



Post-valuation date information in Cayman Islands appraisals

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Disclosure and expert information requests are of fundamental importance in section 238 fair value proceedings, but what about material that post-dates the valuation date?

In two recent decisions, the Grand Court of the Cayman Islands has confirmed that discovery of documents, and responses to information requests, which concern price-sensitive events occurring after the valuation date should be produced, provided that such events were foreseeable as at the valuation date.

Post-valuation date disclosure in *Sina*

Firstly, in *Sina Corporation*, [1] the Grand Court was required to consider the effect of earlier obiter dicta comments of the Cayman Islands Court of Appeal [2] to the effect that even though the valuation date was the date of Sina's EGM approving the merger, subsequent price-sensitive events should still be considered for valuation purposes if they were ascertainable as at the date of the EGM.

Furthermore, the Court of Appeal had suggested that the period for Sina's disclosure should be extended to cover any such price-sensitive events occurring after the valuation date.

The additional discovery sought by the dissenting shareholders included documents relating to an increase in value of Sina's principal trading subsidiary (Weibo) between the date of the EGM and the merger completion date, and also the IPO of a company in which Sina held a significant interest (TuSimple) that was only publicly announced the day after the merger completion date.

Sina resisted the application on several grounds. However, the Grand Court agreed with the guidance of the Court of Appeal as to the approach to be taken to price-sensitive events occurring after the valuation date. The Court emphasised that discovery is the primary means by which documents are produced in section 238 cases, with information requests operating as a useful

follow up procedure and considered that it would be unjust for Sina to avoid disclosing relevant post-valuation date material just because it had not yet been definitively established whether any such material existed.

It was enough for the Court to form a preliminary view that both the share price increase of Weibo and the IPO of TuSimple were foreseeable as at the valuation date since significant price-sensitive events occurring after the valuation date which are foreseeable are relevant to fair value as at the valuation date.

The Court accordingly varied the directions order to require post-valuation date discovery concerning Weibo and TuSimple, plus any further price-sensitive events that may have impacted the value of Sina as at the valuation date.

Post-valuation date information requests in *58.com*

Similarly, in *58.com* [3] the Grand Court was required to consider whether valuation experts need to demonstrate that any requests for information and documents post-dating the valuation date are likely to be relevant to determining fair value before they need to be complied with.

The dissenting shareholders' expert had sought information concerning funding rounds for certain assets of 58.com which took place after the valuation date.

In the expert's view, if these funding rounds were known or knowable as at the valuation date, they could be relevant to fair value. 58.com however contended that the expert had not demonstrated that the information requested was either likely to be relevant to the issue of fair value or that such information was known or knowable at the valuation date.

The Court accepted the expert's evidence that the information sought (i) **might** be relevant to fair value and (ii) that he **believed** (he did not know for a fact) that it would have existed at or near the valuation date. The Court accordingly ordered 58.com to provide the information sought.

Comment

The decisions in *Sina* and *58.com* confirm that documents and information in relation to price-sensitive events post-dating the valuation date is obtainable if the event is foreseeable as at the valuation date and the discovery / information sought may be relevant to determining fair value. The materiality of documents or information post-dating the valuation date will ultimately be a matter for the experts and the Court to assess.

It remains to be seen whether the relevance of post-valuation date documents and information must be established as being a probability (as was the evidence in *Sina*) or merely a possibility (as was the evidence in *58.com*) before it can be obtained.

Nevertheless, the decisions in *Sina* and *58.com* provide welcome reassurance to dissenting shareholders that if a price-sensitive event occurs shortly after the valuation date then it is possible to obtain further discovery and information to establish that the event should be taken into account when determining the fair value of their shares in section 238 proceedings.

How Ogier can help

Ogier presently acts for dissenting shareholders in multiple ongoing section 238 matters and our cross-border team of appraisal rights specialists are well placed to provide legal advice and representation in fair value proceedings in the Cayman Islands.

References

[1] *In the matter of Sina Corporation* (unreported judgment dated 3 June 2024, Parker J)

[2] *In the matter of Sina Corporation* (unreported judgment dated 26 September 2023, Birt JA, Moses JA, Field JA)

[3] *In the matter of 58.com* (unreported judgment dated 2 April 2024, Ramsay-Hale CJ)

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