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Privy Council Confirms that Fair Value in Cayman Merger Appraisal is Different from Fair Value in Delaware Appraisals

Authors: Nigel K. Meeson QC, Partner, Head of Asia Disputes & Restructuring | Erik Bodden, Associate

Summary

In *Maso Capital Investments Ltd & ors, v. Shanda Games Ltd* [2020] UKPC 2 the Privy Council upheld the decision of the Cayman Islands Court of Appeal that the fair value of the shares of a shareholder who has dissented to a statutory merger and who has exercised its appraisal rights in accordance with section 238 of the Cayman Islands Companies Law (Companies Law) must be determined according to the value of the shares which it actually has, including any applicable minority discount. The statutory interpretation of “fair value” in section 238 of the Companies Law is different from the statutory interpretation of “fair value” in section 262 of the Delaware Corporations Code.

Analysis

Lady Arden, who delivered the judgment of the Board, considered that the question was purely one of statutory interpretation: the meaning of the words “fair value” in section 238 was to be ascertained by determining the intention of the legislature from the words used in their context. The incorporation of a minority discount into the “fair value” was justified by three reasons:

1. Comparable provisions in the Companies Law do not provide for pro rata valuation.

The comparable provisions referred to are those dealing with schemes of arrangement and “squeeze outs”. Neither allows for a pro rata valuation and the shareholder will only receive his discounted value based upon what he actually has.

2. The general principle of valuation of shares on sale is that what has to be valued is what the shareholder has to sell.

It is a general principle of share valuation that the court should value the actual shareholding which the shareholder has to sell and not some hypothetical share. The offeror does not acquire control from any individual minority shareholder and they should therefore be valued as a minority shareholding.

3. The similarities between the remedy in Delaware and section 238 do not justify a departure from that principle.

It cannot have been intended by the Cayman Islands legislature that the new concept of “fair value” which was being introduced for the first time into the Cayman Islands Companies legislation should simply mean what the Delaware courts had held that it means either at that time or from time to time. The legislature, when introducing this new and undefined phrase, must be presumed to have intended the courts to interpret the expression consistently with the principles of statutory interpretation, but otherwise free from the constraints of jurisprudence on different valuation standards or of valuation exercises done in different circumstances. The value of Delaware jurisprudence is outweighed by points (1) and (2).

Minority Discount

The amount of the minority discount which will be applied in any particular case will depend upon the facts of the case. In *Shanda Games* the experts had agreed that the applicable minority discount would be 23%. By contrast in the more recent case of *Qunar Cayman Islands Limited* (Parker J 13 May 2019) the judge held, after hearing evidence from the experts, that the applicable rate of minority discount in that case was nil.

Fair Rate of Interest

The Privy Council dismissed the Company's appeal in respect of the manner in which the fair rate of interest to be awarded on the fair value was to be calculated. It held that the judge was correct to hold that the fair rate was to be determined by taking the mid-point between a rate of interest representing the return on the unpaid appraisal monies that a prudent investor could have made, and the rate of interest that the company would have had to pay to borrow the equivalent sum. To this extent the position in the Cayman Islands and Delaware is the same.

Conclusion

The decision of the Privy Council has firmly concluded that appraisal litigation in the Cayman Islands does not simply follow Delaware jurisprudence and fair value is to be determined by the Cayman Courts based upon principles consistent with the overall scheme of the Companies Law, which includes a minority discount. It is clear that the concession made by counsel for the Company in the first reported case of *In the Matter of Integra Group* [2016] 1 CILR 192 was wrongly made.

Authors:

Nigel K. Meeson QC
Partner, Head of Asia Disputes & Restructuring
nigel.meeson@conyers.com
+852 2842 9553

Erik Bodden
Associate
erik.bodden@conyers.com
+1 345 814 7754

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