UPDATE

MARCH 2025

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Third time's not the charm: Company loses on appraisal rights in short form mergers

Update prepared by Simon Dickson and Adam Barrie (Cayman Islands)

The Privy Council upholds the decision of the Grand Court and the Court of Appeal that appraisal rights apply to short form mergers.

Introduction

Part XVI of the Companies Act (2025 Revision) (the Act) sets out the statutory merger and consolidation regime.

The issue for consideration by the Judicial Committee of the Privy Council in *Changyou.com Ltd*[1] was whether a 'short form' merger (being a merger where no special resolution is needed because the parent company holds at least 90 per cent of the shares in the subsidiary) allows for a fair value appraisal, or whether the right to appraisal only applies to 'long form' mergers where a special resolution is required.

It was argued that a short form merger should not provide for appraisal rights. Whereas section 238(1) of the Act provides a general right for any member to be paid the fair value of their shares, section 238(2) to (5) sets out the mechanism for engaging such rights. Section 238(2) to (5) are predicated on the holding of a vote on the merger. In a short form merger, there is no special resolution and therefore there is no vote. Where there is no vote, there can be no appraisal rights.

Decision

Upholding the decision of the Grand Court and the Court of Appeal, the Privy Council held that section 238(1) confers appraisal rights on any member of a constituent company dissenting from a merger and makes no distinction. Therefore, a short form merger must provide for the same rights as a long form merger.

There was no rationale as to why the legislature should have wished to distinguish between the two forms of merger. The commercially justifiable decision of the legislature to dispense with a shareholder vote in a short form merger (where the result is guaranteed) had the unintended and unrecognised effect of depriving shareholders of their appraisal rights.

To illustrate the absurdity of the position the Privy Council noted that, were the Company correct, it would mean that a member with a 0.01 per cent shareholding in a company where the majority held 89 per cent of the voting power (and hence needed to vote on a special resolution) would enjoy full appraisal rights. On the other hand, a member with a 10 per cent shareholding in a company where the majority held 90 per cent of the voting power (and hence did not need a vote on a special resolution) would enjoy no such rights.

Further, and most importantly, if the Company's submissions were right, it would mean that shareholders in a short form merger could have their shares taken away without the same protections as the legislature

[1] *Changyou.com Ltd v Fourworld Global Opportunities Fund Ltd and 7 others* [2025] UKPC 12.

thought appropriate for shareholders in a long form merger. That would be fundamentally unfair and contrary to the principle of legality.

The Solution

The decision contains an interesting analysis of the proper ambit of judicial interpretation together with a discourse on the Constitution Order and the Schedule 2 Bill of Rights.[2] However, in terms of the practical result, the Privy Council followed the Court of Appeal in taking the following steps:

(i) First, it agreed with the Court of Appeal that the legislature's error could not be corrected under common law principles.

(ii) Second, it found that the compulsory acquisition of shares (whether by short form or long form mergers) under Part XVI of the Act falls within section 15 of the of the Bill of Rights in that it is a provision of law that authorises the compulsory acquisition of a person's property.

(iii) Third, it found that to be compatible with the Bill of Rights, Part XVI of the Act must include a provision with respect to short form mergers for the prompt payment of adequate compensation and a right of access to the Grand Court for the determination of the amount of any compensation.

(iv) Fourth, section 5 of the Constitution Order applies to the Act. This means the Court must read and construe the Act with such modifications as may be necessary to bring it into conformity with the Constitution.

(v) Fifth, applying section 5 of the Constitution Order, the Court is permitted to make 'modest' changes to the legislation to bring it into conformity with the Bill of Rights.

(vi) Sixth, the 'modest' changes made by the Court of Appeal to section 238(2) to (5) of the Act were correct. These changes provide a mechanism for dissent in a short form merger by providing that notice of dissent be given immediately after the date on which the plan of merger is given to a member pursuant to section 233(7) of the Act.

Conclusion

The outcome of this appeal was inevitable. The decision of the Court of Appeal was as solid was one could hope for, and it was never likely that the Privy Council would intervene.

The decision raises interesting issues as to the extent of the power of the Court to re-write statutory provisions, and whether such amendments, made on a modest basis or otherwise, blurs the lines between the judiciary and the legislature. However, that is for the world of the constitutional scholar.

What is interesting here, however, is that the Government could have acted on the decision of the Court of Appeal and brought the Act into conformity with the Bill of Rights some time ago. Had they simply made those amendments (as it is the legislature's unfettered right to do) the Privy Council may have been spared the reheating of this slightly stale issue.

[2] The Cayman Islands Constitution Order 2009 (SI 2009 No 1379).

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