

Overview of BVI Dissenter Rights and Statutory Appraisal Process

1. Pursuant to section 179(1) of the BVI Business Companies Act (the “**Act**”), a member of a BVI company is entitled to payment of the fair value of its shares upon dissenting from:
 - (i) a merger, if the company is a constituent company, unless the company is the surviving company and the member continues to hold the same or similar shares;
 - (ii) a consolidation, if the company is a constituent company;
 - (iii) any sale, transfer, lease, exchange or other disposition of more than 50 per cent in value of the assets or business of the company, if not made in the usual or regular course of the business carried on by the company;
 - (iv) a redemption of his shares by the company pursuant to section 176; and
 - (v) an arrangement, if permitted by the Court.
2. The right to dissent from a transaction can only be exercised by a member of the company. The effect of sections 2 and 78 of the Act combined is that (a) a member, in relation to a limited company, means a shareholder and (b) a shareholder is defined as a person whose name is entered in the company’s register of members as the holder of one or more shares, or fractional shares, in the company.

The statutory process for exercising dissenter rights

3. A member’s entitlement to payment of the fair value of its shares is conditional upon that member validly dissenting from the proposed transaction in accordance with sections 179(2) to (7) of the Act.
4. Section 179(2) provides that *“a member who desires to exercise his entitlement under subsection (1) shall give to the company, before the meeting of members at which the action is submitted to a vote, or at the meeting but before the vote, written objection to the action; but an objection is not required from a member to whom the company did not give notice of the meeting in accordance with this Act or where the proposed action is authorised by written consent of members without a meeting.”*
5. Section 179(3) provides that *“an objection under subsection (2) shall include a statement that the member proposes to demand payment for his shares if the action is taken.”*
6. Accordingly, where a company convenes a meeting of members to vote on the proposed transaction, a registered shareholder who desires to dissent and exercise its entitlement under sub-section (1) to payment of fair value of its shares must give to the company, prior to the vote at the meeting, written objection to the proposed transaction (the “**Written Notice of Objection**”) which includes a statement that the member proposes to demand payment for its shares if the action is taken. In this scenario, the provision of a Written Notice of Objection is the first mandatory step which a member is required to take in order to validly exercise dissenter rights under section 179(1).

7. A Written Notice of Objection under section 179(2) is not required in one of two scenarios: (a) the company does not give the member notice of the meeting of members in accordance with the Act or (b) the proposed transaction is authorised by written consent of the members without a meeting.
8. Section 179(4) provides that: *"within 20 days immediately following the date on which the vote of members authorising the action is taken, or the date on which written consent of members without a meeting is obtained, the company shall give written notice of the authorisation or consent to each member who gave written objection or from whom written objection was not required, except those members who voted for, or consented in writing to, the proposed action."*
9. Pursuant to section 179(4) the company is required to give written notice of authorisation ("**Written Notice of Authorisation**") within the prescribed period to each member whose right to dissent from the transaction and exercise an entitlement to payment of the fair value of its shares under section 179(1) remains intact. In addition to those members who were required to give Written Notice of Objection under section 179(2) and failed to do so, the right of any member under section 179(1) is also extinguished if a member voted for, or consented in writing to, the proposed transaction.
10. Section 179(5) provides that: *"a member to whom the company was required to give notice who elects to dissent shall, within 20 days immediately following the date on which the notice referred to in subsection (4) is given, give to the company a written notice of his decision to elect to dissent, stating (a) his name and address; (b) the number and classes of shares in respect of which he dissents; and (c) a demand for payment of the fair value of his shares..."*
11. Only those members to whom the company is required to give Written Notice of Authorisation under section 179(4) have a right to elect to dissent within the prescribed period by providing the company with written notice of election to dissent under section 179(5) stating certain information including the number and classes of shares in respect of which it dissents and a demand for payment of the fair value of its shares ("**Written Notice of Election to Dissent**").
12. Where legal title to the shares are held in the "street name" of the broker or by a third party, the investor must ensure that the Written Notice of Objection (if required) and the Written Notice of Election to Dissent are given by the registered shareholder.
13. Section 179(6) provides that *"A member who dissents shall do so in respect of all shares that he holds in the company."*
14. In the matter of *Nettar Group Inc v Hannover Holdings S.A.* the BVI Court granted the following declarations sought by the company:
 - (i) a member, in relation to a company, means a person whose name is entered in the company's register of members as the holder of one or more shares, or fractional shares, in the company;
 - (ii) the right to exercise dissenter rights under section 179 of the Act is a right which attaches to a share in the company which can only be exercised by the registered holder of that share;
 - (iii) in order to exercise dissenter rights under section 179 of the Act a person must be the registered shareholder of the share(s) in respect of which it seeks to dissent as at (i) the date of giving Written Notice of Objection pursuant to section 179(2) of the Act or (ii) where an objection is not required under section 179(2) of the Act, the date of giving Written Notice of Election to Dissent pursuant to section 179(5) of the Act; and
 - (iv) reference in section 179(6) of the Act to a member who dissents shall do so *"in respect of all shares that he holds in the company"* means all shares of the company for which the member is the registered shareholder as at (i) the date of giving Written Notice of Objection pursuant to section 179(2) of the Act or (ii) where an objection is not required under section 179(2) of the Act, the date of giving Written Notice of Election to Dissent pursuant to section 179(5) of the Act.
15. Section 179(7) provides that: *"Upon the giving of a notice of election to dissent, the member to whom the notice relates ceases to have any of the rights of a member except the right to be paid the fair value of his shares."*
16. Pursuant to section 179(7), upon giving a Written Notice of Election to Dissent to the company, the dissenting member ceases to have any of the rights of a member except the residual rights contained in section 179, i.e. the right to receive fair value for its shares, and the right to institute proceedings on the ground that the proposed action of the company is illegal.

17. The dissenting member's restricted rights as a member only apply in respect of the shares for which it has validly exercised dissenter rights. In the event that a person who is a dissenting member subsequently acquires other shares in the company then no restrictions apply to the rights attaching to those other shares by virtue alone of dissenter rights having been exercised in respect of different shares held.

The process for determining fair value

18. The statutory mechanism for determining the fair value of the shares in respect of which any member has validly exercised dissenter rights under section 179(1) is set out in sub-sections (8) and (9).
19. Pursuant to section 179(8), within seven days immediately following the expiry of the period within which the member may give Written Notice of Election to Dissent, or within seven days immediately following the date on which the proposed action is put into effect, whichever is later, the company shall make a written offer to the dissenting member to purchase its shares at a specified price that the company determines to be fair value.
20. In the case of a redemption of shares by a company pursuant to section 176 of the Act, only sub-sections (1) and (8) to (11) of the Act shall apply, with the written offer to be made by the company to the dissenting member pursuant to subsection (8) to be made within seven days immediately following the direction given to a company pursuant to section 176 to redeem its shares.
21. The parties then have 30 days to seek to agree a price to be paid (the "**Statutory Negotiation Period**"). If the parties cannot agree on a price within 30 days, then within the subsequent 20 day period under section 179(9):
- (a) the company and the dissenting member shall each designate an appraiser;
 - (b) the two designated appraisers together shall designate a third appraiser;
 - (c) the three appraisers shall fix the fair value of the shares as of the close of business on the day prior to the date on which the company's members authorized the transaction (the valuation date of the shares to be appraised), excluding any appreciation or depreciation directly or indirectly induced by the action or its proposal, and that value shall be binding on the company and the dissenting member for all purposes; and
 - (d) the company shall pay to the member the amount in money upon the surrender by it of the certificates representing its shares
22. The Act provides for each of (a) to (d) to be completed within the prescribed 20 day period, with section 179(10) providing that shares acquired by the company pursuant to the appraisal action shall be cancelled, unless the shares are shares in a surviving company, in which case they shall be available for re-issue.
23. *In Brantley Inc. v Antarctica Asset Management Ltd* the BVI Court held that (i) the appraisal process provided for in section 179(9) cannot commence until after the expiry of the 30 day statutory negotiation period under section 179(8); (ii) the appraisal process has to take place immediately after the expiration of the 30 days and be completed within 20 days; and (iii) the member remains a member of the company until the process stipulated in section 179 is completed, albeit a dissenting member has only a residual right to the procedures outlined in section 179 and the right to institute proceedings on the ground that the action of the company is illegal. The dissenting member is still a member of the company but it is not entitled to all the rights that a member of a company would otherwise have.
24. *In Prince Faisal v PIA Investments*, the BVI Court confirmed that the parties are able to contract out of or modify the appraisal process under section 179 of the Act by consent, and as such the parties are able to extend the 20 day appraisal period by agreement. The court did not address the scenario where the appraisers are unable to fix fair value within the prescribed period for any reason but it is likely that the appraisers would need to seek an extension from the Court unless the parties are willing to consent to the same.

The meaning of fair value

25. Section 179(9) provides for a statutory valuation date of the close of business on the day prior to the date on which the company's members approved the proposed transaction. The sub-section also provides that the valuation shall exclude any appreciation or depreciation directly or indirectly induced by the action or its proposal.
26. Other than that, there is no statutory guidance on how fair value is to be determined and it is left to the three appraisers to agree upon the process, acting by a majority in the absence of unanimity. The BVI court is not involved in the appraisal and does not determine fair value. Whilst the Act does not provide for who can and cannot act as an appraiser the individuals appointed will typically be valuation experts from reputable accountancy firms. Whatever the appraisers determine, acting as a majority in the absence of unanimity, to be fair value is final and binding on the parties.
27. The court will only intervene in the appraisal process where there has been fraud or collusion on the part of the experts. The court can also review a jurisdictional error made by experts in an expert determination. An example of a jurisdictional error which would not be binding on the parties is where the appraisers have valued the wrong number of shares by mistake

About Campbells

Campbells has provided comprehensive litigation advice and services to clients worldwide since 1970 from our offices in the Cayman Islands, the British Virgin Islands and Hong Kong. We are regularly trusted to provide Cayman Islands and British Virgin Islands law advice to some of the most prominent names in finance, investment, insolvency and insurance, and are involved in the largest and most complex offshore disputes, liquidations and restructurings. We have extensive experience in statutory fair value appraisals under both Cayman and BVI law.

Should you have any queries in relation to this client advisory, please do not hesitate to contact [Liam Faulkner, Partner](#).



Liam Faulkner

Partner

+1 345 914 5866

lfaulkner@campbellslegal.com