



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE No: FSD 92 of 2017 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2016 REVISION)

IN THE MATTER OF TRINA SOLAR LIMITED

IN OPEN COURT

Appearances: Mr Philip Jones QC instructed by Katie Pearson and Mark Burrows of Harney Westwood & Riegels for the Company

Mr Simon Salzedo QC instructed by Rupert Bell, Niall Hanna and Patrick McConvey of Walkers on behalf of the Dissenting Shareholders

Before: The Hon. Mr Justice Segal

Heard: 29 July 2021

**Draft judgment
circulated:** 2 December 2021

Judgment delivered: 8 December 2021

HEADNOTE

Section 238 Companies Law (2016 Revision) – fair rate of interest - basis on which the fair rate is to be determined – the determination of the fair rate in this case in light of the disputed expert evidence – interest periods – costs as between the parties – application to disapply the limits on the recovery of foreign lawyers’ fees and travel and hotel expenses, on the recovery of witnesses’ hotel expenses and for preparing the Company’s bill of costs and of the taxation process



JUDGMENT DEALING WITH THE FAIR RATE OF INTEREST AND COSTS

Introduction

1. On 23 September 2020, I handed down judgment (the *Trial Judgment*) following the trial of the petition of Trina Solar Limited (the *Company*) pursuant to section 238 of the Companies Act (2016 Revision) (the *Companies Act*) seeking the Court's determination of the fair value of the Company's shares held by Maso Capital Investments Limited (*Maso*) and Blackwell Partners LLC – Series A (*Blackwell* and together with Maso, the *Dissenting Shareholders*), who had dissented from the Company's merger and were respondents to the petition. On 18 December 2020, I handed down a further judgment dealing with various issues which arose in connection with the Trial Judgment. This judgment deals with various consequential matters.
2. The issues for determination are:
 - (a). the fair rate of interest pursuant to section 238(11) of the Companies Act.
 - (b). the periods for which interest has accrued.
 - (c). various costs issues, including (i) what overall order for costs should be made, (ii) interest on costs, (iii) whether there should be a payment on account of costs, and (iv) if it arises, aspects of the quantum of the Company's costs including its application to disapply the limitations on recovery of foreign lawyers' fees and expenses.
3. In relation to the fair rate of interest, the parties exchanged expert reports and supplemental reports. The Company's expert was Ms Susan Glass of KPMG while the Dissenting Shareholders' expert was Mr Braden Billiet of FTI Consulting. Both experts gave live evidence remotely and were cross-examined by Leading Counsel. Mr Jones QC appeared for the Company and Mr Salzedo QC appeared for the Dissenting Shareholders (as they had both done at trial).
4. In relation to costs, affidavits were filed by Mr Manoj Jain for the Dissenting Shareholders and Mr Mark Burrows for the Company. Mr Jain is the Co-Chief Investment Officer of Maso, and Mr Burrows is an associate attorney with Harney Westwood & Riegels (*Harneys*), the



Company's attorneys. The parties agreed that cross-examination of these witnesses was not required.

5. The hearing was held on 29 July 2021 by video link.
6. I have concluded as follows:
 - (a). that the fair rate of interest in this case is the rate at the midpoint between the Company Borrowing Rate and the Prudent Investor Rate, as those terms are explained below. The rate is a simple rate (as to which there was no dispute).
 - (b). that the Company Borrowing Rate shall be 4.7%. It is to be based on the short-term rates as determined by Ms Glass. This rate is to apply both to the interim payments for the period (which I refer to below as the First Period) from the date of the Company's written offer to the Dissenting Shareholders (20 March 2017) until the date on which the Company made the interim payments to the Dissenting Shareholders (25 July 2017) and to the balance of the fair value held to be owing to the Dissenting Shareholders above the interim payments for the period (which I refer to below as the Second Period) from 20 March 2017 to the date of payment of the balance (being 5 February 2021 for Maso and 9 February 2021 for Blackwell).
 - (c). the Prudent Investor Rate shall be the rate as calculated by Mr Billiet. The Prudent Investor Rate will therefore be 9.67% for the First Period for both Maso and Blackwell (so that the fair rate of interest on the interim payments for the First Period shall be 7.19%) and 8.71% for Maso and 8.87% for Blackwell for the Second Period (so that the fair rate of interest on the balance of the fair value held to be owing to the Dissenting Shareholders above the interim payments for the Second Period shall be 6.7% for Maso and 6.79% for Blackwell respectively).
 - (d). that there shall be no order as to costs.
 - (e). that had it been necessary to do so, I would have dismissed the Company's applications for the disapplication of the various limits applied to foreign lawyers' fees and travel and



hotel expenses, the hotel expenses of witnesses and the costs of preparing the Company's bill of costs and of taxation.

- (f). there is, in view of these decisions, no need for me to adjudicate on the applications for interest on costs and a payment on account of costs.

Fair rate of interest

The issues

7. There are two main issues. First, what approach and methodology should be applied in determining the fair rate of interest? Secondly, how should the proper approach and methodology be applied on the facts of this case?

The basis on which the fair rate is to be determined – the Dissenting Shareholders' submissions

8. The Dissenting Shareholders argued that the first issue was decided by the Cayman Islands Court of Appeal (the *Court of Appeal*) in its judgment in *Shanda Games Limited* [2018] (1) CILR 352 (*Shanda (CA)*) and that the Court of Appeal's judgment was binding in this Court. They submitted that the Court of Appeal approved the midpoint approach, under which the Court will award interest at the midpoint between:
- (a). the interest rate at which the company could have borrowed the amount representing the fair value of the dissenting shareholders' shares (the *Company Borrowing Rate*); and
 - (b). the rate which prudent investors in the position of the Dissenting Shareholders could have obtained on the amount representing the fair value of their shares if they had that money to invest (the *Prudent Investor Rate*).
9. The Dissenting Shareholders submitted that the judgment in *Shanda (CA)* on this point remained binding after the decision of the Judicial Committee of the Privy Council (the *Privy Council*) in the appeal in that case ([2020] UKPC 2) (*Shanda (PC)*). They said that *Shanda (CA)* remained binding authority unless and until the Privy Council said otherwise, and that there was nothing in *Shanda (PC)* which indicated that the Court of Appeal's judgment in *Shanda (CA)* on this point was wrong. The Dissenting Shareholders submitted that the Privy Council had dismissed Shanda's appeal without dealing with the proper approach and methodology to be applied in determining the fair rate of interest (since *Shanda (PC)* had held that there was no justification



on appeal for disturbing my decision at first instance on the basis of arguments that had not been raised at the hearing before me). The Court of Appeal's decision was therefore unaffected.

10. The Dissenting Shareholders noted that this issue had been dealt with recently by Mr Justice Parker in *Qunar Cayman Islands Limited* (unreported, Grand Court, 29 March 2021, Parker J). Parker J had dealt with the status of *Shanda (CA)*. He said as follows:

“36. *The leading authority as to the legal principles that ought to apply under section 238(11) remains that of the Court of Appeal in Shanda. It is strongly arguable that the decision is binding on this court, but even if it is not because the Privy Council has somehow left the point open, and even though the court has a broad evaluative discretion to apply on the facts of each case, the settled practice of two first instance courts as upheld by the Court of Appeal should be followed by this court unless there are good reasons not to do so.*

37. *This court must therefore be guided by the principles the Court of Appeal has set out as to the approach to be adopted in determining the fair rate of interest, unless it is persuaded on the particular facts that the approach would be clearly wrong.”*

38. *I am not so persuaded in this case. I am therefore unable to accept the damages approach urged upon the court by Mr Lowe QC, or Ms Glass's market approach which only considers the company's borrowing rate, or to consider only the investor borrowing rate.*

39. *The court should look at both sides of the equation and adopt the midpoint approach.”*

11. The Dissenting Shareholders acknowledged that Mr Justice Parker had not accepted that *Shanda (CA)* was binding. However, he had considered that it was strongly arguable that it was binding and had not felt it necessary to decide the point because he was satisfied that even if it was not binding it was clear that there was a settled practice, evidenced by *Shanda (CA)* and the decisions of this Court in *Integra* [2016] (1) CILR 192 (Jones J) and *Shanda Games Limited* (unreported, 16 May 2017, a decision of mine) (*Shanda (GC Interest)*), which he should follow. He therefore decided that the midpoint approach should be used.

The basis on which the fair rate is to be determined – the Company's submissions

12. The Company, however, argued that the midpoint approach was wrong in principle and based on an erroneous construction of section 238 of the Companies Act. It briefly summarised the arguments and authorities on which it relied in support of its construction of section 238(11) of the Companies Act and submitted that *Shanda (CA)* was not binding on this Court and that there were reasons why this Court should not follow Parker J's approach in *Qunar*.
13. The Company's case was that the fair rate of interest must be determined as the Dissenting Shareholders' reasonable borrowing rate(s) for the amount which the Court had determined was owed to them, but which was not paid (the ***Investor Borrowing Rate***). The fair rate of interest should be based on the rate at which the Dissenting Shareholders could borrow money. The Company's case was based on and followed closely the arguments made and authorities relied on by Shanda in *Shanda (CA)* and *Shanda (PC)* and by the company in *Qunar*.
14. The Company argued that the Privy Council had dismissed Shanda's appeal because, in a case where there was an appeal of a decision of a first instance judge based on the allegedly wrongful exercise of a broad discretion, the challenge must be based on the judge's failure to take into account or properly deal with a submission made to him. The Privy Council had decided that there was no justification for challenging my exercise of discretion on a ground and based on arguments which I had not been asked to consider. The Company submitted that it must follow that the Court of Appeal in *Shanda (CA)* should also have dismissed the appeal to it against my judgment on the same basis and therefore that the Privy Council could not be understood as having indorsed the Court of Appeal's decision. In such a case, the Company argued, the Court of Appeal's judgment was not binding.
15. The Company also said, based on a review of the written and oral submissions made and the judgment in *Qunar*, that there were at least two arguments that it relied on that had not been advanced before Parker J. These were:
 - (a). that (i) the Board in *Shanda (PC)* had recognised (at [46]-[47]) a "*principle of statutory interpretation*" (these are the words used in the Company's written submissions) and applied it to the construction of section 238; (ii) this principle must now also be applied to the construction of section 238(11); and (iii) when that was done, the Court would and should adopt in section 238 cases the approach to the calculation of interest applied in English and Cayman Islands law in cases dealing with claims for damages or payment of a debt. This approach required that the fair rate of interest be based on the Investor Borrowing Rate.

- (b). that Parker J had not been referred to an important passage in the UK Supreme Court’s judgment in *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] 3 WLR 652 at [76] – [77] which confirmed that the removal or disgorgement of the benefit derived by the company from having the use of the dissenting shareholders’ funds had, and should have, no role to play in an award of interest under section 238(11). The midpoint approach erroneously included in the fair interest calculation a component based on the reversal of an asserted unjust enrichment of the Company, namely the Company Borrowing Rate. Instead, the Company argued, fair interest was based only on compensating the Dissenting Shareholders for being out of their money and should be based only on components which established the Dissenting Shareholders’ loss for which they needed to be compensated.
16. The relevant passage in the Board’s judgment relied on by the Company as setting out this principle of statutory interpretation is at [47] (underlining added by me):
- “47. *Contrary to Mr Crow's submission, [Short v Treasury Comrs [1947] 2 All ER 298, [1948] 1 KB 116, affirmed [1948] 2 All ER 509, [1948] AC 534] is relevant even though it stems from very different legislation because it establishes a general principle. That general principle is that where it is necessary to determine the amount that should be paid when a shareholding is compulsorily acquired pursuant to some statutory provision, the shareholder is only entitled to be paid for the share with which he is parting, namely a minority shareholding, and not for a proportionate part of the controlling stake which the acquirer thereby builds up, still less a pro rata part of the value of the company's net assets or business undertaking. The law therefore does not prevent a person from obtaining the control premium for his own benefit if he acquires the whole of the share capital of another company or require him to account to the minority shareholders or anyone else for the benefit which he therefore receives. The UK legislature must be taken to have enacted the Companies Acts on the basis of the general principle which Short confirms. Like any judge-made principle, it can be displaced or varied by the legislature, but there is no indication that it intended to do so in section 238 of the Cayman Islands Companies Law.”*
17. The Company argued that in *Prudential* the question arose as to whether Prudential was entitled to compound interest on sums which it had paid to HMRC by mistake and which HMRC was required to repay (to reverse the unjust enrichment). HMRC had sought to levy tax on Prudential but had acted and done so in breach of EU law. Prudential had claimed that HMRC had been



unjustly enriched not only by the receipt of its payment but also and separately by obtaining the opportunity to use the money it had wrongly received. Therefore, it had a cause of action for interest in unjust enrichment (and not just pursuant to statute). In *Sempre Metals Ltd v IRC* [2008] 1 AC 561, it had been decided that when such a payment had been mistakenly made by a taxpayer, HMRC/IRC was enriched as a result of two different but simultaneous transfers of value. First, the transfer of the funds paid to discharge the tax levied and secondly the opportunity to use the funds received. The House of Lords in *Sempre Metals* had decided that the second transfer of value and enrichment gave rise to an independent cause of action in unjust enrichment. That enrichment, it had been held, had to be reversed by the payment by HMRC/IRC of compound interest. In *Prudential* however, the Supreme Court decided that there was no right to interest on the basis of unjust enrichment. A cause of action in unjust enrichment depended on there being a transfer of value from claimant to defendant in order to satisfy the requirement that the benefit received by the defendant was obtained at the expense of the claimant. There was no transfer by Prudential of the benefit obtained by HMRC in failing to pay back the tax improperly levied, which was caused by HMRC's failure to pay the debt. As Lord Reed DPSC, Lord Hodge and Lord Mance noted in their joint judgment in *Prudential*, “any benefit obtained by D from his failure to pay the debt on time is not obtained at the expense of C in the relevant sense. There has been no transfer of value from C to D. The latter's opportunity to use the money which remains in his possession is the result of his failure to pay the contractual debt.” Furthermore, the Supreme Court held that statutory interest was compensatory. As Lady Arden noted in her judgment in *Shanda (PC)* at [60], “the judgment of Lord Reed DPSC, Lord Hodge and Lord Mance [in *Prudential*], with which the other members of the Supreme Court agreed, observed that interest under section 35A of the Senior Courts Act 1981, which is the equivalent of section 34(1) of the Judicature Law [in the Cayman Islands], is “intended to compensate the claimant for loss of the use of the money.””

18. As I have noted, the Company relied on paragraph 76 and part of paragraph 77 in the judgment in *Prudential*. I set these out in bold below together with paragraphs 69 – 75 and 78 – 79, and the whole of paragraph 77 as it seems to me that these other paragraphs are necessary context for the wording relied on by the Company in paragraphs 76 ad 77 (the underlining is mine):

“[69. When money is paid by mistake, the claimant normally provides a benefit directly to the defendant: he pays him the money. He normally does so at his own expense: he is less wealthy by virtue of the payment. The transaction is normatively defective: the benefit is provided as the result of a mistake. In those circumstances, an

obligation arises immediately under the law of unjust enrichment to reverse the enrichment by repaying the money (or an equivalent amount). The cause of action accrues when the money is mistakenly paid.

70. *The majority in Sempra Metals [2008] AC 561 considered that there was also an additional and simultaneous transfer of value, comprising the opportunity to use the money, which also gave rise to a cause of action based on unjust enrichment. That enrichment had to be reversed by the payment of compound interest.*
71. *This analysis has a number of questionable features, which can be illustrated by an example. If on 1 April the claimant mistakenly pays the defendant £1,000, with the result that the defendant is on that date obliged to repay the claimant £1,000, the defendant's repayment of £1,000 on that date will effect complete restitution. Restitution of the amount mistakenly paid in itself restores to the claimant the opportunity to use the money: there is no additional amount due in restitution. That is because there has been only one direct transfer of value, namely the payment of the £1,000. The opportunity to use the money mistakenly paid can arise as a consequence of that transfer, but a causal link is not sufficient to constitute a further, independent, transfer of value. Contrary to the analysis of Lord Nicholls in Sempra Metals [2008] AC 561, para 102, the recipient's possession of the money mistakenly paid to him, and his consequent opportunity to use it, is not a distinct and additional transfer of value.*
72. *The position is essentially the same if the £1,000 is repaid not on 1 April but on 1 May. There has been no transfer of value subsequent to 1 April, when the mistaken payment was made. The only transfer of value needing to be reversed remains the payment of the £1,000. The claimant can however be awarded, in addition to the £1,000, simple interest on that amount under section 35A of the 1981 Act. That is because the obligation which arose under the law of unjust enrichment on 1 April, upon the making of the mistaken payment, created a debt. Interest can normally be awarded on a debt under section 35A of the 1981 Act.*
73. *That interest is intended to compensate the claimant for the loss of the use of the money to which he became entitled to restitution on 1 April. There is no right to interest on the basis of unjust enrichment: failure to pay a sum which is legally due is not a transfer of value and does not give rise to an additional cause of action based on unjust enrichment. If there was no distinct cause of action for restitution*

of the opportunity to use the money on the date of the mistaken payment (as explained above), a cause of action based on unjust enrichment cannot have subsequently accrued, since no further defective transfer of value has taken place.

74. *The point can also be illustrated by an example used by the revenue. If D owes C £1,000 under a contract, a claim also lies against D for interest under s 35A, from the date when the contractual payment became due. There is no claim against D for interest on the ground of unjust enrichment (even if an unjust factor is present). That is because any benefit obtained by D from his failure to pay the debt on time is not obtained at the expense of C in the relevant sense. There has been no transfer of value from C to D. The latter's opportunity to use the money which remains in his possession is the result of his failure to pay the contractual debt. The same analysis applies where the debt is imposed by the law of unjust enrichment, for example as the result of a mistaken payment of £1,000. Any benefit obtained by D as a consequence of his possession of the £1,000 is derived from his failure to pay that debt. It cannot be said to have been transferred from C to D.*
75. *All this is consistent with a long-established understanding of, first, the nature of the cause of action based on a mistaken payment, and secondly, the basis on which interest is payable. As to the first of these, Lord Mansfield stated in the classic case of *Moses v Macferlan* (1760) 2 Burr 1005 at 1010, [(1760) 97 ER 676 at 679], that the defendant in an action for money had and received 'can be liable no further than the money he has received'. That approach was followed in many later authorities, until *Sempra Metals*: see, to give only a few examples ...]*
- 76 *As to the basis on which interest is payable, a clear explanation was provided by Lord Wright, a judge who was well aware of unjust enrichment (see, for example, *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32), and had also had to consider interest as a member of the Law Revision Committee which reported in 1934, mentioned earlier. In *Riches v Westminster Bank Ltd* [1947] AC 390, 400, he stated:*

"the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money,

or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation.”

77. *Once it is understood that the claim to interest is not truly based on unjust enrichment but on the failure to pay a debt on the due date, the conclusion inevitably follows that interest can be awarded on the claims within categories (b) and (c) under section 35A of the 1981 Act: see *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 and *Sempra Metals* [2008] AC 561, paras 104 (Lord Nicholls) and 175 (Lord Walker)*
- [78. *On a literal reading of section 35A, no such interest could have been awarded on the claims under category (a). That is because section 35A applies only where there are proceedings for the recovery of a debt (or damages), and therefore does not apply where the defendant has repaid the debt (or has set it off) before the creditor has commenced proceedings for its recovery. An award of interest is nevertheless required in such circumstances by EU law, if an effective restitutionary remedy is to be available under English law in respect of San Giorgio claims (Amministrazione delle Finanze dello Stato v SpA San Giorgio [1983] ECR 3595): that was the point decided in Metallgesellschaft. It is unnecessary to decide in this appeal how an award of interest should be made available in those circumstances (and the court has heard no argument on the point). But there are a number of potential solutions.*
79. *For the foregoing reasons, we therefore depart from the reasoning in Sempra Metals so far as it concerns the award of interest in the exercise of the court's jurisdiction to reverse unjust enrichment. As mentioned earlier, it is unnecessary for us to consider the reasoning in that case so far as it concerns the award of interest as damages, and nothing in this judgment is intended to question that aspect of the decision. Since the award of compound interest to PAC by the courts below was based on the application of the reasoning in Sempra Metals which we have disapproved, it follows that the revenue succeed on Issue II, and PAC's claims to compound interest under categories (b) and (c) must be rejected. PAC's claim to compound interest under category (a) would also have been rejected if it had not been accepted by the revenue.]”*

19. The Company argued, rehearsing the submissions made in the earlier cases to which I have referred, that the midpoint approach was based on the reasoning formerly adopted by the Delaware courts when interpreting and giving effect to Delaware’s appraisal rights statute. The Delaware courts regarded (see the extract from the opinion of Vice Chancellor Noble in *Cede* at [14] of *Shanda (GC Interest)*) an award of interest as serving, “two important purposes. First, it compensates the plaintiff for the loss of the use of his money during this period, and thus endeavours to place the dissenting shareholder in the position she would have been in had the corporation promptly paid the value of her shares. Second, it forces the surviving corporation to disgorge the benefit it received from having the use of the plaintiff’s funds.” However, the Company says, this approach is inconsistent with the principles applied by the English and Cayman Islands courts when calculating interest payable by a party following that party’s failure to pay a sum which is determined to have been due and owing by it; and it is these principles which govern and should be applied to the determination of the fair rate of interest under section 238(11). These principles were set out in the judgment of Steyn J in *Banque Keyser Ullman SA v. Skandia (UK) Ins. Co. Ltd.* ([1987] Lexis Citation 1106) as follows:

“The issue of the appropriate rates of interest must now be considered. The selection of an appropriate interest rate is a matter of discretion. But it is not an entirely open textured discretion. A practical and consistent approach has emerged. The purpose of the award of interest is to achieve restitutio in integrum. The enquiry does not focus, in a case such as the present, on the profit to the defendant of the use of the money. It is directed to an estimation of the cost to the plaintiff of being deprived of the money which he should have had. But for practical reasons courts will not allow an enquiry into the plaintiff’s actual loss. To do so might sometimes involve enquiries, in relation to the ancillary relief of interest, approximating the length of the trial. Instead, in cases such as the present, courts award a commercial rate of interest or the rate which somebody in the position of the plaintiff would have had to pay to borrow the money. In the interests of a cost-effective administration of civil justice, the courts must adopt a fairly broad-brush approach to the award of interest. On the other hand, in the light of the overriding criterion of fairness, the courts are vigilant to ensure that the broad-brush approach does not become too blunt an instrument.”

20. The Company argued that *Prudential* supported the proposition that the second of the two purposes of an award of interest identified by the Delaware courts (to disgorge the benefit



received by the company from having the use of the dissenting shareholders' funds) had no role to play in an award of interest under section 238(11). It was only the first purpose, to compensate for the loss of the use of the claimant's capital during the litigation, that should govern any award of interest.

21. However, Mr Jones QC during his oral submissions candidly accepted that in view of Parker J's judgment in *Qunar* and since *Shanda CA* had not clearly been overruled, it was likely that another judge of this Court would follow Parker J's decision and apply the midpoint approach. He therefore did not press his case against the use of the midpoint approach in these proceedings however he made it clear that the Company maintained that *Shanda (CA)* was wrongly decided on this issue and that the Investor Borrowing Rate should be applied, so that if I did indeed decide that the right approach was to follow Parker's J's decision, the Company was able to pursue this argument on appeal (so that, if this case reached the Privy Council, the Privy Council could consider and deal with the substantive legal issues and arguments which were before it in *Shanda (PC)*).

22. Mr Jones QC also invited me, even if I were to decide that the midpoint approach should be followed, to set out the rate of interest that I would have determined to be the fair rate had I applied the Investor Borrowing Rate. He explained that on 26 April 2020 the Company's attorneys, Harneys, had written to the Dissenting Shareholders' attorneys, Walkers and (a) informed them that the Company would be arguing that the Court should apply the Investor Borrowing Rate and advancing the arguments that had been advanced by Shanda in *Shanda (CA)* and *Shanda (PC)* and (b) requested that the Dissenting Shareholders supply copies of their financial statements for the period 2017-2020 so that Ms Glass could provide an opinion on the reasonable borrowing rate for the Dissenting Shareholders. But the Dissenting Shareholders had refused to provide the requested information. In Walkers' letter dated 30 April 2021 they stated that the documents requested were irrelevant as a matter of law since the information sought would only be relevant if the Court needed to base its fair rate of interest determination on the Investor Borrowing Rate and *Shanda (CA)* and *Qunar* had decided that it did not. The Company submitted that on its case the onus was on the Dissenting Shareholders to establish their reasonable borrowing rate and having failed to disclose the most relevant evidence that would enable the experts and the Court to determine such a rate and therefore the fair rate of interest, when deciding what would be the fair rate of interest if the Investor Borrowing Rate was to be applied, the Court should determine that rate as zero and disallow any interest to the Dissenting Shareholders. Alternatively, the Court should rely on and use Ms Glass' calculation of the Investor Borrowing Rate.



The basis on which the fair rate is to be determined – the Dissenting Shareholders’ response to the Company’s submissions

23. Mr Salzedo QC, in light of Mr Jones’ explanation of the Company’s position, did not deal at length in his oral submissions with the Company’s arguments in support of the use of the Investor Borrowing Rate. But he made it clear that the Dissenting Shareholders considered them to be wrong and that they asserted that the use of the midpoint approach was right and justified in principle. He argued that it did not follow from the principle based on *Short* which the Board had held in *Shanda (PC)* was applicable in section 238 cases (namely that the subject of valuation is the actual shareholding being valued) or the Board’s approach to the construction of section 238 that the usual approach to calculating interest in damages or debt cases should, or was intended by Parliament to, apply to determining the fair rate of interest under section 238(11). He noted, as I had done in a point I made to Mr Jones QC during his submissions, that if the application of the *Short* principle and the approach to the interpretation of section 238 adopted by the Board resulted in the midpoint approach clearly being inapplicable then it was to be expected that the Board would have at least noted that this was so when dismissing the fair interest appeal. Mr Salzedo QC also argued that the decision and *dicta* in *Prudential* regarding the nature of claims to interest (that interest is not generally restitutionary) were of no assistance to the Company’s case. He referred and took me to a number of the paragraphs in the judgment before paragraphs 76 and 77 (which I have set out above) and noted that the Supreme Court had decided that interest payable on a repayment of tax paid by mistake and without proper authority can only be awarded under the statutory jurisdiction (in the UK under section 35A(1) of the Senior Courts Act 1981 pursuant to which the court has power to award interest in proceedings for debt or damages from the date the cause of action accrued until judgment) and not as part of a claim for unjust enrichment. However, the decision and analysis were not relevant and did not apply to the determination of the fair rate of interest and the exercise of the Court’s discretion under section 238(11). As regards the need for the Dissenting Shareholders to produce copies of their financial statements for the period 2017-2020, the Dissenting Shareholders’ position was that on their case, this information was irrelevant and not required.

The basis on which the fair rate is to be determined – discussion and decision

24. It seems to me that the proper course is to apply the midpoint approach.
25. I consider that the better view is that *Shanda (CA)* is binding on me. I would note the following comments Mr Justice Maugham in *Curtis Moffat, Ltd. v Wheeler* [1929] 2 Ch 224, 234 (underlining added).

“A similar point came before the Court of Appeal in Hussey v. Horne-Payne on a demurrer, and the Court, consisting of Sir George Jessel M.R., and Cotton and Thesiger L.JJ., agreeing with the views expressed by Fry J. in Hudson v. Buck, decided that the phrase, “subject to the title being approved by our solicitors,” did not express merely what the law would otherwise have implied, but was an additional term. It is true that when the case came before the House of Lords (Hussey v. Horne-Payne) Lord Cairns, then Lord Chancellor, expressed a strong doubt whether the opinion of the Court of Appeal in that respect could be maintained, but the appeal was dismissed on a different ground - namely, that the correspondence as a whole amounted merely to negotiation. It may be observed that Lord Selborne expressed no opinion on the meaning of the phrase in question, and that Lord Cairns did no more than express doubts. In my view I am clearly bound by the decision of the Court of Appeal until it is overruled.”

26. However, the submissions on this issue and the citation of authority were very brief (*Curtis Moffat, Ltd. v Wheeler* was not cited to me) and I do not consider myself in a position to express a final view on the point. In any event, Parker J’s sound and pragmatic summary of the position as a judge of this Court is sufficient to justify applying the midpoint approach as adopted and applied in *Shanda (CA)*, *Shanda (GC Interest)* and *Integra* either on the basis of the binding authority of *Shanda (CA)* or of a clear and settled practice.
27. I do not consider that the two arguments which the Company asserts were not raised before Parker J require that I should decline to follow Parker J’s decision and refuse to apply the midpoint approach. The arguments and *dicta* relied on by the Company do not demonstrate that the reasoning in *Shanda (CA)*, has been shown to be flawed or undermine Parker J’s analysis. They represent arguments to be deployed in an appeal. But I would note that:
- (a) as I understand it, the Company (and other companies in recent section 238 cases) maintain that the Board in *Shanda (PC)* has, in dealing with the minority discount point, adopted an approach to the interpretation of section 238 which must be applied to the whole of the section and when so applied results in any relevant general principle of law (recognised in English and Cayman Islands law) being given effect save to the extent that it can be demonstrated that Parliament in enacting section 238 intended to displace, vary or disapply it. The Company argues that there is such a general principle with respect to the calculation of interest. That principle is set out in the judgment of Steyn J in *Banque Keyser* and, as in



the case of the principle established by Short, the Company says there is no indication that Parliament intended to disapply or vary the principle for the purpose of section 238 (11).

- (b). I do not see how, without more, that it follows from the Privy Council's approach to the construction of section 238 that the *Banque Keyser* methodology for calculating interest must be applied to the determination of the fair rate under section 238(11). The Court of Appeal considered and rejected the application of the *Banque Keyser* methodology and its approach to the construction of section 238 was, in my view, similar to and not contradicted by the approach of the Board.
- (c). the core question is whether the discretion given to the Court by section 238 (11) to fix the fair rate of interest is constrained by and subject to a rule of law that interest must be based on the borrowing costs of the dissenting shareholders and whether the *Banque Keyser* approach can be said to establish a general principle that applies to the calculation of interest in all circumstances, such that Parliament is to be taken to have enacted the Companies Act on the basis of it. These arguments were not put to me in *Shanda (GC Interest)*. But they were put to the Court of Appeal and rejected in *Shanda (CA)*. It will ultimately be for the Privy Council (and possibly the Court of Appeal) to reconsider the issue in the event of an appeal.
- (d). the Company's basic point is that the Privy Council has established the proposition, putting it colloquially, that there's nothing special about section 238 and that the Delaware jurisprudence does not trump and displace applicable principles and rules of Cayman Islands law. But it seems to me that there is nothing in *Shanda (CA)* that is inconsistent with such a proposition. The Court of Appeal also considered that section 238 needed to be understood in the wider context and interpreted having regard to the provisions of the Companies Act as a whole and the relevant policies and principles of Cayman Islands law. The Court of Appeal declined to follow the Delaware jurisprudence relating to minority discounts where that policy was regarded as inconsistent with the policies given effect in Cayman Islands law. The Court of Appeal interpreted section 238 in light of all the other mechanisms in the Companies Act for effecting a compulsory purchase of shares, including the provisions relating to schemes of arrangement and squeeze-out mergers, (which had not been cited to me in *Shanda* at first instance) and considered that the section had to be construed consistently with them (despite the fact that the voting threshold and requisite majority in section 238 cases are materially lower than in the other mechanisms). But even after taking this approach, the Court of Appeal still did not see that the fair rate

of interest had to be calculated only by reference to the dissenting shareholders' loss, and using only one measure of that loss, namely the dissenting shareholders' borrowing costs.

- (e). having said that, I would, for my own part, accept that there are *some* benefits to applying the *Banque Keyser* methodology, in particular because it limits the number of relevant issues and reduces the evidence that needs to be filed and assessed by the Court when determining the fair rate of interest (and thereby reduces the costs and complexity of the exercise). It also removes a number of the uncertainties and difficulties (and arguable unfairness) that arise when determining the Prudent Investor Rate.
- (f). it does not seem to me that the proposition of unjust enrichment law, for which *Prudential* stands as authority, is of assistance in the section 238(11) context. *Prudential* held, as I have explained, that a claim in unjust enrichment based on the defendant debtor's receipt of funds paid by mistake did not entitle the creditor claimant to recover in addition to the funds so paid, interest for the period during which the claimant creditor was out of its money. There was no distinct and additional claim in unjust enrichment for interest on the funds paid by mistake. This was because, even though the defendant debtor had obtained a benefit, namely the opportunity to use the funds, there had been no transfer of value from the creditor to the debtor. The cause of action in unjust enrichment required there to be such a transfer in order to satisfy the requirement that the defendant's benefit be at the claimant's expense. The benefit to be recovered must have been provided by the claimant. "*The opportunity to use the money mistakenly paid can arise as a consequence of that transfer, but a causal link is not sufficient to constitute a further, independent, transfer of value.... the recipient's possession of the money mistakenly paid to him, and his consequent opportunity to use it, is not a distinct and additional transfer of value.*"¹ It is obviously not necessary in order to justify the use of the midpoint approach to determine fair interest under section 238(11) to show that there could be a distinct claim for interest in unjust enrichment. Nor does it follow from the absence of such a claim that it is in principle wrong to take into account the benefits and gains obtained by the company as a result of being able to retain sums representing the fair value of the dissenting shareholders' shares. That depends on the proper construction of section 238(11), the proper characterisation of the claim under section 238 and the meaning and weight to be given to the statutory mandate to determine a fair rate of interest.

¹ *Prudential* at [71].

28. The midpoint approach involves the exercise of a “*broad evaluative discretion*” (as Parker J put in in *Qunar* at [36]) having regard to all the relevant circumstances in order to find a *fair* rate of interest, taking into account and balancing, on the one hand, the benefits which the company is treated as having received by reason of its retention of the fair value payment and on the other, the loss or disadvantage which the dissenting shareholders are treated as having suffered by reason of not having been paid the payment at the date of the company’s offer. This will usually best be done by treating the Company Borrowing Rate as the measure of the benefit to the company and the Prudent Investor Rate as the measure of the loss to or disadvantage suffered by the dissenting shareholders. But this need not always be the case and there is no rule of law that requires the Court only to use the Company Borrowing Rate and the Prudent Investor Rate (although there will be a strong presumption that this is the preferred approach, since as Parker J has noted, the Court will tend to follow its settled practice and if the issue were completely open in every case the exercise of fixing the fair rate of interest would become unnecessarily protracted and expensive, which would be undesirable from the perspective of the parties and the Court).
29. In *Qunar* (and *Shanda (GC Interest)*) it was argued that the fair measure of the company’s benefit was the cash deposit rate representing the yield, returns or interest that were or could have been earned from investing the funds retained, rather than the Company Borrowing Rate (representing the interest costs saved by the Company as a result of not having to borrow the fair value payment), but Parker J, following the approach I had adopted on the facts in *Shanda (GC Interest)* decided that the Company Borrowing Rate should be used. In *Qunar* it was also argued that the Investor Borrowing Rate was the fair measure of the loss to the dissenting shareholders (resulting from the cost of having to pay interest on a loan needed to substitute for the funds not received) rather than the Prudent Investor Rate (and Ms Glass in her evidence in this case pointed out that the loss to the Dissenting Shareholders could be assessed either by reference to the income which they might have received had they received the fair value payment earlier, using the Prudent Investment Rate, or by reference to the additional interest which they might have had to pay to fund borrowings to replace the payment they had not received, being the Investor Borrowing Rate, and she calculated the loss to the Dissenting Shareholders using both measures). In *Qunar*, Parker J rejected (see [77] and [78]) the use of the Investor Borrowing Rate as the fair measure of the loss to the dissenting shareholders, in particular because there was, “*no evidence from which the experts can assist the court or from which the court can determine the dissenter borrowing rate.*”
30. This view is in accordance with the analysis in *Shanda (CA)* and the Delaware cases to which reference is made by the Court of Appeal. As I noted at [14] in *Shanda (GC Interest)*, the Vice



Chancellor in *Cede* had summarised the approach of the Delaware court as follows: “*In determining the fair rate of interest, the Court may consider all relevant factors, including the rate of interest which the surviving or resulting corporation would have had to pay to borrow money during the pendency of the proceeding. In addition to looking to the company's cost of borrowing, or 'borrowing rate', the Court 'has historically examined the return that a prudent investor would have received if he had invested the judgment proceeds at the time of the merger.'* The Court may also consider the legal rate of interest; indeed, *'the legal interest rate serves as a useful default rate when the parties have inadequately developed the record on the issue.'*”

The Petitioners' argument that the interest rate should be based solely on the borrowing rate or the rate 'a prudent investor would require to provide a substantial unsecured loan to the Respondent' must be rejected. As noted above, this Court traditionally looks at both the 'prudent investor rate' and the 'borrowing rate' in fixing the interest rate and the Petitioners have provided no compelling argument as to why this Court should deviate from this practice. Awarding the proposed [unsecured loan] interest rate of 9.940% would grant an 'undeserved windfall' given the volatility of the market....

Although the Court may look at the actual cost of borrowing by the respondent company, the Court determines the petitioner's opportunity cost based on an objective standard. Several other decisions have similarly rejected consideration of a petitioner's subjective opportunity cost in awarding interest. Petitioner voluntarily relinquished funds it could have otherwise invested as it pleased and cannot now argue that in hindsight it would have used those funds to achieve higher returns than the objectively prudent investor.”

31. And the Court of Appeal’s analysis was set out at [58] in the judgment of Martin JA as follows:

“... A section 238 determination, however, does not proceed on the basis that any right of the dissentient shareholder has been infringed by the company. The legislative concern is not to restore him to some anterior position but to ensure that he receives fair value for what he is obliged by statute to give up. In my view, that has the effect when it comes to an assessment of the fair rate of interest of removing the entire focus from the dissentient and instead placing it on the entirety of the circumstances. When those circumstances are considered, it is right to say—as the judge did—that both the disadvantage to the dissentient and the advantage to the company should be taken into account. To adopt the

mid-point approach is a logical way of balancing the advantage and disadvantage, with a fall-back reliance on the judgment rate—which must theoretically itself represent a rate deemed to be fair—if the evidence supports no other conclusion. Although it is possible to take the view that the cost of borrowing is a better measure of the dissentient’s loss than the putative investment returns a prudent investor in his position could have achieved, both measures represent the dissentient’s lost opportunity and consequently the disadvantage to the dissentient of being out of his money. Overall, it seems to me that Jones J and the judge were right to adopt the (former) Delaware practice in relation to the award of interest. That practice, as explained in Cede (7), provides a principled approach that is not in conflict with Caymanian law or practice. Accordingly, I consider that the judge did not err in principle in his approach to the assessment of a fair rate of interest. It was accepted by Shanda that, if the judge had applied the right principle, there was evidence on which he was entitled to reach the conclusion he did about the fair rate.”

32. In my view, in this case, following *Shanda (CA)* and *Qunar* and having regard to the evidence filed, it is appropriate to adopt the midpoint approach based on the midpoint between the Company Borrowing Rate and the Prudent Investor Rate. I do not consider that I should as a matter of principle take into account the Investor Borrowing Rate or that the evidence filed permits me to do so.

33. The Company, as I have noted, argued that if I declined to apply the Investor Borrowing Rate, I should nonetheless still determine the Investor Borrowing Rate to be applied in this case so that if on appeal it is held that the proper approach involves applying the Investor Borrowing Rate, the Court of Appeal will have the benefit of that determination and the relevant figures so as to be able to rule on the Investor Borrowing Rate to be used without the need to remit the case to this Court. However, I do not consider that it would be right to form a view on the Investor Borrowing Rate in view of the state of the evidence. I do not consider that I can safely rely just on Ms Glass’ estimate made without the benefit of financial information relating to the Dissenting Shareholders. Ms Glass acknowledged the difficulties that she was under and the limitations on her opinion as a result of not having the relevant financial information (see paragraphs [47] – [48] in her first report dated 27 May 2021) and it seems to me that it would be unsafe just to rely on her views based on views of the borrowing rates that would be likely to be faced by investors/borrowers in a similar position to the Dissenting Shareholders. These views appeared to me to be somewhat speculative. I am also not prepared to penalise the Dissenting Shareholders for or make adverse findings of fact against the Dissenting Shareholders based on their failure to provide the financial information regarding their financial position that the Company had

requested. If the Company considered that having such information was important and that it was entitled to its production, it should have applied in advance of the hearing for an order for the discovery of the relevant information and for appropriate consequential directions with respect to the expert opinions so that the Court had before it all the relevant information and expert opinions on which to form a view of the Investor Borrowing Rate and so that there could be proper cross-examination of the experts on the issue.

The fair rate in this case – the Dissenting Shareholders’ submissions

34. The Dissenting Shareholders submitted that:

- (a). the Company Borrowing Rate should be (i) 4.7% for the period (the **First Period**) of just over four months from the date of the Company’s written offer to the Dissenting Shareholders (20 March 2017) until the date on which the Company made the interim payments to the Dissenting Shareholders (25 July 2017) (this submission was subject to the reservation of the right to argue for a different rate on appeal) and (ii) 5.5% for the period (the **Second Period**) from 20 March 2017 to the date of payment of the balance of the fair value held to be owing to the Dissenting Shareholders (being 5 February 2021 for Maso and 9 February 2021 for Blackwell).
- (b). the Prudent Investor Rate should be 9.67% for the First Period and 8.71% for Maso and 8.87% for Blackwell for the period from the date of the Company’s written offer to the Dissenting Shareholders on 20 March 2017 to the date on which the balancing payment was received.

35. As regards the Company Borrowing Rate:

- (a). the Dissenting Shareholders argued (based on Mr Billiet’s evidence) that long-term rates should be used when calculating the interest for the Second Period. The Dissenting Shareholders noted that in the Trial Judgment I had determined that the Company’s forward-looking long-term cost of debt as at 16 December 2016 was 5.5%. That figure had been put forward by the Company and Ms Glass, whose evidence I had accepted on this point. The Dissenting Shareholders submitted that it was plainly desirable for the fair value and fair rate of interest determinations to be consistent with each other, so that for the purpose of calculating the Company Borrowing Rate for the Second Period (of nearly four years), the Company’s long-term interest rate (5.5%) as already determined by the Court should be used. This was the figure used by Mr Billiet (who also pointed out that the



new loans actually taken out by the Company in 2016 also supported a long-term rate of at least 5.5%).

- (b). the Dissenting Shareholders also argued that there were two further reasons for determining the fair rate of interest for the Second Period by reference to long-term rates. First, the Buyer Group had borrowed money for the purposes of the merger transaction, for a term of two years, at a rate of 6.0% which was markedly higher than either of Mr Billiet's interest rates, and much higher than Ms Glass' rate. Secondly, the Company's actual borrowing, which was the basis for Mr Billiet's (and Ms Glass') calculations, was secured, whereas the obligation to pay the fair value was unsecured. As Mr Billiet had pointed out, interest rates on secured debt are generally lower than on unsecured debt, all else being equal. Accordingly, by calculating the Company Borrowing Rate by reference to the interest rates on secured debt, Mr Billiet's analysis was inherently conservative. In assessing the benefit to the Company, it was right to regard the Company as effectively having had the benefit of an unsecured loan, which represented a greater benefit than a secured loan at the same interest rate. The Dissenting Shareholders noted that Mr Billiet had not made any upward adjustment to his calculation of the Company Borrowing Rate to reflect the difference between interest payable on secured and unsecured loans. The fact that interest on the (notional) unsecured loan to the Company should be assumed to be higher than the Company's (actual) secured loans simply reinforced and was a further justification for Mr Billiet's conclusion that a rate of 5.5% was appropriate.
- (c). Mr Billiet considered that since the First Period was considerably shorter than the Second Period, a shorter-term (and, therefore, lower) interest rate was appropriate for the First Period (see [3.36] of his supplemental report). He acknowledged that in his evidence in *Qunar* he had used a single borrowing rate by reference to the average length of time in that case during which the fair value sum was owing to the dissenting shareholders. In the present case his opinion was that a rate of 5.0% was appropriate. His starting point was the average interest rate on the Company's actual short-term borrowings in 2015 (that is borrowings due within one year), which was 4.25%. However, the relevant period for the accrual of short-term interest was March to July 2017. The 3-month USD LIBOR rate was around 90 basis points higher in that period than it was on average in 2015. Mr Billiet decided that the proper albeit conservative approach was to adjust the Company's 2015 short-term borrowing rate upwards by 75 (rather than 90) basis points. Mr Billiet only used the movements in USD LIBOR as the basis for his adjustment.



(d). however, for the purposes of this application, the Dissenting Shareholders were prepared to accept that the Company Borrowing Rate should be 4.7% for the First Period. This was on the basis that this is the figure calculated by Ms Glass using a range of interest rates including USD LIBOR, the Chinese base rate and EURIBOR (the latter two of which declined rather than increased between 2015 and 2017) and that this multi-currency methodology had been accepted in the Trial Judgment and was therefore likely to be applied on this application in order to maintain a consistent approach. Ms Glass' approach had been similar to Mr Billiet's calculation of the short-term rate, in that she had started with the Company's actual 2015 short-term borrowing rate of 4.25% and then made an upward adjustment, but hers had been 45, rather than 75, basis points. The Dissenting Shareholders however maintained that I had been wrong to accept Ms Glass' methodology and to use a blended rate where the underlying cash flows were in USD and would challenge my decision on appeal. They therefore reserved the right to maintain and argue for Mr Billiet's approach on appeal and to claim a short-term rate of 5% to be applied during the First Period.

36. As regards the Prudent Investor Rate:

- (a). the Dissenting Shareholders noted that Mr Billiet had estimated that a prudent investor in the relevant period would have allocated assets as follows: 40% equities; 45% bonds and 15% cash. The Dissenting Shareholders argued that, as Mr Billiet's evidence showed, this asset mix was reflective of the asset mixes that were commonly used by leading fund managers for moderately conservative portfolios. It was also the same asset mix as was used and approved by Parker J in *Qunar* (where Ms Glass had also been the company's expert and her evidence, adopting the same approach as her evidence in this case, had been rejected).
- (b). Mr Billiet had estimated the returns on each of the three asset classes he had identified. He relied on a small number of indices covering a broad range of assets in each class. For a given index, he used the returns of an exchange traded fund (*ETF*) that tracked the relevant index, net of fees charged to the fund manager. He considered that the returns of *ETF*s better reflected the returns likely to be available to an investor than the returns of the indices themselves. He pointed out that the use of returns on *ETF*s had been approved and used by Parker J in *Qunar* and that the *ETF*s he used in this case were the same as those he had used in his evidence in *Qunar*. Mr Billiet said that the *ETF*s he had selected in each case reasonably reflected in his opinion the range of returns available to a prudent investor investing in equities, bonds and liquid and short maturity investments of cash.

- (c). Mr Billiet had estimated the ETF returns on the basis of total returns, assuming reinvestment of dividends. He said that had he not done so, he would be required to adjust his core assumption that the cash portion of the portfolio remained constant at 15% of the portfolio. If the estimate was not made on the basis that dividends were reinvested, there would be an implicit assumption that the cash portion of the portfolio increased over time (because the dividends would remain in the form of cash rather than being used to purchase further equities or bonds).
- (d). Mr Billiet had been asked in his instructions to consider the First Period and the Second Period in his analysis. He concluded that for the First Period the annualised returns for equities should be estimated as 18.49%, bonds as 4.86% and cash as 0.59% with a weighted average of 9.67%. He concluded that for the Second Period, as regards Maso (who was, as I have noted, paid on 5 February 2021) the annualised returns for equities should be estimated as 15.83%, bonds as 4.87% and cash as 1.25% with a weighted average of 8.71% and that for the Second Period, as regards Blackwell (who was paid on 9 February 2021) the annualised returns for equities should be estimated as 16.22%, bonds as 4.88% and cash as 1.25% with a weighted average of 8.87%.
- (e). the Dissenting Shareholders submitted that Ms Glass' view that the Prudent Investor Rate should be the risk-free rate was based on a proposition of law and was wrong. They noted that Ms Glass' view, put forward in her evidence in *Qunar*, had been rejected by Parker J in *Qunar* (see [90] of Mr Justice Parker's judgment). They also argued that the factual (or counter-factual) implications of her view were absurd. Ms Glass' position implied that the Dissenting Shareholders, who are professional investors, would have invested the money corresponding to fair value in entirely risk-free assets, whereas in fact that money would have been added to their pool of investment funds and would have earned risked returns. What was relevant was the benefit of which the Dissenting Shareholders had been deprived, and this was the benefit of the returns that could have been earned on such investments.
- (f). the Dissenting Shareholders also submitted that Ms Glass was wrong to calculate the rates of return that the prudent investor would earn by assuming that the investor would have selected investments and adopted an investment strategy on the basis that the investments were to be made only for and would be redeemed at the end of the (relatively short) period during which the Dissenting Shareholders would be out of their money, in this case of just over four months. They submitted that the fact that interest accrued on the sums to be paid



to the Dissenting Shareholders for approximately four months did not mean that the investment horizon of the prudent investor should also be assumed to be four months or that the asset class selection should be based on the assumption that the prudent investor would only invest for that short period. They argued that, as Mr Billiet had said, the relevant question was what a prudent investor in the position of the Dissenting Shareholders would have done with the funds had they been received having regard to the investment strategy that they generally adopted (and not a special investment strategy that depended on investments being made for a short-term equal to the amount of time that the Dissenting Shareholders in fact were out of their money). The Dissenting Shareholders submitted that the answer to this (correct) question was obviously not that the prudent investor (or the Dissenting Shareholders) would have invested funds with an investment horizon of four months; rather, they would have invested them over ordinary investment horizons, according to their ordinary investment preferences as to risk and reward. The Dissenting Shareholders noted that Ms Glass had not suggested that her 20:50:30 asset mix would be appropriate for any longer investment horizon than four months, and they submitted that it was not credible that any professional investor would keep 30% of its assets in cash.

37. Accordingly, the Dissenting Shareholders say that the fair rate of interest for the First Period should be 7.19% (being the midpoint between 4.7% and 9.67%) while it should be 7.10% with respect to Maso (being the midpoint between 5.5% and 8.71%) and 7.18% with respect to Blackwell (being the midpoint between 5.5% and 8.87%).
38. The Dissenting Shareholders argued that it is a notable feature of this case that the different approaches of and the disputes between the experts had already, in effect, been heard and adjudicated on by the Court. This was because the same positions had been advanced by the same experts in *Qunar*. The Court in that case had accepted Mr Billiet's and rejected Ms Glass' evidence. The Dissenting Shareholders submitted that while that finding was obviously not binding on me, the reasoning of Parker J in that case was equally applicable in this case, and there was no good reason to depart from it.

The fair rate in this case – the Company's submissions

39. The Company relied on Ms Glass' opinion and evidence. Consistently with the Company's position at the hearing, and its invitation to the Court to determine the Investor Borrowing Rate even if I decided to apply the modified approach (based on the Company Borrowing Rate and



the Prudent Investor Rate), Ms Glass calculated what she described as “*three potential Fair Rates of Interest*” as follows:

“(a) *Using what I refer to as the UK Approach, I have concluded that the Fair Rate of Interest is 1.8%, which equals the Investor Borrowing Rate.*

(b). *Using what I refer to as the Former Delaware Approach, I have concluded that the Fair Rate of Interest is either:*

Case A: 5.5%, which is based on an average of a Prudent Investor Rate (6.2%) and the Company Borrowing Rate (4.7%) or

Case B: 3.3% which is based on an average of the Investor Borrowing Rate (1.8%) and the Company Borrowing Rate (4.7%).”

40. Ms Glass defined the Investor Borrowing Rate as being the short-term rate at which an average investor could have borrowed during the Interest Period. The Interest Period was the period during which interest was payable by the Company to the Dissenting Shareholders. The Company Borrowing Rate was the rate at which the Company could have borrowed during the Interest Period. The Prudent Investor Rate was the rate of return that an investor might have earned over the Interest Period had the funds payable to it been received earlier.
41. I have already decided that I should not calculate and determine the Investor Borrowing Rate in view of the limited evidence available. I therefore do not propose to summarise or explain further Ms Glass’ approach on this point. Accordingly, it is necessary to consider her opinion that the fair rate of interest in this case should be 5.5%, based on an average of a Prudent Investor Rate (6.2%) and the Company Borrowing Rate (4.7%).
42. As regards the Company Borrowing Rate:
- (a). as noted above, Ms Glass calculated this to be 4.7% and applied this to both the First Period and the Second Period. In her opinion, short-term rates were most appropriate for both periods. The Company Borrowing Rate should, in her view, be based on the Company’s actual borrowing costs over the relevant period and in her opinion, as noted below, the Company had for the First Period and Second Period, revolving credit facilities which were likely to be used less, with reduced borrowings, as a result of not having to pay the fair

value sum to the Dissenting Shareholders. As I have noted, the Dissenting Shareholders do not on this application dispute the use of the 4.7% figure in relation to the First Period.

- (b). Ms Glass considered (see [36] – [40] of her supplemental report) that it was not appropriate to use long-term rates for the Second Period. This was primarily because if long-term rates (rather than the short-term rates on facilities repayable within one year) were used an assumption was being made that the Company had benefitted by avoiding the need to borrow under facilities with a maturity date of over one year (term debt or project financing). However, in Ms Glass' opinion it was more likely that the Company, as a result of being able to retain and delay payment of the sums owing to the Dissenting Shareholders, would have benefitted by being able to reduce its drawings under revolving facilities which were all subject to short-term variable interest rates.

43. As regards the Prudent Investor Rate:

- (a). Ms Glass adopted two alternative positions. First, as noted above, she argued that if the Prudent Investor Rate was to be used at all, it should be based on returns generated by risk-free investments. Secondly, she argued alternatively that an asset allocation of 20:50:30 rather than Mr Billiet's 40:45:15 should be used. Each of Ms Glass' approaches generated a much lower Prudent Investor Rate than Mr Billiet's approach.
- (b). Ms Glass considered that the Prudent Investor Rate should be based on a risk-free investment strategy. She argued that it was inappropriate (in substance, unfair to the company) to allow dissenting shareholders to use as a measure of the loss flowing from their inability to invest the amount of the fair value of their shares, the rates of return produced by ETFs. This was because, as I understood her argument, those returns were only available to investors who invested in circumstances where they became subject to both positive and negative investment returns. But dissenting shareholders would never face the risk of a negative return because the Court would never make them account for losses in the hypothetical investments or pay negative interest rates on cash. In order to earn the return generated by the ETFs, an investor would need to make an investment decision and take a risk as to the performance of the fund in the future, and that risk included the complete loss of a stock, bond, or cash and in the case of cash, of having to pay negative interest rates. By allowing dissenting shareholders to use and rely on the rates generated by ETFs, selected after the event and retrospectively, the Court was providing them with risk-based returns in a case where there was in fact no downside risk.

- (c). the Company accepted, as the Dissenting Shareholders had pointed out, that Ms Glass' view was based on a proposition of law which had been rejected by Parker J in *Qunar* (see [90] of Mr Justice Parker's judgment). But the Company maintained that Ms Glass' approach was right and should be followed.
- (d). alternatively, Ms Glass considered that an asset allocation of 20:50:30 was appropriate:
- (i). to determine the appropriate asset class allocation, Ms Glass reviewed the portfolios put forward by two well-respected assets managers, Vanguard, and Fidelity (both of whom had also been relied on in *Qunar*). The portfolios she reviewed ranged from low to high-risk, with the lower-risk funds containing less equity and more bonds and cash. All of them were intended for medium to long-term investment horizons.
 - (ii). because she applied an investment horizon of approximately four months, she considered that this pointed to a higher mix of low-risk securities.
 - (iii). in her view, an investor should not rely on equity or bond rates of return when faced with a short-term investment horizon (of less than three or five years).

Where an investor had an investment horizon of three years or less, it should invest in risk-free securities, and in the present case an investment horizon of three years or less should be assumed because more than 98% of the fair value was paid to the Dissenting Shareholders by the end of the First Period. She relied on a number of sources to support her view that investors who planned to invest for a period of less than five years should, as one source put it, "*stay out of the stock market.*"

- (iv). she also considered that when considering the rate of return on investments and the period during which the prudent investor is to be assumed to wish to invest, the Court should use the period in which the dissenting shareholders were actually kept out of their money – that is the period from the company's written offer to the date on which payments were actually made (the *Actual Period*). In the present case, since 98% of what was held to be due to the Dissenting Shareholders was paid by way of interim payments, the period was short and only slightly more than four months (see footnote 22 to Ms Glass' first report where she pointed out that if it was assumed that since virtually the whole sum was paid as interim payments in July 2017, the relevant period should be the First Period, then the time horizon would be 4.2 months but that if the Second Period is also taken into account and a weighting were applied by reference to the amounts outstanding, the period would be 4.7

months – i.e. the amount of funds outstanding in each period times the number of days outstanding divided by the total funds outstanding). She considered that it was wrong to ignore the short-term nature of the Actual Period and artificial to apply as the relevant investment horizon a longer period, based on the normal investment strategy of a hypothetical prudent investor in a similar position to the Dissenting Shareholders.

- (v). she concluded that if the Court wished to rely on a diversified mix of securities, then she considered that a low-risk portfolio was appropriate and Fidelity’s conservative portfolio, which was defined as low-risk, with its allocation of 20% equity, 50% bonds and 30% cash, should be used. This was more conservative but more balanced than Vanguard’s lowest-risk portfolio. She noted that her assets allocation was slightly more conservative than that used in *Qunar* (40:45:15) but she regarded the rates of return produced by that asset allocation applied to this case as high and outside the range of what would be considered a prudent and well-balanced portfolio and rate of return.
- (vi). Ms Glass considered that the Prudent Investor Rate should be 6.2% applying a simple rate of interest (this was based on a rate of 6.3% for the First Period and 5.7% for Maso and 5.8% for Blackwell for the Second Period).

The fair rate in this case – analysis and decision

44. In my view,

- (a). as regards the Company Borrowing Rate:
 - (i). I conclude that this should be 4.7% for the First Period and the Second Period.
 - (ii). the underlying issue in my view is what rate of interest would the Company have had to pay in order to borrow an amount equal to the fair value of the Dissenting Shareholders' shares for the relevant period. The relevant period will end on the date on which the Company was reasonably expected to have to pay the fair value to the Dissenting Shareholders. This could be the end of the section 238 proceedings (based on reasonable expectations as to the likely duration of the section 238 proceedings) or possibly, as to part of the fair value, the date on which an interim payment was reasonably expected to be ordered and paid.

- (iii). I can see that there is some force in the argument that the tenor of the assumed loan should be fixed on a forward-looking basis by reference to the likely duration of the section 238 proceedings (or if reasonably anticipated, the date of an order for an interim payment) assessed at the time of the Company's written offer to purchase the Dissenting Shareholders' shares or the filing of the petition. This would represent the period during which the Company could expect to retain all or part of the fair value of the shares and therefore represent the length of time during which it would have benefited by not having to borrow the funds.
- (iv). however, I prefer a backward-looking approach based on the actual period or periods during which the Company was able to retain the fair value of the shares. This removes having to assess and hear evidence on the assessment of the likely length of the proceedings and the likely timing and amount of any interim payment. The Court, based on the expert testimony, is able to assume that the Company has benefitted by avoiding the need to borrow funds (whether by way of new loans or under existing facilities) during that period.
- (v). I can also see the force of the argument that the fact that an interim payment has been made should not affect the selection of the tenor of the assumed loans but only the date on which interest ceases to be payable (because the Dissenting Shareholders have then been paid the amount of the interim payment). That argument would have more force if a forward-looking approach was being adopted (on the basis that the Court was only concerned with an assessment made at the outset of how long the Company would be able to retain the fair value and that was most appropriately based on an estimate of the duration of the proceedings as a whole since it was likely to be difficult to predict the time and quantum of any interim payment). However, I have concluded that, adopting a backward-looking approach, where an interim payment has been made, it should be taken into account for the purpose of determining the tenor of the assumed loan in respect of the amount of the interim payment. This was the approach taken by both experts in this case and it seems unobjectionable as a matter of principle.
- (vi). short-term rates were clearly appropriate for the First Period. Ms Glass considered and the Dissenting Shareholders accepted that the Company Borrowing Rate should be 4.7% for the First Period.

(vii). as regards the Second Period, which was nearly four years, the question is whether the Company could and would have borrowed at short-term or long-term rates. In my view, if the evidence shows that short-term loans were likely to be available to the Company, then short-term rates should be used to calculate the Company Borrowing Rate (this approach is consistent with that adopted by Mr Justice Parker in *Qunar*: see [56] and [63]). It seems to me that it is reasonable to assume that the Company would have borrowed at the lowest rates available and if necessary, rolled over or repaid and re-drawn short-term loans for the purpose. Mr Billiet noted and accepted that the Company had access to short-term borrowings in 2015 and Ms Glass was of the opinion that it was likely that the Company would have been able to reduce its drawings under revolving facilities which were all subject to short-term variable interest rates. In my view, it is appropriate to adopt and use Ms Glass' figure of 4.7% for the relevant short-term rates.

(b). as regards the Prudent Investor Rate:

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

(ii). if a prudent investor in the position of the Dissenting Shareholders was likely and would have been able to apply its ordinary investment strategy when investing a sum equal to the fair value of their shares even after taking into account the fact that the investment was to be realised and cashed in once the proceedings had been concluded, then the asset allocation which such an investor would ordinarily have adopted could be calculated and the rate of returns generated thereby for the period of the litigation (or in the period up to the payment of an interim payment) used for the purpose of determining the Prudent Investor Rate. If, however, the assumption that the investment was only needed for that period would result in a different

assessment of risk/return and asset allocation, then, as it seems to me, there would need to be an adjustment to the asset allocation which would ordinarily have been used when applying the investor's ordinary investment strategy.

- (ii). this approach seems to me to be consistent with the approach adopted in determining the Company Borrowing Rate. I do not see how it would be consistent with that approach or fair for the purposes of section 238(11) to allow the Dissenting Shareholders to receive returns that were calculated without any reference to section 238 proceedings. For the purpose of taking into account the impact of the duration of the litigation on a prudent investor's investment strategy and selection of investment assets, the Court can adopt a backward-looking approach by having regard to the actual duration of the proceedings and the time taken to make interim and final payments to the dissenting shareholders. This removes some of the uncertainty surrounding an assessment made at the time of the start of the proceedings (and the making of assumptions of when the investments will need to be realised) and allows the actual length of the litigation and the actual timing of payments to be taken into account.

- (iv). it is therefore necessary to review the expert evidence to consider which expert's approach and opinion is to be preferred. Ms Glass did explicitly seek to take into account when making her asset allocation and portfolio selection the impact of the duration of the litigation and it was in my view reasonable in principle for her to say that an investor faced with a short-term investment horizon of less than three or five years, which will always be the case in the context of section 238 proceedings, should increase the percentage of risk-free or low-risk investments (that is cash or liquid investments). However, having carefully reviewed her evidence, it seems to me that she has adopted an unjustifiably conservative and an excessively low-risk (and therefore an unbalanced and unreasonable) approach. She has selected and relied on a portfolio which is designated conservative and low-risk and adopted an asset allocation (of 20% equity, 50% bonds and 30% cash) which, as she admitted, was even more conservative than her asset allocation than the one she used in *Qunar* (40:45:15). Of course, the asset allocation she used in *Qunar* is of no direct relevance to this case save that it indicates that the allocation in this case is very conservative and incorporates a high percentage of cash. It does not seem, on the evidence, reasonable to assume that a prudent investor in the position of the Dissenting Shareholders would adjust or need to adjust their normal investment strategy to take account of the likely duration of the investment to such an extent that they would



hold 30% in cash. In the circumstances and in light of the evidence of both experts, I prefer to use Mr Billiet's methodology. I accept that it properly reflects the asset mixes that are commonly used by leading fund managers for moderately conservative portfolios, which is appropriate as a measure of what a prudent investor in the position of the Dissenting Shareholders was likely to adopt, even in the context of section 238 proceedings. I have considered whether I should adjust his asset allocation of 40% equities, 45% bonds and 15% cash to increase the percentage of cash and reduce the percentage of equity but have concluded, on balance, that I should not do so. In the first place, I am satisfied that Mr Billiet's approach is to be preferred to Ms Glass' approach and that the evidence does not demonstrate that his approach to determining the Prudent Investor Rate fails to take into account the fact that the investments made are to be assumed to be realised at the end of the litigation (or when the interim payments are received). Furthermore, even if I considered that some adjustment was required to increase the cash component of the portfolio, it seems to me that I have no proper basis for determining what level of adjustment would be appropriate and that I would be required to make an arbitrary adjustment which could not be justified. In the circumstances therefore I shall adopt Mr Billiet's calculation and opinion of the Prudent Investor Rate.

- (v). I do not accept Ms Glass' argument that the Prudent Investor Rate should be based entirely on a risk-free investment strategy. While I accept that the approach adopted must be fair to both the Company and the Dissenting Shareholders, there is no justification for adopting an assumption that a dissenting shareholder would only invest in risk-free investments. That fails to take into account the position of the dissenting shareholders in question and the evidence of a prudent investor in their position is likely to do. I also do not consider that it is necessary to limit the Dissenting Shareholders' recovery in respect of the Prudent Investor Rate to returns on risk-free assets to take into account the risk that investments may make losses as well as profits. If the evidence in a particular case shows that it was likely that investors in the position of the relevant dissenting shareholders would have invested in investments that would have made losses or become worthless that would need to be taken into account and the selection of relevant ETFs or other reference points needs to be realistic and suitably balanced, as it appears to me it was in Mr Billiet's evidence in this case.

Interest periods

45. It was common ground that interest starts to run from 20 March 2017, being the date of the Company's written offer to purchase the Dissenting Shareholders' shares and ends for the interim payments on 25 July 2017, being the date on which those payments were made. As regards the interest period applicable to the balance paid after the interim payment, the Dissenting Shareholders argued that the interest period should end on the dates on which the further payments were made, namely 5 February 2021 (for Maso) and 9 February 2021 (for Blackwell). I agree. I do not consider that interest should cease to run on 27 December 2018, being the date of Mr Chan's email in which the Company made an offer to the Dissenting Shareholders to settle the proceedings. I accept the Dissenting Shareholders argument that until the dates of payment, the Company continued to have the benefit of the fair value amount and the Dissenting Shareholders continued to suffer the detriment of not having it, and that, as I explain below, I consider that the Dissenting Shareholders acted reasonably in not accepting the offer. As the Dissenting Shareholders pointed out, a similar issue arose in *Qunar* and Parker J held that the dissenting shareholders were entitled to interest until they were paid.

Costs

The Company's submissions

46. The Company's primary position was that it had been the successful party and therefore the Dissenting Shareholders should pay its costs on the standard basis. However, it argued that if the Court considered that there should be some percentage deduction applied to the Company's costs, the Court should nonetheless order the Dissenting Shareholders to pay all of its costs, taxed on the standard basis, from 4 January 2019 onwards, on the grounds that the Dissenting Shareholders unreasonably refused a without prejudice save as to costs offer which the Company made on 27 November 2018 and re-submitted on 27 December 2018, and which expired on 3 January 2019.
47. In addition, by its summons dated 15 June 2021 (the *Costs Summons*) the Company sought various consequential orders. The evidence in support of the Costs Summons was contained in the affidavit of Mr Mark Burrows, an associate in the litigation department at Harneys. These orders included an order for an interim payment on account of the Company's costs and an order that the Dissenting Shareholders pay interest on the Company's costs at a rate of 2.375% per annum from the date of payment of those costs by the Company. Further, the Company sought the following orders (the *Costs Limitations Orders*) pursuant to O.62, r.17(1) of the Grand Court Rules 1995 (the *GCR*):

- (a). that the limitations on the recovery of foreign lawyers' fees under GCR O.62, r.18 be disapplied;
 - (b). that the limitation on the recovery of foreign lawyers' travel and hotel expenses under section 9.4 of Practice Direction No. 1/2001 *Guidelines Relating to the Taxation of Costs* (the *Guidelines*) be disapplied;
 - (c). that the limitation on witnesses' hotel expenses of US\$250 per day under section 9.3 of the *Guidelines* be disapplied; and
 - (d). that the limitation on the costs that are recoverable for preparing the Company's bill of costs and of the taxation process of CI\$2,000 under GCR Order 62, rule 26(3) be disapplied.
48. The Company noted that the Court had determined the fair value of the Dissenting Shareholders' shares to be US\$0.235 per ordinary share, or US\$11.75 per ADS, which was only a 1.29% uplift on the merger price of US\$11.60 per ADS. The Merger Price had been stated in the petition to be the fair price. Furthermore, as the Company had already made an interim payment to the Dissenting Shareholders of the merger price, the Court's judgment had resulted in the Company making a payment to the Dissenting Shareholders of only US\$260,569. The Company accepted that in its closing submissions it had put forward as its primary case that the fair value was US\$7.26 per ADS, being the adjusted market price. However, its case for this valuation had turned on uncontested facts and was a short point of law. As its secondary case, the Company had advanced the fair value put forward by Ms Glass, namely, US\$8.96 per ADS. The Company's position had to be compared with that taken by the Dissenting Shareholders. They had argued that the fair value was US\$193.19 per ADS (representing a 1,565% uplift on the merger price). The Company submitted that the Dissenting Shareholders' claim was wildly unrealistic and that, in light of the competing cases put forward by the parties, in "*real life*" or "*common sense*" terms, the Company had obviously been the successful party (the Company relied on the dictum of Lightman J in *BCCI v Ali* (No 4) 1999 WL 1953270 that, "*success is not in my view a technical term but a result in real life, and the question as to who succeeded is a matter for the exercise of common sense*").
49. The Company also argued that the Court should have regard to the fact that the additional sums which the Dissenting Shareholders had established by the proceedings as being owed to them (US\$260,569) was very small and out of all proportion when compared with the costs the



Company had incurred (US\$8,248,849.96 in the Grand Court proceedings and US\$219,638.90 in the Court of Appeal). It had made no commercial sense for the Dissenting Shareholders to pursue this litigation at such expense.

50. Further, the Company said that it had also been successful on the vast majority of issues, and certainly on those issues which were critical to the determination of the eventual fair value. The Court had agreed with Ms Glass that it was appropriate to give weight to each of three valuation methodologies, namely the merger price, unaffected market price and DCF valuation, rather than relying solely on DCF valuation as contended for by Mr Edwards. The Court had also rejected the Dissenting Shareholders' submission that the Management Projections could not be relied on. The Management Projections were largely adopted, and the Court had rejected Mr Russo's projections. In particular, the Court had rejected using the figure of 9,000 MW for PV module sales in 2017. The Court had held that for the reasons given by Ms Glass and Dr Goffri, the market share forecasts in the Management Projections were to be preferred. The Company argued that a significant amount of time had been taken up in evidence and in submissions on this critical issue. Furthermore, as regards the inputs to the DCF, the Court had found Ms Glass' criticisms of Mr Edwards' approach convincing, and accepted Ms Glass' approach on the weighted average cost of capital, size premium, beta, cost of debt, terminal cash flow and terminal growth rate. On market risk premium, risk-free rate and country risk premium, the Court had split the difference between Mr Edwards' and Ms Glass' approach.
51. In addition, the Company argued that the fact that the Court had preferred the Company's valuation evidence was sufficient to justify a costs award in its favour. In *Integra Jones J* had said that: "*I regard the Respondents as the successful party because I preferred Mr Taylor's valuation approach which led me to conclude that the fair value of Company shares was substantially greater than the mid-point of the value range advanced by Mr Robinson.*"
52. The Company also relied on a without prejudice save as to costs offer to settle the proceedings made by the Company to the Dissenting Shareholders in November/December 2018 (and open for acceptance until 4 January 2019) and argued that if the Court concluded that the Company was entitled to its costs but considered that there should be some deduction therefrom, the Court should nevertheless award the Company 100% of its costs, taxed on the standard basis, from 4 January 2019. This was on the grounds that the Dissenting Shareholders had unreasonably refused the offer. It was implicit in the Company's position that if the Court held that the Company was liable to pay the Dissenting Shareholders' costs, it should not be required to do so in respect of costs incurred after 4 January 2019.

53. Mr Burrows exhibited to his affidavit various emails exchanged between Mr Ian Weingarten, a principal and investment manager at Maso acting for both the Dissenting Shareholders and Mr Jason Chan, the Company's in-house counsel (Mr Jain was copied on all or an addressee of some of the emails). Most of the emails were marked "without prejudice save as to costs" so that the contents could be exhibited but some of Mr Weingarten's emails were headed "without prejudice and confidential" so that their contents were redacted and not relied on. As a result, the Court has only been shown a limited extract from the parties' settlement negotiations.
54. It appears from the email exchanges that a meeting took place at the Company's offices on 27 November 2018, during which the Company made an offer to the Dissenting Shareholders to settle these proceedings for the sum of US\$500,000. This offer was re-submitted in writing by email from Mr Chan to Mr Weingarten and Mr Jain dated 27 December 2018. The email starts with some discussion of the merits of the case and why the Company's position was supported by the evidence of its experts. In the final paragraph Mr Chan says as follows:

"The offer from [the Company] during the previous meeting was as said reviewed and approved by our internal mechanism and I would like to re-submit herein our offer for the sum of USD500k inclusive of all your costs and expenses again for your consideration. As it is now close to New Year, I would like to keep the offer open till 5.00pm 3rd January 2019 Hong Kong time"

55. The Company says that this was a drops hands offer (which would result in no further steps being taken in the proceedings) in consideration of the Company paying an additional \$500,000 over and above the Merger Price.
56. The Company submitted that the Court should take the offer into account when making its costs order and referred to GCR O.22, r.14 which provides as follows:

"(1) A party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be "without prejudice save as to costs" and which relates to any issue in the proceedings.

(2). Where an offer is made under paragraph (1), the fact that such an offer has been made shall not be communicated to the Court until the question of costs falls to be



decided and the Court shall take into account any offer which has been brought to its attention when making an order for costs....”

57. The Company also noted that GCR O.62, r.10(d) provides that “*The Court in exercising its discretion to make an order for costs shall take into account – (d) any written offer made under Order 22 rule 14*” and submitted that this requirement recognised the need, in the words of Henderson J in *G v G* [2010(1)] CILR 365 at 371) for such offers, “*to have teeth in order for them to be effective.*” The Company also relied on the statement made by Mummery LJ in *Butcher v Wolfe and Wolfe* [1999] 1 FLR 334 at 340 that, “*The proper approach of a Calderbank offer, when it is taken into account on a later argument on costs, is to ask whether the party to whom the offer was made ‘ought reasonably to have accepted the proposal in the letter’?*” The Company said that therefore the question for the Court to consider was whether it was reasonable for the Dissenting Shareholders to decline the offer. It acknowledged that in order to do so the Court would need to take into account what amount of interest the Dissenting Shareholders would have been entitled to at the time (and the Company invited the Court to calculate interest on the basis of the Company’s and the Dissenting Shareholders’ positions on the question of what amount of interest should be payable). But, the Company said, on whatever basis interest was calculated, it was likely that the offer was above the amount of the eventual fair value plus interest determination made by the Court (or, if not, not much below it).
58. The Company argued that the Court should take into account the fact that at the time the offer was made costs had already been awarded in the Company’s favour of US\$450,330.30 in aggregate (US\$230,691.40 in this Court and US\$219,638.90 in the Court of Appeal inclusive of foreign lawyers’ fees). Therefore, the Company argued, had the Dissenting Shareholders accepted the offer, not only would they have received US\$500,000 from the Company, but they would also have been relieved of their existing obligation to pay those costs. The total value of the Company’s offer was therefore US\$950,330.30, which was approximately 3.65x the US\$260,569 the Dissenting Shareholders obtained by pursuing the proceedings to trial. The Company submitted that in light of the clearly less favourable result which the Dissenting Shareholders obtained at trial and the significant legal spend which was required and anticipated by both parties to be necessary after the offer was made, it was clearly commercially unreasonable for the Dissenting Shareholders to refuse the offer.



The Dissenting Shareholders' submissions

59. The Dissenting Shareholders on the other hand argued that they were the successful parties and that the Court should order the Company to pay their costs, subject to a deduction of 25% and to taxation on the standard basis in the usual way. They also argued that if the Court did not accept this argument and ordered them to pay the Company's costs, the Court should dismiss the Company's applications for consequential relief.
60. The Dissenting Shareholders said that the correct approach under the GCR and the authorities was first to identify the successful party and then to consider whether any modification is required to the usual order that costs follow the event. Following the approach of Jones J in *Integra*, the relevant comparison was between the Court's fair value judgment and the Company's position at trial (not the Company's offer to pay the merger price which had been superseded by the time the trial commenced). This approach, the Dissenting Shareholders submitted, correctly treated them as analogous to claimants seeking payment from a defendant in pursuit of a legal right.
61. In this case, the Court had held that the Dissenting Shareholders were entitled to US\$11.75 per ADS, representing a judgment sum totalling US\$20,411,178. The Company's position at trial had been (as I have already noted) that the fair value of the Dissenting Shareholders' shares was just US\$7.26 per ADS. On that basis the total judgment sum would have been US\$12,611,491.20. The Dissenting Shareholders had therefore recovered nearly US\$8 million, or 60%, more than was contended for by the Company.
62. The Dissenting Shareholders said that even if the Court should also take into account the difference between the Company's original offer of the merger price and the sum awarded in the judgment, they should still be regarded as the successful party.
63. The Dissenting Shareholders noted that in *Integra* the dissenting shareholders were treated as the successful parties notwithstanding that, (i) the Court's final determination of fair value was closer to the company's valuation than to that of the dissenting shareholders; (ii) the difference between the fair value determined and the merger price originally offered was small; and (iii) the Court had determined one big issue in favour of the company. They also relied on the principle established by the authorities that there was a strong presumption that the overall unsuccessful party is the party "*who has to write the cheque at the end of the case*" (in reliance on the judgment of Hickinbottom LJ in *Kupeli and others v Cyprus Turkish Airlines* [2019] 1 WLR 1235 at [7] – [15]).

64. The Dissenting Shareholders accepted that in some cases it would be appropriate for the Court to exercise its discretion by reference to success/failure on identifiable issues and that they had been unsuccessful on some issues. They said that it was inevitable in section 238 proceedings that there will be numerous sub-issues and that each party will succeed on some points and fail on others, so that it should not follow from the fact that a successful party had lost on some issues that they should be deprived of their costs. However, in this case, the Dissenting Shareholders accepted that some reduction in their cost recovery may be appropriate, in view of the issues on which they had been unsuccessful and argued that a 25% reduction would be appropriate.
65. The Dissenting Shareholders argued that Mr Chan's email of 27 December 2018 did not constitute a "written offer" made under GCR O.22, r.14, so that it should not be taken into account by the Court in exercising its costs discretion under GCR O.62 r.10(d). Alternatively, the Dissenting Shareholders had not acted unreasonably in failing to accept the offer. Furthermore, the result at trial had not been less favourable to the Dissenting Shareholders than the offer.
66. As regards the submission that there was no written offer for the purposes of GCR O.22, the Dissenting Shareholders made three points. First, the offer was defective in that it was expressed to be "inclusive of all your costs and expenses." As a matter of principle, a costs inclusive offer was irrelevant because it would generally be impossible without further detailed inquiry to ascertain what the value of the offer was and whether the offer was more valuable to each Dissenting Shareholder than the result obtained at trial. In order for a settlement offer of this kind to be taken into account under GCR O.22, r.14 it should have offered to pay costs to date. The Dissenting Shareholders relied on *Tramountana Armadora SA v Atlantic Shipping* [1978] 2 All ER 870 at 878 e-g. and *Everglade Maritime v Schiffahrtsgesellschaft Detlef von Appen: The Maria* [1993] 1 WLR 33 at 44C-D. In *Tramountana* the respondents had written to the claimants offering US\$6,000 in full and final settlement, and in response to an inquiry by the claimants stated that the US\$6,000 was a lump sum figure and that they did "not contemplate any payment in respect of interest or costs". The arbitrator decided that the claimants should bear all the costs after the respondents' offer since he concluded that the offer had exceeded the amount of the final award. However, he did not have available to him the amount of the claimant's costs up to the date of the offer (which was in the middle of the arbitration). Donaldson J held that in comparing the offer with the amount awarded the arbitrator had not only ignored the interest payable on the award but had not been in a position to compare the offer in the form of a lump sum inclusive of costs) with the amount awarded because he could not know or ascertain the amount of the claimant's costs up to the date of the offer and was therefore not in a position to compare like

with like. In the passage relied on by the Dissenting Shareholders Donaldson J said that (my underlining):

“Counsel for the claimants' other criticism is more substantial. The offer in this case excluded the payment of interest or costs in addition. So, the comparison is between US \$6,000 to include interest and costs and US \$2,710.4394 [the arbitrator had made an award in favour of the claimants in that amount] plus interest for 3 1/4 years at 8 1/2 per cent [from to the date of the offer] plus costs to [the date of the offer]. But these costs calculated to a date in the middle of the arbitration are a completely unknown factor which the arbitrator is not in a position to assess, even with the evidence which I now have that the claimant's untaxed bill of costs would have amounted to £4,000. The arbitrator is therefore unable to make the vital comparison. On the only figures known to him, the arbitrator is being asked to compare like with unlike. An offer of a lump sum to include costs is not and should never be treated as the equivalent of a payment into court. If a party wishes to make a 'sealed offer' and to have it considered in the context of an order for costs, he must offer to settle the action for £X plus costs.”

67. In *Everglade Maritime*, the arbitrator decided that had there been such a sealed offer, the arbitrator would have considered it proper to deprive the claimants of their costs and ordered that each party should pay its own costs despite the fact that the claimants had made a recovery of part of the sum claimed. But the arbitrator had then asked himself whether the claimant had achieved more by rejecting the offer and going on with the arbitration than he could have achieved if he had accepted the offer and concluded that he had not done so. The arbitrator considered that “*by rejecting the offer and continuing with the arbitration, the claimants will receive an additional \$1,215.99 (a small sum but not de minimis) but have in effect lost a much larger sum, viz., costs in the reference. Taking this into account, we are satisfied that in the light of the sealed offer the respondents are entitled to recover their costs from an appropriate date.*” The arbitrator rejected the claimants’ argument that that the only proper consideration to take into account was whether they had recovered a larger sum in the arbitration by way of principal and interest than was offered and that it was inappropriate that a party, when considering a settlement offer that included costs, should have to speculate whether, if it decided to continue with the case, the eventual award of costs would be more or less favourable than any offer as to costs included in the settlement offer. Judge Diamond QC allowed an appeal from the arbitrators’ decision and in the passage relied on by the Dissenting Shareholders, said as follows:



“As a rule, however, it seems to me that as the rules of court do not apply in an arbitration, it is usually necessary for a respondent at the stage of making a sealed offer to offer to pay the claimant's costs up to the stage of the offer; otherwise, as costs normally “follow the event,” the claimant cannot ordinarily be said to have acted unreasonably if he rejects the offer.”

68. Secondly, in this case the Dissenting Shareholders’ costs were in the region of US\$2.5 million at the date of the offer so that it was plain that the offer was worth substantially less than zero. Thirdly, the offer email was sent on 27 December 2018 and was expressed to be open for only seven days (which encompassed the New Year holiday period). A Calderbank offer should provide a reasonable period for the recipient to consider it. Under GCR O.22 a claimant has 21 days to decide whether to accept a payment into Court, and English appellate authority based on materially identical rules of court had confirmed that 21 days was a reasonable time to consider a Calderbank offer unless there were special circumstances. The Dissenting Shareholders argued that this is more complex litigation than the norm so that a dissenting shareholder should in principle have at least the normal time to consider a Calderbank offer. Seven days over a holiday period was nowhere near a reasonable period in the circumstances.
69. As regards the submission that even if Mr Chan’s email was a “*written offer*” that was in principle to be taken into account, the Dissenting Shareholders had not acted unreasonably in failing to accept it, the Dissenting Shareholders relied on the same reasons. The offer had not offered the Dissenting Shareholders their costs and they had not been given a reasonable period in which to consider it.
70. As regards the question of whether the Dissenting Shareholders obtained a less favourable result at trial, the Dissenting Shareholders submitted that since they had incurred US\$2,703,163.06 in recoverable costs by 27 December 2018, the offer of US\$500,000 above the merger price equated only to a fair value offer of approximately US\$2,000,000 below the merger price, which the Trial Judgment had comfortably exceeded.

Analysis and decision

71. Both parties accepted that Parker J’s recent summary of the applicable principles at [129] in *Qunar* accurately summarised the applicable law and approach to be adopted by the Court:

“(a) Costs are in the discretion of the court.



- (b) *Section 238(14) provides that the costs of the proceedings may be provided for 'as the court deems equitable in the circumstances.' The discretion given to the court by section 238 (14) is therefore a wide one to do justice in all the circumstances.*
- (c) *If dissenting shareholders participate actively in the trial it is equitable for GCR Order 62 rule 4 to apply, and normally costs should follow the event in accordance with the general rule.*
- (d) *It follows that a successful party should recover the reasonable costs incurred by him in conducting the proceedings in an economical, expeditious and proper manner, unless otherwise ordered by the court (Order 62 r.4(2)).*
- (e) *In section 238 cases it is not helpful to attempt to lay down any generally applicable principles or criteria by which to determine what constitutes 'success or failure', save to say that it depends upon all the circumstances.*
- (f) *The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, unless that has caused a significant increase in the length or cost of the proceedings, in which case he may be deprived of the whole or part of his costs. In *Integra* for example, the court accepted that there may be circumstances in which it is appropriate to exercise the court's discretion by reference to identifiable issues, where the valuation approach for example by an expert was preferred. However, *Jones J* was not influenced in that case by deciding one big tax issue in favour of the company because it did not detract from the overall result.*
- (g) *If the successful party raises issues or makes allegations improperly or unreasonably the court may not only deprive him of his costs, but may order him to pay the whole or a part of the unsuccessful party's costs (Order 62 r.11(2)).*
- (h) *A dissenting shareholder's risk as to costs should be limited to the additional costs incurred by the company as a result of his participation if he is unsuccessful."*

72. In *Qunar*, the difference between the judgment as to the fair value (US\$31.20 per ADS) and the company's position at trial (US\$28.09 per ADS) was US\$3.11 per ADS, which amounted to value in the aggregate to the dissenting shareholders of US\$6,250,583.74. The company's original fair value offer of the merger price (US\$30.39 per ADS), was also lower than the

judgment value by US\$0.81 which amounted to value in the aggregate to the dissenting shareholders of US\$1,627,965.54. The company argued that the appropriate costs order should be that the parties bear their own costs, save from 7 February 2019, on which date the company had made a without prejudice save as to costs offer to the dissenting shareholders which it argued they had unreasonably refused. The dissenting shareholders, for whom Mr Salzedo QC also acted, adopted similar arguments to those deployed by the Dissenting Shareholders in this case. Parker J held that in his view, in the exercise of his discretion, the “*fair overall result*” was that there should be no order as to costs.

73. Mr Justice Parker did not consider that it followed from the fact that one party had to write the cheque that they were to be treated as the unsuccessful party. He noted that the dissenting shareholders had at the end of the day beaten the merger price and the company’s position at trial but then took into account the fact that the dissenting shareholders had failed to persuade the Court that their much higher fair value claim was right, had failed on a number of critical issues and had the evidence of their expert rejected on most points. He said as follows:

“148. True it is that the company ‘writes the cheque’ in this case, but it is not a cheque nearly as large as that contended for by the dissenting shareholders. The methodology engaged by their expert, whose evidence was that fair value ought to be 4.15 times the merger price, would have resulted in the dissenting shareholders receiving a 415% uplift rather than the uplift which they did receive of approximately 2%.

149. Save in two minor respects the court, following a three-week trial, and the cross examination of the expert called by the company, Ms Glass, which took some 8 days, accepted her approach and her evidence.

150. The court rejected the dissenters’ expert’s central thesis that there was a systematic undervaluation of Chinese companies on US exchanges and his DCF calculations.

151. In these circumstances and applying the legal principles set out above it would not be fair to order that the company should pay the dissenters’ costs. The common sense outcome in the real world is that the company succeeded at trial. This is to some extent counterbalanced by the dissenters ‘succeeding’ in beating the fair value offer and the company’s position at trial, but the case at trial was really about the vast delta between the two competing valuations.

152. Neither would it be fair to order that the costs of the proceedings from the date of the offer letter (7 February 2019) should be borne by the dissenting shareholders in the light of the submissions made by Mr Salzedo QC concerning the uncertainty caused by its wording, which I accept."

74. The Dissenting Shareholders submitted that Parker J's decision (that although the dissenting shareholders in that case had beaten the company's position at trial, there should be no order as to costs in recognition of his decision on individual issues) should not be followed in this case. As an exercise of his discretion on the facts of *Qunar*, his decision was of no relevance to the approach to be taken in a different case such as the present. To the extent that Parker J's decision was based on a point of principle that could be followed in other cases, to the effect the Court should treat both parties as having been successful in different senses or respects (see [151] so that no order as to costs should be made, it was wrongly decided. The correct approach under the GCR and the authorities was first to identify the successful party and then to consider whether any modification is required to the usual order that costs follow the event.
75. In my view the proper approach in this case is to start by treating the Dissenting Shareholders as the successful parties, but then to consider the extent to which there are features of the case which militate against the unqualified application of the general rule that the successful party should recover its costs:
- (a). paragraph 8 of the Trial Judgment summarised the issues in dispute and my decision on each issue. It is a useful reference point for assessing success in these proceedings.
 - (b). the starting point is that the Dissenting Shareholders did recover a material sum above the amount which at trial the Company claimed was payable both on its primary and secondary case. As noted above, the Dissenting Shareholders recovered nearly US\$8 million more than the sum claimed by the Company on its primary case to be payable. In my view, for costs purposes the Court should give particular weight to the extent to which the Dissenting Shareholders obtained a judgment above the sum which the Company claimed at trial was owed. The principle behind the general rule that the unsuccessful party should pay the costs of the successful party is that a defendant who owes the claimant a substantial sum albeit less than the amount claimed, has had to be brought to Court to enable recovery to be made (and the unsuccessful party always has the opportunity and can be expected to protect its position on costs in the event of an award of less than the full sum claimed by



making a without prejudice save as to costs offer). While the procedural rules laid down in section 238(9) of the Companies Act require the company to commence the proceedings by filing a petition, and most of the issues in dispute relate to the expert evidence concerning the proper valuation of the dissenting shareholders' shares, in substance the proceedings involve an *inter partes* dispute about how much the company owes and should be required to pay the dissenting shareholders. As the Dissenting Shareholders argued, they are to be treated as being in a position analogous to claimants seeking payment from a defendant in pursuit of a legal right. The Company has had to be brought to Court to enable the Dissenting Shareholders to recover what is owed to them.

- (c). the fact that the Dissenting Shareholders claimed to be owed a substantially larger sum than the amount awarded therefore does not of itself mean that they should not be treated as the successful parties.
- (d). the Company accepted, as I have noted, that in its closing submissions it had put forward as its primary case that the fair value was US\$7.26 per ADS but argued that this should be given limited significance or weight because its case for this valuation had turned on uncontested facts and was based on a short point of law. In my view, this does not prevent the Court from deciding, at least as a starting point for the exercise of the costs discretion, that the Company nonetheless was the losing party (the fact that the petition averred that the merger price represented fair value does not assist the Company in a case where it adopted a different case at trial and the Dissenting Shareholders made no objection to it doing so and changing its position from that set out in the petition).
- (e). the Dissenting Shareholders also obtained more at trial than the Company's original offer of the merger price. The Trial Judgment awarded the Dissenting Shareholders US\$11.75 per ADS as the fair value of their shares, representing according to the Dissenting Shareholders a judgment sum totalling US\$20,411,178. The merger price was US\$11.60 per ADS, which would according to the Dissenting Shareholders have resulted in a judgment sum of US\$20,150,592. The difference is US\$260,586 (the Company said that the difference was US\$260,569). I also take this into account (but give this factor significantly less weight than the amount which the Company argued at trial was owing on its primary case) in deciding that the Dissenting Shareholders should be treated as the successful party. While relatively small, I do not consider that it can be said that this sum was *de minimis* and so trifling that it could be ignored or could not justify contesting the Company's petition.



- (f). I note and take into account that in *Integra* Jones J decided that the dissenting shareholders were successful because they recovered more than the original offer of the merger price and substantially more than the value for which the company contended at trial.
- (g). I also note and take into account the various judgments which have emphasised the importance in the exercise of the discretion on costs of who was the winning party. As the Dissenting Shareholders noted, these were summarised in the judgment of Hickinbottom LJ in *Kupeli* (see above) (and include *AL Barnes Ltd v Time Talk (UK) Ltd* [2003] EWCA Civ 402 per Longmore LJ at [28] and *Day v Day* [2006] EWCA Civ 415 per Ward LJ at [17]).
- (h). however, in deciding whether to apply the general rule, the Court is entitled, having regard to all the circumstances, to consider whether there are good reasons to depart from the general rule, including whether the successful party lost (and the losing party succeeded) on one or more issues which had a material impact on the conduct of the trial and costs such that it would be just to reduce the costs otherwise to be awarded to the successful party. In such a case, the Court is required to bear in mind that almost invariably overall success involves losing on some issues.
- (i). in my view, this is a case in which it is appropriate to take into account an issues-based approach and in which there are strong reasons for not applying the general rule. The Dissenting Shareholders in their submissions accepted this to be the case and proposed a 25% reduction in light of the issues on which they had been unsuccessful. In my view, however, for the reasons I set out below, such a limited reduction would not result in a fair or just costs order.
- (j). paragraph 8 of the Trial Judgment shows that the trial addressed a large number of discrete disputes and issues and reveals that the Company was successful on a substantial number of those arising out of the expert valuation evidence. I accepted Ms Glass' evidence on most of the disputed issues arising in relation to the inputs to the DCF valuation. Significantly, I rejected the Dissenting Shareholders' submission that the Management Projections (including the market share forecasts on which they were based) could not be relied and Mr Russo's projections, in particular his use of the figure of 9,000 MW for PV module sales in 2017. The Dissenting Shareholders had placed significant reliance on Mr Russo's evidence, which was a critical plank of their claim that the fair value of their shares was US\$193.19 per ADS and had given rise to a substantial amount of costs and Court



time. As the Company pointed out, this claim represented a 1,565% uplift on the merger price and in view of the Company's expert evidence was on any basis an extravagant claim, on which the Dissenting Shareholders failed at trial. In addition, the Dissenting Shareholders lost at trial on another important argument that supported this high figure, namely the argument that the Court's valuation should be based solely on a DCF valuation. As the Company submitted, I largely accepted Ms Glass opinion on the valuation methodology to be adopted (noting in paragraph 8(d) of the Trial Judgment that I accepted "*the main elements of the opinion of*" Ms Glass on this issue) and concluded that it was appropriate to give weight to each of three different valuation methodologies, although I did adjust Ms Glass' proposed weighting and while the adjustments were minor in percentage terms they did have a material impact on the final determination of fair value.

- (k). the Company also failed on some significant issues. As I noted in paragraph 8(a) of the Trial Judgment, I rejected the Company's full-frontal attack on the Court's previous approach to assessing fair value (based on the proposition that the Court had to determine fair value by reference to the price at which the shares would be exchanged between a willing buyer and a willing seller in an arm's length transaction based only on publicly available information). While this issue involved a point of law, a substantial amount of authority was relied on, and a not inconsiderable amount of Court time was taken up in dealing with the issue (as can be seen from the Trial Judgment). The Company also lost on the minority discount point. The Company, based on Ms Glass' opinion, submitted that the discount should be 10% but I accepted the Dissenting Shareholders' claim to 2% based on Mr Edwards' opinion (see [341] – [353] of the Trial Judgment). While this was not an issue that gave rise to the same volume of evidence or time as the valuation disputes, it nonetheless did involve a material volume of evidence and had a material impact on the final outcome.
- (l). in my view, taking these points into account, if the only consideration were an issue-based order, which is one which could clearly be justified by reference to separation of the issues, that would result in an order giving the Company some part of its costs. But taking into account the fact that it remains the case that the Dissenting Shareholders were the successful parties, which would normally result in an order for costs in their favour and taking into account all the factors and considerations I have mentioned above, I have come to the conclusion, subject to the possible impact of Mr Chan's email of dated 27 December 2018 which I discuss below, that the equitable (fair) order is that there should be no order for costs and that each of the parties should bear its own costs.

- (m). of course, neither party argued for such an order. In keeping with the approach adopted throughout these proceedings, they each took aggressive positions and argued that they were the successful parties and entitled to their costs, although to be fair, the Dissenting Shareholders did by proposing a 25% reduction, introduce a significant element of realism and reasonableness into their case. Nonetheless, it is open to the Court to make whatever order as to costs that in its discretion it considers to be equitable and appropriate and, in my view, making no order as to costs is the right result.
- (n). I have concluded that the offer contained in Mr Chan’s email of dated 27 December 2018 should be taken into account but that the Dissenting Shareholders were not acting unreasonably in the circumstances of this case by refusing to accept the offer. It seems to me that the authorities relied on by the Dissenting Shareholders do not establish that an offer that does not state the costs consequences of its acceptance cannot be taken into account by the Court; rather they show, and in my view it is right to say, that such a letter may be given less weight as a result. In this case, I do take into account, in deciding whether the Dissenting Shareholders were acting reasonably, the difficulties they were under in assessing the value and benefits of the offer produced, particularly in view of the very limited amount of time they were given to accept it (even recognising that the offer had been discussed albeit not put in writing in November). In my view the Dissenting Shareholders had not been given a reasonable period in which to consider the offer and acted reasonably in not accepting it. Therefore, the making of the written offer does not change my decision as to the appropriate costs order to be made.
- (o). it has become the practice of the parties to section 238 cases to adopt what can only be classified as extreme positions at trial, pressing their case for a particularly high or low valuation across a wide range of possible outcomes. While it is right to say that ultimately it is for the Court to decide on what it considers to be the fair value in light of all the evidence, and that parties can legitimately point to different elements of the evidence to highlight valuation issues, parties who fail to adopt a focussed and proportionate approach in their cases will be at risk in costs.
- (p). in the Trial Judgment I noted (in paragraph 8(e)) that, “*there has been an unfortunate failure to coordinate the expert evidence to be given by the industry experts and the valuers.*” In the present case, it does not appear as though this was the fault of one side rather than the other and in view of the costs order I have decided to make, this can have no impact on the liability or entitlement of any party to costs. But in another case, there may well be cost consequences flowing from such a failure.

- (q). while I have reached the same result as Mr Justice Parker in *Qunar* I have not treated his decision on the costs order to be made as a precedent to be followed. But I would say that in my view the Dissenting Shareholders' criticism of Mr Justice Parker's approach is misplaced. They submit that he was wrong because he seems to have found that both parties were successful in different senses. I do not consider that he took that view. He said clearly at [151] that, "*The common-sense outcome in the real world is that the company succeeded at trial.*" So, his starting point was that the company was the successful party. But, exercising his discretion and adopting an approach similar to the one I have followed, he concluded that in the circumstances of that case the general rule that the successful party should recover its costs should not be applied.

The Costs Limitations Orders

76. Since I have decided that there shall be no order as to costs, it is not necessary for me to deal with the Company's application to disapply various limitations applicable to the recovery of sums relating to foreign lawyers, witnesses, and the preparation of its bill of costs. However, since I heard full argument from both the Company and the Dissenting Shareholders on the application and the issues raised may have some relevance for other cases, I consider it appropriate to set out my views on the points in dispute.

77. GCR O. 62 r.18 provides that:

"(1) Work done by foreign lawyers may be recovered on taxation under these rules on the standard basis provided that –

(a) the foreign lawyer has been temporarily admitted as an attorney; and

(b) the work was done after he was admitted.

(2) Work done by foreign lawyers who are temporarily admitted must be fully itemised in the bill of costs and may not be treated as a disbursement.

(3) Whenever a claim is made for work done by foreign lawyers, the taxing officer will investigate whether it has resulted in a duplication or increase in the cost of the proceedings and any such increase shall be disallowed.



- (4) *Work done by local attorneys for the purpose of instructing foreign lawyers and vice versa shall be disallowed.*
- (5) *The taxing officer shall disallow any item which appears to have been incurred, or the costs of which appears to have been increased, because the successful party has engaged both local attorneys and foreign attorneys.*
- (6) *Time spent and disbursements incurred in respect of written and oral communication between foreign lawyers and local attorneys will be disallowed.*
- (7) *The overriding principle is that a paying party should not be required to pay more because the successful party has engaged a foreign lawyer than he would have been required to pay if the successful party had employed only local attorneys.”*
78. GCR O.62, r.17(1) 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.”*
79. Practice Direction No. 1/2001 (the ***Practice Direction***) set out “Guidelines Relating to the Taxation of Costs” (the ***Guidelines***). Paragraph 1 of the Guidelines states that they, *“are made pursuant to GCR Order 62, rule 17 and are intended to be a comprehensive code relating to the procedure in respect of taxation; the form and content of bills of costs; and the nature and amount of fees, charges, disbursements, expenses, or remuneration which may be allowed on taxation.”*
80. The Company, as I have noted, applied for an order that the limitations on the recovery of foreign lawyers’ fees under GCR O.62, r.18 be disapplied. *“Foreign lawyer”* is defined in GCR O.62, r.3(1) as, *“a person who is engaged in practice as a professional lawyer in any country outside the Islands”*. The Company argued that it was clear from the authorities that the Court has the power under GCR O.62, r.17 to dispense with the limitations of O.62, r.18 (and the Guidelines) in order to do justice between the parties and should do so in this case.
81. The Company relied in particular on the judgment of Parker J in *Ritchie Capital Management v Lancelot Investors Fund* (unreported, Grand Court, 4 March 2021, Parker J). This was a decision on the papers. The Court had granted GE’s application to set aside the order giving Ritchie leave to serve GE out of the jurisdiction and had ordered that Ritchie pays GE’s costs of and occasioned by the proceedings. GE applied for an order that Ritchie pay GE’s costs on the indemnity basis and that if costs were to be on the standard basis that GE be permitted to recover fees paid to



foreign lawyers not engaged to give an opinion on a point of foreign law. Mr Justice Parker dismissed GE's application for indemnity costs but granted GE's application that it be permitted to recover the costs of the US legal advisers it had instructed to advise on issues arising in the Cayman litigation. Parker J said as follows:

“31. In General Shopping Kawaley J having reviewed the Practice Direction and Sagicor said at § 24:

“Read in the light of the restrictive terms of the Practice Direction, Sagicor (ibid) supports the following principle. If the receiving party wishes to displace the usual rule of practice that foreign lawyers' fees (and hotel and travelling expenses) are only recoverable where the lawyer is giving an opinion as to foreign law, not to mention the restrictive policies in GCR Order 62 rule 18 (3) to (7) aimed at avoiding duplication of effort, an application for a dispensation from the usual approach should ordinarily be sought before the costs order is actually made.”

32. Both Sagicor and General Shopping were dealing with foreign lawyer fees in the context of costs awarded on the indemnity, not the standard basis which will apply in this case.

33. I do not however take Kawaley J to have meant that there is no jurisdiction under Order 62 rule 18 (1) for the court to allow a party to recover costs in respect of work done by foreign lawyers. That power is clearly given by Order 62 rule 18 (1) but may be limited by the practice in the [Practice Direction].

34. As a matter of practice to the extent that dispensation from the usual approach is necessary, I am minded to follow Kawaley J's lead and give it, insofar as it relates to foreign lawyer costs.

35. The case involved an enormous factual inquiry going back many years and was of some United States legal complexity. I accept that it was in the circumstances appropriate for GE to engage foreign lawyers as well as local attorneys.

36. The case was closely connected with the United States where there had been considerable litigation over many years concerning the same issues in different courts. It was therefore reasonable for GE to instruct the local attorneys in the



Cayman Islands to have recourse to the knowledge of its US attorneys from the prior litigation.

37. *Furthermore, complex US expert evidence was given and it was not unreasonable in those circumstances for GE to be represented by local attorneys with some additional input from US lawyers in order to evaluate the US law issues and instruct GE's own expert and review the US law expert evidence put forward by Ritchie's US law expert."*

82. In *Re General Shopping* (unreported, Grand Court, 25 August 2020, Kawaley J) Kawaley J dealt with an application for the review of a costs certificate issued by a taxing officer. Winding-up petitions had been withdrawn pursuant to a consent order in which it was ordered that the respondents' costs would be paid by the petitioners and if not agreed taxed on the indemnity basis. The respondents challenged the taxing officer's decision to award only a small percentage of the fees payable by the respondents to their New York lawyers in connection with their advice on the Cayman Islands proceedings (expert evidence of New York law had been filed by the petitioners and the winding up proceedings involved other foreign elements since the respondents' case had been based in part on the argument that the Cayman Islands winding up petitions entailed re-litigating issues already determined in prior Brazilian proceedings). Kawaley J dismissed the challenge to the taxing officer's decision on this issue. In addition to the dicta at [24] referred to by Mr Justice Parker, he also noted at [19]:

"It is common ground that the basic distinction between indemnity costs and standard costs is that in the latter case, foreign lawyers' fees are only recoverable if the foreign lawyer is admitted to the local Bar (GCR Order 62, rule 18(1), (2))."

83. *Sagicor v Crawford* [2008] CILR 482 was another case involving indemnity costs. The plaintiffs sought damages from the defendants for fraud and conspiracy. In preparation for the trial, various defendants employed two UK-based lawyers who did not become members of the Bar of the Cayman Islands until very shortly before the trial, in order to reduce costs. They had, however, done the majority of the preparatory work for the trial before then. On the eve of the trial, the plaintiffs abandoned their claim. The defendants were awarded their costs on an indemnity basis. They were also awarded the costs of the UK barristers instructed by them. Henderson J held that GCR O.62 r.18(1)(b) only applied in respect of the taxation of costs on a standard basis and that the Guidelines were merely a set of "guidelines", which could be deviated from in exceptional circumstances, when justice required it, under the broad jurisdiction of the court. He held that his, "award of indemnity costs to these defendants [was] intended to avoid the obvious injustice



in their being out of pocket after being forced to defend ill-considered and unmeritorious allegations of fraud and conspiracy. It would be unjust to allow the guidelines to frustrate that intent.”

84. The Dissenting Shareholders submitted that there was no legal basis for the disapplication of, in the context of taxation on the standard basis, a mandatory rule. GCR O.62, r.18(1) was clear. In a case where taxation is on the standard basis, if the proviso is not satisfied, fees charged by foreign lawyers who were not admitted in the Cayman Islands when the work was done cannot be recovered. There was no basis on which the Court could ignore or disapply the rule. The authorities, save for *Ritchie Capital*, were also consistent with this proposition. Neither *Sagikor* nor *General Shopping* were authority for the proposition that the Court could disapply a clear rule in the GCR. Furthermore, *BDO v Ardent* (unreported, Grand Court, 27 April 2021, Ramsay-Hale J) was also consistent with the proposition that foreign lawyers’ fees were *only* recoverable where costs were payable on the indemnity basis. Justice Ramsay-Hale said (at [54]): “*Ms Stanley submits, and I accept, that while* [the costs of its UK Leading Counsel incurred prior to limited admission in this jurisdiction] *would not be recoverable under taxation on the standard basis ...*” *Ritchie Capital*, the Dissenting Shareholders said, was a case decided on the papers, and was wrong on this point and should not be followed.
85. The Dissenting Shareholders also said that in any event, what was being proposed in this case was very different from *Ritchie Capital*. The Dissenting Shareholders argued that in *Ritchie Capital* the successful party sought recovery of US legal costs incurred by US attorneys who were, it is to be assumed, duly licensed, qualified, and admitted to provide the US legal advice. In the present case, the Company sought to recover costs incurred in respect of Cayman Islands legal advice provided by unadmitted and therefore unqualified attorneys. To permit the recovery of such fees would, the Dissenting Shareholders argued, be an unprecedented step in Cayman Islands jurisprudence.
86. I accept the Dissenting Shareholders’ submission that the Court does not have the power to disapply GCR O.62, r.18(1). The Court’s discretion to award costs is made, by section 24(1) of the Judicature Act (2021 Revision), subject to the provisions of the GCR. In my view, GCR O.62, r.17 does not give the Court the power to override and ignore the specific terms and directions set out in GCR O.62, r.18(1) (there is no indication in GCR O.62, r. 17 that the Court has such a power). GCR O.62, r.18(1) is in mandatory terms 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)(a) and (b) are satisfied. In a case involving taxation on the standard basis

in which they are not, the Court cannot order that work done by foreign lawyers is recoverable. There is no indication that this issue was raised or that it was argued that the Court had no power to disapply GCR O.62, r.18(1) in *Ritchie Capital* which, as the Dissenting Shareholders noted, was a decision made without the benefit of oral argument and a hearing. For that reason, I am satisfied that it is appropriate to treat Mr Justice Parker's views on this point as at most preliminary. The Company's application on this point must therefore be dismissed.

87. The Company argued that GCR O.62 in general and GCR O.62, r.18(1) in particular were outdated and in need of reform. It was pointed out that GCR O.62 and the Guidelines came into force in 1995 and 2002 respectively, and date from a period when Cayman Islands law firms were not part of a global network. The Company said that in the modern age, it was entirely reasonable for a litigant in the Company's position to wish to communicate with attorneys in its own language and time zone (as the Company did in this case which was why personnel in Harneys' Hong Kong and Shanghai offices were used), and the ability to do so was one of the features that made the Cayman Islands an attractive forum to such clients. Furthermore, it was said, the global nature of offshore legal practice was now recognised by Part 4 of the Legal Services Act 2020 which, once in force, will allow a person who is ordinarily resident in another jurisdiction and is a partner, director, member, employee, associate or consultant of a Cayman Islands law firm or an affiliate of a Cayman Islands law firm to be admitted as an attorney in the Cayman Islands with the result that once Part 4 comes into force, the restrictions of O.62, r.18 will no longer apply to those members of Harneys' Hong Kong and Shanghai offices who are admitted under that part. I have a great deal of sympathy with these sentiments and the advantages and benefits both to the clients of law firms and the practice of law in this jurisdiction derived from a global network of offices. But it is not open to a judge of this Court to change the law and ignore the clear and mandatory terms of the GCRs.
88. The Company also applied for an order that the limitation on recovery of foreign lawyers' travel and hotel expenses under section 9.4 of the Practice Direction be disapplied. Section 9.4 of the Practice Direction provides that the travelling and hotel expenses paid to foreign lawyers "*shall not be recoverable on taxation.*" Mr Burrows explained that the Company seeks to recover the travel and hotel expenses paid to Philip Jones QC. The Company argued on the basis of *Sagicor* that the Court had jurisdiction to disapply section 9.4 and should do so in this case. While Mr Jones' travel and hotel expenses were substantial (US\$58,585.38) they were properly incurred and the result of a lengthy stay in the Cayman Islands resulting from the timetable for the trial and the preparation of closing submissions. As such, the expenses were a reasonable cost of the litigation and should be permitted to be recovered. While not specifically dealt with by Mr

Burrows, it also appears from the Company's Statement of Costs exhibited to Mr Burrows' affidavit, that the Company also sought to recover payment of and to have the limits in section 9.4 of the Practice Direction disapplied with respect to the travel expenses of attorneys from Harneys' Hong Kong office, although I was unclear as to precisely who and how much was involved.

89. The Dissenting Shareholders argued that the Company's application should be dismissed. While the travel expenses of foreign lawyers had exceptionally been permitted in *Sagicor*, that was a very different case. There costs were taxed on the indemnity rather than the standard basis, and that was because the case involved serious allegations of fraud and conspiracy that were abandoned on the eve of trial. By contrast, this case was a standard basis case, with no equivalent special feature to justify the disapplication of the Guidelines. Moreover, Mr Burrows had not given any reason why it was said to have been necessary for attorneys from Harneys' Hong Kong office to attend the trial in the Cayman Islands, and it is impossible to see what reason there could be given that the trial was attended throughout by two partners and two associates from Harneys' Cayman Islands office.
90. I would have dismissed this application. The Company's evidence in support of the application did not show any special circumstances that would make it, or otherwise demonstrate that it would be, unjust and unfair on the Company to apply the limitations in section 9.4 of the Practice Direction. In *Sagicor* it was necessary to disapply the Guidelines in order to avoid in Henderson J's words "*obvious injustice*" in a case where the receiving party had been "*forced to defend ill-considered and unmeritorious allegations of fraud and conspiracy*" and awarded indemnity costs. It would be wrong in my view to disapply the limitations in section 9.4, which is the normal rule, just because substantial travel expenses were incurred for the better conduct of the litigation.
91. The Company also sought to disapply the limit of US\$250 per day on accommodation costs for witnesses. The actual rates paid by the Company for accommodation for its witnesses were set out in Mr Burrows affidavit at [36]. The charges ranged between US\$348 and US\$549 per night. The Company said the limits were out of date. They were fixed in 2001, some 20 years ago and were now too low, having regard to the current prices of hotel rooms and apartments. The Dissenting Shareholders said that the mere passage of time could not be a sufficient reason to disapply the Guidelines. If it was, it would follow that the Guidelines and the limit it imposed should be disapplied in every case with the result that it would be rendered a dead letter. I agree. There is no doubt that the limit should be reviewed and almost certainly increased but in the absence of an amendment to the Guidelines or particular circumstances justifying its



disapplication, the limit must be observed and given effect. I do not consider that the mere fact that these are substantial proceedings involving parties and witnesses from other jurisdictions is sufficient to justify a departure from the normal rule.

92. The Costs Summons also sought an order disapplying the limitation on costs that are recoverable for preparing the Company's bill of costs. The limitation under GCR O.62, r.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. Mr Burrows' affidavit did not deal with this application (and therefore did not give any reason why the Company needed to incur these costs or why they were justified by the particular circumstances of this case). The Company, however, in its written submissions argued that the limit imposed by GCR O.62, r.26(3) was grossly insufficient to allow for the preparation of a detailed Bill of Cost (and one which is helpful to the Taxing Officer) in a case such as this where the costs are measured in the millions of dollars, involved many different counsel, experts and service-providers and where the proceedings have been ongoing for over four years involving many days of Court hearings, related proceedings and two interim appeals. The Company asserted that if a successful party was limited to the figure in GCR O.62, r.26(3) there will be no incentive for the unsuccessful paying party to negotiate or agree costs or narrow the issues. The Dissenting Shareholders, in response, submitted that that the Company had failed to justify a disapplication of the usual rule or why the burden of the high costs associated with the preparation of its bill of costs should be borne by them. Once again, I agree and would have dismissed this application. The Company's arguments amount 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.

Interest on Costs and Interim Payment on Account of Costs

93. Since I have decided that there shall be no order as to costs, it is not necessary for me to deal with the applications for interest on costs and for a payment on account of costs.

Mr. Justice Segal
Judge of the Grand Court
8 December 2021