

say, if the second instance dismisses the appeal in this case, the dispute between X and Y about the validity of the settlement is not concluded, and it is unavoidable that X or Y will file another action.

(2) Can the court of second instance dismiss the appeal partially?

Although the second instance has no choice but to dismiss the appeal about the part that is not well-grounded, it seems possible for the court to uphold the appeal about the part that is well-grounded. However, the Supreme Court decided that the court of the second instance has no choice but to dismiss the appeal as a whole, because such a dismissal “would lead to making the close of the litigation effective for only part of the claim subject to the settlement, although it should have become effective for the claim as a whole”.

Even a settlement in litigation may involve a person who is not a party in litigation or a matter that has no relation to the claim in the action. So, the validity of settlement has to be determined as a whole (*see* Case Comment, 1421 HANREI TAIMUZU 101, 103 (2016)). If the appeal is dismissed partially, the judgment of the first instance about that part remains valid, but such a situation is inappropriate for one with the nature of a settlement; the wholeness of settlement. This point also has not been discussed well academically, so it needs to be examined.

4. The conclusion of this judgment

This new judgment decided that the court of second instance has no way but to dismiss the whole appeal, because of the principle of prohibition of modifying the judgment disadvantageously and the nature of settlement. However, as mentioned above, such a judgment cannot resolve the dispute, and X or Y will bring another action. Even if this new decision of the Supreme Court is proper in the light of theory, there is room to examine whether this decision is proper in the light of a case resolution.

5. Commercial Law

X v. Seico Fresh Foods, K.K.
Supreme Court, March 26, 2015

Case No. (*Kyo*) 39 of 2015
2256 HANREI JIHO 88

Summary:

The Supreme Court denied the application of an illiquidity discount in determining a fair price for an unlisted company using an income approach in an appraisal action based on Article 785, Paragraph 1 of the Companies Act.

Reference:

Companies Act, Articles 785 and 786

Facts:

Seico Fresh Foods, K.K. (“SFF”) was a limited liability corporation established in 1940, and engaged in wholesale business in foods and drinks. The shares in the SFF were restricted on transfer. Doto Seico Fresh Foods, K.K. (“DSFF”) was a limited liability corporation established in 1925, and engaged in wholesale and retail business in food and drinks. The shares in DSFF were restricted on transfer. X was a shareholder holding 325,950 shares in DSFF. SFF and DSFF were subsidiaries of Seico Mart, K.K.

SFF and DSFF entered into a merger agreement under which DSFF (the disappearing company) would merge into SFF (the surviving company). Under the agreement, six DSFF shares would be exchanged for one SFF share. X sent a notice in writing that X would vote against the merger at the shareholders meeting. DSFF held a shareholders meeting on August 8, 2012, in which X voted against the merger. X requested DSFF to purchase X’s shares. On October 1, 2012, the merger between SFF and DSFF took effect. SFF offered X to purchase X’s shares at JPY 71 per share, and X declined it. X filed an appraisal action on November 21, 2012.

The District Court of Sapporo determined the fair price as JPY 80 per share. In determining the fair price, the District Court applied the illiquidity discount of 25% because the transfer of shares was restricted and it was a minority portion of shares.

The Sapporo High Court affirmed the District Court’s decision, and specifically noted that the court can take into account the difficulty of

conversion into cash in determining the fair price.

Opinion:

The court has reasonable discretion in determining the fair price under the appraisal action under Companies Act, Article 786, Paragraph 2. Though various valuation methods for an unlisted company are available, it is construed that the court has reasonable discretion to choose which method to use under what circumstances.

Illiquidity discount is applied because shares in an unlisted company do not have marketability and have less liquidity in comparison to listed company shares. However, because appraisal rights are granted to give an opportunity to exit for the dissenting shareholders, and to give an appropriate share of the enterprise value, the illiquidity discount should not be applied to a price calculated based on the income approach.

The fair price should be JPY 106 per share. The opinion below was REVERSED.

Editorial Note:

This is the first decision decided by the Supreme Court that the illiquidity discount should not be applied to the price in calculating the fair price based on the income approach for an unlisted company.

The Supreme Court emphasized that the appraisal rights are granted to the dissenting shareholders to allot the appropriate share of the enterprise value. Especially, it seems that the Supreme Court considers it important that the Companies Act requires the court to determine the fair price for the appraisal action. It seems that this is one of main reasons for the Supreme Court to decline to apply the illiquidity discount. However, allotting the appropriate share does not necessarily or logically relate to the illiquidity discount. Or does it mean that the Supreme Court denied any discount at the shareholder level when the price is calculated based on the income approach? I think that the Supreme Court should have clarified how allocating the enterprise value logically relates to the denial of an illiquidity discount (or a discount at the shareholder level generally).