

# Shareholder disputes in the British Virgin Islands

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In the prevailing economic conditions, shareholders in offshore companies registered in the British Virgin Islands (BVI) are increasingly being forced to consider their rights against directors who may have been responsible for mismanagement of company affairs. Minority shareholders are keen to understand the availability of remedies that allow them to overcome “wrongdoer control”, i.e., where the composition and direction of the board is controlled by majority shareholders.

## Scope of duties

The BVI Business Companies Act, 2004 (as amended) sets out the law governing the “duties of directors and conflicts”. This includes:

- The duty to “act honestly and in good faith” and in what the director believes to be in the company’s best interests; and
- A requirement that directors, after becoming aware they are “interested in a transaction entered into or to be entered into by a company”, shall “disclose the interest” to the company’s board.



**Edmond Fung**  
*Senior Legal Manager  
Loeb Smith Attorneys  
in Hong Kong*

**What is the standard of care that a director owes?** The act provides that a director “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:

1. The nature of the company;
2. The nature of the decision; and
3. The position of the director and the nature of the responsibilities undertaken by him.”

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

- An employee whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; and
- A professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person’s professional or expert competence.

However, the director’s reliance is premised on him or her acting in good faith, undertaking a proper inquiry where this is warranted, and having no knowledge that his or her reliance on the register of members or books, records, financial statements and other information or expert advice is not warranted.

**What are the key remedies available to a shareholder?** The shareholders of a BVI company may pursue the following remedies under the act:

- A personal action;
- A representative action;
- A derivative claim; or
- An unfair prejudice claim.

Minority shareholders most commonly seek a remedy under a derivative claim or an unfair prejudice claim.

**What are derivative claims and what is their legal basis?** A derivative action is a claim commenced by one minority shareholder or more on behalf of a company of which they are a member in respect of a loss or damage that the 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 case law authority of *Foss v Harbottle* (1843)). While English common law applies in the BVI, “members’ remedies” have been given a statutory footing in the act (see below).

**What is the procedure for commencing a derivative action?** 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:

1. Bring proceedings in the name and on behalf of that company; or
2. 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.”

The act lists the factors that the court must consider when determining whether to grant leave, including whether the member is acting in good faith and if the derivative action is in the company’s interest.

**What remedies are available for unfair prejudice and what is their legal basis?** The act provides that a member who considers that the company’s affairs 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 them may apply to the court for an order. If the court considers it just and equitable to do so, it may make such an order as it thinks fit, including:

- Requiring the company or any other person to pay compensation to the member; and
- Appointing a receiver or liquidator of the company.

**LOEB SMITH ATTORNEYS**

Room 306, 3/F Printing House

6 Duddell Street

Central Hong Kong

[www.loebsmith.com](http://www.loebsmith.com)

**Contact details:**

T: +852 3583 5000

E: [edmond.fung@loebsmith.com](mailto:edmond.fung@loebsmith.com)