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UPDATE

FGL Holdings: Grand Court again rejects attempts to deviate from section 238 standard directions

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The Grand Court of the Cayman Islands (the **Court**) has again endorsed the adoption of standard directions in section 238 fair value proceedings.[1] The Court refused to expand the scope of disclosure by dissenting shareholders beyond the accepted categories ordered by the Court of Appeal in *Re Qunar Cayman Islands Ltd* and refused an attempt to subject dissenting shareholders to the information request process. Dissenting shareholders' subjective opinions on fair value are irrelevant. They are not the main focus of the disclosure exercise as they will not hold the lion's share of relevant material to the exercise of determining fair value.

Background

On 7 February 2020, FGL Holdings (**FGL**), a Cayman Islands exempted company that provides life insurance and annuities products in the United States, announced that it had entered into a merger agreement pursuant to which FGL was taken private and became a subsidiary of Fidelity National Finance, Inc (**FNF**). The surviving company from the merger (the **Petitioner**) subsequently petitioned the Court for the determination of the fair value of the dissenting shareholders (the **Dissenters**) shares pursuant to section 238 of the Companies Act (2020 Revision).

The application

The Petitioner applied to the Court for directions for the future conduct of the proceedings. The directions for section 238 proceedings in the Cayman Islands have become relatively standard over the years in light of Practice Direction 1 of 2019 issued by the Court on 24 February 2019 and subsequent cases such as *JA Solar Holdings*[2] and *eHi Car Services Limited*[3]. Please refer to our previous briefings on these for more information[4].

The main issues before the Court at the directions hearing included:

1. Petitioner's disclosure: the Petitioner sought to restrict certain categories of its own disclosure relating to contractual agreements with business partners and investors, as well as its acquisition of Fidelity & Guaranty Life in 2017, on the basis that it would be burdensome to disclose the documents sought. The Dissenters

[1] *Re FGL Holdings* (unreported, 18 December 2020)

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

[3] *Re eHi Car Services Limited* (unreported, 24 February 2020).

[4] See: *The Cayman Standard: Directions in Fair Value Proceedings*, August 2019 (here) and *Cayman court sees no reason to veer from the standard directions in fair value proceedings*, March 2020 (here).

disagreed as their proposals (some of which had been modified throughout the course of negotiations) were reasonable and would capture documents that are relevant to fair value.

2. Dissenters' disclosure: the Dissenters agreed to provide discovery in line with the guidance of the Court of Appeal of the Cayman Islands (the **CICA**) in *Re Qunar Cayman Islands Ltd*[5], by disclosing documents evidencing valuations or similar analyses which were prepared or considered by the Dissenters and documents, information and material passing between the Dissenters and their investment manager or advisor relating to the merger transaction. The decision in *Qunar* has been followed in a number of other first instance decisions. Despite this, the Petitioner sought to vastly expand the Dissenters' discovery obligations to include 10 additional categories of documents relating to the characteristics and motivations of the Dissenters, brokers and counterparties, their particular investment strategies and decision making processes and an extraordinarily broad request for all documents concerning FGL, its business and competitors and the merger, which was found to be *tantamount to a request for the dissenters to give general discovery*. The Dissenters argued that the expansion of the categories sought by the Petitioner was not supported by any authority or the Petitioner's evidence.
3. Information requests: the Petitioner sought to include a provision allowing the valuation experts to ask for information (in the form of written answers to questions posed) or documents to be produced by the Dissenters. The Dissenters submitted that there was no precedent for doing so and such a provision had already been expressly rejected by the Chief Justice in *JA Solar* on the basis that "*such a requirement is not proportionate nor in keeping with the Overriding Objective*"[6].
4. Management meeting: the Petitioner sought a direction for the valuation experts to identify to the Petitioner, in advance, the portions of the management meeting transcript that they sought to rely on in their expert reports so that the Petitioner can clarify any statements made by FGL's management during the management meeting.

The decision

The Court found in favour for the Dissenters on substantially all of the above issues:

1. Petitioner's disclosure: the Court agreed with the Dissenters' that their two proposed additional categories of disclosure were proportionate and reasonable. Notably, the Petitioner did not dispute that these additional categories were relevant to a determination of fair value, but argued that it would be unreasonably burdensome to search for and produce them and that the valuation experts could instead request such documents through the information request process. The Court held that it was proportionate and reasonable for the Petitioner to disclose relevant documents upfront, rather than relying on the information request process.
2. Dissenters' disclosure: the Court refused to expand the scope of dissenter disclosure and ordered the categories of disclosure offered by the Dissenters (i.e. the same categories ordered by the CICA in *Qunar*). It was once again emphasised that dissenters are not required to disclose documents relating to their characteristics and their motivations or the timing and amount of their investments. In addition to these categories, the Dissenters are only required to disclose a schedule of their trades in the Petitioner's shares, not full brokerage records. Dissenting shareholders are not subject to a general disclosure obligation and are not required to search for large quantities of irrelevant material.
3. Information requests: the Court followed the authority in *JA Solar* and held that the Dissenters were not required to respond to information requests from the valuation experts. As the Dissenters are outsiders to the company being valued, their subjective opinions on fair value are irrelevant and there is no good reason to require the Dissenters to answer questions posed by the valuation experts.
4. Management meeting: the Court explained that the management meeting process is not intended to operate as a pre-trial deposition and the weight to be given to what is said in a management meeting is a matter for the trial judge. Valuation experts in this case were ordered to identify any parts of the transcript which they wish to specifically rely upon in their reports so that the company has a further opportunity to

5 *Re Qunar Cayman Islands Ltd* [2018 (1) CILR 199].

6 *Re JA Solar Holdings Co., Ltd*. (unreported, 18 July 2019) at paragraph 76.

make sure the transcript is an accurate record. However, this is not to be used to change or argue about what was said and recorded at the meeting and the valuation experts are not required to indicate the basis or purpose of their reliance.

Comment

The Court's decision reflects the principle that the Dissenters are not the main focus of the discovery exercise in section 238 proceedings and will not hold the lion's share of relevant material to the exercise of determining fair value. The Court's decision is in line with the pre-existing authorities and will provide further comfort for any dissenters wishing to exercise their section 238 appraisal rights in the future.

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