

Nothing is illuminated: Shanda Games in the Privy Council

There are no “*bright-line rule[s]*”. In an appraisal of the “fair value” of a dissenter’s shares in a statutory merger under section 238 of the Companies Law of the Cayman Islands, the Privy Council had to decide whether the value of the dissenter’s shares should be determined on a pro rata basis.

The Board’s opinion was that:

1. The dissenter’s shares are not to be valued as a pro rata proportion of the value of the entire share capital of the company, which broadly would correspond to a share in the company’s business and undertaking.
2. What is to be valued is the actual shareholding itself, and not some hypothetical share.
3. Application of a minority discount is neither prohibited nor mandated, as a matter of law.

In relation to the first two points, the views of the Court of Appeal of the Cayman Islands (“**CICA**”) were upheld. First, in the context of schemes of arrangement and squeeze-outs, the court performs “*a function which is comparable to that performed by section 238 in providing for the review of the valuation of shares in a publicly-held company on the occasion of a non-voluntary disposition*”. Second, as a matter of general principle, the court should value the actual shareholding which the shareholder has to sell and not some hypothetical share. This is because the offeror does not acquire control from any individual minority shareholder.

On the third point, the Board’s view was that the CICA was wrong to suggest that a minority discount should be applied in all cases, as a matter of law. Without giving an example, the Board said that “*there might be a case where a minority discount was inappropriate due to the particular valuation exercise under consideration*”.

This decision may have a limited impact on this area of jurisprudence. As the Board noted, no one contended for a different valuation, in the event that the Board’s opinion was that shares should not be valued on a pro rata basis. So, when an income methodology – such as a DCF analysis – is used to value a dissenter’s shares, valuations may continue to be carried out by valuing the business as a whole, prorating that value across the issued shares, and then adjusting (if necessary) to reflect the fact that any given shareholding is a minority shareholding.



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