

# Fair value update: Cayman court confirms importance of expert's view in discovery

UPDATE

Update prepared by Simon Dickson (Partner, Cayman Islands)

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In the recent decision of *Fountain Medical Development Ltd*<sup>1</sup>, the Grand Court of the Cayman Islands again confirmed the importance to be placed on the views of experts in determining the scope of a party's discovery obligations in section 238 fair value proceedings.

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## Background

Fountain Medical Development Ltd (the **Company**) undertook a statutory merger pursuant to Part XVI of the Companies Law (2016 Revision) (as amended). Dr Chen (the **Dissenting Shareholder**) dissented to the offer to purchase her shares at the merger price. The Company issued a Petition seeking the Court's determination of the fair value of the shares.

The Company and the Dissenting Shareholder were able to agree the position with respect to discovery. As noted in our earlier briefing '[Fair value update: dissenter discovery and discarding Dole](#)', August 2017 the Court has routinely held that, in the specific context of fair value proceedings, dissenting shareholders are not required to provide discovery unless exceptional circumstances exist. Despite this authority, the Company and Dissenting Shareholder agreed that both should make discovery.

Upon the exchange of lists of documents, the Dissenting Shareholder wrote to the Company noting that a number of documents considered relevant by its valuation expert had not been disclosed.

## Company's refusal to give discovery

The Company refused to provide the documents (the **Requested Documents**). Amongst other things, the Company claimed the documents were irrelevant on the basis that they were created after the date upon which the shares were to be valued, being the date of the Extraordinary General Meeting at which the merger received shareholder approval (the **Valuation Date**). The Dissenting Shareholder filed an application for specific discovery.

During the course of the hearing, both parties relied upon expert evidence which addressed the issue of the relevance of the Requested Documents. In particular, the expert evidence addressed the issue of whether the Requested Documents were relevant in light of the fact that a number of the Requested Documents post-dated the Valuation Date.

The evidence of the parties' respective experts varied to some extent. However, both experts agreed that the date range within which information and documentation will be relevant will vary depending upon the valuation methodology. Importantly, both experts agreed that depending on the methodology used, documents and/or information created after the Valuation Date may be relevant.

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<sup>1</sup> Unreported, 19 January 2018.

Notwithstanding the concessions made by its own expert, the Company persisted in its opposition to the application on the basis that (a) the discovery was disproportionate and (b) there was a risk that the Dissenting Shareholder sought the Requested Documents for an improper purpose (being to impugn the merger itself) and would use the Requested Documents in breach of the implied undertaking.

### **Court's decision**

Relying on both her decision and that of the Court of Appeal in *Qihoo 30 Technology Co Ltd* (see our previous briefing [Fair value discovery: Court of Appeal says Grand Court was justified in ordering forensic IT audit](#)) Mangatal J confirmed that experts may reasonably differ in their approach as to the documents required. Mangatal J again confirmed that the experts are the best judge of what information is or is not relevant for their purposes. Accordingly, if the Dissenting Shareholder's expert considered that the Requested Documents were relevant to the valuation exercise, they should normally be disclosed. This is particularly so where, as occurred here, the Company's own expert agreed with the position taken by the Dissenting Shareholder's expert on the issue of relevance in a number of respects.

Whilst the judge appeared to accept that disclosure of documents which are *prima facie* relevant may be curtailed where the request would be disproportionate or oppressive, she held that there was no such concern here. The Court also held that there was no evidence substantiating the allegations made by the Company regarding the potential misuse of the Requested Documents, especially where the Dissenting Shareholder had indicated her willingness to provide undertakings to address any concerns held by the Company.

On that basis, Mangatal J considered that the views of the Dissenting Shareholder's expert should be accorded weight and directed that the Company provide disclosure of the Requested Documents. Mangatal J also directed that the Dissenting Shareholder provide express undertakings to deal with any misgivings of the Company regarding the use to which she would put the Requested Documents.

### **Conclusion**

As noted previously, in the context of section 238 proceedings, there is an imbalance in the information held by dissenting shareholders, on the one hand, and the Company, on the other. The Cayman courts have consistently sought to remedy this imbalance by ensuring that all documents relevant to the issue of valuation are disclosed as part of the discovery process.

The decision in *Fountain Medical* is an extension of this approach, confirming that the views of experts as to what is relevant will be given great weight. Unless there is good reason for doing otherwise, an expert's view of what is relevant should be followed. Importantly, it also confirms that there is no *priori* view as to relevance by reference to the date upon which the documents or information were created. Instead, the relevance of each document will be determined on its own merits, albeit with the benefit of the views of those who will be tasked with conducting the valuation.

### **Contacts**

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