

Privilege in Cayman Islands appraisals – the door opens for dissenting shareholders

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Discovery is a key aspect of section 238 appraisal proceedings and is critical in establishing fair value. In *58.com* the Grand Court of the Cayman Islands recently clarified the circumstances in which a company involved in appraisal proceedings under section 238 of the Companies Act can assert privilege against dissenting shareholders.[1]

In confining the scope of privilege that 58.com can claim against the dissenters, the court has opened the door for dissenting shareholders to obtain, without challenge, discovery of documents that had historically been withheld in Cayman appraisals. This decision will have a significant impact on both current and future appraisal proceedings, where any legal advice obtained by merging companies will now come under increased scrutiny.

Background to 58.com

58.com was previously listed on the NYSE and taken private in 2020. Upon dissenting from the merger, the dissenters became entitled to have the fair value of their former shareholdings judicially determined under section 238 of the Companies Act.

During disclosure, 58.com claimed

- legal advice privilege over all documents concerning legal advice received prior to the merger being approved at the EGM
- litigation privilege over all advice received from around the time that the special committee was formed to consider the proposed merger

The dissenters argued that the company could not claim privilege against them in this way. They relied on the long-established rule in *Woodhouse v Woodhouse*[2] that a shareholder has a common or joint interest in legal advice relating to a company's administration, save where that advice has been obtained for the purpose of hostile litigation against the shareholder. The

dissenters also contended that the company could not rely on litigation privilege to withhold legal advice on a blanket basis from such an early date.

Decision

The court found that 58.com could not withhold documents relevant to the fair value of the shares from the dissenting shareholders based on legal advice privilege and restricted the circumstances in which litigation privilege could be claimed.

The court agreed with the dissenters that their ability to rely on the rule in *Woodhouse* was not extinguished by the operation of the section 238 regime (which provides that shareholders otherwise cease to have any rights as a member except the right to be paid fair value for their shares).^[3]

Similarly, the court found that it did not matter when the dissenters acquired their shares or that they were only the beneficial holders of American Depositary Shares, rather than being registered legal shareholders.

Since the dissenters no longer had any interest in the general administration of the company after serving their notices of dissent, the court decided that their ability to obtain privileged documents under the rule in *Woodhouse* was limited to advice received by the company which related to the central issue of fair value, subject also to the company's ability to assert litigation privilege.

Litigation privilege can be claimed over advice which has been obtained in connection with actual, threatened, or contemplated litigation. In the factual context of 58.com the court found that litigation was reasonably in contemplation soon after the special committee was formed. Even so, the court rejected the company's tacit plea for litigation privilege to automatically attach to all communications from this date. The company needs to establish that any documents for which it claims litigation privilege were specifically created for the purpose of the prospective section 238 litigation.

Ogier is a leading shareholder appraisal firm in the Cayman Islands and represents the largest group of dissenting shareholders in 58.com. For more information, contact your usual Ogier contact or one of the authors of this article.

^[1] *In the Matter of 58.com, Inc.* (unreported, FSD 275/2020 (MRHCJ), 22 March 2023).

^[2] *Woodhouse v Woodhouse* [1914] TLR 559

^[3] Section 238(7)

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