

# Dissenting Members' Rights in the British Virgin Islands

The BVI Business Companies Act 2004 (the **BCA**) provides a remedy for members who dissent from proposed actions by the company in the form of a statutory right to have their shares bought out by the company for fair value.

Section 179 of the BCA sets out a member's right to dissent from the following corporate transactions or restructurings:

- a merger, if the company is a constituent company, unless the company is the surviving company and the member continues to hold the same or similar shares;
- a consolidation, if the company is a constituent company;
- any sale, transfer, lease, exchange or other disposition of more than fifty 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 (ie a **section 175 of the BCA disposal**) and if not otherwise provided in the memorandum and articles of association of the company, but excluding:
  - a disposition pursuant to an order of the court having jurisdiction in the matter;
  - a disposition for money on terms requiring all or substantially all net proceeds to be distributed to the members in accordance with their respective interests within one year after the date of disposition; or
  - a transfer pursuant to the power described in section 28(2) of the BCA (ie the **flight** provision);
- a compulsory redemption of the minority shareholding by the company pursuant to the statutory power under section 176 of the BCA (ie a **minority squeeze out**); and
- an arrangement, if permitted by the court.

## Statutory procedure for exercising dissenter rights in the BVI

Both the member and the company are bound by the procedure and time limits prescribed by the legislation, but the onus is on the member to exercise its statutory rights. The legislation does not explicitly provide for variations or derogations from these, but the court has been reluctant to apply time limits strictly where the parties have been seeking to negotiate in good faith, particularly where this would deprive a member of its statutory rights (*Brantley Inc v Antarctic Asset Management Ltd* BVIHCV 227/2007 (9 May 2007)).

The full procedure is as follows and applies all dissenting members (except in the case of redemption of minority shareholders where only steps (6) to (8) below in relation to appraisers will apply (BCA, s179(12))):

### (1) Dissenter gives written objection to proposed action

A dissenting member must give the company written objection to the proposed action before the members' meeting or at the meeting but before the vote, except where the company did not give proper notice of the meeting or where the proposed action is to be authorised by members' written consent (BCA, s179(2)).

The objection must include a statement that the member proposes to demand payment for its shares if such action is taken (BCA, s179(3)).

The objection does not prevent a member from taking part in the vote.

## **(2) Company gives written notice the action is approved**

Within 20 days of the approval, the company must give written notice to each member who gave written objection, or from whom written objection is not required, that the proposed action has been approved (BCA, s179(4)).

## **(3) Dissenter gives written notice of election to dissent**

The member has 20 days to give the company a notice in writing electing to dissent (BCA, s179(5)). In the case of a merger between a parent and subsidiary, the 20 days runs from when the member receives a copy or outline of the plan of merger (BCA, s179(5)).

The notice must specify the member's name, address, number and classes of shares, and contain a demand for payment of the fair value of its shares.

On giving such notice, the member ceases to have any of the rights of a member of the company except for the right to be paid the fair value of its shares (BCA, s179(7)).

## **(4) Company makes written offer to purchase dissenting member's shares**

Assuming the member has validly exercised its dissenter rights, then within seven days immediately following the (i) expiry of the period within which the member gives its notice of election to dissent or (ii) date on which the proposed action is put into effect (whichever is later), the company (or surviving or consolidated company) must then make a written offer to each dissenting member to purchase its shares at a specified price that the company determines to be their fair value (BCA, s179(8)).

There is no obligation to offer the same price to each member.

## **(5) Share purchase price agreed**

The company and the member then have 30 days to agree the price. If they do, the company must pay that price in money (and not in property or other consideration) when the member surrenders its share certificate (BCA, s179(8)).

If they fail to agree the price within 30 days, then the following procedure for determining fair value of the shares will apply.

## **(6) Appraisers appointed**

Within 20 days following the end of the 30-day period, the company and the dissenting member must each appoint an appraiser, and the two appraisers together must appoint a third appraiser (BCA, s179(9)(a) and (b)).

## **(7) Appraisers determine fair value**

The three appraisers must fix the fair value as at the close of business on the day prior to the date on which members' approval was obtained (BCA, s179(9)(c)).

The value is binding on the company and the dissenting member for all purposes.

## **(8) Company pays fair value**

The company must pay the amount in money on the surrender by the member of its share certificate (BCA, s179(9)(d)).

The shares that are acquired must be cancelled, except if they are shares in a surviving company in which case they are available for reissue (BCA, s179(10)).

Once a shareholder elects to exercise its rights under these provisions, it cannot enforce any rights to which it might otherwise be entitled by virtue of its shareholding, save that it is not prevented from instituting proceedings for relief on the grounds that the action is illegal (BCA, s179(11)).

Certain aspects of the procedure do not mesh precisely with all types of corporate transactions or restructuring and so some pragmatic application is necessary. In particular, section 179 is drafted solely with references to shareholders and contemplates that the relevant dissent would be made at a shareholder's meeting.

However, neither compulsory share redemptions under section 176 nor plans of arrangement require a members' meeting so it is unclear when the dissenter must notify the company.

Further, the provisions generally appear only to apply to shareholder members and not to either guarantee members or unlimited members; nor are there provisions dealing with dissenting creditors or other securities holders to proposed arrangements despite the BCA providing that both may be permitted by the court to dissent under the section 179 procedure. However, given the requirement of a court order for arrangements, the court has wide powers to structure the methods by which dissenters can make their objections known and be bought out for fair value. The expectation would be that the valuation mechanisms in section 179(9) of the BCA would apply to both shareholders as well as the holders of debt and other securities.

In relation to an intended merger, the BVI Commercial Court has confirmed that dissenter rights only apply to existing, registered membership in a company: they do not extend to shares which are not yet held such as where a promissory note gives a contractual entitlement to a member to convert sums due to it into further shares upon a merger (*Nettar Group Inc v Hannover Holdings SA BVIHC (COM) 177/2021 (15 December 2021)*).

## Fair value

There is no statutory guidance on what constitutes fair value or the basis on which it is to be calculated save that any appreciation or depreciation directly or indirectly induced by the action or its proposal is to be left out of account (BCA, s179(9)(c)). Nor does the legislation specify any procedure for carrying out the appraisal or require the disclosure of any information (even financial information) from the company to the appraisers.

However, the court has given the following guidance in relation to ascertaining fair value:

- (1) If the company and the dissenting shareholder fail to agree a fair valuation, they remain free to agree the basis upon which fair is to be determined rather than applying the statutory procedure set out in section 179(9).
- (2) The words "fair value of the shares" are to be given their plain English meaning, and a valuer is not required to undertake legal analysis (the BVI court electing not to follow the English decision in *National Grid Company plc v M25 Group Ltd* [1998] EWCA Civ 1968 on this point).
- (3) Determination of fair value potentially applies in five different situations under section 179 and what may be appropriate to determine fair value in one situation may not be appropriate in another. In some cases an assets-based approach may be appropriate, whilst in others a valuation based upon earnings would be more apt.
- (4) "Fair" means fair to both parties, and not just the dissenting member.
- (5) It is not necessarily unfair to discount the valuation of the shares on the basis that it is a minority shareholding.
- (6) There is no requirement for the company to discount any earning received by a member on the shares held by him between seeking to exercise his right to have his shares purchased for fair value, and that process being completed.
- (7) While the court has jurisdiction to declare that a minority discount can apply to a section 179(9) valuation, whether a minority discount should apply to the valuation of the respondent's minority shareholding falls within the scope of the appraisers' mandate and the court therefore has no jurisdiction to intervene.

- (8) The parties are free to dictate the principles and procedures for carrying out the valuation in the appraisers' terms of engagement. If they fail to do so, the appraisers are free to determine how to proceed and the court will not intervene in the valuation process.



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