before deciding to approve or disapprove them if the initial meeting were convened at the end of the calendar year. However, if 'held' means something more than 'convened' there is nothing in s 136 which would preclude an adjournment to a date in the succeeding year with the permission of the commissioner pursuant to s 136(2)(b). And it is possible that, even without such permission, s 136 does nothing to prevent the adjournment of an annual general meeting so far as it relates to business not required by law to be transacted at such a meeting.[15]

**20-16** Section 587 of the Ordinance appears to be an endorsement of the principle stated in *Guss v Veenhuizen*, namely, all resolutions passed at an adjourned annual general meeting shall for all purposes be treated as having been passed on the date it was in fact passed and not on the original date of the annual general meeting. The offence in s 429(3) in not laying reporting documents (which includes the financial statements, the directors' report and the auditor's report on the financial statements for a financial year[16]) at the annual general meeting within the time frame stipulated in s 429(1) is excused if the court extends time to perform the act or duty under s 431.

# 3. Failure to Hold Annual General Meeting

**20-17** The annual general meeting is an important meeting for shareholders. This is primarily because that is the only time they come into direct contact with the management and get to know from them what had happened in the preceding year and what is going to happen in the future. Also, shareholders get an opportunity to elect directors. Several consequences arise when a company fails

14 [1976] 2 ACLR 337 at 339.
15 ibid at 342.
16 Section 357(2).



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to hold its annual general meeting within the statutory time frame. The principal consequences are discussed below.

## 3.1 Statutory penalty

**20-18** Under s 610(9), if there is a default in holding a meeting of a company in accordance with subsection (1), the company and every responsible person commits an offence, and each is liable to a fine at level 5. Where there is failure to hold an annual general meeting within time under s 610, there will also invariably be default under s 429 which deals with the laying of financial statements, directors' report and auditor's report on the financial statements at annual general meetings. Directors who fail to take all reasonable steps to secure compliance with s 429 are liable to a fine of HK$300,000. Directors who wilfully fail the same are liable to the same level of fine and to imprisonment for 12 months.

## 3.2 Statutory remedy for shareholders

**20-19** Section 610(7) of the Ordinance confers a right upon shareholders to make an application to the court to order the holding of a general meeting in the event of default by the company. Jurisdiction only accrues to the court to make the order upon the happening of actual default. In *Re NBN Ltd*,[17] an application was made to the court under s 136(4) of the Companies Act 1961 (NSW)[18] for an order that the annual general meeting be called for a date on or before 31 December 1981. At the time the application was made, the company was not in default, but the applicant had suspected that the company would not hold the meeting within the calendar year as the accounts had not been prepared. After the application to the court was made, the company circulated the accounts and also applied for an extension of time to the Corporate Affairs Commission to hold the meeting.[19] The court rejected the argument that the evidence before the court showed that the meeting would not be held on or before 31 December 1981. It also dismissed the argument that no regard should be given to the application for extension of time. The court held that its power under the subsection is predicated upon a default being made, and since no default had been made, any order of the court would have the effect of pre-empting the decision of the Corporate Affairs Commission whether to extend time or not.

**20-20** Under s 610(7), the court has very broad discretionary powers to make ancillary or consequential directions as it deems expedient when allowing an application at the instance of a member. These include the power to issue directions to modify or supplement the rules relating to the convening, holding and conduct of the ordered meeting. Under s 610(8), the court-ordered meeting

17 (1981) 6 ACLR 211, (1982) 1 ACLC 31.

18 The modern Hong Kong equivalent is s 610(7).

19 Section 610(5) now enables a company to apply to court for an extension of time to hold an annual general meeting. See *Re Pioneer Industries (Holdings) Ltd* [2015] 1 HKLRD 1, [2014] HKCU 2561 for an example of extension being granted in a highly technical breach of the Ordinance by a listed company undergoing privatisation.





shall be deemed to be an annual general meeting unless contrary directions are issued. A contrary direction is likely to be issued if the court-ordered meeting is outside the calendar year in which the company ought to have held its annual general meeting. In such cases, the court-ordered meeting would not be treated as an annual general meeting unless at that meeting the company resolves that it shall be so treated.

## 3.3 Effect on directorship

**20-21** Articles of association normally provide that the tenure of the office of a director is from one annual general meeting to another and directors who were appointed to fill casual vacancies must retire at the next annual general meeting.[20] Depending upon the way in which articles are drafted, the failure to hold an annual general meeting within time may result in a situation in which all or some of the directors are no longer directors and s 461 of the Ordinance cannot be resorted to save their acts on the ground of 'defect' in appointment. This is because of the lapse of the tenure of office held by the affected directors: *Ong Kim Yim, Mary v Sheecon Trading Co Ltd & Ors*.[21]

**20-22** In *Re Consolidated Nickel Mines Ltd*,[22] the articles of the company provided for the retirement of all directors at the ordinary meeting for the year 1906, and thereafter, one third of the members of the board were to retire. No annual general meetings were held in 1906 or in 1907 but the directors who ought to have retired in 1906 continued in office. Upon liquidation of the company, the directors sent in their proofs for remuneration. In rejecting the claims, Sargant J (as he then was) held that the directors had by virtue of the articles vacated their office since no general meeting had been held in 1906 or 1907 to re-elect them. Sargant J (as he then was) said:

> As to the two other directors, Steel and Phillips, there is another objection. By clause 62 of the articles of association and by statute (s 49 of the Companies Act 1862) the directors were bound to summon a general meeting of the company once in every calendar year, and article 101 provided that 'At the ordinary meeting in 1906 all directors ... shall retire from office'. No ordinary meeting was held or called in 1906 or 1907, and the liquidator's contention is that all directors vacated office on 31 December 1906, which was the last day on which a meeting of the company for that year could have been held. That contention appears to me to be well founded.
>
> A director on his appointment does not ordinarily step into an office which is perpetual unless terminated by some act, but into an office the holding of which is limited by the terms of the articles. The meaning of article 101 is that the holding

20 Cap 622H, Model Articles, Sch 1 (Public Companies Limited by Shares), arts 23–24; Sch 2 (Private Companies Limited by Shares), arts 22–23. See also *Re J&D Industrial (HK) Ltd* [2006] 2 HKLRD 396, [2006] 3 HKC 49.

21 [1995] HKCU 470 (unreported, HCMP 780/1995, 9 May 1995). This case applied the principles in *Re Consolidated Nickel Mines Ltd* [1914] 1 Ch 883; *Re Zinotty Properties Ltd* [1984] 3 All ER 754 and *Dawson v American Consolidated Land Trading Co* [1908] 1 Ch 6.

22 [1914] 1 Ch 883.



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of the office of director was only to last until the end of 1906, or until the earlier date on which the ordinary meeting for that year was held.

Moreover, article 106 in the present case shows that prima facie a retiring director vacated office, and is against the applicants' contention. The duty of the directors was to call a meeting in 1906 and 1907, and they cannot take advantage of their own default in that respect and say that they still remain directors.[23]

**20-23** *Re Consolidated Nickel Mines Ltd* was followed by Hong Kong in *Re J&D Industrial (HK) Ltd*[24] and *Re Duncan Interior Ltd*.[25] In the former case, it was held that as the company had failed to hold an annual general meeting, the applicants had automatically retired as directors since the time when it should have been held.

**20-24** In *Re Zinotty Properties Ltd*,[26] the company never held any annual general meetings, and its articles provided that at the first annual general meeting, all directors were to retire. A winding up resolution was passed by the only two members of the company. Out of the two members, Mr Bulfield, was registered as a member just prior to the meeting at which the resolution was passed. It was argued that the resolution was invalid because the meeting was an inquorate meeting on the ground that Mr Bulfield was in fact not a member. This was because on the date the transfer in favour of Mr Bulfield took place, there were no directors to approve the transfer, and the secretary was therefore not entitled to register the transfer. Counsel for the petitioner relied on the case of *Re Consolidated Nickel Mines Ltd* and argued that whilst shares are *prima facie* freely transferable, it is still subject to the overriding discretion of the directors under the articles to approve or not to approve the transfer. The rival argument was that in the absence of a properly constituted board, the shares achieved a status of free transferability. The court held that since no annual general meetings had ever been held, the original directors were deemed to have retired, and the secretary was not entitled to register the transfer because the power to do so was vested with the directors, who under the articles, had a discretion whether to refuse the transfer or not for at least a period of two months under s 116 of the Companies Act 1948 (UK).[27] Accordingly, the transfer was invalid when registered, and hence, the winding up resolution was also invalid.[28]

**20-25** In *Morris v Kanssen & Ors*,[29] the company failed to hold its annual general meeting in 1941. Nonetheless, the directors continued their office. In 1942, they appointed another person as an additional director and shares were also allotted to themselves and that other person. The issue turned upon whether s 143

23 ibid at 888–889.
24 [2006] 2 HKLRD 396, [2006] 3 HKC 49.
25 [2009] 1 HKLRD 443, [2009] HKCU 562.
26 [1984] 3 All ER 754.
27 See s 100 of the Ordinance.
28 See also *Re a Company (No 00789 of 1987), ex p Shooter* [1990] BCLC 384.
29 [1946] AC 459. See also *Re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797 at 810–811.





of the Companies Act 1948 (UK)[30] could be relied upon to validate the allotment of shares and appointment. In the Court of Appeal,[31] the *obiter dictum* of Sargant J (as he then was) in *Re Consolidated Nickel Mines Ltd*[32] was applied, and it was held that s 143[33] of the UK statute could not be relied upon because the third party was put on inquiry as to the affairs of the board. The House of Lords took a different approach and held that the section only applies to a situation in which there were defects in the appointment of directors. On the facts of the case, there was no appointment at all since there was a complete vacancy on 31 December 1941 in the board of directors of the company. Lord Simonds said:

> There is, as it appears to me, a vital distinction between (a) an appointment in which there is a defect or in other words, a defective appointment, and (b) no appointment at all. In the first case it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose; in the second case there is not a defect, there is no act at all. The section does not say that the acts of a person acting as director shall be valid notwithstanding that is afterwards discovered that he was not appointed a director. Even if it did, it might well be contended that at least a purported appointment was postulated. But it does not do so, and it would, I think, be doing violence to plain language to construe the section as covering a case in which there has been no genuine attempt to appoint at all. These observations apply equally where the term of office of a director has expired, but he nevertheless continues to act as a director, and where the office has been from the outset usurped without the colour of authority. Cromie's acts after the end of 1941 were not validated by the section: Strelitz's acts were at no time validated.[34]

**20-26** The principle that directors who continue to hold office after the time for holding an annual general meeting are no longer directors is also applied in Australia: *Club Flotilla (Pacific Palms) Ltd v Isherwood*.[35]

## 3.4 Return of powers and ratification

**20-27** In some rare cases where there are no *de jure* directors at all because of the failure to hold an annual general meeting within time, powers that are normally exercisable by directors are returned to the shareholders to enable them to call for a meeting to elect directors, or to ratify the acts of those in *de facto* management. In cases where the shareholders do not choose to ratify acts that have been carried out by the directors *de son tort*, none of their acts would be valid. Their acts are also incapable of being saved by s 461 of the Ordinance as this section only applies to defects in appointment of directors as opposed to complete absence of appointment: *Ong Kim Yim, Mary v Sheecon Trading Co Ltd*.[36]

30 See s 157 of the Ordinance. See also s 204, Companies Act 2016 (Malaysia) and s 151, Companies Act (Cap 50) (Singapore).
31 [1944] Ch 346.
32 [1914] 1 Ch 883.
33 Section 157 of the predecessor Ordinance, s 461 of the Ordinance.
34 *Re Consolidated Nickel Mines Ltd* [1914] 1 Ch 883 at 471.
35 (1987) 12 ACLR 387.
36 [1995] HKCU 470 (unreported, HCMP 780/1995, 9 May 1995), per Yam J. See also *Morris v Kanssen & Ors* [1946] AC 459 (HL), per Lord Simonds at 471.



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**20-28** In *Alexander Ward & Co Ltd v Samyang Navigation Co Ltd*,[37] the articles of association of the company provided for the retirement of all directors at annual general meetings. The company through two individuals instituted an action against the defendant. However, at the time when the proceedings were instituted through the two individuals purporting to be directors of the company, the company had never held any annual general meetings for two consecutive years. In the court below, it was held that the proceedings were wrongly constituted, as there were no relevant directors at that time in question who could issue instructions. The company subsequently went into liquidation and the liquidator ratified the acts previously taken by the two individuals. In the House of Lords, Lord Hailsham said:

> I begin by pointing out, not as a pure piece of pedantry, but as bearing on my opinion on both parts of the case, that the ratification relied on is not that of the liquidator, but that of the company acting by the liquidator. The proceedings were *ab initio* in the name of the company. By the time he was sisted and adopted the proceedings, the liquidator was authorised to act for the company. It is not simply an exercise in semantics to point out that if there was a ratification of the acts of Ward and Irons, it was a ratification by the company acting through the liquidator and not by the liquidator acting on his own behalf. The question for consideration is whether the company could ratify through the liquidator and not whether the liquidator could ratify for the benefit of the company.
>
> Clearly, if and insofar as the company could ratify the acts of Ward and Irons, the company has done so by adopting the proceedings and, on the general principle governing the law of ratification '*Omnis ratihabitio retrotrahitur et mandato priori aequiparatur*', the ratification dates back to the acts ratified, and so to the time when the arrestments were laid, and the summons issued.[38]

Lord Kilbrandon said:

> The ground for the proposition that there was no person capable of giving instructions on behalf of the company was then and is now that art 74 of the respondents' articles of association provides:
>
> > 'The business of the company shall be managed by the directors, who... may exercise all such powers of the company as are not by the [Hong Kong] Ordinance or by these articles required to be exercised by the company in general meeting';
>
> the raising of the action being an act of management, and there being no directors with the power to manage, the company cannot have, in the words of the fourth plea-in-law, 'authorised the raising of the action'...
>
> My Lords, I must say I have the gravest doubts as to the soundness of the proposition pleaded. I am not at all convinced that, the management of a company having been confided to the directors, and the instructing of actions at law being an act of management, then, if the company has for the time no directors, it cannot during that time take steps to recover its debts. I think the article probably means no more than this, that the directors, and no one else, are responsible for the management of the company, except in the matters specifically allotted to the company in general meeting. This is a term of the contract between the shareholders and the company. But it does not mean that no act of management, such as instructing the company's solicitor, can validly be performed without the personal and explicit authority of the directors themselves.[39]

37 [1975] 2 All ER 424 (HL).
38 ibid at 428.





**20-29** Incumbent directors in a contest have been known to refuse to hold or delay holding annual general meetings to frustrate the intentions of shareholders either to vote them out of office altogether or refuse to re-elect them. This exposes shareholders to risks because insofar as outsiders are concerned, the company will be bound by the acts of *de facto* directors, unless the rule enunciated in *Royal British Bank v Turquand*[40] is not applicable on the facts of any particular case. The solution is for shareholders to apply to the court under s 610(7) of the Ordinance to compel the holding of the annual general meeting and at the same time apply for interlocutory injunctions against the purported directors to restrain them from committing the company to transactions without the approval of the shareholders in general meeting.

## 4. Extraordinary General Meetings

**20-30** Between one annual general meeting and the next, a company through its directors may propose to carry out transactions which require the approval of shareholders in a general meeting, or the shareholders themselves may desire to take a course of action with respect to the affairs of the company which are within their powers. In the first situation, the articles of association invariably confer powers upon directors to call for general meetings to meet business contingencies that cannot await the next annual general meeting. However, articles of association rarely give power to shareholders to convene general meetings. The absence of such power can work unfairly against shareholders as it has the effect of depriving shareholders of a proper forum to bring forth their views. At the same time, it would nevertheless be unfair to management that shareholders be given unfettered rights to convene general meetings as this might have the effect of disrupting orderly management and administration of a company. Between the two extreme positions, the Ordinance strikes a balance by conferring powers upon shareholders to request directors to convene a general meeting under s 566, and to convene general meetings themselves under s 568 if a sufficiently large number of shareholders desire the holding of a general meeting to carry out their wishes.[41]

### 4.1 Directors' power to convene

**20-31** The Ordinance does not confer power upon directors to call for extraordinary general meetings as such; it only sets out the circumstances under which directors are required to call for extraordinary general meetings. The basic source of power to call for general meetings is found in the articles of association

39 ibid at 432.
40 (1856) 6 E & B 327, [1843-60] All ER Rep 435.
41 Section 313, Companies Act 2016 (Malaysia); ss 176–177, Companies Act (Cap 50) (Singapore); ss 303–305, Companies Act 2006 (UK).



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which invariably give power to directors to call general meetings as and when they deem fit.[42] If the company is a public company, the obligation may also arise under the Listing Rules, for example, to approve very substantial acquisitions, major transactions or connected transactions.[43]

## 4.2 Fiduciary nature of power

**20-32** In *Pergamon Press Ltd v Maxwell*,[44] an English company held 70% interest in an American company. Under the bye-laws of the American company, only certain officers could call for a special meeting of shareholders. A newly constituted board of directors of the English company asked for the resignation of certain directors of the American company which was refused. This effectively meant that the English company could only remove the incumbent directors at the next annual general meeting. Proceedings were filed in New York to enable the English company to call for a special meeting but it failed. Proceedings were then filed in England to compel the defendant to call for the special meeting. Conceding that the power to call for a special meeting under the bye-laws of the American company was a discretionary power of a fiduciary nature, the court was asked to intervene on the basis of improper exercise of discretion on the powers of the American directors. Pennycuick J (as he then was) declined to intervene on the ground that the matter involved a foreign company. The learned judge said, *obiter dictum*, as follows:

> It is accepted ... that the power under s 102 is a fiduciary power of a discretionary nature, vested in the defendant in the capacity of an officer of [the American company]. It follows that the defendant is bound to exercise that power in good faith in the interest of [the American company] as a whole. There is no suggestion that the law of New York is different in this respect from that of England. That being the position, it seems to me, in the first place, that the New York court is the only proper tribunal ... It cannot be open to an English court to control the exercise of a fiduciary power of a discretionary nature arising in the internal management of a foreign company. But even if this difficulty were overcome, the court would not, at the instance of some only of the members of [the American company], make a mandatory order on the defendant directing him to exercise his discretion in a certain manner. That would, I think, be contrary to the principles on which the court acts in controlling trustees or others in the exercise of fiduciary discretionary powers. I observe, in parentheses, that if this were an English company, other remedies might be available ...[45]

**20-33** The view that the discretionary power is fiduciary in nature is not new. It has been held long ago in the case of *Cannon v Trask*[46] that the power is a ministerial power and not a personal proprietary power. This means that the power

42 Cap 622H, Model Articles, Sch 1 (Public Companies Limited by Shares), art 38(2); Sch 2 (Private Companies Limited by Shares), art 34(2).
43 See discussion in this chapter at section 4.3.
44 [1970] 2 All ER 809.
45 ibid at 813–814. In *Re Arrow Taxi Services Pty Ltd* (1995) 15 ACSR 749, the fiduciary nature of the power was accepted by Hayne J.
46 (1875) LR 20 Eq 669.





of directors to call for general meetings, like any of their other powers, is subject to equitable principles. Accordingly, if the power is exercised predominantly to achieve an improper purpose or for a purpose which is foreign to the power, the meeting may be restrained.[47] Recent case law affirms the principle that if directors, as trustees of powers for a company, exercise the power to convene a general meeting to influence its outcome, it is an unconstitutional exercise of powers: *Eclairs Group Ltd & Anor v JKX Oil and Gas plc*.[48]

## 4.3 Obligatory circumstances

**20-34** There are three principal circumstances under which directors are required to call for extraordinary general meetings. The foremost circumstance is where the subject matter for decision is not, whether under the provisions of the Ordinance, the articles of association or the Listing Rules, within the competence of the directors. The other circumstances are when the directors are so requested by shareholders under s 556 and when the auditor of the company gives notice of his intention to resign from office under s 417. Each of the circumstances giving rise to the obligation to call for extraordinary general meetings is discussed below.

### 4.3.1 Transactions requiring shareholders' approval

**20-35** Transactions which require the approval of shareholders in general meetings under the Ordinance, the articles of association and the Listing Rules are discussed in chapter 5.

### 4.3.2 Premature resignation of auditor

**20-36** The functions of an auditor of a company are important, and he enjoys considerable power under the Ordinance.[49] Presumably, the premature resignation of an auditor is something of concern, and may point to the direction that all is not well within the company. Hence, s 421(1) of the Ordinance provides:

> If a person gives under section 417(1) a notice of resignation that is accompanied by a statement of circumstances given under section 424(a), the person may, by another notice given to the company with the notice of resignation, require the directors to convene a general meeting of the company for receiving and considering the explanation of the circumstances connected with the resignation that the person places before the meeting.

**20-37** Under s 421(2), directors must act within 21 days from the date on which the company receives that other notice and convene a general meeting for a date falling within 28 days after the date on which the notice convening the meeting is given. Failure to take all reasonable steps to secure such a general meeting amounts to a criminal offence on the part of the directors under s 421(3).

47 *Adams & Ors v Adhesives Proprietary Ltd* (1932) 49 WN (NSWLR) 109; *Tan Guan Eng & Anor v Ng Kwang Hee & Ors* [1992] 1 MLJ 487. See also *Humes Ltd v Unity APA Ltd & Anor* (1986) 11 ACLR 641, (1987) 5 ACLC 15.
48 [2016] 1 BCLC 1 (SC).
49 See generally Part 9 Division 5 of the Ordinance.



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## 5. Requisitions by Shareholders

**20-38** There is statutory power on the part of shareholders to request directors to convene extraordinary general meetings. The majority of cases that have come before the court in which such power has been invoked relate to the removal of directors prior to the expiration of the term of their office.[50] This is perfectly understandable because most articles of association vest general management over the businesses and affairs of a company in the board of directors.[51] Since shareholders may not usurp the defined powers of directors however disagreeable they may be to the policies of the board, the only recourse available to shareholders is to remove them from the board in general meeting.[52]

**20-39** Section 566 of the Ordinance provides:

> (1) The members of a company may request the directors to call a general meeting of the company.
>
> (2) The directors are required to call a general meeting if the company has received requests to do so from members of the company representing at least 5% of the total voting rights of all the members having a right to vote at general meetings.
>
> ...

**20-40** Section 567 provides:

> (1) Directors required under section 566 to call a general meeting must call a meeting within 21 days after the date on which they become subject to the requirement.
>
> (2) A meeting called under subsection (1) must be held on a date not more than 28 days after the date of the notice convening the meeting.

**20-41** The consequence of directors failing to comply with s 567 is provided by s 568:

> (1) If the directors—
>
> (a) are required under section 566 to call a general meeting; and
>
> (b) do not do so in accordance with section 567,
>
> the members who requested the meeting, or any of them representing more than one half of the total voting rights of all of them, may themselves call a general meeting.
>
> ...
>
> (3) The meeting must be called for a date not more than 3 months after the date on which the directors become subject to the requirement to call a meeting.

**20-42** In the exceptional case where the company does not have any director or does not have sufficient directors capable of acting to form of quorum, any two

50 Sections 462–463.

51 Cap 622H, Model Articles, Sch 1 (Public Companies Limited by Shares), art 2; Sch 2 (Private Companies Limited by Shares), art 3.

52 Generally, see *Gramophone & Typewriter Ltd v Stanley* [1908] 2 KB 89 (CA, Eng).





or more members of the company having 10% or more of the total voting rights at a general meeting may call a general meeting, in the same manner (as nearly as possible) as that in which meetings may be called by the directors.[53]

### 5.1 Requisitioned general meeting to remove directors

**20-43** In the past, articles of association often did empower shareholders in general meeting to remove directors prior to the expiration of the term of their office fixed under the articles of association: *Imperial Hydropathic Hotel Company, Blackpool v Hampson.*[54] Section 462(1) confers powers upon shareholders in general meeting to do so.

**20-44** During the interim period between the date of the requisition and the date fixed for the holding of the general meeting, it is common for the incumbent directors whose removals are sought to carry out acts, or implement proposals that have the effect of impeding, frustrating or thwarting the intention of shareholders to remove them. The means employed cannot be enumerated in advance. Where shareholders seek to remove the majority directors and replace them with persons of their choice, for example, the majority directors may resign at the last minute but before doing so, utilise their power to appoint persons of their choice to take their place under the casual vacancy provision in the articles. If this happens, then the purpose of the scheduled general meeting is frustrated. This is because there is no right or power to remove persons not named in the agenda of requisition notice, or future directors: *National Roads & Motorists' Association Ltd v Scandrett & Anor.*[55] Besides, the new appointees would not have been served with the requisite special notice.

**20-45** Last minute resignation by directors whose removals are sought and appointment of new directors to take their place happened in the case of *Monnington v Easier plc.*[56] In this case, shareholders requisitioned an extraordinary general meeting to remove two directors and, subject to those resolutions being passed, to appoint new directors. Before the scheduled date of the meeting, the two directors resigned and new directors were appointed under the casual vacancy provision of the articles of association. This is a common tactical move in practice. Unfortunately, the plaintiff asked the court to convene a general meeting to give the majority an opportunity to remove the directors as there was likelihood that the board would again exercise its right to appoint new directors shortly before the holding of the meeting. The learned judge correctly dismissed the application on the basis that it had no jurisdiction as the board has the right to appoint additional directors under the relevant article to which the plaintiff and his supporters were bound.

**20-46** The problem faced by a requisitionist and like-minded shareholders who desire to remove directors and to appoint other persons in their place during the

53 Section 569.

54 (1882) 23 Ch D 1. See discussion in chapter 3, section 6.5.

55 (2002) 43 ACSR 401.

56 [2006] 2 BCLC 283.



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interim period have been discussed in several Australian decisions. There does not appear to be a firm and universal consensus as to the basis upon which the court will assist by preventing the incumbent board from thwarting the known intention of the requistionist and his supporters.

**20-47** In *Paringa Mining & Exploration Co plc v North Flinders Mines Ltd & Ors,*[57] the requistionist was a controlling shareholder. The incumbent majority directors whose removals were sought proposed a rights issue and the implementing of a takeover offer. The controlling shareholder opposed these measures. The allegations were that the proposals were for the purpose of defeating the plaintiff's majority interest and to entrench the position of the incumbent directors whose removals were sought. In resolving the issue, King CJ metaphorically described them as 'caretaker directors' in the sense that the incumbent majority directors could not thwart the known wishes of the controlling shareholder. King CJ succinctly pointed this out that to restrain or deny the general meeting Paringa had requisitioned would not only deprive the exercise of a statutory right but might lead to unnecessary litigation over the proposals of the incumbent directors if implemented.

**20-48** Subsequently, in *Woonda Nominees Pty Ltd & Ors v Chng & Ors,*[58] Owen J pointed out that King CJ in *Paringa Mining & Exploration Co plc v North Flinders Mines Ltd & Ors* did not limit the caretaker principle to controlling shareholders and dismissed the argument that recognition of the caretaker principle would open up 'floodgates' as each case must be examined on its facts.

**20-49** In *Chimaera Capital Ltd v Pharmaust Ltd & Ors,*[59] French J (as he then was) criticised and cast doubt upon the 'caretaker doctrine' as its basis is unclear. It was said:

> 91. If there is a caretaker doctrine it has not been defined. The use of an adjectival metaphor does not define a doctrine and can best be regarded as a shorthand reference to the kinds of duties that may constrain the exercise of directors' powers in particular situations including circumstances in which an extraordinary general meeting for the removal of directors has been requisitioned. In my opinion, however, it should be treated with great caution. Such usages which are taxonomical or descriptive, rather than conveying principle or doctrine, have arisen in other areas of the law.[60]

**20-50** In the authors' respectful view, the use of the adjectival metaphor 'caretaker directors' is not objectionable as long as the doctrinal basis is identified. Although King CJ did not refer to the case of *Howard Smith Ltd v Ampol Petroleum Ltd*[61] as referred to in *Chimaera Capital Ltd v Pharmaust Ltd & Ors*, in context, where directors exercise their powers to frustrate, thwart or influence the outcome of the collective will of shareholders in general meeting, it is an unconstitutional exercise of powers and should be struck down immediately: *Howard Smith Ltd v Ampol Petroleum Ltd, Eclairs Group Ltd & Anor v JKX Oil & Gas plc.* The factual matrix of *Paringa Mining & Exploration Co plc v North Flinders Mines Ltd & Ors* resembled that in *Howard Smith Ltd v Ampol Petroleum Ltd*[62] where traditional fiduciary principles were applied at trial.

57 (1988) 14 ACLR 587. See further discussion in section 5.3 below.
58 (2000) 34 ACSR 558 at 568.
59 (2007) 64 ACSR 332.
60 ibid at 357.
61 [1974] AC 821 (PC).





**20-51** An analogous situation is located in the case of *Lee Panavision Ltd v Lee Lighting Ltd.*[63] In this case, Panavision was appointed as Lee Lighting's exclusive management agent to manage and operate all aspects of the business and operations of Lee Lighting. It was clear that when the management agreement expired, the shareholders of Lee Lighting would remove its directors who had been appointed by Panavision as part of the management team. The directors of Lee Lighting voted and entered into a second management agreement on terms similar to the earlier agreement to thwart the known intention of the shareholders of Lee Lighting to remove its directors in the management team. Dillon LJ (Stocker and Sir David Croom-Johnson concurring) held, applying *Howard Smith Ltd v Ampol Petroleum Ltd,* that it was an unconstitutional exercise of powers:

> The function of the directors is to manage, but the reappointment of the directors who are to do the managing is constitutionally a function of the shareholders in general meeting. Therefore it must have been unconstitutional for the directors ... to exercise their constitutional right to appoint new directors, to take away all managerial powers away from any new directors who might be appointed by committing Lee Lighting to the second management agreement ...[64]

**20-52** It is common justification in situations like *Paringa Mining & Exploration Co plc v North Flinders Mines Ltd & Ors, National Roads and Motorists' Association Ltd v Scandrett & Anor* and *Lee Panavision Ltd v Lee Lighting Ltd* that the directors honestly believed that their actions were in the best interests of the company. In the context of the facts in *Lee Panavision Ltd v Lee Lighting Ltd,* Dillon LJ rejected the submission on the basis that the second management agreement was entered into for the improper purpose of thwarting the intention of the shareholders of Lee Lighting. It was held:

> Mr McCombe QC points out, correctly in my judgment, that if it was, as he submitted, a justification for entering into the second management agreement that the directors bona fide believed it to be in the best interests of the company, then it was the directors' honest assessment of the benefit to the company and not the judge's assessment which was relevant.
>
> To my mind the crucial question is whether, in the circumstances trenchantly summarised by the judge, it was within the directors' powers at all to commit Lee Lighting to the second management agreement, however much they may have thought it in that company's best interests, as well as Panavision's, to thwart the intention of the 100 per cent shareholders.
>
> It is well-established that directors cannot use their powers to perpetuate their or their friends' control of their company...[65]

62 ibid.
63 [1992] BCLC 22.
64 ibid at 30.
65 ibid at 30.



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**20-53** In Australia, where the democratic process of the company has been invoked to remove directors, the primacy of the collective will of shareholders in general meeting takes precedence over the subjective views that might be advanced by the incumbent directors so long as the underlying purpose is to have a general meeting to pass the proposed resolutions. In *National Roads & Motorists' Association Ltd v Scandrett & Anor*,[66] Palmer J held:

> 43. Second, Mr Einfeld says that the requisitions for a meeting to consider resolutions A and B should be seen as part of a campaign which is being waged for the benefit of one group of directors in order to enable that group to gain control of the board, regardless of the cost to NRMA, financial or otherwise.
>
> 44. Let it be assumed that such is, indeed, the purpose of the requisitionists. Even so, that purpose is not an improper one. The right to requisition a meeting under CA s 249D(1) for the purpose of removing directors under s 203D exists so that something akin to the democratic process is allowed to work in the governance of public companies.
>
> 45. Just as in the body politic, so also in the body corporate, factions contend for power. The faction in office usually regards as abhorrent the very possibility that the opposing faction may itself achieve office, firmly believing that the opposing faction does not have at heart the best interests of the body as a whole. The opposing faction entertains the same charitable view of the motives held by the faction in power. In the body politic the will of the majority is permitted to decide the contest as often as elections may lawfully be held. In the case of a public company, the will of the majority is permitted to decide the contest as often as members can muster sufficient numbers to invoke the right to requisition a meeting...[67]

**20-54** In the authors' view, emphasis should be placed on the constitutional distribution of powers between the directors and the general meeting and it is unconstitutional for directors to thwart the known wishes of shareholders. Where the removal of directors are sought, there are bound to be rival contentions between the faction in power and the opposing faction identified along the lines pointed out by Palmer J in *National Roads & Motorists' Association Ltd v Scandrett & Anor*. Unless there are compelling reasons, it is best for the court not to be dragged into the fray over the subjective views of the rival factions. This is consistent with the view that the subjective view of directors as to company's interest is an additional and not an alternative test to the proper purpose of a power, or the propriety of the actions of a board: *Eclairs Group Ltd & Anor v JKX Oil & Gas plc*. The fate of a director resisting removal should be left to the general meeting. Whenever self-interests are involved, directors cannot claim that they acted in good faith and for a proper purpose: *Howard Smith Ltd v Ampol Petroleum Ltd.*

**20-55** The cases of *Paringa Mining & Exploration Co plc v North Flinders Mines Ltd & Ors* and *Lee Panavision Ltd v Lee Lighting Ltd* concerned the known wishes of majority shareholders. In *Chimaera Capital Ltd v Pharmaust Ltd & Ors,* the former case was distinguished on this basis and a view was expressed that the 'caretaker principle' should in the minimum be confined to the known wishes of majority shareholders. If constitutionality in the separation of powers

66 (2002) 43 ACSR 401.
67 ibid at 409–410.





between the board and general meeting is the cornerstone, it is unconvincing that in cases where the requisition is by a minority shareholder, different principles apply because of fear that it might open up a floodgate of requisitions. A minority is no less exercising a statutory and constitutional right and it is wrong to prejudge that the minority will be unable to muster enough support for the removal of directors. The Ordinance does not prescribe that a requisitionist may only do so if he is a majority shareholder, or prove that he has the support of others making up a majority. In this respect, the decision of Owen J in *Woonda Nominees Pty Ltd & Ors v Chng & Ors* in rejecting the floodgate submission is supportable.

## 5.2 Time to hold requisitioned meeting

**20-56** Under s 567(2) of the Ordinance, the requisitioned meeting must be held on a date which is not more than 28 days after the date on which the notice convening the meeting is given. Generally, 'days' means 'clear days': *Re Hector Whaling Ltd.*[68]

**20-57** The predecessor of ss 566–568, which was found in s 113 of the predecessor Ordinance, contains the requirement that the directors must 'forthwith' proceed duly to convene the extraordinary general meeting as requisitioned by members. It is submitted that this requirement no longer exists in the current Companies Ordinance, and the only time limit is that stipulated under s 567.

### 5.2.1 Directors' clear intention not to convene

**20-58** There may be situations where directors, however rare, make it known to the requisitionists before the expiration of 21 days have lapsed that they will not convene the requsitioned meeting. In the absence of justifiable reasons[69] on the part of directors, it may be argued that the requisionists can still act under s 568 to convene the meeting themselves before the lapse of 21 days. Support for this view is found in the *obiter dictum* of Deputy Judge Anthony To in *Hong Kong Racing Pigeon Association Ltd & Ors v Lau Koon Nam & 12 Ors*.[70]

## 5.3 Thwarting requisitionist's intentions

**20-59** Theoretically, directors are entitled to act on a requisition to convene a general meeting on the 21st day after the date on which they become subject to the requirement. Also, they are entitled to hold that meeting on the 28th day from the date of the notice convening the meeting was given.[71] In commercial reality, one should not rule out that directors might be tempted to make use of the intervening period between the date of the requisition and the date of the requisitioned meeting to thwart the known wishes of shareholders as disclosed in the requisition notice. If this takes place, it is an abuse of power. However,

68 [1936] Ch 208.
69 See discussion in this chapter at section 5.4.
70 [2002] 3 HKLRD 133 at para [26].
71 Section 567.



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