



Legal Insights

Shareholder Disputes: A comparison between the Cayman Islands and the British Virgin Islands

2023

In the prevailing economic conditions shareholders in offshore companies registered in the Cayman Islands (“**Cayman**”) or the British Virgin Islands (“**BVI**”), including companies which carry on business as investment funds, are increasingly being forced to consider their rights against directors who may have been responsible for mismanagement of the company’s affairs. Minority shareholders, in particular, are keen to understand the availability of remedies which allow them to overcome “wrongdoer control”. That is to say, the common situation where the composition and direction of the board is controlled by majority shareholders. In this Briefing, we set out a brief summary of the duties owed by directors and the remedies available to shareholders in each of these two jurisdictions.

What is scope of a director’s duties?

Cayman Islands

The duties of a director of a Cayman company are found in the common law and include (i) the duty to act *bona fide* in the best interests of the company, (ii) a duty to exercise his or her powers for proper purposes (and not to exercise them for purposes for which they were not conferred), and (iii) a duty not to make secret profits.

British Virgin Islands

The law governing the “duties of directors and conflicts” is set out in Division 3 of Part VI of the BVI Business Companies Act, 2004 (as amended) (the “**Act**”). These largely mirror the position at common law and include, for example, (i) the duty to “*act honestly and in good faith and in what the director believes to be in the best interests of the company*”(section 120); (ii) the duty to exercise powers “*for a proper purpose*” and a requirement that a director “*shall not act, or agree to the company acting, in a manner which contravenes this Act or the memorandum or articles of the company*” (section 121); and (iii) a requirement that “*a director of a company shall forthwith after becoming aware of the fact that he or she is interested in a transaction entered into or to be entered into by the company, disclose the interest to the board of the company*” (section 124). It is interesting to note that the Act also provides that a director of a company that is a wholly-owned subsidiary, subsidiary or joint venture company may, subject to certain requirements, act in the

best interests of the relevant parent, or in the case of the joint venture company, the relevant shareholders even though such act may not be in the best interests of the company of which he or she is a director.

What is the standard of care that a director owes?

Cayman Islands

The common law applies to the Cayman Islands such that a director is under a duty to act with reasonable care, skill and diligence in the performance of his or her duties. In the English caselaw authority of *Re City Equitable Fire Insurance Co [1925] Ch. 407* it was held that a director need not exhibit in the performance of his or her duties a greater degree of skill than may reasonably be expected from a person of his or her knowledge and experience. This highly subjective test, however, has been met with increasing criticism in more recent years and there is further English caselaw authority to suggest that directors are nevertheless subject to an objective duty to “take such care as an ordinary man might be expected to take on his own behalf” (*Dorchester Finance Co v Stebbing [1989] BCLC 498 (decided in 1977)*). As such, a distinction appears to be drawn between the duty of skill on the one hand and the duty to take care on the other. However, in *Re City Equitable Fire Insurance Co* it was further held that “in respect of all duties that, having regard to the exigencies of business, and the articles of association, may be properly left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting to that official to perform such duties honestly.”

British Virgin Islands

In the BVI, the Act provides that “A director of a company, when exercising powers or performing duties as a director shall exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation:

- (i) the nature of the company;
- (ii) the nature of the decision; and
- (iii) the position of the director and the nature of the responsibilities undertaken by him or her.”

This duty is qualified by section 123 of the Act to the extent that the director of a company is entitled to rely upon the register of members and upon books, records, financial statements and other information prepared or supplied, and on professional or expert advice given, by:

- (i) an employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;
- (ii) a professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence; and
- (iii) any other director, or committee of directors upon which the director did not serve, in relation to matters within the director's or committee's designated authority.

However, the relevant director's reliance on the matters set above is subject to the proviso that in doing so he or she acts in good faith, undertakes a proper inquiry where this is warranted, and has no knowledge that his or her reliance on the register of members or the books, records, financial statements and other information or expert advice is not warranted.

What are the key remedies available to a member or shareholder?

Cayman Islands

The following remedies are available to a shareholder of a Cayman company:

- (i) A personal action against the company (where the company has breached a duty which is owed to the shareholder personally);
- (ii) A representative action (this is similar to a personal action and would lie for breach of a duty owed to a group of shareholders);
- (iii) A derivative, or multiple derivative claim (this is the most common type of action. See below);
or
- (iv) A petition to wind up the company on just and equitable grounds. (This remedy risks placing the company into liquidation although the Cayman Companies Act (2023 Revision) (the “**Cayman Companies Act**”) provides the Court with the option of making an alternative order. See below).

British Virgin Islands

The shareholders of a BVI company may pursue the following remedies:

- (i) A personal action under the Act (on the same grounds as at common law in the Cayman Islands);
- (ii) A representative action under the Act. Where a member of a company brings proceedings against the company and there are other members that have the same or substantially the same interest in relation to the proceedings, the Court may appoint that member to represent all or some of the members having the same interest and may, for that purpose, make such order as it thinks fit, including an order:
 - a. as to the control and conduct of the proceedings;
 - b. as to the costs of the proceedings; and
 - c. directing the distribution of any amount ordered to be paid by a defendant in the proceedings among the members represented.
- (iii) A derivative claim under the Act; or
- (iv) An unfair prejudice claim under the Act.

The most common type of remedies sought by minority shareholders are under (iii) and (iv) above. (see below).

What are derivative claims and what is their legal basis?

Cayman Islands

A derivative action is a claim commenced by one or more minority shareholders on behalf of a company of which they are a member in respect of loss or damage which that company has suffered. Such a claim can only be brought in certain circumstances and amounts to an exception to the rule that a company, as a separate legal person, should sue and be sued in its own name (often referred to as the rule in the English caselaw authority of *Foss v Harbottle (1843) 2 Hare 461; 67 E.R 189*). In the Cayman Islands the law governing derivative actions is drawn from the common law rather than statute.

British Virgin Islands

While the English common law applies in the British Virgin Islands “members remedies” have been given a statutory footing in Part XA of the Act (see below).

What is the procedure for commencing a derivative action?

Cayman Islands

As with the majority of actions commenced in the Cayman Islands, derivative claims are normally begun by serving a writ and statement of claim on the relevant defendant or defendants. Grand Court Rules O.15, r. 12A provides that where the defendant gives notice of an intention to defend the claim then the plaintiff must apply to the Court for leave to continue the action. Such an application should be supported by affidavit evidence verifying the facts on which the claim and entitlement to sue on behalf of the company are based. Pursuant to Grand Court Rules O.15 r.12A(8) on the hearing of the application, the Court may grant leave to continue the action for such period and upon such terms as it thinks fit, dismiss the action, or adjourn the application and give such direction as to joinder of parties, the filing of further evidence, discovery, cross-examination of deponents and otherwise as it considers expedient. In *Renova Resources Private Equity Limited v Gilbertson and Others [2009] CILR 268*, Foster., J affirmed the application in the Cayman Islands of the test to be applied in determining whether to grant leave to continue the action put forward by the English Court of Appeal in the case of *Prudential Assurance Co Ltd v Newman Industries Ltd (No.2) [1981] Ch 257*. Foster, J., held that: “(...) *there are two elements to this: first the plaintiff [is] required to show prima facie that there [is] a viable cause of action vested in the company and, secondly, that the alleged wrongdoers [have] control of the company (or could block any resolution of the company or the board) and thereby prevent the company bringing an action against themselves.*”

British Virgin Islands

The Act provides that subject to certain exceptions “*the Court may, on the application of a member of a company, grant leave to that member to (a) bring proceedings in the name and on behalf of that company; or (b) intervene in the proceedings to which the company is a party for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company.*” Section 184C(2) provides that “*without limiting subsection (1), in determining whether to grant leave under that subsection, the Court must take the following matters into account: (a) whether the member is acting in good faith; (b) whether the derivative action is in the interests of the company taking account of the views of the company’s director’s on commercial matters; (c) whether the proceedings are likely to succeed; (d) the costs of the proceedings in relation to the relief likely to be obtained; and (e) whether an alternative remedy to the derivative claim is available.*”

Leave to bring or intervene in proceedings may be granted by the Court only if the Court is satisfied that:

- (i) the company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or
- (ii) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders or members as a whole.

Such an application for leave should be made to the Court supported by affidavit evidence.

Is it possible to bring multiple derivative claims (“MDCs”)?

Cayman Islands

In the *Renova* case the Grand Court held that in appropriate circumstances MDCs would be permitted. In that case, the plaintiff had brought an action in respect of loss incurred by a wholly-owned subsidiary of the company in which it was a shareholder and therefore loss to the subsidiary caused indirect loss to its parent company and shareholders. However, the rule against the recovery of reflexive loss applied such that a shareholder or parent company would not be permitted to claim for indirect losses which mirrored those losses suffered directly by the relevant subsidiary or indeed sub-subsidiary on who behalf action was being brought.

British Virgin Islands

In *Microsoft Corporation v Vandem Ltd BVIHC VAP2013/0007* the Eastern Caribbean Court of Appeal held that BVI law which has been codified in this area “does not permit double derivative actions.” However, while the Act does not contemplate multiple derivative actions, there have been other case law authority that have confirmed that multiple derivative actions are available at common law in the BVI. English caselaw authority (which is persuasive authority in the BVI) such as *Universal Project Management Services Ltd v Fort Gilkicker Ltd [2013] 3 WLR* concerning the interpretation of s.260 the English Companies Act, 2006 may open up arguments that such actions are nevertheless available in the BVI at common law.

What remedies are available for unfair prejudice and what is their legal basis?

Cayman Islands

Pursuant to the Cayman Companies Act the Court may wind up a company if it is of the opinion that it would be just and equitable for it to do so. The Cayman Companies Act also provides that where such a petition “is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely –

- (i) an order regulating the conduct of the company’s affairs in the future;
- (ii) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;
- (iii) an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or

(iv) *an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly.*"

British Virgin Islands

The Act provides that "A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity, may apply to the Court for an order under this section."

The Act also provides that "If on an application under this section, the Court considers it just and equitable to do so, it may make such order as it thinks fit, including, without limiting the generality of this subsection, one or more of the following orders –

- (i) *in the case of a shareholder, requiring the company or any other person to acquire the shareholder's shares;*
- (ii) *requiring the company or any other person to pay compensation to the member;*
- (iii) *regulating the future conduct of the company's affairs;*
- (iv) *amending the memorandum and articles of the company;*
- (v) *appointing a receiver of the company;*
- (vi) *appointing a liquidator of the company under the Insolvency Act on the grounds specified in section 162(1)(b) of the Insolvency Act;*
- (vii) *directing the rectification of the records of the company;*
- (viii) *setting aside any decision made or action taken by the company or its directors in breach of the Act or the memorandum or articles of the company."*

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