MAPLES GROUP

UPDATE

Check Your Privilege: Cayman Islands Companies and Disclosure Obligations

Speed Read

In *58.com* (an ongoing merger appraisal rights case where the Maples Group acts for the company), the Grand Court ("Court") has ruled that, in litigation against its shareholders (or former shareholders), a company cannot withhold documents on the basis of legal advice privilege where that advice is relevant to fair value. A company can however still rely on litigation privilege, a separate form of privilege, that applies where litigation is in reasonable contemplation and the communication is for the dominant purpose of that litigation. In a Cayman Islands appraisal context, the Court readily accepted that litigation would be in reasonable contemplation from a very early stage. This decision is particularly relevant for transactional lawyers working on take privates but applies equally to all transactional legal advice in the event of subsequent litigation in the Cayman Islands between a Cayman Islands company or Exempted Limited Partnership / General Partner and its shareholders or limited partners.

The Facts

58.com (the "Company") is a Cayman Islands company that was listed on the NYSE. It was taken private by way of a merger in September 2020. Section 238 of the Cayman Islands Companies Act allows shareholders to dissent from a merger and instead petition the Cayman Islands court to determine the fair value of their shares. Many arbitrage investment funds have capitalised on this provision and deliberately invest in Cayman Islands mergers in order to dissent. This was the case in 58.com and appraisal litigation has been ongoing since November 2020.

In accordance with usual practice in section 238 litigation, the Company was required to disclose all documents relevant to the question of fair value for a period of five years before the EGM approving the merger. The Company claimed legal advice privilege over all advice received during this period including transactional advice relating to the merger itself. The Company also claimed litigation privilege (being a separate form of privilege) over advice received for the dominant purpose of the dissent litigation. The Company's position was that litigation was in reasonable contemplation from April 2020, being the date shortly after the initial proposal to take the Company private was made public.

After the Company's disclosure exercise was well-advanced, the dissenters sought orders that, following the rule in the English case *Woodhouse v Woodhouse* [1914] TLR 559, the Company could not withhold legal advice from the dissenters on the grounds of privilege. This long-standing (but often criticised) rule provides that a shareholder has a joint interest with the company in legal advice relating to the conduct of company business, because the shareholder has indirectly paid for this advice. As a result, the company cannot claim privilege over that advice in litigation against the shareholder. Modern cases have acknowledged that this reasoning is flawed in light of the separate legal personality between a

company and its shareholders but the rule nevertheless subsists as an equitable exception to the rules on legal advice privilege.

A recognised exception to this arises in the context of litigation privilege – that is, where the communication was created for the dominant purpose of the litigation, provided the litigation was in reasonable contemplation at the time. However, the dissenters objected to the Company's commencement date for litigation privilege and argued that litigation was not in reasonable contemplation until September 2020 when the dissenters notified the Company of their intent to dissent.

The Decision

The Court found as follows:

(a) The rule in *Woodhouse* should be viewed as a procedural rule rather than a company law rule. Accordingly, it applies in a section 238 context notwithstanding that upon dissenting, pursuant to the terms of the Cayman Islands statute, the dissenters had lost all shareholder rights save for their right to be paid the fair value of their shares.
(b) Although the dissenters no longer had a joint interest in advice relating to the general conduct of the business, they had a joint interest in advice that was relevant to the question of fair value. This right was not lost simply because the dissenters were no longer shareholders as a result of the merger.
(c) Despite the fact that many of the dissenters had only become registered shareholders shortly before the EGM approving the merger, they could still see privileged advice prior to this time. The joint privilege rights travelled with the share such that the dissenters acquired the right to see earlier advice as successor in title.
(d) Litigation was in reasonable contemplation from April 2020 shortly after the take private proposal was announced given the "sabre-rattling noises" of some of dissenters at this time and the prevalence of appraisal litigation in the Cayman Islands.
(e) In light of the lateness of the dissenters' application, the Court would not require to the Company to re-do its discovery exercise and instead the parties should seek to agree a more limited disclosure of the legal advice that was materially relevant to the issues in dispute.

The Consequences

This decision is particularly relevant for transactional lawyers working on take privates who should bear in mind the following points:

(a) The test of relevance for discovery in section 238 litigation is broad and covers anything relevant to fair value or that could lead to a train of enquiry.
(b) Accordingly, in the event of (the often inevitable) dissent litigation in the aftermath of a take-private merger, all of the transactional legal advice may need to be disclosed by the company.
(c) This will include advice contained in emails but also other messaging services such as WhatsApp or WeChat.
(d) The question of when litigation privilege arises is fact sensitive and will depend on the circumstances. Advice should be sought from Cayman Islands attorneys at an early stage to ensure that litigation privilege, where available, is not lost.
(e) This decision does not mean that shareholders are entitled to access legal advice outside the litigation context. Shareholders rights of access to documents in the ordinary course continue to depend on the terms of the Articles of Association.

For further information, please reach out to your usual Maples Group contact or any of the persons listed below.

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