

# BRINGING OFFSHORE DERIVATIVE CLAIMS: A COMPARISON

## BRITISH VIRGIN ISLANDS

## CAYMAN ISLANDS

**Why do these types of claims occur in this jurisdiction?**

The British Virgin Islands (BVI) holds a long-established dominant market position for incorporating holding companies and special-purpose vehicles often used in joint venture agreements.

Grand Cayman is the leading offshore jurisdiction for incorporating exempted companies used to establish investment funds.

**What does the court consider when deciding whether to grant permission for a derivative action?**

The BVI Court applies a statutory code under s.184C Business Companies Act 2004.

The Cayman Court applies common law principles that are analogous (but not identical) to the BVI statutory framework.

In both jurisdictions, the courts scrutinize the proposed derivative claim's strength before they will interfere with the board's commercial judgment on whether the claim should be pursued.

**How strong must the merits be for a court to grant permission?**

Section 184C(2)(c) of the Business Companies Act 2004 requires the Court to consider whether the proposed proceedings are "likely to succeed." The question is whether it is "more probable than not" that the claim will succeed. This reflects the familiar civil standard of proof ordinarily applied at trial. The party seeking permission must also demonstrate that the proposed claim will produce meaningful and effective relief in the commercial context, in addition to establishing the legal elements of the claim.

The Court will consider whether the proposed proceedings disclose a *prima facie* case. It is a higher threshold than "good arguable case" (freezing injunctions), and the proposed claim must do more than disclose "reasonable grounds" (the strike-out standard). The Court must be satisfied that the claim is neither spurious nor unfounded, is not speculative, and is brought on reasonable grounds.

**Is there scope for a 'mini-trial'?**

There is no 'mini-trial' at the permission stage, but the "likely to succeed" threshold is clearly higher than is applicable at every other pre-trial phase, such as "real prospect of success" (summary judgment) or "serious issue to be tried" (interim injunction).

There is no scope for a 'mini-trial', but the Court will evaluate the available evidence — even where there are disputed questions of fact — and make a "careful assessment" of the merits.

**What if the proposed action involves questions of foreign law?**

Expert evidence must provide thorough analysis to support any ultimate conclusion on the claim's merits under the applicable foreign law.

Expert evidence on foreign law will need to demonstrate a *prima facie* case under the applicable foreign law.

## ABOUT KOBRE & KIM'S OFFSHORE TEAM:

Kobre & Kim is a conflict-free law firm focused on disputes and investigations, often involving fraud and misconduct. Our offshore team is comprised of experienced lawyers and English solicitors and barristers (including English Queen's Counsel) qualified in key offshore jurisdictions, such as Cayman Islands, the British Virgin Islands, Turks and Caicos Islands, the Bahamas and Bermuda.

Our team represents companies in derivative action claims, including in a recent victory in the BVI Commercial Court on behalf of a fund in defending against a permission application by shareholders, which included disputed issues of Florida law.

We regularly serve as special litigation counsel in partnership with other law firms handling matters involving offshore issues, usually in the areas of complex civil litigation, joint venture and partnership disputes, insolvency, asset recovery and judgment enforcement. Our conflict-free profile allows us to pursue aggressive positions on behalf of clients, even in situations involving multiple, overlapping stakeholder interests.