IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE No FSD 170 of 2016 (IMJ)

IN THE MATTER OF THE E-HOUSE (CHINA) HOLDINGS LIMITED

BETWEEN

E-HOUSE (CHINA) HOLDINGS LIMITED

Petitioner

AND

SENRIGAN MASTER FUND

Respondent

IN CHAMBERS

Appearances: **Mr. M Imrie and Ms. G Freeman of Maples and Calder on behalf of the Petitioner**
Mr. J Goldring QC instructed by Mr. A Jackson of Appleby on behalf of the Respondent

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **17 October 2017**

Draft Judgment Circulated: **30 October 2017**

Judgment Delivered: 3 November 2017

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HEADNOTE

Companies Law (2016 Revision) Part XVI - Merger and Consolidation - Section 238 "Fair Value" Proceedings - Further or Varied Directions sought after Consent Order for Directions - Whether appropriate for Order to be made permitting Experts to ask Further Questions on issues not previously dealt with - in circumstances where no evidence or request from Expert seeking to ask further questions – Court's Case Management Role - Importance of Evidence

JUDGMENT

Introduction

1. A Directions Order (**"the Directions Order"**) was made by consent on 10 January 2017 to progress this case towards trial.

2. E-House (China) Holdings Limited (the "**Company**") seeks further or varied directions.

3. There is really only one substantive issue in respect of which the parties are in disagreement, and which the Court is asked to determine. That is the question whether, in the circumstances of this case, it is appropriate to make the Order which is set out in paragraph 2 of the draft order, as follows:

> "*2. Each Valuation Expert may ask a further 5 written questions (inclusive of sub-questions) on issues not already dealt with by question and answer process to date, to be served within 48 hours of the date of hearing of this Summons.*"

Outline of the Petition Dispute

4. The Company was incorporated in the Cayman Islands on 27 August 2004, as an exempted limited company, and operates a real estate business in the People's Republic of China. Through multiple business units and part-owned subsidiary and affiliated companies, it provides real estate, brokerage, consulting and information services. The Petition follows a merger (the "**Merger**") pursuant to Part XVI of ***the Companies Law*** (2016 Revision) (the "***Law***"), effecting a buy-out of the Company by a management buyer group. Prior to the Merger, the Company's ADSs were traded on the New York Stock Exchange.

5. The Merger, or take private transaction, was approved by an overall majority of shareholders, at an EGM on 5 August 2016 (the "**Valuation Date**"). The price per share under the Merger was US$6.85. The Company says that the fairness of the merger price is supported by management projections of future performance finalised in April 2016 (the "**Management Projections**"). In support of the merger price, it relied on a fairness

opinion, based on the Management Projections, produced by Duff & Phelps. It now relies on an expert report by John Taylor of Houlihan Lokey to contend that the fair value of the Company is lower.

6. Senrigan Master Fund ("**Senrigan**") has dissented from the Merger because it says that the price payable for the shares by the Company's management undervalued the Company significantly, to the benefit of the management buyer group and to the prejudice of independent shareholders. Senrigan relies upon an expert report of Mr. William Inglis of FTI Consulting.

7. Both experts have relied on Discounted Cash Flow (or "**DCF**") methods to value the Company, although the precise approach which each has taken, which requires the use of projections of future performance, differs because (amongst other things) the projections relied upon are different.

Procedural History

8. The court made the Directions Order on 10 January 2017 after the parties had discussed and reached agreement on the directions which would be necessary to take the matter to trial. Save for the omission of a direction requiring the management of the Company to meet with the experts to discuss matters relating to their respective assessments of fair value, the Directions Order substantially mirrors the directions which have become standard in section 238 proceedings, including those made following a contested hearing in ***Re Homeinns Hotel Group*** (an Unreported Judgment of this Court, delivered 12 August 2016). Mr. Imrie, on behalf of the Company indicated that in his experience with these types of proceedings, it has proven better to have written questions and answers to the experts' questions, rather than the off the cuff questions that may be levied at management meetings, and this influenced the format of the agreed Directions Order.

9. Several paragraphs of the Directions Order are relevant to the present application:-

   (1) The Company was to serve upon Senrigan by 10 February 2017 a list of all documents which were or had been in its possession, custody or power

relating to the determination of the fair value of the shares in the Company as at the Valuation Date: see para. 5.

(2) The Company was to upload certain classes of relevant documents into an electronic data room (the "**Data Room**") by 10 February 2017, and then to upload all other relevant documents which it had listed in its list of documents, save for those in respect of which it had raised an objection to production, into the Data Room by 17 February 2017: see paras. 6 and 7.

(3) The Parties were each given leave to appoint an expert in the field of valuation to opine on the fair value of the shares in the Petitioner, valued as a going concern as at the Valuation Date: see para. 9.

(4) The Company was further obliged to upload any additional documents, materials, communications or information reasonably requested by either expert for the purpose of preparing his opinion as soon as practicable, but in any event within 14 days of receiving the request, provided that any such request was made no later than 21 days prior to the exchange of the experts' (primary) reports i.e. by 9 June 2017: see para. 11.

(5) The parties were to exchange the experts' reports simultaneously by no later than 4 pm (Cayman Islands time) on 30 June 2017: see para 12.

(6) The experts were to meet within 21 days following the exchange of their respective reports to discuss the differences between them and producing a Joint Memorandum: see para. 13.

(7) The Joint Memorandum was to be issued by no later than 28 days following the experts' meeting: see para. 14.

(8) Any supplemental reports were to be exchanged simultaneously by no later than 21 days following the issuance of the Joint Memorandum: see para. 15.

(9) A case management conference was to be held on the earliest convenient date after any supplemental reports were exchanged: see para. 18.

(10) The trial was to be listed for the hearing with a provisional time estimate of 5 days not before 30 August 2017: see para. 22.

Discovery and Information Gathering

10. Pursuant to those directions, the Company has given discovery of documents by list and supplemental list (which together listed over 7,000 documents); and uploaded those documents and further documents which it identified in response to the experts' respective requests into the Data Room (which presently contains 9,715 documents).

11. In addition, further to the requests which the experts submitted in accordance with paragraph 11 of the Directions Order, the Company has supplied a considerable amount of information (or explanations) on various matters. The volume of the requests made by the experts has been noted by the Company's expert, John Taylor as follows at paragraph 48 of his Report:

> *"Management interviews took place via written correspondence and submissions concluded on 9 June 2017. Mr. Inglis (the expert appointed by Senrigan) submitted 176 numbered questions (many containing subsets of questions) over a 99-day period; I submitted 123 numbered questions (many also containing sub-sets of questions) over a 22-day period"*

12. In the event the experts together submitted several hundreds of questions (including sub-questions) to the Company over a little more than three months to obtain further documents and information for the purpose of producing their respective reports.

The Company's New Costs Projection – 23 June 2017

13. The Dissenters say, that on 23 June 2017, in response to a question from the Company's own expert, Mr. Taylor, the Company produced revised projections said to represent its unallocated headquarter costs attributable to E-Core (the "**New Costs Projection**"). The projection, produced long after the Valuation Date, was apparently aimed at an issue referred to as the "Unallocated Costs Issue". Senrigan say that it was most unfortunate that the Company provided the New Costs Projection on 23 June 2017, a week before expert reports were to be exchanged, in response to questions from its own expert. Its credibility and relevance, Senrigan says, have already been raised in correspondence, and will be matters to be explored further at trial.

Exchange of Expert Reports

The parties have exchanged the experts' primary reports on 1 July 2017, shortly after the New Costs Projection was provided by the Company. The reports together run to more than 700 pages, and are just about equal in size.

15. The experts have also discussed matters by telephone, within the directed timeframe of 21 days, following the exchange of their reports, to discuss the issues on which they are agreed and the differences which remain between then, in order to produce the Joint Memorandum.

16. Senrigan's position was that the date of provision by the Company of the New Costs Projection has had an impact on the procedural timetable, as they could not be dealt with fully in the expert reports to be filed a week later:

    a. The experts submitted a joint list of questions on the New Costs Projection to the Company on 17 August 2017, to which the Company responded on 25 August 2017;

    b. Both experts considered that the response raised further questions regarding the New Costs Projection, and they submitted a further joint list of questions to the Company on 15 September 2017. The Company has in this hearing indicated that it provided answers to those further questions on or about 12 October 2017.

The Company's Arguments

17. It is the Company's position that the Court should grant the Order sought at paragraph 2 of the draft order, i.e. permitting each expert, if they so wish, to ask a further 5 questions on issues not already dealt with. The Company says this against a background whereby, it claims that unlike a number of other companies involved in Section 238 proceedings, it has complied with all of its disclosure obligations under the Directions Order. There has been no need for Senrigan to make any interlocutory applications in relation to disclosure or the provision of answers to questions in this matter. The Company further comments that it is atypical for a dissenter to be trying to prevent the experts from obtaining more

information about the Company by asking questions of its management. It further emphasizes that it is anxious to provide as much information as may be needed and required by the experts in order to render their reports in order to avoid any adverse inferences being drawn against it. It points out that if any such inferences are to be drawn in relation to discovery invariably this occurs against the Company. It asserts that the Order proposed will not cause undue delay or substantively interfere with time-tabling matters.

18. As I understand the Company's position, they seek to have the Order at paragraph 2 made for the following main reasons:

(1) Both experts have been accepted as being competent and knowledgeable in the field of valuation in other section 238 Proceedings: Mr. Taylor in ***Re Integra Group*** [2016] 1 CILR 192, a decision of Jones J; and Mr. Inglis in ***Re Shanda Games*** (Unreported, delivered 25 April 2017), a decision of Segal J. Both experts are far apart in terms of the values they have arrived at, and therefore, the more help the Court can get, the better, to assist it in its task of arriving at the appropriate valuation.

(2) The Court should make the Order without the need for the experts to give any evidence or opine that particular questions are relevant because the experts ought not to enter into the fray, so to speak, or be open to objections as to relevance. Reference was made to the Court of Appeal's recent decision in CICA No. 20 of 2017, ***In the matter of Qihoo 360 Technology Co. Ltd.*** (Leave to Appeal application), Reasons delivered 9 October 2017, to which I will return.

(3) There is a suggestion in the correspondence that the experts wish to ask further questions. In particular, reference was made to Appleby's letter dated 15 August 2017, in which Appleby indicated that the experts did have further questions and that Mr. Taylor had told Mr. Inglis that he had further questions that did not arise from the interlocutory correspondence. Also, the letter from FTI to Maples dated 11 September 2017 where Mr.

Inglis states, amongst other matters, that "*both John Taylor and I have further questions for E-House arising out of the 26 August documents...*".

(4) The Company says that the Directions Order, at paragraph 11, contemplated variations in the time by which documents or information were to be provided to the Experts. Therefore, by coming to the Court to seek the Order proposed in paragraph 2 of the Draft Order, the Company is not operating outside of the spirit of paragraph 11. Mr. Imrie further submits that, indeed, it is important to allow for further questions after the parties have prepared their respective expert reports, because experience has shown that at trial, it is actually the Joint Memorandum of the Experts and their Supplemental Reports that end up being the focus at the trial, and these are obviously prepared after the initial Reports (Mr. Imrie and his firm appeared for the dissenters in ***Re Integra*** and ***Re Shanda Games***). Paragraph 11 of the Directions Order reads as follows:

> *"The Petitioner shall upload to the Data Room any additional documents, materials, communications (whether by email or otherwise) or information reasonably requested by an Expert for the purpose of preparing his own opinion as soon as practicable, but in any event within 14 days of receipt of such a request, unless otherwise agreed or directed by order of the Court, provided that any such request is made no later than 21 days prior to the exchange of Reports pursuant to paragraph 12 below. Any such request from, or response to an Expert shall, upon receipt or dispatch by the Petitioner, be forwarded to the other Expert."*

Senrigan's Arguments

19. Mr. Goldring QC, on behalf of Senrigan, indicated Senrigan's reasons for opposing the Company's application. It was submitted that the Directions Order established a clear process for ensuring that the Petition proceed to trial, and for it to be tried expeditiously and efficiently. Senrigan expressed its concern that delays on the part of the Company, particularly as brought about by new costs projections produced in response to a question

from its own expert Mr. Taylor, have caused a drift in the procedural timetable. Senrigan wishes to see this delay brought to an end.

20. Learned Queen's Counsel argues that the Company is seeking a significant expansion of the evidence-gathering process to cover new matters in circumstances where, under the Directions Order, any requests for information from the experts were to have been made by 9 June 2017, and expert reports were exchanged on 1 July 2017. It was submitted that it would be for the Company to justify its application, and an exercise of the Court's discretion in its favour, but that it has not done so, providing no rationale or explanation for further questioning. At the same time, it was argued that it would be unfair and prejudicial to Senrigan to permit the Company, at this stage, to provide its expert with new evidence not already dealt with, in an effort to support its valuation.

21. Senrigan, by letter from Appleby to Maples dated 29 September 2017, sought a list of the further questions that the Company's expert proposed to ask, together with an explanation as to why such questions had not been raised by its expert previously. However by letter dated 10 October 2017 Maples have indicated that no list has been provided by the Company's expert for consideration at this hearing.

22. In addition to referring to a number of decisions from the Courts in Delaware, which has legislation that deals with similar issues to the Section 238 Fair Value Proceedings, learned Queen's Counsel also referred to this Court's decision in ***Homeinns*** (at paragraphs 22 and 23). This was relied upon as support for the proposition that there is a need for finality in the expert request process, and the inappropriateness of factual evidence (which Senrigan says must include responses from the Company to experts' requests) being adduced after the exchange of expert evidence.

23. Learned Queen's Counsel was also at pains to point out that Mr. Inglis had not at any time indicated that he had any further general questions to ask and that the further questions to come from both experts, to which his letter of 11 September referred, were further questions arising out of the 26 August 2017 documents sent by Maples.

24. Accordingly, Senrigan asks the Court not to grant the Order sought by the Company at paragraph 2 of the draft.

Discussion and Analysis

25. It seems clear to me that the onus is on the Company to demonstrate to the Court why it is appropriate to make the Order sought. In my view, the Court is not justified in just making new orders or varying old ones where there is opposition, just because it may be thought that the order proposed may be a useful sort of "*catch-all*" or "*just-in-case*" type order. This is particularly the case where directions for the preparation of the matter have already been made, and more so by consent.

26. It is also my view that what paragraph 11 of the Directions Order contemplated was variation of time for the Company to upload information as agreed by the parties or ordered by the Court, but this was in relation to requests made by the experts no later than 21 days prior to the exchange of the primary expert reports. This paragraph did not provide a gateway or basis for carte blanche admission, or application for admission of further requests, after the exchange of the primary expert reports.

27. Reference was made by Mr. Imrie to Order 25 Rule 6 of the ***Grand Court Rules*** ("***GCR***"), as supporting a position that no affidavit evidence need be filed on the hearing of a summons for directions. However, to my mind that plainly is not the Rule to look to after directions have already been given, particularly where made by consent and changes are being sought.

28. Courts do not exist to punish or to be pedantic, but being able to fulfill the overriding objective of doing justice between the parties requires the Court to act upon a sound basis.

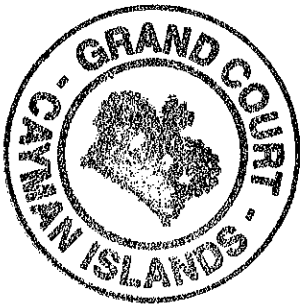
29. Mr. Imrie candidly indicated that there was no evidence before the Court from the experts as to what the questions were which the Company thinks they may wish to ask. His response was that it would not be right for the experts to have to say anything about that. He referred to the decision of Martin J.A in ***Qihoo*** as suggesting that it should not be for the experts to descend into the fray now, and that the experts should simply be allowed to

ask questions. Reference was made to paragraph 3 of the decision. It is to be noted, that whilst this decision of the Court of Appeal, delivered on 9 October 2017 was a decision refusing leave to appeal from a decision of the Grand Court, Martin J.A, in the course of providing the Court's Reasons, provided useful guidance in respect of this relatively untrodden area of the Law. At paragraph 3 Martin J.A. stated as follows:

> *"3. Proceedings under section 238 present two particular difficulties to the courts. First, all or nearly all of the financial information necessary to enable the Court to determine the value of a company's business, and hence of its shares, will inevitably be held by the company itself. The proper conduct of the valuation exercise will accordingly require that the company make adequate disclosure of that information. Secondly, although the task of determining the value is of the Court alone, the Court will not usually be equipped to derive a value from the financial information without the expert assistance. The consequent importance of the expert evidence means that the Court must have confidence that the valuations proposed are based on sufficient information: and that in turn means that the experts will often have to be given a substantial degree of autonomy in determining what information is needed for their valuations. Although care must be taken to ensure that this autonomy is not abused (a point to which we return at the end of these reasons), in general we agree with the statement of Jones J in* ***In the matter of Integra Group*** *[2016] CILR 192 at [11] that "the experts are the best judge of what information is or is not relevant for their purposes".*
>
> (My emphasis)

30. It is to be noted that, whilst his Lordship accepted that the experts have a central role to play in section 238 proceedings, he warned that the autonomy accorded to them must not be abused. At paragraph 27, the learned Justice of Appeal returned to that theme, as promised, and stated:

> *"27. As presaged in paragraph 3 of these reasons, we come back to the possibility of abuse of the autonomy that is of necessity to be given to experts in section 238 proceedings. In paragraph 63 of her judgment the judge recorded a submission by leading counsel for the Company "that section 238 fair value claims must not be allowed to become a carte blanche for dissenters to conduct a*



"drains up" inspection of the entire business, regardless of relevance to fair value". We think there is a danger that the liberty given to the experts to define what is relevant to value could be abused, and even used to put pressure on a company to agree an inflated value for dissenters' shares rather than accept wholesale disruption of an external inspection of its physical and electronic records. At paragraph 114 of her judgment, the judge said that she wished to make it clear that she was not all holding that an order for appointment of a forensic expert would be appropriate in every section 238 proceedings; and again she was right to do so. It is, however, observable that such orders have been made in at least two cases – this one, and ***In the matter of Shanda Games Limited*** *Unreported, Segal J, 25 April 2017 (although in the latter case the order was made by consent) – and we are concerned that they may become accepted practice. We stress that they are to be regarded as exceptional remedies, not common currency in section 238 petitions."*

31. Thus, in ***Qihoo***, whilst the Court of Appeal accepted that the experts must be given substantial autonomy, they were not at all saying that there should not be an evidential basis for orders sought in relation to further requests from experts. In addition, whilst in that case (at paragraph 27), the Court pointed to a danger of the experts' liberty to define relevance being wrongly used to put pressure on a Company, the Court was not saying that this is the only danger that the Court has to guard against.

32. Indeed, it seems to me that, in the instant case, Senrigan is pointing out that there is another kind of danger that can arise, and this time the point made is that a danger can potentially be caused to dissenters, if the Company's management is allowed to include inputs in the DCF modelling that might be affected by hindsight bias and self-interest. Reference was made to the Delaware Court's decisions in ***In Re Appraisal of Dell Inc.*** (31 May 2016) pages 99-100, ***Agranoff v Miller*** (15 May 2001) pages 26-27, (per Strine V-C, now Chief Justice of the Delaware Supreme Court), and others.

33. However, it is also to be noted that, in ***Qihoo***, there was evidence (in the form of a letter) from the relevant expert, indicating his view as to relevance. In the Court of Appeal, the discussion at paragraph 14 of the Reasons took place on the basis of the Grand Court's

analysis and treatment of that evidence from the expert. The point is that in ***Qihoo*** there was evidence forthcoming from an expert claiming relevance.

34. In my judgment, it is clear that the further questions referred to in the letter from Mr. Inglis dated 11 September and Mr. Taylor's email and enclosure dated 15 September 2017 to Maples, refer to questions arising out of the 25 August 2017 letter and documents.

35. Further, I find it surprising that what the Company is relying on is the letter dated 15 August 2017 from Appleby to Maples. In that letter, it is stated that Mr. Inglis said that Mr. Taylor produced a draft of a joint list in which he seeks to introduce a number of general questions which do not arise from recent correspondence. Yet, despite Maples being asked directly by Appleby, in several pieces of correspondence, to indicate what further questions Mr. Taylor might have, Maples and the Company have produced nothing from Mr. Taylor in support of this application.

36. Indeed, in their letter dated 10 October 2017, Maples wrote to Appleby stating:

> *"We maintain the Company's offer to respond to a reasonable number of further written questions if the valuers wish to ask anything else which would assist them in their valuation determinations and continue to seek an order to that effect. If neither valuer wishes to take up that offer, or the Court does not grant such an order, so be it.*
>
> .....
>
> *The offer to answer further questions is being made by the Company as a result of your letter dated 15 August 2017 in which you disclosed that, after the experts reports had been exchanged, Mr. Taylor sought to introduce a number of additional general questions. Having been told that, the Company has proposed ways in which the experts could seek to ask further questions. That has been resisted by your client. We have not received any draft supplemental questions from Mr. Taylor. If the Court makes the proposed order at point 2 of the Summons, both experts can send any supplemental questions to us in accordance with that order, if they so wish."*
>
> (My emphasis)

37. In my judgment, this is precisely the situation in which it is vital for the Court to exert management over the case and exercise its judgment as to the appropriate orders to make. The Court has to do so upon an informed basis. In response to a question from me, Mr. Imrie candidly conceded that the idea of 5 questions (as opposed to 10 or 20 or any other number), came from him, and not from the experts, or either of them. This is the very type of situation where the Court has to be careful to ensure that the Attorneys do not by themselves dictate relevance or the scope for discovery, however, harmless or reasonable a request may at "*first blush*" appear. The Court has a discretion to exercise, but of course this discretion must be exercised judicially. If Mr. Imrie is correct, then it would seem to me that such an order could become standard in every case (despite opposition from the other party/ies), since it is always possible to say it might be helpful to have such an order "*just in case*". That plainly cannot be right, particularly after a fully considered Directions Order has been entered into by consent, dealing with the general subject at issue. If such a need for further questions exists, the Court should expect an expert to say so plainly and unambiguously, and also to indicate, at least in a general way, what additional matters he wishes to ask about. For the Court, as case manager and final adjudicator, to require such an evidential basis at an interlocutory stage is a far cry from declaring that the experts are required to enter into the fray.

38. In the circumstances, I am of the view that it is just and appropriate to refuse to make the order set out at paragraph 2 of the draft order. It would seem to me that Senrigan is entitled to the costs of the application on a standard basis, to be taxed if not agreed. I invite the parties to submit an order along the lines discussed at the hearing.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT

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