

BVI Commercial Court discharges injunction restraining privatisation of NASDAQ-listed BVI company

Cases - 23/06/2021

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A recent judgment from the BVI Commercial Court is a further example of the court's swiftness to exercise its jurisdiction in respect of BVI companies listed on US exchanges. The decision also serves as a reminder of the importance of an applicant's duty of full and frank disclosure and fair presentation in an ex parte hearing and the dangers of breaching that duty.

Justin Davis, Nicholas Burkill, Jean Lau and James McDermott of Ogier successfully acted for the defendants. David Chivers QC led Nicholas Burkill.

On 17 June 2021 the Commercial Court of the British Virgin Islands discharged an injunction previously granted on an ex parte basis to adjourn an EGM called to consider the privatisation of NASDAQ-listed BVI company, Newater Technology, Inc (the **Company**).

Fulcan Capital Partners LLC (**Fulcan**), a shareholder of the Company owning under 1% of the shares, had obtained the injunction to prevent the Company from taking any steps to proceed with the proposed "going private" merger transaction. Fulcan had alleged that its Counter-Offer had been rejected by the Special Committee established to oversee the privatisation without proper consideration.

Wallbank J held it was clear that the injunction should be discharged and not re-granted as Fulcan had failed to make full and frank disclosure on a number of issues. These included that Fulcan had failed to tell the Court that there was only a letter of intent of funding in place for the Fulcan Counter-Offer and that the individual behind Fulcan had purposefully identified an

incorrect address in his witness statements.

Wallbank J determined that Fulcan's failures were deliberate and material and discharged the injunction with immediate effect, with costs. This enables the adjourned EGM to proceed so that the shareholders can consider the merger transaction, which is recommended by the directors.

In the circumstances, Wallbank J also adjourned the defendants' application to strike out the claim.

Ogier worked alongside DLA Piper in Beijing headed by James Chang and Magstone Law in New York headed by Mark Li.

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