In The Supreme Court of Bermuda

CIVIL JURISDICTION

(COMMERCIAL COURT)

2021 NO 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 124, 125 & 126

IN THE MATTER OF JARDINE STRATEGIC HOLDINGS LIMITED

AND IN THE MATTER OF THE AMALGAMATION AGREEMENT BETWEEN JMH INVESTMENTS LIMITED AND JMH BERMUDA LIMITED AND JARDINE STRATEGIC HOLDINGS LIMITED

AND IN THE MATTER OF SECTION 106 OF THE COMPANIES ACT 1981

Before: **Hon. Chief Justice Hargun**

Appearances: **Robert Levy QC, Mark Chudleigh and Lewis Preston Kennedys Chudleigh Limited, Matthew Watson of Cox Hallett Wilkinson Limited, Delroy Duncan QC and Ryan Hawthorne of Trott and Duncan Limited, and Lilla Zuill of Zuill & Co for the Plaintiffs.**

Martin Moore QC and John Wasty of Appleby (Bermuda) Limited for Jardine Strategic Holdings Limited

Date of Hearing: **12 November 2021**

Date of Ruling: **3 December 2021**

RULING ON COSTS

Summons for directions in relation to appraisal of fair value under section 106 of the Companies Act 1981; principles to be applied in relation to the costs of that directions hearing

HARGUN CJ

1. This Ruling relates to the issue of costs following the Judgment of this Court dated 12 November 2021. Over a period of three days in October 2021 the Court heard submissions from Counsel in relation to the appropriate directions which the Court should make leading up to the hearing to appraise the fair value of the shares held by the Dissenting Shareholders. The directions sought by the Dissenting Shareholders and the Company related to experts; electronic data room and Company discovery procedure; discovery to be provided by the Company and the provision of lists of documents; translation of documents disclosed during the discovery process; experts' information requests of the Company; management meetings; factual witness evidence; expert reports of valuation experts and joint memorandum; and case management conference and trial date.

2. There was a fundamental disagreement between the parties in relation to the scope of the specific and general discovery to be provided by the Company to the Dissenting Shareholders and their duly appointed legal advisers and valuation experts. The discovery issue consumed the major part of the three-day directions hearing. The Dissenting Shareholders sought discovery of the specific documents referred to in Appendix 2 of the draft order as well as general discovery in accordance with RSC Order 24 of documents which were prepared or created or communicated in the five-year period ending on the

Valuation Date and which are relevant to the determination of fair value of the Dissenting Shareholders' shares in the Company. Appendix 2 required the Company to upload to an electronic data room all relevant documents and communications in its possession, custody or power as identified in Appendix 2, comprising a list running to 9 pages of documents and communications falling into 38 separate defined categories.

3. The discovery sought by the Dissenting Shareholders from the Company appeared to be in accordance with the settled practice in the Cayman courts in relation to appraisal actions under section 238 of the Companies Law (2016 Revision). Mr. Levy QC, on behalf of the Dissenting Shareholders, took the Court through a number of the Cayman authorities which in principle supported his submission. The Dissenting Shareholders' position also appeared to be supported by a Practice Direction issued by Chief Justice Smellie of the Cayman Islands.

4. The Court accepted that the Cayman authorities relied upon by Mr Levy QC provided valuable insight in relation to the effective management of appraisal actions. These authorities emphasise that in assisting the expert valuers to give their opinion on fair value it is necessary for the Court to ensure that the expert valuers are provided with all necessary relevant documentation and information. The Cayman authorities recognise the crucial importance of providing all necessary relevant information and the fact that the information inevitably will be in the possession of the company.

5. However, in the exceptional circumstances of the Jardine Group, the Court determined that the appropriate approach to discovery was that as suggested by the Company. After the initial upload of all the documents supplied to Evercore for its valuation opinion dated 7 March 2021, together with the valuation opinion, the expert valuers may require and request further categories of documents and information from the Company and/or the Dissenting Shareholders and the Company or Dissenting Shareholders (as appropriate) shall provide the documents or information as requested promptly and in any event no later than 28 days from the date of the request. In relation to general discovery, the Court accepted that it has the jurisdiction to order general discovery in an appropriate case but in the circumstances of this case the Court was satisfied that general discovery under Order

24 rule 3(1) was not necessary and in any event it was not necessary at this stage. In substance, the court adopted the approach proposed by Mr. Moore QC on behalf of Company.

6. In the circumstances Mr. Moore QC on behalf of the Company seeks an order that the Dissenting Shareholders should be required to pay the Company's costs relating to the discovery issue. He says that in essence the application pursued by the Dissenting Shareholders was an application for specific discovery. It was not a minor case management issue. He also says that the discovery issue was a discrete issue and as the Company has succeeded on this issue the Company should be awarded its costs in accordance with the general rule that the successful party should be awarded its costs.

7. Mr. Levy QC, for the Dissenting Shareholders, invites the Court to consider that the discovery issue was part and parcel of the necessary directions the Court was required to give. Indeed, directions in relation to discovery to be provided by the company in an appraisal action is an essential step in properly advancing the action to trial. Mr. Levy QC argues that the appropriate costs order in relation to a directions hearing and directions order is that costs should be in the cause. Such an order recognises that a directions hearing in an appraisal action, even when it is contested, is an "*essentially neutral and necessary case management mechanism aimed at advancing the proceeding to trial for the mutual benefit of all parties*" (per Kawaley J in *Nord Anglia Education Inc* FSD 235 of 2017 (Grand Court of the Cayman Islands) at [32]).

8. The Cayman authorities referred to by Mr. Levy QC recognise that directions hearings can often be contested, particularly in high value appraisal actions. The mere fact that aspects of the directions sought are contested does not necessarily attract the "*winner and loser*" analysis when it comes to the question of costs. In *EHI Car Services Limited* FSD 115 of 2019 (Grand Court of the Cayman Islands) Parker J held that, absent exceptional circumstances, costs of the summons can be determined at the conclusion of the trial and the overall successful party can recover those costs. In his view this approach was consistent with "*costs follow the event*" principle (at [34]). Parker J explained why this was the appropriate approach in the earlier passages of his Ruling at [28], [29] and [33]:

> *"28… In practice it is not likely that these hearings will be truly "neutral" in the sense that the parties will always have certain outcomes that they wish to achieve to advance and protect their cases. However, in furthering the overriding objective these hearings afford an opportunity for the parties to take stock and prepare the way for a fair trial and are, in that sense, not meant to be unnecessarily contentious. In this case the parties did manage to iron out all but six issues between them, albeit the six issues were fully argued out.*
>
> *29. I do not consider that the "winner and loser" analysis is of straightforward application to contested summonses for directions in s. 238 cases, or indeed in this case. This was not a freestanding application where the parties would have been aware that the costs would be dealt with on a distinct basis. Inevitably there will be partial wins and partial losses and complete wins and losses, judged objectively. I accept that the court should not view success as a technical term, but as a result in real life as a matter of common sense.*
>
> *…*
>
> *33. Although in this case the respondents did succeed on all of the main points of contention and did indeed obtain the directions they were seeking in relation to all 19 points…, it cannot be said that the hearing was not of benefit to all parties (and the court) in the future conduct of the case. Moreover, although the company did put forward arguments which the court rejected in support of its case that the regime was not working fairly for the companies and that the experts and attorneys needed to be "reined in", as well as novel and ambitious arguments as to the jurisdiction itself, these were not deployed in a way which in my view was unreasonable or improper."*

9. The Court accepts that the Ruling of Parker J in *EHI Car Services* sets out the proper approach to the issue of costs in relation to applications for directions in appraisal actions. In this case the Court accepts that the Dissenting Shareholders were unsuccessful in relation

to the discovery issue. However, the Court does not consider that the appropriate order the Court should make is to require the Dissenting Shareholders to pay the costs of the Company in relation to the discovery issue.[1] The Court does not consider that the underlying approach to discovery in an appraisal action advanced by Mr. Levy QC was either unreasonable or improper. It was based on Cayman authorities and the settled practice in Cayman in relation to appraisal actions. This Court has not followed the approach to discovery sought by the Dissenting Shareholders based upon exceptional circumstances in this case. The directions given by this Court, including in relation to the issue of discovery, are intended to advance this action for the mutual benefit of all of the parties to this proceeding. For these reasons, the Court considers that the appropriate order in this case is that the entirety of the costs in relation to the summons for directions hearing be costs in the cause.

Dated this 3rd day of December 2021

NARINDER K HARGUN

CHIEF JUSTICE

[1] The Court of Appeal in Bermuda has cautioned against adopting the issue-based approach to costs. The current position is summarised in the decision of Kawaley CJ in *Kentucky Fried Chicken (Bermuda) Ltd v Minister of Economy Trade and Industry (Costs)* [2013] Bda LR 34, at [13]-[14].