

GUIDE TO PROTECTION OF MINORITY SHAREHOLDERS IN THE BRITISH VIRGIN ISLANDS

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PREFACE

This Guide provides an introduction to the remedies available to minority shareholders of BVI companies.

We recognise that this Guide will not completely answer detailed questions which clients and their advisers may have; it is not intended to be comprehensive. If any such questions arise in relation to the contents, they may be addressed to any member of the team, using the [contact information](#) provided at the end of this Guide.

Appleby

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1. INTRODUCTION

The BVI has for many years been the leading offshore domicile for business companies. However, until the BVI Business Companies Act 2004 (**Act**) came into force, BVI company law was relatively weak in the manner in which minority shareholders were protected. It was perhaps felt that the rights of shareholders could be included in a BVI company's memorandum of association (**memorandum**) and articles of association (**articles**), rather than necessarily be articulated through statutory provisions. The overall impression was that while BVI company law facilitated flexible corporate governance, it largely ignored shareholder rights.

The Act was important for, among other things, injecting greater robustness into the area of statutory shareholder rights. The Act not only clarified and codified some existing common law remedies (including the derivative action), but also introduced a significant new remedy for minority shareholders (the unfair prejudice remedy). As a result, protection of minority shareholders is now a strong point, rather than perhaps a shortcoming, of BVI company law. Indeed, BVI law has moved in the direction of many leading onshore jurisdictions (including the US and UK) which have recently enhanced the accountability to shareholders for the actions of a company's directors and management. This is one of the reasons why the Hong Kong Stock Exchange announced in 2009 that BVI companies could list on the Exchange.

This Guide discusses the key statutory rights available under the Act designed to protect minority shareholders, the remedy of winding up a company on just and equitable grounds (which remains available under the Insolvency Act 2003) and some case law which provides guidance on the scope and operation of these remedies. This Guide focuses on the unfair prejudice remedy, the derivative action and the remedy of winding up the company on just and equitable grounds, but other remedies available under the Act (and principally under Part XA of the Act) are noted.

2. UNFAIR PREJUDICE

Under the Act, a shareholder (or "member")¹ of a company may apply to the court if it considers that the affairs of the company have been, are being or are likely to be, conducted in a manner which is, or any act or acts of the company have been, or are likely to be, oppressive, unfairly discriminatory or unfairly prejudicial to the shareholder in its capacity as a shareholder (§184I(1)).

There is some BVI authority at first instance for the proposition that a shareholder for the purposes of §184I includes the beneficial owner of shares in a BVI company, when the registered shareholder is acting as nominee for the beneficial owner². It must be noted, however, that this is contrary to the definition of member under the Act which requires that the relevant person or entity needs to be recorded on the company's register of shareholders in order to be a member for the purposes of the Act.

If the court agrees with the shareholder, and considers it to be just and equitable that an order be made in relation to the particular conduct, it may make any order that it thinks fit, including an order requiring the company or any other person to acquire the shareholder's shares or to pay compensation to the shareholder; regulating the future conduct of the company's affairs; amending the memorandum or articles of the company; appointing a receiver or liquidator of the company; directing the rectification of the records of the company; and/or setting aside any decision made or action taken by the company or its

¹ This Guide uses the term "shareholder", whereas the Act commonly uses the term "member", defined in section 2 of the Act to include (a) a shareholder, (b) a guarantee member, or (c) a member of an unlimited company who is not a shareholder.

² *Headstart Class F Holdings Limited and Citco Global Custody NV v Y2K Finance Inc* [2008] Claim No BVIHCV2007/0278. The decision was not disturbed in *Citco Global Custody NV v Y2K Finance Inc* [2008] HCVAP 2008/022 (Court of Appeal).

directors in breach of the Act or the company's memorandum or articles (see generally §1841(2)). The court will take a very wide view of the discretion to make orders under §1841(2)³.

No order may be made against the company, or any other person, under section 1841 unless the company or that person is a party to the proceedings in which the application is made (§1841(3)). There is no requirement for a court to come to the view that circumstances exist which would enable a winding up order on just and equitable grounds before using the unfair prejudice remedy.

As noted in section 3 of this Guide, while the unfair prejudice remedy is overall a positive addition to the arsenal available to minority shareholders of BVI companies, some consider it a disadvantage of this remedy that it may limit the ability of shareholders to apply to have a company wound up on just and equitable grounds; under the BVI's Insolvency Act, if a BVI court considers that a shareholder has an alternative remedy available, it has discretion to strike out the winding up application. On this basis, it could be said that the unfair prejudice remedy not only enhances the rights of shareholders, but also provides some degree of protection for the company and its creditors.

3. DERIVATIVE ACTIONS

A derivative action refers to an action initiated by a shareholder to enforce a wrong done to the company, the action being taken in the company's name rather than the shareholder's name. Accordingly, the shareholder obtains no direct benefit if judgment is given in the company's favour.

A derivative action is typically used where no action would otherwise be taken by the company because the wrongdoers are also the company's decision-makers. A minority shareholder may need to resort to a derivative action if, for example, directors of the company have breached their fiduciary duties to the company, if the directors are also the majority shareholders and can control the vote at a general meeting, or because the directors may be able to prevent (or at least delay) a general meeting being convened to vote on whether the company should sue the directors.

At common law, a shareholder could only pursue an action on behalf of the company if the circumstances giving rise to the claim fell within one of the exceptions to "the rule in *Foss v Harbottle*"⁴. This common law rule provides that where a wrong has been done to a company, only the company may sue for the damage caused to it.

The exceptions to the rule, which provide an avenue for a minority shareholder to take action on behalf of the company, are where the conduct complained of:

- is *ultra vires* (i.e. beyond the capacity of) the company or illegal;
- constitutes a "fraud on the minority", with the wrongdoers themselves being in control of the company, and thus refraining from causing the company to bring an action;
- is an irregularity in the passing of a resolution which requires a special or extraordinary majority of the shareholders; or
- infringes the personal rights of an individual shareholder (e.g. the right to vote, pre-emption rights etc.).

With the enactment of the Act, the right of shareholders of a BVI company to bring a derivative action was placed on a statutory footing. A shareholder seeking to bring an action on behalf of a company must satisfy the requirements set out in the Act which makes it clear (in §184C(6)) that a shareholder is not

³ *Headstart Class F Holdings Limited*, supra.

⁴ The name derived from the classic case of *Foss v Harbottle* (1843) 2 Hare 461.

entitled to bring or intervene in any proceedings in the name of or on behalf of a company unless such action is taken pursuant to the Act's derivative action provisions.

Under the Act, upon the application of a shareholder of the company, the court may grant leave to the shareholder to bring proceedings in the name and on behalf of the company, or intervene in proceedings (in which the company is a party) already underway with the purpose of continuing, defending or discontinuing the proceedings on the company's behalf: §184C(1). The court may grant such interim relief as it considers appropriate pending the determination of an application under §184C(1): §184C(5).

In determining whether to grant leave for a derivative action, the Act states that the court must take into account five matters (§184C(2)):

- whether the shareholder is acting in good faith;
- whether the derivative action is in the interests of the company taking into account the views of the company's directors on commercial matters;
- whether the proceedings are likely to succeed;
- the costs of the proceedings in relation to the relief likely to be obtained; and
- whether an alternative remedy to the derivative action is available.

Furthermore, leave to bring or intervene in proceedings may only be granted if the court is satisfied that the company does not intend to bring, diligently continue or defend, or discontinue the proceedings (as the case may be), or 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 as a whole: §184C(3).

Unless the court orders otherwise, not less than 28 days' notice of an application for leave must be served on the company, with the company being entitled to appear and be heard at the hearing of the application: §184C(4). Accordingly, an *ex parte* application will not be available.

Importantly, where a court grants leave to a shareholder to bring or intervene in proceedings on behalf of the company, upon application by the shareholder, the court shall order that the whole of the reasonable costs of bringing or intervening in the proceedings must be met by the company: §184D(1). The court will not do so, however, if it considers that it would be unjust or inequitable for the company to bear those costs. In that case, the court can order that the company pay a proportion of the costs that it considers to be reasonable, or order that the company not bear any costs: §184D(2). This provision provides a degree of assurance for shareholders initiating a derivative action that it is highly likely that their reasonable costs will be met by the company (with the issue of costs otherwise being a potential deterrent to a shareholder wishing to pursue an action on behalf of the company).

At any time after granting a shareholder leave to take action on behalf of the company, or to intervene in existing proceedings to which the company is a party, the court can make any orders that it considers appropriate in relation to the proceedings, including:

- an order authorising the shareholder (or any other person) to control the proceedings;
- an order giving directions for how the proceedings are to be conducted;
- an order that the company or any of its directors provide information or assistance in relation to the proceedings; and
- an order that an amount ordered to be paid by a defendant in the proceedings be paid in whole or in part to former or present shareholders of the company, rather than to the company: §184E.

Thus, while the conduct of the proceedings is generally up to the parties, the court has overall control of the proceedings to make sure that the proceedings are conducted in the interests of the particular company.

The Act also states that no derivative proceedings may be settled, compromised or discontinued without the approval of the court: §184F.

4. WINDING UP ON JUST AND EQUITABLE GROUNDS

Under section 162 of the Insolvency Act 2003, one of the grounds upon which the court can appoint a liquidator to wind up a company is that “the Court is of the opinion that it is just and equitable that a liquidator should be appointed” (§162(1)(b))⁵. In hearing the application for the appointment of a liquidator, the court may:

- appoint a liquidator;
- dismiss the application (even if the court finds that a ground upon which it can appoint a liquidator has been proven);
- adjourn the hearing (conditionally or unconditionally); or
- make any interim order or other order that it considers fit: §167(1).

An application pursuant to section 162(1)(b) may be made not only by shareholders of the company, but also by the company itself, a creditor of the company, the supervisor of a creditors’ arrangement in respect of the company, and the BVI Financial Services Commission (where the company is a regulated person, e.g. an insurance or trust company): §162(2). An application for the appointment of a liquidator must not be withdrawn unless leave of the court to do so has been granted: §164.

Unless the court orders otherwise, or the application is made by a shareholder, the Act requires that an application for the appointment of a liquidator must be advertised:

- not less than seven days before the date which is set for the application to be heard, if the company is the applicant; or
- if the company is not the applicant, not less than seven days after the application has been served on the company, and not less than seven days before the date set for the application to be heard: §165(1).

If the application is not so advertised, the court may dismiss the application: §165(2).

Pursuant to rule 168 of the Insolvency Rules 2005, “a member’s application shall not, except as directed by the court, be served on any person other than the Company or be advertised.”

The Insolvency Act provides that the court must not appoint a liquidator on the basis of just and equitable grounds if it is of the opinion that some other remedy is available to the applicant, and the applicant is acting unreasonably in seeking to have a liquidator appointed instead of pursuing that other remedy: §167(3). With the unfair prejudice remedy and derivative action available to shareholders, it seems that the winding up order is now to be preserved as truly a last resort⁶.

⁵ Under section 163(1)(b) of the Insolvency Act, the court can appoint a liquidator of a foreign company that has a connection with the BVI if the court is of the opinion that it is just and equitable that a liquidator should be appointed.

⁶ A view supported by Hariprashad-Charles J in *Imran Saeed Chaudhry v Sat Star Distribution Limited* (BVIHCV 2005/0111) (24 January 2006) at para [27]: “The Court must be convinced that there is no other remedy or relief available to the applicant.”

An application for the appointment of a liquidator must be determined by the court within six months after it is filed: §168(1). The court may, however, extend this period (upon such considerations as it considers fit) for one or more periods not exceeding three months each if it is satisfied that special circumstances exist which justify the extension, and the order extending the relevant period is made before the expiry of that period: §168(2). If the court does not determine the application within the six month or extended period, the application is deemed to have been dismissed: §168(3).

Under section 175(1) of the Insolvency Act, from the time of the commencement of the liquidation of a company:

- the liquidator has custody and control of the assets of the company;
- while the directors and other officers remain in office, they cease to have any powers, functions or duties (other than those powers, functions or duties required or permitted by the Insolvency Act);
- no person may (unless the court orders otherwise):
 - commence or proceed with any action or proceeding against the company (or in relation to its assets); or
 - exercise or enforce, or continue to exercise or enforce, any right or remedy over or against assets of the company;
- no share in the company may be transferred (unless the court orders otherwise);
- no alteration is to be made in the status of, or to the rights or liabilities of, a shareholder, whether by an amendment of the company's memorandum or articles, or otherwise;
- no shareholder may exercise any power under the memorandum or articles, or otherwise, except for the purposes of the Insolvency Act; and
- no amendment is to be made to the company's memorandum or articles.

The common law (both BVI and English case law) provides guidance as to when an order for the winding up of a company on just and equitable grounds may be made.

4.1 The substratum of the company has gone

In a 2009 decision of the Eastern Caribbean Commercial Court in the BVI, Bannister J noted that a company may be wound up on just and equitable grounds where the whole of the business that the company was incorporated to carry on has become impossible⁷. According to Bannister J, "substratum" is not a term of art, and a failure of substratum is to be considered broadly and applies to a number of different factual scenarios.⁸

The test of whether it is impossible to carry on the company's business was confirmed by Bannister J in a December 2010 decision in the Commercial Court⁹. In dismissing the argument that there is a failure of substratum if a company is no longer "viable" (which represents the current position on failure of substratum in the Cayman Islands), Bannister J rejected an application for a feeder fund to be wound up because it had suspended redemptions, in accordance with its constitutional and offering documents. He concluded that the fund's suspension of redemptions did not mean it had become impossible for the company to carry on its business, as its business was the holding of investments in a master fund on behalf of its shareholders— something that it continued to do. According to Bannister J:

⁷ See *Citco Global Custody NV v Y2K Finance* (BVIHCV 2009/0020 A) (25 November 2009). See also the BVI decision of *Western Union Industrial Limited v Reserve International Liquidity Fund Ltd* (BVIHC 2009/322) (26 January 2010), where Bannister J commented that a company may be wound up on just and equitable grounds where it is "paralysed".

⁸ *Citco Global Custody NV* (25 November 2009), *supra*, at para [19].

⁹ *Aris Multi-Strategy Lending Fund Ltd v Quantek Opportunity Fund Ltd* (BVIHCOM 2010/0129) (15 December 2010)

“...a company will not be wound up on substratum grounds unless it can be shown that it is impossible for the business of the company to be carried on – whether that is because (regardless of the company’s circumstances) what it was set up to do could never have been done or can no longer be done, or whether it is because the circumstances in which it finds itself means that the company cannot continue because it lacks the ability or means to do so.”¹⁰

Traditionally, whether the substratum of the company had gone was determined by an examination of the objects clause in a company’s memorandum or articles. If the facts indicated that there was no prospect of commencing, or continuing, the business defined in the objects clause, then a failure of substratum could be argued. Now that a BVI company is not required to have an objects clause in its memorandum and articles¹¹, information upon which to decide whether there is a failure of substratum may need to be obtained from elsewhere¹². This may include the Information Memorandum of a company operating as a mutual fund¹³, or evidence as to the common understanding among shareholders of the company’s main or paramount object at the time they became shareholders.¹⁴

4.2 Management of the company is deadlocked

Deadlock occurs where the company is unable to function properly due to disagreement between those responsible for the management of the company¹⁵. The court will generally not interfere (by making an order for a liquidator to be appointed), if it can be established that the deadlock can be resolved pursuant to the company’s memorandum or articles (for example, by providing for a casting vote in situations where there is a deadlocked vote at a general meeting)¹⁶.

4.3 Confidence in the directors has been lost due to a lack of probity in their conduct of the company’s affairs

The court may wind up a company on the just and equitable ground where the directors have shown a lack of probity or fair conduct in the manner in which they have managed the company’s affairs. This may occur, for example, when the directors have denied the minority shareholders certain information about the company’s affairs¹⁷.

4.4 Fraud on the minority or another irregularity has occurred

A winding up on just and equitable grounds may be ordered where the directors (or the majority shareholders) have made unauthorised payments out of the company’s funds¹⁸. An application for a winding up on just and equitable grounds could also be made where it is claimed that a company’s directors have breached their fiduciary duties (for example, where there is a conflict of interest which enables the directors to make undisclosed profits)¹⁹.

¹⁰ Ibid, at para 35]

¹¹ See section 9 of the Act

¹² *Citco Global Custody NV* (25 November 2009), supra, at para [21]

¹³ *Aris Multi-Strategy Lending Fund Ltd*, supra

¹⁴ *Re Tivoli Freeholds* [1972] VR 445

¹⁵ *Imran Saeed Chaudhry*, supra

¹⁶ *Re Yeindje Tobacco Co Ltd* [1916] 2 Ch 426

¹⁷ See, for example, *Loch v John Blackwood* [1924] AC 783

¹⁸ *RBG Resources v RBG Global* (BVI Civil Appeal No 6 of 2004) (12 January 2004).

¹⁹ *Re William Brooks & Co Ltd* [1962] NSWLR 142; *Re Straw Products* [1942] VLR 222.

4.5 **The company is a quasi-partnership and the petitioner's legitimate expectations have been breached**

The court may order that it is just and equitable to wind up a company which is in essence a quasi-partnership if there has been a breakdown in the mutual trust and confidence that should exist between the company's shareholders. A quasi-partnership will typically be a small company that either was previously a partnership, or that operates in a manner similar to a partnership. The court will not find a quasi-partnership lightly, and the mere fact that certain parties join together to form a small company (for example, a family company) will not automatically mean that the company is a quasi-partnership²⁰.

In the English decision of *Ebrahimi v Westbourne Galleries Ltd*²¹, the House of Lords noted that a company may be considered a quasi-partnership when one or more of the following can be established:

- the company is formed on the basis of a personal relationship involving mutual confidence;
- there is an agreement that all or some of the shareholders of the company will be able to participate in the conduct of the company's business; and
- there is a restriction on the transfer of the shareholders' interest in the company.

A breakdown in mutual trust and confidence may arise, for example, where a minority shareholder is excluded from management of the affairs of the company contrary to its legitimate expectations; where there is a misuse of proceeds from the sale of the company's assets, or when a director is excluded from access to the company's books²².

Where the court finds there is a quasi-partnership, even though the Act and/or memorandum and articles of the Company may allow a particular course of action (such as removing a director), the majority shareholders must act in a manner which is consistent with the understanding that the shareholders had at the time the company was formed²³.

5. **OTHER STATUTORY PROTECTION FOR MINORITY SHAREHOLDERS**

The Act includes a number of other provisions to ensure that while directors and controlling shareholders of BVI companies have a large amount of flexibility to conduct the company's affairs as they choose, they must also be accountable, transparent and fair in their treatment of minority shareholders. The provisions therefore work to provide a degree of empowerment and protection to the company's minority shareholders. Some of the key provisions are summarised below.

5.1 **Shareholder approval for disposition of assets**

One form of protection for shareholders in the Act is that (subject to any limitations or alternative provisions in a company's memorandum or articles) any sale, transfer, lease, exchange or other disposition (other than a mortgage, charge or other encumbrance, or the enforcement thereof) of more than 50 per cent in value of the assets of the company, which is not made in the usual or regular course of the company's business, needs to be approved by a resolution of the shareholders of the company: §175.

²⁰ In the *Matter of Olympic Peru Incorporated* (BVIHC 2005/ 0168) (15 December 2005).

²¹ [1973] AC 360.

²² *Stapp v Surge Holdings Pty Ltd* (1999) 17 ACLC 896.

²³ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.

It has been suggested that, although the position is not clear, where a company is contemplating paying a dividend which amounts to more than 50 per cent of its assets, shareholder approval under section 175 should be obtained²⁴.

Section 175 of the Act sets out the procedure for approval of the disposition. First, the disposition needs to be approved by the company's directors. Once the disposition has been approved, the directors are to submit details of the disposition to shareholders for it to be authorised by a resolution of shareholders. If a meeting of shareholders is to be held to vote on the disposition, a notice of the meeting, accompanied by an outline of the disposition, must be provided to each shareholder, regardless of whether or not the shareholder is entitled to vote on the disposition. Alternatively, if it is proposed that the disposition will be authorised by way of the written consent of shareholders, an outline of the disposition needs to be given to each shareholder, again regardless of whether or not the shareholder is entitled to vote.

5.2 Payment of fair value to dissenting shareholders

The Act sets out an important procedure to ensure that minority shareholders receive fair value for their shares when they dissent from a company's decision to enter into certain types of transactions.

A shareholder of a BVI company is entitled to be paid the fair value of his shares if he dissents from:

- a merger (where two or more constituent companies²⁵ merge into one of the constituent companies), if the company is a constituent company, unless the company is the surviving company and the shareholder continues to hold the same or similar shares;
- a consolidation (where two or more constituent companies consolidate into a new company) if the company is a constituent company;
- any sale, transfer, lease, exchange or other disposition of more than 50 per cent in value of the assets or business of the company, if not made in the usual or regular course of the business carried on by the company, but not including:
 - a disposition pursuant to an order of the court having jurisdiction in the matter; or
 - a disposition for money on terms requiring all or substantially all net proceeds to be distributed to the shareholders in accordance with their respective interests within one year after the date of disposition;
- a compulsory redemption in accordance with the Act (section 176); and
- an arrangement under the Act, if permitted by the court²⁶.

A shareholder who desires to avail itself of its entitlement to a fair value payment under the Act must provide to the company, prior to the meeting of shareholders at which the action is submitted to a vote or at the meeting, but before the vote, written objection to the action. Written objection is not required where the shareholder did not receive notice from the company, or where the proposed action is authorised by written consent of the shareholders without a meeting: §179(2). Any objection must include a statement that the shareholder proposes to demand payment for its shares if the relevant action is taken: §179(3).

Within 20 days following the date on which the vote of shareholders authorising the action is taken, or within 20 days from the date on which written consent of shareholders without a meeting is obtained, the company must give written notice of the authorisation or consent to each shareholder that has provided a

²⁴ Christopher Bickley, "Bermuda, British Virgin Islands and Cayman Islands Company Law" (3rd ed., 2009) at [8.010].

²⁵ A "constituent company" is defined under section 169 of the Act to mean an existing company participating in a merger or consolidation.

²⁶ See section 179(1) of the Act.

written objection (or from which a written objection is not required), except those shareholders that have voted for, or consented in writing to, the proposed action: §179(4). A shareholder that has elected to dissent then has 20 days immediately following the date on which the notice has been given to give the company a written notice of its decision to elect to dissent, stating:

- the person's name and address;
- the number and classes of shares in respect of which it dissents; and
- a demand for payment of the fair value of all of its shares²⁷.

A shareholder who elects to dissent from a merger must provide the company with a written notice of its decision to elect to dissent within 20 days immediately following the date on which the copy of the plan of merger (or an outline thereof) is provided to such shareholder: §179(5). A shareholder that dissents under the Act is required to do so in respect of all the shares it holds in the company: §179(6). Once a shareholder has provided the requisite notice to the company, the shareholder ceases to have any rights as a shareholder except the right to be paid fair value for its shares: §179(7).

The company must then, within seven days of the expiration of the period within which the shareholder gave a notice to dissent or within seven days immediately following the date on which the proposed action is put into effect, whichever is later, make a written offer to the dissenting shareholder to purchase its shares at a specified price which the company considers to be fair value, and within 30 days of making the offer if the company and the shareholder agree upon the price to be paid for the shares, the company shall pay to the shareholder that amount upon surrender of the certificates representing the shares: §179(8).

If the company and a dissenting shareholder fail to agree on a price, within the period of 30 days, the company and the shareholder must each designate an appraiser, and then the two designated appraisers must together designate a third appraiser. The three appraisers must then fix the fair value of the shares owned by the dissenting shareholder as of the close of business on the day prior to the date on which the vote of shareholders authorising the action was taken or the date on which written consent of shareholders without a meeting was obtained, and must exclude any appreciation or depreciation directly or indirectly induced by the action or its proposal, and that value is binding on the company and the dissenting shareholder for all purposes: §179(9).

5.3 Inspection rights

A shareholder of a BVI company has the right, upon giving written notice to the company, to inspect the company's memorandum and articles; the register of shareholders; the register of directors, and minutes of meetings and resolutions of shareholders and of those classes of shareholders of which it is a shareholder, and to make copies or take extracts from the documents and records: §100(2).

Subject to the company's memorandum and articles, the directors are entitled to refuse to permit a shareholder to inspect a document or can limit the inspection (including limiting the making of copies or the taking of extracts from the records), if they are satisfied that it would be contrary to the company's interests to allow the inspection: §100(3). If the directors refuse or limit the inspection of a document, they must notify the shareholder as soon as reasonably practicable: §100(4). If a shareholder has been refused access to a document, that shareholder may apply to the court for an order that it should be permitted to inspect the document or to inspect the document without limitation: §100(5). The court may make such orders as it considers just: § 100(6).

²⁷ Section 179(5) of the Act.

5.4 Restraining or compliance orders

The Act provides shareholders (as well as directors) of a BVI company with the power to apply to the court for an order directing the company or a director of the company to comply with, or to restrain the company or director from engaging in conduct that contravenes the Act or the company's memorandum or articles: §184B(1). This power, which clarifies and codifies the previous common law rights, may be used where the company or director has already engaged in the contravening action, or if either is proposing to engage in the contravening action.

The court can make an interim order before the final determination of an application, and also grant such consequential relief as it thinks fit: §184B(2) and (3).

5.5 Requisitioning a special meeting

Shareholders of a BVI company are provided with the right under the Act to requisition a special meeting of the company. The Act provides that the directors of a company must call a meeting of the shareholders of the company if they are requested in writing to do so by shareholders entitled to exercise at least 30 per cent of the voting rights in respect of the matter for which the meeting is requested (subject to a provision in the company's memorandum or articles for a lesser percentage): §82(2). There is no time frame specified as to when the directors need to call a meeting in response to such a request. Should the directors fail to call a properly requisitioned meeting, the BVI High Court is empowered under the Act to call the meeting.

5.6 Personal actions

The Act confirms that a shareholder of a BVI company can bring an action, in its own name and on its own behalf, against the company for a breach of a duty owed by the company to the shareholder in its capacity as a shareholder: §184G.

This right to bring a personal action may, for example, be exercised by a shareholder who is prevented from exercising its voting rights; refused the right to requisition a special meeting in accordance with the company's memorandum or articles, or is deprived of its entitlement to the benefits of a pre-emption clause. Generally, the appropriate remedy will be a declaration or injunction to enforce the shareholder's personal rights²⁸.

5.7 Representative actions

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 court may appoint that shareholder to represent all or some of the other shareholders: §184H²⁹. In doing so, the court may make orders as to the control and conduct of the proceedings; as to the costs of the proceedings; and directing the distribution of any amount ordered to be paid by a defendant in the proceedings among the shareholders represented.

5.8 Investigation of companies

Section 223 of the Act provides that a member of a company may apply to the court for an order directing an investigation of the company and any of its affiliated companies. The court may appoint an inspector if it appears that the business of the company has been carried on with intent to defraud any person, if the

²⁸ Bickley, *op. cit.*, at [8.002].

²⁹ See also BVI Civil Procedure Rules, Rule 21.1.

company was formed or is to be dissolved for a fraudulent or unlawful purpose or if persons concerned with the incorporation, business or affairs of the company have acted fraudulently or dishonestly.

For more information or specific advice on the protection of minority shareholders of BVI companies, please contact one of the following:

British Virgin Islands

Jeffrey Kirk

Managing Partner, British Virgin Islands
Corporate
+1 284 393 5318
jkirk@applebyglobal.com

Andrew Willins

Partner, British Virgin Islands
Dispute Resolution
+1 284 393 5323
awillins@applebyglobal.com

For the convenience of clients in other time zones, a list of contacts available in each of our jurisdictions may be found [here](#) and [here](#).