



## Legal Insights

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# Unfair prejudice claims in the British Virgin Islands

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### Introduction

All shareholders of a company incorporated in the British Virgin Islands (“**BVI**”) have certain rights and protections. However, the imbalance of voting powers within a company can result in the controlling majority conducting the affairs of the company in a manner that is prejudicial to the rights of the minority shareholders. This article will explore the BVI court’s approach to situations where there is conduct that is alleged to be unfairly prejudice to the shareholder.

### BVI Business Companies Act 2004 (as amended) (“**BCA**”)

The protection of minority shareholders of a BVI company is codified in section 184I of the BVI Business Companies Act 2004 (as amended) (“**BCA**”). Minority shareholders of BVI companies can petition the BVI court for redress if they consider that the affairs of the company have been, are being, or are likely to be, conducted in a manner that is oppressive, unfairly discriminatory or unfairly prejudicial to them. Under section 184I, the court has discretion to protect the rights of minority shareholders and to provide relief against the company and those in control of it. If the court considers it just and equitable to do so, it can make an order as it thinks fit, including:

- 1) requiring the company or any other person to acquire the shareholder’s shares;
- 2) requiring the company or any other person to pay compensation to the shareholder;
- 3) amending the company’s memorandum or articles;
- 4) appointing a liquidator of the company; and
- 5) setting aside any decision made or action taken by the company or its directors in breach of the BCA or the memorandum or articles of the company.

No order under section 184I may be made against the company or any other person unless the company or that person is a party to the application which is brought before the court.

## Objective test

The test for what amounts to unfair prejudice in any case is an objective one (and not subjective). As stated in *Re Bovey Hotel Ventures Ltd* (31 July 1981, unreported), it is not necessary for a petitioner to show that those in control of the company had intended their actions were unfair or had acted in bad faith. The test for unfair prejudicial behaviour is whether a reasonable bystander who observed the consequences of the defendant's conduct would regard it as having unfairly prejudiced the petitioner's interests.

In order for a shareholder to succeed in a claim for unfair prejudice, the shareholder must also show that the conduct which is complained of was unfairly prejudice towards him/her.

## Case law

The Privy Council in *Yao Juan v Kwok Kin Kwok & Crown Treasure* [2022] UKPC 52 ("**Crown Treasure**") considered the elements of a BVI unfair prejudice claim and the appropriate remedies. *Crown Treasure* concerned the affairs of Crown Treasure, a BVI company (the "**Company**"). Madam Yao and Madam Kwok had entered into an oral agreement to develop and operate a luxury hotel in the People's Republic of China ("**Project**"). They both held 50% of the shares in the Company (which was the vehicle through which they would hold their respect interests in the Project). Each party needed the consent of the other party in order to transfer their shares in the Company. Madam Kwok was at all material times the sole director of the Company. Madam Yao contended that she would provide much of the funding and would need to be notified by Madam Kwok about any major decisions, transactions or dealings and would need to consent to all major decisions. Madam Yao complained that without notifying or consulting her (let alone obtaining her consent) Madam Kwok entered into certain transactions that locked in her capital investment for 40 years and led to a dilution of the Company's stake in the Project.

A claim was therefore brought by Madam Yao before the BVI Commercial Court on the grounds that the Company's business affairs (and its subsidiaries) were conducted in a manner that was and is oppressive, unfairly discriminatory and/or unfairly prejudicial in her capacity as a shareholder of the Company. Madam Yao sought relief, and the appointment of a liquidator of the Company. The trial judge found, *inter alia*, that Madam Kwok's conduct was clearly unfairly prejudicial and ordered that the Company be liquidated.

On appeal, the Court of Appeal allowed the appeal in part, concluding that whilst the trial judge was entitled to find that certain acts were proven to be unfairly prejudicial, he was wrong to find that Madam Kwok had breached her agreement with Madam Yao in other respects. The Court of Appeal therefore held that the trial judge was wrong to appoint joint liquidators and the Court of Appeal granted more limited relief to govern the Company's future conduct.

Madam Yao successfully appealed to the U.K. Privy Council (the court of final appeal for BVI litigation matters) which upheld the trial judge's findings of unfair prejudice and reinstated the liquidation order over the Company. It was held that the oral agreement between the parties had entailed a duty to notify and consult each other of major decisions. Madam Kwok, by entering into a loan agreement which had a repayment date of 2045 was an example of unfair prejudice conduct. The unfair prejudice to Madam Yao was due to not having the opportunity to be heard on the intended terms of the loan agreement (given the onerous nature of the conditions of the loan and the effect of those terms on her shareholding).

## Liquidation order as an appropriate remedy

It can be seen from section 184I of the BCA that the court has wide discretion as to the relief granted once unfair prejudice has been established. The most common remedy which is sought by a petitioning shareholder and which is granted by the court is requiring the majority to acquire the shares held by the minority. However, the court is not limited to reversing the conduct or correcting the conduct which lead to the granting of the order. Another U.K. Privy Council case, *Ming Siu Hung and others (Appellants) v J F Ming Inc and another (Respondents) (British Virgin Islands)* [2021] UKPC 1, held, *inter alia*, that once unfair prejudice has been established, the court is entitled to look at the reality and practicalities of the overall situation, past, present and future. The BVI court is entitled to have regard to the facts in relation to the

history of the company and the relationship between the shareholders, and between them and the directors (which includes those which occur after the issue of the claim). The court's discretion means that "nothing is off-limits, subject only to the twin tests of relevance and weight".

Notwithstanding the fact that the court has discretion to grant various remedies and the most common one is a buy out of the minority's shareholding, the court can also grant an order appointing a liquidator over the company. As stated above, in *Crown Treasure*, the U.K. Privy Council reinstated the liquidation order. Even though Madam Kwok had argued that the liquidation of the Company would not be the appropriate remedy as a liquidation order is a remedy of last resort, the Privy Council upheld the trial judge's finding that a liquidation order was the appropriate remedy in this situation. The trial judge had found that a liquidation order was the most appropriate remedy for a number of reasons including the fact that the parties were equal shareholders owing 50% of the Company each. This meant that the case could fall into one of the categories which were highlighted in *Hollington on Shareholders' Rights (8<sup>th</sup> edition)* that would justify a liquidation order where there is unfair prejudicial conduct. The court also noted that the categories in *Hollington* were not exhaustive and therefore it did not limit the court's discretion to grant a liquidation order.

### **Conclusion**

*Crown Treasure* demonstrates the BVI court's approach to an unfair prejudice claim and the fact that it will not hesitate to use its wide discretion to grant a liquidation order if the facts of the case justifies such an order. A liquidation order will wind up the company at the centre of the dispute, and a liquidator, once appointed, will have extensive powers to investigate the company's affairs. Some situations do not require such draconian relief, whilst in other cases it is the only appropriate relief.

A petitioner, before seeking relief under section 184I, should consider not only the extent of the unfair prejudicial conduct they have experienced, but also the commercial, practical and legal effect of the remedy sought as well as the conduct of the defendant(s). Careful planning of an application under section 184I is needed. By doing so, this will increase the chances of not only convincing the court to grant the order sought, but also ensure that any relief eventually granted will be what the petitioner had required.

Please contact a member of our team who will be able to discuss further with you on unfair prejudice claims and to guide you through the process.

***This publication is not intended to be a substitute for specific legal advice or a legal opinion. For specific advice on unfair prejudice claims in the BVI, please contact your usual Loeb Smith attorney or any of the following:***

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