

Cayman Islands Court of Appeal Effectively Rewrites Section 238 of the Cayman Islands' Companies Act

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In a recent judgment in the case of *Re Changyou.com Limited*, CICA (Civil) Appeal 6 of 2021, delivered on 16 September 2022, the Cayman Islands Court of Appeal has applied the interpretative provisions of section 25 and section 15 of the Cayman Islands' Bill of Rights to re-write, in effect, section 238(1) to 238(5) of the Companies Act (2022 Revision) ("Companies Act") so as to grant an appraisal right in short-form mergers.

On the basis of the Court of Appeal's judgment, sections 238(1) to 238(5) of the Companies Act should now be read as follows (deleted words being struck through and added words appearing in bold), with the remainder of the section being unchanged:

238. Rights of Dissenters

- (1) A member of a constituent company incorporated under this Act shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation.
- (2) A member who desires to exercise that person's entitlement under subsection (1) shall give to the constituent company, before the vote on the merger or consolidation **(if any such vote is to be held) or (if no such vote is to be held) immediately after the date on which the plan of merger is given to the member pursuant to section 233(7)**, written objection to the action.
- (3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for that person's shares if the merger or consolidation is authorised ~~by the vote~~ **or approved**.
- (4) Within twenty days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, **or (if no such vote is to be held) within twenty days immediately following the date on which the plan of merger or consolidation is filed with the Registrar pursuant to section 233(9)**, the constituent company shall give written notice of the authorisation **or filing** to each member who made a written objection.
- (5) A member who elects to dissent shall, within twenty days immediately following the date on which the notice referred to in subsection (4) is given, give to the constituent company a written notice of that person's decision to dissent, stating-
 - a) that person's name and address;
 - b) the number and classes of shares in respect of which that person dissents; and
 - c) a demand for payment of the fair value of that person's share.

Section 25 of the Bill of Rights provides as follows:

"Interpretive obligation

25. In any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in [section 15]."

Section 15 of the Bill of Rights assures a right of peaceful enjoyment of property in terms which ordinarily preclude dispossession without compensation. The section is, so far as relevant, in the following terms:

"(1) Government shall not interfere in the peaceful enjoyment of any person's property and shall not compulsorily take possession of any person's property, or compulsorily acquire an interest in or right over any person's property of any

description, except in accordance with law and where – (a) the interference, taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and (b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and (c) provision is made by a law applicable to that interference, taking of possession or acquisition - (i) for the prompt payment of adequate compensation; and (ii) securing to any person having an interest in or right over the property a right of access to the Grand Court, whether direct or on appeal from any other authority, for the determination of his or her interest or right, the legality of the interference with, taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he or she is entitled, and for the purpose of obtaining prompt payment of that compensation;....

(2) Nothing in any law or done under its authority shall be held to contravene subsection (1) —

a) to the extent that the law in question makes provision for the interference with, taking of possession or acquisition of any property, interest or right—

(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract...".

The effect of the Court of Appeal's judgment is to introduce a new procedure in section 238 of the Companies Act:

- i. a dissentient shareholder must give a notice of objection immediately after the date on which the plan of merger is given to the member pursuant to section 233(7);
- ii. within twenty days immediately following the date on which the plan of merger or consolidation is filed with the Registrar pursuant to section 233(9), the Company must give a written notice of the authorisation or filing to each member who gave a written objection;
- iii. within twenty days immediately following the date on which the notice of authorization is given, a dissentient shareholder must give a written notice of dissent

The Court of Appeal's judgment differs from the way that Chief Justice Smellie had effectively re-written the relevant provisions of the Companies Act in his first instance judgment. The Chief Justice's approach had required a dissentient shareholder to give a notice of dissent within 20 days of being given a copy of the plan of merger, as follows (in bold):

238. Rights of Dissenters

- (1) A member of a constituent company incorporated under this Act shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation.
- (2) A member who desires to exercise that person's entitlement under subsection (1) shall give to the constituent company, before the vote on the merger or consolidation, written objection to the action.
- (3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for that person's shares if the merger or consolidation is authorised by the vote.
- (4) Within twenty days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, the constituent company shall give written notice of the authorisation to each member who made a written objection.
- (5) A member who elects to dissent shall, within twenty days immediately following the date on which the notice referred to in subsection (4) is given **or the date on which the plan of merger is given to the member pursuant to section 233(7)**, give to the constituent company a written notice of that person's decision to dissent, stating-
 - a) that person's name and address;
 - b) the number and classes of shares in respect of which that person dissents; and
 - c) a demand for payment of the fair value of that person's share.

In its judgment, however, the Court of Appeal accepted the Company's position that, as originally enacted and on principles of ordinary interpretation, subsections (2) to (16) of section 238, which grant an appraisal right, only apply to long-form mergers and that, but for the application of section 25 and section 15 of the Bill of Rights, section 238 would not give dissentient shareholders an appraisal right in short-form mergers.

It remains to be seen whether the Court of Appeal's approach will be revisited by the Judicial Committee of the Privy Council in due course.

Conyers acts for the Company in these proceedings.

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