

# New Frontier Health Corporation FSD 72 of 2022 (DDJ)

**Briefing Summary:** In the recent decision of *New Frontier Health Corporation* FSD 72 of 2022 (DDJ), the Cayman Islands Grand Court (the "**court**") considered a dilemma which is not uncommon to companies incorporated in the Cayman Islands with operations and management in the People's Republic of China ("**PRC**"), namely the need to comply with the discovery obligations under the court orders and local rules versus the risk of prosecution under the data protection law in the PRC.

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## Background

*New Frontier* concerns a dispute between New Frontier Health Corporation (the "**Company**") and dissenting shareholders as to the fair value of shares in the Company, commonly known as section 238 appraisal proceedings. The location of the Company's operations and its management is the PRC. At issue is whether the court should grant the Company yet another extension of time in respect of its obligation to give discovery of the relevant documentation until the grant of regulatory approval by the Chinese government authorities.

The Company submitted that it cannot disclose the relevant documentation without the approval of the Chinese authorities but there has been no approval mechanism in place for over a year and it is unlikely to be in place in the near future. The Company was concerned that if it discloses the documentation without the approval of the Chinese authorities a real risk of prosecution will arise.

## The court's ruling

To test whether that is an adequate explanation and a valid reason for extension of time to comply with discovery obligations, the court considered issues of PRC law, the guidance provided in *Bank Mellat v HM Treasury* [2019] EWCA Civ 449 and proceeded to exercise its discretion in the particular circumstances of this case.

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The court was satisfied from the expert evidence that the relevant provisions of the laws of the PRC do apply to discovery and that there is an actual risk of prosecution as required under the *Bank Mellat* test but such risk is "*low to moderate*". The court then went on to conduct a balancing exercise and take into account each of the following factors in turn:

1. the court's overriding objective of dealing with cases in a just, expeditious and economical way;
2. Section 7 of the Bill of Rights requiring a fair trial within a reasonable time;
3. the importance of complying with court orders and local rules;
4. the actual risk of prosecution and the degree and extent of such risk;
5. the need for and the importance of the documents;
6. minimisation of the concerns under the foreign law;
7. the location of the documents and the parties;
8. comity considerations;
9. the availability of alternative means of securing the documents;
10. the conduct of the party seeking the extension;
11. whether the delay causes any prejudice to the parties and the legal system generally;
12. the extent to which non-compliance would undermine important interests of the Cayman Islands or compliance would undermine important interests of the foreign state;
13. whether there is an acceptable explanation and good excuse for the delay; and
14. what the justice of the case requires.

The court determined that the core of the balancing exercise was weighing on the one hand the risk of prosecution and on the other the need for and importance of the documents to ensure the fair determination of the section 238 proceedings within a reasonable time. There was no evidence before the court as to the probative value of the outstanding documents but the court took judicial notice of the necessity and importance of a company's discovery in section 238 appraisal cases. Disclosure by companies, as experience shows, is of central significance in the context of fair value cases and is central to the analysis of the experts.

Weighing all the relevant factors, the court decided that the requirement that the Company comply with the disclosure obligations and the interests of the Cayman Islands in the fair and expeditious determination of civil proceedings overrode the requirements of the laws and the legitimate interests of the PRC in data protection and security. The court therefore declined to extend the deadline for the Company's discovery.

## Conclusion

The judgment in *New Frontier* demonstrated that the court expects companies in section 238 appraisal cases to conduct their disclosure expeditiously and will not lightly accede to an open-ended time extension request.

This decision is now subject to appeal to the court of Appeal of the Cayman Islands and we may expect further guidance from the appellate court on the approach to be taken when a local disclosure obligation and a foreign regulatory law are alleged to clash.

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