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UPDATE

The approach to privilege in appraisal proceedings in the Cayman Islands

Update prepared by Simon Dickson, Jessica Vickers and Lisa Yun (Cayman Islands)

The Grand Court of the Cayman Islands has provided clarification on the approach to disclosure of a company's privileged documents to dissenting shareholders in appraisal proceedings to determine 'fair value' under section 238 of the Companies Act (2023 Revision).

In the decision *In the Matter of 58.com, Inc* (unreported, 22 March 2023) the Grand Court of the Cayman Islands (the **Court**) held that a company was not permitted to withhold disclosure of documents from dissenting shareholders under the shield of legal advice privilege where that advice is relevant to the issue of fair value of the shares. The Court also considered the date that litigation can be said to be reasonably in contemplation in the merger in respect of litigation privilege, a separate form of privilege.

This decision is relevant to both shareholders and Cayman Islands companies involved in take-private transactions. Parties should be mindful of the broad disclosure requirements under section 238 of the Companies Act (2023 Revision) (the **Act**) and that legal advice obtained during the merger process may be required to be disclosed in the event that subsequent appraisal proceedings are commenced.

Background

58.com, Inc (the **Company**) is a Cayman Islands entity which was formerly listed on the NYSE that was taken private by way of a merger. Forty-five shareholders dissented to the merger by serving a notice of dissent (the **Dissenters**). Pursuant to section 238 of the Act, upon dissent the Dissenters have a statutory right to be paid a judicially determined fair value for their shares, instead of the merger consideration being offered.

In the appraisal proceedings, the Dissenters sought an order for the disclosure and production of documents which the Company asserted legal advice privilege over. The Dissenters relied upon the long-established authority in *Woodhouse v Woodhouse* [1914] TLR 599 that shareholders had a common or joint interest in any legal advice the Company received, except for advice obtained for the purpose of hostile litigation against the shareholder. In determining the Dissenters' application for disclosure, the Court considered four key issues, as set out below.

1 Whether s.238(7) of the Act extinguished the Dissenters' rights to joint interest privilege

The Company argued that section 238(7) of the Act (which provides that upon dissent, a Dissenter shall *cease to have any rights of a member except the right to be paid the fair value of that person's shares*) extinguished the Dissenters' rights to rely on the rule in *Woodhouse*, namely the right to exercise joint interest privilege in any legal advice the Company had obtained, which was not protected by litigation privilege.

The Court held that section 238 could not sensibly be construed as having intended to deprive the Court of access to the best available evidence on fair value, whether by excluding joint interest privilege or otherwise, noting that allowing a dissenting former shareholder to assert joint interest privilege in relation to advice relevant to the issue of fair value would amplify, rather than stifle, the efficacy of the appraisal remedy. If joint interest privilege could be asserted by former shareholders seeking to vindicate their property rights, clearer statutory language would be required to take away such vested property rights.

2 Whether s.238(7) of the Act narrows the Dissenters' broader joint interest privilege rights

Woodhouse provides that a shareholder will generally have a joint interest in any legal advice which the company whose shares they hold takes about the general administration of the company. The company is deemed, in the very general sense, to be obtaining such advice on the shareholder's behalf. Where a joint interest can be established, the relevant advice is not privileged as between the company and shareholder.

However, the Court held that it was readily apparent from the wording of section 238(7) of the Act that, where a shareholder exercised dissenter rights under section 238, the shareholder relinquished all shareholder rights save for the appraisal rights. Advice then obtained about the general administration of the company is not, by virtue of section 238(7), advice a dissenter has any cognizable interest in. Accordingly, the Court found that the scope for assessing joint interest privilege was *'commensurately narrowed'* under section 238(7) and that the provision should be read as limiting the ability of dissenting shareholders to claim joint interest privilege unless it was advice relevant to the central adjudicative task of appraising the fair value of shares of the company or the company was unable to properly invoke legal professional privilege in relation to a particular instance of advice.

3 Whether the status of the Dissenters at the time legal advice was obtained by the Company barred them from invoking joint interest privilege

As the Dissenters were holders of American Depository Shares at the time the advice was received by the Company, the Company argued that they would be barred from relying on joint interest privilege for disclosure as having the status as a registered shareholder at the time of the relevant legal advice having been obtained by the Company was a requirement to invoke joint interest privilege. The Court held that it made *'little sense'* to view the beneficial shareholder, who subsequently sues as legal shareholder, as lacking standing to assert joint interest privilege because they were not registered shareholders at the time the Company received the legal advice, noting that any joint interest which the nominee as registered shareholder held was held on behalf of the beneficial owner of the shares.

4 Litigation privilege and the date from which litigation is reasonably in contemplation

Litigation privilege is a separate form of privilege that applies to confidential communications where litigation is '*actual, threatened or in contemplation*' and the advice was *'obtained by the company to enable it to carry on with litigation, advice which was in connection with that dispute, advice in defence of the contemplated litigation*'.

An issue arose in relation to the date from which litigation was reasonably in contemplation. The Court clarified that when it was reasonable for litigation to be contemplated was not an *'abstract question but a context specific inquiry which must have regard to both the status of litigation privilege as a fundamental right and the substantive consideration of when advice on litigation was actually sought*'.

In the factual context of this case, the Court held that litigation was reasonably in contemplation shortly after the merger was announced given that some Dissenters made '*sabre-ratting noises*' soon after. The Court held that it was entirely reasonable to receive legal advice in respect of litigation costs and strategy from the beginning of the merger negotiation process in light of reliable evidence that section 238 proceedings may be commenced. However, the Court held that deciding the earliest point when litigation privilege might be claimed did not mean that it automatically covered all advice the company had obtained from that date onwards. Rather, the key issue for determination would be if the advice was given in connection with the dispute.

Conclusion

The Court ordered that the Company was liable to disclose to the Dissenters the legal advice obtained by the Company which was relevant to the determination of fair value. In the factual context of this case, the Court also held that litigation was in contemplation soon after the announcement of the merger. Cayman Islands entities involved in take private-transactions should be mindful of the broad disclosure requirements under section 238 of the Act and the risk that legal advice obtained during the merger process may be required to be disclosed in the event dissent litigation is commenced.

Contacts

Simon Dickson
Partner
Mourant Ozannes (Cayman) LLP
+1 345 814 9110
simon.dickson@mourant.com

Jessica Vickers
Counsel
Mourant Ozannes (Cayman) LLP
+1 345 814 9132
jessica.vickers@mourant.com

Lisa Yun
Associate
Mourant Ozannes (Cayman) LLP
+1 345 814 9218
lisa.yun@mourant.com

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