While Nilon v Royal Westminster *may have closed the door on rectification as a means of recourse, the BVI and Cayman courts have recognised some avenues for recourse by beneficial owners in insolvency matters.*

Further questions regarding the standing of beneficial shareholders

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In a recent decision in the case of *TIPP Investments PCC v. Chagala Group Ltd. et al* (BVIHCM 102/2016), Mr Justice Davis-White clarified the issue of the standing of beneficial shareholders that we highlighted in our previous article. As we had said was the likely outcome of any reconsideration of the case of *Headstart Class F Holdings Ltd and another v Y2K Finance Inc* (BVIHCV 278/2007), a beneficial owner that held its interest through a nominee was not a member (for the purposes of s.184 of the BVI Business Companies Act 2004 (BCA)) and consequently did not have standing to bring an unfair prejudice claim. The *Headstart* case had been wrongly decided, having been based on erroneous interpretation of the English case of *Atlas Ltd & ors v Brightview & ors* [2004] BCC 542.

While the decision in *TIPP Investments* clarifies the position in respect of unfair prejudice and related claims, there remain a number of other areas in which questions over the standing of beneficial shareholders are worth considering.

Rectification claims

The circumstances in which a beneficial owner – one who feels he has wrongly been omitted from the register of members – may have resort to the summary rectification procedure provided by s.43 of the BCA was considered by the Privy Council last year in the case of *Nilon v Royal Westminster* [2015] UKPC 2.

The Privy Council ruled definitively that rectification is a summary procedure which is generally restricted to resolving errors or omissions in registration: it therefore can only be invoked to settle simple disputes over legal ownership, as opposed to disputes as to beneficial ownership of shares. It should not be used to resolve more complex disputes between members, for example contractual disputes under a joint venture agreement (as in this case). The court concluded that *"proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependent on the conversion of an equitable right to a legal title by an order for specific performance of a contract."*

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The Privy Council ultimately found that BVI was not the appropriate forum for the dispute[1].

Insolvency and applications to appoint a liquidator

Courts in the BVI and more recently the Cayman Islands have indicated that there are some avenues of redress for beneficial owners of shares in an insolvent company. Between 2009 and 2010 there were three pivotal decisions primarily concerning failed funds, which addressed the beneficial owner's capacity to commence liquidation proceedings.

In *Western Union International Limited v Reserve International Liquidity Fund Ltd* (BVIHCV 322/2009), the Applicant, Western Union, commenced the process for redemption of its shareholding. Before the shares were redeemed, however, the calculation of NAVs was stopped and all redemptions suspended, as a result of the fund going into Chapter 7 bankruptcy in the United States. Consequently, Western Union International Limited issued an application for the just and equitable winding-up of the BVI Fund. The Fund challenged the applicant's standing to do so, on the grounds that it was neither a registered member nor a creditor of the company.

The Commercial Court found that the Applicant, as a former member with a valid but unsatisfied redemption claim, was a creditor of the Fund and therefore had standing to bring the application. Even if the Applicant had not validly commenced the redemption process, it would have remained a member of the Fund, with standing to bring the application[2].

The Fund was found to have lost its substratum and the Court exercised its discretion to wind up the Fund[3].

Whilst the BVI Court in *Western Union* upheld the right of a beneficial owner with an unsatisfied claim for redemption to petition for the winding up of a company on just and equitable grounds, in *Trade and Commerce Bank v Island Point Properties SA and Jacob Ungar* (HCVAP 12/2009) the Court of Appeal held that an equitable restitutionary claim was not a debt and could not maintain a statutory demand (and by extension an insolvent winding up)[4]. This was the case even where there was no application to set the statutory demand aside within the prescribed period.

The judge at first instance had refused to hear the second Respondent who claimed to be the sole registered shareholder of the First Respondent company. The Court of Appeal, however, held that a shareholder has a right to be heard at a winding up petition as an interested party: *"How much weight is to be given to a member's views is another matter, which need not be addressed for the purposes this appeal, but the right to be heard remains alive and well …"*[5].

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[1] It should, however, be noted that the claim in that case had been issued before EC CPR 7.3 was amended to include a gateway for claims relating to the constitution of BVI companies. The Privy Council ruled (obiter) that *"the fact that there is a specific gateway dealing with the ownership or control of a particular type of property within the jurisdiction does not obviate the need for a claimant to show that the BVI is clearly the appropriate forum".*

[2] BVIHCV 322/2009 at [15-16].

[3] Ibid at [21].

[4] BVIHCVAP 12/2009 at [33-36].

[5] Ibid at [11].

More recently, in the breakthrough Cayman Islands case of *China Forestry Holdings Co Ltd* (FSD 31/2015), beneficial note holders for the first time succeeded in obtaining a winding-up order from the Grand Court against a company, without the involvement of the trustee. Cayman Island entities like China Forestry are often used as the debtor entity in Asian corporate and financing structures and raise capital by issuing notes to investors. For years, the China Forestry type investors and the beneficial owners of the classic offshore company or Fund have faced the same difficulty: *locus standi.*

Section 91(4)(a) of the Companies Law (2013 Revision) allows a petition for the winding up of a company to be made by any creditor, including any contingent or prospective creditor.

In *China Forestry*, the documentation for the notes provided that the beneficial note holders had a right to become certified note holders on the occurrence of certain events. As the beneficial note holder could therefore demonstrate that they were contingent creditors, they were permitted to bring the petition and the Court made the winding up order as sought as the beneficial note holders had adequately demonstrated the company's insolvency by virtue of the steps they had taken on behalf of the registered note holders.

The Court of Appeal of the Cayman Islands has also found, in the case of *Re: Lancelot Investments, KBC Investments Ltd v Varga* (CICA 27/2013), that shares in a fund were held by a custodian as a registered shareholder. The Cayman Islands Court of Appeal found that, on the appointment of a liquidator to the fund, the custodian agreement came to an end, and the beneficial shareholders became entitled to an equitable assignment of the debts (arising from unpaid dividends) to which the custodian was entitled. In those circumstances, the beneficial owners were entitled to sue in their own name (although it was noted that in such a case the assignor should be added as a party).

In conclusion, while *Nilon v Royal Westminster* may have closed the door on rectification as a means of recourse, the BVI and Cayman courts have recognised some avenues for recourse by beneficial owners in insolvency matters.