Trinity Term
[2025] UKPC 33
Privy Council Appeal No 0009 of 2024

JUDGMENT

Jardine Strategic Limited (Appellant) *v* Oasis Investments II Master Fund Ltd and 80 others (Respondents) (Bermuda)

From the Court of Appeal for Bermuda

before

Lord Briggs
Lord Leggatt
Lord Burrows
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
24 July 2025

Heard on 5 March 2025

Appellant
Jonathan Crow KC
Martin Moore KC
Anna Scharnetzky
Andrew Blake
John Wasty
(Instructed by Linklaters LLP (London))

Respondents
Mark Howard KC
Stephen Midwinter KC
Delroy Duncan KC
Ryan Hawthorne
Matthew Watson
Laura Williamson
(Instructed by Charles Russell Speechlys LLP (London) as agent for Carey Olsen (Bermuda) Limited, Trott & Duncan Limited and Kennedys Chudleigh Limited)

LORD RICHARDS:

Introduction

1. This appeal raises a point of some importance in the application of the provisions contained in the Companies Act 1981 of Bermuda ("the Act") for the amalgamation or merger of companies. The issue turns on the proper construction of section 106.

2. The issue arises in an amalgamation which was effected between two companies in the Jardine Matheson group. The structure of the group involves a number of companies with very substantial cross-holdings of shares. The purpose of the amalgamation was to eliminate some of these cross-holdings and, to that end, under the terms of the amalgamation shares held by the minority public shareholders in Jardine Strategic Holdings Limited were cancelled in consideration of cash payments.

3. Under section 106 of the Act, dissenting shareholders are entitled to apply to the court for an appraisal of the fair value of their shares ("a court appraisal") and, if the fair value as appraised by the court exceeds the amount payable under the terms of the amalgamation, the excess must be paid to them. The issue on this appeal is whether the shareholders entitled to apply to the court are those who were registered at the date of the notice of the meeting of shareholders required by section 106 to approve the amalgamation or those registered at the date of the meeting. The practical significance arises in the present case because a significant number of shares were bought after the date of the notice and a number of the purchasers have issued proceedings for a court appraisal pursuant to section 106(6). They will lack standing to bring those proceedings if the first alternative is correct and their proceedings will be struck out.

4. The appellant company, Jardine Strategic Limited ("the Company"), is the continuing company following the amalgamation and, if the proceedings continue, will be liable to make any cash payments due after the court has fixed the fair value of their shares to the minority shareholders. It applied to strike out those appraisal proceedings brought by shareholders who had acquired their shares after the date of the notice of the meeting. Hargun CJ (as he then was) dismissed the application and his decision was upheld by the Court of Appeal. They were unanimous in holding that the shareholders entitled to bring appraisal proceedings were not restricted to those registered at the date of the notice. The Company appeals to the Board with the leave of the Court of Appeal.

Sections 104-109 of the Act

5. Under the statutory procedure contained in sections 104-109 of the Act (as amended), two or more companies registered in Bermuda may amalgamate or merge. An

amalgamation results in those companies continuing as one company (section 104), while a merger involves the undertakings, assets and liabilities of the companies vesting in one of the companies as the surviving company (section 104H). There are no common law means of achieving an amalgamation, or (save by a novation of liabilities with the consent of all creditors) a merger, of registered companies. They require statutory authority.

6. The steps by which either an amalgamation or a merger can be achieved, so far as relevant to this appeal, are set out in sections 105, 106 and 109 of the Act.

7. Section 105 requires all the amalgamating or merging companies to enter into an agreement setting out the terms and means of effecting the amalgamation or merger. Section 105(1) lists a number of matters that must be included in the agreement, including:

> "(d) the manner in which the shares of each amalgamating or merging company are to be converted into shares or other securities of the amalgamated or surviving company;
>
> (e) if any shares of an amalgamating or merging company are not to be converted into securities of the amalgamated or surviving company, the amount of money or securities that the holders of such shares are to receive in addition to or instead of securities of the amalgamated or surviving company…"

8. Section 106 requires the agreement to be approved at a meeting of the shareholders of each company, with a quorum of at least two shareholders holding or representing more than one-third of the issued shares of the company, and by a majority of three-fourths of those voting (unless the bye-laws of the company otherwise provide). The amalgamation or merger takes effect on registration of the amalgamated or surviving company by the Registrar of Companies and the issue of the appropriate certificate pursuant to sections 108-109.

9. Section 106(6) contains the provision, which lies at the heart of this appeal, whereby a shareholder who did not vote in favour of the amalgamation or merger may "apply to the court to appraise the fair value of his shares".

10. Section 106 (omitting section 106(4) which addresses the position of a company with different classes of shares) provides as follows:

"(1) The directors of each amalgamating or merging company shall submit the amalgamation agreement or merger agreement for approval to a meeting of the holders of shares of the amalgamating or merging company of which they are directors and, subject to subsection (4), to the holders of each class of such shares.

(2) A notice of a meeting of shareholders complying with section 75 shall be sent in accordance with that section to each shareholder of each amalgamating or merging company, and shall—

(a) include or be accompanied by a copy or summary of the amalgamation agreement or merger agreement; and

(b) subject to subsection (2A), state—

(i) the fair value of the shares as determined by each amalgamating or merging company; and

(ii) that a dissenting shareholder is entitled to be paid the fair value of his shares.

(2A) Notwithstanding subsection (2)(b)(ii), failure to state the matter referred to in that subsection does not invalidate an amalgamation or merger.

(3) Each share of an amalgamating or merging company carries the right to vote in respect of an amalgamation or merger whether or not it otherwise carries the right to vote.

(4) ….

(4A) The provisions of the bye-laws of the company relating to the holding of general meetings shall apply to general meetings and class meetings required by this section provided that, unless the bye-laws otherwise provide, the resolution of the shareholders or class must be approved by a majority vote of three-fourths of those voting at such meeting and the quorum

necessary for such meeting shall be two persons at least holding or representing by proxy more than one-third of the issued shares of the company or the class, as the case may be, and that any holder of shares present in person or by proxy may demand a poll.

(5) An amalgamation or merger agreement shall be deemed to have been adopted when it has been approved by the shareholders as provided in this section.

(6) Any shareholder who did not vote in favour of the amalgamation or merger and who is not satisfied that he has been offered fair value for his shares may within one month of the giving of the notice referred to in subsection (2) apply to the Court to appraise the fair value of his shares.

(6A) Subject to subsection (6B), within one month of the Court appraising the fair value of any shares under subsection (6) the company shall be entitled either—

(a) to pay to the dissenting shareholder an amount equal to the value of his shares as appraised by the Court; or

(b) to terminate the amalgamation or merger in accordance with subsection (7).

(6B) Where the Court has appraised any shares under subsection (6) and the amalgamation or merger has proceeded prior to the appraisal then, within one month of the Court appraising the value of the shares, if the amount paid to the dissenting shareholder for his shares is less than that appraised by the Court the amalgamated or surviving company shall pay to such shareholder the difference between the amount paid to him and the value appraised by the Court.

(6C) No appeal shall lie from an appraisal by the Court under this section.

(6D) The costs of any application to the Court under this section shall be in the discretion of the Court.

> (7) An amalgamation agreement or merger agreement may provide that at any time before the issue of a certificate of amalgamation or merger the agreement may be terminated by the directors of an amalgamating or merging company, notwithstanding approval of the agreement by the shareholders of all or any of the amalgamating or merging companies."

The amalgamation

11. The Jardine Matheson group comprises a broad portfolio of businesses operating principally in China and Southeast Asia, with a total of over 400,000 employees across many business sectors. The ultimate holding company is Jardine Matheson Holdings Ltd ("Jardine Matheson"), which is incorporated in Bermuda and has its primary listing on the Main Market of the London Stock Exchange, with secondary listings in Singapore and Bermuda.

12. Jardine Strategic Holdings Ltd ("Jardine Strategic"), one of the two amalgamating companies, was incorporated in Bermuda, with listings on the same stock exchanges as Jardine Matheson. Jardine Matheson indirectly owns some 85 per cent of Jardine Strategic's issued shares. The remaining shares were publicly-held. Jardine Strategic itself owned over 59 percent of the issued shares of Jardine Matheson and also owned majority holdings in a further four listed companies.

13. The amalgamation was part of a plan to eliminate the cross-holdings between Jardine Matheson and Jardine Strategic. Under the terms of the amalgamation, the publicly-held shares in Jardine Strategic were cancelled in consideration of cash payments to their holders. Subsequently, Jardine Strategic's shareholding in Jardine Matheson was cancelled.

14. The terms of the amalgamation were contained in an Amalgamation Agreement dated 12 April 2021 ("the Agreement") made between Jardine Strategic, JMH Investments Ltd ("JMH Investments") and its wholly-owned subsidiary JMH Bermuda Ltd ("JMH Bermuda"). It provided for Jardine Strategic and JMH Bermuda to amalgamate and continue as a Bermuda exempted company with the name Jardine Strategic Ltd, subject to the passing of the resolution required by section 106 and the satisfaction of other statutory requirements.

15. The Agreement provided for the cancellation without consideration of the shares in Jardine Strategic owned by Jardine Matheson.

16. As regards the remaining publicly-held shares in Jardine Strategic, defined in the Agreement as "the Excluded Shares", the Agreement provided:

> "7.1 At the Effective Time, by virtue of the Amalgamation and without any action on the part of JMH Investments, Jardine Strategic, JMH Bermuda, the holder of any shares in any of the foregoing companies or any other person:
>
> (a) …
>
> (b) each Jardine Strategic Share (other than an Excluded Share) in issue at the Amalgamated Record Time [defined as immediately before the amalgamation becomes effective] shall, subject to the rights referred to in clause 7.2 be cancelled and converted into, and shall thereafter represent, the right to receive the cash sum of $US33.00 (and subject to applicable withholding for all Taxes, without interest) (the 'Amalgamation Consideration') from Jardine Matheson (or its nominee) instead of securities of the Amalgamated Company…;
>
> …
>
> 7.2 In addition to the Amalgamation Consideration paid in accordance with clause 7.1(b), each Dissenting Shareholder shall be entitled to receive from Jardine Matheson (or its nominee) the difference (if any) between the fair value of such Dissenting Share, as finally determined by the Court in accordance with section 106 of the Bermuda Companies Act, and the Amalgamation Consideration …"

17. "Dissenting Shareholder" is defined as "a holder of Jardine Strategic Shares who does not vote in favour of the Amalgamation Resolution and who is otherwise entitled to make and does make an application to the Court pursuant to section 106(6) of the Bermuda Companies Act" and "Dissenting Shares" are defined as "the Jardine Strategic Shares that are held by Dissenting Shareholders".

18. In accordance with the statutory process, the Agreement was submitted for approval at a general meeting of its shareholders held on 12 April 2021. A circular dated

17 March 2021 containing notice of the meeting ("the Notice") was sent to the shareholders on the register of members as at that date.

19. Jardine Matheson undertook to procure that the shares in Jardine Strategic indirectly owned by it would be voted in favour of the resolution to approve the Agreement. With those shares carrying some 85 per cent of the votes, it was certain that the resolution, which required a 75 per cent majority, would be passed.

20. The resolution approving the Agreement was duly passed at the meeting on 12 April 2021. On 14 April 2021, the appropriate certificates were issued by the Registrar of Companies pursuant to section 108 and the amalgamation thereupon took effect, with Jardine Strategic and JMH Bermuda continuing as the Company (with the name Jardine Strategic Limited).

21. The sum of US$33 per share specified in clause 7.1(b) of the Agreement was stated in the Notice to be the fair value of the shares as determined by Jardine Strategic, in accordance with section 106(2)(b)(i) of the Act. The board delegated responsibility for considering the amalgamation, including the determination of the fair value of its shares, to a committee of directors who were not also directors of Jardine Matheson.

22. Between the date of the Notice and the meeting, there was a significant volume of trading in the publicly-held shares, stimulated by a view among some investors that a court appraisal would lead to a higher value than US$33 per share.

23. On 12 and 15 April 2021, 18 originating summonses were filed by 87 shareholders, seeking court appraisals of their shares.

24. According to the Company's analysis, some 84 per cent of the shares held by the applicants were acquired after the date of the Notice and with knowledge that the amalgamation was not only proposed but also, because of the votes to be cast by Jardine Matheson, that it would be approved and implemented. In argument in the courts below and before the Board, purchasers of shares after the date of the Notice have been called Short-Term Shareholders, while those who held their shares before that date have been called Long-Term Shareholders.

25. It is the Company's case that it is only those who held shares at the date of the Notice who have standing under section 106 to bring appraisal proceedings and that therefore the Short-Term Shareholders did not have standing. It accordingly applied to strike out the originating summonses filed by the Short-Term Shareholders. As earlier mentioned, Hargun CJ rejected the Company's case on standing and dismissed the

Company's applications, a decision upheld unanimously by the Court of Appeal (Sir Christopher Clarke P, Kay and Bell JJA).

26. The Company appeals to the Board on three grounds. First, as a matter of construction of section 106, the right to apply for a court appraisal (ie the standing to bring appraisal proceedings) is restricted to those who held shares at the date of the Notice. Second, the proceedings which the Company applied to strike out were, in any event, an abuse of the process of the court. Third, in appraising the fair value of any particular shares, the court may take into account the time at which and the circumstances in which those shares were acquired. The Board will address each ground in that order.

Ground 1: standing to bring appraisal proceedings under section 106(6)

27. The question of standing is determined by the proper construction of the relevant provisions of section 106, read in context and having regard to their purpose, assisted by such admissible external aids as are available: *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255.

28. The Company's case on construction starts with, and focuses on, the opening words of section 106(6) and, in particular, on the emphasised words: "Any shareholder who did not vote in favour of the amalgamation or merger *and who is not satisfied that he has been offered fair value for his shares*". It submits that these words show that a company putting forward an amalgamation proposal makes an offer to its shareholders, as described below.

29. The Company submits that, by subsections (2) and (6), section 106 confers on shareholders an entitlement to dissent from the proposed amalgamation and to be paid the fair value of their shares stated in the notice of meeting pursuant to section 106(2)(b), and an ancillary right to bring appraisal proceedings if they consider the company's offer of fair value to be inadequate. The Company submits that shareholders are in effect given "a put option" under which they may elect to give up their shares either by accepting the fair value stated in the notice or by requiring the fair value to be fixed by a court appraisal.

30. In support of this argument, the Company submits that sense has to be given to both limbs of section 106(6). Shareholders could apply for a court appraisal only if (i) they did not vote in favour of the amalgamation *and* (ii) they were not satisfied that they had been *offered* fair value for their shares. The second pre-condition requires the relevant offer to be identified and that can only be the offer constituted by the statements of the fair value and of a dissenting shareholder's entitlement to be paid the fair value, contained in the notice of meeting pursuant to section 106(2)(b). There is nothing else in the process required by section 106 that could be described as an offer. The offer is necessarily made to, and only to, the shareholders entitled to receive the notice, being those on the register

of members at the date of the notice of the meeting (or any applicable record date permitted by the Act and the bye-laws). It follows, therefore, that only those shareholders are entitled to apply for a court appraisal.

31. The Company also relies on the purpose of section 106 as regards dissenting shareholders, as disclosed in the Canadian legislation on which it is partly based and in authorities in various jurisdictions, and on its legislative history. It is said in particular that these materials show that those who acquire shares, in the knowledge of the terms of the amalgamation and the fair value offered, are not intended to benefit from the appraisal rights. The Board will consider those matters later in this judgment, but it is convenient to say now that the Board is satisfied that those external materials do not provide support for the Company's case.

32. In the view of the Board, the crucial issue is the proper construction of the terms of section 106, read in their statutory context.

33. The Company's case turns on the use of the word "offered" in section 106(6). Without that word, or an equivalent, the Company would have no case on Ground 1. In the Board's opinion, the Company seeks to place a weight on that word which it cannot bear.

34. It should first be noted that, leaving aside the issue of whether any "offer" is made by the statements in the notice required by section 106(2), there is a sharp division between the parties as to whether section 106(2) creates an entitlement for shareholders to be paid the fair value of their shares which is separate from the right to a court appraisal. The parties are agreed that section 106(2) requires the company to determine and state a monetary sum as the fair value of the shares. This requirement applies whether, as may usually be the case, the amalgamation is on terms that the shareholders will receive shares in the continuing company or, whether, as here, the amalgamation agreement provides for a purely cash price. In the latter case, this is a somewhat formal requirement given that the fair value would normally be the same as the cash price but it is clearly an important statement in other cases.

35. The Company submits that section 106(2) entitles dissenting shareholders to receive the stated cash value instead of the shares or other consideration provided by the amalgamation proposal. The reference in section 106(6) to a shareholder who is not satisfied that he has been offered fair value for his shares is a reference back to the amount of fair value stated in the notice of meeting in accordance with section 106(2). If the shareholder is not content to be paid that amount, he may apply for a court appraisal. The overall result is that a dissenting shareholder can either elect to be paid the amount determined by the company to be the fair value or apply for a court appraisal.

36. The respondents submit that section 106 does not give dissenting shareholders an entitlement to be paid the amount stated in the notice. The statement required by section 106(2)(b)(ii) that "a dissenting shareholder is entitled to be paid the fair value of his shares" is not a reference to "the fair value" stated in the notice as required by sub-paragraph (b)(i) but is informing shareholders that they have a statutory right to apply for a court appraisal.

37. The Board sees considerable force in the Company's reading of section 106 in this respect. It is not easy otherwise to see the purpose of requiring the company to state the fair value in the notice, nor is it clear why a dissenting shareholder must apply for a court appraisal rather than simply requiring payment of the fair value as determined by the company if the dissenting shareholder is content with that amount. Additionally, section 106(6B) is difficult to fit with the respondents' reading. However, it is not necessary to resolve this point because, even assuming the Company's reading is correct, the Board is satisfied that its construction of section 106 as regards standing to bring appraisal proceedings is wrong.

38. No "offer" to shareholders is made or involved in an amalgamation proposed under sections 104-109. There is no offer capable of acceptance or rejection and at no stage is a contract made between the amalgamating companies and their shareholders. Although the terms of the amalgamation must be set out in an agreement between the amalgamating parties (to which, of course, the shareholders are not parties), an amalgamation is an entirely statutory process. Provided the statutory conditions are satisfied – approval of the agreement by the requisite three-quarters majority of shareholders at a meeting with the necessary quorum, followed by delivery of the necessary documents to the Registrar of Companies and the issue of the relevant certificate under section 108 – the amalgamation takes effect under the statute and the rights of shareholders arise and are enforceable under the statute. Those rights are to receive the consideration for which the amalgamation agreement provides or to be paid the fair value of the shares held by the dissenting shareholder.

39. In the context of an exclusively statutory scheme for amalgamation, containing no mechanism for the making, acceptance or rejection of an "offer", the words "he has been offered fair value for his shares" in section 106(6) refer simply to the fair value of the consideration under the amalgamation proposal or, on the alternative view, to the fair value stated in the notice. It is, as Mr Mark Howard KC on behalf of the respondents said, a statement of a statutory right, and does not involve an "offer" in any contractual sense. It is therefore irrelevant to identify the group of shareholders to whom an "offer" is made.

40. More generally, there is nothing in section 106 to suggest that the right to apply for a court appraisal is limited to those shareholders to whom the notice is sent. The notice is a notice of a meeting, which is a necessary pre-requisite of a valid meeting and must be given in accordance with the Act and the company's bye-laws. It is not the

communication of an offer, but it contains a statement of the fair value of the shares as required by section 106(2)(b)(i). As the statement required by section 106(2)(b)(ii) shows, "a dissenting shareholder" is entitled to be paid the fair value of his shares. A dissenting shareholder is one who does not vote in favour of the amalgamation at the meeting convened by the notice (see *Offshore Commercial Law in Bermuda* (2nd ed, 2018) (ed Ian Kawaley) ("*Kawaley*") at para 10.83). That is the only means under the statutory provisions whereby a shareholder can dissent. This strongly suggests that it is the shareholders at the date of the meeting who have the right to be paid the "fair value". Further they are the owners of the shares which will be affected by the amalgamation. If the statute is to provide for shareholders to receive an amount representing the fair value of their shares as an alternative to the consideration under the amalgamation, it is natural to expect in the absence of clear provision to the contrary that it should be available to the shareholders affected by the amalgamation.

41. A further difficulty arises from section 106(2A) which provides that a failure to state in the notice that dissenting shareholders are entitled to be paid the fair value of their shares, as required by section 106(2)(b)(ii), does not invalidate the amalgamation or merger. It is impossible to read the statement of fair value required by paragraph (b)(i) as being on its own an offer. Mr Crow KC, appearing for the Company, submitted that it was the combination of the statements required by paragraphs (b)(i) and (b)(ii) that constituted the offer to shareholders. However, it is difficult to reconcile the terms of section 106(2A) with that submission and with the Company's submission that it is an integral feature of the purpose and effect of section 106 that an offer is made to shareholders.

42. Turning to the purpose of the inclusion of appraisal rights for dissenting shareholders in section 106, the Company submits that the legislation of other countries from which the provision for share appraisals took its inspiration, particularly Canada, shows that the purpose of the appraisal rights was to provide protection for shareholders as at the time when the proposal was made and not to those who subsequently acquired shares.

43. In enacting sections 104-109, the legislature "drew heavily" on the Canada Business Corporations Act ("the CBCA") (*Kawaley* at para 10.59) although, as the Company itself submits, the mechanics of the dissent and appraisal scheme in many ways track the provisions of section 103 of the Act which are "entirely bespoke" (*Kawaley* at para 10.51.)

44. As regards the purpose of conferring a right on dissenting shareholders to require the purchase of their shares at fair value in circumstances including but not limited to an amalgamation, Mr Crow referred the Board to the report which led to the enactment of the CBCA, *Proposals for a New Business Corporations Law for Canada* by Robert WV Dickerson and others (1971) ("the Dickerson Report"). At para 347, the purpose of this

right was explained: "In short, if the majority seeks to change fundamentally the nature of the business in which the shareholder invested, and if the shareholder dissents from the change, he may demand that the corporation pay him the fair value of his shares as determined by an outside appraiser… Instead of placing the minority shareholder at the mercy of the majority, these provisions permit the minority shareholder to withdraw from the enterprise…".

45. From the basis that the dissenter's right was intended to arise when "the majority seeks to change fundamentally the nature of the business *in which the shareholder invested*", Mr Crow submitted that it follows that it must be intended for the benefit of shareholders at the time when the change was proposed and did not extend to those who invested after the proposal was put forward and with knowledge of its terms. In other words, in the circumstances of the present case, it was for the benefit of the Long-Term Shareholders, not the Short-Term Shareholders. In support of this, Mr Crow referred to a decision of the New York Supreme Court, *Application of Stern* 82 NYS 2d 78 (1948), which concerned the provision in section 503 of the Insurance Law of New York for the appraisal and purchase of dissenting shares in the context of an amalgamation. In a decision consistent with other decisions of the New York courts on equivalent provisions in New York corporations laws, the court held that those in the position of Short-Term Shareholders did not enjoy appraisal rights. Justice McNally said, at p 82: "It requires no extended argument to prove that the purpose and policy of section 503 will be defeated if a petition for appraisal can be predicated on shares of stock acquired after a plan for merger has been adopted by the directors and fully publicized".

46. The Company also relies on obiter observations made at first instance in *Nettar Group Inc v Hannover Holdings SA* (15 December 2021, unreported) (British Virgin Islands) ("*Nettar*") in relation to section 179 of the BVI Business Companies Act 2004 which concerns the right of dissenting shareholders to be paid the fair value of their shares in the event of various corporate transactions including a merger or consolidation of companies.

47. The Company's submission on the purpose of the provisions in section 106 for dissenting shareholders faces two fundamental difficulties. The first is that, as the Company accepts, those provisions are "bespoke" and are not based on and do not follow the terms of similar provisions in other jurisdictions. It is stating the obvious to say that the extent of dissenters' rights is a matter of construing those specific provisions of section 106, and that decisions on differently worded provisions elsewhere will be of very limited, if any, value. There is nothing in the preparatory materials for the legislation to suggest that only dissenting shareholders holding shares at the date of the notice of meeting should be entitled to apply for a court appraisal.

48. The second difficulty is that the opposite approach has been taken in other jurisdictions, including Canada. Not only did the Dickerson Report not address this issue

but it is established by decisions of the Canadian courts that those in the position of Short-Term Shareholders are entitled to the appraisal and purchase of their shares under the relevant provisions of the CBCA: see *Silber v Pointer Exploration Corp* 1998 ABQB 673 and *Brookdale International Partners LP v Crescent Point Energy Corp* 2018 ABCA. The same position has been taken in the Cayman Islands: see *Re Qunar Cayman Islands Ltd* [2019] 1 CILR 611 (Parker J) at para 63. Furthermore, the approach taken by the New York courts has been rejected by the Delaware courts: see *Salomon Bros Inc v Interstate Bakeries Corp* (1989) 576 A 2d. 650. The obiter remarks in *Nettar* were made in respect of a provision in markedly different terms to section 106 and are in any event inconsistent with the judgments in the Canadian cases referred to above which appear not to have been cited to the judge.

49. The Company relies on the legislative history of section 106 which, it said, "puts the argument beyond doubt". Section 106(2) and (6) were amended by the Companies Amendment Act 1994. As originally enacted, section 106(2)(b) provided that the notice of meeting shall "state that a dissenting shareholder is entitled to be paid the fair value of his shares, but failure to make that statement does not invalidate an amalgamation". The substantive amendment was to include paragraph (b)(i) requiring the notice additionally to state "the fair value of the shares as determined by each amalgamating or merging company". In its original form, section 106(6) provided that: "Any shareholder not satisfied that he has been paid fair value for his shares may apply to the court for the proper valuation of his shares and section 103 shall apply mutatis mutandis to such application". The effect of amending section 106(6) to its present form is that it is no longer necessary for the dissenting shareholder already to have been paid or received consideration for his shares; it is sufficient that the shareholder did not vote in favour of the amalgamation and "is not satisfied that he has been offered fair value for his shares". An application for a court appraisal can now be made in advance of the amalgamation taking effect, but within a tight time limit of one month after the notice of meeting is given. The Explanatory Memorandum for the Companies Amendment Bill 1994 stated this to be the purpose of the amendments.

50. The Company's submission was that the introduction of the requirement to state the fair value of the shares as determined by the company in the notice of meeting, and the introduction of the word "offered" in section 106(6), showed that the section was thereafter to operate on the basis that the alternative fair value and the right to have the fair value appraised was to be available only to the shareholders as at the date of the notice. Before the amendment, *any* shareholders who were not satisfied that they had been paid fair value for their shares were entitled to apply for a court appraisal. Necessarily such shareholders were those at the time the amalgamation took effect and may well not have included some who had been shareholders at the date of the notice. If the Company's submission were correct, the amendment would therefore introduce a significant change to those dissenting shareholders entitled to apply for a court appraisal. There is nothing in any material relevant to the amendment which suggests that this was the intended effect. If it had been the intended effect, that would have been clear from pre-legislative material, and it would have been clearly spelt out in the amendments. The Company did

not submit that this was the *purpose* of the amendments, only that this was their *effect*. The fact that the amendments would, if the Company were correct, introduce a significant unintended effect tells against its case but, for the reasons already given, there is no reason to construe the amended section 106 as having that effect.

51. The correct construction of section 106 as regards those shareholders who have standing to apply for a court appraisal is reached without the need to consider difficulties arising from the construction advanced by the Company. Nonetheless, it is right to note that its construction would give rise to difficulties which are unlikely to have been intended.

52. First, if the right to apply for a court appraisal can be exercised only by those shareholders as at the date of the notice, this may well act as a serious inhibition on those shareholders' rights to sell their shares between the date of the notice and the date of the meeting. Even though there may be grounds for thinking that the amalgamation consideration does not reflect fair value, no purchaser will be prepared to pay more than the value of the consideration under the amalgamation proposal because that is the maximum they could receive for the shares. This will therefore depress what would otherwise be the market price for the shares. It will prevent those shareholders who want an early exit from achieving it except at a price which may well not reflect the fair value of their shares. Moreover, a recipient of shares by way of gift or inheritance might be registered as the holder of the shares between the notice and the meeting. The same could be true of sales contracted before the notice was sent but not completed by registration of the purchaser until after the notice of the meeting has been given.

53. Second, the Company's construction is difficult to reconcile with the position of a shareholder who is registered as the holder of some shares at the date of the notice and subsequently acquires additional shares. The Company submits that those shareholders could dissent in respect of shares held at the date of the notice but not in respect of shares subsequently acquired. This appears inconsistent with the terms of section 106(6) which entitle a dissenting shareholder to apply for an appraisal of "the fair value of his shares" without qualification as to which of his shares and is in any event a result which, if intended, could be expected to be stated clearly.

54. Third, the Company's construction creates problems as regards shares held by a nominee for beneficial owners. The parties are agreed that references to "shareholder" in section 106 are to registered shareholders. If a nominee holds shares for just one beneficial owner, the nominee can be directed to apply for a court appraisal, if the beneficial owner so wishes. The difficulty comes where a nominee holds for more than one beneficial owner, as is frequently the case with professional nominee companies used by asset managers. The beneficial owners of the shares held by the same nominee may well wish to give different instructions, some approving the amalgamation and others dissenting from it. In order to give effect to these different instructions, the nominee would have to

split the shares between different nominee holders, so that each nominee could approve the amalgamation or abstain or dissent from it in respect of all the shares held by that nominee. If a "dissenting shareholder" means a shareholder at the date of the meeting, these steps can be taken after receipt of the notice of meeting, but they cannot be taken if the Company's construction is correct. If the Company were correct, many beneficial owners would effectively be disenfranchised. A solution suggested by the Company was that a beneficial owner could itself issue the appraisal proceedings, joining the registered holder as a respondent. Even if that would be effective – which must be in doubt, given the terms of section 106(6) which requires the application to be for the appraisal of "his shares", which suggests all, not some, of his shares – the need for such a cumbersome procedural device again tells against the Company's construction.

Ground 2: abuse of process

55. The Company submits that, assuming that the right to bring appraisal proceedings is not limited to shareholders as at the date of the notice of meeting, it is nonetheless an abuse of process for such proceedings to be brought by a person who acquired shares with knowledge of the amalgamation proposal and its terms, at any rate if their intention in doing so was to litigate the issue of fair value. This, it is submitted, would apply to those who acquired shares after the announcement of the amalgamation proposal on 8 March 2021. Mr Crow made clear that this ground of appeal can succeed only if the Board accepts that the purpose of the legislation is to provide an opt-out to shareholders who are facing a fundamental change in the company in which they invested. For the reasons given above, the Board does not accept this. Accordingly, as Mr Crow accepted, this ground of appeal must fail.

Ground 3: appraisal of fair value

56. The Company submits that, if it has failed on grounds 1 and 2, it should nonetheless be open to the court, when appraising at trial the fair value of a dissenting shareholder's shares, to take into account the timing of the acquisition of the relevant shares. If correct, the Company would argue at trial that a discount from what would otherwise be the fair value of a dissenting shareholder's shares should be applied if the shareholder was a Short-Term Shareholder who had acquired the shares with knowledge of the amalgamation proposal. The Company relies on the terms of section 106(6) which, on the application of a dissenting shareholder, requires the court to appraise "the fair value of *his* shares". This wording, it is said, is to be contrasted with the wording of a similar provision in section 238(9) of the Cayman Islands Companies Act which requires the court to determine "the fair value of the shares of all dissenting members". It also relies on authorities on what is meant by the *fair* value of shares in the context of remedies for the oppressive or unfairly prejudicial acts of a company or its majority shareholders, which may focus on fairness on the facts of the particular case.

57. The Board has no hesitation in rejecting this ground of appeal. The wording and context of section 106 makes clear that the court is charged with appraising the fair value of dissenting shareholders' shares on an objective basis, unconnected with the circumstances in which particular shareholders acquired their shares or their motives in doing so. Section 106(2) requires the statement of a single fair value and there is no reason to think that section 106(6) was intended to produce a range of different values unconnected with objective value. The Board is not here concerned with questions as to whether there should be a discount for minority holdings. Equally, the context of remedies for oppressive or unfairly prejudicial conduct is very different from the context and purpose of section 106. The Company gains no support for its argument from the use of "his shares", as opposed to the wording of the Cayman Islands provision. The Company's submission could lead to proceedings greatly complicated and lengthened by investigations into the precise circumstances of and reasons for the acquisition of shares by each dissenting shareholder. The Board is confident that such an outcome was not intended by the enactment, and later amendment, of section 106.

Conclusion

58. For the reasons given in this judgment, the Board will humbly advise His Majesty to dismiss this appeal.