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Dealing with the Death of a Sole Director/Shareholder of a BVI Company in the Context of Pending Proceedings

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Many BVI companies have only one director/shareholder. When that individual dies, the company can be left in a vulnerable position, especially if the company faces pending or contemplated court proceedings. Conyers' Matthew Brown suggests ways of handling this difficult situation.

Companies incorporated in the British Virgin Islands are generally only required to have one director in place at any given time. In fact, it is fairly common for a BVI company to be incorporated with only one member and one director - often the same individual. This has some obvious benefits, but also a number of risks, not least the risk that the company will be left in an exposed position if or when the individual director/shareholder dies.

That risk only increases where there are pending or contemplated court proceedings against the BVI company (whether in the BVI or elsewhere). In the absence of an individual with the authority to take the necessary steps on its behalf, the company may find itself unable to respond to the claims against it, or indeed participate in claims it may have. Unfortunately, this is not an altogether uncommon scenario. In some cultures, the inherent reluctance to discuss one's mortality inhibits succession planning in the corporate context.

This article sets out the potential solutions that may be available where a company finds itself in this awkward position. It does not address the option of appointing a 'reserve director', which remains a useful, though underused, means of avoiding some of the issues discussed below.

The problem and the usual solution

Under BVI statute, the business and affairs of a company are generally required to be conducted by, or under the supervision of, its directors (unless the articles of the company state differently). Those directors are usually, in turn, appointed by the members or by the existing director(s). Accordingly, where a sole director/shareholder dies, there are often at least two obvious consequences for the company: there is no-one who is able to carry on its business and affairs; and there is no-one who can appoint an alternative individual to carry out that task in his place.

It is usually possible to solve both of those problems once a personal representative has been appointed in relation to the deceased's shareholder's estate. Once that has happened, the duly appointed personal representative should be able to secure his registration as the shareholder of the BVI company, and thereafter use that position to appoint himself or another individual as the director of the BVI company. In short, obtaining his appointment as the deceased shareholder's personal representative is a fundamentally important step in the process of taking control of the BVI company.

Letters of administration and grant of probate

Where the sole director/shareholder has died without leaving a valid Will dealing with his BVI assets, then a BVI grant of letters of administration will be required. This is the case even where the applicant has already obtained a grant of letters of administration (or the equivalent) in the country where the deceased was domiciled at the date of his death.

Where the sole director/shareholder *did* leave a valid Will, then his executor(s) is still likely to require a BVI grant of probate (even though the executor derives his title from the Will of the deceased, not the grant of probate).

Unfortunately, obtaining a grant of probate or letters of administration (known collectively as a "grant of representation") can be a fairly slow process in many jurisdictions, and that can include the BVI. Where proceedings against the company are pending or contemplated, it may not be possible to simply wait for the usual process to run its course. In those circumstances, we are often asked whether there is any way in which the process of obtaining a BVI grant can be expedited. Fortunately, there is.

Alternative solutions

When a grant of representation is required as a matter of urgency, an application can be made direct to a Judge of the High Court. If proceedings against the BVI company are pending, there are (at least) two alternative grants that can be sought, both of which Conyers has obtained in recent months:

- a full grant of letters of administration or a grant of probate; or
- a limited grant, limited for *inter alia* the purpose of bringing about the applicant's registration as the sole shareholder of the BVI company and thereafter exercising all rights arising from and by reason of that registration (which will cover any right the members have to appoint directors).

The High Court undoubtedly has the jurisdiction to issue and revoke grants of representation (including full or general grants). The basis of that jurisdiction is Section 7 of the *Eastern Caribbean Supreme Court (Virgin Islands) Act (Cap 80)*, which renders applicable Section 20 of the *Supreme Court of Judicature (Consolidation) Act, 1925* ("the SCJ 1925"): an old English statute. There are now detailed court rules which provide for how grants of probate and letters of administration should ordinarily be obtained, but it is hard to see how these could alter or diminish the High Court's general probate jurisdiction under Section 20 of the SCJ 1925.

In our experience, judges may be reluctant to make a full grant of representation on an emergency basis. Instead, they prefer limited grants, which enable them to provide the applicant with the minimum powers that he requires in order to take whatever steps are necessary. Limited grants, as the name suggests, are grants other than a general or full grant. They include: (1) a grant "*ad colligenda bona*"; and (2) a statutory grant under Section 162(1) of the SCJ 1925.

In terms of a grant *ad colligenda bona*, this is granted in circumstances where the deceased's estate requires protection, but there is some difficulty or delay in obtaining a full grant. This would therefore cover the scenario where a grant is required urgently in order to commence, pursue or defend litigation in another court. The application would need to be supported by an affidavit explaining the reasons why the grant is necessary.

In a very recent case, Conyers successfully obtained a grant *ad colligenda bona* on behalf of a foreign client who, despite being the personal representative of the deceased shareholder in Singapore, required a BVI grant urgently in order to respond to proceedings that had been issued against a BVI company in the BVI.

We are aware of further cases where a grant *ad colligenda bona* has been made in recent years, including in *Liao Chen Toh -v- Liao Hwang Hsiang* BVIPB 93 of 2011 and *In the Estate of Alex Dorance George* BVIHPB 27 of 2016. In the latter case, the grant was made for the purpose of: "*collecting and receiving the estate and doing acts necessary for its preservation including taking all such steps as are necessary (including instituting legal action to preserve any right of action vested in the estate)*."

If a limited grant to preserve the estate is insufficient, and further powers of administration are required, then an application for a limited grant can be made under Section162(1) of the SCJ 1925. This jurisdiction is triggered whenever there are "*special circumstances*" rendering it "*necessary or expedient*" to appoint a person other than the person who is otherwise entitled to a grant of administration by law. The equivalent provision in England has, in the past, been used so as to constitute a person as the personal representative of an estate for the purpose of pursuing or defending a claim: see *Pakistan -v- National Westminster Bank* [2015] EWHC 3052 (Ch); *In the Goods of Knight* [1939] 3 All ER 928. Once more, an application under Section 162 is also made by way of a fixed date claim form, with an affidavit in support.

In summary, when a sole director/sole shareholder of a BVI company dies and there is no reserve director to take over, there are ways in which the absence of authority can be remedied, so that the company can still take whatever urgent steps are required.

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