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UPDATE

Court strikes out "cynical and abusive" winding-up petition designed to prevent s.238 merger

Update prepared by Jessica Bush (Associate, Cayman Islands)

The Grand Court of the Cayman Islands recently warned minority shareholders against using winding-up proceedings for their own commercial interests, rather than to vindicate the rights of shareholders generally. The minority shareholder in the decision of *Ctrip Investment Ltd v eHi Car Services Limited*[1] was prevented from using a winding-up petition to gain leverage for its own competing merger bid. The Grand Court held that the appropriate course for a dissenting minority shareholder is to vote against the privatisation at the EGM or to exercise rights of statutory dissent under s.238 of the Companies Law.

The petitioner, Ctrip Investment Holding Ltd ("**Ctrip**"), was a minority shareholder in eHi Car Services Limited ("**EHi**"), a company listed on the New York Stock Exchange ("**NYSE**") and China's leading car rental service provider. EHi's board received a preliminary non-binding bid to acquire all of EHi's outstanding shares for $6.675 per ordinary share from a consortium of buyers, including EHi's Chairman (the **Buyer Consortium**). Subsequently, EHi received a preliminary bid from Ocean Link for $7.25 per ordinary share which was supported by Ctrip (the **Ocean Link Bid**). The Buyer Consortium responded by raising its price to US$6.75 per ordinary share (the **Buyer Consortium Bid**). After recommendations from EHi's special committee created to evaluate and negotiate privatization proposals, the board of EHi resolved to accept the Buyer Consortium Bid at a board meeting.

Ctrip filed a winding-up petition in the Grand Court on the just and equitable ground, not for the purpose of winding-up EHi but to obtain alternative relief under s.93(5) of the Companies Law. The relief sought by Ctrip included, *inter alia*, declarations that the board meetings held and resolutions passed were void, the appointment of a person by the court to solicit the highest possible bids to take over EHi and an injunction restraining the board from issuing any further shares prior to the EGM at which the merger proposals would be considered.

Justice Kawaley struck out the winding-up petition as an abuse of process, stating that it arose from *the cynical and abusive presentation of a winding-up petition on the just and equitable ground*. Justice Kawaley found that Ctrip's commercial alignment as a supporter of the Ocean Link bid was the most important single consideration in the case. Ctrip was not a 'neutral shareholder' concerned only to enforce its expectations as an investor in EHi and to protect the interests of shareholders as a class, but instead Ctrip's main motive in petitioning was to further its own interests as a participant in a rival take private bid.

Justice Kawaley held that a just and equitable shareholder petition would be dismissed where the company did not cross the forbidden line so as to constitute a visible departure from the standards of fair dealing and the conditions of fair play which a shareholder is entitled to expect.[2] The allegations of misconduct by EHi were found to be unsustainable in the sense that they were factually incapable of proof and unmeritorious.

[1] Unreported, 29 June 2018.

[2] Following the decisions in *Lock v John Blackwood* [1974] AC 783 and *Re The Washington Special Opportunity Fund* (unreported, 2016).

The Judge confirmed that in order to vitiate a board resolution, such as the resolution approving the Buyer Consortium Bid, it was insufficient to establish that the decision was to *some extent* infected by an improper purpose. Rather, the *main or substantial purpose* for which the power was exercised must have been improper. While the Judge was mindful that a stricter proper motive test may be required by the different judicial views expressed in *Eclairs Group Ltd v JKX Oil & Gas Plc*[3], the evidence in this case did not demonstrate *any* improper purpose on the part of EHi's Board.

This decision provides a clear reminder, particularly in a just and equitable winding-up petition, that a minority shareholder may not use winding-up proceedings to advance its own commercial interests rather than to advance the class interests of the shareholders. In the circumstances of this case, a more suitable path for Ctrip as a minority shareholder dissatisfied with EHi's board approved merger offer was to vote against the merger at the EGM or to exercise its statutory rights of dissent under s.238 of the Companies Law. It remains to be seen what circumstances could be considered sufficient to vitiate a board resolution to enter into a statutory merger transaction.

Ctrip has applied for leave to appeal this decision.

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[3] [2015] UKPC 71.