IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 129 OF 2016 (RPJ)

IN THE MATTER OF PART XVI OF THE COMPANIES LAW (2020 REVISION)

IN THE MATTER OF QIHOO 360 TECHNOLOGY CO. LTD.

Appearances**:**	Mr Tom Lowe QC, for the Petitioner
	Mr James Eggleton and Mr. Paul Madden, Harneys
	Mr Robert Levy QC, for the Dissenting Shareholders
	Mr. Rupert Bell and Mr. Patrick McConvey, Walkers
Before:	The Hon. Raj Parker
Heard:	16 July 2020
Draft Judgment circulated:	18 August 2020
Judgment delivered:	19 August 2020

HEADNOTE

s.238 proceedings-application to determine certain presumptions of law - GCR O.14A r.1.1(a) approach of court.

Introduction

1. On 11 March 2020, Qihoo 360 Technology Co. Ltd. (the Petitioner) issued a summons asking the court to decide the presumptive approach to the determination of fair value of certain shares in the Petitioner in advance of the trial.

2. The application[1] seeks orders that the court should apply certain presumptions of law and consequential directions for the expert evidence should the court agree to do so.

[1] Supported by the third affidavit of Natalie Yen Kit Lee sworn on 11 March 2020 (Lee 3).

3. Maso Capital Investments Limited, Blackwell Partners LLC - Series A and Crown Managed Accounts SPC acting for and on behalf of Crown/Maso Segregated Portfolio (the Dissenting shareholders) have applied to the court in a letter dated 28 April 2020 to adjourn the summons and to direct the trial be fixed at the next convenient date.

4. As a result of significant correspondence between the parties which the court attempted to mediate without success, the court directed that the issue as to when the questions and the summons should be decided was to be addressed at an oral hearing which took place on 16 July 2020.

Submissions of the parties

5. Mr Tom Lowe QC for the Petitioner argues that the questions raised in the summons are plainly questions of law which will determine the central issue in the proceedings, namely the case law which should apply to the determination of the fair value of the Dissenting shareholders' shares in the Petitioner.

6. These legal issues need to be applied because of the decision of the Judicial Committee of the Privy Council (JCPC) in the *Shanda Games* case[2].

7. The argument for determining the summons before trial is that if the Petitioner were to be successful the issues in dispute and the expert evidence between the parties would be substantially reduced, and so would be the length of submissions and the time spent on cross-examination. The documents the court would need to consider would also be substantially reduced and so the costs of the parties and court resources would consequentially be also significantly saved in accordance with the Overriding Objective. There has been a history of heavily contested discovery and allegations concerning the destruction of documents which could involve many factual witnesses for the Petitioner which would be avoided.

8. Mr Lowe QC advances the submission that the summons could be heard in two days. If the issues were not addressed before trial the approach would have to be addressed at the trial itself in any case. It would be better as a matter of case management to address the issue in advance so a trial, substantially reduced in scope, could be prepared for.

9. Mr Lowe QC submits that the court will need to consider, following the decision of the JCPC in *Shanda Games*, whether what has now become an amalgamation of English and Delaware case law approaches to fair value should continue to be applied, or whether the correct approach is that English law on fair value should be followed in its entirety and not used merely to modify the approach based on Delaware case law on fair value.

10. Mr Robert Levy QC for the Dissenting shareholders submits that the court should exercise its case management powers by adjourning the summons to trial and asks for

[2] [2020] 1 BCLC 577.

a direction that the trial be listed as soon as possible. He characterised the Petitioner's application as a 'try on' to further delay the trial itself.

11. He submits that the question of valuation is supremely a matter for trial. Full argument and expert evidence need to be heard to make the fair value assessment and the court should not proceed on the basis of legal 'presumptions'. He takes issue with what the JCPC in *Shanda Games* decided, as characterised by Mr Lowe QC, and submits that in any case the presumptions in the summons are contrary to Cayman Islands authority[3].

12. Mr Levy QC suggested that the supposed savings, reductions of time and resource are illusory and this application should be seen by the court as a tactical device calculated to further delay the proper and efficient resolution of these proceedings. If the court were to entertain such an application there would inevitably be an appeal to the Cayman Islands Court of Appeal and then to the JCPC in a bid to slow down further the listing of the trial. If the Petitioner wishes to argue for a particular basis of valuation trial it is free to do so and cross-examine the experts as to the appropriate methodology at trial. Both experts are perfectly competent to address such questions. He indicated that he could cross-examine the relevant factual witnesses on the discovery issues and still keep to a three week estimate, not the six week potential trial length Mr Lowe QC suggested.

13. He also says the basis upon which the application is brought is inapt.

Analysis and decision

14. The application is brought pursuant to GCR 0.14A, r.1.1(a) which provides as follows:

"… the court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that a) such question is suitable for determination without a full trial of the action; and b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter of any claim or issue therein".

15. The relevant presumptions proposed by the Petitioner are:

"-Fair value is the value of the Dissenting Shareholders' shares in the Petitioner on the hypothesis that they were willing sellers of those shares to a willing purchaser in the open market.

-The subject matter of the valuation is to be the Dissenting Shareholders' shares in the Petitioner and not a pro-rata or proportionate interest in the Petitioner as a whole or of its net assets or of the fair value of its undertaking.

[3] *Re Qunar* (unreported, Parker J, 13 May 2019) and *Nord Anglia* (unreported, Kawaley J, 17 March 2020).

-The information available to value the Dissenting Shareholders' shares in the Petitioner was information which would in fact have been known by or have been available to a hypothetical willing buyer and a hypothetical willing seller in the open market"[4]*.*

16. It seems to me that the points addressed by the summons are not easily approached to be determined in advance of trial as dispositive pure questions of law.

17. Valuation in s.238 of the Companies Law (as revised) cases is based upon the particular facts of the case. The court is not an expert valuation tribunal. It relies heavily on expert evidence to assist it, and needs to decide questions relating to methodologies to be adopted based upon the facts and circumstances made available to it. Of course, it is also bound by the decisions of appellate courts on legal issues which are evolving in this particular area. However the legal issues are inextricably linked to the factual and expert evidence and cannot easily be 'hived off' for separate prior determination.

18. I am not satisfied that it would be right to order what might be better described as 'preliminary issues'[5] in relation to the contended for presumptions, because the court in order to assess fair value needs full argument on all the issues based upon the facts and the expert evidence.

19. In my experience of s.238 cases there are no easy shortcuts to this exercise.

20. These proceedings were commenced in August 2016, (some four years ago) and have had a convoluted and highly contentious procedural history, particularly over discovery by the Petitioner.

21. The expert reporting process has now been completed[6]. At no doubt substantial expended cost to the parties, the matter is now ready for trial. Unless the court is persuaded that there was a clear advantage, as a matter of case management and fairness, in hearing the contended for presumptions in the way suggested, the already significantly delayed process should in the ordinary course be taken to trial as soon as possible.

22. The court is not so persuaded. To order the determination of these presumptions before trial risks further dispute, appeals and delay to the trial.

23. The question of the approach to valuation is pre-eminently a matter for the trial judge and is a decision that the court makes having heard all the evidence and argument.

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[4] Paragraph 1 of the summons dated 11 March 2020.
[5] Under GCR O.33, r3.
[6] Initial Reports were exchanged on 26 December 2019, Joint Statements on 19 January 2020 and Supplemental Reports on 22 April 2020.

24. It is not appropriate to determine in advance what methodology or hypothesis of valuation should apply without a full examination of the factual matrix, expert evidence on methodologies and submissions on the applicable legal principles.

25. Similarly on the question of what information would or would not be not be available on the basis of a hypothetical buyer and seller (as suggested in the presumption,) the context is an important consideration.[7]

26. It is not necessary at this stage for the court to decide whether or not the JCPC in *Shanda Games* decided that any particular basis of valuation was right or wrong as contended for in the presumptions[8], or whether as Mr Lowe QC submitted English law had effectively displaced Delaware law, or whether the decision dealt more narrowly with the principles relating to minority discounts as contended for by Mr Levy QC.[9] These are also matters for submission and decision at trial.

27. I have come to the clear conclusion that it is not appropriate in this case to list a hearing for resolution of the issues proposed before trial.

28. The summons will be adjourned to trial so that it can be dealt with during the course of the trial. The Dissenting shareholders' application sought by way of letter is granted so that the trial may be listed as soon as possible.

THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT

[7] See *§* 84 and 87 in *Qunar* per Parker J for the approach of the court in that case which assessed that in order to do justice between the parties the experts would need access to all relevant information on which to base their opinions and the hypothetical sale concept and its consequences should not be applied. See also *In the matter of Qihoo 360 Technology Co. Ltd.* (unreported, Cayman Islands Court of Appeal, Hon John Martin QC, JA; Hon Sir George Newman, JA; and Hon Dennis Morrison, JA, 9 October 2017) *at § 19* in which the court said that full information was needed.

[8] see § 11 of Lee 3.

[9] See § 28 and §55 the JCPC's analysis.