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Restructuring & Insolvency analysis: The Privy Council considered the classic elements of a claim for unfair prejudice under British Virgin Islands (BVI) law and what was the appropriate remedy in *Yao Juan v Kwok Kin Kwok & Crown Treasure*. Written by Claire Goldstein (partner in Harneys' BVI Litigation and Insolvency team) and Romane Duncan (associate in Harneys' Litigation, Insolvency and Restructuring practice).

Minority shareholder rights in the BVI are codified under section 184I of the BVI Business Companies Act 2004 (as amended) (the BCA). Under this section, minority shareholders of BVI incorporated entities can petition the BVI court for redress in circumstances where they feel that the affairs of the company are being conducted in a manner that is unfairly prejudicial to them. Under this section, the BVI court enjoys a wide discretion to protect and provide relief to minority shareholders who make out their allegations of oppressive conduct against the company and those in control of it.

Ordinarily, the rights that shareholders enjoy are governed by the terms on which they associate. However, the imbalance of voting powers often leads to the controlling majority meting out conduct that is prejudicial to the rights of minority shareholders; the court is concerned with offering relief in these circumstances.

In *Yao Juan v Kwok Kin Kwok & Crown Treasure* [2022] UKPC 52, the Privy Council considered the classic elements of a claim for unfair prejudice under BVI law and what was the appropriate remedy.

Background

The underlying dispute concerned an oral agreement entered by the parties to build and operate a five-star luxury hotel in Xiamen, China (the Project). As part of the agreement, the parties incorporated a BVI company, Crown Treasure, as the holding company with each party owning 50% of the shares in the company. The Project was held ultimately by a subsidiary in China. Neither party had the ability to transfer their shares in Crown Treasure without the consent of the other. Madame Kwok was the sole director of Crown Treasure and had the day-to-day control over the operations of the Project but Madame Yao, who provided much of the funding, took the position that the parties' agreed that she would be given information about and would need to consent to all major decisions. Madame Kwok disagreed and, in her evidence, stated that she did not need to obtain Madame Yao's consent in relation to anything.

Sometime after she had made her investment in the Project, Madame Yao discovered that Madame Kwok had carried out certain transactions at the level of the subsidiaries which led to a significant dilution of Crown Treasure's stake in the Project. This was done either without Madame Yao's knowledge or by procuring consent by giving Madame Yao misleading information. Madame Yao, therefore, brought a claim before the BVI Commercial Court for unfair prejudice.

The trial judge held that Madame Kwok's conduct, in relation to the transactions complained, was clearly unfairly prejudicial and ordered that Crown Treasure be placed into liquidation. Madame Kwok, however, appealed both the decision and the remedy to the Court of Appeal. Regarding the remedy, she argued that the liquidation of Crown

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Treasure was too draconian. She was successful at the Court of Appeal leading to a reversal of the liquidation for an order that she provide certain information to Madame Yao. Madame Yao then successfully appealed to the Privy Council who upheld the trial judge's findings of unfair prejudice and reinstated the liquidation order over Crown Treasure.

Unfair Prejudice in the BVI

Under section 184I of the BCA, a shareholder who considers that the affairs of the company have been, are being or likely to be conducted in manner that is unfairly prejudicial may apply to the BVI court for relief. Section 184I(2) BCA provides for a wide range of relief, including the setting aside of any decision or action taken by the company in breach of the BCA or the memorandum or articles of the company.

The test for what amounts to unfair prejudice is an objective one. It is not necessary for the petitioner to show that the defendant was acting in bad faith or intended that his actions would be unfair. The test is whether a reasonable bystander observing the consequences of D's conduct, would regard it as having unfairly prejudiced the petitioner's interest (see *Re Bovey Hotel Ventures Ltd* (31 July 1981, unreported)).

Relief under section 184I BCA is only available to a claimant who can establish that she is a shareholder of the relevant company. Relief can only be granted against the company or any other person (such as another director or shareholder) if they are a party to the proceedings (section 184I (3) BCA). To succeed in a claim for unfair prejudice, a shareholder must show that the conduct complained of was unfairly prejudicial towards her (see *Re Marco (Ipswich) Ltd* [1994] 2 BCLC 354).

Moreover, prejudice is not strictly limited to damage to the value of the shareholding itself and does not need to be financial. The courts take a wide view of the prejudice suffered by a shareholder.

Applying this objective test, the court in *Crown Treasure* found that the oral agreement made between the parties entailed a duty to notify and consult. One example of the unfairly prejudicial conduct was Madame Kwok entering into a loan agreement with a repayment date in 2045. The Privy Council upheld the trial judge's decision that Madame Kwok's conduct was unfairly prejudicial notwithstanding that the capitalization of the land holding company (by the loan) was a requirement of the Chinese authorities. The Privy Council held that the unfair prejudice lay in not having the opportunity to be heard on the intended terms of the loan agreement given its onerous terms and the effect of those terms on Madame Yao's shareholding (see *Yao Juan v Kwok Kin Kwok & Crown Treasure* [2022] UKPC 52 at [89]).

High bar for overturning trial judge's findings of fact

The principles that govern the circumstances in which an appellate court will be justified in overturning the findings of fact of a trial judge are well established. The principles were recently summarised by the Court of Appeal in *Nam Tai Property Inc v IsZo Capital LLP and others* BVIHCMAP 2021/0010 (6 October 2021), at [74]–[78].

An appellate court should not interfere with a judge's findings of primary fact unless they are 'plainly wrong', which means either there was no evidence to support the finding, or the finding was based on a misunderstanding of the evidence, or the finding was one that no reasonable judge could have reached.

When deciding to overturn the findings of fact of a first instance judge, the Court of Appeal must have regard to the totality of evidence that was before the trial judge. Therefore, the analysis of the appellate court should not be confined to the words that the judge summarises in his judgment.

In *Crown Treasure*, the Privy Council held that while it was unfortunate that the first instance judge did not go on to explain why it was that he reached the conclusion, it was apparent from the totality of the judgment his finding was based on an assessment of the conflicting evidence and the credibility of the witnesses. The Court of Appeal erred

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by focusing on a very small part of the evidence before the judge and assumed incorrectly that this was the only evidence he relied on in support of his finding. The Privy Council held that this was not one of the cases where the Court of Appeal met the high bar to overturn the judge's findings of fact.

Following the decision in *Crown Treasure*, appellate courts in other common law jurisdictions now need to take care to construe the totality of a judgment and the evidence before the trial judge before concluding that a particular finding was unsupported by the evidence.

Liquidation order not just in extraordinary cases

Once the unfair prejudice is established, the court has a wide discretion as to the relief which should be granted (see *O'Neil v Phillips* [1999] 1 WLR 1092 (as cited by Justice Adderley in *Yao Juan v Kwok Kin Kwok & Crown Treasure* BVIHCOM2013/0162 (13 March 2018)). The most common remedy sought and granted on a petition for unfair prejudice is for the majority to buy out the shares held by the minority. Nonetheless, the court is not constrained by the relief sought by a claimant in her petition.

Furthermore, the appropriate remedy is not limited to reversing or putting right the conduct which has justified the making of the order. In determining what is appropriate, the court is entitled to look at the reality and the practicalities of the overall situation, past present and future. As Lord Briggs JSC observed, 'nothing is off-limits, subject only to the twin tests of relevance and weight, in relation to the choices to be made in the exercise of the discretion' (see *Ming Siu Hung v JF Ming Inc* [2021] UKPC 1; [2021] 1 BCLC 341).

The gamut of remedies available for unfair prejudice is considered to limit petitioners seeking just and equitable winding up under the BVI Insolvency Act 2003. This is because section 167(3) of the Insolvency Act 2003 provides that the court shall order the appointment of a liquidator unless it is also of the opinion that some other remedy is available, and that the applicant is acting unreasonably in seeking to have a liquidator appointed instead of pursuing that other remedy. In *Redelinguys v Palm Bay Capital Ltd and Hougaard*, BVIHCOMHC 2006/0314, the BVI court exercised its jurisdiction on an application for a just and equitable winder to order the purchase of the applicant's shares instead of winding up.

In *Crown Treasure*, Madame Kwok argued that the liquidation of the company would be an inappropriate remedy as it is a remedy of last resort, and that the court's policy is to discourage liquidation on pure unfair prejudice claims. She also argued that none of the acts complained of fell within the four categories highlighted in *Hollington on Shareholders' Rights* where a liquidation order would be an appropriate remedy for unfair prejudice. The categories include, 'lack of substratum, deadlock, justifiable loss of confidence due to mismanagement and expulsion of a "working partner"'.

However, the trial judge found that liquidation was the appropriate remedy considering the following: (i) liquidation at the parent company level did not operate to wind up the affairs of the PRC subsidiary; liquidation was not terminal to the Project. The liquidators could sell the shares to either party, which would operate very similarly to a buy-out order; and (ii) the parties were 50-50 percent shareholders such that the case could fall within one of *Hollington* categories. The court also held that the *Hollington* categories were not exhaustive and did not limit the court's discretion.

Although the court did not find that Madame Kwok's procurement of Madame Yao's consent by misrepresentation was a separate ground of unfair prejudice, it held that it was entitled to consider this conduct when deciding the appropriate remedy. Madame Kwok also took steps to further dilute Crown Treasure's ownership in the Project while the BVI court was determining the petition. The Privy Council held that this was a 'future circumstance' that the court was entitled to consider when deciding the appropriate remedy. The Privy Council therefore upheld the trial judge's finding that a liquidation order was the appropriate remedy.

Crown Treasure refocuses the approach when considering remedies for unfair prejudice; the court and petitioner

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should consider the practical effect of the remedy together with conduct of the defendant, as opposed to focusing solely on the extent of the prejudicial conduct.

Additionally, liquidators have far-reaching powers to investigate the affairs of a company. In unfair prejudice claims, they may be able to investigate the transactions that led to the prejudicial conduct to consider whether any claims should be brought against the company's former directors to recover company assets.

The Privy Council's decision in *Crown Treasure* demonstrates that notwithstanding the existence of less onerous remedies, there are circumstances where liquidation is the appropriate remedy. The decision accords with wide discretion afforded to the court when remedying unfairly prejudicial conduct.

Case details

- Court: Privy Council
- Judges: Lord Briggs, Lord Kitchin, Lady Rose, Lord Richards and Dame Geraldine Andrews
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