

# 10 INTERESTING QUOTES ON VALUATION OF SHARES IN FROM KEY COMMON LAW JURISDICTIONS

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One of my most favorite quotes from a judgment is the following observation by Justice Gautam S. Patel in contentious litigation on the valuation of shares. “*What is undoubtedly true is that valuation is not an exact science. It is always and only an estimation. The fact that a particular estimation might not catch an objector’s fancy is no ground to discredit it.*”

Another quote I like is: “*Capitalism is rough and ready, and the purpose of an appraisal is not to make sure that the petitioners get the highest conceivable value that might have been procured had every domino fallen out of the company’s way[.] “Fair value does not equal best value.”*”

Indeed, the valuation of shares is a challenge faced by every High Court, Tribunal, or Judicial/ Regulatory body worldwide. This document lists some exciting, sharp, and sometimes witty comments made by Judges from India, Delaware, and other jurisdictions on the valuation of shares.

[Emphasis added in **bold**]

## **What amounts to fairness?**

The submissions in paragraph 9, regarding an “undervaluation of shares of the Petitioner Company” comes for the first time in these written submissions. Many of the subsidiary submissions under this head are repetitive. ***What is undoubtedly true is that valuation is not an exact science. It is always and only an estimation. The fact that a particular estimation might not catch an objector’s fancy is no ground to discredit it.***

The objective of a Court’s exercise of its discretionary jurisdiction under Section 100 of the Companies Act is ***not to entertain every fanciful wish or peevish complaint.*** It is to examine whether, on a standard or a test as detached and as objective as it is possible to be, a ***Court might plausibly conclude that a particular valuation is one that is, on the face of it, unreasonable, unjust and inequitable.***

- *Bombay High Court, Company Petition No. 1072 of 2009. Per Justice Gautam Patel*

## When would a Court interfere?

.....Bluestar, for instance, holds that where a valuation is done by a reputed firm, and is accepted by a majority, even if assets are being transferred at a low price, that does not per se vitiate a valuation report.

To dislodge a valuation from a reputed firm, an objector must show mala fides or fraud. ***To 'show' is not merely to allege. Mala fides or fraud must be established.***

The decisions in ..... Re: Grierson, Oldham and others are all ***authorities for the proposition that in any valuation, opinions may vary; and that no court should be swayed by acidulated allegations in generalities. A court must be satisfied that the unfairness is gross and patent.***

*(a few sentences omitted)*

- *Bombay High Court, Company Petition No. 1072 of 2009. Per Justice Gautam Patel*

## Going Concern Approach in Valuation

“To determine the fair value of a stockholder’s proportionate interest in the corporation, the court must ‘envisage the entire pre-merger company as a ‘going concern,’ as a standalone entity, and assess its value as such.”

“The time for determining the value of a dissenter’s shares is the date on which the merger closes.” When running the fair value analysis, therefore, the court must consider “the corporation’s operative reality as of the date of the merger.” “The concept of the corporation’s ‘operative reality’ is important because ***‘[t]he underlying assumption in an appraisal valuation is that the dissenting shareholder would be willing to maintain their investment position had the merger not occurred’***

- *HBK Master Fund L.P., and others., v. Pivotal Software, Inc., Delaware Chancery Court quoting previous judicial pronouncements*

## Suitability of a valuation method

“In some cases, it may be that a single valuation metric is the most reliable evidence of fair value” such that “giving weight to another factor will do nothing but distort that best estimate.”

“In other cases, it may be necessary to consider two or more factors.” ***[I]n still others, the court might apportion weight among a variety of methodologies.***”

“The Court of Chancery may ***‘adopt any one expert’s model, methodology, and mathematical calculation, in toto, if that valuation is supported by credible evidence and withstands a critical judicial analysis*** on the record.

- *Delaware Chancery Court, Regal, 2021 WL 1916364 and the Dell case*

## **Don Quixote and Valuation**

Fortunately, Delaware law does not demand a quixotic quest for perfection in the appraisal context. As the high court has assuaged, ***“[c]apitalism is rough and ready, and the purpose of an appraisal is not to make sure that the petitioners get the highest conceivable value that might have been procured had every domino fallen out of the company’s way[.] “Fair value does not equal best value.”***

This court’s goal is far more modest: “explain its fair value in a manner that is grounded in the record before it” and ***“accepted financial principles.***

- *DFC Glob. Corp. v. Muirfield Value P’rs*, 172 A.3d 346, 370 (Del. 2017) and the Dell Appeal

## **What valuation method must a Court prefer?**

Although the Delaware Supreme Court has expressly declined to adopt a presumption in favour of any one valuation methodology over another, recent decisions of Delaware courts suggested a ***pecking order of methodologies for determining fair value***. “In the aftermath of Dell and DFC, . . . the fair value analysis should ***‘begin with the market evidence.’***” ***Among the market-based indicators, the deal price (minus synergies) approach is the “first among equals.”***

***“[A] more subjective valuation technique, like DCF methodology or comparable company analysis, ‘is necessarily a second-best method’ when ‘market-based indicators are available.’”***

- *Different opinions including Delaware Chancery Court opinion in Regal, 2021 WL 1916364*

## **Objective criteria to determine if merger value is the fair value or not**

The non-exhaustive list of objective criteria include: first, whether the buyer “was an unaffiliated third party”; second, whether the “seller’s board labored under any conflicts of interest”; third, “the existence of robust public information” about a company’s value; fourth, “whether the bidder conducted diligence to obtain non-public information about the company’s value”; fifth, “whether the parties engaged in negotiations over the price”; and sixth, “whether the merger agreement was sufficiently open to permit bidders to emerge during the post-signing phase.”

- *Delaware Chancery Court in Re: Regal, 2021 WL 1916364*