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Fine Tuning Fair Value Appraisals: Further Guidance from the Cayman Court

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Having seen a surge in dissenting shareholder litigation over the past 18 months, the Grand Court of the Cayman Islands (the "Court") continues to release considered judgments concerning the operation of the appraisal process set out in Section 238 of the *Companies Law (2016 Revision)* (the "Law") that give clear directions as to how such actions should be presented and pursued in this jurisdiction. Following the judgment in *Shanda Games* and building on the judicial guidance found in the other very recent decisions of the Court summarised in our article here, the judgment of the Honourable Justice Raj Parker in *In the matter of Qunar Cayman Islands Limited* (unreported, 21 July 2017) ("*Qunar*") addresses in clear and concise terms the appropriate approach to the directions required in such proceedings which have their own unique features differing from ordinary civil litigation.

Background

Qunar Cayman Islands Ltd (the "Company") is a Cayman Islands exempted limited company that had been listed on the Nasdaq in 2013. In June 2016, it was the subject of a "take private" transaction pursuant to which it was to enter into a merger agreement with Ocean Management Holdings Ltd and Ocean Management Merger Sub Ltd (the "Merger"). The Merger was approved in February 2017. Eight shareholders forming four groups, (collectively, "the Dissenters") dissented to the Merger and commenced the appraisal process provided for in Section 238 to formally assess the "fair value" of their shares (the "Proceedings").

The Proceedings came before the Court for directions on 23 June 2017. Although the broad structure of the directions had been agreed, there remained a number of areas of disagreement, including as to the proper approach to discovery by the Company, the appointment of joint experts, and the question of whether the Dissenters should also be compelled to give discovery.

Discovery by the Company

Referring to the findings of the Court in a number of earlier judgments concerning Section 238, including *In the matter of Integra Group* [2016] 1 CILR 192 and *In the matter of Homeinns Hotel Group* (unreported 12 August 2016), Justice Parker reiterated that the Court is not itself an expert valuation tribunal and must be guided in these matters by the expert evidence from experienced valuers, who will need access to relevant historical data, documents and information concerning the company that will assist with the assessment of fair value required by the Law. Noting that such documents should be readily available and that it was "the usual order", Justice Parker ordered that the Company should give discovery by first uploading to a data room the specific classes of documents which came into being in the course of the Merger process, before uploading all documents that are relevant to fair value as part of the Company's ongoing discovery obligation, rather than limiting discovery to a set list of documents (as proposed by the Company). The Court also found that it would be inappropriate to limit in advance the experts' requests for documents and that instead it should be open to them to be able to ask for any further specific information they deem necessary for the purposes of their valuation, so long as the requests for documents are not oppressive, disproportionate or calculated to embarrass or harass the Company.

Finally, contrary to the approach taken in *In the matter of Homeinns Hotel Group*, the Court ordered that the documents discovered should be disclosed by way of List in the form prescribed by the Grand Court Rules (the "GCR"). Although the data room index could be incorporated by reference into Schedule 1 Part 1 of the standard form, Schedule 1 Part 2 required identification by the Company of the documents which the Company objects to producing (usually on the grounds of privilege), and Schedule 2 requires the Company to identify relevant documents which it has had, but no longer has and to state when they last had them and what has become of them. These are important provisions which should not lightly be discarded.

Experts

The Court was then asked to consider whether each group of Dissenters should instruct their own expert or whether a single joint expert should be appointed on behalf of the Dissenters as one group. Noting that the Court has a discretion to give leave for a party to be allowed to call expert evidence, Justice Parker also referred to the operation of GCR Order 38, rule 4, which provides for the Court to limit expert evidence to ensure a fair trial and that each party has a proper opportunity to put forward its case and test the other party's case. In relation to the proper role of the experts in Section 238 proceedings, Justice Parker noted:

> *Given that their evidence should be and should be seen to be independent work product uninfluenced by the pressures of litigation or any party, so that they can provide independent assistance to the Court by way of an objective and unbiased opinion, there is no room for them to in any way take on the features of an advocate for their client.*

Ultimately, Justice Parker found that if the Court is to achieve its overriding objective of dealing with every cause or matter in a just, expeditious and economical way, it was appropriate that one expert was instructed jointly and severally for all four groups of Dissenters. The Court also noted that in any event, the interests of all dissenters should be aligned in that they share a common interest in the determination of a fair value of their shares.

Discovery by the Dissenters

An application was made for the Dissenters to give discovery which was surprising since the Court had already ruled on this question *In the matter of Homeinns Hotel Group.* Justice Parker noted that the Court would require very clear grounds upon which to make an order for dissenting shareholders to give discovery, and that those grounds would be solely directed towards assisting the Court in determining fair value. No such order would be made if it were not necessary either to dispose of the matter fairly or so as to save costs. Referring to the Delaware decision of *In Re Appraisal of Dole Foods Company, Inc. C.A. No 9079 – VCL* (Del. Ch.Dec. 9 2014) ("*Dole*") which provided for discovery by dissenting shareholders, Justice Parker noted that while the Court would take into account and pay close attention to the decisions of the Courts in Delaware, given the similarity of the jurisprudence and statutory merger provisions, the *Dole* decision was of "little assistance in relation to procedural matters such as discovery where the Delaware jurisdiction is so different".

Justice Parker went on to state that whilst he could not rule out the possibility of discovery being ordered from dissenters, such an order would only be made in a very rare exceptional case. This was not such a case. Material which might give an indication of the value which the dissenters themselves may have thought the company or their shares to have had, prior to or for the purposes of merger, is irrelevant and of no assistance to the Court in determining fair value in this jurisdiction. The Judge was not persuaded that valuations of third parties based on public information were relevant to a determination of fair value because once an expert has the company's full records, nothing helpful could be gained by reviewing third-party valuations. The motivations and views of the Dissenters were unlikely to assist the Court in its rather narrow exercise of adjudication, informed as it would be by the expert evidence. The Judge noted that Section 238 cases should not be treated like ordinary civil litigation where parties seek to undermine each other's cases through discovery and related interlocutory procedures. He concluded that Mangatal J was clearly right in her decision *In the matter of Homeinns Hotel Group* that it was not appropriate for the Dissenters to be ordered to provide discovery in the usual way pursuant to a standard direction under Order 24 of the GCR.

The Judgment

The decision of the Court in *Qunar*, as it relates to the appropriate directions in Section 238 appraisal actions, is to be welcomed, in that it has produced a situation where there should now be a consensus as to the usual order for directions applicable to the majority of such actions. This ought to result in a more speedy resolution of such cases, subject to timely and proper compliance with such directions on the part of the Company, upon whom the principal burden of the directions rests.

Nigel Meeson QC led Erik Bodden on behalf of the largest group of dissenting shareholders in the Proceedings, referred to in the judgment as the PAG dissenters.

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