Hilary Term
[2020] UKPC 2
Privy Council Appeals No 0062 and 0058 of 2018

JUDGMENT

Shanda Games Ltd (Respondent) *v* Maso Capital Investments Ltd and others (Appellants) (Cayman Islands)
Shanda Games Ltd (Appellant) *v* Maso Capital Investments Ltd and others (Respondents) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Wilson
Lord Briggs
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

27 January 2020

Heard on 12 March 2019

Shanda Games Ltd
Philip Jones QC
Ian Mann
Anya Park
(Instructed by Harney Westwood & Riegels)

Maso and others
Jonathan Crow QC
Rupert Bell
Donald Lilly
(Instructed by Edwin Coe LLP)

LADY ARDEN:

1. A key feature of the statutory regime for mergers in the Cayman Islands is that it gives significant rights to dissenting shareholders ("dissenters"). They include an appraisal right, that is, the right to apply to the Grand Court for determination of the "fair value" of their shares and a right to the payment of "a fair rate" of interest on the outstanding consideration. These two appeals concern those two rights. The first appeal (the "fair value appeal"), brought by minority shareholders in Shanda Games Ltd ("Shanda") known as the "Maso parties", concerns the meaning of "fair value", specifically whether it means that there should be a discount to reflect that the dissenters do not have control of the company or whether it means a pro rata share of the full value of the company ("per share value"), as it has in a number of authorities been held to mean in Delaware law. The second appeal (the "interest appeal"), brought by Shanda, concerns the determination of a fair rate of interest.

Cayman appraisal rights

2. Under section 238 of the Companies Law (2013 revision) of the Cayman Islands ("the Companies Law"), where there has been a merger or consolidation involving at least one Cayman company pursuant to Part XVI of the Companies Law, a dissenter is entitled to payment of the "fair value" of his shares. If the dissenter and the constituent company cannot agree on "fair value", the company shall, or he may, present a petition to the Grand Court for its determination of the fair value of his shares and a fair rate of interest, if any, to be paid by the company.

3. Sections 238 and 239 of the Companies Law are set out in the appendix to this judgment. The key provisions may be summarised as follows. The entitlement of the member to fair value is set out in subsection (1) of section 238. The right is apparently limited to members, but no argument has been addressed to that. The dissenter must give notice ("an advance demand") that he objects to the merger and intends to demand payment for his shares before the resolution to approve the merger takes place (subsections (2), (3)). The company must give him notice that the merger has been approved within 20 days of the approval (subsection (4)). The dissenter then has 20 days to give notice of his decision to dissent which he must do in respect of all his shares in the company (subsections (5), (6)). On giving that notice, he loses his status as a member save that he may pursue his claim to payment of fair value and bring a claim to have the merger declared void or unlawful (subsections (7), (12) and (16)), (but not for example to bring a claim for outstanding distributions or past breaches of fiduciary duty). The company (or the surviving or consolidated company) must make an offer ("an advance offer") of what it considers to be the fair value of the shares within a further seven days following the expiration of the 20-day period for dissenting

(subsection (8)). If that offer is not agreed, a petition must be presented within a further 20 days to the court for determination of the fair value (subsection (9)). The court must determine the fair value together with a fair rate of interest, if any, on that amount (subsection (11)). The shares of the dissenters are cancelled on acquisition by the offeror (subsection (15)). Section 239 contains an important exclusion for listed shares ("a market exception") but that exclusion is subject to an exception where, for example, the dissenter is required to accept a cash element, as in this case.

4. Sections 238 and 239 contain many similarities with section 262 of the Delaware Corporations Code (prior to amendment in 2019). This also confers a right on stockholders who dissent from a merger to have their shares appraised by the Delaware Court of Chancery at their fair value. A dissenter must similarly make an advance demand before the resolution to approve the merger is passed (section 262(d)). The exceptions in section 262(b)(1) are similar to those in section 239 save that there is a further exception for cases where the number of registered stockholders is 2,000 or less. The company is not obliged to make an advance offer to dissenters as under section 238(8) of the Cayman Companies Law. Section 262(h) contains directions for ascertaining fair value and ordering interest. It directs the Court of Chancery to find the fair value of the dissenters' shares "exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation" ("synergies"). There is also an express requirement to take into account all relevant factors. Interest is from the effective date of the merger down to the date of payment at 5% over the Federal Reserve discount rate unless the Court determines otherwise "for good cause shown". The dissenter's status as a member ceases at the effective date of the merger but he may claim unpaid distributions declared before that date (section 262(k)). Court approval is required for the dismissal of appraisal proceedings (section 262(k)), but section 262 does not prohibit out of court settlements with any stockholder who is not a party to proceedings.

Merger of Shanda and the Maso parties' exercise of appraisal rights

5. Shanda is an exempted limited company incorporated in the Cayman Islands and its American Depository Shares ("ADSs") were listed on an American stock exchange known as NASDAQ. Its issued share capital is divided into ordinary shares, comprising Class A shares and Class B shares including Class A ordinary shares represented by ADSs (each ADS representing two Class A ordinary shares).

6. On 18 November 2015, Shanda merged with Capitalcorp Ltd as part of a transaction ("a take-private transaction") to enable a group of investors in Shanda to purchase all the shares which they did not own and return it to a privately-held company ("the Merger"). The consideration for each ordinary share was US$3.55 per share and US$7.10 per ADS (the "merger" or "deal" prices). The closing price of Shanda's ADSs as quoted by NASDAQ on 24 January 2014, the last trading day immediately prior to

the announcement leading to the Merger, was US$5.65 per ADS, so that the merger price represented a premium of 25.7% over that closing price. The offer excluded "Rollover Shareholders", namely shareholders who had entered into a support agreement dated 3 April 2015 to vote in favour of the transaction and to receive shares in the parent company in exchange for their Shanda shares. The Rollover Shareholders represented approximately 75.6% of Shanda's issued shares, entitling them to approximately 90.7% of the total number of votes capable of being cast at general meetings and so the Rollover Shareholders held more than the two-thirds majority necessary to approve the special resolution required under Cayman law for approval of the merger.

The Maso parties

7. The Maso parties are Maso Capital Investments Ltd, Blackwell Partners LLC - Series A and Crown Managed Accounts SPC, acting on behalf of Crown/Maso Segregated Portfolio. Their aggregate shareholding is 8,822,062 Class A ordinary shares of Shanda, representing some 1.64% of its issued share capital.

8. On 17 November 2015, prior to the extraordinary general meeting ("EGM") of Shanda to approve the Merger**,** the Maso parties duly gave written notice of objection to the Merger pursuant to section 238(2) of the Companies Law. On 18 November 2015, the EGM of Shanda was held at which the terms of the Merger were approved. On 29 December 2015, the Maso parties gave written notice of dissent pursuant to section 238(5) of the Companies Law.

9. On 4 January 2016, pursuant to section 238(8) of the Companies Law, Shanda offered to pay the Maso parties what it determined to be the fair price of their shares, namely, the Merger consideration. The Maso parties refused this offer. The parties failed to agree on the price to be paid for the Maso parties' shares within the prescribed time under section 238(8) of the Companies Law.

10. Shanda presented a petition on 4 February 2016 pursuant to section 238(9)(a) of the Companies Law which requires the Court to determine the fair value of the Maso parties' shares and a fair rate of interest.

Decisions of the Grand Court and the Cayman Islands Court of Appeal

11. At trial, the experts, Professor Gregg Jarrell, appointed by Shanda, and Mr William Inglis, appointed by the Maso parties, agreed (i) that the fair value of the Maso parties' shares should be determined by applying a discounted cash-flow model, and (ii) that, if it were appropriate to apply a minority discount, the rate should be 23%. The

parties agreed that the valuation date should be the date of the EGM of Shanda to approve the merger held on 18 November 2015.

12. Segal J, sitting in the Grand Court, heard the petition. He observed, in his judgment dated 25 April 2017, that, at the second reading of the Bill introducing what became section 238, the minister, the Honourable G Kenneth Jefferson, noted that:

> "… this Bill responds to requests from the private sector in relation to merger and consolidation provisions and reflects extensive consultation with the private sector as well as the review of Bermuda, BVI, Delaware and UK legislative precedents." [see the Official Hansard Report for Friday 20 March 2009]. (Judgment of the judge, para 75)

13. The judge drew guidance from Delaware law. He noted that section 238 had been adopted with a view to introducing into Cayman law a statutory merger scheme following the model found in other jurisdictions, particularly Delaware. It used the same core concepts found in Delaware and Canadian law. So in his judgment, it was entirely appropriate to pay close attention to the decisions of the Delaware courts in this field. He recognised, however, that it will also be necessary always to be satisfied that the law and practice developed by those courts was consistent with other relevant parts of Cayman law and practice (para 79).

14. On the minority discount point, he held, in his judgment on fair value ("the judge's fair value judgment"), that the Maso parties' shares should be valued on the basis of a pro rata share of what he determined to be the value of Shanda. He held that no discount was to be applied to reflect the fact that the shares held by the Maso parties constituted a minority holding ("a minority discount").

15. The judge decided many other points in a judgment which the Court of Appeal of the Cayman Islands ("CICA") observed was "commendably careful and comprehensive". It is impossible for the Board within the space of this judgment to summarise all the points he considered.

16. Having resolved all the issues of principle, he found that the fair value of the Maso parties' shares was US$8.34 each, or US$16.68 per ADS, which represents an uplift of 235% on the merger price.

17. The Board is concerned principally with the judgment of Segal J dealing with fair value on the non-applicability of a minority discount point. The reasoning of the judge is principally to be found in para 93 of his judgment, where he held:

> "93. It seems to me that the position is the same as a matter of Cayman law under section 238 of the Companies Law - both as a matter of principle and authority. No minority discount is to be applied. My reasons for so concluding are as follows:
>
> (a) As regards [*In the Matter of Integra Group* 2016 (1) CILR 192], Mr Meeson is right that the parties both accepted that there should be no minority discount and therefore the issue was not argued or live. However, it is clear that Jones J considered, as part of his review of the principles applicable to the determination of fair value, that there should be no minority discount (see in particular para 18 of the judgment).
>
> (b) it seems to me that the purpose of the fair value standard is to ensure that the dissenting minority is fully protected and that means that they should be compensated for the value of their full interest in the company. Their full interest is their proportionate share in the capital and value of the company.
>
> (c) this approach is consistent with one aspect of the legal nature of a share and the rights of a shareholder - see, for example, the analysis in *Gullifer & Payne, Corporate Finance Law: Principles and Policy*, 2nd ed (2015): 'even the legal owner of shares does not own a number of separate pieces of property but owns an undivided share in the share capital of the company. When a person is registered as the legal owner of 250 shares out of a share capital of 1,000 what he really owns is 25% of the share capital' (para 8.2.1.3.3, citing Professor Roy Goode's analysis in *Goode on Legal Problems of Credit and Security*, 5th ed para 6-15) (I recognise of course that shareholders are not treated as owners of the company's assets).
>
> (d) the full value of the dissenting shareholder's interest includes the shareholder's rights to a distribution of its share of the company's assets and value following a sale or other

realisation of the company's business and not merely the market value of its shares. This is equivalent to the valuation of a partner's interest in the partnership, described by Lord Millett in [*CVC/Opportunity Equity Partners Ltd v Demarco Almeida* [2002] 2 BCLC 108] (para 91 above) where he said that 'the valuation is not based on a notional sale of the outgoing partner's share to the continuing partners who, being·the only possible purchasers, would offer relatively little. It is based on a notional sale of the business as a whole to an outside purchaser [and a distribution to partners of their share of the partnership property].'

(e) the English unfair prejudice cases are clearly distinguishable. Not only is the statutory language different from section 238 but the remedy granted by the court, in relation to which the valuation issues arise, is an order for sale of the petitioner's shares. Section 238, by applying the fair value standard, does not assume a notional sale of the dissenting minority's shares. The valuation issue in section 994 cases arises in the context of a sale of shares and is therefore very different from the section 238 context. It might also be said that, since section 238 imposes a fairness requirement, the value to which the dissenting minority is entitled is that which is fair and equitable and so the equitable principles that apply in cases of quasi-partnerships should also be applied in the section 238 context.

(f) for similar reasons it seems to me that *Short v Treasury Comrs* [1948] 1 KB 116 is distinguishable (dealing with the compulsory acquisition of shares under wartime emergency legislation).

(g) I also consider that the decision of Ground CJ in *Golar LNG v World Nordic SE* [2011] Bda LR 9 is distinguishable. The case applies section 103 of the Bermuda Companies Act 1981 which operates by using a sale mechanism - the minority shareholders are required to sell their shares to the 95% majority shareholders and the Court is required to 'appraise the value of the shares to be purchased'. So the statutory mandate is to value the shares in the context of a sale and there is no entitlement to fair value."

18. The approach of the judge was essentially to follow the decision of Jones J in *In the Matter of Integra Group* 2016 (1) CILR 192. He had held, obiter, that, adopting the approach of the Delaware courts, the expression "fair value" meant full value as if there had been a sale or other realisation of the company's assets. This value in the judge's judgment represented the real value of the dissenter's shares. The judge noted that section 238 had similar provisions to the Delaware appraisal remedy. Authorities, such as English authorities on unfair prejudice remedies, were not in point.

19. In a separate judgment ("the judge's fair interest judgment") dated 16 May 2017, Segal J awarded interest at the rate of 4.295%, being the mid-point between 3.5% (being the rate at which he decided Shanda could have borrowed the amount representing the fair value of the dissenters' shares in order to pay it to them) and 5.09% (being the rate which he decided prudent investors in the position of the Maso parties could have obtained had they had the money to invest). By order dated 17 May 2017 ("the judge's GC order"), the sums due in respect of the shares were declared to amount to US$8.34 per share (or US$16.68 per ADS) and the fair rate of interest was declared to be 4.295% per annum. The aggregate sum, exclusive of interest from May 2017, exceeded US$73m.

20. On its appeal to CICA, Shanda was successful in relation to fair value on the basis that, in the judgment of CICA, delivered on 6 March 2018, a minority discount should have been applied. It did not appeal on the basis that the judge should have valued the shares on some basis other than the discounted cash flow basis which he had applied since this approach was agreed between the parties' experts (see para 11 above). The judgment of CICA records that the experts for both sides had agreed that, if such a discount were to be incorporated in the valuation, it should be 23% (Judgment, para 26). Shanda was not successful on fair interest. The sum payable in respect of each share held by the Maso parties fell to US$6.4218 per share, equivalent to US$12.8436 per ADS, representing a judgment sum totalling US$57m.

21. In its judgment reversing the judge's judgment on fair value, CICA held that section 238 had to be interpreted in a manner that was consistent with the other provisions of the Companies Law which permitted the acquisition of the shares of dissenting or non-assenting shareholders, namely the provisions dealing with schemes of arrangement and the acquisition of outstanding shares following an offer which had achieved 90% acceptance. Delaware law on excluding a minority discount should not therefore be followed. It was in any event based on a different public policy. For the purposes of section 238, the value of a dissenter's share was the value of what he possessed, namely a minority shareholding. Therefore, a minority discount should be applied. The reasoning was set out in the judgment of Martin JA, with whom Sir John Goldring P and Morrison JA agreed, and was as follows:

"45. As the authorities I have cited demonstrate, the position in relation to the availability of minority discounts differs between Delaware and Canada on the one hand and England and Wales and Bermuda (and to an extent BVI) on the other. In Delaware and Canada it is established that no minority discount is to be applied; in England and Wales, the fact that shares are to be acquired at a discount is no obstacle to a squeeze-out or scheme of arrangement, and the application of a discount is the general rule where shares are purchased in the context of an unfair prejudice claim unless the company is a quasi-partnership. The position in Bermuda follows the English rule in unfair prejudice cases, and BVI permits (although does not prescribe) a minority discount. Although the English cases do not concern an appraisal mechanism, or deal with a statutory standard of fair value, they are concerned with fair value of the shares: see the explicit references to fairness in *In re Hoare* [(1993) 150 LT 374], [*In re Grierson, Oldham & Adams Ltd* [1968] Ch 17], para 13 of [*In re Linton Park plc* [2008] BCC 17] and in para 38 of [*CVC/Opportunity Equity Partners Ltd v Demarco Almeida* [2002] 2 BCLC 108]. The same applies in Bermuda (see para 5 of [*Golar LNG Ltd v World Nordic SE* [2011] Bda LR 9]) and explicitly in the BVI legislation.

46. In para 75 of his judgment in the present case, the judge recorded that when section 238 was introduced the Honourable G Kenneth Jefferson noted, when moving the second reading of the *Companies (Amendment) Bill 2009* in the Legislative Assembly, that '*this Bill responds to requests from the private sector in relation to merger and consolidation provisions and reflects extensive consultation with the private sector as well as the review of Bermuda, BVI, Delaware and UK legislative precedents*' [Official Hansard Report for 20 March 2009]. In para 76 he said that it therefore appeared that Delaware was one of the jurisdictions whose statutory merger law was reviewed, although there was no indication that section 238 was intended to implement or closely follow the Delaware model in particular; and in para 79 he said that '*Delaware was perhaps particularly in mind since it was mentioned as being one of the jurisdictions whose laws had been reviewed and the jurisdiction with the most substantial and sophisticated jurisprudence in the area*'. For my part, I do not think that the statement made in the Legislative Assembly provides any assistance in the interpretation of section 238. The jurisdictions said to have been reviewed do not necessarily provide consistent answers to the problems capable of arising from an appraisal regime, and in the case of minority discounts they provide different answers. Moreover, the appraisal regime to

which section 238 bears most similarity is that of Canada, but its legislation is not said to have been reviewed. That is not to say that the Delaware jurisprudence is incapable of being of help in the interpretation of section 238: it is, as the judge remarked, frequently used and has given rise to a large number of cases and a well-developed jurisprudence. So long as that jurisprudence does not conflict with Caymanian law and practice, it is sensible to look to Delaware for assistance in solving problems that are novel to Cayman but not to Delaware. There is no point in trying to reinvent the wheel. I think, however, that the judge went too far when he said in para 79 that '*when this Court comes to consider the meaning under Cayman law of the terms used in and language of section 238 it is entirely appropriate to have regard to and pay close attention to the decisions of the courts in Delaware (and Canada)', and that it was 'preferable, where possible, to ensure consistency of approach by focusing on one rather than a multiplicity of jurisdictions*'.

47. As the judge himself recognised, again in para 79, '*it will also be necessary always to take care and be satisfied that the law and practice developed by such other courts fits and is consistent with other relevant parts of Cayman law and practice*'. The judge appears not to have been alerted to the possible relevance of the squeeze out and scheme of arrangement regimes, and in relation to English law was taken only to the unfair prejudice regime - which he held was clearly distinguishable, on the ground that it assumed a sale of the shares, whereas section 238 required an assessment of fair value and so was not predicated on a sale. Since the English cases are concerned with fair value, this does not seem to me to be an adequate ground of distinction. It is possible that, had the judge been directed to the other regimes, he would have taken a different view; but be that as it may, it appears to me that in relation to the question of minority discount the judge failed to ensure that his application of the Delaware rules was consistent with other relevant parts of Cayman law.

48. As is made clear by the quotation from [*Re Appraisal of Dell Inc* (unreported) 31 May 2016, Delaware Court of Chancery] set out in para 32 above, the Delaware approach to fair value is heavily influenced by, if not based on, considerations of public policy. The relevant policy appears to be that stated at the end of the quotation, also set out in para 32 above, from [*Cavalier Oil Corpn v Harnett* (1989) 564 A 2d 1137]:

> ‘More important, to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder, a clearly undesirable result.’

So stated, the policy is in direct conflict with what was said in *In re Grierson* (para 35(a) above):

> ‘Then it is said that the price … does not reflect the advantages to Holts by their obtaining complete control of the company. … But, in my judgment, it is not unfair to offer a minority shareholder the value of what he possesses, ie, a minority shareholding. … [t]he element of control is not one which ought to have been taken into account as an additional item of value in the offer of these shares.’

49. In my judgment, it is the latter policy which should prevail. As I have pointed out, the squeeze-out provisions interpreted in *In re Grierson* and *In re Hoare*, and the scheme of arrangement provisions considered in *In re Linton Park*, are replicated in sections 86, 87 and 88 of the Companies Law in this jurisdiction. Those provisions are capable of being used to acquire the shares of a dissenting minority on a takeover, merger or consolidation. The position in the Cayman Islands is accordingly that there are now three mechanisms contained in the Companies Law by which the shares of dissentients may be acquired: by squeeze-out with a 90% majority, by scheme of arrangement with a 75% majority, and under section 238 with a two-thirds majority. Assuming, as I do, that the English approach to squeeze-out and scheme of arrangement acquisitions would be applied in the Cayman Islands, those two mechanisms allow a minority discount to be applied to the cost of acquisition of dissentients’ shares. It seems to me unlikely in the extreme that the simplified merger and consolidation regime introduced as Part XVI of the Companies Law was intended to depart from that approach: it is to be presumed that the three mechanisms, contained in the same piece of legislation and capable of serving the same purpose in different ways, are to be construed from the same standpoint. Nothing in the wording of section 238 suggests that a different approach was intended; indeed, as Shanda pointed out, there is nothing in the wording of the section that suggests that the focus is to be on the value of the company rather than on the value of the shares. The

> absence of such wording is overcome in Delaware by the application of policy considerations; and in Canada the rationale for the exclusion of a minority discount is said to lie in the context, which is in effect that the majority are purchasing the shares of the minority in order to consolidate their existing position (see *Kummen v Kummen-Shipman Ltd* (1983) 19 Man R (2d) 92], referred to in para 34 above). However, that is also the context in which shares may be purchased by squeeze-out or scheme of arrangement, and in England that context does not have the effect of requiring the shares to be valued as a proportion of the value of the company itself.
>
> 50. For these reasons, it appears to me that section 238 requires fair value to be attributed to what the dissentient shareholder possesses. If what he possesses is a minority shareholding, it is to be valued as such. If he holds shares to which particular rights or liabilities attach, the shares are to be valued as subject to those rights or liabilities. As a matter of mechanics, this can be done by adjusting the value that the shares would otherwise have as a proportion of the total value of the company; but failing to make such adjustments means that particular rights or liabilities will often be ignored, and the shares will be valued as something they are not. It follows that the judge (and Jones J in *Integra* before him) was wrong to hold that a minority discount should not be applied in the assessment of the value of the Dissenting Shareholders' shares. I would allow Shanda's appeal on the minority discount point."

22. In the result, CICA reduced the values found by the judge of US$8.34 each and US$16.68 per ADS to US$6.4218 per share and US$12.8436 respectively. Whereas the judge held that there was a bright-line rule at one end of the scale, ie a rule that a minority discount was never applicable, CICA held that there was a contrary bright-line rule, ie that it was always applicable.

23. On interest, CICA affirmed the judge's ruling on interest having rejected a challenge to it in the form of a new point raised by Shanda:

> "56. It was common ground before the judge that the mid-point approach was the correct one to adopt. On appeal, however, Shanda asserted that that approach was inconsistent with the purpose of an award of interest under English (and hence Caymanian) law, and that the judge had accordingly erred in principle. He should instead have awarded a rate representing only

the cost to the Dissenting Shareholders of being deprived of their money, which was conventionally to be assessed as equivalent to the amount which they would have had to pay to borrow money to replace the unpaid fair value of their shares. The rationale for that conventional basis was that the payee could by borrowing an equivalent sum have done exactly the same as he would have done if the money had been paid, so that his loss was not the lost opportunity to deploy the money but the cost of making the borrowing. In the present case, neither party had led any evidence of the cost to the Dissenting Shareholders of borrowing: instead, working on the basis that the mid-point approach applied, they had supplied information about Shanda's cost of borrowing and the likely investment return to a prudent investor in the position of the Dissenting Shareholders. This meant that, if the Court of Appeal accepted that the judge had erred in principle, there would be no material on which it could arrive at a proper interest rate. It could therefore either remit the matter to the judge, or in default of anything else award interest at the judgment rate of 2.375% for US dollars.

57. The cornerstone of Shanda's argument on this point was the following passage from the judgment of Steyn J concerning interest on damages in *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1987] Lexis Citation 1106 [(unreported) 11 December 1987]:

> '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. On this question I have been assisted by a judgment of Forbes J in *Tate & Lyle Food and Distribution Ltd v Greater London Council* [1981] 3 All ER 716; [1982] 1 WLR 149. In dealing with the approach to be adopted Forbes J said (at p 154C-E):

> "I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow the money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money. This does not, however, to my mind, mean that you exclude entirely all attributes of the plaintiff other than that he is a plaintiff. There is evidence here that large public companies of the size and prestige of these plaintiffs could expect to borrow at 1% over the minimum lending rate, while for smaller and less prestigious concerns the rate might be as high as 3% over the minimum lending rate. I think it would always be right to look at the rate at which plaintiffs with the general attributes of the actual plaintiff in the case (though not, of course, with any special or peculiar attribute) could borrow money as a guide to the appropriate interest rate."

That is, if I may say so, a sensible and practical approach. All I would respectfully add is that an issue as to the appropriate categorisation of a particular plaintiff involves the exercise of judicial discretion."

58. I accept that this statement accurately represents the position in England. It is important, however, to appreciate that it is a statement about the principles to be applied in assessing interest on damages. Such an assessment can of course be made only when damages have been awarded, and damages can be

> awarded only when some right of the plaintiff has been infringed. The purpose of an award of interest will be to ensure that the plaintiff is put back, so far as money can, in the position he would have been in had his right not been infringed. That inevitably places the focus solely on the plaintiff: it is only his position that is of relevance. 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 & Co Inc v Medpointe Healthcare Inc* 2004 Del Ch, Lexis 124], 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."

24. Thereafter both the Maso parties and Shanda appealed to the Board with the leave of CICA.

Issues on the appeals to the Board

25. The issues are:

i) On the Maso parties' appeal, whether CICA was correct to hold that a minority discount should be applied in the determination of the fair value of the Maso parties' shares pursuant to section 238 of the Companies Law; and

ii) On Shanda's appeal, whether the requirement to award a fair rate of interest under section 238 of the Companies Law requires the Grand Court to award interest in accordance with the same principles on which the Grand Court awards interest on an award of debt or damages.

26. Mr Jonathan Crow QC addressed the Board on behalf of the Maso parties. Mr Philip Jones QC addressed the Board on behalf of Shanda.

The Board's analysis of the issues on the Maso parties' fair value appeal

27. The Board considers that, when and to the extent that any issue arises as to the valuation of shares under section 238, the meaning of the words "fair value" used in section 238(1) is to be ascertained by statutory interpretation. In that situation, the court has to ascertain the intention of the legislature from the words it has used in their context, and also in the light of any material which demonstrates the mischief that it was concerned to redress by the statutory provision.

28. On this appeal the only issue as to valuation is whether the fair value of the Maso parties' shares is their pro rata proportion of the agreed value for the entire share capital of Shanda, which would broadly correspond with the value of the company's business and undertaking, or whether that value should be reduced by an agreed percentage to reflect the fact that the shares of the Maso parties form part of a minority shareholding in Shanda. That is a very narrow question which does not entail the Board embarking on a detailed analysis of fair value. The Board will so far as possible confine its opinion to those points of interpretation which in its opinion need to be decided on this appeal. The Board does not rule out the possibility that, depending on the circumstances, "fair value" could be ascertained using a different methodology from that agreed on by the parties in these appeals.

29. The Board considers that Shanda is correct in its resistance to this appeal principally for three reasons: (1) comparable provisions of the Cayman Islands Companies Law do not provide for pro rata valuation; (2) the general principle of

valuation of shares on sale is that what has to be valued is what the shareholder has to sell, and (3) the similarities between the Delaware appraisal remedy and section 238 do not justify departure from that principle.

(1) Comparable provisions of the Companies Law do not provide for pro rata valuation

30. There are other provisions in the Cayman Islands Companies Law which enable a minority shareholder to have the court review or fix the value of his shares, and in the equivalent UK provisions the court will in effect approve a value which reflects that the shares are a minority holding.

31. The comparable provisions are those dealing with schemes of arrangements and "squeeze-outs". They have been subject to relevant judicial interpretation in the UK and, making the same assumption as CICA made that the courts of the Cayman Islands would apply English and Welsh law when interpreting equivalent provisions of its Companies Law, the Board takes the course of describing the UK provisions first.

32. Under the UK Companies Act 2006, an offeror may choose to acquire the whole of the share capital of a company by means of a scheme of arrangement under what are now sections 895 to 899 of the Companies Act 2006. The scheme must be approved by the statutory majority at a meeting convened by the court. The court is then asked to sanction the scheme. If one of the shareholders opposes the court sanctioning the scheme, which has been duly approved by the other shareholders, the court will be slow to differ from the view of the majority that the terms were fair: see, for example, per Lewison J in *In re Linton Park Plc* [2008] BCC 17.

33. In addition, where an offeror who acquires 90% in value of the shares to which his offer relates and (where the offer relates to voting shares) 90% of the voting rights carried by those shares, he has a statutory right under what is now section 979 of the Companies Act 2006 (headed "Squeeze-out") to compel the remaining shares to be transferred to him. Provision is made for this transfer to be effected at the offer price or on such other terms as the court thinks fit (sections 981 and 986). The onus of showing that the offer price is unfair falls on the dissenting shareholder, and it is a heavy one. He has to show that it is unfair and not merely that it is open to criticism. In addition, it is not unfair to offer the minority shareholder the value of what he possesses, namely a minority holding without any uplift for the fact that the scheme will give the acquirer control: see *In re Grierson, Oldham & Adams Ltd* [1968] Ch 17, per Plowman J. In other words, there is no established right under these provisions to a pro rata share of the value of the company. Again, however, there is no rule that the minority shareholder will only ever receive the value of his share on a discounted basis because under both

provisions the court may be satisfied that some special exception should be made for his case.

34. CICA considered that the position would be the same under the similar provisions, namely sections 86 and 88, of the Cayman Islands Companies Law. Mr Jones submits that CICA was right to hold, in the light of this historical approach, that the legislature cannot have intended that "fair value" under section 238 should be determined on a different basis.

35. Mr Crow, for his part, submits that the relevant provisions for schemes and squeeze-outs should be treated as separate from the merger provisions of which section 238 forms part. The merger provisions are found in different parts of the Cayman Islands Companies Law, and they contain different procedural protections. For instance, in the case of schemes of arrangement, meetings are convened by the court to consider the scheme and must be approved by special majorities.

36. The Board rejects Mr Crow's submission that a court interpreting "fair value" can distance itself entirely from these comparable provisions in the same legislation. The question is whether the analogy with those provisions is so compelling that section 238 must be interpreted in an identical way. While the provisions do not use the words "fair value," they perform a function which is comparable to that performed by section 238 in providing for the review of the valuation of shares in a publicly-held company on the occasion of a non-voluntary disposition.

37. The further provisions in the Companies Act 2006 on which CICA drew are not comparable to the same extent. These are the provisions relating to the unfair prejudice remedy under section 996 on petitions under section 994 of that Act for relief from unfair prejudice. There is no jurisdiction to grant such relief under the Cayman Islands Companies law. In the UK, if unfair prejudice is proved, the court often grants relief by ordering the defaulting majority shareholder to purchase the shares of the petitioning minority shareholder. If the company is a "quasi-partnership" (that is, essentially a company where a relationship of mutual trust and confidence between the shareholders is required, together with an understanding that the shareholders or some of them will participate in the business and restrictions on share transfers), the court will normally order that the shares be valued without a minority discount (see the decision of the Board in *CVC/Opportunity Equity Partners Ltd v Demarco Almeida* [2002] 2 BCLC 108, para 40).

38. The basis of valuation under section 996 is subject to judicial discretion. In *Strahan v Wilcock* [2006] EWCA Civ 13; [2006] 2 BCLC 555, para 17, the Court of Appeal of England and Wales held that, when the court is considering the price to be paid for the petitioner's shares under an order for their purchase in unfair prejudice

proceedings, exceptional circumstances must exist for the shares to be valued without a minority discount if the company is not a quasi-partnership, though in some later first instance decisions a different approach may have been taken.

39. Mr Crow submits that the function and statutory architecture of the unfair prejudice remedy is different from a merger. There is a sale of the minority interest. It is true that in many cases the minority shareholder is an unwilling seller. More significant is the fact that the disposal of shares results not from a merger, but a purchase order made by the court, which has found unfairly prejudicial conduct and which has a judicial discretion as to the form of relief.

40. Standing back, the Board considers that it would be surprising if the legislature intended to introduce a fundamentally different approach to share valuation under section 238.

41. There is nothing to indicate that that is what the legislature intended to do. The Board agrees with CICA that the statement of the Honourable G Kenneth Jefferson (see para 12 above), even if admissible for interpretation purposes, does not identify the reason for the use of the expression "fair value" or what it was intended to mean. The legislature made some minor changes from the Delaware regime. For example, section 238 does not contain the requirement found in Delaware law that the constituent company has more than 2,000 registered shareholders. So, it had the opportunity to make it clear if it was intended to provide for valuation on a pro rata basis.

(2) General principle of the valuation of shares on sale

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

43. As part of his argument, Mr Crow cited the Canadian case of *Kummen v Kummen-Shipman* (1983) 19 Man R (2d) 92, para 16, in which the court ordered the acquisition of the shares of one shareholder in what was effectively a 50:50 company on the basis of a pro rata valuation of his shares because the other shareholder would end up with 100% control of the company, which is the effect of a merger. That result was consistent with the position under section 996 of the UK Companies Act 2006, but the reasoning is not: the Manitoba court sought to bring into the question of valuation the position that the acquiring shareholder would be in after the valuation. This involves

taking account of the position which the acquirer had independently of the acquisition, and highlights the point of principle, which is supported by authority, that in the absence of some indication to the contrary, when shares are valued, only the value of the shares which the shareholder disposing of them can transfer should be taken into account.

44. The authority which most clearly supports that point of principle is *Short v Treasury Comrs* [1948] 1 KB 116, affirmed [1948] AC 534, albeit that it was decided on different statutory provisions.

45. In *Short,* the Crown had exercised its right to acquire the whole of the share capital of a company and was under the relevant legislation required to pay to each outgoing shareholder as compensation a price which was not less than the value of his shares as between a willing purchaser and a willing seller. The Court of Appeal of England and Wales held that, even though the Crown was acquiring the whole of the share capital, individual shareholders were not entitled to a pro rata share of the control premium because they were only selling their own (minority) shareholding. The House of Lords affirmed this decision.

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

47. Contrary to Mr Crow's submission, this case is relevant even though it stems from very different legislation because it establishes a general principle. That general principle is that where it is necessary to determine the amount that should be paid when a shareholding is compulsorily acquired pursuant to some statutory provision, the shareholder is only entitled to be paid for the share with which he is parting, namely a minority shareholding, and not for 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.

(3) Similarities between the Delaware appraisal remedy and section 238 do not justify departure from the general principle

48. The expression "fair value" is a wide term. In the Board's view, CICA and the judge (albeit to a lesser extent) rightly resisted the temptation to hold that the expression "fair value" must mean the same as in the Delaware legislation. There are many objections to that in any event. First, "fair value" is not statutorily defined in the Delaware Code. It is a concept that has been developed by the Delaware courts and, so far as one can see, the concept has been developed incrementally and it is foreseeable that it will continue to be developed by them. It cannot have been intended by the Cayman Islands legislature that "fair value" should simply mean what the Delaware courts had held it to mean when the concept was introduced into Cayman Islands Companies Law, still less that it should mean whatever the Delaware courts from time to time had held it to mean. The legislature can only have intended that the courts of the Cayman Islands should interpret this phrase, as cases arose, in the accustomed way.

49. The Cayman Islands courts would still be able to use the jurisprudence of the Delaware and other courts if placed before them as a source of guidance on some particular issue. It goes without saying that the jurisprudence of Delaware is of great value in this field. However, it should also be borne in mind that there may be different rules in related contexts, such as a different regulatory scheme for corporations issuing securities to the public and the duty of fairness owed by a controlling stockholder to other stockholders, which are not found in English and Welsh law. In addition, there may be different economic and social policy considerations affecting legislation in Delaware.

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

51. The courts in Delaware and Canada have, it is said, repeatedly held that the valuation should be on a pro rata basis. Mr Crow submits that CICA should have found

these decisions persuasive because of the similarity in the statutory scheme, which had evidently been used as a model by the Cayman Islands legislature, and that CICA should have adopted the policy expressed in those cases rather than the statutory scheme in the Cayman Islands Companies Law, which it found decisive.

52. However, in the opinion of the Board, as respects the specific issue on which the fair value appeal is focussed, the value of the Delaware jurisprudence is outweighed by the points (1) and (2) above. In contrast to the judge's approach, the Board does not consider that the courts of the Cayman Islands were required to adopt the same approach as Delaware on the basis of valuation of a minority shareholding simply because of the similarity of wording.

53. In these circumstances, the Board does not consider that any purpose would be served on these appeals by analysing the equivalent scheme and squeeze-out provisions in Bermuda, where the buy-out provisions are not in identical terms. The provisions for appraisal in the British Virgin Islands are of limited interest because the appraisal there is carried out by experts appointed by the court. Nor does the Board consider that there would be any purpose served by its considering the effect of more recent decisions of the Supreme Court of Delaware, though as a matter of record that Court in *Dell Inc v Magnetar Global Event Driven Master Fund Ltd* Del 177 A 3d 1 (2017) reversed the decision of Laster VC on which the judge had relied at para 92(a) of his judgment as giving a most helpful overview of Delaware law on "fair value".

54. Finally, for completeness, the Board notes that Jones J in the Grand Court in *Integra* held that there should be no minority discount in a section 238 appraisal, but, as Segal J pointed out (see para 93(a) set out in para 17 above), in that case the parties agreed that there should be no minority discount.

Conclusions on the fair value appeal

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

56. As explained, the only issue which the parties have argued is whether the shares of the dissenters should be valued on a pro rata basis or not. The parties have not sought to argue that the value should be something other than CICA found it to be if section

238 does not require a pro rata valuation of the dissenters' shares. Accordingly, the Court of Appeal's order as to the value of the dissenters' shares stands, and the Board humbly advises Her Majesty that the fair value appeal should be dismissed.

The Board's analysis on the issues on Shanda's interest appeal

57. The judge exercised his discretion on the rate of interest that should be paid by Shanda in a manner which on its face was unassailable on appeal. He followed the practice in Delaware. He took the midway point between a rate of interest representing the return on the unpaid appraisal monies that a prudent investor could have made and the rate of interest that the company would have had to pay to borrow the equivalent sum.

58. What Shanda has sought to do on the interest appeal, both before the Board and CICA, is to challenge the judge's judgment by reference to a new argument which was not relied on before him. CICA permitted Shanda to take this course but affirmed the decision of the judge.

59. In short, Shanda's new argument is that the judge's approach was contrary to principle. It submits that the principle is that set out by Steyn J in *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* (unreported) 11 December 1987. Under the law of England and Wales, the purpose of an award of interest is to put the payee in the position he would have been in if payment of the debt on which he is being awarded interest had been duly made or if the wrong for which he is being awarded damages had not occurred, and so that means his borrowing costs. No doubt the courts would not require proof of the costs that a person would normally incur. So, too, section 34(1) of the Judicature Law of the Cayman Islands (2013 Revision) ("the Judicature Law") confers on courts making awards of debt or damages power only to award "simple interest at such rate as the court thinks fit, not exceeding the rate prescribed from time to time by rules of court".

60. In *Prudential Assurance Co Ltd v Revenue and Customs Comrs* [2018] 3 WLR 652, para 73, the judgment of Lord Reed DPSC, Lord Hodge and Lord Mance, 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, is "intended to compensate the claimant for loss of the use of the money".

61. The Board does not propose to set out the response of the Maso parties to these submissions. In the view of the Board, when it is said that a judge has exercised his discretion improperly, it must in general be the case that the impropriety arose out of a submission made to him. There will be exceptions, but the Board cannot see any good

reason from the parties' written cases why the exercise by the judge of his discretion in this case should be open to challenge on a ground which he was not asked to consider.

62. In those circumstances the Board will humbly advise Her Majesty that Shanda's interest appeal should be dismissed.

Costs

63. Shanda seeks to disturb the costs order in CICA on the minority discount appeal, and the costs of the interest appeal. Nothing has yet been said by the Maso parties on costs. The Board is provisionally minded to direct that the costs should follow the event of each appeal and will so order unless submissions to the contrary (not exceeding three pages) are lodged within 14 days of the date on which this judgment is promulgated.

APPENDIX

Sections 238 and 239 of the Companies Law

238. (1) A member of a constituent company incorporated under this Law shall be entitled to payment of the fair value of his shares upon dissenting from a merger or consolidation.

(2) A member who desires to exercise his entitlement under subsection (1) shall give to the constituent company, before the vote on the merger or consolidation, written objection to the action.

(3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for his shares if the merger or consolidation is authorised by the vote.

(4) Within 20 days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, the constituent company shall give written notice of the authorisation to each member who made a written objection.

(5) A member who elects to dissent shall, within 20 days immediately following the date on which the notice referred to in subsection (4) is given, give to the constituent company a written notice of his decision to dissent, stating - (a) his name and address; (b) the number and classes of shares in respect of which he dissents; and (c) a demand for payment of the fair value of his shares.

(6) A member who dissents shall do so in respect of all shares that he holds in the constituent company.

(7) Upon the giving of a notice of dissent under subsection (5), the member to whom the notice relates shall cease to have any of the rights of a member except the right to be paid the fair value of his shares and the rights referred to in subsections (12) and (16).

(8) Within seven days immediately following the date of the expiration of the period specified in subsection (5), or within seven days immediately following the date on which the plan of merger or consolidation is filed, whichever is later, the constituent company, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase his shares at a specified price that the

company determines to be their fair value; and if, within 30 days immediately following the date on which the offer is made, the company making the offer and the dissenting member agree upon the price to be paid for his shares, the company shall pay to the member the amount in money forthwith.

(9) If the company and a dissenting member fail, within the period specified in subsection (8), to agree on the price to be paid for the shares owned by the member, within 20 days immediately following the date on which the period expires - (a) the company shall (and any dissenting member may) file a petition with the Court for a determination of the fair value of the shares of all dissenting members; and (b) the petition by the company shall be accompanied by a verified list containing the names and addresses of all members who have filed a notice under subsection (5) and with whom agreements as to the fair value of their shares have not been reached by the company.

(10) A copy of any petition filed under subsection (9)(a) shall be served on the other party; and where a dissenting member has so filed, the company shall within ten days after such service file the verified list referred to in subsection (9)(b).

(11) At the hearing of a petition, the Court shall determine the fair value of the shares of such dissenting members as it finds are involved, together with a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value.

(12) Any member whose name appears on the list filed by the company under subsection (9)(b) or (10) and who the Court finds are involved may participate fully in all proceedings until the determination of fair value is reached.

(13) The order of the Court resulting from proceeding on the petition shall be enforceable in such manner as other orders of the Court are enforced, whether the company is incorporated under the laws of the Islands or not.

(14) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances; and upon application of a member, the Court may order all or a portion of the expenses incurred by any member in connection with the proceeding, including reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares which are the subject of the proceeding.

(15) Shares acquired by the company pursuant to this section shall be cancelled and, if they are shares of a surviving company, they shall be available for re-issue.

(16) The enforcement by a member of his entitlement under this section shall exclude the enforcement by the member of any right to which he might otherwise be entitled by virtue of his holding shares, except that this section shall not exclude the right of the member to institute proceedings to obtain relief on the ground that the merger or consolidation is void or unlawful.

239. (1) No rights under section 238 shall be available in respect of the shares of any class for which an open market exists on a recognised stock exchange or recognised interdealer quotation system at the expiry date of the period allowed for written notice of an election to dissent under section 238(5), but this section shall not apply if the holders thereof are required by the terms of a plan of merger or consolidation pursuant to section 233 or 237 to accept for such shares anything except -

(a) shares of a surviving or consolidated company, or depository receipts in respect thereof;

(b) shares of any other company, or depository receipts in respect thereof, which shares or depository receipts at the effective date of the merger or consolidation, are either listed on a national securities exchange or designated as a national market system security on a recognised interdealer quotation system or held of record by more than two thousand holders;

(c) cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a) and (b); or

(d) any combination of the shares, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a), (b) and (c).

(2) Rights under section 238 shall be available in respect of any class of shares of a constituent company if the holders thereof are required by the terms of a plan of merger or consolidation pursuant to section 233 or 237 to accept for such shares anything except -

(a) shares of a surviving or consolidated company, or depository receipts in respect thereof;

(b) shares of any other company, or depository receipts in respect thereof; which shares or depository receipts at the effective date of the merger or consolidation, are either listed on a national securities exchange or designated as

a national market system security on a recognised interdealer quotation system or held of record by more than two thousand holders;

(c) cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a) and (b); or

(d) any combination of the shares, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a), (b) and (c).