Discovery in Cayman Islands shareholder appraisals: no "new frontiers"

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The discovery process forms an integral part of section 238 appraisals in the Cayman Islands and is often the subject of dispute between petitioning companies and dissenting shareholders. Nevertheless, despite persistent efforts from companies to alter their discovery obligations, the Grand Court has shown limited appetite to accede to these requests. [1]

This was again the case in *New Frontier Health Corporation*, [2] where the Court heard competing submissions in relation to well-litigated principles of discovery in Cayman Islands appraisal proceedings, as well as some more novel issues.

Background

New Frontier Health Corporation (the **Company**) was previously listed on the New York Stock Exchange and effected a take-private merger in the Cayman Islands. Certain minority shareholders dissented from this merger and had their shares cancelled in exchange for the right to be paid fair value for their former shareholdings under section 238 of the Companies Act (the **Dissenters**).

The matter then came before the Grand Court for the determination of certain procedural directions.

Decision

While many of the directions had already been agreed between the parties before the hearing, the Court was required to rule on the following discovery issues.

Lookback periods

The "lookback period" is the period prior to the valuation date that must be searched for relevant documents. Given that the subject matter of section 238 proceedings is the fair value of formerly

held shares, companies are typically subject to longer lookback periods than dissenting shareholders (who are likely to hold far fewer relevant documents).

In *New Frontier*, the Company unsuccessfully argued that its own lookback period should generally be three and a half years, and only one year for certain categories of documents. In dismissing the Company's arguments, the Court noted that a five year lookback period for company discovery was "customary" in section 238 proceedings and even though the Company in this case had only been incorporated in 2018, it had since acquired business operations which existed prior to this. A five year lookback period was ordered accordingly for all the Company's discovery.

The Court similarly rejected the Company's attempt to expand the common two year lookback period for the Dissenters' disclosure to three years. It was held that a two year period was appropriate and proportionate in the circumstances and "largely consistent" with rulings in previous cases.

Effect of COVID-19 and data protection laws on timing of discovery

The Court also gave short shrift to the Company's contention that the impact of COVID-19 and data protection laws in the People's Republic of China [3] meant that it required longer than usual to complete its discovery.

In rejecting the 180-day period proposed by the Company, the Judge noted that (by the time of the directions hearing) the Company had already had significant time to progress its discovery and that it must now focus on meeting its discovery obligations. In ordering the Company to provide its discovery within 120 days, the Judge commented that the Company appeared to have dragged its feet and must now get on with the discovery process and devote sufficient resource to it, as "the discovery process cannot be permitted to unduly delay the determination of the issues in this case within a reasonable time".

Entry into a Privilege Clawback Agreement

The Company submitted that the Dissenters should be required to enter into a Privilege Clawback Agreement (**PCA**) as a condition of accessing the Company's discovery. This PCA would have allowed the Company to recover any privileged information that it may inadvertently disclose, without being taken to have waived privilege in such information.

While the Company submitted that PCAs are reasonable and proportionate, particularly in litigation which involves large-scale and complex disclosure exercises, a PCA had not been ordered in any previous section 238 proceedings and the Judge was not inclined to interfere with the general law by requiring the Dissenters to execute one in this case.

Comment

We expect that the scope of discovery in section 238 proceedings will continue to be the subject of future disagreement between companies and dissenting shareholders. However, this is yet another heartening decision which demonstrates the Court's desire to stick to tried-and-tested directions and established principles of law, whilst also expediting Cayman Islands appraisal proceedings by requiring companies to conduct their disclosure expeditiously.

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

[2] *In the Matter of New Frontier Health Corporation*, Unreported Judgment, 17 August 2022

[3] For more information, read our briefing Snapshot: Cayman Grand Court considers section 238 valuation date and impact of PRC laws

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