IN THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 92 OF 2017 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF TRINA SOLAR LIMITED

IN OPEN COURT

Appearances:	Mr Philip Jones QC instructed by Nick Hoffman, Katie Pearson and Mark Burrows of Harney Westwood & Riegels for the Company
	Mr Simon Salzedo QC instructed by Rupert Bell, Niall Hanna and Patrick McConvey of Walkers on behalf of the Dissenting Shareholders
Before:	**The Hon. Mr Justice Segal**
Heard:	**6-10, 13-17, 21 May and 5-7 June 2019**
Further hearing:	**6-7 April 2020**
Draft judgment circulated:	**10 September 2020**
Judgment delivered:	**23 September 2020**

JUDGMENT

Introduction

1. This is my judgment following the trial of the petition dated 9 May 2017 (the ***Petition***) presented by Trina Solar Limited (the ***Company***) seeking a determination by the Court of the fair value of the shares of certain former shareholders (together with a fair rate of interest).

2. The Company is a Cayman Islands exempted limited company. There are two segments to its business, namely the upstream and downstream segments. In its upstream business, the Company manufactures and sells solar photovoltaic (***PV***) modules (also known as solar panels) for

residential and commercial use. In its downstream business, the Company develops, designs, manages, and sells or operates solar power projects.

3. In 2016, the Company was acquired by a group of investors (the ***Buyer Group***) which included Mr Jifan Gao (***Mr Gao***), the Company's chairman and chief executive officer. The acquisition was effected by a merger pursuant to section 238 of the Companies Law (2016 Revision) (the ***Companies Law***). On 16 December 2016 (the ***Valuation Date***), at an extraordinary general meeting (the ***EGM***), the Company's shareholders approved a merger between the Company and Fortune Solar Limited, a company indirectly owned by the Buyer Group, and the merger was completed on 13 March 2017. The price agreed between the Company and the Buyer Group was US$11.60 for each of the Company's American Depositary Shares (***ADS***), which was equivalent to US$0.232 per ordinary share (the ***Merger Price***).

4. Two shareholders dissented from the merger. They are Maso Capital Investments Limited and Blackwell Partners LLC – Series A (the ***Dissenting Shareholders***). The Dissenting Shareholders did not accept the Merger Price and instead invoked their right to receive the fair value of their shares as determined by the Court in accordance with section 238 of the Companies Law. Accordingly, the Company presented the Petition pursuant to section 238 (9) of the Companies Law.

5. The Petition was heard between 6 and 21 May 2019. Mr Philip Jones QC appeared on behalf of the Company and Mr Simon Salzedo QC appeared on behalf of the Dissenting Shareholders. I must acknowledge my gratitude to both Mr Jones QC and Mr Salzedo QC for their excellent assistance (their submissions were made with a congenial and impressive combination of rigour and courtesy). Written closing submissions were filed on 2 June 2019. The Company's written closing submissions were 224 pages long while the Dissenting Shareholders closing submissions were 283 pages long. A further hearing, to allow those submissions to be made orally was then held on 5-7 June 2019. I would note that the length of the closing submissions demonstrates the large number, range and complexity of the issues in dispute and that the debates on such issues frequently involved a detailed review of the lengthy analyses produced by and the substantial volume of data relied on by the experts. This plenitude of issues and material has contributed to the excessive length of this judgment, which I regret, since I have felt the need to at least summarise the main lines of the arguments made by counsel and the reasoning of the experts in order to be able to explain my own thinking and decisions. For the future, I consider that it might

be beneficial for the parties to agree or accept page limits for closing submissions and to seek to narrow the number of issues in dispute where possible.

6. On 12 March 2019, the Judicial Committee of the Privy Council (***Privy Council***) had heard an appeal from the judgment of the Cayman Islands Court of Appeal in *Shanda Games Limited v Maso Capital Investments Limited and others* [2018] 1 CILR 352 (***Shanda CICA***). That appeal involved important issues relating to the section 238 jurisdiction. As a result, and on the basis that since the appeal had been heard some two months before the trial of the Petition it was hoped that the advice of the Privy Council would be delivered within a few months of the trial, both the Company and the Dissenting Shareholders requested and I agreed that judgment in these proceedings be delayed until after the Privy Council's advice had been delivered and the parties had been given an opportunity to make further submissions by reference to it. In the event the Privy Council's advice was only promulgated on 27 January 2020 (the ***JCPC Shanda Advice***), some ten months after the *Shanda Games* appeal and seven months after the trial of the Petition (see [2020] UKPC 2).

7. Following the promulgation of the JCPC Shanda Advice, I gave directions for the filing of further written submissions. The Dissenting Shareholders filed further written submissions on 9 March 2020 and the Company filed further written submissions in reply on 23 March 2020. The Dissenting Shareholders also filed a Speaking Note on 5 April 2020. A further hearing was held on 6 and 7 April 2020 to allow oral submissions to be made on the impact of the JCPC Shanda Advice on the section 238 jurisdiction and the parties' submission in this case.

8. My decision can be summarised as follows (using the terms defined later in this judgment):

   (a). I reject the Company's argument that the JCPC Shanda Advice has established a legal rule governing and applicable to all section 238 cases to the effect that the Court must determine fair value by reference to the price at which the relevant shares would be exchanged between a willing buyer and a willing seller in an arm's length transaction based only on publicly available information. I also reject the Company's submission that the Court must only rely on publically available information in determining fair value.

   (b). the Court must assess and determine a monetary amount which in the circumstances represents (its best estimate of) the worth, the true worth, of the dissenting shareholder's shares (true worth meaning the actual value to the shareholder of the financial benefits

derived and available to him from his shares and by being a shareholder). The reference to fair requires that the manner and method of that assessment and determination is fair to the dissenting shareholder by ensuring that all relevant facts and matters are considered and that the sum selected properly reflects the true monetary worth to the shareholder of what he has lost, undistorted by the limitations and flaws of particular valuation methodologies and fairly balancing, where appropriate, the competing, reasonably reliable alternative approaches to valuation relied on by the parties.

(c). the selection of which valuation method to use – alone or in combination with others – is a fact sensitive issue so that in some cases it will be appropriate to give particular weight to market based indicia of value and use a discounted cash flow (***DCF***) valuation as a means of testing those other valuation methodologies.

(d). in the present case I consider, accepting the main elements of the opinion of the Company's valuation expert, Ms Susan Glass (***Ms Glass***) that it is appropriate to give weight to each of the three valuation methodologies referred to and relied on by the experts, namely the Merger Price, the unaffected or adjusted market price and the DCF valuation, prepared with the inputs and otherwise in accordance with the approach I describe below. I therefore reject the Dissenting Shareholders' submission that the fair value determination should be based exclusively on the DCF valuation. Ms Glass considered that the proper weighting should be 40% in respect of the Merger Price, 40% in respect of the adjusted market price and 20% in respect of the DCF valuation. I make a modest adjustment to these weightings and attribute 45% to the Merger Price, 30% to the adjusted market price and 25% to the DCF valuation.

(e). I consider that there has been an unfortunate failure to coordinate the expert evidence to be given by the industry experts and the valuers. The industry experts were supposed to opine on matters relevant to fair value. The valuers were supposed to opine upon fair value. The industry experts were to provide input for use by the valuers on issues that required special expertise concerning the solar energy industry. I anticipated that the industry experts would focus on industry level issues and provide opinions in general terms on how the Company's business and performance would be affected thereby. But the approach I would have expected to be followed was not taken. In these circumstances, I regard both Ms Glass' approach and that of the Dissenting Shareholders' expert, Mr Richard Edwards (***Mr Edwards***), to have been reasonable and I consider that I should consider the evidence

and opinion of each expert on each issue in dispute and then form a view as to whether to accept the forecast and figures in the Management Projections or adjust them in accordance with the views of one or more of the experts. I do not, in the circumstances, accept the Company's criticism of Mr. Edwards' approach although I do consider that as a valuation expert he could legitimately have offered a view and prepared his own valuation based on the materials put in evidence, as Ms Glass has done.

(f). as regards the disputes between the industry experts, I have generally found that the forecasts in the Management Projections have not been shown to be unreasonable or unreliable and therefore that they should be accepted. On the various points in issue I conclude as follows (points (i) – (vi) relate to the Company's upstream segment and points (vii) and (viii) relate to the downstream segment):

(i). there is an insufficient basis to disturb or change the market size forecast in the Management Projections.

(ii). I reject the Dissenting Shareholders' submission that their industry expert, Mr Christopher Russo (***Mr Russo***), was justified in using the figure of 9,000 MW for PV module sales in 2017. For the reasons given by Ms Glass and the Company's industry expert, Dr Shalom Goffri (***Dr Goffri***), I prefer the market share forecasts in the Management Projections.

(iii). I consider that the forecasts for PV module selling prices in the Management Projections have not been shown to be in error and therefore should be accepted.

(iv). the R&D expense projection in the Management Projections of 2% of upstream revenue has not been shown to be unreasonable.

(v). the Capex forecast in the Management Projections should be accepted, subject to making the adjustments proposed by Mr Edwards to adjust down the growth Capex.

(vi). I accept the depreciation estimates in the Management Projections.

(vii). the forecast in the Management Projections for the downstream segment's power sales should be accepted.

(viii). the forecast in the Management Projections for the downstream segment's project sales should be accepted.

(g). as regards the valuation issues in dispute:

(i). I find Ms Glass' criticisms of Mr Edwards' approach convincing. In my view, Mr Edwards's calculation of a separate weighted average cost of capital (***WACC***) for the downstream segment introduces an increased level of uncertainty and speculation and that the consolidated WACC for the whole of the Company's business is more reliable and is to be preferred.

(ii). as regards the market risk premium (***MRP***), I conclude that the use of both the arithmetic and geometric mean is acceptable and the overall assessments of the MRP by both Ms Glass and Mr. Edwards are cogent, well supported by reference to reliable third party sources and reasonable. I consider that the right result is to split the difference between Ms Glass' and Mr. Edwards' estimate and adopt a MRP of 5.5%.

(iii). as regards the risk-free rate, I consider that the approaches of both Ms Glass and Mr Edwards are reasonable and that I should recognise this by splitting the difference between their estimates. I therefore adopt a risk-free rate of 2.75%.

(iv). as regards the country risk premium (***CRP***), I decide that Ms Glass' approach is to be preferred but the source data used by Mr Edwards should be used. Accordingly, the average country risk rating for China as set out in Professor Damodaran's 31 January 2017 edition is to be used without any discount.

(v). a size premium of 2.04% is to be used.

(vi). I prefer Ms Glass' approach to calculating beta so that no Blume or Vašíček adjustment is to be applied and there should be a balancing of the two and five year betas by taking an average of the two.

(vii). as regards the cost of debt, I once again prefer Ms Glass' approach. She calculated a figure of 5.5% (4.6% after tax) to be applied to the Company as a whole.

(viii). Ms Glass' terminal cash flow of US$279.2 million and terminal growth rate of 3.5% are to be preferred and applied.

(ix). as a result, the DCF valuation is to be calculated based on the Management Projections but subject to the adjustments I have set out above. I do not consider that Mr Edwards' forecasts in RE-Mgmt, RE-Russo or RE-Goffri are reasonable or reliable and should not be used (as defined below).

(h). as regards the application of a minority discount, I find that a discount of 2% should be applied (on the basis of Mr Edwards' opinion, which I prefer).

(i). in these circumstances, I would invite the parties and the valuation experts to seek to agree the revised DCF valuation and the fair value of the Dissenting Shareholders' ADS based on my conclusions. If there are further issues or disputes that result, I shall deal with them and would hope that they can be disposed of rapidly on the papers.

The evidence

The Directions Order

9. On 15 November 2017, I gave directions (the ***Directions Order***) in relation to the conduct of the Petition. These directions included a direction (a) requiring the Company to set up an electronic data room and to upload thereto "*all documents (of whatsoever description, whether electronic, hard copy or in any other format) and communications (whether by email or otherwise) and other materials which are or have been in [the Company's] possession, custody or power and which are relevant to the determination of the fair value of the shares in the [Company] as at the Valuation Date*" (as well as certain categories of documents); (b) relating to the filing of evidence by witnesses of fact; and (c) giving permission for the filing of three types of expert evidence, namely industry experts, valuation experts and Delaware law experts:

(a). the Company and the Dissenting Shareholders had sought, and I granted, permission to adduce evidence from witnesses with particular expertise in the solar energy industry in addition to the usual valuation experts. The Company and the Dissenting Shareholders were each given permission to adduce evidence from such an expert to opine on:

"the matters relevant to the fair value of the [Company] as at the Valuation Date including:

a. The macro-economic climate facing the solar energy industry;
b. The competitive environment in the solar energy market;
c Emerging markets as opportunities and as competitors;
d The regulatory environment in which the solar energy industry operates including but not limited to government incentives, national and international sanctions, tariffs;
e. The factors determining a company's market position;
f Current and predicted trends in technology;
g Production costs and trends;
h. The availability and costs of financing;
i. Changes and developments in the foregoing matters over the 5 years prior to the Valuation Date;
j Expected changes and developments in the foregoing matters over the 5 years forward from the Valuation Date;
k The impact of these factors upon the ability of solar energy companies in the PRC to attract investment; and
l Any particular factors affecting the [Company] in relation to the matters referred to above."

(b). the Company and the Dissenting Shareholders were also each given leave "*to instruct an expert witness in the field of valuation in order to opine upon the fair value of the shares in the Company as a going concern as at the Valuation Date.*"

(c). since it was my experience in other section 238 cases that parties made submissions by reference to Delaware law but did so only by way of the written and oral submissions of Leading Counsel and the Cayman attorneys appearing in the proceedings, I indicated that I wished to have authoritative statements of the propositions of and position under Delaware law relied on and therefore that (even though there were no issues of Delaware law directly in issue) Delaware law experts would need to be instructed if reliance was going to be placed in this case on Delaware law. The parties indicated that they would wish to do so and so I gave permission for the Company and the Dissenting Shareholders to each instruct a Delaware law expert.

The factual witnesses

10. The Company adduced evidence from two factual witnesses: Mr Qian Zhao (***Mr Zhao***) and Mr Shuion Chan (***Mr Chan***).

11. Mr Zhao was a director of the Company from 18 May 2007 until 13 March 2017. He was one of two directors appointed to a special committee of the board (the ***Special Committee***) whose function was to evaluate the merger proposal. His evidence for trial was contained in his First (and only) Affidavit sworn on 22 March 2018 (***Zhao 1***). Mr Chan has been the Vice President of Legal Affairs of the Company since January 2008, is a Hong Kong qualified solicitor and was involved in the conduct of these proceedings on the Company's behalf (including the process of documentary discovery). His evidence for trial was contained in his Fifth Affidavit sworn on 23 July 2018.

The experts

12. As regards the industry experts, the Company appointed Dr Goffri of Navigant. He produced an expert report dated 25 October 2018 (***Goffri 1***) and a supplemental expert report dated 7 January 2019 (***Goffri 2***). Dr Goffri is an Associate Director in Navigant's Energy Practice. He was formerly a professional researcher at the University of Cambridge, UK and the Massachusetts Institute of Technology and has over 10 years of experience across a wide range of power and renewables technology evaluation, project evaluation, adoption studies, due diligence, end user energy strategy, and M&A support. The Dissenting Shareholders appointed Mr Russo of Charles River Associates. He also produced an expert report dated 25 October 2018 (***Russo 1***) and a supplemental expert report dated 7 January 2019 (***Russo 2***). Mr Russo is a Vice President and the head of the Energy Practice at Charles River Associates and holds a BS in Mechanical Engineering from Tufts University and a MS in technology and policy from the Massachusetts Institute of Technology. He focuses on energy and has more than twenty years of professional experience as an energy economist in the electricity sector. After his academic training, he held an academic appointment as a Visiting Scientist at the MIT Energy Laboratory. Since the beginning his career as a power plant engineer, his academic and professional career has been focused on the economic analysis of electricity markets. Dr Goffri and Mr Russo also agreed a joint memorandum dated 11 December 2018. I comment in detail later in this judgment on the reliability and credibility of Dr Goffri and Mr Russo by reference to their evidence on particular issues. But at this stage I would say this. I found both Dr Goffri and Mr Russo to be extremely knowledgeable with extensive expertise in the solar energy field. Dr Goffri struggled at times during his cross-examination, particularly in the early stages (but I put most of this down to inexperience rather than weaknesses in his knowledge). His written reports were clear and cogent but a little light on detail. Mr Russo gave his evidence in a clear and careful manner and his written reports were detailed and thorough. He demonstrated a mastery of the evidence and issues

and that he had considered carefully the various issues raised about his reports by both Dr Goffri and Ms Glass. But I found Mr Russo's evidence generally to be overly optimistic and formed the view that he was not prepared to take a balanced view when the evidence suggested that this was needed.

13. As regards the valuation experts, the Company appointed Ms Glass of KPMG LLP. She produced an expert report dated 14 February 2019 (***Glass 1***) and a supplemental expert report dated 9 April 2019 (***Glass 2***). Ms Glass is the National Leader of KPMG's Valuation Practice in Canada, and the former Chair of the Board of KPMG. She has 40 years of professional experience, having held both business and academic roles. For the past 25 years, she has specialised in business valuations, damage quantifications and financial modelling, and has appeared as an expert witness before various courts (including this Court). Approximately one-third of her practice involves valuations and other analyses prepared for litigation purposes. The remainder involves valuations prepared for matters unrelated to litigation, including fairness opinions, solvency opinions, securities law, financings, merger and acquisition transactions, restructurings, income tax reorganizations, financial reporting and regulatory matters. She has considerable valuation experience relating to renewable energy projects. The Dissenting Shareholders appointed Mr Edwards of FTI Consulting LLP. He produced an expert report dated 14 February 2019 (***Edwards 1***) and a supplemental expert report dated 9 April 2019 (***Edwards 2***). Mr Edwards is a Senior Managing Director of FTI Consulting LLP. Prior to joining FTI Consulting LLP he spent over eight years as an equity research analyst with Citigroup and an independent stock broking firm, and six years as a management consultant with McKinsey & Company and Arthur Andersen's Business Consulting Group. He has 25 years of experience in valuation, financial analysis, strategic analysis, and research across a wide range of industries and has prepared valuation reports in various contexts, including in commercial disputes, and also provided valuation advice in non-contentious matters. Ms Glass and Mr Edwards agreed a joint memorandum dated 18 March 2019 (the ***Joint Memorandum***). Once again, I comment in detail later in this judgment on the reliability and credibility of Ms Glass and Mr Edwards by reference to their evidence on particular issues. But at this stage I would say the following. Once again, both Ms Glass and Mr Edwards demonstrated that they had both substantial experience and expertise in valuation matters and a good knowledge of the solar industry and energy sector. They both gave their evidence in a clear and careful manner and their written reports were excellent – clear, cogent, detailed and thorough. As is apparent though from the summary of my conclusions above and will become clear from the rest of this judgment, I have generally found Ms Glass' evidence to be more balanced, realistic and reliable.

14. As regards the Delaware law experts, the Company appointed Professor Lawrence Hamermesh of the Delaware Law School. He produced an expert report dated 15 April 2019 (***Hamermesh 1***) and a supplemental expert report dated 29 April 2019 (***Hamermesh 2***). The Dissenting Shareholders appointed Mr Marcus Montejo (***Mr Montejo***) of Prickett, Jones & Elliott. He produced an expert report dated 15 April 2019 (***Montejo 1***) and a supplemental expert report dated 29 April 2019 (***Montejo 2***).

Further directions regarding the expert evidence – conflict between the opinions of Dr Goffri and Ms Glass

15. On 8 April 2019, a case management conference (the ***CMC***) was held. It became clear at the CMC that an issue had arisen concerning the relationship between, on the one hand, the evidence of the industry experts and the evidence of the valuation experts on the other. The industry experts had produced Company level and Company specific forecasts (rather than provide their opinion on industry level factors that should be taken into account by the valuation experts when preparing their own financial analyses and valuations). Instead of there being two sets of forecasts and valuations before the Court (three if the forecasts of the Company's management were included), there were, in relation to certain matters, four (or five). Furthermore, there were conflicting opinions expressed by the Company's two experts, Dr Goffri and Ms Glass, which caused concerns to the Dissenting Shareholders. They wanted to be clear as to where the conflicts arose, as to the Company's case on such issues (i.e. which of its experts was it relying on?) and to avoid having to cross-examine both of the Company's experts on the same issue. At the CMC, the Dissenting Shareholders applied for an order that:

> *"the Company may not rely upon Ms Glass's opinions as expressed at (i) Glass 1 paragraphs 64, 92-99, 131, Appendix F, Appendix G, (ii) Joint Memorandum paragraph G2.1, or (iii) any other opinion which Ms Glass may state, whether in writing or orally, that confirms or contradicts any of the opinions given by the Industry Experts."*

16. I dismissed the application. I decided that it was not appropriate to prevent the Company relying on the expert valuation evidence of Ms Glass but I accepted that it would be unfair to allow the Company to rely on both that evidence and the expert evidence of Dr Goffri where Ms Glass had decided not to adopt or follow Dr Goffri's evidence. I accepted that there needed to be a mechanism by which the Company identified to the Dissenting Shareholders the Company's case, given that there was contradictory evidence on the same matters which was contained in the reports of Ms Glass and Dr Goffri. In the Note of Ruling on the Dissenting Shareholders' Application dated 9 April 2019 (the ***Note of Ruling***) I said as follows:

"3. *There has been an unfortunate failure to coordinate the expert evidence to be given by the industry experts and the valuers. This appears to have resulted in part from an expansion of the scope of the industry experts' evidence without there being a revision of the directions (such a revision would have provided an opportunity to clarify matters). As a result, the industry experts have produced Company level financial forecasts and analyses that trespass on the territory of the valuers and the valuers faced a conundrum. Ms Glass' response was to form her own view on the industry experts' forecasts and analyses and provide an independent opinion on fair value. Mr Edwards' response was not to form a view on the differing forecasts and analyses provided by the industry experts. Instead, he prepared alternative valuations on the assumption that each of the industry experts' (and the Company's) forecasts and analyses were correct.*

4. *The industry experts were to opine on matters relevant to fair value. The valuers were to opine upon fair value. The industry experts were to provide input for use by the valuers on issues that required special expertise concerning the solar energy industry. There needed to be a discussion among the industry experts and the valuers (and the parties' legal advisers) to define clearly how the industry experts' evidence would be used by the valuers and fit into the valuers' evidence. However, it appears that this did not happen or any discussion that did take place was inadequate. The issue comes before the Court only at a very late stage in the proceedings, less than a calendar month before trial.*

5. *I do not at this stage comment on the impact of this problem, and the differences of approach, on the weight to be given to and reliability of the expert evidence. These issues will need to be the subject of submissions and considered at the trial. But an approach needs to be established to permit a fair and efficient trial and to assist the Court in making a determination as to fair value. In my view, the proper approach is to (i) give primary weight to the valuers' evidence and to allow Ms Glass' evidence to stand and (ii) preclude the Company relying on the evidence of Dr Goffri to the extent that it is inconsistent with Ms Glass' evidence and opinions. Consistently with the principle that the Company should be permitted to rely on Ms Glass' evidence, the Company should be allowed to rely on Dr Goffri's evidence where (but only to the extent that) Ms Glass has adopted, followed or relied on it (including for the purpose of supporting Ms Glass' opinion that it is appropriate to afford less weight to her DCF analysis when determining fair value in this case). This does mean that in relation to such matters the Dissenting Shareholders may need to cross-examine both Ms Glass and Dr Goffri on the same issue. While not ideal, this seems to me, in the circumstances, necessary in order to facilitate a fair trial.*

6. *The following is the form of order I propose to make to give effect to my decision:*

   (a). *where Ms Glass' evidence deals with (or contains an opinion concerning) an issue or matter on which Dr Goffri has given evidence (or expressed an opinion) and Ms Glass evidence (or opinion) is different from or inconsistent with the evidence (or opinion) of Dr Goffri, the Company may only rely on the evidence (and opinion) of Ms Glass.*

   (b). *where Ms Glass' evidence deals with (or contains an opinion concerning) an issue or matter on which Dr Goffri has given evidence (or expressed an opinion) and Ms Glass' has adopted, followed or relied on Dr Goffri's evidence (or opinion) the Company shall be permitted to rely on the evidence (and opinion) of Dr Goffri for the purpose of supporting Ms Glass' evidence (or opinions), including for the purpose of supporting Ms Glass' opinion that it is appropriate to afford less weight to her DCF analysis when determining fair value in these proceedings). In such a*

case the Dissenting Shareholders may cross-examine either or both Ms Glass and Dr Goffri."

17. Following the circulation of that Note of Ruling to the parties, the Dissenting Shareholders sought further directions. I explained the additional orders being sought and my decision in my email dated 23 April 2019:

> *"1. On 9 April I circulated a Note of Ruling which set out the directions I proposed to make to deal with the difficulties resulting from the conflicts in the evidence of the Company's two expert witnesses. These gave rise to a risk of unfairness to the Dissenting Shareholders and inefficiencies and extra expense in relation to the trial (in the absence of pleadings, the conflicts in the expert evidence meant that, in the areas affected by the conflicts, it was impossible for the Dissenting Shareholders to know the case they had to meet – at least before the filing of the Company's opening skeleton argument and possibly thereafter - and was likely to result in the Dissenting Shareholders having to cross-examine both experts on the same issue). I ordered that the Company would only be permitted to rely on Dr Goffri's evidence to the extent that it did not conflict with Ms Glass' evidence and that where there no such conflict and Ms Glass had adopted, followed or relied on Dr Goffri's evidence, the Dissenting Shareholders could choose whether to cross-examine one or both such experts.*
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> *2. Further discussions have taken place between counsel and the attorneys following the circulation of the Note of Ruling in relation to the draft of the CMC order. The Dissenting Shareholders have sought additional orders. They argue that these are implicit in or consequential upon the orders set out in the Note of Ruling:*
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> *(a). first, they seek an order requiring the Company within a short period (approximately one week) to identify (and serve a list of) those parts of Dr Goffri's reports (and the joint industry expert memorandum) which are to be treated (because the Dissenting Shareholders accept them) as being in conflict with Ms Glass' evidence (the **List**). The List is designed to clarify the Company's case on the expert evidence (in particular as to which parts of Dr Goffri's evidence the Company says is not in conflict with the evidence of Ms Glass and therefore can and will be relied on by it) and to assist the Dissenting Shareholders in their trial preparation.*
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> *(b). secondly, they seek a direction that if they choose to cross-examine only one of the two experts on an issue where there is no conflict (and Ms Glass had adopted, followed or relied on Dr Goffri's evidence), their failure to cross examine the other expert will not prevent them from challenging the evidence of the other expert on that issue.*
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> *3. The Company has prepared and served on the Dissenting Shareholders a Statement setting out its position on the overlap between the evidence of Dr Goffri and Ms Glass (by reference to the nine main issues dealt with in Appendices F and G to Ms Glass' first report). It has done so to assist the Dissenting Shareholders (in part as a response to concerns I expressed during the CMC regarding the Dissenting Shareholders' need to know what the Company's case is where the Company has put in two expert reports containing different views). The Statement is only an outline of the Company's case but does provide a general indication of the*

Company's position on the relationship between the evidence of Dr Goffri and Ms Glass and the extent to which the Company intends to rely on Dr Goffri's evidence. The Dissenting Shareholders consider that the Statement fails adequately to clarify the Company's case because it does not identify any parts of Dr Goffri's evidence which the Company will not be relying on. As a result, the Statement does nothing to cure the mischief identified at the CMC and it is impossible for the Dissenting Shareholders properly to prepare the cross examination of Dr Goffri.

4. *I do not think it appropriate to make either of the orders sought by the Dissenting Shareholders:*

   (a). *it would be disproportionate and unfair, in all the circumstances, to require the Company at this stage to identify each and every part of Dr Goffri's evidence which it will not be relying on. The information could only be produced shortly before the commencement of the trial and at the same time as the Company's opening skeleton argument. It will not therefore be of significant assistance to the Dissenting Shareholders in their trial preparation. Furthermore, in my view the Dissenting Shareholders are now able to prepare for the cross examination of the expert witnesses and have the benefit of sufficient protections. In addition, it is important not to interfere with the proper conduct of the trial by seeking to pre-determine and over regulate in advance evidential matters that can only properly be dealt with during and determined at the trial.*

   The trial is due to commence in less than two weeks. Preparation of the List will take some time. The Dissenting Shareholders appear, as I have noted, to consider that a period of seven days was required and sufficient. It is not clear that this period would be sufficient. But even if it was, the List would only be produced on or about 1 May. But that is the day on which opening skeleton arguments are already due to be exchanged. Once such skeleton arguments are exchanged, the Company's position should be clear (or at least much clearer). Requiring the preparation of the List in these circumstances will not produce a significant benefit to the Dissenting Shareholders and will impose a significant burden on the Company. Furthermore, while it would no doubt be of assistance to the Dissenting Shareholders to have, before seeing the Company's opening skeleton, further details of the Company's case, the Dissenting Shareholders are and will be in a position to prepare for the trial. As a result of the orders set out in the Note of Ruling, the Company will be unable to rely on those parts of Dr Goffri's evidence that conflicts with the evidence of Ms Glass. The Dissenting Shareholders can form their own view and prepare submissions as to which parts of Dr Goffri's evidence are covered by the order and therefore cannot be relied on by the Company. They can also form a view on the parts of Dr Goffri's evidence which they wish to challenge to the extent that it is relied on by the Company. Having seen the Statement and then the Company's opening skeleton the Dissenting Shareholders will be able to decide what approach to take to the cross examination of Dr Goffri and Ms Glass. I accept that the Dissenting Shareholders may well need to prepare to cross examine both of them in relation to any issue where they cannot be sure that Dr Goffri's evidence conflicts with that of Ms Glass and appears to be relevant to the Company's case and probably will be relied on by the Company. While this is not ideal it is manageable and cannot be fairly or properly avoided in the circumstances. In addition, it would be wrong to seek to predetermine prior to the trial

detailed questions relating to the nature and weight to be given to parts of the evidence. These questions will need to be the subject of submissions at and dealt with during the trial. The orders set out in the Note of Ruling set out the principle regulating the relationship between Dr Goffri's and Ms Glass' evidence (for the protection and benefit of the Dissenting Shareholders) but it would be wrong to seek to predetermine points regarding particular parts of the evidence before seeing the parties' submissions and hearing argument.

(b). it would also be wrong to regulate in advance the consequences of a decision by the Dissenting Shareholders to cross examine only one rather than both of the Company's experts. The purpose of including the statement that the Dissenting Shareholders were permitted to cross-examine either or both experts was, for the avoidance of doubt, to make clear the Dissenting Shareholders had the choice. It must be for the Dissenting Shareholders to decide, on an issue by issue basis, in light of the Company's case, whether it is necessary to cross examine Dr Goffri to challenge his evidence and opinions and if so the extent of the challenge. The rule requiring cross examination serves the important function of giving the witness the opportunity of explaining any contradiction of or alleged problem with his evidence. Where Ms Glass has relied on Dr Goffri's evidence and his views are of significance on a point in issue it is likely to be important to give him the opportunity to respond to challenges. It would not be right in advance to permit the Dissenting Shareholders to rely only on a cross examination of Ms Glass. It will be for the Dissenting Shareholders, on an issue by issue basis, to decide how to proceed. I appreciate that as a result the Dissenting Shareholders may well need to cross examine both Dr Goffri and Ms Glass on many of the issues in dispute but as I said at the CMC and in my Note of Ruling, this, while not being ideal, is necessary in the current circumstances (and it seems to me that, while entirely a matter for the Dissenting Shareholders, there will be opportunities to mitigate the difficulties, for example by limiting the cross examination of Dr Goffri - in a case where the key evidence and analysis is provided by Ms Glass it might be appropriate to raise the issue only briefly with Dr Goffri)."

18. The parties agreed and I accepted that there was no need for the Delaware experts to be cross-examined.

The background

The Company

19. Changzhou Trina Solar Energy Co., Ltd. (***Trina China***) was incorporated in China in December 1997. It was founded by Mr Gao, who has been Chairman of Trina China since its incorporation. On 14 March 2006, the Company was incorporated as a Cayman Islands exempted company, for use as a listing vehicle to take Trina China public. Trina China became a wholly owned subsidiary of the Company and Mr Gao became the Chairman of the Company. Pursuant to that strategy, on

19 December 2006 the Company's ADS started trading on the New York Stock Exchange (***NYSE***).

20. As I have already noted, there are two segments to the Company's business, namely the upstream and downstream segments (sometimes referred to respectively as the manufacturing segment and the project segment):

    (a). in its upstream business, the Company manufactures and sells PV modules for residential and commercial use. PV modules contain a number of PV cells (typically 60-100 cells), which are a type of solar-powered generator which convert high-energy photons in solar radiation into electrical energy. The upstream business accounted for the large majority of the Company's revenue (over 90% of its total revenue in 2015).

    (b). in its downstream business, the Company develops, designs, manages, and sells or operates solar power projects. Historically the downstream business has been focused on China, but in recent years it has expanded into other markets.

The merger process

21. On 12 December 2015 (the ***Proposal Date***), Mr Gao and the Buyer Group submitted a proposal to acquire all of the shares in the Company (save for those 5.6% of the shares which Mr Gao, his wife and his holding company already owned) at a price of US$11.60 per ADS.

22. On 13 December 2015, the Company's board appointed two directors, Mr Zhao and Mr Sean Shao (***Mr Shao***), to the Special Committee whose function was to evaluate the merger proposal. The Special Committee appointed Kirkland & Ellis LLP (***K&E***) as its US legal adviser, Conyers Dill & Pearman as its Cayman Islands legal adviser, and (on 5 January 2016) Citigroup Global Markets Inc. (***Citi***) as its financial adviser. One of Citi's tasks would be to produce a fairness opinion on the proposed transaction with the Buyer Group and on other competing transactions with other parties if any competing bids emerged.

23. The Special Committee asked Citi to perform a market check, in order to explore potential alternative transactions (the ***Citi Market Check***). On 15 February 2016, the Special Committee agreed a list of twenty-two potential buyers who would be approached (the ***List of Buyers***) so that the market check could proceed. Thereafter Citi drafted, and the Special Committee

approved, a script for use when parties were being contacted and Citi provided updates on progress to the Special Committee. Of the twenty-two parties on the List of Buyers, twelve parties responded (Citi were unable to contact one party and nine others provided no response). Of those who responded, four parties expressed some interest.

24. In parallel with the Citi Market Check, the Special Committee continued to negotiate with the Buyer Group. At a meeting on 25 March 2016 the Special Committee, following receipt of "*an update [from Citi] .... on the status of Citi's ongoing fairness analysis*", instructed Citi to ask the Buyer Group for a "*meaningful increase*" of the Buyer Group's offer.

25. At a meeting of the Special Committee on 8 April 2016, Citi provided details of the Buyer Group's response to this request. The Buyer Group's financial advisers, Duff & Phelps (***D&P***) had made a presentation to Citi on 5 April and set out the Buyer Group's likely response. They explained that in the Buyer Group's view a price increase may not be reasonable because (i) the existing and pro forma leverage level of the Company may be too high; (ii) the management projections provided to the Buyer Group may be too optimistic; and (iii) the current offer price already provided good returns on the Company's shares compared to other comparable listed companies. After discussing this feedback, the Special Committee (according to the minutes of the meeting) "*instructed Citi to go back and further discuss with the [Buyer Group] the Special Committee's request for a meaningful price increase.*" There followed a review of the state of play in the Citi Market Check process. The minutes record the following:

> "*Citi reported to the Special Committee that no meaningful feedback has been received from any party during the market check exercise in the past few weeks. The Special Committee asked questions of Citi and [K&E] regarding the market check process and various related considerations, and a discussion ensued. Following the discussion, after considering various factors, including the scope of the market check process, the process followed, the period of time that has elapsed, the fact that the buyer consortium's offer and the Special Committee's mandate were well publicized before and during the market check process, and the feedback received to date, the Special Committee decided that while it would continue to welcome and pursue incoming inquires and indications of interest, it would be advisable for the Special Committee and its advisors to focus more time and effort on negotiating the best deal with the [Buyer Group].*"

26. On 22 April 2016, the Special Committee received a letter from D&P indicating that the Buyer Group intended to reject the Special Committee's request to increase its offer. D&P explained the Buyer Group's position. Later that day, Citi and K&E held a conference call with D&P during which they informed D&P that given the Buyer Group's small shareholding, the support of the

Company's public shareholders was critical in ensuring the successful outcome of the transaction and they should seriously take account of the Special Committee's meaningful price increase request. D&P agreed to pass this message to the Buyer Group when they had more visibility on its financing. The Special Committee instructed Citi and K&E to await further progress in the Buyer Group's financing discussions.

27. On 5 July 2016, a meeting was held between Citi and the Company's legal advisers and representatives of the Buyer Group (including Mr Gao) and its advisers. The Buyer Group explained that it was rejecting the Special Committee's request for an increase in the offer price.

28. On 7 July 2016, at a meeting of the Special Committee, Citi and K&E briefed the Special Committee on the Buyer Group's position. Citi explained that the Buyer Group had cited various reasons for rejecting the Special Committee's request. These included (1) its view on the general industry outlook was not as optimistic as it had been previously in light of recent developments, (2) recent trading prices of the Company's ADS, (3) the increasing difficulty of financing a transaction in the industry at the time and (4) various macroeconomic trends and factors. Mr Zhao, in his trial affidavit, explained his understanding of the Buyer Group's position as follows:

> *"the Buyer Group had rejected the Special Committee's request for an increase in the offer price because (a) [the] general industry outlook was less optimistic than previously thought as a result of the unique characteristics of the solar industry, such as the constant pricing pressure. It was not therefore possible to rely upon other take-private transactions as precedent, which were generally valued on the assumption of continual upward growth. This was considered to be particularly true in light of recent developments. I understood the recent developments to include greater competition against both domestic and multinational companies in many of the product and service areas in which [the Company] operates, increased regulatory pressure, and increasing uncertainty and volatility in business models similar to [the Company]. As a result, the Buyer Group was of the view that there was potential for short and medium-term volatility in [the Company's] earnings; (b) the trading price of [the Company's] ADS had recently fallen; (c) the Buyer Group was having increasing difficulty in financing the transaction due to the solar industry's current environment; and (d) various macroeconomic trends and factors, such as continuous pricing pressure, lower global demand and over-supply due to competition favoured a lower price. There had been a sharp pricing decrease particularly to module pricing, as well as wafer and cell. Furthermore, aggressive pricing strategy by competitors would impact an even lower pricing and there was the ever-increasing regulatory uncertainty in the industry that caused greater instability."*

29. Following the report on the Buyer Group's position, the Special Committee, Citi and K&E reviewed the status of negotiations with the Buyer Group (including the draft merger agreement)

and how best to proceed. The conclusions are summarised in the minutes of the meeting as follows:

> *"On the price increase, the Special Committee instructed Citi to follow up with the Company to better understand the latest financial model, including any adjustments in the underlying assumptions and projections. With respect to the [Buyer Groups' response as to the terms of the]equity commitment letters and limited guarantee, in light of, among other things, recent developments in the Chinese regulatory environment and recent transactions where a large amount of RMB had to be converted into USD, the composition of the buyer consortium and the fact that the Company has not received any actionable alternative offer to date despite the market check process, the Special Committee determined that the [terms discussed with the Buyer Group] could be acceptable depending on the other terms of the transaction and instructed K&E to continue exploring such approach with the [Buyer Group]and negotiate the related agreements accordingly."*

30. The minutes of Special Committee meetings disclosed by the Company show that there were two further meetings to discuss the terms of the proposed transaction with the Buyer Group and how to proceed. On 15 July 2016, the Special Committee reviewed developments in negotiations with the Buyer Group on transaction terms and on 1 August 2016 (the ***Acceptance Date***), Citi made a presentation regarding it fairness analysis of the consideration that would be paid to the Company's shareholders in the proposed transaction with the Buyer Group and K&E made a presentation on the terms of the proposed merger agreement.

31. Citi's presentation included a slide pack, which was exhibited to the minutes of the meeting (the ***Fairness Analysis***). The Fairness Analysis summarised the valuation analyses undertaken by Citi (a comparable companies' analysis, a DCF valuation and a sum of the parts analysis), all of which produced a range of implied values for the Company's ADS. The comparable companies' analysis, performed by reference to 2016 and 2017 figures and two different ratios resulted in upper end values of US$10.74, US$10.78, US$10.06 and US$7.87. The DCF valuation resulted in a range of US$8.59 to US$14.14. The upper value produced by the sum of the parts analysis was US$11.88 and US$10.38. Citi noted that the 52-week trading price range was US$6.96 to US$11.24. The minutes of the 1 August 2016 meeting record that:

> *"After discussing and considering the proposed terms of the merger agreement and the other transaction agreements and the presentations of [K&E] and [Citi] including the opinion provided by [Citi], and taking into account all of the other factors that it considered, the Special Committee unanimously approved the resolutions [attached to the minutes and approving the merger with the Buyer Group]."*

These resolutions contained a confirmation that the Special Committee determined that it was fair (both substantially and procedurally) to and in the best interests of the Company and its shareholders to proceed with the merger with the Buyer Group and enter the merger agreement and a recommendation to the full board to approve the merger and arrange for the execution of the merger agreement and associated documents. The resolutions also included the following recital:

> *"[that Citi] has delivered its opinion to the Special Committee that, as of the date of such opinion and subject to the limitations, qualifications and assumptions set forth therein, the [Merger Price] to be paid to the holders of [the Company's shares] and ADSs, respectively (other than holders of Excluded Shares and Company Restricted Shares), in the Merger is fair, from a financial point of view, to such holders."*

32. The conclusion summarised in that recital was set out in a written opinion issued by Citi on 1 August 2016 (the ***Fairness Opinion***), which was subsequently attached as an appendix to the Company's Schedule 13E-3 filing with the US Securities and Exchange Commission dated 4 November 2016 (the ***Proxy Statement***). The Fairness Opinion confirmed Citi's opinion that the Merger Price was "*fair, from a financial point of view, to the holders of ADSs*" and contained a detailed list of conditions and qualifications.

33. Those conditions made it clear that the Fairness Opinion (in particular Citi's DCF valuation) was based on and assumed the correctness of the forecasts and projections prepared by the Company's management. Various projections had been prepared by the Company's management, in particular seven year projections dated 22 January 2016 (the ***January Projections***), 2 February 2016 (the ***February Projections***) and 6 July 2016 (the ***Management Projections***). Citi used and relied on the Management Projections.

34. As I have already noted, on the Valuation Date the EGM was held to approve the merger. Three proxy adviser firms, Glass, Lewis & Co. (***Glass Lewis***), Egan-Jones Ratings Company (***Egan-Jones***) and Institutional Shareholder Services (***ISS***), issued reports advising the Company's shareholders how to vote on the merger agreement. Glass Lewis recommended that shareholders vote against the merger, while ISS and Egan-Jones recommended that shareholders vote for the merger.

35. At the extraordinary general meeting:

    (a). 2.2% of shares were voted against the merger;

(b). 40.6% of shares were not directly voted, but their owners were deemed to have given their proxy to the Company's management pursuant to a term of the ADS depositary agreement, and thus were deemed to have voted for the merger; and

(c). 57.2% of shares were voted in favour of the merger.

36. The resolution approving the merger was therefore passed, with 97.8% of shares voted or deemed to have been voted in its favour.

37. The merger completed on 13 March 2017, at which point the Company's ADS ceased trading on the NYSE. Those ADS were cancelled and the former shareholders were paid the Merger Price, save for the Dissenting Shareholders.

The parties' positions and submissions

The Company's submissions

38. The Company's primary submission as to the approach which the Court should take to a section 238 valuation is that, consistently and in accordance with the JCPC Shanda Advice, the Court must apply the principle that a person whose shares are being compulsorily acquired is entitled only to the amount which a hypothetical buyer would pay a hypothetical seller for those shares and is not entitled to any greater benefit that the acquirer acquires by virtue of the compulsory purchase (the ***Hypothetical Transaction Approach***):

(a). where the shares are listed and traded on a public stock market, the price at which the listed shares are trading is the best evidence of what a hypothetical buyer would pay a hypothetical seller for the shares. However, the actual trading price of the shares on the Valuation Date should not be used as it was affected by the merger offer and the prospect of there being benefits flowing from the merger, from which the Dissenting Shareholders have dissented. On the basis that the Dissenting Shareholders should not obtain any benefit from the proposed merger, the fair value of the shares should be the adjusted trading price (the unaffected market price), namely the price at which the shares would have been bought and sold as at the Valuation Date in the absence of any proposed merger.

(b). the fair value is the price that a hypothetical buyer would pay a hypothetical seller *having regard to the information publicly available to both of them.* The Court should not take into account private information not known to the market unless the relevant company was under an obligation to disclose it to the market.

(c). the Company submitted that even if it was wrong to say that the adjusted trading price is to be used to determine fair value, the actual trading price was the maximum price that the Court can award since no hypothetical buyer would have agreed to pay a price higher than the price it would have been able to pay had it gone into the market to make the acquisition.

(d). where, as in the present case, the shares were traded on the basis of public information, it was artificial and unnecessary to attempt to calculate the enterprise value of the company (which added nothing of assistance).

(e). the Company relied on the opinion of the Company's valuation expert, Ms Glass to the effect that the adjusted trading price (the unaffected market price) should be determined by calculating what the trading price of the Company's shares would have been on the Acceptance Date, being the date on which the Company's board agreed to accept the Buyer Group's offer. She calculated this to be at US$7.26 per ADS. The Company argued that it was common ground that the Company's shares would have been trading at US$7.26 per ADS if the special resolution had not been proposed or passed at the EGM and accordingly that was the best evidence of what the shares would have been trading at in the absence of any compulsory purchase process having been initiated at all. The actual trading price of the shares on or immediately before the Valuation Date was US$9.75 per ADS.

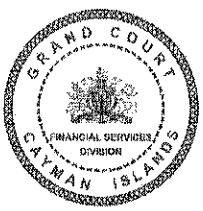
39. In the alternative, if it was wrong to apply the Hypothetical Transaction Approach, the Court should determine fair value in this case by reference to market based methodologies rather than in reliance on the DCF model:

(a). the Company argued that a DCF valuation was inherently unreliable in a litigation context and identified a number of serious problems affecting a DCF valuation in the present case. The Company submitted that little if any weight should be placed on the experts' DCF valuations. Instead, real world indicators of value such as the Merger Price and the Company's trading price should be preferred to the exclusion of a DCF.

(b). the Court should follow the approach taken in *Re Integra Group* [2016 (1) CILR 192] (Jones J) (***Integra***) and *Re Qunar Cayman Islands Limited* FSD No 76 of 2017 (judgment dated May 13, 2019, Parker J, unreported) (***Qunar***) and give significant weight to the Company's market price as an indicator of the fair value of the Company's shares. In *Integra* the Court gave a 25% weighting, while in *Qunar* the Court gave a 50% weighting, to the market trading price (albeit that in the case of *Integra* the market trading price was that of comparable companies).

(c). the Court should follow the approach of the Delaware Supreme Court, which in a number of recent cases had overturned appraisal awards of the Court of Chancery for failing to give sufficient weight to the parties' negotiated merger price - see *DFC Global Corporation v. Muirfield Value Partners, L.P.,* 172 a.3D 346, 1 Aug. 2017 (***DFC***); *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1, 14 Dec. 2017 (***Dell***) and *Verition Partners Master Funds Ltd. v. Aruba Networks, Inc.,* A.3d, 2019 WL 1614026, Del. Apr. 16, 2019 (***Aruba Supreme Court Opinion***). The Dissenting Shareholders were wrong to treat the Merger Price as a floor to the fair value of the Company's shares; rather it provided a ceiling. The Company did not assert that the Merger Price equals the fair value of the shares. It was the Company's case that it exceeded, and would inevitably exceed, the fair value of the shares.

(d). if, contrary to the Company's submissions, the Court considered it necessary to conduct a DCF valuation, the Court would need to adopt a specific set of projections and an appropriate discount rate. The Company relied on and invited the Court to follow the evidence and approach of the Company's valuation expert, Ms Glass (consistent with the directions given in the Note of Ruling). Ms Glass valued the Company based on a weighted-average of fair values derived from an analysis of the Company's trading price and the Merger Price, both of which were given a weighting of 40%. In addition, she considered the results of her DCF analysis, which she afforded a lower weighting (of 20%) due to what she considered to be the high subjectivity and uncertainty surrounding the DCF approach. Her fair value was US$9.96 per ADS (US$8.96 after deducting a 10% minority discount). Ms Glass' valuation was supported by numerous real world indicators including the Merger Price (which had been accepted by some 97% of the Company's shareholders including a large number of institutional investors), market trading prices and the fair value assessment reached by the many reputable analysts covering the Company shortly before the EGM. This contrasted sharply with the approach of the Dissenting



Shareholders' experts who provided an upper valuation of US$197.13 per ADS (pre-minority discount).

(e). Ms Glass' approach to the DCF valuation, and her view on the various issues in dispute concerning the inputs to be used in preparing the DCF valuation, was to be preferred to that of Mr Edwards (I outline their different views below when summarising the Dissenting Shareholders' submissions).

40. The Company supported the opinion of Ms Glass on the application and level of a minority discount. She considered that a minority discount of 10% should be applied.

41. Both parties agreed that all issues of interest should be reserved.

The Dissenting Shareholders' Submissions

42. The Dissenting Shareholders submitted that the Hypothetical Transaction Approach was wrong in both law and principle. They argued that the ultimate conceptual objective of a section 238 determination was the ascertainment of fair value based on intrinsic value.

43. The object of the valuation exercise was the Dissenting Shareholders' shares. The intrinsic *nature* of a share is that it is a bundle of rights held by the shareholder as against the company, including the right to receive dividends if declared and the right to a share of the company's assets (after liabilities have been met) in any liquidation. It followed that the intrinsic *value* of a share is the value of the rights which constitute the share. The essence of those rights is the right to participate in the enterprise value of the company. Market value, by contrast, is the value actually realised or realisable in an existing market. This may or may not be equal to the intrinsic value of the share in a given case: however, in every case, they are conceptually distinct. It is a question of fact whether in a given case market value does or does not approximate intrinsic value. This is a case in which that factual point is put in issue by the Dissenting Shareholders. They submitted that the market value of the shares in the Company does not equal or approximate their intrinsic value.

44. In any trial of a section 238 petition, there is a question of fact as to how the fair value of the relevant shares should be estimated. The Dissenting Shareholders' case was that, on the particular facts of this case, neither the Merger Price nor the traded share price were reliable

indicators of the fair value of the Dissenting Shareholders' shares and that both of those measures significantly understated fair value.

45. As to the Merger Price, the evidence at trial showed that the Buyer Group, including Mr Gao, who knew the Company's position better than anybody, believed that the intrinsic value of the Company as it stood was significantly more than US$11.60; the process for negotiating with the Buyer Group and for conducting a market check, undertaken by the Special Committee, was hopelessly flawed and skewed towards the Buyer Group's deal and the fairness opinion produced by Citi was also seriously flawed. But for that flawed fairness opinion, the merger would not have completed at the Merger Price.

46. As to the market or trading price, Ms Glass' methodology for calculating and her view of the unaffected market price were illogical and unreliable. The fact that the Buyer Group was happy to offer a Merger Price which was 60% higher than US$7.26 was evidence that US$7.26 could not be a sensible measure of fair value. Since the Merger Price understated fair value it followed, *a fortiori*, that the market price understated the fair value of the Dissenting Shareholders' shares to an even greater extent. The evidence was overwhelming that the efficient markets hypothesis was not a sound theoretical basis for treating market price in general as a measure of fair value and on the facts of this case, even if the efficient markets hypothesis did hold in respect of the Company's shares at the relevant time, the market price would still have been understated because at the Valuation Date there was material non-public information (***MNPI***) which was not in or available to the market. This was because the Company knew that it was likely to ship 9,000 MW of modules in 2017 whereas the market's expectation at all relevant dates was less than 7,000 MW. A further reason why it was not surprising that the market price was understated was the systematic undervaluation of Chinese-based companies (like the Company) on US exchanges (the ***China Effect***).

47. It followed that on the particular facts of this case, the only reliable method of valuing the Dissenting Shareholders' shares was a DCF valuation of the Company, assigned pro rata to the Dissenting Shareholders' shares, adjusted by a minority discount:

    (a). a DCF valuation measured the total sum of cash that will flow into the company over the long term, which will be attributable to shareholders either through dividends or through the eventual winding up of the company. In other words, it directly measured the very

rights which each shareholder possessed and an apportionment of the DCF valuation of the company gave the intrinsic value of the share.

(b). both valuation experts in the present case considered that a DCF was an appropriate way to value the Company. Mr Edwards considered that a DCF was the *only* reliable approach whereas Ms Glass applied a judgmental weighting to three figures: a DCF valuation, the Merger Price and the pre-merger share price (subject to a judgmental downward adjustment).

(c). a DCF valuation had been the method adopted by this Court in both *Integra* and *Re Shanda Games* (a judgment of mine dated 25 April 2017, unreported) (***Shanda***), and one of the two methods adopted in *Qunar* and *Re Nord Anglia Education, Inc.* (judgment dated 17 March 2020, Kawaley J, unreported) (***Nord Anglia***).

48. In order to establish the most appropriate DCF valuation in the present case, the Court needed to form a view on various important disputes between the experts. There were disagreements between the industry experts and the valuation experts. The Court should first determine the disputes between the industry experts and then the disputes between the valuation experts as to how the DCF valuation should be carried out. This would establish the applicable inputs for the DCF valuation. The parties should then be instructed to seek to agree the valuation that would result with assistance from the experts. The Dissenting Shareholders submitted that Mr Russo's views on the industry issues and Mr Edwards' views on the valuation issues were to be preferred.

49. The differences between the industry experts had resulted in there being three different sets of cash flow projections available to the valuation experts and the Court: Mr Russo's and Dr Goffri's projections, derived from their respective reports, and the Company's Management Projections. The Management Projections set out the Company's historical financial data for 2014 and 2015, and forecast financial performance from 2016 to 2023 (income statements and balance sheets for each of the Company's segments, and for the Company as a consolidated business, were projected based on over one hundred rows of input assumptions). Ms Glass had relied in her valuation on the Management Projections (with some adjustments of her own). However, Mr Edwards had adopted a different approach and had been right to do so. He put forward three valuations, with each valuation being based on the different views and cash flows of the industry experts and the Company's management. While he provided comments on the three cash flow forecasts he did not purport to express an opinion as to which forecast was most

reliable since he took the view, based on legal advice from the Dissenting Shareholders' legal advisers, that this fell outside the scope of the opinion he had been ordered to provide. Mr Edwards' three valuations were as follows:

(a). a valuation of the Company entirely on the basis of Mr Russo's evidence, which yielded a fair value of US$193.19 per ADS (***RE-Russo***);

(b). a valuation of the Company solely on the basis of management's own cash flow projections, which yielded a fair value of US$50.13 per ADS (***RE-Mgmt***); and

(c). a valuation of the Company on the basis of Dr Goffri's evidence alone, which yielded a fair value of US$9.29 per ADS (***RE-Goffri***).

Since the Dissenting Shareholders argued that the Court should accept Mr Russo's evidence, they submitted that the first valuation (the RE-Russo valuation of US$193.19 per ADS) should be accepted by the Court.

50. The main points of dispute between the industry experts were as follows:

(a). as regards the upstream business:

(i). *the projected size of the market for the overall PV module industry.* Mr Russo prepared his own projection based on a variety of sources. Dr Goffri and Ms Glass however took the view that Mr Russo's projection of market size was too great and should not be relied on.

(ii). *the Company's projected future market share and sales of PV modules.* Once again, Mr Russo prepared his own projections. He prepared his estimates for 2017 sales volume by reviewing and increasing substantially the estimate contained in the Management Projections. He noted that in January 2016, the Company's management had estimated 2017 sales of 9,000 MW but that this estimate had fallen to 7,220 MW in July 2016 and that this lower figure had been used in the Management Projections but the Company's actual module sales had been approximately 9,000 MW in 2017. He decided to assume that 9,000 MW was a reasonable estimate of the Company's sales at the Valuation Date and then

calculated the Company's market share of the global market in 2017 that 9,000 MW represented. Using various contemporary sources, he calculated the global market size as being 71,730 MW, which meant that the Company's share was 12.5%. He then applied the future growth rates which had been contained in the Management Projections and produced his projections for each year from 2018 to 2023. This resulted in a forecast that was considerably higher than the Management Projections and included a forecast of a 30% increase in the Company's market share from 2016 to 2017 and a market share of 21.3% in 2023 compared with the Company's projections of 18.3% (the Company did not directly project its own market share; instead it projected its own PV module sales volume and implied a market share based on this volume and its projections for total market size). Ms Glass agreed with Dr Goffri that it would be unlikely that the Company would be able to meet these forecasts and concluded that, despite the Company's projected average annual market share increase being on the high side, she was prepared to accept them for the purpose of her valuation.

(iii). *the Company's projected PV module selling prices.* Mr Russo projected declining PV module selling prices based on a number of third party estimates and sources. Both Dr Goffri and Ms Glass considered that these projected selling prices were too high. Ms Glass also thought that the Company's projections were too high and produced and relied on her own projections.

(iv). *the Company's projected expenses for research and development (**R&D**).* The Company projected R&D expenses at 2% of upstream revenue. However, Mr Russo disagreed that the Company would need to increase its R&D to 2% which he said was nearly double its historical average. Dr Goffri supported the projected increase on the basis that for the Company to remain competitive it would need to invest more heavily. Ms Glass was satisfied that the Company's forecast for aggregate total upstream operating expenses including for R&D was reasonable

(v). *the Company's projected capital expenditure* (***Capex***). Mr Russo prepared his own Capex projections based on his projection of sales volumes and considered that the estimates for Capex in the Management Projections were too high. Dr Goffri observed that the Company had forecast Capex as averaging 8.1% of revenues between 2016 and 2022 and said that he considered that 9.1% was a more reasonable

figure. Ms Glass concluded that while Dr Goffri's 9.1% figure had been derived following an analysis of industry peers and she had no concerns with his approach, she saw no reason to adjust the Company's projections, given that their Capex forecasts were supported by a reasonably detailed analysis (although the 2016 actual results did suggest that the Company's original estimates might be too low).

(vi). *depreciation.* Mr Edwards considered that depreciation in the Management Projections was understated due to an error. Ms Glass reviewed the Company's depreciation estimates relative to their historical financial statements and found that, if anything, the Company's depreciation expense was too high, not too low. She considered that Mr Edwards' adjustments were unnecessary.

(b). as regards the downstream business:

(i). the Company's downstream business has two segments. First, the build-to-operate segment in which the Company builds PV power plants, operates them itself, and sells the electricity they generate. Secondly, the build-to-sell segment, in which the Company builds and sells PV power plants. In the period between bringing a build-to-sell plant online and selling it, the Company sells the power generated by the plant, so that power sales are involved in both sides of the downstream business. The Management Projections made separate projections for power sales and project (or plant) sales.

(ii). Mr Russo considered that, as at the Valuation Date, the environment for growth in both power sales and plant sales was favourable. Two criteria were particularly relevant to the assessment of the cost and profitability of producing energy by solar generation. The first was the levelised cost of energy (the ***LCOE***) of an energy generating resource. This is a measure of how much it costs to produce a unit of energy from a given resource over its entire lifetime. The second was the capacity factor of an energy generating resource. This is the plant's actual output as a proportion of its theoretical maximum output. Higher capacity factors are more desirable because they indicate increased production of sellable electricity for the same level of capital investment (therefore, all other things being equal, higher capacity factors lead to reduced LCOEs).

(iii). Mr Russo forecast a modest and linear annual increase in capacity factors, to 17.5% by 2023. By contrast, the Management Projections implicitly assumed low and static capacity factors (13.7% for the entire period from 2016 to 2023), which were substantially lower than capacity factors achieved in 2016 in even the least desirable solar locations. Dr Goffri initially endorsed the Management Projections of capacity factors but during cross-examination he accepted that as at the Valuation Date a reasonable forecaster would have anticipated that the Company's capacity factors would increase, but was unwilling or unable to say by how much. Like Dr Goffri, Ms Glass originally endorsed the Company's forecast of capacity factors based on her own research and considered that Mr Russo's estimates were too high. But, the Dissenting Shareholders argued, during her cross-examination she had accepted that she had made an assumption, in reliance on Dr Goffri's evidence, that capacity factors in the future would not be materially higher than they had been historically and that the 13.7% projection was below a reasonable forecast for capacity factors up to 2023 (although she was not prepared to say how far below and whether she accepted that Mr Russo's forecast of 17.5% capacity factors by 2023 was reasonable). The Dissenting Shareholders submitted that in these circumstances Mr Russo's opinion should be preferred either on the basis that his conclusion was reasonable or that he was the expert with the relevant industry expertise.

(iv). as regards *power sales*, Mr Russo prepared projections for power sales volumes, prices and margins. Mr Russo adopted the forecast of power sales prices as contained in the Management Projections but took a different view on power sales volumes and gross margin. He developed his projections of sales volume by separately considering each of the components required to calculate electricity generation: capacity factors and online generating capacity. This resulted in higher volumes than the Management Projections. Mr Russo also assumed a higher gross margin based on the fact that he estimated an increased capacity factor over time (his reasoning being that if the capacity factor increases while operating costs remain the same, gross margin will increase). His approach was to be preferred in particular because:

(A). Mr Russo's projections depended in part upon his forecast of the Company's future capacity factors, which should be preferred to the Company's forecast.

(B). the Company's management had relied on their own estimates of the global solar market which underestimated the likely growth in that market. This led them to underestimate the Company's own power sales volumes. Mr Russo relied on his own higher and more reasonable estimates of solar market size, as a result of which his projection for power sales volume was higher.

(v). as regards *project sales*, Mr Russo based his projections on the Company's projections, however, he revised them upwards to reflect the fact that he estimated the total market size as being higher than the Company's estimates (e.g. if Mr Russo increased the Company's estimate of its market size by 7.5%, he also increased the Company's project sales volume by 7.5%). Mr Russo's estimate of the Company's market size followed his analysis for the upstream business. He assumed that both the upstream and downstream businesses would grow at the same rate. He rejected the Company's estimate of 10% for, and produced a higher estimate of, gross margin (which the Dissenting Shareholders argued was more realistic). The higher gross margin was based on an assumption that the price at which a power plant can be sold reflected the present value of future cash flows – and that in his view the power plants would be more profitable than estimated by the Company so that buyers would be willing to pay higher prices. He then determined his estimates of project sales prices by accepting the Company's projected costs per watt but applying the higher gross margin.

51. There were four central points of dispute between the valuation experts as regards the DCF valuation. The Dissenting Shareholders submitted that the Court should prefer Mr Edwards' view on all the issues where there was a disagreement:

(a). the approach or approaches to valuation that should be adopted. Ms Glass believed that the Company's traded ADS price, the Merger Price and a DCF valuation should all be factored in to the valuation of the Company and that DCF valuation should be afforded a low (20%) weight in that assessment. Mr Edwards' view was that the only reliable valuation approach, in the circumstances of this case, was a DCF valuation. The Dissenting Shareholders submitted that Mr Edwards was correct on this point and Ms Glass was wrong.

(b). the appropriate cash flow forecast to adopt. Mr Edwards' approach left this question to the industry experts and the Court, and so he performed a DCF valuation on the basis of each

of Mr Russo's and Dr Goffri's projections and the Management Projections (subject to certain adjustments). Ms Glass has opined that the Management Projections were reliable and correct (subject to certain adjustments) and had performed a DCF valuation based only on those projections.

(c). the appropriate discount rate and terminal value assumptions which should be applied. Ms Glass calculated a WACC which was excessive and wrong, and she made further errors in calculating terminal value. Mr Edwards' approach to both issues, which yielded a lower WACC and a higher terminal value, was to be preferred:

(i). Ms Glass and Mr Edwards disagreed as to whether it was appropriate to use one consolidated WACC for the whole business or whether a separate WACC should be calculated for the upstream and the downstream segments of the Company's business. Mr Edwards calculated separate WACCs: 8.0% for the upstream segment and 7.5% for the downstream segment. Ms Glass calculated a consolidated WACC for the Company as a whole of 10.8%.

(ii). Mr Edwards calculated the cost of equity for the upstream business using the capital asset pricing (***CAPM***) model. But he considered that it would not be appropriate to use the CAPM model to calculate the WACC of the downstream business. He therefore adopted a WACC of 7.5% for the downstream segment based on management's central estimate of the WACC applicable to its downstream projects in earnings calls throughout 2015 and the views of those analysts who stated a WACC for the downstream segment specifically.

(iii). there were disagreements over key components of the CAPM model:

(A). the risk-free rate (which is the return that an investor would expect from an asset bearing no risk) - Mr Edwards used a risk-free rate equal to the 10-year US Treasury yield as at the Valuation Date of 2.6% while Ms Glass used a risk-free rate equal to the 20-year yield on the same instrument: 2.9%.

(B) the MRP (being the additional return over the risk-free rate that investors require for investing in risky assets) - Mr Edwards calculated that the applicable MRP was 5% while Ms Glass considered it to be 6%. They each

relied on a range of data sources to calculate the premium that equity had in fact earned over the risk-free rate historically. However, Mr Edwards used figures that had been calculated from the geometric mean of historical returns to derive his MRP whereas Ms Glass used figures derived from the arithmetic mean.

(C). the equity beta (a measure of a company's risk relative to the risk borne by the market overall) – there was only a small difference between the valuation experts' estimates of beta. Mr Edwards' beta was 1.72 and Ms Glass' beta was 1.79.

(D). the CRP (the additional risk that investors may require to invest in China as against the most highly developed economies) - Mr Edwards calculated a country risk premium of 0.6% and Ms Glass' figure was 1.33%.

(E). the small stock risk premium (***SSRP***) (this represents a further return that investors may require to invest in small companies). Mr Edwards' view was that no SSRP should be applied to the Company. Ms Glass applied a SSRP of 2%.

(F). after adjusting for tax, Mr Edwards calculated that the Company's post-tax cost of debt was 4.2% while Ms Glass' figure was 4.6%.

(G). the valuation experts agreed that terminal value should be calculated by using a standard perpetual growth rate formula. The discount rate was the WACC. They were also agreed that a terminal growth rate of 3.5% was appropriate for a valuation based on management's projections. In Mr Edwards' valuation based on Mr Russo's evidence he adopted a terminal growth rate of 5%. In Mr Edwards' valuation based on Dr Goffri's evidence he adopted a terminal growth rate of 2%.

(H). the valuation experts also took a different approach to calculating cash flow in the terminal period. Mr Edwards adopted what was described as a bottom-up approach by calculating each element of cash flow separately while Ms Glass adopted a top-down approach whereby she first identified the overall

cash flow growth rate she wished to apply, and then fitted her calculation in respect of each element of the cash flow to that overall rate.

(d). the level of minority discount (if any) that should be applied in order to determine the value of the Dissenting Shareholders' minority interest. Ms Glass proposed that this should be at least 10% and possibly much higher. That view was unsupportable. Mr Edwards' view was that the appropriate discount (if any) was 2% and his view was to be preferred.

52. The Dissenting Shareholders submitted that in determining the fair value of the shares the Court, should, following earlier decisions in this Court, take into account all information that was known or could have been known on the Valuation Date, including the Company's records.

The approach to determining fair value after the JCPC Shanda Advice – the applicable principles of law

The Company's submissions

53. The Company submitted that even though the Privy Council in *Shanda* was dealing only with the issue of whether a minority discount should be applied to reflect the lack of control by minority shareholders, the implications of the reasoning in the JCPC Shanda Advice were far wider than the minority discount issue. Three key propositions could be derived from the JCPC Shanda Advice:

(a). the Court must value the shares held by the shareholder (taking into account the inherent attributes of the shares themselves).

(b). the Court must put the shareholder in the position it would have been in had no merger taken place.

(c). the Court must determine the price at which the shares would be exchanged between a willing buyer and a willing seller in an arm's length transaction based on publicly available information.

54. The Company made submissions as to the basis on which these propositions were to be derived from the JCPC Shanda Advice (and related authorities) and as to their impact on the manner in which the fair value determination was to be undertaken by the Court.

55. In the JCPC Shanda Advice, the Privy Council confirmed that *Short v Treasury Comrs.* [1948] 1 KB 116, affirmed [1948] AC 534 (***Short***) had established a general principle applicable to the compulsory acquisition of shares and that this principle governed the calculation of fair value under section 238. The general principle was the Hypothetical Transaction Approach (a person whose shares are being acquired is entitled only to the amount which a hypothetical buyer would pay a hypothetical seller for those shares and was not entitled to any greater benefit that the acquirer acquires by virtue of the compulsory purchase). That approach was diametrically opposed to the underlying jurisprudential approach adopted in the Delaware cases dealing with the appraisal remedy under Delaware corporate law.

56. The Company submitted that the key part of the JCPC Shanda Advice was to be found in [42] – [47]:

> *"(2) General principle of the valuation of shares on sale:*
>
> *42. In the opinion of the Board, it is the general principle of share valuation that (unless there is some indication to the contrary) the court should value the actual shareholding which the shareholder has to sell and not some hypothetical share. This is because in a merger, the offeror does not acquire control from any individual minority shareholder. Accordingly, in the absence of some indication to the contrary, or special circumstances, the minority shareholder's shares should be valued as a minority shareholding and not on a pro rata basis.*
>
> *43. As part of his argument, Mr Crow cited the Canadian case of Kummen v Kummen Shipman (1983) 19 Man R (2d 92, para 16), in which the court ordered the acquisition of the shares of one shareholder in what was effectively a 50:50 company on the basis of a pro rata valuation of his shares because the other shareholder would end up with 100% control of the company, which is the effect of a merger. That result was consistent with the position under section 996 of the UK Companies Act 2006, but the reasoning is not: the Manitoba court sought to bring into the question of the valuation the position that the acquiring shareholder would be in after the valuation. This involves taking account of the position which the acquirer had independently of the acquisition, and highlights the point of principle, which is supported by authority, that in the absence of some indication to the contrary, when shares are valued, only the value of the shares which the shareholder disposing of them can transfer should be taken into account.*
>
> *44. The authority which most clearly supports that point of principle is Short v Treasury Comrs [1948] 1 KB 116, affirmed [1948] AC 534, albeit that it was decided on different statutory provisions.*
>
> *45. In Short, the Crown had exercised its right to acquire the whole of the share capital of a company and was under the relevant legislation required to pay to each outgoing shareholder as compensation a price which was not less than the value of his shares as between a willing purchaser and a willing seller. The Court of Appeal of England and Wales held that, even though the Crown was acquiring the whole of*

the share capital, individual shareholders were not entitled to a pro rata share of the control premium because they were only selling their own (minority) shareholding. The House of Lords affirmed this decision.

46. *The decision in Short is rightly relied on by Mr Jones. He submits that a minority discount cannot be disregarded for three reasons: first, (as is common ground) a share is a share in the capital of the company, not a share in the undertaking and assets, second, the purpose of appraisal is to put the minority shareholder in the position he would have been in but for the merger (and the Board notes that that submission is confirmed in Delaware law by an express direction, not made explicit in the Cayman Islands Companies Law, that synergies should be disregarded (see para 4 above)), and, third, what has to be valued is what the shareholder has to transfer, which simply a minority shareholding in the company. (The Board expresses no view on whether synergies have to be deducted under the Cayman Islands Companies Law. That question does not arise in this case).*

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

[underlining added]

57. The decision in *Short* reflected the general common law principle for the valuation of shares, which assumed a hypothetical sale between a willing seller and willing buyer. The regulations under consideration in *Short* (the Defence (General) Regulations 1939) simply adopted those general principles. The idea of the hypothetical sale was invariably used to establish the legal parameters of a valuation process. The Privy Council in the JCPC Shanda Advice had stated that the Cayman legislature must be taken to have intended those general principles to apply to the determination of the fair value of shares under section 238 and that was why, after the JCPC Shanda Advice, the task of the Court under section 238 was to determine the price a hypothetical buyer would pay a hypothetical seller for the particular tranche of shares that fell to be valued.

58. The hypothetical sale had been an express construct first used in Victorian tax legislation in the UK (in the Finance Act 1894) which had defined the principal value of property as follows: "*the*

principal value of any property shall be estimated to be the price it would fetch if sold in the open market." But that legislation gave little further guidance and made no mention of a hypothetical sale or willing seller or a willing buyer. This was remedied by the courts which supplemented the statutory reference to "*open market*" by construing it as importing the hypothesis of a willing purchaser and seller (see Hoffmann LJ in *Gray v IRC* [1994] STC 360 at 372). As Lord Reid observed in *Lynall v IRC* [1976] AC 680 at 695 (***Lynall***) this was a "*classic hypothesis designed to look for the highest price that would actually be paid in the real world*":

> *"No doubt sale in the open market may take many forms. But it appears to me that the idea behind this provision is the classical theory that the best way to determine the value in exchange of any property is to let the price be determined by economic forces – by throwing the sale open to competition when the highest price will be the highest that anyone offers. That implies that there has been adequate publicity or advertisement before the sale, and the nature of the property must determine what is adequate publicity. Goods may be exposed for sale in a market place or place to which buyers resort. Property may be put up to auction. Competitive tenders may be invited. On the Stock Exchange a sale to a jobber may seem to be a private sale but the price has been determined, at least within narrow limits, by the actions of the investing public. In a particular case it may not always be easy to say whether there has been a sale in the open market."*

59. The concept of the open market automatically implied a willing seller and a willing buyer, each of whom was a hypothetical abstraction. However, the willing buyer reflected reality in that he embodied whatever was actually the demand for that property at that time.

60. These tax cases were frequently referred to more generally in other valuation disputes. For example, in *Daejan v Cornwall Coast Country Club* [1985] 50 P & CR 157 at 162 Peter Gibson J applied *Lynall* and the open market hypothesis observing that "*the concept of such a hypothetical transaction is one that is now familiar in a number of contexts apart from rent reviews—for example, estate duty, capital gains tax and compulsory purchase—and there is a good deal of helpful guidance to be obtained from the authorities.*" In *ESO Capital Luxembourg v GSA Invest Management Ltd* [2017] EWHC 1351 (***ESO***), Snowden J had applied the tax cases when dealing with the hypothetical sale of a 30% shareholding in a private company which owned a well-known five-star Swiss hotel.

61. One consequence of the requirement that the Court must value the shares not the company was that the valuation of the shares needed to take into account and reflect the inherent attributes of the shares themselves. For example, if and to the extent that the Dissenting Shareholders' established as a fact that the Company's shares were trading at a discount to the true value of the Company because of the China Effect, that was simply an inherent attribute of the shares

themselves. The Dissenting Shareholders had invested in a company whose shares were viewed with caution by investors and market participants and the fair value of the shares had to take that into account (no doubt this adverse perception was reflected in the price at which the shares were bought and sold).

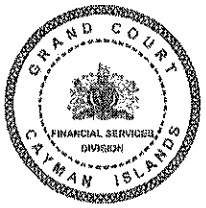
62. As regards the Delaware approach to determining fair value and the Delaware authorities:

(a). there were two fundamental differences between the Delaware jurisprudence and the approach sanctioned by the JCPC Shanda Advice. First, in Delaware the subject matter of the valuation was the company's business and not the dissenting shareholder's shares. Second, in Delaware, in order to avoid unjustly enriching the acquirer, he was not entitled to retain the financial benefit (the ***control premium***) obtained by acquiring control of the whole company, over and above the amount required to pay for the value of the minority shareholding.

(b). since in the Cayman Islands, after the JCPC Shanda Advice, the object of the valuation exercise was the dissenting shareholder's shares, it followed that where the shares in question were shares of a listed company, the price at which the listed shares trade would be important, if not critical, in the Court's fair value determination. There was therefore, the Company argued, a basis for concluding that for section 238 purposes, as a matter of law, the trading price of listed shares was to be regarded as being the primary or most important indication of fair value – and given even greater significance that in the Delaware jurisprudence.

(c). furthermore, since a shareholder in a Cayman company (save in the case of a quasi-partnership) had no legitimate expectation that he could permanently retain his shares, he could not require that fair value be determined on the basis that he retained his shares rather than disposed of them pursuant to a hypothetical sale (even though the Company did not formulate this point in precisely this way, this is how I have understood the argument it made, based on an interpretation of the Companies Law that treats a shareholder as taking his share subject to the majority's rights under and the divestment power in section 238).

(d). in Delaware, the reason for treating the retention of a control premium by the acquirer as unjust was because shareholders were treated as having a legitimate expectation of buying



into and retaining an interest in a going concern business with future prospects as a continuing enterprise. The Delaware approach characterised the dissenting shareholder as a victim whose expectations were unfairly dashed by the majority. In this jurisdiction, as confirmed by the JCPC Shanda Advice, the Companies Law did not confer such an expectation. Rather it considered it beneficial for commerce that a mere majority of shareholders should have the power to procure a merger of the company. The dissenting shareholder had acquired his or her shares subject to all the rights and disabilities conferred by law and by the memorandum and articles of association. These included a power vested in the majority to merge the company. The only legitimate expectation that a shareholder therefore had was that the affairs of the company will be operated lawfully.

(e). the Company referred to *Cavalier Oil Corp v Harnett* 1988 WL 15816 (Court of Chancery), 564 A.2d 1137 (1989) (Supreme Court) (***Cavalier***). This case involved consolidated appraisal proceedings where the dissenting shareholder, Harnett, was the only minority stockholder in the two companies. The companies' expert determined a value for the companies, and then sought to apply a 28% minority discount.

(f). at first instance V-C Jacobs rejected that argument in the following terms:

> *"The Companies argue that a "minority discount" is required to reflect the fact that Harnett's holdings represented a minority stock interest. That argument, in my view, is unsound, because its premise runs counter to the statutory policy underlying 8 Del.C § 262. The unstated premise of the "minority discount" concept is that the function of an appraisal is to value specific shares in the hands of a specific stockholder. If that were so, then the size of a dissenter's stock holdings would be an important consideration. Some jurisdictions do embrace that appraisal concept, and in those jurisdictions a "minority discount" has been upheld.*
>
> *That, however, is not the policy underlying an appraisal under 8 Del.C § 262. The objective of a § 262 appraisal is to value the corporation itself, as distinguished from a specific fraction of its shares as they may exist in the hands of a particular shareholder. Under § 262, the dissenting shareholder is entitled to his proportionate interest in the overall fair value of the corporation, appraised as a going concern...The amount of the holdings of a particular dissenting stockholder is not relevant, except insofar as they represent that shareholder's proportionate interest in the corporation's overall "fair value". That a particular dissenting stockholder's ownership represents only a minority stock interest in a corporation is, therefore, legally immaterial in determining the corporation's "fair value."*
>
> [underlining added]

(g). in the Delaware Supreme Court, upholding the decision of Jacobs V-C, Walsh J said:

> *"... In rejecting a minority or marketability discount, the Vice Chancellor concluded that the objective of a section 262 appraisal is "to value the corporation itself, as distinguished from a specific fraction of its shares as they may exist in the hands of a particular shareholder" [emphasis in original]. We believe this to be a valid distinction.*
>
> *A proceeding under Delaware's appraisal statute 8 Del.C § 262 requires that the Court of Chancery determine the "fair value" of the dissenting stockholders' shares. The fairness concept has been said to implicate two considerations: fair dealing and fair price.... Since the fairness of the merger process is not in dispute, the Court of Chancery's task here was to value what has been taken from the shareholder: "viz his proportionate interest in a going concern." To this end the company must be first valued as an operating entity by application of traditional value factors, weighted as required, but without regard to post merger events or other possible business combinations. ...The dissenting shareholder's proportionate interest is determined only after the company as an entity has been valued. In that determination the Court of Chancery is not required to apply further weighting factors at the shareholder level, such as discount to minority shares for asserted lack of marketability.*
>
> ...
>
> *The application of a discount to a minority shareholder is contrary to the requirement that the company be viewed as a "going concern." Cavalier's argument, that the only way Harnett would have received value for his 1.5% stock interest was to sell his stock, subject to market treatment of its minority status, misperceives the nature of the appraisal remedy. Where there is no objective market data available, the appraisal process is not intended to reconstruct a pro forma sale but to assume that the shareholder was willing to maintain his investment position, however slight, had the merger not occurred. Discounting individual shareholdings injects into the appraisal process speculation on the various factors which may dictate the marketability of minority shareholders. More important, to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder, a clearly undesirable result."*
>
> [underlining added]

(h). the purpose of a Delaware appraisal was to determine the fair value of 100% of the corporation, and to award to the dissenting shareholder his proportionate share of that fair value. The objective was not to value a specific minority share interest in the corporation as such.

63. The Company argued that there were three different ways in which a valuation could be approached which it said were set out in the International Valuation Standards 2017 (***IVS 2017***) produced by the International Valuation Standards Council (a not-for-profit organisation based in London committed to advancing quality in the valuation profession):

(a). the first approach was defined in IVS 2017 (at page 18) as market value (***Valuation Methodology 1***):

(i). *"Market Value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."*

(ii). this definition was said to be similar to the term 'fair value' as used in the International Financial Reporting Standards:

> *"IFRS 13 defines Fair Value as the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measure date."*

(b). the second approach was defined by the IVS 2017 (at page 21) as equitable value (***Valuation Methodology 2***):

> *"50.1. "Equitable Value is the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties.*
>
> *50.2. Equitable Value requires the assessment of the price that is fair between two specific, identified parties considering the respective advantages or disadvantages that each will gain from the transaction. In contrast, Market Value requires any advantages or disadvantages that would not be available to, or incurred by, market participants generally to be disregarded.*
>
> *50.3. Equitable Value is a broader concept than Market Value. Although in many cases the price that is fair between two parties will equate to that obtainable in the market, there will be cases where the assessment of Equitable Value will involve taking into account matters that have to be disregarded in the assessment of Market Value, such as certain elements of Synergistic Value arising because of the combination of the interests."*

(c). the third approach related to litigation disputes and was identified by the Model Business Corporation Act (***MBCA***) as fair value (***Valuation Methodology 3***). The MBCA is a model set of laws prepared by the Committee on Corporate Laws of the Section of

Business Law of the American Bar Association which is followed by twenty-four states in the US. The definition of fair value is the value of the corporation's shares determined (i) immediately before the effectuation of the corporate action to which the shareholder objects, (ii) using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal, and (iii) without discounting for lack of marketability or minority status.

(d). the approach to valuation endorsed by the JCPC Shanda Advice (the Hypothetical Transaction Approach) was Valuation Methodology 1.

(e). Valuation Methodology 3 was the approach used by the Delaware courts in appraisal cases.

64. The Hypothetical Transaction Approach was supported by the standard share valuation textbooks, such as *Tolley's Practical Share and Business Valuation* (2nd Edition, David Bowes paragraphs 5.2 to 5.4 (***Tolley***)) or *Practical Share Valuation* by Nigel Eastaway and others (7th edition, 2019 (***Eastaway***)). They generally deal with the different possible mechanisms to determine what would be the value in a hypothetical sale between a willing seller and a willing buyer. The following extract from *Eastaway* is illustrative of the analysis:

> *"1.17 Basic valuation principles*
>
> *The detailed rules and principles involving share valuation laid down by statute, the courts and established valuation practice will be dealt with in some detail in the following chapters. It is however at this stage worth outlining the fundamental aspects which determine the value of a share.*
>
> *Ultimately the value of anything is what somebody else is prepared to pay for it. In the case of shares in any company the real market is necessarily restricted to those people and institutions prepared to pay for the shares which are basically nothing more than a bundle of rights possessed by the shareholder. For a private company, there is an added restriction in the real market; the restrictions on transfer that are often contained in the articles of association. These rights are delineated by the memorandum and articles of association of the company and by the Companies Acts and court decisions thereon. The shares may entitle the shareholder to participate in dividends that may be declared by the directors, voting in accordance with the rights attached to the shares and to participate in a surplus on liquidation. The shareholder does not possess a proportionate interest in the actual underlying assets of the company. A potential purchaser of such shares is therefore going to consider carefully the rights he would have as the holder of the block of shares being valued. If these were a non-controlling interest the holder would be entitled to such dividends as the directors declare, if any,*

and he would not be able to exercise sufficient votes to change the board of directors if he thought the dividends paid were ungenerous compared with the available profits. However, merely because dividends may not be declared does not mean that the shares are worthless as profits will be reinvested for the eventual benefit of the shareholders, including the non-controlling shareholders. If, on the other hand, the number of shares on offer are sufficient to give the purchaser voting control he will be able to decide how much of the profit should be paid by way of dividend or reinvested or drawn as remuneration and he is therefore primarily interested in the earnings of the company.

A purchaser of 75% or more of the voting shares could, subject to any specific requirement in the shareholders' agreement, put the company into liquidation and is therefore interested in both the break-up value of the shares and the earnings on the basis of keeping the company as a going concern. He would theoretically be prepared to pay on the basis of whichever of these methods gave the greatest value. A 51% shareholder may be able to do the same in appropriate circumstances.

Valuation calculations are often made on the basis of the historical results of the company; but in reality the purchaser is interested in the future results after he has acquired the shares, not in the past results, and therefore these are only of relevance-to the extent that they may be some indication of the likely results that could be expected for the future.

Even a minority shareholder is interested in the asset cover of the company as, if two companies have identical profits and dividends, but one had equity in freehold properties worth £500,000, whereas the other merely had current assets balanced by liabilities, it is likely that a purchaser would pay more for the shares of the company with the freehold property, assuming of course that the anticipated future profits were similar. The reason is simply that such an acquisition would be less speculative, i.e. have less risk attaching to it, in that, if for any reason the business failed, it would nonetheless still be possible to realise the freehold properties.

1.18 Valuation calculations

The three basic factors which affect the value of a company's shares are its earnings, dividends and asset value and may be evidenced by actual sales at arm's length. The relative importance of these factors will vary in relation to the size of the shareholding being valued. Risk and growth are considered to be key factors...."

65. Even where there were restrictions on the transfer of shares, the correct approach was to ask what a hypothetical buyer would pay to be able to step into the shoes of the hypothetical seller even though there was no possibility of a sale of the shares: see *Eastaway* at para 3.02.

66. Applying the Hypothetical Transaction Approach involved assuming a sale by the Dissenting Shareholders of their shares. The hypothetical parties were not persons with the attributes of the

actual parties. It would therefore be a heresy to assume that a hypothetical sale with only the Company as purchaser. There was no room for the presence of a special purchaser in the open market hypothesis. Furthermore, it was well established that in a hypothetical sale the Court had to proceed on the basis of the information that would be available to the parties in the real world, remembering that for these purposes neither party can be the Company and that in the real world even the Company would not be giving unbridled access to company records. What the Company referred to as "*the forensic digging of the valuers in section 238 cases that has hitherto taken place*" was therefore inappropriate. The approach taken in the Delaware cases which allowed the valuer to have all the information that was "*known or could be known*" was wholly wrong in the context of a valuation which had to approximate a real-world transaction for the sale of the Dissenting Shareholders' shares.

67. The Company relied on the decision in *Lynall* (which had been followed in many subsequent cases), in particular the judgment of Lord Reid (at p694):

> *"We must decide what the highest bidder would have offered in the hypothetical sale in the open market, which the Act requires us to imagine took place at the time of Mrs. Lynall's death. The sum which any bidder will offer must depend on what he knows (or thinks he knows) about the property for which he bids. The decision of this case turns on the question what knowledge the hypothetical bidders must be supposed to have had about the affairs of Linread. One solution would be that they must be supposed to have been omniscient. But we have to consider what would in fact have happened if this imaginary sale had taken place, or at least – if we are looking for a general rule – what would happen in the event of a sale of this kind taking place. One thing which would not happen would be that the bidders would be omniscient. They would derive their knowledge from facts made available to them by the shareholder exposing the shares for sale. We must suppose that, being a willing seller and an honest man he would give as much information as he was entitled to give. If he was not a director, he would give the information which he could get as a shareholder. If he was a director and had confidential information, he could not disclose that information without the consent of the board of directors."*
>
> [underlining added]

68. The Company submitted that the function of appraisal proceedings must not be confused with proceedings that are designed to control abuses or breaches. In the absence, as in the present case, of any prior claim for breach of duty or abuse of power, the court must proceed on the basis that everything had been conducted properly in the best interests of the relevant constituent companies but that the dissenting shareholder simply did not wish to participate on the terms offered. Concern about potential abuse should not lead the Court to putting an unnatural construction on the statutory language so as to try to protect shareholders from any perceived abuse. The control

of abuse lay in the numerous mechanisms otherwise available to protect minority shareholders from being abused.

69. It was not the Company's case that a DCF valuation was never appropriate. If a company was a private company and there had been no sales and purchases of its shares, a DCF valuation was likely to be at least the starting point for any valuation of the shares. However, if the shares were listed shares, traded on a public stock market, the price at which the listed shares were trading was the best evidence of the value of what a hypothetical buyer would pay a hypothetical seller for the shares, which is the task the court has to undertake. A public stock exchange was the paradigm example of an open market. Unlike most other property that the Court is asked to value, where it has to envisage a hypothetical open market with hypothetical sellers and buyers, on a public stock exchange there existed an actual open market with actual buyers and actual sellers. The Court did not need to carry out the speculative exercise it would otherwise have to do.

70. The Court of Appeal's judgment in *Shanda CICA* recognised that the actual value of shares could be calculated by determining the value of the company and applying a suitable discount, but the question of what the appropriate mechanism in any particular case might be had not been in dispute. The significance of *Shanda CICA* was that the shares and not the company were to be valued. The mechanism to do this would be a matter for each particular case. The Privy Council had made this abundantly clear in JCPC Shanda Advice.

71. The judgment of Kawaley J in *Nord Anglia* did not support the Dissenting Shareholders' position. It was handed down after and made reference to the JCPC Shanda Advice but the learned judge did not have the benefit of any submissions on the matter as the parties had closed their case prior to the Privy Council's decision and did not make any further submissions. The arguments made by the Company in the present case were not made to Kawaley J (it appeared to the Company that the company in *Nord Anglia* may not have appreciated the logical consequences of *Shanda CICA*). In addition, and in any event, it was a very different type of case and was therefore distinguishable. In *Nord Anglia*, the free float was only 33% and the market for the company's shares was considered not to be sufficiently liquid for reliance to be placed on the trading price, whereas in the present case the free float was over 90% and it was common ground that the market for the Company's shares was to be treated as sufficiently liquid.

The Dissenting Shareholders' submissions

72. The Dissenting Shareholders said that the essential point of principle that emerged from the JCPC Shanda Advice was that section 238 required the Court to determine the fair value of what the dissenting shareholder actually possessed: in other words, the object of the valuation exercise was the dissenting shareholder's shares, not the business of the company. But, they submitted, one permissible method of estimating the fair value of a dissenting shareholder's shares involved the following steps: first find the value of the company as a whole; second, assign that value *pro rata* to the dissenting shareholder's shares; and third, if the facts require it, apply some discount to reflect the fact that the dissenting shareholder's shareholding is a minority shareholding. This was permissible because:

(a). this approach had been taken in every previous section 238 case in the Cayman Islands, without adverse comment from any appellate court.

(b). the Court of Appeal in *Shanda CICA* had said in terms that this approach was permissible (see [50]: "*As a matter of mechanics, this can be done by adjusting the value that the shares would otherwise have as a proportion of the total value of the company*") and this passage from the Court of Appeal's judgment had been cited without criticism in the JCPC Shanda Advice (at [21]). Moreover, the Privy Council itself applied this approach in deciding the case before it.

(c). the approach was consistent with the valuation principles set out in the judgment of the Privy Council in *CVC v Almeida* [2002] UKPC 16 (an appeal from the Cayman Islands Court of Appeal in relation to a winding-up petition). Lord Millett, giving the judgment of the Board, said at [37]:

> *"There are essentially three possible bases on which a minority holding of shares in an unquoted company can be valued. In descending order these are: (i) as a rateable proportion of the total value of the company as a going concern without any discount for the fact that the holding in question is a minority holding; (ii) as before but with such a discount; and (iii) as a rateable proportion of the net assets of the company at their break up or liquidation value."*

(d). Lord Millett explained that the "*break-up or liquidation*" basis at (iii) should not be applied to a business which was intended to continue as a going concern. What was important for the present case was that all three of the valuation bases discussed by Lord

Millett involved measuring and apportioning the enterprise value of the company: the difference between (i) and (iii) is that (iii) assumed that the enterprise will be liquidated, such that the sum total of value it will generate was the sale value of its assets, whereas (i) assumed that the enterprise would continue to generate value by trading as a going concern. The same approach, conceptually speaking, should be applied to the fair valuation of the Dissenting Shareholders' shares, notwithstanding that those shares happen to have been listed on an exchange.

(e). this approach was the routine way of arriving at a valuation of minority shareholdings in the English case law.

73. In English and Cayman Islands law, a share is a bundle of rights and obligations. The Dissenting Shareholders relied on the judgment of Lord Millett in *Commissioners of the Inland Revenue v Laird Group* [2003] 1 WLR 2476 at [35] ***(Laird)***:

> *"35. The juridical nature of a share is not easy to describe...It is customary to describe it as "a bundle of rights and liabilities", and this is probably the nearest that one can get to its character, provided that it is appreciated that it is more than a bundle of contractual rights. The most widely quoted definition of a share is that of Farwell J in Borland's Trustee v Steel [1901] 1 Ch 279, 288 which was approved by your Lordships' House in Inland Revenue Commissioners v Crossman [1937] AC 26. It was usefully and in my respectful opinion accurately summarised by Lord Russell of Killowen in his speech (dissenting on the facts) in that case, at p 66:*
>
> > *"It is the interest of a person in the company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of association of the company."*
>
> *These rights, however, are not purely personal rights. They confer proprietary rights in the company though not in its property. The company is at one and the same time a juridical person with rights and duties of its own, and a res owned by its shareholders: see Gower's Principles of Modern Company Law 6th ed (1997) p 301.*
>
> *36. The rights of the shareholders in a company are set out in its articles of association. In the case of ordinary shareholders, they are normally those described by Lord Wilberforce in [Inland Revenue Commissioners v Joiner [1975] 1 WLR 1701 at 1706–7]: "rights to received dividends, if declared, rights to vote, rights in a liquidation to receive a share of surplus assets after discharge of liabilities."*

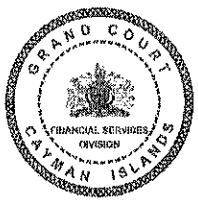
74. In the case of the Company (as with most companies), that bundle included rights to participate in profits and distributions in a winding up (the Dissenting Shareholders held ordinary shares, carrying the rights to dividends and to a share of assets in liquidation as contained in the

Company's articles of association). That was why the best way to estimate the intrinsic value of a block of shares was to start with the intrinsic value of the future cash flows of the company. The result of *Shanda CICA* and the JCPC Shanda Advice was that to measure the fair value of a given block of shares, it will normally be necessary to discount the pro rata value of the company that block represents by a percentage representing the discount for lack of control. But the Court must still start with the value of the company. This approach was supported by the opinion and evidence of Mr Edwards who offered a definition and explanation of intrinsic value. During his cross-examination he said as follows:

> *"the underlying economic value of the business, based on the assessment of its future cash flows, discounted at an appropriate rate, and what that equates to is the sum of cash that the owner of that asset should be prepared -- should be indifferent between accepting a sum of cash and having the rights to those future cash flows. Similarly, a prospective buyer should be indifferent between holding the lump sum cash equivalent and having the right to those uncertain future cash flows."*

75. The Company was wrong to say that its primary case could be derived from what was said in the JCPC Shanda Advice about the decision in *Short*. The Privy Council stated the general principle to be derived from *Short* at paragraph [47] (quoted above) ("*where it is necessary to determine the amount that should be paid when a shareholding is compulsorily acquired pursuant to some statutory provision the shareholder is only entitled to be paid for the share with which he is parting, namely a minority shareholding, and not for the proportionate part of the controlling stake which the acquirer thereby builds up, still less a pro rata part of the value of the company's net assets or business undertaking*"). The Dissenting Shareholders submitted that there was no reference in that statement to hypothetical buyers or sellers or actual market prices. The only point that was to be derived from *Short* was that the subject of the valuation was the appropriated party's "*minority shareholding*". That was a point which the Dissenting Shareholders had always accepted and on which their submissions had been based.

76. The Dissenting Shareholders had no objection to the approach set out in Valuation Methodology 1 as one aspect of valuation methodology if it was properly understood. Parties acting with full knowledge and all appropriate prudence buy and sell companies at their assessment of intrinsic value; and they buy and sell blocks of shares at a proportion of that intrinsic value less a discount for lack of control. The ultimate conceptual objective was the ascertainment of fair value, based on intrinsic value, but if there was an actual market that approximated to the hypothetical world of Valuation Methodology 1, then that will provide evidence of what the outcome might be.



77. In the Dissenting Shareholders' submission, the conceptual distinction between intrinsic value and market value was sufficiently clear as a matter of principle that no recourse to the expert evidence was necessary in order to test it.

78. If the Company was right that fair value should be determined by reference to a hypothetical sale, then there would be no need for section 238 at all, because any shareholder could simply sell their shares at the higher of the market price and the merger price, and that would, by definition, be fair value. Section 238 would be redundant. The right to a fair value under section 238 was a primary right which stood alone, with no requirement to prove that no other remedy might also be available.

79. What was recognised in the textbooks and the cases (including *Short*) was that a listed price *may be* good evidence of the price that would be paid in a hypothetical transaction between well informed, prudent persons. However, whether it was evidence at all, and if so, how cogent, depended on the qualities of the market and the availability in the market of all material information. In some cases, (such as *Short*), there may be no challenge to the reliability of the market as a measure of fair value. But in others, like the present, the assessment of that question was at the heart of the dispute between the parties. It was a factual matter to be decided on the evidence, not a principle of law.

80. The Company's argument that private information available to the company was irrelevant to the issue of fair value had been rejected both in *Shanda CICA* (at [22]) and Parker J in *Qunar*. In *Qunar*, Parker J said the following (at [87] – [89]):

> *"87. In my view in the context of a fair value determination, restricting what information is relevant as a consequence of the hypothetical sale concept is not appropriate.*
>
> *[...]*
>
> *89. I have concluded that the court should look at all information relevant to fair value as at the Valuation Date. This is in order to give it a full picture of the commercial reality in which the Company was operating and would have continued to operate but for the Merger. It is not to be confined to the information available to market participants at the relevant time. The imbalance of control and information between the Company and the Dissenters is thereby corrected to a degree by a full enquiry into the relevant commercial reality from which to assess fair value."*

81. There was a strong and principled reason why non-public information should be taken into account. That was because a management-led buyer group may have access to information that

was not available to the market or to the dissenting shareholders. It would be wrong in principle and contrary to the protective purpose of section 238 to exclude information that may have informed the buyer group's assessment of the price it was willing to pay. This required that non-public information should be taken into account as a matter of course in section 238 proceedings. That requirement was particularly significant in this case, because it was clear that the Buyer Group (which was led by Mr Gao) actually did have access to information that was not available to the market or to the Dissenting Shareholders, most prominently (but not only) in relation to the volume of PV modules that the Company was likely to sell in 2017.

82. The English authorities relied on by the Company to support its attempt to limit the scope of relevant information were of no assistance because first, the law of the Cayman Islands on this point had been clearly stated in *Qunar* and *Shanda CICA* (as well as *Integra* and *Re Homeinns Hotel Group* [2017] (1) CILR 206, Mangatal J) and secondly because in those cases the relevant statutory provisions pursuant to which the valuations had to be prepared, in contrast with a fair value determination under section 238, required the valuation to assume that would be a sale in the open market. This assumption affected and limited the information which a buyer was to be assumed to have.

83. This was particularly the case in relation to *Lynall.* This was a case about the construction of section 7(5) of the Finance Act 1894. That provision required certain shares to be valued, in the words of the Act, at "*the price which, in the opinion of the commissioners, such property would fetch if sold in the open market*". It was therefore unsurprising that the House of Lords considered what information would have been available to a buyer in the open market. It is also irrelevant to an appraisal under section 238, which was concerned with the fundamentally different exercise of ascertaining fair value. Indeed, Lord Reid had contrasted the exercise required by the Finance Act 1984 with the exercise of ascertaining "*fair price*", and noted that the latter requires information confidential to the company to be taken into account. The Dissenting Shareholders relied on the part of Lord Reid's judgment at 694G – 695C.

Discussion

The impact of and position after the JCPC Shanda Advice

84. The Company has argued that the JCPC Shanda Advice has confirmed or established a number of legal rules that must be applied to and which regulate, and require a change of approach to,

the determination of fair value under section 238. In the process, the Company has referred to and revisited a number of points of principle concerning the juridical nature of a share and of the valuation process. However, I note at the outset that these points of principle do not achieve a knockout blow by precluding the Court relying on a DCF valuation. The Company wishes to establish, in the case of listed shares traded in a liquid and properly functioning market and a merger process conducted in accordance with market norms and best practice, the primacy of market based indicia of value so that the trading price (or failing that, the merger price) are the best and most reliable indicators to which the Court give exclusive or substantial weight. The Company seeks to eliminate reliance on or reduce the weight to be attached to a DCF valuation. It argues that market based indicia are to be preferred because they relate (i) directly to dealings in the shares, which are the proper subject matter of the valuation, while the DFC valuation relates to the cash flows of the underlying business, which are not; and (ii) to sale transactions which are the proper basis for section 238 valuations. But, even if the Company is right that section 238 requires the Court to assume a sale of the dissenting shareholder's shares and consider what a hypothetical purchaser would pay for them, a DCF valuation would still be relevant and could be relied on in so far as it can be shown that purchasers will use DCF valuations when deciding what to offer and pay for the shares. And the Company accepted that it could and did not argue that DCF valuations could never be used. So even on the Company's case, the question of whether and the extent to which reliance could be placed on a DCF valuation depends on the facts and circumstances of the particular case.

85. In considering the basis and implications of the JCPC Shanda Advice it is, in my view, important to have regard to the following important passages in addition to those referred to and extracted above:

> *"27. The Board considers that, when and to the extent that any issue arises as to the valuation of shares under section 238,* ***the meaning of the words "fair value" used in section 238(1) is to be ascertained by statutory interpretation****. In that situation, the court has to ascertain the intention of the legislature from the words it has used in their context, and also in the light of any material which demonstrates the mischief that it was concerned to redress by the statutory provision.*
>
> *28. On this appeal the only issue as to valuation is whether the fair value of the Maso parties' shares is their pro rata proportion of the agreed value for the entire share capital of Shanda, which would broadly correspond with the value of the company's business and undertaking, or whether that value should be reduced by an agreed percentage to reflect the fact that the shares of the Maso parties form part of a minority shareholding in Shanda. That is a very narrow question which does not entail the Board embarking on a detailed analysis of fair value. The Board will so far as possible confine its opinion to those points of interpretation which in its opinion need to be decided on this appeal. The Board does not rule out the*

possibility that, depending on the circumstances, "fair value" could be ascertained using a different methodology from that agreed on by the parties in these appeals.

29. *The Board considers that Shanda is correct in its resistance to this appeal principally for three reasons: (1) comparable provisions of the Cayman Islands Companies Law do not provide for pro rata valuation; (2) **the general principle of valuation of shares on sale is that what has to be valued is what the shareholder has to sell**, and (3) the similarities between the Delaware appraisal remedy and section 238 do not justify departure from that principle.*

.....

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

.....

55. *It follows that the judge should not have held that fair value **always** means no minority discount (see, for example, judgment of the judge, para 93, second sentence). **That could not be a bright-line rule to be applied in every case. Similarly, it was not open to CICA to hold that a minority discount should invariably be applied as a matter of law. The legislature's direction is to find the "fair value" of the dissenter's shareholding. Because of the narrow scope of this appeal, the Board is not in a position to rule out the possibility that there might be a case where a minority discount was inappropriate due to the particular valuation exercise under consideration.***

56. *As explained, the only issue which the parties have argued is whether the shares of the dissenters should be valued on a pro rata basis or not. The parties have not sought to argue that the value should be something other than CICA found it to be if section 238 does not require a pro rata valuation of the dissenters' shares. Accordingly, the Court of Appeal's order as to the value of the dissenters' shares stands, and the Board humbly advises Her Majesty that the fair value appeal should be dismissed."*

[underlining and emphasis added]

86. It seems to me that the following propositions can be derived from these passages, taken together with paragraphs [42] – [47] set out above:

(a). the meaning to be given to "*fair value*" in section 238 is ultimately a question of statutory interpretation.

(b). where shares are subject to statutory compulsory acquisition procedures, the process of interpretation is to be undertaken by reference and having regard to relevant judge-made principles applicable to the valuation of shares. Legislation is to be taken as having been enacted on the basis of and so as to respect or give effect to such principles save to the extent that the legislation indicates that it is intended to displace (dis-apply) or vary the principle's application in relation to the matters covered by the legislation.

(c). one such principle was that where it was necessary to determine the amount that should be paid when a shareholding was compulsorily acquired pursuant to statute, the shareholder was only entitled to be paid for the share with which he was parting. There was nothing in section 238 (or the other relevant provisions of the Companies Law) which indicated that this principle was to be dis-applied when the Court made a fair value determination.

(d). in enacting section 238 and using the term "*fair value*" the Cayman Islands' legislature was to be taken as having intended that the Court should interpret this term consistently with the principles of statutory interpretation but otherwise free from the constraints of the jurisprudence governing different valuation standards, or of valuation exercises done in different circumstances.

(e). the legislature's direction was to find in each case the "*fair value*" of the dissenting shareholders' shareholding. There was not a bright-line rule to be applied in every case. For this reason, it had not been open to the Court of Appeal, and the Court of Appeal had been wrong, to hold in *Shanda CICA* that a minority discount should invariably be applied *as a matter of law*. It was possible that there might be cases where a minority discount was inappropriate due to the particular valuation exercise under consideration. I had also been wrong in *Shanda* to hold that there was a different bright line rule, namely that a minority discount was never applicable.

(f). since a shareholder was only entitled to be paid for the share with which he was parting (forced to part), he was not to be paid a sum representing the benefit obtained by the acquirer as a result of being able to acquire all the shares of the company. That benefit did not attach to and was not derived from the shareholder's property (his share) of which he

had been deprived. The statutory power, absent a contrary provision, allowed the acquirer to obtain the whole of the share capital of another company (including the control premium) without having to account to the minority shareholders or anyone else for the benefit which he thereby received (which was derived from the acquisition of the shares of shareholders other than the minority). Section 238 was such a power and the relevant provisions of the Companies Law did not contain a provision (and was not to be interpreted as) having the effect of requiring the Company to pay, as fair value, the dissenting shareholders for the benefit derived by the acquirer from the acquisition of other shares of the Company.

87. In my view, neither the Privy Council's decision nor its reasoning in the JCPC Shanda Advice require the Court, as a matter of law, to adopt the Hypothetical Transaction Approach. I do not accept that the JCPC Shanda Advice stands as authority for the third proposition relied on by the Company (see paragraph 53(c) above - the Court *must* determine the price at which the shares would be exchanged between a willing buyer and a willing seller in an arm's length transaction based on publicly available information). I consider that the Dissenting Shareholders' submissions on this issue are generally, subject to some modifications, correct.

88. The Privy Council concluded that in UK and Cayman law, statutory powers authorising the compulsory divestment or cancellation of shares in return for a payment (which can be referred to generically as compensation, in the sense of the identification of an amount that represents the monetary equivalent or worth of the rights given up, rather than and not as compensation for a civil wrong) are, in the absence of contrary provision, to be interpreted as giving the affected shareholder a right only to compensation for what they are required to give up and not a right to share in the benefit obtained by the acquirer. This principle was based on *Short*.

89. In *Short*, the House of Lords had to interpret the relevant provisions of the Defence (General) Regulations 1939 (the ***Regulations***) which empowered the Government to order (where required for the efficient prosecution of World War 2) the transfer of all a company's shares to a designated transferee. Regulation 78(5) provided that the shareholders should be paid a "*price*" for the shares transferred which was to be "*such price as may be specified by an order made by the Treasury being a price which in the opinion of the Treasury was not less than the value of those shares between a willing buyer and a willing seller on the date of the order ...*". It was held (see Lord Porter' speech at 542-545) that the proper basis for valuing the shares under regulation 78(5) involved assuming that the shares had been purchased in individual blocks from individual

shareholders (the appellant shareholders had argued that since the Regulations only authorised the expropriation of all the shares, the proper method of fixing the price was first to ascertain the value of the whole undertaking and then to determine the proportionate value of each class of shares).

90. Despite the fact that *Short* involved the construction of a particular piece of wartime legislation relating to what the Government had to pay for requisitioning and taking over companies required to support the war effort (described by Lady Arden as "*very different legislation*"), the Privy Council (and the Court of Appeal) concluded that it established a principle of general application to (the interpretation of) all statutory powers involving compulsory divestments and acquisitions and the payment of compensation, which, on the proper construction of the Companies Law, applied to section 238 fair value determinations. The subject matter of the fair value determination is what the dissenting shareholder possessed and had been required to part with. He was not entitled to compensation for a benefit obtained by the acquirer by reason of the acquirer's acquisition of other, additional, shares. But this principle does not say anything about the manner in which the fair value of the dissenting shareholder's shares is to be ascertained nor require the Court to assume a hypothetical sale.

91. In ascertaining fair value, the Court must assess and determine a monetary amount which in the circumstances represents (its best estimate of) the worth, the true worth, of the dissenting shareholder's shares (true worth meaning the actual value to the shareholder of the financial benefits derived and available to him from his shares and by being a shareholder). The reference to fair requires in my view *inter alia* that the manner and method of that assessment and determination is fair to the dissenting shareholder by ensuring that all relevant facts and matters are considered and that the sum selected properly reflects the true monetary worth to the shareholder of what he has lost, undistorted by the limitations and flaws of particular valuation methodologies and fairly balancing, where appropriate, the competing, reasonably reliable alternative approaches to valuation relied on by the parties.

92. The assessment of the true or proper monetary worth of the share can be done in appropriate cases by assuming an immediate sale and certain conditions within which the sale is assumed to take place. This will often be the most reliable method of capturing the full monetary worth of the share. But the financial worth of a share can also be assessed (absent a statutory direction to the contrary) on the assumption that the shareholder retains that share and obtains the financial benefits of so doing. This is what the Dissenting Shareholders have in mind when they refer to

intrinsic value (establishing a monetary value for the shareholder's bundle of rights by reference to the financial benefits flowing from the right to participate in profits and obtain distributions in a winding up). In both cases a DCF valuation of the company can be of assistance and relied on. The DCF valuation generates a value *for the shares* by starting with a valuation of the company's cash flows, which cash flows (and assets) represent the financial benefits in which shareholders may ultimately participate, allocating that value to shareholders proportionately and then making suitable adjustments to reflect the different holdings, rights and obligations of individual shareholders (in order to base the valuation on the shareholder's particular entitlement). In the case where there is a valuation based on an assumed sale, the DCF valuation may be relevant in so far as it represents or supports a calculation of what a purchaser is likely to offer and pay for the shares. In a case where there is a valuation based on an assumed retention, the DCF valuation is relevant in so far as it represents or supports a calculation of what the shareholder is likely to receive over time by way of dividends and distributions in a winding up. This approach is supported by the comments of Martin JA in *Shanda CICA* ("*As a matter of mechanics, [a share can be valued] by adjusting the value that the shares would otherwise have as a proportion of the total value of the company*") and of Parker J in *Qunar* (at [48]) ("*Calculating the value of a company as a whole is a way of assessing the value of a block of shares*").

93. I can see that it is arguable that since section 238 operates in the context of a merger transaction involving the sale and transfer of shares to a bidder and by way of a compulsory divestment, the appropriate concept to be used to determine the amount of compensation payable is that of the price (payable on a sale). But I do not consider that section 238 mandates the Court to find or only rely on the fair *price* in every case. Section 238 is careful to distinguish between "*fair value*" and "*price*". "*Price*" is mentioned in section 238 (8) and (9) when referring to the sum to be offered by the company to purchase the dissenting shareholders' shares. But if there is no agreement and therefore no sale to the company, the dissenting shareholders' entitlement, following *ceasing* to have the rights of a member, is to be paid the *fair value* of their shares (under sections 238 (1), (7) and (11)). Fair value may equate to fair price but it need not do so in every case. Furthermore, there is no assumed sale to but a cessation or cancellation of rights against the Company.

94. The Dissenting Shareholders submit that the *best* way to estimate the true worth of a block of shares is to *start* with a DCF valuation based on the future cash flows of the company's business. I would not go that far. I would not prioritise or privilege the DCF valuation in this way. The selection of which valuation method to use – alone or in combination with others – is a fact

sensitive issue so that in some cases it will be appropriate to give particular weight to market based indicia of value and use the DCF as a means of testing those other valuation methodologies. Accordingly, in some cases, as I explain further below, the trading price and merger price may be seen as reliable and may properly be used as the starting point for the valuation subject to testing by reference to a DCF valuation.

95. If it is wrong to say that the Court must assume a hypothetical sale, it is also wrong to say that the Court must assume a sale in an open market. The reason why the discussion in *Short* focused on the meaning and implications of an open market sale was because the assumption of an open market sale was required by the statutory regime established by the regulations.

96. It is also wrong, in my view, to say that the JCPC Shanda Advice *requires* the Court when determining fair value for the purpose of section 238 to apply the common law jurisprudence establishing the approach to be adopted when the Court is required to determine the price payable for shares in an open market sale. First, the principles discussed in the case law relied on by the Company are not of the same juridical character as the general principle identified by the Privy Council. They relate to valuation methodology, to be used *when and if* a valuation is to be made on a particular basis, namely assuming and based on an open market sale. The general principle identified by the Privy Council identifies the subject matter of the divestment for which the shareholder is entitled to compensation. Identifying what is to be treated as given up and divested tells one nothing about the manner in which it must be valued. Secondly, the cases relied on involved valuations whose purpose was to establish a "*price*" and which had to be based on an assumed open market sale. Such an assumption is not required by section 238. As I have explained, section 238 is careful to distinguish between "*fair value*" and "*price*". The common law jurisprudence may be both relevant and helpful in particular cases but not in every case.

97. Furthermore, when valuing the dissenting shareholder's shares, the Court is not required to treat market inefficiencies as flaws attaching to or inherent in the dissenting shareholder's shares. The Company argues that in a case in which listed shares trade at a price which is lower than a value indicated by a DCF valuation because of market concerns and uncertainties regarding the company or the sector in which it operates (for example because it operates in China and a number of China based companies have been the victims of fraud or mismanagement such that market participants are unable to determine whether the company could be similarly afflicted) the dissenting shareholder is only entitled to be paid the (lower) market price (even if the company is properly managed and fraud-free) - because all the dissenting shareholder has is the

right to sell his shares in the market and therefore the fair value of his shares is subject to and affected by such market perceptions. But, apart from the need to take into account the possibility that market perceptions will be corrected, the worth of the shares is not, as a matter of principle, the same as or limited to their market price, but can also be assessed by reference the financial benefits which can be derived from retention of the shares.

98. These conclusions are confirmed by Lady Arden's analysis, as summarised above. She pointed out that it would be wrong (rigidly and automatically) to apply valuation methodologies from other contexts to section 238 fair value determinations. As I have already explained, Lady Arden made clear that by using the new and previously unused term of "*fair value*" the Cayman Islands' legislature was to be taken as having intended that the Court could interpret this term, subject to the ordinary principles of statutory interpretation, free from the constraints of the jurisprudence on different valuation standards, or of valuation exercises done in different circumstances. Furthermore, there were not, as a matter of law, bright-line rules regulating the approach to be adopted by the Court when deciding fair value and the proper methodology for ascertaining the value of that which the dissenting shareholder has had to give up. As a result, as Lady Arden pointed out, in certain cases a minority discount could be inappropriate on the facts and in light of the "*particular valuation exercise under consideration.*" It seems to me that the Company is attempting to persuade the Court to adopt either the type of bright line rules which Lady Arden rejected or strong legal presumptions requiring rebuttal which are also inconsistent with the approach set out by Lady Arden.

99. Lady Arden did not, and did not need to, elaborate in the JCPC Shanda Advice on what would need to be shown in order to justify there being no minority discount (and the parties have not sought to advance additional arguments based on the JCPC Shanda Advice to the effect that this is one of the cases that Lady Arden had in mind when she said that on some occasions no minority discount should be applied). Nor did she seek to define or elaborate further on the meaning of "*fair value*". Interestingly, Lady Arden has, however, offered some thoughts extra-judicially in her lecture to the 9th Annual P.R.I.M.E. Finance Conference (on 3 February 2020):

> *"Of course, fair value may mean a price specially fixed by the court and representing its view as to the fair value. The court may consider, for instance, that the fact that the shareholder had to sell when otherwise they would have wanted to hold on to their investment in the company a relevant factor and that they should be compensated for that element of involuntary sale i.e. for the fact of expropriation.*

When the statute says "fair value" it arguably does not make clear to whom it must be fair – has it got to be fair to the shareholders seeking appraisal, the remaining shareholders or the company?

Another view might be that the shares are only worth what someone is prepared to pay for them. This is the merger price. Courts may consider that fairness to other shareholders involves giving the merger price weight too.

From this it might follow that, if the price has been carefully negotiated by a committee of unaffiliated directors, with the benefit of full access to information about the company and with the benefit of independent financial or other relevant advice, the fair value of shares is that negotiated price. The courts may find additional reassurance in this negotiated price if there have been competing bids for the company.

Moreover, courts do not normally second-guess the judgment of shareholders on financial matters – and in this instance some shareholders will have found the merger price acceptable. So their approval may be given weight for this reason too.

There may also be the problem that to determine the fair value without reference to the merger price may encourage litigation. It may even encourage people to buy shares with a view to exercising appraisal rights, and this could also have an adverse impact on court resources.

It may also make it difficult to achieve mergers efficiently and have adverse economic consequences: there may be less rationalisation of industries that have become outmoded.

These are some of the difficult issues that may have to be considered in the future and therefore I express no view on them. There may indeed be no one answer to the question of the correct approach to valuation: there may be different answers according to the facts of the case. We shall have to see."

100. Obviously these comments express the informal thoughts and speculations (and indeed expressly disclaim the expression of any views) of one of the members of the Privy Council and have no weight as authority. The parties submitted that I should give them no weight and should not take them into account when making my decision. I agree and have not relied on them for the purpose of reaching my view as to the law established and to be derived from the JCPC Shanda Advice. I would simply note that Lady Arden clearly did not believe that the JCPC Shanda Advice established and laid down a single, standard valuation methodology to be adopted in section 238 cases.

101. In *Nord Anglia*, Kawaley J did briefly review the JCPC Shanda Advice and did not consider that it affected the approach that the Court should take in deciding what valuation methodologies are appropriate on the facts and in light of the expert evidence. He concluded that a blended approach was appropriate attributing a 60% weighting to the merger price and a 40% weighting to an adjusted DCF valuation. I accept of course that Kawaley J did not have the benefit of the

arguments made by the Company in this case and therefore that his conclusions were not reached after considering their points. Nonetheless, his reading of the JCPC Shanda Advice did not cause him to conclude that a fundamentally different approach from that adopted in previous decisions was now required and in my view he was right so to conclude.

102. I would also note that in *Qunar* Parker J, albeit before the JCPC Shanda Advice was promulgated, rejected the argument that the Court was required to adopt the Hypothetical Transaction Approach. He said the following:

> *"84. The problem with applying the hypothetical sale analogy is that in this case one can see that the sellers (the Dissenters) might be fairly unwilling and the buyers (the majority) somewhat eager in the context of the Merger. Moreover, there is no 'sale', simply an extinguishment of rights and the cancellation of shares in return for the entitlement to the fair value payment.*
>
> *85. I have reached a decision on what is being valued (the shares themselves) and the information to be taken into account (all relevant information to fair value - see below) without recourse to applying a strict hypothetical sale concept to the transaction and its logical consequences."*

103. In my view, therefore, as the Dissenting Shareholders submitted, the JCPC Shanda Advice has not established new rules of law regulating the choice of valuation methodologies to be employed by the Court in a section 238 case. There are a number of recognised methods for attributing a monetary value to the particular rights and obligations which shareholders of particular companies possess and it is necessary in each case to consider, with the assistance of suitably qualified experts, which method is most suitable and appropriate. A DCF valuation is clearly one of such methods, as the Company ultimately accepted, despite its lengthy arguments as to why market methodologies based on the Hypothetical Transaction Assumption were required after the JCPC Shanda Advice.

104. As a general matter, it seems to me that the approach adopted in both *Qunar* and *Nord Anglia*, the two most recent section 238 fair value determinations, remains appropriate and consistent with the JCPC Shanda Advice.

MNPI

105. The Company sought to exclude from the valuation process information which was neither in the public domain or required to be disclosed to the market by the Company (i.e. MNPI). This was because such information would not be available (i) in an open market - the section 238 valuation

was to be based on a hypothetical sale in an open market and (ii) to any potential purchaser - even if there was no open market assumption, the section 238 valuation was to be based on an assumed sale transaction and focused on the price that a purchaser would be prepared to pay. I have already rejected these arguments, and so the Company's grounds for arguing that MNPI cannot in principle ever be taken into account fall way. The Company submitted that previous cases in this Court which permitted use to be made of MNPI had been based on the approach in the Delaware cases which was wrong in the context of a valuation process in this jurisdiction which had to approximate a real-world transaction for the sale of the Dissenting Shareholders' shares. The Company relied, as I have explained, on *Lynall*. But I consider the Dissenting Shareholders' submissions on this issue to be right. I do not consider that the JCPC Shanda Advice has changed the analysis and would follow in particular the decision of Parker J in *Qunar* which is directly on point and the approach adopted by Kawaley J in *Nord Anglia*.

106. It seems to me, as I have already explained, that the task of the Court is to determine a monetary amount which in the circumstances represents the true worth of the dissenting shareholder's shares without being limited by particular valuation methodologies and their associated assumptions. To do so, the Court must be able to have regard to and take into account all relevant information and not just the information available to on-market purchasers. As I have also already said, the reference to fairness reinforces the point by invoking the principle of just or fair treatment for the dissenting shareholder which to my mind must include a valuation process that takes account of all relevant facts and matters. In my view the Dissenting Shareholders are right to say that *Lynall* is distinguishable for the reasons they give. The decision in *Lynall* was based on an analysis of the requirements and nature of an open market because section 7(5) of the Finance Act 1894 directed that the valuation ascertain the price that the shares would fetch if sold in the open market. The other cases relied on by the Company also involved a valuation methodology that required, or was agreed, to involve an open market sale (for example, in *ESO*, Snowden J noted, at [47], that "*The parties agreed that the task of the court is to arrive at a valuation on the assumption of a hypothetical sale on the open market between a willing vendor and a willing purchaser*"). Furthermore, this approach is supported by and consistent with the evidence of the Company's own valuation expert, Ms Glass. She pointed out that market trading prices cannot by definition reflect any private information not in the public domain but considered that if there was MNPI which affected the value of the company which was not publicly available, it would be legitimate to take that into account in valuing the company (albeit that the fact that there might be mispricing in the market did not mean that market prices should be ignored or rejected entirely in the assessment of the fair value). She considered that where the price at which

shares were trading was considered to be a good indicator of the value of the company based on public information available, the valuer could and should calculate what difference it might make to the market price had the private information been made public.

The relevance and impact of the Delaware jurisprudence

107. The Company says that the Delaware approach is diametrically opposed to the approach required by the JCPC Shanda Advice (and *Shanda CICA*). It did so primarily to support its argument that it followed from this jurisdiction's focus on valuing the dissenting shareholders' shares rather than the company's business that in Cayman exclusive or predominant weight should be given to indicia of value that were directly related to the shares, such as the market trading or sale price on a merger. I have already dealt with this argument. But the Company also relied on the Delaware jurisprudence to support other arguments it made. One of these was that the price that a hypothetical buyer would pay a hypothetical seller was also the governing principle under Delaware law, albeit it was applied to the company's business and undertaking rather than to the shares themselves

108. This was not an issue that either of the Delaware law experts addressed directly although a number of the dicta cited in their opinions were relevant to the point (the underlining in all cases is added):

(a). in the Delaware Supreme Court in *DFC* (at page 23) the court summarised the decision in *Cavalier* as follows:

> *"... Basically, [Cavalier] focuses the appraisal proceeding on the fair market value of the company being appraised, putting aside any issues relevant to the value of [dissenters'] share blocks and trying to exclude any portion of value that might be attributed to a synergy premium a buyer might pay to gain control. That is, in sum, our case law has been read to value the company on its stand-alone value."*

(b). and the court went on to explain its understanding of the fair value standard at page 25:

> *"...fair value is just that, "fair." It does not mean the highest possible price that a company might have sold for had Warren Buffett negotiated for it on his best day and the Lenape who sold Manhattan on their worst. Rather, as the Court of Chancery has put it in another context:*
>
> *"A fair price does not mean the highest price financeable or the highest price that fiduciary could afford to pay. At least in the non-self-dealing context, it means a*

price that is one that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably accept."

Capitalism is rough and ready, and the purpose of an appraisal is not to make sure that the [dissenters] get the highest conceivable value that might have been procured had every domino fallen out of the company's way; rather, it is to make sure that they receive fair compensation for their shares in the sense that it reflects what they deserve to receive based on what would fairly be given to them in an arm's length transaction."

(c). the following statements are made and dicta quoted and relied on by Mr Montejo (at [9], [10] and [11] of Montejo 1:

"An appraisal proceeding is a limited legislative remedy intended to provide shareholders dissenting from a merger on grounds of inadequacy of the offering price with a judicial determination of the intrinsic worth (fair value) of their shareholdings." Cede & Co. v. Technicolor, Inc., 542 A.2d 1182, 1186 (Del. 1988)

The "corporation must be valued as a going concern based on the operative reality of the company at the time of the merger." Montgomery Cellular Hldg. Co., Inc. v. Dobler, 880 A.2d 206, 222 (Del. 2005) (internal quotation marks omitted).

"All relevant, non-speculative factors bearing on [the Company's] value as of the merger date" may be considered, exclusive of elements of value arising from the expectation or accomplishment of the merger." Del. Open MRI Radiology Assocs. P.A. v. Kessler, 898 A.2d 290, 310 (Del. Ch. 2006)

The Court of Chancery has "significant discretion to consider 'all relevant factors' and determine the going concern value of the underlying company." Golden Telecom, Inc. v. Global GT LP, 11 A.3d 214, 218 (Del. 2010)

Merger price, share market prices, and discounted cash flow analysis are also "elements of value" that will be considered and weighed by the Court based on the body of evidence presented at trial to support them. Glassman, 777 A.2d at 248]. "In the end, after this analysis of the relevant factors, in some cases, it may be that a single valuation metric is the most reliable evidence of fair value and that giving weight to another factor will do nothing but distort that best estimate. In other cases, it may be necessary to consider two or more factors. Or, in still others, the court might apportion weight among a variety of methodologies. But, whatever route it chooses, the trial court must justify its methodology (or methodologies) according to the facts of the case and relevant, accepted financial principles." Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., 177 A.3d 1, 21 (Del. 2017)

(d). but in *Cavalier* Walsh J also said, in a passage immediately before the extract quoted by Martin JA in *Shanda CICA*, that:

"The application of a discount to a minority shareholder is contrary to the requirement that the company be viewed as a "going concern." Cavalier's

argument, that the only way Harnett would have received value for his 1.5% stock interest was to sell his stock, subject to market treatment of its minority status, misperceives the nature of the appraisal remedy. Where there is no objective market data available, the appraisal process is not intended to reconstruct a pro forma sale but to assume that the shareholder was willing to maintain his investment position, however slight, had the merger not occurred. Discounting individual shareholdings injects into the appraisal process speculation on the various factors which may dictate the marketability of minority shareholders."

(e). so while there are statements referring to valuations based on market prices, and the objective of ensuring that dissenting shareholders receive fair compensation for their shares in the sense that the compensation reflects what they deserve to receive based on what would fairly be given to them in an arm's length transaction, it is also accepted that the underlying purpose is to determine (by way of a best estimate) the intrinsic worth of the shareholding and that in a case in which the "*market data*" (market based indicia of value including the trading price of the shares) is unavailable (or unreliable), the appraisal process is not based on an assumed sale but an assumed retention – so that there is a valuation of the dissenting shareholder's retained interest in the company's business (its enterprise value) on the basis that there had been no sale transaction and no merger.

109. Both the Company and the Dissenting Shareholders agreed that it was, and after the JCPC Shanda Advice remained, appropriate for the Court to take into account some elements of the Delaware jurisprudence. This seems to me to be right. This is clear both from the remarks made by Martin JA in *Shanda CICA* at [46] and from those of Lady Arden in the JCPC Shanda Advice at [49]. The relevance of the Delaware jurisprudence was usefully discussed by Parker J in *Qunar* (at [34] – [35]) and well summarised by Kawaley J in *Nord Anglia* (at [81]). Recognising and giving proper weight to the need to avoid reliance on Delaware law and practice where it is inconsistent with the law and practice of this jurisdiction (as I pointed out in *Shanda* and was reiterated by the Court of Appeal in *Shanda CICA* and by Lady Arden in the JCPC Shanda Advice), it seems to me that the Delaware courts' analysis of the mechanics of the valuation process and different valuation methodologies (particularly DCF valuations) reflects a reasoned review of what is reasonable and consistent with the principles and best practices adopted by valuation professionals (and often involves an analysis and assessment of the same literature and standards that are relied on by valuers in this Court). This aspect of the Delaware jurisprudence is of general application and can be of great assistance to this Court.

Reliance on and use of the adjusted trading price

The Company's submissions

110. The gravamen of the Company's main argument was that as a matter of law and principle, in the case of the shares of public companies, where the company's shares are listed and there is a liquid market, with the shares being followed by analysts and the share price moving with announcements, a market based price was likely to be the best evidence of fair value (either because it was the best evidence of what price a hypothetical seller would negotiate with a hypothetical buyer or because it was the best evidence of the intrinsic worth of the shares). Furthermore, since after the JCPC Shanda Advice it was clear that the object (or subject matter) of the valuation exercise was the shares themselves, the price at which listed shares trade was obviously important if not critical.

111. The Company submitted that, as was clear from *DFC* and *Dell*, the Delaware courts subscribed to the semi-strong version of the efficient market hypothesis (***EMH***). This is that well-traded stocks in a mature market, such as the US, are semi-strong efficient, which means the prices reflect all publicly-available information regarding the stock, the company, the industry, the economy but not private information. Furthermore, these cases showed that those prices were better indicators of value than expert valuations, as they were the product of the collective judgment of many well-informed market participants about the company's future prospects, based on public filings, industry information and research conducted by equity analysts who are uninterested in the outcome of litigation.

112. In *Dell*, the original offer was US$13.65. The offer was subsequently increased and the actual merger price was US$13.75. This was a 37% premium to the unaffected market price. The Court of Chancery decided that no weight should be given either to the trading price or the merger price and instead placed one hundred per cent reliance on a DCF valuation that the court had itself constructed. The Delaware Supreme Court held that this approach was wrong (pages 7-8, 24 and 25):

> *"... Dell had a deep public float and was actively traded as more than 5% of Dell's shares were traded each week. The stock had a bid-ask spread of approximately 0.08%. It was also widely covered by equity analysts, and its share price quickly reflected the market's view on breaking developments. Based on these metrics, the record suggests the market for Dell stock was semi- strong efficient, meaning that the market's digestion and assessment of all publicly available information concerning Dell was quickly impounded*

into the Company's stock price. For example, on January 14, 2013, Dell's stock jumped 9.8% within a minute of Bloomberg breaking the news of the Company's take-private talks, and the stock closed up 13% from the day prior – on a day the S&P 500 as a whole fell 0.1%

... Further, the trial court expressly found no evidence that information failed to flow freely or that management purposefully tempered investors' expectations for the Company so that it could eventually take over the Company at a fire-sale price, as in situations where long-term investments actually led to such valuation gaps...."

....the Court of Chancery's analysis ignored the efficient market hypothesis long endorsed by this Court. It teaches that the price produced by an efficient market is generally a more reliable assessment of fair value than the view of a single analyst, especially an expert witness who caters her valuation to the litigation imperatives of a well-heeled client.

A market is more likely efficient, or semi-strong efficient, if it has many stockholders; no controlling stockholder; "highly active trading"; and if information about the company is widely available and easily disseminated to the market. In such circumstances, a company's stock price "reflects the judgments of many stockholders about the company's future prospects, based on public filings, industry information, and research conducted by equity analysts." In these circumstances, a mass of investors quickly digests all publicly available information about a company, and in trading the company's stock, recalibrates its price to reflect the market's adjusted, consensus valuation of the company."

113. In *DFC* (at page 37) the Delaware Supreme Court had stated that:

> *"When, as here, the company had no conflicts related to the transaction, a deep base of public shareholders, and highly active trading, the price at which its shares trade is informative of fair value, as that value reflects the judgments of many stockholders about the company's future prospects, based on public filings, industry information, and research conducted by equity analysts."*

114. The Company also noted that this Court had placed weight on market based trading prices in previous decisions:

(a). in *Qunar*, Parker J adopted a blended approach, giving 50% weighting to a DCF valuation and 50% to the unaffected market trading price.

(b). in *Integra*, Jones J also adopted a blended approach with a 75% weighting given to DCF and 25% to market trading prices, but since the stock was illiquid, comparison companies were used rather than the company's stock itself. Jones J held that "*this methodology is to be preferred in cases where there is a well-informed and liquid market with a large, widely held free float.*"

115. The Company noted that its ADS traded at between approximately U$7 and US$13 between December 2014 and December 2016 and submitted that Ms Glass' methodology and conclusions were reasonable and reliable. The main points of her analysis were summarised at [6.4] of Glass 1:

(a). the Company's ADS were liquid. Ms Glass had conducted liquidity analyses and confirmed that the Company's shares were liquid. She also noted that prices moved upon announcements being made and that the Company was valued by quality analysts.

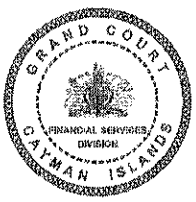
(b). at or around the Proposal Date, the Company's ADS price appeared to have been impacted by factors other than fundamentals and therefore, might not provide a reasonable indication of fair value.

(c). that situation had changed by the Acceptance Date, at which point share price movements were consistent with company fundamentals and analyst expectations.

(d). but after the announcement of the approval of the merger by the Company's board on the Acceptance Date, ADS trading was driven, at least in part, by the expected Merger Price, as opposed to company fundamentals or intrinsic value.

(e). in these circumstances it was reasonable to rely on the ADS trading price as at 29 July 2016, the date immediately prior to that announcement (1 August 2016 being a Monday and 29 July 2016 being the previous Friday). Accordingly, she estimated the fair value based on the trading price on that date but adjusted to take account of relevant changes (interim factors) occurring between that date and the Valuation Date. In doing so, she had regard to two key issues: what was the amount that should be used as the starting point and what adjustments should be made for the interim factors?

(f). she considered whether the starting point of the analysis should be the price at 29 July 2016 (US$8.25) or a 30-day average. The average price over the 30-day period prior to the Acceptance Date was US$8.35 (she decided not to consider averages further back in time, given the significant changes in market expectations over time). On the basis of the continual fall in the share prices of peer companies and the fact that her estimate of the decline during the relevant period was conservative, she concluded that the starting point of the analysis should be the 29 July 2016 price of US$8.25.



(g). she then considered the interim factors that would have influenced fair value between 29 July 2016 and 16 December 2016. At the Acceptance Date, the Company's ADS trading price was in decline and in her view had the merger not taken place, it was likely that the ADS price would have fallen further. Ms Glass compared the trading prices of the Company's peers in the period from immediately prior to the Acceptance Date to the Valuation Date and concluded that all of the share prices had declined significantly (although the movement in the S&P 500 and the NYSE showed a small increase).

(h). she took into account these trends and the comments of analysts and estimated the fair value of the Company's ADS at the Valuation Date by applying a 12% reduction to the trading price at 29 July 2016. This was a conservative estimate of the quantum of the decline which was based on her best judgment and was equivalent to the lowest value decline experienced by any of the Company's peers. Therefore, prior to consideration of a control premium, she estimated the fair value of the ADS at the Valuation Date as being US$7.26.

116. However, the Company submitted that the opinion on this issue of its own valuation expert, Ms Glass, had to be viewed with caution:

(a). first, Ms Glass, like Mr Edwards, had attempted to calculate the enterprise value of the Company and was heavily influenced by the Delaware approach. When analysing whether the trading price could be relied on she asked herself whether it was indicative of the enterprise value of the Company. She tried to analyse those occasions when she thought it was and those when she thought it was not. For the reasons I have summarised above, the Company submitted that this was not an exercise that was needed when assessing fair value, which required an assessment of what the hypothetical buyer would pay for the shares from a hypothetical seller and the trading price provided the best evidence of that.

(b). secondly, as I have noted, in giving her opinion of fair value she weighed the result of three different valuation methodologies (using the market trading price, the merger price and her DCF valuation) but only allocated 40% to the market trading price.

(i). she concluded that (Glass 1 at [322]):

> *"I am of the view that the Market Trading Price also provides strong evidence as to the fair value of the ADS, considering:*

a) *The overall liquidity of the ADS.... Over all periods reviewed, the [Company's] ADS had a low bid-ask spread, a deep public float, and were actively traded. In addition, the share price reacted quickly to news about the Company.*

b) *The high number of trades per day, which further strengthens our ability to rely on the trading price. Over the period reviewed, the market price of the Trina ADS reflected the combined opinions and market activity of an average of 8,680 investors each day. In my view, those combined opinions should not be dismissed or ignored.*

c) *The experience and qualifications of many of [the Company's] larger public shareholders, which included respected institutional investors with substantial stakes, such as Franklin Resources, Platinum Investment Management, Oaktree Funds, Goldman Sachs, Morgan Stanley, Deutsche Bank, State Street, Citadel Advisors, and Bank of America Corp.*

d) *The relatively wide analyst and investor following, together with the views of many respected analysts at or shortly prior to the Valuation Date. For the most part, analysts believed the shares were fairly priced – as illustrated by the high proportion of hold recommendations.*

e) *The lack of strategic premiums. Unlike the Merger Price, the trading price does not include any strategic or similar premiums that must be removed."*

(ii). but she considered that it was necessary to discount the weight to be attributed to the trading price for the following reason (in Glass 1 at [323]):

> *"The key negative arising from the market trading approach is the subjectivity surrounding [the Company's] likely share price movements between the Acceptance Date and the Valuation Date – although I believe my estimate of that change (a 12% decline) was fair, since it represented the minimum decline experienced by any of the peer companies."*

(c). the Company submitted that, if its primary case based on the requirement to determine fair value on the basis of the Hypothetical Transaction Approach was rejected by the Court, Ms Glass' conclusion, that the market price provided strong evidence of the fair value of the Company's ADS was correct and should be accepted by the Court without the need for the 60% discount that she had applied and only subject to her adjustment to determine the adjusted market price. In the present case the Buyer Group only controlled 5.6% of the shares and there was a liquid market that satisfied all the tests set out in *Dell*. The Court should rely exclusively on or give substantial weight to the adjusted market price.

(d). the Company rejected the Dissenting Shareholders' arguments challenging the reliability of the adjusted trading price. In particular, they rejected the Dissenting Shareholders' arguments concerning the existence of MNPI and the China Effect. I deal with the Company's position on these points after I have explained the Dissenting Shareholders' submissions.

The Dissenting Shareholders' submissions

117. The Dissenting Shareholders argued that, on the contrary, there were a number of reasons why the traded price of the Company's ADS on the New York Stock Exchange did not reflect the fair value of those shares. These can be summarised as follows:

(a). all of the evidence about the merger process in this case suggested that the Merger Price was below fair value. If that was right, it must follow that the Company's traded ADS price was so far below fair value that it cannot be viewed as any reliable indicator. It was important to note how far apart the figures were. Ms Glass' had calculated the unaffected market price as US$7.26. The Merger Price of US$11.60 was 60% higher than that amount. Ms Glass had grossed up the market price by a control premium. On her estimate of that premium of 10% (which the Dissenting Shareholders rejected as excessive) Ms Glass reached the sum of US$8.07. Even using that figure, the Merger Price was 44% higher than the market price.

(b). Ms Glass had accepted that at the Proposal Date, when the unaffected market price would normally be assessed, the market price understated the true value of the Company. The only way in which the market price could be relied on was by using an artificial construct that produced what was described as an "*adjusted price*" as a proxy for actual unaffected market price. Ms Glass used the traded price on 29 July 2016, the last trading day before the Acceptance Date, which she then adjusted downwards to reflect the manner in which she expected the price would have moved but for the announcement of the merger. This was an unsatisfactory approach. The adjusted price calculated by Ms Glass provided a value as at a different date (the Valuation Date) from that which would normally be used based on and by reference to changes to the prices of other company's shares occurring after a further and different date (the date immediately prior to the Acceptance Date).

(c). the accepted view in the recent academic literature was that the EMH, to the effect that markets can be relied on to determine value efficiently, did not justify the unqualified and immediate acceptance of and reliance on market prices; rather great care had to be taken to test whether in all the circumstances market prices reflected intrinsic value.

(d). in the present case it had not been shown that market prices were likely to be reliable indicators of the intrinsic value of the Dissenting Shareholders' shares.

(e). there was MNPI that was highly relevant to the Company's value at the Valuation Date which was not known to the market and not reflected in the market price.

(f). because of the China Effect - at the relevant time, Chinese companies were systematically undervalued on US exchanges.

118. As regards the reliability of the EMH in general:

(a). the central premise of that hypothesis was that in an efficient market, prices incorporate all relevant information quickly and rationally, and consequently are the best available estimates of a security's fundamental or intrinsic value.

(b). however, that central premise was no longer supported in the academic literature. As Mr Edwards explained in Edwards 2, work in the field of behavioural finance now suggested that economic theory did not lead to an expectation that financial markets were always efficient. Rather, systematic and significant deviations from efficiency were expected to persist for long periods of time. That work identified various examples of stock mispricing (some of which Mr Edwards referred to) which had been immediately observable but nonetheless persisted for long periods. This was inconsistent with the EMH since had the hypothesis been correct such mispricing would have been arbitraged away very quickly. Ms Glass had accepted in Glass 2 (at [94]) that "*many market participants do not accept the EMH*" and that "*the EMH does not imply that market prices equal fair value 100% of the time for all companies*". She had accepted during her oral evidence that "*significant mispricing for significant periods of time is sometimes a feature, even of advanced stock markets.*"

(c). accordingly, the market price could not generally be relied upon as an indicator of fair value, and Ms Glass' claim that "*valuation theory*" justified reliance on trading prices was not sustainable. But it did not follow that market prices can *never* be relied upon as indicators of fair value. The correct position was that it could not be assumed that in a given market for a given asset, the trading price will approximate fair value. As Mr Edwards explained during his cross-examination, considerable care has to be used before relying on the trading price. It was wrong to assume that markets get it right all the time.

119. In this case there were a number of factors which demonstrated that market trading prices could not be assumed to be or treated as reliable.

(a). Ms Glass had said that she considered two issues when deciding whether the market trading price was reliable. First, whether the shares were liquid and well traded. This was a necessary but not a sufficient condition. Secondly, she assessed over a two-year period whether the trading price was in line with company's fundamentals, being its sales, earnings, prospects and risks (whether the price was in line with what would be anticipated given the expectations as to these matters). She accepted that one way of capturing these fundamentals was by a DCF valuation and suggested that there might be other reliable methods. But none of the alternatives were reliable which left the DCF valuation, which the Dissenting Shareholders submitted was the most appropriate valuation methodology in the present case. One alternative which Ms Glass put forward involved using a multiples analysis, but that was not as reliable as a DCF because comparable companies in the relevant market sector could themselves be over or under-valued. Ms Glass' suggestion that the trading price would also be validated if it could be shown to be close to analysts' price targets was also misconceived and circular because the target prices relied on were only short-term price expectations, based on the current trading price, and a multiple of one year's results, with the multiple being influenced by the current trading price.

(b). Ms Glass had also considered and relied on the views of analysts who covered the Company at and around the Valuation Date. She had been wrong to rely on the analysts' reports and target prices as indicators of intrinsic value:

(i). she had reviewed the nature of the work typically performed by analysts and noted that the Company was followed by a considerable number of quality analysts in the relevant period. She concluded that the analysts were well informed. She noted that

when the Company first announced that it had received a proposal from the Buyer Group, most of the analysts believed the offer price to be too low, and some commented on the potential for Mr Gao to later relist in China. She concluded however, that by the Acceptance Date the analysts had changed their views, as a result of significant negative events transpiring in the interim. At that time, the valuations of analysts had fallen and the sentiment had changed considerably.

(ii). but Ms Glass had mischaracterised the nature and usefulness of the analysts work for the purpose of establishing fair value. She had sought to suggest that analysts were not primarily in the business of predicting what share prices will be in the future, but rather were primarily in the business of estimating intrinsic values, which the share price may reflect in future if there was no mispricing but otherwise may not. This was wrong as the analyst reports upon which she relied showed that analysts were in the business of estimating future share prices, not intrinsic value. Save for the separate valuation of the downstream business by Morgan Stanley and Credit Suisse, each of the five quality analysts Ms Glass used calculated its target price as a multiple of earnings for a single year. The results of such analysis reflected the analysts' expectations of short run market prices, not intrinsic value. It was unsatisfactory to rely on analyst reports, which were concerned with predicting market prices and not assessing intrinsic value, to establish that market prices reflect intrinsic value – the analyst reports simply did not speak to that question at all. This was put to Ms Glass who had no proper answer to it. Moreover, given that analysts were concerned with predicting what the share price would be in 12 (or 18) months, it was inevitable that their target prices would be heavily influenced by the current level of the share price.

(iii). analysts will inevitably not interrogate (or will interrogate only to a limited extent) whether the current share price mispriced the share, relative to its true intrinsic value. Given that, and given that the relevant analysts were expressly not concerned with ascertaining the intrinsic value of shares, there was no proper basis for relying on these analyst reports as corroborating the theory that market price equals or approximates fair value.

(c). Ms Glass had accepted that what she had done was not an event study. An event study was the method used to prove the EMH in relation to a given set of events. However, she

wrongly denied that this was what she was trying to do and therefore that the event study technique should have been used. The conclusion that a market price at a given date was indicative of fair value is precisely the type of conclusion that arose from a positive proof that the EMH applied to such shares at such a date. The fact that Ms Glass had accepted that this was not what she had proved was fatal to any claim that her work supported the reliability of the market price in this case.

(d). Ms Glass' methodology for calculating the adjusted trading price was inadequate and did not provide a reliable basis for establishing the fair value of the shares. Ms Glass had concluded that the market price had not been affected by the merger prior to the Acceptance Date because movements in the Company's share price in the months preceding the Acceptance Date were consistent with market factors. However, as Mr Edwards pointed out (in Edwards 2 at [2.14] – [2.15]) just because a share price moved directionally in the manner one would expect in response to news and events, it did not follow that the absolute level of the share price was consistent with the intrinsic of fair value of the shares. If the Company's ADS were undervalued relative to their intrinsic value at the start of the assessment period, then none of Ms Glass' directional analysis of the subsequent movements in that price went any way towards showing that the ADS price on 29 July 2016 (or any date) reflected or approximated fair value. All that Ms Glass had done was to compare the trading price at the Proposal Date (when she had already concluded that the trading price undervalued the shares) with the price at the Acceptance Date and identify what she said were three negatives that she suggested became known at some point during the period between those two points, concluding that the fair value at the second of those dates was lower than at the first. To conclude that this demonstrated that the trading price at the second date equated to fair value was an obvious non sequitur. There was nothing in Ms Glass' analysis of the Company's share price which actually established (or even suggested) that the absolute level of the share price reflected the intrinsic value of the shares at any time. Ms Glass had not done any analysis to establish that the ADS price reflected the Company's fair value at the start of the period of her analysis.

(e). none of Ms Glass' techniques went to the question of the absolute level of the Company's price at any relevant date. She wrongly claimed that the views of analysts filled that gap, but on proper inspection of the reports relied upon, they did not do so. Her methodology had been unable to identify the amount of the previously admitted undervaluation of the

Company's shares or the time when it was reversed, or the reason why it was reversed. All that remained was a set of price movements, some of which may be explicable as to direction only.

120. As regards MNPI:

(a). there was very significant information which was known to the Company and the Buyer Group, but not the market, as at the Valuation Date. The Company's management was in possession of private information about the Company's future prospects that was very material to the Company's value. This was one reason for the market's undervaluation of the Company.

(b). this included information concerning the Company's performance and other relevant developments between the date on which the market was updated by the Company and the Valuation Date. This was a significant period since the Company had not given any updated guidance to the market after quarter 2 of 2016.

(c). of particular importance was the fact that the Company and the Buyer Group knew but the market did not know that the Company was likely to ship 9,000 MW of modules in 2017.

(d). the evidence showed that in fact at the material time (i) the market's expectation was that the Company would ship between 6,000 and 7,000 MW of PV modules in 2017 (based on the Company's Q2 earnings call on 23 August 2016 and analysts' reports published around the Acceptance Date); (ii) the Company's management knew that the Company was in fact likely to ship 9,000 MW of modules in 2017; (iii) the Company's management also knew or assumed that module sales volume would increase in subsequent years at the rate anticipated by the Management Projections; and (iv) there was no reason to think that this private information would change expectations as to module selling prices (the Company was a "*price taker*" and did not itself influence average selling prices in a significant way).

(e). Mr Russo noted that in January 2016, the Company's management had estimated 2017 sales of 9,000 MW but that its estimate fell to 7,220 MW in July 2016, which was ultimately the number used in the Management Projections and that the Company's actual module sales were approximately 9,000 MW in 2017 (in a press release dated 29 January 2018, the Company announced that its global module shipments in 2017 were between 9.0

and 9.2 GW). Mr Russo considered that it was reasonable that the Company's management would have been able to form a reasonably accurate estimate of sales in December 2016, and should not have relied upon a then stale sales estimate. He said that:

> *"The actual 2016 sales match up very closely with the internal forecasts from July of 2016, indicating that Trina had good visibility into its future sales. Trina's management knew of positive market trends (among them growth in India ...), and should have had high confidence in their 2017 sales with only a few weeks left in 2016. Given the accuracy with which Trina's management was able to forecast their actual 2016 sales midway through the year, I would have expected actual 2017 sales to have been better-predicted than management's projections suggested."*

(f). Mr Russo's evidence was that module sales would have a lead-time of 6 to 12 months, which was confirmed by the statements about contractual lead times in the Proxy Statement. The relevant paragraph the Proxy Statement was as follows:

> *"We conduct our PV module sales typically through short-term and medium- term contracts with terms of one year or less or, to a lesser extent, long-term sales or framework agreements with terms of generally one to two years. Our short-term and medium-term contracts provide for an agreed sales volume at a fixed price. Our long-term sales or framework agreements provide for a fixed sales volume or a fixed range of sale volume to be determined generally two or three quarters before the scheduled shipment date. Compared to short-term and medium-term contracts, we believe our long-term sales or framework agreements not only provide us with better visibility into future revenues, but also help us enhance our relationships with our customers."*

(g). given those lead times, the Company as at the Valuation Date would have been in a position to estimate correctly that its 2017 sales would be in the region of 9,000 MW. During cross-examination Mr Russo had confirmed that his conclusion:

> *"[Was] borne out by the fact that [the Company's] management has made public statements to the effect that they can see several quarters ahead. It's borne out by the language .... in their 20-F [the Proxy Statement] ... and it's borne out and supported by -- rather than by just my experience in the industry that the lead time on these 3 projects is 6-12 months, perhaps longer, which was in fact confirmed by ... the 20-F .... I feel fully confident that [the Company] would have been able to estimate their order book with perhaps not certainty but rather reasonable confidence, circa the Valuation Date."*

(h). the Dissenting Shareholders argued that it became clear during Ms Glass' cross-examination that that the basis of her criticism of Mr Russo's approach was that she was unwilling to accept that the Company could have estimated 9,000 MW as at the Valuation

Date. When it was put to Ms Glass by Mr Salzedo QC that following Dr Goffri's oral evidence, both industry experts were agreed on this point she said as follows:

> *"A. Well, I'm seeing lots of "probably" and "I guess so's" but -- no, I disagree with both of them and I -- they are industry experts, I recognise that, but not necessarily experts in forecasting. So, yes, I disagree.*
>
> *Q. And I have to suggest to you that it's an incredibly partisan position to take up that you disagree with the industry experts on a point like that of industry expertise as to what [the Company] could have predicted given the facts at 16 December 2016.*
>
> *A. I disagree with you. I mean, this is not a full -- I mean, you know, Dr Goffri was under cross-examination for the first time. He -- I guess -- I don't know what was going through his mind. This is not something he thought about ahead of time or -- you know, I don't understand. Just because -- it's entirely possible that [the Company] would have thought that their module sales would be 7,200 but they end up being 9,000. Because even though they have short-term and long-term and medium term contracts, if their order book, or whatever you call it, was, let's say, around 7,000 at December 31st, it's entirely possible that they sold more. If a customer came along and wanted more, [the Company] is going to obviously sell more. And I don't know when that happened and I'm saying there is nothing to presume that -- we don't have any sort of information as at December 31st. What we do have is market information and what you are presuming, that [the Company] knew at December 16th that they would increase their market share from, you know, whatever, 9.5 to 12.5 and that they would increase their sales by 43 per cent in the face of industry increases of around 10 per cent, I would need to understand why that is and I have not -- that's where the industry experts come in, providing a reason as to why it's reasonable to expect that [the Company] would have expected 43 per cent growth even though the rest of the industry was predicting 8 to 10 per cent and I have not heard anything from either industry expert or from anybody along those lines, so the only thing I've heard is they actually sold 9,000 megawatts and that's hindsight."*

(i) in a subsequent exchange she said as follows:

> *"Q. Do you accept that as a matter of industry expertise, it is in fact the normal position for there to be a lead time for several months on module sales?*
>
> *Y. Yes, you don't order your modules on Monday and start the job on Tuesday, I'll agree with you on that.*
>
> *Q. So Dr Goffri must be right, mustn't he, that on 16 December 2016 you would have a good idea of your sales for the next half year?*
>
> *A. Well, possibly but that's not to say things don't happen that you don't expect. Things don't happen -- you are implying that nothing unexpected can happen.*

Q. Ms Glass, you know very well that there is no such implication in my question. This whole exercise is about coming up with the best, most reasonable forecast. You know that, don't you?

A. I agree with you.

Q. Good. And you have to accept, don't you, on the facts, from what you've just accepted, that as a module manufacturer, on 16 December in a given year, you would have a good idea of the most likely sales you are going to make in the next half year?

A. I agree with that fact. What I don't agree with is that you somehow know that's going to be 9,000. But I agree, you will have -- you should have a reasonably good estimate, which might prove wrong but you should have a reasonably good estimate."

(j). The Dissenting Shareholders submitted that Ms Glass' position was that she accepted that module sales had substantial lead times and that the actual sales for the first half of 2017 were in the region of 4.4 GW, but she nonetheless resisted the proposition that in December 2016 the Company's management would have been in a position to estimate sales of around 9 GW for 2017. That was an illogical position contradicting the unanimous opinions of Mr Russo and Dr Goffri and, moreover, one on which Ms Glass lacked the expertise from which to form an independent view. The logic which Dr Goffri had accepted was irresistible: given the usual lead times, and what is now known about actual sales in the four quarters of 2017, a reasonable forecast at December 2016 would have been in the region of 9,000 MW. No other answer was logically sustainable. It was impossible to resist the conclusion that Ms Glass' position on this point was a partisan one intended to avoid making a concession that would materially increase the valuation of the Company's shares.

(k). after the conclusion of her cross-examination I asked Ms Glass whether when giving her evidence (during her cross-examination) regarding Mr Russo's view that the figure of 9,000 MW for 2017 sales should be used she was considering what a reasonably diligent management team should have done. She answered that she was considering that, and that she had not seen how a reasonably competent management team in December 2016 could have predicted 9,000 MW. But the Dissenting Shareholders submitted that:

(i). this response did not affect Ms Glass' admission during her cross-examination that, on the assumption that the actual sales figure of 9,000 MW was admissible evidence in relation to the issue of what the Company's management might reasonably have

concluded based on the circumstances at the Valuation Date, she accepted that the most reasonable forecast for 2017 shipments was 9,000 MW.

(ii). at all times during her evidence, Ms Glass had insisted that the fact that the 2017 sales were actually 9,000 MW was inadmissible hindsight, even when addressing the question of what management should reasonably have forecast in December 2016, and even when the admissible facts included substantial lead times for sales. That position was obviously wrong as a matter of principle.

(l). based on this evidence, the Dissenting Shareholders invited the Court to find that as at 16 December 2016:

(i). the Company's management knew, or should have realised if they had applied their minds to the question, that the best forecast of module sales for 2017 was 9,000 MW.

(ii). 9,000 MW was the appropriate forecast for 2017 module sales for valuation purposes.

(iii). the appropriate module sales forecasts for succeeding years was: (i) the figure derived by assuming the same year on year percentage increase in MW as implied by the Management Projections; alternatively, (ii) the figure derived by applying a 1.3% annual increase in market share as per Mr Russo's projections; or, in the further alternative, (iii) the figure derived by adding 2,000 MW each year as per the Management Projections.

121. As regards the China Effect:

(a). another reason for the market's undervaluation of the Company was to be found in the clear empirical evidence that investors in US-listed stocks in Chinese companies such as the Company generally lacked relevant and important information about those stocks. The Dissenting Shareholders' case was that, given the systematic mispricing of companies like the Company on US exchanges, the traded price of the Company's ADS on the NYSE was not a reliable indicator of the fair value of those shares.

(b). one example of information which Chinese investors do, but US investors do not, have about Chinese companies was put forward by Mr Chan in his oral evidence. He accepted that "*the [US] stock market did not necessarily put proper value on the long-term prospects of the company.*" He suggested that US investors might not understand the way in which land holding works in China and as a result might undervalue the Company.

(c). another example which had been explored in the academic literature, was that US investors did not know whether Chinese companies were fraudulent or genuine. By contrast, Mr Gao and the Buyer Group knew, and the Court knows, that the Company is a genuine company.

(d). the literature on the China Effect had been summarised by Mr Edwards in Edwards 1 ([3.13]) and, in more detail, in Edwards 1, Appendix 5. According to Mr Edwards, the literature showed that following a series of high-profile accounting frauds involving US-listed Chinese companies (of which there were 60 allegations between 2010 and 2012 as against five between 2007 and 2009), 526 US investors lost confidence in Chinese companies generally, as they were unable to distinguish between fraudulent and non-fraudulent firms. As one of the articles stated, "*the dishonesty of bad firms spread suspicion to all other good firms listed in the US.*"

(e). Ms Glass (in Glass 2 at [49]) had dismissed the academic literature on the basis that it supported the proposition that Chinese companies were undervalued in the US between 2010 and 2012 but not subsequently. The Dissenting Shareholders submitted that this was wrong: it was a misreading of the literature that Mr Edwards had cited and was contradicted by other recent studies.

(f). Mr Edwards relied in particular on two papers published in 2017:

(i). the first was written by Beatty, Lu & Luo (Singapore Management University School of Accountancy Research Paper Series Vol. 5, No. 1 Paper No: 2017-57 *Market Failure and Reemergence: A Study of Chinese Firms Listed in the US* – draft dated 28 September 2016) (***Lemons 2***). This was an update on an earlier study by the same authors (***Lemons 1***). Ms Glass had suggested that in Lemons 2 the authors had found that the trend of undervaluation of Chinese companies in the US had reversed but this was incorrect. The authors had explained the systematic reasons