

Valuations can play a key role in contentious cases

Insights - 29/06/2021

As seen on [Global Banking and Finance Review](#). This article was co-written by Colin Everson, Associate Managing Director, Duff & Phelps, A Kroll Business, and David Welford, Partner, BVI Dispute Resolution, Ogier.

As business models, corporate structures and accounts become ever more complex, assessing the value of a given firm or asset at a particular point in time is increasingly challenging. The discipline of business valuation has developed to provide such assessments, combining scientific methods of financial analysis with deep market knowledge and professional judgement to provide robust measures of value. Commercial litigators are likely familiar with the broad concepts involved - but perhaps not with how valuation principles can be deployed in contentious cases.

Just as there is an almost infinite number of ways for a dispute to arise, the circumstances in which valuation might come into play are extremely varied. In one recent case, Duff & Phelps was charged with calculating the loss of marketable goodwill suffered by a UK university denied registration by a third level regulator (denied unlawfully, as the litigation eventually established). But cases are not always quite so discrete. In our experience, the typical scenarios where valuation can assist in the resolution of disputes include actions for fraud or recovery of debt, disputes following a merger or acquisition, insolvency proceedings and unfair prejudice petitions pitting minority against majority shareholders.

Take fraud, for example. Your client seeks interim measures to prevent dissipation of assets. The value of particular assets frozen or offered as fortification of the cross undertaking can be key. We have seen several cases recently in which the litigators successfully obtained freezing orders over shares in an overseas company, but uncertainty persisted as to the value of those shares. In such circumstances, getting an accurate and independent valuation can put those issues to bed, allowing the legal team to get on with the substance of the claim.

In January, it was reported abnormal trading conditions are generating and sharpening disputes over business valuation in the mergers and acquisitions context. The unfortunate buyers of a company in February 2020 may find themselves in possession of a far less attractive enterprise

than envisaged. Whether or not they have a remedy depends in part on disentangling the effects of an almost unprecedented business environment from underlying issues for which warranties or indemnities might compensate.

In any instance, planning ahead is advisable wherever possible. Often, engaging a valuation team from the outset will prevent future complications arising further down the litigation process.

Meeting the client's needs - and the court's

The independence of the valuation exercise is mission critical. Valuers must be alert to potential conflicts of interest that might arise if, for example, their firm carries out both audit and valuation work and to maintain a degree of arm's-length objectivity.

Of course, in the litigation context, independence is particularly important. The obligations of a valuation expert are to the court, not to fight the client's case. At the same time, the expert must be prepared to robustly defend their methods and conclusions against challenge from the other side, in particular when giving live evidence. The credibility of any analysis depends on the expert's ability to stand behind it without lurching into advocacy of the client's position.

Lawyers will recognise the tension created by professional obligations sometimes outweighing their duty to the client - and there are other similarities between the outlook of the two professions. The fundamental services provided to their clients by both litigators and valuers are the protection, restoration and maximisation of value - goals at the very heart of corporate society. Ultimately, we are all in the value business.

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