

Dissenter disclosure in Cayman appraisals revisited

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Given the central importance of the discovery process to shareholder appraisal litigation, it is unsurprising that the scope of such disclosure is often a matter of significant debate between the parties. In a recent decision in the ongoing *58.com* litigation, [1] the Grand Court of the Cayman Islands revisited the disclosure that must be produced by dissenting shareholders in fair value proceedings under section 238 of the Companies Act.

Background

Discovery was first ordered against dissenting shareholders in the *Qunar* appraisal. [2] Since then, the Grand Court has consistently ordered that dissenters only need to disclose the same (or very similar) categories of documents as were ordered in *Qunar* and has repeatedly rejected attempts by companies to expand the scope of dissenter disclosure. [3]

Despite this trend, the scope of discovery for dissenting shareholders was again hotly contested in *58.com*, where the company sought to:

- a. broaden the scope of the disclosure beyond the standard *Qunar* categories
- b. remove the requirement for disclosable documents to actually be relevant to the determination of fair value, and
- c. apply an extended five year temporal "look back" period from the valuation date

Decision

In addressing the expanded categories of disclosure sought by the company, Justice Ramsay-Hale noted that the dissenting shareholders are not themselves the subject of the valuation exercise and reaffirmed that their particular motives and commercial positions are not relevant,

nor are their subjective views or any decisions that they may have made as to valuation. Similarly, the Court found that discovery for the purpose of undermining the credibility of a party or its witnesses is generally not appropriate in fair value proceedings. The Court consequently refused to order any of the broadened categories of disclosure sought by the company and restricted the scope of the dissenter disclosure exercise to that which had previously been ordered in *Qunar* and applied in subsequent cases.

In addition, the Court found that that a relevance filter was a sensible stipulation which had been endorsed in a number of earlier section 238 proceedings and limited dissenter disclosure to only those documents (within the defined *Qunar* categories) which are actually relevant to the question of fair value of the shares as at the valuation date.

Finally, the Court agreed with the dissenting shareholders that a more limited two year "look back" period was consistent with previous decisions and that the extended five year period sought by the company would not assist in the valuation exercise.

Comment

Even though the Court's decision in *58.com* does not close the door on the scope of dissenter discovery being relitigated in the future, dissenters ought to be encouraged by the Cayman Court's consistent refusal to expand the scope of their disclosure.

This latest decision both limits the administrative and cost burden on dissenters in providing their discovery and ensures that the focus of Cayman appraisal proceedings remains on information that is essential to the determination of fair value.

[1] *In the Matter of 58.com, Inc.* Unreported Judgment, 8 March 2022 (Ramsay-Hale J)

[2] *In the Matter of Qunar Cayman Islands Limited* [2018 (1) CILR 199]

[3] See *In the Matter of JA Solar Limited Holdings Co. Limited* Unreported Judgment, 18 July 2019 (Smellie CJ); *In the Matter of eHi Car Services Limited* Unreported Judgment, 24 February 2020 (Parker J); *In the Matter of FGL Holdings* Unreported Judgment, 18 December 2020 (Parker J)

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