IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Neutral Citation Number: [2025] CIGC (FSD) 25

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 CHAMBERS

Before:	The Hon. Justice Kawaley
Appearances:	Ms Farrah Sbaiti and Ms Raedean Simpson of Ogier (Cayman) LLP ("Ogier") for Waterwood 020 Project Limited (the "Dissenter")
Heard:	On the papers
Date of decision:	5 February 2025
Draft Reasons circulated:	17 March 2025
Reasons delivered:	25 March 2025

Fair value petition-unopposed hearing-interest and indemnity costs-need for expert evidence-relevant principles-Companies Act (As Revised Revision), sections 233, 238- Cayman Islands Constitution Order sections 7, 15-Grand Court Rules (2023 Consolidation), Preamble paragraph 1, Order 62 rule 4 (2), (12)

REASONS FOR RULING ON INTEREST AND COSTS

Background

1. The proceedings commenced by Petitions filed by the Dissenter and the Company in November 2017 were consolidated by a Directions Order dated 5 September 2018. The Petition sought this Court's determination of the fair value of the Dissenter's shares in the Company, pursuant to section 238 of the Companies Act (As Revised) (the "Act"). The trial of the Petition took place nearly seven years later, by way of a remote hearing on 17 July 2024. The Company was debarred from contesting the proceedings and was not legally represented in any event throughout the year preceding the trial.

2. The Judgment delivered on 9 September 2024 summarised the following key findings recorded in it:

> "*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.*"

3. The Dissenter accepted my provisional fair value findings and applied for interest and costs, inviting the Court to determine these consequential issues on the papers without an oral hearing. In the directions Order made on 13 November 2024, I provisionally agreed to deal with the application on the papers. This was because I wished to reserve the right to require expert and/or factual evidence should I consider it appropriate to do so in light of the material subsequently placed before the Court.

4. On the 13 December 2024, the '*Written Submissions of the Dissenter on Interest and Costs*' and the '*Dissenter's Submissions Bundle (costs & interest)*' were filed. The Submissions and supporting materials satisfied me that I could approach the question of interest following the principles applied in previous cases where expert evidence was adduced. As regards the Prudential Investor Rate, I was not persuaded that I could properly accept the contextual reasonableness of the approach the Dissenter contended for based on submissions alone. The same applied to the specific interest calculations relied upon (the accuracy of which was not in all respects self-evident as a matter of simple arithmetic). While the Company Borrowing Rate contended for appeared straightforward, it seemed somewhat odd to me for there to be not even a sentence of evidence supporting the point, bearing in mind the paying party was not expressly conceding the point. In contentious litigation, parties frequently agree figures relating to damages and interest without formal evidence; to my mind a different and more formal approach was required in the context of an unopposed hearing.

5. It is now the rule rather the exception in FSD cases that applications for costs (save in large or complicated cases) are dealt with on the papers so no concerns arose as regards the costs limb of the present application.

6. On 10 January 2025, I issued the following further directions:

> "*Pursuant to Ogier's letter to the Court dated 18 October 2024, the Judge agreed to consider the application for interest and costs on the basis of written submissions only, in the first instance.*
>
> *The Judge has now considered the Written Submissions and attachments filed on or about 13 December 2024.*

He is provisionally willing to accept the approach proposed by the Dissenter to the fair rate of interest without expert evidence because:

(1) the appropriate Company Borrowing Rate appears to be a straightforward factual issue, which was not controversial in the I-Kang case;

(2) the investment mix approved by the Court in I-Kang (based on a fulsome analysis of expert evidence and authorities, in a commercial context involving a similar timescale), seems reasonable to apply to computing the Prudential Investor Rate.

The Judge considers that a short factual affidavit should be filed by the Dissenter formally confirming:

(1) the basis for the proposed Company Borrowing Rate; and

(2) its belief in the reasonableness of the Prudential Investor Rate methodology adopted and the accuracy of the final rate relied on.

Subject to receipt of this supplementary evidence, the application for interest and indemnity basis costs will be approved for reasons to be supplied after a draft order has been submitted and perfected."

7. On 30 January 2025, the Dissenter filed a draft Second Affirmation of Ka Wai Cheung formally supporting the application in the requested brief form. On 5 February 2025, I decided to grant the relief sought by the Dissenter consequential upon the Judgment, namely:

(a) pre-judgment interest at the rate of 6.39% for the period 29 September 2017 until 5 February 2025 (the effective date of the Order which would necessarily be perfected later), and thereafter at the statutory rate of 2.375% until payment; and

(b) costs of the action to be taxed if not agreed on the indemnity basis.

8. The Dissenter was then able to calculate the interest amount for inclusion in the final form of Order, which contemplated that the present Reasons would be delivered before the Order was perfected. I was grateful for this deferral proposal because it would afford me a chance to consider any potentially significant non-editorial comments arising on the draft Reasons before finalising the Order. Even following an *inter partes* hearing, the Court has a residual jurisdiction which will sparingly be exercised to consider substantive comments on a draft judgment which bear on the terms of the final relief granted. In an uncontested case involving substantial sums where the risk of judicial misapprehension is higher, a marginally more generous jurisdiction must surely exist. The form of Order which I approved before these Reasons were delivered was in the following terms:

> "*1. The Company shall pay to the Dissenter the Fair Value Sum within 14 days of the date of this Order.*
>
> *2. The Company shall pay to the Dissenter within 14 days of the date of this Order, interest on the Fair Value Sum at the fair rate of 6.39% accruing from 29 September 2017 to 5 February 2025, in the amount of US$149,858,865. Thereafter, interest will continue to accrue on the Fair Value Sum at the judgment debt rate of 2.375% per day until payment is received.*
>
> *3. The Company shall pay the Dissenter's costs of the proceedings, to be taxed on the indemnity basis, if not agreed.*"

9. These Reasons and Order would likely have to be enforced in foreign proceedings and would potentially be subjected to collateral attacks. In these circumstances, it appeared essential from the outset to give full reasons for an unusual and not entirely straightforward decision involving substantial monetary sums which had been determined without an oral hearing.

Interest: The Dissenter's case

Preliminary

10. Despite my insistence on the need for formal evidential support for part of its case on interest, the Dissenter's case on interest was overall a carefully crafted and persuasive one. By reference to previous section 238 case law, it was easily demonstrated that an entitlement to pre-judgment interest existed. Less easily, but ultimately with sufficient conviction, it was demonstrated that

the principles applicable to determining the relevant rate could be ascertained and applied without recourse to expert evidence.

The fair rate of interest

11. It was submitted that a dissenter's entitlement to be paid the "fair rate of interest" for the pre-judgment period was settled as a matter of law:

> "*5. The correct approach to the fair rate of interest may now be considered settled law.*
>
> *6. The Court has repeatedly held that a midpoint approach should be taken…*
>
> *7. Applying the mid-point approach, the fair rate of interest is the midpoint between:*
>
> *(i) the Company Borrowing Rate, being the rate at which the company could have borrowed the amount representing the fair value of the dissenter's shares; and*
>
> *(ii) the Prudent Investor Rate, being the rate which prudent investors in the position of the dissenting shareholder could have obtained, if they had the money to invest.*"

The relevant period

12. It was submitted that in past cases, pre-judgment interest had been paid over two periods:

> (a) from the date of the written fair value offer to the date of any interim payment; and
>
> (b) (on the excess recovered by dissenters) from the date of the interim payment to the date of final payment.

13. The previous cases relied upon for the general approach to determining the fair rate of interest and the relevant period were *Re Integra Group* 2016 (1) CILR 192 (Jones J), *Re Shanda Games Limited* 2018 (1) CILR 352 (CICA); *Re Qunar*, FSD 76/2017 (RPJ), Judgment dated 29 March 2021 (unreported); *Re Trina Solar Limited*, FSD 92/2017 (NSJ), Judgment dated 8 December

2021 (unreported) and *Re iKang Healthcare Group, Inc.*, FSD 32/2019 (NSJ), Judgment dated 11 September 2024 (unreported).

14. In the present case, the relevant period was said logically to run from the date of Company's fair value offer (29 September 2017) until the date of this Court's Order on interest which finally determined the quantum of the Company's payment obligation. Thereafter, interest would accrue at the statutory rate of 2.375%. Subject to considering the appropriateness of relying on the cited previous section 238 cases on interest, these submissions appeared to be entirely valid.

The Company Borrowing Rate

15. It was further submitted that the same cases demonstrated that the "Company Borrowing Rate" was determined by reference to the subjective assessment of what rate the Company would have been likely to borrow at, at the relevant point in time. A table was set out in Ms Sbaiti's Written Submissions to illustrate this point, showing rates ranging from 9.75% (Integra) to 4.3% (Qunar). It was substantively argued as follows:

> "*16. The Dissenter submits that the Company Borrowing Rate in this case should be 4.35% per annum, which was the applicable interest rate under the terms of a loan agreement between the Company and its majority shareholder and/or its subsidiaries, Baidu, Inc ('Baidu').*
>
> *17. The Company took a loan of RMB 320 million from Baidu Times Internet Technology (Beijing) Co., Ltd on 19 December 2015. Documents disclosed by the Company in which this loan is recorded are referenced at paragraph 3.58(4) and footnote 97 in the expert valuation report of Mr Mark Bezant that the Dissenter relied on at the trial of the petition.*
>
> *18. In addition, references to this loan, which was extended at the end of 2016 (with the same applicable interest rate), are also included in the following documents disclosed by the Company:*
>
> *(i) The Company's 2015 audited financial statements: which show a loan on credit of RMB 320 million from Beijing Online Network Technology*

(Beijing) Co., Ltd. (a Baidu subsidiary), to which an interest rate at 4.35% is applicable;

(ii) The Company's 2016 audited financial statements: which show an entrusted loan of RMB 220 million from Baidu Times Internet Technology (Beijing) Co., Ltd, to which an interest rate of 4.35% is applicable."

16. The Dissenter's case relied in part on material which was formally before the Court through Mr Bezant's Expert Report and partly on factual material being relied upon merely by way of submission. This was to my mind an evidential gap which ought properly to be filled by direct evidence, bearing in mind the uncontested nature of the hearing and the substantial sums involved.

17. It was then argued as a conclusory point that the proposed 4.35% rate was arguably conservative, by reference to supporting material exhibited to the Dissenter's Expert Report, albeit that the Company might have been able to provide more accurate specific evidence:

"*20. It is noted that the Company's ability to secure funding from Baidu became restricted prior to the merger (MB1 at paragraphs 2.5, 3.45, 3.82 and 5.27). Thus the proposed 4.35% Company Borrowing Rate is likely to understate the arm's length risk of the Company at the time of the merger. By way of comparison, Meituan (one of Xiaodu's competitors) took out short-term loans at higher interest rates in the range of 4.785% to 5.655% between 2016 and 2018,16 albeit not limited to its food delivery business. Therefore, the proposed rate of 4.35% is arguably conservative.*

21. Of course, without the involvement of the Company at this stage of proceedings there is no evidence of the actual borrowing rate between the date of the merger and the date of the Fair Value Judgment."

18. These submissions also appeared fundamentally sound, subject to the need to review the relevant case law and allay my lingering anxieties about the need for the Dissenter to produce direct evidence confirming the appropriateness of the rate contended for.

The Prudent Investor Rate

19. The correct legal approach commended to the Court was derived from the approach taken by Segal J in two cases. Firstly, his observations in *Re Trina* where he opined as follows:

> "*44 (b) (i)… the issue for the Court is* ***what a prudent investor in the position of the Dissenting Shareholders would have done with the funds had they been received having regard both to the investment strategy that they generally adopted and to the likely duration of the investment****. The objective is to establish a fair sum of representing the Dissenting Shareholders' loss in the circumstances of the section 238 proceedings. The Dissenting Shareholders should be assumed to have made an investment of a sum equal to the fair value of their* ***shares taking into account that the investment was to produce a return in the period up to time at which the fair value of the Dissenting Shareholders' shares were paid by and received from the Company****. (emphasis added)*"

20. The next strands of Segal J's analysis which was relied upon by Ms Sbaiti were the following observations in *Re iKang:*

> " *95…*
>
> *(e) in determining what assumed investment returns are fair an objective standard is used….*
>
> *(f) in determining what is a fair (assumed) investment return using this objective standard the Court presumes that investment returns that would have been generated by an ordinary non-specialist retail or professional investor acting prudently will be fair. The ordinary non-specialist retail or professional investor is representative of, and has the level of expertise held and follows an investment strategy that is used by, most of such investors.*
>
> *(g) the prudence requirement acts as a material constraint on available returns. Acting prudently involves adopting a conservative investment strategy with low to moderate risk (to achieve a balanced and overall a conservative portfolio) albeit that there can be a mix of investments with different risk profiles to achieve that overall balance.*

> *(h) but the Court may award a higher rate of interest than would be determined using the prudent ordinary investor model and assume that higher returns would be generated by investors with the general (but not any special or peculiar) characteristics of the relevant dissenting shareholders where the evidence demonstrates that such returns would be likely to be made and the dissenting shareholders can show that it would be unfair not to do so.*"

21. Again, subject to reviewing the passages relied upon in their context and in light of the other case law placed before the Court, the principles advanced appeared on their face to be clear and highly persuasive. The Dissenter's counsel then proceeded to address the potentially thorny issue (absent support from expert evidence, which the Court would typically receive) of how the relevant rate should be determined for the purposes of the present case. The elegant solution was to use as a proxy for expert evidence in this case, the findings arrived at by Segal J based on a rigorous analysis of the evidence of competing expert witnesses in the almost contemporaneous case of *iKang.* At first blush*,* the proposed approach seemed an implausible one. The path to every unopposed order is always potentially strewn with banana skins for the unwary judge which potentially result in a laughable decision. It is often helpful to initially view even innocuous submissions with some suspicion. In that vein, the apparent invitation to follow, in synchronistic fashion, both the legal and factual approach of a Judge in another case conjured up the somewhat irreverent image of a song, 'Segal Simply Says', inspired by the 1968 hit '*Simple Simon Says*'. Despite the apparent novelty of the proposed approach, my initial anxieties were ultimately dispelled.

22. In the Dissenter's Written Submissions, the following arguments were advanced:

> "*26. It is submitted that the asset allocation and assumed returns on those assets throughout the duration of the litigation should be consistent with the asset allocation and assumed returns in iKang, this being the most recent judgment on the determination of a fair rate of interest in a s.238 case.*
>
> *27. In 'applying the ordinary/average prudent investor standard' the Court in iKang adopted an asset allocation of 45% equities, 45% bonds, 10% cash (see [96(a)-(b)]). The Dissenter does not submit that it should benefit from higher returns that those that a prudent ordinary investor would expect under the 'ordinary prudent investor model', but rather submits that the asset allocation of 45/45/10 is similarly appropriate for the Dissenter in this case, as an ordinary/average prudent investor.*

28. *Recognising that the Court was departing from the asset allocation of 40% equities, 45% bonds and 15% cash, decided in the earlier s.238 interest cases, Segal J in iKang stated that 'while it is desirable where possible to maintain a consistent approach to asset allocation in similar cases, and for that reason the 40/45/15 allocation used in Qunar and Trina is relevant and may be a useful starting point or benchmark, each case has to be decided by reference to the evidence adduced and the circumstances of the case' (at [96(d)] and see also [103]).*

29. *As can be discerned from the iKang judgment, the evidence upon which the Court relied for the purposes of determining the appropriate asset allocation for an ordinary prudent investor included figures in the publicly available 'Thinking Ahead Institute Study' (where the asset allocation was 53% equities, 39% bonds, 8% cash). Used as a starting point, the Court reduced the allocation to equities (by moving most of the adjustment to bonds) to reflect a more conservative approach which the Court determined was justified by reference to the more conservative (and moderate) Black Rock, Vanguard and Fidelity portfolios (see iKang at [96(d)]).*

30. *The Thinking Ahead Institute Study data and the Black Rock, Vanguard and Fidelity portfolios are publicly available materials and are being relied on in the absence of expert evidence. However, as the Court placed reliance on this material adduced by way of expert evidence in iKang, and this data formed the basis for the Court's asset allocation in that case, which concerned a similar interest period as in the present case, it is reasonable to rely on this data for the purposes of determining that the asset allocation should be 45/45/10, in this case.*

31. *In relation to the returns assumed on the three asset classes, the ETFs the Court applied in Qunar, Trina and iKang are:*
    a. Equities: the iShares MSCI World ETF;
    b. Bonds: the iShares Core U.S. Aggregate Bond ETF and iShares Core International Aggregate Bond ETF; and
    c. Cash: SPDR Bloomberg Barclays 1-3 Month T-Bill ETF.

> *32. On the basis that these ETFs were considered appropriate for the ordinary prudent investor in iKang (and also Qunar and Trina), they are similarly applicable for the purposes of assessing the Prudent Investor Rate for the Dissenter in this case.*
>
> *33. To assist the Court we have appended the underlying data and calculations for the approach outlined above at Appendix 1 (Excel, sheet 2 onwards).*
>
> *34. Applying all of the above, the Dissenter submits that the Prudent Investor Rate for this case is* ***8.43%****.*" [Emphasis added]

23. Carefully read, the central thesis which was advanced could be summarised as follows:

    (a) the Prudent Investor Rate in *iKang* which the Court applied was supported by expert evidence in that case. But the experts relied on underlying data which is in the public domain, so the methodology (if sound) could be applied to other cases without the need for expert assistance;

    (b) because the expert and judicial analysis in *iKang* covered a period in time similar to that covered by the interest period in the present case it is reasonable for the Court here to determine the rate assuming the same mix of investments and using the same data sources for assumed rates of return as were deployed by Segal J in *iKang*;

    (c) the assumed assets classes ("ETFs") contended for were not simply those used in *iKang,* but in *Trina* and *Qunar* as well; and

    (d) (implicitly) the Dissenter could fairly do the relevant calculations without incurring the costs of adducing expert evidence in a case not contested by the Company in circumstances where there were grounds for anxiety about the extent to which any further costs incurred would be recoverable.

24. This was, on reflection, arguably an entirely coherent and reasonable basis for the Court to be asked to proceed, subject to reviewing the relevant cases and clarifying the nature of the forensic task being undertaken when determining the Prudent Investor Rate overall. As to the latter concern, the only rough and ready analogy I could readily draw upon was the use of the 'Ogden Tables' in personal injuries and fatal accidents cases when calculating the discount rate

when calculating future loss for the purposes of damages awards. In that context, standardised data unsupported by expert evidence is used by litigants to hypothesise what the future investment value of a sum paid in the present in anticipation of future losses. This provided some intuitive comfort that that there is no invariable mandatory legal requirement that the entitlement to an award of interest on compensation awarded by a court must be supported by expert evidence formally adduced in every case before each court. Ultimately, I would extract more comfort from the case law, albeit that none of the cases cited were unopposed ones.

25. Additionally, however, it did seem to me to be essential to have some positive evidential support, as opposed to bare submissions, for the assertion that the proposed approach was commercially reasonable and also to verify the accuracy of the calculations this Court was being asked to accept. This instinctive judgment also found support in the case law placed before me.

Conclusion of submissions on interest

26. The following conclusory submissions on interest were set out in Ms Sbaiti's Written Submissions:

> "*35. The relevant components of the mid-point rate calculation is set out on sheet 1 in the Excel at Appendix 1 entitled 'Dashboard'. The midpoint between the Company Borrowing Rate (4.35%) and the Prudent Investor Rate (8.43%) is 6.39%.*
>
> *36. If the Court considers that any aspect of the above should be re-calculated on a different basis, the Dissenter will give all necessary assistance.*
>
> *37. The Dissenter will calculate the interest amount at the fair rate determined over the period determined by the Court (which we respectfully suggest should be 29 September 2017 to the date of the order made). Thereafter, it is proposed that interest continue to accrue on the Fair Value Sum at the judgment debt rate of 2.375% per day until payment is received.*"

27. The mid-point calculation was entirely straightforward, assuming the Court accepted the proposed Company Borrowing Rate and Prudential Investor Rate, respectively.

Findings: governing legal principles on interest in section 238 cases

28. The starting point is the governing statutory provisions. Section 238 provides:

> "*(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.*" [Emphasis added]

29. Section 238 is based in part on a Delaware statutory provision which confers a broad discretion on the Court as regards appraising what a fair value of the shares is and what a "*fair rate of interest*" is. How these discretionary powers should be judicially exercised has been developed in an incremental fashion on a case-by-case basis. After a decade of extensive argument in well-resourced litigation, certain governing principles are now adequately clear.

30. In the seminal case of *Re Integra*, where Jones J had only Delaware authority to refer to, he pivotally held:

> "*72. By s.238(11) of the Companies Law, the court is required to determine the fair value 'together with a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value.' This formulation appears to have been reproduced from an earlier version of §262(h) of the Delaware General Corporation Law which provided that 'the Court shall appraise the shares . . . together with a fair rate of interest, if any, to be paid upon the amount determined to be the fair value.' The Delaware courts interpreted this provision in a way which involves balancing the rate which the surviving corporation would have had to pay to borrow funds and the rate which a prudent investor could have earned on cash or cash equivalents during the relevant period. The 'legal rate' payable on judgment debts was treated as a useful default rate in cases where the parties failed to adduce any relevant evidence (Cede & Co. Inc. v. MedPointe Healthcare Inc. (1))….*
>
> *74. It can be said that the respondents have been kept out of their money since July 2nd, 2014, the date on which Integra made its written offer to pay fair value of US$10 per share pursuant to s.238(8). For whatever reason, it did not offer to pay this amount (or any lesser amount) on account pending the outcome of the*

proceedings. It follows that Integra has had the use of the respondents' money for more than a year."

31. Jones J had no expert evidence and no direct affidavit evidence on interest which he dealt with somewhat summarily on the basis of documentary evidence before the Court (e.g. the company's audited financial statements) and submissions. He concluded that:

> "77. *…a judgment creditor can expect to earn on cash deposits. The mid-rate between Integra's assumed return on cash (0.2%) and Integra's assumed US dollar borrowing rate (9.7%) is 4.95% per annum. I conclude that this is a 'fair rate of interest' which should be awarded to the respondents from July 2nd, 2014 until payment.*"

32. This laid the groundwork for the cases which followed. Putting aside the question of the prescribed rate of interest on judgment debts which was not taken into account, the principle of the mid-point between the company borrowing rate and what it would earn on the relevant investment is supported by this seminal decision. It also provides potentially important tacit support for the notion that the Court can in appropriate cases determine the fair rate of interest without the assistance of expert or direct factual evidence on the points in issue. This was seemingly a composite hearing on fair value and interest in a fully contested matter. In fact, subsequent cases indicate that a more rigorous focussed evidential approach may be required.

33. The Judgment in *Re Shanda Games* relied upon in the present case was a freestanding 'Judgment on the Fair Interest Issue' following a separate hearing on that issue at which Leading Counsel appeared on each side. Segal J's 16 May 2017 Judgment was seemingly the first decision to accord focussed attention on the fair rate of interest issue in a section 238 fair value case. It is apparent from paragraph 3, that although directions were given after the main trial for the filing of further submissions and evidence, the only factual evidence filed came from the parties' respective firms of attorneys. In the context of what was clearly a fully argued hearing on interest, the Court was content, but only reluctantly, to rely primarily on submissions based on an essentially uncontentious factual foundation. As he observed on this issue:

> "*23. In making the fair rate of interest determination the Court relies on the parties providing reliable evidence. There was a significant evidence gap in Integra and while the position is better in these proceedings it is by no means satisfactory…*"

34. The decision directly supported my request for some evidence on the interest issue. As to the computation approach, it also clearly supports the proposition that the Dissenter's counsel cited it for. Namely, that the approach approved by the Court of Appeal (who in 2018 dismissed the company's appeal against Segal J's decision) was the mid-point between the Company Borrowing Rate and the Prudent Investor Rate. In addition, the rationale for what is now referred to as the 'Company Borrowing Rate' is helpfully explained by Segal J. It was "*the benefit derived by Shanda from not having to pay the Judgment Sum*" (paragraph 24 (a)). The focus was on what rate the company would have had to pay if it was required to borrow. The 'prudent investor rate', it was seemingly common ground, should be objectively determined based on an assessment of what investments a prudent investor would likely make. This assessment required an evidential foundation. Adopting the mid-point between the two was an incident of fairness to both sides (paragraph 20).

35. Parker J delivered a judgment dealing solely with interest and costs in *Re Qunar* on 29 March 2021, some three years later to await a potentially dispositive Privy Council decision in *Shanda Games*. This was also a fully contested matter with a long list of appearing parties. It was heard over two days in mid-February, the trial judgment having been delivered in mid-May 2019, over 20 months earlier. He applied the principles established in *Shanda Games*, understandably regarding himself as bound by the Court of Appeal's decision on the approach to interest in section 238 cases. He also had the benefit of expert evidence on the interest issue. Parker J rejected a challenge to the mid-point principle The main dispute was how the Company Borrowing Rate should be calculated, and Parker J held that he preferred the approach (contended for by the dissenters' expert) that assumed that short-term borrowing would have been possible and included a country risk premium. Finally, he rejected the submission that the prudent investor rate should be replaced by the investor borrowing rate.

36. In summary, the general principles established in *Integra* and refined in *Shanda Games* were consolidated in *Qunar*, although the course of the hearing was different (expert evidence on interest and distinctive challenges as to the correct approach). An important gloss added to the pre-existing legal picture is provided by Parker J's approach to deciding what the investment mix should be:

> "*89. I have decided that the appropriate asset allocation of Mr Billiet is to be preferred as is his view of the prudent investor's investment horizon. This takes account of investors in the position of the dissenters who tend to take a long term view and would not, for example, keep 30% in cash.*"

37. This clarifies that while the prudent investor rate is predominantly an objective criterion, account can be taken of the dissenters' investment profile as well. The Judgment in *Qunar* also addresses the start and end dates of the interest period more fully than the earlier cases. Following the earlier cases, the date of the fair value offer was selected as the start date. As far as the end date was concerned, one date applied in respect of amounts which were covered by interim payments, and another date applied to amounts which were outstanding thereafter. The company contended that because they had offered to pay the remaining sums on 5 July 2019, after the Court had directed that a hearing on interest and costs should await the outcome of the Privy Council appeal in *Shanda Games.* The Board ultimately declined to consider a challenge to Segal J's findings on a point not raised before him. Despite the long passage of time between the main trial and the judgment on interest and costs, Parker J rejected the company's contention:

> "*122. The company has had use of the money and the dissenters are entitled to interest on the sum due until the earlier of judgment in this application or when they are paid. There should be no deduction as contended for by Mr Lowe QC. After judgment as Mr Salzedo QC says, interest will run at the judgment interest rate."*

38. This finding is pertinent to the question I had to decide in the present case of when the end date should be, albeit in starkly different circumstances where the Company has done everything but offer to pay.

39. Segal J delivered his 'Judgment dealing with the Fair Rate of Interest and Costs' on 8 December 2021, following a July 2021 hearing on interest and costs consequential to a September 2020 trial judgment. This was another hearing with expert evidence on interest, with Leading Counsel appearing for each side. He summarised his overall finding on interest (paragraph 6 (a)) as being:

> "*…that the fair rate of interest in this case is the rate at the midpoint between the Company Borrowing Rate and the Prudent Investor Rate, as those terms are explained below. The rate is a simple rate (as to which there was no dispute).*"

40. He also found (paragraph 6 (b)) that the start date was the fair value offer date (in March 2017) and the end date was (as regards amounts outstanding after interim payments) when the final

payments were made (this was presumably before the judgment on interest was formally delivered).

41. Segal J firmly rebuffed attempts to persuade him to depart from the previously endorsed general approach:

> "*26. … Parker J's sound and pragmatic summary of the position as a judge of this Court is sufficient to justify applying the midpoint approach as adopted and applied in Shanda (CA), Shanda (GC Interest) and Integra either on the basis of the binding authority of Shanda (CA) or of a clear and settled practice.*"

42. He likewise rejected the attempt to persuade him to adopt the 'Investor Borrowing Rate' rather than the Company Borrowing Rate (paragraph 32). Segal J's approach to determining the applicable Company Borrowing and Prudent Investor rates will be considered further below. His approach is particularly helpful, because it sets out a clear and coherent principled basis for the assessment, which is instructive in wider terms beyond the confines of the particular circumstances of the *Trina Solar* case. For present purposes, it suffices to note that this decision confirms the governing principles contended for by the Dissenter in the present case.

43. As *iKang* is relied upon primarily for how to compute the Prudent Investor Rate, and will be considered in that respect separately below, its conclusions on the general principles can be dealt with quite shortly. Segal J's decision does confirm the main elements of the principles the Dissenter submitted were now well established as a result of the cases just considered, even though he broke fresh ground by considering, more fully than had occurred before, the extent to which the profile of the dissenters was relevant to determining the Prudent Investor Rate. In this regard, he invited supplementary submissions and evidence in relation to Delaware law on this issue. Taking those bespoke arguments and the previous case law into account, he concluded as regards the governing principles as follows:

> "*95. Accordingly, the applicable principles can be summarised as follows:*
>
> *(a) section 238(11) requires the Court to determine a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value;*
>
> *(b) the Court has a broad discretion to determine what is fair. The focus is on the entirety of the circumstances in deciding what is a fair rate of*

interest balancing the disadvantages suffered by the dissenting shareholders and the benefits received by the company. For this reason, the mid-point approach is appropriate (as a logical way of balancing the advantages and disadvantages);

(c) the Court takes into account the fact that a section 238 determination does not proceed on the basis that any legal right of the dissenting shareholder has been infringed by the company. The legislative concern is not to restore him/her to some anterior position existing before the commission of a wrong but to ensure that he/she receives fair value for what he/she is obliged by statute to give up;

(d) the cost of borrowing a sum equal to the fair value amount and the putative investment returns that could have been achieved had the fair value amount been invested at the time of the merger both represent the dissenting shareholders' lost opportunity and consequently the disadvantage to the dissenting shareholders of being out of their money;

(e) in determining what assumed investment returns are fair an objective standard is used. An objective standard is used both because (as a matter of practice) it is necessary to ensure that the procedure for assessing the fair rate of interest is proportionate in terms of expense and Court time and because (giving effect to the statutory policy of balancing advantages and disadvantages) it is necessary to limit the level of returns assumed to have been lost by the dissenting shareholders so as to avoid penalising the company by making it liable for all and above average losses incurred by the dissenting shareholders;

(f) in determining what is a fair (assumed) investment return using this objective standard the Court presumes that investment returns that would have been generated by an ordinary non-specialist retail or professional investor acting prudently will be fair. The ordinary non-specialist retail or professional investor is representative of, and has the level of expertise held and follows an investment strategy that is used by, most of such investors;

(g) the prudence requirement acts as a material constraint on available returns. Acting prudently involves adopting a conservative investment

strategy with low to moderate risk (to achieve a balanced and overall a conservative portfolio) albeit that there can be a mix of investments with different risk profiles to achieve that overall balance;

(h) but the Court may award a higher rate of interest than would be determined using the prudent ordinary investor model and assume that higher returns would be generated by investors with the general (but not any special or peculiar) characteristics of the relevant dissenting shareholders where the evidence demonstrates that such returns would be likely to be made and the dissenting shareholders can show that it would be unfair not to do so;

(i) the Prudent Investor Rate endeavours to place the dissenting shareholders in the position they would have been in had the company promptly paid them the value of their shares, and is based on the return that a prudent investor would have received if he/she had invested the fair value amount, at the time of the merger. Dissenting shareholders are not limited to returns assumed to be made on investments that will have to be realised and cashed-in once the company pays over the fair value amount (by interim or final payment). The assumed investments do not stand as substitutes for the fair value amount which can only be assumed to be retained until payment is made. However, since the core objective is to compensate the dissenting shareholders for the loss of the use of their money during the period they are kept out of it, namely the relatively short duration of the section 238 proceedings, the Court retains a discretion, as it seems to me, to treat as unfair high returns assumed to be generated by a very long term investment strategy."

44. However, before articulating the governing principles in the more textured way above, Segal J had already summarised them more pithily at the beginning of his Judgment:

"*6. As regards the fair rate of interest:*

(a) the mid-point approach has been adopted by both Mr Billiet and Mr Good in estimating the fair rate of interest;

(b) under the mid-point approach, the fair rate of interest is taken to be the mid-point between the Company Borrowing Rate and the Prudent Investor Rate;

(c) the Company Borrowing Rate is the rate at which the Company could have borrowed the amount representing the fair value of the Dissenting Shareholders' shares during the relevant period (or periods);

(d) the parties have agreed the amount of interest payable in respect of the Company Borrowing Rate in the aggregate sum of US$2,546,224;

(e) *the parties (and the experts) have agreed the periods in relation to which interest has accrued (following the approach adopted in previous cases). These periods are as follows. In relation to the Initial Payments, the period between the Offer Date and the Interim Payment Dates. In relation to the Final Payments, the period between the Offer Date and the Final Payment Dates.*"

45. Based on the above review of the cases relied upon, I accepted Ms Sbaiti's central submission that the core principles governing the approach to assessing the fair rate of interest under section 238 of the Act are clearly and firmly established as a matter of Cayman Islands law.

Interest: merits of Dissenter's case on how the methodology should be applied on an unopposed application without expert evidence

Legal principles governing the overall approach

46. Looking back at the pantheon of previous section 238 interest cases, argued by bulging legal teams typically led by eminent Leading Counsel, the present unopposed application feels like a poor relation. Like Oliver Twist in the Poor House, I felt entitled to ask for more. A thin gruel in the form of basic factual foundation I felt confidently entitled to demand. Demanding expert evidence seemed like asking for a classic steak 'with the works'. What legal principles applied was the critical question.

47. On reflection this conundrum was an unusual manifestation of a very common civil procedural dilemma. What are the minimum requirements for establishing a *prima facie* case when an application is unopposed? The most valuable high-level guidance I found for how to approach

the interest evaluation issue came from parts of the Judgment in *iKang* on which the Dissenter did not directly rely. After summarising the various submission made in that case, Segal J opined as follows:

> "78. *The pre-judgment interest statute* [in the United Kingdom] *has been interpreted as only permitting interest to be determined on an objective basis by reference to a claimant with the general (but not special or particular) attributes of the claimant in question (although in some cases the personal circumstances of the claimant have been considered). The court as a general rule follows the categorisation of the claimant in an objective sense ignoring their special and specific features. General attributes are usually taken to refer, for example, to the fact that the claimant is a global bank, a prime bank, a small bank, a small business or an individual. As regards what counts as general attributes, see Kramer, The Law of Contract Damages Third edition, 2022 at [7-50] and McGregor on Damages, Twenty-Second edition, 2024, at [20-115] – [20-123] (this last paragraph deals with the approach where the wrong done to the claimant causes him/her to miss out on investments rather than cause him/her to borrow).*
>
> *79. Accordingly, in exercising the broad statutory discretion to award pre-judgment interest the English courts have adopted a practice in commercial cases designed to limit the scope of the inquiry so as to ensure that the procedure is proportionate and cost-effective. These English cases establish one basis for adopting an objective standard albeit not a strict objective standard that ignores all of the claimant's characteristics. They have limited the factual matters to be taken into account when determining statutory pre-judgment interest.*
>
> *80. It seems to me that this policy and reasoning applies equally to section 238(11) cases. There is a need to establish a procedure that is proportionate and cost-effective and avoids a further mini-trial just to determine the fair rate of interest. Interest is important but it is ancillary to the primary issue of the determining the fair value of the dissenting shareholders' shares. This justifies limiting the scope of the inquiry and an element of what is described in the English cases as rough justice.*

81. It is clear that, as I have explained, the section 35A jurisdiction is different from the jurisdiction under section 238(11). This is because the jurisdiction to award pre-judgment interest involves a plaintiff-focussed assessment of interest on damages for a civil wrong (whether in tort or contract). The court is required to find a rate of interest that restores the claimant to the position it would have been in had it been paid compensation for the wrong at the relevant time. It has been held that the court's discretion is a broad one driven by the same compensatory aim as damages and exercised with that in mind, focussing only on the cost to the plaintiff of being deprived of the money which he/she should have had and not on the profit to the defendant of the use of the money (see Steyn J in Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd, 11 December 1987). The court in a case involving the award of statutory pre-judgment interest is focussed on compensation for the loss caused to the claimant, the victim of the wrong. In the section 238(11) context, the Court is required to find a fair rate balancing the interests of the company and the dissenting shareholders. As Martin JA said in Shanda-CA in section 238 cases the entire focus is removed from the claimant/dissenting shareholders and is instead placed on the entirety of the circumstances taking into account both the disadvantage to the dissenting shareholders and the advantage to the company.

82. Despite this difference, it seems to me that the approach taken in these English cases provides a useful guide as to the need to establish a, and as to what may be an appropriate, proportionate and cost-effective procedure for the determination of interest in the section 238 context. An objective standard should be applied to determine the dissenting shareholders' opportunity cost and assumed lost returns because investigating the particular and special attributes of each dissenting shareholder will involve in each case a detailed factual inquiry with the need for substantial evidence about which there may be factual disputes and the need for cross-examination of witnesses. The procedure for establishing the fair rate of interest needs to conducted in accordance with the overriding objective and therefore to be proportionate and cost-effective. It is clearly important to ensure that the procedure and rules applied to determine interest under section 238(11) allows the Court to deal with the application justly but it is desirable to avoid the determination of the fair rate of interest requiring a further full trial." [Emphasis added]

48. This is a very compelling and coherent analysis. It emphasises that the fair rate of interest in a section 238 case is supposed to be fair to both the company and the dissenter, because it is compensating the dissenter for the inability to invest the award, not compensating the dissenter for a wrong measured in damages. However, the process for determining that rate must be in accordance with the Overriding Objective, implicitly, because the interest award is intended to be a commercially rational remedy. It would not be a commercially rational remedy if a dissenter had to incur a disproportionate amount of costs to recover an interest award. So, adding a gloss to Segal J's explicit analysis, there are substantive as well as procedural imperatives for this Court to ensure that interest determinations in the section 238 context are carried out in a proportionate manner. The substantive law imperatives derive from the provisions of section 238 itself, which is designed to guarantee a dissenter the fair value for shares which have been acquired without their consent and confer the right to interest as essentially consequential relief.

49. At a higher level still, substantive law support for the Overriding Objective may be found in the provisions of:

(a) very clearly, section 7 of the Constitution, which in guaranteeing a fair hearing implicitly requires civil proceedings to facilitate the achievement of substantive justice; and

(b) very clearly (but only recently so), section 15 of the Constitution, which provides that where a law authorises the confiscation of private property, provision must also be made :

> "*(i) for the prompt payment of adequate compensation; and*
>
> *(ii) securing to any person having an interest in or right over the property a right of access to the Grand Court…for the determination of…the amount of any compensation to which he or she is entitled, and for the purpose of obtaining prompt payment of that compensation*…" (section 15 (1) (c))

50. It was until recently subject to doubt whether these protections applied to compulsory acquisitions by private parties which were merely facilitated by legislation. However, on 11 March 2025, in *Re Changyou.com Limited* [2025] UKPC 12, the Privy Council held:

> "*56. Mr Crow accepted that for the Legislature to pass a law authorising the Government to acquire a person's property compulsorily itself would engage section 15. But the Board does not see why it would not equally engage section 15 if the Legislature passed a law authorising A to acquire the property of B compulsorily. That is just as much an interference by "government" in the shape of the Legislature with B's peaceful enjoyment of his property. So although the second and third limbs of section 15(1) prevent the Government from itself taking possession or acquiring an interest in or right over a person's property, the first limb preventing interference with enjoyment is in the opinion of the Board engaged by the passing of a law which deprives B of his property whether or not the Government acquires an interest in it.*"

51. In short, these constitutional principles provide higher level support for the procedural principles embedded in the Overriding Objective set out in this Court's Rules, which impose a positive duty on the Court to seek to make the substantive law effective in an efficient manner.

52. It is beyond argument that section 238 confers rights on dissenters to have this Court appraise the fair value of their shares, together with a fair right of interest, which very closely resemble the sort of protections which section 15 of the Constitution requires. Although section 238 was enacted in the same year as the Cayman Islands Constitution Order 2009 enacted section 15, the similarity between the protections conferred may be coincidental. It is well recognised that section 238 was modelled to a material extent on section 262 of the Delaware General Corporations Law. My own researches, carried out before the Privy Council decision in *Changyou*, revealed that Jennifer McLellan in '*An Appraisal of Appraisal Rights in Delaware*' 92 Denv. L. Rev. F. (2015) (at page 110) has suggested that the source of these statutory appraisal rights may be a common law fundamental property right rule:

> "*These rights arose out of the common law requirement that prohibited a corporation from making a 'fundamental organic change' without unanimous shareholder approval.*"

53. It might therefore be said that a company which enters into a merger or consolidation transaction which engages section 238 rights enters into a Faustian statutory bargain which binds it, when midnight comes, to pay any dissenter the fair value of its shares as determined by the company or by the Court. Where the Court's jurisdiction is engaged, the company becomes subject to a positive duty to assist the Court to determine the fair value and will usually possess the evidence most relevant the valuation exercise. Whether these provisions entitle

dissenters to assert a joint interest privilege claim to any advice obtained by the company, which is materially relevant to fair value, or disentitle a company from asserting privilege, has yet to be clearly worked out[1]. However, Martin JA observed in *Re Qihoo360 Technology Company Ltd*, CICA 20/2017, Judgment dated 9 October 2017 commenting on the "*particular difficulties*" presented by section 238 cases:

> "*3. …all or nearly all of the financial information necessary to enable the Court to determine the value of a company's business, and hence of its shares, will inevitably be held by the company itself. The proper conduct of the valuation exercise will accordingly require that the company make adequate disclosure of that information….*"

54. With these substantive law imperatives in mind, the following provisions of the Preamble to the Grand Court Rules (2023 Revision) ("GCR") take on added significance in the context of the present 'section 238-lite' case where economy and proportionality have heightened significance:

> "***The Overriding objective***
>
> *1.1 The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way.*
>
> *1.2 Dealing with a cause or matter justly includes, as far as is practicable —*
>
> *(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;*
>
> *(c) saving expense;*

[1] The Privy Council is currently considering the scope of the joint interest privilege rule in a relation to a Bermudian fair value case, *Jardine Strategic Holdings Ltd-v-Oasis II Master Fund Ltd (No.2)*.

(d) dealing with the cause or matter in ways which are proportionate

(i) to the amount of money involved;

(ii) to the importance of the case; and

(iii) to the complexity of the issues;

(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other proceedings." [Emphasis added]

55. It was obvious that economy and expedition would be achieved if the Court proceeded without expert evidence in relation to the fair rate of interest issue. What was less clear was whether the fair rate of interest could be determined justly without expert evidence, with procedural goals such as the normal advancement of the proceedings and proportionality being neutral or marginal concerns because:

(a) advancing the 'normal' course of the proceedings was, in the context of an unprecedented uncontested section 238 proceeding, a practical impossibility; and

(b) proportionality was difficult to assess in a case involving high value but uncertain recoverability.

Determining the Company Borrowing Rate

56. Following the now settled governing legal principles, the fair rate of interest analysis has two main limbs to it. First and most simply, the Company Borrowing Rate. This is the rate the Company would likely have borrowed at if it needed to borrow the funds it retained rather than paying to the Dissenter over the applicable interest period. Far more complicated is the Prudential Investor Rate, which entails deciding what mix of investments should be assumed and, in some cases, taking into account the special characteristics of the dissenters.

57. In *Integra,* Jones J decided both limbs of the ultimate rate summarily based on documentary evidence before him at trial about what interest was actually being paid by the company on its loans, which is the approach commended in relation to the Company Borrowing Rate here. In

Shanda Games, Segal J had regard to expert evidence in circumstances where the company had no debt which could be referred to, to ascertain the Company Borrowing Rate. Expert evidence was again relied upon in *Qunar* in circumstances where there were no actual loans to refer to. In *Trina Solar*, there was an argument between the experts as to whether over the relevant periods, short-term (higher) or long-term (lower) rates could have been obtained. Segal J preferred the lower rate the company's expert proposed because of the length of the applicable period. It is not obvious that such a common-sense determination required expert evidence; in my judgment it did not. In *iKang*, it appears the Company Borrowing Rate was agreed, with controversy focussing on the Prudent Investor Rate.

58. The Dissenter's submission summarised above (at paragraph 15) was that 4.35% was the appropriate Company Borrowing Rate based on a loan facility recorded in its financial statements from related entities, the term of which was extended. A Second Affirmation was filed by director Ka Wai Cheung to support those submissions. It was averred that this rate, a short-term 1-year rate, was probably conservative because of the Company's difficulties at the time of the Merger. I have considered whether a longer-term lower rate would be more appropriate because of the length of the interest period, which spans over 7 years. In the previous cases where a long-term rate was considered more appropriate, the company had no existing debt to use as a reference point. It made commercial sense in that commercial context to infer that the company had the ability to borrow on a long-term basis. The Company here seemingly did not have that ability; because even its own shareholders only lent on a short-term basis and at a rate which would presumably not have been higher than what was available on the open market. This restricted view of the Company's borrowing power, of course, found further general support in the Company's admitted inability to fund the present litigation all the way to trial.

59. I found that I could justly accept the Company's factual evidence that the appropriate Company Borrowing Rate should be 4.35%, without the need to delay the proceedings further and compel the Dissenter to incur the additional possibly irrecoverable cost of adducing expert evidence on the issue.

60. The Company Borrowing Rate approved in the present case (4.35%) is of course based on the specific facts of this case. However, I regarded it as a rough and ready cross-check to note that it is comparable to, or within the same broad range of, the rates approved by this Court in previous cases: *Integra* (9.7 %, see paragraph), *Qunar* (4.5%, see paragraph 63), *Shanda Games* (3.5 %, see paragraph 24 (a) (v)) *Trina Solar* (4.7%, see paragraph 6 (b)). In *iKang,* the aggregate amount payable in respect of the Company Borrowing Rate was agreed but the rate

itself was not identified in the Judgment (see paragraph 6 (d)). However, it was submitted (Written Submissions, paragraph 15) that the implicit rate based on that compromise was between 4.94% - 5.01%.

The Prudent Investor Rate

61. The Dissenter's's submissions on how the Prudential Investor Rate should be determined have been summarised above (paragraphs 19-22). The Second Affirmation of Ka Wai Cheung avers that the proposed approach, following the methodology applied by Segal J in *iKang* (based on expert evidence), can reasonably be applied to the present case.

62. In considering the merits of this position, it is important to emphasise that I was not required to decide whether or not expert evidence would be potentially admissible if one or more parties applied to adduce it. There is no general legal requirement that expert opinion evidence support a judicial finding as to the appropriate rate of interest on damages or a fair value award. This is not a medical negligence-type issue. My sole concern was whether, in the context of an unopposed application where it would be unfair to require the Dissenter to adduce expert evidence unless it was strictly required, the findings sought could justly be made:

(a) on the basis of factual evidence formally adduced; and

(b) being guided by the approach adopted to a similar issue in another case before this Court where expert evidence was adduced.

63. It is helpful to consider what the requisite legal standard is, before one considers the facts. In *iKang*, Segal J held:

> "*44. The clearest statement of what the objective prudent investment standard requires is set out in the opinion of Vice Chancellor Chandler in Chang's Holdings (1994) at [4] (my underlining):*
>
> > *'……. The prudent investor standard incorporates all investments that a hypothetical objective prudent investor would consider. See Charlip, supra, Let.Op. at 3; Tennetic, supra, at 351-352; Lebman, 414 A.2d at 829. This Court's decisions in Lebman v. National Union Elec. Corp., Tennetic, Inc. v. A.J. Industries, Inc. and Charlip v. Siegler Lear, Inc. all included an average return on stocks as part of the mix of*

> *investments for an ordinary prudent investor. Charlip, supra, at 3; Tennetic, supra, at 351-352; Lebman, 414 A.2d at 829. The prudent investor takes both a long term and short term investment strategy, suggesting that some of the investor's money can be placed in mutual funds or other long term investments. See Charlip, supra, at 5-6. Dr. Tannian testified that stocks have outperformed bonds over the long run, and a prudent investor would take note of that fact in developing a long term investment strategy.*
>
> *Petitioner is correct that returns from mutual funds can be a part of the prudent investor rate, but Dr. Tannian relied exclusively on this long term approach. The prudent investor employs a long term and short term strategy even though the investor's overall approach is conservative. See Lebman, 414 A.2d at 829. Dr. Tannian's opinion gives no weight to short term investment strategies and his overall mix of investments is too risky. In Dr. Tannian's report, the prudent investor loses money in the year 1990. The prudent investor would employ a mix of the conservative investments advocated by Mr. Koch, and the riskier investments detailed in Dr. Tannian's testimony. Because the prudent investor standard is an objective test, Mr. Chang's personal investment prowess has no bearing on the prudent investment rate. Lebman, 414 A.2d at 829*".

64. I was guided by that definitional legal test, which is consistent with the approach adopted in the earlier section 238 cases. Beyond defining what a prudent investor is, it is also essentially a matter for judicial determination as to what the elements of the test are. As noted above, I agreed with Segal J that the test is mainly objective but that subjective considerations can potentially be taken into account. In *iKang*, Segal J took some account of the profile of the Dissenters to some extent, and factual evidence was adduced in the present case to aver that reliance on *iKang* was reasonable. Because dissenters in section 238 cases often appear to be commercial birds of a feather flocking together, the suggestion that the Dissenter had a comparable profile was a plausible one. Primarily, an objective test was applied in *iKang* and it was submitted that the findings based on expert evidence were transferable to the present case because most of the interest periods were overlapping. A significant divergence of time would undermine the relevance of the commercial data considered in a previous case. The fact that the time period in iKang and the present case substantially overlap also added potential weight to the finding in that case, because as Segal J observed:

"*94. … The limited duration of the litigation is taken into account by only permitting the investment returns that are assumed to have been earned during the period of the litigation (and in the period before the interim payments are made) to be used. In this way, the dissenting shareholders are only compensated for the loss of the use of their money during the period of the litigation. It is right to say that the award of interest under section 238(11) is intended to compensate the dissenting shareholders for the loss of the use of their money and endeavours to place them in the position they would have been in had the company promptly paid them the value of their shares. The Prudent Investor Rate is based on the return that a prudent investor would have received if he/she had invested the fair value amount at the time of the merger.*"

65. With the central controversy being what the mix of investments a prudent investor would choose, why the Court in *iKang* made the findings it did is a mixed question of law and fact. The following observations of Segal J provide further guidance as to how he approached the expert evidence he had the benefit of:

"*86. I consider that the preferable approach is as follows (which respects both the policy of limiting the scope of the inquiry to promote proportionality and cost-effectiveness and the policy of finding a fair rate by limiting the company's responsibility for all the dissenting shareholders' losses, but also recognises that the Prudent Investor Rate is supposed to reflect the lost opportunity to invest of the dissenting shareholders before the Court). The legal principle, mandated and made applicable by section 238(11), is that dissenting shareholders are entitled to a rate of interest that in all the circumstances is fair. But when determining what is fair (having regard to the position of both the dissenting shareholders and the company) the Court should adopt and start with a presumption that adopting the prudent investor rate based on the returns that would have been obtained by an average (ordinary or broadly typical) retail or professional investor acting prudently will be fair but this presumption can be rebutted in cases where the dissenting shareholders can show that adopting the average/ordinary investor model would be unfair to them having regard to their position (taking into account the type or category of investor they are).*

> *87. This approach does not change the burden of proof – each of the parties must establish their case on the balance of probabilities standard – but sets out how the Court should establish what is a fair rate of interest by using the prudent average investor standard. Wherever dissenting shareholders rely on their general characteristics for the purpose of establishing the Prudent Investor Rate, the Court must assess whether in determining a fair rate it is necessary to take these into account and if so the effect of doing so…*"

66. In a contested case where there is controversy as to what a prudent investor would invest in, clearly the Court would generally be assisted by experts independently opining rather than partisan lay witnesses making factual assertions or counsel making bare submissions. But it is easy to imagine cases where straightforward factual evidence might exist about what baskets of investments were common for prudent investors to invest in. In such cases, it seems improbable that the Court would insist that expert evidence be adduced, regardless of the costs and delay involved. Here the Dissenter argued that the relevant expert evidence which was accepted in *iKang* was based substantially on publicly available information, which the Court could examine for itself. In fact, Segal J in *iKang* both indicated that it was desirable to adopt a similar investment mix in all section 238 cases and emphasised the need for modification based on the facts of each case. His critical findings were as follows:

> "*96. In the present case, it seems to me that:*
>
> *(a) on balance, the preferred approach is to adopt an asset allocation of 45% equities, 45% bonds and 10% cash to be applied in both the first period and the second period;*
>
> *(b) this is based on applying the ordinary/average prudent investor standard and using (i) the data in the Thinking Ahead Institute study for the period 2019-2022 (53%/39%/8%) as the basic benchmark for the asset allocation that would be adopted by most professional asset managers (covering private wealth managers, insurers, and banks) as representatives of the ordinary/typical investor but ([ii]) adjusting down the Thinking Ahead Institute study allocation for equities (53%) to reflect the more prudent asset allocations represented by the more conservative/moderate Black Rock, Vanguard and Fidelity portfolios, which Mr Good supports and which suggest that an allocation below the 53% for equities indicated by the Thinking Ahead Institute study*

for the period 2019-2022 is appropriate. I note that all the conservative and moderate portfolios have equity allocations of 40% or below. 45% seems to me to represent a reasonable and conservative figure to adopt to achieve a balance between these figures. The bond allocation needs to be increased (I consider that the evidence indicates that a considerably higher allocation for bonds above cash is appropriate even for a conservative strategy) and I note that conservative/moderate Black Rock, Vanguard and Fidelity portfolios have allocations for bonds of between 45% and 70% and once again 45%, involving an uplift of 6% from the Thinking Ahead Institute study figure, seems me to be reasonable as a prudent allocation. The residual cash figure of 10% also seems to me to represent a reasonable balance of the allocations contained in the evidence and a prudent figure;

(c) I take the private wealth managers, insurers, and banks covered by the Thinking Ahead Study to stand as representatives of the ordinary/typical investor and note that professional investors were accepted to be appropriate for this purpose by Mr Good;

(d) this asset allocation involves a higher allocation to equities than was used in Qunar and Trina primarily because the evidence in this case relied on by Mr Good for his ordinary/average prudent investor analysis appears, even when adjusted to give some weight to the asset allocations adopted by the more conservative portfolios relied on by Mr Billiet, to require it. I have started with the figures in the Thinking Ahead Institute study for the period 2019-2022 (53%/39%/8%) but have reduced the allocation to equities (by moving most of the adjustment to bonds) to reflect a more conservative approach which seems to me to be justified by reliance on the more conservative (and moderate) Black Rock, Vanguard and Fidelity portfolios and also to take account of the fact that even Mr Good did not consider that complete reliance could properly be placed on the Thinking Ahead Institute study which involved some approximation and whose dates were less than perfectly aligned with the dates applicable in this case. It seems to me that some rounding down of the equity allocation and an increase in the bond allocation is an appropriate adjustment to the

cautious and conservative side. It seems to me that while it is desirable where possible to maintain a consistent approach to asset allocation in similar cases, and for that reason the 40/45/15 allocation used in Qunar and Trina is relevant and may be a useful starting point or benchmark, each case has to be decided by reference to the evidence adduced and the circumstances of the case;

(e) as regards the returns assumed to be made on these investments/assets, I would use Mr Good's data and adopt Mr Good's methodology which seems to me to be reasonably and properly based on indices that properly reflect returns generated by conservative investment strategies;

(f) I consider that the asset allocation and returns produced by this methodology are fair in all the circumstances. Even if the status of the Dissenting Shareholders who are hedge funds is taken into account, I do not see how the asset allocation and returns proposed by Mr Billiet can be regarded as being consistent with a prudent investment strategy. In any event, the asset allocation and returns produced by the ordinary/average prudent investor standard are not so low when compared with, or so far removed from, the allocation and returns which the Dissenting Shareholders (who say they are hedge funds) say should be adopted and assumed for hedge funds (being investors with their general characteristics) as to make it necessary to increase the equity/bond allocation and the rates of return in order to achieve a fair balance between the dissenting shareholders and the company. The Dissenting Shareholders have not shown that their status as hedge funds justifies imposing on the company a higher rate of interest. I agree with Mr Good that the evidence filed by the Dissenting Shareholders as to their own position and status as hedge funds was sketchy and too limited and that finding a suitable investment strategy that fits all hedge funds is problematic but it does seem to me that the Dissenting Shareholders can show and have established that hedge funds do and should be assumed to adopt higher risk (and event driven) investment strategies." [Emphasis added]

67. Distilling these findings further, it was found that:

(a) the mix of investments approved in *Qunar* and *Trina Solar (40% equities, 45%* bonds and 15 % cash) was a useful starting point;

(b) the appropriate mix based on the expert evidence in *iKang* was 45%/45%/10%; and

(c) the primary basis for the findings was the Thinking Ahead Institute 2019-2022 data (upon which the company's expert relied), adjusted downwards (as regards equities, 3 points) and upwards (as regards bonds, 6 points);

(d) overall, the expert evidence of the company's expert was preferred to that of the dissenters' expert.

68. In the present case the only factual evidence before the Court supported a finding that the Prudent Investor Rate methodology applied in *iKang* covering a largely overlapping period of time is reasonably applicable to the circumstances of the present case. It might be contended that the degree of temporal overlap has been somewhat overstated. The offer date in *iKang* was 28 January 2019, and the interest judgment date was 11 September 2024 (5 years, 7 months). Here the offer date was 29 September 2017, and the interest judgment date 5 February 2025 (7 years, 4 months). It is true that the entire interest period in *iKang* fell within the interest period in this case and that this represented roughly 70% of the relevant period for this case. On any view, that is a significant degree of overlap. I considered it appropriate to accept the submission that the iKang methodology for calculating the Prudent Investor Rate could be applied in the present case.

69. Substantive justice under section 238 (11) requires the Court to determine a "*fair rate of interest*" and where the paying party is unavailable to posit its version of what justice represents, the Court must be astute to avoid supinely accepting the receiving party's case. Mindful of this need for independent judicial scrutiny, I would summarise the main reasons for accepting the Dissenter's invitation to apply the *iKang* methodology to the present case without requiring expert evidence as follows:

(a) the approach adopted in *iKang* was broadly consistent with the approach taken in two earlier cases, *Qunar* and *Trina Solar* and arrived at after a rigorous and careful legal and factual inquiry;

(b) the approach was fundamentally based on a public study, the Thinking Ahead Institute 2019-2022 report, with relatively minor tweaks, based on a conservative approach to the expert evidence;

(c) the approach was substantially based on expert evidence adduced by the company in *iKang*, which makes the risk of serious prejudice to the Company in this case unlikely;

(d) the approach was not to any (or any material) material extent based on any distinctive investment characteristics relied upon by the dissenters in that case;

(e) the present application was unopposed and the ability of the Dissenter to enforce the substantive Judgment and the costs and interest awards is subject to doubt. In a rough and ready sense, this counterbalances any risk of unfairness to the Company inherent in the adopted methodology. In all the past cases, there was no suggestion that the dissenters would not be promptly paid in full;

(f) in these circumstances it lay well within the remit of this Court's case management discretion to rely on credible factual evidence and build on the judicial experience and findings made in previous cases without expert evidence;

(g) the relevant exercise of discretion was also informed by the legal policy expressed in section 238 as a whole and the letter and/or spirit of corresponding fundamental fair hearing and property rights;

(h) it mattered not that in a different factual and legal context (e.g. in the typical well-resourced and heavily contested section 238 proceeding), expert evidence might well have been ordered to assist the Court to resolve disputes as to the appropriate fair rate of interest.

70. In the result, I found that the Prudential Investor Rate in this case should be 8.43% as the Dissenter contended. According to the Dissenter's evidence and submissions, their Prudent Investor Rate was calculated using the same ETFs as were approved by the Court in *iKang,* even though the 2024 Thinking Ahead Report suggests a higher (and more favourable) weighting for equities. Moreover, in the draft Second Affirmation of Ka Wai Cheung, it was averred:

> "*21. Waterwood has relied upon the same underlying data sources for the ETFs listed above, and as adopted by the Court in iKang, varying only the relevant period over which these returns have been assumed, so as to include data spanning the interest period in this case. I note that the interest period in iKang covers the majority of the interest period in this case, and therefore the data sources for the ETFs in iKang are appropriate to rely on for the purposes of the Prudent Investor Rate assessment in this case.*" [Emphasis added]

71. Because of this distinctive approach, a comparison with rates in other cases is not that meaningful, even though it is implicitly considered in the context of comparing the final fair rate of interest results below. However, while preparing the present Reasons (after the Order had effectively been made but before it was perfected, I discovered that the Dissenter had not directly indicated what the implied Prudential Investor Rate in *iKang* had been, and explained how (if at all) its entirely proper extension of the interest period made the rate it contended for here different to that in *iKang*. I accordingly requested that this matter be addressed in the final Second Affirmation before it was filed, appreciating that it seemed clear from the *iKang* Judgment that different interest period applied to different dissenters so that no simple correspondence might be justified.

72. I considered the Second Affirmation dated 26 February 2025 before perfecting the final Order and the following averments satisfied me that, in broadbrush terms, the rate contended for in this case was not to any material extent out of line with the rate (s) approved in *iKang*, the methodology of which had been followed:

> "*23. As compared to the Prudent Investor Rate implicit in the Court's findings in iKang (7.62% over the longest period considered in that case of 25 January 2019 to 21 February 2024), the Prudent Investor Rate in this case is slightly higher (8.43 %). Waterwood has been advised that it is due to the relatively stronger returns on the underlying ETF over the period 22 February 2024 to 12 December 2024. This is demonstrated in the Indexed Market Movement Chart (at page 116), which shows the market movements over the period from 29 September 2017 until 12 December 2024, which subsumes the relevant period in iKang. As can be seen from this Chart. The returns on the weighted average of the ETF (45% equities, 45 % bonds and 10%) increase after the end of the iKang period resulting in a slightly higher Prudential Investor Rate in this case.*"

73. This evidence provided a clear and principled basis for accepting the rate the Dissenter contended for, based on the approach adopted in another fully contested case covering a largely similar time period.

74. Another minor wrinkle encountered on the way to this conclusion was that the Exhibit to the Second Affirmation was not translated from the Chinese original to English. I assumed that a translation existed but was told that an official translation would take weeks (and I inferred significant costs) to prepare because of the length of the document. In the exercise of my discretion I determined that I would rely on the sole page the Affiant expressly relied upon, the Chart which did not require translation. However, I insisted that an intelligible version of the Chart be provided, because from the black and white version of what appeared to me to be an original which was exhibited it was impossible to discern, as opposed to speculating, what line in the chart represented what ETF element. It mattered not that what the Chart portrayed might well be as 'plain as a pikestaff' to investment *aficionados*. On 4 March 2025 I requested a colour version of the Chart (which I received on 12 March 2025) and which supported the averments made in paragraph 23 of the Second Affirmation of Ka Wai Cheung in a way which I was able to comprehend. Albeit that the Chart covered the period 29 September 2017 until 12 December 2024 (omitting the final 7 or so weeks of the period), the weighted average for the majority of the post-*iKang* period rose sharply from roughly 115 on the index to nearly 160.

The fair rate of interest and the interest period

75. I had no difficulty in accepting that, consistent with the previous recent authorities, the fair rate of interest should be the mid-point between the Company Borrowing Rate (4.35 %) and the Prudential Investor Rate (8.43%), which was 6.39 %. Again, as an admittedly simple cross-check or 'reality check', this outcome is far from eyebrow-raising compared with fair rate of interest findings of 4.95% in Integra (2015), 4.295% in Shanda Games (2017), and rates (for various dissenters and various interest periods) ranging between 6.7% and 7.19% in Trina Solar (2021). It is unclear from the Judgment alone precisely what fair rates of interest were actually approved in Qunar. The same applies to *iKang* where (1) matters of higher principle were in dispute, (2) further calculations were directed to be carried by the experts after the judgment and (3) there were varying interest periods based on different payment dates.

76. However, the Dissenter's evidence in the present case, which I saw no reason to reject, suggested that the most relevant rate approved in *the iKang* case was 7.62%.

Costs: legal principles governing indemnity costs

77. The following provisions of the GCR contain the uncontroversial governing principles in relation to the award of costs both generally and indemnity costs in particular. GCR Order 62 rule 4 pertinently provides:

> "*(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by successful party in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court….*
>
> *(5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs…*
>
> *(11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.*"

78. In short, there is a starting assumption that a successful party will be awarded their costs to be taxed on the standard basis. Where one party has clearly succeeded overall, it is for their opponent to displace the starting assumption that costs follow the event. Where the receiving party seeks costs to be taxed on the indemnity basis, it is for them to show that the paying party has conducted the proceedings or any part of it in an exceptional and inappropriate manner.

79. The Dissenter's counsel submitted in the latter regard:

> "*46. In the context of s.238, the principles that guide the Court's discretion to award costs on an indemnity basis were summarised recently and succinctly in Re FGL Holdings (unreported, 19 April 2023, Parker J):*
>
> *'94. The law in relation to indemnity costs can be shortly stated.*

95. GCR O.62, r.4(11) provides that the Court may order indemnity costs if it is satisfied that the paying party has conducted the proceedings 'improperly, unreasonably or negligently'.

96. The principles to be considered by the Court in the exercise of its discretion can be summarised as follows (Talent Business Inv v China Yinmore Sugar Co [2015 (2) CILR 113] [35]–[41]):

a) The Court should primarily focus on the unsuccessful party's conduct, not the merits of its position. (Ahmad Hamad Algosaibi & Bros. Co. v. Saad Invs. Co. Ltd [2012 (2) CILR 1] at [11]–[12])

b) It is an exceptional order: 'the discretion [to award costs on the indemnity basis] is to be exercised only in the most exceptional cases' because awarding costs on the indemnity basis is 'a punitive measure of taxation'. (Ibid at [9] and Headnote, Para 1)

c) There should normally be an element in the unsuccessful party's conduct which deserved a mark of disapproval — "[t]hat conduct would need to be unreasonable to a high degree". (Ibid at Headnote, Para 1) d) Pursuing a novel claim, even one unlikely to succeed, does not itself justify the award of costs on the indemnity basis, unless the claim was advanced improperly, unreasonably or negligently. (Sagicor General Insurance (Cayman) Limited v Crawford Adjustors (Cayman) Limited [2011 (2) CILR 471] at [25]–[26])

97. It is not appropriate to award costs on the indemnity basis if the plaintiff's case is merely weak or unlikely to succeed. To be awarded indemnity costs, the paying party's case must have been 'manifestly hopeless' to the extent that it was

unreasonable to maintain the claim, and this assessment must be made without the benefit of hindsight (Bennett v Attorney General [2010 (1) CILR 478] at [6]–[9] See also Ritter v Butterfield [2018 (2) CILR 638] at [36] [38])."

Costs: merits of Dissenter's application

Overview

80. The merits of the application for costs of the proceedings overall, on the basis that the Dissenter had achieved substantial success, were clear beyond sensible argument. The Company had offered to pay the Dissenter "*a total of US$42 million in return for shares purchased for US$125 million*" (Judgment, paragraph 3). The fair value of the Dissenter's shares was valued at US$318.69 million.

81. The merits of the application for such costs to be taxed if not agreed on the indemnity basis appeared at first blush to be straightforward as far as the costs up to the stage of the proceedings when the case advanced on an unopposed basis. At that stage, it could not fairly be contended that the Company's conduct was objectionable in the requisite sense. However, Ms Sbaiti argued near the end of her Written Submissions as follows:

> "*55. … While the Company's non-attendance at trial has no doubt shortened the time that would otherwise have been required for that hearing, that saving simply reflects the fact that the whole process could have been dealt with quickly and economically had the Company co-operated at the outset*."

The Dissenter's case for indemnity costs

82. The Dissenter characterised the Company's conduct as "*wholly cynical*" overall. The following factors were relied upon:

(a) the Company failed to present its Petition within the time prescribed by section 238 (9), until pressed by the Dissenter filing its own Petition into doing so;

(b) the Company from as early as January 2018 had to be pressed into agreeing directions and complying with its discovery obligations;

(c) Doyle J's Interim Payment Order dated 2 June 2023 requiring the Company to pay US$35.7 million plus interest at the rate of 2.375% (from 29 September 2017 until payment) by 16 June 2023 was not complied with. The Company's attorneys ceased on act on 15 June 2023;

(d) on 28 August 2023, Doyle J awarded indemnity costs against the Company in relation to the Interim Payment Application;

(e) at paragraph 10 of my Reasons delivered on 9 January 2024 for the Case Management Order dated 23 November 2023, I inferred that the Company's stated inability to afford lawyers was because its controllers had deliberately withdrawn funding from it;

(f) the Company's failure to disclose the 'Operational Data' deprived the Court of the benefit of the Dissenter's Expert's evaluation of data relevant to the question of fair value; and

(g) the Company's failure to participate in the proceedings deprived the Court of the ability to evaluate the Company's evidence of the merger process, which is "*the ordinary course*".

83. I provisionally assessed the merits of these complaints individually as follows:

(a) in and of itself, the Company's undoubted failure to comply with its mandatory obligation to file a petition within the time specified by subsection (9) as read with subsection (8) of section 238 was improper, but the impropriety only obviously impacted on the early part of the proceedings and was cured when the two Petitions were consolidated om 5 September 2018;

(b) at first blush, mere delay in progressing an action or complying with discovery obligations not resulting in interlocutory indemnity costs orders is not an obvious basis for concluding that an indemnity costs award is merited;

(c) non-compliance with an interim costs order is inherently improper litigation conduct;

(d) the fact that indemnity costs have already been awarded in respect one part of a proceeding is not necessarily probative of improper or unreasonable conduct in the action overall;

(e) if the Company's controllers had deliberately decided to cease contesting the proceedings while failing to make any payments to the Dissenter, that would be obviously improper having regard to the character of the section 238 scheme. Careful analysis would be required of when such intention was formed and how it impacted on the proceedings as a whole;

(f) the Court had dealt with the Operational Data issue at the interlocutory stage and not made any indemnity costs orders. However, bearing in mind how long discovery issues were in play, the fact that (as recorded in paragraph 58 of the Judgment) the Company substantially failed to comply with the Specific Discovery Order made on 14 March 2023 was obviously inherently improper. Less clear was the impact of this conduct on the proceedings as a whole; and

(g) the complaint that, in effect, the Company's absence from the litigation stage had diverted the proceedings from their ordinary course seemed at first blush to be a somewhat innocuous complaint. On reflection however, it was a potentially pivotal point which highlighted the need to carefully analyse the implications of the unprecedented way in which the Company had conducted its case overall.

84. On further analysis, my findings on the merits of the complaints viewed individually were as follows:

(a) the Company's non-compliance with the statutory time requirements for filing its Petition, viewed with the benefit of hindsight, suggests a lack of enthusiasm about complying with the section 238 scheme from the outset;

(b) I did not accept that the correspondence relied upon demonstrates any material delay on the Company's part in agreeing directions. The Company did have to be pressed over discovery between 2018 and 2019, but this in my experience is a common feature of section 238 cases. My 15 March 2021 Specific Discovery Order reserved the costs of that application. On 14 March 2023, I awarded those costs to the Dissenter on the standard basis, awarded the Company the costs of the Forensic Audit application and ordered the Company to pay the costs of the Operational Data issue up to 9 December

2022 (when it made a reasonable compromise offer) on the indemnity basis. The Company's compliance with its discovery obligations has accordingly already been evaluated for costs purposes;

(c) an award of costs taxable on the indemnity basis has already been granted by Doyle J in respect of the failure to comply with the Interim Payment Order. This speaks for itself as an indicator of improper conduct;

(d) the latter impropriety has a significant continuing effect to it, viewed in light of the legal policy embedded in the statutory scheme, which is considered further below;

(e) there is no sufficient basis for inferring that the Company's controllers intended from the outset not to actively participate in the proceedings. One potential counter-indication is that the Company's attorneys, Maples and Calder, rejected an invitation to make a voluntary interim payment by inviting the Dissenter to make a formal application by letter dated 14 February 2018. Admittedly, at that early stage, the Dissenter had not had discovery and was most likely unable to make a cogent interim payment application. But it is still unclear what commercial or strategic benefit the Company obtained by continuing to actively participate in the proceedings for 5 years before, as it were, abandoning ship;

(f) although the Court had already dealt with the costs of the Operational Data issue, how that improper conduct impacts on the costs of the proceedings as a whole falls to be considered in the context of a legal analysis of the Company's litigation obligations under section 238 of the Act; and

(g) there was an overarching basis for viewing the Company's conduct of the proceedings as a whole as clearly deserving of a penal costs order. In my 9 January 2024 Reasons for the Case Management Order dated 23 November 2023 directing the continuance of the proceedings on an unopposed basis, I had already held:

> "*3. A fundamental assumption underpinning this statutory regime is that where the claims of dissenting shareholders are not compromised, the petitioner will make appropriate financial provision to both fund any appraisal litigation and meet any award which the dissenter may achieve…*

> *10. I considered these directions to be reasonable to approve in circumstances where it was appropriate to infer that the Company's controllers had deliberately elected to withdraw funding support which would have enabled the Company to continue to actively participate in these proceedings and discharge both its obligations to the Dissenter under section 238 of the Companies Act and its obligation under the Preamble to the Grand Court Rules to assist the Court to achieve the Overriding Objective.*"

85. Only brief elaboration is required as to why it is fundamental to the statutory regime that the company which has acquired the dissenter's shares should, where fair value is litigated, retain sufficient funds to finance such litigation and, more importantly still, meet whatever award may be made. Section 233 ("*Merger and consolidation*") implicitly entitles a company to acquire shareholder's shares in a merger or consolidation, without their consent, provided the transaction is approved by a special resolution of shareholders. Section 238 qualifies the right of a company to compulsorily acquire a dissenter's shares by conferring a guarantee that the dissenter receives the fair value for their shares. It suffices to set out subsection (1):

> "*(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.*"

86. Section 233 (9) (c) also requires a director to make a declaration of, *inter alia*, solvency and verify a statement of assets and liabilities to the Registrar as part of the statutory process of implementing a merger or consolidation. In particular, a director must declare "*that the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the constituent companies*". Section 238, which gives effect to constitutionally entrenched protections for property rights, would be rendered nugatory if the merging company was not obliged to make appropriate provision for meeting a dissenter's statutory rights. Even if dissenters are members with rights limited to enforcing their fair value entitlement and not creditors in any sense (which I doubt), section 233 (9) (b) requires "*a director's declaration that the constituent company is, and the consolidated or surviving company will be, immediately after merger or consolidation, able to pay its debts as they fall due*". That can only sensibly be understood to include a judgment debt obtained pursuant to section 238.

87. It is also noteworthy that section 238 preserves for the dissenting member the following additional residual rights:

> "*(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.*" [Emphasis added]

88. There might well be cases on the margins where a merging company misjudges how generous a fair value appraisal may be. But it is difficult to think of a more egregious violation of the statutory scheme than conduct of the Company in the present case, which in effect amounts to the Company telling the sole Dissenter: '*if you disagree with our assessment of what fair value is, you will get nothing at all.*" In making my 23 November 2023 Case Management Ruling, I assumed in the Company's favour that it had the resources to instruct lawyers and that its controllers had deliberately withheld funding. The position would of course be far worse if in fact the Company failed to make any provision to meet the Dissenter's claim and was litigating whilst insolvent. Then, the legality of the Merger itself would be subject to potential challenge.

89. The Transcript of the hearing of the Interim Costs application records the Dissenter's Leading Counsel complaining of the Company failing to respond to various requests for confirmation that it had sufficient resources to meet any judgment ultimately made. The Company's response dated 14 February 2023 to the most recent Dissenter request (dated 1 February 2023) included the following pertinent response:

> "*Respectfully, there is no obligation on the Company to provide the information sought absent a Court order, and we have no instructions to do so. Of course, the Company will comply with any order of the Court. If you do intend on making any application in this respect, please notify us accordingly.*"

90. This was an express representation that the Company was able to comply with any interim payment order which might be made. By letter dated 23 February 2023, the Dissenter reiterated concerns about the Company's ability to meet any judgment based on news reports about, *inter alia*, a change of name. However, the Company was also quoted (Transcript, page 25) as ultimately responding shortly before the 5 May 2023 hearing in the following terms to the Dissenter's indication that it would apply for an interim payment order:

> "*As you know, the company intends to oppose the application in full. If contrary to the company's opposition, an interim payment is ordered. The company has a genuine and*

> *well-founded concern that the dissenter will not be in a position to be paid or will refuse to be paid any excessive components of the interim payment (Inaudible). The hearing of the application, the company intends to invite the court to order that any interim payment not be paid directly to the dissenter. Instead, the company would invite the court that any interim payment be paid into court. Alternatively be paid into OGA's interest bearing trust account, pending the outcome of trial. (Several inaudible words) will not be paid out (Several inaudible words) confirm whether the dissenter is prepared with such an order*."

91. This was a further and more explicit representation that the Company had the means to meet any interim payment order, albeit expressed in terms conveying great confidence that it would be found entitled to recover some of any such payment at the end of the trial. The repayment by the Dissenter concern was reiterated by Mr Imrie KC in oral argument (Transcript, page 164):

> "*…they are not entitled to ask the Court to draw an adverse inference from the Company's failure to volunteer and provide information about its financial position. The credit risk is all in relation to overpayment to the Dissenter. That's the test that's been applied in Ehi and in the other cases. Our position on this is set out in some detail at paragraphs 33 to 35 of our skeleton.*"

92. The Company's position primarily was that no interim payment was required at such a late stage of the proceedings in the absence of positive evidence of any prejudice to the Dissenter, and that any payment ordered should be far lower than that sought by the Dissenter. Adopting a balanced approach Doyle J found that the concerns of both the Dissenter and the Company about payment and a risk of overpayment were justified and ordered that the interim payment should be paid into an Ogier account. This reflected an assumption that there was no doubt about the Company's ability to pay the sum ordered, which was $37.5 million on the hypothesis that there would be a minority discount of 15%. Accordingly, the Interim Payment Order was for an amount less that the fair value offer the Company itself had made after the Merger. This was patently within the range the Company ought reasonably to have expected. Payment was ordered within 21 days, and I can discern no complaint by the Company that it needed further time.

93. It is unsurprising that when Doyle J learned at the costs stage that the eminently fair Interim Payment Order had not been paid and that the Company's lawyers had ceased to act, the

Learned Judge appears to have been somewhat enraged. He concluded (at paragraph 8) of his Costs Judgment, not that the Company was unable to comply with the Order, but rather:

> "*It would appear, in the absence of any explanation for non-payment, that the Company never had any intention of paying an interim payment if ordered to do so.*"

94. Certainly, the post-judgment developments fully vindicated his findings that the Dissenter's concerns of a risk of non-payment were justified. I drew the same inference, because a clearer factual foundation would be required to infer that the Company misled the Court in the far more serious way of falsely representing that there was no risk of it being unable to pay any interim payment order or final award after a trial when in truth it was insolvent and unable to even retain counsel for a trial. A rational litigant, advancing a meritorious case but faced with unforeseen stormy financial seas, would be expected to do something to preserve its commercially valuable defence, rather than scuttling its litigation vessel altogether. This suggests the Company's case on the merits was more bluster and bravado than real.

95. The Company's actual capacity to pay lies beyond the scope of the present inquiry. It was not necessary to record findings as to the Company's real motives to firmly conclude in the context of a costs application that, viewed in light of the final denouement, the present proceedings as a whole were conducted by the Company in a manifestly unreasonable manner.

96. The final outcome is that:

(a) the Dissenter has obtained a fair value appraisal far in excess of what the Company offered and is bereft of the security for meeting that judgment which the Interim Payment Order was designed to provide; and

(b) the integrity of the statutory scheme has been undermined through the Company's substantial non-compliance with its obligations to the Court under section 238 of the Act to enable a well-informed appraisal to take place. The integrity of the existing statutory framework might well require consideration of what tweaks to the substantive statutory provisions and/or supporting Rules of Court may be required to reduce the risk of similar abuses in future cases.

97. This improper and/or unreasonable conduct, despite occurring (or manifesting itself) at a late stage of the proceedings, in my judgment infected the proceedings as a whole and justified a general award of costs to be taxed if not agreed on the indemnity basis.

Conclusion

98. For these reasons, on 5 February 2025, the Dissenter was awarded pre-judgment interest from 29 September 2017 (the date of the Company's fair value) until 5 February 2025 at the rate of 6.39 % and interest thereafter at the statutory rate of 2.375% on the Judgment debt of US$318,690,000. The Dissenter was also awarded the costs of the Petition to be taxed if not agreed on the indemnity basis.

99. Having regard to how shabbily the Company has conducted the present proceedings, the reasonable and restrained way in which the Dissenter and its counsel approached the unopposed interest application can only be commended. The Dissenter and its attorneys are, surely, deserving of a section 238 'fair play' award.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT