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

CICA (CIVIL) APPEAL NO. 19 OF 2022
(FORMERLY CAUSE NO. FSD 128 OF 2021 (RPJ))

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF SINA CORPORATION

Before:	**The Hon Sir Richard Field, Justice of Appeal** **The Right Hon Sir Alan Moses, Justice of Appeal** **The Hon Sir Michael Birt, Justice of Appeal**
Appearances:	**Mr Robin Hollington KC instructed by Mr Simon Dickson and Ms Ella van der Schans of Mourant Ozannes (Cayman) LLP for Appellants 1-4 and 15; Mr Shaun Maloney and Ms Farrah Sbaiti of Ogier (Cayman) LLP for Appellant 5; and Mr Rocco Cecere, Mr Zachary Hoskin and Mr Ronan O'Doherty of Collas Crill for Appellants 16-28** **Mr Thomas Lowe KC instructed by Mr Sam Dawson and Mr Nigel Smith of Carey Olsen for Appellants 6-14** **Mr Stephen Atherton KC instructed by Ms Grainne King, Ms Catie Wang and Ms Moesha Ramsay-Howell of Harney Westwood and Riegels for Sina Corporation.**
Heard on the papers	
Draft Judgment circulated:	**15 November 2023**
Judgment delivered:	**27 November 2023**

JUDGMENT ON COSTS

Birt, JA

1. This judgment is supplementary to the Court's judgment dated 26 September 2023 ("the Main Judgment"). Words and expressions defined in the Main Judgment carry the same meaning in this judgment.

2. In brief outline, the Grand Court (Parker J) held on a summons for directions that the valuation date for valuing the shares of the Dissenters in Sina Corporation ("the Company") in the section 238 proceedings currently before the Grand Court should be the date of the EGM at which the shareholders considered the merger proposal. The Dissenters appealed that decision. They fell into two groups. The Collas Crill, Mourant and Ogier Dissenters contended that the valuation date in section 238 proceedings should generally be the merger completion date and that that was the appropriate date in these proceedings, whereas the Carey Olsen Dissenters ultimately contended in their oral submissions that, although the date of the EGM taken by the Grand Court was incorrect, the valuation date should be the date which the Court determined would be fair in light of all the circumstances and this could not be determined until discovery had taken place and the facts had been determined; in short, until the hearing of the issue of fair valuation.

3. For the reasons set out in the Main Judgment, the Court rejected these contentions. It held that the EGM date was normally the fairest valuation date in section 238 proceedings and, on the basis of the material before the Court, there was no reason to depart from that date in the present case. It therefore upheld the decision of the Grand Court and dismissed the appeal.

4. The Main Judgment did however make clear that (i) a different valuation date could be taken if there was good reason, in a particular case, to choose some other valuation date as producing the fairest assessment of fair value, and (ii) where the valuation date was disputed, the Grand Court should determine the appropriate valuation date at a summons for directions in advance of the trial, but that such decision would not be irrevocable and could be revisited if evidence emerged on discovery or at trial which suggested that there was good reason to take a different valuation date.

5. When the Main Judgment was circulated in draft in the usual way, the parties were informed that the Court's provisional view as to costs was that costs would follow the event and that accordingly the Dissenters, jointly and severally, should be ordered to pay the Company's costs of the appeal, such costs to be on the standard basis and to be taxed if not agreed. The Court indicated that if any party wished to contend for some other order, they should file submissions, with any party wishing to respond to any such

submissions having the right to do so. The Court indicated that it would then decide the issue of costs on the papers.

6. Both sets of Dissenters filed submissions seeking an alternative costs order and the Company filed written submissions in response. The Court has considered the submissions and the authorities referred to.

7. The submissions filed by the parties raise the following issues for determination:

(i) Should costs be awarded against the Dissenters?
(ii) If so, should those awarded against the Carey Olsen Dissenters be limited by reference to the arguments which they raised?
(iii) Should any costs liability of the Dissenters be several or joint and several?
(iv) Should any costs awarded be taxed and payable forthwith?

I shall consider each of these issues in turn.

(i) Should costs be awarded against the Dissenters?

8. The Collas Crill, Mourant and Ogier Dissenters submitted that the costs of the appeal should be reserved. They pointed out that in the Main Judgment, as summarised at [4] above, the Court specifically envisaged the possibility of an initial decision as to the valuation date being revisited if evidence emerges on discovery or at trial that shows that some other date is the fairest date. They submitted that it could not be ruled out that evidence may emerge from discovery and at trial in the present case which leads the Grand Court to conclude that there is good reason to vary the valuation date from the EGM date. It would be unjust for the Dissenters to bear all the costs of the appeal if the valuation date was ultimately varied and costs should therefore be reserved until after the trial.

9. In support of this approach, they referred to three English cases which showed that in some circumstances, a court may exercise its discretion to reserve costs until a later date. In *Unwired Planet International Limited v Huawei Technologies Co* [2015] EWHC 3837 (Ch), Birss J, having quoted at [16] the observation of the English Court of Appeal in

Weill v Mean Fiddler Holdings [2003] EWCA Civ 1058 that, where there is a split trial on liability and damages and it is uncertain until the trial on quantum whether the claimant will recover more than nominal damages, it may be proper to defer any decision on the costs of the liability trial until the final outcome of the action is known, said at [24]:

> ***"The principle is the one identified in Weill v Mean Fiddler itself, that if the court considers there is a real possibility that the outcome of the hearing which is to take place at the overall conclusion, may affect the merits of the parties' entitlement to costs of the issue which is before court right now, then it would be appropriate to consider carefully whether to postpone the decision on costs."***

That was a patent case and Birss J, having found for the plaintiffs on the validity of the relevant patent, did not in fact reserve costs but, as explained at [29] – [34] of his judgment, held that the defendants should pay the costs of that hearing notwithstanding the fact that the issues of remedy and quantum remained outstanding.

10. In *Credico Marketing Limited v Lambert* [2022] EWHC 2114 (QB), there was a split trial of liability and quantum. The plaintiffs succeeded on liability but Cavanagh J considered (at [33]) that there was a very real possibility that the damages for breach of contract would be very small indeed. Having referred to the observation of Birss J quoted above, the judge decided to postpone determination of the costs of the trial on liability until after the trial on quantum.

11. Finally, the Court was referred to *Jas Financial Products LLP v ICAP Plc* [2015] EWHC 1587 (QB). This was a case where the judge dismissed an application by the defendant for summary judgment, but agreed that the plaintiff's pleading needed improvement and that it had been entirely legitimate for the defendant to apply for summary judgment on the basis of the pleadings. The judge decided to reserve costs because he felt it would be unjust, given the fact that the defendant had made the application on the case as then pleaded, to make an adverse costs order and it might be one of those cases where it turned out at trial, once the dust had settled, that the defendant was, in some respects at least, correct.

12. I do not derive any assistance from this last case. It was clearly a fact specific decision which turned on the judge's view that the defendant had been entitled to seek summary judgment on the basis of the pleadings as they were at the time and that in those circumstances it would be unjust to make an adverse costs order.

13. Rule 28 of the Court of Appeal Rules (2014 Revision) provides that:

> ***"The powers and discretion of the Court under section 24 of the Judicate Act…*** **[relating to costs]** ***shall be exercised subject to and in accordance with GCR Order 62."***

14. 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."***

15. The Company was clearly the successful party in relation to the appeal and the starting point therefore is that it should be awarded its costs.

16. I do not consider that there is any reason to depart from that starting point in this case. I do not think that the observation of Birss J in *Unwired Planet* and the decision in *Credico Marketing* suggests that costs should be reserved in this case.

17. In the first place, they were both decisions dealing with costs at first instance whereas as the Court is considering the costs of an appeal. It was the Dissenters' choice as to

whether to appeal. They could have accepted the decision of Parker J and subsequently applied to the judge to vary that decision if new material arose on discovery or at trial. Having decided to appeal on the basis of the current material, they must take the normal consequences of having appealed and having lost. The Company has only incurred the costs of an appeal because the Dissenters chose to appeal.

18. Secondly, the facts in this case are very different from those in *Credico Marketing*, where costs were reserved. In that case the judge found that there was a *"very real possibility"* that damages for the breach of contract, which he had found to have occurred, would be very small. In those circumstances, it is not surprising that he reserved costs in order that he could consider the overall outcome at the conclusion of the proceedings. Here, it is entirely speculative as to whether material will emerge on discovery or at trial which leads to a different valuation date being selected. There is no *"very real possibility"*. The highest the Dissenters could put it at [14] of their written submissions was that the emergence of such material could not be ruled out. The Dissenters chose to appeal on the basis of the material currently available and this Court has held that such material does not constitute good reason for taking a valuation date other than the EGM date. In those circumstances, the normal consequences of an unsuccessful appeal should follow.

19. The Carey Olsen Dissenters submitted that the costs of the appeal should be costs in the cause. They pointed out (correctly) that there was no precedent in which the valuation date in section 238 proceedings had been decided upon by the Grand Court after contested argument and that in those circumstances it was entirely reasonable to argue the point.

20. It is true that Parker J decided that the costs of the hearing before him should be costs in the cause. In my view, that was for perfectly understandable reasons. In the absence of previous contested argument as to the valuation date in section 238 cases, it was indeed reasonable to debate the point as an issue *en route* to deciding on fair value. But this Court has to consider the very different matter of an appeal. The Carey Olsen Dissenters decided to appeal the judge's decision, but the Court has upheld that decision and the appeal has been dismissed. In those circumstances, I can see no reason why they should not pay the costs of the appeal.

21. It is true that, as the Dissenters point out, the Company was unsuccessful in certain arguments it raised, such as whether it was an inflexible rule that the EGM date should be taken as the valuation date and whether more weight should have been given to the uncontested previous practice of the Grand Court. As this Court made clear in *Re Trina Solar Ltd*, Unreported, 4 August 2023, at [20] – [24], the principles as to costs laid down in *Re Elgindata (No 2)* [1993] 1 All ER 232 remain applicable in this jurisdiction. Thus a court may deprive a successful party of some or all of his costs where that party has raised issues on which he has failed. However, this may only be done where such issues have caused a significant increase in the length or cost of the proceedings. I do not consider that this was the case in respect of the unsuccessful points raised by the Company on this appeal and accordingly there should be no deduction from the costs awarded to the Company.

22. In summary, I am of the view that all of the Dissenters should be ordered to pay the Company's appeal costs on the standard basis, such costs to be taxed if not agreed.

(ii) Should the costs awarded against the Carey Olsen Dissenters be limited?

23. As already mentioned, the submissions of the Carey Olsen Dissenters differed to some degree from those of the remaining Dissenters. The Carey Olsen Dissenters submitted that the valuation date should be decided on a case by case basis having regard to what was the fairest date in the particular circumstances. In their skeleton argument at [18], they submitted that, on the facts of this case, the merger completion date was the fairest date and should therefore be the valuation date, although in his oral argument, Mr Lowe submitted that the Court did not have the full picture and that, if it allowed the appeal, it should remit the matter to the Grand Court for determination following discovery in trial. The remaining Dissenters submitted that, although it should not be a hard and fast rule, the valuation date in section 238 cases should generally be the merger completion date and that was the appropriate date to choose in this case.

24. The Carey Olsen Dissenters submitted that they should not be required to pay the costs incurred by the Company in arguing that the valuation date was not the merger completion date. They submitted that their liability should be confined to the costs

reasonably incurred by the Company in arguing that the valuation date was not a *"fair"* date to be determined as a matter of construction but was the EGM date.

25. I do not accept this submission for the following reasons:

(i) The Notice of Appeal and the Grounds of Appeal were filed on behalf of all the Dissenters. including the Carey Olsen Dissenters. Both documents asserted that the judge was wrong to choose the EGM date and requested this Court to hold that the merger completion date was the correct valuation date in this case. In the Grounds of Appeal, five specific grounds were given in support of these assertions.

(ii) In their skeleton argument, the Carey Olsen Dissenters put forward submissions as to why the judge was wrong to choose the EGM date. It is true that they went on to submit that the valuation date should be whatever was the fairest date in any particular case, but they submitted that on the facts of this case the merger completion date was the fairest date. Their ultimate submission was therefore very similar to the remaining Dissenters, namely that the EGM date was wrong and that in this case the merger completion date was the correct valuation date.

(iii) The skeleton argument filed by the Company addressed the five grounds of appeal contained in the Grounds of Appeal filed by all the Dissenters and also defended the judge's decision to choose the EGM date. These were arguments raised by all the Dissenters.

(iv) It is true that, in oral argument, Mr Lowe departed from his skeleton argument and submitted that, if this Court were to uphold the appeal, it should remit the choice of valuation date for determination by the Grand Court on the basis that it did not have the full picture at present pending discovery and trial.

(v) In the circumstances, whilst it is correct that the argument of the Carey Olsen Dissenters that the choice of valuation date was very fact specific, varied somewhat from that of the remaining Dissenters that it should generally be the merger completion date, the essential arguments in advance of the hearing were

the same, namely that the judge was wrong to choose the EGM date and that, on the facts of this case, the merger completion date was the appropriate date for this Court to choose. This was the essential case to which the Company replied.

(vi) In the circumstances, I see no proper ground for limiting the costs awarded against the Carey Olsen Dissenters, as they submit. Whilst there were some differences in approach, they ultimately made common cause with the remaining Dissenters and I see nothing unjust in costs being awarded against them in circumstances where their appeal failed.

(iii) Should the costs liability of the Dissenters be joint and several or several?

26. The Dissenters submitted that if, contrary to their primary submission, a costs order was made against them, such order should be made against them severally, not jointly and severally.

27. They prayed in aid the decision of the Court of Appeal of England and Wales in *Ward v Guinness Mahon Plc* [1996] 1 WLR 894. In that case there were 99 plaintiffs claiming damages against the sponsor of a business venture which failed, of which 6 had been selected as lead plaintiffs for trial. The question arose as to whether a pre-emptive costs order should be made limiting the liability of the plaintiffs, in the event of an adverse costs order being made at trial, to several liability. The judge refused to make such an order but he was overturned on appeal. The Court of Appeal acknowledged that the critical question was who should bear the risk of a shortfall in recovery if some of the plaintiffs were unable to pay their share of the costs in the event that the defendant was ultimately successful. Thus Sir Thomas Bingham MR said at 900F-G:

> ***"It is, I think, plain that whichever decision one makes imposes a risk of non-recovery of costs on someone. If we make the order that Mr Guthrie asks for*** [i.e. a several liability order]***, then there is a risk that Guinness Mahon (if successful) may fail to enforce all its orders against individual plaintiffs. If, on the other hand, we make the order that Mr Leaver seeks for Guinness Mahon*** [i.e. that the lead plaintiffs be jointly and several liable for Guinness Mahon's costs]***, then there***

is a risk that certain of the lead plaintiffs may fail to be reimbursed by some of the other plaintiffs.

The broad question, as it seems to me, is: what, in this situation, does fairness demand?"

28. The court concluded that an order limiting the liability of individual plaintiffs to several liability should be made. There appear to have been three main reasons given for the decision at 901. First, the defendant would be no worse off under a several costs order than it would have been if it had been sued to judgment by 99 plaintiffs. Secondly, it would be difficult ever to find plaintiffs willing to act as lead cases if there were to be joint and several liability. Thirdly, in a passage quoted by Bingham MR at 900, a Law Society working party on the issue of costs in group actions had recommended that liability as between plaintiffs should be several so as not to limit access to justice because of the deterrent effect of potentially having to pay all the costs of the action. The extract quoted by Bingham MR ended by saying:

"While several liability will make it much harder for defendants to recover their costs when they are successful, we see no real alternative to such a rule."

29. In *Rowe and Others v Ingenious Media Holdings Plc and Others* [2020] EWHC 235 (Ch), a case involving 28 claimants selected from a larger pool of some 500, Nugee J followed *Ward v Guinness Mahon*. He held that that case clearly established that it was fairer that the risk of collection of costs from many plaintiffs should lie with the defendant as opposed to fellow plaintiffs and that nothing had occurred since the decision in *Ward v Guinness Mahon* which suggested a change in approach. He summarised the position at [31] as follows:

"…I see no reason to think that the risk of joint liability has ceased to have a deterrent effect. Those of relatively modest means whose claims are small are likely to consider any substantial costs risk as outweighing the potential recovery; and those who are wealthier and have larger claims are likely to fear that a defendant with the benefit of a costs order enforceable against all claimants jointly

will seek to recover first from those with the most assets, or at any rate those which are most easy to enforce against, including their homes."

30. The Company submitted that the position was very different in section 238 proceedings. There were not multiple claims issued against the Company as in the above cases. There was simply a single petition issued by the Company in which dissenting shareholders could participate. It was not comparable to a case where it might be said that the Company would not be worse off under a several liability costs order than it being awarded costs in several actions. Fairness demanded that the Company should not be exposed to potentially having to pursue each of the twenty-eight Dissenters in different jurisdictions to recover their individual share of the costs.

31. The Company further submitted that the concerns about access to justice for parties of modest means expressed in the English cases referred to above was not relevant here as the majority of the Dissenters were substantial funds who would have been aware of the risk of an adverse costs order when deciding to dissent.

32. The Company also relied on the decision of Parker J in Re *FGL Holdings Limited* Unreported, 19 April 2023. That case concerned section 238 proceedings where the judge held that the company had been the winning party and that the dissenters should pay the costs. Parker J rejected an argument that each of the five dissenters should only be responsible for a pro-rata proportion of the costs. The dissenters had dealt with the litigation as a group making common cause and the company should not be exposed to the risk of having to pursue different entities in respect of a costs award. He therefore ordered joint and several liability.

33. In my view, the fair order in this case is that costs should be awarded against the Dissenters on a several basis. I have reached this view for the following reasons:

    (i) The Company relied on the decision of Parker J in *FGL Holdings*. Although Parker J was not referred to the above English cases, I can well understand his decision in that case. There were only five dissenters, each of whom was an investment fund of a single investment manager, they all instructed a single law firm and there appears only to have been one set of arguments put forward on

behalf of all the dissenters. In the circumstances, it is hardly surprising that a joint and several order was made.

(ii) The circumstances of this case are very different. There are twenty-eight Dissenters with varying sizes of shareholding. They have instructed four different legal firms, who have in turn instructed two different sets of counsel. The arguments raised by the two different groups, whilst having largely common issues, include different submissions.

(iii) In such a case, the points made in the English cases referred to have some force. Whilst in this particular case it is said that the Dissenters are all substantial funds, it may often be the case that dissenters hold comparatively small shareholdings, so that the risk of potentially being liable for all the costs of the dissenters would act as a disincentive to seeking fair value and participating in section 238 proceedings.

(iv) I would emphasise that, in concluding that a several order is appropriate here, I am not seeking to lay down any guidance for future cases. The allocation of costs is very much a discretionary decision for a trial judge who has the feel of the case and such decisions are very fact specific.

34. The question then arises as to how this liability for costs should be allocated between the Dissenters.

35. In *Rowe*, Nugee J followed the approach of Hildyard J in *Greenwood v Goodwin* [2014] EWHC 227 (Ch) and held that the liability should be apportioned between the claimants pro-rata to the size of their cash investment. At [35], he quoted from an earlier oral judgment he had delivered in the same case in the following terms:

> ***"6…. It does seem to me, as a matter of fundamental equitable principles, that if a number of people band together in a venture, whether that be litigation or anything else, and they stand to get out of it very disproportionate rewards, then if***

they are going to share the risks, the starting point as to what is fair is that they should share the risks proportionate to the possible rewards….

7. The notion that in a case like this, where some people have invested £35,000 or £50,000 and other people have invested millions, that they should be equally liable on a per capita share for the downsides of the litigation when the upsides of the litigation are so disproportionately spread is one that I do not find attractive in the least…"

I would respectfully agree with those views.

36. Both sets of Dissenters have submitted that, if the costs liability was to be several, each Dissenter should be liable pro-rata to its holding of dissented shares in the Company. The Company did not comment on that proposal.

37. I agree this is an entirely fair proposal and would so order.

(iv) Should there be immediate taxation and payment?

38. At [9] and [22] of its written submissions, the Company requested that any costs awarded against the Dissenters should be taxed and payable forthwith.

39. GCR O.62, r.9 provides:

"(1) Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise.

(2) If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may order accordingly."

40. In *Re The Sphinx Group of Companies* [2009] CILR 178, Smellie CJ held that the normal expectation was that costs should only be taxed at the conclusion of the cause or matter pursuant to r.9(1) and there needed to be exceptional circumstances for an order to be

made under r.9(2) for earlier taxation. That approach was also adopted by this Court in *Scully Royalty Limited v Raiffeisen Bank International AG,* Unreported, 8 April 2022, Civil Appeal 21 of 2020 at [42]-[51].

41. In its written submissions, the Company did not refer to the requirement for exceptional circumstances nor did it put forward any reasons as to why there might be exceptional circumstances in this case.

42. In the circumstances, the normal approach foreshadowed in r.9(1) applies and I would therefore reject the Company's application.

Summary of conclusions

43. I would therefore order as follows:

(i) The Dissenters must pay the costs of the Company in connection with the appeal, such costs to be on the standard basis and to be taxed if not agreed.

(ii) The liability of the Dissenters under (i) shall be several, with the liability of each Dissenter being pro-rata to such Dissenter's holding of dissented shares in the Company.

(iii) The Court makes no order for earlier taxation of such costs under O.62, r.9(2).

44. As to the costs of this dispute over costs, the result has been something of a draw, with the Company being successful over the reserved costs/costs in the cause point and the Dissenters being successful on the issue of several liability, being the two main issues. I would therefore order that there be no order as to costs in respect of this costs dispute.

Moses, JA

45. I agree.

Field, JA

46. I also agree.

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