

BVI/Cayman Islands: the offshore toolkit in support of onshore litigation

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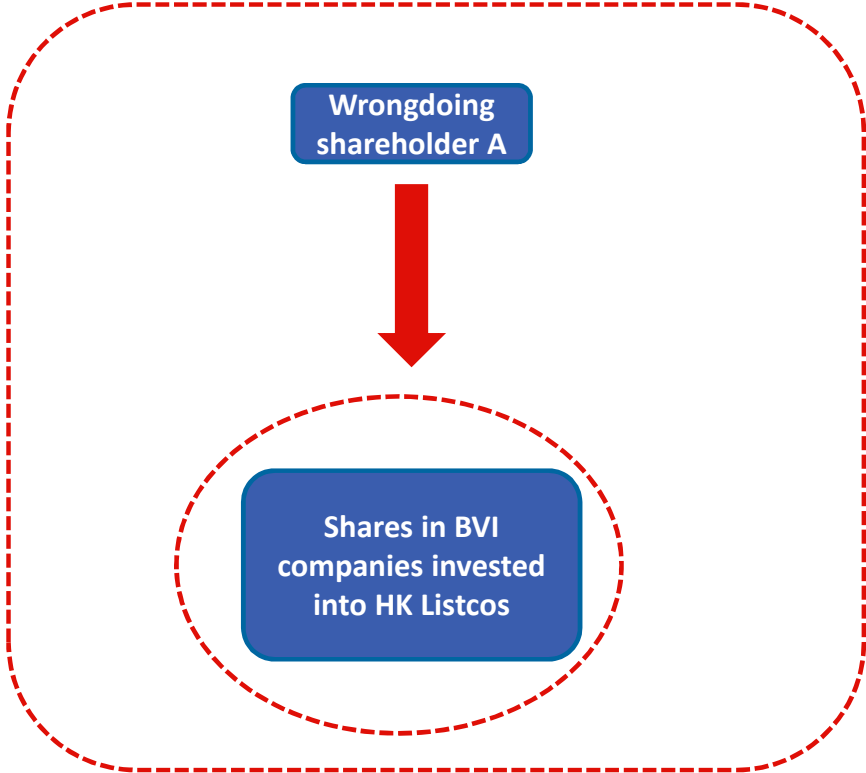
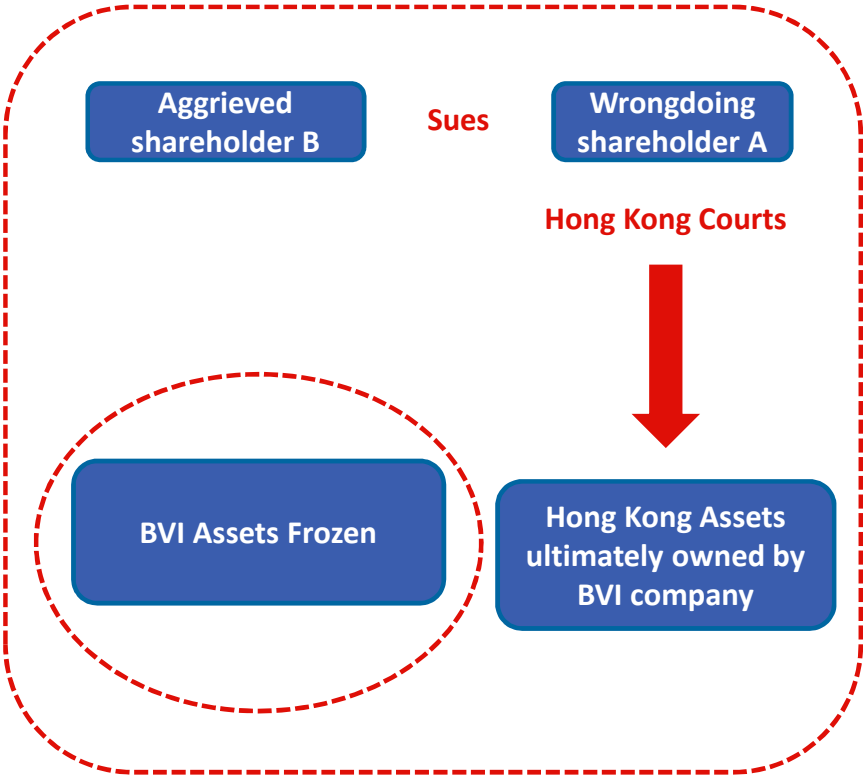
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Orders in Support of Onshore Proceedings



Orders in support of onshore proceedings



Three reasons assistance might be sought from the offshore courts:

- To freeze offshore assets pending determination of onshore proceedings – ‘holding the ring’ until it’s determined who gets what
- To obtain details regarding offshore assets – are the parties disclosing all of their assets?
- Enforcement of foreign judgment or arbitration award against offshore assets

Orders in support of onshore proceedings



Freezing orders – Getting back on course

Free-standing relief in support of foreign proceedings

- BVI: 2010-2020 = ‘Black Swan’ relief;; 2021 = statutory jurisdiction and PC decision
- Cayman Islands: 2014 = statutory jurisdiction

Non-proprietary claim:

- Good arguable case against the defendant; and
- A real risk of dissipation.

Interim relief against non-cause of action defendants
– *Chabra* relief

Orders in support of onshore proceedings



Disclosure orders

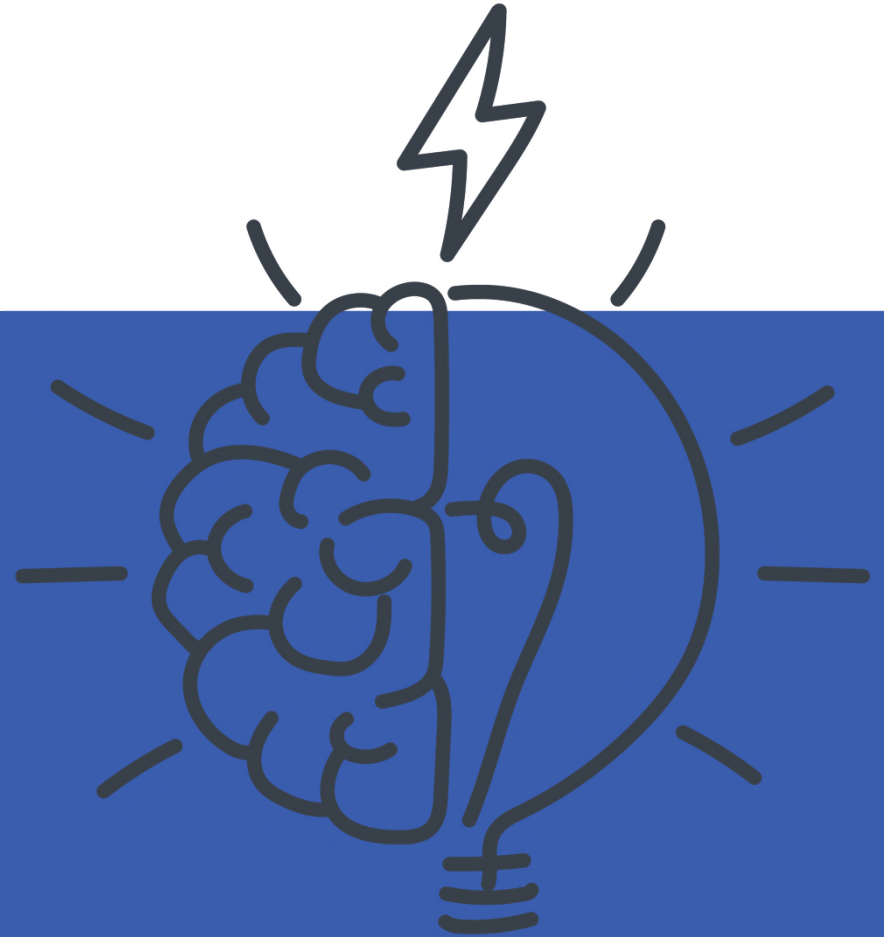
Third party disclosure orders

- *Norwich Pharmacal* relief: a third party can be obliged to disclose the identity of a wrongdoer, if they have notice of it
- Letters of request: request for evidence or production of documents by one court to another



Restraining and compliance orders and other statutory remedies

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Wait! There is more... other orders in support of onshore proceedings



Other interim remedies

- Stop notices
- Appointment of receivers over respondent's assets to secure and preserve assets pending determination of foreign claim
- Restraining and compliance orders

Wait! There is more... other orders in Support of Onshore Proceedings



Arbitration support

- Recognition and enforcement of awards
- Anti-suit injunctions and stay applications in favour of foreign arbitrations
- Obtaining freezing and disclosure orders, and advising on strategy for enforcement (including liquidation or bankruptcy proceedings)
- Acting as expert witnesses on matters of BVI and Cayman Islands law

Wait! There is more ... other orders in Support of Onshore Proceedings



Liquidation v arbitration

- Just and equitable winding-up: not arbitrable
 - BVI: *Hydro Energy Holdings BV v Zhaocheng* (Commercial Court, 2021)
 - Cayman: *In the Matter of China CVS (Cayman Islands) Holding Corp* (CICA, 2020)

- Insolvency:
 - The court will exercise its discretion as to whether to grant a stay based on whether there is a dispute based on genuine and substantive grounds
 - No requirement for exceptional circumstances as in *Salford Estates* case

Wait! There is still more ... Restraining and compliance orders



Section 184B of the BVI Business Companies Act 2004 provides:

If a company or director engages in, or proposes to engage in, or has engaged in, conduct that contravenes the Act or the M&As, a member or director may apply to the Court for an order:

- a) Directing the company or director to comply with; or
- b) Restraining the company or director from engaging in conduct that contravenes the Act or M&As.

The Court can also grant any consequential or interim relief.

Wait! There is still more ... Restraining and compliance orders



On a member's just and equitable winding-up petition, under section 95(3) of the Companies Act (2021 Revision) permits the court to make certain orders as an alternative to a winding-up order, including:

- An order regulating the conduct of the company's affairs in the future
- An order requiring the company to refrain from doing or continuing to do an act or to do an act

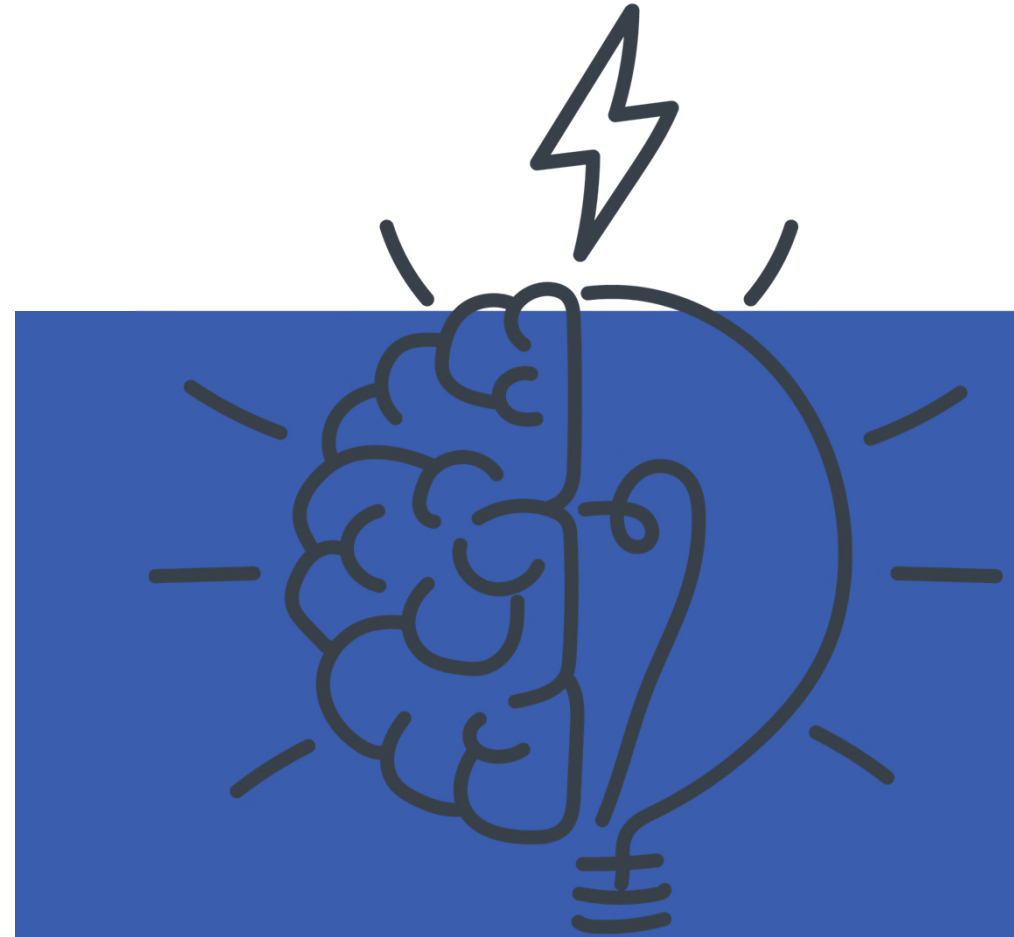
Crucially, petitioners must first establish the just and equitable ground before alternative relief can be given.

Wait! There is still more ... restraining and compliance orders

- These reliefs could be particularly useful in shareholders dispute
- Eg, if majority shareholders appoint additional directors to take control of the board in breach of the relevant provisions in the M&A
- The minority shareholder could go to Court ex parte and obtain an order enjoining the additional directors from acting and/or removing them
- Very powerful tool that can often lead to settlements



**I have a
judgment. What
can I do?**



I have a judgment. What can I do?



Enforcement Options

- Recognition and enforcement of foreign judgments
- Liquidation
- Charging orders against shareholdings
- Appointment of receivers over shares

I have a judgment. What can I do?

Asset tracing: identifying traceable proceeds

Examples of situations where the rules of “following” and “tracing” can be invoked:

- A transfers property to B, B then transfers property to C.
- A transfers property to B, B mixes it with other property so that the property loses its discrete identity.
- A transfers property to B, B exchanges the property for a new property.
- A transfers property to B, B mixes it with other property and then exchanges the property withdrawn from the mixture for a new property.

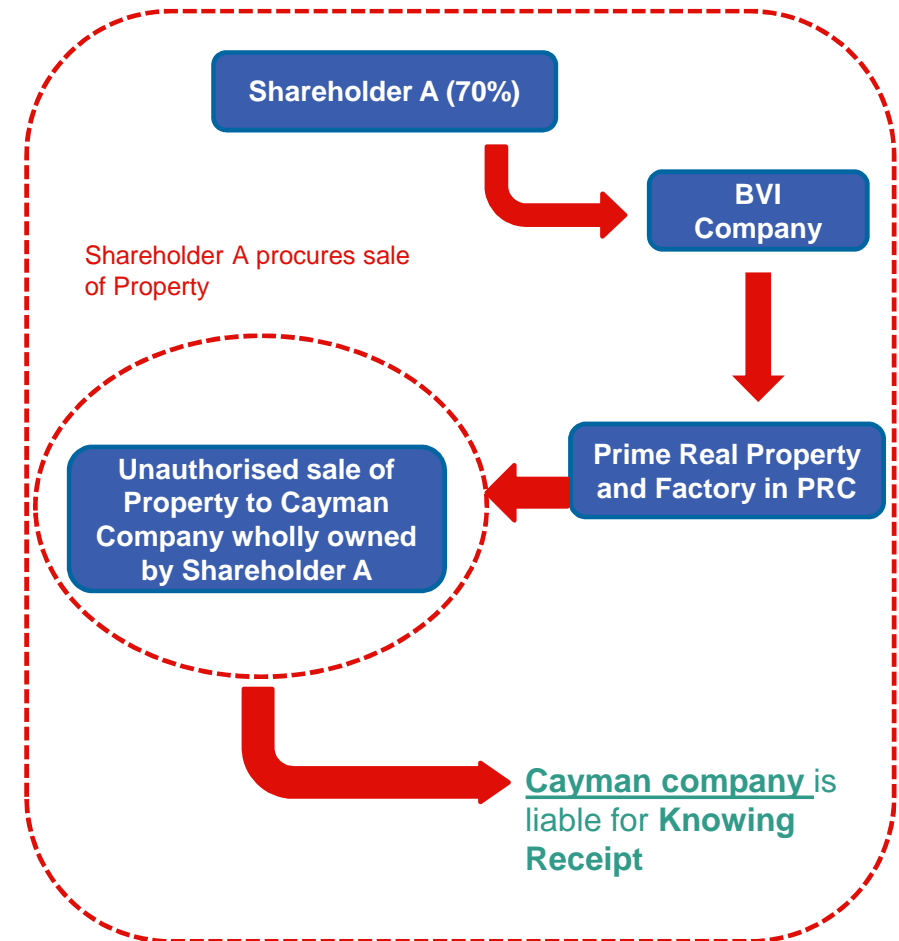


Knowing Receipt



Knowing receipt

- Doctrine for imposing liability on people who receive property that belonged to a trust / was held by a fiduciary, and knew that it has been given to them in breach of trust / fiduciary duty
- In *Ei Ajou v Dollar Land Holdings plc* [1994] 1 BCLC 464, 467, Hoffmann LF set out the requirements for knowing receipt:
 - a) There is property subject to a trust / fiduciary relationship
 - b) The property is transferred
 - c) The transfer is in breach of trust / fiduciary duty
 - d) The property (or its traceable proceeds) is received by the defendant
 - e) The receipt is for the defendant's own benefit
 - f) The defendant receives the property with knowledge that the property is trust property and has been transferred in breach of trust / fiduciary duty





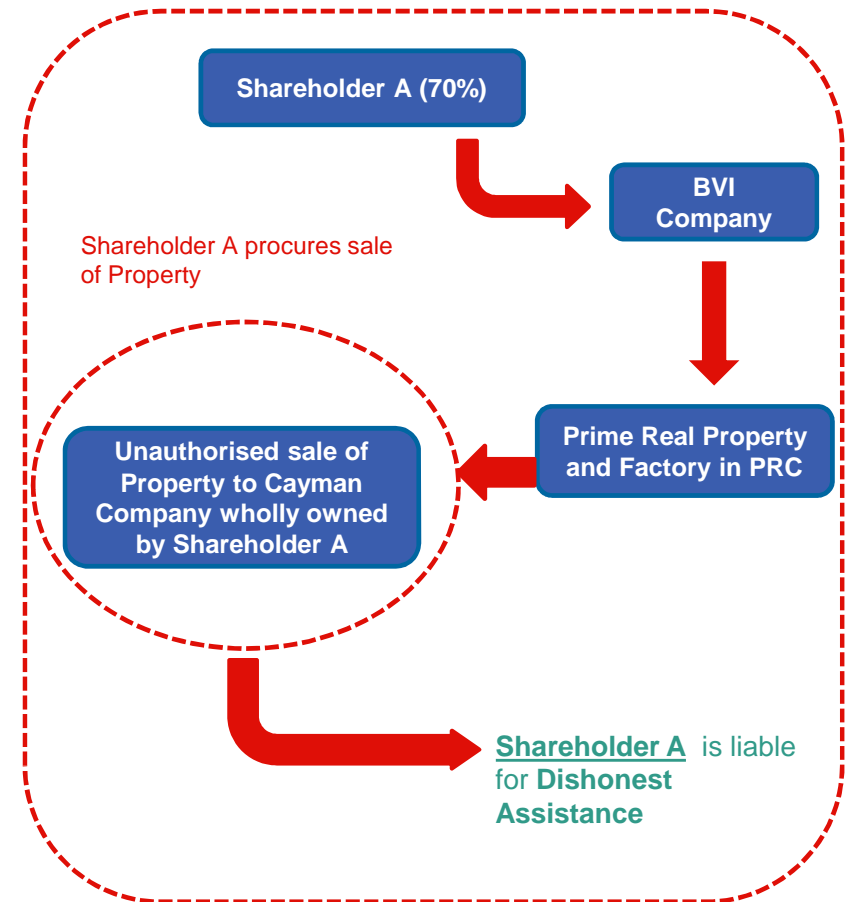
Dishonest Assistance



Dishonest assistance

The general requirements of liability for dishonest assistance are:

- a) There must be a trust
 - b) There must have been a breach of trust by the trustee of that trust
 - c) The defendant must have helped that person in the breach
 - d) The defendant must have had a dishonest state of mind
- If these requirements are met, the defendant is liable personally to account in equity in respect of the breach of trust



I have an arbitration award. What can I do?

Recognition of the Award

In broad terms any:

- final and conclusive monetary award;
- obtained against a party in arbitration proceedings in Hong Kong;
- for a definite sum may, with the leave of the Court;
- be enforced in the same manner as a judgment of the British Virgin Islands court/ Cayman Islands court

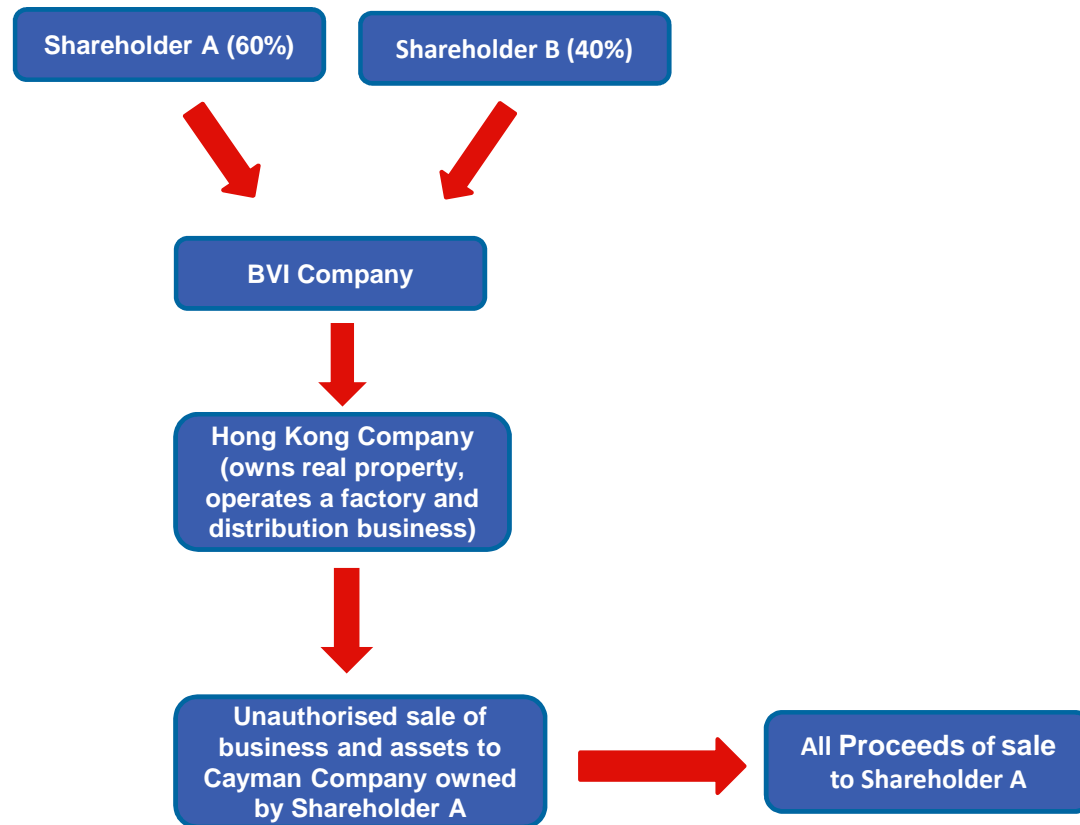
Hold on: When will leave be refused?



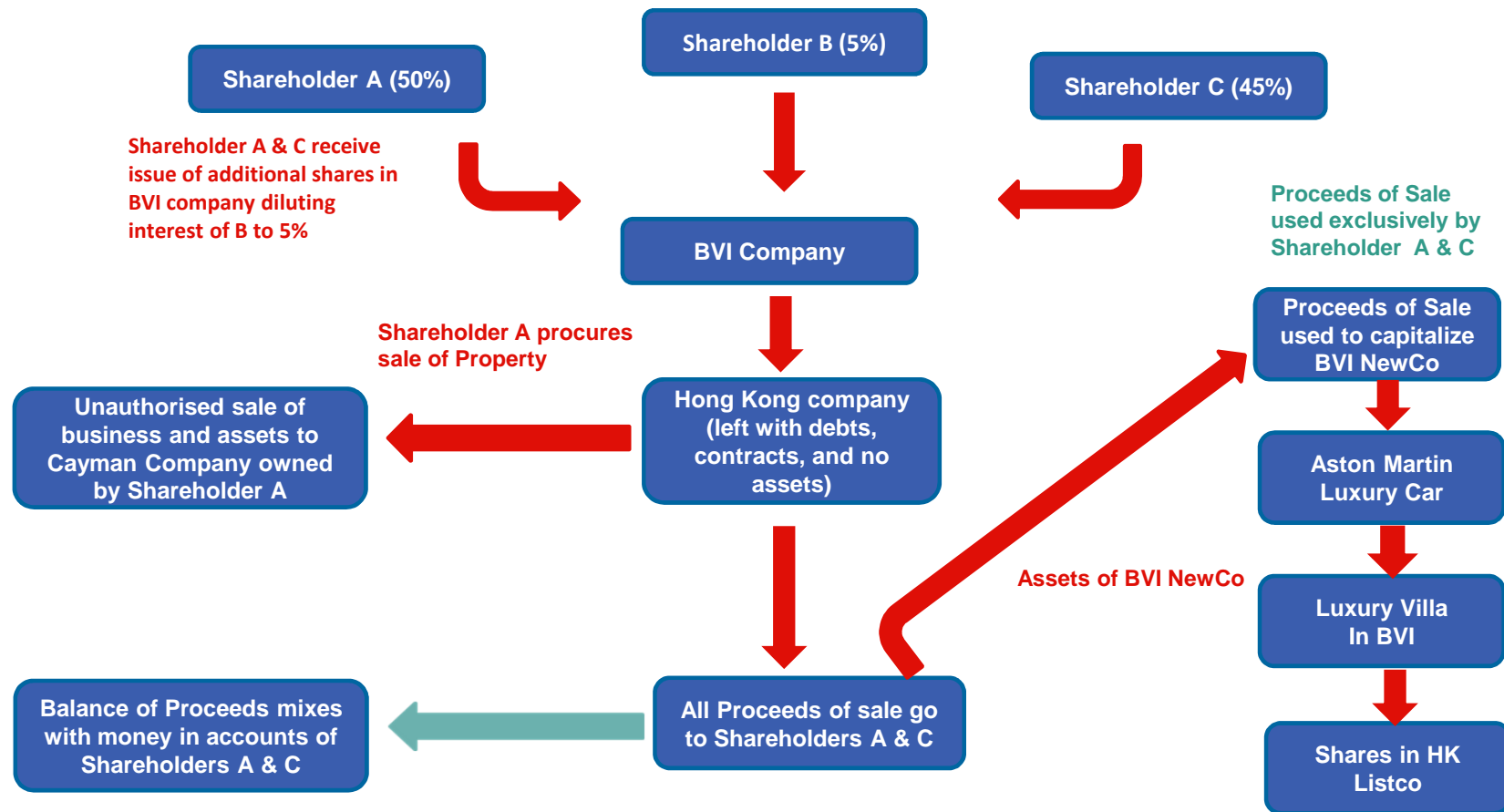
Case Study




“Happy days! Business is booming”

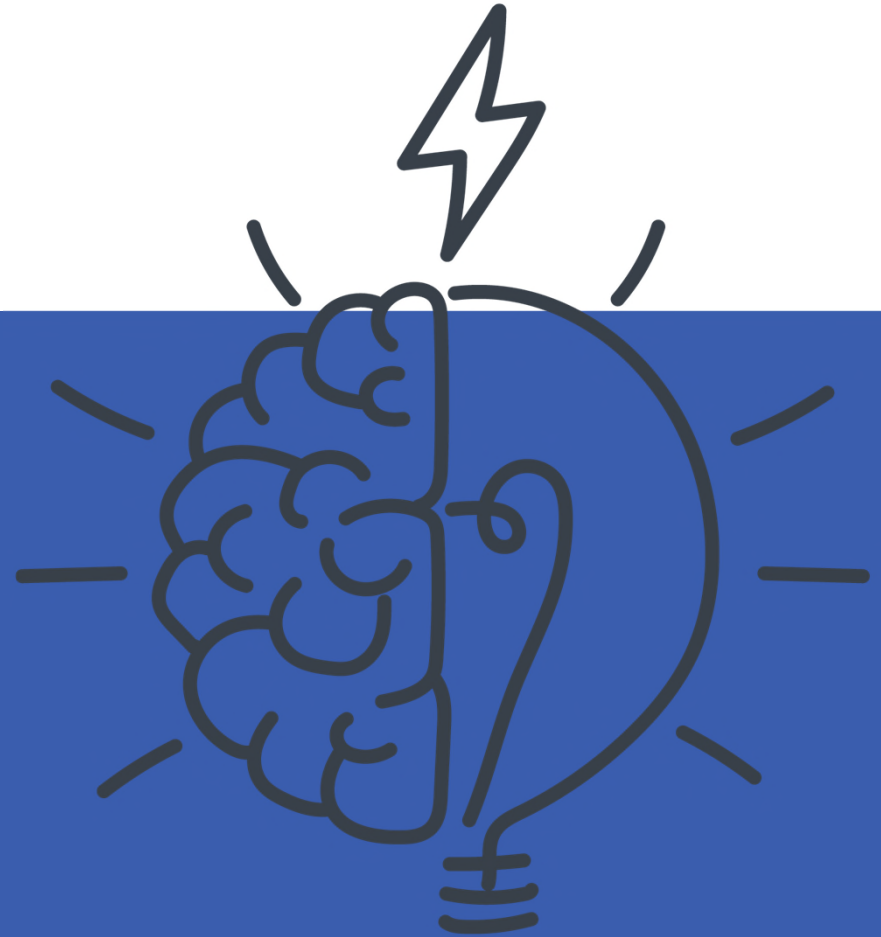


“My business is gone! What can I do?”





**Where do you
bring your
substantive
claim?**



Causes of action and where to start proceedings

What can you go after? How and when do you go after it?



Considerations:

- Where are the assets located?
- What are the assets?
- How readily can they be moved/dealt with?
- Who has control of the assets?

Call to action!

- Once you know what you are dealing with formulate the plan
- Onshore vs offshore interim remedies

Defensive action by the wrongdoer – what will shareholder A do?

- An action such as this is personal. A lot is at stake.
- Expect an aggressive defence!
- Think ahead – what are the common tactics deployed:
 - forum challenge;
 - discharge application;
 - replacement with undertakings;
 - breaches of any injunction;
 - The blame game.

Why commence offshore proceedings?



- Swift justice
- Well regarded jurisdiction with progressive and responsive judiciary
- The assets are now held via a Cayman company
- The BVI company is the aggrieved party



Questions?