IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT, FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 6 of 2021
(Formerly FSD 120 of 2020 (ASCJ))

IN THE MATTER OF THE COMPANIES ACT (2020 REVISION)
AND IN THE MATTER OF CHANGYOU.COM LIMITED

BETWEEN:

CHANGYOU.COM LIMITED

Appellant

AND

(1) FOURWORLD GLOBAL OPPORTUNITIES FUND, LTD.
(2) CORBIN OPPORTUNITY FUND, L.P.
(3) CORBIN ERISA OPPORTUNITY FUND, LTD.
(4) BOOTHBAY DIVERSIFIED ALPHA MASTER FUND LP
(5) BOOTHBAY ABSOLUTE RETURN STRATEGIES, LP
(6) ATHOS ASIA EVENT DRIVEN MASTER FUND
(7) ATHOS SPECIAL SITUATIONS FUND SPC for and on behalf of ATHOS GLOBAL OPPORTUNITIES SP 1
(8) FMAP ACL LIMITED

Respondents

Before: **The Rt. Hon Sir John Goldring, President**
The Hon John Martin, Justice of Appeal
The Hon C Dennis Morrison, Justice of Appeal

Representation: **Jonathan Crow KC, Alex Potts KC and Erik Bodden of Conyers Dill & Pearman LLP for the Appellant**
Jonathan Adkin KC, Rocco Cecere, Annalisa Shibli and Dawn Major of Collas Crill for the Respondents.

Judgment Delivered: **20 December 2022**

JUDGMENT OF THE COURT
(After consideration of the papers)

MARTIN JA:

1. On 16 September 2022 judgment was handed down in this appeal. The judgment stated that the appeal was dismissed. Issues have now arisen consequent on the judgment 1) as to the terms of the order that should be made; 2) as to costs; and 3) as to leave to appeal to the Privy Council. This is the judgment of the court on those issues, which we take in turn. In doing so, we assume familiarity with the terms of the judgment.

Terms of the order

2. Paragraph 81 of the judgment ("the judgment") of Martin JA, with whom Goldring P and Morrison JA agreed, stated *"I consider that the Chief Justice reached the right conclusion, and his order was justified; and I would dismiss this appeal*". On the face of it, therefore. the order of the court should state that the appeal is dismissed. The appellant argues, however, that the effect of the judgment was in fact to allow the appeal, and the order should reflect that position.

3. This proposition is advanced in three ways. First, it is said that the construction of section 238 adopted by this court (paragraph 79) makes clear that any written objection must be given immediately after the plan of merger is given to members; and it is clear from the Statement of Agreed Facts that none of the respondents objected after receiving the plan, although they all did so before that. The consequence is said to be that the petition must be dismissed for want of compliance with the procedural requirements of section 238, even assuming it to be available in short-form mergers; and that paragraph 2 of the Chief Justice's order, which reflects the final bullet point quoted at paragraph 30 of this court's judgment and states that "*The Petitioners have taken appropriate steps to dissent from the Company's Merger and have the right to prosecute their Amended Petition dated 30 June 2020*", was simply wrong. We call this "***the procedural requirement point***".

4. The second way in which the proposition is advanced is by reference to the alterations that will have to be made to paragraph 1 of the Chief Justice's order to reflect the different way in which this court considered section 238 is to be read from that adopted by the Chief Justice. The appellant describes these as "*material variations*", and suggests that the necessity to make them is a result of the appellant's appeal and "*represents a considerable degree of success for the appellant*". The appeal should, so it is said, accordingly be allowed at least to the extent of the variations. This is "***the variation point***".

5. Thirdly, the appellant points to the fact that its proposed ordinary construction of section 238 was the one adopted by this Court, so that the appellant has been successful on an important issue in dispute. This is "***the construction point"***.

6. None of these points has any merit. In approaching them, it is necessary to have regard to two things in particular: the way in which the appeal was argued by the appellant, and the structure of the judgment.

7. In relation to the procedural requirement point, the appellant correctly points out that its notice of appeal sought the reversal of the whole of the order made by the Chief Justice, and that paragraph 7 of its skeleton argument for the appeal said that it was wrong for the Chief Justice to have held (a) that a shareholder in a short-form merger was entitled to give notice of dissent within 20 days of receipt of the plan of merger "*notwithstanding the express statutory language of sections 232, 233 (7) and 238 which do not so provide*" and (b) that the respondents had taken the appropriate steps to dissent. The appellant also referred to footnote 10 to the skeleton, which trails the possibility of a defence to the petition on the basis that the respondents accepted the merger price. On the basis of these references, the appellant says that it made clear to this court that the procedural requirement point was an issue for determination in the appeal.

8. What the appellant omits to mention, however, is that nothing in its grounds of appeal, in the remaining 104 paragraphs of its skeleton argument, or in its oral submissions addressed the question of the respondents' compliance with the procedural requirements of section 238 or came close even to hinting that the procedural requirement point was or might become a separate live issue. Even paragraph 10 of the appellant's skeleton clearly implies that the objection is one of law based on the terms of section 238, not an objection of fact. The failure to raise the procedural requirement point is particularly striking, since it was at least arguable that the construction adopted by the Chief Justice, objectively construed, required a member to give notice of dissent after receipt by him of the plan of merger. What the Chief Justice did was to require notice of dissent to be given "*within"* 20 days of the copy of the plan of merger being given to the member. Read in the context of the (unamended) section 238, which stipulates a clear timetable for objection and dissent, and in particular (by subsection (5)) requires notice to be given "*within 20 days immediately following the* [vote]", it would have been open to the appellant to argue on appeal that the Chief Justice's choice of the word "*within*" implied a step to be taken subsequently to receipt of the plan of merger. The appellant did not do so; and it is now far too late for it to seek to raise an issue which could (and, if the appellant wished it to be resolved, should) have been raised during the hearing of the appeal. It is incorrect to say, as the appellant does, that it had no opportunity to raise the point until it saw the respondents' options for amendment (which were only provided after the end of the hearing) or until it received a draft of the judgment: the point was always available on the wording adopted by the Chief Justice. The reality is that the appeal was fought entirely on the question of principle of the availability of appraisal rights in short-form mergers, and the appellant lost that battle.

9. As it is, this court specifically dealt in the body of the judgment with the validity and effect of the amendment propounded by the Chief Justice, saying "*Reading the section in this way does have the effect of making it compatible with section 15 of the Bill of Rights, and justifies the Order made by the Chief Justice*" (paragraph 79). What this court then did was to adopt a construction that it considered "*preferable*"; but that does not mean that the Chief Justice's formulation was, as the appellant would have it, "*incorrect*" – and the sentence just quoted from paragraph 79 of the judgment is to directly contrary effect. In essence, both the Chief Justice and this court were seeking to identify ways in which section 238 could be brought into compliance with the Bill of Rights. Both courts were clear that the section required amendment, and clear as to the substance of the amendment required; where they differed was in relation to the words best suited to achieving compliance. The fact that this court chose different words from those adopted by the Chief Justice does not mean that the words he chose were impermissible or wrong, or that the substitution of this court's wording in any sense represents a success for the appellant. That is sufficient to dispose of the variation point.

10. The appellant's position on the construction point betrays a misunderstanding of the structure of the judgment. It is true that this court took the view that what it described as the ordinary construction of section 238 meant that appraisal rights were not available in short-form mergers, and true that that was the construction contended for by the appellant. But proper determination of the ordinary construction of the section was a necessary preliminary to any consideration of the constitutional position. That is because, as stated in paragraph 75 of this court's judgment, the court must act differently depending on whether primary

legislation (in this case section 238) is incompatible with the Bill of Rights or merely unclear or ambiguous as to its compatibility. In order for the court to be in a position to assess questions of lack of clarity, ambiguity and incompatibility, it is essential that it knows what the relevant primary legislation means. Determination of the ordinary construction of section 238 was accordingly a necessary stepping-stone to the ultimate outcome of the appeal. It cannot be regarded as a separate issue.

11. For these reasons, the order will state that the appeal was dismissed. It will vary the Chief Justice's order to reflect this court's preferred amendments to section 238; but, as already stated, that does not have the consequence that the appeal has in any sense succeeded.

Costs

12. The ordinary rule is that costs follow the event. On that basis, the appellant should pay the respondents' costs of the appeal. The appellant resists this conclusion, however, on the basis of what it claims was its success on the procedural requirement point and the construction point. Those points now having been determined against the appellant, it has no basis of resistance to the usual order. The appellant must pay the respondents' costs of the appeal on the standard basis, and the order will so provide.

13. The draft order proposed by the respondents (annexed to the document called "*Changyou – Dissenters' Reply Submissions*") accurately embodies our conclusions on the appellant's points and the outcome of the appeal, and we direct that the order take that form.

Leave to appeal

14. The appellant seeks leave to appeal to the Judicial Committee of the Privy Council ("the JCPC"). It claims to be entitled to leave as of right; but seeks discretionary leave in the alternative. In either case, it seeks a stay of proceedings on the petition pending resolution of the matter by the JCPC.

15. Under section 3(1)(a) of the Cayman Islands (Appeals to Privy Council) Order 1984, an appeal lies as of right from decisions of this court in the case of final decisions in any civil proceedings where the matter in dispute on the appeal to the JCPC is of the value of £300 or upwards, or where the appeal involves directly or indirectly a claim to or question respecting property or a right of similar value. There can be no question that an appeal would involve a question respecting rights (namely the respondents' rights to appraisal of the value of their shares) of a value greater than £300. The question, then, is whether the appeal would involve a final decision.

16. The hearing at first instance, and the appeal, concerned a preliminary issue. That of itself does not mean that the decision made is to be regarded as interlocutory rather than final: see *White v Brunton* [1984] QB 570 and *Holmes v Bangladesh Biman Corp* [1988] 2 Lloyd's Rep 120. In the latter case, Bingham LJ said this (at p 34C-F):

> "*Order 33, rule 3 [of the Rules of the Supreme Court] gives the court a wide discretion to order the separate trial of different issues in appropriate cases and a decision is not to be regarded as interlocutory simply because it will not be finally determinative of the action whichever way it goes. Instead, a broad common-sense test should be applied, asking whether (if not tried separately) the issue would have formed a substantive part of the final trial. Judged by that test this judgment was plainly final, even though it did not give the plaintiff a money judgment and would not, even if in the airline's favour, have ended the action*".

Applying that test, it is plain that the decision on the preliminary issue in the present case was a final decision. The preliminary issue raised the fundamental question of the respondents' ability to petition under section 238 at all, and had that question not been dealt with prior to the trial it would most certainly have formed a substantive part of the trial. Its importance is signified by the fact that, had it been determined against the respondents, it would have brought the entire proceeding to an end.

17. The appellant is accordingly entitled to appeal to the JCPC as of right.

18. Had that not been so, we would have taken the view that the question involved in the appeal was one that, by reason of its great general or public importance, ought to be submitted to the JCPC for determination at this time, and would have given leave under section 3(2)(a) of the 1984 Order.

19. We also grant a stay of further proceedings on the petition pending resolution of the matter by the JCPC. There is no point in incurring the costs of appraisal if in the end it turns out that the respondents were not entitled to maintain their petition. The stay will not extend to the costs order made on this appeal.