PRACTICE UPDATE

SHAREHOLDER DISPUTES IN THE BRITISH VIRGIN ISLANDS

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The British Virgin Islands is best known for its role as a holding company jurisdiction – a jurisdiction through which joint venture parties will often co-operate in ventures far removed from the shores of the British Virgin Islands in sectors as disparate as energy and natural resources to shipping and trading goods.

The latest statistics released by the British Virgin Islands Financial Services Commission show that there are some 480,072 active companies on the register, and many more that are inactive. It is therefore natural that where differences arise between joint venture parties, it is to the BVI, and its successful Commercial Court, that they head to resolve their disputes.

Such litigation may take a number of different forms. As in *Liao v Upbeat Global Limited* BVIHCM80/2010 a party may challenge the validity of resolutions. In that case, the Claimant established at trial that notice of a shareholders meeting had not been given and that DHL packages which had been sent (on the Defendant's case, containing notice of that meeting) were in fact an elaborate fraud, containing nothing other than marketing literature. It may, as in *Royal Westminster v Nilon* BVICVAP 2011/0001, take the form of a dispute in relation to the ownership of shares, usually in the form of an action for declaratory relief or an action under Section 43 of the BVI Business Companies Act 2004 for rectification of the register, or it may take the form of a derivative action or a claim for unfair prejudice.

Derivative actions emerged, first at common law and then by statute, as one of the ways of ameliorating the harshness of the rule in *Foss v Harbottle* that where a company suffers loss, an action for damages lies only through the company. This rule is obviously defensible, in any case except where it is those in control of the company that have committed the wrong. In such circumstances, a loss suffered by the minority derivatively through the company would go uncompensated; they are unlikely to resolve to bring proceedings against themselves.

Regulated by Statute

The position in the British Virgin Islands is regulated by statute. Section 184C of the BVI Business Companies Act 2004 provides that a derivative claim may be brought only with the permission of the Court, and that in deciding whether to give permission the Court must take into account (a) whether the member is acting in good faith, (b) whether the derivative action is in the interests of the company, (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.

An alternative is the bringing of an action for unfair prejudice. This does not depend upon the Court's permission to bring it. Section 184I provides that:

> "A member of a Company who considers that the affairs of the company have been, 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 in that capacity, may apply to the Court for an order under this Section".

Section 184I(2) provides that the Court may make any order it thinks fit, including any of the relief set out in sub-sections (a) to (h).

The last couple of years have seen an unusual number of significant judgments in relation to these provisions. In *Gray v Ledra* BVIHCM2011/79 it was established - to nobody's surprise - that a derivative action brought without permission was liable to be

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struck out. It also surprised no-one to learn that the words in Section 184I(2) that "the Court may make any order it thinks fit, including …" mean exactly what they say, and that the Court is not limited to granting the relief set out at sub-sections (a) to (h) (see *Chemtrade v Fuchs Oil Middle East Limited* BVICVAP 2013/0004). In that case, the judge held that the punishment had to fit the crime and he refused to grant relief winding up the company, or directing the acquisition of its shares. Instead, he made an order regulating the future conduct of board meetings (the so called, Business Administration Order) on the basis that:

> "The unfair prejudice of which the Brothers complain is of having been frozen out of management at board level. They do not complain that the affairs of FOMEL are going to be taken in directions unacceptable to them as shareholders, or that their investment has been or is going to be jeopardized as a result of actions taken by their fellow shareholder or that if they are compelled to remain as shareholders they will be financially disadvantaged by arrangements designed to benefit Fuchs to the prejudice of the Brothers. The unfairness of which they complain will disappear if I order …"

A similar theme arose in *Re Oledo Petroleum Limited* BVICVAP2013/0006, a case in which the Claimants – having already commenced, but not served, a claim for unfair prejudice – sought leave to bring derivative proceedings. Bannister J held that they had a sufficient alternative remedy in their extant claim for unfair prejudice, which was capable of giving them monetary compensation equivalent to any increase in the value of the shares, rather than allowing them, through the company, to lay claim to the shares themselves. The Court of Appeal agreed.

Problematic Issue

A more problematic issue emerges in relation to so-called multiple, or double, derivative actions. The problem arises frequently in cases where multiple holding structures exist. If A and B are shareholders in C, it is clear that A can be given leave to bring proceedings in C's name. That is a derivative action. But if A and B are shareholders in C and C in turn holds shares in D, and that it is at the level of D that the fraud occurs – what is to be done?

It is now settled in the British Virgin Islands that Section 184C cannot be read so as to permit A to bring proceedings in D's name; that would be a double derivative action. Bannister J so held in *Microsoft Corporation v Vadem* BVICVAP2013/0007, a decision upheld by a decision of a Single Judge of the Court of Appeal. There is some first instance authority in England which suggests that the right to bring double derivative proceedings may exist at common law, independently of the statute, but whether or not such a right would be found to subsist in the BVI following the statutory codification of derivative actions is much more debateable.

Appleby acted on behalf of the successful Claimant in Liao v Upbeat and for the successful Defendant/Respondent in Oledo Petroleum.

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