



## Cayman Court considers principles to be applied for “fair value” appraisal of merger dissenting shareholders



Author:

Nigel K. Meeson Q.C., Partner

On 28th August 2015 the Grand Court of the Cayman Islands finally had the opportunity to give judgment in an appraisal action brought by dissenting shareholders in a statutory merger transaction under Part XVI of the Companies Law. Although there is nothing new or surprising in the judgment, it nevertheless provides welcome guidance and confirmation of the principles to be applied in an appraisal action, whilst recognising that the valuation exercise is fact specific and each case will be decided upon its own facts.

*In the Matter of Integra Group (Jones J)* a management buyout was effected by means of a statutory merger, and a price was set of US\$10 per share after consideration by an independent committee and a fairness valuation. Shareholders dissented and the appraisal remedy was triggered.

The first point to note in connection with the proceedings is that each party appointed their own valuer to provide expert evidence to the Court. This would be the normal practice in the Cayman Islands, rather than appointing a single joint expert.

In order to provide a valuation each expert required access to a large volume of corporate information and for this purpose an electronic data room was established with the intention that all relevant material would be uploaded so as to be available to the experts and the legal advisers, subject to appropriate undertakings of confidentiality. The Court was critical of the company’s management in not complying by refusing to upload material on the basis that they considered it irrelevant. Ordinarily one would have expected that an application to court would have been made, but apparently this was not done and so there was material requested by one expert that had not been provided which the Court said “there was no means of knowing whether material withheld by Integra’s management might have affected the experts’ judgment in any way”. The experts also conducted interviews with the company’s management.

In terms of the expert reports provided to the Court, the Court was critical of one expert who produced a range of valuations which the Court said “was not particularly helpful”.

The Court rejected the use of the accounting definition of “fair value” as it appears in the *International Financial Reporting Standards* (“IFRS”) as being irrelevant and not informative, but looked to the definition provided by the *International Valuation Standards (2013)*.



The Court looked to jurisprudence in both Canada and Delaware, and a number of applicable propositions were derived:

1. The relevant date was the date immediately prior to the approval of the merger, i.e. the date of the EGM.
2. The business was to be valued as a going concern.
3. The effect of the merger itself should be disregarded, whether positive or negative.
4. There should be no premium for the forcible expropriation of the shares by the merger.
5. There should be no minority discount.
6. There is no set valuation methodology to be used. Fair value can be proved by any admissible evidence according to any techniques or methods generally considered to be acceptable in the financial community.

The Court recognised that there are three generally accepted approaches to valuation:

- (a) The Market Approach
- (b) The Income Approach
- (c) The Cost (or asset based) Approach

The approach used may differ from one case to another. In the case before it, the Court accepted an approach which combined an income approach using a discounted cash flow methodology with a market approach using a guideline public company methodology with a weighting of 75%/25% in favour of the income approach.

The Court did however remove from the calculation the cost saving of going private because the dissenters should not benefit from any enhancement in value attributable directly to the transaction they dissented from. In the end the Court awarded the dissenters US\$11.70 per share as opposed to the merger price of US\$10 per share.

In addition the Court awarded a “fair rate of interest” as being the midpoint between the company’s assumed rate of return on cash and it’s assumed US\$ borrowing rate.



### Author

**Nigel K. Meeson Q.C.**

Partner

+1 345 814 7392

[nigel.meeson@conyersdill.com](mailto:nigel.meeson@conyersdill.com)

### Global Contacts

**Kerri L. Lefebvre**

Director

Head of **Dubai** Office

[kerri.lefebvre@conyersdill.com](mailto:kerri.lefebvre@conyersdill.com)

**Christopher W.H. Bickley**

Partner

Head of **Hong Kong** Office

[christopher.bickley@conyersdill.com](mailto:christopher.bickley@conyersdill.com)

**Linda Martin**

Director

**London** Office

[linda.martin@conyersdill.com](mailto:linda.martin@conyersdill.com)

**Alan Dickson**

Director

Head of **Singapore** Office

[alan.dickson@conyersdill.com](mailto:alan.dickson@conyersdill.com)

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