Wednesday, May 20, 2020

NOTICE TO ALL LISTED COMPANIES

Re: Holding of Annual General Meetings under COVID-19 Restrictions

On Thursday, May 14, 2020 the Jamaica Stock Exchange ("JSE") sent a letter to all listed companies, acknowledging the challenges faced by companies in holding 2020 AGM's and advising of our intention to institute a Representative Action in the Supreme Court of Jamaica on behalf of Companies that wished to hold Annual General Meetings under the sanction of the Court.

Since time was of the essence for many Companies, we placed a deadline of Tuesday May 19, 2020 for receipt of Participation Agreements from Companies signifying their intention to participate.

As a result of some of the questions asked, and in response to requests for further time to deliberate, **we have decided to extend the time for Participation Agreements to be submitted to 4:00pm Friday May 22, 2020**.

We can confirm that sufficient responses have been received to ensure that we will be proceeding but we are anxious that all affected companies who must hold AGMs during the restrictive period take steps to make sure they are legally compliant, whether by participating in the JSE led action or by instituting their own action.

We are mindful of members who wish to participate but hope for a lower fee. Please note that the total all inclusive legal cost is US$40,000.00 plus GCT of $6,000.00 = US$46,000.00. So if, e.g., 30 companies participate, the cost per company comes down to US$1,533.33. We have 60 listed companies.

We would also like to share some of the **legal advice** we have received so that Companies and their counsel can be better guided as to why the JSE is of the view that most of their plans to hold AGMs are not legally compliant and would violate the rights of shareholders.

We are reminded by our attorneys that the law is not all to be found in the Companies Act, but more so in judgments of court cases where meetings were challenged.

Our position based on the advice received is as follows:-

1. ***All shareholders are entitled to attend the AGM in person if they so choose. Companies cannot require members to appoint a proxy or to watch by video stream***

   In Byng v London Life Association Ltd. [1988 B. No. 8077] - [1990] Ch. 170 the court considered the meaning of "meeting" in the UK's 1985 Companies Act as well as whether physical space was relevant in determining whether a meeting was constituted.

   Vice Chancellor Sir Nicolas Browne-Wilkinson said:

   The rationale behind the requirement for meetings in the Companies Act is that the ***members shall be able to attend in person so as to debate and vote*** *on matters affecting the company. ……*

   I would add that at a company meeting, ***a member is entitled not only to vote but also to hear and be heard in the debate****.*

   Unlike directors' meetings, where section 141 of the Jamaican Companies Act ("the Act") allows for directors to participate using electronic means and still be considered 'present' at a meeting, there is no similar provision in the Act for members at a shareholders meeting. This seems to suggest that the intention is that members of a general meeting must be present in a physical space to be 'present' at a meeting.

   It is important not to follow guidance from Jurisdictions like the UK where the law has been amended to specifically authorise attendance by electronic means.

2. ***Companies cannot require shareholders to send in their Questions and Votes on the resolutions in advance***

   As stated above members are entitled to come to the meeting and to debate and to Vote at the meeting after they have their debate.

   In Re Ryde Ex-Services Memorial & Community Club Limited (Administrator appointed) [2015] NSWSC 226

The court invalidated all resolutions of a meeting as a result for an irregular voting procedure which denied members the right to have a debate before voting, or to have a show of hands or to call for a poll. The court said:-

> *although the chairman acted with bona fides* ***the voting procedure he announced, and implemented, on his own authority, deprived members, at least, of an opportunity to have a vote by a show of hands*** *(considered, by the terms of article 65(a), important),* ***if not a vote after debate****.. denial of that opportunity, in the context of the meeting as a whole, to a significant degree* ***deprived members of the Club of a reasonable opportunity to exercise their voting rights in an orderly and constructive way and, thereby, to participate in a process of decision-making in which they were entitled to participate.***
>
> *A method of voting to which members are entitled cannot readily be displaced by another method of voting imposed on them in denial of that entitlement. Implicit in denial of a right to vote – even so fleeting a right as a right to a show of hands – is a denial of a right to a reasonable opportunity to participate in the process of corporate decision making.* ***A show of hands (or a poll called for in lieu of a show of hands) may provide a litmus test of voting intentions on larger questions yet to be debated or put to a vote, an opportunity for participants in a meeting to test numbers, a measure of whether real opportunities for persuasion to one view or another are present***

3. *Companies cannot require Shareholders to appoint a Proxy from a designated list of Proxies,*

Section 131 of the Companies Act provides that:

> ***Any member*** *of a company entitled to attend and vote at a meeting of the company* ***shall be entitled to appoint another person*** *(whether a member or not)* ***as his proxy*** *to attend and vote instead of him,*

The section clearly contemplates the shareholder having the choice.

Section 134 provides

> ***134.****—(1)* ***A corporation****, whether a company within the meaning of this Act or not* ***may****— (a) if it is a member of another corporation, being a company within the meaning of this Act, by resolution of its directors or other governing body* ***authorize such person as it thinks fit to act as its representative*** at any meeting of the company

Guidance from the 3rd Edition of Corporate Secretaryship ICSA Professional Development by Luke Thomas states at page 247

> ***A member may appoint a proxy of his own choice….***

and at page 245

> *The Chairman of the meeting is usually shown as the default proxy, but* ***that name can be struck out by the shareholder if he wishes to insert the name of a different proxy****.*

Trevor Adams editor of Business law and Practice stresses that:

> ***a member may wish to appoint a proxy*** *not only where the member is unable to attend meetings but also* ***where he feels that a proxy may be more articulate*** *or persuasive when speaking on a particular issue.*

The proxy form must be delivered to the Shareholders along with the Notice and the accounts.

4. *The Meeting once called must be started and then adjourned, it cannot simply be withdrawn or adjusted, or postponed unless the Articles authorise this*

In the text Shackleton on the Law and Practice of Meetings (12th ed, 2011) p.147,:

> ***Once a general meeting has been convened upon due notice, it cannot be postponed or cancelled. The correct procedure*** *where the purpose for which a meeting has been convened has ceased to exist,* ***is to hold the meeting as convened and adjourn it sine die*** *without putting the resolution to the members. A purported cancellation will not be valid. [Emphasis added].*

In Mr Stuart Kaye v Oxford House (Wimbledon) Management Company Ltd [2019] EWHC 2181 (Ch) after receiving legal advice, the Chairman for the meeting announced that the resolutions to be passed were ineffective and would not be put to the meeting and thereafter closed the meeting and left. The shareholders who were still present, continued the meeting and passed the resolutions. In deciding that the Chairman had no authority to withdraw the resolutions and close the meeting the Court stated:

> *Once a meeting has been duly called, in the absence of something in the articles of the company allowing for a meeting to be postponed by a subsequent notice, it cannot be so postponed … Further such a meeting cannot be cancelled, that being a matter going even further than a postponement, unless the articles permit (Bell Resources Ltd v. Turnbridge Pty Ltd (1988) 13 ACLR 429 SC (WA)).*

It has been held however in Byng v London Life Association Ltd [1990] Ch 170 that the chairman has a residual common law power to adjourn a meeting which is improper and cannot conduct business.

Listed companies who have already sent out Notices which they now realise would be for an irregular meeting should take legal advice on how to proceed. It may well be that the only correct course would be to advise members that the meeting will be convened and then immediately adjourned and a new meeting under the sanction of the court will be held

5. Can Companies have the shareholders in different rooms, no more than ten at a time?

This multiple room option was attempted in Byng v London Life Association Ltd [1990] Ch 170 but the court ruled that no business could be validly transacted at the meeting as there were problems with the technical equipment and the court felt that the members were not able to all participate together in the proceedings as one meeting. It therefore appears to be *possible* but quite risky if a shareholder were to challenge it.

Moreover, it is doubtful that it could pass the test of the Disaster Risk Management (Enforcement Measures) Order, which provides

(a) ***gatherings in any public place shall not exceed 10 persons at a time****; and*

(b) except as required for work in accordance with paragraph 7, each person at such a gathering shall maintain a distance of at least 91.44 centimetres (or 3 feet) from other persons.

There can be little doubt that Companies would need to get the Ministry's approval for the plan and then comply with rigid guidelines in the unlikely event that they approved such a plan. Members could not be allowed to congregate outside, or for drinks, or when leaving etc….

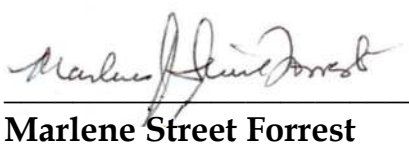
The Jamaica Stock Exchange through the Regulatory and Market Oversight Division is charged with the responsibility to ensure that all listed companies comply with the Laws of Jamaica, the Stock Exchange Rules, and observes the rights of shareholders.

We believe that fair warning and information and opportunity have now been afforded to all listed companies to be knowledgeable of the perils of holding Annual General Meetings which could:

- breach the laws of Jamaica,
- disenfranchise shareholders of their rights, and
- run the risk of the meeting later being invalidated along with all resolutions, director appointments and other and subsequent board business.

The law provides a clear solution in these circumstances to seek a court order and the JSE has created a path that we hope would cost members less than it might otherwise cost them. Companies are however entitled to seek their own court order.

Please be guided accordingly



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