IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Cause NO. FSD 92 OF 2014 – AJJ

The Hon. Justice Andrew J. Jones QC
In Chambers, 10th September 2015

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND

IN THE MATTER OF INTEGRA GROUP

Appearances: Mr. Nicholas Dunne and Barnaby Gowrie of Walkers for the Company/Petitioner

Mr. Mac Imrie and Ms Gemma Newell of Maples and Calder for the Respondents

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REASONS FOR ORDER FOR COSTS

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1. The Court is now required to make an order for the costs of this proceeding in accordance with the provisions of section 238(14) of the Companies Law (2013 Revision) which provides as follows:

The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances; upon application of a member, the Court may order all or a portion of the expenses incurred by any member in connection with the proceeding, including reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares which are the subject of the proceeding.

Before considering how to exercise the Court's discretion in the particular circumstances of this case, I make certain general observations.

2. The Companies Law provides for more than one mechanism whereby the merger, amalgamation or acquisition of a company can be achieved. A merger or amalgamation can be achieved through the mechanism of a scheme of arrangement under sections 86 and 87 of the Companies Law subject to obtaining the approval of a majority in number representing 75% in value of the members in question and the sanction of the Court. An acquisition of a company's shares can be achieved by making a tender offer, in which case section 88 of the Companies enables a transferee company to "squeeze out" the dissenting shareholders in the event that the offer has been accepted by the holders of not less than 90% of the shares by value. The provisions of Part XVI of the Companies Law provides an alternative mechanism by which either of these commercial objectives can be achieved and in each case the end result is that dissenting shareholders can be "squeezed out".

3. In this case the transaction was a management buy-out of all the outstanding shares of the Company which the MBO Participants did not already own. They could have structured the transaction as a tender offer in which case it would have been necessary to obtain 90% of the issued share capital within four months of making the offer in order to compulsorily acquire the dissenters' shares. By structuring the transaction as a merger under section Part XVI the approval threshold is much lower. The MBO Participants only needed to secure a special resolution in order to compulsorily acquire the dissenting shareholders' shares, but the price they pay for the lower approval threshold is the cost of having to apply to the Court to determine the fair value of the shares held by any dissenters.

4. It seems to me that a scheme of arrangement and an appraisal action are, at least in one respect, analogous proceedings. The policy of the law is that the will of the majority can be imposed upon the minority on the basis that their interest is protected by the intervention of the Court. In principle, the costs of presenting a petition for the sanction of a scheme of arrangement are paid by the company which promotes it as an inherent part of the transaction cost. In the event that a dissenting shareholder chooses to oppose a sanction application, the Court will make an order for costs in accordance with the general principles set out in GCR Order 62, rule 4, but the dissenting shareholders' risk in costs is limited to the extra cost, if any, incurred by the company as a result of his unsuccessful opposition. The point being that the company would have to incur the costs of presenting the petition and conducting the proceeding in any event, whether or not any dissenting shareholders chose to participate. If the dissenting shareholder succeeds, in

principle he should recover the reasonable costs incurred by him in opposing a sanction application in an economical, expeditious and proper manner.

5. A petition to sanction a scheme of arrangement under section 86 is not the same as an appraisal action, in the sense that the purpose of the Court's intervention is to sanction the transaction and make it binding upon the shareholders as a class including those who voted against it. The purpose of an appraisal action under section 238 is limited to the determination of the fair value of the shares held by the dissenting shareholders. An important distinction between section 86 and section 238 is that the promoter of a scheme of arrangement must apply to the Court for its sanction in any event, whereas the promoter of a statutory merger only has to apply to determine fair value in the event that a shareholder takes the procedural steps necessary to positively record his dissent and establish his right to a judicial determination. However, by section 238(9) the obligation to petition the Court is imposed upon the company. The company's petition must be served on all the dissenting shareholders, a verified list of whom must be filed in Court, but they do not need to participate in the proceeding. The company cannot obtain a default judgment. The Court must still exercise its judgment based upon evidence, whether or not any dissenting shareholder appears to make a positive case. It seems to me that it would not be equitable to impose the cost of an appraisal action upon a shareholder who does nothing more than record his dissent and decline the company's offer, thereby triggering his right to a judicial determination. To do otherwise would mean that a small shareholder could not sensibly exercise his statutory right because the cost of an appraisal action, even if unopposed, could exceed the value of his shares.

6. I think that different considerations come into play if a dissenting shareholder choses to participate in an appraisal action and assert a positive case. In these circumstances it would be equitable for GCR Order 62, rule 4 to apply, such that costs should normally follow the event, but the dissenting shareholder's risk should be limited to the additional costs incurred by the company as a result of his participation. If the dissenting shareholder succeeds, he can expect to recover his costs on the standard basis against the company. To the extent that he incurs cost which would be recoverable on the indemnity basis, but are not recoverable against the company on the standard basis, the second limb of section 238(14) gives him the possibility of recovering a pro rata share of the difference from other non-participating dissenters who will have benefitted from his success.

7. Having set out what I think are the general principles which ought to be applied by the Court when exercising the Court's discretion, I now turn to consider the circumstances of this particular case. The Company presented the petition as it was bound to do under section 238(9). The Respondents (acting collectively through their common investment

manager) actively participated in the proceeding from the beginning. Applying the principles set out in GCR Order 62, rule 4, I have come to the conclusion that the Respondents are the successful party and that the Company should pay their costs, to be taxed on the standard basis if not agreed.

8. I do not think that it is helpful for me to attempt to lay down any generally applicable principles or criteria by which to determine what constitutes success or failure in an appraisal action, save to say that it must depend upon the circumstances of the particular case. In this case the Company's fair value offer made pursuant to section 238(8) was US$10 per share (or $20 per GDR). In effect, the Company thereby confirmed its determination that the amount of the merger consideration constituted fair value. There is no evidence before the Court about any negotiations which may or may not have taken place at this stage or at any later stage during the course of the proceeding. All I know is that the Respondents rejected $10 per share. However, the Company resiled from this position and put its case on the basis that the fair value was US$8.41 per share with the result that the principal amount payable to the Respondents collectively would be US$13,073,513.20. In the event, I concluded that the fair value was US$11.70 per share, resulting in a principal amount payable of US$18,187,883.00. On this basis I think that the Respondents must be regarded as the successful party.

9. The Company argues that the Court should take a more nuanced approach. Whilst there may be circumstances in which it is appropriate to exercise the Court's discretion by reference to the outcome of identifiable issues rather than the overall result, I do not think that there is an appropriate basis for doing so in this case. I valued Integra at US$105 million. This was substantially less than the value of US$130/135 million contended for by Mr Taylor, the Respondents' expert witness. It was also substantially more than US$85 million, which was the value contended for by the Company based upon the mid-point of Mr Robinson's range of values. I do not think that the Company can be regarded as the successful party because the Court's valuation of $105 million is closer to $85 million than $135 million. Nor do I think that the Company should be regarded as the successful party because the Court's valuation is *only* $5 million more than the high end of Mr Robinson's range. I regard the Respondents as the successful party because I preferred Mr Taylor's valuation approach which led me to conclude that the fair value of Company shares was substantially greater than the mid-point of the value range advanced by Mr Robinson. The fact that I decided the "big tax issue" in favour of the Company does not detract from the overall commercial result. The Respondents recovered more than the fair value of US$10 per share originally offered and substantially more than the fair value of US$8.41 for which the Company contended at trial. On this basis I regard the Respondents as the successful party and I am not persuaded that there are any

circumstances which would lead me to depart from the conclusion that they should have their costs of the proceeding to be taxed on the standard basis, if not agreed.

Order accordingly.

DATED this 10th day of September 2015

The Hon. Justice Andrew J. Jones, QC
JUDGE OF THE GRAND COURT