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Section 238 - eHi Car Services Limited: the Grand Court refuses (again) to reinvent the wheel

FEBRUARY 2020

The Grand Court (**Court**) has handed down its ruling in *eHi Car Services Limited*[1](**Ruling**), roundly rejecting an attempt by eHi Car Services Limited (**Company**) to re-write the procedural framework for section 238 proceedings. The Company had sought significant departures from the procedure that has become increasingly standardised in section 238 litigation and which, in the Court's view, is working well in practice to address the information imbalance between companies and dissenters.

The Company re-argued several issues which were expressly and repeatedly rejected by the court in previous rulings. Finding in favour of the dissenters on each issue in dispute, Justice Parker endorsed the Chief Justice's recent decision in *JA Solar*[2], which held that the section 238 process was a vital safeguard for minority shareholders to protect their economic interests, and attempts by companies to limit their disclosure obligations should be treated with scepticism.

The Ruling contains an important reminder that, under Cayman Islands law, the court's role is to determine fair value for all shareholders and it will not discriminate between shareholders on the basis of who they are and their motivations for buying shares. The Judge held that it was not a legitimate exercise to investigate individual shareholders' commercial motivations.

Main issues in dispute

The Ruling, which can be found here, addresses a significant number of important procedural issues. The main areas of dispute are discussed below.

Section 238 procedure generally

The main thrust of the Company's submissions was that the section 238 procedure is unfair to companies and had evolved without sufficient consideration to whether the procedure was appropriate or consistent with the Grand Court Rules (**GCR**).

The Court rejected this argument, noting that the Company had failed to produce any evidence that the '*standard*' section 238 procedure was unfair to companies. In fact, the standard directions had been developed over the course of more than twenty section 238 proceedings and a series of carefully reasoned judicial decisions. They are also reflected in a Practice Direction issued by the Court in February 2019, after significant consultation with Cayman Islands legal practitioners. The procedure was '*tried and tested*' and, in Justice Parker's personal experience, working well. The standard directions should be the starting point and departed from only where they caused injustice.

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The Court noted that it was implicit in the Company's submissions that professional experts and attorneys will conduct themselves in a unreasonable and disproportionate matter. The Court rejected this premise and stated that the working assumption must be that professionals will conduct themselves reasonably and having regard to their obligations to the court. The Company adduced no evidence that attorneys or experts had acted unreasonably in previous matters.

Justice Parker held that some of the specific features of section 238 procedure reflected some of the specific requirements of section 238 litigation generally. However, these features had evolved to address the significant imbalance of information and understanding between companies on the one hand and the dissenters and their experts on the other. The Court rejected the Company's argument that section 238 procedure was inconsistent with the GCR.

Management meetings

In section 238 litigation, the company holds the overwhelming majority of information relevant to the court's determination of fair value. Justice Parker noted that management meetings are one of the ways in which the imbalance of information can be corrected because they facilitate interaction and dialogue between the experts and the company '*to get to the core issues in a much more efficient way*'.

The Company's main attack on management meetings was that the Court did not have jurisdiction to order them, despite the fact that the court has ordered them in effectively all section 238 proceedings and had rejected jurisdictional arguments made by companies on at least three previous occasions[3]. Justice Parker rejected the Company's position and agreed with the dissenters that the Court's power to order management meetings is its inherent jurisdiction as a court of justice to make procedural orders to achieve justice.

There was also a dispute as to the rules that should apply to the conduct of management meetings. The Court rejected the Company's position in respect of each of these disputes and most notably agreed with the dissenters that: (i) a transcript should be made of the meeting and could be relied upon by the experts; (ii) the number of meetings should not be restricted; (iii) the Company's management should be required to answer reasonable follow-up questions from the experts; and (iv) dissenter representatives could attend the meeting in a observatory capacity.

Information requests

Another way in which the imbalance of information between the company and dissenters is corrected in section 238 proceedings is by way of the experts sending requests for information to the company's management. Justice Parker rejected the Company's attempts to restrict when and how often the experts could make information requests, noting that the starting assumption is that experts are professional people and could be relied upon to act reasonably. The Court considered that the directions sought by the Company were overly prescriptive and would undermine the expert-driven process.

Dissenter discovery

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The Company sought to broaden several of the categories of documents that dissenters were ordered to disclose in a number of previous cases. The Court rejected each of the Company's proposed expansions on the basis that any additional categories of documents would have marginal probative relevance and it was therefore unnecessary or disproportionate for the dissenters to disclose them.

Judge Parker noted that some of the new categories of documents sought by the Company were designed to understand the motivations and subjective views of the dissenters. He issued a reminder that the court has repeatedly held that dissenters' identities and motivations are not relevant to the determination of fair value:

> *It is important to bear in mind that the characteristics of, and the motivations which might be guiding, dissenting shareholders are generally irrelevant to a fair value determination: see Integra at § 16 (8), Zhaopin at § 48-50 and Qunar at § 63. So is the timing and amount of their investment and whether they bought after the merger announcement with full knowledge of it and before the EGM or whether they voted for the merger or not. It is not relevant to ascertain whether they are speculative investors engaged in arbitrage or long-term shareholders who are being 'taken out' by the majority against their will, as fair value needs to be determined in one way for all dissenting shareholders irrespective of whether or not they might be said to be more or less 'deserving': see Qunar at § 63.*[4]

Take away points

Many of the points argued by the Company had already been argued and rejected in previous cases. However, the decision is important because it reinforces that the unique procedural features of section 238 litigation are crucial mechanisms to address the significant informational disadvantages faced by dissenters and their experts, and to ensure that the court has all the evidence necessary to properly determine fair value. The Ruling is another reminder that the court will be sceptical of attempts by companies to limit or restrict the information they are required to provide the dissenters and the experts. Another important feature of the Ruling is the court's reinforcement of previous decisions which held that it will not discriminate between different types of shareholders, and the court is not concerned with what motivated a dissenter to purchase shares.

Collas Crill (Cayman) acts for a group of dissenters who are respondents in the matter of eHi Car Services Limited.

Led by Partner Rocco Cecere, Collas Crill's highly experienced section 238 practice is a sought-after, market-leading presence in merger appraisal cases in the Cayman Islands. Please contact Rocco for more information.

[1] Unreported, 24 February 2020 (FSD 115 of 2019 (RPJ))

[2] *JA Solar* (unreported 18 July 2019)

[3] *Trina Solar Limited* (unreported 1 November 2017), *KongZhong Corporation* (unreported 2 February 2018), *JA Solar* (unreported 18 July 2019)

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[4] Paragraph 64

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COLLAS CRILL

For more information please contact:



Rocco Cecere

Partner | Cayman

t: +1 345 914 9630 | **e:** rocco.cecere@collascrill.com



Zachary Hoskin

Partner | Cayman

t: +1 345 914 9663 | **e:** zachary.hoskin@collascrill.com

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