

# RETROSPECTIVE TIME EXTENSION APPLICATIONS MAY BE TOO LITTLE, TOO LATE

## WONG MICHELLE YATYEE V GOLDBOND GROUP HOLDINGS LIMITED [2021] HKCFI 1129

### Background

Under the Hong Kong Companies Ordinance<sup>1</sup> (CO), a company must hold an annual general meeting (AGM) for each financial year<sup>2</sup> and its directors must lay before the company in AGM its financial statements, directors' report and auditor's report<sup>3</sup>. The CO stipulates that a private company or a company limited by guarantee shall hold an AGM (and its directors shall lay the reporting documents) within 9 months after the end of a financial year<sup>4</sup>. For any other company, the statutory time limit is 6 months<sup>5</sup>. Further, non-compliance with the statutory requirements to hold an AGM and lay the reporting documents may lead to criminal consequences<sup>6</sup>.

The recent decision in *Wong Michelle Yatyee v Goldbond Group Holdings Limited*<sup>7</sup> [2021] by the Court of First Instance (Court) concerned a delay in holding an AGM and laying the financial statements and retrospective applications for an extension of time to rectify the non-compliance. The Court clarifies the legal principles applicable in such applications. The case also highlights the importance of monitoring compliance with the statutory requirements and the potential legal consequence for non-compliance or for not promptly applying for a time extension in advance of the deadline.

### Facts

Goldbond Group Holdings Limited (Company) is a company listed on the Stock Exchange of Hong Kong. Shortly before the 2019 results were to be approved by the board, the Company's then auditors requested the audit committee to undertake forensic investigation into certain transactions carried out by a wholly-owned subsidiary. The forensic investigation took time to

conclude and the audit work for the financial years 2019 and 2020 was suspended in the meantime. For that reason, notwithstanding the financial years 2019 and 2020 ended on 31 March 2019 and 31 March 2020 respectively, the Company was not able to finalise the financial statements within the statutory periods (i.e. 6 months from 31 March 2019 and 31 March 2020 respectively). The financial statements were eventually finalised in around November 2020.

In light of the defaults, in December 2020, an executive director/shareholder of the Company (Applicant) made a retrospective application to the Court for a time extension to lay the financial statements and to hold the AGM for 2019 and 2020 pursuant to sections 429, 431 and 610 of the CO. Before the application was heard, on 28 December 2020, the Company held the AGM for 2019 and 2020 to approve the financial statements.

It is worth noting that notwithstanding the delay in publishing the annual results, the Company had kept its shareholders informed of the status of the preparation of the financial statements and the Company's financial position by means of regular announcements.

### Time extension for the laying of reporting documents

The Court confirmed that it had the discretion to extend time for laying annual results. When exercising its discretion, the Court would consider various factors including the following:

- whether the default was inadvertent;

<sup>1</sup> Chapter 622 of the Laws of Hong Kong

<sup>2</sup> Sections 429 and 431, CO

<sup>3</sup> Section 610, CO

<sup>4</sup> Sections 431(1)(a)(i) and 610(1)(a), CO

<sup>5</sup> Sections 431(1)(b)(i) and 610(1)(b), CO

<sup>6</sup> According to sections 429(3)-(5) of the CO, a director of a company who fails to take all reasonable steps to secure compliance with the requirement to lay the reporting documents may be liable to a fine of \$300,000 and to imprisonment for 12 months. According to section 610(9) of the CO, a company which contravenes the requirement to hold an AGM, and every responsible person of the company, may be liable to a fine of \$50,000.

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- whether the shareholders were prejudiced by the non-compliance;
- whether the court is satisfied that the company would comply with the obligations to lay its financial statements before general meetings in the future; and
- whether the application is made for some discernible legitimate purpose.

The Court, however, made clear that while it has the power to grant time extension before or after the original deadline for laying the reporting documents, a more compelling justification is required where an application is made retrospectively.

In this case, the Court allowed the application with retrospective effect. In doing so, the Court came to the view that the default was not deliberate and was not due to any disregard of the relevant statutory obligations on the part of the Company or its directors. Indeed, the Company and its directors had subsequently taken reasonable steps to rectify the situation. Further, there did not appear to be any prejudice suffered by the members as they had been kept informed of the Company's financial condition all along.

The Court acknowledged that if it allowed the application, the Company's directors would not be considered as having contravened the relevant statutory provision which requires them to lay the financial statements within "6 months, or any longer period directed by the Court" after the end of the financial year. The effect would be to relieve the directors from any criminal liability for not complying with their statutory obligations. It appears that the Court accepted this as the discernible legitimate purpose of the time extension application.

### Time extension for the holding of AGM

The Applicant originally applied for an extension of time to hold the AGM pursuant to section 610(5) of the CO, which provides that the court may extend time "on an application made before the end of the period otherwise allowed". In light of such express wording, the Court concluded (and the Applicant conceded) that it has no power to grant any extension under section 610(5) if the application is made after the prescribed deadline as in the present case.

The Applicant then relied on section 610(7) of the CO, which provides that if a company contravenes the requirement to hold an AGM, a member may apply to the court for an order that a general meeting be called. An order under section 610(7) would normally be made upon a member's application (such as the Applicant's application) so as to uphold the member's fundamental entitlement to an AGM. However, here the Court refused to do so because by the time the application was heard, the AGM had already been held. More importantly, if the application were made with the hope that the directors could be relieved from any criminal liabilities for failing to hold an AGM within time, such purpose could not be achieved. The Court clarified that an order under section 610(7) does not have the effect of absolving the company and its directors from their liability for the original default. There remains a contravention of the requirement to hold an AGM in the first place.

### Takeaways

This case highlights the following:

- Adherence to the statutory period for a company to hold an AGM and its directors to lay the reporting documents is of paramount importance. Failure to comply with the statutory requirements could result in criminal prosecution against the company as well as its directors.
- Where circumstances render it impracticable to meet the statutory deadline, companies should seek legal advice on the appropriate steps to be taken as soon as practicable and apply for time extension sooner rather than later. The court has no power to grant a retrospective time extension for the holding of AGM and an application for a retrospective time extension for the laying of reporting documents requires a more compelling justification. Thus, the best way to avoid any breach of the statutory requirements and the consequential liability is to apply for time extension in advance of the statutory deadline.
- Where it is not possible to lay the reporting documents in AGM, and even if a time extension has been obtained, companies should keep their shareholders informed of the status of the preparation of the reporting documents and their financial condition. This will mitigate the risk of any prejudice suffered by the shareholders and increase the chances of success in any time extension application in the future in case of further delays.

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