FSD Users Sub-committee – Section 238 Proceedings

SUMMARY OF CASES

1 Procedural Matters

Nord Anglia Education Inc (Kawaley J, 11 July 2018)

1.1 Practitioners were reminded by Kawaley J of their general and specific obligations to seek to reach agreement on logistical discovery matters in a manner consistent with common sense and proportionality and reserved the Court's right to summarily disallow costs in respect of disputes which are unreasonably referred to the court to resolve.

Ehi Car Services Limited (Parker J, 24 February 2020)

1.2 The Company sought directions for the further conduct of the proceedings as the parties were unable to agree on a number of issues, including the timing of the information request process, whether there should be a management meeting(s), the timing of factual evidence, and the scope of dissenter discovery. The parties also dispute whether the company should be required to disclose information about the dissenters' former shareholdings and whether the five different legal teams representing 28 dissenters should be required to coordinate by order of the Court.

1.3 The standard directions were not varied because there was no evidence shown to the Court to indicate that the 'standard' directions that have been ordered and complied with on a regular basis in recent years have been working any material injustice or are otherwise unfair. The Court confirmed that as long as the directions (typical to 238 cases) are not shown to work injustice in the particular case, they are treated as 'standard form directions' that the courts have ordered as a useful and the best 'starting point'. There is a value to the consistency of approach in relation to the same legal process because that in itself advances the overriding objective so that the parties can expect certainty or at least consistency, absent a good reason to the contrary.

1.4 The Court noted that in complex litigation and in particular in section 238 cases, it relies upon the attorneys' obligations to the court and the common sense and experience of counsel to coordinate matters sensibly. It is not for the court to micromanage in advance the conduct of attorneys or counsel.

Changyou.com Limited (Smellie CJ, 28 January 2021)

1.5 The Court considered the applicability of section 238 to "short form" or "vertical" mergers pursuant to section 233(7) of the Companies Act. Changyou argued that the right to fair value did not apply to short form mergers because there was no shareholder vote (as a shareholder may not dissent from a short form merger as such dissent is conditional upon the shareholder objecting to the merger prior to the vote).

1.6 The Chief Justice disagreed on the basis that Changyou's interpretation elevated the mechanical provisions dealing with how dissent rights were to be exercised, to substantive law. The Grand Court held that properly construed, s238 provided a freestanding right of dissent in a short-form merger. Section 238(1) should be read as permitting a shareholder to give a notice

of dissent in the absence of a shareholder vote. Such notice must be given within 20 days of the company providing a copy of the plan of merger to the shareholder. The Chief Justice held that the Petitioners had validly exercised their dissent rights, and were free to prosecute their fair value petition against Changyou.

Sina Corporation (Parker J, 25 January 2022)

1.7 At the directions hearing, Parker J was required to determine the date on which the fair value of a dissenting shareholders' shares in a company should be assessed (the Companies Act is silent on the date upon which shareholdings are to be valued).

1.8 The Company argued that the valuation date of the shareholding should be the date of the extraordinary general meeting. The Dissenters argued that the valuation date of the shareholder should be the date that the merger completed. Whilst these dates usually fall within a few days of each other, in this case there had been a three-month period between the date of the extraordinary general meeting and the merger completion date (and certain events had taken place which may have impacted the fair value of the Dissenters' shares).

1.9 Parker J held that the date upon which the fair value of the dissenting shareholders shares in a company should be determined is the date of the extraordinary general meeting – this is the date that the merger is considered by all of the shareholders in light of information that is available at the time, and subsequently authorised. Parker J also noted, however, that each case will fall to be determined on its own facts and the date is not rigidly set in future cases.

FGL Holdings (Parker J, 8 April 2022)

1.10 This was an application dealt with on the papers by Parker J in advance of the trial to assist the parties with their preparation for cross-examination of witnesses. The Company had sought an order that the Dissenters provide indices for the documents which they wish to put to the Company's factual witnesses in cross examination and that no further documents be permitted without the consent of the Company or leave of the Court.

1.11 The Dissenters resisted the application on a number of bases including that such an order would be unfair, and extraordinary. In particular noting that the FSD Guide, the Grand Court Rules, the Rules of the Supreme Court or the English Civil Procedure Rules do not provide for a witness to have advance notice of the exact documents upon which they will be cross examined.

1.12 Parker J noted that section 238 proceedings are unique in that there is no formal pleadings or statements of case and accordingly parties may be unaware of the specific case to be made which concerns the factual witnesses until written openings are served shortly before trial. Parker J ordered that the Dissenters provide a list of topics or themes that they intend to cover in cross-examination, to ensure there is no unreasonable element of surprise of ambush. He determined to leave it to his discretion as to whether other lines of cross-examination can be pursued outside the topics identified or whether documents outside the agreed trial documents can be utilised.

Sina Corporation (Parker J, 18 May 2022)

1.13 A procedural timetable was set following a directions hearing in December 2021, however, subsequently Parker J was required to determine whether the company should be permitted to delay providing its factual evidence until after any 28 U.S.C. §1782 discovery applications filed by the dissenting shareholders had been determined.

1.14 Parker J found that even though the dissenting shareholders had foreshadowed the potential for 28 U.S.C. §1782 discovery applications at the time of the December 2021 directions hearing, the subsequent filing of those applications meant that an adjustment to the timetable was necessary. In particular, Parker J considered that it was fair and reasonable to allow the company to deal with any additional material that might be ordered to be produced by third parties before preparing its own factual evidence.

1.15 Parker J ultimately ordered that the time for factual evidence to run was from the date that all discovery was provided, including any discovery provided by third parties under 28 U.S.C. §1782.

Changyou.com Limited (Court of Appeal, 16 September 2022)

1.16 The Court of Appeal applied the interpretive provisions of section 25 [and section 15] of the Cayman Islands' Bill of Rights to effectively re-write section 238(1) to 238(5) of the Cayman Islands Companies Act (2022 Revision) in order to grant an appraisal right for dissenters in short-form mergers (section 233 of the Companies Act). The Court of Appeal's modifications to the statutory provisions differed slightly from those made by the former Honourable Chief Justice Smellie in the first instance judgment (Smellie CJ, 28 January 2021).

1.17 In effect, the Court of Appeal introduced a modified procedure in section 238 of the Companies Act to allow for this, whereby:

(a) a dissenting shareholder must give a written notice of objection (if any such vote is to be held) or (if no such vote is to be held) immediately after the date on which the plan of merger is given to the member pursuant to section 233(7);

(b) within twenty days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, or (if no such vote is to be held) within twenty days immediately following the date on which the plan of merger or consolidation is filed with the Registrar pursuant to section 233(9), the constituent company shall give written notice of the authorisation or filing to each member who made a written objection; and

(c) a dissenting shareholder must give a written notice of dissent within twenty days immediately following the date on which the notice of authorization is given.

51job, Inc. (Doyle J, 2 December 2022)

1.18 A number of procedural issues were considered by Doyle J in a contested directions hearing, including the following:

(a) Doyle J accepted that the time period for the determination of any foreign discovery application (including 28 U.S.C. §1782 discovery applications) was not entirely in the control of the applicant, however His Lordship was keen to encourage applications to make such applications at an early stage and to progress them expeditiously. His Lordship confirmed that such applications cannot be allowed to unduly delay the determination of the 238 proceedings, which under section 7 of the Bill of Rights must be determined "*within a reasonable time*". Doyle J considered the Dissenters' submissions in respect of the implied undertaking, but decided that it was sensible and fair to include certain protections and restrictions that had been agreed by consent in *Re 58.com Inc.* (on 28 September 2022). Finally, Doyle J confirmed that the Company should not unreasonably withhold its consent to any request by the Dissenters to use additional relevant documents discovered by the Company in the proceedings for the purposes of any application for a foreign discovery order;

(b) Doyle J rejected the Company's argument that supplemental factual affidavits were appropriate because experience in recent cases suggested that the experts would be helped by allowing for that one or both of the experts had misapprehended a key factual issue in their first reports – the Dissenters argued that this proposed direction departed from the standard approach in section 238 cases. Doyle J confirmed that it was not appropriate to permit supplemental factual evidence as it would be a departure from the spirit of the standard approach to section 238 cases.

2 Interim Payments

*Qihoo 360 Technology Co. Ltd ("**Qihoo**")* (Quin J, 27 January 2017)

2.1 Justice Quin ordered that the company make an interim payment to the dissenting shareholders of approximately $16.9m, representing the merger consideration which had been offered based on the merger offer share price (i.e. the fair value offer under s.238(8)). The company's primary argument was that the dissenting shareholders were not owed a debt or entitled to damages (as required by Order 29) but were rather only entitled to be paid fair value for their shares and that value had not been established by the Court. The Court rejected the company's argument and held that a fair value determination by the Court pursuant to section 238 comes within the interpretation of 'interim payment' pursuant to GCR Order 29.

2.2 The Court noted that there was considerable force in the dissenting shareholders' reliance on Jones J's obiter comments (made in the context of determining fair value and interest payable to dissenting shareholders) in *Integra*:

> *'It could be said that the [dissenting shareholders] have been kept out of the money since July 2nd 2014, a date on which Integra made its written offer to pay Fair Value of*

US$10 per share pursuant to section 238(8). For whatever reason, it did not offer to pay this amount (or any lesser amount) on account pending the outcome of the proceedings. It follows that Integra has had the use of the [dissenting shareholders'] money for more than a year.'

*Qunar Cayman Islands Limited ("**Qunar**")* (Mangatal J, 8 August 2017 and Cayman Islands Court of Appeal, 20 June 2018)

2.3 At first instance, Justice Mangatal confirmed that the Grand Court has the power to order interim payments, and consistent with *Qihoo*, ordered that an interim payment equating to the company's fair value offer under section 238(8) be made to the dissenting shareholders. The mechanism used for interim payments arises by virtue of GCR Order 29, Rule 12(c) of the GCR. This was affirmed on appeal.

2.4 The company in *Qunar,* like in *Qihoo,* had argued that, as section 238 only provides for the Court to make a declaration as to the fair value of the shares rather than an order for payment of the amount declared, they were not proceedings in which the company would be held liable to pay “any damages, debt or some other sum” as Order 29, Rule 9 defines interim payments. Although Justice Mangatal held that there was some merit in this proposition, she saw no fault in Justice Quin's reasoning and therefore no reason not to follow his decision.

2.5 In terms of the "just" amount for an interim payment, neither *Qunar* nor *Qihoo* expressly preclude the possibility of relying on expert evidence in order to determine if the "just" amount should exceed the merger consideration. Justice Mangatal however held that the "just" sum should be predicated on the basis of what the company maintained was the fair value and accordingly ordered interim payments at the same amount as the merger consolidation.

2.6 On appeal, the Company's argument that GCR O.29 did not apply to section 238 petitions was unsuccessful on the basis that: (a) the court had jurisdiction to order the payment; (b) section 238 of the Companies Law does not preclude an order for interim payment notwithstanding that there is no express reference to it (the court described this as a "very surprising argument" if correct, as it would mean s238 proceedings existed in a vacuum); and (c) the question of liability to pay is expressly the subject of section 238.

Zhaopin Limited (McMillan J, 22 June 2018)

2.7 The court referred to and relied on the earlier decisions of Justices Quin Mangatal in determining the appropriateness of making an order for interim payments, holding that "*This Court is not convinced that Quin J and Mangatal J were in error. On the contrary, this Court accepts that the learned Judges were entirely right in their approach*", later characterising the guidance provided by Mangatal J in *Qunar* as "*both adequate and concise*".

2.8 McMillan J rejected the argument advanced by the Company that there was no jurisdiction to make an order for interim payments as the applicants could not show they would obtain judgment in their favour in the sense of both succeeding in their claim and obtaining a substantial sum of money on the basis that it was "*profoundly unattractive as well as illogica*l".

2.9 McMillan J also rejected the suggestion that there was no hardship or prejudice suffered by the dissenters (and that the company would be subject to hardship in the event that it was required to make an interim payment) or that there is any legislative basis upon which to make a distinction between shareholders who purchased shares for one commercial purpose as distinct from another. He observed that *"had the legislature sought to make any such distinction it would have done so., Accordingly it is not open to this court to withhold interlocutory relief on a basis that neither the Grand Court Rules nor the Law itself has ever intended*. *Other than in the context of considering and applying a minority discount as may be appropriate, it would be beyond the Court's authority to go further and to adopt and apply such interventionism.* "

2.10 In circumstances where the *Shanda* decision had by now been handed down and found that a minority discount is applicable in s238 cases, McMillan J applied a 15% discount to the amount claimed by the dissenters by way of interim payment (in the absence of expert evidence at this stage of the proceeding).

In the matter of eHi Car Services Limited (Kawaley J, 28 November 2019)

2.11 The Court considered an application for interim payment pending trial in circumstances where the company had not conceded that the merger consideration represented fair value, and had instead expressly reserved the right to argue or a lower amount at trial.

2.12 Applying orthodox interim payment principles, Kawaley J held that it was neither safe nor just to award the full amount of the merger price on an interim basis. Rather, the Court had to identify the irreducible minimum amount that could safely be assumed the dissenters would receive in any event, without venturing into disputed issues of fact or valuation.

2.13 Relying on both English authorities and previous s238 decisions on interim payments, the Court determined that in the circumstances, the irreducible minimum amount was 65% of the merger price, and awarded dissenting shareholders only 65% of the merger consideration accordingly. This was based on the range of values contained in the fairness opinion in the proxy statements which the Court considered was the best evidence of value before it at the time.

Nord Anglia Education Inc (Kawaley J, 26 May 2020)

2.14 The Company sought a partial stay pending its appeal against the Fair Value Order under s238 of the Companies Law. The fair value per share was determined to be US$37.68 (US$7.23 in excess of the market price). Some 20 of the original 34 Dissenters contended that the fair value should be US$45.45 and appealed the decision. Having already paid the 'undisputed' amount to the appealing dissenters by way of interim payment, the Company proposed to pay into Court, pending appeal, in excess of US$140 million which represents the 'disputed' US$7.23 per share.

2.15 The Court granted the partial stay sought having regard to section 19(3) of the Court of Appeal law (2011 Revision).

3 Company Disclosure Obligations

Qihoo (Mangatal J, 27 July 2017) and (Court of Appeal, 9 October 2017)

3.1 The general principle, established in Integra is that "*the experts are the best judge of what information is or is not relevant for their purposes".* In this instance, the company had repeatedly given deficient discovery, which warranted what Mangatal J described as an "exceptional remedy", namely the appointment of a forensic IT expert to conduct the discovery exercise on behalf of the company.

3.2 This approach was affirmed by the Court of Appeal in its judgment on 9 October 2017 where the Court of Appeal concluded that it was "*in keeping with the overriding objective*" and that "*the case was exceptional, not only because of the central importance of discovery in section 238 proceedings and the role of the company in that process, but also because the company's inconsistent and cavalier approach to discovery*."

3.3 The Court of Appeal agreed with Mangatal J that such orders should only be made in exceptional circumstances and warned against them becoming accepted practice.

Fountain Medical Development Ltd (Mangatal J, 19 January 2018)

3.4 The Company's disclosure obligations were limited at first instance to a specific date range, on the basis that the company conceded this would not preclude the experts from requesting documents outside of that range, if relevant.

3.5 Mangatal J also followed and applied the principle set out by Jones J in Integra (that "*the experts are the best judge of what information is or is not relevant for their purposes")*, taking the view that this "*does not come close to being oppressive or abusive*."

3.6 Mangatal J concluded orders for specific discovery may be made where appropriate and where the requirements of GCR O.24, r.7 have been satisfied.

3.7 While Mangatal J observe that the company has been "*very tardy in complying with disclosure obligations*" and "*delayed unnecessarily in p[providing the documents that its own expert has conceded are relevant*", she declined to make an order that the company swear an affidavit explaining the search process undertaken.

Nord Anglia Education Inc (Kawaley J, 19 March 2018)

3.8 Kawaley J considered the governing legal principles of disclosure obligations in fair value proceedings (in particular extracts from *Qihoo* (Unreported, 9 October 2017, CICA, Martin JA) and *Qunar* (Unreported, 20 July 2017, Grand Court, Parker J)), and held that the company's basic obligation should be to provide:

(a) discovery of all documents (of whatever description etc.) relevant to the question of fair value created in the 5 year period ending in the valuation date; and

(b) (without limiting the generality of the obligation in (a)), documents relevant to the categories of documents requested by the dissenters, subject to the overarching limits of relevance to fair value.

3.9 Kawaley J also held that the company could use key word searches to identify documents to be discovered as this is consistent with the Overriding Objective as formulated in the GCR. However, he noted that carrying out any such searches would not be a substitute for the company's *"…overarching obligation to identify documents relevant to the valuation question".*

3.10 Kawaley J approved of a highly sensitive documents regime, to be used by the company in relation to those documents which the company identified as highly confidential. In relation to these documents, the company was permitted to produce redacted and un-redacted versions of the highly sensitive documents, with only experts and counsel to have access to the un-redacted documents in the first instance. Further, if the dissenting shareholders' expert wished to rely on a highly sensitive document in his/her expert report, he/she was to only refer to the redacted version of that document and best efforts should be made to protect the confidentiality of information which is not central to the valuation analysis.

Xiaodu Life Technology Ltd (Kawaley J, 26 March 2018)

3.11 The Company's disclosure obligations were limited at first instance to a specific date range, on the basis that the company conceded this would not preclude the experts from requesting documents outside of that range, if relevant.

3.12 The Court made clear that the permission to use key word searches did not dilute the Company's ongoing obligation to disclose all documents relevant to the determination of fair value.

Qihoo (Mangatal J, 19 December 2018)

3.13 Following the order appointing the forensic IT expert, the dissenting shareholders brought an application for an order terminating the forensic IT expert appointment, revoking the company's leave to instruct an expert witness and serve expert evidence at trial, and disabling the company from relying on any factual evidence at trial, on the basis that the company had expressly directed employees to delete and destroy data and the company's chairman was seeking to extricate himself from the forensic audit by claiming he does not use any form of computer or electronic device.

3.14 The dissenting shareholders had not been able to demonstrate that there has been deletion of important material such that a fair trial was impossible. The court held that it would be inappropriate to make findings against the chairman in the absence of cross-examination and the evidence and circumstances of the application did not reach the level that would be required in order to justify the draconian relief sought.

Nord Anglia Education Inc (Kawaley J, 21 December 2018)

3.15 The Court was asked to consider the appropriateness of a '"bespoke' e-discovery system", which imposed confidentiality features on the documents disclosed and which the dissenting shareholders contended had an adverse effect on the functionality of the documents, contrary to the Directions Order for disclosure.

3.16 The Court determined that when providing disclosure to dissenting shareholders under s.238, the starting presumption is that documents will be provided in their native format and it incumbent on the company to justify any departure from this general rule. In this instance, Kawaley J found that the company had failed to establish that they were justified in limiting the class of users entitled to view unredacted highly sensitive documents but agreed that it was justified in utilizing its '"bespoke' e-discovery system" as a form of watermarking due to the unique circumstances of the case.

JA Solar Holdings Co Ltd (Smellie CJ, 17 July 2019)

3.17 Recognising the critical nature of the discovery process, which must be tempered by the tests of relevance and 'appropriate proportionality', the Company was ordered to provide both *specific* and *general* discovery for the five year period ending on the valuation date (not two years as sought by the Company).

3.18 In recognition that disclosure of certain information by the Company would be in breach of certain Chinese laws (and following *Zhaopin*), His Lordship permitted redaction of certain documents on the basis that, upon request: 1) the company give reasons for specific redactions; and 2) any documents shall be made available un-redacted to the parties' representatives within the PRC.

FGL Holdings (Parker J, 18 December 2020)

3.19 It was accepted as well settled that extensive discovery of company documents, which may be onerous and expensive, is essential in section 238 proceedings. The Dissenters as outsiders are entitled to it and the Court is reliant on the relevant material being provided to the valuation experts.

3.20 The Company did not refuse but suggested alternative approaches to disclosure of two categories documents on the basis that it would be unduly burdensome. The Court found that the discovery obligations should not be put over to the information request process, which is designed to elicit specific information and answers based on the experts' prior and ongoing review of the relevant discovery. It also found that appropriate narrowing terms had been suggested in respect of one category, such that the disclosure was proportionate. However the Court emphasised that the disclosing party should not be able to make a choice as to the particular sources from which discovery should be made, unless it can give an assurance that there is no other relevant material.

Xiaodu Life Technology Limited (Kawaley J, 27 April 2021)

3.21 Kawaley J issued a letter of request to the High Court of Hong Kong (for the examination and production of documents by 11 former officers) on an application supported by the dissenter's valuation expert on the basis of evidence from the expert as to the additional documents required, why they should exist. and their importance to the valuation. The Company did not oppose the relief sought.

3.22 He also made an order on the Dissenters' specific discovery summons that the Company serve an affidavit within 28 days stating (i) whether certain specified documents were or had at any time been in the possession, custody or power of the Company; (ii) the basis on which it is said the documents are not in the possession, custody or power of the Company; and (iii) what steps the Company had taken to recover the documents. The Court gave weight to the fact that the application was supported by evidence from the expert to the effect that "I need these documents for my report and to assist the Court".

3.23 While the Court acknowledged that "*In many cases, it is possible to simply accept evidence from an officer of a company that it has complied with its discovery obligations and that no further documents exist which must be produced. Such averments "would normally be conclusive": per Mangatal J in Re Qihoo 360 Technology Ltd [2017 (2) CILR 72]*" the Court noted that this was not a normal case as the deponent for the Company was not an officer of the Company but rather an employee of the post-merger parent company, who did not purport to have personal knowledge of the Company's pre-merger record keeping. He also failed to indicate sources of knowledge when making "*various critical assertions in relation to the present application*".

3.24 Kawaley J noted that "*The legal importance of discovery in the section 238 petition context is also significant in the context of an application such as the present one which is primarily designed to test the adequacy of the Company's disclosure by requiring a fuller explanation of what the true position is"* and that the Company's evidence failed to adequately explain why certain documents had not been disclosed and/or were not available to the Company.

eHi Car Services Limited (Parker J, 2 August 2021)

3.25 The issue in this judgment was whether there had been a waiver of privilege by virtue of mistaken discovery. Specifically, the Court determined whether without prejudice communications with third parties mistakenly disclosed by the company could be relied on by the dissenting shareholders' valuation expert.

3.26 Parker J dismissed the dissenting shareholders' application, holding that a shareholder's standard entitlement to privileged communications of the company did not extend to without prejudice settlement negotiations between the company and a third party. Parker J further held that the joint privilege between the company and the third party was not capable of being waived by inadvertent disclosure. None of the established exceptions to the rule against disclosure of without prejudice communications applied, nor was the disputed correspondence sufficiently important or probative to justify making any further principled or discretionary

exception on the merits. The Court consequently refused to order disclosure of the without prejudice communications.

Sina Corporation (Parker J, 25 January 2022)

3.27 Parker J was required to determine whether the Company should be permitted to delay its discovery pending regulatory approvals pursuant to a number of PRC data protections laws (including a Data Security Law, Personal Information Protection Law and a Cybersecurity Law). The Dissenters challenged whether the PRC regulations affected the Company's discovery and whether there was any real risk of prosecution for the Company if the discovery was found by PRC authorities to be in breach.

3.28 Parker J noted the Dissenters' concerns concerning delay, and encouraged the Company to continue with attempts to obtain any necessary regulatory approvals from PRC authorities, however His Lordship was not prepared to pause the Company's discovery process. The Company was ordered to comply with its discovery obligations within 70 days or to make a further application to the Court as soon as it became clear that it would be unable to do so.

New Frontier Health Corporation (Doyle J, 12 August 2022)

3.29 The Company unsuccessfully sought an order that the "lookback period" for its own discovery should generally be three and a half years, and only one year for certain categories of documents. Doyle J, dismissed the Company's arguments, confirming that a five-year "lookback period" for discovery by a company in section 238 proceedings was "customary" and that even though (in this case) the Company had only been incorporated in 2018, it had acquired business operations that pre-dated its incorporation.

3.30 Further, Doyle J dismissed the Company's argument that it should be ordered to provide the bulk of its discovery within 180 days (as opposed to the 120 days sought by the Dissenters). The Company contended that the impact of COVID-19 and data protection laws in the People's Republic of China meant that it required a longer than usual period to complete its discovery. Doyle J confirmed that he was not persuaded by this argument, as the Company (in this case) had already had a significant amount of time to progress its discovery by the time of the directions hearing (which it had not done).

51job, Inc. (Doyle J, 2 December 2022)

3.31 Doyle J accepted the Company's proposed direction of rolling discovery with a maximum of 196 days. His Lordship noted the "complicated factors" in respect of the Company's discovery and confirmed that he did not think that the Company had dragged its heels in respect of discovery. Finally, Doyle J stated that the Company should not expect any extensions and should put sufficient resources in place to ensure that the timescales would be met.

4 Dissenter Disclosure Obligations

Homeinns Hotel Group (Mangatal J, 12 August 2016)

4.1 Justice Mangatal held that "*it is not in keeping with the purposes of section 238 for the dissenting shareholders to be ordered to provide discovery*". The Court directed that the company provide certain classes of documents identified by the dissenting shareholdings as relevant to the valuation and in the possession of the company. The Court rejected the company's argument that discovery should take place in the usual way (i.e. by the mutual exchange of relevant documents in the parties' respective possession, custody or power under order 24 of the GCR). The Court, in line with Justice Jones' decision in Integra, also ordered that additional documents requested by either parties' experts should be made available to ensure that the parties' respective valuation experts are provided with all the material they require to prepare their valuations reports. Justice Mangatal did note that experts should bear in mind or request only what is actually necessary for their reports.

4.2 *Homeinns* was followed *In the matter of Trina Solar Limited ("**Trina Solar**")* (25 July 2017) where Justice Segal also noted that dissenting shareholders were not required to give discovery under the GCR.

Qunar (Parker J, 20 July 2017)

4.3 The company argued that as the dissenting shareholders comprised a number of professional arbitrage funds, they should give discovery on the same terms as the company. The company referred to the Delaware decision of *Dole Food Company Inc ("**Dole**")* which had not been relied upon in *Homeinns.* In *Dole* the Delaware Court ordered the dissenters to provide discovery for a number of reasons, namely: (i) the appraisal statute authorizes the court to consider all factors relating to fair value, which includes the prices for which knowledgeable insiders sold their shares (ii) lay witnesses (including stockholders) under Delaware procedure are competent to express their views on valuation and (iii) the ability of the Company to have the dissenters' internal valuation documents aided more constructive settlement negotiations.

4.4 Justice Parker noted that while the Court would take into account and pay close attention to the decisions of the Delaware Courts, given the similarity of the jurisprudence and statutory merger provisions, the *Dole* decision was of "*little assistance in relation to procedural matters such as discovery where the Delaware jurisdiction is so different*." However, in a departure from *Homeinns* Justice Parker acknowledged that the Court had the power to order discovery by dissenting shareholders in section 238 proceedings, but would do so only in appropriate and exceptional cases, where it was demonstrated that the dissenters were likely to have documents that could be of assistance to the Court in its determination of the fair value of the shares. He further noted that section 238 cases should not be treated like ordinary civil litigation where parties seek to undermine each other's cases through discovery and related interlocutory procedures. He concluded that Justice Mangatal was clearly right in her decision in *Homeinns* that it was not appropriate for the dissenters to be ordered to provide discovery in the usual way pursuant to a standard direction under Order 24 of the GCR.

*KongZhong Corporation (*Parker J, 2 February 2018)

4.5 This decision was made before the *Qunar* appeal was handed down and Parker J followed his approach in Qunar at first instance, indicating that the court would require clear grounds on which it could order disclosure by the dissenting shareholders.

Qunar (Court of Appeal, 10 April 2018)

4.6 The Court of Appeal overturned the first instance decision of Parker J in which he had determined that it was not appropriate for the dissenters to be ordered to provide discovery and concluded that there was no justification for the adoption of the "*extreme and unique*" position in section 238 proceedings that only one party should provide disclosure.

4.7 Notwithstanding the differences in disclosure obligations between Delaware and Cayman, the Court of Appeal considered the decision of the Delaware Court of Chancery in Dole to have been a "*sophisticated, well-informed, modern judgment*" and therefore had regard to the considerations therein. The Court of Appeal considered that it would be "*unhealthy in such a context, and in litigation especially, to form a priori assumptions about relevance.*"

4.8 The Court of Appeal also highlighted that valuations prepared or procured by dissenters, as well as details of trades by dissenters, could be relevant to determining fair value and relied on the apparent importance of third party valuations held by the company, which meant that it could not consistently be argued that third party valuations held by the dissenters were in contrast, irrelevant. Rix JA observed that the dissenters' valuations "*are likely to be all the more pertinent in that they are likely to be highly contemporaneous and professional reports of sophisticated members of the market who are not only observers but ready to act on their own research and scholarship*."

Trina Solar (Court of Appeal, 17 May 2018)

4.9 As the Qunar decision was determinative of the substantive issues on the appeal (i.e. the appropriateness of an order for dissenter disclosure), the appeal of the first instance decision of Segal J was disposed of by a consent order agreed between the parties and approved by Segal J (the consent order requiring the dissenting shareholders to give disclosure equivalent to that ordered on appeal in Qunar).

Nord Anglia Education Inc (Kawaley J, 1 June 2018)

4.10 Kawaley J followed the principle set out by the Court of Appeal in *Qunar* to the effect that the normal presumption in favour of mutual discovery applied generally in section 238 petitions as in civil discovery and ordered that the dissenters produce a schedule detailing their trading history in the company and, if requested by an expert, the main supporting documentation evidencing the scheduled trades.

4.11 Kawaley J expressly considered that requiring disclosure of the dissenters' own supporting modelling and documentation, over which proprietary rights had been asserted, would be "a bridge too far" given the proprietary rights at stake.

Qunar (Court of Appeal, 19 June 2018)

4.12 Parker J confirmed, following the Court of Appeal's decision in April, that "*there is now a general requirement for automatic mutual disclosure to be imposed in these cases. It follows that the Court's approach to discovery should be similar to that which applies generally in civil litigation where there is a mutual obligation to search for and to list all documents which are relevant to the issues in dispute and which are necessary to be disclosed for disposing fairly of the action or for saving costs*."

4.13 While Parker J noted that ordinarily the company will have significantly more relevant disc losable material than the dissenters he did not otherwise consider that there was a basis for distinguishing or narrowing the parameters of disclosure for the dissenters as against the company.

JA Solar Holdings Co Ltd (Smellie CJ, 17 July 2019)

4.14 Following the *Qunar appeal*, an application by the Company for *general* discovery from Dissenters was rejected on the basis that it would not be proportionate.

FGL Holdings (Parker J, 18 December 2020)

4.15 The Dissenters offered discovery of documents in a manner consistent with the discovery identified by the Court of Appeal in *Qunar*. The Court confirmed there was no general discovery obligation on dissenters as this would be inconsistent with the careful analysis of the Court of Appeal in settling the specific categories of documents that are discoverable by the dissenters. In particular they are not required to disclose documents relating to their characteristics and motivations, or the timing and amount of their investments, while valuation analyses of those looking to invest in the market are relevant.

4.16 The Company sought to expand the categories of disclosure by the Dissenters, however none of those arguments were accepted. The Court found that none of the requests sought were relevant, necessary for disposing fairly of the value question, proportionate or likely to be sufficiently probative so as to make the exercise worthwhile.

Xiaodu Life Technology Limited (Kawaley J, 27 April 2021)

4.17 Kawaley J granted an order for specific discovery (seeking disclosure of documents or a sworn affidavit pursuant to GCR O.24, r.7) against the Dissenters on the basis that the documents sought were within the Dissenter's possession custody or power because they were held by parties who were in substance acting as the Dissenter's agents. The Court was more attracted to "*the Company's pragmatic agency analysis*" than the Dissenter's "*seeming reliance on corporate formalities to evade what would otherwise be straightforward discovery obligations*",

although was mindful not to ignore the legal formalities of corporate structures save on exceptional and compelling grounds.

4.18 The application was refused in respect of one category of documents as the preponderance of the evidence before the Court suggested that the Company was best placed to compel production of documents created by one of its own employees.

58.com, Inc. (Ramsay-Hale J, 8 March 2022)

4.19 The Dissenters agreed to provide the "Standard Dissenter discovery" following the decision of the Cayman Islands Court of Appeal in *Qunar*. The Company confirmed that it would consider the position following the judgment of *FGL Holdings* – the company's application in *FGL Holdings* for wider discovery than the *Qunar* categories was subsequently rejected by Parker J. The Company subsequently presented the Dissenters with a revised proposal seeking discovery substantially wider than the *Qunar* categories. The Company argued that Parker J "*got it wrong*" and that discovery ordered in *FGL Holdings* was confined to that case. The Company proposed 8 categories of discovery for Ramsay-Hale J to consider, which either extended the *Qunar* categories or introduced new categories of discovery.

4.20 Ramsay-Hale J systematically analysed each of the eight categories of documents proposed by the Company, considering expert evidence from both the Company and Dissenters, before refusing each of the Company's proposed categories and ordering that the Dissenters make discovery of the Qunar categories of documents.

4.21 The Judgment also considered three related, but consequential proposals:

(a) The first was the Dissenters' proposal that they be permitted to apply a relevance filter to their disclosure categories of documents. Ramsay-Hale J confirmed that this was sensible in the circumstances and had been endorsed by the Court previously;

(b) The second was the look-back period for the Dissenters' discovery. The Company argued that this period should be 5 years (as opposed to 2 years sought by the Dissenters). Ramsay-Hale J again sided with the Dissenters on this issue; and

(c) The final issue concerned the Dissenters' request to rely upon the evidence of a "deal process" expert. This issue was decided summarily at the hearing, however Ramsay-Hale J expanded upon her reasoning for not permitting the additional expert. In short, having considered all of the evidence, Ramsay-Hale J decided that where the expert was being called to impugn the deal process and not give evidence of value, and where the valuation experts were able to speak on the issue, the Court did not require the deal expert to determine the fair value of the Dissenters' shares.

New Frontier Health Corporation (Doyle J, 12 August 2022)

4.22 The Company unsuccessfully sought an order for the "lookback period" for the Dissenters' discovery to be extended to three-years, as opposed to the common two-year "lookback period"

as had been ordered in previous cases. Doyle J confirmed the two-year "lookback period" sought by the Dissenters as this was largely consistent with previous 238 rulings, and His Lordship was not persuaded that a three-year "lookback period" was warranted in the circumstances of the case.

4.23 Further, the Company sought an order that the Dissenters enter into a Privilege Clawback Agreement as a condition of accessing the Company's discovery. Such an agreement would have allowed to Company to recover any privileged information inadvertently disclosed without having been deemed to have waived privilege. Doyle J rejected the Company's proposal, confirming that His Lordship was not persuaded that it would be appropriate for the Court to grant such an order, and was not inclined to interfere with the general law (i.e. "*the well-established principles applicable where a privileged document is inadvertently disclosed which seek to balance the rights of the parties*").

51job, Inc. (Doyle J, 2 December 2022)

4.24 One issue raised during the course of the hearing concerned the 'Schedule of Trades'. The Dissenters referred to the judgment of Ramsay-Hale J (as she was then) in *58.com* (Unreported, 8 March 2022) and the reasons of Martin JA (18 August 2022) to show the distinction between materials held by dissenters which are capable of demonstrating value, and materials which do more than reveal thoughts or motivation of the dissenters. The Company referred to CICA judgment of *Re Qunar* [2018 (1) CILR 199], where Rix JA stated, *inter alia*, that "the idea that dissenting shareholders should not be required to disclose their dealings in the shares of a s.238 company seems to me to be inexplicable". Doyle J confirmed that it Rix JA did not appear to have felt that the dissenters should not be required to provide details of any "short" positions in respect of the company's shares.

4.25 Doyle J was content to adopt the Company's approach and proposed directions, noting that how the Company would be permitted to deploy such documentation would be a matter for determination at the trial. Doyle J also stated that the direction did not fall foul of the rule against evidence of motivation of the dissenters.

5 Management meetings and admissibility of evidence

Trina Solar (Segal J, 25 July 2017)

5.1 The Court was asked to grant an order directing that a meeting take place between members of the company's management team and the valuation experts so that the experts could obtain information as to the fair value of the shares. Justice Segal held that a management meeting could only take place if: (i) the meeting, like an expert's meeting, is treated as a without prejudice meeting; and (ii) nothing said at the meeting is admissible as evidence (unless the parties waive the without prejudice privilege.

*KongZhong (*Parker J, 2 February 2018)

5.2 Parker J agreed with the decision of Segal J in Trina Solar to the effect that the court had jurisdiction to order that such management meetings should take place.

5.3 Parker J expressly declined to follow Segal J's approach as to the status of such meetings (i.e. that they should be held without prejudice) and directed those meetings should be treated as "open" so that experts could refer to and rely on information obtained for the purposes of preparing their reports.

Xiaodu Life Technology Ltd (Kawaley J, 26 March 2018)

5.4 Kawaley J ordered that neither the transcript nor any of its contents shall be admissible in evidence unless otherwise directed by the court but that the experts could use the information obtained at the management meeting for the purposes of preparing their reports.

5.5 To the extent that the dissenters' expert proposed to rely on specific oral statements of members of management of the Company, Kawaley J considered that the expert should provide the company with a reasonable opportunity to clarify or comment upon the statement in writing before finalising their report.

JA Solar Holdings Co Ltd (Smellie CJ, 17 July 2019)

5.6 The Court declined to limit the number of management meetings to one only and to order that it be convened within 28 days of the exchange of factual evidence, noting that to do so would be unduly restrictive. The Court also declined to limit the ability for the valuation experts to ask follow-up questions, noting that it should not be assumed that the valuation experts would seek to ambush the company and "the experts should have some latitude to decide whether other topics or questions should be raised…"

5.7 The Court rejected an application that the experts be entitled to submit requests for information to the Dissenters on the basis that it was not clear what other material the dissenters might possess, besides the valuations and analyses identified in *Qunar,* which could possibly assist the valuation experts. The Court confirmed that it is not engaged in testing any assessment of fair value put forward by the dissenters (as opposed to their expert) which would in any event be irrelevant and highlighted that the position of the company is different as it is in possession of the essential material to determine fair value 'from the inside' and has put forward a fair value determination in its proxy statement. The Court concluded that there is no apparent good reason to require the dissenters to answer questions and such a requirement is not proportionate nor in keeping with the Overriding Objective.

5.8 It was acknowledged that the parties were entitled to be represented at management meetings by the lawyers they would wish to attend (including non-Cayman lawyers). However, it did not follow that costs of attendance by non-Cayman lawyers would be recoverable in the proceedings

5.9 Management meetings will ordinarily be open and not 'without prejudice' (especially because there is generally nothing about such meetings that would naturally attract that privilege and the utility of such meeting is greatly diminished if valuation experts cannot refer to what was said during them in their reports).

Ehi Car Services Limited (Parker J, 24 February 2020)

5.10 The Court confirmed that it has jurisdiction to order management meetings under its inherent jurisdiction as a court of justice to make procedural orders to achieve justice. The GCR does not deal with this, but the GCR are rules of practice only. The Company is subject to this court's jurisdiction as a company incorporated in the Cayman Islands, which has invoked the statutory merger regime under Part XVI of the Companies Law. This court has power pursuant to its inherent jurisdiction to compel a party which has submitted to its jurisdiction, or is otherwise subject to it, to take procedural steps which it considers necessary or appropriate for the resolution of the proceedings before it.

5.11 Orders relating to management meetings are not directed at third parties to provide information or discovery, they are directed at the company, through its management. The Court has a general discretion and to order management meetings is in accordance with the overriding objective, proportionate and efficient and will achieve a fair outcome for both parties. Because of the clear imbalance of information and understanding, which puts the dissenters and their expert at some disadvantage, it is necessary to attempt to correct that by members of the company's management being made available to answer questions.

FGL Holdings (Parker J, 18 December 2020)

5.12 The Court did not consider that information requests by Dissenters of an expert would be useful for appropriate, consistent with the approach adopted in JA Solar.

51job, Inc. (Doyle J, 2 December 2022)

5.13 Doyle J accepted that the purpose of management meetings was to enable valuers to get a better idea of the company's business and, as such, was influenced by the Company's submission that to allow company management to clarify, correct or comment on the relevant passages to be relied upon enables management to speak freely and prevents the management meeting process from being turned into a formal deposition or examination.

6 Expert evidence

Bona Film Group Limited (McMillan J, 13 March 2017)

6.1 The Company was debarred from adducing expert evidence at a directions proceeding, following a number of directions orders with which the company failed to comply. The Court made the company the subject of an "unless order", with which the company also failed to comply such that the company was unable to adduce any expert evidence at trial (had the matter proceeded to trial). This order was made in the context of serious and persistent failures

by the company to engage in, or adhere to, the s.238 process, including by providing documentary discovery and serving expert evidence, as ordered by the Court.

Shanda Games (interlocutory ruling dated 25 April 2017)

6.2 in similar circumstances to Bona Film the dissenting shareholders were not satisfied with the steps taken by the company to comply with the Court's directions order which dealt with, among other things, the appointment of valuation experts and disclosure requirements to be undertaken by Shanda. An application for an "unless order" was made by the dissenting shareholders that the company be debarred from adducing evidence of fair value unless it complied with the directions order. Before this application was heard a consent order was agreed to by the parties in relation to the engagement of a forensic IT expert. The judge noted that the application had been required as a result of "*serious and substantial concerns over compliance and failure to comply with the terms of the earlier order*."

6.3 The dissenting shareholders remained seriously dissatisfied with the extent of compliance and alleged serious non-compliance with the consent order and brought a further application to debar the company from adducing expert evidence at the trial. Although the Court agreed that the company had failed to perform its disclosure obligations, Segal J did not consider it appropriate to make a debarring order, or to issue an unless order, although the dissenting shareholders' costs were ordered on an indemnity basis. The Judge warned the company that if it did not perform its discovery obligations it would result in further sanctions in costs and possibly additional orders, noting that the Court might appoint its own expert with powers to take possession of the relevant documents (paragraph 59 of the attached ruling dated 25 April 2017).

6.4 The Court was also prepared to accept the dissenting shareholders' submissions that it could and should draw adverse inferences against the company on factual issues where: (a) the company could or reasonably ought to have been able to answer any question or respond to any factual point but failed to do so; and (b) where the company could reasonably have been expected to have had documents which would have shed light on an issue, then the court should infer that the Company's response and/or documents would not have assisted the company's case (paragraph 60 of the ruling dated 25 April 2017).

Shanda Games (judgment to re-open the proceedings dated 27 July 2017)

6.5 The company applied to re-open the proceedings to allow it to adduce further expert evidence with regard to valuation, to ensure that the Court was making a decision as to fair value on the basis of proper evidence, so as to ensure that the Court could dispose of the proceedings in a just manner. The company submitted that the experts' approach in relation to fair value was wrong in numerous respects and led to a fair value which was unreliable and led to a decision of the Court which was unsafe as it impacted on the Court's ability to determine fair value. Segal J noted that (in the absence of fraud) the problems with expert witness evidence must be sufficiently serious such that the Court's decision cannot stand. Segal J disagreed with the company's submissions noting that the company was unable to establish that the expert's evidence was "*so deficient and incompetently prepared as to be outside the range of*

reasonable professional opinions on the valuation issues." Segal J went on to point out that "*there are different opinions on points on which reasonable and competent experts can disagree. Indeed the Delaware jurisprudence demonstrates that they almost always do substantially disagree*."

6.6 Segal J pointed out that although the Court is "*particularly dependent on expert evidence in s.238 cases…the Court still has to determine the fair value for itself*" and "*is not required to follow the experts and has to form its own independent view*." (see paragraphs 44 to 47 of the judgment dated 27 July 2017).

Qunar Cayman Islands Limited (Parker J, 20 July 2017)

6.7 The Court examined issues in relation to the number of experts and whether each dissenter group should be given leave to instruct a separate expert. Parker J noted that the Court had discretion to give leave pursuant to GCR O.38 r.36 and also the power to limit expert evidence pursuant to GCR O.38 r.4.

6.8 Having regard to the overriding objective, Parker J noted that it was not sensible to proceed allowing each dissenter group a separate expert and that one expert instructed by all dissenters would be of more assistance to the Court. He noted that it was "*the duty of experts under Cayman Law to help the Court on matters within their expertise, and that is paramount and overrides any obligation to the party from whom they may have received instructions or by whom they are paid*."

Zhaopin Limited (Kawaley J, 21 June 2018)

6.9 This was a decision of Kawaley J dated 21 June 2018 concerning the appropriate scope of protection of a company's confidential information in section 238 proceedings in which the Company contended that each adviser or agent who would gain access to the Company's discovery should be required to expressly agree in writing to comply with the NDA before the Dissenters were given access to the data room.

6.10 Kawaley J rejected the Company's proposed requirements on the basis that it represented a departure from what was the more common (albeit not uniform) practice of relying upon dissenters to enforce their confidentiality obligations as regards persons gaining access to the data room on behalf of dissenters. He considered that: "*In my judgment, where the Dissenters are contractually liable for any breaches of confidence which their agents commit and are under a duty to cooperate with the Company in the event of any breach which occurs, this should ordinarily provide sufficient protection for the Company's legitimate concerns. The Dissenters accept that they are obliged to require their experts and attorneys to confirm in writing to them (the Dissenters) that they agree to be bound by the NOA: "3.3 Recipient shall be entitled only to make copies for the benefit of its legal advisers or expert advisers who shall each expressly agree in writing to be bound by this Agreement prior to receipt of Confidential Information*".

Nord Anglia Education Inc (Kawaley J, 11 July 2018)

6.11 This is a further judgment from a directions hearing which dealt with certain disputed issues relating to proposed NDA agreements for which the parties had sought the court's resolution in written submissions to the court.

6.12 An "appointee" for the purposes of s238 engagements and confidentiality regimes means "*persons appointed by the Experts who are independent of their clients."*

6.13 Consistent with his decision in *Zhaopin*, Kawaley J determined that the Company may make access conditional upon Appointees agreeing to be bound by the terms of the NDAs entered into between the expert and the Company (which had been agreed in this instance), however attorneys need not assume direct contractual confidentiality obligations to the Company in respect of their access to the data room.

eHi Car Services Limited (Parker J, 22 June 2021)

6.14 The focus of this application was the importance of, and the role of, experts in section 238 proceedings and, in particular, their ability to request management meetings. At a previous hearing, the Company had unsuccessfully challenged the Court's jurisdiction to order management meetings. However, irrespective, the Company refused to convene a management meeting after receiving a request from the Dissenters' expert unless the Dissenters' expert provided a list of questions, ahead of the time required by the directions order, for the Company to consider.

6.15 Parker J considered that management meetings are central to determining the fair value of the Dissenters' shares and is a tried and tested procedural step for achieving a fair outcome in section 238 proceedings. Accordingly, he held there was no reason in principle to dispense with management meetings. He further noted, that there is a degree of autonomy enjoyed by experts who are engaged to assist the Court as professional practitioners and, in particular, the Court will rely on them to (i) assess what information is relevant for their purposes; and (ii) what procedure might assist them in obtaining and interrogating information most efficiently.

51job, Inc. (Doyle J, 2 December 2022)

6.16 The Dissenters sought a direction for permission at this stage for both the Company and the Dissenters to engage a separate, deal process expert due to the, "*very unusual circumstances of the present case*". The Dissenters submitted that this case was the only section 238 case where the agreement arrived at between the company and purchasers was "*comprehensively and radically*" renegotiated and the deal price so significantly reduced as a consequence of the renegotiation.

6.17 Doyle J considered evidence before him from Delaware, together with relevant Cayman Islands law and procedure, before ultimately rejecting the Dissenters' arguments, stating that he was not persuaded that it was necessary or appropriate or in accordance with the overriding objective for there to be deal process experts in this case in addition to valuation experts.

Further, Doyle J stated that it was difficult to see what issue the deal process evidence would go to that could not be covered by a competent and properly chosen valuation expert.

7 Minority Discount

Shanda Games (Court of Appeal, 9 March 2018)

7.1 The Court of Appeal overruled prior decisions in which it had been determined that it was not appropriate to apply a minority discount in determining the fair value of the dissenting shareholders' shares on the basis that a minority discount is applicable to comparable English regimes (squeeze-out, schemes and acquisitions).

7.2 Ultimately the Court of Appeal concluded that "*if what [a dissenting shareholder] possesses is a minority shareholding, it is to be valued as such."*

7.3 As the quantum of the minority discount had been agreed by the experts, the quantification of the discount was not the subject of the first instance decision or appeal.

Zhaopin Limited (McMillan J, 22 June 2018)

7.4 McMillan J held that, having regard to the decision of the Court of Appeal in *Shanda Games,* an order for an interim payment equal to the merger price may be discounted by an amount which is "just and measured". In that case a discount of 15% was applied.

*Nord Anglia Education (*Kawaley J, 17 March 2020)

7.5 No minority discount was applied primarily because the Company's expert did not seek it. The Dissenters' expert was of the view that no minority discount applied but that if it did, the maximum discount would be 2%. Kawaley J noted that he would have applied 2% had the Company sought it based on the uncontradicted opinion of the dissenters' expert.

Trina Solar Limited (Segal J, 23 September 2020)

7.6 The parties agreed that there were reasons why buyers might pay a premium to acquire a company, thus justifying a minority discount for the purpose of determining a fair valuation of the Dissenters' shares. The Dissenters submitted control was the only relevant consideration in this case, submitting that 2% was an appropriate discount, while the Company noted more reasons for a premium, and therefore requested a 10% discount on the value of the shares.

7.7 The Court held that 2% was appropriate as the Dissenters' valuation analysis was based on more reliable and independent sources than the Company's, whose expert accepted that the minority discount applicable to public securities was low and objected to reliance being placed on premiums paid in takeover bids because they were not paid solely for the ability to control the public company. The data relied on by the Dissenters sought to isolate and establish a separate value for control and used a number of apparently well researched and respectable studies and selected the mid-point from the range of discounts suggested.

Trina Solar Limited (Segal J, 18 December 2020)

7.8 A dispute arose following trial as to whether the 2% minority discount held to be applied by the Judge should be applied to that part of the fair value determination based on the merger price. Segal J concluded that based on the expert evidence before him (and expressly "without deciding the point for the future") the minority discount should be applied to the part of the fair value calculation based on and derived from the merger price.

Shanda Games (Privy Council, 27 January 2020)

7.9 The Privy Council confirmed that the Dissenters' shares are not to be valued as a pro rata proportion of the value of the entire share capital of the Company, but rather that the actual shareholding shall be valued. As such, application of a minority discount is nether prohibited nor mandated. The Board concluded that the Judge should not have held that fair value always means no minority discount. That could not be a bright line rule to be applied in every case. Nor was it open to the CICA to find that minority discount should be applied in all cases as a matter of law. As the legislature's direction is to find the "fair value" of the shareholding, the Court cannot rule out a case where a minority discount was inappropriate due to the particular valuation exercise under consideration.

FGL Holdings (Parker J, 20 September 2022)

7.10 Parker J confirmed that it is the general principle of share valuation that the Court should value the actual shareholding which the shareholder has to sell and not some hypothetical share, as in a merger transaction the offeror does not acquire control from any individual minority shareholder. Accordingly, in the absence of some indication to the contrary or special circumstances, a minority shareholder's shares should be valued as a minority shareholding and not on a *pro rata* basis. It is a fact specific exercise.

8 Valuation Methodology

*Nord Anglia Education (*Kawaley J, 17 March 2020)

8.1 Kawaley J found that a blended approach between the "transaction price" ($32.50) and an adjusted DCF valuation, weighted 60%/40% respectively, was appropriate to determine the fair value of the shares. The parties were left to compute the final DCF value based on the Judge's findings on the various inputs but the *pro rata* share value was expected to be in the region of $44, which is close to the midpoint between the Company expert's preferred "market price" valuation (US$30.45) and the top of the Dissenters expert's DCF valuation range ($76.51). The Judge found merit in the main points advanced by both sides, concluding that essentially both sides were partly right and partly wrong although he leaned more heavily towards the Company's proposed valuation outcome.

8.2 In particular, he found that the "transaction price" was credible because the transaction was an arms' length one (despite one party being on the buy and sell side) and was more reliable as an indicator of fair value than the "market price" because it was arrived at taking into account

material non-public information which may have resulted in the market undervaluing the shares. He accepted the Company's alternative DCF analysis (which had been provided as a cross-check of their "market price" approach and which gave a range of $28.64 to $41.19) with one modification to the cost of debt which resulted in a lower discount rate and a slightly higher per share value than the top of the Company's DCF range ($41.19) and found that the independent financial advisors to the Special Committee's independent DCF analysis ($40) lent credibility to the value he had reached.

8.3 As to the inputs into the DCF analysis: Terminal growth rate of 1.81%; Beta is 1.3; no Blume adjustment to historic beta figure; No size premium or country risk premium to be applied; Cost of debt is 5.8% pre-tax and 4% post-tax; WACC to be calculated by the parties but estimated at 8.7%.

8.4 The Judge also criticised both sides' experts as he felt he had to approach their evidence with considerable care: he noted that one expert's answers on contentious issues were "obtuse" and he was unwilling to contradict his report whereas the other was reluctant to accept hypothetical scenarios inconsistent with the dissenters case which "diluted any semblance of objectivity on his part". However, Kawaley J rejected submissions by both sides that either of the experts had failed to discharge their duties to the court as independent experts

JA Solar Holdings Co Ltd (Smellie CJ, 17 July 2019)

8.5 The Court agreed that the valuation experts should be free to choose whichever valuation methodology they considered suitable. However, the Judge disagreed that a direction to the experts to value the company "as a going concern" did in fact constitute a limitation on valuation methodology – finding instead that the term referred to the subject matter of the valuation (being the Company as at the Valuation Date). Further, to seek that the Company was not to be valued as a "going concern" suggested that it was insolvent, which was clearly incorrect. He therefore agreed that the valuation experts should be instructed to value the Company "as a going concern".

Qihoo 360 Technology Co (Parker J, 19 August 2020)

8.6 The Company asked the Court to decide the presumptive approach to the determination of fair value in advance of the trial, on the basis that if the Company were successful, the expert evidence would be reduced, as would cross examination and the length of submissions. This was required following the Privy Council decision in *Shanda,* to determine whether suggested an amalgamation of English and Delaware case law relating to fair value should be applied or whether the English law on fair value should be followed. The Dissenters argued that the question of valuation is a matter of trial and should not be determined on the basis of legal presumption.

8.7 The Court concluded that the points addressed by the summons were not easily approached to be determined in advance of trial as dispositive pure questions of law and the question of the approach to valuation is pre-eminently a matter for the trial judge, to be determined having heard all the evidence and argument. It is not appropriate to determine in advance what

methodology or hypothesis of valuation should be applied without full examination of the factual matrix, expert evidence on methodologies and submissions on the applicable legal principles.

Trina Solar Limited (Segal J, 23 September 2020)

8.8 The Company submitted that the Privy Council case of *Shanda Games Limited v Maso Capital Investments Limited and others* [2020] UKPC 2 had established a legal rule governing and applicable to all section 238 cases to the effect the Court must determine the 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 (the Hypothetical Transaction Approach) based only on publically available information. The Dissenters submitted that *Shanda Games* did not establish this rule and instead the fair value determination should be based exclusively on the Discounted Cash Flow valuation.

8.9 The Court disagreed that *Shanda Games* had confirmed the appropriateness of the Hypothetical Transaction Approach in all circumstances, Instead, 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. 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 DCF valuation as a means of testing those other valuation methodologies.

8.10 The Company's valuation expert evidence was preferred, giving 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, attributing 45% to the Merger Price, 30% to the adjusted market price and 25% to the DCF valuation.

Trina Solar Limited (Segal J, 18 December 2020)

8.11 In its September judgment the Court asked the valuation experts to agree the revised DCF valuation and fair value of the Dissenting Shareholders' shares based on the conclusions in the judgment. 3 issues could not be resolved and were referred to the Court to be determined on the papers.

8.12 As regards Beta, the Judge accepted the Dissenters' position that an unlevered beta of 0.975 and a levered beta of 1.79 should be used. As regards terminal cash flow, the Court confirmed that adjustments to the terminal cash flow figures were required to reflect the conclusions of the Court on other valuation issues.

Shanda Games (Privy Council, 27 January 2020)

8.13 The Board did not consider that the courts of the Cayman Islands were required to adopt the same approach as Delaware on the basis of valuation of a minority shareholding simply because of the similarity of wording.

FGL Holdings (Parker J, 20 September 2022)

8.14 At trial, the company and the dissenting shareholders effectively argued competing methodologies before Parker J (market-based valuation methodologies and income-based valuation methodologies respectively).

8.15 With respect to the income-based valuation methodologies put forward by the dissenting shareholders, Parker J confirmed that whilst these methodologies could be an accurate measure of value, their reliability was contingent on the underlying financial projections and subjective assumptions. Parker J agreed with the company's argument that financial services businesses (as was the case here) could not be valued in this way without encountering difficulties. Further, Parker J found that the dissenting shareholders' expert's "dividend discount model" did not reliably estimate dividend payments and contained too many speculative inputs – the "dividend discount model" was ultimately rejected by Parker J.

8.16 With respect to the market-based valuation methodologies put forward by the company, Parker J confirmed that where there was sufficient evidence demonstrating semi-strong efficiency for shares at a certain time in a particular market and that in the absence of any MNPI or evidence that the shares were undervalued, the market price will generally be the best indicator of fair value. Parker J ultimately determined that the market for the company's shares prior to the merger announcement was semi-strong efficient and there was no MNPI, however he was not persuaded that the unaffected share price could be reliably "rolled forward" to the date of the extraordinary general meeting, as COVID-19 had been so disruptive to the business during the relevant period. Accordingly, whilst the use of a market-based valuation methodology was possible, it was less reliable in these circumstances, particularly where other valuation methodologies produced more consistent results.

8.17 Ultimately, Parker J determined that the merger consideration received by the company's shareholders who voted in favour of the merger provided the most reliable indicator of fair value and was the fairest outcome. Parker J also concluded that the transaction process was well designed, robust and conducted at arm's length. Likewise, the transaction price had been endorsed by a number of unaffiliated shareholders voting at the extraordinary general meeting and was consistent with other valuation indicators (including the fairness opinion and analyst reports).

9 Costs

Nord Anglia Education Inc (Kawaley J, 9 October 2018)

9.1 On a Summons for Directions, costs are generally to be ordered to be in the cause which is both consistent with the "costs follow the event" principle and reflects the character of the Summons for Directions as an essentially neutral and necessary case management mechanism aimed at advancing the proceeding to trial for the mutual benefit of all parties.

9.2 Having said that Kawaley J observed in obiter that "*specific discovery applications would generally be viewed as freestanding applications in relation to which, if contested, a distinct costs order would be made*".

Kongzhong Corporation (Parker J, 18 December 2018)

9.3 Parker J followed the distinction made in *Nord Anglia Education Inc* between the costs-to-follow-the-event regime and the costs-in-the-cause regime. A summons for directions is a neutral and necessary case management mechanism, wherein in this case "the application clarified for both parties the way management meetings and their output should be treated..." and in which more generally orders concerning case management serve to advance the proceedings to trial for the mutual benefit of all parties. As such it is usually appropriate that costs be in the cause.

9.4 Having considered the circumstances of the matter, balancing the interests of justice and taking into consideration the conduct of the parties, it was determined that costs should be in the cause in this instance.

Nord Anglia Education Inc (Kawaley J, 21 December 2018)

9.5 On the question of costs in interlocutory applications, Kawaley J noted that *"[t]he most powerful case management tool the Court is left with is the jurisdiction in relation to costs. In litigation where the parties find it difficult to cooperate in the pre-trial phase and there is a pronounced risk of interlocutory applications which are technically meritorious being deployed for collateral tactical purposes, the Court should be cautious about awarding the successful party their costs in any event".*

9.6 Although the dissenting shareholders were successful in their application, costs were ordered in the cause.

Nord Anglia Education Inc (Kawaley J, 19 April 2019)

9.7 The Court considered the appropriate award of costs arising from one party's successful summons challenging deficient e-discovery. His Lordship determined that the successful party had *not* made out a case for an order of wasted costs.

9.8 His Lordship also examined whether the following factors mitigated the standard rule that 'costs follow the event' for the successful applicant: 1) the failure to accept an offer for their expert to view the relevant documents, which would have had the effect of advancing the discovery process; and 2) the successful party's evident motivation, in bringing the summons, to extend the discovery timetable so as to align it with a US section 1782 discovery proceeding (finding that their conduct was not, of itself, so unreasonable as to displace the usual rule).

9.9 He noted that "*In my judgment it is clear that there is a starting presumption in favour of the provision of documents in their native format, and, in the present section 238 context, it was incumbent on the Company to justify a departure from this general rule."*

Ehi Car Services Limited (Kawaley J, 31 March 2020)

9.10 The Court considered the appropriate award of costs after an interim payment application in which the Dissenters had sought an interim payment of US$6.125 per share, the Company argued the payment should be US$2.52 per share, and the Court ordered US$4.00 per share as an interim payment. The main governing principle upon which the award was assessed was that put forward by the Company. However, the Dissenters achieved some success and the test ultimately applied had not been previously explicitly applied to an interim payment in the section 238 context.

9.11 The Court ordered that the Company be awarded its costs of the Walkers Dissenters' Summons, to be taxed if not agreed on the standard basis, the Company be awarded its costs of the Collas Grill Dissenters' Summons incurred after November 12, 2019 when it served its Skeleton Argument, to be taxed if not agreed on the standard basis. All other costs in relation to the application, including pre-summons costs in connection with negotiations, were ordered to be costs in the Petition.

9.12 The Company's costs in relation to the preparation of their expert report were disallowed.

9.13 The Company was also awarded the costs in relation to the costs application in relation to the Walkers Dissenters' Summons, to be taxed if not agreed, on the standard basis, as it appeared to the Judge to be clear beyond sensible argument that it achieved success overall on the costs application. However, the costs of the Collas Crill Dissenters' Summons were ordered to be costs in the Petition as it was not clear to the court that either party achieved substantial success overall.

Ehi Car Services Limited (Parker J, 26 May 2020)

9.14 The Court was asked to exercise its discretion to order that the Company pays the Dissenters' costs of and occasioned by the summons and which resulted in a judgment dated 24 February 2020, and the costs of the CMC on 25 0ctober 2019, where the order was that the costs of that hearing be costs in the summons for directions. While the court had preferred the directions proposed by the Dissenters, the Company submitted that there was an important difference between failing to persuade the Court to agree to proposed directions to trial and acting in such

a way that costs should be awarded against it. The Dissenters also sought a forthwith costs order.

9.15 The Court concluded that it was not just to order the Company to pay the Dissenters' costs. Section 238 directions are fairly standard but should not be taken as precedents and should be reviewed in the light of each case. To apply for directions contrary to the 'standard directions' was not in this case considered improper behaviour which would lead to adverse cost consequences. As such, the cost of the summons for directions and at the CMC are to be determined at the conclusion of the trial and the overall successful party can recovery those costs (following the costs follow the event principle).

9.16 The Court also found that there were no exceptional circumstances justifying the costs being taxed forthwith as such an order is not appropriate on an interlocutory application and the general rule should apply that the costs should not be taxed until the conclusion of the proceedings (at the end of the trial, whether or not there is an appeal).

Qunar Cayman Islands Limited (Parker J, 26 March 2021)

9.17 The Court was asked to consider the fair rate of interest pursuant to section 238(11) of the Companies Act., the periods in respect of which interest accrued and the liability for costs of the proceedings.

9.18 The Court declined to depart from the reasoning of Segal J in *Shanda Games* in which he adopted the company borrowing rate to calculate the fair rate of interest.

9.19 In order to calculate dissenter loss (i.e. the potential loss suffered by dissenters as a result of being out of their money), a prudent investor rate (and not the investor borrowing rate) should be adopted.

9.20 The Court also found that simple interest should be calculated from the fair value offer date, being the date when a dissenter'\s rights are lost.

Global Cord Blood Corporation (McMillan J, 21 May 2021)

9.21 The plaintiffs commenced proceedings by originating summons seeking declarations, among others, as to the appropriateness of a statutory merger under section 237 of the Companies Act which was alleged to constitute a fraud on the minority and injunctive relief restraining certain officers from the Company from acting on the Special Committee.

9.22 Following a number of procedural errors, amendments and delays, the proposed merger was in any event abandoned (although the Court noted that it was "*unable to deduce from or even to infer from that abandonment that the current proceedings were causative of that outcome or influenced the recommendation of the Special Committee in any way*") and the Originating Summons was dismissed in the exercise of the Court's inherent jurisdiction.

9.23 The plaintiffs contended that costs should not follow the event as the general rule should only apply where the discontinuance can safely be equated with defeat or the acknowledgment of likely defeat and in this instance, the plaintiff obtained a tangible benefit from the proceedings. The defendants sought indemnity costs.

9.24 The Court concluded that "*the Plaintiffs stand open to the persuasive criticism that they moved forward much too quickly and that conceptually they failed to identify either their primary objectives or the correct procedural way in which to attain them*" and that the prosecution of the matter was inadequate. However, as the conduct did not amount to impropriety, unreasonableness or negligence, costs were awarded on the standard basis.

Qunar Cayman Islands Limited (Parker J, 16 June 2021)

9.25 Following the delivery of the judgment dated 29 March 2021, the parties remained in dispute as to how the prudent investor rates should be calculated. The parties' disagreement related to the decision on whether simple or compound interest should be awarded and, in particular how the Dissenters' expert's "*simple rate equivalent*" should be calculated.

9.26 The Company's position was that neither implicit nor explicit compounding is permissible in light of the ruling that simple interest should apply. The Dissenters' stated that the Company had confused two different points; (i) that the Court held that the fair rate of interest should be applied to the fair value on a simple basis and should not be compounded; and (ii) the fair rate of interest is calculated by reference to investor returns that include compounding, as those returns assume that the investor does not withdraw profit within the calculation period.

9.27 The Court accepted the Dissenters' arguments – interest should be calculated using a simple interest approach, but so as to ensure that interest will equal or approximate amounts that would arise under a compound interest award.

Trina Solar Limited (Segal J, 8 December 2021)

9.28 Following the delivery of the fair value judgment on 23 September 2020 and the post-judgment decision on 18 December 2020, the dissenting shareholders had been awarded an uplift of 1.29% (a judgment sum of approximately US$260,000, taking into account earlier interim payments) over the merger price. On 29 July 2021, Segal J heard the parties on a number of consequential matters, including (i) the fair rate of interest pursuant to section 238(11) of the Companies Act; (ii) the periods for which interest has accrued; and (iii) various costs issues, including:

(a) what overall order for costs should be made;

(b) interest on costs; and

(c) aspects of the quantum of the company's costs, including an application to dis-apply the limitations on recovery of foreign lawyers' fees and expenses.

9.29 The dissenting shareholders argued that they were the successful parties and that the company therefore should pay 75% of their costs (in the usual way). Conversely, the company argued that it was the successful party and that the dissenting shareholders should instead pay its costs on the standard basis. Segal J found that even though the dissenting shareholders had not managed to recover the amount sought at trial, the sum ultimately recovered was a material amount above the sum that the company had claimed was payable at trial. However, as the Company had been successful on a number of discrete issues arising out of the valuation expert evidence, Segal J found that the equitable result was that there be no order as to costs. This outcome was not influenced by the dissenting shareholders' refusal (earlier in the proceedings) to accept an offer made by the company to settle for US$500,000 above the merger price – this was due to the specific parameters of the company's offer.

9.30 With regard to interest, Segal J confirmed that the approach in *Qunar*, i.e. that interest is calculated by reference to the average between the investor borrowing rate and the prudent investor rate.

9.31 Segal J's considered the company's (separate) application to dis-apply the various limitations (Practice Direction No.1 of 2001 (the "**Practice Direction**") and GCR Order 62, rule 17 and 18) applicable to the recovery of sums relating to foreign lawyers, witnesses and the reparation of its bill of costs. GCR Order 62, rule 18 relates to work done by foreign lawyers, and rule 17 provides that "*where the costs of any action or matter are to be taxed the Court may, if it thinks fit, direct that any item of work shall be allowed, disallowed, restricted or qualified on taxation*". The Company sought to dis-apply the rule and relied on the Judgment of *Ritchie Capital Management v Lancelot Investors Fund*, a decision of its facts. Segal J confirmed:

(a) the Court does not have the power to dis-apply GCR Order 62, rule 18;

(b) GCR Order 63, rule 17 does not give the Court the power to override and ignore the specific terms and directions set out in GCR Order 62, rule 18;

(c) GCR Order 62, rule 18 is mandatory in the sense that it stipulates that foreign lawyers' fees can only be recovered in a taxation on the standard basis if the proviso and the requirements of r.18(1) and (2) are satisfied; and

(d) In a case involving taxation on the standard basis in which they are not, the Court cannot order that work done by a foreign lawyer is recoverable.

9.32 Further, the company argued that GCR Order 62 and the Practice Direction were outdated – it pointed out that they came into force in 1995 and 2002 respectively. The company also contended that the limitation on recovery of foreign lawyers' travel and hotel expenses under section 9.4 of the Practice Direction should be dis-applied (the company's Leading Counsel having incurred substantial hotel expenses). Segal J confirmed that he would have dismissed the application – the company's evidence did not show any special circumstance that would make it, or demonstrate that it would be unjust or unfair on the company to dis-apply the limitations in 9.4 of the Practice Direction.

9.33 Further, the company sought to dis-apply the limit of US$250 per day on accommodation costs for witnesses (the accommodation costs of the company's witnesses were much higher per night) as prescribed in 9.3 of the Practice Direction. The company argued that the limit was out of date – it was fixed in 2001 and was now too low, having regard to the current prices of hotel rooms and apartments. Segal J dismissed this contention, although he did confirm that the limit should be reviewed. However in the absence of amendment or particular circumstances justifying disapplication, the limit must be observed.

9.34 Finally, the company sought an order dis-applying the limitation on costs that are recoverable for preparing the company's bill of costs. The limitation under GCR Order 62, rule 26(3) is $2,000 (save in the case of a taxation conducted by a Judge, where it is $5,000). By contrast, the company's statement includes "Fees for Preparation of Statement of Costs" of $15,000. The company argued the limit was grossly insufficient to deal with the preparation of the Bill of Costs in such a case. Segal J disagreed and confirmed that the company's arguments amounted to a plea for an amendment to the limit in the GCR rather than to a justification for the disapplication of the limit in the circumstances of this case.