

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

**CLAIM NO. BVIHCM2022/0202
BETWEEN:**

RHINO RESOURCES LIMITED

Applicant

and

[1] SANLAM TRUSTEES INTERNATIONAL LIMITED

[2] NICOLA HUTTON

[3] ERAJ WEERASINGHE

[4] MARK BEZANT

Respondents

Appearances:

Mr Paul Chaisty KC (instructed by Conyers Dill & Pearman) and Mr Jerry D. Samuel and André Sheckleford) of that firm appeared on behalf of the Applicant

Mr Charles Hollander KC and Ben Woolgar (instructed by Appleby) appeared on behalf of the First Respondent

The Second, Third, and Fourth Respondents did not appear and were not represented

2024: November 21
December 3

JUDGMENT

Introduction and Background

- [1] **MITHANI J:** In this application dated 18 October 2024 (“the Application”), the Applicant, Rhino Resources, Ltd (“Rhino”) seeks directions for the carrying out of an appraisal under s. 179(9) of the BVI Business Companies Act, 2004 (“**BCA 2004**”) relating to the valuation of the minority shareholding of the First Respondent, Sanlam Trustees International Ltd (“Sanlam”), in Rhino.
- [2] **The background to the dispute need only be stated briefly.**
- [3] Sanlam holds 50 Class A Shares and 4,950 Class B Shares in Rhino, representing 10% of the issued shares of Rhino (“Sanlam’s Shares”). On 3 November 2021, Rhino received a written letter of instruction from the holder of 90% of the issued shares of Rhino requiring Rhino to redeem the Sanlam Shares pursuant to s. 176 of the BCA 2004. Following receipt of that letter, Rhino passed a resolution to redeem Sanlam’s Shares pursuant to s. 176(1)(a) of the BCA 2004. On the same day, a notice of redemption was sent to Sanlam. On 15 November 2021, Sanlam sent a notice of dissent, pursuant to s. 179 of the BCA 2004, in which it disputed the value of Sanlam’s Shares attributed by Rhino and called for the issue to be determined under s. 179(9) of the BCA 2004.
- [4] To say that the difference in value attributed to Sanlam’s Shares between Rhino and Sanlam is substantial is an understatement. Rhino values those shares at US\$50,000. Sanlam says they are worth in the sum of some US\$1.7 billion, based on what it describes as the valuable energy licences that Rhino obtained in South Africa, Namibia, and Senegal¹.
- [5] There is no issue that the requirements of s. 176 of the BCA 2004, which govern the circumstances in which the shares of a company may be redeemed, have been complied with. Accordingly, Sanlam’s Shares fall to be redeemed by Rhino in accordance with s. 179 of the BCA 2004.

¹ Sanlam claims that, in February 2022, Shell and Total announced major oil discoveries in Namibia’s Orange Basin, adjacent to a block for which the Rhino Group held an exploration licence. Based on this, Sanlam considers its Shares to be worth in the region of \$1.7 billion as at 2 November 2021, which is understood to be the agreed date when Sanlam’s Shares in Rhino should be valued.

[6] Section 179(1) states that “a member of a company [i.e., Sanlam] is entitled to payment of the fair value of his or her shares upon dissenting from ... (d) a redemption of his or her shares by the company [i.e., Rhino] pursuant to section 176.” (Emphasis supplied).

[7] Section 179 of the BCA 2004 sets out the process that governs the valuation of a dissenting member's shares which are redeemable under s. 176 of the BCA 2004. Where the parties are unable to come to an agreement, s. 179(9) of the BCA 2004 states that:

- “(a) the company and the dissenting member shall each designate an appraiser;
- (b) the 2 designated appraisers together shall designate an appraiser;
- (c) the 3 appraisers shall fix the fair value of the shares owned by the dissenting member as of the close of business on the [relevant date]² ... and that value is binding on the company and the dissenting member for all purposes; and
- (d) the company shall pay to the member the amount in money upon the surrender by him or her of the certificates representing his or her shares.”

[8] There has been a substantial period of delay in implementing the procedure under s. 179 of the BCA 2004 for the valuation of Sanlam's Shares. It is immaterial who was responsible for the delay. However, what should have been a short procedure for the determination of the value of Sanlam's Shares under s. 179(9) of the BCA 2004 has taken over three years.

[9] The current position is as follows:

- (a) the requirement to have three appraisers to value Sanlam's Shares has been fulfilled. The three appraisers are the second, third, and fourth respondents (“the Appraisers”) to the Application. It should be noted that a significant, if not substantial, part of the delay in doing so was because Sanlam decided to appoint a Mr Phillip Steyn as an appraiser. Mr Steyn should never have been nominated by Sanlam to be an assessor because he has or had a strong connection or association with Sanlam. Further periods of delay may be explained by the fact that both parties have had extensive correspondence

² As I understand it, there is (for present purposes – although the First Respondent has reserved its position) no dispute about this date. It is 2 November 2021.

between themselves and the Appraisers about how the valuation should be carried out.

- (b) A protocol ("the Protocol") setting out the machinery for the valuation of Sanlam's Shares has been agreed between the Appraisers. Various issues concerning the proper interpretation of that document arise, including whether Rhino is obliged to disclose documents that it regards as being confidential (but important in assessing the fair value of the shares by the Appraisers) to Sanlam if it is requested to do so by the Appraisers.
- (c) The Appraisers are unwilling to commence work under the Protocol to value Sanlam's Shares unless they have certainty or clarification about the matters that are in issue between Rhino and Sanlam concerning the interpretation of the Protocol and the matters arising from it ("the Disputed Issues").

[10] The Disputed Issues primarily relate to whether documents from Rhino that are disclosed to the Appraisers may be disclosed by the Appraisers to Sanlam. In the following excerpts of their email dated 26 September 2024 sent to the parties, the Appraisers set out their concerns as follows:

"The valuation of Sanlam's shares is to take place in accordance with Section 179(9) of the BVI Business Companies Act ("the Act"). In this context the Appraisers have developed, in consultation with the parties, a protocol for the valuation process. I provided a version of this protocol on 29 May 2024 ("the Protocol"), and indicated it should be considered final other than its operative date (namely when the Appraisers send a draft information to the parties, at which point the timetable envisaged in the Protocol would begin). At that point, the Appraisers understood the issue to be that Rhino disputed certain individuals (such as Sanlam's UK legal advisers) should not be permitted access to information Rhino deemed confidential but this did not extend to denying access to Sanlam completely...

Based on Conyers' letter dated 21 August 2024, the Appraisers understand that Rhino will proceed with the appraisal solely on the basis that its documents can only be seen by the Appraisers (and those assisting them) and not by any other person or party, including Sanlam (or named individuals at Sanlam) and its legal advisers. Rhino's expressed concern relates to the potential for misuse of its confidential information. The Appraisers understand that Rhino's position is that the valuation to be conducted under the Act by the Appraisers does not require any other party than the Appraisers to have access to its information. Relatedly, Rhino considers that decisions regarding access by others, in the context of the appraisal, to Rhino documents or the information they contain rest solely with Rhino. While the protocol initially allowed for information sharing

with Sanlam and Appleby, the subsequent request to include additional parties, such as Addleshaw Goddard [Sanlam's UK lawyers], arose only after the final draft protocol was sent to the parties on 29 May 2024. This change has introduced a point of contention regarding access to Rhino's information.

In contrast, as set out in Appleby's letter dated 30 August 2024, the Appraisers understand that Sanlam's position is that: (i) due process will not be served if no-one at Sanlam, or its legal advisors, can have sight of Rhino's documents– or related submissions – provided in response to the Appraiser's requests under the Protocol; and (ii) Rhino's position conflicts with the process envisaged under the Protocol (a view repeated in Appleby's email of 25 September 2024."

[11] The letter goes on to state that:

"In the specific context of an appraisal under the Act, the extent to which one party can restrict access to another party and/or its advisors to the first party's documents in the context of the process the Appraisers have devised is, in the opinion of the Appraisers, a matter for the Court.

Resolution of this matter may affect the process carried out by the Appraisers, and in this case the extent to which the Protocol is then revised or implemented. The Appraisers can only consider this once the position as regards the parties' rights under the Act are clarified.

To clarify, it is not that the Appraisers cannot assess the fair value of Sanlam's share unless documents are to be made available to Sanlam and/ or its advisors. However, the Appraisers developed the Protocol reflecting their preference (and prior experience of expert determination processes more broadly) that nominated individuals at each party and/ or its advisors could see at least some of the documents and materials provided by the other party and therefore be in a position to assist the Appraisers in their task, by reference to the terms of the Protocol (as regards the right of both parties to make submissions, and the right of the Appraisers to ask questions of either party including in respect of the documents received in response to the Appraisers' Document Requests)."

[12] It is plain from the contents of this letter that the Appraisers do not feel able to proceed with the valuation without receiving a direction from the Court on the Disputed Issues.

[13] Rhino's position is that this Court should assist the Appraisers with the Disputed Issues so the valuation of Sanlam's Shares can proceed to a final determination. Sanlam's position is that the Protocol governs how the valuation should be carried out and that the Court has no jurisdiction to construe the terms of what the Appraisers have agreed between themselves as to how the valuation should be carried out, still less direct them as to how they should perform their functions under the terms of the Protocol. If the Court accepts this contention, then the Application falls to

be dismissed and the Appraisers should simply be informed that they should “get on” with the valuation, based on their understanding of the terms of the Protocol.

[14] Despite the contentions advanced by Sanlam that the machinery for undertaking the valuation of Sanlam’s Shares is within the sole province of the Appraisers, it has sought to suggest to the Appraisers what the Protocol means and what the Appraisers should take into account in determining the value of those shares. It has also sought to treat the valuation exercise as an arbitration, as opposed to an expert determination. Likewise, Rhino has felt it appropriate to dictate to the Appraisers how they should conduct the valuation exercise and has already accused the Appraisers of bias against Rhino. It is also alleged by Sanlam that there has been a marked change (described by Mr Hollander KC as a *volte-face*) from the position initially taken by Rhino (which was to leave all valuation matters to the Appraisers) to dictating what they should or should not do.

[15] While it is not for me to comment upon these matters because they have no relevance to my determination of the Application, it is of little surprise that the Appraisers feel the need to get clarification about the Disputed Issues to avoid their decision being impugned on the basis that they should have dealt satisfactorily with those issues before issuing their valuation.

[16] Each party referred to the unreasonable position adopted by the other in correspondence and their written evidence. I see little point in rehearsing the rival arguments of the parties in this judgment. The matters for determination by the Court are straightforward, despite the voluminous bundles that have been prepared for the purpose of the hearing. Those boil down to the Court having to decide whether the determination of the Disputed Issues falls within the remit of the Appraisers or whether the Court should provide some direction to the Appraisers about how the Protocol should be interpreted.

The Law

[17] I have referred to s. 179(9) of the BCA 2004. Once appraisers are appointed to value the redeeming party’s shareholding, they will, or should, agree a process for the valuation of that shareholding. Section 179 gives that process, and the subsequent value of the shareholding fixed by the appraisers, statutory recognition by providing in, s. 179(9)(c), that the value of the

shareholding fixed by the appraisers “is binding on the company and the dissenting member for all purposes.”

[18] It is only necessary for me to refer to one case – a decision of the Court of Appeal of the Eastern Caribbean Supreme Court – on the subject, which provides detailed guidance on the approach that a court should take to determine the Disputed Issues.

[19] In **Olive Group Capital Ltd v Mayhew BVIHCMAP 2016/0002, 7 November 2016**, the dispute between the parties was whether a minority discount should apply to the shares being redeemed. The first-instance judge (Leon J) held that the dispute was solely within the terms of the expert’s mandate and that the court should not intervene in it. However, if the dispute was “jurisdictional”, such as the interpretation of the expert’s mandate, the court must determine that issue and it was a matter of procedural convenience whether it did so before or after the expert completed his work. Webster JA (Ag), with whom the other members of the Court agreed, said, at [23]-[26]:

“[23] This appeal is concerned with the form of alternative dispute resolution known as expert determination. Expert determination usually arises in contractual situations where the parties agree that in the event of a dispute relating to the contract, the dispute should be determined by an independent person (the expert) whose decision shall be final and binding. Section 179 embodies the process of expert determination in a statutory context. The parties have not varied or added to the terms of the section 179(9) mandate in any significant way. The only issue that was debated and agreed was that BVI law should be applied to the valuation process. This does not vary the mandate because BVI law would have applied to the valuation process unless it was specifically excluded by the parties.

[24] The attraction of expert determination is that it is quicker, simpler and less expensive than arbitration or litigation. However, there are certain principles that the courts have developed over the years to regulate the procedure.

[25] The first principle is that once the dispute falls within the terms of the expert’s mandate he has jurisdiction to deal with it and the parties are bound by his decision. The mandate in this case is set out in section 179(9). In **Norwich Union Life Insurance Society v P&O Property Holdings Limited [1993] 1 EGLR 164 at page 16**, Nicholls VC said:

‘As a matter of principle, the issue on which a determination of the court is being sought is either within the matters remitted to the expert for his decision or it is not. If it is, then the court will not intervene either before or after, unless there has been fraud or collusion.’

[26] The second principle is that if the mandate does not contain principles and procedures for carrying out the valuation, and none are agreed by the parties, the expert will be free to determine how he proceeds and the court will not intervene to tell him how to conduct the valuation, neither before nor after the valuation. The parties are bound by whatever he decides and the court will intervene only if there is fraud or collusion. In one of the leading cases on expert determination, **Barclays Bank plc v Nylon Capital LLP [2012] 1 All ER (Comm) 192**, Thomas LJ summed up this aspect of the procedure as follows:

[37] As I have said there is no procedural code for expert determination, in contradistinction to arbitration. The activities of an expert are subject to little control by the court, save as to jurisdiction or departure from the mandate given. Unless the parties specify the procedure, the expert determines how he will proceed; it is rare for what might be perceived as procedural unfairness in an arbitration to give rise to a ground for challenge to the procedure adopted by an expert. (See Kendall, Freedman and Farrell *Expert Determination* (4th edn, 2008 Ch 16) [now **Kendall on Expert Determination 5th Edn, 2014**]

[38] I therefore accept that if the parties have chosen such a process and the dispute falls within the jurisdiction of the expert, then they must be held to it, whatever view might be taken as to the appropriateness of the procedure for the matters submitted to the expert.”

[20] I agree with Mr Hollander that there is a residual jurisdiction, of a very limited nature, to put an appraisal “back on track” if something has gone wrong: see **Brantley v Antarctica Asset Management Ltd BVIHCV2007/0227**, 9 May 2008, at [48], per Hariprashad-Charles J:

“An interesting point has now arisen. What is the position in cases, such as the present one, where the time for the appraisal process had long expired before an appraiser was designated due to, for example, intentional or unintentional delays by one party or the other? It appears that the Legislature did not contemplate such cases. Contrary to Mr Husbands’ forceful submission, I agree with Mr Young that the jurisdiction of the Court to deal with such situations is not ousted. The Court always has an inherent jurisdiction to deal justly and fairly with matters of such nature. If that were not the case, then a member or shareholder may suffer irreparable loss, through no fault of its own but with the fervent desire that it could have resolved the dispute through negotiation.”

[21] Mr Hollander submits that there is no need for the Court to exercise its residual jurisdiction in this case. The Disputed Issues relate entirely to the terms of the Protocol which are solely for the

Appraisers to interpret. There is no longer any need to put this case back on track and, once the Appraisers are informed about the Court's decision, they should be able to proceed with the valuation without any difficulty.

The Protocol

[22] The mandate of the Appraisers is set out in the Protocol.

[23] So far as relevant to the determination of the Application, the relevant terms of the Protocol are as follows:

- “2. Rhino and Sanlam are hereafter referred to together as “the Parties” and individually as “a Party”. References to “the Parties” and “a Party” herein are deemed to include the Parties’ advisors, as agreed between the Parties separately and appended to the Protocol as an addendum.
5. The Appraisers shall determine the fair value of the Rhino shares held by Sanlam as at 2 November 2021 and that value will be binding on the Parties for all purposes pursuant to Section 179(9)(c) of the Act (“the Valuation Exercise”).
7. The Appraisers agree to adhere to the procedures and timeline set out in this document, which may be subsequently amended by agreement between the Appraisers, or two of the Appraisers acting as a majority.
9. In the absence of unanimity on any issue relevant to the Valuation Exercise, the Appraisers agree to act by a majority.
10. In the absence of unanimity on any issue relevant to the Valuation Exercise, the Appraisers agree to act by a majority.
12. The Appraisers shall prepare the following fair valuation reports:
 - (i) Each Appraiser shall prepare a draft fair valuation report for provision solely to the other two Appraisers in the context of assessing fair value. The form of the draft fair valuation report is a matter for each Appraiser. However, each draft fair valuation report shall include:
 - a. the Appraiser’s opinion of the fair value of the Rhino shares held by Sanlam as at 2 November 2021;
 - b. the valuation approach/methodology, assumptions and calculations relied on;

- c. the information relied on (each draft report shall attach the documents relied on); and
- d. any outstanding matters requiring resolution.

The valuation reports drafted and received, along with any supporting documents or information attached thereto, shall be considered confidential and may only be shared among the Appraisers. Sharing of these reports and/or related information to parties outside of the Appraisers is prohibited.

- (ii) Together, the Appraisers shall determine the most appropriate valuation methodology, assumptions and calculation of fair value and prepare a final joint fair valuation report, identifying their unanimous or majority opinion as to the fair value of the Rhino shares held by Sanlam as at 2 November 2021...

- 14. The Valuation Exercise will be conducted on the basis of information and documents shared by the Parties and considered by the Appraisers to be relevant to the Valuation Exercise.
- 15. Upon receipt of the request list, each Party shall independently determine the rights of access to the specific documents they will share. Both Rhino and Sanlam reserve the right to restrict access to certain named individuals, other than the Appraisers, as deemed necessary, solely for the documents they are sharing. These rights of access shall be applied in the data room environment.
- 17. All submissions are to be provided to the Appraisers through the designated data room.
- 18. Where a party has failed to provide the Appraisers with submissions or responses within the timetable set out above, the Appraisers shall reserve the right to conduct the valuation in the absence of those submissions and/or responses.
- 20. The Appraisers may draw adverse inferences, where appropriate, from the non-provision of information or responses to requests."

[24] It is also appropriate for me to set out para. 16 of the Protocol because it provides the timeline in the form of a table about the steps (and their timing) that need to be complied with in order that the Appraisers can perform their functions under the Protocol:

Date A: Within 2 business days of the finalization of this protocol by the Appraisers, they shall initiate the information sharing phase by issuing a formal document request ("Document Request List") to both Parties. The date on which such request list shared shall be Date A.

Date B	Each Party shall have a period of 5 business days from Date A to provide their initial comments on the Document Request List ("Request List Response") (referred to as "Date B"). The Request List Response shall include: - An indication of the availability of the Appraisers' requested items; - Comments on the completeness of the request list, including a list of other documents the Party considers relevant to the valuation exercise (and why) that may have been omitted from the Document Request List; - Any proposed modifications; and - Instructions regarding the access rights to be assigned to each document in the data room.
Date C	Written comments on the Request List Response from each Party are to be submitted within 5 business days (referred to as "Date C").
Date D	Within 2 business days of Date C, the Appraisers shall issue a Final version of the Document Request List ("Date D").
Date E	Within 5 business days of Date D, each Party shall upload the requested documents and information to the designated folders within a data room ("First Document Submission") to be hosted by FTI ("Date E"). To the extent possible, the uploaded documents shall be organised and labelled in a clear and easily accessible manner to facilitate efficient review by all parties involved.
Date F	If the Appraisers consider that in light of the First Document Submission, they require any further information or explanations in connection with the Valuation Exercise then the Appraisers will deliver their further specific request(s) for information to the Parties within 5 business days of Date E ("Date F").
Date G	The Parties shall respond to any further specific request(s) for information within 5 business days of Date F ("Date G").
Date H	The Appraisers shall use their best endeavours to prepare their draft fair valuation report and provide copies thereof to each other not later than: 28 days after Date E (if the Appraisers do not issue any further specific request(s) for information); or 28 days after Date G (if the Appraisers issue any further specific request(s) for information).
Date I	The Appraisers shall use their best endeavours to deliver their joint fair valuation report to the Parties not later than 14 days after Date H ("Date I").

Upon issuance of the joint valuation report, the data room will be closed, and all documents uploaded will be permanently deleted. FTI shall confirm this closure in writing to the Parties.

- [25] The first step for the implementation of the Protocol (i.e., Step A) has not taken place because the Appraisers need clarification about the Disputed Issues before they take that step.

Analysis and discussion

- [26] The substantive relief sought by Rhino in the Application is for declarations in the following terms:

- (a) that Rhino is not obliged to make available to Sanlam or its advisors “any document submitted to the Appraisers for the appraisal process for which the Applicant has exercised its right to restrict access to the Appraisers only pursuant to paragraph 15 of the Protocol”; and
- (b) that there is no incompatibility between paragraphs 9 and 15 of the Protocol, in circumstances where access to the documents to be submitted by a party is restricted.

- [27] The principal issue giving rise to the making of the Application is Rhino's understandable concern that if the documents upon which it intends to rely, or which the Appraisers wish to consider, are released to the Appraisers, they may need to be disclosed to Sanlam and, if so disclosed, may come to the attention of Sanlam's present or former personnel, English legal advisors or the beneficiary of the shares in question, Mr Steyn. This concern, not unnaturally, has been substantially increased first by the nomination of Mr Steyn by Sanlam as its appraiser and, subsequently, by the suggestion by Sanlam that the documents released to it should be made available to Mr Steyn to assist Sanlam in the valuation process. This concern was expressed by Conyers, the legal practitioners acting for Rhino, in their letter to Appleby, who act for Sanlam, in the following terms:

“We believe that your client's recent appointment of an independent Appraiser unlocks many of the points of issue on this document. However, due to the previous breaches of confidentiality by Mr Phillip Steyn, our client cannot agree to its commercially sensitive Confidential Information being shared in any way with him or persons connected with him, irrespective of whether or not he signs a confidentiality undertaking.”

[28] Whether or not this position is appropriate for Rhino to take seems to me entirely immaterial. The fact is that Rhino is genuinely concerned that releasing confidential or commercially sensitive documents to Sanlam poses a great danger to Rhino if those documents are misused by Sanlam, and specifically, Mr Steyn.

[29] Sanlam continues to allege that the position adopted by Rhino is wrong and that if the confidential information is released to Sanlam with an appropriate confidentiality agreement in favour of Rhino, entered into by Sanlam and Mr Steyn, it should be a complete answer to the objections relating to disclosure raised by Rhino. In para. 6 of her witness statement dated 4 November 2024, Ms Laure-Astrid Wigglesworth, on behalf of Sanlam, explains why:

“Rhino’s current position is inconsistent with the position which it had previously taken. Indeed, Rhino has repeatedly changed its position when it suited it to do so: first accepting that Phillip Steyn (Mr Steyn), a beneficiary of the Trust in respect of which Sanlam acts as Trustee should be entitled to see those documents on appropriate terms as to confidentiality; then, second, contending that only Sanlam and Sanlam’s lawyers should be entitled to see the documents, to the exclusion of Mr Steyn; then, third, to suggesting that only named individuals at Sanlam should see the relevant disclosure, with the implication that none of Sanlam’s lawyers should; to fourth contending that only Sanlam, and Sanlam’s BVI lawyers should be entitled to have sight of the documents; to, fifth, in the face of the Appraisers’ indication that Sanlam was entitled to have sight of the documents, making a renewed suggestion that access should be limited to Sanlam itself; to, sixth, now suggesting that nobody other than the Appraisers should have sight of them at all.”

[30] Whether or not this position is correct or reasonable to take by Sanlam is also immaterial. So is the question whether the confidential documents should only be disclosed to Sanlam’s UK and BVI lawyers. The fact is that if Rhino has any concerns about the misuse of its confidential and commercially sensitive documents, it should be entitled to refuse to disclose those documents if there is any possibility that their contents may come to the knowledge of Sanlam or its personnel. Mr Hollander is right that the Appraisers do not have coercive powers. Nor is there the type of protection available in this process as there would be if the court were undertaking the valuation, such as the grant of an injunction to prohibit disclosure to third parties or the enforcement of the implied undertaking that documents made available to a party will not be used by that party for a collateral purpose.

[31] Are these matters for this Court to decide?

- [32] In my judgment, they are not. This is made clear by para. 15 of the Protocol which expressly states that upon receipt of the request list “each Party shall independently determine the rights of access to the specific documents they will share. Both Rhino and Sanlam reserve the right to restrict access to certain named individuals, other than the Appraisers, as deemed necessary; solely for the documents they are sharing.”
- [33] The decision about whether to allow any documents requested by the Appraisers to be released to Sanlam or any other person is entirely for Rhino to make. It is based upon the express provisions of the Protocol. Rhino is at liberty to stipulate that the documents should not be released to Sanlam. The Appraisers will not be able to require those documents to be disclosed to Sanlam.
- [34] Rhino’s concern that its refusal to do so may be prejudicial to it in the valuation exercise because the Appraisers may draw an adverse inference as a result of that failure seems to me to be misplaced. In the first place, on my reading of the Protocol, the ability of the Appraisers to draw adverse inferences only arises from the non-provision of documents to them, not to Sanlam. But importantly, I would not expect the Appraisers to draw any adverse inferences where there is a legitimate reason to refuse to provide documents to a third party, i.e., someone other than the Appraisers. However, these are matters solely with the province of the Appraisers. It is not for this Court to seek to identify the different hypothetical situations that may arise during the valuation process.
- [35] There may be circumstances where there is a dispute between the Appraisers about the construction or interpretation of the terms of their mandate. In such a case, if there is no effective mechanism to resolve the issue, the Court may be willing to assist. However, this is not the position here.
- [36] Much the same analysis applies to the remaining Disputed Issues. They include the manner in which the Appraisers should call for representations from Rhino and Sanlam about the value they place on the Sanlam Shares; what documents the Appraisers should seek from Rhino and Sanlam; the terms upon which the FTI data room should operate; and whether Rhino and Sanlam are entitled to dictate or even comment upon any additional procedural directions that the Appraisers may issue (which it is agreed by the parties it is open for the Appraisers to do) to enable them to arrive at their valuation.

- [37] I have thought carefully about whether this Court could give some indication about the concerns expressed by Mr. Chaisty KC that the Appraisers themselves have sought guidance from the Court. I am unpersuaded that this is a good reason for the Court to intervene in the matter. It does not seem to me even to fall within the Court's very narrow jurisdiction to put matters back on track.
- [38] While sympathizing with the Appraisers and understanding fully why they would want clarification of their remit under the Protocol, there is no good reason for this Court to do so. Indeed, looking at the terms of their own letter dated 26 September 2024 referred to above, they confirm that "it is not that the Appraisers cannot assess the fair value of Sanlam's share unless documents are to be made available to Sanlam and/ or its advisors" but that it would be desirable if the parties or their legal advisers "could see at least some of the documents and materials provided by the other party and therefore be in a position to assist the Appraisers in their task, by reference to the terms of the Protocol... "
- [39] The terms of the Protocol are agreed by the Appraisers. They are binding on the parties. They set out the Appraisers' mandate. The Appraisers will know that provided their valuation is conducted in accordance with the Protocol, and is fair and independent, the Court will not interfere with it. The best guidance I can give to them is to proceed fearlessly with the steps laid down in the Table, knowing that if they do so, and do so fairly and independently, they can absent compelling reasons, expect the Court to support their determination.

Conclusion and matters arising

- [40] For all the above reasons, I dismiss the Application.
- [41] I direct that a copy of this judgment be sent to the Appraisers immediately so they can commence their work under the Protocol.
- [42] The parties' legal representatives are invited to submit a draft minute of order to reflect this judgment as soon as possible and to attempt, if at all possible, to agree the issue of costs of the Application arising from this judgment.

[43] It remains for me to thank counsel and the legal representatives for all their assistance in the matter.

Abbas Mithani KC

High Court Judge

By the Court

Registrar