Bermuda Minority Shareholder Protection and Appraisal Rights: Acquisitions, Takeovers and Squeeze-outs

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Shareholders of companies that are the subject of a takeover, amalgamation or merger have certain intrinsic rights in the event that they dissent. Generally, dissenting shareholders have a right to have the 'fair value' of their shares assessed by the Courts and a right to have their shares purchased at a 'fair value'. This article aims to provide general information on various shareholder appraisal rights under Bermuda law.

Part 1 – Statutory Overview

Court-Approved Scheme of Arrangement (Section 99)

A Section 99 scheme of arrangement (compromise or arrangement) must be approved by a majority in number representing 75% in value of the shareholders (or class of shareholders) present and voting either in person or by proxy at the requisite general meeting to approve the scheme. Following shareholder approval, the scheme must be sanctioned by the Court and if it is sanctioned then it is binding on all of the shareholders (or class(es) of shareholders).

Whilst the Bermuda Companies Act 1981 (**Companies Act**) does not provide express dissenting shareholder or appraisal rights, those affected by the scheme are entitled to appear and raise objections at the hearing of the petition for the Court order which the Court takes into account. The Court will only sanction a scheme if it is reasonable, and will be concerned to see that the shareholders approving the scheme are fairly representative of the class or body of affected shareholders. The Court has wide discretionary powers and, for example, an order can be made by the Court in relation to those who dissent from the scheme, or if the Court is not satisfied then it can refuse to sanction the scheme altogether. It is important to note that the sanctioning of a scheme is not a rubber stamping exercise.

A copy of the Court order sanctioning the scheme must be lodged with the Bermuda Registrar of Companies and the scheme will become effective and binding on all of the shareholders, resulting in the acquisition of the target company's shares.

Section 102 Compulsory Acquisition/Squeeze-out (10%)

Under Section 102 of the Companies Act, if an offer to acquire shares (or any class of shares) of a company is approved by the holders of 90% in value of the shares (which are the subject of the offer) within four months of the offer then the acquirer can, within two months of the date of the approval, compulsorily acquire the shares of dissenting shareholders by giving notice to

such shareholders of the compulsory acquisition of their shares. A 'dissenting shareholder' in the context of a squeeze-out includes a shareholder who has not assented to the scheme or contract for acquisition of shares or any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with any such scheme or contract.

A dissenting shareholder has one month from the date on which the compulsory acquisition notice was given in order to make an application to the Court, which has power to make such orders as it thinks fit, to order to the contrary. Dissenting shareholders do not have express appraisal rights under Section 102.

If no application to the Court is made, then on the expiry of one month from the date on which the compulsory acquisition notice was given, the acquirer becomes entitled to acquire the subject shares (on the same terms as those offered to the shareholders who accepted the offer).

Dissenting shareholders also have the right under Section 102 to serve a notice on the acquirer requiring it to acquire their shares on the terms of the earlier offer, or on such terms as may be agreed or as the Court (on the application of either the acquirer or the dissenting shareholder) thinks fit to order. This right must be exercised within 3 months from the giving of notice by the acquirer that the 90% threshold has been reached.

Section 103 Alternative Squeeze-out (5%)

Section 103 of the Companies Act allows for the holders of not less than 95% of the shares (or any class of shares) in a company to give notice of the intention to acquire their shares to the remaining shareholders (or class of shareholders), on the terms set out in the notice. The purchaser must offer the same terms to all shareholders in respect of shares to be acquired.

Any shareholder who receives an offer notice under Section 103 has the right to apply to the Court to appraise the value of their shares within one month of receiving the offer. Within one month of the Court's appraisal, the purchaser is entitled to either acquire all the shares involved at the price fixed by the Court or choose to cancel the offer. There is no appeal process available in relation to the Court's appraisal decision.

If the Court has appraised any shares under Section 103 and the purchaser has, prior to the appraisal, acquired any shares, then if the price of the shares that was paid is less than that appraised by the Court the purchaser must either pay the difference to the shareholder(s) in the price paid and the price appraised, or cancel the offer, return the shares to the shareholder(s) and repay the shareholder(s) the purchase price. This must be done within one month of the Court appraising the value of the shares.

Merger or Amalgamation (Section 106)

The directors of each amalgamating or merging company must submit the amalgamation agreement or merger agreement for approval by the shareholders. A notice of a meeting of the shareholders must be sent to each shareholder of each amalgamating or merging company and include (or be accompanied by) a summary or copy of the agreement, state the fair value of shares and state that a dissenting shareholder is entitled to be paid the fair value of his shares.

Unless the bye-laws otherwise provide, the resolution of the shareholders approving the amalgamation or merger must be approved by a majority vote of 75% of those voting at the meeting and the quorum necessary for such meeting is two persons holding (or representing by proxy) more than one-third of the issued shares.

Any shareholder who did not vote in favour of the amalgamation or merger and who is not satisfied that they have been offered fair value for their shares can apply to the Court to appraise the fair value of their shares within one month of the issuance of the notice (of the shareholders' meeting).

The Companies Act provides that within one month of the Court appraising the fair value of any shares, the company is entitled either to pay to the dissenting shareholder an amount equal to the value of their shares as appraised by the Court, or to terminate the amalgamation or merger in accordance with the Companies Act. This determination is subject to the amalgamation agreement or merger agreement which may provide that at any time before the issue of a certificate of amalgamation or merger the agreement may be terminated by the directors of an amalgamating or merging company, notwithstanding approval of the agreement by the shareholders of all or any of the amalgamating or merging companies.

Where the Court has appraised any shares and the amalgamation or merger has proceeded prior to the appraisal then, within one month of the Court appraising the value of the shares, if the amount paid to the dissenting shareholder for their shares is less than the value appraised by the Court then the amalgamated or surviving company must pay the shareholder the difference between the amount paid and the value appraised by the Court.

There is no appeal process available in relation to the Court's appraisal decision under this Section. The costs of any application to the Court are in the discretion of the Court.

Part 2 – Case Law Developments

Although there is no statutory guidance on what should be considered by the Court when determining 'fair value', the question has been considered by common law and Bermuda has a developing body of case law which is helpful in understanding what the Court's role is in relation to the statutory protections described above and how 'fair value' is determined.

MFP-2000, LP v Viking Capital Limited and MISA Investments Limited [2014] Bda LR 6

In MFP-2000, LP v Viking Capital Limited and MISA Investments Limited, the Court was asked to determine whether, in relation to a Section 103 squeeze-out, the holders would be entitled to acquire the remaining 5% of the shares if they cease to hold the requisite statutory threshold of (not less than) 95% of the shares in the company before acquiring the remaining 5%. The Court confirmed that the sole object of statutory interpretation is to arrive at the legislative intention. In light of this it found that where Section 103 provides a mechanism whereby the holders of not less than 95% of the shares in the company can purchase the shares of the minority that means the holders of (not less than) 95% of the shares at the date when a Section 103 notice is given. The Court therefore confirmed that the majority need not retain their shares for the duration of time until the minority of shares have been acquired or, alternatively, the notice cancelled. The majority holders were found to be entitled to acquire the minority shareholding, even though they no longer satisfied the 95% threshold requirement.

MFP-2000 LP v Viking Capital Ltd and Misa Investments Ltd [2014] Bda LR 73

The Court of Appeal considered the previous judgment in this case (see summary above) and confirmed that the intention of the legislature was to enable holders of virtually all of the shares of a company responsible for the notice and acquisition mechanism to give full effect to it whilst ensuring the fair treatment of minority shareholders as to price. The Court of Appeal also confirmed that the Companies Act allows for the 95% majority holders at the time of the service of a Section 103 notice to rely on its provisions even if they have disposed of their majority shareholding before completion of the appraisal process. This was succinctly put by the Court of Appeal as follows "*the structure and wording of section 103 oblige and entitle 95% majority holders who have served a section 103(1) notice to acquire the remaining minority holdings, whether or not they remain 95% majority holders at the time of any appraisal invoked by the minority holders*". The Court of Appeal further agreed that the dominant purpose of Section 103 was the facilitation of corporate restructuring whilst also providing fair treatment of minority shareholders.

Mehta and MFP-2000 LP v Viking River Cruises Ltd and others [2014] Bda LR 99

In this case, the Plaintiffs (Nitin T Mehta and MFP-2000, LP) applied for summary judgment in respect of their claim for payment *pro rata* of a dividend which was declared. A dividend was declared by the company and a Section 103(1) notice was served on the Plaintiffs on the same day. Subsequently the company resolved to increase the dividend by approximately US$2M. The Plaintiffs argued that they were entitled to receive their *pro rata* share of the dividend and would remain entitled irrespective of whether their shares were purchased pursuant to the Section 103 mechanism. Section 103(3) was considered in the judgment and the Court highlighted the fact that Section 103(3) presents the majority shareholders with a choice - they can either elect to acquire the shares at the price fixed by the Court or, alternatively, cancel the notice given under Section 103(1). The Court confirmed that until that choice has been made, the majority shareholders' entitlement to the shares is only provisional. The Court was satisfied that the legislature did not intend that majority shareholders be entitled to dividends on shares declared before they make their election.

The Court found that entitlement to a dividend in relation to majority shareholders may "relate back" but that if that was the case it would relate back to the majority shareholder's election under Section 103(3) to acquire shares once appraised by the Court, rather than relating back to the date of service of the Section 103(1) notice. The application for summary judgment was successful and the Plaintiffs were found to be entitled to payment of their *pro rata* share of the dividend declared by the company.

Artha Master Fund, LLC v Dufry South America [2011] Bda LR 17

In Artha Master Fund, LLC v Dufry South America, Artha Master Fund, LLC declined to accept the assessment of the fair value of its shares presented to it for the purposes of a merger and amalgamation agreement and invoked its statutory right to seek the Court to appraise the fair value of its shares pursuant to Section 106(6) of the Companies Act. The case is helpful to the extent that the Court considered the scope of expert evidence in relation to the Court's role in determining 'fair value' pursuant to Section 106(6). The Court indicated that the scope of the expert evidence should be limited to the issue of the fair value of the shares to be contrasted with the fair value as presented by the company to the shareholder and that the role of the Court was to determine whether that appraisal is greater or not. The Court also indicated that although the Companies Act does not

provide for an appeal mechanism, it would be "*at a minimum strongly arguable*" that any party to an appraisal action that contends that their fair trial rights have been contravened may seek redress under section 15 of the Constitution.

Golar LNG Limited v World Nordic SE [2011] Bda LR 9

In this case, Golar LNG sought an appraisal of its shares in BW Gas Limited under Section 103 of the Companies Act after World Nordic SE had acquired in excess of 95% of the shares and issued a notice of its intention to acquire the outstanding shares pursuant to Section 103. The Court considered the question as to the proper approach to valuation and it determined that when appraising the shares for 'fair value' the Court should have regard to the 'market value' when available, but also will have to have regard to "*all the relevant information that is put before it*". The Court went on to confirm that there is no prescriptive rule applicable to all cases and that "*valuation is as much an art as a science*". The question of burden of proof was also considered by the Court which determined that it is 'neutral' and that it was up to the Court to assess the value such that neither side bears a burden to establish the value which it is presenting, although if a party asserts a factual situation it must prove it.

The Court accepted that the company's quoted share price should be considered the principal method to assess the market value of the minority interest and accepted that the share price fell "*within a reasonable range of values*", but that a minority discount should apply to reflect 'fair value'.

The body of case law in Bermuda demonstrates that this is an evolving area of law which will be further established as shareholders continue to exercise their statutory rights and mergers and acquisitions become more popular.

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