



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

**CAUSE NO: FSD 275 OF 2020 (MRHCJ)**

**IN THE MATTER OF THE COMPANIES ACT (2020 REVISION)  
AND IN THE MATTER OF 58.COM, INC.**

**IN CHAMBERS**

**Appearances:**

Mr Jonathan Adkin KC instructed by Ms Dunzelle Daker of Ogier, Mr Mark Dowds of Carey Olsen, Ms Charlotte Walker of Collas Crill and Ms Katie Logan of Campbells, on behalf of “the Dissenters”<sup>1</sup>

Mr Charles Béar KC instructed by Ms Caroline Moran, Mr Daniel Mills, Ms Christiana McMurdo and Mr Malachi Sweetman of Maples and Calder, on behalf of 58.Com, Inc. (“the Company”)

**Before:** The Hon. Justice Kawaley

**Heard:** 9-10 January 2023

**Draft Judgment  
Circulated:** 13 March 2023

**Judgment Delivered:** 22 March 2023

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<sup>1</sup> The 45 Dissenters are listed in Appendix 1 to their Cross-Summons dated 10 May 2022.

**HEADNOTE**

*Petition under section 238 of the Companies Act-cross-application by Dissenters for a declaration that the Company is not entitled to claim privilege against its own shareholders save as regards hostile litigation against them-Companies Act (2020 Revision), section 238*

**RULING ON DISSENTERS' CROSS-SUMMONS RELATING TO PRIVILEGE****Background**

1. On 2 April 2020, Ocean Link announced a proposal to buy the Company's shares for US\$55 per Alternative Depositary Share ("ADS"). Later that month, a Special Committee was appointed and advisers including Fenwick & West LLP were retained. The possibility of dissenting shareholders to any merger agreement which might be reached surfaced, according to the Company, one week later. On 30 April 2020 the buyer group including Ocean Link and the Company's founder Mr Yao submitted a formal offer. On 15 June 2020, the Special Committee recommended acceptance of the merger offer (subject to shareholder approval) and Maples & Calder (Cayman) LLP were retained to handle litigation on 19 June 2020. The extraordinary general meeting to consider and potentially approve the merger was held on 6 September 2020 ("EGM"). The merger was approved by the requisite majority of more than 75% of shareholders voting. The 45 Dissenters filed Notices of Dissent between on or about 14 September and on or about 1 October 2020. A fair value offer made by the Company to the Dissenters on 7 October 2020, pursuant to section 238(8) of the Act, was rejected.
2. The Company presented its Petition herein on 10 November 2020. The case was assigned to Ramsay-Hale J (as she then was) and it remains, save for the present discrete application, on her docket. A three-day directions hearing took place in the summer of 2021 and the present dispute of the scope of the Company's ability to claim privilege was not canvassed. The order on the Summons for Directions was formally made on 8 November 2021, and the Company gave disclosure in various batches or tranches over several months commencing in mid-October 2021. On 12 April 2022, the Company filed a Summons seeking, *inter alia*, injunctive relief against the Dissenters in relation to their section 1782 discovery applications in the United States. By their Cross-Summons dated 10 May 2022, the Dissenters sought so far as is relevant for present purposes the following relief:

*“3. An order that the Company disclose and produce for inspection (and may not claim privilege against the Dissenters in respect of) documents within its possession, custody or power in relation to any period prior to 30 September 2020.*

*4. Such further or other orders as the Court thinks fit, including as to costs.”*

3. The Dissenters’ fundamental position, opposed by the Company, is that the well-known principle that a company cannot assert legal advice privilege against a shareholder in relation to the management of the company’s affairs applies to discovery given by the petitioner in appraisal proceedings. It is common ground that this legal point, in effect whether the Dissenters share a joint interest privilege with the Company, has not been adjudicated (nor seemingly even raised) before in any of the many section 238 proceedings which have taken place in this Court since the section’s enactment in 2014.

#### **Preliminary views**

4. It seemed reasonable to infer that the Dissenters’ Cross-Summons was to some extent a tactical response to the Company’s ‘attack’ on the Dissenters’ overseas discovery machinations. The First Affidavit of Marie Skelly was sworn both in opposition to the Company’s Summons and in support of their own Cross-Summons. The Dissenters’ evidence did not reveal any pivotal event, like Isaac Newton’s falling apple, which suddenly inspired the notion that a joint interest privilege claim existed and/or should be asserted. As the common law is grounded in the notion of legal theory rendering service to practical problems, a common lawyer is entitled to view with some initial scepticism an argument based on longstanding legal principles being raised in well-trodden legal terrain seemingly entirely detached from any discernible practical dilemma. However, that same initially sceptical common lawyer will generally do well to recall that the soundness of legal points does not invariably depend on the familiarity of the factual matrix in which a novel argument is advanced.
5. Because of the consistently high value of section 238 appraisal proceedings, company founders and dissenters have a shared vested interest in ensuring that the governing legal framework conforms as far as possible to their respective notions of commercial rationality. While I would not hesitate about summarily dismissing an obviously hopeless tactical application, this Court should be slow to allow initial scepticism to cloud its judgment about the true merits of novel legal points which litigants have clearly significantly invested in having fully argued by experienced counsel. Although the section 238 path is now fairly familiar, this Court’s less than one decade’s experience

is still only infantile in historical legal terms. By the end of the hearing therefore I had formed the following preliminary views:

- (a) in principle, joint interest privilege should be enforceable by registered shareholders of companies, without regard to whether they were registered shareholders or ADS holders at the time the legal advice was given. Section 238 does not exclude the rights of dissenting shareholders to assert joint interest privilege where it properly arises;
- (b) joint interest privilege is unlikely in most cases to properly arise in relation to legal advice obtained by the Company in relation to the merger process itself. Legal advice received at some point after the announcement of the merger (the date when the first notice of dissent is served being the latest possible point) is likely in most cases to be covered by litigation privilege in any event;
- (c) as section 238 proceedings are appraisal proceedings, only legal advice relevant to the fair value of the shares would be properly discoverable. This would be unlikely to occur in each and every case. When legal advice was materially relevant, the case in favour of disclosure would probably speak for itself and would be clearly linked to specific assets and documents related to their valuation;
- (d) assuming that joint interest privilege could be asserted by the Dissenters, would the right to assert it not be constrained to some extent by the context of the present litigation since they had no subsisting interest in the general administration of the Company's affairs? This might explain why:
  - (i) the joint privilege issue was belatedly raised in the present case, detached from any specific challenges to privilege claims in relation to identified documents; and
  - (ii) joint interest privilege had not apparently been asserted by dissenters, on a broad basis at least, in past section 238 cases<sup>2</sup>; and

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<sup>2</sup> A rare privilege dispute in a section 238 case arose in relation to dissenter discovery in *Re Nord Anglia*, FSD 235/2017 (IKJ), Judgment dated 21 June 2019 (unreported).

- (e) further and in any event, it seemed likely that in relation to issues and documents in relation to which the legal advice received by a company were highly material to the central issue of fair value, the law would not in any event permit the section 238 petitioner from using legal privilege as a shield.

## The Dissenters' Submissions

### Overview

6. In their Skeleton Argument, the Dissenters' counsel summarized their case on the present application as follows:

*“2. In overview, the 10/5/22 Summons relevantly seeks an order for disclosure and production of documents which the Company claims to be entitled to withhold from the Dissenters on grounds of legal professional privilege. Save in relation to documents created after the Dissenters had served their notices of dissent pursuant to section 238(5) of the Act, those claims of privilege are unfounded:*

*2.1. It is a well-established rule that a company cannot claim privilege against its own shareholder in relation to the documents of the company, including confidential advice obtained by the company, unless obtained for the purpose of hostile litigation against that shareholder: Woodhouse v Woodhouse [1914] TLR 559 [DA/2/15-16].*

*2.2. The Company contends that the rule does not apply here because the Dissenters' shareholdings originally took the form of interests under the American Depositary Share (“ADS”) system, whereby they were beneficial owners of the shares rather than registered shareholders. That is a wholly unmeritorious distinction without a difference given the established scope and purpose of the rule, which is engaged by the joint or common interest of those beneficially entitled to a common fund in advice obtained in respect of that fund (and where they will have borne, directly or indirectly, part of the cost of obtaining the advice). In any event, the Dissenters all ultimately exercised their rights as holders of ADSs to become legal owners of shares in the Company and, to the extent of any difference, will have succeeded to all the rights of the nominee as regards privilege.*

*2.3. The Company alternatively contends that it is entitled to withhold documents from a given Dissenter save where the documents were created at a date by which that Dissenter already held shares (or ADSs). Given the various dates on which the Dissenters acquired their respective shares, this would be highly unwieldy as a matter of procedure, and it is baseless as a matter of law. The true principle is that privilege cannot be asserted against a shareholder in respect of any of the Company's documents as to which they have a joint or common interest and this extends to all documents whose creation predated any litigation reasonably expected against the shareholder. Further and in any event, by virtue of the principles already referred to, rights of privilege vis-à-vis the Company are ancillary to ownership of its shares and a shareholder succeeds to all such existing rights on*

*acquisition of their shares. Nor is the position altered, as regards documents already existing, by the cessation of a shareholder's membership of the company (or, by the same token, any alteration of the nature of their shareholder rights under the scheme of s 238 of the Act).*

*2.4. Although it is common ground that the Company is, on the other hand, entitled to withhold documents created after hostile litigation was reasonably contemplated, that arose only after the Dissenters served notices of dissent pursuant to section 238(5) of the Act (between 15 September 2020 and 1 October 2020) and not, as the Company contends, from the date when the Board resolved to constitute a Special Committee to consider a merger proposal (in April 2020), which was necessarily to be done in the shareholders' interests rather than for purposes of any contemplated hostile litigation.*

*2.5. Finally, the Company contends that it is 'too late' for the Dissenters to seek discovery and inspection of the documents withheld. However, on the premise that the Court considers that those documents should not have been withheld at all, the suggestion that it is somehow precluded from requiring the position now to be rectified and must instead resolve the proceedings on a partial and incomplete evidential basis is self-evidently without merit.*

*3. It follows that privilege has been asserted on incorrect bases, apparently with respect to large volumes of relevant documents. Given the community of interest between a company and its shareholders, there is simply no basis for the Company to hide behind the cloak of privilege as regards documents created at any time before the expectation of hostile litigation had brought that community to an end, or as regards documents created at any time for a purpose other than such litigation, as regards any of its shareholders. Justice strongly requires that the proceedings should be determined with the benefit of the full documentary record relevant to the issues arising and the Court is asked to grant the necessary relief accordingly."*

### **The Dissenters' framing of the factual matrix**

7. As regards the Dissenters' relationship with the Company's shares, this was summarized as follows:

*"4.2. At all material times prior to the Merger, the Company's ADSs, each representing two Class A shares of the Company, were listed on the New York Stock Exchange under the symbol "WUBA". The Company's Class A shares were not listed and investors wishing to invest in WUBA could only buy ADSs. These interests were created pursuant to a Deposit Agreement dated 31 October 2013, governed by New York law, and entered into between the Company, Citibank, N.A. as depository ("Citibank"), and all holders and beneficial owners of ADSs issued thereunder (the "Deposit Agreement" ...).*

*4.3. The Dissenters acquired their ADSs at various times beginning in about 2013 the associated shares all originally being registered in the name of Citibank as depositary. In order to exercise their statutory dissent rights, each of the Dissenters subsequently converted their ADSs into Class A shares (as they were expressly entitled to do under the Deposit Agreement, and required to do in order to dissent from the Merger) and became the legal owners of such Class A shares. Such conversion into legally owned Class A shares took place in each case prior to 7 September 2020, the date of the EGM of the Company at which the Merger was approved...”*

8. The timing of the present application was explained as follows:

*“5.3. The Company’s position that it was entitled to assert privilege against its shareholders, including with respect to documents created prior to there being any conceivable expectation of hostile litigation or documents which have nothing to do with such litigation, became apparent in the context of an application made in the US courts against Houlihan Lokey pursuant to section 1782 of Title 28 of the United States Code (which was one of a number of section 1782 applications made on behalf of the Dissenters). In particular, Houlihan Lokey produced a ‘privilege log’ identifying 434 documents in respect of which it was said that the Company asserted privilege as against the Dissenters (and in addition to documents as to which Houlihan Lokey itself asserted privilege). Subsequent correspondence with the Company’s counsel in about March to May 2022 confirmed that this was indeed the Company’s position...”*

9. This is a somewhat beguiling averment, as regards what it implies. Most broadly, it implies that there is something unusual, if not unprecedented, in the context of a section 238 proceeding for privilege to be claimed based on legal advice as opposed to litigation privilege. In fact, the Company’s contention that joint interest privilege has not been asserted or recognised in past cases was not contradicted. Secondly, and more narrowly, the submission implies without substantiation that it is self-evident from the nature of the documents in respect of which privilege has been claimed by the Company, that such advice must be relevant to the question of fair value around which the present appraisal proceedings revolve. This highlighted the need to consider the practical implications of the declaration the Dissenters sought in addition to the abstract legal merits of the supporting legal arguments.
10. The Company’s evidence positively asserted that in none of the previous section 238 cases of which the deponent was aware had the joint interest privilege claim advanced by the Dissenters in the present case been asserted. This assertion, which was not materially undermined, suggested most significantly that legal advice materially relevant to the issue of fair value was not a standard feature of appraisal proceedings. Bearing in mind the typically vigorous and rigorous way in which section 238 cases have been contested over more than 5 years, the fact that the joint privilege claim was



only now being asserted suggested the Dissenters' broadly framed case was a somewhat counterintuitive one. Accordingly, the counter-assertion that if joint interest privilege did apply on the basis contended for by the Dissenters the Company's discovery exercise to date would have been largely wasted initially seemed to me to be more rhetorical than real.

11. Nonetheless, the First Affidavit of Marie Skelly did specifically point to privilege being claimed in relation to what appeared to be advice to the Special Committee in relation to the merger as an instance of an improper assertion of privilege without asserting that this was inconsistent with past practice in previous section 238 cases. And the First Affidavit of Katherine Logan, sworn in reply, accepted that the joint privilege issue had never been considered in previous cases, while describing (at paragraph 12) with greater specificity the parameters of the Dissenters' complaint:

*“...the matter in issue is whether the Company can claim privilege against the Dissenters in material...such as, for example, legal advice given to the Special Committee regarding the negotiation of the merger agreement or advice given to the Company regarding the terms of that agreement.”*

#### **The Dissenters' legal submissions**

12. Mr Adkin KC addressed two main points of legal principle. Firstly, did the rule in *Woodhouse v Woodhouse* [1914] TLR 559 operate in favour of the Dissenters in the present case so that the Company could only rely on litigation privilege in relation to any documents disclosed in the present case? Secondly, if the rule did apply, at what point in time was it possible for the Company to rely upon litigation privilege because litigation had become within the Company's reasonable contemplation.
13. As regards the first point, Mr Béar KC accepted that it would not be easy for a Judge of this Court to accept the proposition he reserved the right to pursue at a higher level, namely that the rule in *Woodhouse* no longer applied at all. Controversy accordingly focused on whether the rule applied (a) at all, having regard to the terms of section 238, and/or (b) during any period when any one or more of the Dissenters was merely an ADS holder as opposed to a registered shareholder. The way in which the Dissenters' Skeleton Argument addressed the parameters of the *Woodhouse* rule can accordingly be adequately described by reproducing the following selective passages:

*“6.1. The line of authorities expounded in Woodhouse v Woodhouse [1914] TLR 559 establishes the principle that a shareholder in a company is entitled to see otherwise privileged documents of the company obtained in the course of the company's*



*administration of its affairs, including advice by solicitors to the company, excepting only where the advice relates to hostile litigation between the company and the shareholders.*

6.2. *In CAS (Nominees) v Nottingham Forest [2001] 1 All ER 954 at [16]-[17], the Court rejected the submission that the rule in Woodhouse should not apply to a public limited company with substantial numbers of shares in issue, quoted on a stock market. The judge held that there was nothing in the authorities which supported the ‘proposition that the rule is to be differently applied depending on the size and importance of the company concerned’.*

6.3. *In the Cayman Islands, the rule has been applied on multiple occasions: see In re Torchlight Fund L.P. [2016 (1) CILR Note 9] [DA/4/27]; Unreported, 6 April 2016, In re Torchlight Fund LP (at [39-42]) [DA/5/28-59] (at [DA/5/46-47]); In re Freerider Limited [2009 CILR 604] (at [26-27]) [DA/6/60-84] (at [DA/5/72-74]); and In re Fortuna Development Corporation [2004-05 CILR 197] (at [39-40]).*

6.4. *The original basis of the principle lay partly in the analogy with the relationship between a trustee and a beneficiary and having regard to the latter’s proprietary interest in the common fund or property at issue...*

6.6. *More recent authorities have also emphasised that the rule in Woodhouse is reflective of a wider principle which arises out of procedural law and the law of evidence rather than the substantive law governing particular relationships: see Dawson-Damer v Taylor Wessing [2020] Ch 746 [DA/9/110-140]. In the latter case, the English Court of Appeal quoted approvingly the following statement from Bankim Thanki KC The Law of Privilege (3rd. ed.), at paragraph 4.84:*

*‘There exist relationships within which the parties will be unable to claim privilege in certain communications as against each other. More specifically, privilege cannot be claimed in circumstances where the parties to the relationship have a joint interest in the subject matter of the communication at the time that it comes into existence.’ ”*

14. The last point, that the joint interest rule applied to shareholders otherwise than as a substantive principle of company law was emphasised by Mr Adkin KC in oral argument by way of response to the Company’s contention that section 238(7) of the Act prevented the Dissenters from relying upon any pre-existing shareholder rights in the present proceedings, including the rule in *Woodhouse*. Dealing with the alternative argument that the rule did not operate in favour of ADS holders in any event, the following central points were advanced:

*“11. The position of ADS holders has received previous judicial consideration, in the context of which it has been held that such holders have an interest in the contractual arrangements by which the shares are held pursuant to the ADS documents (see Richards LJ in Secure Capital SA v Credit Suisse AG [2017] 2 CLC 428) [DA/12/163-178]. In*

*Pearson v Lehman Bros Finance [2010] EWHC 2914 Ch [DA/13/179-275], Briggs J held that that there was still a trust in the overall pool of shares and that ‘such a trust works by creating a beneficial co-ownership share in the identified fund, rather than in the conceptually much more difficult notion of seeking to identify a particular part of that fund which the beneficiary owns outright’ (at [232]) ([DA/13/229]). The investors who use intermediary participants are the ‘ultimate beneficial owners’ of the relevant interests that exist in the intermediated chain of interests (see Briggs J in Re Lehman Brothers Int (Europe) [2014] 2 BCLC 295 [163]).*

*12. Furthermore, the following aspects of the arrangements are beyond dispute. It is the ADS holders, not the nominee depositary that have an economic interest in the value of the Company's shares. It is the ADS holders, not the depositary, that are entitled to receive dividends and shareholder communications, to give voting instructions, and to exchange their ADSs for shares (see Logan 1 at [15.5] and, generally, at [13]-[18]...) In other words, the Dissenters were at the material times shareholders in every sense except holding legal title, enjoying all the other interests and rights that come with share ownership. New York Courts have generally endorsed the analysis that they, and not the depositary, have the rights of shareholders: see Logan 1 at [16]...”*

15. The nub of the Dissenters’ response to the Company’s alternative argument that litigation privilege could be claimed over most of the documents was summarised in the Dissenters’ Skeleton Argument as follows:

*“ 26.6. The position between the Dissenters and the Company only became adversarial following the giving of notices of dissent under s 238(5) of the Act (and, even then, only upon the failure of the written offer pursuant to s 238(8)). At that stage, but no earlier, the Dissenters and the Company ceased to be engaged in a process in which they had a common interest, namely the assessment of the value that was fair for their shares. The nature of the process changed at that stage because, pursuant to the statutory mechanism, the Company’s view of fair value had been rejected by the Dissenters, thus requiring the appraisal of fair value by a process of adversarial litigation between the Dissenters and the Company pursuant to s 238(9).*

*27. Accordingly, the exception to the rule only applied from, at the earliest, 1 October 2020.”*

16. As regards the principles governing when the application of litigation privilege first arises, and the scope of this category of privilege, I considered the following submissions to be most pertinent:

*“25.1. In Sharp, Newey J conducted a review of the caselaw and held that the authorities were consistent to the effect that the exception to the rule arises only where advice is taken by the company in relation to litigation that is ‘actual, threatened or in contemplation’ (at [12]). Moreover, this not only presupposes that litigation is actual, threatened or in contemplation, but requires that the advice be (at [21]): ‘...advice which was obtained by*

*the company to enable it to carry on with litigation, advice which was in connection with that dispute, advice in defence of the contemplated litigation, which falls within the exception to the general rule, and that is privileged against the shareholders.’*

*25.2. On the facts of Sharp, it was argued that advice received by Lloyds Banking Group was privileged against its shareholders once it announced the plan to acquire Halifax Bank of Scotland since litigation would be in contemplation from that moment. Nugee J, rejecting this, said: ‘It is one thing to say the board could reasonably have expected some dissentient shareholders to be unhappy with a decision; it is quite another thing to say that litigation was in the circumstances reasonably expected...’*

*26.4. Moreover (and crucially), even insofar as the Company could and did reasonably anticipate litigation by mere virtue of the Merger itself being anticipated, it would not follow that the exception to the rule was engaged. The relevant test imposes further and no less significant requirements as to the purpose of the advice concerned. For the exception to apply, it must have been (again quoting Nugee J.) ‘obtained by the company to enable it to carry on with litigation, advice which was in connection with that dispute, advice in defence of the contemplated litigation.’ Even insofar as there was a general anticipation of litigation which was sufficiently concrete following the institution of the Special Committee, the exception to the rule would only be engaged to the extent that advice was obtained for that specific purpose.*

*26.5. Unless the Company suggests that it did not seek to act in good faith in these respects, it must follow that communications created in relation to the assessment of fair value were created for the very purposes of furthering the interests of shareholders including the Dissenters, by making a genuine assessment of the proposed transaction and the fair value of dissenters’ shares. Far from involving hostility between shareholder and Company, that process embodies the community of interest between shareholder and Company. It matters not that the Company or its lawyers may have considered, in the abstract, that litigation might or would be likely to occur with unidentified dissentient shareholders in the event that they were not satisfied with the valuation offered. That cannot affect the purpose of the relevant communications which occurred. Nor is the position altered by expressions of concern on the part of shareholders seeking to ensure that fair value was obtained.”*

17. The point that some advice must have been obtained in relation to the fair value assessment itself was reinforced by reference to *Re Trina Solar Limited*, FSD 92/2017, Judgment dated 23 September 2017 (unreported), where legal advice provided to the company’s special committee was disclosed.

## The Company's submissions

### Overview

18. The Company introduced its case in its Skeleton Argument in the following way:

*“2 This application raises two basic issues:*

*2.1 Joint privilege: Can the Company claim legal advice privilege against these shareholders?*

*(a) Legal professional privilege is a basic right, but the Dissenters contend that the Company cannot invoke it for the duration of the merger process (until 30 September 2020). The Dissenters rely on a controversial English doctrine whereby shareholders are entitled on discovery to see a company's otherwise privileged documents (although, as will appear below, the Dissenters also seek to extend that doctrine well beyond any reported decision to include: (1) otherwise privileged documents which were brought into existence before the shareholder in question became a shareholder; and (2) those other than registered shareholders).*

*(b) The Dissenters' contentions, if correct, would undermine the basic freedom of Cayman-registered companies to take legal advice in confidence. The Company contends that they are not correct and that (1) the doctrine does not apply as against shareholders who have chosen a course of action under s. 238 of the Companies Act which involves expressly giving up rights; (2) alternatively, even if not excluded by the operation of the statute, the doctrine applies only in favour of a shareholder who was registered at the relevant time, i.e. the time of each communication in question, and the Dissenters' attempts to extend the principle are not well-founded...*

*2.2 Litigation privilege: If the Company cannot claim legal advice privilege, from what (if any) date can it claim litigation privilege in respect of legal advice concerning the fair value dispute?*

*(a) It is common ground that litigation privilege is in principle available between a company and shareholders with whom it is in dispute, even where legal advice privilege is not. Applying the test of when litigation was reasonably in contemplation, the Company considers that its legal advice relating to the prospective fair value dispute was capable of attracting litigation privilege from the time of the appointment of the Special Committee on 20 April 2020, alternatively from the time of the Board's resolution to accept the merger terms on 15 June 2020.*

*(b) Despite having been requested to state their position on this issue, the Dissenters have not done so and have merely challenged the assertion of privilege in relation to particular*

*documents from April and June 2020. On the question of principle - at what time was litigation in contemplation, such that litigation privilege was capable of arising - the Dissenters' position remains unknown...*

*3. In this s.238 dispute the issue of legal privilege as between a company and the dissenting shareholders has now arisen for determination, in the sense that the Dissenters have raised a challenge to the Company's basic ability to maintain legal privilege. However, it is clear that the merged company has been treated as entitled to make a general claim for privilege in the great majority, if not all, of the s. 238 proceedings to date. If the Dissenters are correct, and legal advice privilege is in principle unavailable, then litigants and courts have been proceeding for the last 6 years under a remarkable misapprehension...*

*4 This settled practice cannot create law; but it can create, or form the background to the creation of, reasonable expectations. It has done so here, even if (contrary to the Company's primary position, above) the Dissenters were otherwise entitled to see the Company's documents subject to legal advice privilege. The Dissenters waited far too late to bring their privilege challenge which is inconsistent with the mutual conduct of the proceedings to date..."*

### **The Company's framing of the factual matrix**

19. In the Company's Skeleton Argument the following chronology was set out:

*"5 The Company at all material times operated a classified online advertising business and was formerly listed on the New York Stock Exchange. The present dispute arises out of a "take-private" transaction in 2020. The relevant chronology is as follows:*

*02.04.20 Ocean Link, a private equity firm, announces a proposal to purchase the Company at US\$55 per Alternative Depositary Share ('ADS').*

*06.04.20 With a view to setting up a special committee of the Board to report on the fairness of the terms of the offer and negotiate with the bidder, Mr Robert Dodds, Jr. and Ms Lily (Li) Dong are approached to be members (and be appointed to the Board for that purpose).*

*09.04.20 From early April 2020, the Company begins receiving threatening communications from shareholders. In fact, at that point the Dissenters are (at most) beneficial shareholders only, holding ADS rights under which legal title to the shares is with a nominee institution, Citibank. In most instances, the Dissenters only buy into the Company after the take-private process commences.*

*20.04.20 The Company resolves to set up the Special Committee consisting of Mr Dodds and Ms Lily Dong. The Special Committee appoints advisers including (by 21.04.20) the law firm Fenwick & West LLP.*

*30.04.20 The members of a buyer group (General Atlantic, Warburg Pincus, Ocean Link, and Mr Yao (the Company's founder and CEO)) holding 44% of the voting power in the*

*Company agree to work exclusively with each other to acquire the Company and submit an offer for US\$55 per ADS.*

*15.06.20 Following deliberations and negotiation with the Buyer Group, the Special Committee recommends acceptance of a merger offer at US\$56 per ADS and the Board resolves to accept the offer subject to shareholder approval. The statutory process under s. 238 commences.*

*19.06.20 Instruction of litigation team from Maples & Calder.*

*June 2020 From June onwards, shareholders (or beneficial shareholders) make explicit their intention to challenge the fairness of the merger price if approved.*

*06.08.20 First date on which any of the Dissenters converts its ADS interest into shares.*

*27.08.20 First date of a notice of objection from any of the Dissenters under s. 238(2)."*

20. Two other broad factual matters are relied upon by the Company. Firstly, if (which is denied) joint interest privilege can be asserted by the Dissenters, they lacked the standing as registered shareholders to do so:

*"35 On that alternative hypothesis, the conclusion of principle is therefore that joint privilege exists (i.e. the Company's privilege is only affected) in respect of any given shareholder only during the period (1) when that shareholder is on the register and (2) before service of that shareholder's final notice of dissent under s. 238.*

*36 This means that none of the Dissenters would be entitled to see any documents before 6 August 2020; the date of commencement of access varies from then until 3 September 2020. This timing problem is not confined to the start of the period of access. As already noted, on the Dissenters' own case, a shareholder's entitlement lapses in relation to privileged documents after the notice of dissent.*

*37 Yet the Dissenters are not linked nor in identical positions in any of these respects. They are simply a collection of some 43 separate funds who gave in their separate notices of dissent on 8 different dates, who acquired their title as shareholder on 12 different dates, and who acquired even a beneficial interest on 21 different dates, many well after the merger was announced. Even if Shareholder A is entitled to see privileged documents from a date before or after the dates accessible to Shareholder B, that cannot mean that, as against Shareholder B, the Company also de facto loses its privilege simply because A and B are both parties to the same proceeding."*

21. Finally, the Company submitted:

*"39 The Company contends that, in any event, it is too late and an abuse of process for the Dissenters to raise their privilege challenge. The time for them to do so was before the Company commenced its discovery review, not after it had almost completed.*



*40 As noted above, despite the large number of s. 238 proceedings which preceded the present petition, in none of them has the Company's claim to legal advice privilege been generally disputed by the dissenting shareholders. Moreover, in In re Qihoo Mangatal J at 2017 (2) CILR 43, [106], acknowledged that the company concerned would be able to claim privilege against the dissenters. The history of local practice is set out at paras 13-14 of Mills 3.”*

22. The completeness of the Company’s list of section 238 cases was challenged by the Dissenters’ evidence. However, in general terms the Company’s complaint that the most appropriate time for requiring it to undertake a fundamentally different approach to discovery was at the hearing of the Summons for Directions seemed sound. However, the need to consider the abuse of process issue only arose for serious consideration if the Dissenters were right in the most extreme iteration of their joint interest privilege submissions.

### **The Company’s legal submissions**

23. Both in writing and orally, Mr Béar KC reserved the right to pursue at a higher level the interesting argument that the shareholder’s longstanding right to see privileged documents relating to a company’s affairs had outlived its usefulness. In the Company’s Skeleton Argument, the current legal position was summarised in the following way:

*“6. The general position in English law is that the shareholders of a company are entitled, as part of their right to disclosure in legal proceedings against their company, to see its legally privileged documents. Following the main authorities and textbooks, we refer to this as a ‘joint privilege’.*

*7 The rule as it currently prevails in England has been articulated as follows:*

*‘It is well established by authority that a shareholder in the company is entitled to disclosure of all documents obtained by the company in the course of the company's administration, including advice by solicitors to the company about its affairs, but not where the advice relates to hostile proceedings between the company and its shareholders: see Re Hydrosan Ltd [1991] BCLC 418 and CAS (Nominees) Ltd v Nottingham Forest FC plc [2002] 1 BCLC 613, [2001] 1 All ER 954. The essential distinction is between advice to the company in connection with the administration of its affairs on behalf of all of its shareholders, and advice to the company in defence of an action, actual, threatened or in contemplation, by a shareholder against the company.’*

*8 The rule appears to have been originated in the 19th century, in explicit reliance on the false theory that shareholders had some kind of property right in the assets of the company,*



*by analogy with the position of a cestui que trust or partner. That theory has been long discredited – see, for example, Lord Reed's summary in BTI 2014 LLC v Sequana SA [2022] 3 WLR 709, SC, at [44].*

*9 Other than the bare force of precedent, therefore, there is no reason why the rule should survive. To assert that shareholders have in some sense paid for company legal advice is simply fallacious and ignores the basic separation of corporate personality, while undervaluing the importance of upholding the normal sacrosanctity of legal advice. For these reasons, the Canadian courts and some in Australia have refused to follow or doubted the English rule, and it has been described by a prominent English commentator (Charles Hollander) as ‘a wrong turn’.”*

24. The first substantive and contentious argument which was fully pursued was a point of statutory construction, namely that section 238 (7), read in the context of the section as a whole, extinguished the dissenting shareholder’s right to rely on the rule in *Woodhouse*:

*“13 The structure of the section is clear. A member who dissents by serving the statutory notice gains a new entitlement – for the company to pay him the fair value of his shares, as assessed by the Court. Normally, of course, a member has no such right. But in return, the shareholder ‘shall cease to have any of the rights of a member’, subs. (7).*

*14 It is common ground that the right of a shareholder to disclosure of privileged material is one of the rights of a member, and that s. 238 operates – to some extent at least – to deprive a dissenting shareholder of that right. The rights of a member include a shareholder's entitlement to disclosure of otherwise privileged material which non-shareholders would not be able to see. As the Dissenters' evidence in support of the summons acknowledges (Skelly 1, paragraph 68, fn. 4): ‘Pursuant to section 238(7) of the Act, upon serving a notice of dissent under section 238(5), a shareholder ceases to have any of the rights of a member except the right to be paid fair value and the rights referred to in sections 238(12) and (16). The Dissenters accept that they are not entitled to see privileged material created after this date.’ The date referred to is ‘the last date on which...the Dissenters served notices of dissent to the Merger pursuant to section 238(5) of the Act’.*

*15 The critical question is therefore whether the removal of rights effected by s. 238(7) is only for the future, such that (as the Dissenters argue) the only rights removed are those in respect of communications after the notice of dissent which triggers the removal. That s. 238 is not so limited is clear from (1) the unqualified language used by subs. (7) in removing rights (‘...any of the rights of a member...’), and (2) what is included in the carve-outs from that removal.*

*16 The carve-outs make the point: the dissenting member is given the express ability under subs. (16) to ‘obtain relief on the ground that the merger or consolidation is void or unlawful’. That ability would, ex hypothesi, have already arisen, under the articles of the*

*company or the general law, at the time that the merger or consolidation was authorised. It constitutes a past cause of action vested in shareholders. Yet the express preservation of such a cause of action can only mean that, but for the saving provision in subs. (16), this past cause of action would also have been removed by subs. (7). The reach of subs. (7) must be interpreted accordingly.*

*17 In the only s. 238 case to reach the Privy Council, Shanda Games v Maso Capital [2020] 1 BCLC 577, the court explicitly analysed s. 238 as excluding the right ‘for example to bring a claim for outstanding distributions or past breaches of fiduciary duty’ (see [3] at 580c). The court also noted that in the corresponding Delaware legislation (on which the Cayman legislation was generally based but which it did not simply copy), the right to sue for outstanding distributions was preserved: [4] at 580h. Thus the Cayman legislature must be taken to have made a conscious choice to exclude all past rights save only those expressly retained.”*

25. As a matter of first impression, the idea that section 238(7) should be construed as not simply prospectively depriving dissenters of share rights but also retrospectively depriving dissenters of pre-existing joint interest privilege rights within the context of section 238 proceedings seems inconsistent with the dominant legislative purpose of the statutory provision as a whole. At first blush it seems to make little sense to infer the legislative intention to dilute the efficacy of the remedy conferred on dissenters by depriving them of the ability to access in section 238 proceedings to relevant legal advice obtained by the company which would have been available to them had they still been shareholders. Mr Adkin KC’s oral reply on this point seemed compelling.
26. However, in my judgment it is ultimately also important to answer a broader question of statutory construction, unconstrained by the necessarily narrow framing of the joint interest privilege issue as defined by the terms in which the Dissenters’ Cross-Summons was drafted. Does section 238 by necessary implication prevent the petitioning company (or, indeed, a dissenter) from asserting a claim to legal advice privilege when the advice is materially relevant to the question of fair value? Mr Béar KC, in response to hypothetical questions I put to him in the course of argument, accepted that the iniquity exception to a privilege claim would prevent the Company from improperly relying on privilege to its advantage and at the Dissenters’ expense. Without having to rely on that exceptional and somewhat inaccessible common law rule, was it implicit in the section 238 statutory regime that the parties could not impede the judicial process of arriving at a fair appraisal by asserting legal advice privilege which was material to the valuation exercise?
27. It being all but obvious that section 238 cannot sensibly be construed as intended to deprive the Court of access to the best available evidence on fair value, whether by excluding joint interest

privilege or otherwise, the more substantive controversy centred on how joint interest privilege applied temporally in the section 238 context, having regard to (a) the period of time when any Dissenter was merely an ADS holder and (b) the period of time when any advice obtained by the Company was potentially protected in any event by litigation privilege. Sub-issue (a) was a legally complicated question; sub-issue (b) was a factually complicated question. As regards the former, the Company's Skeleton Argument advanced the following key submissions:

*“25 There is no doubt that having the relevant status is a prerequisite to invoking a joint privilege: cf. O'Rourke v Darbishire [1920] AC 581. This was a decision of the House of Lords in the context of the supposed entitlement of a cestui que trust (in an action against alleged constructive or resulting trustees) to the production of documents relating to the affairs of the alleged trust. In refusing that entitlement, it was said at p. 620 that: 'an essential preliminary is either the admission, or the establishment, of the status on which the right is based'. That being so, it is difficult to see on what basis the right could extend outside the duration of the status on which it is based.*

*26 This also reflects the basic principle 'once privileged, always privileged': R v Derbyshire Magistrates, ex p. B [1996] 1 AC 487. The parameters of privilege, including the identity of those who share in it, must be capable of definite ascertainment at the time of creation of the relevant document. Put another way, a party must be able to know the outer boundaries of its legal privilege. On the Dissenters' case, that certainty is unachievable.*

*27... In fact, the Dissenters choose to ignore the fact that most of them did not even acquire ADSs until well into the relevant events, and instead make the unprincipled argument that all of them can rely on the status of any of them. Even putting that to one side, however, the difficulty for the Dissenters is that the status of ADS holder is insufficient both on well-established general principle, and on the specific terms of the ADS documentation which they obviously assented to when taking up those rights.*

*28 The starting-point is that the entitlement to see privileged documents has only ever been stated in terms of a right of shareholders. That is, therefore, 'the status on which the right is based' (cf. O'Rourke v Darbishire, above). A company at least knows who are its shareholders from time to time, since they are conclusively defined by the register (subject only to rectification). If the Dissenters are right, however, any beneficial owner – a class intrinsically unknown to the company - can also invoke joint privilege.*

*29 Any such outcome would clearly contravene the undisputed general principle of law, as laid down in e.g. Svansson v Jonasson [1997] CILR 192, 203, per Georges, J.A.: there is a 'fundamental principle of non-recognition by the company of trusts affecting its shares'. Likewise, Briggs LJ in Eclairs Group v JKC Oil & Gas plc [2014] Bus LR 835 at [33] stated that –*

*‘Companies are, in general, both entitled and obliged to deal only with those who are registered as having the legal ownership of their shares. Companies are, in general, entitled to decline to deal with mere beneficial owners.*

*30 Eclairs concerned the imposition of restrictions on share dealings under Part 22 of the Companies Act 2006 which was a ‘remarkable exception’ to that general principle, involving a statutory power to inquire into any form of ‘interest’ in the shares, and so necessitating a correspondingly broad approach to standing. There is no such context here. On the contrary, a restrictive approach is supported by other authority:*

*30.1 In BBGP Ltd v Babcock & Brown Global Partners [2011] Ch 296 at [59(a)], Norris J refused as a matter of policy to extend the rule so as to allow privileged material to be shared with the shareholders of a shareholder.*

*30.2 In Medlands (PTC) Ltd v Commr of the Bermuda Police Service [2020] Bda LR 26, Hargun CJ had to consider whether joint privilege in a company's legal advice could be claimed by the shareholder of a shareholder. At [50]-[54], he decided that it could not be: the individual concerned ‘[was] not a shareholder in the relevant company’ (at [53]).*

*31 There is likewise ‘no reason to extend the encroachment upon the basic rule of privilege’ (to cite Norris J) to beneficial owners, not least because their identification would be considerably harder than for shareholders who at least are on registers.*

*32 As to the documents, the publicly-available ADR issuing document for the Company states: ‘As an ADR holder, we will not treat you as a shareholder of ours and you will not have any shareholder rights. Cayman Islands law governs shareholder rights. Because the depositary or its nominee will be the shareholder of record for the shares represented by all outstanding ADSs, shareholder rights rest with such record holder. Your rights are those of an ADR holder... Because the depositary or its nominee will actually be the registered owner of the shares, you must rely on it to exercise the rights of a shareholder on your behalf.’ This could hardly be clearer. The effect must be to exclude any right of a beneficial shareholder, were one otherwise to exist. The Dissenters are seeking to go behind the very terms of the document they rely on.*

*33 The Dissenters appears to seek to justify their position by reference to a supposed principle that New York law recognises beneficial shareholders. But although the relations between ADS holder and depositary are governed by a contract under New York law, it is a fallacy to suggest that this has any bearing on relations between an ADS holder and the company, even as a matter of NY law: cf. Nelson 3, paragraph 6 (especially at 6.6)...”*

28. These arguments appear at first blush to be sound, but they only gain traction in the present context if the Company is also right in contending that the Dissenters upon becoming registered shareholders did not stand in the shoes of their predecessors in title as regards whatever joint

privilege rights they formerly enjoyed. Similarly, the Dissenters' case that joint interest privilege applies throughout the merger agreement negotiation period until notices of dissent were filed only requires the Company to rely upon litigation privilege if the Dissenters' sweeping proposition is in fact sound. The Company nonetheless argued:

*“48 The evidence is clear that take-private transactions involving Chinese-based businesses of substantial size almost inevitably lead to dissents under s. 238 and thence to litigation. There are (in effect) professional dissenters who buy into companies going through a take-private process precisely in order to seek value from the legal process: see Mills 3, paras 6-11. One of the Dissenters here, Maso Capital, is a prominent protagonist in this field which actually boasts about having a business model built around ‘the Cayman Islands' courts and legal system... we've done it over a dozen times, and we've had successful outcomes in every single case'. The pattern of acquisitions shown in Annex 1 to Mills 3 is strikingly redolent of this behaviour: 28 of the 45 dissenters bought in after the announcement of the merger discussions in April 2020, and 26 of those did so on or after the announcement of the Board's acceptance of the merger proposal on 15 June 2020 (including Maso Capital, which bought on that day).*

*49 Mr Dodds' evidence describes graphically how he was warned in no uncertain terms from the very first contact he had offering him a special committee position that ‘Cayman litigation will happen’ (see Dodds 2, paras 9-13). He records also how shareholders (in fact at the time, ADS holders) began aggressive correspondence referring expressly to litigation from as early as 9 April 2020 (Dodds 2, paras 18-21).*

*50 The Company submits that in the unusual circumstances of the culture that has developed around take-private transactions of Cayman companies of this kind, litigation was very clearly in reasonable contemplation from the very start of the process in early April. As already noted at para 2.2(b) above, it is regrettable – but telling – that the Dissenters have thus far advanced no positive case as to the point at which litigation was in reasonable contemplation.*

*51 That leaves the final question whether any particular document was prepared for the dominant purpose of advice in connection with such litigation (including trying to head it off). The Dissenters' evidence advances little by way of facts in this regard, although Ms Logan (the deponent of two of the affidavits filed in support of the application) impermissibly professes to be "surprised" by the suggestion that advice given by Fenwick & West LLP to the Special Committee on 21 April 2020 and 14 June 2020 can properly be characterised as having been created for the predominant purpose of this litigation: see Logan 1, paras 28-30.*

*52 The surprise is not merely irrelevant but ill-founded, because the courts have readily accepted that where a particular incident or transaction is very likely to lead to litigation, then legal advice is for the dominant purpose of that litigation: see a consistent stream of authorities including Re Highgrade Traders [1984] BCLC 151, CA; Westminster v*



*Dornoch (above, at [31]-[32]); and SFO v ENRC (above, at [104]-[109]). As Oliver LJ said in the first of these cases, the two purposes (advancing the relevant matter and protecting the party's interests in the anticipated litigation) are inseparable.*

*53 In this case, that is doubly so since the legal advice at the early stage was provided by a law firm experienced in such matters, Fenwick & West LLP, who could be expected themselves to be very well aware of the all but inevitable appraisal proceeding were a merger to go ahead. Each case must turn on its own facts, but the prevalence of litigation in this particular area is truly striking. Litigation risk of a high order would inevitably be at the forefront of the mind of any person guiding the transaction.*

*54 Accordingly, litigation privilege is made out in principle. It would, of course, be for the Company to claim that privilege in relation to each document if the basis for doing so arose, i.e. if and to the extent that it were not able to claim legal advice privilege as against the Dissenters. The Company has not done so thus far since, in accordance with its understanding of the law, it is entitled to rely simply on legal advice privilege, and does not lose that right simply because the Dissenters were at one stage shareholders and had rights as members until serving their notices of dissent.*

*55 For completeness, we note that even in a case where the court is not satisfied that the dominant purpose for which a particular document (or documents) was brought into existence was to obtain legal advice in anticipation of litigation, the court has power to order a further affidavit from the party claiming privilege: West London Pipeline v Total UK [2008] 2 CLC 258.”*

29. In short, both the Dissenters’ proposition that all legal advice received in relation to the merger process fell within the parameters of the traditional shareholders’ joint interest privilege rule and the Company’s riposte that all such advice fell within the parameters of litigation privilege seemed artificial and unsound, at least in their posited and unrefined form. How a more coherent analysis of the legal position can be extracted from these polar extremes will be considered below.
30. The Company’s final fall-back position was that the failure of the Dissenters to raise the joint privilege issue at the hearing of the Summons for Directions amounted to an abuse of process. In the Company’s Skeleton Argument the following pertinent arguments were advanced:

*“43 No valid excuse whatever has been advanced for this delay in bringing forward the Dissenters' privilege challenge. A party should not be permitted to blow hot and cold in this way which is contrary to the overriding objective. Moreover, it is an abuse of process to raise an issue when it could and should have been litigated earlier. This form of abuse – Henderson v Henderson abuse – is recognised in Cayman as well as English jurisprudence: Arnage Holdings v Walkers (a firm), 28.10.22, Doyle J, [7(1)] and [148]-[149]. It can exist in relation to different stages of the same proceeding, as well as the*

more familiar form where it applies to separate proceedings: see *Gruber v AIG Management* [2019] EWHC 1676 (Comm); *Kensell v Khoury* [2020] P&CR 17. ‘The question then is ultimately whether, in all the circumstances, a party’s conduct is abusive because it seeks to raise issues for determination that ought in fairness to have been raised, if that party wished to raise them, at the earlier stage’ (*Gruber* at [11.f]). See also, in the Privy Council, *Yat Tung Investment Co v Dao Heng Bank* [1975] AC 581; and (for the general applicability of *Henderson v Henderson* principles) *Yearwood v Yearwood* [2020] UKPC 26, [30]-[31], and *Baudinet v Tavioni* [2012] UKPC 35, [25]-[27].

44 While the first instance English authorities cited above indicate that it may be harder to find a *Henderson* abuse of process where there has been no trial, that is because they have been concerned with new claims or defences. Here, by contrast, the issue is itself interlocutory – i.e. the scope of disclosure – and the time to raise and finally determine the issue of joint privilege was properly before the final trial.

45 In any case, the position was fully reviewed by the (English) Court of Appeal in *Koza Ltd v Koza Altin* [2021] 1 WLR 170, CA (summarised at holding (1) in the headnote, pp. 170H-171A). The Court of Appeal considers that *Henderson* applies equally to interlocutory proceedings. In this regard, the recent *Arnage* decision is also highly instructive. As Doyle J said at [7(1)]:

‘[T]he modern litigation culture requires parties to be open and cooperative. Their cards should be put on the table at the outset. They should not keep cards up their sleeve to be played later. They should raise all relevant issues at the outset.’”

31. To the extent that the Dissenters’ Cross-Summons potentially meant that the Company’s entire discovery exercise had to be carried out again applying a new legal approach, raising the joint interest privilege issue belatedly clearly amounted to litigating in an unreasonable manner in breach of the Overriding Objective and/or abuse of process in a general sense. As I indicated in the course of argument, the wider abuse of process complaint was, in legal terms at least, more straightforward than the *Henderson v Henderson* abuse analysis. To my mind that latter form of abuse usually entails the contested determination of one or more issues and the failure to explicitly raise an ancillary issue which is so closely connected to the issue(s) expressly determined by the Court that raising the ancillary issue later amounts to a collateral attack on the original decision. The doctrine of abuse of process is in any event an inherently a flexible and fluid one which can be invoked when needed without needing to fit the form of misuse of the Court’s processes which is complained of into any neat pre-existing categories, although the Overriding Objective, the jurisdictional basis for the “modern litigation culture” alluded to by Doyle J in *Arnage Holdings v Walkers (a firm)*, FSD 105/2014 (DDJ), Judgment dated 28 October 2022 (unreported), will always be an important guide.



## Findings

### Preliminary: the issues

32. The Dissenters seek an Order “*that the Company disclose and produce for inspection (and may not claim privilege against the Dissenters in respect of) documents within its possession, custody or power in relation to any period prior to 30 September 2020*”. The legal grounds which they rely upon for seeking this relief is the proposition that as shareholders they have common or joint interest in any legal advice the Company received except advice covered by litigation privilege in relation to the present adversarial proceedings. They relied upon one of the seminal English cases on this principle, *Woodhouse v Woodhouse* [1914] TLR 559, and referred to the principle as the rule in *Woodhouse*. In effect a declaration was sought as to the extent to which the rule in *Woodhouse* applied to the Company’s right to claim privilege in the present proceedings. Mr Adkin KC characterised his opponents’ counter-arguments as “roadblocks” intended to block the Dissenters’ path to the relief sought under paragraph 3 of their Cross-Summons. In light of the Company’s submissions in opposition to this application, the following principal issues fall for determination:

- (a) whether section 238(7) of the Act deprives the Dissenters of any standing to assert a common or joint privilege in any legal advice received by the Company or has no impact at all on the Dissenters’ standing in this regard;
- (b) whether, contrary to the alternatives posited by the parties (as summarised in issue (a)), section 238(7) constrains to some lesser extent the Dissenters’ ability to rely upon the rule in *Woodhouse* and, if so, what are the parameters of any such constraints;
- (c) identifying the date from which litigation was reasonably contemplated, to the extent that the Company may only rely upon litigation privilege; and
- (d) whether the Dissenters are debarred from asserting a claim of joint privilege to advice received by the Company at a time when they were not registered shareholders.

### Does section 238 (7) preclude the Dissenters from invoking any joint interest privilege rights?

33. The Company contended that, assuming the Dissenters were able to assert joint privilege in any advice the Company received under the rule in *Woodhouse* which was not protected by litigation privilege, such rights were expressly displaced by the statutory appraisal scheme.

34. Section 238 provides as follows:

“238. *Rights of dissenters*

(1) A member of a constituent company incorporated under this Law 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, 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 shares.

(6) A member who dissents shall do so in respect of all shares that that person holds in the constituent company.

(7) Upon the giving of a notice of dissent under subsection (5), the member to whom the notice relates shall cease to have any of the rights of a member except the right to be paid the fair value of that person's shares and the rights referred to in subsections (12) and (16).

(8) Within seven days immediately following the date of the expiration of the period specified in subsection (5), or within seven days immediately following the date on which the plan of merger or consolidation is filed, whichever is later, the constituent company, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase that person's shares at a specified price that the company determines to be their fair value; and if, within thirty days immediately following the date on which the offer is made, the company making the offer and the dissenting member agree upon the price to be paid for that person's shares, the company shall pay to the member the amount in money forthwith.

(9) If the company and a dissenting member fail, within the period specified in subsection (8), to agree on the price to be paid for the shares owned by the member, within twenty days immediately following the date on which the period expires —

(a) the company shall (and any dissenting member may) file a petition with the Court for a determination of the fair value of the shares of all dissenting members; and

(b) the petition by the company shall be accompanied by a verified list containing the names and addresses of all members who have filed a notice under subsection (5) and with whom agreements as to the fair value of their shares have not been reached by the company.

(10) A copy of any petition filed under subsection (9)(a) shall be served on the other party; and where a dissenting member has so filed, the company shall within ten days after such service file the verified list referred to in subsection (9)(b).

(11) At the hearing of a petition, the Court shall determine the fair value of the shares of such dissenting members as it finds are involved, together with a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value.

(12) Any member whose name appears on the list filed by the company under subsection (9)(b) or (10) and who the Court finds are involved may participate fully in all proceedings until the determination of fair value is reached.

(13) The order of the Court resulting from proceeding on the petition shall be enforceable in such manner as other orders of the Court are enforced, whether the company is incorporated under the laws of the Islands or not.

(14) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances; and upon application of a member, the Court may order all or a portion of the expenses incurred by any member in connection with the proceeding, including reasonable attorneys' fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares which are the subject of the proceeding.

(15) Shares acquired by the company pursuant to this section shall be cancelled and, if they are shares of a surviving company, they shall be available for re-issue.

(16) The enforcement by a member of that person's entitlement under this section shall exclude the enforcement by the member of any right to which that person might otherwise be entitled by virtue of that person holding shares, except that this section shall not exclude the right of the member to institute proceedings to obtain relief on the ground that the merger or consolidation is void or unlawful." [Emphasis added]

35. Section 233 (dealing with the merger or consolidation of two Cayman Islands companies) provides, *inter alia*:
- “(5) *Some or all of the shares whether of different classes or of the same class in each constituent company may be converted into or exchanged for different types of property (consisting of shares, debt obligations or other securities in the surviving company or consolidated company or any other corporate entity, or money or other property, or a combination thereof) as provided in the plan of merger or consolidation.*”
36. Section 233(5) gives legislative permission for, *inter alia*, shares of the “*constituent company*” to be converted into shares of the consolidated company and/or cash. Section 234 makes additional provisions to enable section 233 to apply to mergers between locally incorporated companies and overseas companies. In my judgment the dominant legislative purpose of section 238 of the Act is to create a legal framework through which minority shareholders who object to a company’s appraisal of the fair value of the shares to be acquired through an amalgamation or merger can apply to Court for a judicial adjudication of the fair value issue.
37. Subsection (7) expressly provides that dissenters, in choosing to invoke the remedy created by section 238, cease to enjoy any rights of shareholders save for the remedial rights they have elected to exercise under these statutory provisions. The bare question of whether section 238(7) excludes any pre-existing joint interest privilege a section 238 dissenter previously enjoyed as a shareholder is an unhelpful, conclusory one. A preliminary question, which potentially points to a meaningful answer, is the following. Is the idea of a company being deprived of the ability to rely on privilege as against a dissenter in any circumstances whatsoever so clearly incompatible with the remedy conferred by section 238, that Parliament must be deemed to have intended to exclude the operation of joint interest privilege altogether from this appraisal sphere?
38. The Company was unable to advance any convincing support for such a broad exclusionary implication. It is far easier to identify arguments against such a construction than in support of it. In a variety of scenarios advice received by a company might potentially be relevant to the fair value of the company’s shares in circumstances where the *Woodhouse* rule would ordinarily be expected to apply (subject, of course, to considering the Company’s alternative arguments as to why the rule is inapplicable in any event). Most obviously, if significant assets were subject to a title dispute or a significant operating subsidiary was subject to a damages claim, advice received by the company about the merits of the hostile claim would potentially be highly relevant to the valuation exercise.

39. I accept Mr Béar KC's submission that the common law fraud or iniquity rule would potentially operate to prevent a company from concealing such advice to a fraudulent or iniquitous extent, but this rule is effectively one of last resort depending, in part at least, upon the integrity of the litigant and their advisers. If a key asset is valued based on taking the upper level of a range of potential negative litigation outcomes provided in legal advice, it would not to my mind be fraudulent or iniquitous for a company to assert privilege over the full advice received if no joint interest could be asserted by a dissenter. An additional safeguard may well be that where a company wishes to positively rely on legal advice it may agree to waive privilege, but the dissenters' legitimate concern would be their inability to identify and review advice the company received which was unhelpful to the company's case on fair value.
40. Somewhat less obviously, perhaps, legal advice received in relation to the negotiation of the merger agreement may be so relevant that it would be undesirable for the company to be able to rely on privilege. If lawyers are instructed by the special committee to lead the negotiations, communications between them and the special committee may be a significant part of the narrative since the fairness of the bargaining process may be in dispute as well as the fairness of the agreed share valuation detached from the negotiated price.
41. Allowing a dissenting former shareholder to assert joint interest privilege (or requiring the constituent company to waive privilege) in relation to advice relevant to the fair value question (as opposed to advice at large) would obviously amplify rather than stifle the efficacy of the appraisal remedy. Depriving dissenters and the Court from being able to consider advice highly material to the fair value question would obviously diminish the efficacy of the remedy rather than enhance it.
42. If joint interest privilege can (section 238 (7) apart) be asserted by former shareholders seeking to vindicate their property rights looking back to the period before service of their notices of dissent when they were shareholders, I consider that clearer language would be required to take away such vested rights. There is, it is trite law, a presumption that Parliament does not intend to interfere with fundamental rights such as vested property rights and fair hearing rights.
43. This canon of construction has, in my judgment, an enhanced significance in legal jurisdictions such as the Cayman Islands with constitutions which limit legislative competence through the entrenched Bills of Rights. Parliament may be presumed to have ensured before enacting any law (typically with drafting input from the Attorney-General's Chambers) that it is constitutionally compliant. The weight to be attached to the presumption may well be somewhat greater when considering the interaction between ordinary legislation and fundamental rights which are

expressed in unqualified terms (such as the prohibitions on torture and slavery and the right to a fair trial, Bill of Rights sections 3, 4(1) and 7(1))<sup>3</sup>. The weight to be attached to the presumption might, depending on the content of the relevant legislative rules, be somewhat lighter (or at least more nuanced) when the fundamental rights permit legislative exceptions in the public interest (such as property rights, Bill of Rights section 15).

44. Mr Béar KC expressly relied on the well-recognised principle that the right to a fair hearing (Bill of Rights, section 7) encompasses litigation privilege. However, both the right to a fair hearing and the right not to be deprived of property without adequate compensation (Bill of Rights, section 15) are potentially engaged under section 238 as regards the remedy conferred on dissenters as well. How these fundamental rights interact with the application of the rule in *Woodhouse* in the context of section 238 proceedings is considered briefly below as a backdrop to the competing contentions as to how the rule applies in this statutory context.
45. For these reasons, in seeking to answer the narrow question of whether section 238(7) excludes the application of the rule in *Woodhouse* altogether, on the assumption that it potentially applies, I unreservedly find that the subsection does not have the exclusionary effect for which the Company contended.

**Does section 238 (7) limit the operation of the rule in *Woodhouse* to some lesser extent?**

46. Most broadly, the rule in *Woodhouse* was explained in a text upon which the Dissenters relied, Bankim Thanki KC *'The Law of Privilege'* (3rd. ed.), at paragraph 4.84:

*“There exist relationships within which the parties will be unable to claim privilege in certain communications as against each other. More specifically, privilege cannot be claimed in circumstances where the parties to the relationship have a joint interest in the subject matter of the communication at the time that it comes into existence.”* [Emphasis added]

47. More specifically, it was common ground that the rule was in general terms accurately explained in *CAS (Nominees) Ltd v Nottingham Forest FC plc* [2002] 1 BCLC 613, [2001] 1 All ER 954. In that case Evans-Lombe J held:

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<sup>3</sup> These nuanced distinctions as to how the presumption operates in relation to constitutionally protected fundamental rights may explain why the Judicial Committee expressed apparent doubts about whether the presumption of constitutionality applied at all in this type of constitutional context: *The Attorney General-v- Jamaican Bar Association et al*[2023] UKPC 6 at paragraph 26 (Lords Briggs and Hamblen).



“13. In *W Dennis and Sons v West Norfolk Farmers Limited* [1943] Ch. 220 Simonds J was considering an action by shareholders seeking relief against the directors of a company who, they alleged, had improperly exercised their powers to control the company's affairs. In those proceedings the plaintiffs sought disclosure of a report by accountants which had been obtained by the company in anticipation of the dispute. In his judgment Simonds J says this at page 222:-

*‘Two points have been raised, first whether, having regard to the circumstances in which, and the date on which, the accountants report was made, it is a privileged document, and, secondly, whether, even if it were otherwise a privileged document, it is privileged having regard to the fact that the plaintiffs are themselves shareholders in the Defendant company.*

*I have formed a clear opinion on second point which disposes of the case. The general rule, which applies equally as between a company and its shareholders and as between a trustee and his beneficiaries is thus stated at pages 518 and 519 of the Annual Practice 1943: ‘a cestui que trust... is entitled to see cases and opinions submitted and taken by the trustee for the purpose of the administration of the trust; but where stated and taken by the trustees not for that purpose, but for the purpose of their own defence in litigation against themselves by the cestui que trust they are protected... on the same principle a ratepayer would be entitled to see cases and opinions taken by the corporation on the subject of rates... and so in *Gourand v Edison Gower Bell Telephone Co Ltd* an action by shareholders against the company, the plaintiffs were held entitled to see communications between the company and their solicitors: but similarly a shareholder could not seek counsel's opinion taken by the company in respect of the matter in dispute between them.’*

*In the present case it seems clear that when in January 1938 the defendants instructed the accountants to make a report on the interpretation of the article, and, therefore on the duty of the director's in administering the affairs of the company, they were doing something on behalf all the shareholders. They were seeking to do no more than to perform their duty having regard to the difference of opinion which had arisen on the board, and they did not seek the report because some action was threatened against them. That being so, the plaintiffs, as shareholders, are entitled to see what the accountants reported regarding the rights and duties of the board.*

*That was the position when the report was commanded. Two days before it was made the plaintiffs instituted proceedings by way of originating summons so that the construction of the article and their rights under it might be determined. The present defendants were necessarily made defendants in those proceedings. It appears to me that the plaintiffs, by instituting the proceedings two days before the report was received, did not lose their right as shareholders to see that which they otherwise would have been entitled to. In other words the report was not a document obtained by the defendants for the purpose of defending themselves against hostile litigation, and it was only where a document is obtained by a company for that purpose that privilege can be claimed. It must never be forgotten that the rules as to privilege are strict, and, as has so often because said, privilege is not to be extended.” [Emphasis added]*



48. The common law rule therefore is that shareholders will generally have a joint interest in any legal advice which the company whose shares they hold takes about the general administration of the company, because the company is deemed in a very general sense to be obtaining the relevant advice on the shareholders' behalf. Because an analogy has traditionally be drawn with the position of beneficiary and trustee, the rule in *Woodhouse* may in my judgment be viewed as deploying an equitable approach to mitigate the consequences of applying a strict legal approach based on the separation of legal personality between company and shareholders. On this basis, criticism of the rule for failing to take account of the modern legal view of the separate identities of company and shareholders overlooks the enduring practicalities underpinning the rule. As Lord Bridge (with whom Lord Kitchin agreed) observed in *BTI 2014 LLC-v-Sequana SA et al* [2022] UKSC 25:

*“22. A different approach, which has been influential in the modern case law, was adopted in Gaiman v National Association for Mental Health [1971] Ch 317, where Megarry J said at p 330 that '[t]he [company] is, of course, an artificial legal entity, and it is not very easy to determine what is in the best interests of the [company] without paying due regard to the members of the [company]'. His Lordship went on to say that he 'would accept the interests of both present and future members of the [company], as a whole, as being a helpful expression of a human equivalent'”.*

49. The rule in *Woodhouse* is essentially based on the proposition that where a shareholder can establish a joint interest together with the company in legal advice obtained in relation to the general conduct of its business, the relevant advice is not privileged as between company and shareholder. Thus understood, it becomes readily apparent that where a shareholder exercises dissent rights under section 238 and relinquishes under section 238 (7) all shareholder rights save for the appraisal rights conferred by section 238, the scope for assessing joint interest privilege must be commensurately narrowed. The position should in the interests of clarity be viewed in two stages. Firstly, the pre-merger period and secondly the period after preparations for a merger have begun.
50. I shall consider firstly the pre-merger period. A section 238 dissenter has no subsisting general interest in the administration of the company's affairs and retains solely the right to obtain the fair value for its shares as adjudicated by this Court. Accordingly, any advice obtained by the company in the course of its general administration, excluding litigation against the dissenter, which is relevant to ascertainment of fair value would *prima facie* be subject to a joint interest privilege claim. Any advice which is not relevant to the fair value question, whatever the position might have been before the dissenter became a dissenter under section 238, would no longer be subject to a joint privilege claim by the shareholder.

51. After preparations for the merger have begun, the position appears at first blush to be more complicated but ought in principle to be the same. Advice obtained about the general administration of the company is not, by virtue of section 238 (7), advice a dissenter has any cognizable interest in. Can it validly be argued, as the Dissenters do in this case, that the work of the Special Committee at least is demonstrably being carried out having regard to the interests of shareholders as a whole so a joint interest exists in all advice received before litigation is reasonably contemplated? This is a question which appears to me to be somewhat finely balanced and not one where the correct answer can be found in any directly relevant judicial or academic authority. However, based on the approach I have adopted on the way in which section 238 (7) modifies former shareholders' broader joint interest privilege rights, the focus ought not to be on the general role of the Special Committee and whose interests it is generally acting in when the advice is obtained. Such an analysis would in my judgment be more appropriate for an existing shareholder asserting an unmodified *Woodhouse*-based joint interest privilege claim. The focus should instead simply be on whether the specific advice to which the joint interest privilege claim relates is sufficiently relevant to the question of fair value to confer a joint interest in it operating in favour of dissenters as a procedural incident of their substantive section 238 rights.
52. Such a conclusion is consistent with the most persuasive strands of the Dissenters' and the Company's respective submissions. It rejects the unrealistic blanket assumption that all advice received after section 238 litigation was first contemplated qualifies for litigation privilege protection. But it also rejects the equally unrealistic blanket assumption, which is clearly inconsistent with past practice in this field that joint interest privilege automatically attaches to any advice received by a merger company before the section 238 dissent notices are served. The Dissenters contended that *Re Trina Solar Limited*, FSD 92/2017 (NSJ), Judgment dated 23 September 2017 (unreported) provides an example of advice given to the special committee being (voluntarily) disclosed; if correct, this would confirm the potential relevance of such advice in this commercial and legal context. The Company contended that *In re Qihoo* [2017 (2) CILR 43] provides an example of a company's privilege claim being upheld; if correct, this would confirm that there has in the past been an assumption that privilege can be claimed.
53. It is not easy to extract from the fulsome trial judgment of Justice Nick Segal in the *Re Trina Solar Limited* case a clear conclusion as to the extent to which legal advice received by the company's special committee was disclosed. It is true that Segal J described the production of presentations made by Kirkland & Ellis as "*helpful*" (at paragraph 162). It is apparent that the purport of general

briefing advice given by Kirkland & Ellis at certain meetings of the special committee was disclosed in special committee meetings. This was not merely a relatively inconsequential part of the historical narrative of negotiations with the Buyer Group (see Judgment, paragraphs 27-30); it included substantive consideration of Kirkland & Ellis' advice in the context of analysing its independence (paragraph 175).

54. Indeed, Justice Segal appears to have almost bemoaned the absence of evidence as to what advice the Special Committee received on one issue, noting in relation to a statement in the Proxy Statement that *“it is unclear how this passage came to be included in the Proxy Statement, how and when the Special Committee approved it and whether if this was the Special Committee’s view it was held in February and was based on any advice”* (paragraph 163(c)). To my mind, this case provides no meaningful illustration of joint interest privilege being recognised as such. What it clearly illustrates is the narrower proposition that communications between the special committee and its lawyers in the lead up to a merger being approved are likely to concern matters of some relevance to the question of fair value which are far removed from litigation privilege territory.
55. A similar conclusion may be drawn from *In re Qihoo* [2017 (2) CILR 43], where paragraph 5 of an earlier consent order explicitly required the company to upload communications between the special committee and its advisers including *“counsel”* (see paragraph 13). Justice Ingrid Mangatal required the company to comply with that obligation on the basis that it could obtain for production documents held by its former attorneys, noting:

*“106. However, in my judgment, any question of privilege attaching would be the privilege of the client, the Company to waive, and I therefore accept Mr Levy QC’s submission that the Company ought to be able to compel Skadden to hand over the documents for uploading to the Data Room in their native form. In my judgment the discovery of these documents is relevant, reasonable, necessary and proportionate.”*

56. It is unclear from the report how the privilege issue evolved in that case. But it does seem obvious that even the company did not assert that all communications between the special committee and its lawyers were entitled to blanket protection of litigation privilege. The Judge clearly found that such communications were relevant. Accordingly, this case provides general support for the proposition that legal advice received by the special committee which is relevant to the question of fair value may potentially form the subject of a joint interest privilege claim asserted by section 238 dissenters. It also suggests even more clearly (notwithstanding the seemingly novel arguments advanced on behalf of the Dissenters by Mr Adkin KC in the present case) that the Court should

leave for specific consideration on a document-by-document basis whether a claim to privilege should or should not be defeated by a claim to joint interest privilege by dissenters.

57. The statutory construction which I adopt for section 238(7) is also consistent with the relevant fundamental rights which underpin the present legal context. The right to a fair hearing (Bill of Rights, section 7) is relevant to:

- (a) the litigation privilege rights of all parties; and
- (b) all parties' right to a fair determination of their civil rights and obligations.

58. The property rights protected by Bill of Rights section 15 are the high-level basis for the dissenters' statutory right to receive due compensation for the loss of their property under section 238. Section 15 critically provides:

*“15.—(1) Government<sup>4</sup> 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; and (iii) giving to any party to proceedings in the Grand Court relating to such a claim the same rights of appeal as are accorded generally to*

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<sup>4</sup> According to the spirit of section 15, at least, the term “Government” embraces the Executive, Legislative and Judicial branches of government.

*parties to civil proceedings in that Court sitting as a court of original jurisdiction.*  
[Emphasis added]

59. In short, section 238 appears to me to be drafted very much with these fundamental property right protections in mind; it is a law which provides a right to adequate compensation for shares which have been compulsorily acquired against the wishes of dissenters under the merger provisions of the Companies Act. These provisions were enacted by the legislative branch of government and are presumably justifiable in the interests of the economic benefits which so obviously flow to the Cayman Islands community from this territory's burgeoning financial services industry. Section 15 of the Bill of Rights is closely connected with the umbrella fundamental right conferred on natural and artificial persons of "*peaceful enjoyment of one's possessions*", a right which is exercised through commercial activity of all kinds (European Convention of Human Rights and Fundamental Freedoms, Protocol, Article 1<sup>5</sup>). It is these fundamental freedoms which underpin the merger regime and much of our company and commercial law.
60. One broad policy imperative may against this background be discerned as underpinning the rule in *Woodhouse* in the context of the present proceedings. It may be characterised as a rule of evidence and civil procedure designed to ensure that the fair hearing rights of parties to litigation (which include legal professional privilege) are vindicated.
61. It is ultimately self-evident that section 238(7) intends to prevent dissenters who are no longer shareholders from exercising rights they no longer possess and/or enjoy. It is equally self-evident that section 238, read as a whole, does not create an appraisal regime under which dissenters and the Court are expressly or by necessary implication intended to be denied access to legal advice received by the company which is not covered by litigation privilege, and which is relevant to the central issue of fair value. These policy considerations for present purposes provide further support for the conclusion that section 238 (7) should be read as limiting the ability of dissenting shareholders to claim a joint interest privilege in advice received by the petitioning company, save to the extent that:

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<sup>5</sup> "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*"

- (a) the advice is relevant to the central adjudicative task of appraising the fair value of the dissenters' shares in the company, because the only rights which remain vested in a dissenter are its fair value appraisal rights; and
- (b) the company is unable to properly invoke legal professional privilege in relation to a particular instance of advice.

**The status of the Dissenters as ADS holders at the date when advice was received by the Company: does the rule in Woodhouse apply at all?**

62. Notwithstanding my findings that section 238 effectively provides a statutory basis for a modified form of joint interest privilege rights that dissenters generally can invoke in the statutory appraisal proceedings, it is now necessary to consider the Company's somewhat intricate case as to why the Dissenters, who were ADS holders when any pre-litigation advice was likely received by the Company, cannot invoke the rule in *Woodhouse* in any event. I firstly set out the conclusions which I would have reached based on the case argued before me in January 2023, and then consider how (if at all) those findings are affected by the supplementary submissions tendered in relation to a Bermudian judgment delivered on 14 February 2023 which considered overlapping issues.
63. An ADS holder is not a shareholder of a shareholder, so the decisions of Norris J in *BBGP Managing General Partner Ltd et al-v- Babcock and Brown Global Partners* [2010] EWHC 2176 and Hargun CJ on this point in *Medlands PTC Limited et al-v-Commissioner of the Bermuda Police* [2020] SC (Bda) 20 Civ (26 March 2020) are distinguishable. Accordingly, the question which arises for determination is whether the joint interest privilege, which may have arisen when advice was received by the Company, and which could have been enforced by the nominee registered shareholder prior to the Dissenters becoming registered shareholders, was transmitted when the Dissenters received legal title to their shares, or was extinguished.
64. I confess that I was instinctively reluctant at the outset to accept that the administrative arrangements of modern stock exchanges designed to facilitate the trading of shares should constitute a basis for depriving the holder of the economic interest in the shares from asserting joint interest privilege for the purposes of exercising their statutory appraisal rights. Because if the Company's submissions on this point are correct, section 238 dissenters will never be able to gain access to legal advice received by the company no matter how relevant it may be to fair value (the fraud or iniquity exception apart) if their economic interest in a merger company was held through nominees, either at their own election or by reason of compliance with mandatory listing rules. To my mind, just as equity was used to soften the hard legal edges of separate legal personality through

the conceptually imperfect development of the rule in *Woodhouse*, equity also has a strong inclination against allowing nominee-ship arrangements to undermine the economic interests of beneficial owners of shares. This traditional inclination can only be fortified by the modern constitutional protections afforded to property rights. In event, the corollary of the Company's case that any joint interest privilege rights were attached to the shares and extinguished by section 238(7) is that such rights must have been capable of being transmitted to successors in title if they are not precluded by section 238 (7) (as I have found). Procedural rights they may well be (as the Dissenters contended), but they can have no meaningful existence unless they are regarded as attached to particular shares.

65. I accept entirely that a dissenter or its predecessor in title, particularly where that predecessor was merely a nominee, must have been a shareholder when the relevant advice was received by the company to give rise to a common or joint interest in the advice when it was received, to the extent that the rule in *Woodhouse* is relied upon.
66. I express no view as to whether an ADS holder has the right to assert joint interest privilege, *qua* ADS holder, independently of the section 238 context. In the present context, however, I reject the proposition that a petitioning company can assert privilege against a dissenter in relation to legal advice which is (a) not protected by litigation privilege and (b) which is relevant to the fair value of the dissenter's shares. Section 238 creates a remedy to ensure that dissenters are fairly compensated for the 'confiscation' of their shares effected by the merger or amalgamation process. It is remedy necessarily asserted by a former shareholder which is unarguably available to a former shareholder which was only a nominee during the period of time when advice relevant to fair value might potentially have been obtained. The fact that a dissenter only acquired its shares after the merger was announced is not said to diminish its economic rights. Nonetheless it is necessary to analyse the true character of the rule in *Woodhouse* in its common law emanation before considering its modified iteration in the present statutory context.
67. The best view that can be formed in admittedly unstable legal terrain is that the law has on an incremental basis developed a broad rule that in certain circumstances a party may not properly assert privilege against another party based on their shared interest in the legal advice received. In an English Court of Appeal case upon which Mr Adkin KC relied, *Dawson-Damer-v-Taylor Wessing LLP* [2020] Ch 746, the following passage in the Court's judgment (Floyd, Newy and Arnold LJJ) supports this conclusion:



“43. Even so, we have in the end concluded that the question whether ‘joint privilege’ exists is correctly characterised as one of procedural law rather than trust law. It seems to us that, whilst “joint privilege” may have its origins in authorities concerned with trusts, it does not represent part of trust law. A principle of procedure and evidence has evolved.

44. In the first place, the Courts have distinguished disclosure in litigation from a beneficiary’s rights under trust law in a number of the more modern authorities. In *O’Rourke v Darbishire*, Lord Wrenbury said that a beneficiary’s ‘proprietary right’ to see trust documents “has nothing to do with discovery’. In *Schmidt v Rosewood Trust Ltd*, Lord Walker saw Lord Wrenbury’s observations as ‘a vivid expression of the basic distinction between the right of a beneficiary arising under the law of trusts (which most would regard as part of the law of property) and the right of a litigant to disclosure of his opponent’s documents (which is part of the law of procedure and evidence)’. In *Breakspear v Ackland*, Briggs J said that, where disclosure of a wish letter is sought from the Court in existing litigation to facilitate the determination of an issue to which it is alleged to be relevant, ‘different considerations’ arise which are ‘governed by the law and practice as to disclosure in civil proceedings’.

45. Secondly, it is significant that ‘joint privilege’ has been recognised in contexts other than trusts. The fact that it applies as between shareholder and company is especially important. As Mr Taube accepted in submissions, the fact that a company engaged in litigation with a shareholder must disclose documents which, as against third parties, would attract LPP cannot be explained as merely a reflection of a right which a shareholder would have anyway. Absent litigation, a shareholder’s rights to access any company documents, let alone those within the scope of LPP, are extremely limited (compare e.g. *R v Masters and Wardens of the Merchant Tailors (1831) 2 B & Ad 115*). That strongly suggests that the ‘joint privilege’ which has long been held to exist between shareholder and company should not be regarded as an aspect of company law. It is more plausibly seen as one emanation of a wider principle of procedure to the effect that ‘privilege cannot be claimed in circumstances where the parties to the relationship have a joint interest in the subject matter of the communication at the time that it comes into existence’ (to use the formulation in Thanki, ‘The Law of Privilege’ – see paragraph 26 above). That view is also supported by Stephenson LJ’s endorsement in *CIA Barca de Panama SA v George Wimpey & Co Ltd* of the passage from the then-current edition of *Phipson on Evidence* reading:

‘No privilege attaches to communications between solicitor and client as against persons having a joint interest with the client in the subject matter of the communication, e.g. as between partners; a company and its shareholders; trustee and cestui que trust ...’  
[Emphasis added]

68. The above *dicta* support the following conclusions as to the general scope of the rule in *Woodhouse*:
- (a) when the issue of disclosure arises in the context of litigation, the ordinary rules of disclosure ought to apply. Outside of litigation, a shareholder's rights of access a company's documents are limited;
  - (b) the shareholder's 'joint privilege' should be viewed as a procedural rule rather than a company law rule; and
  - (c) the umbrella procedural law principle is that no privilege can be claimed by any party against another party who had a joint interest in the legal advice when it was received.
69. Dealing with the first of these three conclusions, I accept the proposition that a shareholder's right of access to a company's documents exists independently of what is relevant in the context of litigation and reject the Dissenters' counsel's attempt to characterise joint privilege as a right of access to all documents relating to the business of a company. The scope of a shareholder's information rights will be dependent in part upon the company's articles and, in the case of a listed company, will be defined by the applicable listing rules. The existence of any joint interest a shareholder potentially has in any advice received by the company will essentially depend upon the advice being relevant to an issue in the relevant proceedings.
70. Secondly, I accept the proposition that the shareholder's joint privilege should be viewed as a procedural rule. It is essentially common ground that one has to construe section 238 to determine whether the joint privilege is preserved or excluded by the statutory provisions. I have found above that the joint privilege is preserved, albeit to a more limited extent in terms of scope than the Dissenters contended. Neither of the first two conclusions has any significance for the issue now under consideration: must the shareholder be a registered shareholder when the legal advice is received.
71. The third conclusion is more potentially relevant to the present area of inquiry. The joint interest has only traditionally been held to arise on the grounds that the shareholder asserting it had the joint interest when the advice was received. The Company's case is that this principle means that it is necessary to analyse in relation to each Dissenter whether they had acquired their shares when the advice in respect of which joint interest privilege is claimed was received. As to this, in my judgment the relevant litigation context is the pivotal consideration. I do not accept, despite the way in which the principle was expressed in the passage from *Thanki* approved by the English Court of Appeal in *Dawson-Damer-v-Taylor Wessing LLP* [2020] Ch 746 (at paragraph 45), that

in all legal contexts joint interest privilege will only arise if the shareholder asserting the claim was itself/herself/himself a shareholder when the relevant legal advice was received by the company. In the present context at least, section 238 confers on each dissenter a right to “*payment of the fair value of that person’s shares*”. It has never been suggested to my knowledge that valuation falls to be carried out on a basis which assigns different values based on when each dissenter acquired their actual shares. Instead the implicit assumption has always been that each shareholder, even those who acquired their shares with a view to commercially exploiting the dissenter process, acquires as successors in title whatever economic rights are attached to the shares. It follows, as a matter of principle, and admittedly without this conclusion being supported by any direct authority, that joint privilege rights despite their procedural character ought also to be properly viewed as ordinarily attaching to shares.

72. Accordingly, it makes no sense to view the beneficial shareholder who subsequently sues as legal shareholder as lacking standing to assert a joint interest claim because they were not registered shareholders when any relevant legal advice was received by the Company. Any joint interest which the nominee as registered shareholder held, it held on behalf of the beneficial owner of the shares. In equity, when the legal title in the shares were transferred by the nominees to the former ADS holders, there was no transfer of equitable ownership. It is impossible to identify any principled basis for concluding that the effect of unifying legal and beneficial ownership should be to make the rights which can be asserted by the beneficial owner of shares less than those which could be asserted by the nominee.
73. I reserved judgment on 10 January 2023 in the present application and had hoped to deliver judgment by the end of February. On 14 February 2023, Chief Justice Narinder Hargun delivered judgment in Bermuda in *Re Jardine Strategic Holding Limited* [2023] SC (Bda) 8 Civ. (14 February 2023). Mr Adkin KC appeared for the dissenters in that appraisal case, and the Dissenters’ counsel shortly thereafter invited me to consider this judgment and permit counsel to tender short supplementary submissions by 1 March 2023. I accepted this invitation. Three issues of relevance to the present case were addressed, the first of which bears upon the issue under present consideration:
- (a) whether a new shareholder could assert joint interest privilege; and
  - (b) whether appraisal proceedings were hostile proceedings and an exception to the joint interest privilege rule. This point I address separately below in relation to the litigation privilege issue;

(c) how early is litigation reasonably in contemplation in the context of appraisal proceedings?

74. Mr Adkin KC in the Dissenters' Supplemental Submissions enthusiastically commended the conclusions reached by Hargun CJ in *Jardine* on issues (a) and (b) to this Court. Mr Béar KC in the Company's Supplemental Written Submissions commended the findings of Hargun CJ on issue (c) to the Court but submitted that the findings on issues (a) and (b) were distinguishable because of the different statutory context:

*“2. There were two distinguishing features present in Jardine and not in this case.*

*First, there is no equivalent under Bermudian law of s. 238(7) and s. 238(16). The Bermudian legislation offers a different approach to the Cayman Islands Companies Law. Under Cayman Islands law, the merger becomes effective when filed with the Registrar of Companies after approval by the statutory majority of shareholders. The process under s.238 then creates a class of dissenters whose shareholder rights are generally removed in exchange for the specific rights identified under s.238. In contrast, the Bermuda statute does not create any special class of dissenting shareholders, and allows the company to terminate the merger within one month of the Court's fair value decision. That possibility presumably explains the absence of any equivalent to s. 238(7) and (16): it necessarily requires that shareholders should have continuing rights since ex hypothesi the company might decide to abandon the merger and return to the status quo.*

*Second, the decision concerned the rights of former shareholders to see company privileged documents dating from the time of their shareholding, notwithstanding that they had since ceased to be shareholders. It was therefore the converse situation to the present case, where the Dissenters became shareholders only very shortly before the valuation date, and thus only after the great majority of the period when the privileged documents were brought into being (and in all cases, only after the Board's approval of the merger terms on 15 June 2020). The distinction is one which Hargun CJ himself drew, as explained below.”*

75. These distinctions are not material as I reach the same broad conclusions focussing quite intently on the unique statutory and factual features of the present case. In short, the *Re Jardine* case in holding that a former shareholder may assert a joint interest which it previously enjoyed confirms, albeit indirectly, my central findings on the relevance of the Dissenters not being registered shareholders when any advice not likely to be covered by litigation privilege was received by the Company in the present case. In *Re Jardine*, Hargun CJ pivotally found on the first issue as follows:

“153. The Defendants argue that any entitlement of a shareholder to see a company’s privileged documents in litigation could not be a personal right independent of a person’s shareholding. Instead, it would be a right derived from, and incidental to, that person’s status as a member. It would follow, it is contended, that once a shareholder ceases to be a member, whether by transfer or cancellation of his shares, any rights to see the company’s privileged documents in litigation, like all of his rights incidental to his status as a member, cease to exist and, in the case of a transfer, would be assumed by his successor in title. Therefore, the Defendants contend, a former shareholder does not retain any “joint interest rights”.

154. In relation to this argument advanced by the Defendants, the Court accepts Mr Hollander KC’s submission that there is a distinction in analysis between: (i) documents created during a relationship which gives rise to joint interest privilege; and (ii) whether a new shareholder is entitled to see the documents which were created during the period before he became a shareholder. In relation to the documents created during the relationship which gives rise to joint interest privilege, the relevant issue is whether the documents were created during the period of the relationship. The privilege does not disappear when the shareholder ceases to be a shareholder. In relation to whether a new shareholder is entitled to see the documents which were created during the period before he became a shareholder, the analysis is indeed concerned with property rights. Authorities show that shareholders are entitled to be treated as successors in title of prior shareholders for purposes of legal professional privilege. Under this analysis, privilege can be regarded as an incident of a property right, such that privilege may be asserted by successors in title to the property {Hollander on Documentary Evidence (14th Ed) 13-08 and 19-04, approved in *Travelers Insurance Company v Armstrong* [2021] EWCA Civ 978; *Surface Technology plc v Young* [2002] FSR 25; *Winterthur Swiss Insurance v AG (Manchester) Ltd* [2006] EWHC 839 (Comm); *Crescent Farm v Sterling Offices* [1972] Ch 553; and *St. John’s Trust Company (PVT) v James Watlington et al.* 2015 SC (Bda) 447 Civ 14 December 2020).” [Emphasis added]

76. I gratefully adopt Hargun CJ’s persuasive analysis on this point.
77. In summary, the relevant question is not whether or not the Dissenters can fit themselves into a predefined category of common or joint interest privilege. Rather, the question is whether the Company can properly assert privilege against the Dissenters in the legal and factual context of the present litigation, having regard to (a) the interest shared by the parties in any legal advice which is relevant to fair value and (b) the Company’s ability to play its trump card of raising a valid litigation privilege ‘defence’. The rule in *Woodhouse* confers on the Dissenters as successors in title of, *inter alia*, their former nominees the procedural right to assert joint privilege to that extent.

**The date from which litigation was reasonably in contemplation**

78. As in the case of the issue just dealt with, I begin by setting out the findings which I would have reached based on the arguments advanced at the hearing of the Dissenters' Cross-Summons. I then proceed to consider whether these findings are impacted by the supplementary written submissions tendered over a month after I had reserved judgment in relation to the Bermudian *Re Jardine* case.
79. The parties adopted extreme factual positions as regards the facts while essentially agreeing on the applicable law. The extreme positions largely mirrored the extreme tactical consequences which would ensue if either of their primary positions on joint interest privilege were to be fully accepted by this Court. Either the Company would be unable to rely upon legal advice privilege as regards all of the documents which it had initially assumed it could assert such a claim, or the Dissenters would be unable obtain any of the documents they hoped to obtain. Having rejected both extremes as regards the availability of the joint interest privilege rule to the Dissenters, the practical importance of this point is somewhat diminished. But it similarly needs to be assessed in a suitably objective manner.
80. Two legal submissions advanced on behalf of the Dissenters I accept as reflecting the correct legal position:
- (a) litigation must be “*actual, threatened or in contemplation*” (*Sharp, at [12]*);
  - (b) the advice must have been “*obtained by the company to enable it to carry on with litigation, advice which was in connection with that dispute, advice in defence of the contemplated litigation*” (per Nugee J in *Sharp, at [21]*).
81. Deciding the earliest point when litigation privilege might be claimed does not mean that litigation privilege will automatically cover all advice the company receives; the relevant advice must actually have been given in connection with the dispute. However, as Mr Béar KC importantly pointed out, in evaluating the evidence “*the court must take a realistic, indeed commercial, view of the facts*”: *Serious Fraud Office-v-Eurasian Natural Resources Corpn Ltd* [2019] 1 WLR 791 (Per Sir Geoffrey Vos, C). Before considering the evidence on point (a), it is necessary to consider the commercial context in which the present controversy arises. Point (b) could obviously not be addressed in the context of the present application which did not condescend to analysing the



implications of particular documents. The commercial and legal context in this case appears to me to be in general terms reflective of what will likely appertain in every section 238 case:

- (a) a formal ‘take private’ merger offer is received by a listed company from an investor group including a third-party investor and existing controlling shareholders including one of the original founders of the company. The transaction entails the buyer group acquiring the shares of minority investors who purchased their shares on the relevant stock exchange for a price agreed between the company and the buyer group subject to shareholder approval;
- (b) because the ‘buyer group’ includes parties who control the board of directors, the task of deciding whether the offer should be accepted and is fair to minority shareholders is delegated to a special committee comprised of independent directors;
- (c) the special committee engages its own financial and legal advisers, who ultimately recommend to the board that the offer should be accepted. Before an offer is recommended to the board, the special committee will seek to enhance the terms of the offer as much as possible;
- (d) the type of transaction in contemplation from the date a special committee is appointed and the offer announced to the market is almost invariably a financially substantial one. It often involves seasoned specialist legal and financial teams representing the special committee and minority shareholders who include in their ranks ‘institutional’ dissenters skilled in extracting the maximum value from section 238 proceedings. In this context it would be unsurprising if the special committee did not wait until notices of dissent were served to obtain litigation advice in relation to prospective section 238 proceedings;
- (e) in advising the board that an offer should or should not be accepted, the special committee has regard to the interests of the shareholders as whole, seeking to balance the interests of the majority in pursuing the commercial advantages privatization offers and the conflicting interests of the minority whose shares will be acquired as an essential part of the transaction in receiving fair value for those shares;
- (f) there are competing and conflicting interests at play because the buyer group’s interests lie in minimizing the merger consideration while the minority shareholders’ interests lie in maximizing the price they receive for their shares. These conflicting interests are indicative of a commercial matrix which is both:
  - (i) transaction specific, and
  - (ii) clearly distinguishable from the standard corporate commercial terrain in which all shareholders may easily be viewed as sharing a common interest in the due administration of the company’s general business affairs;
- (g) although the legal framework requires a special majority of shareholders voting at an extraordinary (or special) general meeting to approve the merger, in some cases the buyer group may still hold a controlling position;

- (h) section 238 (1) confers on every dissenting shareholder an entitlement “*to payment of the fair value of that person’s shares*”. When the company petitions the Court because its fair value offer has been rejected by one or more dissenters, “*the Court shall determine the fair value of the shares of such dissenting members as it finds are involved, together with a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value*” (section 238 (11));
- (i) this specific commercial and legal context may accordingly be viewed, as I have formally recorded above, as creating a joint interest shared by all stakeholders in the company in ensuring that dissenting shareholders receive fair value for their shares as determined by this Court;
- (j) legal advice received by the company at any time prior to the dissenters relinquishing their general share rights and which is also relevant to the question of fair value is, subject to any *bona fide* litigation privilege claim the company can assert, potentially subject to a joint interest privilege claim on a dissenter’s part. Subject to what valuation considerations are or are likely to be controversial in each case, such joint privilege would perhaps arise, *inter alia*, in relation to either:
  - (i) advice taken by the company in relation to the merger process generally (e.g. for the purposes of negotiating what the special committee considers will reflect fair value), and/or
  - (ii) advice taken by the company independently of the merger process which is relevant to the value of a significant asset.

82. Against this background, I find that the Company’s evidence in the present case that some eventual Dissenters made sabre-rattling noises soon after the Merger was announced supports a finding that that litigation was reasonably contemplated as early as this date. It would be entirely unremarkable if the Special Committee, well in advance of the formal approval of the Merger Agreement, the EGM and the filing of notices of dissent, did seek some anticipatory litigation advice about potential section 238 proceedings involving one or more of the ‘usual suspects’. I accordingly have no basis for doubting the following evidence given by Mr Robert Dodds Jr in his Second Affidavit:

“22. *From the date of our appointment to the Board and thereafter, Lily and I took advice from Fenwick from time to time relating to the anticipated dissent litigation including on topics such as the merger dissent litigation process, record-keeping and discoverability of documents, the shareholder correspondence, and risk to the Company.*

23. *In particular, as we neared agreement with the Buyer Group and drew closer to executing the Merger Agreement, I was actively giving thought to the anticipated litigation, should the Merger go through. To this extent I sought further litigation advice in a meeting on 14 June 2020 with Fenwick, who outlined the dissent litigation process to me.”*

83. However, this finding leaves open for future determination (in relation to specific documents or categories thereof) the precise extent to which advice is both relevant to fair value but was also actually received by the Company in relation to the prospective section 238 litigation. As Mr Adkin KC submitted, it seems impossible to believe that all advice taken between April and June 2020 in particular (the period between the announcement of the Merger and its consummation) would be for the purpose of litigation. Nonetheless I reject the submission that the earliest date when litigation would reasonably be in contemplation would be after the Merger was approved by the Company at the earliest. When it is reasonable for litigation to be contemplated is not an abstract question but a context-specific inquiry which must have regard to both the status of litigation privilege as a fundamental right and the substantive consideration of when advice on litigation was actually sought. In this commercial context, it is entirely reasonable for (most obviously) litigation costs and strategy to be canvassed with lawyers from the beginning of the merger negotiation process in light of reliable evidence that a section 238 petition would likely be filed.
84. I now consider how the above ‘provisional’ findings are impacted by Narinder Hargun CJ’s decision in relation to this same broad issue in *Re Jardine Strategic Holding Limited* [2023] SC (Bda) 8 Civ. (14 February 2023). Again, his persuasive findings entirely reinforce my own provisional findings and support the position contended for by (a) the Company as regards the date from which litigation was reasonably contemplated, and (b) the Dissenters as regards the limited scope of litigation privilege after that date. He pivotally held:

*“167. In this case, for the reasons set out in paragraph 156 above, the Court concludes that it was virtually inevitable that there would be appraisal actions by the shareholders if the Amalgamation was going to be announced and implemented. This is demonstrated by the fact that 78% of the Plaintiffs acquired their shares (or depositary receipts) after the first announcement of the proposed Amalgamation, with the knowledge that the Amalgamation was a foregone conclusion. It is also demonstrated by similar steps having been taken in relation to recent amalgamations in the Cayman Islands involving Hong Kong based companies. The Court holds that, as at the time when the Company and Jardine Matheson decided to implement the necessary steps to accomplish the Amalgamation, section 106 proceedings against the Company were in the contemplation of the Company. Any other conclusion, in the Court’s view, would be entirely contrary to the Cayman Islands experience of similar amalgamations involving Hong Kong based companies and the actual experience in this case. The Court accepts Mr Moore KC’s submission that the present litigation was in the contemplation of the Company by the time the Transaction Committee was established on 19 February 2021...*

*169. Accordingly, the Court concludes that based on the facts set out in paragraph 156 above, litigation in the form of section 106 proceedings was indeed in contemplation by*

*the time the Transaction Committee was established on 19 February 2021. As a result, in accordance with the decision of Nugee J in Sharp v Blank, any legal advice sought and received, on or after 19 February 2021, by the Company and/or the Transaction Committee in defence of or in connection with the contemplated section 106 proceedings will fall within the exception to the general rule and is privileged against the Plaintiffs.*” [Emphasis added]

85. I indicated above that it was difficult to avoid the suspicion that the Dissenters’ Cross-Summons was in part a ‘tit-for-tat’ response to the Company’s ‘attack’ on their own section 1782 discovery campaign in the United States. In fairness, this strand of the argument does also cause one to wonder whether the Company may well have adopted a more expansive approach to claiming privilege in this case than in previous cases; causing as a result eyebrows to raise on the part of the Dissenters’ battle-hardened section 238 discovery troops. Whatever the reality may be in this respect, I resoundingly reject the Company’s tacit plea for a finding that litigation privilege automatically attaches to all advice received from the date when litigation was first reasonably contemplated when minority shareholders first expressed opposition to the proposed merger on or about 9 April 2020. There is simply no sufficient evidential foundation for such a finding.
86. Accordingly, in the absence of agreement between the parties, a further application will be required to resolve any disputes as to precisely what documents (or portions of documents) after early April 2020 litigation privilege properly attached to.

#### **Abuse of process**

87. In light of the findings, I have made as to the way in which joint interest privilege applies as modified by the section 238 statutory regime, I am bound to reject the Company’s case that it is too late for the Dissenters to advance their application at this stage. It would have been an abuse of process to belatedly raise arguments which totally changed the landscape of the applicable rules on privilege in section 238 cases, requiring the Company to adopt an entirely new approach to claiming privilege. I am unconvinced that, if the Company has assumed that all legal advice received before or after early April 2020 was protected by legal advice privilege regardless of its relevance to fair value, that this was a reasonable approach to take based on past section 238 practice. It is one thing to assume that no joint interest privilege can be asserted by dissenters generally in the context of section 238 proceedings; it is another thing, and inconsistent with a straightforward reading of section 238 itself, to assume that even legal advice which is (a) relevant to the central issue of fair value, and (b) not protected by litigation privilege would not be potentially subject to disclosure.

88. Because of the high-level factual basis on which the Dissenters' Cross-Summons has been argued, I am unable to fairly conclude at this stage that the Company will (based on the 'middle road' nature of my findings on all key issues) indeed have to go back to square one and redo its entire privilege exercise. Even if that were to prove to be necessary, in my judgment the Dissenters' delay in seeking the limited form of relief to which they are properly entitled in relation to the joint privilege issue falls well clear of the sort of unreasonable conduct which would justify depriving them of relief altogether. Any failure to comply with the Overriding Objective which may be established would simply justify an appropriate wasted costs order.
89. The most proportionate way of proceeding in light of the late stage at which the joint interest privilege issue has been raised might be for the Dissenters to adopt the pragmatic approach of making specific discovery requests in relation to targeted documents which are materially relevant to the fair value appraisal. This in any event the sort of approach which the Valuation Experts are likely to adopt. But that is a matter which I would leave the parties to seek to agree, with liberty to apply for such ancillary directions relating to the process and costs as may be required.

### Conclusion

90. In essence I have found that the Company is legally liable to disclose legal advice relevant to the determination of fair value but I am not prepared at this stage, having regard to the Overriding Objective, to require them to produce all documents which are relevant applying the standard, broad relevance test. My provisional view is that both sides have achieved a significant degree of success on points of legal significance for the section 238 discovery regime and that the costs of the Summons to date should be in the cause, with liberty to the Company to apply for wasted costs orders based on how the modified discovery process unfolds. I will hear counsel as to the terms of the final Order and costs, if these cannot be agreed.

91. In summary, however, I find that the Dissenters are entitled to an Order substantially in the following terms (the modifications to the form of Order sought are underlined):

“The Company is liable to disclose and produce for inspection (and may not claim privilege against the Dissenters in respect of) documents within its possession, custody or power which are relevant to the question of fair value, without prejudice to the Company’s right to assert litigation privilege in relation to advice received for the purposes of the present proceedings.”



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