

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

Adam Pike

PKXADA001

University of Cape Town

LL.M. – Minor Dissertation

Topic: A Textual Analysis of Section 164 of the Companies Act 71 of 2008

Supervisor: Jacqueline Yeats

Minor dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LL.M. degree in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LL.M. dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Name: _____

Signature: _____

Date: _____

TABLE OF CONTENTS

	Page No
PART A: PRELIMINARY STATEMENTS	1
1. Statement of Dissertation	1
2. Statement of Terminology	3
3. Statement of Acknowledgement	5
PART B: INTRODUCTION	6
4. THE APPRAISAL RIGHT	6
4.1 Origins of the Appraisal Right	6
4.2 Transactions	8
4.3 The Appraisal Right in the Companies Act	9
4.4 Additional Safeguards	11
PART C: PRACTICE AND PROCEDURE OF THE APPRAISAL RIGHT	13
5. STANDING	13
5.1 Standing in relation to the Remedy	13
6. NOTICE	16
6.1 Notice of Meeting	16
6.2 Notice Anomaly	17
6.3 Notice of Objection	19
6.4 Partial Dissent	21
7. ADOPTING THE RESOLUTION	24
7.1 Meeting	25
7.2 The Vote Anomaly	26
7.3 Notice of adoption of the resolution	26
8. THE DEMAND	27
8.1 Demand	28
8.2 Rights Cease upon Demand	28
9. THE OFFER	30
9.1 The Written Offer	30
9.2 Written offer problem	31
9.3 Acceptance and lapse of the Written Offer	32

10.	APPLICATION.....	33
10.1	Application to Court.....	33
10.2	Lapsed Dissident Anomaly.....	34
10.3	Security for Cost.....	36
10.4	The <i>Dominus Litis</i> , the onus of proof and the evidentiary burden.....	37
10.5	The Appraiser.....	38
10.6	Court's Duty and Discretion.....	38
10.7	Valuation objective.....	40
10.8	Court Order.....	43
10.9	Costs Orders.....	45
10.10	Interest.....	46
11.	PAYMENT.....	47
11.1	Obligation to Pay.....	47
11.2	Variation of the Company's Obligations.....	48
	PART D: CONCLUSION.....	49
	 BIBLIOGRAPHY.....	 52

PART A: PRELIMINARY STATEMENTS

1. Statement of Dissertation

It has been acknowledged that the appraisal remedy is complicated, technical, time consuming and procedurally rigid from the dissidents' perspective. The appraisal remedy has been criticised for these very reasons.¹ These qualities have been characterised as limitations on its efficacy for dissidents. The potential for time delays and the cost implications are cited as additional shortcomings.² It has been suggested that expert legal advice is required by a dissident in order to exercise the appraisal remedy.³

The purpose of this dissertation is not to address these issues if indeed they are issues at all. It may seem flippant to dismiss these observations. However, it may reasonably be said that all enabling legislation is complicated and technical. Any statute that provides one party with a remedy against another will set out a procedure to be followed by the remedy seeking party. The procedure provided for in legislation generally ensures that barriers to entry deter *mala fide* applicants, but remain fair in order to ensure that those who follow the procedures and meet the requirements receive the remedy to which they are entitled. Were the procedures less rigid, the remedy might be abused and instead become an instrument of oppression.

It may be argued that the dissident is helpless in the face of a monolithic corporate entity but this sentiment does not account for the fact that the dissident will be paid fair value for its shares. Critics of the appraisal remedy ought to bear in mind that the dissident that chooses to exercise the remedy does so after the transaction has been approved by a majority of a minority in an extraordinarily complicated and rigid approval process. I shall elaborate upon this process in due course.

¹ Ezra Davids, Trevor Norwitz and David Yuill 'A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008' in Tshepo H Mongalo (ed) *Modern Company Law for a Competitive South African Economy* (2010) at 360.

² Farouk HI Cassim (managing ed), Maleka Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev and Jacqueline Yeates *Contemporary Company Law* 2 ed (2012) at 798.

³ Maleka Femida Cassim 'The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 2) (2008) *SA Merc LJ* 20 at 164.

Concerns in relation to the costs of judicial appraisal are also articulated, in as much as the burden of the costs may have a suppressive effect⁴ on the exercise of the appraisal remedy by a dissident. In ordinary litigation, where a litigant is less certain of a favourable outcome, let alone being paid, there are procedural and financial hurdles more burdensome than those found in the appraisal remedy, particularly where both parties are required to discover documents, adduce evidence, lead witnesses and be represented. Even if a party in ordinary litigation prevails, the manner in which costs are awarded on a *party and party* basis means that a successful litigant bears a cost of asserting or protecting a right which the fee tariffs do not account for. The economic efficiency of a judicial appraisal is unique in its formulation, in as much as only one dissident need apply to court, and the remaining dissidents stand to benefit as a result of a successful application. Nevertheless, litigation costs are often prohibitive, and may deter a dissident from pursuing its appraisal remedy. However, the cost of litigation should not form the basis of the critique of the appraisal remedy, for the deterrent effect of litigation is not a feature unique to judicial appraisal.

The criticism of the remedy to which I have alluded appears to be grounded in an egalitarian conception of corporate law, which has human rights as a point of departure. This approach may be appropriate in cases where argument is made for the inclusion of stakeholder and labour protection in a corporate statute - in relation to a remedy available to the minority of the minority,⁵ I am less certain.

If a private company is effecting a transaction that gives rise to an appraisal remedy, it could reasonably be assumed that the management of the company is sophisticated, and that the shareholders have a corresponding level of insight into the remedies available to them, particularly in light of the close relationship of shareholders in a private company.⁶ It is unlikely that such a shareholder will be overwhelmed by the requirements of the appraisal remedy.

⁴ Cassim *et al* op cit note 2 at 806. Davids *et al* op cit note 1 at 360.

⁵ In the preceding paragraphs, I sketched a brief portrait of the approval process in relation to a transaction. In circumstances where a controlling party and parties acting in concert are prohibited from being reckoned for the purposes of constituting a quorum or participating in the vote, it is said that the transaction must be approved by a 'majority of the minority'. That being the case, the appraisal remedy is available only to the minority of the minority. I shall return to this theme.

⁶ I assume a level of social sophistication common to the shareholders and the management.

Conceptually, the framework of the remedy is simple. After receiving the meeting notice, the dissident must send an objection notice to the company before the vote is taken. The dissident must vote against the resolution. If the resolution is approved, the company will send an adoption notice. After receiving the adoption notice, the dissident must send the company a demand. After the company makes an offer, the dissident may accept it or brief an attorney for a court application.

In the circumstances, the use of such concepts as fairness, justice and equality, as understood in constitutional jurisprudence, as the basis of Companies Act commentary does not account for the inherently unequal nature of the shareholders statuses, and the robust nature of commercial endeavour. If the Companies Act can be likened to an infant, it is not yet teething. Rather than trying to demand from it that it eat with its mouth closed and behave like a gentleman, a better suggestion would be that it be fed a bottle so that it can grow into a productive member of statutory society.

In this dissertation, I present a close textual analysis of section 164 of the Companies Act 71 of 2008. In it, I will elaborate upon a number of anomalies, several of which are potentially, fatal as well as other problem areas. In addition, I will address certain inaccurate commentary. I emphasise that the purpose of the dissertation is not to come to a conclusion regarding the fairness, justice or worth of the appraisal remedy. The analysis in this dissertation is concerned with whether the appraisal remedy is fit for use, that is, whether the appraisal remedy in its present form is capable of being applied in order to achieve its stated purpose. The conceptual merit of the remedy is not considered.

The analysis of the appraisal remedy as it appears in the Companies Act, will be comparative, in as much as the appraisal remedy is derived from the corresponding provision in the Canadian Act.

2. Statement of Terminology

The terminology used in the Companies Act to describe the subject matter of the appraisal remedy is different to the terminology used in the Canada Act, and in the other company laws that will be considered. In order to avoid prolix explanation, I will adopt a unified lexicon in relation to such terminology.

For ease of reference, I will use the terms below which shall have the meaning ascribed to them:⁷

'adoption notice' means the notice given by the company in relation to the adoption of the resolution to dissidents who have given an objection notice;⁸

'amendment' means an amendment to the constitutional documents of the company, where such an amendment, if approved, gives rise to the appraisal remedy;⁹

'appraisal remedy' means the rights which may be exercised by a dissident as provided for in section 164 of the Companies Act, section 190 of the Canadian Act, section 110 of the New Zealand Act and section 262 of the Delaware Law, as the context may require;

'Canadian Act' means the Canada Business Corporations Act RSC 1985 c C-44, being the federal legislation in terms of which corporations are incorporated and regulated in Canada;

'Companies Act' means the Companies Act 71 of 2008;

'company' means a corporation or a company, the shares of which are the subject matter of an appraisal remedy, as the context may require;

'constitutional documents' means the memorandum of incorporation of the company¹⁰ and any rules¹¹ or the articles,¹² as the context requires;

'Delaware Law' means the Delaware Code, title 8, chapter 1, being the legislation in terms of which corporations are incorporated and regulated in the State of Delaware;

'demand' means the demand made by the dissident to the company for the payment of the fair value of the shares;¹³

⁷ Davids *et al* op cit note 1 at 352.

⁸ Section 164(4) of the Companies Act and section 190(6) of the Canadian Act.

⁹ Section 164(2)(a) of the Companies Act and section 190(1)(b) of the Canadian Act.

¹⁰ Section 164(4)(a) of the Companies Act.

¹¹ Rules as contemplated in section 15(c) of the Companies Act.

¹² Section 190(1)(b) of the Canadian Act.

¹³ Section 164(5) of the Companies Act and section 190(3) of the Canadian Act.

'dissident' means a shareholder availing itself of the appraisal remedy;

'meeting' means a meeting of shareholders called for the purpose of considering and adopting a resolution;

'meeting notice' means the notice of the meeting at which the resolution shall be considered, and if approved, adopted;

'objection notice' means the notice given by the dissident to the company notifying it of the dissidents objection to the proposed resolution;

'New Zealand Act' means the Companies Act 1993 No 105, being the legislation in terms of which companies are incorporated and regulated in New Zealand;

'resolution' means the resolution, irrespective of its character, which must be adopted to give effect to the transaction in relation to which the dissident exercises the appraisal remedy, as the context may require;¹⁴

'shares' means shares or securities in the company, as the context may require; and

'transaction' means a transaction which must be approved by resolution, which if approved gives rise to the exercise of the appraisal remedy by a dissident, and for the purpose of this dissertation shall include, where appropriate, an amendment.¹⁵

3. **Statement of Acknowledgement**

This dissertation would not have been possible without the assistance of a number of typists who, in addition to typing and formatting my preparatory notes and material, answered their telephones at all hours.

Most importantly, I would like to thank Lisa and Alex for their patience, support and love. Alex et Lisa sont mon univers.

¹⁴ Section 164(2) of the Companies Act and section 183(2)(b) of the Canadian Act.

¹⁵ Ibid.

PART B: INTRODUCTION

4. THE APPRAISAL RIGHT

4.1 Origins of the Appraisal Right

The appraisal remedy is an American innovation that was introduced in order to relieve controlling shareholders from the constricting requirements of unanimous assent required to affect major changes to the nature of a business operated by the company in question.¹⁶ In an advancing industrial economy, modern enterprises required an adaptive corporate regime within which changing business conditions could be accommodated.¹⁷ Law makers relaxed unanimous consent requirements and granted dissidents an appraisal remedy as a counter-balance.¹⁸ It was recognised that the flexibility to restructure a company must be balanced with the ability of dissidents to maintain or ringfence their assets and rights on the basis on which they had initially invested.¹⁹

In the context of transactions having shares as the sole consideration for shareholders of the target company, the appraisal remedy functioned as an exit mechanism. Dissidents were, upon the exercise of the appraisal remedy, entitled to receive the fair value of their shares in cash and were accordingly obliged to relinquish their position in the company. Absent such a remedy, dissidents would otherwise have been expected to receive an investment not of their choosing,²⁰ in a company in which they had no desire to remain, with a risk profile they had not accepted.²¹ This understanding of the appraisal remedy, known as the 'defeated expectations' view',²² was the basis of the justification for the extension of the remedy. The

¹⁶ Bayless Manning 'The Shareholder's Appraisal Remedy: An Essay for Frank Coker' (1962) 72 *Yale LJ* 223 at 226 - 227.

¹⁷ Wayne D Gray *The annotated Canada Business Corporations Act* 2ed (2002) at 372 and the following related statutes: Corporations Returns Act, Investment Canada Act.

¹⁸ See Manning op cit note 16 at 228-9; William T Allen and Reinier Kraakman *Commentaries and Cases on the Law of Business Organizations* (2003) at 452. This causal link has more recently been doubted: see, eg, Hideki Kanda and Saul Levmore 'The Appraisal Remedy and The Goals of Corporate Law' (1985) 32 *UCLA LR* 429 at 436. There has been much vigorous debate in America on the appraisal right, its purpose and the justifications for and against it. However, much of this debate is beyond the scope of this article.

¹⁹ Cassim *et al* op cit note 2 at 796 - 797.

²⁰ For instance, in the case of a traditional pooling-type merger, where the consideration is in the form of securities. See Chapter 15: Fundamental Transactions, Takeovers and Offers.

²¹ MF Cassim op cit note 3 at 158. See Arthur R Pinto and Douglas M Branson *Understanding Corporate Law* (1999) at 127-8; Allen & Kraakman op cit note 18 at 452-3.

²² MF Cassim op cit note 3 at 158. Robert Charles Clark *Corporate Law* (1986) at 444. See Manning op cit note 16 at 246 disputes this justification for appraisal.

dissident had an expectation in relation to the conduct of the company's business, which had been disappointed.

Subsequently, the regulation of corporate transactions was relaxed. Cash was permitted as consideration in transactions. The justification for the appraisal remedy was then understood as a mechanism to ensure that dissidents' positions were eliminated at a fair value.²³ The 'remedy-for-unfairness' justification²⁴ was premised upon the fact that shareholders were not privy to the negotiation of the transaction agreement in terms of which the merger was implemented. As such, the opportunity for directors to self-deal is acknowledged. With the shareholders' unanimous approval no longer necessary, the appraisal remedy assumed the function of a bulwark against directors' self-interested decision making and ensured that dissidents' interests were accounted for.

On either view, the prospect of substantial opposition to a transaction might ensure that the board reconsider the implications of its proposed implementation.²⁵ Dissidents now rely on the appraisal remedy to challenge the adequacy of the price offered²⁶ and as a check on directors' opportunism.²⁷ If sufficient dissidents object to the consideration, creating a heavy drain on the company's cash resources, the transaction will effectively be blocked.

Instead of placing the dissident at the mercy of the majority, appraisal provisions permit the dissident to withdraw from the company and, if enough dissidents are affected, to bar the proposed transaction. Nevertheless, the majority shareholders can, if they go through the proper formalities and if they pay the dissidents, effect almost any transaction with impunity. The result is a solution of the problem that protects minority shareholders from discrimination and, at the same time, preserves flexibility within the enterprise, permitting it to adapt to changing business conditions.²⁸

²³ MF Cassim op cit note 3 at 158. See Robert W Hamilton *The Law of Corporations in a Nutshell* 5ed (2000) at 628; Pinto & Douglas op cit note 21 at 127-8; Allen & Kraakman op cit note 18 at 452-3.

²⁴ MF Cassim op cit note 3 at 158. See Clark op cit note 22 at 445.

²⁵ MF Cassim op cit note 3 at 158. M Eisenberg 'The Legal Roles of Shareholders and Management in Modern Corporate Decision Making' (1969) 57 *California LR* 1 at 85-6; Kanda & Levmore op cit note 18 at 443-4; Clark op cit note 22 at 445.

²⁶ For example, in the case of a cash merger, where the shareholders receive cash as merger consideration and are cashed-out.

²⁷ Cassim *et al* op cit note 2 at 797.

²⁸ Gray op cit 17 at 372.

4.2 Transactions

Certain transactions are recognised as sufficiently important to warrant the availability of a remedy to dissidents. They are ordinarily characterised as fundamental transactions and as in the Companies Act include mergers or amalgamations²⁹, disposals of assets³⁰ and schemes of arrangement.³¹ A remedy might also be also available when the constitutional documents of a company are amended in a manner materially adverse to the rights of shareholders.³² Out of 'concern for the helpless minority shareholder',³³ the appraisal remedy has been fashioned to give optionality to dissidents in such circumstances.

The appraisal remedy is contentious. It has generated much commentary.³⁴ Certain of the controversy relates to the fundamental changes in respect of which the appraisal remedy ought to apply. Bayless Manning, in his seminal article published in 1962,³⁵ questions the arbitrary selection of certain transactions which State legislatures in the United States have selected for special treatment.³⁶ In the appendix to his article,³⁷ he sets out a survey of State appraisal statutes by transactions giving rise to the remedy. Interestingly, of the States that

²⁹ Section 113.

³⁰ Section 112.

³¹ Section 114.

³² Section 164(2)(a).

³³ Manning op cit note 16 at 227.

³⁴ See Manning op cit note 16. William L Caryt 'Federalism and Corporate Law: Reflections upon Delaware' (1973-1974) 83 *Yale LJ* 663; Michael P Dooley and Michael D Goldman, 'Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law' (2000-2001) 56 *Bus Law* 737; J Kirkland Grant 'The Delaware Appraisal Statute' (1981) 6 *DeLJ Corp L* 590; Kanda & Levmore op cit note 18 at 429; Peter V Letsou 'The Role of Appraisal in Corporate Law' (1998) 39 *B C LR* 1121; William F Looney 'Dissenting Minority Stockholder's Right of Appraisal' (1962) 4 *B C LR* 85; Charles W Murdock 'The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares' (1989-1990) 65 *Notre Dame LR* 425; Michael R Orlando 'The Appraisal Remedy in Illinois under the 1983 Business Corporation Act: Some Suggestions for Improvement' (1985-1986) 19 *J. Marshall LR* 229; Michelle M Pepin 'Exclusivity of Appraisal - The Possibility of Extinguishing Shareholder Claims' (1992) 42 *Case W Res LR* 955; Ralph Winter 'State Law, Shareholder Protection, and the Theory of the Corporation' (1977) 6 *J Legal Stud* 251; Anders Bruun and Michael Lansky 'The Appraisal Remedy for Dissidents in Canada: Is it Effective?' (1977-1978) 8 *Man LJ* 683; Brian Cheffins 'An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law' (1990) 40 *U Toronto LJ* 775; Jeffrey G Macintosh 'Shareholders' Appraisal Right in Canada A Critical Reappraisal' (1988) 13 *Can U S LJ* 299 / (1986) 24 *Osgoode Hall LJ* 201; Greta M Fung 'A Common Goal from Two Different Paths: Protection of Minority Shareholders in Delaware and Canada' (1993-1994) 57 *Alb LR* 4.

³⁵ See Manning op cit note 16 at 223.

³⁶ *Ibid* at 241-242.

³⁷ *Ibid* at 264.

provide for the appraisal remedy in circumstances similar to the Companies Act,³⁸ only the statutes of North Carolina and Louisiana are comparable.³⁹

Whilst the debate regarding the utility of the appraisal remedy is irrelevant for present purposes, it is important to note that the scope of the remedy has evolved. It is no longer a tool solely for the benefit of dissidents in circumstances where they desire to liquidate their position in a company. The appraisal remedy's major contribution is not in shielding dissidents, but in giving 'greater mobility of action to the majority'.⁴⁰ As pointed out by Manning, 'the appraisal statutes may be viewed either as a bulwark for the rights of the minority, or as a lubricant to speed the spread of majoritarianism. Of course the statutes might do both, depending upon their administration and their application.'⁴¹

The justification given for the review of the Companies Act 61 of 1973 was that the company law regime was highly formalistic creating artificial preferences for certain structures.⁴² This is noteworthy in as much as certain transactions artificially selected remain prominent in their status as giving rise minority remedies and requiring extraordinary approval. It remains the case that companies may undertake and implement non-fundamental transactions with value diminishing consequences that do not warrant such scrutiny. The managerial *fiat* contemplated in section 66(1) is a far more potent weapon in the hands of an unscrupulous board than the relatively small shield given to dissidents in the form of section 164.

4.3 The Appraisal Right in the Companies Act

The appraisal remedy, a novel concept in our corporate law,⁴³ 'effectively grants a put option to dissatisfied shareholders'.⁴⁴ Section 164 is derived in large part from the equivalent provision in the Canadian Act.⁴⁵ The Canadian equivalent has been called a 'procedural

³⁸ 71 of 2008.

³⁹ Manning op cit note 16 at 262.

⁴⁰ Manning op cit note 16 at 227.

⁴¹ Manning op cit note 16 at 230.

⁴² South African Company Law for the 21st Century: Guidelines for Corporate Law Reform, Government Gazette, 4 No 26493 23 June 2004 at 14 and 15.

⁴³ This remedy is also not adopted wholesale but has been tailored to the South African context. For example, the Companies Act does not include the Delaware 'market out' which provides that appraisal rights are not available if target company shareholders are receiving only publicly traded stock in consideration for their shares. See further Davids *et al* op cit note 1 at 352.

⁴⁴ Cassim *et al* op cit note 2 at 796.

⁴⁵ Canada Business Corporations Act RSC 1985, c. C-44 s190.

morass'.⁴⁶ It too was introduced as a counterweight to the newly adopted merger provisions, which together were hoped to provide flexibility and enhance efficiency in the economy.⁴⁷

In the ordinary course, the appraisal remedy may be invoked by dissidents once a notice given by a company, in circumstances other than business rescue,⁴⁸ informs shareholders of a meeting at which a resolution⁴⁹ pursuant to a transaction shall be considered for adoption. The notice must inform shareholders that the appraisal remedy may be invoked.⁵⁰

Although not within the scope of this dissertation, there are a number of provisions that might be found in appraisal remedies that do not feature in section 164. Discussion shall be limited to merely mentioning them and few apposite comments.

The Companies Act does not make provision for a short-form merger procedure,⁵¹ or at least a mechanism to facilitate such mergers. The short-form merger procedure in the Canadian Act⁵² permits approval of the implementation of a short-form merger by way of a board resolution of each merging company.

Neither of the Canadian Act, New Zealand Act⁵³ or the Companies Act has a market-exception excluding recourse to the appraisal remedy to dissidents holding listed shares. The Delaware Law excludes recourse to the appraisal remedy to the holders of listed shares that are traded in a liquid market⁵⁴ and where the listed price of the shares is a reliable indication of their fair value.⁵⁵ It was suggested that the Companies Act does not include the market

⁴⁶ Bruce Welling *Corporate Law in Canada The Governing Principles* (2006) at 568; cf Piet Delpont and Quintus Vorster *Henochsberg on the Companies Act 71 of 2008* (2012) at 577.

⁴⁷ Notice of intention to introduce a Bill into Parliament: Explanatory summary of Bill General Notice 166 of 2007 at 13.

⁴⁸ Section 164(1).

⁴⁹ Sections 112, 113 and 114. The resolutions in question relate to the fundamental transactions contemplated the Companies Act, as well as the alteration of the preferences, rights, limitations or other terms of any class of its shares in any manner 'materially adverse to the rights or interests' of holders of that class of shares as contemplated in section 37(8).

⁵⁰ Section 164(2).

⁵¹ A short form merger is a simplified form of a merger between a holding company and its wholly-owned subsidiary, called a vertical short-form merger, or between two wholly-owned subsidiaries of a holding company, known as a horizontal short-form merger, cf MF Cassim op cit note 3 at 155 and 158.

⁵² See section 184 of the Canada Business Corporations Act, 1985.

⁵³ Companies Act 1993.

⁵⁴ Listed shares or widely traded shares with more than two thousand record shareholders.

⁵⁵ See section 262(b)(2) of the Delaware General Corporation Law, 2001.

exception because 'the financial markets are notoriously imperfect'.⁵⁶ It is unclear whether this remark applies to the market in this particular jurisdiction or markets generally.

The grant of the appraisal remedy acknowledges that transactions may have significant and far-reaching consequences for shareholders,⁵⁷ the nature of the company and the rights attaching to shares.⁵⁸ As such, dissidents may, when circumstances permit, opt out of the company by withdrawing the fair value of their shares in cash by exercising the appraisal remedy after receiving the notice as aforesaid.

The Companies Act is silent as to how the fair value is to be arrived at, although it does provide for the appointment of an expert appraiser to assist the court with the valuation process. It may be that guidance can be taken from the Canadian courts, which have, like the Delaware courts, undertaken court valuations for some time and developed a settled approach to this task.⁵⁹

Notwithstanding that dissidents might never need to exercise the appraisal remedy, its existence⁶⁰ functions as an incentive for companies to avoid transactions that may be unfair to minority shareholders⁶¹ and encourage them to exercise the appraisal remedy. On the other hand, it may deter well-meaning boards from transactions that could benefit the company.⁶²

4.4 Additional Safeguards

The appraisal remedy itself, is one part of and integral to a broader approval process. Viewed in its totality, the appraisal remedy is penultimate step in the implementation process of certain transactions.

Regardless of a variation of approval thresholds in a company's constitutional documents, a resolution pursuant to a transaction must be passed with the support of at least 75 per cent of

⁵⁶ MF Cassim op cit note 3 at 162. Were this is the case, one would have to accept that shares are traded at 'notoriously imperfect' prices which do not represent fair value. This begs the question whether a dissident who purchased shares at less than fair value should be entitled to fair value. There is no satisfactory answer to this question.

⁵⁷ Cassim *et al* op cit note 2 at 796.

⁵⁸ Cassim *et al* op cit note 2 at 796.

⁵⁹ Davids *et al* op cit note 1 at 360.

⁶⁰ FH Easterbrook and D Fischel *The Economic Structure of Corporate Law* (1991) at 145; Allen & Kraakman op cit note 18 at 140.

⁶¹ There are other protections available to dissidents, minorities and oppressed persons as set out in Part B of Chapter 7. These are mentioned briefly below. See footnotes 148 - 156.

⁶² Davids *et al* op cit note 1 at 360-1.

the voting rights exercised on that resolution.⁶³ The voting rights controlled by 'an acquiring party' or a 'person related to'⁶⁴ or 'acting in concert with'⁶⁵ an acquiring party must not be included in calculating the percentage of voting rights required or actually voted in support of the resolution. Furthermore, it is not permissible to pass the resolution by way of a round robin resolution in terms of section 60.⁶⁶

The quorum for the meeting is at least 25% of all of the eligible voting rights or such higher percentage if one is prescribed in the constitutional documents. The voting rights of an acquiring party or any person related to or acting in concert with an acquiring party must not be included in determining whether the applicable quorum requirements have been met.⁶⁷ In the event that the resolution is approved, it may still be subject to the judicial review procedure contemplated in section 115(3). If the transaction is affected, it is regulated in terms of Parts B and C of Chapter 5, that is sections 117 to 127 and the Takeover Regulations, being regulations 81 to 122.⁶⁸

The 'majority of the minority' approval requirement protects minority shareholders in circumstances where the transaction is not conducted on an arms-length basis and where the acquirer is able to exert influence on the disposer.⁶⁹ Judicial review of the transaction is required if more than 15 per cent of the shareholders at the meeting voted against the resolution, and any of them require the company first to seek approval from the court. In addition, any shareholder may apply to the court for a review of the transaction, regardless of how many shareholders voted against it. One might question how effective this remedy might

⁶³ Section 115(1) read with section 115(2)(a).

⁶⁴ To determine who is 'related' to an acquiring party, see the definition of 'related' in section 2(1) of the Companies Act.

⁶⁵ For the purposes of section 115(4) 'act in concert' has the meaning set out in section 117(1)(b).

⁶⁶ If the company has only one shareholder, the section does not require that the sole shareholder meet with anyone but, as with any other meeting of shareholders, the statutory formalities around convening and holding the meeting must be observed and all relevant paperwork must be signed.

⁶⁷ Section 115(4)(a).

⁶⁸ Companies Regulations 2011.

⁶⁹ Davids *et al* op cit note 1 at 357 and 358. According to Davids *et al*, this serves as a valuable protection for minority shareholders and is found under the 'Related Party' provisions of the JSE Listing Requirements (Rule 1 0.4(e)) and also under the 'whitewash' provisions of a mandatory offer under the previous Security Regulations Code (Rule 8.7). They note a further concern, namely that the terms 'acquiring party' and 'person acting in concert' are not defined for the purposes of section 115. The term 'acting in concert' is defined in section 117, applies only in the context of affected transactions. The authors note that it would have been advisable to specify exactly what is meant by these terms, given the variety ways in which a merger, in particular, can be implemented. They opine that in most cases it is likely to be clear who the 'acquiring party' is, and 'acting in concert' is likely to be defined with reference to the definition set out in section 117, cf Davids *et al* op cit note 1 at 358. 'Related persons' is of course defined in section 2 of the Companies Act.

be in practice. First, the grounds on which a court may review and set aside a merger resolution are relatively limited. It requires not merely unfairness, but manifest unfairness, and procedural irregularity must have materially tainted the transaction.⁷⁰

A second limiting factor to the effectiveness of judicial review which has been identified, being the potential cost of the proceedings, which may be a deterrent to shareholders. In so far as the 15 per cent threshold is met and the company is required to initiate the review and would bear most of the cost. The review remedy is available to those who voted against the transaction, but not to shareholders who did not or were unable to vote against the resolution, regardless of whether they suffer material prejudice as a result of the transaction.⁷¹

Once a resolution has passed this rigorous approval procedure and been subject to review, one wonders what it is that the dissident knows that the company and majority do not.

PART C: PRACTICE AND PROCEDURE OF THE APPRAISAL RIGHT

5. STANDING

5.1 Standing in relation to the Remedy

In the Canadian Act, the idea of a 'dissident' is introduced in section 183(2)(b) in terms of which notice of a meeting must be given at which a transaction resolution shall be considered. The meeting notice must state that 'a dissenting shareholder is entitled to be paid the fair value of their shares'. The idea of a 'dissent' is elaborated upon in section 190(1) which states that 'a holder of shares of any class of a corporation may dissent... if the corporation resolves to ... effect a major transaction'. The Canadian Act implies that the recipient of the meeting notice is entitled to dissent in accordance with the provisions of section 190(1) by sending a written objection to the resolution, in accordance with section 190(5).

In the Companies Act the term 'dissenting shareholder' first appears in section 164(3) which simply states that 'at any time before a resolution referred to in subsection 2 is to be voted on, a dissenting shareholder may give the company a written notice objecting to the resolution'.

⁷⁰ Davids *et al* op cit note 1 at 359.

⁷¹ Davids *et al* op cit note 1 at 360.

The question arises whether the right to dissent is available to persons other than the recipients of the meeting notice. If this question can be answered in the affirmative, the appraisal remedy may be used for purposes other than that for which it was initially intended.

Although the requirements for qualifying as a dissident in Delaware are not contiguous with the Companies Act, there have been developments in that jurisdiction in relation to complexities arising out of the use of the appraisal remedy. Certain shareholders who acquire shares after notification of a merger attempted to perfect the appraisal remedy.⁷² Whilst the mechanism in terms of which the matter was resolved is not of interest,⁷³ what was of concern was the risk that 'the appraisal statutes will become warped far beyond their intended purpose, turning into a new vehicle for meritless strike suits rather than an effective tool for corporate governance'.⁷⁴

In the Canadian context, a question arose whether a beneficial shareholder was entitled to exercise the right to dissent. In the Canadian Act, it is clear that only registered shareholders are entitled to dissent. In the case of *Silber v BGR Precious Metals Inc*⁷⁵ it was held that a shareholder acquiring a share and being registered as such may exercise the right to dissent, notwithstanding that he was not a shareholder at the time when the meeting notice was delivered. The dissidents acquired their shares after the announcement of a proposed transaction. Although it was argued that the dissidents should not be allowed to make use of the appraisal remedy because they were aware of the proposed transaction before they became shareholders, the court held that shareholders could employ the appraisal remedy, regardless of that fact.⁷⁶

In another Canadian case, *Silber v Pointer Exploration Corp*⁷⁷, the court held, that if the company wanted to control the entitlement of shareholders to make use of the appraisal

⁷² *In re Appraisal of Transkaryotic Therapies, Inc No CivA 1554-CC 2007 WL 1378345 at 1* (Del Ch May 2, 2007).

⁷³ The perfection procedures in the Companies Act and the Delaware law are too different for the purposes of comparative analysis.

⁷⁴ George S Geis 'An Appraisal Puzzle' (2011) 105 *Northwestern U LR* 1635 at 1639.

⁷⁵ *Silber v BGR Precious Metals Inc* (1998) 41 OR (3d) 147 (Gen Div).

⁷⁶ *Silber v BGR* supra note 75 at 157.

⁷⁷ *Silber v Pointer Exploration Corp* (1998) 42 BLR (2d) 149 (Alta QB).

remedy, it could have specified in the information circular that only shareholders registered at the date of that circular were entitled to employ the appraisal remedy.⁷⁸

The position is somewhat different under the Companies Act. A 'shareholder' is defined as 'the holder of a share issued by the company and who is entered as such into the ... register'.⁷⁹ Nevertheless, a person with a beneficial interest in a share shall be entitled to vote on any matter provided that the beneficial interest includes the right to vote and that person's name is on the company's register of disclosures as a holder of a beneficial interest.⁸⁰ What is less clear is whether the right to vote extends to and includes the right to give the company a written notice objecting to the resolution contemplated in section 164(3), or if that power is reserved for registered shareholders only.

In relation to subsequent 'registered' shareholders, the Companies Act provides for the determination of a record date set for the purposes of determining *inter alia* which shareholders are entitled to receive notice of shareholder meetings, participate in and vote at shareholders meetings.⁸¹ The board is entitled to set that record date, and if it does not, the record date is the last date by which a company is required to give the meeting notice.⁸² The constitutional documents of a company may provide for the determination of a record date set by the directors, for the purposes of determining which shareholders are entitled to vote at such a meeting.

It has been questioned what position a South African court might take in relation to whether beneficial shareholders or subsequent shareholders may be entitled to the appraisal remedy.⁸³ Save in circumstances where the constitutional documents of a company provide otherwise,⁸⁴ the analysis above closes the enquiry.⁸⁵

⁷⁸ *Silber v BGR* supra note 75 at 157.

⁷⁹ Section 1.

⁸⁰ A beneficial shareholder as contemplated in section 56(9).

⁸¹ Section 59(1).

⁸² Section 59(3).

⁸³ HGJ Beukes 'An Introduction to the Appraisal Remedy in the Companies Act: Standing and the Appraisal Procedure' (2010) 22 *SA Merc LJ* 176 at 178.

⁸⁴ Section 59 states that the board of a company may set a so-called record date for the purpose of determining *inter alia* which shareholders are entitled to receive notice of a shareholders meeting, participate in and vote at a shareholders meeting. Section 59(3) provides that if the board does not determine a record date for any action or event, the record date is as stipulated in section 59(3)(a) or 59(3)(b), unless the company's MOI provides otherwise.

⁸⁵ *Ibid.* The questions raised by Beukes op cit note 83 at 179 are addressed directly in the Companies Act and warrant no further debate.

6. NOTICE

6.1 Notice of Meeting

An academic commentator⁸⁶ observed that although section 164 of the Act does not compel the company to give the meeting notice, section 164(2) does require the company to include a statement informing shareholders of the appraisal remedy.⁸⁷ The purpose of section 164 is not to create the obligation to notify shareholders of such meetings, but to establish the framework within which dissidents may pursue the appraisal remedy ancillary to the transactions.⁸⁸ The particular notice requirements are found in section 112 (disposal of substantially all assets or undertaking), section 113 (merger or amalgamation) and section 114 (scheme of arrangement),⁸⁹ and in sections 61 and 62.⁹⁰

Section 164(2) states that a meeting notice must include 'a statement informing shareholders of their rights under this section'. Each of the particular sections referred to in the preceding paragraph has a unique formulation in relation to the form such a statement must take.⁹¹ Section 112(3) requires 'a *written summary* of the provisions of section 164'. Section 113(5) requires 'a *copy or summary* of section 164, in a manner that satisfies prescribed standards'. Section 114 requires 'a *copy* of section 164 to be included in the report'.

In light of the inconsistent terminology, it is advisable to adopt a comprehensive approach and in a meeting notice include a *copy and a summary* of section 164. Reference to 'a copy or summary of section 164, in a manner that satisfies prescribed standards' is problematic as there are no '*prescribed standards*' in relation to notices. Save as aforesaid, the phrase appears in the Companies Act in relation to maintenance of securities registers⁹² and the disclosure of information in the annual financial statements⁹³ only.⁹⁴ The Act provides that

⁸⁶ Beukes op cit note 83 at 174.

⁸⁷ The notice of the meeting must refer to the relief offered to a dissenting shareholder set out in section 164.

⁸⁸ Section 164 (2)(b) of the Companies Act.

⁸⁹ Companies Act, cf Delpont & Vorster op cit note 46 at 578.

⁹⁰ Companies Act.

⁹¹ Beukes op cit note 83 at 174.

⁹² Section 50(1)(b).

⁹³ Section 30(5)(b).

⁹⁴ The phrase 'prescribed standard' is used once in the Company Regulations with reference to the preparation of its financial statements to the standards of either IFRS or IFRS for SMEs or SA GAAP.

meeting notices must be delivered to shareholders in 'the prescribed manner' and that the notice must be in the prescribed form.⁹⁵

Section 6(4) of the Act provides that if no form is prescribed by the Act, the producer of the notice must provide that notice in plain language.⁹⁶ Section 6(4) does not apply to the drafting of resolutions to be included in a meeting notice.⁹⁷

In relation to the requirement to include the appraisal remedy statement in the meeting notice, a Canadian court has held that a notice which simply states that 'the Act provides that a shareholder has a right to dissent if the corporation resolves to amend its articles' will not suffice.⁹⁸ The Canadian Act refers to a notice that encompasses at least an explanation of the bundle of rights given to dissidents of which the critical right is the right to be paid for the shares in the event of a structural change to the constitutional documents.⁹⁹

6.2 Notice Anomaly

In relation to the duty of the company to give the meeting notice in terms of section 164(2), there appears to be an anomaly. Section 64(4) provides that a material defect in the giving of a meeting notice shall render the meeting null and void and incompetent, unless all those entitled to receive it ratify the defective notice. This provision is qualified.

If the material defect relates only to particular matters on the agenda, such matters may be severed and the notice remains valid with respect to the remaining matters.¹⁰⁰ The meeting may consider the severed matter if the defective notice has been ratified in terms of section 62(4)(d) (sic). There is no sub-section (4)(d) in the Companies Act. Assuming that the intended ratification takes place in terms of sub-section (4), the meeting may consider the severed matter.

⁹⁵ Section 62(1). Regulation 36(2) states that a company *may* notify the shareholders of a shareholders meeting by delivering a completed Form CoR 36.2 to each registered shareholder, except to the extent that the requirements of a central securities depository provide otherwise. It is clear from the language used in the Regulations and in the Form that the use of the Form is voluntary (despite the peremptory language used in the Act).

⁹⁶ A notice is in plain language if it is reasonable to conclude that a person or the classes of person for whom the notice is intended, with average literacy skills and minimal experience in dealing with company law matters, could be expected to understand the content, significance and import of the notice without undue effort.

⁹⁷ Section 65(4), also see paragraph 5.5 of this note.

⁹⁸ *Fitch v Churchill Corp* [1990] 4 WWR 256, citing the Business Corporations Act SA 1981 c B-15.

⁹⁹ Canadian Act section 190(5).

¹⁰⁰ Section 62(5).

In order for a dissident to make a demand to be paid fair value,¹⁰¹ the dissident must have *inter alia* sent a notice of objection contemplated in section 164(3),¹⁰² voted against the resolution¹⁰³ and complied with all the procedural requirements of section 164.¹⁰⁴

A dissident is excused from sending the objection notice if the company failed to give the meeting notice, or failed to include the appraisal remedy statement in that notice.¹⁰⁵ The exception presupposes that the meeting was held, the resolution was adopted and is valid notwithstanding the defective notice. If this were not the case, there would be no need to excuse the dissident's failure to send the objection notice. The conclusion to be drawn is that the failure to send the meeting notice in the circumstances of a transaction is not a material defect as contemplated in section 62(4),¹⁰⁶ since it is assumed that the resolution can be adopted without the absent dissident having to ratify the defective notice.

There may be merit in this approach, in as much as section 62(6) states that an immaterial defect in the form of giving notice, or an accidental failure in the delivery of the notice to any particular shareholder to whom it is addressed does not invalidate any action taken at that meeting. If that approach is correct, the requirement to include in the meeting notice the appraisal remedy statement,¹⁰⁷ is immaterial and may be ignored. The requirement that the 'notice of a shareholders' meeting to consider a resolution to approve a disposal contemplated in (section 112) *must* ... include or be accompanied by a written summary of ... the provisions of section 115 and 164¹⁰⁸ is immaterial and may also be ignored. The requirement that a meeting notice contemplated in section 113 '*must* include or be accompanied by a copy or summary of ... the provisions of section 115 and 164'¹⁰⁹ is immaterial and need not met. Although the report to the board compiled by the independent expert contemplated in section 114 '*must* at a minimum ... include a copy of section 115 and 164' this is not the case, as the failure to include of the copy s164 is immaterial.

¹⁰¹ Section 164(5).

¹⁰² Section 164(5)(a)(i).

¹⁰³ Section 164(5)(c)(i).

¹⁰⁴ Section 164(5)(c)(ii).

¹⁰⁵ Section 164(6) read with section 164(5)(a)(i).

¹⁰⁶ Companies Act.

¹⁰⁷ Section 164(2).

¹⁰⁸ Section 112(3)(b)(ii).

¹⁰⁹ Section 113(5)(b).

On this approach, the use of the word *must* in each extract, is misleading in as much as the failure to include the appraisal remedy notice in the meeting notice does not invalidate any action taken at the meeting, despite the seemingly peremptory nature of the instruction.

This must be so, by the very fact that section 164(6) assumes that the resolution is adopted, despite the company's failure to give the meeting notice, and excuses non-compliance with certain subsequent procedural requirements in the case of dissidents who were not given the meeting notice.

This anomaly shall be referred to as the notice anomaly. In and of itself, the notice anomaly appears to be a rather serious conceptual blunder, the consequences of which manifest later in the section. I will address the consequences of the notice anomaly in due course.

6.3 Notice of Objection

A rather strained distinction has been suggested¹¹⁰ between the 'written notice' objecting to the resolution referred to section 134(3) and a 'notice of objection' referred to in section 164(5)(a)(i), on the basis that the latter is expressed as being written. The distinction, it is averred, is fortified by the fact that the unwritten 'notice of objection' in section 164(5)(a)(i) does not refer to the '*written* notice of objection' in section 164(3) or section 164(4)(a). Based on that distinction, the commentator concludes that an unwritten 'notice of objection' is required in addition to a 'written notice of objection'.¹¹¹ The commentator then attempts to distinguish between the unwritten 'notice of objection', the 'written notice of objection' and a further 'notice of intention to oppose',¹¹² referred to in section 37(8)(a) and section 115(8)(a).

It is then suggested that a dissident is required to give three distinct notices signifying opposition to the resolution. This suggestion cannot be supported in the circumstances. A purposive interpretation of the Companies Act, as is required by section 5(1) read with section 7(b)(i) and (j) would require the reasonable reader to accept that the three notices referred to above are indeed the same. In any event, the assertion that the unwritten 'notice of objection' and unwritten 'notice of intention to oppose' must be distinguished from the

¹¹⁰ Beukes op cit note 83 at 181.

¹¹¹ Ibid.

¹¹² Beukes op cit note 83 at 182.

'written notice' may be resolved by reference to section 6(4)(b) and subsection (5) which require notices be in writing, or at least in a form that is reduced to a document.

Nevertheless, the giving of the objection notice by the dissident is an essential pre-condition to 'perfecting' the right to an appraisal,¹¹³ which may be excused in circumstances where the company failed to give notice of the meeting.¹¹⁴ No time is provided by which the objection notice must be given, save that it must be given before the resolution is put to the vote. Therefore, the dissident may arrive at the meeting and give the objecting notice at any time before the vote is taken.

Unlike the demand contemplated in section 164(5), the giving of the objection notice does not impair the rights of the dissident as contemplated in section 164(9). Consequently, the dissident may refrain from pursuing the appraisal remedy notwithstanding having given the objection notice. It has been suggested that the nonbinding nature of the objection notice may be abused in as much as dissidents may give the objection notice without any intention of pursuing the appraisal remedy, merely as a tactic to exert what influence it can to oppose the transaction.¹¹⁵

Canadian commentators have understood the benefit of the objection notice on the basis that 'other shareholders may be influenced by the number of shareholders who indicate an intention to assert the dissent remedy should the proposal be approved'.¹¹⁶ It has been suggested that the similar considerations may be applicable in South Africa, namely to provide 'scope for the board to rethink its strategy, especially where large numbers of minority shareholders indicate their intention to dissent'.¹¹⁷ This proposition is difficult to sustain in relation to the Companies Act for the reasons given below.

In the Canadian Act, the notice must be given 'at or before any meeting of shareholders at which a resolution ... is to be voted on'.¹¹⁸ In the Companies Act a dissident 'may give the company a written notice objecting to the resolution' ... '(a)t any time before a resolution ... is

¹¹³ See sections 164(5), 37(8) and 115(8).

¹¹⁴ Section 164(6) read with section 164(5)(c)(i). Refer to the notice anomaly infra.

¹¹⁵ Delpont & Vorster op cit note 46 at 578.

¹¹⁶ *Denischuk v Bonn Energy Corp* (1983) 30 Sask R 37 (QB), per Estey J. at 39. See, for instance, *Royfor and Co. v Skye Resources Ltd* (1982) 38 OR (2d) 253 (HC) affirmed 40 OR (2d) 416 (CA).

¹¹⁷ Cassim *et al* op cit note 2 at 800. See also Cassim *et al* op cit note 2 at 797-8 where it is suggested that a dissatisfied shareholder is required to take action as soon as a resolution is proposed, so as to make its opposition or objection known to the company before the resolution is put to the vote.

¹¹⁸ Section 190(5).

to be voted on'.¹¹⁹ In both cases, there is no time stated before which the objection notice must be given other than before the vote is taken at the meeting (attendance at which is compulsory, in South Africa).

Since the Companies Act, unlike the Canadian Act, makes it a requirement that the dissident votes against the resolution¹²⁰ the rationale given for requiring the objection notice is unconvincing, particularly when a dissident is entitled to give the objection notice moments before voting begins. Nothing is gained by requiring compliance with both the opposition notice and the nix vote. The Canadian appraisal remedy does not require an explicit vote against the resolution. An abstention is sufficient.

Whilst the objection notice has a distinct and unique function in Canada, where no nix vote is required, the objection notice does not provide the board with any further insight over and above the opposing votes. The additional step required by the Companies Act offers no apparent benefit to the company or the dissident. Any perceived benefit the company may enjoy from such 'advance notice' is moderated in light of the fact that the dissident can delay giving the objection notice to the last minute.

6.4 **Partial Dissent**

The Canadian Act permits a partial dissent. Section 190(1)¹²¹ states that a holder of shares of any class of a company may dissent if the company resolves to, inter alia, amend its articles ... to add, change or remove any provisions restricting or constraining the issue, transfer or ownership of shares of that class. Section 190(3) states that 'a shareholder who complies with the section is entitled ... to be paid by the corporation the fair value of the shares in respect of which the shareholder dissents'.

The right to a partial dissent is qualified by section 190(4) in terms of which a claim in terms of section 190 may only be made with respect to all the shares of a class held on behalf of any one beneficial owner and registered in the name of the dissident. The demand required in terms of section 190(7) requires that the number and class of shares in respect of which a dissident dissents is set out therein. The Canadian position is that a dissident may dissent in

¹¹⁹ Section 164(2).

¹²⁰ Section 164(5)(c)(i).

¹²¹ Canadian Act.

relation to one class of shares even if it holds shares in more than one class, provided that it dissents in relation to all the shares in the class held by it.

The South African position is less clear, particularly in relation to the breadth of the effect of the appraisal remedy in circumstances where the company amends its constitutional documents as contemplated in section 37(8). At issue is whether the dissident in such circumstances is required to engage the remedy in relation to all its shares, or in relation to the affected class only. Seen from another perspective, the issue may be that when an amendment is proposed to one class of shares, the dissident is given an opportunity to invoke the appraisal remedy in relation to all classes of shares held by it. On either construction, prejudice may be suffered.

In the first case, the dissident may be forced to have all the shares appraised, in circumstances where the unaffected class of shares are well placed. In the second case, a dissident may exercise the appraisal remedy opportunistically and in relation to all the shares held by it, regardless of an unaffected class, exposing the company to a mass extraction of capital.

The first mention of the shares that form the subject matter of the appraisal remedy is in section 164(5) - a dissident may demand that the company pay the fair value for '*all of the shares* of the company held by that person'. In order to exercise the appraisal remedy in the case of an amendment to the constitutional documents, the dissident must hold '*shares of a class* that are materially and adversely affected by the amendment'.¹²² The wording of section 164(5) is problematic in as much as the two operative phrases, namely 'all of the shares' and 'shares of a class' are seemingly at odds.

The wording used in section 164(5) indicates that a dissident, who holds shares in more than one class, may make a demand, but if the demand is made, the demand must be in respect of *all of the shares* of the company held by (it), notwithstanding that only *shares of a class* are affected by the amendment.¹²³ Put differently it appears that if an amendment affects only a particular class of share, the dissident may only exercise the appraisal remedy in relation to *all the shares* held by it. The unfairness and prejudice following a narrow interpretation of section 164(5) would be unfortunate.

¹²² Section 164(5)(a)(ii).

¹²³ Beukes op cit note 83 at 179.

From a dissident point of view, in order to protect the affected shares, it would have to relinquish its position in relation to un-affected shares, the latter of which may be a sound investment and, but for the narrow interpretation of section 164(5), would best be left as is. This is the dissident conundrum.

From a company point of view, a board might be disinclined to propose *bona fide* amendments to the constitutional documents that affect one class of shares, for fear of a mass exodus of opportunistic dissidents seizing an opportunity to liquidate their capital. This is the company conundrum.

The dissident and company conundrums are certainly not what the legislature intended and do no justice to the policy for the inclusion of the appraisal remedy in the Companies Act. In relation to the conundrums identified, the harsh consequence of a narrow reading section 164(5) might be avoided by construing sub-sections 164(8) to (10) as qualifying section 164(5), in addition to giving substance to it.

Section 164(8) states that the demand must state, inter alia, 'the number and class of shares' in respect of which the shareholder seeks payment. Section 164(9) states that after having sent the demand the dissident has 'no further rights in respect of *those* shares, other than to be paid *their* fair value'. Section 164(10) provides upon the occurrence of certain events, that 'the shareholder's rights in respect of *the* shares are reinstated without interruption'.

The italicised words in the preceding paragraph are definitive, in as much as the phrase 'class of shares'¹²⁴ presupposes that there are other shares in relation to which the dissident does not seek payment. That rights in respect of *those* shares¹²⁵ are impaired presupposes that there are rights in relation to other shares that shall not be impaired and may be exercised.

The position must be as follows: a demand is made in respect of a number and class of shares.¹²⁶ After delivery of the demand, the dissident has no further rights in respect of those shares;¹²⁷ upon the occurrence of certain events, the rights in respect of the shares which are the subject matter of the demand is sent are reinstated without interruption.¹²⁸

¹²⁴ Section 164(8).

¹²⁵ Section 164(9).

¹²⁶ Section 164(8)(b).

¹²⁷ Section 164(9).

¹²⁸ Section 164(10).

In order to solve the conundrums, one would have to read in an implied qualifier, such as 'of those shares held by a person in a class affected by an amendment contemplated in subsection(5)(a)(ii) or otherwise, '... such that the preamble to subsection (5) read as follows:

A shareholder may demand that the company pay the shareholder the fair value of those shares held by a person in a class affected by an amendment contemplated in subsection(5)(a)(ii) or otherwise, for all of the shares of the company held by that person if—

Although rather inelegantly phrased, the insertion of an implied qualifier such as that suggested does away with ambiguity of the present wording, and goes some way to avoid the prejudice which would otherwise have arisen.¹²⁹

7. ADOPTING THE RESOLUTION

Where the resolution is defeated, the dissident's right to an appraisal falls away. There is no longer a transaction from which to dissent. Similarly, the dissident has no right to an appraisal where (subsequent to the approval of the resolution) the directors revoke a resolution in terms of section 164(9)(c). The Canadian Act has a similar mechanism.¹³⁰ In addition, if a dissident gives an objection notice but subsequently votes in favour of the resolution, the right of dissent is forfeited.¹³¹

Canadian commentators have observed that the objection notice given by the dissident to the company prior to the vote is not binding upon the dissident.¹³² Subsequent to the vote being taken, the dissident may simply elect not to assert its right to the appraisal remedy. This is achieved by refraining from any further action pursuant to the appraisal remedy.

Section 115(1) provides that despite section 65 and any provision of the constitutional documents or resolution of directors or holders of the company's shares to the contrary, a transaction cannot be implemented unless approved in terms of s115.¹³³ The consequence of this is two-fold. Any provisions in the constitutional document that varies the thresholds for a special resolution as permitted in section 65(10) are inapplicable.

¹²⁹ Cf Cassim *et al* op cit note 2 at 803.

¹³⁰ Kevin Patrick McGuinness *The Law and Practice of Canadian Business Corporations* 2ed (2007) at 1031.

¹³¹ Section 164(8)(b).

¹³² McGuinness op cit note 130 at 1031.

¹³³ Section 115(1).

Importantly though, section 115(8)(b), states that the 'holder ... is entitled to seek relief in terms of section 164 if that person ... *was present at the meeting* and voted against that special resolution. Similarly, section 37(8)(b) states that 'any holder ... is entitled to seek relief in terms of section 164 if that shareholder ... *was present at the meeting*, and voted against that resolution'.

A further question arises in relation to whether the resolution in question must be approved at a meeting, or whether a round robin resolution would suffice in the circumstances. In this regard, it should be noted that section 115(2) expressly refers to 'at a meeting called for that purpose'. As such, the resolution must be passed at a meeting and cannot be approved by round robin as envisaged in section 60.¹³⁴

It has been asserted¹³⁵ that a dissident is specifically required to be present at the meeting in question. Presumably this assertion is based on the use of the wording of section 115(8)(b) and section 37(8)(b) which contain the words 'if that person ... was present at the meeting' and 'if that shareholder ... was present at the meeting'. The commentator states that it is unclear whether a dissident may be represented, and vote in opposition to this resolution, by proxy.¹³⁶

Clarity may be had by reference to the definition of 'present at a meeting', in section 1, which means 'to be present in person, or able to participate in the meeting by electronic communication, or to be represented by a proxy who is present in person or able to participate in the meeting by electronic communication'. Section 58 is instructive in as much as it provides for the general right of a shareholder to be represented by proxy

7.1 Meeting

The dissident is required to vote in opposition to the resolution, notwithstanding having given the objection notice. The Canadian Act requires that only an objection notice be required to engage the appraisal remedy. The requirement that the dissident vote against the resolution,¹³⁷

¹³⁴ Regarding whether the resolution may be passed by round robin, it should also be noted that section 115(2) expressly refers to 'at a meeting called for that purpose'. In addition, this view is supported from a policy perspective, in as much as the holding of a meeting would enable shareholders to air their views, which a round robin resolution would not.

¹³⁵ Beukes op cit note 83 at 183 and fn 32.

¹³⁶ Ibid.

¹³⁷ Section 115(2).

in addition to giving the objection notice, is not easily explained. It has consequences that will be elaborated upon in the next section. In any event, the Canadian approach, requiring only an objection notice is far more efficient.

7.2 **The Vote Anomaly**

It is already contemplated that the company may fail to give the meeting notice. The issues relating to the failure to send the meeting notice have been addressed above. I have also considered the conclusion that might be reached in relation to the manner in which non-compliance with the obligation to send the meeting notice is resolved in section 164.

Of deeper concern, regarding the non-compliance with the meeting notice obligations, is the effect it has on the ability of a dissident to perfect its right to demand payment of the fair value of its shares.

As mentioned above, section 164(7) requires a dissident to have complied with section 164(5), before it is entitled to make any such demand. In order to qualify and meet the requirements set out in section 164(5), the dissident must have at least sent the company an objection notice and voted against the resolution.

A dissident who has not received the meeting notice is excused from having to give the objection notice in as much as section 164(6) states that the requirement of section 164(5)(a)(i) does not apply. The inclusion of this exception is laudable. It would be unjust, unfair and, indeed, irrational for a dissident to be denied the appraisal remedy in circumstances where the company did not give a proper meeting notice.

Unfortunately, the legislature fell short. The exception in section 164(6), regarding the objection notice, fails to take into account that the dissident is also required to vote against the resolution to perfect the appraisal remedy. If a dissident is excused from complying with the objection notice requirement on the basis that it did not receive the meeting notice, how then is it that a dissident is expected to know that it is required to vote against the resolution, notice of which it has not received? This cannot be explained. This is the vote anomaly.

7.3 **Notice of adoption of the resolution**

Within ten business days after the company has adopted the resolution, it must send an adoption notice that the resolution has been adopted to each dissident who gave the objection

notice, has not withdrawn that objection notice, or voted in support of the resolution.¹³⁸ It is not clear how the company will know whether the dissident voted against the resolution or not. Presumably, the company secretary will keep a record of the votes cast against the resolution. If the company fails to send the adoption notice to a dissident, it suffers no adverse consequences¹³⁹ however, it does cause problems. These problems will be addressed in due course. Nevertheless, the company does not have to send the adoption notice to any person other than dissidents that gave an objection notice, voted against the resolution and did not withdraw the notice. It is uncertain why a dissident would want or need to withdraw the notice. Such a withdrawal is irrelevant as nothing turns on it.

8. THE DEMAND

The demand is a written notice and must contain the details in section 164(8).¹⁴⁰ The dissident must send the demand to the company within 20 business days after receiving the adoption notice,¹⁴¹ or within 20 business days after learning that the resolution has been adopted.¹⁴² The demand must also be sent to the Panel.¹⁴³

Similarly, in Canada, it is only after the resolution is passed that the dissident must provide the number and class of shares in respect of which he dissents by way of demand. However, section 190(7) of the Canadian Act does not set a fixed deadline. The deadline may extend to 20 days after the dissident learns of the adoption of the resolution. In the case of South Africa, this requirement is problematic.

As has become apparent, the appraisal remedy must be engaged before it is perfected in both the Companies Act and the Canadian Act.

¹³⁸ Section 164(4).

¹³⁹ Cassim *et al* op cit note 2 at 801. There may, however, be practical consequences, for example delays in the delivery to the company of demands by dissidents.

¹⁴⁰ The demand must state the shareholder's name and address, the number and class of shares in respect of which payment is sought, and a demand for payment of the fair value of those shares.

¹⁴¹ If the shareholder does not receive a notice.

¹⁴² Section 164(7).

¹⁴³ Section 164(8) of the Companies Act, although the twenty business days requirement in s 165(7) clearly does not apply to delivery of the demand to the Panel. It is not clear why the requirement to deliver the demand to the Panel applies in respect of all companies, including companies that are not 'regulated companies'. See Delpont & Vorster op cit note 46 at 580.

In the Companies Act, an objection notice and vote against the resolution is required. The right is perfected by the demand. Once the demand is sent, the company is on terms. The dissident may revoke the demand at any point.

In the Canadian Act, an objection notice is required but sufficient to entitle the dissident to make the demand. Once the demand is given, the right is perfected. Similarly, the dissident may revoke the demand.

8.1 Demand

As a result of the vote anomaly, a dissident who did not receive the meeting notice is excused from having to give the objection notice. As pointed out, it is unlikely that such a dissident would have been aware of the vote requirement, in the absence of the meeting notice. In the absence of a vote against the resolution, such a dissident will be unable to make a valid demand. It should be noted that section 164(6) does not excuse the failure to vote in the same way that it excuses the failure to give the objection notice.

8.2 Rights Cease upon Demand

A dissident who has otherwise complied with the procedural requirements provided for in section 164 and sent a demand has no further rights in respect of its shares, other than to be paid their fair value.¹⁴⁴

In relation to the predecessor of the Canadian Act, a Canadian court held, in *Brant Investments Ltd v Keeprite Inc*,¹⁴⁵ that a dissident did not lose the right to challenge oppressive action. On the other hand, a later court held that there is no reason to read the language of section 190(11) of the Canadian Act so as to restrict 'rights as a shareholder' only to matters such as voting and receiving dividends. It would also preclude a shareholder from bringing an oppression action under section 241.¹⁴⁶

In terms of the Companies Act, the dissidents would presumably also lose their rights to future distributions, if declared,¹⁴⁷ and to vote, however, the precise extent of the 'relinquished rights' is uncertain. It should be noted that it is not particularly clear how it is that

¹⁴⁴ Section 164(9). It is not clear which particular 'rights' are being referred to.

¹⁴⁵ (1983) 44 OR (2d) 661 (Ont HC) at 664.

¹⁴⁶ *McConnell v Newco Financial Corp* (1979) 8 BLR 180 (BCSC), citing the CBCA.

¹⁴⁷ Section 46.

distributions and voting rights are the only two rights that have been identified as being relinquished. For example, would the dissidents have the right to bring an oppression application as suggested in the *Brant* case? The concern is that during the period commencing on demand and enduring until receipt of payment, which may be of uncertain duration, the company might take steps that are prejudicial to the interests of such dissidents.

Whilst a full discussion of the issue raised by this question is not within the scope of this dissertation, reference may be had to some the remedies provided for in the Companies Act, the *locus standi* of claimants in relation to such remedies and the nature of the relief that may be sought.

The statutory derivative action may be initiated by a person entitled to be registered as a shareholder¹⁴⁸ or if the person has been granted leave of the court.¹⁴⁹ The category of persons entitled to serve the demand is wide, and can accommodate a dissident, particularly where leave of the court is sought and granted.

An application to declare a director delinquent or under probation may be moved by a shareholder, director, company secretary or prescribed officer, a registered trade union or another representative of the employees of a company.¹⁵⁰ In addition, the Commission and the Panel have standing.¹⁵¹ Assuming that for the purposes of section 162 the dissident does not have standing it may always initiate a complaint to the Commission in terms of section 168(1), the *locus standi* requirements of which are then restrictive. The Commission or the Panel may, as a result of such complaint, make an application contemplated in section 162 where grounds exist therefor.

A declaratory order contemplated in section 161, by its very nature, would be appropriate, particularly when a dissident is uncertain of its rights as shareholder, if any. It contemplates that a court may give an order determining any rights of a securities holder in terms of the Companies Act and the constitutional documents¹⁵² and in addition, an order to protect such rights,¹⁵³ or an order to rectify harm suffered by the securities holder in question.¹⁵⁴

¹⁴⁸ Section 165(2)(a).

¹⁴⁹ Section 165(2)(d).

¹⁵⁰ Section 162(2).

¹⁵¹ Section 162(3).

¹⁵² Section 161(1)(a).

¹⁵³ Section 161(1)(b)(i).

The most potent section of the Companies Act available to the dissident is section 218(2), a general remedy available to any person to sue any other person who contravenes any provision of the Companies Act for any loss or damage suffered as a result of the contravention. It has been submitted that 'contravene' here would include, in addition to any offence', any non-compliance with a provision of the Companies Act that may not be an offence.¹⁵⁵ It should be noted that there is no fault requirement in the section. Accordingly liability is strict.

In relation to the oppression remedy contemplated in section 163, it appears that the open list of orders that may be given by a court,¹⁵⁶ are directed at giving relief to an applicant seeking a remedy to the enjoyment of their rights *qua* shareholder. The interplay between the rights sought to be protected under this remedy and those contemplated in the appraisal remedy, appear to be at odds. Whilst the oppression remedy is aimed at restoring a state of affairs for the applicant's benefit, the appraisal remedy is directed towards the smooth exit from the company. Put differently, the oppression remedy appears to be a remedy suitable for a shareholder wishing to remain a shareholder and wanting to enjoy their rights as such, whilst the appraisal remedy is one upon which a dissident relies in order to exit a company after having elected to relinquish its rights as a shareholder. As to whether a dissident could assert both remedies, it seems that there would be limited opportunities to pursue an order under both sections in relation to one class of shares.

9. THE OFFER

9.1 The Written Offer

In terms of section 164(11), the company must make an offer to dissidents within five days of the latter of the effective date of transaction,¹⁵⁷ or the last day for the receipt of demands in

¹⁵⁴ Section 161(1)(b)(ii).

¹⁵⁵ Delport & Vorster op cit note 46 at 639.

¹⁵⁶ Section 163(2).

¹⁵⁷ Section 164(11)(a).

terms of subsection (7)(a),¹⁵⁸ or the day the company received a demand as contemplated in subsection (7)(b), if *applicable*.¹⁵⁹

This last option in section 164(11)(c) is problematic. In order for the company to interpret section 164(11)(c), it will need to know whether the circumstances in section 164(7)(b) are indeed 'applicable'. Initially it seems unclear as to how this will be determined. In order to interpret the section, the company will have to have an insight as to whether the dissident received the adoption notice under section 164(4), which would trigger the 20 business day period within which the dissident may dispatch a demand, as provided for in the subsection.

Every offer made by the company to dissidents in respect of shares of the same class or series must be on the same terms.¹⁶⁰ It is unclear what the phrase 'or series' refers to as it does not appear in the Companies Act again. Unlike the Canadian Act, there is no provision in the Companies Act for the issues of a 'series' of shares. This must be a drafting error. The statement showing how the value of the shares was determined must accompany the offer. There is no indication in the Canadian Act or in the Companies Act of the details that such a statement should contain.

9.2 Written offer problem

The company must establish the point in time when the dissident contemplated in section 164(7)(b) learns of the adoption of the resolution so that it can calculate when the 20 business day period lapses before having to make the required offer. If a dissident is entitled to make a demand within 20 business days of *learning* of the adoption of the resolution,¹⁶¹ a literal interpretation of section 164(11)(c) will have the result that the obligation of the company to send the offer to the dissident may never arise.¹⁶² The dissident may never learn that the resolution has been adopted, and consequently never make the demand contemplated in section 164(11)(c).

¹⁵⁸ Section 164(11)(b). In which case, a dissident would be encouraged to withhold demands until the last of the 20 business day period provided for demands to avoid prejudice and retain any suspended rights for as long as possible.

¹⁵⁹ Section 164(11)(c). This will be 20 days after the notice was sent, by virtue of section 6(10) and section 6(11) read with regulation 7(1) and Table CR3 and regulation 7(2) ('the deemed receipt method').

¹⁶⁰ Section 164(12)(a).

¹⁶¹ Section 164(7)(b).

¹⁶² Section 164(4).

There is no guidance as to how a company would establish whether the dissident contemplated in section 164(7)(b) has learned of the adoption of the resolution. What is clear, however, is that the company has no incentive to establish the date in question. It would be in the company's selfish interest for the dissident in question to never learn of the resolution and never make a demand.

How is the company to anticipate that the demand contemplated in section 164(11)(c) will ever come? The dissident who has sent an objection notice and voted against a resolution, is not thereby obliged to make a demand. May the company continue to wait for the demand *ad infinitum*, and as a consequence never have to make an offer. That cannot be what the legislature intended.

I submit that the company must make an offer after the effective date¹⁶³ or after the period for sending demands have elapsed,¹⁶⁴ notwithstanding the date on which the dissident 'learned' of the adoption of the resolution for the following reasons. The date that the dissident contemplated in section 164(11)(c) may be deemed to have received the adoption notice must be calculated in accordance with sections 6(10) and 6(11)¹⁶⁵ read with regulations 7(1), 7(2) and Table CR3 of the Company Regulations ('the deemed receipt method'). Read together these provisions set out a method according to which notices sent in terms of and in accordance with the Companies Act are deemed to have been received. This will be 20 days after the notice was sent. If the deemed receipt method is not employed, the possibility exists for circumstances to arise in terms of which the company may refrain from making the required offer.

9.3 Acceptance and lapse of the Written Offer

A dissident who has made a demand can either accept the offer¹⁶⁶ or apply to a Court to determine a fair value of the relevant shares, but before the offer lapses.¹⁶⁷ The offer lapses after 30 business days.

¹⁶³ Same as note 157.

¹⁶⁴ Same as note 158.

¹⁶⁵ Companies Act 71 of 2008.

¹⁶⁶ Section 164(13).

¹⁶⁷ Section 164(14). See Delpont & Vorster op cit note 46 at 580.

If a dissident accepts the offer, the dissident must either tender the share certificates, or take the steps required in terms of section 53 in the case of uncertificated shares.¹⁶⁸

It has been suggested¹⁶⁹ that a dissident is not required to indicate acceptance of the offer in a written notice or by any means other than by tendering its shares. Section 164(13) states that '(i)f a shareholder accepts an offer ... the shareholder must ... tender the relevant share certificates to the company or the company's transfer agent'.¹⁷⁰ Whilst the Act is silent on the manner in which acceptance of the offer is to be communicated, it is clear that the acceptance of the offer and the tender of the share certificates are two separate and distinct acts. The tender of the certificates follows upon acceptance of the offer. The mere tender of the shares as suggested would not meet the common law requirements that acceptance be *inter alia* unequivocal¹⁷¹ and correspond to the offer.¹⁷² If anything, the offer ought to set out the manner in which acceptance should be communicated. In the absence of such an indication, it is doubted that a mere tender would suffice.

The offer lapses if it has not been accepted within 30 business days after it was made. In this event, all the dissident's rights in respect of the shares are reinstated without interruption.¹⁷³

10. APPLICATION

10.1 Application to Court¹⁷⁴

If the company has failed to make an offer, or has made an offer that the dissident considers to be inadequate, and that offer has not lapsed, a dissident may apply to the Court to determine a fair value in respect of the shares, and for an order requiring the company to pay the dissident the fair value.¹⁷⁵ All dissidents who have not accepted an offer from the company as at the date of the application must be joined as parties and are bound by the decision of the court.¹⁷⁶

¹⁶⁸ Section 164(13). See Delpont & Vorster op cit note 46 at 580.

¹⁶⁹ Beukes op cit note 83 at 189.

¹⁷⁰ Section 164(13)(a)(i).

¹⁷¹ *Collen v Rietfontein Engineering Works* (1948) 1 SA 413 (A) at 421.

¹⁷² *Christian v Ries* (1898) 13 EDC 8 15.

¹⁷³ Section 164(9), (10) and (12)(b).

¹⁷⁴ See Delpont & Vorster op cit note 46 at 582.

¹⁷⁵ Section 164(14).

¹⁷⁶ Section 164(15)(a).

The period within which a dissident must make an application commences and expires only if the company makes an offer, failing which the dissident is not on terms to initiate an application. There is no sanction or penalty provided for in section 164, in circumstances where a company fails to make an offer. If such a state of affairs prevails, the result would be untenable.

If no offer is forthcoming, a dissident may have to resort to an alternative remedy. The question whether the dissident has recourse to an alternative remedy has been considered on page 30.

In the circumstances, a dissident may resort to section 218(2) in terms of which any person who contravenes a provision of the Companies Act is liable to any other person for consequent loss or damage suffered as a result of the contravention. This provision is notable for two important reasons. As indicated on page 31, any person has *locus standi* whether they have shareholder rights or not, and liability is strict.¹⁷⁷ The declarator contemplated in section 161 may also be an appropriate avenue of relief.

Whilst it may be that the right to claim payment of the fair value prescribes in accordance with the Prescription Act,¹⁷⁸ the prescription period will only commence once the right to receive payment vests in the dissident.

10.2 Lapsed Dissident Anomaly

Upon application to court, the company is required to notify each 'affected dissident' who has not accepted an offer of the date, place and consequences of the application and of their right to participate in the proceedings.¹⁷⁹ It is not clear who falls into the category of such affected

¹⁷⁷ Section 218(2) does not provide for a fault standard.

¹⁷⁸ Prescription Act of 68 of 1969. Extinctive prescription commences to run as soon as the debt is due.¹⁷⁸ The courts have given the term debt a wide and general meaning. In its broadest sense, 'debt' refers to an obligation to do something, whether by payment otherwise. See JS Saner 'Prescription' in WA Joubert (founding ed) *The Law of South Africa* vol 21 2 ed para 125.

¹⁷⁹ Section 164(15)(b). Paragraph (a) provides that all dissidents who have not yet accepted an offer from the company have to be joined as parties to the application and that they are all bound by the decision of the court. But it is not stated what the result will be if the company fails to give notice to affected dissidents and they are not joined as parties to the application.

dissidents.¹⁸⁰ The easy answer would be that the 'affected dissidents' are 'all dissidents who have not accepted an offer from the company as at the date of the application'.¹⁸¹

The Canadian Act is clear in as much as it requires that the dissidents who are party to the application are 'all dissidents whose shares have not been purchased by the company'.¹⁸² This is significant. The Canadian Act does not make provision for the lapse of an offer and for the reinstatement of the dissident's rights.

This is in contrast to the position in the Companies Act, where a dissident's rights in respect of the shares are reinstated without interruption¹⁸³ if a dissident to whom an offer was made allows the offer to lapse.¹⁸⁴ A dissident whose offer has not lapsed has *locus standi* to bring the application.¹⁸⁵ Nevertheless, the court must join the dissidents that have not accepted the offer and they will be bound by the court's order, notwithstanding that they may be joined after the 30 business day period provided for in section 164(9)(a) has lapsed.

All dissidents whose offers have lapsed are *ipso facto* dissidents that have 'not accepted offers as at the date of the application' and they must be joined to the application.¹⁸⁶ Even if their offers haven't lapsed as at the date of the application, their offers will by the effluxion of time lapse during the application process. There is no provision in section 164 which states in express terms that upon being joined by the court as an applicant, the dissidents' rights are again terminated or suspended, notwithstanding that their rights may have been reinstated as contemplated in section 164(10).

It bears repeating that dissidents have their rights reinstated once their offers lapse, and are entitled to receive any benefit that may accrue to the shares in question.¹⁸⁷ It appears that this is the case regardless that such dissidents have been joined in the court application. This is the lapsed dissidents' anomaly.

At any time before the Court gives the order contemplated in section 164(15)(c)(v)(bb), a dissident, even a dissident whose offer has lapsed, it seems may accept the offer made by the

¹⁸⁰ Section 164(15)(b).

¹⁸¹ Section 164(15)(a).

¹⁸² Section 190(19)(a).

¹⁸³ Section 164(10).

¹⁸⁴ Section 164(9)(a).

¹⁸⁵ Section 164(14)(b).

¹⁸⁶ Section 164(15)(a).

¹⁸⁷ Section 164(10).

company with those of section 164(11). In such a case the dissident must comply with the requirements of section 164(13)(a) and the company with those section 164(13)(b).¹⁸⁸

This is intended to promote settlement, but may also be subjected to abuse by dissidents. In respect of costs orders, the Act provides that the court may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court.^{189 190}

10.3 Security for Cost

In terms of section 190(18) of the Canadian Act, a dissident is not required to give security for costs in an application for a court valuation.¹⁹¹ There is no such rule in the Companies Act. Security for costs are determined with reference to the Uniform Rules of Court and to the extent relevant, the common law.

In terms of Rule 47(1), a party entitled and wishing to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.¹⁹² In terms of Rule 47(3),¹⁹³ 'if the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.'

The application of the quoted rules may be unjust, particularly in the circumstances where the dissident moving the application is vexatious and fails to give security when required or directed to do so. In such circumstances, the company may have the proceedings stayed, to the prejudice of *bona fide* dissidents, until such time as appropriate security is furnished. Proceedings may be delayed unnecessarily.

¹⁸⁸ Delport & Vorster op cit note 46 at 582.

¹⁸⁹ Section 164(15)(c)(iv).

¹⁹⁰ Cassim *et al* op cit note 2 at 806.

¹⁹¹ McGuinness op cit note 130 at 1035.

¹⁹² Uniform Rules of Court authorised by section 43 of the Supreme Court Act 59 of 1959.

¹⁹³ Ibid.

10.4 **The *Dominus Litis*, the onus of proof and the evidentiary burden**

The onus of proof¹⁹⁴ refers to 'the obligation of a party to persuade the trier of facts by the end of the case of the truth of certain propositions'.¹⁹⁵ The incidence of the onus of proof is determined by the applicable substantive law rule,¹⁹⁶ and ordinarily falls on the *dominus litis*.¹⁹⁷ In the case of an application brought in terms of section 164, the *dominus litis* would ordinarily be the applying dissident.

The burden of proof or the evidentiary burden, as opposed to the onus of proof, refers to the 'duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent',¹⁹⁸ and may also be described as the 'burden of adducing evidence in rebuttal'.¹⁹⁹

In the Canadian case law, it is generally accepted that the company has access to, and more often than not holds the information and data relevant to the determination of a fair value.²⁰⁰ In terms of the Canadian Act, the company is also the first party entitled to approach the court,²⁰¹ and as such, the company assumes the position of *dominus litis* in the conduct of the application ordinarily.^{202 203} However, the duty is upon the court to determine what the fair value is. There is no onus of proof on either party.²⁰⁴ The Canadian court is entitled to direct a trial to determine the fair value of the shares.²⁰⁵ The trial court may, in its discretion, require further or other evidence from either or both parties. It is empowered to appoint one or more appraisers to assist it in fixing fair value.²⁰⁶

¹⁹⁴ The duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim or defence, as the case may be.

¹⁹⁵ Heydon and Ockelton *Evidence: Cases and Materials* 4 ed (1996) at page 15. Cf PJ Schwikkard and Van der Merwe *Principles of Evidence* 3ed (2008) at page 571.

¹⁹⁶ Schwikkard & Van der Merwe op cit note 195 at 572.

¹⁹⁷ Except where the respondent sets up a special defence, in which case the respondent bears the onus of proof. See further *Pillay v Krishna* 1946 AD 946 at 952-3.

¹⁹⁸ *South Cape Exploration (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA (A) at 548.

¹⁹⁹ *Ibid* at 6.

²⁰⁰ *Denischuk v Bonn Energy Corp* (1983) 29 Sask R 156 (QB), citing the CBCA.

²⁰¹ Section 190(15).

²⁰² *Neonex International Ltd v Kolasa* (1978) 84 DLR (3d) 446, citing the CBCA.

²⁰³ *Denischuk v Bonn Energy Corp* (1983) 29 Sask R 156 (QB), citing the CBCA.

²⁰⁴ Section 190(20). See *Ultramar Canada Inc v Montreal Pipe Line Ltd* (1990) 74 OR (2d) 136, additional reasons at (1990) 75 OR (2d) 498, citing the CBCA.

²⁰⁵ *Robertson v Canadian Cannery Ltd* (1978) 4 BLR 290 (Ont HC), citing the CBCA.

²⁰⁶ *Denischuk v Bonn Energy Corp* (1983) 29 Sask R 156 (QB), citing the CBCA.

10.5 The Appraiser

In the Canadian case law, there appears to be no uniform approach to the role of the appraiser. The court in *Neonex International Ltd v Kolasa* expressed the difficulty in relation to the appraiser thus:

'Where an amalgamated company has only one easily appraised piece of property, the appointment of an independent appraiser might be appropriate. It is not suitable where the nature of the company's operations is complex. Who would pay the cost of the appraiser during the course of such an inquiry? An appraiser could take months or years to conduct an investigation. Generally speaking, the court will only award costs at the conclusion of a proceeding. They cannot be advanced part way through to help finance the other side's claim or defence. From whom would the appraiser take his instructions? Not from the court because it must remain impartial. If the court were to appoint an appraiser, where would the onus of proof lie? Whose witness is the appraiser? What happens if the appraiser's evidence is shown to be erroneous? What other evidence would the court need to reach a decision? The court's procedure, the rules of evidence and the adversarial system cannot adjust to the kind of inquiry contemplated in the court appointment of an appraiser.'²⁰⁷

It is not within the scope of this dissertation to discuss the merit of the issues raised by the court in *Neonex*. However, it would be interesting to see how a South African acquits itself in this regard.

10.6 Court's Duty and Discretion

It was first suggested, in relation to the Companies Bill, that the court must determine *a* fair value and not *the* fair value, and presumably that '(f)air value is a range of values and not a particular figure'.²⁰⁸ Although the comment was first made in relation to the Companies Bill, the wording in question may be found in the Companies Act.²⁰⁹ Indeed, the author of the

²⁰⁷ *Neonex v Kolasa* op cit note 202.

²⁰⁸ MF Cassim op cit note 3 at 66. The issue was considered in the context of the courts discretion in relation to the assessment of the cost order that it might eventually give particularly where a court finds that the fair value is less than that originally offered by the company. This suggestion is given in the context of warning that cost orders ought not to be construed as a disincentive to dissidents.

²⁰⁹ Section 164(15)(c)(ii).

suggestion in question is also the author of the chapter on the appraisal remedy in the leading textbook on company law. The suggestion is reproduced in the textbook.²¹⁰

The particular phrase is borrowed from the Canadian Act.²¹¹ The concern relates to the conceptualisation of '(f)air value (as) a range of values'. The distinction is important in as much as the dissident may demand, company is required to offer and, if that offer is accepted, pay '*the fair value*'.²¹² In the event of a judicial appraisal, the dissident must apply to court for an order that the company pay '*the fair value*'.²¹³ The court is entitled to appoint an appraiser to assist in determining '*the fair value*',²¹⁴ make an order as to costs having regard to the offer made by the company and the final determination of '*the fair value*' by the court²¹⁵ and order the company to 'pay *the fair value*'.²¹⁶ However, the dissident 'may apply to a court to determine *a fair value*'²¹⁷ and the court 'must determine *a fair value*'²¹⁸ of the shares of all dissenting shareholders, subject to the provisions of section 1654(16), which refers to '*the fair value*'.

This suggestion was considered in *Fraser Inc v Aitken*²¹⁹ in relation to the Canadian Act. At issue was whether the court had some form of discretion in fixing the fair value of shares that was not possessed by the company. The court expressed some reservation about exercising such a discretion if, indeed, it existed.²²⁰ The Canadian commentary states that 'the assumptions and the problems of interpretation required to sustain the proposition need only be stated to demonstrate how very unlikely it was that the Legislature intended to confer any kind of discretion upon the court in selecting a fair value for the shares. However, it is even

²¹⁰ Cassim *et al* op cit note 2 at 808.

²¹¹ Section 185(18).

²¹² See sections 164(5), 164(8)(c), 164(11)(c) and 164(13)(b).

²¹³ Sections 164(14)

²¹⁴ Section 164(15)(c)(iii).

²¹⁵ Section 164(15)(c)(iv).

²¹⁶ Section 164(15)(c)(v)(bb).

²¹⁷ Section 164(14).

²¹⁸ Section 164(15)(c)(ii).

²¹⁹ (1988) 41 BLR 87 (Ont HC) per Anderson J at 109.

²²⁰ McGuinness op cit note 130 at 1039, where it is stated if the court has a discretion, one is required to assume: first, there are different fair values that may be placed upon shares; second, the corporation is entitled to offer only one of these fair values (although, for some reason, which of these various fair values is not explained); third, the court may offer any of them (although how it is intended to differentiate between them, and the factors that should influence its decision on which of them to select, are also not explained); and, fourth, there was some reason behind the Legislature granting a wider valuation power to the courts than that conferred on the parties (although, if there was such a reason, the Legislature left little in the way of a clue to what that reason might be, or how it might be utilized as a policy guide to the court in applying the discretion allegedly vested in it).

clearer that as a matter of policy it is not desirable for dissident shareholders to seek the assistance of the courts frivolously.²²¹ In *Fraser Inc v Aitken* it was held that:²²²

'Recourse to the Court is a necessary safeguard to assure that a corporation acts responsibly and fairly in making its offer of the fair value, but it would be an unfortunate perversion of that safeguard if it came to be assumed by shareholders that application to the Court practically assured a bonus over what was offered. In my view, resort should be had to any discretion which may be found in the section only where the evidence discloses special circumstance will clearly call for its exercise.'

10.7 Valuation objective

Section 164(15)(c)(ii) states that the court must determine a fair value in respect of the shares of the dissidents. Section 164(16) provides that the fair value in respect of any shares must be determined 'as at the date on which and time immediately before the company adopted the resolutions that gave rise to the transaction'. Save as aforesaid, the Companies Act provides no guidance as to how the fair value of the shares ought to be determined.

The Delaware Law merely states that fair value should be determined with reference to 'all relevant factors' and 'exclusive of any element of value arising from the accomplishment or expectation of the merger'.²²³ In Delaware, the 'court's task in an appraisal proceeding is to value what has been taken from the dissident, being the *pro rata* interest in the going concern'.²²⁴

In Canada, the 'fair value' of the company is determined with reference to 'the highest price available in an open and unrestricted market between informed, prudent parties acting at arm's length and under no compulsion to act, expressed in terms of money or money's worth'.²²⁵ The 'fair value' of a dissident's shareholding, as in Delaware, is considered to be the

²²¹ Ibid at 109/10.

²²² McGuinness op cit note 130 at 1040

²²³ Brett A Margolin and Samuel J Kursh 'The Economics of Delaware Fair Value' (2005) 30 *Del J Corp L* 413 at 415.

²²⁴ Margolin & Kursh op cit note 223 at 415. Cf *Cede & Co v Technicolor Inc* 684 A2d 298 (Del 1996).

²²⁵ *Ultramar Canada Inc v Montreal Pipe Line Ltd* op cit note 204.

proportionate interest in the company as a going concern, being the *pro rata* share of the *en bloc* value without a minority discount.²²⁶

Four methods of valuation are generally accepted by the courts:²²⁷ the market value approach, the net assets approach, and the earnings of investment value approach or some combination of the three approaches.²²⁸ Whilst it is not within the scope of this dissertation to consider the voluminous case law in relation to the appropriateness or otherwise of favouring one approach over another, it bears mentioning that each has advantages in particular circumstances.

Whilst net asset valuation tends to undervalue shares, it does provide a back-stop for other valuation methods.²²⁹ Nevertheless, there are certain types of enterprises for which the approach has been favoured, particularly for companies in the natural resources sector, where the value of such companies are determined with reference to underlying assets.²³⁰

The use of the market value approach gives the most objective results, but prices within capital markets are susceptible to inexplicable fluctuations and extraneous factors that may distort the value of a company. A strict market value approach may result in arbitrary values.²³¹ Market prices may be helpful if they represent an actively traded market immune from unusual factors.²³² However, valuations of shares that are not traded regularly or are traded in a thin market, carry less weight.²³³

Whilst the discounted cash flow method is accepted as a legitimate valuation technique in the financial community,²³⁴ particular assumptions underlying its application in particular circumstances may always be challenged. The particular assumptions and applicable criteria upon which the method relies may be subjectively weighted. For this reason, the Delaware

²²⁶ Fung op cit note 34 at 76 and the authorities cited there.

²²⁷ *Brant Investments v KeepRite* op cit note 145, per Anderson J. at 115. Cf *Domglas Inc v Jarislowsky, Fraser & Co* (1982) 22 BLR 121.

²²⁸ *Neonex v Kolasa* op cit note 202; *Domglas Inc v Jarislowsky* op cit note 227; *LoCicero v BACM Industries* op cit note 266; *Brant Investments v KeepRite* op cit note 145.

²²⁹ *Abraham v Inter Wide Investments Ltd* (1988) 66 OR (2d) 684 (HC).

²³⁰ 'Recent Developments in Delaware Corporate Law' (1997) 22 *Del J Corp L* 291 at 305.

²³¹ *McGuinness* op cit note 130 at 1037.

²³² *Silber v BGR* supra note 75.

²³³ Vern Krishna 'Determining the 'Fair Value' of Corporate Shares' (1987-1988) 13 *Can Bus LJ* 132 at 156 - 157 and the authorities cited therein. Cf *Manning v Harris Steel Group Inc* [1987] 1 *WWR* 86.

²³⁴ See Steven P. Lamb and John Day 'Some Courts Are Using New Approach to Set Dissenting Shares' Value' (1991) *National LJ* at 58, which notes that discounted cash flow method has become the 'methodology of choice' in Delaware.

court subjects the method to rigorous scrutiny. Nevertheless, the utility of the technique is established.²³⁵

Courts in Canada and Delaware have adopted similar approaches to determining fair value; a dissident is entitled to a pro rata share of the going concern value of the enterprise.²³⁶ Both jurisdictions have concluded that the generally accepted commercial practice of valuation is the acceptable method for determining the value of an enterprise.

In Canada and in Delaware there is consensus regarding acceptable valuation methods, but it is acknowledged that the determination of 'fair value' is inexact, because of the variety of valuation methods accepted and the flexibility permitted within financial reporting standards.²³⁷ This practical problem of value determination, together with the long-standing tradition of judicial deference to honest business judgments made in good faith, has led the courts in both jurisdictions to rely on the procedural safeguards as protection for dissidents against abuse.²³⁸

Although, the appraisal remedy does not call upon the court to determine the fairness of a transaction, there is no onus on either party to establish fairness or unfairness.²³⁹ However, a fair and objective process in relation to the negotiation by the company of the transaction agreement and the determination of the transaction consideration has evidentiary value in establishing whether the majority exploited its power.²⁴⁰ For that reason, it has been suggested that a 'fair process' will yield a 'fair result'.²⁴¹

²³⁵ Eisenhofer and Reed op cit note 29 at 115.

²³⁶ See *Smith v Shell Petroleum Inc* [1990] FedSec LR (CCH) 95; *Joseph v Shell Oil Co* (1984) 482 A 2d 335 DelCh, *Weinberger v UOP Inc* (1983) 457 A 2d 701 Del, and Canadian decisions in *Chicago Blower Corp v 141209 Canada Ltd* (1988) 56 ManR 2d 276 (QB), *Ferguson v Imax Systems Corp* (1983) 43 OR2d 128 (CA).

²³⁷ Fung op cit note 34 at 50. Cf *Brant Investments v KeepRite* op cit note 145.

²³⁸ Fung op cit note 34 at 91.

²³⁹ *Smeenk v Dexeigh Corp* (1990) 74 OR (2d) 385 72 DLR.

²⁴⁰ Fung op cit note 34 at 50 and the authorities cited there. Cf *Van de Walle v Unimation Inc* [1990-1991] FedSec LR (CCH) 95.

²⁴¹ Fung op cit note 34 at 78. Cf *Brant Investments v KeepRite* op cit note 145, where an independent committee reviewed and approved the acquisition. There was no evidence of coercion or unequal bargaining power. The court held that provided that the committee understood its mandate and discharged it honestly and effectively, the business judgment rule protects its decision, and, therefore, the decision would not be subjected to 'microscopic examination'.

10.8 Court Order

Where an application is made for an appraisal, the court is under a duty to determine the fair value of the shares of all dissidents.²⁴² Once the court has determined the fair value, the Court must then make an order requiring the dissidents to either withdraw their demand or tender their share certificates,²⁴³ and requiring the company to pay the fair value in respect of their shares to each dissident who tenders its share certificates.²⁴⁴ Such an order is subject to any conditions the court considers necessary to ensure that the company fulfils its obligations under this section.²⁴⁵

It has been noted that section 164(15)(c)(v) is poorly drafted, in as much as it is unclear what order a court may give.²⁴⁶ If a withdrawal of the demand is ordered or chosen, as the case may be, it is assumed that the dissident's rights in respect of the shares are reinstated without interruption.²⁴⁷ This may not be possible since the Companies Act does not provide for the reinstatement of rights in the event of an election or order to withdraw at such an advanced stage of the appraisal process. Section 164(10) provides for the reinstatement of rights if any of the circumstances in 164(9) arise. There are three possibilities. First, reinstatement is possible if the demand is withdrawn before the offer is made.²⁴⁸ This is not possible in the circumstances, since the offer has been made. In order to approach the court, the offer must have been made and not lapsed.²⁴⁹ Secondly, reinstatement is possible if the company did not make an offer.²⁵⁰ For the same reason as in the first instance, this is also not possible. Thirdly, reinstatement is possible if the resolution is revoked.²⁵¹ Again, this will not be the case.

Notwithstanding the problem in relation to whether the rights of the dissident may be reinstated, there is the question as to whether the election to withdraw the demand or tender

²⁴² McGuinness op cit note 130 at 1036. See *infra* for discussion in relation to the distinction between 'a fair value' and 'the fair value'.

²⁴³ Section 164(15)(c)(v)(aa).

²⁴⁴ Section 164(15)(c)(v)(bb). A decision of the court as to the fair value of shares results in a judgment against the company on behalf of the dissidents. Cf *Kelvin Energy Ltd v Bahan* (1987) 52 Alta L.R (2d) 71 79 AR 259 (QB), citing the Business Corporations Act SA 1981 c B-15.

²⁴⁵ Section 164(15)(c)(v).

²⁴⁶ Delport & Vorster op cit note 46 at 581. Cf *Dauids et al* op cit note 1 at 361.

²⁴⁷ Section 164(10).

²⁴⁸ Section 164(9)(a).

²⁴⁹ Section 164(14).

²⁵⁰ Section 164(9)(b).

²⁵¹ Section 164(9)(c).

the certificates falls to the dissident.²⁵² There is an argument to be made that the election interpretation was the intention of the legislature. Assuming the withdrawal of the demand and reinstatement of rights is competent, the construction of section 164(15)(c)(v) remains two-fold. The section states that one of the options in section 164(15)(c)(v)(aa) must be elected, namely withdraw the demand or tender the certificates. The order must also require the company to pay the fair value to each dissident 'who complies with subsection (13)(a)'.²⁵³ It appears to be implied that the dissident *may* comply with subsection (13)(a) and the result is that the company need not pay the dissident who does not comply with subsection (13)(a). Had section 164(15)(c)(v)(bb) been stated as 'requiring ... the company to pay the fair value in respect of their shares to each dissenting shareholder ordered to tender their certificates as contemplated in subsection (13)(a)' the position would have been less ambiguous.

The other interpretation could be that there is no choice, that the Court will order the dissidents either to withdraw the demand or to accept the offer, and that the dissident does not have a choice, other than to comply with the particular order.²⁵⁴ Both interpretations raise concern. Whilst the first interpretation may appear to be a literal reading of the section, the second interpretation is the more palatable of the two.²⁵⁵ Even if the second interpretation is favoured, a further problem remains.

Regardless of which interpretation prevails, if the dissident remains a shareholder in the company after the implementation of the transaction, the intention of the parties is ignored, and the purpose for which the transaction was conceived is subverted.²⁵⁶ This is a particular concern in the context of a squeeze out merger, where the purpose of the transaction is to eliminate minorities, particularly in circumstances where the target company of which the dissident was a shareholder no longer exists.

If section 164(15)(c)(v) is interpreted to give the dissident the election to tender the certificates or withdraw the demand, dissidents would be encouraged to employ the appraisal

²⁵² Delport & Vorster op cit note 46 at 581.

²⁵³ Section 164(15)(c)(v)(bb).

²⁵⁴ Section 164(16) and see discussion *infra*.

²⁵⁵ Davids *et al* op cit note 1 at 361.

²⁵⁶ Davids *et al* op cit note 1 at 362.

remedy as a 'no-lose' technique. Dissidents may then be able to select the fair value offered, or the judicially determined fair value, if the latter exceeds the original offer.²⁵⁷

As a final comment, it may be suggested that the order of the court in this regard be confined to the terms of the provision which enable the dissident to make the application in the first place, namely section 164(14), in terms of which a dissident may apply to the Court to determine a fair value in respect of the shares, and for an order requiring the company to pay the dissident the fair value.²⁵⁸ In addition, guidance may be taken from section 164(15)(c)(v) which states that the order is subject to such conditions the court considers necessary to ensure that the company fulfils its obligations under the section, the chief of which is to pay their fair value.

It is unclear what the legislature was trying to achieve by straying from the wording of the Canadian Act, which follows the Delaware Law. The Canadian Act simply states that '(t)he final order of the court shall be rendered against the corporation in favour of each dissenting shareholder and for the amount fixed by the court.'²⁵⁹

10.9 Costs Orders

In relation to the court's discretion to award costs, and give cost orders, the concern has been articulated that such cost orders will deter dissidents from pursuing judicial appraisal. The concern arises out of the uncertainty of the valuation process which may yield unpredictable results, since 'valuation is not an exact science but merely a prediction or an estimate'.²⁶⁰ If the basis of this concern is to be accepted, the question unfortunately arises as to how the court can be expected to better do the job of determining the fair value of the shares than the company and its board of directors. The company's determination of fair value is, in the absence of fraud, mala fides or negligence, akin to a business judgment. In the case of *Black v Black*²⁶¹ four different appraisers came to vastly different conclusions as the value of shares held by a husband in a divorce case. Although different considerations were applicable, the values of the shares ranged from eight million to forty three million dollars. The point made was that subjective considerations may lead to inaccurate results.

²⁵⁷ Davids *et al* op cit note 1 at 363.

²⁵⁸ Section 164(14).

²⁵⁹ Section 190(22) of the Canadian Act.

²⁶⁰ Cassim *et al* op cit note 2 at 806.

²⁶¹ (1988) 66 OR (2d) 643 (HC).

The valuations reached in the *Black* matter may be as different as the valuations that might be reached by the company, the court and the dissident. What then is the test for awarding costs? *Bona fides*, diligence, fortitude, humility or candour? These are not qualities that the court is called upon to assess. In appraisal remedy proceedings, the court is constrained by the duty it is required to discharge, namely the determination of the fair value of the shares.

It is hoped that the courts will maintain this duty in mind in exercising their discretion with regard to orders of costs.²⁶² Nevertheless, the court's discretion as to costs ought to be exercised to avoid fruitless litigation by unreasonable or opportunistic parties.²⁶³

10.10 Interest

Canadian case law is full of considerations that may be taken into account when determining the rate of interest that may be awarded to a dissident. The primary consideration is to reimburse the dissident.²⁶⁴ The company has had the use of the dissident's money and the dissident has been deprived of the use of the same. The dissident would have been able to earn a rate of return on his money. It should also be acknowledged that had it not been for the transaction, the shares would still have been 'locked' in the company, and earning the return then in place. There is no reason that the dissident should be afforded rights more advantageous than those that prevailed before the commencement of the transaction.

In its discretion, the court may award interest from the date of approval of the resolution.²⁶⁵ Although the provision is clear, perhaps a better date from which to calculate interest would have been from the date on which the dissident would have received the payment of the fair value of the shares but for the declined offer and the court application. This is the date that non-litigating dissidents would have been paid and the date upon which the litigating dissidents would have been paid had it not been for the court application. Non litigating dissidents are not entitled to interest from the date of approval of the resolution until the date they are paid. There does not appear to be any policy reason why the litigating dissidents earn

²⁶² Cassim *et al* op cit note 2 at 806.

²⁶³ *Smeenk v Dexeigh Corp* op sit note 239, citing the CBCA.

²⁶⁴ *Domglas Inc v Jarislowsky* op cit note 227, citing the CBCA. The court may fix an interest rate based on the approximated weighted average of the prime commercial lending rates of Canadian chartered banks from the valuation date to the date of payment where the court finds fair value to be 80% greater than the price which the company offered to the dissident.

²⁶⁵ Section 164(15)(5)(c)(bb). Cf *Kelvin Energy v Bahan* op cit note 244.

interest for a period during which the co-operating dissidents were also 'out of pocket', for lack of a better expression.

In *LoCicero v BACM Industries Ltd*, the court stated that in circumstances where the company is found to have offered fair value to dissidents, it is more appropriate to award interest to dissidents at a rate of return which the dissident could have obtained by placing his funds in a long-term investment rather than at what it would have cost the company to borrow.²⁶⁶

Notwithstanding the *LoCicero* matter, the determination of the rate of interest might be made with reference to the underlying *causa* of the dispute. In transactions other than squeeze-outs, were it not for the transaction, or the amendment, the dissident would not be contesting the fair valuation of its shares. Instead, the capital represented by such shares would be earning a rate of return acceptable to the dissident, which rate would be equal to the internal rate of return enjoyed by the shareholders prior to the transaction. The court might be invited to assume that were it not for the transaction, the dissident would have been a content shareholder, with its capital invested in the company, with a right to no more or no less than the rate applicable to the shares on the day before the resolution was adopted.

11. PAYMENT

11.1 Obligation to Pay

The company must pay the agreed amount within 10 business days after the dissident accepts the offer and tenders the share certificates or directs the transfer of uncertificated shares.²⁶⁷

This payment will not, subject to the Panel rules, require the company to make a comparable offer.²⁶⁸

Section 164 does not contemplate a situation where a company does not make an offer or, after an offer is accepted or fair value has been judicially determined, fails to pay the dissident. If the dissident accepts an offer and the company does not pay, the dissident may rely upon a number of remedies in the circumstances. The dissident may initiate an action in

²⁶⁶ *LoCicero v BACM Industries Ltd* 31 Man R (2d) 208 (QB 1984) citing the Corporations Act, SM 1976 c 40.

²⁶⁷ Section 164(13)(b).

²⁶⁸ Delport & Vorster op cit note 46 at 581.

terms of section 218(2) of the Companies Act in terms of which '(a)ny person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention'. The dissident would be entitled to employ the summary judgment procedure available in terms of the uniform rules of court. The circumstances must be distinguished from those referred to in the case of *Ford Motor Co.*²⁶⁹

11.2 Variation of the Company's Obligations

If, however, there are reasonable grounds to believe that payment by the company of the fair value would result in the company being unable to pay its debts as they fall due and payable for the ensuing 12 months, the company may apply to a court for an order varying its obligations.²⁷⁰

It was suggested²⁷¹ that the fair value payment accepted by the dissident should be taken into consideration if a court varies the company's obligations to pay in terms of section 164(17). The suggestion is based on the reasoning that '(t)he court is not asked to determine the fair value for the shares when the company brings this application'.²⁷² The court, it is argued, is merely asked to 'vary the company's existing obligations in a just and equitable way, having regard to its financial circumstances'.²⁷³

I submit that the variation in relation to the company's obligation might entail no more than an order in terms of which a company may discharge its obligations over an extended period, in light of the fact that the liquidity of the company might be stressed. The Companies Act contemplates this scenario.²⁷⁴

The suggestion that the variation could be applicable to the value of the shares is not sustainable in light of the very purpose of the appraisal remedy. The point of which is to determine the fair value of the shares. A variation of the amount payable would necessarily entail an amount payable that is not fair value. Furthermore, the issue to be considered when

²⁶⁹ *Ford Motor Co. of Canada v Ontario Municipal Employees Retirement Board* (1996) 34 BLR (2d) 156; on appeal 153 DLR (4th) 33 (Ont CA).

²⁷⁰ In terms of section 164(17); see further below.

²⁷¹ Beukes op cit note 83 at 192.

²⁷² Section 164(17)(a).

²⁷³ Beukes op cit note 83 at 192

²⁷⁴ Section 164(17).

a company makes an application under section 164(17) is liquidity, or cash flow. A mere reduction of the fair value payable would not necessarily restore liquidity. However, interim payment of instalments would achieve this result.

Finally, it is suggested that in return for the reduction of the fair value, the court might consider reinstating the dissidents' rights in respect of his shares, if such an order would be just and equitable.²⁷⁵ This is not a competent order of the court. It is submitted that in making an order in terms of section 164(17)(b), the court is entitled to ensure that the dissident is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable'.²⁷⁶ In addition, the company in relation to which the suggested rights may be reinstated may no longer be in existence.

PART D: CONCLUSION

The first problem identified in section 164 is the notice anomaly. The consequence of the notice anomaly turns on the exclusion provided for in section 164(6). Although the dissident is excused from having to give the objection notice, section 164(6) does not excuse the dissident who fails to vote against the resolution. Section 164(6) falls short, in that it does not take into account that the dissident, by reason of not receiving the meeting notice, is unaware of the meeting, and unaware of the fact that in order to invoke the appraisal remedy it is required to vote against the resolution. There is no apparent cure to the notice anomaly and the consequences that flow therefrom. The cause of this problem is that insufficient recognition is given to the defective notice, which should render the meeting null and void as contemplated in section 62. If the defective notice received the attention that it ought to have received, the notice anomaly would be eliminated.

There is no apparent reason why the dissident should be required to give the objection notice and be required to vote against the resolution. This additional requirement, to vote against the resolution, is not found in the Canadian Act. Whilst the drafters of section 164 may have had noble intentions, their failure to have regard to the consequences of the addition of the nix vote, compounds the problem resulting from the notice anomaly. Even if it is the intention of the legislature to treat notices for transactions in the extraordinary manner contemplated

²⁷⁵ Beukes op cit note 83 at 193.

²⁷⁶ Section 164(17)(b)(ii).

above, the objection notice problem could be avoided by dispensing with either the objection notice or the six vote.

The ambiguity in section 164(5) in relation to whether the dissident's demand must be in relation to all of the shares of the company or only shares of a class does not admit of a satisfactory solution. The implied qualifier proposed is inelegant and unlikely to find judicial support particularly in a jurisdiction where the bench refrains from naked legislating.

The company is required to give the adoption notice to each dissident who gave the objection notice. Although an exception is made for dissidents who failed to give the objection notice in relation to their right to make a demand in terms of section 164(6), it is unlikely that such a dissident would be given the adoption notice, in as much as the company has not received from the dissident in question the objection notice.

As a further consequence of the vote anomaly, a dissident who subsequently discovers of a resolution passed pursuant to a transaction, does not qualify to make a demand, in as much as section 164(6) does not excuse non compliance with the six vote requirement. There is no cure for the consequence of the vote anomaly.

The next problem which arises due to an innovation introduced by the drafters of section 164 which is not found in the Canadian Act is the lapsed dissident anomaly. The consequence of a lapsed offer is that it is unclear whether the reinstated rights endure notwithstanding a subsequent application to the court for a judicial appraisal of fair value. There is no indication in the section that a court may suspend rights which have been reinstated by virtue of the lapsed offer. The untenable situation arises that dissidents who must be joined as applicants notwithstanding their apathy, they continue to exercise their shareholder rights. As mentioned above, the lapsed dissident anomaly arises out of an innovation for which there is no apparent reason.

The last problem relates to the construction of section 164(15)(c)(v) and the difficulties of interpreting the section in order to provide for an order which does not subvert the purpose of the appraisal remedy. It is unclear why the drafters of section 164 would contemplate giving a dissident an opportunity to withdraw its demand at such a late stage of the proceedings. There is no comparable provision in the Canadian Act, the New Zealand Act or the Delaware Law.

In the introduction to this dissertation I stated that it has been acknowledged that the appraisal remedy is complicated, technical, time-consuming and procedurally rigid. I also noted that the appraisal remedy had been criticised for these very reasons. The issues that I have identified lend weight to these acknowledgments and criticisms but for different reasons. The criticism that I referred to in the introduction was directed at the basic framework of the appraisal remedy and the perceived bias in favour of the company and the burden to be borne by the dissident. As I mentioned at the outset the purpose of this dissertation was not to consider the conceptual merit of the appraisal remedy but to assess whether the remedy was fit for purpose. The foregoing analysis shows that the legislative tinkering by the drafters of section 164 have not only added nothing of any substance to the Canadian Act but have rendered the remedy impotent and has blunted its purpose.

The drafters of the appraisal remedy may have had good intentions. It is unfortunate however that the remedy will only be useful after extensive revision.

University of Cape Town

BIBLIOGRAPHY

Books and articles

Allen, William T and Kraakman, Reinier *Commentaries and Cases on the Law of Business Organizations* (2003) Aspen Publishers, New York.

Beukes, HGI 'An Introduction to the Appraisal Remedy in the Companies Act: Standing and the Appraisal Procedure' (2010) 22 *SA Merc LJ* 176.

Bruun, Anders and Lansky, Michael 'The Appraisal Remedy for Dissidents in Canada: Is it Effective?' (1977-1978) 8 *Man LJ* 683.

Caryt, William L 'Federalism and Corporate Law: Reflections upon Delaware' (1973-1974) 83 *Yale LJ* 663.

Cassim, Farouk HI (managing ed); Cassim, Maleka Femida; Cassim, Rehana; Richard Jooste; Shev, Joanne and Yeates, Jacqueline *Contemporary Company Law* 2 ed (2012) Juta, Claremont.

Cassim, Maleka Femida 'The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 2)' (2008) *SA Merc LJ* 20.

Cheffins, Brian 'An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law' (1990) 40 *U Toronto LJ* 775.

Clark, Robert Charles *Corporate Law* (1986) Little Brown, US.

Davids, Ezra Norwitz, Trevor and Yuill, David 'A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008' in Mongalo, Tshepo H (ed) *Modern Company Law for a Competitive South African Economy* (2010) Juta, Claremont.

Delpont, Piet and Vorster, Quintus *Henochsberg on the Companies Act 71 of 2008* Volume 1 (2012) Lexis Nexis.

Dooley, Michael P and Goldman, Michael D 'Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law' (2000-2001) 56 *Bus Law* 737.

Easterbrook, Frank H and Fischel, Daniel R *The Economic Structure of Corporate Law* (1991) Harvard University Press, Harvard.

Eisenberg, E 'The Legal Roles of Shareholders and Management in Modern Corporate Decision Making' (1969) *57 California LR* 1.

Fung, Greta M 'A Common Goal from Two Different Paths: Protection of Minority Shareholders in Delaware and Canada' (1993-1994) *57 Alb LR* 4.

Geis, George S 'An Appraisal Puzzle' (2011) *105 Northwestern U LR* 1635.

Gray, Wayne D *The annotated Canada Business Corporations Act* 2 ed (2002) Carswell, Canada.

Hamilton, Robert W *The Law of Corporations in a Nutshell* 5ed (2000) West Group, Minnesota.

Heydon, John D and Ockelton, Mark *Evidence: Cases and Materials* 4 ed (1996) Butterworths, United Kingdom.

Kanda, Hideki and Levmore, Saul 'The Appraisal Remedy and The Goals of Corporate Law' (1985) *32 UCLA LR* 429.

Kanda, Hideki and Levmore, Saul 'The Appraisal Remedy and the Goals of Corporate Law' (1985) *32 UCLA LR* 429.

Kirkland Grant, J 'The Delaware Appraisal Statute' (1981) *6 DeLJ Corp L* 590.

Krishna, Vern 'Determining the 'Fair Value' of Corporate Shares' (1987-1988) *13 Can Bus LJ* 132.

Lamb, Steven P and Day, John 'Some Courts Are Using New Approach to Set Dissenting Shares' Value' (1991) *National LJ*, June 17 at S8.

Letsou, Peter V 'The Role of Appraisal in Corporate Law' (1998) *39 B C LR* 1121.

Looney, William F 'Dissenting Minority Stockholder's Right of Appraisal' (1962) *4 B C LR* 85.

Macintosh, Jeffrey G 'Shareholders' Appraisal Right in Canada A Critical Reappraisal' (1988) 13 *Can U S LJ* 299 / (1986) 24 *Osgoode Hall LJ* 201.

Manning, Bayless 'The Shareholder's Appraisal Remedy: An Essay for Frank Coker' (1962) 72 *Yale LJ* 223.

Margolin, Brett A and Kursh, Samuel J 'The Economics of Delaware Fair Value' (2005) 30 *Del J Corp L* 413.

McGuinness, Kevin Patrick *The Law and Practice of Canadian Business Corporations* 2 ed (2007) Lexis Nexis, Canada.

Murdock, Charles W 'The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares' (1989-1990) 65 *Notre Dame LR* 425.

Orlando, Michael R 'The Appraisal Remedy in Illinois under the 1983 Business Corporation Act: Some Suggestions for Improvement' (1985-1986) 19 *J. Marshall LR* 229.

Pepin, Michelle M 'Exclusivity of Appraisal - The Possibility of Extinguishing Shareholder Claims' (1992) 42 *Case W Res LR* 955.

Pinto, Arthur R and Branson, Douglas M *Understanding Corporate Law* (1999) Lexis Nexis.

Saner, JS 'Prescription' in W A Joubert (founding ed) *The Law of South Africa* vol 21 Second Edition (2003) Butterworths, Durban.

Schwikkard, PJ and Van der Merwe, SE *Principles of Evidence* 3ed (2008) Juta, Claremont.

Welling, Bruce *Corporate Law in Canada: The Governing Principles* (2006) Scribblers Publishing.

Winter, Ralph 'State Law, Shareholder Protection, and the Theory of the Corporation' (1977) 6 *J Legal Stud* 251.

Cases

Abraham v Inter Wide Investments Ltd (1988) 66 OR (2d) 684 (HC).

Black v Black (1988) 66 OR (2d) 643 (HC).

Brant Investments Ltd v KeepRite Inc (1987) 37 BLR 65 (HC).

Cede & Co v Technicolor Inc 684 A2d 298 (Del 1996).

Chicago Blower Corp v 141209 Canada Ltd (1988) 56 ManR 2d 276 (QB).

Christian v Ries (1898) 13 EDC 8 15.

Collen v Rietfontein Engineering Works (1948) 1 SA 413 (A).

Denischuk v Bonn Energy Corp (1983) 29 Sask R 156 (QB).

Denischuk v Bonn Energy Corp (1983) 30 Sask R 37 (QB).

Domglas Inc v Jarislowsky, Fraser & Co (1982) 22 BLR 121.

Ferguson v Imax Systems Corp (1983) 43 OR2d 128 (CA).

Fitch v Churchill Corp [1990] 4 WWR 256.

Ford Motor Company of Canada v Ontario Municipal Employees Retirement Board (1996) 34 BLR (2d) 156; on appeal 153 DLR (4th) 33 (Ont CA).

Fraser Inc v Aitken (1988) 41 BLR 87 (Ont HC).

In re Appraisal of Transkaryotic Therapies, Inc No CivA 1554-CC 2007 WL 1378345 at 1 (Del Ch May 2, 2007).

Joseph v Shell Oil Co (1984) 482 A 2d 335 DelCh.

Kelvin Energy Ltd v Bahan (1987) 52 Alta LR (2d) 71.

LoCicero v BACM Industries Ltd 31 Man R (2d) 208 (QB 1984).

Manning v Harris Steel Group Inc [1987] 1 WWR 86.

McConnell v Newco Financial Corp (1979) 8 BLR 180 (BCSC).

Neonex International Ltd v Kolasa (1978) 84 DLR (3d) 446.

Pillay v Krishna 1946 AD 946.

Robertson v Canadian Cannery Ltd (1978) 4 BLR 290 (Ont HC).

Royfor and Co. v Skye Resources Ltd (1982) 38 OR (2d) 253 (HC) affirmed 40 OR (2d) 416 (CA).

Silber v BGR Precious Metals Inc (1998) 41 OR (3d) 147 (Gen Div).

Silber v Pointer Exploration Corp (1998) 42 BLR (2d) 149 (Alta QB).

Smeenk v Dexeigh Corp (1990) 74 OR (2d) 385 72 DLR.

Smith v Shell Petroleum Inc [1990] FedSec LR (CCH) 95.

South Cape Exploration (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 3 SA (A).

Ultramar Canada Inc v Montreal Pipe Line Ltd (1990) 74 OR (2d) 136.

Van de Walle v Unimation Inc [1990-1991] FedSec LR (CCH) 95.

Weinberger v UOP Inc (1983) 457 A 2d 701 Del.

Statutes and bills

Canada Business Corporations Act RSC 1985 c C-44.

Companies Act 61 of 1973.

Companies Act 71 of 2008.

Delaware Code, title 8.

Delaware General Corporation Law, 2001.

New Zealand Companies Act 1993 no 105.

Notice of intention to introduce a Bill into Parliament: Explanatory summary of Bill General Notice 166 of 2007 at 13.

Prescription Act of 68 of 1969.

Supreme Court Act 59 of 1959.