

What shareholders need to know about their rights and remedies under BVI law

GUIDE

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Introduction

The BVI continues to be a popular place in which to establish asset holding companies and joint venture companies due to its flexible corporate legislation and widely respected commercial court.

This guide examines the main rights of a shareholder in a BVI company and the potential remedies available to a shareholder when things go wrong.

Principal sources

The principal sources of shareholder rights and remedies under BVI law are set out in the:

- BVI Business Companies Act 2004 (the Companies Act);
- Insolvency Act 2003 (the Insolvency Act); and
- company's memorandum and articles of association (M&A).

This guide assumes that the company has a single class of shares and relatively standard M&A.

BVI company law basics

Management

It is a long established principle of company law that directors are agents of the company and act as its directing mind and will.¹ Under the Companies Act (and normally under the company's M&A), the directors are given the power to manage the company's business.

The shareholders (or owners of the company) do not generally have the power to interfere with the way the directors manage the company's business, however, if they are unhappy with the way the company is being run, they have the power to remove the directors unless the company's M&A state otherwise.²

Majority rule principle

The majority rule principle is another long established principle of company law. It recognises that, to allow a company to function properly, a decision made by a majority of its shareholders should generally prevail and bind the company. Consequently, the court will not normally interfere with the internal management of the company where it is acting within its powers.³ However, as noted below, the Companies Act contains a number of provisions which protect the interests of minority shareholders in the event that the directors or majority shareholders abuse their powers or act in an unfair way.

Shareholder resolutions

Unlike the position in other jurisdictions, there is no concept of a special resolution or an extraordinary resolution under the Companies Act.

Generally, any resolution of shareholders may be passed by a simple majority of votes cast unless the company's M&A specify a higher majority. The notable exceptions are:

- (unless the Company's M&A state otherwise) under the Companies Act a written resolution to remove a director must be passed by a majority of at least 75 per cent of the shareholders entitled to vote;⁴
- under the Companies Act a resolution to approve a scheme of arrangement must be passed by a majority in number of shareholders representing at least 75 per cent in value of the shareholders present and voting at the meeting; and
- under the Insolvency Act, a resolution to appoint a liquidator in respect of the company must be passed by a majority of at least 75 per cent (or any higher majority specified in the M&A) of the votes cast by shareholders present and voting at the meeting.

¹ *Halsbury's Laws of England, Companies* (Volume 14(8) (2016)), para 270.

² *Hollington on Shareholders' Rights* (8th Edition), 5-12 to 5-17.

³ *MacDougall v Gardiner* (1875) 1 Ch. D. 13; *Carlen v Drury* (1812) 1 VES and B 149.

⁴ Subject to a company's M&A, a resolution removing a director may also be passed at a meeting of the members called for the purpose of removing a director.

- Consequently, with few exceptions, in the absence of specific provisions in the company's M&A, under BVI law there is no minority shareholding that can block a resolution from being passed by a simple majority of shareholders.

Basic shareholder rights

A shareholder has the following basic rights under the Companies Act and normally under the company's M&A.

Attend shareholder meetings

A shareholder has a right to receive notice of, attend and vote at, a shareholder meeting or to sign (or refuse to sign) a written shareholder resolution. Unless the company's M&A state otherwise, a shareholder is entitled to cast one vote for every share held.

The Companies Act requires that shareholders be given a minimum of seven days' written notice of any shareholder meeting, although this period can be waived by shareholders who hold at least 90 per cent of voting rights on all matters to be considered at the meeting unless the company's M&A state otherwise.

Receive distributions

Unless the company's M&A state otherwise, a shareholder has a right to receive a proportionate share of any distribution paid to shareholders according to the number of shares held.

Receive surplus assets on liquidation

Unless the company's M&A state otherwise, on the liquidation of a company, a shareholder has a right to receive a proportionate share of any distribution of the company's surplus assets made to shareholders according to the number of shares held.

Transfer of fully paid shares

Most companies' M&A do not restrict the transfer of fully paid shares in registered form. If a shareholder complies with the transfer provisions in the company's M&A, the shareholder normally has a right to transfer the shareholder's fully paid shares without restriction.

Where a transfer of shares complies with the transfer provisions in the company's M&A but the company refuses to register the transfer, the shareholder has a right to apply to the High Court to have the transfer registered in the company's register of shareholders (See *Rectification order* below).

Copy of company's M&A

A shareholder has a right to be provided with a copy of the company's M&A upon paying the company the reasonable cost of providing it.

Additional shareholder rights

A shareholder has the following additional rights under the Companies Act.

Appoint and remove directors

Unless the company's M&A state otherwise, the shareholders have the right to appoint and remove directors.

Call shareholder meeting

Shareholders have the right to require the directors to call a shareholder meeting if they:

- ask the directors to do so in writing; and
- are entitled to exercise at least 30 per cent (or any lower percentage stated in the company's M&A) of the voting rights in respect of the matter for which the meeting is called.

Court ordered shareholder meeting

A shareholder (or a director) has the right to apply to the High Court for an order calling a shareholder meeting and the court will make the order if it is of the opinion that:

- it is impractical to call or hold a shareholder meeting in the manner specified in the Companies Act or the company's M&A;
- the directors have failed to call a shareholder meeting when they have been required to do so by shareholders holding the necessary percentage of voting rights; or
- it is in the interests of the shareholders that a meeting is held.

The court may make an order on any terms it thinks fit, including in relation to the way the meeting is to be held and as to the costs of conducting the meeting and as to the provision of security for costs.

Amend M&A

Unless the company's memorandum of association gives the directors the power to do so, the company's M&A may only be amended by a resolution of shareholders.

Inspect corporate documents

A shareholder has the right, upon giving written notice to the company, to inspect and make a copy of, or take an extract from, the:

- M&A;
- register of shareholders;
- register of directors; and
- decisions of the shareholders (whether passed in writing or at a meeting).

Unless the company's M&A state otherwise, if the directors believe that it would be contrary to the company's interests to allow a shareholder to inspect (in whole or part) any register or shareholder decision, the directors may:

- refuse to allow the shareholder to inspect the document; or
- limit the inspection of the document (including by limiting making copies or taking extracts of it).

If the directors exercise their power to refuse or limit a shareholder's right to inspect, they must notify the shareholder as soon as reasonably practicable.

Where the directors fail, or refuse, to allow a shareholder to inspect, or limit the shareholder's right to inspect a document, the shareholder may apply to the High Court for an order that the shareholder be allowed to inspect the document or to inspect it without limitation.

In addition, where a company's M&A require the company to prepare financial statements, a shareholder will normally have a right to be provided with a copy of the financial statements for each financial period of the company.

Vote on significant asset disposals

Unless the company's M&A state otherwise, under the Companies Act, a shareholder has a right to approve or object to a significant asset disposal.

If a company's M&A do not state otherwise, where the company proposes to sell, transfer, lease, exchange or otherwise dispose of more than 50 per cent in value of its assets otherwise than in the usual or regular course of its business, the following approval process must be followed:

- first the directors must approve the disposal;
- secondly an outline of the details of the disposal must be given to each shareholder irrespective of whether or not the shareholder is entitled to vote on the resolution; and
- thirdly the shareholders must approve the disposal.

This procedure does not apply to a disposal that arises as a result of the creation or enforcement of a security interest over an asset.

Require shares be bought

If a shareholder dissents to any:

- merger where the company is not the surviving company;

- consolidation;
- disposal of more than 50 per cent in value of the company's assets;
- mandatory redemption of the shareholder's shares; or
- arrangement,

the shareholder may require the company to buy the shareholder's shares at fair value.

A shareholder who wants to dissent must give the company a written notice stating that the shareholder:

- objects to the relevant action; and
- proposes to demand payment for the shareholder's shares if the action is taken.

The dissent notice must be given to the company before the shareholder meeting at which the relevant action will be considered or at that meeting but before the vote is taken or (in the case of a mandatory redemption) before the redemption date.

The Companies Act sets out additional procedural requirements and a timetable which the dissenting shareholder and the company must follow relating to the purchase of the shareholder's shares (including a mechanism for determining the fair value of the shares if the company and shareholder are unable to agree it).

Once the dissent notice is given, the shareholder ceases to have any rights as a shareholder except the right to be paid fair value for the shareholder's shares.

Approve voluntary liquidation

As noted above, under the Insolvency Act, the shareholders have the right to pass a resolution to place the company into liquidation.

In addition, under the Companies Act (and normally the company's M&A), the shareholders have the right to pass a resolution to appoint a voluntary liquidator to dissolve the company by way of voluntary (ie solvent) liquidation. However, the voluntary liquidation process must be started by the directors making a solvency declaration and approving a liquidation plan.

Modification in company's M&A

As noted elsewhere in this guide, the Companies Act allows many shareholder rights arising under it to be limited, modified or disapplied by the company's M&A.

In addition, provisions can be included in the company's M&A and/or a shareholders' agreement to protect rights of shareholders, especially minority shareholders in a joint venture company. Typical protective provisions include:

- veto rights or weighted voting rights on particular issues;
- reserved matters (actions which require prior shareholder approval or approval of a particular percentage (eg 75 or 90) of shareholders);
- pre-emptive rights relating to share issues and transfers;
- rights for specific shareholders to appoint and remove directors; and
- requiring the nominee(s) of a particular shareholder to be present in a quorum for a director or shareholder meeting.

Shareholder remedies

The Companies Act and the Insolvency Act set out a number of potential remedies for a shareholder whose rights have been breached or who is unhappy with the way the company is being managed.

Unfair prejudice

Remedy

Under the Companies Act, a shareholder who considers that the affairs of a company have been, are being, or are likely to be, conducted in a way that is, or any act of the company has been, or is, likely to be

oppressive, unfairly discriminatory or unfairly prejudicial to the shareholder in that capacity (unfair prejudice), may apply to the High Court for relief.

A number of principles regarding unfair prejudice arise from the cases, including:

- where the company is a parent, its affairs can include an act, or failure to act, of a subsidiary controlled by it, especially if the directors of the parent and subsidiary are the same; and
- in considering whether conduct amounts to unfair prejudice:
 - the test is objective and is whether a reasonable bystander would consider the conduct in question amounts to unfair prejudice;
 - the starting point is to examine the basis on which the claimant agreed to become a shareholder (eg the terms of the company's M&A and (if relevant) shareholders' agreement);
 - a technical or trivial breach of the company's M&A does not necessarily amount to unfair prejudice, and conversely, there are circumstances where rigidly adhering to strict legal rights will amount to unfair prejudice; and
 - a claimant does not need to show that a person acted in bad faith or with the intention of causing unfair prejudice.

Relief available

The Companies Act confers wide powers on the High Court to grant relief in the case of unfair prejudice. If the court considers that it is just and equitable to do so, it may make any order it thinks fit, including an order:

- requiring the company or any other person to acquire the claimant's shares;
- requiring the company or any other person to pay compensation to the claimant;
- regulating the future conduct of the company's affairs;
- amending the company's M&A;
- appointing a receiver or liquidator of the company;
- directing the records of the company to be rectified; or
- setting aside any decision made, or action taken, by the company or its directors in breach of the Companies Act or its M&A.

An order cannot be made against the company or another person (like a director or shareholder) unless the company or that person is a party to the proceedings.

Although a wide range of remedies are available, the remedy most commonly awarded is an order that the company or another shareholder buy the claimant's shares at fair value.

If an offer is made to buy the claimant's shares at fair value and the claimant rejects the offer, the claimant's unfair prejudice claim will fail.⁵

The reason is that the offer is equivalent to the remedy likely to be awarded by the court, so continuing the action is considered to be an abuse of process.

Grounds for relief

Common grounds on which shareholders have brought a successful claim for unfair prejudice include:

- serious mismanagement of the company's business leading to a justifiable loss of confidence by a shareholder (eg due to dishonesty);
- breaching the company's M&A and/or a shareholders' agreement (eg failure to observe restrictions on share transfers or pre-emptive rights on share issues);
- paying excessive remuneration to directors;
- breaches of directors' duties (eg misuse of the company's property or issuing shares to dilute the shareholding of a minority shareholder);

⁵ *O'Neill v Phillips* [1999] 2 All ER 961.

- the directors refusing to pay a dividend for an improper reason or failing to pay a particular level of dividend where payment at that level was a term on which the claimant agreed to become a shareholder; and
- a breakdown in mutual trust and confidence between the shareholders where the company is a quasi-partnership (eg excluding a shareholder from participating in the company's management - see Quasi-partnerships below).

Contracting out

The High Court has held that it is possible to contract out of the unfair prejudice provisions in the Companies Act if the provision is not contrary to public policy. It has said that an agreement to refer disputes to arbitration is not contrary to public policy.⁶

Derivative action

Remedy

Generally only the company may bring an action against a person who commits a wrong against it.

However, where the company will not bring an action, for example because the wrongdoers are the directors, the Companies Act allows a shareholder to bring an action (called a derivative action) against the wrongdoers on behalf of the company and in the company's name.

Although a derivative action is brought by a shareholder, if the claim is successful, the shareholder will only benefit indirectly because the claim is for the benefit of the company and not the shareholder individually.

Court permission

Unlike the position in other jurisdictions, a shareholder must apply to the High Court to get permission to bring (as opposed to continue) a derivative action. The High Court has said that bringing a derivative action without the court's permission amounts to an abuse of process.⁷

Under the Companies Act, a derivative action includes a shareholder intervening in proceedings to which the company is already party for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company.

Unless the High Court orders otherwise, a shareholder must give the company at least 28 days' notice of its application for permission to bring a derivative action.

The High Court may only give its permission if it is satisfied that:

- the company does not intend to bring an action; or
- it is in the interests of the company that the conduct of the action is not left to the directors or to be determined by the shareholders as a whole.

When considering whether to give its permission, the High Court must consider:

- whether the shareholder is acting in good faith;
- whether the derivative action is in the interests of the company taking account of the views of the directors on commercial matters;
- whether the derivative action is likely to succeed;
- the cost of the derivative action relative to the relief likely to be given; and
- whether an alternative remedy is available.

A shareholder may not settle, compromise or discontinue a derivative action without the approval of the High Court.

⁶ *Ennio Zanotti v Interlog Finance Corp et al* BVIHCV 2009/0394.

⁷ *Lu Chung v Greater Achieve Limited & Ors* BVIHC (COM) 140 of 2015.

Costs

If the High Court gives a shareholder permission to bring a derivative action and the shareholder makes a costs application, the court will order the company to pay all of the reasonable costs of bringing the action unless the court considers it would be unjust or inequitable to do so (in which case the court may order the company to pay a reasonable proportion of the costs or none at all).

Relief available

If the High Court gives a shareholder permission to bring a derivative action, the court may make any order it considers appropriate, including an order:

- authorising the shareholder or any other person to control the proceedings;
- giving directions for the conduct of the proceedings;
- requiring the company or the directors to provide information or assistance relating to the proceedings; and
- directing that any amount ordered to be paid by a defendant be paid (in whole or part) to current or former shareholders rather than to the company.

No common law application

The Companies Act states that a shareholder may only bring proceedings in the name of, and on behalf of, the company under it. Consequently, a shareholder cannot bring a derivative action under common law.

Double derivative actions

A double derivative action arises where a shareholder of the holding company of a subsidiary that has been wronged seeks to bring a derivative action on behalf of the subsidiary.

The BVI High Court has held that the Companies Act does not allow double derivative actions,⁸ however, the Court of Appeal has said, in the context of a double derivative action to be brought in a foreign jurisdiction, that:

- the High Court does:
 - not have the power to give a shareholder of a BVI holding company permission to bring an action against a foreign subsidiary in the foreign court; and
 - have the power to give the BVI holding company (on the application of a shareholder) permission to bring an action in the foreign court; and
- it is a matter for the foreign court to decide whether the shareholder (on behalf of the BVI holding company) has the standing to bring an action in the foreign court under the laws of that jurisdiction.⁹

Interestingly, the English High Court held that, although the UK Companies Act 2006 (which has similar provisions to the Companies Act) abolished the right to bring a common law derivative action, it has not abolished the right to bring a common law double derivative action.¹⁰

The BVI High Court has not considered whether the Companies Act has abolished common law double derivative actions, however, it is likely that it would reach the same conclusion as the English High Court.

Liquidation on just and equitable grounds

Remedy

The Insolvency Act allows a shareholder to apply to the High Court to have a liquidator appointed in respect of the company on just and equitable grounds.

Unless the court orders otherwise, the application for the appointment of a liquidator must be advertised not less than seven days:

- after the application has been served on the company; and

⁸ *Microsoft Corporation v Vadem* BVIHC (Com) 2012/0048.

⁹ *Microsoft Corporation v Vadem* BVIHC VAP2013/0007.

¹⁰ *Bhullar v Bhullar* [2015] EWHC 1943 (Ch).

- before the hearing date.

Grounds for relief

Common grounds on which shareholders have brought a successful claim to have a liquidator appointed on just and equitable grounds include:

- the purposes for which the company was created have been achieved in full or it has become impossible to achieve them;
- a deadlock arising in the management of the company as a result of which decisions cannot be made regarding the company's business, unless the deadlock results from the:
 - actions of the applicant; or
 - operation of a provision in the company's M&A designed to prevent a particular action being taken;
- the serious mismanagement of the company's business leading to a justifiable loss of confidence by a shareholder (eg due to dishonesty);
- a breach by the directors of their duties (eg by making secret profits or making improper payments from the company's funds); or
- a breakdown in mutual trust and confidence between the shareholders where the company is a quasi-partnership (eg excluding a shareholder from participating in the company's management - see Quasi-partnerships below).

Remedy of last resort

This is clearly a remedy of last resort and the court cannot appoint a liquidator if it is of the opinion that:

- another remedy is available; and
- the shareholder is acting unreasonably in seeking to have a liquidator appointed rather than pursuing the other remedy.¹¹

As noted above, one of the orders available for a successful unfair prejudice claim is the appointment of a liquidator, so a successful application to have a liquidator appointed would normally be brought as part of an unfair prejudice claim.

Moreover, given the remedies available for an unfair prejudice claim, it is likely that, if the company is solvent, an application to have a liquidator appointed on just and equitable grounds would fail.

Quasi-partnerships

As mentioned above, if the court finds that a company is a quasi-partnership, and there has been a breakdown in mutual trust and confidence between its shareholders, this may be a ground on which to bring an unfair prejudice claim or seek the appointment of a liquidator on just and equitable grounds.

What is a quasi-partnership?

A quasi-partnership is a vehicle which, although taking the form of a company with limited liability and separate legal personality, is run and owned in a way that makes it similar to a partnership.

Normally, a quasi-partnership has a small number of participants (who are often family members or close friends) who do not want to involve any new participants without their consent. Frequently, the directors and shareholders of a quasi-partnership are the same.

A quasi-partnership has the following defining features:

- the company is formed or continued on the basis of a personal relationship involving mutual trust and confidence;
- there is an understanding that some or all of the shareholders will participate in the management of the company's business; and

¹¹ *Kwok Kin Kwok et al v Yao Juan* BVIHMAP2018/0042.

- generally there are restrictions on share transfers in the company's M&A and/or (if relevant) shareholders' agreement.

Consequence and advantages

The consequence of a company being categorised as a quasi-partnership is that the court will apply to it some of the equitable principles or constraints that apply to a partnership.

Where a disgruntled shareholder wants to bring an unfair prejudice claim and/or seek to appoint a liquidator on just and equitable grounds, the main advantages of a company being categorised as a quasi-partnership are:

- the court will uphold informal agreements and understandings between shareholders regarding their rights, expectations and obligations relating to the company and its management even where they are not set out in the company's M&A or (if relevant) shareholders' agreement;
- the court may find it unjust, inequitable or unfair for a party to exercise that party's strict legal rights or to exercise them in a particular way where to do so is contrary to an informal agreement or understanding between the parties;
- normally, an irretrievable breakdown in relations among shareholders will not constitute a ground for a successful unfair prejudice claim or petition to appoint a liquidator on just and equitable grounds, but an irretrievable breakdown in mutual trust and confidence among shareholders in a quasi-partnership may do so; and
- in the case of an unfair prejudice claim, where the court orders that the claimant's shares are to be bought by another party at fair value, a discount will not be applied on the basis that the claimant holds a minority shareholding.

Squeeze out (mandatory redemption)

Under the Companies Act, unless the company's M&A state otherwise, shareholders holding shares carrying 90 per cent of the voting rights in a company may give the company a written instruction directing it to redeem the shares of the minority shareholders.

Upon receiving the written instruction, the company must:

- redeem the shares of the minority shareholders, irrespective of whether the shares were issued on terms that they are redeemable; and
- give written notice to each minority shareholder stating:
 - that the minority shareholder's shares are to be mandatorily redeemed under the Companies Act;
 - the redemption price; and
 - the way the shares are to be redeemed.

If the company's M&A do not disapply the mandatory redemption provisions of the Companies Act, a minority shareholder cannot prevent the majority shareholders exercising their squeeze out rights.

However, if the minority shareholder believes that the redemption price for the shares is below their fair value, the minority shareholder would be able to exercise the right to dissent (see *Require shares be bought* above) and to have the company buy the shares at their fair value.

Personal action for breach of duty

The Companies Act allows a shareholder to bring an action against a company for a breach of duty owed by it to the shareholder (eg calling a shareholder meeting on less than seven days' notice or failing to observe a quorum requirement for a shareholder meeting).

Unlike a derivative action which must be brought in the name of the company for the company's benefit, a shareholder brings the action in the shareholder's own name and for the shareholder's own benefit.

The normal remedy for a personal action is a declaration or an injunction to protect the shareholder's rights.

Restraining or compliance order

If a company or a director engages in, or proposes to engage in, conduct that contravenes the Companies Act or the company's M&A, the Companies Act allows a shareholder to apply to the High Court for an order directing the company or director to comply with, or restraining the company or director from engaging in the conduct that contravenes, the Companies Act or the company's M&A.

Representative action

Where a shareholder brings proceedings against the company and there are other shareholders with the same, or substantially the same, interest in the proceedings, the Companies Act allows the High Court to appoint that shareholder to represent some or all of those other shareholders. For this purpose, the court may make any order it thinks fit, including an order:

- relating to the control and conduct of the proceedings;
- relating to the cost of the proceedings; and
- directing the distribution among the shareholders represented in the proceedings of any amount ordered to be paid by a defendant in the proceedings.

Rectification order

The Companies Act allows a shareholder or other aggrieved person to apply to the High Court for an order rectifying a company's register of shareholders if:

- the register omits, or inaccurately records, information that is required to be entered in it, or
- there is unreasonable delay in entering the information in the register.

The court may:

- determine any question relating to the right of a person who is a party to the proceedings to have the person's name entered in, or omitted from, the register and may generally determine any question that may be necessary or expedient;
- refuse the application, in which case it may or may not order the applicant to pay costs; or
- order the register to be rectified, in which case it may order the company to pay all costs of, and any damages sustained by, the applicant.

This remedy is commonly sought where:

- the company refuses to register a transfer of shares in accordance with the M&A; and
- the company incorrectly registers a transfer of shares in breach of the M&A.

Court ordered investigation

The Companies Act allows a shareholder to apply to the High Court for an order directing an investigation of the company. The court may appoint an inspector to investigate the company and its affiliates if it appears to the court that:

- the business of the company or any of its affiliates has been carried on with the intention to defraud any person;
- the company or any of its affiliates was formed, or is to be dissolved, for a fraudulent or unlawful purpose; or
- anyone involved with the incorporation, business or affairs of the company or any of its affiliates has acted fraudulently or dishonestly in connection with these matters.

Personal action against director

A director does not owe duties to shareholders (either individually or collectively) by reason only of holding the position of director.

However, a director may act in a way which brings the director into direct and close contact with a shareholder and which creates a special factual relationship between the director and the shareholder resulting in the director owing a fiduciary duty to the shareholder.

The situations in which a director has been held to owe a fiduciary duty to a shareholder include where the director has:

- been appointed as an agent of a shareholder;
- given advice to a shareholder in the context of a takeover;
- given advice to a minority shareholder on matters affecting its interests on which the minority shareholder relies; and
- bought shares in the company from a shareholder.

Contacts

A full list of contacts specialising in BVI law can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. © 2021 MOURANT OZANNES ALL RIGHTS RESERVED