

Article

Shareholder Rights and Remedies: a summary

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This article summarises certain remedies available to aggrieved shareholders of companies incorporated in the popular offshore jurisdictions of the BVI and the Cayman Islands.

Unfair Prejudice

Statutory 'unfair prejudice' remedies are often employed by aggrieved shareholders who consider that the affairs of the relevant company are being conducted in a manner that is oppressive, unfairly discriminatory or unfairly prejudicial to them in their capacity as members of the company. In the BVI, shareholders may bring this action under Section 184I of the BVI Business Companies Act, 2004.

There is no free-standing statutory remedy for allegations of unfair prejudice in the Cayman Islands, outside the context of a winding up petition on just and equitable grounds under section 92(e) of the Cayman Islands Companies Act (2020 Revision). However, section 95(3) of the Law allows the Court to grant an alternative remedy for minority shareholders that can establish, in principle, that it is just and equitable that a company should be wound up, by, for example, ordering the sale or purchase of shares or a wide range of other remedies which are listed as alternatives to winding-up the company, including an order regulating the conduct of the company's affairs, an injunction, or an order authorizing civil proceedings. No remedy under either statutory regime is granted as of right by the Court following an established claim of unfair prejudice or an entitlement to a winding-up order. The Court's main function is to exercise its discretion to grant a remedy which is fair and proportionate in the circumstances.

There is no prescribed time limit for bringing unfair prejudice claims in the BVI, but the court will take into account any delay in starting proceedings.

Winding Up on the Just and Equitable Ground

Aggrieved shareholders in BVI companies may also seek to wind up the relevant company on just and equitable grounds under Section 162 of the BVI Insolvency Act, 2003 as may shareholders in Cayman Islands companies under section 92(e) of the Cayman Islands Companies Act (2020 Revision). In assessing whether the appointment of liquidators is 'just and equitable' the Court will be guided by the principles set out by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, taking into account all of the facts of the case and whether the subject company is a 'quasi-partnership'.

The BVI Court's jurisdiction to wind up a company on just and equitable grounds where there is a functional deadlock in the management of the company was recently put into focus by the Judicial Committee of the Privy Council in *Chu v Lau* [2020] UKPC 24, on an appeal from the BVI courts. While recognising that a winding up order is usually a remedy of last resort and that each case will turn on its particular facts, the Privy Council advised that winding-up might be appropriate where the company concerned is a quasi-partnership and where it is shown by the petitioner that there is an irretrievable breakdown of trust and confidence between the relevant partners at the time of trial.

In the Cayman Islands, the Court's undoubted power to wind up a company on just and equitable grounds is highly sensitive to the facts of the case, taking into account the unique provisions of section 92(e) and 95(3) of the Cayman Islands Companies Act (2020 revision).

Derivative Actions

Where wrongs have been committed against the relevant company, the members may, in certain circumstances, seek permission from the Court to bring a derivative claim against the wrongdoers in the name and on behalf of the company under Section 184C of the Act. The BVI Court will be required to take a number of mandatory factors into account as prescribed by section 184C (2) of the Act. Some of these factors include whether the member is acting in good faith, whether the derivative action is in the interests of the company and whether an alternative remedy to the derivative claim is available. Further, in considering whether to grant permission to bring a

derivative action, the BVI Court must be satisfied that: (i) the company does not intend to bring or defend the action itself; and (ii) it is in the best interests of the company that the conduct of the proceedings should not be left to its directors; and/or the shareholders as a whole, as the case may be.

In the context of derivative action proceedings commenced in the Cayman Islands Court, Order 15 rule 12A provides that the plaintiff must apply to the Grand Court for leave to continue the action, at which point the Court will take into account a range of relevant considerations. The availability of a derivative action as a matter of common law has been recognized in a number of reported cases involving Cayman Islands companies.

Foster J, in the Cayman Islands decision in *Renova Resources Private Equity Limited* [2009] CILR 268 stated that where such an action is allowed, the member is not really suing on his own behalf nor on behalf of the members generally, but on behalf of the company itself. Although he will have to frame his action as a representative one on behalf of himself and all the members other than the wrongdoers, this gives a misleading impression of what really occurs. The plaintiff shareholder is not acting as a representative of other shareholders, but as a representative of the company.

The Grand Court of the Cayman Islands in *Top Jet Enterprises Limited* (Unreported 19 January 2018 Segal J) also identified circumstances where an aggrieved shareholder may bring an action against a third party. It was held in that case that, if the third party is an 'accessory to or closely associated with the conduct which gives rise to the fraud on the minority', a derivative claim against the third party may be permissible.

The availability of an unfair prejudice claim is not an absolute bar to a derivative claim in the BVI. The appropriate course of action would depend on the circumstances of the particular case. The Court must consider all the relevant circumstances, including the costs involved in pursuing the derivative action and, more importantly, whether the same results could be achieved by way of a single unfair prejudice claim as would be available by way of a derivative action.

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