Case Summary (1)

Re: Asiatic Century Ltd. and 10 others

HCMP Nos. 1445-1449/2013
1451-1453/2013
1456-1458/2013

Date of Judgment : 28 October 2013

This is a summary of a combined judgment of the court given in HCMP Nos. 1445-1449, 1451-1453 and 1456-1458, all of 2013.

Background

1. There were 11 applications before the court made pursuant to sections 111(2), 111(3) or 122(1B) of the Companies Ordinance (Cap. 32) ("**the Ordinance**") for orders rectifying defaults by 11 companies (collectively "**the Companies**") to hold annual general meetings within the period of time prescribed by the Ordinance or to lay before each company in general meeting profit and loss account and balance sheet for the relevant period.

2. The Companies had each not held annual general meetings since incorporation. Nor had audited accounts been tabled before the Companies in general meetings.

3. Each of the Companies was an indirect subsidiary of a company incorporated in the Cayman Islands and intended to be listed in Hong Kong.

The statutory requirements

4. Section 111(1) of the Ordinance requires a company to hold an annual general meeting in every calendar year. If the company is in default, the company and every officer in default are liable to a fine upon conviction. Section 111(2) gives the court a discretion, upon the application of any member of the company, to grant an order calling or directing the calling of a general meeting of the company, thereby rectifying a breach of section 111(1).

5. Section 122(1) and (2) require the director(s) of a company to lay before the company in annual general meetings its profit and loss account and balance sheet made up to a date not more than 6 months, or in the case of a private company or a company limited by guarantee not more than 9 months, before the date of the meeting. If any director of a company fails to take reasonable steps to comply with

the above requirement, he is liable upon conviction to imprisonment and a fine.

6. Section 122(1B) allows the court, if it thinks fit to do so, substitute for the requirement to lay accounts before the company at its annual general meeting a requirement to lay such accounts before the company at such other general meeting as the court may specify; and the court may extend the said periods of 6 and 9 months.

The present applications

7. It was alleged that the breaches of sections 111 and 122 only came to light during the course of a due diligence exercise carried out for the purpose of the listing. The Group of companies operated 3 clubs in Central. The Companies did not manage the clubs but provided only management services, including the holding of necessary licenses and signing relevant contracts to facilitate the operation of the clubs. As the Companies did not carry out any active trading business, it was mistakenly thought that no audited accounts needed to be prepared and no annual general meetings, which were generally convened mainly for approving audited accounts, would thus be required. The director on behalf of the Applicants stated that he was not familiar with the Ordinance and did not know that a company without an active trading business must hold annual general meetings and prepare accounts and lay those accounts before the company in annual general meetings.

The legal principles

8. The court has restated the factors, as shown in the previous cases of similar applications under sections 111(2) and 122(1B), to which the court has regard in the exercise of its discretion :-

   (i) whether the shareholders were aware of the financial position of the company and thus were not prejudiced by the non-compliance;

   (ii) whether the default was inadvertent; and

   (iii) whether the court was satisfied that the company would comply with the obligation to lay its accounts before general meetings in future.

The decision

9. The court was not satisfied that the breaches of the Ordinance in these 11 cases arose out of inadvertence and considered that the breaches were more likely to be explained by indifference and quite possibly by the assumption that the requirement to prepare audited accounts and the attendant costs could be avoided.

10. The court recognizes that the refusing of the applications may have an effect on the proposed listing but does not consider that it is a reason of itself to grant the orders that should otherwise be refused. The originating summonses were all dismissed.

11. The court has taken the opportunity to deliver a message to practitioners that applications under sections 111(2) and 122(1B) should not be assumed to be a formality. This is so particularly when multiple retrospective applications are made. Careful thought has to be given to the justification for seeking the relief and applications should be presented in a manner which assists the court in considering them.

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