Whether your company is a Hong Kong or non-Hong Kong company - the Hong Kong Companies Ordinance applies and provides for substantial remedies for breaches of fiduciary duties

不論您的公司是否於香港成立，香港《公司條例》都適用並可就違反受信責任提供實質補救

Mohan Datwani 高朗

When there is a reference to a 'company' under the Companies Ordinance, it normally refers to a company incorporated under the Companies Ordinance. There are also certain references to a 'non-Hong Kong company' under the Companies Ordinance. This refers to a company incorporated outside of Hong Kong that has established a place of business in Hong Kong. The paradigm example is an overseas incorporated company listed in Hong Kong. Under listing requirements these overseas listed companies are required to be registered under Part 16 of the Companies Ordinance as a non-Hong Kong company. The main aim is that there should be appointment of process agents, filing of certain notices and other administrative filings. In the context, the common assumption among certain directors is that aside from minor regulatory filings, the Companies Ordinance, which mainly governs Hong Kong companies, including Hong Kong listed companies, does not provide any serious regulatory oversight for overseas incorporated listed companies.

However, the decision of *Ge Qingfu v L&A International Holdings Limited* [2018] HKCFI 2742 **(Ge case)** (below) serves as a reminder to directors of companies, Hong Kong and overseas listed companies alike, that they need to give serious consideration to compliance issues within the substantive provisions of the Companies Ordinance relating to protection of the interests of the company and its shareholders. Specifically, they are required to fulfil their fiduciary duties to Hong Kong legal standards irrespective of where they are incorporated, whether in Hong Kong or elsewhere.

Importantly, if they should fail to do so, they stand exposed to the possibility of claims not only against their listed companies but also against themselves. Further, in respect of any monetary damages awarded against them, depending on their contractual and/or D&O insurance arrangements, they may become liable for the damages. In the *Ge case* some HK$18.7 million was awarded against the directors in favour of Ge for their breach of fiduciary duties. To avoid such risk exposures, directors of companies, including Hong Kong and overseas listed companies, must discharge their director and/or fiduciary duties to the standards expected of them under Hong Kong laws. They should also keep proper records of all corporate actions and make timely filings and disclosures under the applicable Listing Rules as part of discharging of their director and/or fiduciary duties.

Remedies for Protection of Companies' or Members' Interests

The *Ge case* was brought under Part 14 of the Companies Ordinance. This provides for remedies to protect the interests of companies and their members, including the unfair prejudice remedy, the statutory injunction order restraining conduct that constitutes contravention of the Companies Ordinance, the statutory derivative action, and the right to seek a court order to inspect company records. In particular, Division 3 of Part 14 provides for 'Remedies for Others' Conduct in relation to Companies etc.' Under Section 728 thereof, the Court can order wide-ranging remedies against any person where the person that has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute a contravention or default of the Companies Ordinance, a breach of fiduciary duties and/or the company's articles in respect of a company.

As you may recall, a company refers to a Hong Kong incorporated company. But for the purposes of Part 14, Section 722 extends the definition of a company to a 'non-Hong Kong company' which includes an overseas incorporated listed company. This is the reason why the Court exercised jurisdiction under the *Ge case* over L&A International Holdings Limited **(L&A)** a GEM Board company incorporated under Cayman Islands law.

The Ge case

The facts of the *Ge case* are complex. But reduced to its simplest form, the directors of L&A purported that it had issued certain options to employee-grantees that were supposed to have been exercised. The effect was to bring the number of issued shares in the company from about 24 billion shares to around 25.6 billion shares. The dilution effect meant that Ge's minority shareholding fell below 10% and he was not able to raise a requisition for an EGM to remove L&A's directors. It also helped to defeat a general offer by a third party on the basis that the offer did not cover the option shares. On these facts, Ge sued

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7:00pm-7:20pm
Opening by Hosts: HKIoD Focus

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Chairman, HKIoD

Dr Carlye Tsui
CEO, HKIoD

7:20pm-7:50pm
Highlights Talk: An Overview of Economic Outlook

Mr Robin Xing
Chief China Economist, Morgan Stanley

Host:

Ms Bonnie Chan
Deputy Chairman, HKIoD

7:50pm-8:40pm
Panel Discussion: Sustaining Growth in a Fast Changing World

Mr T K Chiang
Managing Director, CLP Power Hong Kong Limited

Mr Tin Ha
Director of Finance and Operations, Roche Hong Kong & Macau

Ms Ada Wong
CEO, Champion REIT;
Directors Of The Year Awardee

Host:

Mr William Lo
Deputy Chairman, HKIoD

8:40pm-9:30pm
Panel Discussion: Corporate Leadership with the Power of Innovation

Prof K C Chan
Chairman,
WeLab virtual bank

Mr Thomas Ho JP
Chief Executive,
Gammon Construction Limited;
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Mr Shang Hailong
Managing Director,
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(amongst others) L&A's directors for breach of fiduciary duties. The remedies Ge sought included a claim for the HK$18.7 million that he spent to purchase shares to bring himself over the 10% shareholding threshold in L&A to preserve his minority interest in order to raise the requisition for an EGM to remove L&A's directors.

The Court's findings and remedies

In a nutshell, the Court found that the grant of the options was a false scheme devised to defeat a third-party general offer. This was evident from the lack of proper corporate documents and the delayed announcements and filings, which L&A's directors attempted to explain using the excuse of multiple oversights. Accordingly, the Court found that L&A's directors were in breach of their fiduciary duties in granting of the options (except for a sick director who played no part in the granting of the options). Under the circumstances, the Court ordered the directors of L&A to pay Ge damages of around HK$18.7 million plus interest, and costs of the proceedings as set out in the judgement.

For the director

As the *Ge case* demonstrates, directors need to be aware that there are powerful provisions under Part 14 of the Companies Ordinance that can expose them to personal liabilities for breaches of fiduciary duties. Further, they should be aware that the Court is ready and willing to exercise these powers. The directors should remember that contractual arrangements and/or D&O insurances may not necessarily cover their personal exposures to liabilities. It is therefore important for directors to be aware of and discharge their director duties properly to the expected standards under Hong Kong law. Further, as a compliance matter, directors must be mindful of keeping proper records and making timely announcements and disclosures under the applicable Listing Rules.

Mohan Datwani FCIS FCS(PE) is a Solicitor and a fellow member of HKIoD.

在《公司條例》提述的「公司」，一般是指根據《公司條例》註冊成立的公司。而《公司條例》提述的「非香港公司」，則指在香港以外註冊成立並在香港設立營業地點的公司，在外地註冊成立的香港上市公司便是典型的例子。根據上市規例，這些海外註冊成立的香港上市公司必須根據《公司條例》第16部註冊為非香港公司，主要目的是確保相關公司有委任法律程序文件代理人並將特定的通告及其他行政文件報備。就此而言，某些董事通常會假設《公司條例》主要規管香港公司（包括在香港上市的公司），而對於海外註冊的上市公司，除基本監管存檔要求外，並無嚴格規管。

然而，高等法院原訟法庭2018年編號2742、葛慶福控訴樂亞國際控股有限公司案（*Ge Qingfu v L&A International Holdings Limited〔2018〕HKCFI 2742*）（「葛氏案件」）（見下文）提醒香港公司和海外註冊成立的香港上市公司必須認真考慮遵守《公司條例》中有關保障公司及其股東權益的實質規定。具體而言，不論公司於香港或其他地方註冊成立，都必須按照香港的法律標準履行受信責任。

更重要的是，若公司董事未能履行受信責任，該上市公司固然會被追討賠償，董事本人亦無法置身事外。此外，視乎公司董事的合約及／或董事及高管人員責任保險的安排，如判決涉及向董事的金錢索償，董事可能需要承擔賠償責任。在*「葛氏案件」*中，多名董事被判違反受信責任，需向葛氏賠償港幣1,870萬元。香港公司和於香港上市的海外公司的董事要避免這類風險，必須按照香港的法律標準履行董事職責及／或受信責任。他們應妥善保存一切公司行動的紀錄、及時存檔並按照適用的上市規則作披露，以履行董事職責及／或受信責任。

保障公司或成員權益的補救措施

*「葛氏案件」*是根據《公司條例》第14部提出的訴訟。該部的條文就保障公司及其成員權益提出補救措施，包括補救被不公平損害的權益、頒發法定強制令以禁制構成違反《公司條例》的行為、提出衍生訴訟及尋求法庭頒令以查閱公司紀錄的權利。並且，第14部的第3分部更規定「對於其他人就公司從事的行為作出的補救等」。根據該部分的第728條，如果某人曾從事、正從事或正擬從事某行為，而該行為已構成、正構成或將構成違反本條例的行為、關乎違反本條例的錯失、違反有關的受信責任及／或有關公司章程細則，法庭可以頒令多種不同的補救。

如上所述，公司是指在香港註冊成立的公司。不過，就第14部的目的而言，第722條將公司的定義延伸至「非香港公司」，包括在外地註冊成立而於香港上市的公司。正因如此，在*「葛氏案件」*中法庭可向樂亞國際控股有限公司（樂亞）這間根據開曼群島法例註冊成立的創業板上市公司行使司法管轄權。

「葛氏案件」

*葛氏案件*的案情十分複雜，簡略而言，樂亞的董事聲稱向受贈僱員授予一些期權，並指這些期權理應已行使。這令公司的已發行股份數目從大約240億股增至256億。這種攤薄效應令葛氏的少數股權跌至10%以下，使他失去要求舉行特別股東大會以罷免樂亞的董事的權力，亦令一項第三方提出的全面收購建議因為收購不包括期權股份而遭否決。葛氏基於以上案情而對樂亞提出多項控訴，包括董事違反受信責任；葛氏還提出多項申索，包括賠償港幣1,870萬元。他曾以這金額購買超過10%的股份以保留小股東權益，從而符合資格要求舉行特別股東大會罷免樂亞的董事。

法庭的裁定及補救措施

簡言之，法庭裁定授予期權只是否決第三方提出全面收購建議的幌子，公司沒有相關的正式文件，而在公告和備案亦有延遲，就足以證明這一點。樂亞的董事屢屢以疏忽為藉口試圖開脫，因此被法庭裁定（一名沒有參與授予期權的患病董事除外）在授予期權方面違反受信責任。有鑑於此，法庭頒令樂亞的董事向葛氏賠償大約港幣1,870萬元另加利息及裁判書列出的訟費。

董事須知

*葛氏案件*顯示，公司董事必須明白，根據《公司條例》第14部的有力條文，他們可能要為違反受信責任承擔個人法律責任。此外，董事亦必須明白法庭隨時可以並且願意積極行使這些權力。董事必須緊記，合約及／或董事及高管人員責任保險的安排未必能豁免他們的個人法律責任，因此他們必須知悉並且按照香港法例預期的標準履行董事責任。另外，在合規方面，董事必須注意妥善保存紀錄，並及時按照適用的上市規則作出公告和披露。

高朗律師 FCIS FCS(PE) 是香港董事學會資深會員。

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Tel 電話： +852 2889 1414
Fax 傳真： +852 2889 9982
Email 電郵： magazine@hkiod.com

Editor 編輯
Ms Cora Wan 温旭兒小姐

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