

[2] For the purposes of an appeal to this Court, the applicants are essentially proposing to make three arguments. The first is that s 149 did not apply to the transaction because the directors were acquiring shares in the capacity of trustee. That appears to be a new argument and, moreover, one which is simply unsustainable. It would allow the obvious purpose of the section to be subverted by the use of a trust associated with a director.

[3] The second proposed argument is that the section did not apply because both parties and the valuer whom they agreed upon to establish the fair market value of the shares had available to them all information material to an assessment of the value of the shares. This is again a new point. We consider that it should not be allowed to be taken for the first time in this Court, noting that the respondents say that they would, if the point had been taken below, have been in a position to adduce evidence to the contrary, that is, that there were matters about the company known to Mr Fong which were not made known to the valuer.

[4] The third proposed argument is that fair value and fair market value are the same concept. The Court of Appeal agreed that might be so but said that the case had proceeded in the High Court on the basis of “unchallenged evidence” that the concepts are different. It may be that this is not a matter appropriately to be determined on the basis of expert evidence and is, instead, a matter of interpretation of the agreement of the parties referring the valuation of the shares to the valuer selected by them, read in light of the statute. However, it would be an injustice to the respondents to allow a further appeal to be argued on a basis which is contrary to that on which the case was conducted in the High Court.

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