

Singapore Court of Appeal Clarifies that Third-Party Offers for Shares Not Invariably Best Evidence of Fair Market Value

The Court of Appeal has clarified that, while the court should take into account evidence of a genuine third-party offer to acquire shares in determining the fair market value of the shares, the offer is not invariably the best evidence of the shares' fair market value. Appropriate weight must in each case be ascribed to the offer based on its specific terms and nature: *Abhilash s/o Kunchian Krishnan v Yeo Hock Huat and another* [2019] SGCA 14.

Our Comments

Very often, parties to a transaction do not give much thought when using the term "fair market value" during negotiations. They may be under the mistaken impression that valuation is just a process, or that the financial accounts will provide an accurate position, or that the valuers will be able to sort the matter out. Quite the opposite, not only is there no magic formula or standard test, it is a fact-sensitive exercise that parties need to undergo before being able to arrive at a "fair market value". It is therefore important that parties to a transaction appreciate that every seemingly inconsequential fact can potentially lead to significant value being won or lost.

This decision is instructive as it makes clear that the court can only begin to ascribe informational value to a third-party offer when the offer is one made at arm's length, is genuine, and not speculative or conditional.

This update takes a look at the Court of Appeal's decision.

Background

The key facts relevant to the issues discussed in this update are summarised below.

The appellant in this appeal was one Abhilash s/o Kunchian Krishnan ("Mr Abhilash"), a minority shareholder of JCS-Vanetec Pte Ltd ("JCSV"), the second respondent. The first respondent, who was the majority shareholder of JCSV, was one Yeo Hock Huat ("Mr Yeo").

Mr Abhilash commenced court proceedings against JCSV and Mr Yeo in which he claimed that Mr Yeo had conducted the affairs of JCSV in a manner oppressive to him and in disregard of his interests as a shareholder within the meaning of section 216(1) of the Companies Act, and sought an order that his shareholding in JCSV be purchased by Mr Yeo on a fair market valuation.

On the first day of the trial of the action, the parties recorded a consent order to the effect that the issue of liability for minority oppression would be dispensed with, and that the court would, at the trial, determine the fair market valuation of JCSV for the purposes of sale and purchase of Mr Abhilash's shares in JCSV.

Before the High Court, Mr Abhilash's principal submission was that JCSV should be valued on an income basis. The High Court Judge took the view that the income approach was inapplicable as JCSV was not a going concern, and accepted Mr Yeo's submission that the net assets basis of valuation was the applicable approach.

Mr Abhilash appealed to the Court of Appeal against the High Court Judge's decision.

Issue before the Court of Appeal

Before the Court of Appeal, Mr Abhilash focused his appeal on a narrower question, i.e. whether a certain third-party offer for the purchase of shares in JCSV should be relied upon as the basis for valuing the shares in JCSV.

He argued that fair market value is a measure of what a company can fetch in the market and, in determining this, the court must take into account genuine offers made by third-parties because they are the "best evidence" of fair value.

In this case, the third-party offer in question was an offer made in 2015 or 2016 by one Shanghai Ossen Aviation Technology Co, Ltd ("Shanghai Ossen") to purchase all the shares in JCSV for a "tentative price" of \$50 million. As the Court of Appeal noted, two significant features of the Shanghai Ossen offer were that:

- It was conditional upon the conduct of due diligence, which was never carried out.
- The consideration of \$50 million was not strictly an offer to acquire the shares of JCSV for \$50 million. Rather, it was an offer for \$10 million in cash to the shareholders of JCSV coupled with \$40 million in equity to be invested in a joint venture company to be established between JCSV and Shanghai Ossen.

The Court of Appeal's Decision

The key question before the Court of Appeal was whether the Shanghai Ossen offer should be accepted as the "best evidence" of JCSV's fair market value.

It held that it was not.

Pertinently, the Court of Appeal observed that, while evidence of a third-party offer is relevant, appropriate weight must in each case be ascribed

to the offer based on the specific terms and nature of the offer. It emphasised that:

- A fair market valuation is a fact-sensitive exercise in which the weight of the evidence must be determined on the specific facts of each case.
- A distinction must be drawn between two distinct concepts: (a) what a (hypothetical) genuine purchaser is willing to pay; and (b) what the specific offeror (who made the offer in question) was prepared to pay on the facts of the case in question. Concept (a) is an approach to determining fair market value based on objective data before the court together with appropriate input from expert witnesses. In contrast, concept (b) might be *indicative* of concept (a) but that is as far as it goes.
- The evidence of any offer that is before the court must therefore be evaluated before it can be determined whether, and how much, that offer accurately indicates what a "genuine purchaser" would be willing to pay.

The Court of Appeal rejected Mr Abhilash's submission that an actual third-party offer is the best evidence of that asset's fair market value to any purchaser by reason of it being an offer that a buyer is willing to pay in an arm's length transaction. It pointed out, among other things, that the decision of the New South Wales Court of Appeal in *MMAL Rentals Pty Ltd v Bruning* (2004) 63 NSWLR 167 illustrated the point that an offer by a particular purchaser to acquire a particular asset will be given significant weight in the context of that asset's value to *that particular purchaser*. For example, it cannot be ruled out that some buyers might be prepared to purchase assets at a considerable premium to their fair market value, due possibly to unique synergistic considerations which those buyers perceive.

That said, the Court of Appeal accepted that, where there is evidence of a third-party offer to acquire shares, and that offer is shown to have

been made at arm's length, is genuine, and not speculative or conditional, the court can and should take that offer into account in determining the fair market value of the shares. However, these are merely "pre-conditions" before the court can begin to ascribe any informational value to the third-party offer. For instance, an offer that is not genuinely made would clearly lack informational value.

In this case, the Shanghai Ossen offer was not an unconditional offer capable of immediate acceptance; it was subject to due diligence which was never performed. In addition, even though the Shanghai Ossen offer was not an offer to purchase JCSV's shareholders' stakes for \$50

million, Mr Abhilash's argument effectively sought a payout on the basis of an immediate payment of \$50 million.

Moreover, neither Mr Abhilash's own valuation expert nor Mr Yeo's valuation expert attached any significance or relevance to the Shanghai Ossen offer for the valuation of JCSV. In fact, Mr Abhilash's expert took the view that the offer was of no assistance in the expert valuation of JCSV's fair market value.

In the circumstances, the Court of Appeal held that Mr Abhilash failed to show that JCSV had a fair market value of \$50 million and dismissed his appeal.

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