



Approach to unchallenged expert evidence in the Cayman Islands

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In the recent decision of *Re Xingxuan Technology Ltd (unreported, Kawaley J, 9 September 2024)*, the Grand Court of the Cayman Islands determined that the fair value of the dissenting shareholder's shares was approximately 659% higher than the merger consideration offered by the company. The decision provides important guidance in relation to how the court will approach unchallenged evidence from an expert witness.

Background

Xingxuan Technology Ltd was a privately held Cayman Islands company which was sold by way of a statutory merger. Upon dissenting from the merger, the sole dissenting shareholder became entitled to have the fair value of its former shareholdings in the company judicially determined under section 238 of the Companies Act.

In 2023, the dissenter obtained an order for an interim payment (for more information, read [Ogier's overview of the relevant judgement](#)) which the company failed to comply with and attorneys for the company ceased to act. The court ordered that the trial of the petition proceed on an unopposed basis unless the company engaged new attorneys. The company failed to do so and was therefore not permitted to participate in the proceedings. The trial of the petition proceeded on an unopposed basis with only the dissenter's expert, having submitted a written report, attending the hearing to answer any questions to court had.

The decision

The court accepted the dissenter's expert's valuation of the company which was based on a combination of sales data (GMV) for the company and its competitors, and prices paid for these companies' shares in pre-merger financings. Applying a discount of 10% to reflect a lack of control and particular rights associated with the dissenters' shares, the court determined that the fair

value of the dissenter's shares was US\$318.69 million (an uplift of 659%).

The court's approach to uncontested expert evidence in s238 proceedings

The court considered and endorsed English authorities and stated that in considering whether to accept uncontested expert evidence, the court must have regard for the integrity of the judicial process, which requires regard to be had not merely to fairness to the unchallenged witness but also for the court's decision being seen to be a credible one as well. The latter obliges the court only to accept expert opinions which withstand an appropriate level of scrutiny.

Justice Kawaley acknowledged the reliance of the court on expert evidence in making a fair value determination but noted that even in the absence of a competing expert, the court must still: (a) determine whether, and to what extent, it accepts an expert's evidence in relation to each relevant issue, and (b) if necessary, substitute its own view for that of an expert to such extent as the relevant expert evidence is found to be unreliable.

In circumstances where expert evidence is uncontradicted and unchallenged in any way, the court will not reject the evidence unless the opinion either:

- (a) is unsustainable either on its face or having regard to the underlying facts; or
- (b) relates to an issue the expert has been afforded an opportunity to address at or before trial; and, additionally
- (c) the court must have regard to the commercial rationality of the appraisal result contended for by the expert evidence viewed as a whole

The court did not find the dissenter's expert evidence in this case to be unsustainable on its face or inherently improbable when commercially viewed in the round.

What is the general application?

Although this decision relates to a determination of fair value under section 238, that the court will only accept expert opinions which withstand an appropriate level of scrutiny is generally applicable to all cases involving expert evidence, whether contested or uncontested. Moreover, the court will not decline to substitute its own view for that of the expert if it considers the evidence to be unsustainable, improbable or lack commercial sense. Accordingly, litigants should fully expect the court to thoroughly test any unchallenged expert evidence and not just accept it at face value without being satisfied that it withstands the appropriate level of scrutiny.

How Ogier can help?

Ogier acted for the dissenting shareholder in this matter and presently acts for dissenting shareholders in multiple ongoing section 238 matters. Our cross-border team of appraisal rights specialists are well placed to provide legal advice and representation in fair value proceedings in the Cayman Islands.

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