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IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 009 of 2021
(Formerly Cause No. FSD 92 of 2017 (NSJ))

IN THE MATTER OF THE COMPANIES ACT (2016 REVISION)

AND IN THE MATTER OF TRINA SOLAR LIMITED

BETWEEN

(1) MASO CAPITAL INVESTMENTS LIMITED

(2) BLACKWELL PARTNERS LLC – SERIES A

APPELLANTS

-AND-

TRINA SOLAR LIMITED

RESPONDENT

Before:	**The Hon. Sir Richard Field, Justice of Appeal** **The Hon. Sir Michael Birt, Justice of Appeal** **The Rt. Hon. Sir Jack Beatson, Justice of Appeal**
Appearances:	**Mr. Simon Salzedo KC instructed by Mr. Rupert Bell and Mr. Patrick McConvey of Walkers for the Appellants** **Mr. Philip Jones KC instructed by Ms. Katie Pearson and Ms. Rhiannon Zanetic of Harneys for the Respondents**
Heard:	**On the papers**
Draft circulated:	**14 July 2023**
Judgment delivered:	**04 August 2023**

JUDGMENT ON COSTS AND APPLICATION FOR A STAY

Birt, JA

1. On 4 May 2023, this Court gave judgment ("the Judgment") allowing the Appellants' ("the Dissenting Shareholders") appeal in certain respects. The Court now deals with two

consequential matters. The first is the issue of costs and the second is whether there should be a stay on this Court's decision pending an appeal by the Respondent ("the Company") to the Privy Council, which appeal the Company is entitled to bring as of right.

2. In order to explain my decision on these matters, it is necessary to summarise the history of the proceedings very briefly. In this judgment, words and expressions defined in the Judgment have the same meaning where used herein.

Procedural background

3. The Company was taken private as a result on offer by a group which included the founder of the Company, Mr Gao. The Dissenting Shareholders exercised their right under section 238 of the Companies Act (2016 Revision) to receive the fair value of their shares rather than the Merger Price.

4. There was a lengthy hearing before Segal J ("the judge") at which there was a wide variation in the parties' positions.

5. The Company's primary submission was that the fair value should be determined by reference to the Market Price, which the judge accepted to be $7.26 per ADS. The Company's alternative submission was that the fair value should be ascertained by reference only to market based methodologies, i.e. the Market Price and the Merger Price. If this was not accepted, the fair price should be ascertained by a weighting of the different methodologies in accordance with the evidence of the Company's valuation expert.

6. The Dissenting Shareholders, on the other hand, submitted that there were weaknesses in both the Market Price and the Merger Price, such that weight could not properly be placed upon them. They submitted, therefore, that the fair value should be calculated solely by reference to a DCF valuation.

7. In relation to the DCF valuation, the parties disagreed on many of the projections and assumptions in the Management Projections, and they also disagreed on a number of the matters used to ascertain the discount rate to be applied to the future cashflows in order to reach a DCF valuation. In this respect, the Dissenting Shareholders relied on the evidence

of their solar expert and valuation expert to submit that the fair value based on a DCF valuation was $193.19 per ADS, as compared with the Merger Price of $11.60 per ADS.

8. The judge rejected the Company's submission that he should only have regard to the Market Price as well as its alternative submission that he should only place weight on the market place methodologies, namely the Market Price and the Merger Price. He also rejected the Dissenting Shareholders' submission that fair value should be calculated entirely by reference to a DCF valuation. He agreed with the Company's valuation expert that a weighted average of all three methodologies was appropriate, but whereas she had proposed a weighting of 40% Market Price, 40% Merger Price and 20% DCF valuation, he opted for 30% Market Price, 45% Merger Price and 25% DCF valuation.

9. As to the Management Projections and the DCF discount, the judge determined the various matters in dispute. On the substantial majority of matters, he accepted the evidence of the Company's experts rather than the Dissenting Shareholders' experts. In particular, he largely accepted the evidence of the Company's valuation expert.

10. Based upon the judge's decisions, the parties agreed the necessary calculations for the DCF valuation, which came to $17.81 per ADS (after a 2% minority discount determined by the judge which was not challenged on appeal). Using the weightings determined by the judge, the fair value came to $11.75 per ADS (as compared with the Market Price of $7.26 and the Merger Price of $11.60).

The appeal

11. The Dissenting Shareholders did not appeal every aspect of the judge's decision. They listed five grounds of appeal, some of which had sub-grounds.

The grounds of appeal can be summarised as follows:

Ground 1 – Market Price

The judge wrongly found: (i) that the market in the Company's ADS was semi-strong efficient; (ii) that there was no material non-public information as at the Valuation Date in relation to the 9,000 MW point; and (iii) that it was reasonable for the Company's valuation expert to place weight on the report of analysts.

Ground 2 – Merger Price

The judge wrongly found that the criteria for placing weight on the Merger Price were satisfied.

Ground 3 – Management Projections

The judge erred in: (i) adopting too high a test for departing from the Management Projections; (ii) failing to adopt a figure of 9,000 MW for module sales in 2017; (iii) failing to make any adjustment to the Management Projections for future module selling prices; and (iv) failing to make any upward adjustment to the Management Projections for downstream capacity factors.

Ground 4 – the DCF discount

The judge erred in: (i) failing to make any reduction to the country risk premium in respect of China; (ii) including a size premium; and (iii) adopting the pre-tax cost of debt figure advocated by the Company.

Ground 5 – Weighting

Because of Ground 1 and Ground 2, no weight should be attached to the Market Price or the Merger Price, with the consequence that 100% weighting should be placed on the DCF valuation.

This Court's decision

12. In the Judgment the Court reminded itself that the judge's findings could only be overturned if plainly wrong. Applying that test, the Court's decisions on the individual grounds of appeal were as follows.

Ground 1

This was unsuccessful. Although the Court accepted some of the Dissenting Shareholders' criticisms in relation to sub-ground (iii) concerning analysts, it held at [244]-[245] of the Judgment that this was no reason to reduce the weighting which the judge had given to the Market Price. It rejected sub-grounds (i) and (ii).

Ground 2

This was successful. For the reasons summarised at [149], the Court held that no weight should be placed on the Merger Price. In his submission on costs, Mr Jones suggested that the Company had had some partial success on this ground. First, he submitted that the Court had found that there was no evidence to demonstrate that Mr Gao's position was the reason for the lack of a competing bid. That is correct, but the Court immediately went on to say at [147(vi)(b)] that the important point was that there was a material risk that this was so and that the existence of that risk had not been addressed by the Special Committee. Accordingly, I do not think that this point avails Mr Jones.

Secondly, he submitted that the Court did not consider the judge's interpretation of *Norcraft* to be wrong in principle. As the Court stated at [137], the judge had misunderstood what was said in *Norcraft*, but the Court agreed that his statement of principle was correct. This was a very minor point and did not affect the outcome of Ground 2. Accordingly, despite Mr Jones' submissions, my assessment is that the Dissenting Shareholders should be regarded as having been wholly successful in relation to Ground 2.

Ground 3

The Company accepts that the Court upheld the Dissenting Shareholders' submissions on sub-grounds (i) and (iv). In relation to sub-ground (ii), the parties agreed at the hearing that it stood or fell according to the Court's decision on Ground 1(ii) and no time was spent on it. Accordingly, I consider it should be ignored for present purposes. As to sub-ground (iii), the Court accepted the Dissenting Shareholders' submissions, not only that the Management Projections should be varied to reflect the figures for selling prices in the Company's valuation analyst's report (excluding the SunShot figures) but also that the rate of decline in prices would slow and that this must be reflected in the figures. The Court held that it did not have any evidence before it as to what would be the appropriate rate of decline for 2021-23 and accordingly ruled that, if the matter could not be agreed between the parties, the issue should be remitted to the Grand Court for resolution. In my judgment, the Court essentially accepted the Dissenting Shareholders' submissions (apart from a last minute suggestion in a document handed up by Mr Salzedo during his reply submissions). Accordingly, I conclude that in all essential respects, the Dissenting Shareholders succeeded on Ground 3.

Ground 4

The Dissenting Shareholders failed on all three sub-grounds of Ground 4 as the Court upheld the findings of the judge.

Ground 5

The Court upheld the Dissenting Shareholders' contention that no weight should be placed on the Merger Price but upheld the judge's finding that a 30% weighting should be given to the Market Price, thereby rejecting the Dissenting Shareholders' contention that no weight should be placed on the Market Price. The Court accordingly placed 70% on the DCF valuation and 30% on the Market Price. The Dissenting Shareholders were therefore successful in increasing the weighting given to the DCF valuation but did not succeed in their contention that the DCF valuation should attract a 100% weighting. In my judgment, they are to be regarded as having been successful on Ground 5.

Summary of outcome

13. In summary, as just stated, the Court altered the weighting so as to be 30% Market Price and 70% DCF valuation. In relation to the latter, the parties were invited to try and agree the rates of decline of average selling prices for 2021-23 and to then agree the calculation of the DCF valuation taking account of those matters in Ground 3 where this Court had altered the judge's decision. The Court further ruled that if it was not possible for the parties to agree the reducing rate of decline for 2021-23, this aspect would be remitted to the Grand Court for decision.

14. The parties have been unable to agree the rate of decline but have incorporated the remaining calculations. The Company's valuation expert has assessed a fair value of $16.41 per ADS whereas the Dissenting Shareholders' valuation expert assesses the fair value at $18.98 per ADS. The upshot is that, even if the Grand Court ultimately finds in favour of the Company's valuation expert, the result of the appeal will have increased the Dissenting Shareholders' recovery by just under $8.1m ($8,094,961).

(A) Costs

15. With that introduction, I turn to consider the issue of costs. The parties have filed written submissions and the Court has considered the matter on the papers.

(i) The applicable principles

16. Rule 28 of the Court of Appeal Rules (2014 Revision) provides that '*the powers and discretion of the Court under section 24 of the Judicature Act*… [relating to costs] *shall be exercised subject to and in accordance with GCR Order 62*'.

17. The starting point is that costs should follow the event. This is emphasised in GCR, O.62, r.4 as follows:

> ***"(2) The overriding objective of this Order is that a successful party to any proceedings should recover from the opposing party the reasonable costs incurred by [the] successful party in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.***
>
> …
>
> ***(5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."***

Paragraph (7) then goes on to list some of the orders which the Court may make under the rule, including that one party must pay a proportion of another party's costs, or the costs relating to particular steps taken in the proceedings, or costs relating only to a distinct part of the proceedings.

18. In *Re Qunar Cayman Islands Limited* (Unreported, Grand Court, 29 March 2021), Parker J summarised the applicable principles in section 238 cases in the following terms at [129]:

> ***"(a) Costs are in the discretion of the court.***
>
> ***(b) Section 238(14) provides that the costs of the proceedings may be provided for 'as the court deems equitable in the circumstances'. The discretion given to***

the court by section 238(14) is therefore a wide one to do justice in all the circumstances.

(c) If dissenting shareholders participate actively in the trial it is equitable for GCR Order 62 rule 4 to apply, and normally costs should follow the event in accordance with the general rule.

(d) It follows that a successful party should recover the reasonable costs incurred by him in conducting the proceedings in an economical, expeditious and proper manner, unless otherwise ordered by the court (Order 62 r.4(2)).

(e) In section 238 cases it is not helpful to attempt to lay down any generally applicable principles or criteria by which to determine what constitutes 'success or failure', save to say that it depends upon all the circumstances.

(f) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, unless that has caused a significant increase in the length or costs of the proceedings, in which case he may be deprived of the whole or part of his costs. In Integra for example, the court accepted that there may be circumstances in which it is appropriate to exercise the court's discretion by reference to identifiable issues, where the valuation approach for example by an expert was preferred. However, Jones J was not influenced in that case by deciding one big tax issue in favour of the company because it did not detract from the overall result.
(g) If the successful party raises issues or makes allegations improperly or unreasonably the court may not only deprive him of his costs, but may order him to pay the whole or a part of the unsuccessful party's costs (Order 62 r.11(2)).

(h) A dissenting shareholder's risk as to costs should be limited to the additional costs incurred by the company as a result of his participation if he is unsuccessful."

19. The above statement was endorsed by Segal J in his judgment on costs in the present case.

20. The principles summarised at (f) and (g) above in *Qunar* are derived from the English case of *Re Elgindata (No 2)* [1993] 1 All ER 232 and this was specifically acknowledged by Parker J in *Qunar*. The relevant extract from *Elgindata* is to be found in the judgment of Nourse LJ at [237] as follows:

> ***"The principles are these. (1) Costs are in the discretion of the court. (2) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (3) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs. (4) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or a part of the unsuccessful party's costs."***

21. Mr Jones submitted that in England, following the introduction of the Civil Procedure Rules, the fourth principle was no longer applicable, in that it was no longer necessary for a successful party to have acted unreasonably or improperly before he can be required to pay the costs of the other party of a particular issue on which he (the otherwise successful party) has failed; see for example *Summit Property Limited v Pitmans* [2001] EWCA Civ 2020 per Longmore LJ at [16].

22. However, the Civil Procedure Rules have not been enacted in this jurisdiction and the courts have continued to refer to *Elgindata*; see for example not only *Qunar* but also *AB Jnr v MB* (Unreported, Grand Court, Smellie CJ, 16 June 2013); *Re eHi Car Services Limited* (Unreported, Grand Court, Kawaley J, 31 March 2020); *Re Kongzhong Corporation* (Unreported, Grand Court, Parker J, 18 December 2018); and *Cayman Shores Development Ltd et al v The Registrar of Lands et al*, 4 July 2023, CICA (Civil) 17 of 2021, a decision of this Court.

23. Accordingly, whilst courts may be more willing than in the past to make orders which reflect success or failure on particular issues, the principles summarised in *Elgindata* remain applicable in this jurisdiction. In particular, before a successful party is ordered to pay the costs of the other party in relation to a particular issue upon which the successful

party has failed, it must be shown that the issue has been raised properly or unreasonably. However, there is no requirement for an issue on which the successful party has failed to have been raised improperly or unreasonably for the court to deprive the successful party of the costs of that issue.

24. Nevertheless, as stated in *Elgindata*, it must be an issue which has caused a significant increase in the length or cost of the proceedings. As this Court stated in *Scully Royalty Limited v Raiffeisen Bank International AG* (Unreported, 8 April 2022) at [26] by reference to the decision of Mann J in *Sycamore v Breslin* [2013] 4 Costs LO 572, in any litigation, especially complex litigation, any winning party is likely to fail on one or more issues in the case. The fact that a party has not won on every issue is not, of itself, a reason for depriving that party of part of its costs. In my judgment, the extract cited above from the judgment of Parker J in *Qunar* is a useful summary of the position in relation to costs in section 238 cases, albeit directed more towards the position at first instance.

(ii) Costs of the appeal

25. There is a dispute between the parties as to who should be regarded as the successful party in relation to the appeal. The Dissenting Shareholders submit that they have been successful. The appeal has been allowed and, as a result of this Court's decision, they will receive at least $8m more than under the judge's decision. On the other hand, the Company submits that more hearing time (by reference to the transcript) and preparation time (by reference to the pages of the skeleton arguments) were spent on issues where the Dissenting Shareholders failed than on those on which it succeeded. The Company therefore submitted that it should be awarded such percentage of its costs as the Court considered appropriate on the basis of an issues-based approach.

26. In my view, there is no doubt that the Dissenting Shareholders were the successful party on this appeal. As a result of the Court's decision, the fair price will be at least US$16.41 (or possibly $18.90) per ADS as compared with the judge's price of $11.75. In cash terms, the Dissenting Shareholders will be at least $8m better off than under the judge's decision and possibly more. The starting point, therefore, must be that the Dissenting Shareholders should be entitled to their costs of the appeal.

27. I do not consider that any of their arguments were raised unreasonably or improperly. The question therefore is whether there should be any deduction to reflect the fact that they failed on Grounds 1 and 4 and, if so, the amount of any such deduction.

28. I accept that a significant amount of time and effort was devoted to these two issues and that this merits a deduction from the costs awarded to the Dissenting Shareholders. According to the Company, just over half the hearing time was occupied on Grounds 1 and 4 and some 40% of the pages of the skeleton arguments. Whilst this is relevant information, I do not think it right to fix a percentage deduction by reference to such matters. The number of pages of a skeleton argument may not be an accurate reflection of the time and effort spent (it may take longer to produce a suitably condensed and concise argument) and the time at a hearing is often affected by the interventions of the Court. Furthermore, the aim of a costs order is to make a fair and just order and this must take into account the overall feel and outcome of the case. As this Court said in *Scully Royalty* at [28], it is generally preferable for the Court to adopt a broad and reasonably robust approach in establishing a percentage deduction rather than ordering a deduction by reference to the exact time spent on the unsuccessful issue, even if this can be ascertained. In my judgment, adopting a broad approach, I consider that a fair deduction would be 25%. Accordingly, I would order the Company to pay 75% of the Dissenting Shareholders' costs in relation to the appeal, such costs to be on the standard basis and to be taxed if not agreed.

(iii) The costs below

29. In his costs judgment, the judge held that the Dissenting Shareholders should be regarded as the successful party as they had obtained some $8m more than the amount which would have been payable pursuant to the Company's primary position, namely that the fair price should be the Market Price of $7.26 and had also recovered a modest amount (some $260,000) more than was payable under the Merger Price. However, even the Dissenting Shareholders accepted that there should be a 25% deduction in their costs in view of the number of issues on which they had been unsuccessful.

30. The judge did not consider this to be sufficient. For the reasons set out at [75(i)-(l)] he felt that no order as to costs was the fair order. In particular, he had regard to the number of issues upon which the Dissenting Shareholders had failed as set out at [8] of his main

judgment and the fact that their claim that the fair price was $193.19 per ADS was an extravagant one.

31. The Dissenting Shareholders submit that, their appeal having been allowed, they should be awarded the costs of the hearing below. The Company, on the other hand, submits that the question of the costs below should be remitted to the Grand Court for decision following the judge's determination of the outstanding issues in relation to fair value which have been remitted to him. I do not accept that this would be right. The Grand Court will only be considering a very limited valuation point and will not be in as good a position as this Court to decide upon a fair costs order below. Accordingly, this Court should rule on the position.

32. It could be argued that, this Court having made a deduction of 25% in relation to the costs of the appeal, a similar deduction would be appropriate in respect of the Grand Court hearing. However, I do not think that that would be right. A deduction of 25% reflects the significance of the issues upon which the Dissenting Shareholders were unsuccessful before this Court. That was not the position before the Grand Court. Only some of the judge's decisions on particular issues were appealed. It is clear from [8] of his main judgment that there were many other issues argued before him and that on the majority of them, the Dissenting Shareholders lost.

33. This Court has to try and determine what would have been a fair costs order if the judge had decided the individual issues as he did but amended to reflect those where we have held that he erred. As already mentioned, the result of our decision is that the Dissenting Shareholders will recover significantly more than under the judge's decision. Doing the best I can, I consider that the fair order for the judge to have made, had he decided the case as we have determined he should have, would have been to award the Dissenting Shareholders their costs (on the basis they were clearly the successful party and had recovered a materially greater amount from the Company as a result of the litigation), but to make a deduction of 50% to reflect the number of issues on which the Dissenting Shareholders would have lost.

(iv) Interest

34. In their written submissions, the Dissenting Shareholders applied for an order for interest on their costs at the prescribed rate of 2.375% per annum from the date of payment by the

Dissenting Shareholders to their attorneys until date of payment. In their response submissions, the Company accepted that interest may be payable should either party be awarded costs and did not comment on the suggested starting date referred to by the Dissenting Shareholders.

35. In the circumstances, I agree that interest should be payable and would order that it should be paid at the rate of 2.375% per annum and should run from the date of payment by the Dissenting Shareholders to their attorneys until the date of payment by the Company.

(v) Interim payment

36. GCR O.62, r.4(7)(h) provides that, where the Court orders a party to pay costs subject to taxation, it may order that party to pay a reasonable sum on account of costs, such sum to be assessed summarily. It is now well-established that the courts in this jurisdiction will normally make such an order unless there is reason not to do so; see the comments of this Court in *Scully Royalty* at [54] approving the observations of Kawaley J in *Al Sadik v Investcorp Bank BSC* [2019] (2) (CILR) 585 at [25]. See also *Ritchie Capital Management LLC v Lancelot Investors Fund Limited* (Unreported, Grand Court, 4 March 2023) per Parker J at [38]-[40].

37. The Dissenting Shareholders submit that the Court should order an interim payment of 60% of its costs here and below. The Company accepts that it is conventional to order an interim payment of 50% to 60% of the anticipated costs but submits that no interim payment should be ordered in this case for two reasons.

38. First, it argues that it would be inappropriate for the Court to order an interim payment in circumstances where fair value remains undetermined pending remittance to the Grand Court. I do not accept this argument. The Grand Court's decision on the minor outstanding issue of valuation will not affect the costs orders which this Court has made and the underlying reason for ordering interim payments, namely that it is wrong for a party which has incurred costs to be kept out of all its money pending taxation. Whatever the judge's decision on the matter which has been remitted to him, the Dissenting Shareholders should receive a meaningful contribution towards the costs which they have incurred so far in circumstances where this Court has awarded them costs.

39. Secondly, the Company is applying for a stay of execution pending its appeal to the Privy Council and submits that this Court should not make a decision on interim payment of costs until it has determined whether there should be a stay. As can be seen later in this judgment, the Court does not propose to order a stay and accordingly this point falls away. In any event, I do not consider that the mere fact of an appeal to the Privy Council (and the possibility that this Court's decision might be overturned) is sufficient reason to refuse to order an interim payment. My reasons for that conclusion mirror those for refusing a stay or ordering security, as set out below. I do not consider that there is any material risk that, if this Court's costs orders are overturned, the Dissenting Shareholders will be unable or unwilling to repay any amount which they have received by way of interim payment.

40. The Dissenting Shareholders have prepared two costs schedules. The first concerns the proceedings before the Grand Court up to 15 June 2021 and the second covers the proceedings in the Grand Court after 16 June 2021 and this appeal, although it is broken down to distinguish between the costs at first instance and the costs on appeal. The Dissenting Shareholders assert that both costs schedules have been prepared in accordance with the rates for attorneys and counsel permitted in the relevant Practice Direction. The upshot is that their costs in relation to the proceedings at first instance are assessed at US$7,009,816.17 and their costs on appeal are US$514,611.45.

41. These sums must of course be adjusted to reflect the costs orders which this Court has made. Thus, in respect of the costs below, where this Court has awarded 50%, the sum of $7,009,816.17 must be reduced to $3,504,908.08; and in respect of the costs of appeal, where this Court has awarded 75%, the sum of $514,611.45 must be reduced to $385,958.59.

42. The Dissenting Shareholders submit that this Court should award 60% of these sums by way of interim payment. They accept that, as mentioned in *Scully Royalty* at [58], 50% is often ordered as a conservative approach which should not lead to an over-payment. However, they submit that in this jurisdiction, 60% can safely be ordered. That is because the cap on attorneys' rates required by the Practice Direction means that costs schedules in this jurisdiction are significantly more conservative than those in England and Wales (which are required to show the sums payable by the client, which in commercial cases often includes fees that exceed the guideline rates which are normally the maximum allowable on taxation).

43. In the absence of any submission from the Company to the effect that this is incorrect, I am content to make an interim order of 60% on this occasion. However, as the matter has not been argued, this should not be taken as any form of acceptance that 60% is to be taken as a generally acceptable figure in this jurisdiction. My decision is confined to the facts of this case where the point was not contested.

44. I would therefore order the Company to make an interim payment on account of costs in the sum of US$2,334,520. This is calculated by adding 60% of $3,504,908.08 to 60% of $385,958.59. This sum must be paid within 28 days.

(B) Stay pending appeal

45. The Company has filed a Notice of Motion seeking leave to appeal to the Privy Council against the decision of this Court. It is common ground that an appeal lies of right and that accordingly leave to appeal should be granted.

46. However, the Company has also applied for a stay of the Court's decision pending the outcome of its appeal to the Privy Council. That application is opposed by the Dissenting Shareholders.

47. Section 7 of the Cayman Islands (Appeals to Privy Council) Order 1984 addresses the issue of a stay of execution where the decision appealed from requires the appellant to pay money. However, as the parties have been unable to agree on the fair value following the Court's decision, the order of the Court does not require payment of any money; it simply remits the assessment of fair value to the Grand Court to be decided in accordance with the rulings given in the Court's judgment. Accordingly, section 7 has no application. Nevertheless, it is common ground that this Court has an inherent jurisdiction to grant a stay of execution pending appeal to the Privy Council; see *Re CVC Opportunity Equity Fund Partners* [2000] CILR M-8.

48. The principles for granting a stay of execution from a judgment of the Grand Court pending an appeal to this Court are well-established. We have been referred to a number of cases but I would quote only one. After a thorough review of the authorities in *Re Aquapoint LP* (Unreported, Grand Court, 5 October 2022), Doyle J said at [20]:

> ***"It can be seen from the local Cayman authorities that: (1) an appeal does not operate as a stay; (2) the starting point is that there should be no stay and a successful party at first instance should not be deprived of the fruits of that success; (3) there must be 'good cause' or 'good reason' for a stay. In some of the English authorities there is reference to 'solid grounds'; (4) the court is likely, all other things being equal, to grant a stay where the appeal could otherwise be rendered nugatory or deprived of much of its significance; and (5) in deciding whether or not to impose a stay the court will consider the grounds of appeal, their likelihood of success and the balance of convenience having regard to the interests of the relevant parties. The overriding feature is the interests of justice."***

49. It seems to me that the principles governing a stay of execution pending appeal from the Grand Court to this Court are equally applicable in relation to appeals from this Court to the Privy Council.

50. There is no suggestion that the Company's appeal would be rendered nugatory if there is no stay of the Judgment. I am also content to proceed on the assumption that the Company has arguable grounds of appeal. The real issue is whether good cause has been shown for a stay and where the balance of convenience falls having regard to the interests of justice.

51. The sole reason relied upon by the Company in support of its application for a stay is that the costs of the proposed hearing before the Grand Court will be wasted if the appeal to the Privy Council is successful. That hearing is required in order to determine what rate of decline in average selling prices should be applied for 2021-23 in relation to the Management Projections. The fair value can then be calculated having regard to this Court's decision and the Grand Court's decision as to the rate of decline. The Company submits, correctly, that if its appeal to the Privy Council is successful in overturning the relevant part of this Court's decision, that hearing will have been unnecessary and the costs incurred in connection with it will have been wasted if it takes place before the decision of the Privy Council.

52. In my judgment, this is insufficient to order a stay. I would summarise my reasons for so concluding as follows:

(i) The hearing before the Grand Court is on a very limited point, namely what should be the rate of decline in average selling prices for 2021-2023 having regard to the fact that it was common ground between the experts that the rate of decline in those years would reduce but there was not agreement as to the rate of reduction. Whilst it will be necessary to adduce and hear expert evidence on this point, it should not be extensive or lengthy. Once the Grand Court has decided on the rate of decline, the calculation of fair value in the light of this Court's decision and that of the Grand Court will be a purely mathematical exercise.

(ii) Accordingly, the costs to be incurred in connection with the proposed hearing before the Grand Court will be comparatively modest, certainly in comparison with the extensive costs which have already been incurred and which no doubt will be incurred in connection with the appeal to the Privy Council.

(iii) I see no reason why the Grand Court should not make an order to the effect that, if the appeal to the Privy Council is successful (so that the hearing before it will have been unnecessary), the Dissenting Shareholders should be responsible for the costs of such hearing. It is entirely reasonable that they should proceed with the hearing at their risk in the event of the Privy Council overturning this Court's decision. In these circumstances, whilst the Company will be responsible for its costs of the proposed hearing in the meantime, it will be able to reclaim them from the Dissenting Shareholders in the event of success before the Privy Council.

(iv) In summary therefore, I see little or no prejudice to the Company by refusing a stay and do not consider that the ground relied upon by the Company amounts to *'good cause'* or *'good reason'* to overcome the starting point that a stay is not normally granted.

(v) Conversely, I consider that the grant of a stay would prejudice the Dissenting Shareholders. This has been a lengthy piece of litigation, the merger having taken place as long ago as March 2017. Following this Court's decision, the Dissenting Shareholders are entitled to a minimum of a further US$8m. The appeal to the Privy Council will no doubt take some time. If a stay is granted and the appeal to the Privy Council is unsuccessful, it would only be then that steps could be taken for the hearing before the Grand Court in order to determine the outstanding issues.

Even then, there is the possibility of an appeal. All this will mean that it will be some time after the Privy Council decision before fair value is finally assessed. I accept that interest can be ordered but do not consider that this will fully compensate the Dissenting Shareholders for such a delay. The underlying thinking behind the principles governing stays of execution pending appeal is that a successful litigant should not be deprived of the fruits of his success without good cause.

(vi) Conversely, the refusal of a stay will mean that the hearing before the Grand Court can take place before the Privy Council appeal is heard. This will mean that, if the Privy Council refuses the appeal, the fair value will have been determined by the Grand Court and the matter will be brought to a conclusion one way or the other as a result of the Privy Council decision.

(vii) Weighing these matters in the balance, I consider that the balance of convenience and the interests of justice point strongly towards refusing a stay of execution.

53. Finally, the Company submitted in a three line paragraph of its reply submissions that, if the Court was minded to refuse a stay, it should direct the Dissenting Shareholders to provide security prior to execution, i.e. prior to the hearing before the Grand Court proceeding.

54. No grounds in support of this suggestion were included. It was not suggested that the Dissenting Shareholders would be unable or unwilling to pay any costs order in connection with the 'wasted' Grand Court hearing and there is nothing in the papers before us to support any such suggestion. The Dissenting Shareholders have been funding the present very expensive litigation for a number of years and the inference must be that they have access to substantial funds. Furthermore, they have been previous litigants in at least two substantial section 238 cases in this jurisdiction, namely *Qunar* and *Shanda Games*, the latter of which went all the way up to the Privy Council. There is nothing before us to suggest they have failed to make any required payments in connection with such litigation.

55. In the absence of any evidence, I cannot find that there is a material risk of the Dissenting Shareholders not meeting any order for costs which may be made in connection with the

proposed limited hearing before the Grand Court. In the circumstances I see no grounds for ordering security.

Summary of conclusions

56. In summary, I would order as follows:

(i) The Company is to pay 75% of the Dissenting Shareholders' costs of the appeal on the standard basis, such costs to be taxed if not agreed.

(ii) The Company is to pay 50% of the Dissenting Shareholders' costs of the trial before the Grand Court on the standard basis, such costs to be taxed if not agreed.

(iii) Interest is to be paid on such costs at 2.375% per annum as set out at paragraph 35 above.

(iv) The Company is to pay an interim amount on account of the costs at (i) and (ii) above in the sum of $2,334,520, such sum to be paid within 28 days.

(v) Leave to appeal to the Privy Council is granted but the application for a stay of execution pending appeal is refused.

(vi) The application by the Company for security to be provided by the Dissenting Shareholders is refused.

Beatson, JA

57. I agree.

Field, JA

58. I also agree.