<table>
<thead>
<tr>
<th><strong>Title</strong></th>
<th>The company law and division of powers; 公司的權力劃分問題</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Author(s)</strong></td>
<td>Smart, P</td>
</tr>
<tr>
<td><strong>Citation</strong></td>
<td>Hong Kong Lawyer, 2000, Feb, p. 29-31; 香港律師, 2000, Feb, p. 29-31</td>
</tr>
<tr>
<td><strong>Issued Date</strong></td>
<td>2000</td>
</tr>
<tr>
<td><strong>URL</strong></td>
<td><a href="http://hdl.handle.net/10722/53384">http://hdl.handle.net/10722/53384</a></td>
</tr>
<tr>
<td><strong>Rights</strong></td>
<td>This work is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License.</td>
</tr>
</tbody>
</table>
The Company Law and Division of Powers

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

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

Miracle Chance

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

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

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

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

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

Comment

There is no doubt that the Court of Appeal was on firm legal ground in holding that the absence of an effective board of directors resulted in management powers reverting to the shareholders (see Alexander Ward & Co Ltd v Samyang Navigation Co [1975] 2 All ER 424). It might also seem that the approval by Rogers JA of Breckland Group Holdings is not remarkable - for there is a long line of English cases (see, in particular, Scott v Scott [1943] 1 All ER 582, Shaw v Shaw [1935] 2 KB 113 and, more recently, Mitchell & Hobbs (UK) Ltd v Mill [1996] 2 BCLC 102), which assert that an exercise of management powers by the directors cannot be 'overruled' by a resolution of the shareholders in general meeting. In particular, Harman J in Breckland Group Holdings refused to follow the much debated decision of Neville J in Marshall's Valve Gear Co Ltd v Manning Wardle & Co Ltd [1909] 1 Ch 267, where the opposite view had been
maintained. Yet while the English judges appear to have abandoned Marshall's Valve completely, Neville J's view - namely that the shareholders in general meeting can overrule a validly taken decision of the board - was once supported by another decision of the Court of Appeal in Hong Kong. Rogers JA in Miracle Chance makes no reference to the earlier decision in Tang Kam-yip v Yau Kung School [1986] HKLR 448. In summary, Rogers JA has adopted Breckland Group Holdings, yet Marshall's Valve is supported by Tang Kam-yip and that case was apparently not dealt with by Rogers JA.

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

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

'...would have been for the court to have stayed the proceedings but to have ordered a meeting of the company to see whether any resolution of the matter could have been arrived at by the company in general meeting'.

(see [1999] 3 HKC 811 at 815G)

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

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

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

Philip Smart
Faculty of Law
University of Hong Kong

公司的權力劃分問題

Philip Smart 經看近期一宗由上訴法庭審理的案件，並認為該案有助提
醒執業律師們不能假設《公司條例》的條文僅適用於本地成立的公司
一般適用於海外成立的公司。
法院無權根據
《公司條例》第114B條
命令英屬維爾京群島
公司或其他海外公司
召開會議

當然，Miracle Chance 一案並不涉及董事
局作出任何決定的情況，而羅傑志法官
認同 Breckland 一案的存在，也只能是附帶意
見。然而，正如出版者曾經主張（見 Smart,
Lynch 及 Tam 著 Hong Kong Company Laws:
Cases, Materials and Comments (1997) 第
157 頁），Tang Kam-yip 一案中法官法院
認同 Marshall’s Value 一案，也只能
附帶意見，而且可能與管院法官 Lord
Wilberforce 在 Howard Smith Ltd v Ampol
Petroleum Ltd [1974] AC 821 一案中所作的
意見（見第 837 頁）不相一致。簡言之，
筆者認為，Marshall’s Value 一案在香港的
法院有權最終裁決，但我們在充分理由
中香港法院會對 Tang Kam-yip 一案作出
識別並且拒絕接納 Marshall’s Value 一案。

事實上，在 Miracle Chance 一案中，羅傑志
法官也是抱著這種態度。（由 Tyler 所
著，載於 (1987) 17 HKLR 230 的文章。）

一聲警告
正如上文提到，在 Miracle Chance 一案中，
MCL 的章程細則規定，由大股東所
作出的訴訟同意，須取得有效的股東決
議，故此 MCL 大股東所作的決定有效。
但若公司的章程細則沒有這樣的規定，情
況會是如何？羅傑志法官認為，在該情況
下，「恰恰的做法」是：
「... 由法庭覈實有關的法律程序，
同時下令公司舉行會議，以確
定公司大會可否就事情達成決議。」（見
第 815 頁 G)

我們必須小心對待這個野牌提出的意见。

根據《公司條例》（第 32 章）第 114B
條，法庭有廣闊的審裁權，命令公司召
開股東大會：特別是當小股東拒絕出席任何
擬舉行的會議時。而當法院無法達成法律
上的要求時，法庭可以行使審裁權！其
Re-Opera Photographic Ltd [1989] 1 WLR 634
及 Marfield Coatings Co Ltd v Springfield
Coatings Co Ltd [1995] 1 HKC 74 一案。然
而，問題是第 114B 條關於「公司的會
議」，而根據同一條例第 2 條，「公司」
表面上在於香港成立的公司。筆者認為，
不論怎樣去理解《公司條例》內有關會
議的條文（包括第 114B 條），我們都不能說
該些條文改變了「公司」的本意。簡單
來說，法院無權根據《公司條例》第
114B 條命令英屬維爾京群島公司或其他海
外公司召開會議。

羅傑志法官在提及召開會議的一時所
考慮到的可能是第 114B 條，而是法庭監
控其審裁的聆訊的有關權力。從此而言，
筆者不清楚法院能夠如何在不依賴第 114B
條的情況下決定此等會議的法定人數應是多
少。不管如何，Miracle Chance 一案揭開了
我們，雖然近年來香港不少人使用英屬維
爾京群島公司，但執業律師就不應毫不留
地假设《公司條例》的條文適用於本地成
立的公司一般適用於海外成立的公司。”

Philip Smart
香港大學法律學院