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Qunar Cayman Islands Limited: Court confirms interim payments are appropriate in Cayman Appraisal Actions

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In *Qihoo 360 Technology Co. Ltd* ("*Qihoo*") (unreported 26 January 2017) the Honourable Justice Quin held that the Grand Court had power to order an interim payment to be made by the Company to dissenters in fair value proceedings under Section 238 of the *Companies Law (2016 Revision)*. He further held that the appropriate amount of such interim payment was the Company's fair value offer made under Section 238(8), being the amount which the Company considered to be the fair value of the dissenters' shares.

It is surprising that in the recent Cayman Islands case of *Qunar Cayman Islands Limited* ("*Qunar*") (unreported 8 August 2017), the Company in that case decided to re-run the same arguments before a different judge, the Honourable Justice Mangatal. Rather less surprising, is that she confirmed that the Grand Court has the power to award interim payments and made an award in the amount of the Company's fair value offer under Section 238(8), being the merger consideration.

The ruling is consistent with the approach adopted by in *Qihoo* giving dissenting shareholders to a company merger or consolidation assurance that, pending a determination of the fair value of a company's shares, they have a mechanism (by virtue of Order 29, Rule 12(c) of the *Grand Court Rules (1995) Revision*), to challenge their deprivation of the price of their shares while the company has the benefit of the use of the money in order to mitigate the hardship or prejudice that could be suffered in the period between the commencement of proceedings and the ultimate determination of fair value.

As the Company has already paid the amount of the merger consideration to the non-dissenting shareholders, it is difficult to see any rational basis for not paying the same amount to the dissenting shareholders. There is no sensible basis for penalising a shareholder who exercises his statutory right to dissent.

The earlier decision in *Qihoo* was the first time that the Grand Court had ordered an interim payment in Section 238 proceedings, the Court rejecting the submissions that the Section 238 procedure is a self-contained statutory code to which Order 29 did not apply. This proposition was revived in *Qunar*, the Company arguing that the decision in *Qihoo* was wrong and should not be followed. It was also argued on behalf of the Company that, as Section 238 only provides for the Court to make a declaration as to the fair value of the shares (and interest) rather than an order for payment of the amount declared, they were not proceedings in which the Company would be held liable to pay "any damages, debt or some other sum" as Order 29, Rule 9 defines interim payments. Although Mangatal J held that there is some merit in this proposition, she saw no fault in Quin J's reasoning and therefore no reason not to follow his decision.

The Court also considered the circumstances in which it would be appropriate to exercise its jurisdiction. In this instance, as the Company had on numerous occasions expressly stated that, so far as it was concerned, the merger price was the fair value of the shares for the purposes of proceedings under Section 238, Mangatal J rejected the Company's argument that there was no evidential basis, or sufficient evidential basis, upon which the Court could decide what a 'just sum' was without expert evidence being adduced, or that the Court ought to be satisfied of the dissenters' ability to repay any such payments. She held that the just sum should be predicated on the basis of what the Company had maintained was the fair value and accordingly ordered interim payments at the same amount as the merger consolidation. She went on to say that if the fair value at trial was ultimately found to be less than the merger price, the Court has the ability to order repayment of any overpayment and thus redress any imbalance.

Whilst only the second decided case of its kind, with the surge in dissenting shareholder litigation that this jurisdiction has seen, the decision of the Court in *Qunar* is an important one that will impact on other cases before the Grand Court and fair value determinations in general. Dissenting shareholders can take comfort from the fact that they may not only challenge the deprivation of their share price, but that in circumstances where a company has told the world at large that fair value is the merger price, it is just to require payment that sum to negate the prejudicial effect of being kept out of what *prima facie* was their own money.

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