

UPDATE

Fair value update: dissenter discovery and discarding *Dole*

Update prepared by Jessica Bush (Associate, Cayman Islands)

A recent unreported decision of the Grand Court of the Cayman Islands provides welcome guidance on the disclosure obligations of parties to a "fair value" petition pursuant to section 238 of the Companies Law. In particular, Mr Justice Parker rejected the company's efforts to limit its own disclosure obligations, and further rejected the company's efforts to require the dissenting shareholders to provide disclosure.

In previous legal updates¹, we have discussed the statutory merger regime in the Companies Law (2016 Revision) (as amended) (the **Law**). Shareholders of Cayman companies which have voted on a merger are entitled, pursuant to section 238 of the Law, to dissent from the merger. Unless the company and dissenting shareholder can agree on the 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 of the Cayman Islands for determination of the fair value of the shares.

A number of fair value petitions are currently before the Grand Court. The recent decision of Justice Parker in *Qunar*² provides welcome guidance on a number of pre-trial issues in fair value petitions.

Background

Qunar Cayman Islands Limited (the **Company**) is a Cayman Islands exempted limited company listed on the NASDAQ and operated mainly in the People's Republic of China. It has described itself as "one of the leading mobile and online commerce platforms for travel in China" and was the subject of a "take private" transaction by way of a merger (the **Merger**).

Eight shareholders, comprised of four separate groups of funds, dissented from the Merger (the **Dissenters**). Mourant Ozannes acts for one group of the Dissenters (the **Maso Dissenters**).

At a recent directions hearing, the Court was asked to determine a number of pre-trial issues, including:

- whether the Company could restrict its discovery obligations to certain categories of documents, rather than give disclosure of all relevant material;
- whether the Dissenters should be ordered to give discovery; and
- whether the Dissenters should be required to instruct a single joint expert, or permitted to instruct their own experts.

¹ See our legal updates "Cayman Court makes first ruling on the meaning of "Fair Value" under the statutory merger regime" (September 2015), "Section 238 fair value determinations: more guidance from the Court" (March 2017), "Demystifying the de-listing process: guidance on section 238 fair valuation" (June 2017)

² *In the matter of Qunar Cayman Islands Limited* (FSD 76 of 2017, unreported, 21 July 2017).

Discovery by the Company

The Court rejected the Company's attempts to limit its obligations to provide disclosure to the Dissenters. In particular, the Court did not accept the Company's argument that its discovery obligation should be limited to specific categories of documents. Rather, the Court accepted the Maso Dissenters' submissions that:

- based on previous section 238 decisions³, the Court should not limit in advance the types of documents which the expert should be entitled to see and that the Company should be required to disclose all relevant documents;
- in determining fair value the Court is not itself an expert valuation tribunal and must be guided by the expert evidence from experienced valuers;
- valuation experts typically require access to relevant historical data, documents and information relating to the Company's past trading and auditing, together with its forecasts in relation to trading in the future and not only those that have been publicly disclosed; and
- the Company was subject to a general obligation to search for and produce all documents relevant to fair value and give discovery by uploading those documents to a data room.

While directions given in particular cases are not to be regarded as precedents,⁴ the Court was cognisant that there have been a number of cases in which orders for directions have been made for the Company to give discovery on a "catch all" general basis. This follows from the fact that the Company will likely hold all the relevant information which will go to a determination of fair value, while the dissenting shareholders are essentially outsiders to the Company.

Discovery by the Dissenters

As we have previously reported, in *Homeinns*⁵ the Court refused to order that the dissenting shareholders provide discovery, holding that it was not in keeping with the purpose of fair value determinations under section 238. Notwithstanding this, the Company argued that *Homeinns* was not determinative of whether dissenters should be required to give discovery. The Company relied on the Delaware decision of *In re Appraisal of Dole Foods Company, Inc.*⁶ where the Court of Chancery in Delaware ordered discovery from the dissenting shareholders.

The Court rejected the Company's argument. Whilst the Court stated that it took into account the decisions of the Courts of Delaware and Canada to assist on matters of substantive law, it accepted the Maso Dissenters' submissions that *Dole* was of little assistance to the Cayman Court because of the significant differences between Cayman and Delaware law in respect of procedural matters such as discovery.

Keeping in line with the approach in both *Integra*⁷ and *Homeinns*⁸, the Court refused to order the Dissenters to give discovery. Dissenting shareholders will take comfort from the fact that Justice Parker considered that dissenters would only be required to provide discovery in *exceptional cases*.

Leave to appoint an expert to determine the fair value of the Company's shares

In the particular circumstances of this case, the court also directed that the Dissenters instruct one expert jointly rather than one expert each.

³ See *In the matter of Homeinns Hotel Group* (FSD 75 of 2016, unreported, 12 August 2016), *Perfect World, In the matter of Shanda Games Limited* (FSD 14 of 2016, unreported, 25 April 2017), *Mindray, In the matter of Bona Film Group Limited* (FSD 215 of 2016, unreported, 3 March 2017) and *In the matter of Qihoo 360 Technology Co. Limited* (FSD 129 of 2016, unreported, 26 January 2017).

⁴ *In the matter of Homeinns Hotel Group* (FSD 75 of 2016, unreported, 12 August 2016), paragraph 4.

⁵ *In the matter of Homeinns Hotel Group* (FSD 75 of 2016, unreported, 12 August 2016).

⁶ *In Re Appraisal of Dole Foods Company, Inc. C.A. No 9079 – VCL (Del.Ch.Dec. 9 2014)*.

⁷ *In the matter of Integra Group* (FSD 92 of 2014, unreported, 28 August 2015).

⁸ *In the matter of Homeinns Hotel Group* (FSD 75 of 2016, unreported, 12 August 2016).

Conclusion

Dissenting shareholders can take comfort that the Grand Court has resisted a further attempt by a company to limit the scope of its own disclosure obligations to dissenting shareholders, and also refused to order discovery from dissenting shareholders. We will continue to keep you apprised of all developments in this rapidly growing body of case law, as a number of fair value petitions continue to progress through the Grand Court.

Contacts



Christopher Harlowe
Partner, Mourant Ozannes
Cayman Islands
+1 345 814 9232
christopher.harlowe@mourant.com



Simon Dickson
Partner, Mourant Ozannes
Cayman Islands
+1 345 814 9110
simon.dickson@mourant.com



Jennifer Maughan
Senior Associate
Hong Kong
+852 3995 5747
Jennifer.maughan@mourant.com



Jessica Bush
Associate
Cayman Islands
+1 345 814 9132
jessica.bush@mourant.com

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2018 MOURANT OZANNES ALL RIGHTS RESERVED