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UPDATE

Cayman court sees no reason to veer from the standard directions in fair value proceedings

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In the recent decision of *Re eHi Car Services Limited* the Grand Court of the Cayman Islands refused an attempt by eHi Car Services Limited (the **Company**) to materially vary the standard pre-trial directions for the management of fair value proceedings brought under section 238 of the Companies Law (2020 Revision) (the **Law**).

The court has recently refused an attempt by the Company to vary the pre-trial directions that have become the norm in s.238 proceedings.[1] The decision provides a welcomed reminder that s.238 of the Law is a vital safeguard for minority shareholders and the standard directions play a role in ensuring that the valuation experts receive sufficient and reliable information to assist the court in its determination of the fair value of the dissenting shareholders' shares.

The Company's arguments were generally premised on an underlying assumption that the procedural regime in s.238 proceedings is duplicative, unfair and disproportionately costly to companies and has evolved without sufficient consideration of the Grand Court Rules (the **GCRs**). These arguments were rejected out of hand by the Honourable Justice Parker, who held that significant variations to the standard directions should not be ordered unless a compelling reasons exists to do so.

The decision addressed a number of important procedural issues in relation to the conduct of s.238 proceedings through to trial, including in relation to:

1. Management Meetings: The court rejected the Company's argument that the court has no jurisdiction to order that meetings take place between the Company's management and the parties' instructed experts (**Management Meetings**). The court has an inherent jurisdiction to make procedural orders beyond the specific confines of the GCRs to achieve justice between the parties. The court likewise rejected the Company's argument that Management Meetings are unnecessary, inefficient and contrary to the overriding objective to conduct proceedings in a just, expeditious and economical way. As s.238 proceedings are largely driven by the evidence of valuation experts the reliability of expert evidence at trial is critical. Management Meetings provide an important role in the information gathering process as they provide an interactive method through which information can be provided. They allow the experts to get to the core issues in a much more efficient way than through the exchange of written materials.
2. Expert Information Requests: The court rejected the Company's attempts to place restrictions around the timing and number of information requests that may be submitted by the experts to the Company's management as part of the information gathering process. The court must be able to assume that experts

[1] See our previous article on the standard form of pre-trial directions, *The Cayman Standard: Directions in Fair Value Proceedings*, August 2019. These pre-trial directions have recently been reflected in Practice Direction 1 of 2019, issued by the court.

are highly experienced professionals, with overriding obligations to the court, who will act reasonably and proportionately. It is important for the experts to be able to consider the factual evidence in the case and have an opportunity to ask questions arising out of it in preparation for trial.

3. Dissenter Discovery: The Company unsuccessfully attempted to extend the categories of disclosure to be provided by the dissenting shareholders (the **Dissenters**) in s.238 proceedings, as ordered by the Court of Appeal in *Qunar Cayman Islands Limited*.[2] The court found that in each case the probative value of the additional categories were of minimal value and it would be disproportionate to require the Dissenters to search for and disclose that material. In reaching its decision, the court provided a reminder that the characteristics and motivations of dissenting shareholders are irrelevant to a fair value determination, citing *Qunar*.[3] The timing and amount of the Dissenters' investments, whether they invested before or after the merger announcement or EGM and whether they voted in favour of the merger (or otherwise), are irrelevant to a determination of fair value. It is also irrelevant whether the Dissenters are long-term shareholders or speculative investors engaged in arbitrage, as fair value is to be determined in one way for all Dissenters.
4. Dissenter Collaboration: It is often the case in s.238 proceedings that Dissenters may have engaged different attorneys or counsel. However, the court refused the Company's request for the court to micromanage the Dissenters' rights as litigants by, for example, requiring the Dissenters to identify issues on which they collectively agree at the same time as filing any written submissions or restricting them to a single set of submissions. The court relies on the attorney's common sense, experience and obligations to the court to coordinate matters sensibly. If there is any unreasonable or abusive conduct the court has powers to curtail this by the imposition of costs or other orders.

The standard directions that have evolved from previous cases play an important role in ensuring that the experts are provided with all of the evidence necessary to guide the court in its determination of fair value. The Court will be slow to limit the flow of information to the Dissenters and their experts and will only depart from the standard directions if the facts of the case warrant the use of bespoke directions. In addition, the court has made clear yet again that the characteristics and motivations of dissenting shareholders are irrelevant to a fair value determination.

[2] Qunar Cayman Islands Limited v Athos Asia Event Driven Master Fund and Ors (unreported, 10 April 2018, Goldring P, Rix JA and Field JA). Broadly, these categories included disclosure of a history of trades, valuation analysis and pre-merger communications with the company.

[3] *Ibid*.

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