



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 227 OF 2017 (IKJ)

**IN THE MATTER OF PART XVI OF THE COMPANIES LAW (2016 REVISION)
AND IN THE MATTER OF XINGXUAN LIFE TECHNOLOGY LTD**

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances: Mr David Chivers KC of counsel instructed by Ms Marie Skelly and Mr Greg Coburn of Ogier (Cayman) LLP ("Ogier") for Waterwood 020 Project Limited (the "Dissenter")

The Company did not appear

Heard: On the papers

Date of decision: 24 November 2023

**Draft Reasons
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Appraisal of fair value of shares petition-summons for directions-petitioner unable to participate in proceedings without an attorney-petitioner in breach of Court orders and apparently insolvent-requirement for bodies corporate to have legal representation-Companies Act (2023 Revision) section 238-Grand Court Rules Preamble, Order 5 rule 6 (2), Order 12 rule 1 (2)

REASONS FOR DECISION

Background

1. The Company presented the Petition herein following a merger between the Company and a subsidiary of Rajax Holding (Rajax Merger Sub Limited) on August 24, 2017 (the “Merger”). It was represented by Maples and Calder whose legal team includes attorneys who routinely appear for petitioners in section 238 appraisal cases. The law and practice under section 238 of the Companies Act (2023 Revision) has developed rapidly over the last few years in large part because the sums involved make it commercially viable to fully ‘lawyer up’ and convert what would typically be mundane interlocutory applications into veritable legal feasts. The present case was perhaps not one of the larger cases as it involves only one Dissenter. But the Dissenter’s initial investment was US \$125 million and the merger consideration was US\$480 million, which is not exactly, by the standards of most mortals at least, ‘chump change’.
2. Founders of private companies can generate significant profits by ‘going public’, raising significant sums through public share offerings and skilfully deploying the capital raised to increase the operations and market share enjoyed by the listed company. Significant profits can also be generated through ‘going private’, shedding the expenses associated with the compliance requirements of the relevant stock exchange and concentrating share ownership in fewer hands. This is often effected through a merger between an existing majority shareholder and an outside private investor who form a new private investment vehicle which they wholly own. The price that the stakeholders in the new merged company pay for acquiring a new corporate vehicle with more concentrated ownership is a statutory obligation to pay dissenting shareholders the “fair value” for their shares. As Lady Arden observed at the beginning of her judgment on behalf of the Privy

Council in *Shanda Games-v- Maso Investments Limited* [2020 (1) CILR293; [2020] UKPC 2 (at paragraph 1):

“A key feature of the statutory regime for mergers in the Cayman Islands is that it gives significant rights to dissenting shareholders (“dissenters”). They include an appraisal right, that is, the right to apply to the Grand Court for determination of the ‘fair value’ of their shares and a right to the payment of ‘a fair rate’ of interest on the outstanding consideration.”

3. A fundamental assumption underpinning this statutory regime is that where the claims of dissenting shareholders are not compromised, the petitioner will make appropriate financial provision to both fund any appraisal litigation and meet any award which the dissenter may achieve. Because the section 238 matters invariably involve well-resourced legal teams, the law and practice in this area is both complex, highly specialist and incremental in its development. This is very far removed from ‘litigant in person territory’. The present case appeared to be no exception until June of this year:

- (a) the Summons for Directions was heard on 2 March 2018, and disputes about whether the content and timing of information requests and whether management meetings should be open or closed were resolved in a 6 page judgment on 19 March 2018;
- (b) on 15-16 March 2021, I heard the Dissenter’s application for a Letter of Request and heard Specific Discovery applications filed by each party. Although the first two applications were granted at the end of the hearing, I reserved judgment on the third. This generated a 22 page Judgment dated 28 April 2021;
- (c) on 22-23 February 2023, I heard the Dissenter’s Forensic Audit Summons, issued to enforce the 2021 Specific Discovery Order made against the Company. At the end of the hearing, I granted relief consistent with a proposal made by the Company the previous December. The Reasons ran to 32 pages. I observed (at paragraph 64): “.... *Each side has accused the other in correspondence of delaying this action and neither is wholly right or wrong. Unless the parties display more tangible enthusiasm for progressing this 2017 case to trial, the Court will be obliged to consider making case management directions of its own motion and dealing with costs in future interlocutory application by making costs taxable and payable forthwith.*”;

- (d) on 5 May 2023, Doyle J heard the Dissenter's Interim Payment application. He delivered a 35 page Judgment on 26 May 2023;
- (e) on or about 15 June 2023, Maples and Calder came off the record as attorneys for the Company;
- (f) by 28 August 2023, when Doyle J, after a hearing on the papers, granted the Dissenter's their costs of the Interim Payment Summons to be payable forthwith on the indemnity basis, the Company was already in breach of the Interim Payment Order dated 26 May 2023. In a short Judgment, Justice Doyle made the following strident remarks:

“8. In my judgment the Company has however acted outside the norm and improperly and unreasonably to a high degree. It offered nothing. It would appear, in the absence of any explanation for the non-payment, that the Company never had any intention of paying an interim payment if ordered to do so...”

- 4. The hearing on the papers of the Dissenter's Summons dated 1 September 2023 with the Company unable to participate because it asserted that it could not afford to retain its former counsel nor retain new counsel had an 'other worldly' air about it. If the Company's approach to the Interim Payment Summons was somewhat surprising, its response to the Dissenter's attempts to progress the Petition to trial were no less eyebrow-raising. On 23 November 2023, I granted the directions sought by the Dissenter by its 9 September 2023 Summons on the papers on an uncontested basis.
- 5. These are the reasons for a comparatively straightforward decision which I have sought to explain more fully than would ordinarily be required because it was arrived at against a highly unusual procedural history.

Case Management Ruling prior to hearing

- 6. The Dissenter's 1 September 2023 Summons was listed for a hearing on 23 October 2023. It primarily sought directions for the exchange of expert evidence in order to progress the Petition the Company had presented to trial. The Company was by this time in breach of various earlier procedural orders of this Court, most notably an Interim Payment Order. In early October an

individual purporting to represent the Company communicated with the Court seeking an adjournment on the grounds of inability to retain counsel. On or about 10 October 2023, I made the following informal directions which were communicated by email to the Dissenter's counsel and the natural person seeking permission to represent the Company:

“CASE MANAGEMENT RULING

By email dated 9 October 2023, purportedly sent on behalf of the Company, Ms Michelle Xyn has made, inter alia, the following request of the Court:

‘Xingxuan Technology Limited (the “Company”) is in dire financial situation so we are unable to afford the expensive attorney service any more. We are sorry if that make you think we ignore or disregard your court order, that’s not our intent. We always respect the honorable judge and would like to participate in the process in good faith, if we are allowed to do so without the attorney’s support.’

I do not consider it appropriate to deal with the merits of the opposed adjournment request.

Order 6 of the Grand Court Rules provides as follows:

‘(2) Except as expressly provided by or under any Law, a body corporate may not begin or carry on or defend any such proceedings otherwise than by an attorney.’

This rule cannot be departed from save in exceptional circumstances: Telesystem International Wireless Incorporated, T.I.W. do Brasil Limitada and Demarco Almeida v. CVC/Opportunity Equity Partners L.P. and Four Others [2002 CILR 96], Smellie CJ at paragraph 70.

I am bound to refuse the request for the Company to continue the present proceedings without an attorney in breach of this Court’s Rules.

That does not mean an agent of the Company cannot request an adjournment in order to retain counsel.

The Dissenter is in these circumstances encouraged to seek instructions to agree an adjournment of the 23 October 2023 hearing if the Company is able and/or willing to seek

to retain alternative counsel on a reasonably prompt basis. If the Company is unable to even seek to retain counsel within any reasonable timeframe, the Dissenter can of course seek appropriate relief on an unopposed basis from the Court.”

7. On 16 October 2023, a Power of Attorney apparently signed by the Company’s director was emailed to the Court authorising “*WANG Shujing*” and “*XUE Yimin*” to represent the company in connection with the present proceedings. The covering email from Michelle Xue explained that the authorised agents were Susan Wang and herself (Ms Xue). With the Dissenter requesting a hearing on the papers (but ready to appear through Leading Counsel) and the Company’s agents requesting to appear at a live hearing, I issued the following further Case Management Ruling on 19 October 2023:

“SUMMARY CASE MANAGEMENT RULING ON 23 OCTOBER 2023 HEARING

1. *The Dissenter’s Summons for Directions is listed for hearing on 23 October 2023.*
2. *The Company is admittedly unable to pay its debts as they fall due, in breach of (inter alia) an Interim payment Order and is unable to retain counsel on usual commercial terms. Through an authorised agent it is seeking time to obtain counsel to act for it on a pro bono basis. The Court has even been asked to assist in identifying such counsel and/or to permit to adduce its valuation evidence in any event.*
3. *The statutory scheme pursuant to which the Company itself commenced these proceedings assumes that the Petitioner will be adequately funded to both contest such proceedings and meet any payment orders the Court may make. The Company’s present position seriously undermines the efficacy of the section 238 jurisdiction and the processes of this Court.*
4. *The Dissenter invites the Court to either proceed with the directions hearing or to dispose of the application on the papers.*
5. *It is obvious that the only rational case management decision is to direct for the hearing to proceed on the papers to avoid the Dissenter incurring unnecessary costs which it may never recover. This is because:*
 - (a) *the Company cannot substantively defend the present proceedings without counsel;*
 - (b) *the Company admits it is unable to instruct counsel on usual commercial terms;*
 - (c) *the Company’s attempts to find pro bono counsel seem fanciful as there is no precedent in this jurisdiction (or any other jurisdiction of which I am aware) for pro bono representation taking place on behalf of private commercial entities;*
 - (d) *only a limited range of Cayman Islands law firms have the requisite specialist knowledge and experience to be able to effectively represent the Company in litigation of this nature without the assistance of an international law firm and/or leading counsel. It*

seems highly unlikely that any of such firms would agree to act on a pro bono basis. For the avoidance of doubt, it is not the function of the Court to assist sophisticated commercial litigants to find counsel.

6. I will accordingly grant such directions as I consider appropriate on the assumption that the present proceedings will not be contested and will give reasons for granting those directions. However I will give liberty to the Company to apply to vary those directions in the event that fresh lawyers do come onto the record within a reasonable time (e.g. by 30 November 2023). This will ensure that the Company will not be prejudiced if my present assessment that there is no real prospect of counsel being retained is reasonably quickly shown to be wrong.”

Order made on Dissenter’s Summons

8. The Dissenter’s counsel submitted a draft Order on 24 October 2023 for my consideration. I failed to address the matter promptly and the proposed timetable was out of date by the time I revisited this matter again and circulated my proposed form of Order on 22 November 2023. My delay in dealing with the matter was in part due to a desire to afford the Company an opportunity to find new counsel and avoid making a timetable only to revisit it in early course. Giving directions for a section 238 petition to be heard on an unopposed basis unless the Petitioner obtained counsel was hardly a standard procedural direction.

9. The Dissenter’s counsel then submitted a revised draft Order to the Court on 22 November 2023 which I approved the next day in the following terms:

1. *The procedural timetable in the Order of this Honourable Court dated 5 September 2018 as amended from time to time (the ‘Directions Order’) be and is varied as follows:*

1.1 *Under paragraph 25 of the Directions Order:*

(a) *any factual evidence to be relied upon at the trial shall be given by affidavit, with any such affidavits to be filed and served by 4:00pm on 21 December 2023, and any affidavits in response shall be filed and served within 14 days.*

(b) *No such affidavit shall be read at trial unless a deponent the subject of a notice under paragraph (c) presents themselves for cross examination at such time and date as the Court shall direct.*

- (c) *Any party wishing to cross examine a deponent shall serve on the other party a notice to that effect at least 21 days before the date on which the trial of the Petition is first fixed to begin.*
- 1.2 *Under paragraph 22(3) of the Directions Order, the Reports shall be exchanged simultaneously by 4pm on 26 January 2023.*
- 1.3 *Under paragraph 23 of the Directions Order, the Experts shall meet with a view to producing the Joint Memorandum required under paragraph 24 of the Directions Order within 28 days following the date the Reports are exchanged;*
- 1.4 *Under paragraph 24 of the Directions Order, the Experts shall produce their Joint Memorandum no later than 28 days following the date of the meeting of the Experts.*
- 1.5 *Under paragraph 25 of the Directions Order no CMC shall be held but each of the parties shall have liberty to apply for a CMC if so required.*
- 1.6 *Under paragraph 26 of the Directions Order the parties shall attend on the Registrar of the FSD within 14 days of the Joint Memorandum being produced to fix a listing for the trial of the Petition.*
2. *Paragraphs 2 to 7 inclusive in the Order of this Honourable Court dated 14 March 2023 dealing with access to the Historic Data (as defined at paragraph 2 therein) be suspended until further order of the Court.*
3. *Unless the Company appears through attorneys of record, the Petition shall proceed on an unopposed basis.*
4. *Liberty to apply.*
5. *The costs of this Summons be costs in the cause.” [Emphasis added]*
10. I considered these directions to be reasonable to approve in circumstances where it was appropriate to infer that the Company’s controllers had deliberately elected to withdraw funding support which would have enabled the Company to continue to actively participate in these proceedings and discharge both its obligations to the Dissenter under section 238 of the Companies Act and its

obligation under the Preamble to the Grand Court Rules to assist the Court to achieve the Overriding Objective.

Refusal of the Company's request to be represented by agents instead of lawyers

11. I considered but ultimately decided against fixing a date by which the Company should retain counsel. As a practical matter, my provisional view is that if counsel were to be retained and instructed to delay the proceedings, any such efforts would not receive a warm welcome from the Court. Participation with a view to advancing the Company's case in a manner consistent with the Overriding Objective will always be welcome and would ease rather than increase the Court's adjudicative burden. Of course, compliance with the Interim Payment Order dated 6 June 2023 (Doyle J) in the amount of approximately US\$35.7 million is likely to be a precondition for any further formal participation in these proceedings on the Company's part.
12. This Court's duty to deploy active case management measures¹ requires that procedural orders be viewed as subject to ongoing review. After explaining why I refused the Company's application to be represented by non-lawyers in the 19 October 2023 Summary Case Management Ruling (and proceeded to dispose of Dissenter's 9 September Summons on an unopposed basis), I will also briefly explain the results of my subsequent review of that process. The starting point is this Court's rules. GCR Order 5 rule 6 provides:

“Right to sue in person (O. 5, r. 6)

6. (1) Subject to paragraph (2) and to Order 80, rule 2, any person (whether or not the person sues as a trustee or personal representative or in any other representative capacity) may begin and carry on proceedings in the Court by an attorney or in person.

(2) Except as expressly provided by or under any Law, a body corporate may not begin or carry on or defend any such proceedings otherwise than by an attorney. [Emphasis added]

13. GCR Order 5 rule 6 does not confer an express discretionary power to permit a company to appear in person although this cannot exclude the Court's power, having regard to the umbrella fair hearing rights in section 7 of the Constitution and the common law rules of natural justice, to allow a non-

¹ The Preamble to the Grand Court Rules provides:

“4.1 The Court must further the overriding objective by actively managing proceedings.”

lawyer to speak on behalf of a company to some extent. In the present case I was willing to consider an application for an adjournment by the Company's authorised agents, but only if they were willing to demonstrate that a serious attempt would be made to retain fresh counsel. On the contrary, they expressly represented that they could not afford to retain counsel.

14. GCR Order 5 rule 6 (2) must be read in conjunction with GCR Order 12 rule 1 (2):

“Mode of acknowledging service (O.12, r.1)

1. (1) *Subject to paragraph (2) and to Order 80, rule 2, a defendant to an action begun by writ may (whether or not the defendant is sued as a trustee or personal representative or in any other representative capacity) acknowledge service of the writ and defend the action by an attorney or in person.*
- (2) *The defendant to such an action who is a body corporate may acknowledge service of the writ and give notice of intention to defend the action either by an attorney or by a person duly authorised to act on the defendant's behalf but, except as aforesaid or as expressly provided by any Law, such a defendant may not take steps in the action otherwise than by an attorney.*

15. How has this Court applied these rules in the past? It was only in the course of preparing this Judgment and ensuring that my previous decision on the Company's participation should not be revisited that I have referred to any judicial authority seriously considering the relevant rules. Smellie CJ (as he then was) in *Telesystem International Wireless Incorporated v CVC/Opportunity Equity Partners LP* [2002 CILR 96], dealing with a contempt application, provided a most illuminating analysis of the principles underpinning these rules:

“61. How, then, is a corporation to be regarded as being present? The normal principle is that a corporation can only pursue litigation by being represented by its legal advisers. Only in exceptional circumstances will a corporation be allowed for those purposes to be represented by its officers or employees. The normal principle is recognized in the rules of court. In O.12, r.1 (2), it is provided that, apart from acknowledging service of a writ and giving notice of intention to defend, a corporate defendant ‘may not take steps in the [writ] action otherwise than by an attorney.’ And, more generally, O.5, r.6 (2) of the Grand Court Rules provides that

'except as expressly provided by or under any Law, a body corporate may not begin or carry on or defend any . . . proceedings otherwise than by an attorney.'

62 *These are rules of considerable antiquity, embracing the practice of the courts for more than a century: see Re Arbitration Between London County Council and London Tramways Co. (12) and Scriven v. Jescott (18) (both cited at 1 The Supreme Court Practice 1997, para. 5/6/1, at 30). They are rules which are rarely waived, having, as they do, their basis in fairness and common sense. So observed Bingham, M.R., in delivering the judgment of the English Court of Appeal in Radford v. Freeway Classics Ltd. (15). He further explained ([1994] 1 BCLC at 448):*

'It is worthy of note that the provisions which I have cited from the rules which require corporations to appear through solicitors are not merely rules for the sake of having rules but rest on a basis of fairness and good sense . . . A limited company, by virtue of the limitation of the liabilities of those who own it, is in a very privileged position because those who are owed money by it, or obtain orders against it, must go empty handed away if the corporate cupboard is bare. The assets of the directors and shareholders are not at risk. That is an enormous benefit to a limited company but it is a benefit bought at a price. Part of the price is that in certain circumstances security for costs can be obtained against a limited company in cases where it could not be obtained against an individual, and another part of the price is the rule that I have already referred to that a corporation cannot act without legal advisors. The sense of these rules plainly is that limited companies, which may not be able to compensate parties who litigate with them, should be subject to certain constraints in the interests of their potential creditors.'

63 *This dictum is as important for all it implies as it is for all it expresses. As I understand it, the principle is not simply that a company which is represented, and therefore can afford legal representation, will also likely be able to satisfy a judgment debt obtained by its creditors. That may or may not be the case. More importantly, what is implied, I believe, is that as attorneys also owe public duties as officers of the court, the court can more readily assume that corporations who*

are represented by attorneys are more likely to conduct themselves in a responsible manner in relation to litigation before the court.” [Emphasis added]

16. These observations seem particularly apposite to the present case where the Company, shorn of its high-powered and reputable attorneys, was seeking to participate in substantial commercial proceedings while in breach of a substantial payment Order made by this Court. A contrasting scenario existed in *Aydoc & Aydoc-v-Lorimar Development Limited*, G 101 of 2015, Judgment dated 31 July 2020, where Justice Robin McMillan refused the application of a company’s attorney to come off the record to preserve its ability to participate in the proceedings. The application by the attorney to come off the record prior to a taxation of costs hearing came after the plaintiff had obtained judgment against the company in relation a building dispute (following a successful appeal to the Court of Appeal). A no less trenchant view was taken of the importance of a body corporate being legally represented, however. McMillan J held:

- “7. *The Court was unable to see its way to granting the application having reviewed and considered the relevant provisions of the Grand Court Rules.*
8. *First, O.5, r.6 (1) and (2) states:-*
- ‘6. (1) Subject to paragraph (2) and to Order 80, rule 2, any person (whether or not he sues as a trustee or personal representative or in any other representative capacity) may begin and carry on proceedings in the Court by an attorney or in person.*
- (2) Except as expressly provided by or under any law, a body corporate may not begin or carry on or defend any such proceedings otherwise than by an attorney.’*
9. *In light of this latter stipulation, the Court does not consider that in the current circumstances it would be consistent with the interests of justice to place both the Plaintiffs and indeed the Defendant itself in such a predicament whereby the Defendant cannot function.*

10. *It is essential in practical terms that the Defendant continues formally to be represented irrespective of whether the Defendant's attorneys are able to obtain specific instructions or no*
12. *In conclusion, this is an occasion where in coming to its decision the Court must look to the broader interests of justice and to the appropriate maintenance of confidence in the efficacy of our judicial system. The Court must ensure that the normal advancement of the proceeding is facilitated rather than delayed or obstructed, that there is a saving of expense and that the cause or matter is dealt with by the Court in a way that is proportionate.”*
17. The most recent consideration of these rules came in *Intertrust Corporate Services (Cayman) Limited-v-Cayman Islands Monetary Authority*, FSD 158 and 169 of 2021 (NSJ), Judgment dated 27 May 2022 (unreported) which directly concerned the question of whether the Authority’s in-house attorneys qualified as attorneys for the purposes of these rules. Segal J found there was no relevant distinction between ‘in-house’ attorneys and other attorneys, it seemingly being common ground that the legal representation requirement prescribed by Order 5 rule 6 rule 2 and Order 12 rule 1 (2) was a strict one.
18. These rules are expressed in more restrictive terms than the equivalent provisions in the English Civil Procedure Rules (“CPR”), which it is helpful to consider to gain a wider conceptual perspective. CPR 39.6 provides:

“Representation at trial of companies or other corporations

39.6 *A company or other corporation may be represented at trial by an employee if–*

- (a) the employee has been authorised by the company or corporation to appear at trial on its behalf; and*
- (b) the court gives permission.”*

19. It appears that CPR 39.6 does not apply to Small Claims in England and Wales at all.² The position in commercial cases is most relevant to the present case. In *Bank of Baroda-v- GVK* [2023] EWHC 2560 (Comm), Dame Clare Moulder (sitting as a Deputy Judge of the High Court) declined to hear a representative of the unrepresented company on an application for an adjournment. As to the governing principles, she held:

“CPR 39.6, ‘Representation at trial of companies or other corporations’ provides:

‘A company or other corporation may be represented at trial by an employee if -

(a) the employee has been authorised by the company to appear at trial on its behalf; and

(b) the court gives permission.’

Paragraph M3.1 of the Commercial Court Guide states:

‘Although rule 39.6 allows a company or other corporation with the permission of the Court to be represented at trial by an employee, the complexity of most cases in the Commercial Court generally makes that unsuitable. Accordingly, permission is likely to be given only in unusual circumstances, and is likely to require, at a minimum, clear evidence that the company or other corporation reasonably could not have been legally represented and that the employee has both the ability and familiarity with the case to be able to assist the court and also unfettered and unqualified authority to represent and bind the company or other corporation in dealings with the other parties to the litigation or with the Court.’[Emphasis added]

20. This decision provides further support for the proposition that under the Cayman Islands procedural framework, particularly in the context of a complex commercial case, the requirement for legal representation ought generally to be regarded as a principle which will be strictly adhered to. It certainly confirms rather than undermines the decision that I made in the Summary Case Management Ruling on 19 October 2023. I see no need to revisit this decision in all the circumstances of the present case.

² *Sunrule Limited-v- Avinue Limited* [2003] EWCA Civ 1942 at paragraph 19.

21. Are there exceptions to the general exclusionary rule? For my part it ought to still be open to this Court, depending on the particular circumstances of each case, to hear a corporate representative “to ensure that there [are] no unusual extenuating circumstances which might justify the Court granting the adjournment... sought to enable the Fund to obtain legal representation...”.³ These cases perhaps suggest that I may in previous cases have adopted an overly liberal approach to hearing non-lawyer representatives of legally unrepresented companies. Moreover the approach to be adopted in cases involving modest sums may be somewhat different. In my judgment the fair hearing rights protected by section 7 of the Constitution and the Overriding Objective combine to require priority to be given to substantive justice rather than over slavish adherence to the formal requirements of this Court’s Rules.

Conclusion

22. For these reasons, on 23 November 2023 I gave directions for the further conduct of the section 238 Petition presented by the Company on the application of the Dissenter, on terms that the case would proceed on an unopposed basis unless the Company was legally represented.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

³ See e.g. *Re Oakrun Precious Metals Fund, Ltd*, FSD 9 of 2019 (IKJ), Judgment dated 30 April 2019 (unreported as to this point), paragraphs 5-6.