

# Presumptive approach to the determination of fair value rejected by the Grand Court in *Qihoo*

UPDATE

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In a recent decision,<sup>1</sup> the Grand Court of the Cayman Islands (the **Court**) refused to make a number of legal presumptions as to the question of fair value in advance of the trial of a section 238 fair value appraisal. The Court held it would be inappropriate to make legal presumptions relating to the valuation methodology to be adopted by the Court, without proper regard to the factual matrix, expert evidence, valuation methodologies and submissions on the legal principles presented at trial.

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## Background

In January 2016, Qihoo 360 Technology Co. Ltd. (the **Petitioner**), a Cayman Islands exempted company, announced that it had entered into a merger agreement. The Petitioner petitioned for the determination of the fair value of the dissenting shareholders' shares pursuant to section 238 of the Companies Law. The appraisal proceedings in *Qihoo* have had a convoluted and highly contentious procedural history, however expert reports have now been exchanged and the appraisal proceedings are otherwise ready for trial.<sup>2</sup>

## The application

The Petitioner applied for the Court to determine the meaning of fair value as a preliminary question of law, prior to the full trial of the appraisal proceedings. The Petitioner submitted that the following legal presumptions (the **Presumptions**) were available to it in light of the Judicial Committee of the Privy Council's (UKPC), Cayman's highest appellate court, decision in *Shanda Games*:<sup>3</sup>

- (1) fair value is the value of the Dissenting Shareholders' shares in the Petitioner on the hypothesis that they were willing sellers of those shares to a willing purchaser in the open market;
- (2) the subject matter of the valuation is to be the Dissenting Shareholders' shares in the Petitioner and not a pro-rata or proportionate interest in the Petitioner as a whole or of its net assets or of the fair value of its undertaking; and
- (3) the information available to value the Dissenting Shareholders' shares in the Petitioner was information which would in fact have been known by or have been available to a hypothetical willing buyer and a hypothetical willing seller in the open market.

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<sup>1</sup> *In the Matter of Qihoo 360 Technology* (unreported, 19 August 2020).

<sup>2</sup> Please refer to our previous briefings on the interlocutory disputes regarding interim payments ([here](#)) and discovery ([here](#)).

<sup>3</sup> *Shanda Games Ltd v Maso Capital Investments Ltd and others* [2020] UKPC 2. For a detailed discussion on the UKPC's decision in *Shanda*, please refer to our previous briefing ([here](#)).

The Petitioner contended that the Presumptions were questions of law that would be central to the determination of fair value and ought to be determined in advance of trial to narrow the issues in dispute between the parties, which would be subject to expert evidence and the cross-examination of witnesses.

The Dissenting Shareholders contended that the question of valuation is supremely a matter for trial as the hearing of full arguments and expert evidence is needed to make the fair value assessment. Accordingly, the Court should not proceed based on legal presumptions.

### The decision

The Honourable Justice Parker refused the Petitioner's application. Parker J held that valuation in an appraisal proceeding is based on the facts of the case and the Court is assisted by expert evidence. The determination of the methodology or hypothesis of valuation could not be made in advance of trial, without a full examination of the factual matrix, expert evidence on valuation methodologies and submissions on the relevant legal principles. The legal issues are inextricably linked to the factual and expert evidence and cannot easily be hived off for separate prior determination.

It was also not necessary at this stage for the Court to decide whether or not the UKPC's decision in *Shanda* determined if any particular basis of valuation was right or wrong, as contended for in the Presumptions. Neither was it necessary to decide, as the Petitioner submitted, whether English law had effectively replaced Delaware law, or whether, as the Dissenting Shareholders submitted, the decision dealt more narrowly with the principles relating to minority discounts.

### Comment

This decision provides assurance that the Cayman Islands' courts will be slow to make any legal presumptions regarding the determination of fair value in appraisal proceedings without proper regard to all of the circumstances of the case. The question of the valuation methodology is pre-eminently a matter for the judge to determine at trial, having heard all of the evidence and argument of the parties.

## Contacts

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