Case Comment: Olive Group
Welcome Clarification on Dissent Procedure under BVI Law

Authors:
Robert J.D. Briant, Partner, Head of BVI Office
Mark J. Forte, Partner, Head of BVI Litigation

Section 179 of the BVI Business Companies Act – Rights of Dissenters – Role of Appraisers

In an important new case, Leon J in Olive Group Capital Limited -v- Gavin Mark Mayhew provides welcome clarification to the dissent and appraisal procedure under Section 179 of the BVI Business Companies Act (the "Act"), including for going private transactions such as squeeze out mergers and forced redemptions.

The case involved a minority shareholder, Gavin Mayhew, who was forcibly redeemed pursuant to Section 176 of the Act. Section 176 provides that shareholders holding not less than 90% of the issued shares of a BVI company may require the company (in this case, Olive Group Capital Limited ("Olive Group")) to redeem the shares of the remaining Shareholders. As was his right, Mr. Mayhew dissented pursuant to Section 179 of the Act and demanded payment of the fair value of his shares. Pursuant to Section 179, the company and the dissenting shareholder are tasked over a 30 day period to reach agreement as to fair value, failing which they each appoint an appraiser, these two appraisers appoint a third appraiser, and the three appraisers fix the fair value of the shares. In this case, Olive Group appointed PwC, Mr. Mayhew appointed Deloitte, and these two appraisers appointed BDO as the third appraiser.

In an earlier decision on this matter, Bannister J determined that, barring any agreement to the contrary, any question between the appraisers is determined by a majority of the appraisers. In that earlier case, the process had become ‘stuck’ and fair value could not be fixed until this question had been resolved.

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The three appraisers then met on several occasions in order to fix fair value. There was no impediment to future meetings and the appraisers were not seeking any assistance from the Court. Notwithstanding the fact that the appraisers were getting on with it, Olive Group applied to Court requesting a series of declarations which essentially would set out how the appraisers were to operate. The requested declarations included asking the Court to determine the meaning of fair value, to set the parameters for the fixing of fair value, including the facts to be taken into account by the appraisers, to fix the maximum value that the appraisers may determine as fair value, to establish the process to be adopted by the appraisers and to determine whether there should be a minority discount. Mr. Mayhew sought determination that the Court had no jurisdiction to interfere in the valuation process on the basis that the process was for the appraisers alone, and
that Section 246, which allows a BVI company to apply to court for an interpretation of the Act or its memorandum and articles of association, was not available to the Olive Group to determine these issues.

The issues were determined against Olive Group and the claim dismissed, with none of the declarations granted.

Rather, the Court determined the following:

- The appraisal procedure under Section 179 is an Expert Determination procedure. There is a body of law governing Expert Determinations, and the appraisal procedure is governed by that body of law.

- There is limited ability for the Court to interfere during the Expert Determination, and the Court does not have jurisdiction to interfere where the appraisers are not impeded from finishing their work and have not sought the assistance of the Court. The Court does not have jurisdiction "when there is no issue and no problem".

- The ability of the Court to interfere may arise after the appraisers have finished their work, but even then only if there is a "serious and fundamental matter respecting the appraisal process". Examples would be fraud, collusion or jurisdictional error (such as a material departure from instructions).

- The parties can mutually agree how the appraisal process should be governed, which agreement can modify the mechanism under Section 179.

- Leon J indicated that it would be difficult to see how there would be a minority discount under a Section 176 redemption, but said that this is a matter for the appraisers (at least at first instance).

- Section 246 of the Act is a valuable provision. However, it does not allow the Court to assume jurisdiction where it does not have jurisdiction in the first place, such as in the fact pattern of this case.

Leon J citing Premier Telecom indicated that Expert Determination can be a "relatively quick and inexpensive" process and is the policy behind Section 179. We agree. The BVI is the leading offshore incorporation jurisdiction by far because of the efficiency of the Act. It only makes sense that the dissent process is also meant to be quick and efficient.

Shareholders exercising their dissent rights under BVI law now have comfort that they should be able to dissent and receive the fair value of their shares in cash on a quick and efficient basis. However, if the parties prefer the appraisers to adopt a different approach, the parties are free to agree that they do so.

It is worth noting that the appraisers in this instance were experts. This fact gave comfort to Leon J. Other persons finding themselves in the dissent process under Section 179 of the Act may also want to consider retaining experts in order to provide a similar level of comfort to the Court.

This case answered certain fundamental questions about the dissent process under BVI law and provides a welcome framework for future appraisals under Section 179.

Conyers appeared as Solicitors and Counsel for the successful defendant.

To read the full judgment, please click here.
This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

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For further information please contact: media@conyersdill.com

<table>
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<tr>
<th>Authors</th>
<th>Global Contacts</th>
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<tbody>
<tr>
<td><strong>Robert J.D. Briant</strong>&lt;br&gt;Partner, Head of BVI Office&lt;br&gt;+1 284 852 1100&lt;br&gt;<a href="mailto:robert.briant@conyersdill.com">robert.briant@conyersdill.com</a></td>
<td><strong>Kerri L. Lefebvre</strong>&lt;br&gt;Director&lt;br&gt;Head of Dubai Office&lt;br&gt;<a href="mailto:kerri.lefebvre@conyersdill.com">kerri.lefebvre@conyersdill.com</a></td>
</tr>
<tr>
<td><strong>Mark J. Forte</strong>&lt;br&gt;Partner, Head of BVI Litigation&lt;br&gt;+1 284 852 1113&lt;br&gt;<a href="mailto:mark.forte@conyersdill.com">mark.forte@conyersdill.com</a></td>
<td><strong>Christopher W.H. Bickley</strong>&lt;br&gt;Partner&lt;br&gt;Head of Hong Kong Office&lt;br&gt;<a href="mailto:christopher.bickley@conyersdill.com">christopher.bickley@conyersdill.com</a></td>
</tr>
<tr>
<td><strong>Nigel K. Meeson, Q.C.</strong>&lt;br&gt;Partner&lt;br&gt;Head of Asia Disputes &amp; Restructuring Group&lt;br&gt;<a href="mailto:nigel.meeson@conyersdill.com">nigel.meeson@conyersdill.com</a></td>
<td><strong>Linda Martin</strong>&lt;br&gt;Director&lt;br&gt;Head of London Office&lt;br&gt;<a href="mailto:linda.martin@conyersdill.com">linda.martin@conyersdill.com</a></td>
</tr>
<tr>
<td><strong>Alan Dickson</strong>&lt;br&gt;Director&lt;br&gt;Head of Singapore Office&lt;br&gt;<a href="mailto:alan.dickson@conyersdill.com">alan.dickson@conyersdill.com</a></td>
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