

**IN THE EASTERN CARIBBEAN SUPREME COURT IN THE HIGH COURT  
OF JUSTICE**

**TERRITORY OF THE VIRGIN ISLANDS COMMERCIAL DIVISION**

**IN THE MATTER OF OLIVE GROUP CAPITAL LIMITED**

**AND IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT, 2004**

**Claim No. BVIHC (Com) 2015/115**

**BETWEEN:**

**OLIVE GROUP CAPITAL LIMITED**

Claimant

**and**

**GAVIN MARK MAYHEW**

Defendant

**Appearances on 2 December 2011:**

Vernon Flynn QC, Philip Kite and Mark Rowlands for Claimant Mark Forte, Rosalind Nicholson and Robert Briant for Defendant

**Appearances on 21 January 2016:**

Jeremy Child for Claimant

Mark Forte, Rosalind Nicholson and Tameka Davis for Defendant

2015: December 2

2016: January 21

## **JUDGMENT**

*Minority shares of company member being compulsorily redeemed pursuant to section 176*

*of the BVI Companies Act, 2004 ("Act"? - Fair value being fixed by appraisers under*

*Section 179(9) of Act- Court does not have jurisdiction to interpret Act or give directions to appraisers at time when appraisers not impeded (completely or at all) from proceeding with their ongoing statutory share valuation work and have not sought assistance of Court, directly or indirectly.*

*Section 246 of Act is innovative, valuable and useful remedy available to company to seek guidance and 'safe harbour' from Court - May be applicable in situations not presently contemplated.*

*Section 179(9) of Act provides statutory Expert Determination process to fix fair value of shares - Limited role for Court - Expert Determination is neither court adjudication nor arbitration - Appraisers do not have duties that court or arbitral tribunal would have to adjudicate between competing positions without relying on own subjective opinions or to comply with rules of procedural fairness with which courts and arbitral tribunals must comply - Courts and arbitral tribunals have judicial functions to perform, and must observe basic rules which govern judicial proceedings - Expert Determination is a more cost effective, efficient, expeditious and focused process.*

*Court may review Expert Determination if wrongdoing or if jurisdictional error (although timing for jurisdiction review not settled) - Appears it is no longer 'default position' that there should be recourse to courts on point of law determined by expert in light of English Court of Appeal judgment in Premier Telecom Communications Group Ltd and Ridge v Webb, [2014] EWCA Civ 994 (although in contractually based Expert Determination parties may provide for such court recourse) - Questions of law pervade many issues likely to arise on a valuation - Inherently unlikely that parties intend that on none of them should valuer's view be binding - Mistakes may be made, both of fact and law.*

*"Fair value", to large degree, may be valuation determination under Section 179(9) - Business Valuers work with concept routinely and it has meaning to them - In some contexts, a legal aspect - Must be a value that is "fair" to company and member - "Fairness" not something judges always need to determine - Can be assessed in context of business world in which company operates and generally how business people value interests in companies - May be open to Court when question properly before it to make policy determination that a member who dissents should or should not be subjected to minority discount.*

*Appraisers in Expert Determination process, like arbitrators, may but need not suspend their work when challenge brought in Court.*

**[1] Leon J [Ag]:** This Application determines a preliminary issue {"**Preliminary Issue**"} in this Claim1 pursuant to this Court's Order dated 16 October 20152, and in the result, finally determines this Claim.

**[2]** The Preliminary Issue is whether this Court has jurisdiction to grant the relief sought by Olive Group Capital Limited {"**Company**"}, being a series of declarations

{set out below in this Judgment) respecting the fixing of the "fair value" of the shares of the Defendant, Gavin Mark Mayhew ("**Mayhew**"), by appraisers {"**Appraisers**"} pursuant to section 179(9)(c) of the BVI Business Companies Act, 2004 {"**Act**"}.

**[3]** The declarations claimed, in summary, include3:

a. the meaning of "fair value",

b. the parameters for the fixing of the fair value {including facts to be taken into account by the appraisers who have been designated to fix fair value),

c. the maximum amount the appraisers may fix as fair value or alternatively that the appraisers are under a duty to give reasons for exceeding that maximum amount;

d. that the appraisers must apply "a discount for [the shares'] minority and illiquid status", and

e. the process that must be adopted by each of the appraisers {which essentially would be a full adjudicative process}.

**[4]** The Company repeatedly and forcefully submitted to this Court that the issue on this Application - the Preliminary Issue - is whether the Court has "jurisdiction<sup>11</sup> to make any of the declarations, either pursuant to section 246 of the Act {quoted

1 Claim Form and Statement of Claim dated 28 September 2015.

2 Order of the Honourable Justice Barry Leon dated 16 October 2015.

3 Statement of Claim dated 28 September 2015, prayer for relief, pages 17 - 21, paras. 1(1)-(6).

below} or the Court's inherent jurisdiction, not whether it should make any of the declarations claimed. The Company submits this Court has such jurisdiction.

**[5]** Mayhew disputes the jurisdiction of the Court to make the declarations sought. His position essentially is that Section 179(9) of the Act gives appraisers the jurisdiction and mandate to "fix the fair value of the shares owned by the dissenting member' as of the date specified and sets out the only limitation on their determination<sup>4</sup>. As such, all other questions relating to the valuation of the shares to be valued are left, at least at until their work has been completed, to the appraisers appointed under the Section.

**[6]** This Application therefore determines:

- first, questions respecting the purpose and scope of Section 246 of the Act; and
- second, whether in light of the scheme and provisions of section 179 of the Act, this Court has jurisdiction - under Section 246 of the Act or inherent - to make any of the declarations claimed in the Claim and Statement of Claim respecting, and during the course of, the fixing of the "fair value" of the shares by appraisers pursuant to section

179(9)(c) of the Act, at a time when the appraisers are not impeded (completely or at all} from proceeding with their ongoing statutory share valuation work (fixing the fair value of shares) and have not sought the assistance of this Court, directly or indirectly ("**Current Circumstances**").

<sup>4</sup> That limitation being: "... excluding any appreciation or depreciation directly or indirectly induced by the action or its proposal".

## **Events Leading to the Claim and this Application**

[7] Mayhew owns 8.29% of the issued share capital (6,522,437 ordinary shares) of the Company ("**Mayhew Shares**").

[8] The Company's majority shareholder is Strategic and General Holdings Ltd. ("**Strategic**") which held 90.11% of the issued share capital of the Company. Strategic is wholly owned by two brothers, David and Christopher St. George, who with Mayhew were the 'Founders' (a defined term in the shareholders' agreement) of the Company.

[9] Strategic directed the Company to redeem the Mayhew Shares pursuant to Section 176 of the Act which permits "members of the company holding ninety percent' of the outstanding shares (as specified in the subsection) to instruct "the company ... to redeem the shares held by the remaining members<sup>11</sup> and requires that the "company shall redeem the shares"<sup>5</sup>.

[10] Section 176(3) required the Company to give written notice to Mayhew "stating the redemption price". The Company gave notice to Mayhew pursuant to section 176(3) on 9 January 2014. The redemption price stated in the notice for the Mayhew Shares was \$0.7013 per share, being a total of \$4,573,884.

<sup>5</sup> Provisions of the nature exist in many modern company statutes. They reflect a policy decision to give companies, and in particular their shareholders with a specified high (here 90%) majority, flexibility to do things which they would not be able to do with small minority shareholders as members of the company. It has been described as an 'expropriation' right whereby the interests of a small minority are required, as a matter of public policy, to give way to the large majority. The offsetting policy decision is to treat the expropriated shareholder(s) "fairly".

[11] Section 179(1) provides that a member of a company is entitled to payment of the "fair value of his shares upon dissenting from" any of five types of transaction<sup>6s</sup>. One of those is "(d) a redemption of his shares by the company pursuant to section 176".<sup>7</sup>

**[12]** On 16 January 2014, Mayhew gave written notice to the Company of his election to dissent.<sup>8</sup>

**[13]** Where a member dissents, Section 179(8) of the Act provides a period of thirty days for the company and the dissenting member to attempt to agree the price to be paid for the member's shares. If they fail to agree, the process set out in Section 179(9) shall be followed to determine the amount to be paid to the dissenting member by the company for the dissenting member's shares.

6 179(1) A member of a company is entitled to payment of the fair value of this shares upon dissenting from

(a) 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;

(b) a consolidation, if the company is a constituent company;

(c) 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, but not including

(i) a disposition pursuant to an order of the Court having jurisdiction in the matter,

(ii) a disposition for money on terms requiring all or substantially all net proceeds to be distributed to the members in accordance with their respective interest within one year after the date of disposition, or

(iii) a transfer pursuant to the power described in section 28(2);

(d) a redemption of his shares by the company pursuant to section 176; and

(e) an arrangement, if permitted by the Court.

7 The other four types of transactions that give rise to dissent rights are different in that they are transactions being entered into by the company (merger; consolidation; disposition of more than fifty per cent in value of the assets or business of the company out of the usual or regular course of the business; and arrangement permitted by the Court) that may change the company in a way that the dissenting minority member(s), as a matter of public policy, should not be required to be part of. They have the option of staying in and going along for the ride, or exiting and being paid "the fair value of the sharen which they own.

8 Act, Section 179&) and (12).

**[14]** No agreement was reached between the Company and Mayhew within the thirty day period and, accordingly, the provisions of section 179(9) were engaged.

**[15]** Sections 179(9)(a) and (b) of the Act required that the Company and Mayhew to each designate an appraiser within twenty days and then that the two designated appraisers together designate a third appraiser.

**[16]** The Company designated PricewaterhouseCoopers Limited ("**PwC**") and Mayhew designated Deloitte and Corporate Finance Limited ("**Deloitte**") as appraisers.

Together PwC and Deloitte designated BOO LLP ("**BDO**") as the third appraiser. BOO, PwC and Deloitte together are referred to in this Judgment as the Appraisers.

### **The Section 179(9)(c) Fixing of Fair Value Process**

**[17]** Section.179(9)(c) of the Act provides as follows - and only as follows - with respect to the mandate, mission, parameters, processes of and limitation on appraisers under the section:

(c) the three appraisers shall fix the fair value of the shares owed by the dissenting member as of the close of business on the day prior to the date on which the vote of members authorizing the action was taken or the date on which written consent of members without a meeting was obtained, excluding any appreciation or depreciation directly or indirectly induced by the action or its proposal, and that value is binding on the company and the dissenting member for all purposes;

**[18]** The House of Assembly made numerous policy choices when it enacted Section 179(9) including:

- a. to require that the designated appraisers fix the fair value of the shares;
- b. to not specify an adjudicative or common law adversarial process or assign the job of fixing fair value to a judge, other court official, or arbitral tribunal;
- c. to adopt a process that is comparable to an established dispute resolution process known as Expert Determination (about which more will be said below);
- d. to not specify any particular qualifications for an appraiser;
- e. to require three appraisers rather than say one, presumably to gain the benefit of three persons' expertise, wisdom, analysis and input, including if desired a mix of expertise, and to engender greater confidence in the company and the dissenting member respecting the process and the outcome;
- f. to empower the company and the dissenting member to each designate an appraiser, presumably to increase the confidence of the designating party in the appropriateness of the designated appraiser and to ensure to the extent possible that in the eyes of each of the company and the dissenting member the appraisers have what each of them respectively considers to be the requisite expertise, credentials and other attributes for the particular valuation;

g. to empower the two appraisers designated by the company and the dissenting member to choose the third appraiser, presumably to increase their confidence in the third appraiser, to enable them to designate a third appraiser who they consider has the requisite expertise, credentials and other attributes for the particular valuation and/or to provide expertise and/or attributes which the two party designated appraisers do not have (including, if they see fit, legal expertise), and to have a third appraiser with whom they would be comfortable working<sup>9</sup>;

h. to not specify the special role, if any, of the third appraiser (such as serving as chair);

<sup>9</sup> This form of designation method is common in arbitration and there is much literature on the benefits, and detriments, of the method, including survey work indicating a strong preference among parties for having this type of involvement in the selection of the tribunal members.

i. to not define "fair value", which could have been done;

j. in respect of "fair value", to not say anything one way or the other about any "minority discount" considerations;

k. to specify the date of the valuation (11as of the close of business on the day prior to the date on which ...");

l. to exclude "any appreciation or depreciation directly or indirectly by the action or its proposal", a restriction with which the appraisers must comply;

m. to say nothing about process or procedure matters including any of the following:

i. the processes or resources the appraisers may use - or not use - to fix the fair value of the shares;

ii. the parameters for fixing fair value, including the types and sources facts and information to be obtained, received or taken into account by the appraisers;

iii. the extent or nature of the input of the company. the dissenting member or others;

iv. the relevance or irrelevance of the size and nature of the minority interest or the liquidity or illiquidity of the shares, or of any prior sale(s) of shares;

v. any maximum or minimum value that can be fixed for the shares;

vi. whether the appraisers can engage legal or other advisors;

vii. any obligation on the appraisers to be transparent, to give reasons, or to provide alternative values in the event a court subsequently finds that the appraisers erred in a reviewable manner; and

viii. the valuation process to be followed, or the respective role, independence and impartiality of each of the appraisers;

n. to specify expressly that the fair value fixed by the appraisers is "binding on the company and the dissenting member for all purposes"; and

o. to not expressly specify the jurisdiction and role(s) of the courts during or after the valuation process.

**[19] In making these policy choices, the House of Assembly must be taken to have appreciated the consequences, and the advantages and disadvantages, of the process**



and of specifying or not specifying the above matters (which advantages and disadvantages, like beauty, may be in the eye of the beholder).

[20] To extent there is applicable law or analogous law, for example, on independence and impartiality and/or Expert Determination, the Section 179(9) valuation process benefits from it.

### **Prior Court Proceedings Respecting this Appraisal: 2014 Application**

[21] Before BOO was engaged by the Company and Mayhew, there was a disagreement between the Company and Mayhew on, among other things, what would happen if the Appraisers were not of a unanimous view of valuation.

[22] The Company commenced proceedings in 2014 pursuant to Section 246 of the Act (quoted below) for a declaration that in the absence of unanimity, a majority of the Appraisers could fix the fair value of the Mayhew Shares {112014 Application"1)0. The 2014 Application was heard on 18 December 2014.

[23] By Order dated 18 December 2014<sup>11</sup>, the Honourable Justice Bannister QC of this Court declared as follows:

10 BVIHC (COM) 2014/0137 In the Matter of an Application by Olive Group Capital Limited.

<sup>11</sup> The Order is dated 18 December 2014, and was entered (sealed) 30 January 2015. Following the hearing and judgment on 18 December 2014, the parties were unable to agree on the wording of the order. Accordingly, a hearing to settle the terms of the Order was held 28 January 2015 at which time Justice Bannister ruled that the Order should contain a declaration and not

For all purposes of an appraisal conducted pursuant to and in accordance with the provisions of sub-section 179(9)(c) of the [Act], a majority of two out of three appraisers designated to carry out such appraisal may, in the absence of unanimity, fix the value of the shares owned by the dissenting member.

[24] More is said about the 2014 Application below.

### **The Appraisers' Work to Date**

[25] The terms on which BDO took up its appointment are set out in a letter of engagement dated 9 March 2015 ("**Engagement Letter**"), including a majority

decision-making provision in accordance with Justice Bannister's Order. The Engagement Letter was agreed between the Company and Mayhew and includes provisions respecting the appraisal process and other matters that flesh out the statutory appraisal process for this appraisal to some degree, and as a consequence, to some degree limit the wide scope that Section 179(9) provides to the Appraisers.

**[26]** While certain provisions of the Engagement Letter were pleaded in the Statement of Claim<sup>12</sup> and Statement of Defence<sup>13</sup>, the provisions were not submitted as being relevant one way or the other to this Application, and no issues respecting the interpretation or application of the Engagement Letter arise on this Application.<sup>14</sup>

**[27]** Accordingly, it should be noted that anything said in this Judgment about Section 179(9) is not intended to comment upon or apply to anything in the ordinary just a recital. Transcripts of the hearings on 18 December 2014 and 28 January 2015 were before this Court on this Application.

<sup>12</sup> Statement of Claim dated 28 September 2015, in particular paragraph 33.

<sup>13</sup> Statement of Defence dated 15 October 2015, in particular paragraphs 34 and 93.

<sup>14</sup> The pleadings, as always, reflect the parties' positions, and references in this Judgment to what is pleaded respecting the letter of engagement is not intended to resolve any differences between the parties (or with or among the Appraisers) that may exist in respect of the provisions of the letter of engagement.

application of Section 179(9) that has been modified by the Engagement Letter in this particular case.

**[28]** Following the execution of the Engagement Letter, in March 2015 the Appraisers undertook their work, including (as one would expect of professional valuers) meeting with the Company's senior management and with Mayhew to gather information.<sup>15</sup>

**[29]** In the course of their work, they communicated with the Company and Mayhew, through their respective legal practitioners, regarding the legal practitioners' respective views on the applicability, or not, of a minority discount in the fixing of the fair value of the Mayhew Shares, and in light of the differences of views, engaged their own legal practitioners on the question.

**[30]** The Appraisers communicated among themselves (as one would expect of professional valuers) including respecting the fair value of the shares. In a letter dated 15 June 2015, BDO communicated to the other two Appraisers, PwC and Deloitte, "preliminary views on the question whether a minority discount should be applied in fixing the "fair value" of the Mayhew Shares".<sup>16</sup>

**[31]** The Company took issue with BDO's preliminary views when it learned of them, and after back and forth between legal practitioners, the Company asked the Appraisers

to suspend their work, which Mayhew opposed, pending the Company bringing proceedings in this Court. When the present proceedings were brought on 28 September 2015, the Appraisers declined to suspend their work. They scheduled meetings of the Appraisers for 12 and 13 October 2015 in Dubai.<sup>17</sup>

15 Affidavit of David St. George sworn 6 October 2015 ("**St. George Affidavit**"), paragraph 22.

16 Statement of Claim, paragraph 51(i), and Statement of Defence, paragraph 62.

17 St. George Affidavit, paragraphs 22, 26, 30 and 31.

**[32]** The Company chose not to accept that the Appraisers could continue their work in the face of the Company's proceedings and brought an urgent injunction application to this Court to prevent the Appraisers from proceeding with the scheduled meetings on the ground that they should be restrained from deciding matters, or forming views on matters, before the Claim was determined that could preclude them from later proceeding and making decisions in accordance with the declarations sought in the Claim, if granted by this Court.

**[33]** The submissions supporting this view included both the contractual provision in the Engagement Letter that the Appraisers' determination shall be "final and binding for all purposes<sup>11</sup> so that it may be "very difficult for this to be subsequently challenged" <sup>16</sup> , and a practical concern that once people discuss and form preliminary views on a matter, it may be more difficult to move them from those views.

**[34]** This Court granted the interim relief by Order made on 8 October 2015. In fact what the Court did was order the Company and Mayhew to jointly instruct the Appraisers that they shall not fix the fair value of the Mayhew Shares or finally determine any issues in respect of which the Company was seeking declarations in this Claim, or meet without leave of the Court except for their meeting scheduled for 12 and 13 October 2015. It was accepted that an Order directed to the parties would be the practical way to 'enjoin' the Appraisers.

**[35]** On 16 October 2015, as set out above, the Court granted a modified order that precludes the Appraisers, pending determination of the Claim, from fixing the fair value of the Mayhew Shares or <sup>11</sup>finally, formally or informally, [determining] any

18 Affidavit of David St. George sworn 8 October 2015 ("**St George Affidavit 2**"), paragraph 4 (g).

issue" on which the Company is asking the Court to make declarations, and directed the determination (trial) of the Preliminary Issue.

**[36]** Specifically, the Order of 16 October 2015 sets out the Preliminary Issue as follows:

[W]hether the court has jurisdiction to grant the relief prayed by the Claimant in its Claim Form and Statement of Claim.

### **Section 246 of the Act**

**[37]** Section 246 of the Act, which is one of the two bases upon which the Claimant asserts that this Court has jurisdiction to enable it to make the declaratory orders sought {the other being, as noted above, the Court's inherent jurisdiction), is an innovative and useful remedy available to a company under the Act. The section provides as follows:

246 (1) A company may, without the necessity of joining any other party, apply to the Court, by summons supported by an affidavit, for a declaration on any question of interpretation of this Act or of the memorandum or articles of the company.

(2) A person acting on a declaration made by the Court as a result of an application under subsection (1) shall be deemed, in so far as regards the discharge of any fiduciary or professional duty, to have properly discharged his duties in the subject matter of the application.

**[38]** The section is contained in Part XV of the Act, "Transitional and Miscellaneous Provisions". There is nothing in the surrounding provisions that gives any guidance as to the construction of the section.

**[39]** The section appears to have as its prime purpose, or one prime purpose, a means for a company to seek guidance (comparable in other contexts to "advice and directions"; court sanction; a Beddoes order) and a 'safe harbour from the Court. It enables a company to seek such guidance in a summary - and where appropriate, ex parte - manner. By its terms, the section covers questions of interpretation of

(a) the Act, (b) the company's memorandum, and (c) the company's articles.

**[40]** The draftsman presumably envisioned that a company may encounter a situation in which it considers the Act, the memorandum or the articles are insufficiently clear; the company needs or wants to take some action (whether internal to the company or in relation to the outside world); and the company desires to do so with greater clarity and without exposure to any subsequent complaint about the propriety of its action in relation to its duties. That is, it wants to avoid the risk of subsequent allegations of a failure to discharge any fiduciary or professional duty.

**[41]** The section does not require that the application be ex parte but it is permissible to apply ex parte ("may, without the necessity of joining any other party") - it seems that the section also permits a party with an interest to be joined to the application. To

interpret Section 246 otherwise would reduce its value in the face of statutory wording that appears to demand a liberal interpretation.

**[42]** Section 246 appears to this Court to be a valuable provision that may be applicable in situations not presently contemplated by this Court. Accordingly, the full measure of its scope and application should be interpreted and determined in the traditional manner of the common law, on a case by case basis.

**[43]** One question about the section might be whether a company may utilize the section on an ex parte basis in the face of a person or entity known to have an opposing position or some other interest. The process of full and frank disclosure on an ex parte application should enable a court to assess the particular attempted usage and mandate the involvement of the interested person(s), as appropriate.

**[44]** Here that issue does not arise. The affected parties are before the Court, in the person of the Company and Mayhew, and indirectly the Appraisers. The 2014 Application was brought by the Company ex parte but Mayhew was present by counsel for the 2014 Application and participated in it. For this proceeding the Company rightly made Mayhew a party, which appears to be the preferable route given that the relief sought would materially affect his interests.

**[45]** Another question about the section might be whether some other person, such as the Appraisers here, could ask a company to seek a declaration from the Court. That is not the case here - the Appraisers have not asked the Company to seek declarations from this Court, and there is nothing to suggest that they support or consider they require direction on any of the matters raised by the Company in its Claim and Statement of Claim.<sup>1s</sup>

**[46]** As was pointed out by the Claimant at the hearing of this Application, and as noted above, Section 246 was the basis of the 2014 Application.

**[47]** An important difference in the 2014 Application is that the Company brought the application (ex parte but with Mayhew participating) because the difference between the Company and Mayhew had become an impediment to progress with the appraisal process. Justice Bannister, in his oral Judgment<sup>2t0</sup> stated:

So I don't think it's unfair to say that as things stand the whole process is in bulk in the sense that it simply got stuck and has no movement.

<sup>19</sup> These facts are part of the definition of Current Circumstances in this Judgment.

It seems to me that the company is in the position whether rightly or wrongly it does need to know the answer to this question. Although I think it's wrongly rather than rightly. I should say at this stage I accept, as Mr. Evans says, that there being any need for this question to be resolved. The<sup>21</sup> appraisers should have set about their work and if a problem arose, then the Court would have to resolve it. But that for the reasons I have attempted to give is not what has happened. For the reasons I have given it is not possible for this process to move forward unless this difference of views is settled.

... there is, at the moment, a complete log jam.

**[48]** This Court concludes that Section 246 could be used by the Company, on notice to Mayhew, to seek an interpretation of a provision of the Act which the Court otherwise has jurisdiction to interpret at the time and in the circumstances that exist. Likewise, of course, the Court has inherent jurisdiction to interpret the Act at a time and in circumstances when a question of interpretation is properly before it.

**[49]** However, that does not mean that this Court has jurisdiction on either basis at this time and in the Current Circumstances to intervene to interpret a provision of the Act - in this case Section 179(9)(c) - if effectively the House of Assembly has told the Court not to do because the House of Assembly has mandated a process that limits the motivation for, and extent, manner and timing of any Court intervention.

**[50]** Further, the Court's inherent jurisdiction is not applicable where its exercise would be inconsistent with a statutory provision or a provision of the CPR. This was made clear by the Privy Council in *Texan Management Limited et al v Pacific*

<sup>21</sup> This part of the sentence likely should read "... that there not being any need for this question to be resolved, the appraisers should have ...".

*Electric Wire & Cable Company Limited*<sup>22</sup>, which judgment was applied by our Court of Appeal in *Fairfield Sentry Limited (In Liquidation) v. Alfredo Migani and others*.<sup>23</sup>

**[51]** To like effect, this Court's Section 246 jurisdiction is not applicable where its exercise would be inconsistent with an operative provision of the Act; that is, where making a declaration under Section 246 about the operation of a provision of the Act is precluded directly or indirectly by that very provision.

### **Jurisdiction to Make Declarations in Current Circumstances**

**[52]** It is important to recall, in the context of the Preliminary Issue, and the position taken by the Company on this Application, that the word "jurisdiction" has a range of meanings: for example, subject matter jurisdiction; territorial jurisdiction. Also jurisdiction may have a temporal aspect - a court or other tribunal may have jurisdiction to do something at a point in time or when certain foundational events have occurred, for example, but not otherwise.

**[53]** It should be remembered that the definition of Current Circumstances above includes the concept of "at this time", to make clear that even if this Court does not have jurisdiction to intervene now, it may (and I emphasize "may") be that at a later point in time and in appropriate circumstances - most likely subsequent to the completion of the work of the Appraisers or if an impeding problem develops for the Appraisers before then - the Court could intervene to, among other things, interpret Section 179(9)(c) of the Act and grant declaratory relief in respect of one or more of the types of matters raised in the Claim. However, that is not a question for this Application.

22 [2009] UKPC 46, paragraph 57.

23 HCVAP 2011/041-052; 054 -056; 058-062, October 4, 2012, page 7.

**[54]** The question for the determination on the Preliminary Issue is whether this Court has jurisdiction in the Current Circumstances to grant any of the declaratory orders sought by the Company in its Claim.

**[55]** The Preliminary Issue was designed by this Court to have this Court determine, at the outset of the Claim, in the interests of efficiency and in line with the Overriding Objective and this Court's case management authority, whether it could make at this stage and in the circumstances as they stand, any of the declarations sought in the Claim.

**[56]** The Preliminary Issue is directed to this Claim in the present context (as that is the context in which it has been brought); not to whether there might be some occasion subsequently in connection with this valuation, or in connection with some other statutory valuation, in which the circumstances could require the Court's intervention, whether under Section 246, some other statutory provision if available, or the Court's inherent jurisdiction.

**[57]** To be clear, this Court accepts the Claimant's submission that the question on this application in relation to the Preliminary Issue is whether the Court *could* make any of the declarations, not whether it *should* make any particular declaration or declarations. However, the Preliminary Issue still must be context specific - the context being the Current Circumstances with the statutory appraisal process ongoing - it is not being completely impeded, or impeded at all, as it was when Justice Bannister made his Order

in the 2014 Application; the Appraisers have not asked for any assistance or guidance from the Court nor given any indication that they need or desire it; and so forth.

**[58]** There is no jurisdiction for the Court to intervene in the statutory process under Section 179(9) when there is no issue and no problem.

**[59]** While some may struggle with that concept, one only needs to look to the public policy of this jurisdiction (and many others) concerning the role of the courts in relation to Arbitration 24 and in relation to Expert Determination (to give two examples) - it is not a foreign concept for the courts' involvement in an alternative process to be limited in scope and limited temporally.

**[60]** The fact the Company may consider the statutory provision is unclear to it, or more likely anticipates that the Appraisers are not following the process it would like the Appraisers to be following or they may be inclined to make a decision on fair value with which the Company may not agree, does not give the Company a basis to come to the Court to ask the Court to tell the Company, Mayhew or the Appraisers what the statute means, how it should operate or how the Appraisers should operate.

**[61]** Justice Bannister appears to have done his best in the 2014 Application to make it clear to the Company that coming to the Court in anticipation of a problem is not how the Section 179(9) appraisal process is intended to work. He stated in his oral Judgment: "The appraisers should have set about their work and if a problem arose, then the Court would have to resolve it."<sup>25</sup>

**[62]** The Company appears not to have taken heed, although it appears that the Appraisers, whether due to Justice Bannister's wise guidance or otherwise, understand that their role under Section 179(9) is to proceed with their mission.

**[63]** Even if the Appraisers were to come to this Court in some other manner (if available) seeking guidance on the range of matters raised by the declarations

<sup>24</sup> See the Arbitration Act, 2013 for a relevant comprehensive example of this approach as a matter of public policy in this Territory.

<sup>25</sup> 2014 Application, Transcript, 18 December 2014, page 146, lines 2 - 4.

sought in the Claim - which is not the case - this Court might come to a comparable view and say to the Appraisers that these, perhaps even all of these, are matters which they must decide because the process of Section 179(9) is not that the Court will decide these matters (certainly at first instance). The House of Assembly has deliberately implemented a process for the valuation that puts it almost entirely in the hands of the Appraisers (certainly at first instance). However, in such event the Court would need to consider the reasons the Appraisers are seeking guidance, including whether there is an impeding problem, and all other relevant considerations.



**[64]** Whatever may be the case when there is an impediment to the process that cannot be resolved without the Court's involvement, there is no basis - and no jurisdiction - for the Court to intervene when the process appears to be operating as intended.

**[65]** The jurisdiction issue before this Court now appears not to have been presented to Justice Bannister on the 2014 Application yet there is nothing in what he did or said in the 2014 Application that is inconsistent with this Court now determining the Application before it as the jurisdiction issue set out in the Preliminary Issue.

**[66]** The real question in ascertaining the Court's jurisdiction to make any of the kinds of declarations sought is what did the House of Assembly intend to create when it created the fair value appraisal process in Section 179(9).

**[67]** The House of Assembly chose a process known as Expert Determination. It is neither court adjudication nor arbitration, both of which involve various processes that the declarations seek to impose upon the Section 179(9) process.

**[68]** It is not a question of whether the Court should impose those processes - it cannot; it does not have the jurisdiction to do so.

**[69]** By reason of the scheme and provisions of section 179(9) of the Act, this Court does not have jurisdiction in the Current Circumstances to grant the relief prayed by the Company in its Claim Form and Statement of Claim, being a series of declarations claimed respecting and during the course of the fixing of the "fair value" of the Mayhew Shares by the Appraisers pursuant to section 179(9)(c) of the Act, which claimed declarations include what "fair value" means; the parameters for the fixing of the fair value (including facts to be taken into account by the appraisers); the maximum amount the appraisers may fix as fair value or alternatively that the appraisers are under a duty to give reasons for exceeding that maximum amount; that the appraisers must apply a discount for the Mayhew Shares' "minority and illiquid status", and the process that must be adopted by each of the Appraisers.

**[70]** If an issue is blocking the process, as existed in the 2014 Application, the Court may have jurisdiction to make certain declarations (such as interpreting a part of Section 179(9)) - but even then the Court would need to consider carefully whether the House of Assembly left the particular matter for the Appraisers to determine, either finally or at least initially.

**[71]** This does not necessarily mean that there is no role for the Court - in Expert Determination there is a limited role for the courts, as the jurisprudence illustrates, and as is discussed below under "Expert Determination".

**[72]** After the Appraisers finish their work, there may be certain bases upon which the Court would have jurisdiction to intervene. But any basis asserted would have to be considered in the context of the process that the House of Assembly chose when it chose the Section 179(9) process and the law on Expert Determination.

**[73]** For example, if an appraiser, or the panel of appraisers, were corrupt - one party had bribed them, to pick a blatant example. If such an abhorrent situation were to come to light, the Court can intervene, just as it would if such corruption occurred in any process, adjudicative or otherwise.

**[74]** This Application is not a determination of the jurisdiction of the Court in relation to a Section 179(9) appraisal process after the process has been concluded.

**[75]** However, lest the Company or Mayhew think this Judgment leaves open the opportunity to raise all of the types of matters in the Claim later, it does not. As explained later in this Judgment, the Court's jurisdiction is circumscribed by the appraisal process mandated in Section 179(9) and the law respecting Expert Determination, as discussed below.

**[76]** This Judgment interprets the appraisal process as a statutory Expert Determination process. The Company and Mayhew will have only the ability to seek Court intervention later that is open in such a process. The Court has only the jurisdiction to intervene later that is consistent with such a process.

**[77]** Of course this Judgment itself does not provide a catalogue of grounds available to seek Court intervention later. However, it does rule on the nature of the Section 179(9) appraisal / valuation process and in doing so, invokes the law on Expert Determination.

### **Fair Value under Section 179(9)**

**[78]** A particular question raised by the Company in its Claim is the meaning of "fair value" as used in Section 179(9) of the Act.

**[79]** Business Valuers work with the concept of "fair value" routinely, and it is a concept that has meaning to them.

**[80]** Likewise, business valuers' expertise enables them to assess, form an expert view on, and exclude "any appreciation or depreciation directly or indirectly induced by the action or its proposal", as required by Section 179(9)(c).

**[81]** Having said that, courts have said that it may not just be an expert factual question but that there is, at least in some contexts, a legal aspect.

**[82]** Specifically, more recent jurisprudence in this jurisdiction and elsewhere holds that a "fair value" must be a value that is "fair" to both sides.<sup>26</sup>

**[83]** "Fairness" is not something that judges always need to determine - indeed, it may be that "fairness" in respect of a Section 179(9) fair-value valuation can be assessed fully in the context of the business world in which the company operates and generally how business people and business valuers value interests in companies. If, for example, real world experience would indicate that in a

26 H.R.H. Prince Faisal Bin Khalid Bin Abdul Aziz Al Saud v PIA Investments Limited {"**Prince Faisal**"}, page 11, paragraph 25, BVIHC {Com} 2011/03, 25 July 2011, Bannister J.

And also see Glass v 618717, 2012 ONSC 535, Brown J, paragraph 246, which with respect to minority discount (second sentence of quotation) may or may not reflect the policy of Section 179(9)(c) of the Act: "Fair value is a value that is 'just and equitable' - one which provides 'adequate compensation (indemnity), consistent with the requirements of justice and equity.' One important implication of the distinction between market and fair value is that, in general, no minority discount can be applied in determining 'fair value' ..."

particular corporate context, minority discounts do not tend to exist in practice, there may be no reason to impose one where "in theory" one might think there should be a minority discount {whether because of a certain form of illiquidity or for some other reason).

**[84]** This is consistent with the obiter view express by Justice Bannister of this Court in Prince Faisal (see footnote 26) where he stated "... in my judgment the words 'fair value of the Shares' [in the context of Section 179 of the Act] do not require legal analysis. They are words of plain English and the valuer will apply them accordingly."<sup>27</sup>

**[85]** It may be open to a court to make a policy determination - if and when the issue arises following a fair value determination or when brought before the Court by appraisers who require direction from the Court in order to conclude their fixing of fair value of a member's shares - that a member who dissents should not be subjected to a minority discount ever.

**[86]** Perhaps it would be determined as a matter of policy that a member who is expropriated in the context of section 179(1)(d) should never be subjected to a minority discount because, unlike members in the context of section 179(1)(a), (b), (c) and (e) in which the member had a choice - that is, the member could have stayed on board for the ride after the material change - under Section 179(1)(d) the member has no choice, has lost the opportunity of sharing in the future successes of the company, has lost any choice the member may have had on the timing of the realization of the member's

investment and the tax or other consequences of the timing, and has the 'transaction costs' of having to find an alternative investment.

27 Prince Faisal, page 10, paragraph 30.

**[87]** However, those are not questions that need to be determined now; and in line with what is said in this Judgment about jurisdiction, these are not questions that this Court has the jurisdiction to answer at this point in time in the context of this appraisal process.

### **Final and Binding for All Purposes**

**[88]** As noted above, the Engagement Letter provides that the Appraisers' determination "shall be final and binding for all purposes". Whether that adds anything to the effect of the fixing of fair value under Section 179(9) is questionable but it is not an issue that was argued when the injunction was sought. It is almost certain that the injunction would have been granted based solely on the consequences of Section 179(9) in light of the scheme of that section, even without the "final and binding for all purposes" overlay.

**[89]** The scheme of Section 179(9), and the law on Expert Determination, leaves limited room for Court review of the fixing of fair value. As noted above, that was a policy choice by the House of Assembly.

**[90]** So the Company was correct to say, as it did on the injunction application, that "it may be very difficult for [the Appraisers' determination {fixing) of fair value] to be subsequently challenged<sup>11.28</sup> However this is how it should be under the scheme for the fixing of fair value set out in Section 179(9). It does not mean that an interested party can intervene or seek suspension of the work of the Appraisers - it means there is a process for the fixing of fair value that is Expert Determination and as such the process leaves a broad scope to the Appraisers, and limited room for an interested party to intervene at any stage, barring a serious and

28 St. George Affidavit 2, paragraph 4(g).

fundamental matter respecting the appraisal process. This is discussed further below, under "Expert Determination".

**[91]** Arbitral awards usually are made "final and binding" by the applicable statute, and as such there is a body of law on what "final and binding" means, and when and to what extent a court may intervene.

[92] This Judgment does not set out the parameters for a judicial consideration of appraisers' determinations but simply notes that there is some limited room for judicial intervention.

### **Appraisers Declining to Suspend their Work**

[93] This Court would be remiss if it did not comment on the Appraisers' decision not to suspend their work when these proceedings were brought and the Company asked them, over the objection of Mayhew, to suspend their work.

[94] Again looking to the prevailing law in arbitration, appraisers like arbitrators need not suspend their work when there is a challenge brought to a court during the course of their work. They may choose to do so but they are well within their jurisdiction to continue their work while the court proceeding proceeds. It is a subject area on which much has been written in the arbitration context. Suffice it to say based on what this Court has seen in the proceedings in relation to the whole history relating to the fixing of the value of the Mayhew Shares, the Appraisers were entitled, until the Court issued its injunction, to decide to continue their work. Indeed, despite the Orders made before there was an opportunity to consider matters fully, they took an appropriate decision and position with the Company. They seem to have had an essentially correct view on the Section 179(9) procedure.

### **Minority Discount**

[95] One of the six groups of issues on which the Claim seeks this Court's declaration is whether a minority discount is required by Section 179(9). In the Current Circumstances this Court has no jurisdiction to make any determination of that question.

[96] Section 179(9) of the Act says nothing about a minority discount. As noted elsewhere, the Court may be asked at some point in connection with this appraisal, or in connection with some other fixing of fair value in a different case, to consider whether a minority discount is a legal question, or whether as a matter of policy a minority discount should not or should be required.

[97] It seems to me, as noted elsewhere in this Judgment, that there could be an argument available to an expropriated shareholder under Section 176 of the Act that there should be no minority discount - that in effect the Company's price for being able to expropriate is to forego any minority discount which might otherwise be available to it factually. In the real world, a person with a small 'blocking' interest - whether minority shares or a small piece of land needed for the assembly of a large real estate development - may receive a premium. That might not be seen to be an appreciation or depreciation directly or indirectly induced by the action or its proposal but simply as the

price the majority needs to pay to be free to be able to do what it wants to do, free of any concern about a minority (being unfairly prejudiced, having some other complaint about the majority or being able to impede or delay the majority in what the majority wishes to do in what it sees as its interests).

**[98]** There may be arguments that as a matter of policy (as opposed to as a matter of fact and share valuation} there should be a minority discount although, if there are such arguments, their rationale seems seem harder to appreciate.

**[99]** But these are not questions for this Judgment as they are not before this Court on this Application and could not be determined without submissions from the parties at an appropriate time.

**[100]** The Appraisers are able under their mandate in Section 179(9) to determine 'fair value" and as part of that to assess commercially whether a minority discount is appropriate in their expert opinion.

### **Expert Determination**

**[101]** As stated above, by enacting Section 179(9), the House of Assembly chose to adopt a process to fix fair value that is an established dispute-resolution process known as Expert Determination. The Section 179(9) process is a statutory Expert Determination process (most Expert Determination processes arise contractually}.

**[102]** Expert Determination is neither court adjudication nor arbitration, both of which involve various processes that the declarations claimed - rightly or wrongly - seek to impose upon the Section 179(9) statutory Expert Determination process.

**[103]** Section 179(9) invokes the law on Expert Determination, including the limited role of interested parties (in particular, the company and the member}, and the limited role of courts.

**[104]** However, the law of Expert Determination is still evolving as courts in different jurisdictions seek to define it by reference to its distinctions from adjudicative processes, and to clarify the bases and circumstances for judicial intervention.

**[105]** The Appraisers, under law on Expert Determination, do not have the duties that a court or arbitral tribunal would have to adjudicate between the competing positions without relying on their own subjective opinions or to comply with rules of procedural fairness with which courts and arbitral tribunals must comply. Put another way, court and arbitral tribunals have judicial functions to perform, and they must observe the basic rules which govern judicial proceedings. 29

**[106]** The role of the courts in reviewing expert determinations exists but is limited. On fundamental problems in the expert determination, there is no question but that the courts can intervene. The question becomes setting the parameters on fundamental problems.

**[107]** In the usual contractual context in which Expert Determination arises, Lord Denning made it clear that a court can intervene if there has been fraud or collusion, holding as follows:

If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is that they have agreed to be bound by it. If there were fraud or collusion, of course, it would be different. Fraud or collusion unravels everything.<sup>30</sup>

29 For a global review of key distinguishing features of Expert Determination, see "Distinguishing Expert Determination from Arbitration: The Canadian Approach in a Comparative Perspective", Martin Valasek and Frederic Wilson, *Arbitration International*, 2013 Vol 29, No. 1, page 63; and see *Expert Determination*, John Kendall, 1996, 2nd ed, FT Law & Tax, London.

30 *Campbell v Edwards* [1976] 1 All ER 785

**[108]** Also, there is no question but that a court can review a jurisdictional error made by experts in an Expert Determination, although the timing for such court review may not be settled.

**[109]** The Company made considerable reference in its skeleton and at the hearing of this Application to the 2011 English Court of Appeal judgment in *Barclays Bank PLC v Nylon Capital LLP* ("**Barclays**")<sup>31</sup>, which dealt with the court's role in determining an expert's jurisdiction where it is disputed, and the timing of such determination by the court {that is, whether as is usually the case in arbitration, the expert should be permitted to make a jurisdictional decision first, in particular

where the agreement gives the expert the jurisdiction to determine his or her jurisdiction p2.

**[110]** However, while the judgment sets out an approach where an issue about the fundamental jurisdiction of the expert arises {that is, whether the expert has jurisdiction to determine the particular dispute that has arisen}, it does not arise on this Application, and certainly not in the sense that it arose in *Barclays* {whether the expert had jurisdiction under the relevant agreement to determine the matter that was in dispute between the parties). Notably the Court of Appeal distinguished the issue in that case from a case where the issue is the interpretation of the mandate given to the expert in relation to a dispute where it is accepted that the dispute is within his jurisdiction and where "very different considerations apply".<sup>33</sup>

31 Barclays Bank PLC V Nylon Capital LLP [2011] EWCA Civ 826.

32 The Court of Appeal in Barclay set out an approach to the expert determining his or her jurisdiction first, when mandated to do so, that differs fundamentally from the approach to an arbitral tribunal determining its jurisdiction in comparable circumstances. It remains to be seen whether the Barclay approach will ultimately prevail if and when the issue is considered by the Privy Council or the UK Supreme Court. The test is whether it is in the interests of justice and convenience for the court to determine the matter itself rather than allowing the expert to determine it first.

33 Barclays, page 355, paragraph 43.

**[111]** The distinction between a mistake, as contemplated by Lord Denning, and a fundamental jurisdiction error (a material departure from instructions} was set out by Lord Justice Dillon as follows:

"The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect, eg if he valued the wrong number of shares, or valued shares in the wrong company, or if ... the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that, either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do".<sup>34</sup>

**[112]** The limits of court review are not necessarily that clear, as was pointed out by Lord Neuberger in Barclays (as obiter, writing for himself only, having concurred in the majority judgment):

If the expert valued the wrong number of shares, it is scarcely controversial to suggest that this decision could not stand if it was challenged in court ... But what if the expert had valued the right number of shares on the wrong basis, for example, because of his misinterpretation of the company's articles of association...?"<sup>35</sup>

**[113]** Lord Neuberger expressed his view (after noting that it is dangerous to generalise without regard to the words of the expert determination provision and its commercial as well as documentary matrix}, that in the absence of any other direction or indication, there should be recourse to the court on a point of law determined by an expert, particularly if the legal determination has a very substantial effect on the parties' rights and obligations. He reasoned that while he appreciated "the advantage of leaving all points of law to the final determination of

34 Jones v Sherwood Computer Services ("**Sherwood**") [1992] 2 All ER 170.

35 Barclays, page 357, paragraph 64.



the expert is that it results in a relatively quick and cheap process for the parties ... it must be questionable whether the parties would have intended an accountant, surveyor or other professional with no legal qualification, to determine a point of law, without recourse to the courts."<sup>36</sup>

**[114]** Lord Neuberger seemed not to have had in mind the process followed by the Appraisers of engaging their own legal practitioners and hearing from the interested parties' legal practitioners, which while not the same as a court review, may mitigate to a significant degree his concern about an expert with no legal qualification.

**[115]** It appears it is no longer the 'default position' that there should be recourse to the courts on a point of law determined by an expert in light of a subsequent judgment of the English Court of Appeal (although in a contractually based Expert Determination the parties may provide for such court recourse).

**[116]** The English Court of Appeal in 2014 in *Premier Telecom Communications Group Ltd and Ridge v Webb ("Premier")* put it this way:

"I am unable to accept that submission ["that the parties intended that the court should decide all questions of law bearing on the valuation, with the result that on none of them was the valuers' [sic. valuer's] decision intended to be binding"], which in my view states the proposition far too broadly. Questions of law pervade many of the issues that are likely to arise on a valuation of this kind and it is inherently unlikely that the parties intended that on none of them should the valuer's view be binding. Parties who refer a matter to an expert for decision usually do so in order to obtain a quick and relatively inexpensive decision of a binding nature on a matter that calls for informed judgment. Often that involves the application of principles and expressions that were familiar and well understood in the

<sup>36</sup> Barclays, pages 357 - 358, paragraphs 65, 69 and 70.

particular field of endeavor, whatever that may be. In such cases it would be surprising if they had intended the expert's decision to be of no effect if it could be shown that they made a mistake in the application of some well recognised principle. Parties who refer a dispute to an expert must be taken to have recognised that mistakes may be made, both of fact and law, but they are prepared to take that risk because they place a high degree of confidence in their chosen expert".<sup>37</sup>

**[117]** It is interesting to note that the Supreme Court of Canada took a comparably deferential approach to appeals of questions of law in non-international {domestic} arbitration in the same year in *Sattva Capital Corp. v. Creston Moly Corp.*<sup>38</sup>The arbitration statute made appeals on questions of law available. Even so, the Canadian Supreme Court limited to scope for a court to intervene, holding as follows respecting the standard of review:

"In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise".

**[118]** On 30 December 2015, the Delaware Chancery Court released a memorandum opinion in *PECO Logistics LLC v. Walnut Investment Partners L.P.*<sup>39</sup>, that very much accords with the English Court of Appeal's approach in *Premier*.

" To sum up, the Walnut Investors take issue with three aspects of Duff & Phelps' valuation determination ... [Duff & Phelps were a third party valuation firm selected in accordance with the procedures set forth in the LLC Agreement]. Critically in that regard, both the Company and the Rollover Investors expressly agreed that they "shall be bound by the determination of the Valuation Firm ... with respect to the Put Price as

37 *Premier Telecom Communications Group Ltd and Ridge v Webb*, [2014] EWCA Civ 994, paragraph 12.

38 2014 sec 53, paragraph 106.

39 C.A. 9978-CB (Bouchard C) at page 21

established by the Valuation Firm ...<sup>11</sup> In other words, the LLC Agreement reflects a reciprocal arrangement whereby the buyer and seller of the preferred units were both bound to whatever determination a nationally recognized valuation firm made.

When parties to a contract agree to be bound by a contractually established valuation methodology, this Court will respect their right to order their affairs as they wish and refrain from second-guessing the substantive determination of value. As then-Chancellor Strine explained in *Senior Housing Capital, LLC v. SHP Senior Housing Fund, LLC*, "[w]hen parties bargain to have a contractual payment turn on the valuation of property, the parties are free to set whatever level of judicial review they like."

The Court in *Senior Housing* conceptualized three levels of review for valuation appraisals extending along a spectrum.... Third, the parties could agree to a regime in which the appraiser's valuation is final, thereby precluding judicial or any other form of review of the appraiser's substantive determination of value. The rationale for this final option is captured in a rhetorical question the Chancellor posed in *Senior Housing*: "When parties contractually decide to have a qualified expert with relevant credentials make a determination of value without any indication that the expert's judgment is subject to judicial review, on what basis would it make sense to

infer that the parties intended to have a law-trained judge do a *de novo* review of the expert's determination?<sup>11</sup>

Although the role of the appraiser in *Senior Housing* was somewhat different than the role of the valuation firm in this case, the third scenario identified in *Senior Housing* accurately describes the choice the parties to the contract made here. The LLC Agreement explicitly states that both parties agree to be bound by the valuation of the preferred units as determined by the valuation firm, and provides for no judicial, arbitral or other form of review of that valuation. Accordingly, in order to respect the contractual choice that the indisputably sophisticated parties made here, the Court must in my opinion refrain from second-guessing the substance of Duff & Phelps' valuation of the preferred units. ...

This is not to say that the Rollover Investors are left without any legal protection. Even when parties to a contract agree to preclude judicial review of the substance of an appraiser's determination, they have a legitimate contractual expectation that the appraiser's determination was the product of a good faith, independent judgment. Thus, the Court may protect against conduct undertaken by a contractual party to taint or corrupt the contractually prescribed appraisal process".

**[119]** Even if Lord Neuberger's view about the 'default position' of a court reviewing an alleged error of law by an expert (which he articulated in *Barclays*) is correct, it remains to be determined - but not on this Application and not without full submissions - whether it applies to Section 179(9)(c)'s expert determination provision, and in particular to the minority discount issue, if that issue is a question of law (even strictly a question of law)-which, as stated above, may not to be the case.

**[120]** The court determining the question may need to consider, in line with what Lord Neuberger indicated, Section 179(9)(c)'s "commercial matrix". including (i) the reasons for such a provision in the Act and (ii) the draftsman's presumed intentions about the desirability of court review of alleged legal errors versus the desirability in a dissenting company member situation of (using the words from *Premier*, above) "a quick and relatively inexpensive decision of a binding nature on a matter [share value] that calls for informed judgment ... [which] involves the application of principles and expressions that [are] familiar and well understood in the particular field of endeavour [business valuation]."

**[121]** Leaving aside the question of the review by a court of an alleged error of law by an expert in an Expert Determination, it ought to be understood and accepted that Expert Determination overall is a different process.

**[122]** As good as our common law adversarial system may be, it is not perfect and it is not the only way of doing things on every dimension. Historically in relation to

arbitration some judges and some counsel, particularly in common law jurisdictions, struggled - and some still struggle - with what they view as the courts 'ceding' jurisdiction, not having a traditional 'day in court', giving up rights to oral discovery (which are not part of the system in this jurisdiction) and traditional document disclosure (which has become more limited than it once was in our court system), 'constitutional rights' (which may not apply in this jurisdiction or indeed in any jurisdiction) or the right to a jury (again which does not exist here in civil matters).

**[123]** Also our civil courts have moved away from traditional 'perfect justice' as a realistic goal - there are other systemic issues at play. The 'right result' can be a pyrrhic victory if the time and cost of achieving it are disproportionate.

**[124]** The system we have under Section 179(9) needs to be understood and accepted as a 'different' way of achieving the determination of a particular type of dispute. That means a need for an understanding of the Expert Determination process by appraisers, companies and members, counsel and the Court, and a need to recognize that the Court has a limited jurisdiction in a Section 179(9) process.

**[125]** This also means that while there are some limits, generally speaking the Appraisers have considerable leeway to determine and implement all aspects of their process to perform their statutory mandate.

**[126]** It should not be forgotten that the Appraisers, like those almost always (if not always) chosen as experts for an Expert Determination, are not people picked randomly off the street - they are experts with professional training and standards that those designating them consider desirable for the task; they were not imposed on the Company and Mayhew but were chosen in a manner in which they had input; and it appears that the Appraisers are experienced in the valuation (appraisal) of companies and businesses. They will know how valuation works in the real world; in real transactions. They will have experience with when, why and how in the real world minority discounts are seen or not seen. They know - or if not they now know - that they have an obligation to be fair to both the Company and Mayhew. They must be impartial<sup>40</sup> and independent. They may be guided by their professions' views of best practices and by what courts have provided, in a non-binding way, by way of suggestions for experts in an expert determination.

**[127]** It was open for the Company to try to have legal expertise included among the Appraisers if it considered it necessary or desirable. Sometimes two accounting experts in an arbitration will choose a legal expert as tribunal chair. But the Company also could have designated such a person as its designee in the expectation that the other two designees would be business valuers. This person could have been a retired commercial (company law) judge or a senior commercial (company law) practitioner, for example. There are significant tactical aspects to selecting a tribunal and a

designating party that considers that it is critical to have legal expertise on the tribunal, or in this case, among the appraisers, had it within its or his power to assure that. (Of course the other way appraisers can gain legal assistance is as was done here, by engaging legal practitioners for legal advice.)

40 While absent an agreement among the parties for a different process impartiality and independence are inherent in a role such as exist for appraisers under the Section 179(9)(c) process and for experts in Expert Determination generally, it is comforting to see that Black's Law Dictionary (9th Edition) defines "appraiser" as "an impartial person who estimates the value of something".

**[128]** This Judgment is not seeking to outline definitively the law on Expert Determination - that is for another day, when issues arise. Rather, this discussion of the law of Expert Determination simply illustrates that it is a different beast, and while there are matters to be clarified about it, it certainly is not a blank page supporting this Court in the Current Circumstances needing to flesh out any of the matters on which declarations are sought in the Claim in order to enable the fixing of fair value to proceed towards its conclusion.

### **Ascertaining What an Expert Did**

**[129]** Lord Justice Dillon's qualification in *Sherwood*, above - "if there is evidence to show that [i.e.: what the nature of the mistake was]" - is important. The nature of Expert Determination is such that there may not be the same kind of reasoned decision that one would see from a court or arbitral tribunal, nor is there the same kind of record nor the same kind of transparency. Again, these are policy choices made here by the House of Assembly, and in contractual Expert Determination made by the parties, to forego many of the trappings of an adjudicative process for a more cost effective, efficient, expeditious and focused process.

**[130]** The Company raised a concern that it and Mayhew may never know if the Appraisers have done things one way or another - or something in between - as there are no rules that require them to be as transparent as in an adjudicative process. That is true.

**[131]** The Appraisers may choose greater or lesser transparency. They may choose the manner in which they give and possibly explain their decision (fair value); and they may choose to give or not give an alternative fair value estimate (e.g.: if they use a minority discount, and then later it is found that they should not have done so, the figure without a discount would be available to the court and interested parties).

**[132]** This reflects the House of Assembly's policy choice to have these determinations made using a different process; usually a more inquisitorial process (which of course is the kind of process used in the civil law procedures that are followed by the majority of the world's population}.

**[133]** That the Appraisers can make various choices (for example, choose greater or lesser transparency}, does not mean that those choices will be made arbitrarily. In making those choices, it may be expected that the Appraisers will be guided by their training, the professional standards of their profession and standard industry practice. That is inherent in the choice of people in a particular profession as appraisers (which does not mean that the Company or Mayhew can enquire into those standards or how they were or were not applied}.

**[134]** As a further example, the Appraisers may (or may not} decide to issue a draft document for comment. They may (or may not} decide to invite the Company and Mayhew to request an elaboration of reasoning set out that they do not understand, to the extent such reasoning is set out, so for example in order that they may better understand how the Appraisers 'got from A to B'. If the Appraisers consider that additional explanation is warranted or would be helpful, they may decide to include it.

**[135]** Lord Neuberger in Barclays had some suggestions for parties and experts which he offered as possibilities, starting with the parties considering whether to agree that an expert's determination of a point of law will not be final and binding but may be referred to the court.

**[136]** His other suggestions may be worthy of consideration by experts but they were proffered by Lord Neuberger simply as matters to consider, and this Court refers to them for no greater reason, and not with any direction {which this Court has no jurisdiction to give in the Current Circumstances, consistent with what has been determined above}, request or even suggestion to the Appraisers that they do so.

**[137]** Lord Neuberger suggested that if the parties agree to a court review of legal determinations:

"...then the expert should indicate whether, and in precisely what way, his determination would have been different if he had decided the point the other way: that may help the disappointed party decide whether it is worth challenging the decision, and it may assist the parties to arrive at a settlement".

And then he goes on to state as follows:

"Sometimes it is not possible to show that the expert has made a mistake of law in arriving at his valuation, because he has not expressed a view on the issue of law, and it cannot be said that he was under a duty to do so, and it is not clear from his determination how he must have decided the issue. In such a case, it seems to me that there would be no basis for challenging the determination on the basis of error of law. For the reasons already given, if the expert needs to determine a point of law which divides the parties, he may think it right not only to decide the point and say how he has

decided it, but to indicate what the valuation would have been if he had decided the point the other way".<sup>41</sup>

**[138]** To reiterate, these are matters that they Appraisers may consider; they are not procedures or processes they must follow. The opportunity for the Company and Mayhew to specify matters of procedure and process upon which they could agree was in their joint engagement of the Appraisers or in some other joint direction to the Appraisers (which the Appraisers were willing to accept}. Except to the extent the Company and Mayhew may have done so in such manner, they are in the

41 BareI ays, pages 358 and 359, paragraphs 71 and 72.

hands of the process specified in the Act, and the Appraisers they have designated, subject only to such limited review as may be available to them after the Appraisers have fixed the fair value of the Mayhew Shares.

**[139]** The Company and Mayhew should not intervene in the work of the Appraisers before it has been concluded save to {a) comply with paragraph 3 of the Order below, {b) convey in writing any joint instructions and requests to the Appraisers on which the Company and Mayhew may agree, {c) respond to enquiries and requests from the Appraisers in relation to their valuation, or {d) pose purely administrative questions such as a request for an indication of anticipated timing of the conclusion of the Appraisers work or in connection with the fees and expenses invoiced by the Appraisers.<sup>42</sup>

**[140]** If any issues arise between the Company and Mayhew before the conclusion of the Appraisers' work that they cannot resolve through genuine efforts to do so, and in the view of one or both of them cannot await the conclusion of the Appraisers' work, they may seek this Court's assistance, initially informally and with minimal or no materials, at a case conference that may be scheduled by way of a joint letter to the Court.

## **Costs**

**[141]** On the handing down of this Judgment, the Company accepted that follows from the above that it be ordered to pay Mayhew's costs, which Mayhew seeks as the successful party. Accordingly, there will be an order, as set out below, that the

42 As stated in this Judgment, the Section 179(9) process is intended to be more cost effective, efficient, expeditious and focused process. Any remedy of a company and a dissenting member in most circumstances lies after the end of the Expert Determination - paragraph 4 of the Order should assist to facilitate the Appraisers finishing their work as contemplated by Section 179(9) and provide adequate opportunity for the Company or Mayhew to obtain the assistance of this Court if truly needed before then in appropriate circumstances.

Company shall pay Mayhew's costs of the Claim including the injunction proceedings and this Application, to be assessed by this Court, if not agreed, at a costs assessment to be listed on an expedited basis.

## **Declarations and Orders**

**[142]** Accordingly, there will be declarations and orders in the following terms:

1. By reason of the scheme and provisions of section 179 of the Act, this Court declares and orders that it does not have jurisdiction to grant the relief prayed by the Company in its Claim Form and Statement of Claim, being a series of declarations claimed respecting and during the course of the fixing of the "fair value" of the Mayhew Shares by the Appraisers pursuant to section 179(9)(c) of the Act - at a time when the Appraisers are not impeded (completely or at all) from proceeding with their statutory work - which claimed declarations include what "fair value" means; the parameters for the fixing of the fair value (including facts to be taken into account by the appraisers); the maximum amount the appraisers may fix as fair value or alternatively that the appraisers are under a duty to give reasons for exceeding that maximum amount; that the appraisers must apply a discount for the Mayhew Shares' "minority and illiquid status", and the process that must be adopted by each of the Appraisers.

2. The Claim is dismissed.

3. This Order being the "final determination of the Claim", as that phrase is used in the Order of this Court dated 16 October 2015, the Company and Mayhew shall jointly instruct the Appraisers forthwith -

i. that the prior joint instructions pursuant to the Order of the Court made on 16 October 2015 are hereby terminated; and

ii. that the Appraisers do now proceed to fix the fair value of the Mayhew Shares pursuant to their engagement to do so; and a copy of the sealed Order reflecting this Judgment, and a copy of this Judgment, shall be provided to the Appraisers forthwith.

4. The Company shall pay Mayhew's costs of the Claim including the injunction proceedings and this Application, to be assessed by this Court, if not agreed, at a costs assessment to be listed on an expedited basis.

Justice Barry Leon [Ag.]

**Commercial Court Judge**