

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

Qunar Cayman Islands Limited：法院确认开曼估值诉讼中暂时支付是得宜的

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

在 *奇虎360科技有限公司*（下称“奇虎”）一案（未发布，2017年1月26日）中，Quin法官认为大法院有权颁令要求公司在公允价值程序中根据《公司法（2016年版）》第238条向异议人进行暂时支付。Quin法官进一步认为暂时支付的适当金额为公司根据公司法第238(8)条作出的公允价值报价，即公司认为的异议人股份的公允价值金额。

令人诧异的是，在近期的 *Qunar Cayman Islands Limited*（下称“去哪儿”）开曼群岛案件（未发布，2017年8月8日）中，该公司决定在另一法官（即Mangatal法官）前再次运用相同的论据。然而当Mangatal法官确认大法院有权判予暂时支付，并裁定暂时支付的金额为公司根据公司法第238(8)条作出的公允价值报价（即兼并代价），这裁决却不那么让人惊讶了。

该裁决与 *奇虎* 一案中所采用的方式一致，即向反对公司兼并或合并的异议股东保证，在确定公司股份的公允价值之前，彼等可以（根据《大法院规则（1995年）修订本》第29命令第12(c)款）质询公司对其股价的剥夺，而公司可运用资金减轻自程序开始至最终确定公允价值期间可能蒙受的困难或损害。

由于公司已向非异议股东支付兼并代价，难以找出任何合理理由不向异议股东支付相同金额的款项。对行使法定权利提出异议的股东进行处罚是没有任何明智依据的。

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

早前 *奇虎* 一案中的裁决是大法院首次在公司法第 238 条程序中颁令要求暂时支付，法院不同意公司法第 238 条规定是一项独立、自足的成文法，而第 29 命令不适用的意见。此意见在 *去哪儿* 一案中被重新提出，公司辩称 *奇虎* 一案的裁决有误，故不应遵循。公司的代表亦提出，由于公司法第 238 条仅规定法院作出有关股份（及权益）公允价值的声明，而不是颁令要求支付声明的金额，因此公司在该等程序中并无责任支付“任何损害赔偿、债务或其他款项”从而符合第 29 命令第 9 款对“暂时支付”的定义。尽管 Mangatal 法官认为此意见有一定的道理，但她在 Quin 法官的推论中找不出任何过失，因此没有理由不遵循他的裁决。

法院亦考虑了适宜行使其司法管辖权的情况。在这种情况下，鉴于公司已多次明确表示，就公司而言，为公司法第 238 条程序之目的，兼并价格为股份的公允价值，Mangatal 法官驳回了公司的以下论据：法院如没有引用专家证据，则没有证据基础或充足的证据基础来决定什么是‘合理的金额’，或法院应信纳异议人有能力偿还任何相关付款。Mangatal 法官裁定合理的金额应在公司所维持者等同于公允价值的基础上进行推断，于是颁令要求暂时支付与兼并代价金额相同的款项。她接着表示，若最终发现审讯时的公允价值低于兼并价格，法院有能力颁令要求偿还任何超额支付的款项，从而纠正失衡情况。

虽然这仅仅是此类案件的第二个已判决案件，随着该司法管辖区内异议股东诉讼激增，法院在 *奇虎* 一案中的判决变得尤为重要，将会影响大法院的其他案件和公允价值的确定。可以让异议股东感到安慰的是，彼等不仅可以质询对其股价的剥夺，而且在一间公司已向外宣布公允价值为兼并价格的情况下，仍然可以合理要求支付该金额，从而化解因无法得到明显属其所有的金钱所带来的不利影响。

own money.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

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