

UPDATE

Confirmation: dissenting shareholders are entitled to interim payments

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The Grand Court has confirmed its previous decision that it has jurisdiction to order that a company subject to a "fair value" proceeding pursuant to section 238 of the Companies Law make interim payments to dissenting shareholders. This decision has a significant impact on other cases before the Court and on fair value determinations in the Cayman Islands generally.

Background

As we have previously reported, where a company merges or consolidates under Part XVI of the Companies Law (2016 Revision) (as amended) (the **Law**), shareholders dissatisfied with the price offered by the company for their shares may dissent from the transaction and in so doing lose their rights as shareholders except the right to be paid fair value for their shares.¹ Unless the company and dissenting shareholders are able to agree on a price to be paid for the dissenting shareholder's shares, the company must (and a dissenting shareholder may) file a petition in the Grand Court seeking the determination of the fair value of its shares. There are currently a number of "fair value proceedings", or "section 238 proceedings" as they are also known, before the Grand Court.

Pending the outcome of the Court's fair value determination, a dissenting shareholder is deprived of the price of its shares while the company has the benefit of the use of that money.² As we reported in [Section 238 fair value determinations: more guidance from the Court](#) in the case of *Qihoo*, the Honourable Mr Justice Quin determined that the Court had jurisdiction to order that a company make interim payments to dissenting shareholders who were effectively being kept out of the money in the period between the commencement of the proceedings and the ultimate determination of fair value at trial.

The question has recently been addressed again in another set of section 238 proceedings in a hearing before the Honourable Justice Mangatal. In *Re Qunar Cayman Islands Limited*³ (**Qunar**) (unreported, 8 August 2017), two dissenting shareholders, funds managed by Maso Capital (the **Dissenters**), sought interim payments at the same amount as the merger consideration on the basis that Qunar Cayman Islands Limited (the **Company**) had consistently maintained that the merger consideration constituted fair value for the shares in the Company. In response to that application, the Company invited the court to overturn the decision in *Qihoo* on the basis that it considered the decision to be wrong and should not be followed. The Court distilled the application into three main issues:

- Does the Court have jurisdiction to award interim payments in section 238 proceedings?

¹ Dissenting shareholders are however afforded rights by the Law as to participation in any proceedings to determine the fair value of their shares and as to obtaining relief on grounds that the merger or consolidation is void or unlawful.

² This was recognised in *Maso Capital Investments Limited & Ors v Qihoo 360 Technology Co. Ltd* (unreported, 26 January 2017) (**Qihoo**) at para 67 relying on the dicta of Jones J in *In the matter of Integra Group* (unreported, 28 August 2015) (**Integra**).

³ *Maso Capital Investments Ltd et al v Qunar Cayman Islands Limited* (unreported, 8 August 2017).

- If the Court does have that jurisdiction, should it exercise its discretion to do so?
- Was there a sufficient evidential basis upon which the Court could decide what constituted a "just sum"?

Does the Court have jurisdiction to award interim payments in fair value proceedings?

Order 29, rule 12(c) of the Grand Court Rules (1995 Revision) gives the Court the power to award interim payments of such amount as it thinks just if "the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs".⁴

The Company argued that the interim payment regime in Order 29 did not apply to fair value proceedings on the basis that the remedy available to the dissenting shareholders is merely a declaration as to the fair value of the company's shares (and interest), rather than an order for payment of that sum. While the Company accepted that section 238 undoubtedly created a liability in favour of the Dissenters, it submitted that the only remedy afforded by the statutory scheme was a declaration as to fair value (and not a money judgment which could form the basis of an application for interim payments). The Company further argued that the fair value regime is a stand-alone statutory code and ordering interim payments would be inconsistent with this regime.

The Dissenters, in reliance on the decision in *Qihoo*, argued that the Court does have jurisdiction to order interim payments in section 238 proceedings. In particular, the Dissenters argued that the Grand Court should follow *Qihoo* unless convinced it was wrongly decided by Quin J.⁵ Further, the Dissenters submitted that the argument raised by the Company that fair value proceedings only provide declaratory relief was overly technical, as the two fair value proceedings which have gone to trial in this jurisdiction have resulted in orders by the Court for sums of money to be paid by the relevant company to the dissenting shareholders.⁶

Mangatal J, in agreement with the Dissenters, was not convinced that Quin J was wrong as his reasoning was very clear and was made following fully contested arguments from the parties. In the circumstances, she considered that she ought to follow Quin J's decision and held that the Grand Court does have jurisdiction to award interim payments in fair value proceedings. The learned judge also considered that the Company's submission that fair value proceedings only provide declaratory relief was problematic, in that, if a company does not act upon the declaration (i.e. by paying the dissenting shareholders fair value for their shares) and separate enforcement proceedings were needed, it would have the undesirable consequence of multiplicity of law suits and increased costs.

Should the Court exercise its jurisdiction? If so, what is a "just sum"?

The Company argued that the Court should decline to exercise its discretion to order interim payments as there was:

- no evidence as to what a "just sum" would be in the circumstances as no expert evidence had been filed by the Dissenters; and
- the Court could not be satisfied as to the ability of the Dissenters to repay the balance of any interim payments ordered if the fair value of the shares was ultimately determined to be less than the merger price.

The Court rejected both of these arguments, noting that the Company had told the world, including its regulators, that it would contend in the proceedings that fair value is the merger price.⁷ The Court agreed with the Dissenters that "what the Company says about fair value must... count for something". While there is no presumption that the merger price is fair value, the Court held that a just amount for the Company

⁴ Also see the Grand Court Law (2015 Revision), section 20.

⁵ Following the authority in *Lornameade Acquisitions Ltd v Kaupthing Bank HF* [2013] 1BCLC 73 and *China Shanshui Cement Group Limited* 2015 (2) CILR 255.

⁶ *Integra* and *In the matter of Shanda Games Limited* (unreported, 25 April 2017).

⁷ The Company had, on numerous occasions, contended that the merger price is fair value, including in the agreement and plan of merger and the Company's proxy statement.

to pay by way of interim payments should be "predicated on the basis of what the Company has maintained is the fair value".

Mangatal J held that, in determining whether to order interim payments and the amount of such payments, the Court was not (as suggested by the Company) pre-empting the Court's fair value determination. Rather, the Court's task is to determine what is just as between the company and the dissenters. Mangatal J held that the purpose of the interim payment jurisdiction is to mitigate the hardship or prejudice suffered by dissenters being kept out of the money between the commencement of the proceedings and the determination and payment of fair value for their shares.

Furthermore, if the fair value at trial is ultimately found to be less than the merger price, the Court has the ability to re-tilt the scales and adjust interim payments by ordering repayment of any overpayment plus interest. In this way the Company can be compensated if it is later established, with the benefit of hindsight, that it was deprived of a portion of an interim payment.

Mangatal J also saw no substance in the Company's concern that the Dissenters may not be able to repay any interim payments ordered should the final determination as to fair value be less than the merger price. The learned judge also rejected the Company's argument that the Company's estimated costs of the proceedings should be deducted from any interim payments ordered on the basis that she saw no basis for such an argument, either on the construction of the language of the relevant rules or as a matter of principle. Accordingly, the Court ordered the Company to pay interim payments equal to the merger price multiplied by the number of shares held by the respective Applicants.

Conclusion

Consistent with the approach adopted by Quin J, Mangatal J has confirmed the Grand Court's jurisdiction to order interim payments to be paid to a dissenting shareholder pending the determination of the fair value of a company's shares. In circumstances where a company has told the world at large that fair value is the merger price, it is just that a dissenting shareholder be paid that sum to avoid any hardship when it is effectively being kept out of its own money.

Mourant Ozannes acted as attorneys for the Dissenters, together with Mr Robert Levy QC as lead counsel, in these proceedings.

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