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Class rights in BVI company law

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BVI company law has two overarching characteristics. Firstly, it maximises flexibility to ensure that international users of offshore vehicles can structure their companies in a way that suits their needs. Secondly, it provides very clear black letter descriptions of even basic corporate procedures, so that there is always a roadmap to follow. However, one area of law where both those rules seem not to apply is in the area of class rights.

The BVI Business Companies Act 2004 (the ***Act***) is almost completely silent when it comes to the issue of class rights. Although the Act refers to classes and class rights, it never takes the time to define them or to regulate them. But it does two things: firstly, it specifies that all class rights must be set out in the memorandum of association (but not, curiously, the articles), and secondly, it defines a class by reference to shares holding the same rights, as specified in the memorandum.

The fact that the Act does not define a class right is perhaps not a surprise. Corporate statutes rarely do. Most jurisdictions are content to rely upon the class formulation of *Scott J in Cumbrian Newspapers Group v Cumberland & Westmorland Herald [1986] BCLC 286*. By way of recap, Scott J (later Lord Scott of Foscote) held that there were three types of rights conferred under a company's memorandum and articles: (i) rights expressly attached to a particular class, (ii) rights conferred on an individual personally, and (iii) rights conferred on an individual but intimately connected with their shareholding. Scott J held that both (i) and (iii) would be class rights, but that (ii) would not (and would not normally be enforceable – see *Eley v Positive Government Security Life Assurance Co Ltd (1876) 1 Ex D 88*). For convenience, the third category can be called "informal classes", ie where it is the existence of the right that effectively creates a separate class, not the express creation of a class which has separate rights.

However, having ascertained what a class right is, the next issue is that the Act virtually completely ignores class rights in the BVI. For example, there is no particular statutory protection of class rights (contrast for example in the UK Companies Act 2006, sections 630 and 633). Most memoranda and articles provide that class rights can only be varied with the consent of a majority of the class. Such provisions are no doubt effective, but what happens if there is no

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such provision? There does not appear to be any relevant common law rule, so in the absence of any such restriction, it would appear that those class rights are not protected more than any other provision in the memorandum or articles (putting aside for the moment any issues of minority prejudice). Although there are those who argue that the converse should be true – that if there is no statutory provision to vary class rights, a variation is only valid if approved unanimously (in line with contractual rights). However, that seems unlikely.

A bigger problem arises with "informal classes" where a right is expressed in the articles. This can either be intended to expressly attach to a class of shares, or on a personal basis. Say for example the articles provided that on any resolution to remove a director, each share which was held by a director carried three votes (as was the case in *Bushell v Faith [1970] AC 1099)*. At common law this creates a separate class of shares – we could call them "director shares". But, under the Act, it is not clear that this would create a separate class at all. If they are only set out in the articles and not in the memorandum as required by section 9, by definition can they be class rights? If they are not class rights, does that mean that they would not be protected by any class right protection in the memorandum? Can "informal classes" of the type discussed in Cumbrian Newspapers ever arise in a BVI company because of the section 9 requirement?

It is probably no answer to say that the memorandum and articles are a continuous document, and that a requirement to set a matter out in the memorandum may be satisfied by inserting it into the articles. The Court of Appeal appears to have precluded that, and mandated a stricter approach to statutory requirements in *Guinness v Land Corporation of Ireland (1882) 22 Ch 349.* However, care may be needed with that case – it was decided under the Companies Act 1862 which treated the documents as fundamentally different (the members could amend the articles, but not the memorandum).

Whether the rights are set out in the memorandum or the articles will probably not have much impact on the willingness of a court to intervene in cases of clear minority prejudice. For parties documenting their arrangements who wish to avoid recourse to the courts, clearly setting out all class rights – even for "informal classes" – in the memorandum of association remains the advisable course.

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