

BERMUDA SUPREME COURT

Uprise Corporation et al -v- Mingyuan Medicare Development et al [2016] SC (Bda) 28 Civ

COMPANIES ACT, 1981 SECTIONS 72, 76, AND 79 -
FAILURE TO CONVENE ANNUAL GENERAL
MEETING - RELIEF SOUGHT BY PERSON LACKING
STANDING AS A 'MEMBER' - POWER OF COURT
TO GRANT RELIEF TO BENEFICIAL OWNER OF
SHARES - INHERENT JURISDICTION OF COURT

This case concerned an attempt by the Applicant Shareholders in the Respondent Company to bring about the Company's Annual General Meeting ("AGM") AGM in order to remove it from the control of a Chairman with dubious intentions. The Primary relief sought by the Applicants was an Order pursuant to Section 76 of the *Companies Act, 1981* (the "Act") compelling the convening of an AGM of the Respondent Company. It was also questioned whether another Shareholder, Greater Achieve Limited, which had attempted to have its beneficial ownership in the Company's shares transferred into its own name from its Nominee but had been prevented from doing so under suspicious circumstances, could access relief under the same application notwithstanding their present lack of standing to petition.

The availability of the primary relief for the Applicants under Section 76 of the Act depended on the 'legal impracticability' of the Company convening the AGM. The Applicants argued that impracticability arose because not only was the Board obviously reluctant to convene the AGM, but it was now impossible for them to convene it without the intervention of the Court or the Registrar (*Ng Pui Lung -v- CY Foundation Ltd and Luck Continent Ltd [2011] Bda LR 12*). Under Section 71(1), AGMs are to be convened at least once per calendar year; under company Bye-laws, a time limit may fall before the end of the year. Kawaley CJ found that the date of delinquency in failing to hold an AGM arises at the first instance of breach of time limits, whether the limit is statutory or pursuant to the Bye-laws. It was common ground that as the Company had not held an AGM

since June 2014; they were in breach of both limits. Therefore, it was legally impracticable for them to convene the AGM without the assistance of the Registrar or the Courts.

Kawaley CJ also found that the Company being willing to take curative steps to address delinquency did not remove the fact of legal impracticability for the Company to convene the AGM if the preconditions for granting relief under Section 76 have been met. He stated that the broad language of Section 76 suggested no legislative intention that the date of statutory legal impracticability should be the only date relevant to delinquency, nor any intention to exclude impracticability when arising under the Bye-laws. Further, Section 72(2) does not explicitly refer to the Section 71 time limit, but rather only "*when [the AGM] should have been held*". On the basis of this statutory background, the Judge found no reason to preclude the Applicants from a Section 76 Order, given that the Company had been in breach of the Bye-law time limit since September 2015, that it had been in breach of the statutory time limit since December 2015, and that the more draconian remedy of winding up the Company had been available to the Applicants under Section 72(3) for breach of the statutory time limit since 1 January 2016. Therefore, he found that the Applicants were able to obtain a Section 76 Order to compel the convening of the AGM. Considering the dubious actions of the Company Chairman, leading to the present proceedings, Kawaley CJ found that to leave it to the Company as it currently stood; to convene would not be preferable to allowing the Applicants a Section 76 Order.

In relation to relief for the Joinder Applicants, it was conceded that should Greater Achieve successfully request its beneficially owned shareholdings be transferred into its own name, it would be entitled under Section 79(2)(a) to request the Company circulate its proposed resolutions for the upcoming AGM. The controversial point was whether they were able to enforce those rights prior to that transfer. Counsel for the Parties argued on the one hand that the commercial reality of beneficial ownership should govern the Court's approach, and on the other that only registered members of a company can exercise the rights of members. The Respondent relied particularly on authorities advising against "judicial legislation" which might tempt the Court to give standing to the Joinder Applicants in some novel fashion.

At this point, Kawaley CJ digressed to address the balance to be struck between excessively liberal statutory interpretation and the powers under the inherent jurisdiction of the Courts in Common Law jurisdictions to "make law". He distinguished between impermissible judicial legislation and what he termed Bermuda's "common law, common sense" approach to judging. He concluded that though the Joinder Applicants had no standing as registered shareholders, the Court had the inherent jurisdiction to grant orders giving substantively similar relief as ancillary orders to the primary relief sought by the Applicants through the prerogative of the Court to act on its own motion under the Rules of Court to manage cases efficiently.

While the Joinder Applicants had failed to register previously, Kawaley CJ was willing, giving the Company the benefit of the doubt, to attribute that incident to an "administrative hiccup" rather than malign intent. But on that basis, he found there was no reason to expect that the Joinder Applicants would not be registered voting shareholders within a period of six weeks. Accordingly, he set the date for convening the AGM after that period, when the Joinder Applicants would be fully able to participate.

In the interim, interpreting Section 76 to allow the Court to give directions regarding future meetings and to give ancillary directions of the Court's "own motion" to better manage logistics in proceedings under the Rules of Court, Kawaley CJ found there was no reason to dismiss the Joinder Summons and refuse relief altogether because it was sought prematurely. Further, he ruled that the most efficient way of disposing of the proceedings before the Court would be to make ancillary orders to the primary relief for the Applicants that the AGM agenda should include any resolutions proposed by Greater Achieve in accordance with their imminent Section 79 rights, and that the meeting should be held at a date affording sufficient time for Greater Achieve to become a registered shareholder and submit its proposed resolutions under Section 79.

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