EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0002
(CLAIM NO. BVIHC(COM) 2015/0115)

BETWEEN:

OLIVE GROUP CAPITAL LIMITED

Appellant

and

MR. GAVIN MARK MAYHEW

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. Vernon Flynn, QC with Ms. Victoria Lord for the Appellant
Mr. Richard Millett, QC with Mr. Mark Forte and Ms. Tameka Davis for the Respondent

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2016: April 5;
November 7.

Commercial Appeal – Section 176 of BVI Business Companies Act – Compulsory redemption of shares – Application of minority discount – Whether minority discount applies as a matter of law to a valuation of shares redeemed under section 176 of BVI Business Companies Act – Whether a minority discount can apply to a section 179 valuation – Jurisdiction of the court to grant declaration regarding procedure for valuing minority shares – Whether it is the court or the appraisers who should decide on a case by case basis if the discount applies to a valuation under section 179 of BVI Business Companies Act – How the minority discount is to be applied under section 179 of BVI Business Companies Act

This appeal arises out of the judgment and order of the learned trial judge sitting as a judge of the Commercial Court in which he ruled that the court did not have jurisdiction to try the claim of the appellant company, Olive Group Capital Limited **("the Company")**, for several declarations regarding the procedure for valuing the minority shares of Mr. Gavin

Mark Mayhew, ("the respondent"), in the Company that were compulsorily redeemed by the Company under section 176 of the BVI Business Companies Act ("the Act").

Until the compulsory redemption of his shares by the Company in January 2014, the respondent was a minority shareholder of the Company. On 8th January 2014, the majority shareholder, Strategic and General Holdings Limited ("Strategic") caused the Company to initiate the process under section 176 of the Act of redeeming the respondent's shares.

In January 2014 on the instructions of Strategic, the Company gave the respondent notice as required by the Act of the redemption of his shares and the proposed redemption price to be paid for same. The respondent dissented from the redemption price offered by the Company which brought into play the provisions of section 179 of the Act. Section 179 sets out the procedure for redeeming the shares. This procedure involved the Company and the dissenting member each appointing an appraiser and the two appointed appraisers together appointing a third appraiser. The three appraisers ("the Appraisers") would together assess the fair value of the respondent's shares.

Differences arose during the valuation process concerning the application of a minority discount. There are two aspects to this dispute. Firstly, whether it applies, as a matter of law, to a valuation of shares redeemed under section 176 of the Act, and secondly, assuming that a minority discount can apply to a section 179 valuation, whether it is the court or the Appraisers who should decide on a case by case basis if the discount applies to a valuation under the section and how it is to be applied.

On 28th September 2015, the Company issued a claim in the Commercial Court seeking declarations regarding various aspects of the valuation process including a declaration that "The fair value of the Mayhew Shares, determined in accordance with s. 179(9)(c) of the Act, must apply a discount for their minority or illiquid status."

When the case came before the learned trial judge he ordered that the following issue be tried as a preliminary issue – "The question whether the court has jurisdiction to grant the relief prayed by the Claimant in the Claim Form and Statement of Claim." He found that the court did not have jurisdiction to grant the relief sought by the Company. In coming to his decision, the learned trial judge decided that the declarations sought by the Company were all matters that fell within the mandate given to the Appraisers under section 179(9) and are matters to be resolved by the Appraisers during the course of the valuation. They are not matters for the court's determination, and section 246 of the Act does not give the court jurisdiction where none existed under section 179(9). Having found that the court does not have jurisdiction the judge treated his decision as a final determination of the claim and ordered the Appraisers to resume the process of valuing the shares. He dismissed the claim with costs to the respondent.

Being dissatisfied with the order of the learned trial judge, the Company appealed his order. The primary issue which arose in the appeal was whether the learned judge erred in his application of the law relating to expert determination and concluded incorrectly that the court does not have jurisdiction to grant the relief claimed in the claim form and statement of claim.

Held: dismissing the appeal, confirming the orders of the learned judge in the court below and awarding costs of the appeal to the respondent to be assessed if not agreed within 21 days of the date of this order, that:

1. Where a dispute arises during the valuation process, the court must decide firstly if the dispute falls within the expert's mandate. Once the dispute falls within the terms of the expert's mandate he has jurisdiction to deal with it, the parties are bound by his decision and the court should not intervene. If the dispute is jurisdictional, such as the interpretation of the expert's mandate, the court must determine that issue and it is a matter of procedural convenience whether it does so before or after the expert completes his work.

   Barclays Bank plc v Nylon Capital LLP [1994] CLC 1125 applied; Director of Telecommunications and another v Mercury Communications Ltd [1994] CLC 1125 applied; Premier Telecom Communications Group Ltd and Darren Ridge v Darren Webb [2014] EWCA Civ. 994 applied.

2. The court has jurisdiction to declare that a minority discount *can* apply to a section 179(9) valuation. However, the issue whether a minority discount *should* apply to the valuation of the respondent's minority shareholding is one that falls within the scope of the appraisers' mandate and thus the court has no jurisdiction to intervene. Accordingly, the declaration as sought in paragraph 5 of the claim form that a minority discount must be applied to a section 179(9) valuation is not one that the court has jurisdiction to grant.

   H.R.H Prince Faisal Bin Khalid Bin Abdul Aziz Saud v PIA Investments Limited BVIHCV(COM)2011/0003 (delivered 25th July 2011, unreported) approved.

3. If the expert's mandate does not contain principles and procedures for carrying out the valuation, and none are agreed by the parties, the expert will be free to determine how he proceeds and the court will not intervene to tell him how to conduct the valuation, neither before nor after the valuation. The parties are bound by whatever he decides and the court will intervene only if there is fraud or collusion. In this case, the mandate in section 179(9) is silent on the application of the minority discount and it is therefore a matter that falls within the remit of the Appraisers to decide whether one should be applied to the valuation of the respondent's redeemed shares, and if it should, the details of how it is to be applied.

   Barclays Bank plc v Nylon Capital LLP [1994] CLC 1125 applied; Norwich Union Life Insurance Society v P&O Property Holdings Limited [1993] 1 EGLR 164 at page 166 applied; H.R.H Prince Faisal Bin Khalid Bin Abdul Aziz Saud v PIA Investments Limited BVIHCV(COM)2011/0003 (delivered 25th July 2011, unreported) approved.

4. The function of the courts under section 179(9) is not to resolve non-existent or hypothetical disputes, nor to provide guidance to the Appraisers for doing their job under the section. If the Company had wanted these matters to be included in the Appraisers' mandate it should have included them in the Letter of Engagement. In the circumstances, the court does not have jurisdiction to grant the declarations sought in numbers 1, 2, 3, 4 and 6 of the claim form.

H.R.H Prince Faisal Bin Khalid Bin Abdul Aziz Saud v PIA Investments Limited BVIHCV(COM)2011/0003 (delivered 25th July 2011, unreported) approved.

JUDGMENT

[1] WEBSTER JA [AG.]: This is an appeal against the judgment and order of Leon J sitting as a judge of the Commercial Court by which he found that the court did not have jurisdiction to try the appellant's claim for declarations regarding the procedure for valuing the minority shares of the respondent in the appellant company that were compulsorily redeemed by the appellant under section 176 of the BVI Business Companies Act ("the Act").

Background

[2] Olive Capital Group Limited ("the Company") is a company incorporated under and subject to the laws of the British Virgin Islands. Mr. Gavin Mark Mayhew ("the respondent"), was, until the compulsory redemption of his shares by the Company in January 2014, a minority shareholder of the Company holding 8.9% of the issued shares ("the respondent's shares"). The majority shareholder of the Company is and was at the material time Strategic and General Holdings Limited ("Strategic") holding 90.11% of the issued shares of the Company.

[3] On 8th January 2014, Strategic caused the Company to initiate the process under section 176 of the Act of redeeming the respondent's shares. Section 176 reads –

> "176. (1) Subject to the memorandum or articles of a company,
>
> (a) Members of the company holding 90 per cent of the votes of the outstanding shares entitled to vote; and
>
> (b) of the company holding 90 per cent of the votes of the outstanding shares of each class of shares entitled to vote as a class,
>
> may give a written instruction to the company directing it to redeem the shares held by the remaining members.

(2) Upon receipt of the written instruction referred to in subsection (1), the company shall redeem the shares specified in the written instruction irrespective of whether or not the shares are by their terms redeemable.

(3) The company shall give written notice to each member whose shares are to be redeemed stating the redemption price and the manner in which the redemption is to be effected."

[4] On the instructions of Strategic, the Company sent the notice required by sub-section (3) of section 176 to the respondent on 9th January 2014 giving him notice of the redemption of his shares and the proposed redemption price to be paid for the shares. The respondent dissented from the redemption price offered by the Company which brought into play the provisions of section 179 of the Act which sets out the procedure for redeeming the shares. Full details of the redemption procedure are not important for the consideration of this appeal. The provisions of section 179 that are relevant are sub-section (1) which states that the member whose shares have been redeemed is entitled to be paid fair value for his shares upon dissenting from the redemption; and sub-section (9) which is set out below because of the important role that it plays in this appeal. The sub-section reads –

"(9) If the company and a dissenting member fail, within the period of 30 days referred to in sub-section (8), to agree on the price to be paid for the shares owned by the member, within 20 days immediately following the date on which the period of 30 days expires, the following shall apply:

(a) the company and the dissenting member shall each designate an appraiser;

(b) the two designated appraisers together shall designate an appraiser;

(c) the three appraisers shall fix the fair value of the shares owned by the dissenting member as of the close of business on the day prior to the date on which the vote of members authorising 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; and

(d) the company shall pay to the member the amount in money upon the surrender by him of the certificates representing his shares."

[5] The following appraisers were appointed to assess the fair value of the respondent's shares:

[a] The Company appointed PricewaterhouseCoopers ("PWC");

[b] The respondent appointed Deloitte Corporate Finance Limited ("Deloitte");

[c] PWC and Deloitte appointed BDO LLP ("BDO").

The three appraisers together are referred to in this judgment as ("the Appraisers").

[6] Following the appointment of the Appraisers the terms of their engagement were set out in a letter dated 9th March 2015 from BDO to the Company and the respondent ("the Letter of Engagement").

[7] The Appraisers embarked on the assigned task of valuing the respondent's shares. The first major difference that they had was that they could not agree how their decisions should be made, whether by unanimous decision or by majority vote. That difference was resolved by Bannister, J. by an order dated 30th January 2015 when he ruled that, in the absence of unanimity, the Appraisers should make decisions by a majority of two out of the three Appraisers.

[8] The other significant difference that arose during the valuation process was whether appraisers appointed under section 179 of the Act can apply a minority discount to the valuation of shares redeemed by a company under section 176, and if they can, whether the Appraisers should apply a discount to the valuation of the respondent's shares.

Minority Discount

[9] The concept of a minority discount simply put is the notion that minority shares are worth less in practice than a pro rata amount of majority shares. The difference in value is caused by various factors some of which are listed in paragraph (2)(v) of the Claim Form (referring to the respondent's shares) as:

[a] the shares are highly illiquid, not readily capable of realisation by the respondent and are at risk of compulsory redemption at the direction of the majority shareholder;

[b] they confer no rights of control over any resolution of the Company's shareholders or directors; and

[c] they do not confer a right to receive a distribution from the Company nor any power to compel the Company to make a distribution (per the shareholders agreement between the shareholders of the Company).

This is not an exhaustive list of the factors that can affect the issue of a minority discount. The factors vary from company to company, and the Appraisers may identify other factors during the course of the valuation.

[10] If the discount applies to the respondent's shares, he will receive less on an assessment of the fair value of the shares than if they were valued on as a pro rata share of the value of the Company's business. In this case, the difference is significant. The preliminary assessment by the Appraisers indicates a difference in value of approximately $9.8 million.[1]

The Disputes

[11] The disputes between the parties arose initially between the Company and the respondent, both acting through their respective firms of solicitors. Following the appointment of the Appraisers in early 2015, Maples and Calder, the firm of

[1] Paragraph 23 of the first affidavit of David St. George sworn and filed on the 6th October 2015 at volume B5 page B617 of the Appeal Bundle.

solicitors who then represented the Company, wrote to the Appraisers on 13th April 2015 regarding the issue of the minority discount and concluded –

> "We also agreed that the decision as to whether to apply a discount or not would be for the expert appraisers to decide, based on the specific facts of the matter at hand."[2]

Conyers, the solicitors who have represented the respondent throughout, responded to the Maples' letter on 21st April 2015 by informing the Appraisers that -

> "As a result of further research, we are now of the view that as a matter of law there is no minority discount under a dissent from a section 176 redemption."[3]

[12] The Company's position at this stage was that it was for the Appraisers to decide whether the discount should be applied to the redeemed shares, while the respondent's position was that the discount does not, as a matter of law, apply to a section 179 valuation. This aspect of the dispute remained unresolved and in fact became more intractable when the Company later took the position that it is for the court to decide if the Appraisers can apply a discount to the valuation of the redeemed shares.

[13] There was further correspondence between the Appraisers and the parties between June and September 2015 regarding the applicability of a minority discount to the valuation of the shares. The main exchanges were between BDO and Harneys, the new solicitors for the Company.

[14] BDO's position in the correspondence was that differences in the valuation process should be resolved by the Appraisers without resort to the courts. In their letter of 15th June 2015 to the other two appraisers (Deloitte and PWC) BDO said that -

> "The question whether a minority discount should be applied is just one of the issues which we must decide."

[2] Appeal Bundle B6 pages B1429-1430.
[3] Appeal Bundle B6 page B1432-1433. The two letters are exhibited to Mr. St. George's affidavit.

And later in the same letter –

> "In this case, my view is that the fair approach to valuation is that there should be no minority discount. I consider that the factors which point in the direction of a minority discount are substantially outweighed by the factors which point in favour of there being a *(sic)* minority discount."

[15] It is not surprising that Harneys did not share BDO's view that a minority discount should not apply to the valuation of the respondent's shares. They repeatedly insisted in correspondence that the appraisal process should be suspended because there were uncertainties regarding the correct interpretation of BVI law as they apply to the process. Harneys did not specify the uncertainties in any of their letters. They only became apparent when the Company filed and served its claim at the end of September 2015.

[16] I deduce from the correspondence, the pleadings and the submissions of counsel that there are two aspects to the dispute regarding a minority discount. Firstly, whether it applies, as a matter of law, to a valuation of shares redeemed under section 176 of the Act. Secondly, assuming that a minority discount can apply to a section 179 valuation, whether it is the court or the Appraisers who should decide on a case by case basis if the discount applies to a valuation under the section and how it is to be applied.

The Claim

[17] On 28th September 2015, the Company issued a claim in the Commercial Court seeking declarations regarding various aspects of the valuation process including a declaration that:

> "5. The fair value of the Mayhew Shares, determined in accordance with s. 179(9)(c) of the Act, must apply a discount for their minority or illiquid status."

The main focus of the appeal and practically all the arguments were directed at whether the court has jurisdiction to grant the declaration sought relating to the minority discount. I will deal with this issue first as it will have an impact on whether the court has jurisdiction to grant any or all of the other declarations.

[18] The claim was made under section 246 of the Act which provides that –

> **"246 (1)** A company may, without the necessity of joining another party, apply to the court, by summons supported by affidavit, for a declaration on any question of interpretation of this act or the memorandum or duties of **association of the company."**

[19] When the case came before Leon J he ordered that the following issue be tried as a preliminary issue –

> **"The question whether the court has jurisdiction to grant the relief prayed** by the Claimant in the Claim Form and Statement of Claim**." ("The Preliminary Issue"**)

The apparent simplicity of the Preliminary Issue belies the complexities involved in its resolution.

[20] We were reminded repeatedly by lead counsel for the Company, Mr. Vernon Flynn QC, that the Preliminary Issue was very narrow and was limited to answering the question whether the court has jurisdiction to grant the relief sought in the claim. To paraphrase his mantra - the issue is whether the court "could" grant the relief, not whether it "should".

[21] The Preliminary Issue was tried by Leon J on 2nd December 2015. On 31st January 2016 he delivered his judgment. He found that the court did not have jurisdiction to grant the relief sought by the Company. In coming to his decision, he decided that the declarations sought by the Company were all matters that fell within the mandate given to the Appraisers in the expert determination under section 179(9) and are matters to be resolved by the Appraisers during the course of the valuation. They **are not matters for the court's determination, and section** 246 of the Act does not give the court jurisdiction where none existed under section 179(9). Having found that the court does not have jurisdiction, the judge treated his decision as a final determination of the claim and ordered the Appraisers to resume the process of valuing the shares. He dismissed the claim with costs to the respondent.

The Appeal

[22] **The Company appealed the judge's order.** The notice of appeal covers 33 pages. It lists 13 grounds of appeal which, for convenience and with due deference, I have reduced to the following issue: Did the learned judge err in his application of the law relating to expert determination and conclude incorrectly that the court does not have jurisdiction to grant the relief claimed in the claim form and statement of claim.

The Law Relating to Expert Determination

[23] This appeal is concerned with the form of alternative dispute resolution known as expert determination. Expert determination usually arises in contractual situations where the parties agree that in the event of a dispute relating to the contract, the dispute should be determined by an independent person (the expert) whose decision shall be final and binding. Section 179 embodies the process of expert determination in a statutory context. The parties have not varied or added to the terms of the section 179(9) mandate in any significant way. The only issue that was debated and agreed was that BVI law should be applied to the valuation process. This does not vary the mandate because BVI law would have applied to the valuation process unless it was specifically excluded by the parties.

[24] The attraction of expert determination is that it is quicker, simpler and less expensive than arbitration or litigation. However, there are certain principles that the courts have developed over the years to regulate the procedure.

[25] The first principle is that once the dispute falls within the terms of the **expert's** mandate he has jurisdiction to deal with it and the parties are bound by his decision. The mandate in this case is set out in section 179(9). In Norwich Union Life Insurance Society v P&O Property Holdings Limited[4] Nicholls VC said -

> "**As a matte**r of principle, the issue on which a determination of the court is being sought is either within the matters remitted to the expert for his

[4] [1993] 1 EGLR 164 at page 166.

decision or it is not. If it is, then the court will not intervene either before or after, unless there has been fraud or collusion."

[26] The second principle is that if the mandate does not contain principles and procedures for carrying out the valuation, and none are agreed by the parties, the expert will be free to determine how he proceeds and the court will not intervene to tell him how to conduct the valuation, neither before nor after the valuation. The parties are bound by whatever he decides and the court will intervene only if there is fraud or collusion. In one of the leading cases on expert determination, Barclays Bank plc v Nylon Capital LLP,[5] Thomas LJ summed up this aspect of the procedure as follows:

> "[37] As I have said there is no procedural code for expert determination, in contradistinction to arbitration. The activities of an expert are subject to little control by the court, save as to jurisdiction or departure from the mandate given. Unless the parties specify the procedure, the expert determines how he will proceed; it is rare for what might be perceived as procedural unfairness in an arbitration to give rise to a ground for challenge to the procedure adopted by an expert. (See Kendall, Freedman and Farrell *Expert Determination* (4th edn, 2008 Ch 16.)
>
> [38] I therefore accept that if the parties have chosen such a process and the dispute falls within the jurisdiction of the expert, then they must be held to it, whatever view might be taken as to the appropriateness of the procedure for the matters submitted to the expert."

[27] Hoffman LJ (as he then was) described this aspect of the procedure as a matter of substantive law in Director of Telecommunications and another v Mercury Communications Ltd,[6] and in illustrating the difference between the substantive law and procedural convenience[7] he said at page 1139 –

> "I can illustrate the difference in this way. The parties agree that a firm of accountants shall determine the value of a parcel of shares. They do not prescribe any particular principle of valuation, such as allowing for a discount for minority interest. In such a case, the court will not intervene to decide how the valuation should be done. Neither in advance of the valuation nor afterwards. The parties have agreed to accept the

5 [2012] 1 All ER (Comm) 912.

6 [1994] CLC 1125.

7 Procedural convenience is discussed at paragraphs 31 et seq. below.

accountants' valuation and in the absence of fraud or collusion they are bound by whatever he decides."

[28] A good illustration of how the substantive law principle works is Premier Telecom Communications Group Ltd and Darren Ridge v Darren Webb.[8] The case involved the valuation of shares by the appointed experts, Grant Thornton. The appellants were dissatisfied with the valuation by Grant Thornton and applied to the court to set it aside on account of errors made by the experts. The claim was dismissed. Lord Justice Moore-Bick found at paragraph 26 of the judgment –

"In my view these complaints all concern maters that were within the scope of Grant Thornton's mandate […] I am not persuaded that Grant Thornton did make errors of the kind alleged, but even if they did, I do not think it is arguable that they thereby departed from their mandate."

[29] Lord Justice Moore-Bick also made the point at paragraph 12 that –

> "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 the chosen expert."

Since the Court of Appeal found that the alleged errors in the case were within the expert's mandate it declined to intervene and dismissed the appellant's appeal against the judge's order dismissing the claim.

[30] On the other hand, when the dispute falls outside the expert's mandate, or the expert departs from the instructions in the mandate in a material respect, the court will intervene and set aside the determination.[9]

[8] [2014] EWCA Civ. 994.

[9] See: Premier Telecom Communications Group Ltd, per Moore-Bick LJ, at paragraph 8.

[31] The third principle, and the one that is most relevant to this appeal, is where there is a dispute during the course of the valuation and the parties cannot agree whether it is to be decided by the experts or the court. If the dispute relates to the interpretation of the Appraisers' mandate, the court generally has jurisdiction to intervene and interpret the mandate. The issue then becomes whether the court should intervene before the experts conduct the valuation or await the outcome of the experts' work and then intervene, if requested, to see if they applied the principles correctly. This is the rule of procedural convenience.[10]

[32] There is also the further question of who decides if the dispute that has arisen relates to matters that are within the exclusive jurisdiction of the appraisers (as in Premier Telecommunications Group), or to matters relating to the scope or interpretation of the appraisers' mandate, and whether they acted within the scope of the mandate (as in Barclays Bank plc which is discussed in detail below).

[33] The decided cases provide guidance on determining firstly, the type of dispute that has arisen between the parties, and secondly, who should resolve the dispute – the experts or the court.

[34] In Mercury Communications Ltd,[11] the dispute concerned the construction of condition 13 of a telecommunications licence granted to British Telecommunications. Lord Hoffman dissented on the point of construction of condition 13 but when the case went on appeal to the House of Lords their Lordships said that his judgment on the issue was correct.[12] The headnote contains a note of Lord Hoffman's decision:

> "The issues between the parties concerned the construction of parts of condition 13, which was not a question for the decision of the director but a point of law. The question then arose as to whether it was procedurally convenient to entertain the application for declarations at that stage."

[10] See: Mercury Communications Ltd, per Hoffman LJ, [1994] CLC 1125 at page 1130.
[11] ibid.
[12] See: Barclays Bank plc, per Thomas LJ, at paragraph 33.

[35] At page 1139 of the judgment Lord Hoffman drew a distinction between the principles of substantive law and procedural convenience. **–**

> "[...] when parties have agreed to appoint someone to determine a question in dispute, they should not pre-empt his decision by asking the court to decide the matter in advance. It is however important to notice that there are two separate principles involved. One is a matter of substantive law and the other a matter **of procedural convenience.**"

[36] The distinction between the principles of substantive law and procedural convenience was taken up by the Court of Appeal in Barclays Bank plc[13] where the appointed expert was required to allocate profits under clause 9 of a partnership agreement. Clause 26.1 of the agreement contained an expert determination agreement. A dispute arose about whether profits on initial capital investments brought into the partnership should be allocated under clause 9. Proceedings were brought by the bank for a declaration that it was under no obligation to pay to the defendant profits on its initial capital investments. The defendant sought to stay proceedings on the ground that the dispute should be resolved by the expert under the expert determination agreement in clause 26.1. The judge refused to stay the proceedings and the defendant appealed. The Court of Appeal dismissed the appeal finding in effect that the jurisdiction of the expert conferred by clause 26.1 was to determine how profits were to be allocated, but the disputed issue was whether the profits in question were to be allocated under clause 9. The question of how the profits would be distributed (once allocated) would arise only after the initial question whether they fall under clause 9 was answered by the court. This raised a real and not a hypothetical dispute on a point of law and as such it was for the court to decide if it was just and convenient to determine it or leave it to the expert to determine it first.

[13] ibid.

[37] Having made the findings that the dispute was real and involved a question of law that the court should resolve, Thomas LJ outlined the procedure that the court should adopt at paragraph 42 of his judgment-

> "**[42]** In my view it is not necessary to go further than the statement of principle by Hoffman LJ in *Mercury Communications*; it does not assist to describe the circumstances in which a court will intervene as "**exceptional**". The court has to determine first whether it is faced with a dispute which is real and not hypothetical and then if it is real, whether it is in the interests of justice and convenience to determine the matter in issue itself rather than allowing the expert to determine it first. The matter in issue in this appeal is the issue of jurisdiction. In my view, very different considerations apply to those which apply where the issue is one relating to interpretation of the mandate given to the expert in relation to a dispute where it is accepted the dispute is within his jurisdiction."

[38] To sum up, where a dispute arises during the valuation process, the court must decide **firstly if the dispute falls within the expert's mandate.** If it does, the court should not intervene. If the dispute is jurisdictional, such as the interpretation of **the expert's mandate, the court must determine that issue, and it is a matter of** procedural convenience whether it does so before or after the expert completes his work.

Applying the principles to the facts

[39] I will now apply the relevant principles to the facts of this case bearing in mind that the dispute between the parties is on two levels: the jurisdictional level of whether a minority discount applies to a section 179(9) valuation; and if it applies, whether it should apply **to the valuation of the respondent's shares**.

The Jurisdictional Dispute

[40] Section 179(9) is silent on the applicability of the minority discount. In the instant appeal, there is a real dispute between the parties as to whether it applies to the **valuation of the respondent's shares. T**he dispute bears strong resemblance to the disputes in Barclays Bank plc about the construction of clause 26.1 of the partnership agreement and the construction of condition 13 of the

telecommunications licence in the Mercury Communications case. There are other examples in the cases that were cited to this Court.

[41] The issue has never been addressed directly by the BVI courts but in H.R.H Prince Faisal Bin Khalid Bin Abdul Aziz Saud v PIA Investments Limited,[14] a case before the Commercial Court concerning a section 179(9) valuation, albeit on different aspects of the process, Bannister J seems to have proceeded on the assumption that a minority discount could apply to a section 179(9) valuation. At paragraph 25 of his judgment he said –

> "It is far from obvious to me that where shares are expropriated in these circumstances an undiscounted valuation will necessarily provide the right solution in every single case. In this case, for example, Prince Faisal deliberately turned himself into a minority shareholder. No doubt he had excellent reasons for doing so, but I do not see why, in the circumstances, it is *necessarily* fair that he should be paid out on a non-discounted basis. I can see good arguments why he should be but an argument is not the same thing as a universal rule."

[42] Justice Bannister's comments were obiter and are not binding, but they provide good guidance. All that the learned judge was saying was that in a section 179(9) valuation a minority discount can be applied but it is not a universal rule. I agree with him entirely. It must be that a minority discount can, as a matter of law, be applied in a section 179(9) valuation, and I so find. If this was the narrow issue of jurisdiction that the court was being asked to decide, the answer would clearly be in the affirmative – that the court has jurisdiction to decide the question in essence whether the consideration of a minority discount falls within the scope of the appraisers' mandate under section 179(9). This is also the answer to the "could" aspect of Mr. Flynn's argument.

[43] But this conclusion does not mean that the Preliminary Issue succeeds on this point. The Preliminary Issue is whether the court has jurisdiction to grant the relief sought by the Company in the claim form and statement of claim. Based on my analysis above, I find that the court has jurisdiction to declare that a minority

[14] BVIHCV(COM)2011/0003 (delivered 25th July 2011, unreported).

discount can apply to a section 179(9) valuation. But this is not the declaration that is sought in the claim form and statement of claim. The Company is asking the court to declare that "*The fair value of the Mayhew shares, determined in accordance with s. 179(9) of the Act, must apply a discount for their minority and illiquid status*". Implicit in the wording of the declaration is that the power to apply the discount is contained in section 179(9) and the Company is asking the court to declare that the Appraisers must apply the discount to the valuation of the respondent's redeemed shares.

[44] This raises a wholly different question leading to a consideration of the peculiar facts and circumstances surrounding the holding of the respondent's shares. This does not engage a consideration of the scope or interpretation of the mandate of the appraisers nor even a question of the interpretation of section 179(9). It truly turns on the question of not whether a minority discount could as a matter of BVI law be applied, but rather, whether in the context of Mayhew's minority shareholding, a minority discount should apply. The answer to this latter question in the context of the jurisdiction of the court would, on the authorities, be that that would be an issue falling within the scope of the appraiser's mandate and thus one in respect of which the court has no jurisdiction to intervene. Accordingly, the declaration as sought is not one which the court has jurisdiction to grant.

[45] This is not something that the court has power to do and I am not prepared to direct the Commercial Court to adjudicate that declaration.

Should the Discount Apply?

[46] This finding is sufficient to dispose of the declaration sought in respect of the minority discount but out of deference to the very full and impressive submissions by counsel for the parties on the point whether a discount should apply to the valuation of the respondent's shares, including their request for general guidance on the point, I will say something on the point.

[47] In paragraphs 23-29 of this judgment, I made the point with reference to the decided cases that if the expert's mandate does not contain principles and procedures for carrying out the valuation, and none are agreed by the parties, the expert will be free to determine how he proceeds and the court will not intervene to tell him how to conduct the valuation, neither before nor after the valuation. The parties are bound by whatever he decides and the court will intervene only if there is fraud or collusion. In this case, the mandate in section 179(9) is silent on the application of the minority discount and it is therefore a matter that falls within the remit of the Appraisers to decide whether one should be applied to the valuation of the respondent's redeemed shares, and if it should, the details of how it is to be applied. Referring again to Bannister J in the Prince Faisal case[15] –

> "The cases [on expert determination] appear to me to involve some fine distinctions, but for present purposes I think it is sufficient if I say that in my judgment the words 'fair value of the Shares' do not require legal analysis. They are words of plain English and the valuer will apply them accordingly."

[48] This aspect of the dispute between the parties is not a real dispute on a point of law as in cases such as Barclays Bank plc v Nylon. I agree with Leon J's overall finding that it is for the Appraisers to determine if a discount should be applied to the valuation of the respondent's shares and that the court should not intervene in the process. I would add that if the Appraisers misapply the procedures or otherwise go outside of their mandate, the court will then have jurisdiction to intervene.

Other Declarations

[49] The remaining declarations sought by the Company fall into three categories. In dealing with them I will use the numbers assigned to them in the claim form and statement of claim.

[15] ibid at para 41.

[50] Firstly, declarations 1 and 2 relate to matters in the statutory process in section 179(9) and the **court's confirmation** is sought that these matters will be included in the valuation process. The second category is declarations 3 and 4 seeking a limit on the fair value of the shares to US$1.17 per share, or alternatively, if the appraised value exceeds $1.17 per share, that the Appraisers give reasons for their decision. The third category is declaration 6 which seeks declarations relating to the methodology of the appraisal process and the procedures to be followed by the Appraisers. I will deal with these declarations, albeit in a very summary way.

[51] Declaration 1 seeks **a declaration that the fair value of the respondent's shares** means the estimated price for the transfer of the shares between the Company and the respondent and reflects their respective interests, rights and restrictions in the shares before the redemption and excluding any appreciation or depreciation that is induced by the redemption. This is nothing more than another way of saying what is already in section 179(9)(c). There are no real disputes regarding these matters. They are matters that are in the section and there is no basis for a court to make declarations on them.

[52] The same is true of declaration 2. item (i) (the date for fixing fair value) was agreed by the parties in correspondence.[16] Items (ii), (iii) and (iv) are undisputed matters arising out of section 179(9)(c). Item (v) lists three matters that the Appraisers will have to consider if they decide that the minority discount should be applied to the valuation of the re**spondent's** shares. The court does not have jurisdiction to make declarations in respect of any of these matters.

[53] As stated in paragraph [50] above declarations 3 and 4 seek to place a limit on the fair value of the shares to US$1.17 per share, or alternatively, if the appraised value exceeds $1.17 per share, that the Appraisers give reasons for their decision.

[16] Appeal Bundle B5/33/B620.

These are matters for the Appraisers. They are not disputed matters of law and the court does not have jurisdiction to resolve them.

[54] The reliefs sought in declaration 6 are wide ranging and cover matters such as transparency, impartiality and reasonableness by the Appraisers in the valuation process, directions as to matters that they should and should not consider, and avenues for exchanging information between the Appraisers and the parties. I make the following comments about these requests:

(a) Section 179 is an expert determination procedure and consistent with this procedure the draftsperson did not lay down procedures for the appraisers to follow. As a result, the Appraisers determine how they will proceed and the court will not intervene to tell them how to conduct the appraisal.[17]

(b) There is no evidence that there were disputes regarding any of the matters sought in declaration 6, far less a "real dispute" as required by the authorities for the court to intervene.

(c) I do not accept the Company's submission that the court's wide jurisdiction under section 246 allows it to take jurisdiction over a matter in the valuation process when that jurisdiction is not available under section 179(9). The Company must establish jurisdiction under the section or at common law, but not by using section 246 to create jurisdiction where none exists.

[55] Bearing all of these matters in mind as well as the guidance in the authorities I find that the court does not have jurisdiction to grant the reliefs sought in declarations 1, 2 3, 4 and 6. The function of the courts under section 179(9) is not to resolve non-existent or hypothetical disputes, nor to provide guidance to the Appraisers for doing their job under the section. If the Company had wanted these matters to be included in the Appraisers' mandate it should have included them in the Letter of Engagement. I find that the court does not have jurisdiction to grant the declarations sought in numbers 1, 2, 3, 4 and 6 of the claim form.

[17] See paragraph 26 where the relevant passage from the Barclays Bank case is set out.

[56] The declaration sought in 5 is not available in the form proposed by the Company. The only declaration that the High Court can make is a general declaration that in a valuation carried out under section 179(9) a minority discount can be applied.[18] This is not the declaration that was sought by the Company and therefore I do not think they were successful on any aspect of the appeal.

[57] The answer to the Preliminary Issue is that the court does not have jurisdiction to grant the declarations claimed in the claim form and statement of claim.

Interest

[58] Before setting out the proposed order of the court I would like to record that during the hearing Mr. Flynn QC took instructions and confirmed that the Company would pay interest on the amount that is found to be owing to the respondent for the shares at LIBOR from time to time from 15th June 2015 until payment in full.

Conclusion

[59] In all the circumstances I would dismiss the appeal and confirm the orders made by the learned judge.

Order

[60] I would make the following orders:

1. The appeal is dismissed and the orders of the learned judge in the court below are confirmed.

2. The respondent is awarded his costs of the appeal such costs to be assessed if not agreed within 21 days of the date of this order.

[18] See paragraphs 41-45 above.

[61] The court expresses its gratitude to counsel on both sides for their very thorough and helpful written and oral submissions.

Paul Webster
Justice of Appeal [Ag.]

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise Esther Blenman
Justice of Appeal