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UPDATE

The Cayman Standard: Directions in Fair Value Proceedings

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In a recent decision the Grand Court of the Cayman Islands has confirmed that there is a relatively 'standard' form of directions for the management of fair value proceedings.

The Grand Court of the Cayman Islands has recently approved the use of a 'standard' form of pre-trial directions for the management of fair value proceedings brought under s.238 of the Companies Law (2018 Revision)[1] unless the facts of the case warrant the use of bespoke directions.

These 'standard' directions broadly provide for:

(a) the opening of an electronic data room by the company undergoing the merger (the Company);

(b) an initial (and swift) upload to the data room of specific classes of those documents that are immediately available to the Company that were generated for, or used in, the merger process;

(c) a further (swift) upload of all other documents relevant to calculation of the fair value of the Company;

(d) limited disclosure by the dissenting shareholders of documents falling within the specific categories ordered by the Court of Appeal in Re Qunar Cayman Islands Limited 2;

(e) the exchange of evidence of fact with leave to cross-examine witnesses of fact at trial;

(f) the instruction of a valuation expert by the Company and jointly by the dissenting shareholders(s);

(g) the right of the experts to make information requests of the Company; and

(h) meeting(s) between the valuation experts and members of the Company's management team, such meetings to be held on an 'open' rather than a 'without prejudice' basis, allowing either side's expert to refer to any points raised in the meeting(s) in their report.

The valuation experts should then exchange their expert reports, meet again to ascertain areas of agreement and disagreement, and exchange supplemental reports.

In *Re Qunar*, the Court of Appeal ordered that dissenting shareholders were to provide specific disclosure of documents evidencing valuations or similar analyses that they prepared or considered when buying the shares. The Grand Court confirmed in *JA Solar* that the dissenting shareholders' obligation to provide disclosure is limited to these limited categories and does not constitute a general obligation to disclose all documents relevant to a determination of the fair value of the Company. It would be disproportionate for the dissenting shareholders to be required to search for and produce documents beyond the categories ordered by the Court of Appeal as they are unlikely to be able to produce anything that would be relevant to fair value.

[1] *Re JA Solar Holdings Co., Ltd* (unreported, 18 July 2019, CJ Smellie).

[2] *Qunar Cayman islands Limited v Athos Asia Event Driven Master Fund and Ors* (unreported, 10 April 2018, Goldring P, Rix JA and Field JA,).

Similarly, while the valuation experts can issue information requests to the Company, the dissenting shareholders are under no obligation to answer questions put to them by the valuation experts. The Grand Court held that to require this of the dissenting shareholders would be disproportionate and not in keeping with the overriding objective of efficient case management as stipulated in the Grand Court Rules.

The Grand Court once more recognised the importance of management meeting(s) in enabling the valuation experts to obtain information about the Company's business for the purpose of their expert reports. In *JA Solar*, the Company sought to impose a number of limitations or conditions on the management meeting(s) which were rejected by the Grand Court. The Grand Court directed that the management meeting(s) were to take place on an open basis (rather than on a 'without prejudice' basis), that the management meeting(s) were to be recorded, a transcript prepared, and that the valuation experts could refer to information provided in a management meeting in their expert valuation reports.

Lastly, the Company in *JA Solar* objected to a direction that the valuation experts should prepare their expert reports on the fair value of the dissenting shareholders' shares in the Company as 'a going concern' as at the valuation date. The Company argued that the wording of s. 238 did not expressly include any reference to a 'going concern' valuation: it only required the Court to determine the fair value of the dissenters' shares. This objection was dismissed out of hand by the Chief Justice. The Company was plainly a going concern (as it was not in liquidation) and it was appropriate to direct that it be valued as such.

This decision serves as a welcome clarification on a number of common areas of disagreement between a merger company and the dissenting shareholders seeking to agree a set of directions, and may be seen as a retreat from some of the more company friendly directions that have been ordered in other recent s.238 cases. Such directions ought to become more common place, with less scope for disagreement, as we see more court decisions on the appropriate directions to manage fair value proceedings through to trial.

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