

## Avenues of redress for stakeholders in Cayman incorporated companies facing the excesses of majority

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Against the backdrop of differing economies, laws and regulations throughout Asia, choosing to incorporate Cayman entities into holding and investment structures allows international stakeholders to co-operate under the aegis of a stable and effective judicial system. Appeals from the Grand Court of the Cayman Islands lie with the Cayman Islands Court of Appeal, comprising judges who have held high judicial office in the Commonwealth. The Judicial Committee of the Privy Council is the final Appellate Court for the Cayman Islands. As such, through its Court system, Cayman is able to provide the investment community with impartial, established and highly regarded judicial resources dedicated to resolving complex commercial disputes.

A minority shareholder has at its disposal common law and statutory rights which may be deployed in circumstances where directors have breached their fiduciary duties, including the rights:

- a. to commence proceedings in a personal capacity directly against the company in certain circumstances
- b. to commence a derivative action (subject to the Court's permission to continue) in the name of the company, and
- c. to petition to wind up the company under the "just and equitable" ground

### **Personal Actions**

A shareholder in a company may be able to commence proceedings in a personal capacity directly against the company. The right being enforced must be a personal right conferred qua shareholder of the company and the matter about which the shareholder makes complaint

must not be merely procedural irregularity but arise from a breach by the company of the company's articles of association (its statutory contract with its shareholders). The question of whether a shareholder may bring a personal action against the company where the directors have allotted shares for improper purposes is subject to an appeal to the Judicial Committee of the Privy Council (in which Ogier acted for the appellant).

## **Derivative Actions**

A fiduciary relationship will exist between the director and the company. In general, the director's fiduciary duties are owed only to, and can only be enforced by, the company; this means that the company (not its shareholders) is the only proper plaintiff in an action where the company is entitled to relief – this is known as the "rule in *Foss v Harbottle*". The rule, which takes its name from the English law case of *Foss v Harbottle* [1843] 2 Hare 461, has been applied repeatedly in the Cayman Islands.

To prevent directors from stifling legal proceedings in respect of their wrongdoing, the common law has developed exceptions to the rule in *Foss v Harbottle*. As a result, Cayman law allows for a company's shareholder to bring proceedings in the name of and on behalf of the company. Two of these exceptions to highlight are:

- a. where the act complained of constitutes a so called "fraud" on the minority. This envisages a situation where the persons against whom relief is sought are majority shareholders or appointees of the majority shareholders and neither the directors nor the majority shareholders will authorise the company to bring an action to redress the alleged wrong. To pursue a claim under this exception, it must be shown first, that the alleged wrong is a "fraud" (in the loose sense of a fraud *or* a breach of duty) and, (ii) secondly, that the alleged wrongdoers are in control of the company; or
- b. where the act of the director complained of is illegal or ultra vires and, therefore, is incapable of being ratified by the members

## **Winding up on the "just and equitable" ground**

The Court has jurisdiction to order the winding up of a company on a shareholder's petition if it is of the opinion that it is just and equitable that the company should be wound up. The words 'just and equitable' have long been considered by the English and Cayman courts to have a wide and general meaning to be taken at their face value. Consistent with this, it is not possible to state the categories of circumstance in which Cayman companies may be wound up on the just and equitable ground exhaustively. However, instances may include:

- a. where the majority shareholders have deprived minority shareholders of their right to appoint and to remove their own directors in furtherance of their right to participate in the

management of the company

- b. where there is a justifiable lack of confidence in management
- c. where a director is excluded from participating in the management of the company in breach of a mutual understanding on which the company was formed
- d. where the company is a "quasi-partnership" and the petitioner's expectations have been breached. A "quasi-partnership" is a company in which features are present which make it appropriate to subject the strict legal rights of the members to equitable considerations. These features typically include the following:
  - i. the company is formed on the basis of a personal relationship involving mutual confidence
  - ii. there is an agreement that all or some of the members will participate in the company's business; and/or
  - iii. there is a restriction on the transfer of the members' interest in the company

Under the Cayman Companies Act, the Court has a jurisdiction to make orders in the alternative to a winding up. Such orders include:

- a. regulating the conduct of the company's affairs in the future
- b. requiring the company to refrain from doing an act which the petitioner has complained of, or to do an act which the petitioner has complained that it has omitted to do
- c. authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner; or
- d. providing for the purchase of the shares of any member of the company by the company or by other members of the company

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