

Chief Justice confirms and expands upon the 'standard directions' in section 238 proceedings

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Introduction

In a decision that serves as a clear warning to companies seeking to limit their discovery obligations in proceedings brought under section 238 of the Companies Law (2018 Revision) (the "**Law**"), the Chief Justice of the Cayman Islands has handed a group of dissenting shareholders a significant victory in what will likely become the benchmark for future directions orders in section 238 proceedings in the Cayman Islands.

Ogier represented a group of dissenters comprising over 82% of the total dissenters by number of shares (the "**Dissenters**").

Background

On 23 August 2018, JA Solar Holdings Co., Ltd ("**JA Solar**") presented a petition to the Grand Court of the Cayman Islands ("**Petition**") pursuant to section 238 of the Law to have the fair value of the shares held by the Dissenters determined by the Court. Section 238 of the Law gives a shareholder a statutory right to dissent from the merger of a Cayman Islands incorporated company, and to be paid a judicially determined fair value for the shareholders' shares instead of the merger consideration offered by the company.

Following the presentation of the Petition, there was considerable disagreement between JA Solar and the Dissenters as to the appropriate directions with respect to discovery (by both JA Solar and the Dissenters), the holding and conduct of management meetings, and whether JA Solar should be valued "*as a going concern*".

JA Solar had sought to amend several of the typical directions ordered in previous section 238 proceedings in order to ensure that those directions were substantially more favourable to its own interests. More particularly, JA Solar sought, among other things:

- That the disclosure of JA Solar's documents be limited to a two year period ending with the valuation date (the date on which non-dissenting shareholders approved the merger). This was in contrast to the five year period proposed by the Dissenters;
- The provision of "general discovery" by the Dissenters (in addition to specific discovery);
- A restriction on the Court-appointed valuation experts (**the "Experts"**) requesting information/documents from JA Solar produced after the valuation date;
- That the Dissenters be required to respond to requests from the Experts;
- A limit that only a single management meeting be held between JA Solar's management and the Experts, to be held on a "without prejudice" basis and with no ability for the Experts to raise new topics and/or questions not previously agreed in writing; and
- The removal of the phrase *"as a going concern"* as the basis for valuation.

Decision

In his ruling dated 18 July 2019, Smellie CJ rejected each of the above directions sought by JA Solar.

Beginning with the *"very vexed"* issue of discovery by companies in section 238 proceedings, His Lordship noted the Court's experience of companies providing far more limited discovery than that which dissenting shareholders were seeking, or what would ordinarily be discovered in contested commercial litigation. His Lordship considered that these attempts to circumscribe the scope of company discovery should be viewed with *"scepticism"*, in view of what His Lordship considered to be *"the central importance of discovery by companies"* in section 238 proceedings and accordingly, found that:

- As to the time period from which a company should discover relevant documents, the Court found that the purpose of discovery in section 238 proceedings is restricted by relevance to the issues in the proceedings, and also involves proportionality. However, this did not extend to setting an arbitrary cut-off date for discovery, which could prevent the Experts from fully understanding JA Solar's value. The Court considered JA Solar's proposed two year cut-off to be *"grossly inadequate"* and contrary to the orders previously made by the Grand Court in section 238 proceedings. A five year cut-off, as sought by the Dissenters, was ordered.
- There was no purpose in straying outside the much more limited categories of dissenter disclosure that the Court of Appeal had ordered in *Re Qunar[1]*, and JA Solar's application for much wider general discovery against the Dissenters was refused.
- In relation to JA Solar's proposed directions on expert information requests, the Court pointed out that the directions sought by the Company were *"entirely different to the 'standard form' of directions for such information requests seen in other section 238 cases"*.

More particularly, the Court rejected JA Solar's proposal that the Dissenters answer information requests from the Experts. The Court further ordered that the Experts can request information produced after the valuation date from JA Solar.

- The Court was unclear as to why JA Solar wanted to restrict the number of management meetings between JA Solar management and the Experts, or place restrictions on their operation, in circumstances where management meetings serve as a *"crucial element in the valuation process for ensuring the experts are able to determine the fair value [of the Dissenter's shares]"*. In rejecting all but one of JA Solar's proposed amendments (being the allowance of non-Cayman Islands legal advisors to attend management meetings), the Court agreed with the Dissenters' submissions that JA Solar's proposed restrictions would not only hinder the effectiveness of management meetings, but also the ability of the Experts to prepare their valuation reports.
- In addressing the basis of valuation, the Court acknowledged that the term *"going concern"* is not a defined term in law, but its meaning was well-understood, and the notion that JA Solar is not a going concern, and should not be valued as such, was plainly wrong.

Conclusion

The Chief Justice's reasoned judgment in this matter is likely to be treated as the benchmark for the determination of future directions in section 238 proceedings. It represents a significant victory for dissenting shareholders wishing to have the fair value of their shares determined by the Court under section 238 of the Law.

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

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