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

CICA (Civil) Appeal No. 019 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; 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 6-15

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: **15 March 2023**

Draft circulated: **7 September 2023**

Judgment delivered: **26 September 2023**

JUDGMENT

Birt JA

1. This is an appeal against the judgment ("the Judgment") of the Hon. Justice Parker ("the judge"), delivered on 25 January 2022. The issue concerns the appropriate date a court should adopt when

hearing a petition under section 238 of the Companies Act (2021 Revision) ("the Act") for the purposes of valuing shares held by shareholders who have dissented from a merger. After hearing a summons for directions, Parker J held that the relevant date was the date of the Extraordinary General Meeting ("EGM") at which the shareholders considered the merger proposal. Some of the dissenting shareholders (represented by Mr Robin Hollington KC (and to whom I shall refer to as "the Collas Crill, Mourant & Ogier Dissenters" contend that the valuation date should be when the merger was completed. The other dissenters (represented by Mr Tom Lowe KC and to whom I shall refer as "the Carey Olsen Dissenters") submit that, although the date of the EGM is incorrect, the valuation date must be the date which the court determines would be fair in light of all the circumstances and thus cannot be determined until discovery has taken place and the facts have been determined; in short, until the hearing of the issue of fair valuation. When it is not necessary to distinguish between the two groups of dissenters, I shall refer to them simply as "the Dissenters". Sina Corporation ("Sina" or "the Company"), as the Respondent, supports the decision of the judge that the date of the EGM is the appropriate valuation date.

Background

2. The merger in question was the process by which Sina came to be delisted from the Nasdaq and taken into private ownership. Sina is an exempted limited company under the laws of the Cayman Islands. It operates an online media business in China; its most wide-spread business is a social media platform in China called Weibo. On 6 July 2020, an existing shareholder of the Company (New Wave Holdings Limited) proposed to the Board a merger, whereby it would acquire all the outstanding shares it did not already own. The same day a Special Committee was appointed and it subsequently determined that the proposed transaction was fair and in the best interests of Sina. It advised that the offered price of $43.30 per share was fair. On 28 September 2020, the Company's Board approved a merger agreement which provided for that consideration.

3. The merger agreement was executed on 28 September 2020 between the Company, New Wave Holdings Limited ("Parent") and Parent's wholly owned subsidiary, New Wave Merger Sub Limited ("Merger Sub"). Parent was owned by New Wave MMXV Limited which was controlled by Mr Charles Chao, Chairman and Chief Executive Officer of the Company.
4. There was a condition precedent to the merger. By Section 7.02 of the merger agreement (headed Additional Conditions to the obligations of Parent and Merger Sub):

i. "The obligations of Parent and Merger Sub to consummate the Merger are subject to the satisfaction or waiver (where permissible under applicable Law) of the following additional conditions on or prior to the Closing Date.

ii. ……

iii. (c) Dissenting Shareholders. The holders of no more than 10% of the Shares shall have validly served and not validly withdrawn a notice of dissent under Section 238(2) of the CICL."

5. The Closing Date was specified as five working days after all conditions were satisfied or waived (Section 1.02). The "Effective Time" was defined as the time on the Closing Date when the plan of merger was registered by the Registrar of Companies of the Cayman Islands (Section 1.03). By Section 8.01 the merger agreement could be terminated by agreement between Parent and the Company before the Effective Time. By Section 8.02 a Long-Stop Date of 28 June 2021 was specified and either the Company or Parent could terminate the agreement before then if the Effective Time had not occurred.

6. Members of the Company holding 21,528,295 ordinary shares, representing 35.9% of the total ordinary shares and 42% of the shares independent of Mr Chao, filed advance notices of objection, pursuant to section 238(2) of the Act. The effect of the condition precedent was that, once the dissenting shareholders had served and not withdrawn their notice, the merger could not take place unless and until the condition precedent was waived.

7. On 23 December 2020, at the EGM of shareholders, a special resolution was passed by the requisite two-thirds majority, approving the plan of merger. Mr Chao held shares which represented 61.1% of the total voting rights in the Company. In a press release dated 28 December 2020 filed with the US Securities and Exchange Commission, the Company acknowledged that there was no assurance that the merger would be consummated, referring to uncertainty as to whether the condition precedent would be met and, if not, whether Parent would agree to waive that condition.

8. Following the EGM, formal notices of dissent pursuant to section 238(5) of the Act were given by those holding 31.7% of the shares independent of Mr Chao.

9. On 22 March 2021, that is some three months after the EGM, the Company waived the condition precedent and the plan of merger was executed and filed with the Cayman Islands Registrar of Companies, a certificate of merger was issued, the merger became effective, and the shares in the Company were de-listed and taken into private ownership by the Buyer group. I shall refer to this date as "the Completion Date".

10. On that date the quoted price of shares in the Company's subsidiary Weibo had risen from $US 45.94 on 22 December 2020 to $52.46. This, the Appellants assert, was an increase in value of some $600 million. It is important to note that no evidence has been given or evaluated as to the cause of this increase in value, nor were we referred to any evidence as to when, within the above period, that increase took place.

11. On 26 March 2021 the Company made a fair value offer to the Dissenters, pursuant to section 238(8) of the Act, at the merger price. This was rejected and the Company accordingly issued a petition asking the court to determine the fair value of the Dissenters' shares.

The statutory scheme for payment of fair value for a dissenter's shares

12. Section 233 makes provision for the merger and consolidation of two or more companies limited by shares and incorporated under the Act. A written plan of merger must be approved by the directors of each constituent company (section 233(3)). The plan must be authorised by each constituent company by way of special resolution (section 233(6)(a)); the plan must be filed with the Registrar who must satisfy himself that the requirements of the Act have been complied with (s.233(9)), and if satisfied the Registrar registers the plan and issues a certificate of merger (233(11)).

13. Subject to section 234, a merger is effective on the date the plan of merger is registered (section 233(13)).

14. Section 234 provides for postponement of the effective date of a merger (see [36(vi)] below) and section 235 for amendment or termination of the plan of merger before the effective date. Section 236 identifies the effect of a merger.

15. It is in the context of these provisions that section 238 (set out in full in an annexe to this judgment) makes provision for the entitlement of a member of a constituent company who dissents from the merger to seek a valuation by the court.

16. The relevant procedure laid down by section 238 can be summarised as follows:

(i) A shareholder is entitled to payment of the fair value of his shares upon dissenting from a merger (section 238(1)).

(ii) To exercise this right, a shareholder must, before the vote is taken at the EGM, give written notice of objection and of his intention to seek payment for his shares if the merger is approved (section 238(2) and (3)).

(iii) Within 20 days of an EGM at which the merger is approved, the company must give written notice of the outcome to each shareholder who has given notice of objection (section 238(4)).

(iv) Within 20 days thereafter, an objecting shareholder must give written notice of his dissent and of his demand for payment of the fair value of his shares (section 238(5)) (a "subsection (5) notice").

(v) Serving a subsection (5) notice is a significant step. On giving this notice the shareholder loses all his rights as a shareholder other than the right to be paid the fair value, to participate in the court proceedings for determination of fair value, and to bring a claim to have the merger declared void or unlawful. In particular, assuming the merger completes, the dissenting shareholder is irrevocably committed to accepting fair value for his shares rather than the merger price (section 238(7), (12) and (16)).

(vi) Within 7 days following the expiry of the 20 day period for dissent or within 7 days immediately following the date on which the plan of merger is filed, <u>whichever is the later</u>, the company must make a written offer to purchase each dissenting shareholder's shares at what it considers to be the fair value of the shares (section 238(8)).

(vii) If there is a failure to agree on price within 30 days, the company must – and any dissenting shareholder may - file a petition for determination of fair value by the court within a further 20 days (section 238(9)).

The purpose of section 238

17. It is clear that section 238 is intended to confer a right on those who dissent from the merger proposal to compensation, assessed by a court, of the fair value of the shares of which they are being deprived. The Privy Council explained in *Shanda Games Limited v Maso Capital Investments Ltd* [2020] UKPC 2:

> ***"The court has to ascertain the intention of the legislature from the words it has used in their context and also in the light of any material which demonstrates the mischief that it was concerned to redress by the statutory provision."*** [27].

18. The purpose of section 238 is to:

> ***"find the fair value of the dissenter's shareholding"*** **[55].**

19. Parker J himself made helpful comments on the meaning of fair value in the context of section 238 in *Re Qunar Cayman Islands Limited* [2019] (1) CILR 611:

> ***"What does fair value mean?***
>
> ***[58] As I have said the phrase "fair value"' is not used elsewhere in the [Act] and must be construed in its particular context, that is to say the simplified regime to give a mechanism for the majority to effect a merger. The dissenters' entitlement is a quid pro quo to be paid the fair value of their shares, having had their shares cancelled as part of the transaction.***
>
> ***[59] I accept the dissenters' submission that it cannot only mean, or only be a proxy for, the market or traded price for the shares. The words used could have been "market or open market value" or "traded value" if that was what had been intended.***
>
> ***[60] Indeed, where the market is shown to be inefficient, illiquid or badly informed, the true or "fair value" may be something quite different to the traded price. Fair value means something other than market price. It may mean more, the same, or less.***

[61] However, it does not follow that the market price cannot be a good guide to fair value if there is efficiency, active trading and knowledge. Although as I have indicated the fair value of the shares is not necessarily the same as the merger price or the price at which the shares traded before the market was affected by knowledge of the merger, the value which the shares had just before the merger may be a good cross-check. Does "fair" add anything to "value"?

[62] In my view the word "fair" adds the concepts of just and equitable treatment and flexibility to "value." That is reflected in what matters the court will take into account in its assessment of what is "fair value" in all the circumstances. It enables the court to achieve a just and equitable result on the facts of the case."

Commenting on the hypothetical sale concept used to assess the price of assets from what would be paid in the real world [81], Parker J said:

[84] The problem with applying the hypothetical sale analogy is that in this case one can see that the sellers (the dissenters) might be fairly unwilling and the buyers (the majority) somewhat eager in the context of the merger. Moreover there is no "sale," simply an extinguishment of rights and the cancellation of shares in return for the entitlement to the fair value payment.

[85] I have reached a decision on what is being valued (the shares themselves) and the information to be taken into account (all relevant information to fair value—see below) without recourse to applying a strict hypothetical sale concept to the transaction and its logical consequences."

20. Smellie CJ also identified the purpose of section 238 in *Re Changyou.com Limited* (Unreported, Grand Court, 28 January 2021) at [42]:

"The merger and consolidation provisions set out in section 233 enable a minority of shareholders to be compulsorily deprived of their property (i.e. their shares) against their wishes. The quid pro quo for that is an entitlement to be paid fair value for that property by the Company, which is what subsection 238(1) provides. Were such a quid pro quo not available to that minority, they could be deprived of their property at whatever price the

holder with the requisite majority chose, irrespective of whether such price represented the actual value of their shares. That is self-evidently the mischief at which the appraisal rights conferred by subsection 238(1) is directed: to prevent minority shareholders from being deprived of their property for anything other than its fair value."

(See also Segal J's reference to the court's objective to provide a valuation which *"properly reflects the true monetary worth to the shareholder of what he has lost"* (*In the Matter of Trina Solar Limited* (Unreported, Grand Court, 23 September 2020)).

Previous Cayman Islands practice regarding the valuation date

21. The judge recorded at [16] of the Judgment that the Company's legal team had produced a table which apparently listed every set of proceedings that had been commenced in the Cayman Islands under section 238. Of the 28 sets of proceedings listed, the team had been able to determine the valuation date used in 17 of those cases. In every one of those cases, the EGM date was adopted as the valuation date. The judge held at [16] that it was to be inferred that this had been by agreement and had not been expressly considered by the court, so that the weight of those decisions could only be persuasive, not conclusive.

22. The table has been updated for the purposes of this appeal and now lists 34 sets of proceedings (including the present case). Of the 33 cases (excluding the present case), the date of the EGM was taken as the valuation date in 19 cases and in 12 cases the valuation date could not be confirmed. In one case, *Charm Communications Inc*., the directions order had specified two possible valuation dates, namely the date upon which the circular was sent to shareholders prior to the EGM and the date of the EGM itself. It is not known which date was actually used. In a further case (*Changyou.com Limited*) there was no EGM as it was a short-form merger, to which reference is made below. It is not known what valuation date was used in that case. There is no known previous case where the merger completion date was taken as the valuation date.

23. Whilst in many cases there was only a short interval between the date of the EGM and the date upon which the planned merger was registered so as to become effective, as set out at [25] of the Judgment, there were four cases where the date of the EGM had been taken as the valuation date despite a gap of a similar order to the present, namely *Qihoo 316 Technology Co Limited* – 3

months, 15 days; *Trina Solar Limited* – 2 months, 25 days; *JA Solar Holdings Co Limited* – 4 months, 4 days; and *iKang Healthcare Group Inc* – 4 months, 29 days.

The judge's decision

24. As already stated, the judge upheld the Company's submission that the valuation date should be the date of the EGM. In very brief outline I would summarise his reasoning as follows (references in square brackets being to the relevant paragraph(s) of the Judgment):

(i) Although there was some importance to be attached to consistency of approach which allowed for some predictability for parties, each case would nevertheless turn on its own specific facts and he did not accept that the valuation date was to be rigidly fixed for all cases. The overriding issue was to ensure that the date for valuation was, like everything else in the process of determination, fair [28].

(ii) The Act did not specify the date on which the fair value of the Dissenters' shares was to be ascertained [29].

(iii) The intention of the Dissenters to invoke their entitlement to be paid fair value crystallised immediately before the EGM by their objection to the merger. This was the moment when the Dissenters were to be treated as dissenting from the merger and was the point at which they were assessing their rights. It was therefore the correct date on which fair value should be determined. Taking the EGM as the valuation date would mean that the value would not be affected by reference to events which occurred subsequently and would have played no part in their calculation [34] and [44].

(iv) The EGM was the date of the merger decision and the point at which the Dissenters and the accepting shareholders took their decision as to whether to object or approve and these decisions were taken on the circumstances as they existed at the EGM [31] and [46].

(v) Taking the EGM date was fair as between the Dissenters themselves and fair as between the Company and the Dissenters and indeed all the shareholders. They were all assessing their interests at one point in time for the purposes of approving or deciding to object [47].

(vi) He did not derive any assistance from the unfair prejudice and insolvency cases in England and Wales as the circumstances were very different [40] and [41].

(vii) He took note of the previous Cayman Islands cases where the valuation date had been taken as the date of the EGM. As none of these decisions had apparently been made after argument on the date of valuation, this factor was only persuasive, but it at least made his decision consistent with those cases [48] and [49].

25. Although the judge indicated at [28] that the valuation date was not to be fixed rigidly for all cases, I accept that his reasoning and conclusion were expressed in general terms and suggested that the valuation date should normally be the date of the EGM.

This appeal

26. As already stated, although all the Dissenters appeal against the judge's decision that the valuation date should be the date of the EGM, there is a difference between them. Mr Hollington argues 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, which he stated to be the date upon which both the company and the dissenting shareholders are bound to the purchase and sale of the dissenting shareholders' shares; see [19] and [35] of his skeleton. On the facts of this case, the merger completion date was the Completion Date as the merger took effect on registration of the plan of merger, the Company having waived the condition precedent. Mr Lowe, on the other hand, argues that the valuation date should essentially be decided on a case by case basis having regard to what is fair in the particular circumstances. Although at [18] of his skeleton argument he submitted that the Court should decide on the Completion Date as the valuation date in this case, in his oral submissions (pages 80 – 81 of the transcript) he 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 of the valuation date following discovery and trial.

Discussion

27. In most cases, it will make no difference whether the EGM or the merger completion date is taken as the valuation date. This is for two reasons. First, as the table of previous cases shows, in

the majority of cases there is a relatively short period (often a matter of a few days) between the EGM and the merger completion date. Thus, in most cases it is highly unlikely that there will be any difference in value between the two dates.

28. Secondly, even where there is a material delay and a price sensitive event occurs between the EGM and the merger completion date, such event will often be reflected in the valuation even if the valuation date is as at the EGM. That is because, when valuing on a particular date, any valuer looks forward to see whether any event that might affect the profitability of the company in question is likely to occur in the foreseeable future. To take a simple example, if at a valuation date there is a general expectation in the market that the selling price of an item sold by a company is likely to increase substantially in the foreseeable future or the demand for such item will increase substantially, thereby increasing the profitability of the company, that would be reflected when valuing the company as at the valuation date. Conversely, if a totally unforeseeable event occurs after the valuation date, that event would not be taken into account when valuing the company as at the valuation date. The weight to be placed on a subsequent price sensitive event when valuing a company at a particular date will depend on the degree to which the event, as at the valuation date, would be considered likely.

29. The essential point is that, unless the subsequent event is wholly unforeseen, a valuation as at a particular date will take the subsequent event into account to a greater or lesser extent. As Field JA put it during argument, if the subsequent event is due to causes which *'were at an early stage of fermentation'* at the valuation date, valuers would be bound, when valuing as at the valuation date, to see whether there were indications of the subsequent event such that it should be taken into account when assessing the value of the company as at the valuation date.

30. Transposing that to the present case, if the subsequent increase in the share price of Weibo was foreseeable as at the EGM, whether as a certainty, likely, possible or remotely possible, the increase would be taken into account when valuing as at the EGM, with the weight to be given to the increase to be determined by reference to the degree of likelihood as at the valuation date of the subsequent increase occurring.

31. Nevertheless, in some cases, the choice of valuation date may make a material difference, e.g. if a subsequent event is unforeseeable at the earlier valuation date. The question therefore arises as to

whether the Act envisages a particular date as being an appropriate valuation date even though no date is specified in the Act.

32. The only direction in the Act is that the court must determine the fair value for the shares which have been lost. This must have the consequence that whatever date is selected it should not impede the court's obligation to determine fair value and it should not adversely affect the fairness of the court's assessment. The fair date of valuation is that which achieves the fairest assessment.

33. This leads Mr Lowe to his submission that the choice of valuation date should be entirely fact specific and should not be determined until trial when the court has all the information in order to decide on the fair date for valuation. However, in my judgment, this would have very undesirable consequences and is not required by the Act. It would mean that, when preparing for trial, the parties would not know what the valuation date would be and therefore the scope of the evidence needed to be adduced. Valuation experts would have to prepare valuations as at different dates to cater for the possible decisions of the court and counsel would have to prepare alternative arguments dealing with different possible valuation dates.

34. Such an approach would not, in my view, be helpful or consistent with the economic and expeditious approach which the Grand Court seeks to achieve. In *Nord Anglia*, Kawaley J made some pertinent observations about the need to conduct section 238 proceedings in a consistent, expeditious and economical manner. Thus, at [8]-[11] he said:

> ***"8. Expedition and economy are explicitly given a higher priority in this Court's Rules than under the English CPR, which opens by formulating the purpose of the overriding objective as being to 'enable the Court to deal with cases justly'. Order 1.2 of this Court's Rules defines 'justly', non- exhaustively, in terms which largely mirror the corresponding rule in the English CPR, and which includes the proportionality principle. However it adds, with implicit priority, the following additional elements:***
>
> ***'(a) ensuring that the substantive law is rendered effective and that it is carried out;***
>
> ***(b) ensuring that the normal advancement of the proceeding is facilitated rather than delayed…..'***

9. These guiding principles must inform this Court's approach to the present Summons for Directions taking cognisance of the fact that section 238 is designed to accord substantial commercial justice to merger companies and dissenting shareholders alike. These increasingly common petitions should in my judgment be judicially managed in a way that will, so far as reasonably practicable, promote confidence in the processes of this Court for all key stakeholders. Where, as here, the parties have achieved substantial agreement on the proposed directions but found certain issues to be intractable, the Court must do its best to adopt a balanced approach to the opposing contentions. An approach which will encourage the parties to cooperate in the ensuing phases of the proceedings, and indeed, in future similar cases.

10. Of particular importance will be the need, so far as consistent with the facts of this particular case, to strive for a consistent approach to similar issues on the part of the various judges of this Court. The starting assumption must be that the approach adopted in previous section 238 cases will be of considerable assistance to me in the present case. The fact that the present case is of higher value and may involve more documents than previous cases does not to my mind undermine this starting assumption."

35. In my view, these laudable objectives would best be served if this Court can identify a valuation date which will generally be applicable as achieving the fairest assessment of fair value, so that it will be the starting point from which the Grand Court will only depart if, in a particular case, it considers that there is good reason to choose some other valuation date as producing the fairest assessment of fair value.

36. One can well understand why the Collas Crill, Mourant & Ogier Dissenters argue for the merger completion date on this occasion in view of the increase in the Weibo share price. But dissenters are not entitled to a one-way bet, choosing the merger completion date if the valuation may have gone up since the EGM and the EGM date if the valuation may have gone down since that date. They are only entitled to fair value and that means a value which is fair to both the dissenters and the company. Although my reasoning is not entirely the same as that of the judge, I agree with his decision that the date of the EGM will in general produce the fairest assessment of fair value. I would summarise my reasons as follows:

(i) A dissenter takes his decision to dissent on the basis of the information and factual situation (including the likelihood of future events) at the time he takes his decision to dissent. On the basis of that information and factual position, he will decide whether to accept the merger price or opt for fair value. Fairness seems to me to suggest that the court should consider the matter of fair value on the basis of the same information and circumstances as the dissenters acted upon.

(ii) It seems to me to be fundamentally unfair for the dissenter, having weighed up his best course on the basis of the position as at the date of his decision, to find that because of some unforeseen event occurring after he took his decision, the fair value is less than he thought, and that he should after all have accepted the merger price.

(iii) I accept, of course, that the unexpected subsequent event may lead to an increase in fair value rather than a reduction, in which event the dissenter will benefit if the valuation date is the merger completion date. Mr Hollington, in his reply submissions, said that dissenters *'rolled a dice'* when deciding to dissent in that they took the risk of an increase or reduction in value subsequent to the decision to dissent. I do not consider that to be fair. Dissenters are not gamblers. They are investors who have taken a considered decision that, on the basis of the position at the time of their decision to dissent, fair value is likely to be greater than the merger price. They of course take the risk that the court will not agree and will decide that fair value is in fact less than they thought, but it is unfair if the court reaches its decision on the basis of the circumstances existing at a time after they have taken their decision, when the fair value may be influenced by matters which have arisen since they took their decision.

(iv) As discussed earlier, if the event subsequent to the dissenters' decision is, to a greater or lesser extent, foreseeable at the time they took the decision, it is entirely fair that this event is taken into account, because the dissenters were equally in a position to anticipate the event as a possibility and it was therefore one of the facts and circumstances which they could take into account when reaching their decision to dissent.

(v) Although a dissenter will have assessed the likely fair value on the basis of the position as at the date of his decision to dissent and will have become irrevocably bound by that choice, the buyers / company, as in this case, may not become bound to proceed until the merger completion date. By the imposition of conditions to be satisfied or waived before

becoming bound to complete, the company can defer completing the deal (and therefore becoming bound to pay fair value) until a date of its choice, which may be some time off. If something occurs or may occur which will lead to a lower valuation, the company can wait and choose a merger completion date which will take that event into account and therefore lead to a lower valuation than would have been the case as at the date the dissenter took his decision.

(vi) Indeed, the merger completion date may be even later than the date of registration of the plan of merger. Section 234 allows a plan of merger to provide that the merger will not become effective until a specified date or until the date of the occurrence of a specified event subsequent to the date of registration provided it is no more than 90 days after registration of the merger plan. Thus the company can defer registration and can then, if there are appropriate conditions, defer the merger completion date for up to 90 days after registration, which may be a considerable period after the dissenters have had to make their choice.

(vii) In other words, taking the merger completion date as the valuation date for assessing fair value places all the cards in the hands of the company / buyer whereas the dissenters are stuck with the choice which they made shortly after the EGM on the basis of the position as it then was. The company / buyer can control the merger completion date so as to achieve the best outcome for itself in terms of valuation whereas the dissenters are helpless. In my judgment, this is not fair to the dissenters.

(viii) I accept, of course, that totally unexpected circumstances may occur which may cause the fair value as at the merger completion date to be higher than that at the date the dissenters took their decision, in which case the dissenters may benefit if the merger completion date is taken as the valuation date rather than the date of the EGM. However, that would be entirely fortuitous. It seems to me fairer to the dissenters (and for that matter the buyer / company) to fix the value by reference to the circumstances as at the date of the dissenting shareholders' decision, which circumstances can be considered by both the dissenters and the company when they reach their respective decisions. Neither of them is left at the mercy of future events (whether favourable to the dissenters or the company) which may be outside their control.

(ix) The question then is what date should be taken to achieve the objective of fairness as described in the above sub-paragraphs? It is here that my reasoning differs from that of the judge who, as set out at [24(iii)] above, considered that the dissenters' entitlement to be paid fair value crystallised at the EGM because of their prior objection to the merger pursuant to section 238(2). I accept the Dissenters' submission that this is not the case. Dissenters are not bound by their objection as at the EGM. They may vote against the merger at the EGM, but unless they subsequently serve a subsection (5) notice, they will receive the merger price. It is only on serving a subsection (5) notice that a dissenter takes an irrevocable decision to opt for fair value rather than the merger price; from that point he is bound by his decision to dissent and he loses all his rights as a shareholder save for the few exceptions spelt out earlier.

(x) The logic of the previous sub-paragraphs would suggest that the valuation date should be the date of the subsection (5) notice. However, no party contended for that date, and it would normally be difficult to fix upon a precise date. Different dissenters will give their subsection (5) notices on different dates (albeit within a short period), but the valuation date taken by the court must be the same for all dissenters.

(xi) In my judgment, the date of the EGM will normally be a suitable proxy for the date on which dissenters take their irrevocable decision to elect to receive fair value rather than the merger price by serving a subsection (5) notice. Although in theory the latest date for a subsection (5) notice could be as much as 40 days after the EGM, this is highly unlikely to be the case. In practice the delay between the EGM and the subsection (5) notices is likely to be short and the value as at the EGM is likely to be the same as the value when a dissenter serves his subsection (5) notice. Furthermore, in reality, a dissenter is likely in practice to reach his decision on the basis of the information as at the EGM. It is at that point that he will have decided to object and, in the absence of some unexpected price sensitive event between the EGM and the date of his subsection (5) notice, he is likely to issue his subsection (5) notice for the same reasons and based on the same information as led him to give notice of objection before the EGM. Accordingly, I see no unfairness to a dissenter in holding that the valuation date should generally be the date of the EGM as being a date on which, in all likelihood, the facts and circumstances known to the dissenter will be the same as those when he issues his subsection (5) notice. I consider later the position where this might not be the case. Furthermore, as the judge said at [46]

and [47], the EGM date is also the point at which the non-dissenting shareholders make their decision to accept the merger price on the basis of the circumstances at that time.

37. In reaching my conclusion that the date of the EGM will normally be the fairest valuation date, I have taken account of the arguments made on behalf of the Dissenters and I would comment on them as follows.

(i) Significance of mutuality and completion

38. Mr Hollington submitted that fair value should be assessed as at the date when both sides are bound, i.e the merger completion date. Until that moment, it is only the Dissenters who were bound. The Company could have refused to waive the condition precedent so that the merger might not have taken place or could wait until after the Weibo price increase in order to deprive the Dissenters of the benefit of that price increase.

39. I do not consider that the mutuality obligation is a significant factor when deciding what is the fair date for valuation. As already stated, the Dissenters were bound once they served the subsection (5) notices and they have bound themselves on the basis of the position at that time. Far from it being fairer for valuation to be calculated as at the date when both sides become bound, it is likely to lead to unfairness by enabling the Company in effect to choose the valuation date by reference to when it elected to become bound to complete. As stated at [36(vii)] above, it places all the cards in the hands of the Company.

40. I accept that, in this case, the event which has taken place between the EGM and the merger completion date is something which may increase the value of the Company, namely the increase in the share price of Weibo. However, as already discussed, if the cause of Weibo's price increase was something which could have been anticipated as a reasonable possibility as at the date of the EGM, valuation as at the EGM will reflect that likelihood. If, on the other hand, the Weibo price increase was totally unforeseeable and came out of the blue after the Dissenters decided irrevocably to dissent, it does not seem to me to be unfair for the Dissenters not to benefit from such unforeseen event. They had made their decision to dissent and opt for fair value and must be taken to have accepted the risk that there might be an unforeseeable event that caused the value of the Company to increase subsequently to their decision.

41. It is also submitted on behalf of the Dissenters that fair value is compensation for what the Dissenters have lost. What they have lost are the shares in the Company and these are only in fact lost at the merger completion date; that should therefore be the date of valuation. However, I do not consider that the date when shares are taken from dissenters is necessarily the fairest date upon which to value those shares. As already stated, they take their decision on the basis of the situation when they decide to dissent, not on the date when the shares are finally taken from them, and in my view it would be unfair for them to suffer (or benefit) as a result of an unforeseeable event after that decision merely because the procedure under the Act lays down some time between when they decide to dissent and when the shares are actually finally taken from them. Regardless of when they actually lose the shares, fairness suggests to me that they should be valued by the court on the same basis as they were valued by the dissenters when deciding whether or not to accept the merger price or opt for fair value.

42. It is further submitted that the fact that the Company might not waive the condition precedent (so that the merger might not proceed at all) supports the merger completion date as the valuation date because it is only then that it is known that the merger will proceed. I do not see that this supports the merger completion date as the fairest valuation date. If the merger does not go ahead, the Dissenters would remain as shareholders in the Company and would receive neither the merger price nor fair value. The valuation date would simply be irrelevant as there would never be an assessment of fair value by the court.

(ii) The advantage of known facts

43. It was submitted on behalf of the Dissenters that, when valuing what the Dissenters have lost, the court should not put itself in a position of hypothesising how it would have predicted future events as at the EGM date when, by taking the valuation date as the merger completion date, those future events have already taken place. In other words, the court should not speculate about what might have happened when it is known what actually happened ("the Bwllfa principle" – *Bwllfa and Merthyr Dare Steam Collieries (1891) Limited v The Pontypridd Waterworks Company* [1903] AC 426).

44. However, I do not see that the Bwllfa principle outweighs the need to take a valuation date which is as fair as possible. For the reasons I have given, I consider that the fair valuation date will generally be the EGM date. In any event, taking the merger completion date as the valuation date

will not avoid the issue raised by the Bwllfa principle. Just as there may be a price sensitive event subsequent to an EGM but before the merger completion date, so there may similarly be a price sensitive event subsequent to the merger completion date. In either case, if this is an event which could have been foreseen as reasonably possible as at the valuation date, it will need to be reflected in the valuation process. Thus, the need to take account of foreseeable future events will, as a matter of generality, be just as applicable if the valuation date is the merger completion date as it will be if the EGM is taken as the valuation date.

(iii) Short-form merger

45. Section 233(7) provides that, where a parent, holding 90% or more of the voting rights of a subsidiary, wishes to merge with that subsidiary, no special resolution at an EGM is required. Such mergers are commonly referred to as *'short-form'* mergers in contrast to *'long-form'* mergers where, as in this case, a special resolution at an EGM is required.

46. In *Re Changyou.com Limited* (supra) the question arose as to whether the absence of an EGM meant that minority shareholders had no right to seek payment of fair value pursuant to section 238(1). Smellie CJ in the Grand Court noted that there was a mismatch between the right conferred on dissenters by section 238(1) and the procedural steps set out thereafter in section 238(2)-(16) but nevertheless held that a dissenter in a short-form merger had the same right under section 238(1) to payment of fair value for his shares. His decision was upheld by the Court of Appeal in *Re Changyou.com*, Unreported, CICA, (Civil) Appeal 6 of 2021, 16 September 2022, per Martin JA, with the agreement of Goldring P and Morrison JA.

47. The question then is when is a dissenter in a short-form merger to be regarded as having dissented? On this point, there was a difference of opinion between the Chief Justice and the Court of Appeal. The Chief Justice considered at [129] of his judgment that a dissenter must give notice of dissent within 20 days of being served with the plan of merger as required by section 233(7) and that this was the equivalent of a subsection (5) notice. The Court of Appeal, on the other hand, considered at [79] and [80] that the two stages of objection and dissent, which exist in the long-form merger, should also be reflected in a short-form merger. The equivalent of a notice of objection under section 238(2) was that a dissenter must give notice of objection immediately after he is given the plan of merger pursuant to section 233(7). The Court of Appeal further held that, just as the company must within 20 days of an EGM in a long-form merger give notice of

the result of the vote to any member who has given notice of objection, so the company in a short-form merger must within 20 days of filing the plan of merger with the Registrar, give notice to all members who have given written notices of objection that the plan has been so filed. Any member who wishes irrevocably to exercise his right to dissent must do so within 20 days of receipt of that notice. Thus the Court of Appeal treated the date of registration of the plan of merger in a short-form merger as being the equivalent of the EGM date in a long-form merger; a dissenter must give the equivalent of a subsection (5) notice within 20 days of receipt of notice from the company which in turn must be within 20 days from the date of registration of the plan of merger.

48. It is submitted on behalf of the Dissenters that, as there is no EGM in a short-form merger, the valuation date cannot be the EGM date in such cases and this counts against the EGM date being the fair valuation date in a long-form merger because the valuation date would therefore be different in a long-form merger as compared with a short-form merger.

49. It was not necessary in *Changyou* for either the Chief Justice or the Court of Appeal to consider what should be an appropriate valuation date and it is not known what valuation date was eventually taken. However, it seems quite likely that a court would take the date of registration of the plan of merger as the appropriate valuation date in a short-form merger. I do not consider that this would be because the date of registration in itself is the fairest valuation date. In my view, it is because, as just stated, in a short-form merger that date is the equivalent of the EGM date in a long-form merger, i.e. it is shortly (a maximum of 40 days) before a dissenter irrevocably commits himself to opt for fair value rather than the merger price and the dissenter is likely to have taken his irrevocable decision to dissent on the basis of the position as it was as at the registration date.

50. Accordingly, I do not regard the fact that the EGM date cannot be the valuation date in a short-form merger counts against selecting the EGM date as the fairest valuation date in a long-form merger. On the contrary, I would expect a court in a short-form merger to apply the same principles as I have sought to outline above and to select a date (probably the date of registration) which is a suitable proxy for the date upon which the dissenters in a short-form merger become irrevocably committed by serving notice of dissent after the date of registration in the same way as the EGM date is a suitable proxy for the date upon which dissenters become irrevocably committed in a long-form merger by serving a subsection (5) notice. There would accordingly be a consistency of approach and reasoning by the court even if the actual date taken differed as

between a short-form and long-form merger because of the absence of an EGM in the case of the former.

(iv) Delaware authority

51. It was common ground between the parties that the courts of Delaware, when considering the equivalent of section 238, take the merger completion date as the valuation date. The Dissenters submit that the Cayman Islands courts should do likewise on the basis that Delaware has considerable experience of this type of case and has fixed upon the fairest valuation date.

52. It is clear from the decision of the Privy Council in *Shanda Games Limited v Maso Capital Investments Limited* [2020] UKPC 2, [2020] B.C.C. 466 that, whilst Delaware jurisprudence can be of assistance in some cases, caution needs to be exercised in simply following decisions of the Delaware courts. Thus Lady Arden, speaking for the Privy Council, said at [48]-[50]:

> ***"48. The expression 'fair value' is a wide term. In the Board's view, CICA and the judge (albeit to a lesser extent) rightly resisted the temptation to hold that the expression 'fair value' must mean the same as in the Delaware legislation. There are many objections to that in any event. First, 'fair value' is not statutorily defined in the Delaware Code. It is a concept that has been developed by the Delaware courts and, so far as one can see, the concept has developed incrementally and it is foreseeable that it will continue to be developed by them. It cannot have been intended by the Cayman Islands' legislature that 'fair value' should simply mean what the Delaware courts had held it to mean when the concept was introduced into Cayman Islands companies' law, still less that it should mean whatever the Delaware courts from time to time had held it to mean. The legislature can only have intended that the courts of the Cayman Islands should interpret this phrase, as cases arose, in the accustomed way.***
>
> ***49. The Cayman Island courts would still be able to use the jurisprudence of the Delaware and other courts if placed before them as a source of guidance on some particular issue. It goes without saying that the jurisprudence of Delaware is of great value in this field. However, it should also be borne in mind that there may be different rules in related contexts, such as a different regulatory scheme for corporations issuing securities to the public and the duty of fairness owed by a controlling stockholder to other***

stockholders, which are not found in English and Welsh law. In addition, there may be different economic and social policy considerations affecting legislation in Delaware.

50. The Board takes the view that comparative law whose subject matter is similar to s.238 may provide to varying degrees a useful comparison, but that it would be wrong to fail fully to recognise that the Cayman Islands' legislature made the decision in enacting s.238 to use a new and undefined phrase, which is different from that used in other provisions of the Cayman Islands Companies Law, namely 'fair value'. By using a phrase not used elsewhere in the Cayman Islands Companies Law, the legislature must, it is to be assumed, have intended the courts, if they thought fit, to interpret the expression 'fair value' consistently with the principles of statutory interpretation but otherwise free from the constraints of jurisprudence on different valuation standards, or of valuation exercises done in different circumstances."

53. At the conclusion of the hearing of this appeal, the Court was not entirely clear as to the basis upon which the Delaware courts had selected the merger completion date as the appropriate valuation date and invited assistance on this point. Supplementary submissions were filed by the Collas Crill, Mourant & Ogier Dissenters and the Company, and the Court is grateful for this additional material.

54. It is common ground between the parties that, although the Delaware courts take the merger completion date as the valuation date, the current General Corporations Law (like the Act) does not specify the date upon which shares of a dissenter are to be valued. It is said therefore by the Dissenters that this similarity in the legislation enables the Cayman Islands courts to derive considerable assistance from the Delaware jurisprudence.

55. However, it appears also to be common ground that, until 1976, the various iterations (including in 1899, 1943 and 1967) of the Delaware Corporations Law specifically provided that a dissenter's shares were to be valued at the effective date of the merger, i.e. the merger completion date. It was only in 1976 that the Delaware Corporations Law for the first time was silent as to the date upon which fair value should be determined and that has been the statutory position since then.

56. Naturally, until 1976, the Delaware courts therefore took the merger completion date as the valuation date because that was what the statute told them to do. See for example *Tri-Continental Corporation v Battwe* 74 A.2d 71 (1950) at 72 and *Frances I Du Pont and Co v Universal City Studios Inc* 343 A. 2d 629 (1975). In *Du Pont*, the Court of Chancery said this at 634:

> ***"An appraisal is [the] method of paying a shareholder for taking his property. It is a statutory means whereby the shareholder can avoid the conversion of his property into other property not of his choosing. The statutory right is given the shareholder as compensation for the abrogation of the common law rule that a single shareholder could block a merger….***
>
> ***Thus, the whole statutory proceeding is directed towards determining 'the value of [the] stock on the date of recording of the agreement of consolidation or merger' 8. Del.C.262(b). This overriding purpose of the statute focuses attention on two factors, the value of the stock and the time of the taking.***
>
> ***First, as the wording and history of the statute demonstrate, it is the value of the stock that is considered the damage principal for the purpose of the award… It is stock that is the property subject to the taking and it is the value of the stock which constitutes the measure of the statutory recovery by the judgment….***
>
> ***Second, <u>under the statute</u>, the key date for fixing both liability and damages is the date of the merger. Although the corporation, absent an agreement with the shareholder as to price, has no statutory obligation to pay the value of the stock until the Court enters its decree under section 262(f), the corporation has, in effect, been liable for the taking of the shareholder's property since the date of taking i.e. the date of merger. The valuation is made as of the date of the merger and is determined 'exclusive of any element of value arising from the expectation or accomplishment of ther (sic) merger'…. While a certain amount of retrospective analysis and backdating are required, the whole statutory scheme is keyed to the date of the merger because that is the date on which the shareholder's property is taken."*** [Emphasis added]

57. The Dissenters place some weight on these observations but I do not see that they assist. They are made in the context of the statute mandating that the valuation date is the date of merger.

58. We were not referred to any case since 1976 (when the statute ceased to specify the valuation date) where the Delaware courts have considered whether or not to continue to value the company as at the merger completion date; they appear simply to have continued the previous practice which had been laid down by statute without consideration of whether this is in fact the fairest date to take.

59. In the circumstances, I do not see that much weight can be placed on the position in Delaware. It is clear that the Delaware jurisprudence has been much, if not wholly, influenced by the previous statutory provision. I do not consider that the considerations articulated in the above extract from *Du Pont* or the current practice in Delaware are sufficient to outweigh the considerations of fairness I have sought to outline earlier.

(v) Unfair prejudice / schemes of arrangement

60. The Court was referred to several cases in connection with unfair prejudice claims. Mr Hollington relied on them to show that the starting point for choosing a valuation date in such cases was the date of the court order for purchase of the shares, i.e. the date on which both sides became bound to a sale; see [30] of his skeleton. He submitted that this pointed towards the merger completion date as the equivalent in section 238 cases. Mr Lowe, on the other hand, submitted that the cases showed that, outside the UK, it is not necessarily accepted that there is *'starting point'* in unfair prejudice petitions and that the unfair prejudice cases supported his submission that the choice of valuation date should simply be seen as an aspect of the fair value determination; see [12]-[13] of his skeleton.

61. In *Re London School of Economics Limited* [1986] 1 Ch 211, Nourse J considered whether there was a general rule as to the date upon which shares which a court had ordered to be purchased in an unfair prejudice claim should be valued and said this at 224:

> ***"If there were to be such a thing as a general rule, I myself would think that the date of the order or the actual valuation would be more appropriate than the date of the presentation of the petition or the unfair prejudice. Prima facie an interest in a going***

concern ought to be valued at the date on which it is ordered to be purchased. But whatever the general rule might be it seems very probable that the overriding requirement that the valuation should be fair on the facts of the particular case would, by exceptions, reduce it to no rule at all."

62. In *Profinance SA v Gladstone* [2002] 1 WLR 1024, the England and Wales Court of Appeal reviewed a number of cases and noted that there were many where some date other than the date of the court order had been taken as the valuation date in unfair prejudice petitions. Nevertheless, the Court of Appeal concluded at [61] that the general trend of authority over the previous fifteen years appeared to support the date of the order as the starting point, while recognising there were many cases in which fairness (to one side or the other) required the court to take another date. The court then went on to illustrate some cases where an alternative date would be appropriate. Mr Hollington relied on this case in particular in support of the merger completion date being the normal valuation date in section 238 cases.

63. In *Financial Technology Ventures II (Q) LP v ETFS Capital Limited* [2021] (1) JLR 122, [2021] JCA 176, the Jersey Court of Appeal, whilst not specifically disagreeing with the above observation in *Profinance*, emphasised the need to choose the valuation date which was the fairest in the particular circumstances. It stated that there were no fixed rules. To like effect was the view of the Supreme Court of New South Wales in *Short v Crawley* (No 30) 2007 NSWSC 1322 where White J said at [1246] *"The question is, simply, what is the fair time to adopt as the time for valuation of the plaintiffs' shares?".* Mr Lowe relied on these two cases in support of his submission that there should be complete flexibility in choosing the fairest valuation date in any particular case.

64. The Dissenters referred to the fact that at [30]-[40], the Privy Council in *Shanda Games* derived some assistance from the principles of valuation in unfair prejudice cases in the context of whether there should be a minority discount when valuing for the purposes of section 238. They submitted that similar assistance could be derived when assessing an appropriate valuation date.

65. However, it seems to me that choosing a valuation date is a rather different exercise from considering whether, when valuing, it is appropriate to include a minority discount. Like the judge, I do not think that much assistance can be derived from the practice in unfair prejudice claims when deciding on a valuation date for the purposes of section 238 cases. It seems to me that the situation is very different. In unfair prejudice cases, the court has ordered a sale of the

petitioner's shares as a remedy for wrongful conduct by those in control of the company. Being a court ordered remedy, it is not surprising that, as a starting point, the shares should be valued as at the date that the court grants the remedy. However, it is clear from the cases that there is very considerable flexibility and that in many cases a much earlier valuation date will be taken in order to achieve a fair result. An obvious example is where the wrongful conduct has led to a decline in the value of the petitioner's shares.

66. Section 238 cases are very different. There is no question of the court imposing an order for sale as a form of remedy for wrongful conduct. On the contrary, there has been an offer for the company's shares and the dissenters have chosen to opt for a court assessed fair value rather than the merger price offered by the buyer. In doing so the dissenters will have taken their decision at a particular point of time before the merger completion date. Accordingly, I do not see that the practice in unfair prejudice cases assists in relation to the choice of valuation date for section 238 cases.

67. Mr Hollington also sought assistance from the practice of the courts of England and Wales in relation to schemes of arrangement, particularly those involving a compromise or arrangement with creditors. In such schemes, it is sometimes the case that a particular class of creditors is excluded from the scheme on the basis that, if there were to be a liquidation or some form of formal insolvency, they would receive nothing because the company is insolvent. In such cases, issues of valuation become important in order for the court to determine, when deciding whether to sanction the scheme, whether such creditors would in fact be 'out of the money' (i.e. receive nothing) on liquidation or administration. Thus in *Re Bluebrook Limited* [2009] EWHC 211 (Ch), Mann J noted at [14(ii)] that, the original valuation having been as at 9 March 2009, the valuers updated their valuation as at 3 June to take account of a change in market and economic conditions by that date, with the hearing taking place in early August 2009.

68. I accept that in such cases the court looks for a recent valuation, but this is hardly surprising. The court has to decide whether to sanction the scheme. In order to reach that decision, the court needs to establish whether a particular class of creditors would in fact be 'out of the money' if there were a formal insolvency. The court needs to establish this on the basis of the most up to date information as this would be the only reliable basis for deciding if the particular creditors would in fact be out of the money in the event of a liquidation or some formal insolvency.

69. I do not see that this assists in the very different circumstances of a section 238 petition. In such cases there is no question of insolvency nor of the court deciding whether to sanction what is proposed. The court's sole function is to fix upon a fair valuation and for that purpose to establish a fair valuation date. Unlike in a scheme of arrangement, that does not have to be the most recent available date.

70. Mr Hollington also referred to *Re Virgin Active Holdings Limited* [2021] EWHC 1246 (Ch). That case related to a restructuring plan as introduced under part 26A of the UK Companies Act 2006. Under part 26A, the court can now sanction a scheme of arrangement even if a class of creditors does not agree to the scheme by the requisite majority of 75%. In order for the court to be able nevertheless to sanction the scheme, the court must be satisfied that none of the members of the relevant class of creditors would be any worse off as a result of the scheme than they would be in the event of the most likely alternative scenario if the scheme were not sanctioned. Mr Hollington pointed out that in *Virgin Active Holdings* the expert valuer provided an initial report on 18 March 2021 and an updated valuation on 19 April, which was shortly before the court hearing on 26 April.

71. For the same reasons as in relation to an ordinary scheme of arrangement case, it is to my mind not surprising that the court seeks the most up to date information when deciding whether to sanction a restructuring plan. It needs to know what would happen in the event of the most likely alternative scenario and what the position of the creditors would be. For the same reasons as in relation to an ordinary scheme of arrangement, I do not consider that the practice under part 26A assists in determining what should be the fair valuation date in the very different circumstances of a section 238 application.

(vi) Effect of the merger

72. At [15] of the Judgment, the judge agreed with the observation of Jones J in *Re Integra Group* [2016] (1) CILR 192 at [25] that the calculation of fair value should disregard any enhancement or diminution of value attributable to the merger ("the synergy disregard"). At [28] of his skeleton, Mr Hollington suggests that the judge went on to infer at [34] of the Judgment that the requirement for the synergy disregard supported the adoption of the EGM date as the valuation date. I do not think that the judge was expressing any such view in that paragraph. It seems to

me that he is there speaking of the effect on value of events which occur subsequent to the valuation date rather than any effect of the merger.

73. However, I agree with Mr Hollington that, if the judge was expressing the view that the need for the synergy disregard pointed towards the EGM date as the fairest valuation date, this was incorrect. The synergy disregard is part of the valuation process which, if it applies at all (as to which the Privy Council reserved its position in *Shanda Games* at [46]), is applicable whatever the valuation date. It does not point towards any particular date as the most appropriate valuation date.

(vii) Previous practice

74. In its Respondent's Notice, the Company contended that the judge gave insufficient weight to what it said was the *'settled practice'* of the Grand Court to assess fair value as at the EGM date.

75. As already stated, it is correct that the Grand Court has, in every case where the valuation date can be ascertained, taken the EGM date as the valuation date. However, in all the cases except one, there is no evidence of any consideration by the court of any different date and the matter appears to have proceeded by agreement. The one case where some consideration was given to the topic is *Re Integra Group* where Jones J discusses the appropriate valuation date at [22]-[26]. However, in that case the choice presented to the judge appears to have been between the date upon which the circular containing the merger proposal was sent to shareholders and the date of the EGM; no one appears to have suggested the merger completion date. Furthermore, it appears ultimately to have been agreed between the parties that the EGM was the appropriate valuation date (see [22]). In addition, the judge appears to have been under the erroneous impression that the practice in Delaware was to value as at the date of the EGM (see [23]). In these circumstances, I do not consider that any weight can be placed on the discussion in *Integra*.

76. At [17]-[20], the judge noted the desirability of consistency of approach and that the starting assumption should be that the approach adopted in previous cases would be of considerable assistance. However, he stated that, as the issue had not previously been considered and the

previous cases appeared all to have proceeded by consent, the weight of the previous decisions could only be persuasive [16] and [49].

77. I reject the Company's submission that the judge should have placed more weight on the previous practice. Although, even in cases where there was a significant delay between the date of the EGM and the merger completion date, it does not appear to have occurred to any of the experienced counsel or experienced commercial judges in those cases that the valuation date should have been the merger completion date rather than the EGM date, the fact remains that the matter has never been argued and accordingly the Grand Court has never had to focus in a contested context on the appropriate valuation date. Accordingly, the weight to be placed on the previous practice was limited and the judge had to consider the matter afresh. It is clear that he did so and it would have been wrong for him to have placed more weight on the previous practice than he did in circumstances where the issue had not arisen in those earlier cases. In my judgment, his approach in this respect cannot be faulted.

Any flexibility?

78. The judge's decision that the EGM date is the fair valuation date was expressed in very general terms as being applicable as a matter of principle. However, he did say at [28] that, while consistency of approach is important, he did not accept that the valuation date is to be rigidly fixed for all cases.

79. In the Respondent's Notice and the Company's skeleton at [79(2)], the Company asserts that the judge was wrong to envisage any flexibility; on the contrary, the valuation date should always be that of the EGM (except presumably in the case of short-form mergers). In my judgment, as discussed above at [32]-[34], this Court should establish a starting point for the valuation date in a long-form merger and, for the reasons I have given, I consider that that starting point should be the date of the EGM.

80. However, given that no date is fixed in the statute, I accept that a court may depart from the starting point if, in a particular case, it considers there is good reason to choose some other valuation date as producing the fairest assessment of fair value. However, there would have to be good reason. The mere fact that there has been a price sensitive event subsequent to the date of the EGM would not in itself be sufficient. That is because, if the event is wholly unforeseeable,

fairness does not require the dissenters either to benefit from or be prejudiced by the event. If, on the other hand, the event was on the cards as a reasonable possibility as at the date of the EGM, it can be taken into account as part of the valuation process when valuing as at the EGM.

81. Two examples occur to me where there might be good reason to take a different date. The first was discussed during the hearing of the appeal, namely where there has been *'skulduggery'* as it was referred to at the hearing; for example, where the buyers comprise management who have inside knowledge and suppress information for their benefit. Such a position could often be dealt with as part of the valuation process in that, if the information was in existence and could therefore in theory have been ascertained at the EGM date, it could be taken into account when valuing as at that date. However, there may be some cases where the court considers it fairer to take a later date in order to ensure that the dissenters receive fair value despite any misconduct or sharp practice by the buyers.

82. The second is where the price sensitive event occurs after the date of the EGM but before the subsection (5) notices are given. In these circumstances, the dissenters will have decided irrevocably to dissent in the knowledge of the post-EGM event. It would therefore be unfair for the court to assess fair value on the basis of the position as at the EGM. Fair value should be assessed on the basis of the information ascertainable as at the date the dissenters took their decision irrevocably to dissent by serving their subsection (5) notices. In such circumstances, a court might for example decide to take the date when the last subsection (5) notice was served as the valuation date.

83. In short, as discussed at [35] above, there is a strong public interest in the court generally taking the same valuation date, namely the date of the EGM, but the court always retains the ability to choose a different valuation date if there is good reason to do so because it is fairer on the facts of the case.

When should the valuation date be determined?

84. I would hope that this judgment would assist in avoiding disputes as to when the valuation date should be. If a dispute nevertheless arises, my view would be that it should be determined at a summons for directions (as in this case) so that the parties can prepare for trial in a sensible and economic manner, knowing the date by reference to which fair value will be assessed.

85. However, I do not consider that any determination at such a hearing is irrevocable. If, during the process of discovery or even at trial, evidence emerges which suggests that there would be good reason (as discussed earlier) to take a different valuation date, it would in my view be open to the court to amend its decision and assess fair value by reference to a different date (albeit that if this occurs at trial it may require an adjournment). In so stating, I am not seeking to encourage such a course, merely to make clear that it is open to the court to do so if it becomes clear that the EGM date (or the date fixed at the directions hearing if different) would no longer be appropriate for assessing fair value.

Disclosure

86. On 18 May 2022, the judge gave a number of directions, including for disclosure by the Company of all documents which are relevant to the determination of fair value. The time period for such disclosure was stated to be documents prepared or created *'in the five year period ending with the Valuation Date'* i.e. the date of the EGM.

87. In *Maso Capital Investments Limited v Trina Solar Limited*, CICA (Civil) Appeal 9 of 2021, 4 May 2023, this Court emphasised at [256]-[262], and in the concurring judgment of Field JA, the importance of a company giving full disclosure in section 238 cases. Where, as here, there has been a significant price-sensitive event (i.e. the increase in value of the Weibo shares) not long after the valuation date, it seems to me essential that any order for discovery should cover the period of such event so that the court can be as well informed as possible about the causes of such event, when such causes may have arisen, and therefore the extent to which the event should be taken into account as part of the valuation process.

88. This is a general point not related specifically to the fact that the valuation date is the date of the EGM. If the valuation date were to be the merger completion date and the price sensitive event were to occur not long after that valuation date, disclosure would need to cover the period of the relevant event.

89. There is no appeal in respect of the disclosure order and the matter is therefore not before us. Nevertheless, it seems to me essential that the disclosure order should be varied so that the period

covered by the order is extended to, say, the Completion Date in order to cover the period of the Weibo increase. No doubt an early application for variation can be made to the judge.

Conclusion

90. In my judgment, on the basis of the material before the Court, there is no good reason to depart from the starting point of the EGM date in this case. If the increase in the Weibo shares was wholly unforeseeable as at the date of the EGM, I see no unfairness in the Dissenters not benefitting from that price increase. If, on the other hand, the seeds of the Weibo price increase were ascertainable as at the date of the EGM, then valuation as at the EGM can take this into account to such extent as the court considers fair. I would therefore uphold the judge's decision and dismiss the appeal.

Moses JA

91. I agree.

Field JA

92. I also agree.

ANNEXE

Section 238 Companies Act (2021) Revision

Rights of dissenters

(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, written objection to the action.

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

(4) Within twenty days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, the constituent company shall give written notice of the authorisation 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 name 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.

(6) A member who dissents shall do so in respect of all shares that that person holds in the constituent company.

(7) Upon the giving of a notice of dissent under subsection (5), the member to whom the notice relates shall cease to have any of the rights of a member except the right to be paid the fair value of that person's shares and the rights referred to in subsections (12) and (16).

(8) Within seven days immediately following the date of the expiration of the period specified in subsection (5), or within seven days immediately following the date on which the plan of merger or consolidation is filed, whichever is later, the constituent company, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase that person's shares at a specified price that the company determines to be their fair value; and if, within thirty days immediately following the date on which the offer is made, the company making the offer and the dissenting member agree upon the price to be paid for that person's shares, the company shall pay to the member the amount in money forthwith.

(9) If the company and a dissenting member fail, within the period specified in subsection (8), to agree on the price to be paid for the shares owned by the member, within twenty days immediately following the date on which the period expires — (a) the company shall (and any dissenting member may file a petition with the Court for a determination of the fair value of the shares of all dissenting members; and
(b) the petition by the company shall be accompanied by a verified list containing the names and addresses of all members who have filed a notice under subsection (5) and with whom agreements as to the fair value of their shares have not been reached by the company.

(10) A copy of any petition filed under subsection (9)(a) shall be served on the other party; and where a dissenting member has so filed, the company shall within ten days after such service file the verified list referred to in subsection (9)(b).

(11) At the hearing of a petition, the Court shall determine the fair value of the shares of such dissenting members as it finds are involved, together with a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value.

(12) Any member whose name appears on the list filed by the company under subsection (9)(b) or (10) and who the Court finds are involved may participate fully in all proceedings until the determination of fair value is reached.

(13) The order of the Court resulting from proceeding on the petition shall be enforceable in such manner as other orders of the Court are enforced, whether the company is incorporated under the laws of the Islands or not.

(14) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances; and upon application of a member, the Court may order all or a portion of the expenses incurred by any member in connection with the proceeding, including reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares which are the subject of the proceeding.

(15) Shares acquired by the company pursuant to this section shall be cancelled and, if they are shares of a surviving company, they shall be available for re-issue.

(16) The enforcement by a member of that person's entitlement under this section shall exclude the enforcement by the member of any right to which that person might otherwise be entitled by virtue of that person holding shares, except that this section shall not exclude the right of the member to institute proceedings to obtain relief on the ground that the merger or consolidation is void or unlawful.