IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 227 OF 2017 (IKJ)

IN THE MATTER OF PART XVI OF THE COMPANIES ACT (AS REVISED)

AND IN THE MATTER OF XINGXUAN TECHNOLOGY LTD

IN COURT

(Remote hearing)

Before: The Hon. Justice Kawaley

Appearances:

Mr David Chivers KC of counsel with Ms Farrah Sbaiti and Ms Raedean Simpson of Ogier (Cayman) LLP ("Ogier") for Waterwood 020 Project Limited (the "Dissenter")

The Company did not appear

Heard: 17 July 2024

Draft Judgment

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Appraisal of fair value of shares petition-unlisted company-online to offline food deliver business-valuation methodology- minority discount-uncontested trial-approach to unchallenged expert evidence-Companies Act (2023 Revision) section 238

JUDGMENT

Background

1. The Petition herein was presented by the Company following a merger between the unlisted Company and a subsidiary of Rajax Holding (Rajax Merger Sub Limited) on 24 August 2017 (the "Merger"). Although the Dissenter was out of the blocks first, presenting its own Petition on 3 November 2017 (FSD 225/2017), the Company presented its Petition on 6 November 2017, also under section 238 of the Companies Act. By a Directions Order dated 5 September 2018 herein, the two matters were consolidated under the title and cause number of the Company's Petition.

2. The Company's Board of Directors (the "Board") authorised the Company to enter into the Merger and convened an extraordinary general meeting (the "EGM") on 18 August 2017. The shareholders (including the Petitioner) were given notice of the EGM on 19 August 2017 and the EGM was held on 21 August 2017 (the Valuation Date"). The merger was approved by 85.95% of all issued shares and opposed by 14.05%. The Dissenter alone voted against the Merger (having given notice of objection before the meeting commenced) in respect of its 125 million Series A Preferred Shares. The Company gave formal notice of the approval of the Merger on 8 September 2017 and the Dissenter gave formal notice of dissent on 22 September 2017.

3. The "Merger Price" negotiated with Rajax Holding ("Rajax") consisted of US$ 280 million (the "Cash Consideration") and (arguably) shares in Rajax Holding ("Rajax") valued at US$200 million. Based on the value reflected in the Merger Price and the distribution rights attached to the Company's shares, the Dissenter was on 29 September 2024 offered US$24.5 million in cash and Rajax shares valued by the Company at US$17.5 million. The Dissenter was offered a total of US$42 million in return for shares purchased for US$125 million.

4. The Company was not a listed one and the transaction did not involve the majority acquiring the minority's shares as frequently occurs in section 238 cases. The Company's shares were, instead, acquired by Rajax, a competitor.

5. The proceedings progressed in a relatively standard manner after directions were ordered on 5 September 2018 over a period of just over 4 years. The parties appointed their Valuation experts (Mr John Utting for the Company, and Mr Mark Bezant for the Dissenter). Specific Discovery was ordered on 15 March 2021, supplemented by an Order for a Forensic Audit and Specific Discovery on 14 March 2023. However, by the time (a) the Company failed to comply with both the 14 March 2023 Order and the Interim Payment Order of Doyle J dated 2 June 2023 and (b) Maples and Calder ceased to act for the Company on 15 June 2023 (and were not replaced by fresh attorneys), it became clear that the Company's pursuit of the Petition had taken an unusual turn.

6. The Dissenter issued a Summons for Directions dated 1 September 2023. The Company claimed it was experiencing difficulties in retaining fresh counsel and sought to continue through lay representatives, one of whom was the recipient of a power of attorney in this regard. On 23 November 2023, for reasons given on 9 January 2024, I gave directions for the further conduct of the section 238 Petition presented by the Company on the application of the Dissenter. Most pertinently, I ordered that the case would proceed on an unopposed basis unless the Company was legally represented.

7. It was against this background that on 17 July 2024 the Petitioner called its Valuation Expert Mr Bezant to give oral evidence upon which he was not cross-examined in support of his Expert Report. It was submitted that the Court was entitled to accept his evidence because it was credible. The primary valuation methodology, in circumstances where the Merger Price was said to be clearly unreliable and a discounted cashflow ("DCF") valuation clearly impracticable, was based on the valuation investors had actually placed on the Company in financing rounds.

8. The Court was asked on that basis to conclude that the fair value the Petitioner's shares was US354.1 million, instead of the value derived from the Merger Price of US$42 million.

The issues for determination

9. My provisional high-level view was that the Dissenter's fair value figure was so much larger than the Merger Price that the Court should evaluate the uncontested expert valuation evidence critically to avoid a result that was commercially farcical and fundamentally unjust. I was given no explicit, precedent-based guidance as to the correct approach to an uncontested fair value hearing, and the conundrum facing the Court appeared to be the legal equivalent of a 'Black Swan' event.

10. However, Mr Chivers KC fairly invited the Court to approach the application applying established fair value principles. The main issues which accordingly fall for determination are:

(a) identifying the most relevant legal principles governing fair value determinations in section 238 cases;

(b) assessing how those principles should be applied to the present case;

(c) evaluating the factual and expert evidence relied upon in support of fair value; and

(d) making a fair value determination.

Governing legal principles

The statutory provisions

11. The relevant provisions of section 238, ignoring for present purposes the procedural provisions, are as follows:

> "*(1) A member of a constituent company incorporated under this Law shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation…*
>
> *(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. A dissenter is accordingly entitled to "*payment of the fair value*" of its shares. The Court is required to "*determine the fair value of the shares*". While the statutory provisions form the foundation for the applicable legal framework, it is primarily previous decisions of the Cayman Islands courts which create the substance of the legal structure in practical terms.

The proper approach to fair value

13. Although the Dissenter's counsel did not directly address the question of how the Court should approach the evidence in an uncontested case, the Written Opening Submissions furnished considerable indirect assistance in the form of the general principles to which reference was made. Firstly, reference was made to what was said to be the most recent published section 238 trial judgment, *Re iKang Healthcare Group*, FSD 32 / 2019 (NSJ), Judgment dated 21 June 2023 (unreported). In that case, Segal J opined as follows, citing his own earlier statement of principles in *Re Trina Solar Limited*, FSD 92/2017 (NSJ), Judgment dated 23 September 2020 (unreported) :

> "*31. The meaning of fair value is now well-established. I set out the proper approach to its determination in Re Trina Solar at [91] (unreported. 23 Sep. 2020) (Trina) as follows:*
>
> > *'In ascertaining fair value, the Court must assess and determine a monetary amount which in the circumstances represents (its best estimate of) the worth, the true worth, of the dissenting shareholder's shares (true worth meaning the actual value to the shareholder of the financial benefits derived and available to him from his shares and by being a shareholder). The reference to fair requires… inter alia that the manner and method of that assessment and determination is fair to the dissenting shareholder by ensuring that all relevant facts and matters are considered and that the sum selected properly reflects the true monetary worth to the shareholder of what he has lost, undistorted by the limitations and flaws of particular valuation methodologies and fairly balancing, where appropriate, the competing, reasonably reliable alternative approaches to valuation relied on by the parties'.*"

14. In this passage, Segal J (per Segal J) helpfully confirms in a textured way what the compressed terms of section 238 (11) merely imply. The Court is required to carry out its own active evaluation of the question of fair value, and not merely accept or reject the case on fair value advanced by the parties without critical scrutiny.

15. I also derive further assistance from another case which the Dissenter's counsel placed before the Court, which focusses more narrowly on the approach to expert valuation evidence, *Re Shanda Games*, FSD 14/2016 (NSJ), Judgment dated 25 April 2017 (unreported), an approach which was affirmed by the Cayman Islands Court of Appeal [2018 (1) CILR 352]. Martin JA explained the correct approach as follows, explicitly adverting to the possibility that experts might not be instructed on both sides (although that eventuality did not arise in that case):

> "*22…Since the fair value is not necessarily the same as the merger price or the price at which the shares were trading before the market in them was affected by knowledge of the merger, it is inevitable that the determination will involve an assessment of a substantial quantity of information relating to the financial affairs of the company whose shares are to be valued. It is unlikely in the extreme that the court will be able to make that assessment without expert assistance. In the ordinary case, as in this one, both the company and any dissenting shareholders will appoint experts; but even in a case where no dissenting shareholder is prepared to participate in the litigation, the company, and perhaps also the court itself, will instruct an expert. In every case, the court's task will be to assess the utility of the expert evidence to the determination of fair value. Carrying out that task in the context of s.238 proceedings is no different in nature from carrying it out in ordinary inter partes litigation. In ordinary litigation, and in s.238 proceedings, the court will determine generally, or on an issue-by-issue basis, whether an expert's evidence is to be accepted in whole or in part and how conflicts are to be resolved. If necessary, the court is entitled to substitute its own view for that of the experts. The process, however, is one that will be familiar to most judges.*" [Emphasis added]

16. Although in most cases there will be competing expert evidence as to fair value, when there is only one expert, the authority placed before me suggested, the Court must still:

(a) determine whether, and to what extent, it accepts an expert's evidence in relation to each relevant issue, and

(b) if necessary, substitute its own view for that of an expert to such extent as the relevant expert evidence is found to be unreliable.

17. My desire to elucidate the principles governing the approach to unchallenged expert evidence prompted my own research into this topic which merely provides a gloss on and substantially confirms the legal position advanced by the Dissenter's counsel. The position of a joint expert is broadly analogous with a single expert whose evidence is not contradicted or challenged through

cross-examination. In this context, Christopher Clarke LJ (as he then was) opined as follows in *Coopers Payen Limited and Sanwa Packing Industry Co Limited-v-Southampton Container Terminal Limited* [2003] EWCA Civ 1223:

> "*42. All depends upon the circumstances of the particular case. For example, the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong. More often, however, the expert's opinion will be only part of the evidence in the case. For example, the assumptions upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be relevant, although it is to be hoped that all relevant assumptions of fact will be put to the expert because the court will or may otherwise be left without expert evidence on what may be a significant question in the case. However, at the end of the trial the duty of the court is to apply the burden of proof and to find the facts having regard to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate.*
>
> *43. In the instant case the judge did not disregard the evidence of the joint expert. On the contrary in some respects she accepted it. A judge should vary rarely disregard such evidence. He or she must evaluate it and reach appropriate conclusions with regard to it. Appropriate reasons for any conclusions reached should of course be given.*"

18. The United Kingdom Supreme Court has comparatively recently considered this topic in a case where a civil claim was contested, but one party alone adduced expert evidence and their opponent did not require the expert to attend for cross-examination. Lord Hodge in *TUI UK Ltd-v-Griffiths* [2023] UKSC 48 summarised the general principles:

> "70. *In conclusion, the status and application of the rule in Browne v Dunn and the other cases which I have discussed can be summarised in the following propositions:*
>
> > *(i) The general rule in civil cases, as stated in Phipson, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.*
> >
> > *(ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.*

(iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.

(iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.

(v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.

(vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of Phipson recognises in para 12.12 in sub-paragraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in Chen v Ng, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.

(viii) There are also circumstances in which the rule may not apply: see paras 61-68 above for examples of such circumstances." [Emphasis added]

19. This is highly persuasive authority for the proposition that the starting position is that a trial judge should be slow to reject the unchallenged evidence of an expert witness on grounds which the expert has not been given a reasonable opportunity to respond to. However, the integrity of the judicial process requires regard to be had not merely to fairness to the unchallenged witness, but also to fairness in terms of the Court's decision being seen to be a credible one as well. The latter limb of the fairness requirement obliges the trier of fact only to accept expert opinions which withstand an appropriate level of scrutiny. What level of scrutiny is appropriate will depend on the circumstances and the significance of the issue. Lord Hodge also noted (at paragraph 69):

> "*Because the rule is a flexible one, there will also be circumstances where in the course of a cross-examination counsel omits to put a relevant matter to a witness and that does not prevent him or her from leading evidence on that matter from a witness thereafter. In some cases, the only fair response by the court faced with such a circumstance would be to allow the recall of the witness to address the matter. In other cases, it may be sufficient for the judge when considering what weight to attach to the evidence of the latter witness to bear in mind that the former witness had not been given the opportunity to comment on that evidence…In any event, those circumstances, involving the substantive cross-examination of the witness, are far removed from the circumstances of a case such as this in which the opposing party did not require the witness to attend for cross-examination.*" [Emphasis added]

20. As ever, context is everything. In my judgment the difference between a case where a witness attends for cross-examination and does not attend at all is far starker than the present case. Here, the Dissenter's Expert has not been cross-examined by the opposing party but has voluntarily appeared for the express purpose of being questioned by the Court. However, it is still necessary to consider whether it is appropriate to reject an opinion on a matter which the Expert has not been afforded an opportunity to address. In *Griffiths*, the Supreme Court held that the trial judge and Court of Appeal majority were wrong to reject the unchallenged expert's evidence which was neither irrational nor incapable of being further explained if the expert (acting proportionately in a low-value claim) had been given a chance to elaborate on his views. I find that it will generally be wrong in principle, and unfair to an expert witness, to reject a material aspect of an unchallenged opinion on a basis the expert has not been afforded a reasonable opportunity to consider and respond to.

21. There is another, admittedly nuanced, distinction between the context of *Griffiths* and the present case. There, the relevant expert opinion addressed a 'pure' question of fact, causation of loss in a tort claim. It is clear from the observations of Martin JA in *Re Shanda Games* set out in paragraph 15 above, that the function of experts in this legal context (section 238 appraisal proceedings) is to assist the Court to evaluate complex financial information, not to deliver a definitive fair value assessment which the Court either fully accepts or rejects in a binary fashion. The Court's fair value determination must necessarily entail both:

    (a) factual findings similar to those made in relation to liability or quantum of loss in general civil litigation; and

    (b) evaluative findings similar to those made when assessing the measure of general damages.

22. As regards evaluative findings, these will often involve both (1) assessments of the views of an expert on non-definitive questions of judgment, and (2) taking a high-level view of the global impact of various facts and matters on the ultimate fair value outcome. The Court's statutory adjudicative function cannot effectively be extinguished altogether because of the happenstance that only one party presents an expert report which is neither challenged by other evidence nor tested by cross-examination. In such circumstances the Court must have a positive obligation to ensure that the result potentially supported by the unchallenged and untested expert evidence can properly receive the *imprimatur* of this Court. As Clarke LJ stated in *Coopers Payen Limited* (at paragraph 42)*:* "*All depends upon the circumstances of the particular case.*"

23. In summary, I find that the unchallenged opinion of Mr Bezant on any significant issue ought not to be rejected unless the opinion either:

(a) is unsustainable either on its face or having regard to the underlying facts; or

(b) relates to an issue he has been afforded an opportunity to address at or before trial; and, additionally

(c) the Court must have regard to the commercial rationality of the appraisal result contended for by the expert evidence viewed as a whole.

Minority discount

24. The Dissenter's counsel in their Written Submissions very properly disclosed that in the context of the Interim Payment application, a 5% minority discount had been conceded to be appropriate to apply to cover the eventuality that the transaction might not have completed. Both in that interlocutory application and at trial, it was contended that a minority discount as generally applied in section 238 cases was inappropriate because this was not a "take private" case. It was therefore appropriate for fair value to be determined by reference to The Dissenter's contractual entitlement:

> "*47. It is also accepted by the Dissenter that Mr Bezant is correct to apply the contractual distribution mechanism under the Share Subscription Agreement detailed in Appendix 3 to MBR {C1/1/142} in assessing the fair value attaching to the Dissenter's shares once the overall value of the Company has been determined.104 This approach is also consistent with the observations made in Shanda CICA:*
>
> > *'For these reasons, it appears to me that section 238 requires fair value to be attributed to what the dissentient shareholder possesses. If what he possesses is a minority shareholding, it is to be valued as such. If he holds shares to which*

particular rights or liabilities attach, the shares are to be valued as subject to those rights or liabilities. As a matter of mechanics, this can be done by adjusting the value that the shares would otherwise have as a proportion of the total value of the company; but failing to make such adjustments means that particular rights or liabilities will often be ignored, and the shares will be valued as something they are not.'

48. The use of the contractual mechanism avoids the need to apply any minority discount in circumstances where there is no evidence that the Company would, absent the merger, have continued as a free-standing going concern. This is not a "take private" case where the majority is acquiring the shares of a minority. In other words, the alternative to a merger (in which the contractual waterfall applies) is some other transaction in which the contractual waterfall will also apply. Mr Bezant has correctly valued the shares 'subject to those rights and liabilities' and their value depends upon where the Dissenter sits in the waterfall. The issue of minority discount was addressed in evidence at the hearing for an interim payment and (to be transparent with the Court not least since the Judge hearing the interim payment application is necessarily different to that hearing the trial), the Dissenter led expert evidence (not from Mr Bezant) was that while a minority discount was not appropriate, a discount of 5% might be appropriate to reflect the risk that a transaction did not complete."

25. I consider the applicable principles when dealing with the merits of these submissions below.

The Factual evidence

26. No factual evidence was adduced at trial. The electronic bundle included factual evidence referred to in the Expert Report, which consisted of Affidavits filed in relation to the discovery and interim payment applications. The Expert Report also summarised the key facts upon which Mr Bezant's valuation was based. Many of these were uncontroversial matters; others were elicited through information requests.

The Dissenter's Expert Evidence

Mr Bezant's qualifications

27. He is a Senior Managing Director in the London office of FTI Consulting, Inc. ("FTI") and a Fellow of the Chartered Institute of Accountants. His experience of valuing shares and businesses is extensive, detailed in Appendix 1. Mr Bezant is a well-known and experienced valuation expert.

He has carried out over 600 valuations and given expert evidence on over 375 occasions. He has appeared before the courts of, *inter alia*, England and Wales, the Cayman Islands, British Virgin Islands, Bermuda, Guernsey, Jersey, Hong Kong, Germany and the Netherlands.

Impressions of the witness' oral testimony

28. Mr Bezant was not subjected to the usual rigours of cross-examination. He indicated that only on one previous occasion had his expert evidence been unopposed. However, he manifested no inclination to exploit the absence of conflicting expert testimony to zealously contend for the perfection of the contents of his own Report. Instead, he defended his conclusions in a measured and objective manner.

Mark Bezant's Expert Report: Summary of conclusions

29. Mr Bezant's Expert Report is dated 26 January 2024. In Section 2 he summarises his conclusions, having introduced his instructions as follows. He was instructed by Ogier on behalf of the Dissenter to prepare an expert report in these proceedings, which he prepared with assistance from FTI staff acting under his direction.

30. The Company was an indirect subsidiary of Baidu, Inc ("Baidu"), a technology company operating primarily in the People's Republic of China ("PRC"). The Company's business (launched in April 2014) was an online to offline ("O2O") food delivery business. It operated under the brand name "Baidu Wamai"; "Waimai" is the Mandarin word for "takeaway". Prior to the Merger, the Company had two financing rounds:

(a) the Series A financing round in 2015 (The Dissenter invested US$125 million in October 2015); and

(b) the Series B financing round (which completed in July 2016).

31. The resulting proportions of shares held in relation to the Company were Baidu 59.11%, Management 11.72% and Others 29.17%.

32. As regards the Company's business prior to the Valuation Date, Mr Bezant summarised the business and its operating environment as follows. Online food delivery as a business sector had grown rapidly in the PRC in recent years, with emergence of three dominant players, Rajax, Meituan and the Company. The two competitors each had a market share of around 35% while the Company's market share was around 20%. The Company from inception focussed on the lucrative (fastest growing) white collar market segment. The Company was initially involved in a short-term loss-making price war with its main competitors until, a year before the Valuation Date, it abandoned this strategy and became more profitable. Notably, it achieved a larger share of the more profitable Beijing segment of the relevant national O2O market.

33. The Expert's approach to determining the fair value of the Dissenter's shares was to determine the fair value or market value of the Company as a whole. The critical perspective chosen was that of either Rajax or Meituan which he regarded as the most likely buyers. Either of these competitors would through acquiring control of the Company achieve the benefits flowing from market dominance. In these circumstances, he opined that no rational seller would accept a price of less than what either of the two most likely purchasers would be willing to pay. Against this background, Mr Bezant had regard to three valuation reference points:

(1) the Merger Consideration;

(2) the terms and conditions of the financing transactions and acquisitions in relation to the Company, Rajax and Meituan and

(3) the Company's own DCF valuation model.

34. The Merger Consideration was disregarded altogether by Mr Bezant because he was unable to obtain any information about how it was arrived at, and also because of the non-competitive process adopted of negotiating only with one potential buyer. Primary reliance was placed on financings carried out by the Company and each of its two main competitors, none of which entailed change of control resulting in the need to take into account synergies. The Expert felt unable to carry out his own DCF valuation and placed no reliance on the Company's own DCF valuation, which it disclaimed (in responses to information requests and at the Management Meeting), although he considered that US$7.1 billion June 2017 valuation as "*directionally informative as to management's views at this time*" (paragraph 2.23).

35. The critical calculation used by Mr Bezant was the multiple Enterprise Value to Gross Merchandise Value (EV/GMV). GMV reflects the total number of transactions on the Company's platform. In Figure 2.1 he sets out his chosen multiple of 0.8, together with various cross-checks:

(a) the Series A and Series B financing rounds suggest a multiple within the 1.2 to 1.5 range;

(b) pre-Valuation Date Rajax/Meituan transactions suggest multiples ranging between 0.7 and 0.9; and

(c) post-Valuation Date transactions suggest a multiple in the 0.5-1.0 range.

36. He then opines as follows:

> "*2.25 My valuation conclusion (c. USD 2.5 billion) is approximately 5.0 times the Merger Consideration of USD 480 million. In certain other circumstances, such a difference would be unexpected. However, in the present circumstances, I do not consider that it is. As I explain above and in Section 5, the Merger does not correspond to the definition of the transaction that is hypothesised in market value. In the absence of proper marketing and competitive bidding, I do not consider that the merger process can be assumed to have led to a price that is reflective of market value. My further analysis is that it led to a very significantly lower price, albeit one I cannot analyse further.*
>
> *2.26 Finally, my conclusion also implies that Baidu failed to negotiate the best outcome for the shareholders of the Company, itself included. I have asked for but have not seen any information that may enable me to understand or rationalise this outcome. While I am unable to reconcile my conclusion with Baidu's actual intentions in the context of the Merger, I note that market commentators have expressed similar views that Baidu could have obtained a higher price for the Company."*

37. As regards the views of "*market commentators*", one article was cited (at paragraph 5.26) and referred to in oral argument. Although essentially speculative, it provided some seemingly independent contemporaneous support for the proposition that the fairness of the price was at least subject to doubt:

> "*A Baidu spokesperson has declined to disclose the value of the deal. We are continuing to dig around, but as a potential range, consider that when rumours of this sale were first reported a few days ago, it was estimated to be $500 million for the business, plus $300*

> *million in an additional traffic agreement, amounting to an $800 million deal. But also consider that last year, Waimai's valuation was estimated at around $2.5 billion.*
>
> *Taken together, this could mean that the price was actually higher today, or that Baidu was particularly keen to offload this asset, even at a knock-down price.*"[1]

38. One aspect of the valuation methodology which I was initially concerned might involve an unjustifiable 'sleight of hand' was valuing the Beijing business sector separately rather than adopting a global nationwide analysis. This was justified on the grounds that in any event this represented the most significant part of the Company's market. In the end I accepted this rationale.

39. In Appendix 3 of the Expert Report (A 3.7), Mr Bezant cites Section 2.2(a) of the Merger Agreement as the basis for his conclusion that the distribution of the Merger Consideration was based on the shareholders' liquidation distribution rights. Those rights gave Series B shareholders priority over Series A, but subject to that each class was entitled to receive 120% of their original investment. In the event Series B shareholders did receive 120%, but Series A (including the Dissenter) only received 34% of their investment based on the Merger Consideration.

40. On this basis Mr Bezant proposes a distribution of the Company's fair value on a basis which assumes that all share classes receive their 120% entitlements with the surplus being distributed rateably based on the percentage of shares each shareholder held.

Mr Bezant's oral evidence

41. The first conclusion that I sought to test was the conclusion that no reliance could be placed on the Merger Consideration. I suggested that it must be a factor which could be taken into account to some extent. Mr Bezant was only willing to accept that it was "potentially" a factor to be taken into account. He insisted it was too low relative to other indicators and also that he had been unable to clarify whether payments to Baidu for services should not properly be viewed as "stapled transactions".

42. The second issue I raised was the centrality of the multiplier chosen to apply to the GMV figures, which the Expert confirmed were indeed based on "*hard*" data:

[1] '*Baidu sells food delivery business to its rival Ele.me*', TechCrunch, 24 August 2017.

> "*Q: Yes. But then when you come to choose the multiples, my understanding is that what you do there is to look at the financing rounds in relation to the company and also, as a sort of cross-check, you look at what happened with the other two big players in the market, and you then arrive at a multiplier, and that is…it is the application of the multiplier to the GMV figures that results in the equity value.*
>
> *A. That is correct, my Lord. It is a very standard way of valuing these businesses, the level of GMV and what people are willing to pay for GMV is a guide to the underlying potential of the business is a helpful way we've thought about it.*"[2]

43. I then suggested that the reliability of the value placed on the Company and its competitors by a comparatively small number of investors was less than that derived from the judgment of a large number of investors trading in listed shares. Mr Bezant agreed with that suggestion, applying the logic of the book '*The Wisdom of Crowds*'. However, he pointed out that the relevant investors though comparatively small in number were sophisticated investors who understood the relevant market. He rejected the suggestion that they were making wild guesses based on inflated management projections, noting that the last financing round attracted investment at a notional value of $2.4 billion in contrast to the Company's DCF valuation of $7.1 billion.

44. As regards the criticisms made in his Report about the defects in the negotiation process, Mr Bezant clarified that the main defect was not merely a lack of documentation as to how the price was arrived at, but rather the lack of a competitive process:

> "*A…the process is anomalous and the outcome is anomalous and I don't have an explanation for that, but it is not a process that would generate the best outcome. It's-- It just can't…*"[3]

45. Responding to my concerns about the great disparity between the Merger Consideration and his fair value figure, he recalled one case in Bermuda where a minority shareholder had negotiated an even more disparate return. However, Mr Bezant fairly accepted that the disparity he contended for here was "*very unusual*":

[2] Transcript page 61, lines 13-25.
[3] Transcript page 70, lines 17-20.

"*Q. But it is still --but, I mean, that's one case that you can recall , but, I mean, you accept that -- I mean, I'm not sort of -- I accept that your valuation is what it is and I accept entirely that you have advanced a potentially acceptable reason for it, but, you know, I suppose I'm just concerned that Dissenters of the world, if I were to accept your evidence in full , that Dissenters of the world might erect a statue to me and Companies of the world would be trying to tear it down.*

A. Yes. I suppose it is true that the value that I think is sensible is a much higher multiple of the offer price than the ordinary - Transcript page 61, lines 13-25.

Q. Yes, and that is unusual.

A. That is very unusual."[4]

46. Responding to Mr Chivers KC's questions arising from questions from the Court, Mr Bezant testified as follows:

(a) he had not excluded from his Report any matters of which he was aware which were potentially relevant;

(b) the valuations derived from the Company's financing rounds were not "aggressive" when compared with those of Rajax and Meituan; and

(c) the multiplier he had chosen was reasonable because:

"*Every data point I have seen, every valuation −− every multiple I have seen is 0.7 or higher and every valuation I have seen is higher than my conclusion, other than the merger transaction.*"[5]

The Dissenter's closing submissions

47. Mr Chivers KC firstly addressed the consequences of the Company's failure to produce evidence to explain the transaction price and to contest the proceedings:

"*The first is this: insofar as the company might have asserted that the merger price or, indeed, any other figure , was evidence of fair value, the company would have failed to*

[4] Transcript pages 75-76, lines 19-25, 1-8.
[5] Transcript page 79, lines16-18.

satisfy the evidential burden in doing so, and it's not for the Dissenter to disprove what might have been the company's positive case.

Secondly, where Mr Bezant has had to make assumptions, he has made them based on evidence to which he has referred. He hasn't made any guesses. In other words, where there is some evidence, however weak, to justify those assumptions, the court is entitled to draw an adverse inference against the company that those assumptions are correct.

So, the court, just as Mr Bezant has to reach a conclusion on fair value, and it can only proceed on the best available evidence, again, not speculating as to what the position might have been had other evidence been served."

48. Next the Dissenter's counsel addressed a question I had put to Mr Bezant about the extent to which some reliance could be placed on the Merger Consideration. He submitted that in the absence of an explanation as to why Rajax asked for the BCA shares to kept separate from the Merger Consideration, the Court was entitled to conclude that the Merger Consideration alone was not a reliable indicator of fair value.

49. My question of why a minority discount was inappropriate was responded to in summary as follows:

"*In other words, you are not relying as a shareholder simply on some future income stream, you are being told 'yes, we're up for sale' and it is only a question of who and how much. That's the basis for that, and so we −− if the court looks at questions of discount, it is an uncertainty based, it is a timing, uncertainty basis, and that's the basis on which we put it before you.*"[6]

50. However, the central broad submission which was advanced by Mr Chivers KC in his oral closing was the following:

"*The court has received expert evidence from Mr Bezant. He is clearly a person suitably qualified to give opinion evidence. The company hasn't put forward any evidence to the contrary, and my Lord is entitled to accept Mr Bezant's evidence in its entirety, if you find that it is relevant, that it is evidence−based, and that it is credible. Mr Bezant's evidence is all of those things. He set out very carefully his methodologies, and those are conventional valuation techniques. He hasn't taken into account any irrelevant considerations. He hasn't even taken synergies into account, although the question of whether that is permitted is an open one, particularly in relation to general market synergies. Again, he has taken a conservative position, understating the valuation. He acknowledges that there is a weakness in the evidence that he has been able to rely on,*

[6] Transcript page 89, lines 14-21.

> *and that had he had further information he would have been able to produce further checks, in particular in relation to the DCF, and he acknowledges that his opinion lacks granularity. It is a broad brush. On the other hand, it is also clear that his primary valuation relies on objective evidence where there is no doubt as to the validity of that material.*"[7]

Findings: the fair value of the Dissenter's shares

Preliminary

51. As noted above, the Court's duty is essentially to determine the extent to which it accepts the Dissenter's expert evidence and, if necessary, to do its best to form its own conclusions as to fair value where it considers that evidence to be unsatisfactory.

52. In contested valuation cases, the key issues are almost invariably identifying the most appropriate valuation methodology and/or how the appropriate methodology ought properly to be applied to the facts of the relevant case. Where the relevant shares are listed and actively traded, the market price and/or the transaction price have considerable prominence. In other cases, and generally, provided sufficient data is available, the more elaborate discounted cash flow (DCF) analysis is often considered to be particularly useful.

53. The Company's shares were not listed, and the Merger Consideration seems demonstrably to be an unreliable indicator of market value. Mr Bezant has proposed a bespoke (but not unprecedented) valuation methodology. Nonetheless, the appropriateness of his methodology and the way in which he has applied it each requires evaluation.

Valuation methodology

54. I have little difficulty in accepting Mr Bezant's opinion that the Merger Consideration, even if broadly defined to include the BCA shares, is not indicative of market value. His view that selling the Company to one of two competitors without negotiating at all with the other was unlikely to produce a true or reliable market price is compelling. It accords with common sense and is a conclusion that could properly be reached without expert advice. Two other incontrovertible facts provide further support for his conclusion on this issue:

[7] Transcript page 85, lines 1-25.

(a) the negotiations and Merger were completed with apparently undue haste; and

(b) the Company has, unusually (and seemingly uniquely in a section 238 case), made no serious attempt to defend the fairness of the Merger Consideration as a basis for ascertaining the fair value of the Dissenter's shares.

55. In *Re Shanda Games* [2018 (1) CILR 352], Martin JA considered what a DCF valuation entailed. By way of introduction, he observed:

> "*61. Professor Jarrell and Mr. Inglis agreed that Shanda's business was to be valued by use of a discounted cash flow ('DCF') model. As its name indicates, a DCF analysis contains two main elements: a prediction of future cash flows, and the application to those cash flows of a discount rate so as to translate the future cash flows into a present capital value. In effect, the exercise is designed to identify how much it would have cost at the valuation date to buy an investment with a rate of return and a risk profile equivalent to that of the company's business.*"

56. Martin JA then explained how the discount rate is calculated. In brief, it generally is considered as representing "*the expected rate of return on equivalent investment opportunities in the capital markets, also known as the weighted average cost of capital ('WACC') of the company. The weighting exercise implicit in determining the WACC involves estimating the cost of equity of a company and its debt*" (paragraph 62). One of the elements of determining the cost of equity is systemic risk reflected in an equity risk premium, which is multiplied by a factor known as "beta", which represents the risk inherent in a particular investment in relation to the overall market risk. A size premium may be added in the case of smaller companies. In the same paragraph it is noted that "*because beta is used to multiply one of the factors, rather than being added as a separate factor, small changes to it are capable of having large effects on the discount rate, and consequently on the value.*"

57. Mr Bezant advanced two reasons for rejecting a DCF approach to valuation. First, because the Company was relatively new, there was a lack of reliable historic trading data. Second, although he did have access to Management Forecasts, he lacked sufficient information to evaluate their reliability. The first reason is inherently persuasive on its face. The second reason for not undertaking a DCF analysis is supported by the Company's failure to comply with its discovery obligations herein, combined with the admittedly extravagant forecasts produced by management for its own DCF model prepared for pre-Merger fundraising purposes.

58. In the course of discovery, skirmishes which included a hearing in March 2021, the Company broadly contended it could not provide access to its Operational Data because post-Merger it had no right of access to the data which was on Baidu's servers. On 24 February 2023 I directed the appointment of a Forensic Auditor, in terms substantially consisted with those proposed by the Company in December 2022, with a view to ensuring the Dissenter's Expert had access to further information relevant to the valuation exercise. A Specific Discovery Order was formally made on 14 March 2023 towards this end. I was satisfied there was no prospect of this Order being substantially complied with when I gave directions for an uncontested trial on 23 November 2023.

59. There was no previous local or foreign case in which the valuation method Mr Bezant used had been approved. However, he referred in his Report and in his oral evidence to an arbitration involving the valuation of shares in a Middle Eastern food delivery business in which he and an opposing expert each used the same methodology. I accordingly accept Mr Bezant's assertion that the valuation methodology he deployed was a "*very standard way of valuing these businesses*".

The merits of the valuation

60. The valuation was based primarily on a combination of sales data (GMV) for the Company and its competitors and prices paid for their shares in pre-Merger financings. As a further cross-check, Mr Bezant referred to post-Merger financings as well. I accept his approach was reasonable in all the circumstances of the present case. Because the Company itself followed the contractual waterfall when calculating shareholders' distribution entitlements, I accept it was appropriate to calculate the value of the Dissenter's shares on the same basis as well. Two issues in my judgment arise for consideration in assessing the application of Mr Bezant's conceptually reasonable valuation approach:

(a) whether the chosen multiplier was reasonable; and

(b) was the result (an entitlement five times that paid to and accepted by all other shareholders) reasonable and not inherently incredible on its face.

61. Multipliers appeared to me to be important by analogy with the way in which the beta multiple has a significant impact on DCF calculations, as observed in the passage in *Shanda Games* cited in paragraph 55 above. In response to my questioning designed to identify potential weaknesses in the valuation, Mr Bezant very fairly responded as follows:

> "*Q: Yes. I mean, do you accept, sort of as a matter of principle, that if there was an opposing expert representing the company trying to contend for the lowest possible value that the area that they would be most likely to focus on would be the multiples that you've used?*
>
> *A. Quite probably because, as you've said, to the extent the GMV numbers are as they are, then what drives the valuation are the multiples that you then apply to them, so I agree with you, under the method that I have adopted, that would be where they would look to take issue to the extent they disagreed with me.*"[8]

62. Mr Bezant was afforded an opportunity to respond to my concern that there was an inherent risk that a comparatively small number of investors might, in effect, pay over the odds. Because the weight to be assigned to the judgment of market players as evidence of market price or value increased with the number of trading decisions being made. It is well accepted in valuation cases that the share price is a stronger or weaker indicator of market value depending on the volume of trading activity, or the liquidity of the shares. The Dissenter's Expert did not contest this proposition, only convincingly demonstrating that (1) although the number of investors might on each occasion have been rather small, there had been a series of financing rounds, (2) the Company's own DCF valuation had clearly been ignored by Series B investors and that (3) the size of the investments showed sophisticated investors were involved. He also accepted that he only had access to "*fragmented*" parts of the Company's Operational Data.

63. Mr Bezant critically opined as follows:

> "*And over time new investors have generally come in, sometimes pre−existing investors have reinvested, so at each round where the company its or Rajax or Maituan has raised more capital in the last two or three years, it has involved new blood and old blood in different ways which is helpful, because it's not just the same people expressing the same views on value, there's a consensus of new and old investors as to what to pay, and you take some comfort from that. It's not always the case but it is often the case that there's new money coming in alongside pre−existing money which should lead you to have some comfort that there's a consensus on value here…*"[9]

64. I might have been inclined to accept without further inquiry the 0.8 multiplier selected by Mr Bezant, being roughly in the middle of his range of relevant multipliers, save for the fact that, by

[8] Transcript pages 67-68, lines 19- 5.
[9] Transcript page 62, lines 8-20.

his own account, it produced a "*very unusual*" fivefold increase over the proportion of the Merger Consideration paid out to shareholders. However, a better comparator arguably is the difference between what Series A Investors like the Dissenter hoped to recover on a liquidation (120%) and what Mr Bezant's fair value represents in terms of return on investment ("ROI"). The Merger Consideration seems clearly to be an unrealistically low starting point.

65. Had the Dissenter received the same 120% ROI on its own US$125 million investment which Series B Investors (through their higher ranking) actually received following the Merger, it would have received an additional US$31.25 million (or a gross sum of US$156.25 million). The US$354.1million said to represent the fair value of the Dissenter's shares is only 2.27 times the ROI which was contemplated as a possible commercial outcome when the Series A shares were issued. That is far less improbable a commercial outcome than a comparison with the Merger Consideration suggests.

66. Taking a high-level view, three features loom large in the evidential landscape. One, the Merger process strongly suggests that the Company was sold at an undervalue. Two, the fact that the Company has effectively abandoned any effort to justify the fairness of its own Merger Consideration-based offer (in the process breaching its implied obligation under section 238 of the Act to reserve adequate funds to meet the Dissenter's claim and the costs of any contested appraisal proceedings). And three, Mr Bezant's US$2.5 billion valuation of the Company falls well within the range of values implicitly assigned to the Company and its main competitors by those who participated in various financing rounds pre-and post-Merger.

67. It follows that, bearing in mind the Dissenter's expert evidence is uncontradicted and unchallenged in any way, Mr Bezant's valuation cannot fairly be found to be either:

    (a) unsustainable on its face; or

    (b) inherently improbable, commercially viewed in the round.

68. I did not ultimately consider there was any basis for doubting the rationality of the decision to value the Beijing business segment separately, due to its disproportionate value to the Company's business as a whole. Having regard to the inherent unreliability of the valuation method deployed, particularly in circumstances where the Expert acknowledged that he would have preferred to have been able to fortify his analysis with a more in-depth inquiry, I have carefully considered whether

it is appropriate to choose a multiplier in the middle of the relevant range. This begs the question, what is the relevant range?

69. On one view, the relevant range is 0.5-1.5. However, Mr Bezant in fact merely used the low points from post-Merger transactions as a cross-check. His chosen multiplier (0.8) was roughly 55% of the high point based on the Series B financing round in relation to the Company itself. It was in the middle of the range suggested by the financings in relation to the Company's main competitors, which were also used as a cross-check. I agree his approach was not "aggressive" and do not consider there is any proper basis for rejecting it in circumstances where the Expert has not been cross-examined and his evidence is uncontradicted.

70. Subject to considering the Minority Discount/rights attaching to the Dissenter's shares issue below, I find that the Dissenter has made out its case that the fair value of its shares in the Company is US$354.1 million.

Findings: Minority Discount/relevance of the rights attaching to the Dissenter's shares

71. In the Cayman Islands Court of Appeal decision in *Re Shanda Games,* Martin JA summarised the principles governing the application of a minority discount to the *pro rata* value of a dissenter's shares as follows:

> "*50. For these reasons, it appears to me that section 238 requires fair value to be attributed to what the dissentient shareholder possesses. If what he possesses is a minority shareholding, it is to be valued as such. If he holds shares to which particular rights or liabilities attach, the shares are to be valued as subject to those rights or liabilities. As a matter of mechanics, this can be done by adjusting the value that the shares would otherwise have as a proportion of the total value of the company; but failing to make such adjustments means that particular rights or liabilities will often be ignored, and the shares will be valued as something they are not. It follows that the judge (and Jones J in Integra before him) was wrong to hold that a minority discount should not be applied in the assessment of the value of the Dissenting Shareholders' shares. I would allow Shanda's appeal on the minority discount point.*" [Emphasis added]

72. The operative part of the reasoning in that case, narrowly viewed, was that where minority shareholders are bought out by a majority, the *pro rata* value of their shares as a percentage of the value of the company should be reduced on account of their minority status. A central basis of Martin JA's analysis, however, was the broader, overarching proposition that fair value must have

regard to "*what the dissentient shareholder possesses*", including any "*particular rights or liabilities*" attached thereto.

73. I was initially unable to readily accept Mr Chivers KC's submission that a minority discount is inappropriate in the context of a transaction where:

(a) all the Company's shares have been sold; and

(b) the sale proceeds have been distributed in accordance with distribution rights attached to the shares.

74. In *Re Shanda Games* [2020] UKPC 2, Lady Arden approved the passage in Martin JA's judgment cited in paragraph 69 above. However, she also made it clear that as a general principle of share valuation, minority shares are never valued as a *pro rata* share of a company's overall value:

> "*42. In the opinion of the Board, it is a general principle of share valuation that (unless there is some indication to the contrary) the court should value the actual shareholding which the shareholder has to sell and not some hypothetical share. This is because in a merger, the offeror does not acquire control from any individual minority shareholder. Accordingly, in the absence of some indication to the contrary, or special circumstances, the minority shareholder's shares should be valued as a minority shareholding and not on a pro rata basis.*"

75. Although this point would benefit from full argument, this principle does seem to assume a minority shareholder is being compensated for losing control to an internal majority. Lady Arden went on to opine as follows:

> "*47…That general principle is that where it is necessary to determine the amount that should be paid when a shareholding is compulsorily acquired pursuant to some statutory provision, the shareholder is only entitled to be paid for the share with which he is parting, namely a minority shareholding, and not for a proportionate part of the controlling stake which the acquirer thereby builds up, still less a pro rata part of the value of the company's net assets or business undertaking. The law therefore does not prevent a person from obtaining the control premium for his own benefit if he acquires the whole of the share capital of another company or require him to account to the minority shareholders or anyone else for the benefit which he therefore receives. The UK legislature must be taken to have enacted the Companies Acts on the basis of the general principle which Short confirms. Like any judge-made principle, it can be displaced or varied by the legislature, but there is no indication that it intended to do so in section 238 of the Cayman Islands Companies Law.*"

76. Moreover, the Privy Council analysis on this point concluded with the following *caveat*:

> "*55. ... The legislature's direction is to find the "fair value" of the dissenter's shareholding. Because of the narrow scope of this appeal, the Board is not in a position to rule out the possibility that there might be a case where a minority discount was inappropriate due to the particular valuation exercise under consideration.*"

77. As a matter of further analysis, I was inclined by the end of the trial to accept the submission that a minority discount is inappropriate where a company's entire shareholding is sold to an outsider and the sale proceeds are distributed on a *pro rata* basis to majority and minority shareholders alike, in accordance with the rights attached to the shares. This cannot be viewed as altogether analogous to a company offering minority shareholders a premium above what it later contends is fair value. Rather, it suggests a commercial context in which the majority/minority distinction lacks the import that it has in the typical merger context. Having reserved judgment and considered the matter further, this point appears to be something of a 'red herring'.

78. First, it is impossible to avoid considering the impact of the lower ranking of Series A shareholders such as the Dissenter in the distribution 'waterfall' as a factor to be taken into account at this stage of the valuation exercise. True, had all the shares been sold to a major competitor through a process designed to maximise the sale price, it seems obvious that all shareholders would have been entitled to receive their 120% and then share in the excess. The Dissenter invested half of the $250 million raised through Series A shares; Series B shares were cumulatively purchased for less than $140 million (by outside investors) with Baidu acquiring Series B shares worth $276 million. But, apart from such a sale being consummated, a discount would potentially be required to take into account:

(a) the minority status of the shares (applying general valuation principles); and

(b) the ranking of the Dissenter's shares in the contractual distribution waterfall.

79. Understandably, the Dissenter's counsel addressed this discount scenario in a way which minimised the weight to be attached to it as a contingency. Mr Chivers KC put it this way:

> "*So in other words, if you had taken your minority holding and you were looking for a buyer in the market prior to…the merger taking place, you could have said to the purchaser, 'Look, I don't want to hang on, I 'm prepared to accept a little bit of discount*

> *for timing issues , but actually…we are about to go through a sale and that sale is going to be on the basis, rationally , of an auction between the two big players, both of whom have got lots and lots of money, both of whom have a very strong rational basis for acquiring it , and so if you imagine that these were listed shares, the market would have said, 'wow, they are up for sale', and the price would have moved on…That's the basis. In other words, you are not relying as a shareholder simply on some future income stream, you are being told 'yes, we're up for sale' and it is only a question of who and how much. That's the basis for that, and so we –– if the court looks at questions of discount, it is an uncertainty based, it is a timing, uncertainty basis, and that's the basis on which we put it before you.*"[10]

80. A 5% discount for this "uncertainty" was proposed in the context of the interim payment application and was, somewhat reluctantly, it seemed, suggested at trial as an option the Court might feel compelled to consider. Viewing the matter more rigorously, however, my preliminary view that a standard minority discount was inappropriate became less tenable.

81. I ultimately feel compelled to reject his analysis. The reason why the risk of a sale not taking place (or being delayed) requires consideration arises from a need to fairly evaluate what the Series A shares held by the Dissenter were worth. In every section 238 case where a discount is considered appropriate, a minority discount is applied to the *pro rata* share value (or, where applicable, the market or transaction price) on the hypothesis of the relevant shares were being sold outside of the context of the relevant merger transaction. If fair value means the *pro rata* value discounted to take into account the fact that, apart from the merger, a minority shareholder's shares are worth less than a majority shareholder's, why is the distribution methodology applied from one merger to the next material to the applicability of the discount?

82. In my judgment, the pertinent question is what the relevant dissenter's shares would be worth if sold outside of the relevant transactional context. The form the transaction takes, whether applying a contractual distribution waterfall or not, is to my mind irrelevant to the minority discount analysis. A discount to the *pro rata* value of the Dissenter's shares should not be viewed as being required in the present case to take into account the risk of a sale not completing. Rather, consideration of a minority discount is required because it is standard valuation practice to have regard to both:

(a) the general assumption that minority shareholdings have lower market value than majority shareholdings; and

[10] Transcript page 88 lines 21-25 to page 89 lines 1-21.

(b) any other special rights attaching to shares which are relevant to their market value divorced from the transactional context which has triggered the statutory appraisal process.

83. However, in considering what the appropriate discount ought to be, I am bound to have regard to the approach taken by this Court in previous section 238 cases. In accordance with guidance provided by the Court of Appeal and Privy Council in *Re Shanda Games,* attention has focussed on the extent to which evidence demonstrates a sufficient nexus between the character of the shares and their market value. Accordingly, Parker J applied a 0% minority discount in relation to liquid, publicly traded shares in *Re Qunar* [2019] 1 CILR 611 (at paragraph 406). In *Re Trina Solar* FSD 92/2017, Judgment dated 23 September 2020 (unreported), Segal J applied a 2% minority discount (paragraphs 341-352), which was not seemingly appealed. He accepted the dissenters' expert's evidence that in relation to public companies, minority discounts should be linked to the value of an absence of control. He noted:

> "*345. The Dissenting Shareholders submitted that Mr Edwards' view was also supported by a 2003 paper by Tatiana Nenova of the World Bank which found that the average control premium for US-listed companies was between 1.6% and 2%. …*
>
> *354. While the expert evidence in this case was clearly more substantial than that adduced in Nord Anglia and perhaps Qunar, I ended up with the same feeling as that experienced by Kawaley J of not being fully satiated! The minority discount issue may well merit a more thorough and detailed explanation by the experts in future cases.*"

84. In *Re FGL Holdings*, FSD 184/2020(RPJ), Judgment dated 20 September 2022 (unreported), where the relevant shares had been listed, Parker J concluded (at paragraph 604) that no minority discount should be applied. In *Re iKang*, FSD 32/2019 (NSJ), Judgment dated 21 June 2023 (unreported), Segal J applied a 2.5% minority discount in relation to another public company. These cases demonstrate an established judicial practice of applying modest (if any) minority discounts in relation to liquid shares of listed companies where the discount is intended to reflect the impact, in prejudicial value terms, of a lack of control. This is a clear indication that a larger minority discount is appropriate here where the Dissenter's shares were:

(a) held in a private company (albeit one which was probably an attractive target for either of its main competitors); and

(b) subject to the preferential distribution rights of another class of shares.

85. The Dissenter accepted that a 5% discount might be appropriate at the interim payment stage but did not (so far as I am aware) invite Mr Bezant to address this issue in his Expert Report. A search for the term "minority discount" in the electronic version of his Expert Report returned "*no matches*". Admittedly this issue was implicitly not addressed on the hypothesis (which I have now rejected) that the need for any such discount did not arise. I did not during the trial apprehend the import of this issue and so did not invite Mr Bezant or counsel to assist the Court with it. It seems inherently improbable that Mr Bezant would have opined that no minority discount was in his professional opinion appropriate, or that a discount of less than the 5% suggested by another expert before the trial was suitable.

86. The various section 238 cases placed before me suggest a broad consensus among valuation experts that minority discounts have minimal or no significance in relation to the shares of listed companies which are actively traded and which it is accordingly easy for an individual shareholder to sell. If the Dissenter's Expert could have assisted their cause on this issue, he would likely have been invited to formally address the issue.

87. How should I deal with the evidential vacuum in terms of direct, expert evidence? In *Re Nord Anglia* [2020 CILR] (at paragraph 255), I found that no minority discount was required in relation to a listed company, but in circumstances where the dissenter's expert's evidence that no discount was appropriate was uncontradicted. That was an orthodox approach in the context of an *inter partes* trial.

88. Here, the Dissenter has failed to grasp a nettle which has an obvious sting, exploiting the absence any opposing evidence or argument, while commendably acknowledging the need for the Court to at least consider the value of the shares independently of the sale which actually occurred. The available indirect evidence together with binding legal precedent obliges this Court to do its best to deal with this issue in a just manner. The Dissenter has provided an alternative basis for a discount based on the 'risk of no sale' contingency, which I regard as a minority discount by another name. The real problem with this framing is that it is one which seems to ignore altogether the rights attaching to the shares as an additional value-relevant factor, albeit one to which even an expert would be unable to assign a precise value. It does this, magician-like, by shifting the focus away from rigorous scrutiny of what the value of the shares the Dissenter held truly was.

89. This debate (as to whether a minority discount or some other bespoke discount was appropriate) was the subject of preliminary argument when the Dissenter successfully applied for an interim payment before Doyle J just over a year before the trial. The debate was decisively won by the Company. Justice Doyle held:

> "*80. In powerful and well-presented submissions on this point, Mr Imrie sought, as it transpires successfully, to persuade the court to take into account the likelihood or at least possibility that the trial judge may apply a minority discount. To put it another way in view of Mr Imrie's advocacy the Dissenter did not persuade me that it was, on a balance of probabilities, likely that the trial judge would not apply a minority discount…*
>
> *82. In my judgment in the context of the determination of an interim payment application in the circumstances of this case I should, erring on the side of caution, factor in a possible deduction for minority discount. I have no lost sight of Mr Taylor's evidence of a no more than 5% discount 'for the risk that the transaction does not go through', in effect instead of a minority discount and his evidence that discounts for lack of control or lack of marketability are inapplicable in this case.*"

90. Since the Dissenter informally admitted at the interlocutory stage that the Court might award a 5% discount (on bespoke grounds), that strongly suggests a larger discount is properly appropriate. Sophisticated commercial actors, particularly in the section 238 context, simply do not make overstated admissions against their own commercial interests. These shares were not listed or actively trading; and they were not in the class which had preferential distribution rights, a factor which on the face of it calls for an additional discount. Nonetheless, it is possible to infer from the available evidence that even a combination of the lack of control, presumed illiquidity and share rights factors would not have dramatically impacted the marketability of the Dissenter's shares because:

(a) Baidu clearly wished to sell;

(b) the speed of the sale which occurred demonstrates the Company was an attractive target for its main competitors;

(c) it is more likely that a sale would have been delayed (e.g., by a more competitive process) than never occurred at all; and

(d) as counsel also submitted, the hypothetical potential buyer of the Dissenter's shares would likely have viewed the shares (in circumstances where a global sale was pending) as an attractive proposition.

91. It is possible to infer that these factors would have enhanced the liquidity of the Dissenter's shares and minimised the impact of the various factors weighing potentially towards illiquidity. Nevertheless, these surrounding circumstances must be considered as having a material (and more than minimal) impact on fair value in the context of a private company and comparatively illiquid minority shares.

92. In all the circumstances, I accept the Dissenter's case that that the fair *pro rata* value of its shares (applying the contractual liquidation formula used to distribute the Merger Consideration) is US$354.1 million. However, I find that this base sum is subject to a minority discount of:

(a) 5% to reflect the impact of a combination of both no control and (primarily) illiquidity; and

(b) an additional discount of 5% to bring into the reckoning the ranking of the Series A shares on the price at which the shares could be privately sold by the Dissenter.

93. I make the finding recorded in sub-paragraph (b) in the preceding paragraph provisionally, subject to the right of the Dissenter to file supplementary expert evidence and/or submissions on this issue within 28 days. My findings on this sub-issue might (theoretically at least) have been undermined had counsel or Mr Bezant been afforded an opportunity to consider these points. Having regard to the fact that the present proceedings are uncontested, on balance I conclude that I cannot fairly deprive the Dissenter of an opportunity to address this somewhat atypical point at this stage, if required.

94. For the avoidance of doubt, my only real anxiety about the fairness of the global minority discount I have provisionally applied is that it may be too small.

Conclusion

95. For the above reasons, I:

(a) accept the Dissenter's case that the Company was at the relevant time worth US$2.5 billion;

(b) accept that the Dissenter's *pro rata* distribution rights were US$354.1 million;

(c) apply discounts totalling 10% (5% minority discount plus 5% share rights discount, US$35.41 million), subject to (e) below;

(d) find (subject to (e) below) that the fair value of the Dissenter's shares is US$318.69 million;

(e) grant leave to the Dissenter to file further expert evidence and/or supplementary submissions in relation to the share rights discount element of sub-paragraphs (c)-(d) hereof, within 28 days of the date of delivery of the present Judgment.

96. I will hear counsel in relation to interest, costs and any other consequential matters arising from the present Judgment.

THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT