IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 218 OF 2015 (IMJ)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF CAPITALHOLD LIMITED

IN CHAMBERS

Appearances:	**Mr. Matthew Collings Q.C., instructed by Mr. Ian Huskisson and Ms. Charmaine Richter of Travers Thorp Alberga for the Petitioners/Applicants** **Mr. Nigel Meeson Q.C. instructed by Mr. Ben Hobden of Conyers, Dill & Pearman for the Company/Respondent.**
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**14 March 2016**
Delivered:	**14 March 2016**
Circulated:	**21 March 2016**

Released for Publication: 13 March 2017

HEADNOTE

Company Law - Disclosure – Stage at which to be ordered - Whether Privilege applies to communications between Company, its agents and any other persons including attorneys, where the applicant for discovery is a shareholder.

EX TEMPORE JUDGMENT

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1. Before me is the first hearing of this contributories' Petition. There is an Amended Summons for Directions dated 3 March 2016. At the end of the hearing only one issue

remained outstanding, which is an application under paragraph 7 of the Amended Summons. Further amendments of the relief sought by Mr. Collings Q.C. on behalf of the Petitioners were made during submissions and in discussions shortly before giving this Judgment.

2. I wish to record my appreciation of the reasonableness of the parties in ultimately reaching an accord on most of the directions and the candid manner in which concessions were made.

3. Under paragraph 7 of the Amended Summons the Petitioners seek a direction that there be disclosure of all documents and all communications between the Company, its agents and any other persons including attorneys concerning the Agreement and Plan of Merger dated 20 December 2015.

4. Orders agreed are as follows:

   1) The Petitioners have leave to amend the Petition.

   2) The Petitioners have leave to serve the Amended Petition on all the other shareholders at their respective registered offices and out of the jurisdiction where applicable.

   3) The Amended Petition be treated as being between the Petitioners and the Majority Shareholders and that the Company should play no active part in, nor should it incur any further costs, in relation to the Amended Petition, save for

providing discovery if so directed by the Court or otherwise as may be directed by the Court.

4) A direction that the Petition should not be advertised.

5. Originally it had been argued in a Skeleton Argument submitted by Mr. Meeson Q.C. on behalf of the Company that, in so far as there is correspondence between the Company and its attorneys, then that correspondence is privileged. However, at the end of the day there was no disagreement with the principle that if a company expends money on legal advice then that advice may be disclosed to shareholders. The Petitioners rely on ***CAS (Nominees) Ltd v Nottingham Forest plc*** [2001]1 All ER 954 for the principle that a *cestui que trust* is entitled to see opinions and communications created for the purpose of administration of the trust, which was applied to the circumstances of a company and its shareholders. The principle is that the directors owe a fiduciary duty to the shareholders to only apply the assets of the company for the proper purposes of the company.

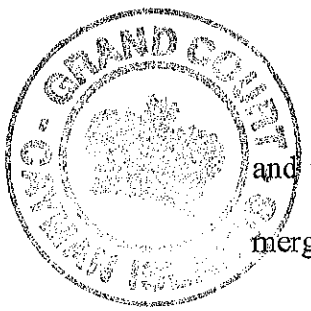
6. The exception to the principle is where privilege can be maintained against a shareholder in relation to opinions or communications made for the purpose of the fiduciary or directors' own defence to litigation brought against them by the shareholder. The exception does not apply here. The Company has agreed to a direction that it is only a nominal party or the subject matter of the proceedings, the proceedings being in substance between the Petitioners and the other shareholders of the Company.

7. I should here add that the Petitioners are also seeking directions for the service of pleadings.

8. The issue remaining in relation to the order sought boils down to relevance and timing. In written submissions on behalf of the Company it had been stated that the Petition was not against the Company; the allegations were made against the other shareholders and a non-party is not ordinarily liable to provide disclosure. However, it seems plain to me that, for the purposes of this application the Company is a party, albeit a nominal one, but nevertheless a party for the purposes of this application.

9. It was more forcefully argued on behalf of the Company that this application was premature because pleadings have not closed and therefore, since discovery orders are made in respect of issues identified in proceedings, it should be ordered at a later stage. It was further argued that this application "puts the cart before the horse", so to speak, in the sense that it is not yet clear what will be pleaded by the majority shareholders.

10. It was also argued in the written Skeleton Argument that the merger has been terminated and is irrelevant. I agree with Mr. Collings Q.C. that this argument cannot be maintained, as the Petitioners rely not simply on the existence or fact of the occurrence of the Agreement and Plan, but also upon what is reflected by the purpose, and effect of the arrangements referred to: see in particular paragraphs 45 and 50 of the Amended Petition



and the allegations of breach of duty and improper purpose in relation to the proposed merger.

11. I was initially attracted to the idea that any order for disclosure should await service of pleadings and the involvement of the other shareholders. However, upon reflection, unless the other shareholders concede the allegation that the plan of merger was for an improper purpose, or adopt some other like course, the disclosure the Petitioners seek is likely to be relevant and remain so.

12. In addition, Mr. Collings Q.C. submits that he wishes for an order now so as to properly finalise pleading his case and further, maintains that the shareholders are entitled to see the documents. There is a willingness to dispense with lists of documents and it is agreed that any disclosure by the Company should also be provided to the other shareholders. Another consideration is that Mr. Meeson Q.C. has indicated that whilst in his submission it is premature to require disclosure from the Company now, there is no intention for the Company or its representatives to return to be heard further on the adjourned hearing of the Summons, or at what might be considered a more appropriate time.

13. I am of the view that the application is in the nature of specific disclosure. I note that GCR O.24, r.7 indicates that an application for specific disclosure, as opposed to standard discovery after the close of pleadings (O.24, r.1), may be made "*at any time*". The test is

whether the class of documents specified relate to one or more of the issues and whether the disclosure is necessary for disposing fairly of the cause or matter or for saving costs.

14. In all the circumstances I am satisfied that it is appropriate to make the order sought at paragraph 7, now paragraph 5 of the Order, for the reasons advanced. I so order.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT