COLLAS CRILL

Landmark judgment: Privy Council confirms minority shareholders have dissent rights in short-form mergers

MARCH 2025

The Judicial Committee of the Privy Council (**JCPC**) has delivered a landmark judgment in *Changyou.com Ltd v FourWorld Global Opportunities Fund Ltd & Others*,[1] conclusively determining that minority shareholders are entitled to dissent from a 'short-form' merger and to be paid fair value for their shares, mirroring protections available to shareholders in 'long-form' mergers.

Upholding the Cayman Islands Court of Appeal's decision, the JCPC confirmed that denying minority shareholders dissent rights in short-form mergers is inconsistent with the legislative purpose of the dissent regime in the Companies Act and violates a shareholder's constitutional right to peaceful enjoyment of their property.

The judgment is an important victory for minority shareholders of Cayman Islands companies, reinforcing dissent rights as a key minority protection and decisively closing off a loophole historically used by companies. The judgment will have an immediate and significant impact on merger and acquisition law and appraisal litigation in the Cayman Islands.

Collas Crill, with Jonathan Adkin KC and Adil Mohamedbhai of Serle Court, represented the successful shareholders, managed by FourWorld Capital Management LLC and Athos Capital Limited.

Dissent rights in short- and long-form mergers

The statutory merger process under Part 16 of the Companies Act allows companies to restructure or consolidate by merging two or more entities into a single surviving company. Statutory mergers are commonly used by public companies seeking to privatise by acquiring minority shareholders' interests at a price determined by the company.

Most statutory mergers are 'long-form' mergers, where the target company (the company whose shares will be acquired) convenes an extraordinary general meeting (**EGM**) for shareholders to vote on the proposed merger, requiring a two-thirds majority for approval. Shareholders who consider the offered price unfair have the right to dissent. Provided they follow the detailed dissent procedure prescribed in section 238 of the Act, shareholders are entitled to receive fair value for their shares as determined by the Grand Court.

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Where a parent company already owns at least 90% of the target's shares, there is no requirement for an EGM or shareholder vote,[2] as the outcome is effectively predetermined. These are known as 'short-form' mergers. Companies conducting short-form mergers historically interpreted the Companies Act as excluding dissent rights, primarily because the statutory dissent procedure in section 238 was designed around an EGM and required certain steps to be timed accordingly. In the absence of an EGM, companies adopted the position that the dissent regime did not apply, and shareholders were forced to accept the price offered by the company.

The issue for determination before the Privy Council

The Changyou merger, completed in April 2020, was a short-form merger. Several shareholders dissented from the merger and petitioned the Grand Court to determine the fair value of their shares. Changyou argued that dissent rights did not extend to short-form mergers. However, both the Grand Court and the Cayman Islands Court of Appeal held that the Cayman Islands legislature intended to grant dissent rights to shareholders in short-form mergers. To give effect to that intention, both courts rectified the statutory language and established a procedure for shareholders to dissent in the absence of an EGM. Changyou appealed to the JCPC.

The Privy Council's judgment

In a unanimous judgment, the JCPC upheld the Court of Appeal's ruling and determined that section 238 of the Companies Act, as drafted, did not conform with the constitutionally protected right to peaceful enjoyment of property. Consequently, it must be read with the necessary modifications required to bring it into conformity with the Constitution. The JCPC upheld the modifications made to the statutory wording by the Court of Appeal, ensuring that the appraisal remedy applies equally to both short- and long-form mergers.

Ordinary statutory interpretation

The JCPC first considered the standard or 'ordinary' construction of Part 16, comprising a two-part analysis of ascertaining the meaning of the relevant provisions and determining whether it is possible to rectify any deficiencies in the drafting with reference to ordinary statutory interpretation rules. The JCPC then addressed the constitutional issues arising.

On ordinary construction, the JCPC endorsed its prior judgment in Shanda Games,[3] reaffirming that *'the meaning of a statutory provision is to be ascertained from the words that the legislature has chosen to enact, read in their statutory context and in the light of the statutory purpose'*. It rejected Changyou's submission that the purpose of Part 16 is to confer appraisal rights only on dissenters from long-form mergers.[4]

The JCPC accepted the dissenters' submission that section 238 confers appraisal rights on all dissenters, finding no evidence that the Cayman Islands legislature intended otherwise.[5] The JCPC also drew parallels with the 'squeeze out' provisions in the Companies Act, noting that adopting Changyou's interpretation would permit companies to circumvent shareholder protections by structuring squeeze-outs as short-form mergers.[6]

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The JCPC ultimately concluded that:

> *'section 238 as drafted does not do what it was meant to do because it contains no machinery that enables the appraisal rights intended to be conferred on short-form shareholders to be exercised. The Board accepts that this must have been an oversight on the part of the legislature'.*[7]

Given this, the JCPC considered whether it was possible to correct the legislature's oversight pursuant to ordinary principles of statutory construction.[8] It determined that this was not possible, as *'it is not obvious how the legislature would have adapted these steps to the case of a short-form merger'* and creating such steps would '*cross the line between interpretation and legislation*'.[9]

Constitutional question

Recognising that the legislative oversight in Part 16 could not be rectified through ordinary statutory interpretation, the JCPC turned to the Constitution of the Cayman Islands.

Section 15 of the Constitution (which falls within the Bill of Rights) states that *'Government shall not interfere in the peaceful enjoyment of any person's property and shall not compulsorily take possession of any person's property, or compulsorily acquire an interest in or right over any person's property of any description...'*.[10] While this basic tenet is subject to certain exceptions, the core principle of the protection of property rights is clear.

The JCPC concluded that section 15 of the Bill of Rights applies to short-form dissenters' appraisal rights because:

- Part 16 of the Companies Act, which allows for the compulsory acquisition of shares in mergers, constitutes *'just as much an interference*' with a shareholders' peaceful enjoyment of their property as if the government had taken the shares directly;[11]

- Having considered several cases at length, the JCPC rejected the Company's submission that Part 16 does not interference with property rights simply because shareholders acquire shares knowing they are subject to statuary merger provisions. The JCPC concluded that *'the fact that the respondents acquired their shares in the Company ... at a time when the legislation already provided for the possibility of their shares being cancelled by means of a short-form merger does not prevent the subsequent implementation of such a merger from constituting an interference with the peaceful enjoyment of their property*'[12] and;

- Part 16 does not fall within the carve-outs to section 15 of the Bill of Rights.[13]

Having concluded that section 15 of the Bill of Rights is engaged, the JCPC considered the implications. Under section 5 of the Constitution, all 'existing laws' (i.e. laws that existed on 6 November 2009, the day the Constitution came into effect) must be read *'with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution'.*

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The question of what constitutes an 'existing law' had not previously been considered, making this a novel legal issue. The JCPC established that the test for determining whether provisions in a pre-Constitution law remain an 'existing law' under section 5 of the Constitution is *'whether there have been any material amendments to the provisions in question*'.[14]

Applying this test to section 238 of the Companies Act, the JCPC held it remained an 'existing law' despite amendments to other provisions of the Act after 2009. After reviewing these post-2009 amendments, the JCPC found that none constituted material changes to section 238. This key test is likely to have a broad impact throughout various common law jurisdictions with similar language built into their constitutions.

On this basis, the JCPC held that it was required to interpret section 238 *'with such modifications, adaptations, qualifications and exceptions as may be necessary to bring [it] into conformity with the Constitution*'. It concluded that the Court of Appeal's modifications to the wording of section 238 (set out in full at the end of this article and which provide a clear process for shareholders to dissent in a short-form merger) were necessary to bring the Act into conformity with the Constitution.[15]

Conclusion

This judgment is significant for several reasons. In the Cayman Islands merger appraisal context, it confirms that shareholders of a company undertaking a short-form merger are entitled to dissent from the merger and be paid fair value of their shares, as determined by the Grand Court.

Previously, many short-form mergers, often involving large publicly listed Cayman Islands companies, were completed without granting minority shareholders dissent rights. As a result, dissenting shareholders had no effective legal recourse and were forced to accept the price agreed between the parent and subsidiary companies. The Changyou ruling definitively closes this loophole.

Beyond merger appraisal, the judgment also establishes, for the first time, a definition of 'existing law' – a concept central to constitutional interpretation in the Cayman Islands and a number of other common law jurisdictions.

For minority shareholders, the key takeaway is that they must follow the procedures outlined in the Court of Appeal's interpretation of section 238 (set out below in mark up) to dissent in a short-form merger.

Please find a link to the full ruling here.

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[1] [2025] UKPC 12; judgment date 11 March 2025.

[2] Pursuant to section 233(7) of the Companies Act.

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[3] Shanda Games Ltd v Maso Capital Investments Ltd [2020] UKPC 2, [2020] 1 BCLC 577.

[4] *Changyou* [2025] UKPC 12 at [30-34].

[5] *Changyou* [2025] UKPC 12 at [36-40].

[6] *Changyou* [2025] UKPC 12 at [42-44].

[7] *Changyou* [2025] UKPC 12 at [46].

[8] Pursuant to the well-known judgment of Lord Nicholls in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586.

[9] *Changyou* [2025] UKPC 12 at [50-51].

[10] Section 15(1), Cayman Islands Constitution Order (SI 2009 No 1379).

[11] *Changyou* [2025] UKPC 12 at [55-56].

[12] *Changyou* [2025] UKPC 12 at [65].

[13] *Changyou* [2025] UKPC 12 at [74].

[14] *Changyou* [2025] UKPC 12 at [93].

[15] *Changyou* [2025] UKPC 12 at [96-97].

The Court of Appeal's interpretation of section 238

Revised wording of section 238(1) to (5) as per the Court of Appeal's judgment **(modifications in bold):**

(1) A member of a constituent company incorporated under this Act shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation.

(2) A member who desires to exercise that person's entitlement under subsection (1) shall give to the constituent company, before the vote on the merger or consolidation **(if any such vote is to be held) or (if no such vote it to be held) immediately after the date on which the plan of merger is given to the member pursuant to section 233(7)**, written objection to the action.

(3) An objections under subsection (2) shall include a statement that the member proposed to demand payment for that person's shares if the merger or consolidation is authorised by the vote **or approved**.

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(4) Within twenty days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, or (if no such vote is to be held) **within twenty days immediately following the date on which the plan of merger or consolidation is filed with the Registrar pursuant to section 233(9)**, the constituent company shall give written notice of the authorisation **or filing** to each member who made a written objection.

(5) A member who elects to dissent shall, within twenty days immediately following the date on which the notice referred to in subsection (4) is given, give to the constituent company a written notice of that person's decision to dissent, stating-

a) that person's made 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.

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