



Right to Inspect Company Documents

Whether a director or a shareholder has the right to inspect company documents depends on (1) the articles of association of the company concerned; (2) the statute that governs the company; (3) its common law rights. Although both the directors and shareholders have rights to inspect company documents, such rights are legally distinct and are founded on different principles.

A Articles of Association

Directors

The articles of association are the constitution of the company, defining the rights and responsibilities of directors and the means by which the shareholders exert control over the board of directors.

The standard sample of articles of association in Hong Kong does not normally provide for the director's right to inspect company documents as such a right is an integral part of their duties under common law. If a company is formed under other jurisdictions, such as the Cayman Islands or Bermuda, the director's right to inspect may be stated in the articles or bye-laws.

Shareholders

However shareholders are not normally given the right to inspect company documents as the division of labour between shareholders and directors are such that directors are the ones who are in charge of the daily operation of the company and not the shareholders. The standard sample of articles of association in Hong Kong will not give the right to shareholders to inspect company documents unless that person is authorised to do so by the directors, an ordinary resolution of the company, or an order under section 740 of the Companies Ordinance (Cap. 622). To invoke section 740, the shareholders have to obtain a court order – it requires at least 5 members or member(s) holding 2.5% of the voting shares and the application has to be in good faith and for a proper purpose. The shareholders also need to specify what company documents to inspect.

B Statute: Companies Ordinance (Cap. 622)

Under sections 374-375 of the Companies Ordinance (Cap. 622), a director has a right to inspect the company's books and records and to make a copy of the accounting records during inspection. If any director fails to secure compliance with the sections, he/she is liable to a fine of HK\$300,000 and to imprisonment for 12 months.

Shareholders can only have the right to inspect under section 740 of the Companies Ordinance (Cap. 622) as explained above.



C Common Law

Directors

As mentioned before, inspecting company documents is an integral part of the director's duties in carrying out its function and such rights are well established under common law. The statutory provision is consistent with and does not detract from the common law right¹.

However it is different if the directors want to inspect documents belonging to a subsidiary; it was held in *Ho Pui Tin v Wah Nam Group Limited*² that the inspection rights (in the context of section 121 of the old Companies Ordinance) would not enable a director of the holding company to inspect the books of account of a subsidiary per se but the court accepted that where there were a consolidation balance sheet and profit and loss account, consolidation working documents and schedules should be included for inspection even if they do disclose the position of the subsidiaries. It is therefore more straightforward to arrange a director of such a subsidiary to exercise the rights of inspection instead.

"The scope of inspection can potentially be very wide, covering any 'documents belonging to the company'³, 'corporate material'⁴, 'corporate records and accounts' or 'corporate information'⁵, 'accounting and other records of the company'⁶.

The right of inspection flows from the director's duties to the company and a director does not have to explain why the inspection is sought or demonstrate any particular ground or 'need to know' as a basis⁷.

It is perfectly proper for a director to engage an accountant to conduct the inspection in exercise of his right. A director may certainly exercise his right through his agent⁸. A director is also entitled to take copies of the documents during inspection⁹.

Shareholders

As previously mentioned, shareholders can only rely on section 740 of the Companies Ordinance (Cap 622). The question is what "in good faith" and "for a proper purpose" under section 740 mean under the common law. These are two separate and independent tests. To establish good faith, the applicant must first, establish that he believed his purpose in applying for an inspection order was proper. The predominant motive must not be idle curiosity, for harassment or blackmail, to obtain information for the company's competitors, or anything amounting to an abuse of process. As for "proper purpose", the Court will consider whether the application was made for a proper purpose i.e. whether the applicant can show a sufficiently reasonable case "to investigate a genuine and credible belief that there has been corporate mismanagement" *Wong Kar Gee Mimi v Hung Kin Sang Raymond*¹⁰. It is sufficient that the shareholder's

¹ *Conway v Petronious Clothing Company* [1977] 1 WLR 73 at 85 and 89; *Berlei Hestia (NZ) Limited v Fernyhough* [1980] 2 NZLR 150 at 163; *Wuu Khok Chiang George v ECRC Land Pte Limited* [1999] 3 SLR 65 at paragraphs 25 and 31

² HCMP 5224/1999

³ *Burn v London and South Wales Coal Company and Risca Investment Company* (1890-91) 7 TLR at 118; *Edman v Ross* [1922] 22 SR (NSW) 351 at 360, *Tsai Shao-Chung v Asia Television Limited* (HCMP 479/2011) and appeal thereof CACV 185/2011

⁴ *Molomby v Whitehead & Australian Broadcasting Corp* [1985] 7 FCR 541 at 550

⁵ *Berlei*, supra at 163

⁶ *Wuu Khok Chiang George*, supra at paragraph 25

⁷ *Law Wai Duen*, supra at 405 and 409; *Molomby*, supra at 550; *Wuu Khok Chiang George*, supra at paragraph 27

⁸ *Edman v Ross*, supra at 361; *Law Wai Duen*, supra at 409

⁹ *Burn v London and South Wales Coal Company*, supra at 118; *Edman v Ross*, supra at 361

¹⁰ [2011] 5 HKLRD 241 at 29 and 30

purpose is "germane to shareholder's economic interest", without proving a personal or proprietary interest.



The court should be more willing to grant inspection orders to protect the interests of members in publicly listed companies. This view was endorsed by Deputy Judge (as he then was) L Chan in *Choi Chi Wai v Hong Kong Agriculture Special Zone Ltd*, as being 'more in line with the prevailing disposition of the community on corporate governance'.

Reasons to refuse inspection

Directors

Where it can be proved that the director intends to abuse the confidence in relation to the company's affairs and to injure the company in a material way that the director's right of inspection can be interfered with, and such interference can only be effected in circumstances where a restriction on a director's right can be imposed because of misuse of confidential information leading to damage (*Law Wai Duen*, supra at 408).

The view changed with the advent of the English case *Oxford Legal Group Ltd v Sibbasbridge Services Ltd*. In that case, the English Court of Appeal made it clear that the Court would not grant a director's inspection application if the director was using his right to inspect for improper purposes, even if those purposes did not give rise to injury to the company. In other words, "abusing confidence to injure the company" is merely one example of "improper purpose".

This view has been approved by the Hong Kong Court. In *Yung Siu Wa v Raffles Family Office Limited*, "[an] attempt to achieve an advantage in proceedings, anticipated or existing, between various shareholders of the company concerned, if established, would be an improper purpose, as this would not be for the purpose of discharging one's duties as a director." In this case, the plaintiff would soon inevitably be removed as a director. The fact that a director would inevitably be removed soon was not per se a reason to refuse inspection. But the evidence shows that the plaintiff applied to inspect documents so that it might assist him in his own foreshadowed litigation with other shareholders, and hence it is for an improper purpose.

Shareholders

In *Morning Ray Investment Co Ltd v Jinhui International Enterprise Ltd*, the plaintiff was a minority shareholder of the defendant company and had a representative director on the board of the defendant. The central issue in *Morning Ray* was whether the application was for a proper purpose. The plaintiff neither explained why it had not included directors' right to inspect in its application, nor demonstrated that its representative director had even made a meaningful attempt to exercise such right. The Court rejected the application based on such failures.

¹¹ *Conwa Wong Kar Gee Mimi*, supra at 25

¹² HCMP 53/2011, [2012] HKEC 808, 5 June 2012

¹³ [2008] Bus LR 1244

¹⁴ [2018] HKCFI 2620

¹⁵ [2022] HKCFI 926

The court will first consider the availability of other recourse when assessing the merit of an s 740 application. Minority shareholders who are directors or have representative directors on the boards should therefore first invoke their directors' right to inspect.

It is crucial to find the appropriate timing and manner in which to exercise the right to inspect - this involves careful strategic planning. Minority shareholders and directors should consult their legal advisors to find the best plan of action.



Conclusion

Sufficient notice period is of paramount importance. Reference to "not less than 21 or 14 days" in the CO or the CWUMPO is interpreted by the courts to "21 or 14 clear days", exclusive of the day on which the notice is served and the day on which the meeting is held. To avoid any doubt, "the day on which the notice is served" means the day the notice is served on the relevant parties and so it includes the day the notice is received. Especially when the notice of the meeting is dispatched by post, the Articles of Association of the company usually contains a deeming receipt provision regulating the date on which a notice is deemed to be served.

The common law rule that fractions of a day are not reckoned is acknowledged and accepted by the courts to be applicable in the context of meetings of companies, presumably, to give effect to the legislative intention that sufficient time should be given to members or creditors for deliberation of the meetings.

Section 307 of the Companies Act 2006 in the UK sets out what is known as the clear day rules, which state, rather clearly, that any reference in section 307 to a period of notice is to be calculated by excluding (a) the date of the meeting and (b) the day on which the notice is given. Such express provision has codified the common law rule. Yet, the CO has not followed suit and we have to rely on the common law for the calculation of days.

Calculating the number of days' notice required for a meeting is an essential and sometimes daunting task for the company secretary and the company's legal advisers.

Despite the above, it is always prudent and advisable to allow a few more days in giving the notice of meeting so as to avoid unnecessary disputes and any resolution passed be open to attack or challenge. Kaplan J's words should be borne in mind when giving sufficient notice period, "there is nothing to stop more than 21 days' notice being given, and I find it difficult to see why there is always an attempt to produce a notice which gives the very minimum amount of time with no leeway and in this case results in short notice".

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Reference

- (1) The Securities and Futures Commission v The Stock Exchange of Hong Kong Limited [1992] 1 HKLR 135
- (2) Goal Upward Investment Ltd v Osman Mohammed Arab & others [2016] 5 HKLRD 158
- (3) Re Lympe Investments Ltd [1972] 1 WLR 523
- (4) Re Railway Sleepers Supply Co (1885) 29 Ch D 204
- (5) Re Hector Whaling Ltd [1936] 1 Ch 2018
- (6) Kosmin, L., & Roberts, C. (2008). Company Meetings and Resolutions: Law, Practice, and Procedure (3rd ed.). Oxford University Press.
- (7) Shackleton, F., Cordes, M., & Caulfield, G. (2011). Shackleton on the Law and Practice of Meetings. Sweet & Maxwell.
- (8) Lawton, P. (1993). Meetings in Hong Kong their Law and Practice. Longman.