

BRITISH VIRGIN ISLANDS COMMERCIAL COURT

***Chang Ho Kwok David and Silver Shadow
Company Limited -v- Winbless Inc and
Amazing Inc Claim No. BVIHC (Com) No 149
of 2019***

SHAREHOLDER REQUESTING MEMBERS MEETING UNDER SECTION 82(2) OF THE BUSINESS COMPANIES ACT, 2004 (“BCA”) - NO BOARD MEETING HELD FOR PURPOSE OF CONVENING MEMBERS MEETING - ONE OF TWO DIRECTORS PURPORTING TO CONVENE MEMBERS MEETING - WHETHER MEMBERS MEETING VALIDLY CONVENED - IN RE STATE OF WYOMING SYNDICATE [1901] 2 CH 432 CONSIDERED AND FOLLOWED - SHAREHOLDER APPLYING IN ALTERNATIVE FOR COURT TO CONVENE MEMBERS MEETING PURSUANT TO SECTION 86(1)(A) AND (B) BCA - SECTION 86(1)(B) CONSIDERED - WHETHER CONDITIONS FOR CONVENING MEETING UNDER SECTION 86(1)(A) MET - IN RE EL SOMBRERO LTD [1958] 1 CH 900 CONSIDERED AND APPLIED - WHETHER FACT THAT PURPOSE OF MEETING WAS TO REMOVE DIRECTOR MEANT THAT SECTION 86(1)(A) OF NO APPLICATION - ROSS -V- TELFON [1997] BCC 945 CONSIDERED

This case concerns a claim by Silver Shadow Company Limited (“Silver Shadow”) for a declaration that a resolution passed by the Second Defendant, Amazing Inc (the “Company”) was effective to remove the First Defendant Winbless Inc (“Winbless”) and Mrs Chang (the First Claimant’s mother), who along with Silver Shadow were members of the Board of the Company, from its board. In the alternative, Silver Shadow sought an order convening a meeting of members of the Company under Section 86(1) of the BCA and an order that Winbless votes its shares at the meeting in accordance with the directions of the first Claimant.

The Court held that the resolution was not validly passed and effected. Only the directors of the Company may convene a meeting at which resolutions passed otherwise than unanimously would be capable of binding the Company. It was not open to one out of a number of directors to convene a meeting of members on its own initiative. The Court then considered whether it should convene a meeting in accordance with either Section 86(1)(a) or Section 86(1)(b) of the BCA. Section 86(1)(a) provides that the Court may convene a meeting if it is impracticable to call or conduct a meeting in a manner specified in the BCA or the Company’s constitution. Section 85(1)(b) confers a discretion on the Court to call a meeting when it is in

the interest of the members to do so. The UK equivalent statute does not have a provision corresponding to Section 85(1)(b). In dealing with the discretion under that section the Court held that it did not depend on difficulties in convening or conducting meetings but was intended to provide the Court with a general power to direct a meeting where it considers that the membership of a company would benefit from the holding of a meeting. It determined that this section would have no application in this case.

Section 86(1)(a) is materially identical to the UK predecessor of Section 371. In construing the ambit of the Court's discretion under that provision the Judge relied on the definition of "impracticable" in *Re EL Sombrero Ltd* namely that impracticable was not synonymous with impossible and the question was whether as a practical matter the meeting could be conducted. The Judge was also cognisant of the English Court of Appeal decision in *Ross -v- Telford* where the court held that Section 371 could not be used to arrange matters that a member without any previous ability to do so could defeat opposition to a decision at board level. He found that the convening of the meeting in this case was impracticable and said that although the Court of Appeal in *Ross* had approved a submission that Section 371 had nothing to do with board meetings, this had to be read in context. The function of Section 371 was not to engineer changes in company boardrooms by interfering with entrenched rights. He held that the meeting in that case would not destroy entrenched rights or shift the balance of power in the Company and the necessary conditions for making an order under Section 86(1)(a) had been satisfied. The Court made an Order convening a meeting.

Founded in 1928, Conyers Dill & Pearman is an international law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. With a global network that includes 130 lawyers spanning eight offices worldwide, Conyers provides responsive, sophisticated, solution-driven legal advice to clients seeking specialised expertise on corporate and commercial, litigation, restructuring and insolvency, and private client and trust matters. Conyers is affiliated with the Codan group of companies, which provide a range of trust, corporate secretarial, accounting and management services.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.