IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 14 OF 2016 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF SHANDA GAMES LIMITED

JUDGMENT

IN OPEN COURT

Appearances:

Mr. Richard Millett QC and Paul Madden and Dhan Vekaria of Harney Westwood & Riegels for the Petitioner.

Mr. Robert Levy QC and Mac Imrie, James Eldridge and Gemma Freeman of Maples & Calder for the Dissenting Shareholders.

Before: **The Hon. Justice Segal**

Heard: **6 April 2017**

Decision Notified: **25 April 2017**

Judgment Circulated: **27 July 2017**

HEADNOTE

Summons for order to re-open the trial of the Petitioner's petition under section 238 of the Companies Law (2016 Revision) and to introduce additional expert evidence

Introduction

1. This is an application by Shanda Games Limited (the ***Petitioner***), by summons (the ***Summons***) issued on 20 March, following the trial of its fair value petition (the ***Petition***) under section 238 of the Companies Law (2016 Revision), for liberty to re-open its case and to introduce additional expert evidence.

2. Following a hearing of the Summons on 6 April and the filing of further post-hearing written submissions, on 25 April I informed the parties that I had concluded that the Petitioner was not entitled to the relief sought in the Summons, and in particular that I should not direct that the trial be re-opened so as to allow the Petitioner to adduce further evidence. Since I was on vacation at that time, I explained that my written reasons would need to be prepared and handed down in due course following my return from vacation. These are those written reasons.

3. The shareholders who dissented from the Petitioner's merger and who were parties to the Petition were (1) Blackwell Partners LLC-Series A (**Blackwell**) (2) Crown Managed Accounts SPC (**Crown**) and (3) Maso Capital Investments Limited (**Maso**) (together the **Dissenting Shareholders**). The Dissenting Shareholders opposed the Summons.

4. The Petitioner says that, following the conclusion of the trial in November 2016, apparently as a result of concerns regarding the competence and performance at trial of the expert nominated by the Petitioner, Professor Gregg Jarrell (***Professor Jarrell***), it instructed new attorneys who recommended that the Petitioner instruct a new valuation expert to review the trial transcripts and the reports and evidence of Professor Jarrell and the expert nominated by the Dissenting Shareholders, William Inglis (***Mr Inglis***). The Petitioner followed this recommendation and obtained a fresh expert opinion which concluded that the expert evidence from Professor Jarrell was so inadequate in attacking Mr Inglis' work and conclusions, that the Court had been misled at trial. Accordingly, the Petitioner considered that it was necessary, in order to ensure that the Court was making a decision as to fair value on the basis of proper evidence and could dispose of the proceedings in a just manner, that the Petitioner be

permitted to introduce further expert evidence, in particular that orders be made for the Petitioner's new expert to give evidence and for consequential relief to be granted to allow the Court to consider his evidence. The Petitioner went ahead and issued the Summons seeking that relief. The Summons, as it turned out, was issued on the same morning that my judgment was handed down in draft (subject to the usual arrangements for counsel to have the opportunity to provide corrections to the Court before the judgment is formally handed down and published).

5. In my judgment I concluded that the fair value of the Dissenting Shareholders' shares in the Petitioner as at 18 November 2015 (the ***Valuation Date***) was US$16.68 per ADS (this is the amount that was calculated in accordance with the rulings I made in, and determined by me to be the correct figure based on, the judgment). In my judgment, I reviewed and analysed the evidence and opinions of Professor Jarrell and Mr Inglis on the nine key valuation issues that remained in dispute at the end of the trial and set out my ruling in relation to each issue.

The circumstances surrounding the issuing of the Summons

6. The trial of the Petition concluded on 17 November 2016. Before and during the trial the Petitioner was represented by Conyers, Dill & Pearman (***Conyers***). However, on or around 20 December 2016, the Petitioner engaged another firm of attorneys, Harney Westwood & Riegels (***Harneys***), to represent it. Harneys filed a notice of change of attorney with the Court on 20 January 2017. The sealed notice was also served on the Dissenting Shareholders' attorneys (Maples and Calder - ***Maples***) and on Conyers on that day. By email dated 3 February 2017, Harneys provided the Court Registry with the email addresses of the relevant attorneys at Harneys to contact in relation to the proceedings. A further copy of the Notice was attached to that email.

7. On the final day of the hearing I had been asked by Mr Levy QC, counsel for the Dissenting Shareholders, whether I was able to provide any indication of when I was likely to be able to deliver my judgment. I explained that while I was anxious to deliver a judgment as soon as I could. I did not wish to raise expectations unduly, and indicated that realistically the parties should have in mind the early part of the New Year, perhaps the first couple of weeks of January. I was seeking to take into account both the upcoming Christmas vacation and the pressures of other judicial business.

8. In the event, because of other urgent applications with which I had to deal both immediately before and after the Christmas vacation, I was unable to complete my judgment until later. However, I wished to ensure that the parties were updated on my progress and therefore provided, via my personal assistant in the Financial Services Division, regular updates on when the written judgment was likely to be handed down. The final updates were sent on Tuesday, 14 March and then Friday, 17 March. In my email of Tuesday, 14 March I indicated that I planned to complete and distribute in draft my judgment by Friday, 17 March. On 17 March I explained that while the judgment had been written and completed I did not wish to release it that evening before I had been able to complete the proof-reading process and so the judgment would be provided to the parties during the morning of Monday, 20 March.

9. I had been informed that all counsel had been provided with my updates. Unfortunately, due to an administrative oversight, my updates had only been sent by the Court to Maples and Conyers and not to Harneys. I only became aware of this when Harneys filed their first set of written submissions in support of the Summons, in the circumstances I describe below.

10. I sent the written judgment to my personal assistant at 14.04 London time (09.04 Cayman time I believe) on Monday, 20 March for immediate distribution in draft (on the usual basis) to the parties (I was in Sydney at the time attending a conference). At 14.25 London time (09.25 Cayman time) I received an email from my personal assistant which forwarded to me a copy of an email from Maples of the same date, which itself forwarded a copy of an email to the Court of the same date from Harneys (which attached a copy of the Summons and an affidavit in support sworn by Fleur O'Driscoll, which affidavit referred to a new expert report which had been prepared at the request of the Petitioner by Mr Jaime d'Almeida of Duff & Phelps – ***Mr d'Almeida***). The email from Maples was timed at "7.17 AM" (Cayman time I assume even though the sender from Maples was in Hong Kong). The email from Harneys was timed at 18.02 on 20 March (which I assume was Hong Kong time, and 05.02 Cayman time).

11. The Harneys email stated that:

*"We act for Shanda Games Limited (**Shanda**) in the above entitled proceedings. To be clear, Conyers Dill & Pearman acted for Shanda at the hearing of this matter before Mr Justice Segal. Since that hearing, we filed a Notice of Change of Attorneys dated 20 January 2017 (copy attached).*

We are instructed to contact the Court Registry on an urgent basis. It is extremely likely that the Judge's ruling in these proceedings will be delivered shortly. Our client desires to make an application before that Judgment is delivered. Please see attached:-

1. *Summons; and*
2. *Supporting Affidavit of Fleur O'Driscoll.*

On this basis, could you please bring this email and Summons to the Judge's immediate attention and before the Judgment is delivered.

Maples and Calder act for the Respondents in this matter. To be clear, we have not contacted Maples and Calder prior to sending this email. Given the urgency of this matter, we are instructed to issue the Summons and simultaneously request that Maples and Calder provide their dates to avoid. We appreciate this is unusual, however, the present circumstances and the nature of our instructions require us to deal with the Summons in this manner."

12. The Maples email said as follows:

"We represent the Dissenting Shareholders. Having just received the email below, we are astonished by its contents, and the contents of the documents attached to it. We would respectfully make the following points:

1. The hearing concluded at the end of November and the Company's new attorneys were appointed on 20 January 2017. According to Ms O'Driscoll's affidavit, Mr D'Almeida was appointed over one month ago on 16 February 2017. Despite this, we were not given any prior notice of the proposed summons, which has been circulated after Mr Justice Segal has completed his judgment and while it is in the final stages of proofing. This is quite incredible not only due to the lateness with which notice has been given to us and the Court but also because the attorneys involved in the case are in regular communication. Specifically, all of the attorneys have been attending the same conference in Sydney, Australia, in the last few days at which the Judge is also present and Harneys' representatives who are mentioned in the affidavit have not mentioned it in discussions or given any indication that an urgent application would be made. Their approach flies in the face of the usual listing protocols that apply to urgent on-notice applications.

2. It is not clear to us what the legal or jurisdictional basis for the application is. To our knowledge it is unprecedented in the Cayman Islands or the UK for such an application to be made: the applicant closed its case in November 2017 and it is too late for them to apply to reopen it.

3. The timing of the application, the ambush tactics adopted by the Company's new attorneys, the undue pressure it places on the Court because, amongst other things of the reference to a new expert expressing a price-per-ADS, and bizarre content of the application (including the provision of an affidavit by an attorney rather than a party) give the appearance of abuse of process.

4. In the absence of any principled basis for the application it is respectfully suggested that the Court should not delay the release of the judgment any further and that it should be issued as planned. The points raised in the application would be unlikely to be successful at appeal and are at best desperate, but in any event are moot until the parties have seen the judgment.

5. Given the urgency of the issues, if the Court is prepared to give consideration to the application, the dissenting shareholders hereby request an urgent telephone or in person conference with Mr Justice Segal to discuss the issues raised. Maples and Mr Levy QC are available any time including in Sydney or to suit the judge's travel schedule."

13. At 07.52 (Cayman time) Harneys sent a further email to the Court in the following terms:

> *"We are concerned about the content of Maples and Calder's email and respectfully ask for a response by return urgently from them.*
>
> *We seek clarification as to how Maples know that "the judgment has been completed and is in its final stages of proofing"?*
>
> *This is not an "ambush" – we were not on notice from the Court that the judgment is imminent and/or being "proofed" since both parties have been waiting for some months. We have got on with instructing our fresh expert urgently.*
>
> *We will not be bounced into a telephone hearing. We require formality and proper channels of communications. The issues are immensely serious, and this cannot be "discussed" informally."*

My directions for the filing of submissions and for the disposal of the Summons

14. At 14.35 London time (09.35 Cayman time), having read the emails from Maples and Harneys referred to above, I asked my personal assistant to inform both counsel immediately that circulation of the draft judgment must proceed. I did not consider it appropriate to delay its circulation and handing down in circumstances where I had already informed counsel on the previous Friday that the draft would definitely be handed down on Monday, 20 March, when I had finished and given my assistant the final version of the draft before being informed of the Summons and where the Summons had been filed so long after the conclusion of the trial. Accordingly, the draft judgment was circulated to counsel.

15. At 21.10 London time (14.10 Cayman time) on 20 March I sent an email to my personal assistant for immediate distribution to counsel in the following terms:

> *"I have now had an opportunity to read the Petitioner's summons and evidence in support...*
>
> *I wish to proceed as follows. The Petitioners and the Dissenting Shareholders should file written submissions and I shall thereafter determine the summons on the papers (unless an issue arising out of the written submissions causes me to decide that a hearing is necessary).*
>
> *The timetable for the filing of written submissions shall be as follows. The Petitioners submissions shall be filed by 5pm Cayman time on Wednesday 22 March and the Dissenting Shareholders should file their submissions by 5pm Cayman time on Monday 27 March. I shall issue my decision as soon as possible thereafter."*

16. At the time of writing this I was still unaware that Harneys had not been sent copies of my regular updates. Despite the comments in Harneys' email of 07.52, which I found puzzling, I was under the impression that the Summons must have been

deliberately filed at a time that would coincide with the handing down of the draft judgment. As a result it appeared to me that this was an exceptional case which would justify, in the interests of justice, the expeditious disposal of the Summons on the papers but since I was still not fully aware of the relevant facts and had not heard from the parties I made it clear that I would consider whether a hearing was necessary in light of, and after having seen written submissions which I ordered be filed.

17. Richard Millett QC and Harneys on behalf of the Petitioner filed outline submissions on 22 March (the ***Outline Submissions***). From the Outline Submissions it became apparent that Harneys had not been receiving copies of my updates and were unaware that the judgment was to be delivered on 20 March. The Outline Submissions noted that:

> *".. at the time of filing the Summons although Harneys assumed that a draft judgment ... would be circulated Harneys was unaware when the [draft judgment] would be circulated....*
>
> *Following the filing of the Summons, Harneys became aware that the Court had previously provided, by email, Conyers and Maples with updates as to when the Draft Judgment would be circulated. Harneys was not sent these emails either by the Court or the other parties, and therefore Harneys had no advance knowledge as to when the Draft Judgment would be circulated.*
>
> *We are grateful for the Court's assistance in providing Harneys with the previous email communications. We wish to make clear that we do not allege any impropriety on the part of the Court or Maples. It appears that there has simply been an administrative error.*
>
> *The Draft Judgment was circulated to the parties (including Harneys) on 20 March 2017, after the Summons was filed."*

18. On 24 March the first affidavit of Paul Madden (an associate attorney with Harneys) was filed in support of the Summons. This exhibited the new expert report prepared by Mr d'Almeida which was also dated 24 March.

19. Mr Levy and Maples on behalf of the Dissenting Shareholders filed their submissions on 27 March (the ***Dissenting Shareholders' First Written Submissions***) together with the eighth affidavit of Rachel Baxendale, who is a litigation paralegal working for Maples, which exhibited excerpts from the transcript of the trial and correspondence between Maples and Harneys.

20. On 28 March, without there being a direction for reply submissions, Mr Millett and Harneys filed further written submissions (the ***Further Outline Submissions***). In these Further Outline Submissions, Mr Millett and Harneys noted that in order to

respond to the assertions made in the Dissenting Shareholders' submissions that the filing of the Summons was an abuse of process (and which submissions raised questions concerning Harneys' knowledge of the timing at which the judgment was to be delivered and their conduct in filing the Summons) Mr Madden had filed a second affidavit on 28 March. Mr Madden explained the timing of the Summons and the circumstances in which it came to be issued and exhibited Harneys' correspondence with the Court and with Maples.

21. On 30 March I ordered that a hearing of the Summons be listed as soon as possible. In an email of that date, sent via my personal assistant, I explained my decision as follows:

> *"Having reviewed the written submissions filed in accordance with the directions I gave on 20 March I have concluded that it is necessary to hold a hearing in respect of the Petitioner's summons dated 20 March (the* ***Summons****).*
>
> *The hearing should take place next week. My preference is for Wednesday 5 April but my assistant will contact Maples and Harneys to discuss timing and the necessary arrangements.*
>
> *I have reached this conclusion for two main reasons.*
>
> *First, in the Petitioner's written submissions counsel have explained that Harneys were not aware of the updates I had provided regarding the timing of the handing down of my draft judgment, in particular the confirmation I had given that the draft judgment would definitely be distributed on 20 March. I had, in fact, been unaware that a notice of change of attorney had been filed until I was sent a copy of the Summons. I only received a copy of the Summons after I had sent the draft judgment to my assistant for immediate distribution to the parties. I had assumed, when reviewing the Summons, that Harneys were aware that the judgment was to be distributed on 20 March and that the Summons had been issued and served knowing that it would and perhaps deliberately to coincide with the distribution of the draft judgment. That seemed to me to constitute evidence of an abuse of process and exceptional circumstances that justified dealing with the Summons without the additional delay and expense of a further hearing. But, of course, I made it clear that my directions that my view to proceed without a hearing was provisional and subject to my review of the written submissions that I had directed be filed. Having reviewed the written submissions, it appears that my assumption is incorrect. While it does not follow that a finding of abuse of process is inappropriate in the circumstances (about which I express no view at this stage), it does mean, as it seems to me, that one important ground for concluding that a hearing should not be held has fallen away.*
>
> *Secondly, the written submissions make clear that the Summons is hotly contested and that a number of points of law arise which should not be decided by the Court without having had the benefit of counsels' oral submissions and a hearing.*
>
> *In the circumstances I consider that it would not be appropriate to deal with the Summons on the papers……"*

The 6 April hearing, the further submissions and my ruling

22. The hearing of the Summons was listed for and took place as I have already noted on 6 April. It was my view that insufficient time had been allocated for the hearing and

that at the conclusion of the hearing counsel had been unable to fully develop their submissions. I therefore ordered that further written submissions be filed (to respond to the submissions made during the hearing and confirm and clarify each party's position) with the Dissenting Shareholders' further submissions to be filed by 13 April and the Petitioner's further submissions to be filed by 19 April. The further submissions of the Dissenting Shareholders (the ***Dissenting Shareholders' Post–Hearing Submissions***) were filed on 13 April and the Petitioner's submissions were filed, after I granted a short extension of time, on 20 April (the ***Petitioner's Third Submissions***).

23. As I have noted above, after carefully considering the submissions made in writing and during the hearing, and the evidence, on 25 April I informed the parties that I had concluded that the Petitioner was not entitled to the relief sought in the Summons.

The relief sought by the Petitioner in the Summons

24. In the Summons the Petitioner sought the following orders:

> "*1. The Petitioner have liberty to re-open its case and introduce additional expert evidence in the form of a further expert report prepared by [Mr d'Almeida], such evidence to be prepared in accordance with the Rules for Expert Witnesses in the FSD Guide and served on [the Dissenting Shareholders] by 5pm (Cayman time) on 24 March 2017.*
>
> *2. The valuation expert nominated by the Dissenting Shareholders, Mr William Inglis of FTI Consulting, have liberty to prepare a further supplemental report for the purpose of rebutting the contents of Mr d'Almeida's report, should he wish to do so, such evidence to be prepared in accordance with the Rules for Expert Witnesses in the FSD Guide and served on the Petitioner by 5pm (Cayman time) on 21 April 2017.*
>
> *3. Mr d'Almeida and Mr Inglis (the Experts) shall meet on or before 5 May whether in person, by telephone conference call or video link or howsoever they shall decide for the purpose of narrowing the issues in dispute and shall following such meeting prepare a joint report or memorandum listing those issues on which they agree and those issues on which they do not agree within 14 days of the meeting.*
>
> *4. The parties shall tender the Experts for cross-examination by counsel at a date to be determined but not before 19 may 2017.*
>
> *5. Such further order as the Court deems fit including as to costs.*"

The Petitioner's submissions

25. The Petitioner's submissions were formulated and elaborated in its various written submissions filed before, and oral submissions made at, the hearing. I take its final position to be that set out in the Petitioner's Third Submissions, which were filed after the hearing (in reply to the oral submissions made at the hearing on behalf of the Dissenting Shareholders and to the Dissenting Shareholders Post-Hearing Submissions) but the main thrust of the Petitioner's position was set out in the Outline Submissions. The principal submissions can be summarised as follows:

(a). The principal relief sought by the Petitioner was leave to adduce additional expert evidence from a new expert, Mr d'Almeida.

(b). The Court had jurisdiction, and a discretion, to allow a party to call fresh evidence after trial, both before and after the handing down of the Court's judgment in draft.

(c). While it was arguable that different principles were to be applied depending on whether the application for leave to adduce fresh evidence was made (a) before or (b) after the delivery of the Court's judgment, provided that the application was made before the Court's order was drawn up:

(i). the approach to be taken by the Court was generally the same, although in the latter case the fact that judgment had been delivered would be a relevant factor for the Court to take into account in exercising its discretion. In the present case although the Summons was filed before the draft judgment had been circulated, since the Petitioner had seen the draft judgment its delivery would be part of the circumstances, and a factor, which the Court should take into account in exercising its discretion whether to permit the Petitioner to adduce further expert evidence; and

(ii). even if a more onerous test applied to the latter case, either the present case should not be treated as being subject to the more onerous test since the Summons had been issued before the draft judgment had been circulated or even if the more onerous test applied it was satisfied here.

(d). Mr Millett relied on *Charlesworth v Relay Roads Ltd* [2000] 1 WLR 230 as setting out the applicable approach and principles to be applied in the present case. This was relied on as authority for, and as providing an instructive analysis of, the principles applicable to applications to adduce further evidence after a trial has completed (and judgment had been delivered but before the order had been finalised).

(e). Mr Millett relied in particular on the following passage (at page 238) in the judgment of Neuberger J which he said identified the principles which were relevant to applications for leave to amend pleadings and adduce further evidence (Mr Millett submitted that Mr Justice Neuberger appears to have considered that the applicable principles were the same for both):

> *"In these circumstances, I conclude that the following principles apply where a party is seeking to call fresh evidence on a new point after judgment has been given but before the order has been drawn up: (1) the court has jurisdiction to grant an application to amend the pleadings to raise new points and/or to call fresh evidence and/or to hear fresh argument; (2) the court must clearly exercise its discretion in relation to such an application in a way best designed to achieve justice; (3) the general rules relating to amendment apply so that: (a) while it is no doubt desirable in general that litigants should be permitted to take any reasonably arguable point, it should by no means be assumed that the court will accede to an application merely because the other party can, in financial terms, be compensated in costs; (b) as with any other application for leave to amend, consideration must be given to anxieties and legitimate expectations of the other party, the efficient conduct of litigation, and the inconvenience caused to other litigants; (4) quite apart from, and over and above, those principles, because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the court was prepared to accede to an application where the applicant could not satisfy the three requirements in Ladd v Marshall; (5) almost inevitably, each case will have particular features which the court will think it right to take into account when deciding how to dispose of the application before it; (6) the court should be astute to discourage applications which involve parties seeking to put in late evidence, but cases where new evidence is found after judgment is given and before the order is drawn up will be comparatively rare."*

(f). When these principles were applied to the facts of the present case, it was clear that the Court should exercise its discretion to permit the Petitioner to file the new report from Mr d'Almeida and grant the relief sought in the Summons because:

(i). There was a strongly arguable case that the Court was misled by the expert evidence at trial, or much of it, which was unreliable and unsafe as a basis for the Court to perform its statutory function of arriving at a fair value.

(ii). That case was based on a very detailed independent expert's report from Mr d'Almeida, who is a highly reputable and experienced valuer. While not yet in evidence directly, since permission to introduce the report was the subject of the Summons and not yet granted, the Court was entitled to and should rely on Mr d'Almeida's report for the purpose of the Summons and allowing the Petitioner to establish the matters required to support its Summons, since it had been prepared by a qualified expert in the same manner as a formal expert report and was clearly reliable and comprehensive (an approach with which I had indicated before the hearing I agreed).

(iii). Mr d'Almeida had concluded (see paragraphs 7 and 253 of his report), following a thorough review of all relevant documents and after discussions with the Petitioner's management team, that:

(A). "*[Professor] Jarrell's opinions suffered from insufficient procedures, process and analysis. As a result, [Mr Inglis'] analysis was not critically analysed sufficiently and [Mr] Inglis was able to provide the Court with unreasonable claims.*"

(B). "*the fair value of Shanda's common stock [was] $9.32 per ADS as of the Valuation Date.*"

(C). "*[Professor] Jarrell's analysis was insufficient and he was not a helpful expert for the Court. He did not perform his duty as a business valuation expert in regards to his procedures, process and analysis with the appropriate skill, care and diligence and as a result [Mr] Inglis' analysis was not critically analysed sufficiently. [My] report supplemented [Professor] Jarrell's rebuttal of [Mr] Inglis and provided*

evidence demonstrating that [Mr] Inglis' opinions were unsubstantiated."

(iv). The evidence supporting the case was credible (and did not need to be incontrovertible).

(v). The evidence demonstrated first that Professor Jarrell's failures were so serious and fundamental that his own expert opinions and evidence were unreliable and unsafe, secondly, that Mr Inglis' evidence was also unreliable and unsafe and thirdly that Professor Jarrell had failed to correct or challenge Mr Inglis' opinions and evidence so that in these circumstances the Court could not properly rely on either expert's evidence and therefore could not make a proper fair value determination.

(vi). Furthermore, the Summons was not an abuse. It could not, in the circumstances, have been issued any earlier for the reasons given in the evidence filed in support. The Petitioner was not at fault because it was not responsible for the serious failures of the expert it had nominated.

(vii). As Mr Millett said in the Outline Submissions, the overarching point was that the Petitioner had discovered, via a change in its legal team and by instructing a new expert, that the Court was materially misled by the entire corpus of opinion evidence going to value. That was because Professor Jarrell was either not qualified or not competent to challenge Mr Inglis on a number of fundamental points of methodology and inputs which would, had they been put to Mr Inglis, have made a significant difference to the evidence at trial and therefore to the Court's conclusions on fair value.

(g). In particular:

(i). Key aspects of the opinion evidence that the Court had available at trial in order to determine fair value was outside the range of reasonable expert opinion and therefore unreliable and unsafe.

(ii). That was not because of any failure of due process but because Professor Jarrell had failed to do a proper job and had failed to provide the Court with an opinion compiled with reasonable skill and care. One of his failures was, in the ways and manner identified in Mr d'Almeida's report, to challenge Mr Inglis' approach and views. Professor Jarrell had failed to act as an expert with reasonable skill, care and diligence. His procedures and processes, as Mr d'Almeida had concluded, were seriously inadequate and flawed. Mr d'Almeida had concluded that Professor Jarrell had performed insufficient due diligence; had failed to perform sufficient independent research and analysis; had conducted an inadequate review of the [Petitioner's] discounted cash flow projections; and was insufficiently familiar with the Cayman court process and with his own report. As a result Professor Jarrell's valuation analysis was not prepared with the requisite skill, care and diligence because he failed to utilize a country risk premium; he implausibly used the highest possible long-term growth rate; he failed to consider guideline publicly-traded companies; he provided insufficient support for using the supply-side equity risk premium; he inappropriately utilised explicit projections for 2020 in his analysis; he failed to determine the fair value of the outstanding options and he inappropriately included subsidy income into perpetuity.

(iii). These failures meant that Mr Inglis' opinions and evidence on key points were never properly tested and Mr Inglis was never properly challenged or required to justify these opinions or his approach, and the Court was ill-equipped to do so itself. Mr d'Almeida had concluded that Mr Inglis' analysis and valuation methodology had been fundamentally flawed in certain key respects and that Professor Jarrell's attempted rebuttal of Mr Inglis' opinions was inadequate. His failures included his failure to criticise Mr Inglis for not cash adjusting his estimates of beta; his failure to analyse in detail the revenue assumptions made by Mr Inglis; his failure adequately to address Mr Inglis' statements and analysis of the Chinese market; his failure to criticise Mr Inglis for setting depreciation at a level equal to capital expenditures in the terminal period; his failure to criticise Mr Inglis regarding his fair value standard; for failing to

criticise Mr Inglis for his use of the risk-free rate; for failing to criticise Mr Inglis for using the mid-cap range instead of an individual decile; for failing to review important publicly available data and for failing to criticise Mr Inglis regarding the source of his equity risk premium.

(iv). In Mr d'Almeida's view, Mr Inglis' opinions and evidence were seriously unreliable and not within the range of opinions which could properly be formed by a reasonable expert exercising proper skill and care. Mr Millet referred in particular to, as an example of an important opinion which was outside the range of what could be considered to be reasonable in this sense, Mr Inglis' discount rate (at 10.20%) which was the lowest of all the relevant data points (see figure 34 at paragraph 235, page 110, of Mr d'Almeida's report) and more than three percentage points below the Court's own conclusion (or over 22% less than the Court's own conclusion). Mr Millett noted that this accounted for much of the enormous difference in valuation between Mr Inglis' figure of over US $27 per ADS and Mr d'Almeida's value of just over US $9 per share.

26. Mr Millett argued that in this case the rule in *Ladd v Marshall* [1954] 1 WLR 1489 was not strictly relevant since the Summons had been filed before the draft judgment had been received by the Petitioner or its legal advisers so that the result of the case was not known at the time the Summons was filed. In such circumstances the balancing exercise and factor based discretion (exercised in light of the overriding objective) as explained by Neuberger J in *Charlesworth* was the proper approach. But even if the *Ladd v Marshall* rule applied (that decision of course being the leading English case before the introduction of the Civil Procedure Rules on the admission of new evidence on appeal) it was satisfied in the present case. Mr Millet submissions can be summarised as follows:

(a). In his judgment in *Ladd v Marshall* Denning LJ had set out a three-pronged test as follows [at 1491]:

> *"...first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be*

incontrovertible."

(b). As regards the first part of this test, the fresh material that the Petitioner wished to introduce (namely Mr d'Almeida's report) was both evidence within and for the purpose of the rule in *Ladd v Marshall* and could not have been obtained with reasonable diligence for use at trial.

(c). It was clear from the decision of Mance LJ in *Paragon Finance v Gale* [2000] CP Rep 10 that there was no principled objection to expert evidence being the subject of a *Ladd v Marshall* application. The fact that leave was always required for expert evidence to be admitted did not mean that an expert's report for which no leave had been obtained was inadmissible and therefore not evidence for the purposes of *Ladd v Marshall* (such an approach would mean that no expert evidence could ever be the subject of a *Ladd v Marshall* application unless the Court had first given permission to adduce it and that must be wrong). If the Court was satisfied that it should be admitted then the Court could give permission to adduce it under the rule in *Ladd v Marshall*.

(d). The evidence of Mr d'Almeida (i.e. the substance of his opinions) could not with reasonable diligence have been obtained for use at trial precisely because the Petitioner was entirely reliant on Professor Jarrell's opinions and could not reasonably be expected to know that they were wrong or that he had failed in material respects to critique Mr Inglis' work.

(e). As regards the second part of the *Ladd v Marshall* test, Mr Millet submitted that it was obvious that if Mr d'Almeida's report was admitted it would probably have an important influence on the case. Mr d'Almeida addressed in depth all of the main issues affecting the valuation of the Dissenting Shareholders' shares and he had significant points to make in relation to each of them which should have a significant bearing on the Court's assessment of the evidence before it and on its fair value decision.

(f). Mr Millett drew to the Court's attention each of the key issues addressed by Mr d'Almeida and submitted that it was clear that he had raised serious and substantial questions regarding the opinion evidence given at trial and presented a credible alternative opinion as to the fair value of the Dissenting Shareholders' shares which was bound to have a significant impact on any assessment of fair

value.

(g). As regards the third part of the test, Mr d'Almeida's report was plainly credible and provided an entirely credible valuation that contained a credible attack on the failings of both the experts who gave evidence at trial. Mr d'Almeida was a very experienced expert who had produced a detailed and cogently argued report.

(h). Mr Millett argued that it was not necessary for the Petitioner to show that the experts who gave evidence at trial were either acting improperly or incompetently. All that was required was that the Petitioner demonstrates that their approach was wrong in numerous respects and led to a fair value which was unreliable. The significance of Mr d'Almeida's report was demonstrated by the fact that it would be essential at any retrial that Mr Inglis knows exactly why and where Mr d'Almeida says he went wrong, so that Mr d'Almeida's opinions and concerns can be properly addressed. The fact that Mr d'Almeida has offered so much detailed criticism of the evidence given at trial by the other experts was a significant factor for the Court to take into account.

27. I summarise below the key points made by Mr d'Almeida in his report, which Mr Millet argued established that the evidence given by Mr Inglis was fundamentally flawed and outside the range of opinion which a reasonable expert could be expected to give in the circumstances, and established Professor Jarrell's failure properly to show the weaknesses in Mr Inglis' evidence and his failure to correct them in his own evidence. As I have noted above, Mr d'Almeida's criticism of and challenge to Professor Jarrell's opinions and evidence identified two particular problem areas. First, there were the failures and inadequacies in Professor Jarrell's own valuation methodology and approach. Secondly, there were his failures properly and adequately to challenge the opinions and evidence of Mr Inglis. I shall deal with each in turn.

(a). The main points made in relation to the first type of criticism can be summarised as follows:

(i). ***country risk premium***: Mr d'Almeida criticised Professor Jarrell for failing to add a country risk premium ("***CRP***") to his discount rate (see pages 24-29 of his report). Mr d'Almeida considered that Professor Jarrell should have done so because he was valuing a

company with entirely foreign operations. Mr d'Almeida considered that this failure evidenced not only a serious methodological error but also a flaw in Professor Jarrell's approach to his task as an expert. Mr d'Almeida asserted that Professor Jarrell had said that he did not feel the need to incorporate a CRP because he wished to ensure that his DCF method valuation was "*conservative (not overstated)*." This represented a serious misunderstanding of the proper role of an expert, which was to arrive at his or her independent view on valuation, not arrive at values that are "*conservative*" or "*aggressive*" relative to his or her client's interests, and undermined the reliability of his valuation evidence. Mr d'Almeida referred to three ways in which the CRP could be determined (although he noted both that it was "*not uncommon for experts to debate over which of these methods to use*" and "not uncommon for an expert to ignore these methods) and calculated CRPs based on these three different approaches for China and South Korea and a weighted average of the two. He did not identify which approach he viewed to be preferable and appropriate but offered "*multiple ways to calculate a [CRP]*" (see footnote 10 on page 6 of his report) and a range of between 0.86% and 2.65% (see figure 1 also on page 6). But he did note that one of the approaches (the country yield spread model) produced a CRP that was consistent with the 0.90 percent figure utilised by Mr Inglis.

(ii). ***terminal value and long term growth rate***: In Mr d'Almeida's opinion, Professor Jarrell's terminal year value was too high because the assumed long-term growth rate that he used (5.4%) was too high. Mr d'Almeida considered that Mr Inglis' long term growth rate (4.5%) was the correct rate to apply (see figure 1 on page 6 of Mr d'Almeida's report). In his valuation analysis, Professor Jarrell calculated the terminal year value utilizing the average nominal GDP growth rate from 2020 to 2060 of 5.4 percent based on May 2014 data from the OECD. In doing so, he inappropriately used the highest long-term growth rate that is typically considered when determining a long-term growth rate and he failed to (and could not) justify why doing so was appropriate for the Petitioner. Professor Jarrell should have

utilised a long-term growth rate lower than nominal GDP. Mr Inglis utilised a long-term growth rate of 4.5 percent based on the same May 2014 OECD data utilised by Professor Jarrell and, in Mr d'Almeida's view, Mr Inglis' conclusion (while based on stale data for a November 2015 valuation date) was corroborated by a more contemporaneous long-term (i.e., through 2045) source from IHS. This source indicated the midpoint between China's long-term nominal GDP and inflation was 4.4 percent.

(iii). ***failure to consider guideline publicly-traded companies' betas***: Mr d'Almeida agreed with Mr Inglis that Professor Jarrell should have utilised the betas of guideline publicly-traded companies instead of the Petitioner's beta (because the Petitioner's stock price was impacted by the announcement of the transaction from January 27, 2014 to November 18, 2015). Mr d'Almeida selected the same guideline companies as Mr Inglis (see pages 104 to 106 of Mr d'Almeida's report).

(iv). ***Professor Jarrell failed to provide adequate support for using the supply-side equity risk premium***: Professor Jarrell used a supply-side equity risk premium (of 6.21%). Mr d'Almeida agreed that this was the right approach (and the right premium). Mr Inglis used a forward looking equity risk premium (and 6%). Mr d'Almeida said that Professor Jarrell was not prepared to defend his approach at trial and so the Court was less able (perhaps unable) properly to assess the challenge to Mr Inglis' analysis. Professor Jarrell should have pointed out that Mr Inglis' selection of an equity risk premium of 6% was inconsistent with the approach of and figures used by Professor Damodaran, which Mr Inglis was purporting to follow (and therefore arbitrary and unjustifiable), and was also based on historical data. Mr d'Almeida said that the supply-side equity risk premium had been the most commonly used approach in the Delaware courts and should have been used in the present case. Furthermore, Professor Jarrell failed to challenge or correct Mr Inglis' claim that the supply-side equity risk premium needed to be

adjusted downwards to take account of the World War II interest rate bias (namely that the US Federal Reserve bank suppressed interest rates around the time of World War II). Professor Jarrell was not only forced to concede during cross-examination that he was unaware of this issue but omitted to point out that Mr Inglis had failed properly to apply the methodology used in the Duff & Phelps 2015 Handbook for using a supply-side equity risk premium with the World War II interest rate bias. Had the Duff & Phelps approach been properly followed the combined equity risk premium and risk free rate would have been higher than that actually used by Mr Inglis.

(v). ***Professor Jarrell inappropriately used projections for 2020 contained in a spreadsheet prepared by the Petitioner***: Mr d'Almeida agreed with Mr Inglis that these projections were unreliable and should not have been used by Professor Jarrell.

(vi). ***Professor Jarrell failed to produce a proper analysis supporting his opinion that the restricted stock units and stock options should be included in the calculation of the number of the Petitioner's shares***: Mr d'Almeida agreed with Professor Jarrell that the dilutive impact of the options and restricted stock units in this case was not attributable to the merger transaction and should therefore be taken into account when determining the Dissenting Shareholders' pro rata interest in the value of the Petitioner. However, he criticised Professor Jarrell for failing properly to explain, support or justify his opinion. Mr d'Almeida provided his own detailed analysis and support by reference both to the terms of the options and restricted stock units in the Petitioner's 20-F filing and proxy statement and the two approaches generally used to incorporate the impact of options on the value of common stock (see pages 110-112 of his report).

(vii). ***Professor Jarrell inappropriately included subsidy income into perpetuity***: Mr d'Almeida, based on his discussions with the Petitioner's management, also agreed with Professor Jarrell that the

subsidy income (RMB 137.2 million) should be taxed however he disagreed that it was appropriate to assume that this amount of subsidy would continue to be received in perpetuity. Professor Jarrell should not have done so and as a result his valuation should have been lower. The reason why Mr d'Almeida reached this conclusion was in part the statements made by the Petitioner's management (who had cautioned that there was no guarantee that government subsidies would continue) and also statements made by the relevant Chinese governmental agency which were critical of preferential policies to promote regional economic development and favoured a review of these policies.

(b). The second type of criticism related to the ways in which Professor Jarrell's rebuttal of Mr Inglis' evidence was deficient. The main points made by Mr d'Almeida can be summarised as follows:

(i). ***Professor Jarrell failed to criticise Mr Inglis for not cash-adjusting his Beta estimates***: Mr d'Almeida pointed out that beta reflects the relative systemic risk of a business, and that a business with excess cash is less risky than one without excess cash. He criticised Mr Inglis for ignoring the impact of excess cash held by his two guideline companies (Changyou.com and NetEase) and for failing to make appropriate adjustments to his beta. He criticised Professor Jarrell for failing to highlight and demonstrate the need for such an adjustment. Mr Inglis had calculated betas for his guideline companies of 0.886 for Changyou and 1.115 for NetEase, ignoring the impact of excess cash that these businesses held. But the median of quarterly excess cash as a percentage of cash was 97.0% for NetEase and 96.0% for Changyou and according to both the texts by McKinsey and Professor Damodaran cash over 2% of revenues can be viewed as excess. Mr d'Almeida says that had Mr Inglis properly cash-adjusted his beta estimates, his betas would have been 1.28 for Changyou and 1.33 for NetEase, the average of which is 1.31, thereby increasing his discount rate and lowering his value.

(ii). ***Professor Jarrell did not appropriately assess Mr Inglis' treatment***

for mobile game revenue intensities: One of the adjustments that Mr Inglis made to the Petitioner's projections was to assume that pipeline mobile games launched in and after 2016 should have had revenue intensities that matched their game type (so that a game with a particular game type would have the revenue intensity associated with that type). Mr Inglis' adjustments to revenue intensities increased his DCF Method value by RMB 616 million (RMB 2.28 per ADS). Mr Inglis had opined that this was necessary because the Petitioner's model appeared arbitrarily to adjust revenue intensities for and assign revenue intensities to games in a manner that appeared to result in an inconsistency between the projected royalties and fees and the projected revenues for the game. He had said the following at paragraph A10.11 of his first report:

"*Shanda projects the revenue that that will be earned by each pipeline game on the basis of its game type (A1 to A3 for PC and B1 to B3 for mobile), where the game type then determines the proportion of a modelled pattern of revenue that the game will earn. For example, B1, B2 and B3 mobile games are projected to earn 100%, 50% and 25% respectively of the modelled pattern of revenue for a mobile game. For some of the mobile games projected to be launched from 2016 and beyond the revenue proportions (which [the Petitioner] calls "revenue intensities") do not match the assumed game types. Shanda has acknowledged that this mismatch exists. I correct it by setting the revenue intensity for each game to the one that matches its game type. This increases the equity value by RMB 616 million.*"

Mr d'Almeida said that this approach was unjustified and that a correct analysis of the model, and the additional explanations of the construction and functioning of the model provided to him by the Petitioner's management, demonstrated that these adjustments were unjustified (he also referred to and relied on the transcript of the teleconference held on 23 June 2016).

Mr d'Almeida took the view that Mr Inglis had been wrong to

conclude that there was any inconsistency or problem with the Petitioner's projections of revenues for pipeline mobile games launched in and after 2016. He also criticised Professor Jarrell because he should have done further analysis and asked the Petitioner to clarify the model (see paragraph 110 of Mr d'Almeida's report). Mr d'Almeida did perform the further analysis and obtain the further information from the Petitioner's management.

As a result he had concluded that management had undertaken a game by game assessment for mobile games to be launched in 2016 and thereafter of the discount and adjustment to revenue projections to be applied to each game in light of risk and other factors applicable to it and the likelihood that it would not achieve the projections. Mr d'Almeida had defined revenue intensities as "*probability success factors*." I assume that this is what he was told by the Petitioner's management since I do not recall this phrase or term being used or referred to previously by either expert (in their reports or cross examination) or in counsel's written or oral submissions. The Petitioner in its written response to Mr Inglis' question on this issue had said "*Classification of a mobile to a certain type ... does not mean that this game will ultimately generate the type of revenue (i.e. revenue intensity) that is commonly expected for this type of games [sic]*." In Mr d'Almeida's view there were good reasons why such adjustments would need to be made on a game by game basis. This was because each game had a unique life cycle depending on the quality, intellectual property, type of game (e.g. MMO games, combat) and other factors. He gave as an example of such factors the country in which a game was expected to be launched since certain countries involved additional risk. He referred to various B1 games (said to designate a revenue intensity of 100%) in the model which were to be launched in Korea, all of which were given a revenue intensity of less than 100%, which Mr d'Almeida considered was "*not surprising*" because this reflected the additional risk of launching games in Korea. Therefore in Mr d'Almeida's view "*it was not unlikely that different games would have different revenue intensities*."

Mr d'Almeida also considered that an examination of the model established that there was "*no indication, or any reasonable explanation, why the type should match the revenue intensity.*" He said that when the model was examined it showed that "*type*" defined other assumptions, none of which was the revenue intensity (in particular game type was used to drive royalty and licensing fees for both PC and mobile games). He gave an example of cells 0152 to P155 on tab "*Game List*" which state that the B1 type is assumed to generate RMB 500k of daily revenue, B2 is assumed to generate RMB 250k of daily revenue, and B3 is assumed to generate RMB 125k of daily revenue. Accordingly, he concluded that "*There is no indication, or any reasonable explanation, why the type should match the revenue intensity*" (as he has defined it).

(iii). ***Professor Jarrell did not address the Mir 2 mobile revenue increase made by Mr Inglis***: Mr d'Almeida criticised Professor Jarrell for failing to deal in his evidence with Mr Inglis' adjustments, and to demonstrate why it was unjustifiable for Mr Inglis to make the adjustments, to the Petitioner's revenue forecasts so as to incorporate further revenues for the Mir 2 mobile game. Mr Inglis had added over RMB 1.9 billion in revenue attributed to the Mir 2 mobile game during 2015 and 2016. Professor Jarrell did not even mention the Mir 2 mobile game in Professor Jarrell's supplemental report. Mr d'Almeida however did undertake an analysis of and reviewed Mr Inglis' methodology and concluded that Mr Inglis' adjustments could not be supported or justified. Mr Inglis had estimated the Mir 2 mobile revenue to be RMB 1.8 billion to RMB 2.1 billion from August 2015 until March 2016 based on a press release issued by the Petitioner in March 2016. The Petitioner's management had estimated RMB 91 million for 2015 and 2016 in the March 2015 Projections. Mr Inglis had noted that the Petitioner's financial statements did not include the revenue owed to the Petitioner from the Tencent agreement (including the results for the quarter ended 30 September 2015) because there was a lag of two to three months

before revenues were received under the fee agreement. Mr Inglis therefore assumed that the Petitioner would start receiving the sums owed to it from the Valuation Date, i.e. with a lag of approximately three and a half months from when it is earned. However, Mr d'Almeida concluded, from his examination of Mr Inglis' model, that this was not the case and that there were errors in Mr Inglis' model. Mr Inglis had estimated revenue (including revenue from Tencent) of RMB 3,931 million for the calendar year 2015 and RMB 1,383 million for the fourth quarter of 2015. Therefore, Mr Inglis estimated RMB 2,548 million for the first three quarters of 2015. However, the actual revenue for the first three quarters of 2015 was only RMB 2,171 million. Therefore, Mr Inglis had overstated the actual revenue earned by the Petitioner in the first three quarters of 2015. After having overstated the actual revenue earned by the Petitioner Mr Inglis then projected quarterly Mir 2 mobile revenue from November 2015 to April 2017. He modified the Petitioner's model to increase revenues arising from the Tencent agreement for the Mir 2 mobile game using and based on information arising after the Valuation Date (March 2016 versus November 2015). Mr d'Almeida also criticises Mr Inglis for failing then to increase the related Android distribution fees. This, he said, should have been done because the Petitioner's management had confirmed that the fees were higher in that period (in an August 2016 information request response and in the September 2016 updated model). Mr d'Almeida considered that Mr Inglis gave no good reason for failing to increase the fees and that, as a result of adopting this approach Mr Inglis had included the benefits but not the proper costs of the Tencent agreement in his valuation. Furthermore, Mr Inglis had only made (large upward) adjustments to projected revenues for the Mir 2 mobile without similarly analysing and applying adjustments to other pipeline games. Mr d'Almeida says that Mr Inglis should have asked the Petitioner's management about each PC and mobile pipeline game and made suitable adjustments for each game. It was, he said, inappropriate for Mr Inglis to adjust for one successful game but identify and then make downward adjustments for games that had failed. Mr d'Almeida rejected Mr Inglis' explanation as to why he had only focused on and made

adjustments to projected revenues relating to the Mir 2 mobile game, namely materiality (the size of the likely increase in Mir 2 game revenues was substantial and material to the valuation having regard to the total projected revenues and the size of the Petitioner's business. In Mr d'Almeida's opinion this was unsatisfactory. Mr Inglis had recognised that "*the rest of the business...profits had been less than anticipated in the forecast...*" and, as Mr d'Almeida had found out and established when he visited the Petitioner and had meetings with management there were numerous pipeline games that did not launch, were launched and then quickly terminated, were still in the testing phase, or had other issues. He gave examples of such games in his report. Mr d'Almeida concluded that many games were expected to launch before the Valuation Date and the information as to whether they had in fact been launched or whether they had been terminated would have been available to Mr Inglis and should have been taken into account in his adjustments and valuation.

(iv). ***Professor Jarrell failed adequately to address Mr Inglis' use and analysis of data relating to the Chinese market to support his valuation***: Mr d'Almeida mounted a sustained challenge to Mr Inglis' analysis of and reliance on data relating to the market for shares of gaming companies listed in China. Mr d'Almeida concluded that Mr Inglis' approach was both internally inconsistent and unsubstantiated. Mr d'Almeida stated that Mr Inglis valuation of $27.16 per ADS was higher than any other contemporaneous indication of value for the Petitioner and inconsistent with other US-listed Chinese gaming companies. He noted that in an apparent effort to support such a high value, Mr Inglis had inferred that a high value was not unreasonable given multiples for Chinese traded companies and transactions for 100% interests in Chinese games businesses. Mr Inglis had concluded that there was evidence that the perceptions of investors in US markets towards Chinese companies were tainted as a result of events starting around mid-2010 and that this had resulted in an undervaluation of many legitimate Chinese companies listed in the US. A re-listing in China would, in Mr Inglis' view, result in a

significantly higher share price for the company concerned. Mr Inglis considered the potential for the Petitioner to re-list in China and the impact that would have on the market price of the Petitioner's shares and on the imputed value of the Petitioner. Mr Inglis cited three companies (Perfect World, Focus Media and Giant Interactive) that had de-listed in the US and re-listed in China at a higher value and in reliance on the experience of and multiples on re-listing achieved by these three companies that a re-listing of the Petitioner in China would imply a value of $26.34 to $43.17 per ADS. Mr d'Almeida noted that Professor Jarrell had correctly challenged and criticised Mr Inglis' approach on one ground but he considered that Professor Jarrell's criticisms were incomplete as he failed to identify and put to the Court two further grounds. Professor Jarrell had properly criticised Mr Inglis' approach on the basis that including in or supporting the valuation of the Petitioner by reference to the higher share values achievable in the event of Chinese re-listing failed to reflect the Petitioner's true financial position and legal status at the Valuation date. Mr Inglis had asserted that the merger price for the Petitioner was depressed due to there being a Chinese discount and that there was an opportunity for Petitioner to re-list on a Chinese stock exchange at a substantially higher price. Professor Jarrell said, and Mr d'Almeida agreed, that Mr Inglis' assumption that the Petitioner could re-list in China after de-listing in the United States violated the Petitioner's "*operative reality*." But there were two further criticisms that Professor Jarrell should have made. First, Mr Inglis had identified perceived weakness and problems in the US market with respect to Chinese companies and concluded and assumed that the US market was inefficient and unreliable but had failed to identify and take account of the weaknesses of, and inefficiencies in, the Chinese market. Mr Inglis failed to analyse why and demonstrate how the Chinese market was efficient and whether Chinese companies listed in China were trading at or above their intrinsic value. In Mr d'Almeida's opinion, there were ample reasons for concluding that Chinese companies were trading at prices that were substantially greater than their

intrinsic value so that these prices were not a reliable guide for determining fair value. Secondly, Mr Inglis had failed to demonstrate that there was a realistic basis for concluding that the Petitioner could successfully re-list in China and take advantage of any increase in share prices. Mr d'Almeida said that even if one assumed that the same Chinese company was worth more, on a fair value basis, when listed in China rather than the United States, Mr Inglis had provided no basis for the expectation/assumption that the Petitioner, or any other Chinese company, could easily re-list in China after de-listing in the US to capture this increase in value. He identified and discussed a series of conditions that would need to be satisfied and difficulties overcome before this could be done. Mr d'Almeida also reviewed the history of Chinese companies that announced their intention to de-list in the US and re-list in China and notes that of the one hundred companies referred to by Mr Inglis as having made such an announcement only three successfully went private and re-listed in China. In Mr d'Almeida's opinion the correct conclusion to be drawn from the data relied on by Mr Inglis is that the probability of there being a successful de-listing followed by a re-listing is low (and that it appeared that the Petitioner's shareholders took the view that the Petitioner's value would not be substantially higher if there was a re-listing in China).

(v). ***Professor Jarrell failed to criticize Mr Inglis for setting depreciation equal to capital expenditures in the terminal period***: Mr d'Almeida criticised the approach of both Mr Inglis and Professor Jarrell on the treatment and calculation of depreciation in the terminal period. Both Professor Jarrell and Mr Inglis had set depreciation as equal to capital expenditures in the terminal year period. Mr d'Almeida considered this to be a common mistake in discounted cash flow analysis. It ignores the fact that capital expenditures are in contemporaneous dollars (i.e., the year in which the expenditures are made), while depreciation is in historical dollars (i.e., the prior year in which the original asset was acquired). If one assumes capital expenditures grow as a function of revenue, then as long as capital expenditures are

increasing, the amount of depreciation will always be less than the amount of capital expenditures. Mr d'Almeida cited the approach to this issue in a textbook written by three well-regarded practitioners (*A Consensus View: Q&A Guide to Financial Valuation*, 2016).

(vi). ***Professor Jarrell failed to criticise Mr Inglis regarding his fair value standard***: Mr d'Almeida noted (a) that in his first report, Mr Inglis had said that *"I consider fair value in this context may be influenced by the opportunities available to market participants as regards the realization of value for Shanda as a whole, including where different markets offer materially different opportunities*." and (b) that Mr Inglis had testified at trial that *"(t)he company could have realized the value, admittedly not the equipment list directly, but its main assets are the value of the underlying businesses, which it could have sold to someone who could re-list it in China*." According to Mr d'Almeida, this notion directly contradicted the going-concern premise of value. A going-concern value is defined as "*the value of a business enterprise that is expected to continue to operate into the future. The intangible elements of Going-Concern Value result from factors such as having a trained work force, an operational plant, and the necessary licenses, systems, and procedures in place*." Mr Inglis' approach, according to Mr d'Almeida, was more consistent with liquidation value, defined as "*the net amount that would be realized if the business is terminated and the assets are sold piecemeal*."

(vii). ***Professor Jarrell failed to criticise Mr Inglis regarding the risk-free rate***: Mr d'Almeida agreed with Professor Jarrell that a twenty-year risk-free rate should be used in the CAPM and considered that the

guidance from relevant textbooks and the jurisprudence of the Delaware Court of Chancery supported this view. Mr Inglis had inappropriately used a ten year risk free rate. Mr d'Almeida provided a table of fifteen Delaware opinions and noted that the majority of the last ten decisions that disclosed the risk-free rate assumption adopted a twenty-year risk-free rate. While Professor Jarrell had correctly stated in his report that the horizon of the risk-free rate for a going-concern business *"...should be that of a long-term Treasury bond..."* to *"...match the time horizon of...the investment, not the investor"* and that the twenty year risk-free rate *"most closely matches the often-assumed perpetual lifetime horizon of an equity investment"* he never drew the conclusion for the Court of why the textbook citations were relevant to his argument. Furthermore, the period length of the net cash flows should match the period length of the risk-free rate. This approach was supported by the authoritative literature cited by Mr d'Almeida. However Mr Inglis' discrete period cash flows extended out for fifteen years — already five years longer than his ten-year risk-free rate — and attributed nearly half of his cash flows to years beyond that (RMB 22,984 discrete period and RMB 22,841 terminal period). In Mr d'Almeida's view it was clearly inappropriate for Mr Inglis to use the ten-year yield because it did not match the expected period length of his net cash flows. Mr d'Almeida considered that Professor Jarrell should have clearly explained this issue to the Court. Mr d'Almeida agreed with both Mr Inglis and Professor Jarrell that it was important to ensure that the risk-free rate and equity risk premium were consistent. Therefore, in his view Mr Inglis could not use his equity risk premium estimates because *"the measures Professor Damodaran publishes are based on a ten-year US government bond yield and the ten-year risk-free rate was inappropriate to use"*.

(viii). ***Professor Jarrell failed to criticise Mr Inglis for his use of the mid-cap range instead of an individual decile:*** Mr d'Almeida noted that Professor Jarrell criticised Mr Inglis for determining his size

premium based on his DCF method analysis and not Shanda's market capitalization, but failed to criticise Mr Inglis for using a size premium that was broad and unspecific when a narrow, specific size premium was available for the Petitioner from the same source. The mid-cap range spans companies with market capitalizations of $2,552.441 million through $10,105.622 million. Mr Inglis should have used the third decile based on his value. The third decile spans companies with market capitalizations of $5,864.266 million through $10,105.622 million, a range that is over 40 percent less than the mid-cap range. Furthermore, using a decile was consistent with the approach taken in Delaware where the majority of the last ten decisions that disclosed the size premium assumption adopted a decile.

(ix). ***Professor Jarrell failed to review important public data***: Mr d'Almeida noted that Mr Inglis had prepared an analysis of guideline publicly-traded companies to estimate beta and that within that analysis he had excluded iDreamSky Technology Ltd. ("***iDreamSky***") and KongZhong Corp. ("***KongZhon***g") because they had go private offers in June 2015. In Mr d'Almeida's view this was an appropriate treatment for these companies. However, a closer review of these companies that Mr Inglis considered to be comparable was revealing and contradicted Mr Inglis' cost of capital, and both experts' long-term growth rate, conclusion. Mr d'Almeida noted that none of the information was presented to the Court because Professor Jarrell failed to perform the necessary due diligence. All this information supported a discount rate higher than the one used by Mr Inglis, and had Professor Jarrell provided this information the Court would have been more informed before reaching a decision on fair value.

(x). ***Professor Jarrell failed adequately to criticize Mr Inglis regarding the source of his equity risk premium***: Mr d'Almeida noted that Mr Inglis had relied on various sources from Professor Damodaran for his equity risk premiums ranging from 4.38 percent to 6.12 percent. However, Professor Jarrell failed to point out that Professor

> Damodaran's primary advice to practitioners was to focus on cash flows rather than the discount rate when determining the cost of capital. Mr d'Almeida concluded that "it follows that if the Court wants to focus on the discount rate, as I believe it should, it may be more reasonable to rely on Professor Damodaran as a benchmark for inputs to the discount rate, rather than the primary source of input to the discount rate. From this perspective, Professor Damodaran's 6.12 percent ERP supports the 6.20 percent Supply-Side ERP

The Dissenting Shareholders' submissions

28. The Dissenting Shareholders' submissions (as made in the Dissenting Shareholders' First Written Submissions, at the hearing and in the Dissenting Shareholders' Post – Hearing Submissions) can be summarised as follows:

(a). The application is far too late and is an abuse of process.

(b). The Court did not have a general discretion to re-open proceedings, but rather ought to apply the well-established legal test for admitting late evidence, based on *Ladd v Marshall*. The grounds relied upon by the Petitioner to justify re-opening the trial and for the submission of further evidence did not come close to meeting the established test.

(c). The further evidence to be provided on behalf of the Petitioner could not meet the original terms on which the trial was conducted, namely: each party was allowed to (and did) appoint only one expert witness (and Mr d'Almeida would be the second for the Petitioner) and neither expert was to have unilateral communications with the Petitioner (and Mr d'Almeida has in fact done so). The Petitioner's application would produce a result that was grotesquely abusive and unfair to the Dissenting Shareholders.

(d). The Petitioner's allegations and concerns about Professor Jarrell's evidence were not borne out by the content of the draft Judgment and the criticisms and challenges to Mr Inglis' integrity, expertise and evidence were wholly unjustified. Mr Inglis is an expert who gave evidence in an entirely proper and satisfactory manner and his evidence was capable of being relied on by

the Court so as to produce a fair and reliable result.

(e). To the extent that it is relevant that these are section 238 proceedings as opposed to typical adversarial litigation (as the Petitioner submits), this militates against the Petitioner's application because section 238 clearly envisages that the Court might proceed on the basis of the evidence of only one expert, such that *even if* Professor Jarrell's evidence were to be altogether ignored or held inadmissible (and the Dissenting Shareholders do not say that is the right approach), that still would not invalidate the trial or relieve the Court of its obligation at trial to determine fair value.

29. As regards the submission that the Summons had been filed far too late and was an abuse of process:

(a). Mr Levy noted that the application had been launched a very long time after the trial (some one hundred and twenty days after the trial had concluded) and a long time after the Petitioner's new counsel, Harneys, had been appointed (fifty six days after Harneys formally came on record as attorneys for the Petitioner on 20 January 2017). Mr Levy argued that the delay in issuing and the timing of the filing of the Summons indicated that the Summons had not been issued in good faith and for proper purposes but instead improperly to seek to influence the Court by producing without permission a further expert report showing a significantly lower value per ADS than either Mr Inglis or Professor Jarrell had concluded was fair and also to delay the delivery of the judgment or the making of a final order.

(b). While Harneys had stated in evidence that they had not been notified of the updated correspondence from the Court notifying the parties that issuance of the judgment was delayed and the revised dates on which the judgment could be expected to be delivered, the Court should infer that the timing of the application was intended to delay the proceedings and the time at which the Dissenting Shareholders would be able to obtain and enforce a judgment in their favour. He referred to and relied on the fact that the Petitioner and Harneys were well aware that a judgment could be handed down from a point in early January (so that any application would need to be ready and made from around this time); the discussions that had taken place in January

between Maples and Harneys regarding the Dissenting Shareholders' concerns regarding the Petitioner's willingness promptly to pay any sums awarded by the Court; the discussions between the attorneys after January in which Harneys could but did not mention the possibility of the application being made and the timing of the issue of the Summons.

(c). Mr Levy submitted that the relief sought by the Petitioner in the Summons is unprecedented and that there is no example of a court, in the Cayman Islands, England or elsewhere, granting relief of the type sought by the Petitioner. In the circumstances, the Petitioner reserved its rights to seek a punitive costs order. Mr Levy said that he and his instructing attorneys had "*been unable to find any examples of a Court re-opening a trial for new expert evidence in these circumstances – i.e., where nothing at all has changed, where no new facts have come to light, and where the basis of the application is that their expert did a really bad job. No examples are provided by the Company. This application appears to be wholly novel.*" (See paragraph 17 of the Dissenting Shareholders' First Written Submissions).

(d). As regards the impact on the timetable and the delays that would result if the Court granted the relief sought by the Petitioner:

(i). Mr Levy argued that the nature and procedural implications of the relief sought in the Summons were unclear and that the Petitioner had not adopted a consistent position on this (in its written and oral submissions).

(ii). He noted that the Summons sought permission for the Petitioner to re-open its case by introducing additional expert evidence and having Mr d'Almeida's report admitted as expert evidence in a re-opened trial. That was to be followed by a rebuttal report from Mr Inglis, an expert meeting and a joint report of issues on which the experts agreed and disagreed (there were to be no supplemental reports). Thereafter, there was to be a further hearing at which the experts were to be tendered for cross-examination (or in Mr Inglis' case, re-cross-examination).

(iii). The Summons contained a timetable for each of these steps. Mr d'Almeida's report was to be filed and served by 5pm (Cayman time) on 24 March 2017 (presumably to be treated as having been served on this date and the hearing date for and included in the Summons was 6 April); Mr Inglis' further supplemental report was to be filed and served by 5pm (Cayman time) on 21 April; the experts' meeting was to take place on or before 5 May and the joint report was to be prepared within 14 days of that meeting and the hearing at which the experts would be cross-examined was to be on a date to be determined not before 19 May 2017.

(iv). Mr Levy noted, following comments I had made at the hearing, that if the relief and directions sought in the Summons were granted the effect would be to put the parties back to the position they were in after the directions order made by consent on 31 March 2016 (the **Directions Order**), which was almost a year before the draft judgment was handed down. This result would be seriously prejudicial to the Dissenting Shareholders, undermine and be inconsistent with the principle of the finality of litigation and be wholly unjust.

30. As regards the tests in *Ladd v Marshall*:

(a). Mr Levy submitted that the Petitioner's application failed each of the three tests in *Ladd v Marshall*.

(b). As a general matter Mr Levy submitted that:

(i). It was necessary for the Petitioner to establish an exceptional case before the Court would allow a party to file new evidence following a full hearing and the delivery of a judgment in draft. Examples of the Court doing so were rare and this approach was justified by the need for there to be finality in litigation.

(ii). Mr Levy relied on point 4 from the extract from the judgment of Neuberger J in *Charlesworth* (quoted above) as well as the headnote

in the Weekly Law Reports which states as follows:

> "*The court has jurisdiction to allow a pleading to be amended between judgment and the drawing up of the order, even if that involves a new argument being put forward and further evidence being adduced. The court must exercise its discretion in a way best designed to achieve justice. The general rules relating to amendment and the late admission of evidence apply, and the fact that the other party can be compensated in costs does not mean that the court will necessarily accede to the application.* ***Only in an exceptional case will the court do so where the applicant cannot satisfy the test for admitting fresh evidence on appeal***" [emphasis added].

(iii). Mr Levy also referred to and relied on a further passage in the judgment of Neuberger J in *Charlesworth*. At page 237 of the report Neuberger J said:

> "*to the view that the court is entitled to be somewhat flexible, and not to proceed on the strict basis that each of [the] three conditions always has to be fully satisfied before fresh evidence can be admitted before judgment. Of course in many ways an applicant seeking to persuade the judge to receive fresh evidence and/or argument on a new point is in a very similar position to an appellant seeking similar relief from the Court of Appeal. He has had a full opportunity to collect his evidence and to marshal his arguments, and* ***there must be a strong presumption against letting him have a second chance, particularly after he has seen in detail from the judgment why he has lost.***" *[emphasis added]*

Mr Levy submitted that this presumption applied in the present case since the Petitioner had, at the time of making its submissions and the hearing of the Summons, seen the draft judgment.

(iv). Mr Levy also submitted that the *Ladd v Marshall* criteria should be read in light of the overriding objective set out in the Preamble to the Grand Court Rules, namely that the court should deal with every cause matter "*in a just, expeditious and economical way*". He argued that it was not just, expeditious or economical to permit a party to have the trial all over again (which is what the Petitioner was in substance asking the Court to order) just because they consider, or purport to consider, that their expert witness did not do a good job or that the trial did not go well.

(v). Mr Levy submitted that in order to show that the result in the draft judgment was unsustainable as a matter of fact or law the Petitioner

would have to demonstrate that on all the issues which the Court has determined, the evidence relied upon was outwith a range of reasonable professional opinion thereby rendering any reliance upon such evidence unsafe. The Court does not have a general, at large or broad discretion to re-open proceedings, but rather ought to apply the well-established legal test for admitting late evidence based on *Ladd v Marshall*. The grounds relied upon by the Petitioner to justify re-opening the trial and for the submission of further evidence did not come close to meeting the established test.

(vi). The Dissenting Shareholders submitted that this test had not been satisfied. The d'Almeida report did not achieve this. The test, Mr Levy submitted, was a very high one. It was not sufficient to demonstrate that there may be (yet further) professional opinions with differing conclusions from those already filed and relied on in the proceedings; it has to be established that the opinions previously rendered were unsafe. Likewise, it would not be sufficient merely to demonstrate that Professor Jarrell had made errors or had been negligent. If the Court was satisfied that Mr Inglis was: (i) an expert; (ii) honest; and (iii) that his opinions were within a range of reasonable professional opinion, then the Court would have had a perfectly sound evidential basis for its conclusions and it would be wrong and unjust to allow the proceedings to be re-opened and to prevent the Dissenting Shareholders from having judgment in proceedings which had been properly conducted merely because the Petitioner had selected an expert who failed to perform adequately (and may have been negligent) at trial.

(vii). Further, Mr Levy argued that *Attorney General v Bridger* [2015] (1) CILR 206 established the *Ladd v Marshall* criteria were to be applied even in a case in which the application to adduce additional evidence was made after the hearing but before a judgment had been issued. In that case Williams J said as follows (at paragraph 19):

"The parties agree that the test for the admission of the new evidence was that established in Ladd. I too am satisfied that the three criteria set out in

Ladd constitute relevant considerations and firm guidance in deciding the exercise of my discretion as to whether to receive new affidavit evidence post-hearing but pre-judgment. I accept that some recent authorities support a more flexible approach and am satisfied that the application to adduce further affidavit evidence should also be decided in the context of the overriding objective set out in the Preamble to the GCR."

(c). As regards the first limb of the test (the evidence could not have been obtained with reasonable diligence for use at the trial):

(i). Mr Levy submitted that no new evidence had been unearthed that could not, with reasonable diligence, have been found before the trial. All that had apparently changed since the Petitioner closed its case and the trial concluded was that the Petitioner has concluded that Professor Jarrell was incompetent. An application to introduce a further expert opinion to replace that previously provided at trial could not be treated as "fresh evidence" in the *Ladd v Marshall* sense. Further expert evidence required because a party, after the conclusion of the trial, had appreciated that his own expert had performed very badly (indeed had completely failed to discharge his duties to the Court or that party and to provide reliance opinion evidence) did not fall within the scope of the of the *Ladd v Marshall* jurisdiction. Nothing new, which could not have been discovered or dealt with before or at the trial, had occurred to justify the granting of relief.

(ii). Furthermore, in order to come within the first limb of *Ladd v Marshall* the fresh or further material had to be admissible evidence. Mr. d'Almeida's report was not admissible evidence. I took Mr Levy's position to be both that Mr. d'Almeida's report failed to satisfy the requirements for expert evidence set out in the Directions Order and that, even though the Court could give fresh directions now for the provision of further expert evidence, in view of the manner in which Mr. d'Almeida's evidence was prepared, it would be inappropriate for his evidence to be admitted. So the problem with Mr. d'Almeida's report was not only that the Court's permission and directions for the admission of further expert evidence were required and had not been given but the circumstances surrounding the preparation of Mr d'Almeida's report

made it improper to admit it. The Petitioner's evidence demonstrated that Mr d'Almeida had been given further information and more extensive access to the Petitioner's management than had been available or given to Mr Inglis and Professor Jarrell. That meant that the report was not evidence that could properly have been admitted at trial in accordance with the directions for expert evidence given in the Directions Order (under which neither side was to have unilateral meetings with management or access to the Petitioner and the same information was to be provided to both experts simultaneously). Furthermore, since Mr d'Almeida had now unilaterally been given this additional information and access it would be unfair for him to be allowed to give expert evidence and for his evidence to be set against the evidence of Mr Inglis, even if Mr Inglis was now to be given access to further information and management. Because the access provided to Mr d'Almeida had been unregulated and unsupervised, it would be impossible to create a level playing field that would ensure that the experts were in the same position and that Mr Inglis and the Dissenting Shareholders were being properly treated. Mr Levy also raised concerns about Mr d'Almeida's independence in view of the circumstances surrounding his instruction (it was suggested that Mr d'Almeida was an advocate for the Petitioner and not an independent expert).

(d). As regards the second limb of the test (that the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive), Mr Levy said that since the report prepared by Mr d'Almeida should not be admitted as expert evidence in these proceedings (for the reasons I have summarised above) the Court is not in a position to conclude that the second limb of the test is satisfied since the Court does not know what further expert evidence the Petitioner will be able to rely on and what further expert evidence will be adduced.

(e). As regards the third limb of the test (that the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible) Mr Levy submitted:

(i). For the reasons he had given in relation to the second limb of the test, Mr Levy argued that the Court could not be satisfied that the third limb of the test was satisfied because it could not know what further expert evidence the Petitioner will be able to adduce.

(ii). But assuming that Mr d'Almeida's report was admissible or indicative of the further expert evidence that was to be adduced, Mr Levy submitted that the substance of Mr d'Almeida's report did not raise any believable evidence of impropriety or incompetence on the part of either Professor Jarrell or Mr Inglis, or the evidence that they gave.

(iii). The Dissenting Shareholders' position was that Mr d'Almeida's report unfairly and incorrectly criticised the evidence and integrity of Mr Inglis and contained a series of errors and contestable conclusions. At best, it represented another opinion which did not demonstrate that the expert evidence given at trial was fundamentally flawed as to make both of them unsafe such that the Court could not properly rely on any expert testimony. At worst, it represented an advocacy piece that was designed to assist the Petitioner in arguing for a lower fair value determination and failed to present a fair and balanced view of the issues.

(iv). During the hearing Mr Levy gave three examples of errors in Mr d'Almeida's report which he said had the effect of rendering the new analysis unbelievable and incredible, and certainly falls far short of demonstrating that Mr Inglis' evidence was unsafe:

(A). the arbitrary reduction in the Petitioner's revenue by 10% (which Mr Levy asserted was an alarming, broad and arbitrary assumption to make) and the failure to adjust the corresponding figure for Cost of Goods Sold – i.e. costs of sale, or "COGS";

(B). Mr d'Almeida's misunderstanding of the model and the

revenue intensities in the "Games list" and "pipeline Mobi" tabs; and

(C). Mr d'Almeida's apparent failure to understand the Mir 2 mobile revenue adjustments made by Mr Inglis.

(f). In the Dissenting Shareholders' Post –Hearing Submissions Mr Levy set out in detail the reasons why the Dissenting Shareholders considered Mr d'Almeida's report to be unreliable and why his opinions and analysis of the expert evidence given by Professor Jarrell and Mr Inglis were incorrect or incredible. The Dissenting Shareholders' Post –Hearing Submissions sought to respond to the key (but not all of the) criticisms made by Mr d'Almeida and to challenge Mr d'Almeida's competence and his independence. I summarise these criticisms below (following the order of my summary of Mr d'Almeida's criticisms set out above but omitting the headings where Mr Levy did not specifically address and make submissions on the relevant criticism).

(i). ***country risk premium:*** Mr Levy submitted that the Petitioner had failed to establish, indeed assert, that Mr Inglis' approach was outside the range of reasonable professional opinion on this point. Mr d'Almeida acknowledged in paragraph 65 of his report (as I have noted above) that Mr Inglis had used one of the three methods for calculating the country risk premium that he, Mr d'Almeida, had said was common for experts to use. Furthermore, the country risk premium determined and used by Mr Inglis was the same as the premium identified by Mr d'Almeida as being the applicable premium to be derived by using that methodology. Mr Inglis (see for example paragraph A14.45 of his first report) had used what Mr d'Almeida labels the Country (Sovereign) Yield Spread model and selected China as the most suitable country for this purpose. This resulted in a premium of 0.90%. Mr d'Almeida had accepted that this was an appropriate methodology for China (see paragraph 63 of his report). While Mr d'Almeida had considered and produced a weighted average of other countries country risk premiums calculated using this methodology and had offered a range of

different premiums as being useable, Mr Inglis' premium was within Mr d'Almeida's own range and he had not established that Mr Inglis' approach was in any way unreasonable. Mr Levy submitted that in these circumstances there could be no serious criticism of Mr Inglis' approach and the Court was able to rely on his opinion.

(ii). ***terminal value and long term growth rate***: Mr Levy did not address this issue in detail, no doubt because Mr d'Almeida's long term growth rate of 4.5% was the same as that used by Mr Inglis (see figure 1 on page 6 of Mr d'Almeida's report) and appeared to agree with Mr Inglis' methodology. Once again, Mr Levy submitted that there could be no serious criticism of Mr Inglis' approach and the Court was able to rely on his opinion.

(iii). ***equity risk premium***: As I have already noted Mr Inglis used an equity risk premium of 6% by reference to and in reliance on a methodology and calculations prepared by Professor Damodaran (for developed markets). As Mr Inglis noted at paragraph A14.19 of his first report Professor Damodaran had, as at 1 November 2015, estimated the market implied EMRP on four different bases (being the trailing twelve months approach, the smoothed approach, the normalized approach and the net cash approach) and these had resulted in the following values: 6.12%; 5.92%; 4.38% and 5.50% respectively. Mr Inglis had concluded (at paragraph A14.20) that he had decided to use 6% which *"was towards the higher end of the range of Professor Damodaran's figures and those commonly used, in my experience"* (he did note in a footnote that the Duff & Phelps recommended equity risk premium was lower at 5% but that was based on historical averages and was therefore prepared in a manner that was inconsistent with his forward looking approach). Mr d'Almeida in effect criticised Mr Inglis approach as arbitrary. He had picked 6% without analysis or an explanation, particularly when he had provided a range of values. Mr d'Almeida also criticised Mr Inglis for using Professor Damodaran's equity risk premium analysis because that was based on a ten-year bond yield and the ten

yield was inappropriate because that period did not match the expected period length used by Mr Inglis in his cash flows (see paragraph 167 of Mr d'Almeida's report). Mr d'Almeida had decided that Professor Inglis was on this occasion correct and that 6.21% was the preferred equity risk premium. Mr Levy says that Professor Damodaran's range of values should be seen as providing a range of values which a properly qualified expert acting with due skill and care could select. He submits that for Mr d'Almeida's criticisms to hold good and be successful he needs to undermine the approach of Professor Damodaran and this is simply not credible. It also cannot be right to criticize Mr Inglis' use of a higher rather than the highest value from the range – it might be said (and this is my point rather than Mr Levy's) that Mr Inglis could be expected to use the average of the range – 5.48% – but that would result in a lower value and not assist Mr d'Almeida's argument). Professor Damodaran is Mr Levy says one of the world's leading experts on research and technical literature on equity risk premium analysis. Furthermore, Mr Levy submits, there is a well-accepted method for converting Professor Damodaran's equity risk premium analysis to the equivalent measure based on a twenty-year bond yield (based on the Duff & Phelps 2015 Valuation Handbook) and if this is done the resulting equity risk premium would be 5.57%.This would, Mr Levy says, have no impact on Mr Inglis' estimate of the discount rate with a beta of one and would decrease his estimate of the discount rate with a beta of greater than one (which is the case for Mr d'Almeida's beta, which is 1.31).

(iv). ***failure to criticise Mr Inglis for not cash adjusting his beta estimates***: Mr Levy submits that Mr d'Almeida's criticism is without foundation. Critically, Mr Inglis sets out in paragraphs A14.32 to A14.36 a reasoned position as to why he considered it inappropriate to cash adjust his beta calculations in this case. This was because "*in the absence of information as to why [his two guideline companies, Changyou and NetEase] hold relatively large cash balances I assume that some of the cash is held as an offset against the debt and thus I net the cash against the debt in my*

analysis." Mr Levy says that this is a reasonable approach and well within the range of approaches which a properly qualified expert would take. Furthermore, Professor Jarrell also took the view that cash adjusting beta was inappropriate.

(v). ***Mr Inglis' adjustment and treatment of mobile game revenue intensities***: Mr Levy is very critical of Mr d'Almeida's opinion on this issue. He says that Mr d'Almeida had misunderstood the way the model worked. Mr d'Almeida is wrong, Mr Levy says, to say that game type does not relate to or define revenue intensity and to suggest that it relates to and establishes revenue for the game. To illustrate Mr d'Almeida's misunderstanding of how the model works, Mr Levy referred to the treatment in the model of game 31. This game is assumed to launch in the middle of the quarter and has a multiplier of 2. That is because it is two B1 games (i.e. one B1 game with a multiplier of 2). The projection is set out in cell AG 209 which states 22,500k for the first quarter. This is calculated as follows: (22,500k /45) divided by 2 = 250k per day for each of the two games (45 days being half a quarter, and remembering that the game was assumed to launch in the middle of the quarter). This, Mr Levy says, is inconsistent with Mr d'Almeida's position which is that game type is related to the amount of revenue. If that were right, since game 31 is a B1 game it would and should have revenue of 500k per day. But it does not. It has revenue of only 250k per day. This is because the model applies the revenue intensity of 50% to the assumed revenue for the game to produce a figure of 250k per day. Mr Levy also criticises Mr d'Almeida's suggestion that game specific differences in revenue intensities can be justified because it is necessary to take into account the country in which they will be launched and the country specific risks that then arise. Mr Levy says that this cannot be the explanation for different revenue intensities applied to games of the same type since a review of the model establishes that all of the pipeline mobile games to be launched during the forecast period are assumed to launch in both Korea and China and so should be subject to the same risk factors and therefore discount. Mr Levy notes that Mr d'Almeida appears to be

relying on his discussions with the Petitioner's management and questions the reliability of the information provided to Mr d'Almeida. He notes that it appears that Mr d'Almeida had discussions with an employee of the Petitioner who did not work for the Petitioner when the model was prepared and therefore was not involved in its construction. Furthermore the note provided by Mr d'Almeida (on page 9 of Appendix D to his report) of his conversation with this employee shows that he was not explaining the model at all but rather offering an explanation of the performance of certain games launched after the Valuation Date. In any event, Mr Levy submits, the issue was dealt with in depth and extensively during cross-examination at trial and despite this the evidence regarding the operation and reliability of the model on this issue remained inconclusive and unclear because the Petitioner failed to explain the basis on which the model had been prepared in a way that allowed the experts and the Court to understand that a consistent and appropriate methodology had been adopted for projecting revenue for the post 2016 mobile games. It would have been easy for the Petitioner to have provided that explanation and supporting data. The Court had been entitled to draw adverse inferences from the Petitioner's failure to do so and it would be wrong to allow the Petitioner to escape at this stage the adverse consequences of its own performance in relation to the trial. I think that it was also Mr Levy's position that the new expert evidence in any event failed to advance and clarify matters and did not resolve but left in place the uncertainties and problems that had caused Mr Inglis to make the adjustments he made and the Court to conclude that in the circumstances it should adopt his approach.

(vi). ***Mir 2 mobile revenues***: Mr Levy was once again very critical of Mr d'Almeida's opinion on this issue. He said that it incorrectly described Mr Inglis' analysis in important respects. Mr Inglis had not inflated or overstated the projected revenue by assuming it to start too early. Mr d'Almeida said that Mr Inglis had accounted for revenue from Mir 2 from the first quarter of 2015. But, Mr Levy argued, Mr Inglis did no such thing and Mr d'Almeida (see figure

11 in his report) was wrong. Mr Inglis had in fact assumed that the revenue from Mir 2 mobile started in the fourth quarter of 2015 – the game was launched in August 2015 and the evidence showed that the Petitioner would have been aware of the substantial increased revenue before the Valuation Date. Mr Inglis had modelled revenue from Mir 2 over seven quarters (as the Petitioner had modelled all its mobile game revenues over a similar seven quarter span) and (contrary to what Mr d'Almeida suggests) Mr Inglis' model shows revenue from Mir 2 mobile coming in to the Petitioner from mid-November 2015 and running forward for seven full quarters (albeit that because the revenue was assumed to start mid-quarter Mr Inglis' model runs over eight quarters, albeit that it only models income for a period of 21 months). Furthermore, Mr d'Almeida had also been wrong to suggest that Mr Inglis had failed to project increased fees and thereby assumed adjusted benefits but not the adjusted costs associated with the Tencent agreement. Mr Inglis had been cross-examined on this point and had made it clear that he considered that it would have been wrong to make adjustments for changed costs since there was no evidence to show that the distribution cost information was known before the Valuation Date. Mr Levy submitted that Mr Inglis did deal with and take account of (and did not ignore as alleged) the evidence that the Petitioner had consistently missed its projections. He had not arbitrarily reduced revenue projections by 10% but had reasonably formed a considered opinion based on an assessment of a variety of factors. Mr Levy referred to the sections in Mr Inglis' first report in which he discussed the Petitioner's underperformance during the first three quarters of 2015 (see paragraphs 13.17-13.26) and explained how he justified the approach he had taken (he had relied for example on the delays of games into later years and management distraction arising from the take private transaction; the Petitioner's confirmation on 14 August 2015, shortly after the launch of the Mir 2 mobile game, that it expected to achieve its full year targets for 2015 and that while performance had been below expectations from early April 2015 (when the projections were prepared) to August 2015, the underperformance was expected to be offset by strong

performance later in the year. Mr Levy then challenged Mr d'Almeida's own analysis and revenue projections, noting that Mr d'Almeida's justification for his reduction of revenue by ten per cent was insupportable. Mr d'Almeida had stated that his reason for the revenue reduction (see paragraph 195 of his report) was because of the Petitioner's previous underperformance. Mr d'Almeida failed, Mr Levy submitted, to give proper weight to the matters mentioned by Mr Inglis in the parts of his report I have referred to above and to the cross-examination on the issue at trial and his selection of a ten per cent reduction was in any event arbitrary. Furthermore, having reduced revenues in this way Mr d'Almeida had improperly made no equivalent adjustment for the costs of goods sold. In the Dissenting Shareholders' Post-Hearing Submissions Mr Levy made the point in the following way: "*If one is modelling over a five year period and reduces revenues so substantially, it would ordinarily follow that the costs of sales should diminish (especially considering that includes elements like royalties paid by Shanda which are obviously based on the revenue). But Mr d'Almeida has not done that and that failure is economically illiterate. The impact is obvious - lower revenues and higher costs results in less profit, a less profitable company and therefore a lower value.*" This was, Mr Levy submitted, wholly unjustifiable.

(vii). ***Professor Jarrell's failure adequately to address Mr Inglis' use and analysis of data relating to the Chinese market to support his valuation***: Mr Levy submitted that this criticism was irrelevant on this application since Mr Inglis had made it clear and the Court had accepted that he did not use the relevant data (relating to the Chinese market and the relative undervalue of Chinese companies listed on US markets) in calculating the fair value of the Dissenting Shareholder's shares. Therefore even if Mr Inglis had been wholly wrong his error did not and could not affect, and further expert evidence on the issue was irrelevant to, the fair value determination.

(viii). ***Professor Jarrell failed to criticize Mr Inglis for setting depreciation equal to capital expenditures in the terminal period***: Mr Levy refers to Mr d'Almeida's reliance on the work by Hitchner and Ors, *A Consensus View* (see my reference to it above) and notes that the authors only offer a tentative statement to the effect that equalizing capex and depreciation is "*a simplifying assumption that **may be** too simplistic*" (the emphasis was added by Mr Levy). He submits that this demonstrates that Mr d'Almeida is only offering a different opinion on a point on which experts can properly and reasonably differ. There is no clear consensus among valuation experts and financial analysts that Mr d'Almeida's approach is the only reasonable and proper one to adopt. Mr Levy also notes that the question to which the words quoted by Mr d'Almeida are a response itself shows that it is very common and squarely within the reasonable range of professional opinion to do precisely what Mr Inglis and Professor Jarrell did. The question is as follows: *"Many analysts make depreciation and capital expenditures equal in a capitalized cash flow model and the terminal year of a discounted cash flow model. Is that the correct assumption to make*?" Finally Mr Levy challenges by reference to Mr Inglis' evidence Mr d'Almeida's assertion that capital expenditures always grow as a function of revenue. Mr Inglis had noted in his supplemental report (at paragraph 5.46 to 5.50) that a proportion of the capital assets that the Petitioner will acquire are technology-related and of a type for which prices have in recent years been reducing while functionality has been increasing at a high rate. On this basis it was and is by no means clear that the Petitioner would have needed to increase capital expenditures even at a rate equal to inflation to maintain or even increase capacity.

(viii). ***Professor Jarrell failed to criticise Mr Inglis regarding his fair value standard***: Mr Levy submitted that this criticism was wholly without foundation. It could not be credibly argued that Mr Inglis had failed to undertake his calculation by reference to the proper standard of and test for fair value.

(ix). ***Professor Jarrell failed to criticise Mr Inglis regarding the risk-free rate***: Mr Levy says that, once again, nothing Mr d'Almeida says proves that Mr Inglis' approach was outside the reasonable range of professional opinion on the issue. There is, he says, a respectable body of opinion that favours and justifies the use of the twenty-year treasury bond yield. Contrary to Mr d'Almeida's opinion and as was discussed at trial, while the Delaware courts have often used the twenty-year treasury bond yield in calculating the risk-free rate, as the Delaware Chancery Court has itself recently noted, it "*does not appear from these* [Delaware] *cases, however, that the issue of a 10–year versus a 20–year bond was disputed or that the Court based its use of a twenty-year rate on professional or academic valuation literature*" (see *Merion Capital Lp & Ors v 3M Cogent, Inc 2013 Del Ch Lexis 172* , where the Court went on to use the 10 year rate). There was in Mr Levy's submission no established rule of using the twenty-year bond as suggested by Mr d'Almeida that made the use of the ten-year bond unreasonable and beyond the range of accepted professional opinion.

(f). Mr Levy argued that the Petitioner's case was based on an attempted impeachment of Mr Inglis' expertise and evidence, which involved an (extremely serious) allegation of either an intentional misleading of the Court or professional incompetence, neither of which had any basis (and each of which was inconsistent with the Court's conclusion in its draft judgment).

(g). Mr Levy further noted that many of the challenges now raised by Mr d'Almeida in his report seek to re-open points that were conceded by the Petitioner at trial. Mr Levy submitted that the Petitioner should not be permitted to withdraw at this stage in the proceedings from its concessions and that the Court should give great weight when determining whether to grant the relief sought that to do so would allow the Petitioner effectively to change its position and re-litigate points in a wholly different manner from its approach at trial.

Discussion

31. The first issue to be dealt with is the test which the Court must apply in deciding whether to admit further evidence and re-open the trial in the current circumstances.

32. In addition to *Charlesworth* a number of other cases were cited to me and discussed at the hearing. Three seem to me to be particularly relevant and important.

(a). The first case is the judgment of the Supreme Court in *L-B (Children) (Care Proceedings: Power to Revise Judgment)* [2013] UKSC 8, [2013] 1 WLR 634.

(i). The issue in this case was whether and in what circumstances a judge who had announced his decision was entitled to change his mind.

(ii). In care proceedings brought by a local authority in respect of two children after one of them had been found to have numerous non-accidental injuries, the judge held a fact-finding hearing to determine the identity of the perpetrator or perpetrators. Each parent accused the other of being the sole perpetrator. The judge gave an oral judgment, later transcribed under the heading "*Preliminary outline judgment*", which concluded that the father was the perpetrator and an order was drawn up to that effect. But before that order was formally sealed the judge gave a second "*perfected judgment*" holding that after further consideration of the evidence she was unable to find to the requisite standard which of the parents had injured the child and that it could have been either of them. The mother appealed that ruling.

(iii). Baroness Hale, with whom the other Justices unanimously agreed, reviewed the history of the jurisdiction and the line of authorities dealing with it and identified a number of important principles. She noted that in *In re Barrell Enterprises* [1973] 1 WLR 19 the Court of Appeal had refused to allow the reopening of an unsuccessful appeal and Russell LJ in giving the judgment of the court had stated that "*save in the most exceptional circumstances*" the successful party in a

case in which an oral judgment had been delivered should be entitled to assume that the judgment was valid and effective. Baroness Hale then referred to a number of subsequent Court of Appeal cases in which *Barrell* had been considered and concluded as follows (at paragraph [27]:

> *"Thus one can see the Court of Appeal struggling to reconcile the apparent statement of principle in the Barrell case .., coupled with the very proper desire to discourage the parties from applying for the judge to reconsider, with the desire to do justice in the particular circumstances of the case. This court is not bound by the Barrell case or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in Stewart v Engel [2000] 1 WLR 2268 , 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in In re Blenheim Leisure (Restaurants) Ltd , Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances."*

(b). The second case is *Vringo Infrastructure Inc v ZTE (UK) Ltd* [2015] EWHC 214 (Pat) (Birss J).

(i). In this case the defendant (Z) applied to re-open a trial at which it was found that the patent of the claimant (V) was valid. The patent concerned a method used for relocating a protocol termination point in mobile phone technology. The key aspect was the use of protocol transparency. An issue at trial had been whether references to "*transparency*" in the prior art documents had been references to "*protocol transparency*", and whether the latter term had been known in any event. The judge held that the relevant prior art documents did not disclose protocol transparency. Z then looked for other examples of protocol transparency, finding prior art documents that it sought to rely on (IS-95) which concerned protocol transparency in a relocation. It obtained an order suspending the court's sealing of the order arising from the trial pending the instant application. IS-95 had been made available to the public before the trial. The parties' experts disagreed on whether IS-95 disclosed protocol transparency. The

court was required to determine (i) the principles to apply on such an application; (ii) whether the test in *Ladd v Marshall* was made out; (iii) whether the overriding objective required that the application be granted. Z submitted that it had carried out reasonable searches of documents and arts cited around the world and had engaged a patent search firm, but had not found the documents that it now sought to rely upon. It further submitted that it had thought that the arts that it had adduced at trial were sufficient to show that the patent was invalid, so that it had been reasonable not to look any further.

(ii). Birss J held that the power to reverse a decision before the court's order had been drawn up existed, and was not limited to exceptional circumstances: every case depended on its circumstances and the overriding objective was the starting point. He followed the Supreme Court's decision in *L-B (Children) (Care Proceedings: Power to Revise Judgment)*. Birss J considered and followed *Charlesworth* and said that allowing an amendment before a trial began was different from allowing it at the end of the trial to give an apparently unsuccessful defendant a chance to run a new argument, particularly where the amendment was sought after judgment. The application had to be considered in the interests of efficient litigation, justice to others and use of court resources. The *Ladd v Marshall* principles for admitting new evidence on appeal were relevant and were to be applied more leniently: they did not need to be fully satisfied before fresh evidence could be admitted before judgment.

(iii). The following is an extract from Birss J's judgment which sets out his reasoning (it is a lengthy extract because the reasoning seems to me to be of particular importance in the present case):

> "*15. I start with the decision of the Supreme Court in In re L and another (Children) (Preliminary Finding: Power to reverse) [2013] UKSC 8 . In that case, the Supreme Court considered the power of the judge to reverse his or her decision before the order was drawn up and sealed. They held that the jurisdiction to do this does exist and, importantly, they disapproved of statements in two earlier cases In re Barrell Enterprises [1973] 1 WLR 19 and Stewart v. Engel [2000] 1 WLR 2268 , to the effect that exceptional circumstances were required before such a jurisdiction should be exercised. The Supreme Court explained that every case must depend on its*

circumstances and that the starting point was the overriding objective in CPR Part 1 to deal with cases justly. .. It also means that care needs to be taken with other cases dealing with this issue in so far as they take In re Barrell or Stewart v. Engel into account.

16. *There are .... major differences between the circumstances of In re L and this case.*

17. *[One] difference is important. In re L was concerned with a judge changing her mind. It was not a case, like this one, about an application by the losing party to raise a new, hitherto unpleaded issue, call more evidence and have a new point decided. This case is not one in which I am being invited to change my mind about a point I have decided based only on what I heard at the time. Nevertheless, it seems to me that this difference does not mean that the general principle articulated by the Supreme Court is inapplicable. By that I mean that the overall guiding principle here is the overriding objective to deal with cases justly, or, in terms of the CPR Part 1 as it is today, to deal with cases justly and at proportionate cost. It must be applied in different factual circumstances and the fact that this application involves amended pleadings and new evidence is an element, no doubt an important one, in the relevant circumstances.*

.....

19. *I start with the decision of Neuberger J in Charlesworth v. Relay Roads [2000] RPC 9 and [2000] 1 WLR 230 . Here, Neuberger J heard an application by the defendant to reopen the trial, amend the pleadings to raise two new points on prior art and then have new evidence and a fresh trial, at least on these new points. The first point was about an item of prior art already in the case called Cheney. The application was not seeking to add new prior art but to call new evidence about this existing prior art. The judge had considered Cheney at trial and rejected the invalidity case based on it. The new evidence dealt with the point considered by the judge. The second new point that the applicant sought to raise was to raise a new item of prior art altogether, a prior use which had been carried out by the patentee.*

20. *The judge decided that he had jurisdiction to make the order before the sealing of the order following trial. In that sense he was dealing with the same point as was confirmed in In re L .*

21. *In terms of the exercise of his discretion, the judge considered the discretion applicable to amending pleadings under the CPR , i.e. the overriding objective ...*

.....

23. *Neuberger J noted that important considerations were the interests of conducting the litigation efficiently and, in the end, the balance of the interests of a litigant in the instant case, justice to other litigants and a fair allocation of the court's resources.*

24. *The judge also considered Ladd v. Marshall ... and the conditions which have to be satisfied in the Court of Appeal before it would receive new evidence. That question naturally arises in a case like this since the applicant is the party who would otherwise be an appellant seeking to rely on fresh evidence after judgment.*

25. *[After stating the three limbed test in Ladd v Marshall Birss J went on] Neuberger J then said:*

"While I think that these three factors should be in the forefront of the mind of the court when considering an application to admit new evidence after judgment has been handed down, but before the order has been drawn up, I am inclined to the view that the court must be somewhat more flexible and not to proceed on the strict basis that each of these three conditions always has to be satisfied before fresh evidence can be admitted before judgment."

.....

29. *The point which Neuberger J in Charlesworth was seeking to express was that in a case like the one before him, with an application to raise a new point, call new evidence and have a new trial, that if the applicant does not meet the Ladd v. Marshall test, it is hard to see how, in most cases, it would be permitted. I respectfully agree with that sentiment although I think it is right to say that to characterise any element of the test by using the word "exceptional" is not now correct in the light of In re L .*

30 *For the outcome of Charlesworth itself, one needs to look at the version of the report of that case which is to be found in the RPCs. In relation to the Cheney prior art, although the judge could not be certain that the new evidence would lead to the invalidity of the relevant claim and that it was conceivable that the claim was valid as held at trial, Neuberger J clearly thought this new evidence gave rise to a strong case of invalidity. At page 310, line 40 to page 311, line 10 of the RPCs, the judge held that there was a good chance of persuading the Patents Court that the claim was invalid. However, he refused to admit the evidence, essentially because the point to which it was relevant was quite clear in advance of the hearing and the applicant could have raised it earlier. The applicant had the relevant drawings and chose or neglected to look at them. So given that Ladd v Marshall was not satisfied and there were no special factors, the judge refused the application.*

.....

38 *I can summarise the principles in this way. The court has a jurisdiction, at least before the order is drawn up, to entertain an application of this kind as in here. The principle to be applied generally is the overriding objective to deal with cases justly and at proportionate cost. This involves dealing with cases expeditiously and fairly and allocating an appropriate share of the court's resources to a dispute. In a case like this one, in which the application is to amend the statement of case, call fresh evidence and then have a further trial, the principles relevant to amending pleadings have a role to play but the Ladd v. Marshall factors are also likely to have real significance.*

39 *As regards principles applicable to amendments, the modern view is probably the Court of Appeal in Swain v. Hillman [2001] All ER 91 If the court would not have permitted the amendment before trial, it is hard to see how it is likely to be admitted after trial, apart from some very unusual circumstances. Nevertheless, just because a court would have permitted the amendment sought before, or even*

during the trial, if it had been raised at that stage, it does not mean that it should be permitted after judgment.

40 *As to Ladd v. Marshall, the trial judge is in some ways in a better position than the appellate court to assess the significance of a new point and new evidence. In any case, at this stage the Ladd v. Marshall factors should be applied more leniently to an applicant than they might be applied in an appellate court; but, all the same, the Ladd v. Marshall factors are clearly relevant because the application is an attempt to call new evidence after judgment. If those factors, even applied more leniently, are against the applicant, it is likely that powerful factors in the applicant's favour will be needed to justify the application."*

(c). The third case is the decision of Justice Barry Leon in the BVI Commercial Court in *Malitskiy v Stockman Interhold SA* BVIHC 2015/0008. In this case Justice Leon was dealing with an application for an order for the appointment of liquidators. At the hearing of the application the applicant sought an adjournment of the hearing of its application for the appointment of the liquidators and the judge reserved judgment on the adjournment application and on the application to appoint the liquidators. After that hearing and before the judge delivered his judgment the applicants applied for permission to introduce additional evidence in relation to matters which had arisen and developments which had occurred since the hearing. Justice Leon considered the relevant authorities in including *Charlesworth, L-B (Children) (Care Proceedings: Power to Revise Judgment)* and *Vringo Infrastructure*. He summarised his conclusions as follows:

"94. *[Re L] was a case dealing with reconsideration, not additional evidence, after judgment was rendered but before an order was sealed. However, it seems logical that the test for additional evidence after judgment should be the same: dealing with the case justly. That test is flexible enough to allow for some consideration to be given to the factors in the relaxed appellate court test that has been used for additional evidence applications before there is a sealed order. Those factors would be part of all that a court would consider in the particular circumstances to deal with the case justly.*

95. *The English High Court did consider the question of additional evidence after judgment early this year in Vringo Infrastructure Inc. v. ZTE (UK) Limited [32], a patent case in which the unsuccessful party sought permission to reopen the trial to plead and lead evidence of new prior art (against the validity of the patent).*

96. *Justice Birss applied In the Matter of L and B (Children) in that situation, accepting*
that the Supreme Court was "considering the legal principles from the point of view of civil and family law in general and not just children cases" and concluding that even though the case before him was not a judicial reconsideration case [the general principle articulated by the Supreme Court is applicable and the overall guiding principle is the overriding objective to

deal with cases justly applied in different factual circumstances and the fact that this application involves amended pleadings and new evidence is an element, no doubt an important one, in the relevant circumstances.]

97. *The test for additional evidence before judgment has been rendered must be taken to have advanced with the advancement of the test for a court to admit additional evidence and/or reconsider its judgment before its order has been sealed. The test before judgment also must be to deal with the case justly.*

98. *It must be borne in mind that before judgment has been rendered the question of reconsideration does not arise; it is a question only of whether further evidence is to go into the initial consideration. There is no question of the court changing its mind or a successful party being deprived of a judgment already rendered.*

99. *In such circumstances logically the court may be more liberal in admitting additional evidence if it should be done to deal with the case justly. However in making that consideration, it may consider the factors that would have been considered under the Charlesworth v Relay Roads Ltd. relaxed appellate test but again with the bottom line focus being on dealing with the case justly.*

33. In light of these authorities (which seem to me to be consistent with the judgment in this jurisdiction of Williams J in *Bridger*) I would make the following comments:

(a). The Court does have jurisdiction to admit new evidence and order a further hearing (and thereby re-open the trial) after the hearing and after the Court has handed down its judgment in draft, before the sealing of the Court's order (any appeal would be against the order of the Court and not the judgment).

(b). It seems to me that Birss J accurately summarised the basis on which that jurisdiction is to be exercised in paragraph 38 of his judgment in *Vringo*. The principle to be applied generally is the overriding objective to deal with cases justly and at proportionate cost. This involves dealing with cases expeditiously and fairly and allocating an appropriate share of the court's resources to a dispute.

(c). As Neuberger J and Birss J held, in cases involving an application to call new evidence and have a new trial, the Court should take into account the *Ladd v Marshall* test. As Birss J also noted, in the case of applications before the trial judge rather than the Court of Appeal, the *Ladd v Marshall* factors should be applied more leniently (note the statement at paragraph 8-021 of James, Expert Evidence: Law and Practice (4th ed., 2015, Sweet & Maxwell) that "*The Ladd v Marshall principles remain persuasive (but not determinative) in this field but*

the trial judge enjoys a greater discretion to let in fresh evidence prior to the final order being drawn up since the trial judge is better equipped than the appellate court to know what effect such fresh evidence would have on his original decision.").

(d). Even so, in a case in which the *Ladd v Marshall* factors are against the applicant, even applied more leniently than on an appeal, other "*powerful factors*" in the applicant's favour (or putting the point in another way without using the inappropriate term "*exceptional*", strong reasons) will be needed to justify the application.

(e). The handing down of a judgment in draft does not of itself preclude the granting of the application or determine how the Court should exercise the jurisdiction. Once the judgment has been handed down then a further issue arises, namely the question of reconsideration (using Justice Leon's terminology) and the impact of depriving a successful party of a judgment already rendered needed to be taking into account when the Court is applying the overriding objective.

(f). Even though in the present case the Summons was issued shortly before the draft judgment was received by counsel, since I had completed the draft judgment and reached a decision on the petition, I consider that I should take into account the prejudice that would be suffered by the Dissenting Shareholders if I were to grant the relief sought by the Petitioner in the Summons and allow the Petitioner to rely on new expert evidence and re-open the trial. The fact that a decision has been reached and the draft judgment completed is a factor that I must take into account. As I understand his submissions, this was accepted by Mr Millett.

34. When applying the overriding objective in the context of applications to admit new evidence after trial (both before and after the Court has handed down its judgment) there is a balance to be struck between the Court's desire (and the parties' entitlement) to have a decision based on the full facts (the true position) and the need for finality in litigation. As is noted (in the context of applications to admit new evidence on appeal) in paragraph 6.002 of Leadbeater, Ourchas, Mccafferty and O'Sullivan in *Civil Appeals* (2nd ed., 2015, Sweet & Maxwell): "*It has been*

recognised that courts may get a result wrong and yet it will still be in the interests of justice that the matter not be re-opened. Lord Wilberforce acknowledged that sometimes fresh material may be found which may have led to a different result had it been available; but nevertheless "in the interest of peace, certainty and security" the law prevents further inquiry into the fresh material because the law insists on finality." (quoting Lord Wilberforce from *The Ampthill Peerage* [1977] A.C. 547 at 575).

35. In my view, there are a number of factors which weigh strongly in favour of dismissing the Summons and not permitting the Petitioner to have liberty to re-open its case and introduce additional expert evidence. I explain these factors, and my reasoning, below.

36. Of course the balancing exercise and the search for the just result requires the Court to have regard to the circumstances of the case and all relevant factors. But the particular importance of the need for finality in litigation in the present context was highlighted by Neuberger J in *Charlesworth* (Birss J in *Vringo*, as I noted above, commented that *Neuberger J noted that important considerations were the interests of conducting the litigation efficiently and, in the end, the balance of the interests of a litigant in the instant case, justice to other litigants and a fair allocation of the court's resources.*"). It seems to me that the Court has to consider and weigh in the balance in particular the reasons for the application, the conduct of the parties, the delay between the conclusion of the trial and the making of the application, the prejudice to the applicant as a result of not allowing the new evidence to be admitted and the trial re-opened, the prejudice to the other party of being deprived of the judgment or the further costs and delays of having to deal with further evidence and a new hearing and the need to secure the "*just, most expeditious and least expensive determination of every cause or matter on its merits*" (see paragraph 2.2 of the Preamble to the Grand Court Rules). The need for justice to other litigants and a fair allocation of the court's resources must be taken into account.

37. In the present case there was a long trial conducted by leading counsel during which the issues and evidence were fully explored. The issues on which the Petitioner now focusses and which are dealt with in Mr d'Almeida's report were all discussed and the subject of detailed submissions and cross-examination during the trial. Many if not most of the difficulties faced by Professor Jarrell during his cross examination were

crystal clear during the trial because Professor Jarrell was candid and straightforward about the limited nature of his evidence and preparation and his failures fully to understand parts of Mr Inglis' evidence. It was his poor performance in the witness box on some issues that presumably caused the Petitioner and its counsel to adopt a series of concessions and not contest a significant number of issues at the trial.

38. The trial concluded on 17 November 2016. The Petitioner waited until 20 March 2017 to make its application. I appreciate that the Court had not by then delivered its judgment but that is no excuse for the delay in a case where the problems with the expert witness and evidence complained of were apparent at trial. I also accept the evidence given by members of Harneys (which is a firm of undoubted integrity) that they were not aware of my updates regarding the timing of the handing down of my judgment and therefore do not take the view that the application can be said to be an abuse of process (although it was a remarkable coincidence that the filing of the Summons almost precisely coincided with the handing down of my judgment and I am entitled I think at least to note that the filing of the Summons could be viewed as a litigation tactic to delay the conclusion of the litigation and the time at which the Petitioner had to make further payments to the Dissenting Shareholders, as Mr Levy argued it was).

39. Mr Millett said that the Petitioner was not at fault because it had taken proper steps to instruct a competent expert. There is no evidence on the steps taken by the Petitioner but I am prepared to assume that this was the case, particularly because Professor Jarrell was clearly well qualified and experienced. The concern and criticism arises in the present case from the failure to act with sufficient expedition during or shortly after the trial when the performance of the expert was visible and clear during the trial. Mr Millett argues that the delay was justified by the need to instruct a new expert and await the outcome of his work. I accept that some delay was bound to be involved and that the Petitioner was no doubt told that any criticism of and challenges to the expert evidence given at trial would need to be detailed and delivered in depth. But even taking into account such factors it seems to me that the Petitioner could have acted much more rapidly and brought on an application to deal with the perceived deficiencies in and problems with the expert evidence.

40. If I were to accede now to the Petitioner's application it would require me to order that Mr Inglis be given an opportunity to re-open and re-do his expert report to

respond to Mr d'Almeida's report, no doubt after making orders to ensure that the information and factual evidence available to both Mr d'Almeida and Mr Inglis were the same (probably by requiring the information made available to Mr d'Almeida to be collected and put in the data room so that it was clear what had been provided and that both experts could review the same material) and to order a further management meeting which both Mr d'Almeida and Mr Inglis could attend. After Mr Inglis had prepared a further report the two experts would need to meet and prepare supplemental reports. There would also have to be another trial at which they could both be cross-examined (of course it might be possible to avoid some of these steps and fast track aspects of the further proceedings but this seems to me to be a fair summary of the process that would need to be followed). In many respects the proceedings would need to revert to the stage reached when the Directions Order was made. This will involve significant further cost to the parties, delays and significant further amounts of limited court time and resources. These matters must be taken into account and given appropriate weight in the balancing exercise. They weigh against granting the relief sought.

41. The main thrust of the Petitioner's complaint, when properly understood, is that its expert was negligent in the performance of his duties and as a result his evidence was not properly prepared and failed to convince the Court or undermine the evidence given by the Dissenting Shareholders' expert. Mr d'Almeida in his report repeatedly states that Professor Jarrell failed to perform his duty as a business valuation expert with appropriate skill, care and diligence. It seems to me that in such a case the negligent performance of his duties by an expert will rarely be and in this case is not sufficient to allow the party that selected him to re-open the trial and instruct a second expert (and in effect to have a second bite at the cherry). The prejudice suffered by the party concerned can be remedied by his right to make a claim against the expert in negligence. It would be disproportionate and unjust (and inconsistent with the overriding objective) to make the other party suffer the consequences (when both parties were able to select whichever expert they chose and were sufficiently literate in litigation or advised by counsel who were able to select a suitable expert).

42. This point was made and highlighted by Mance LJ in his judgment in *Paragon Finance* (see above) where he said the following:

"The effect of counsel's submissions would be that this matter would not be closed, it would be reopened in his client's favour at considerable cost of money and time. On the other hand this

case is of likely greater importance to his client than to the claimant. His client is a private individual, uninsured and is in no financial position to meet the claim. But it seems to me that the reference to justice is of the most significance and takes one back to Lord Wilberforce's dictum [in Mulholland v Mitchell [1971] AC 666] where it was said that the overriding consideration was whether to refuse fresh evidence would affront common-sense or sense of justice.

Counsel submits that is the position here, and that the material put before me is such that it would affront justice if there was not a fair trial. But, ultimately, having considered the submissions which he has put forward with force, I find myself unable to see the matter in that light. Justice is a concept which must be viewed as between both parties here. Under the new rules the aim of the court is certainly to adjudicate justly, but also expeditiously and cost effectively on the issues raised.

Leaving that aside, it seems to me that counsel's submissions before me really amounted to the fact that the more negligent the representative of Mr Gale was shown to have been (and he submitted he was clearly negligent), the less protection the other parties to the litigation had and the less assurance the other party could have that the litigation would be a final resolution of the issues. That runs contrary to what one might expect to be the position. One might argue that, where there is a remedy against the legal adviser, then the court need not have quite the same sympathy for a litigant or the same readiness to grant him concessions in relation to the actual litigation with the other party.

That proposition was itself rejected in the context of striking out for want of prosecution where it was held that the existence or otherwise of a remedy against a legal adviser was generally irrelevant. But it does seem to me that, in so far as counsel seeks to invoke the negligence of the representative, if anything that is a factor which may comfort the court when considering whether the judgment should stand and that there should be no departure from the ordinary view that fresh evidence available for the trial should not be relied upon as a ground for upsetting the adjudication made after a properly conducted trial.

The conclusion I come to therefore is that this application should fail. Looking at the justice of the case between these parties, this matter was tried. So far as the claimant/respondent was concerned it was tried fully and properly and that should be an end of the matter. Any complaint which Mr Gale may have against his solicitors which, as I have said, was a central plank in counsel's submissions, serves if anything as some comfort in reaching the conclusion that this application should fail

43. This analysis and approach seem to me to be relevant and a useful guide in the present case (recognising that the failures of the Petitioner in this case cannot be said to be on a par with those of the defendant in that case, where his conduct of the litigation and the performance of his legal advisers, in particular in failing, and the delay in taking steps, to instruct an expert were described by Mance LJ as involving "*a disastrous misconduct of litigation*"). The Petitioner, to the extent that it can make out its claim of negligence, will presumably have a remedy against Professor Jarrell and his insurers and will be protected in that way.

44. I appreciate that Mr Millett did not just rely on the alleged negligence of Professor Jarrell. He accepted that he needed to do more than that. On his own case, he accepted that he had to demonstrate that the problems with the experts meant that the Court's decision was unsafe. The Court should permit the Petitioner to adduce further expert

evidence because Professor Jarrell's and Mr Inglis' opinion evidence failed properly to deal with a number of critical issues with the result that their valuations were fundamentally flawed. Their evidence was so seriously deficient that the Court was materially misled by the entire corpus of opinion evidence going to value and its determination of fair value was as a result unreliable. In substance (although this is my formulation and not his) the submission was that neither Professor Jarrell nor Mr Inglis gave evidence which can properly be described as the evidence of a competent expert. The evidence, in Mr Millett's formulation, was (at least at it relates to the critical issues discussed by Mr d'Almeida) outside the range of opinions which an expert exercising reasonable skill and care would produce and their methods were not those which would have been used by and did not conform to the standards of such an expert.

45. It seems to me to be right that in order to justify re-opening the trial and allowing further expert evidence to be introduced the Petitioner must show (in the absence of fraud) that the problems with the expert witness evidence are sufficiently serious such that the Court's decision cannot stand. This can be tested by an analogy with the Court's approach on an application to introduce new evidence going to the credibility of a witness of fact at trial (where the applicant wants to introduce evidence of new facts which put the witness' credibility in issue). In such cases it is established that the evidence be sufficiently serious to mean that the court's decision cannot stand. From one perspective the challenge (or a part of it) mounted to the experts here is a challenge to their professional credibility. The reliability and credibility of the experts are being challenged albeit not by reference to the honesty of the witnesses and their propensity for truth telling but by reference to their competence and capability as properly qualified experts. I should add that I do not consider that this is a case in which there was or could have been a challenge to the integrity of the expert witnesses. Mr Levy submitted that the Petitioner must be taken to be saying that Mr Inglis was seeking to mislead the Court. Mr Millett disavowed any such suggestion and he was clearly right to do so. Mr Inglis is not only a well-qualified and enormously experienced financial adviser and expert but also a man with a professional track record that demonstrates skill and integrity.

46. I do not consider that the fact that the trial that the Petitioner wishes to re-open involves a section 238 petition fundamentally changes the analysis. It is correct that in a section 238 case the Court has to determine the fair value for itself and is (and was

in this case) particularly dependent on the expert evidence to assist it in this task (although it is not required to follow the experts and has to form its own independent view). This simply means that all (or most of, in a case in which there is also factual evidence) the issues in dispute are dealt with by the experts so that if it can be shown that the expert opinion evidence was fundamentally flawed the Court's decision-making will of necessity be unsafe and undermined because there will be no other evidence on which the Court could have relied for the purpose of forming its view.

47. In my view Mr Millett is unable to satisfy this test. Mr d'Almeida's report does not establish that Mr Inglis' evidence on the material matters he identifies was so deficient and incompetently prepared as to be outside the range of reasonable professional opinions on the valuation issues. I reach this conclusion largely for the reasons given by Mr Levy as I have summarised them above. The Court was properly able to rely on his evidence. Furthermore, the Court was able to rely on parts of Professor Jarrell's evidence as well. While I found that some parts of Professor Jarrell's evidence were weak and unreliable, his failures did not undermine the credibility and reliability of all his evidence, as I set out in my draft judgment. On a number of issues Professor Jarrell demonstrated the expertise of a properly qualified expert and gave evidence which was reasonable, consistent with the academic and professional literature and accepted methodologies of those qualified in the field of financial valuation and statistical analysis. Nor in my view did Professor Jarrell's failure to raise the points and challenge Mr Inglis on the issues identified by Mr d'Almeida mean that Mr Inglis' evidence must be treated as unsafe. It seems to me that Mr d'Almeida has identified a series of points, significant though they are, on which he has formed a different view and opinion from Mr Inglis. There are different opinions on points on which reasonable and competent experts can disagree. Indeed the Delaware jurisprudence demonstrates that they almost always do substantially disagree. The fact that the Petitioner has (belatedly) found an expert who is prepared to support a much lower value for the Dissenting Shareholders' shares and to support this with a reasoned opinion is not sufficient to justify the conclusion that the evidence at trial was seriously compromised and flawed and that my judgment was unsafe. It would be wrong, in my view, to permit the Petitioner to indulge in opinion shopping and to impose on the Dissenting Shareholders the further costs and delays associated with further evidence and a new trial (as well as to cause them the significant prejudice resulting from being deprived of the judgment I have already delivered).

48. I accept that in relation to some of the significant valuation issues that were left for decision at trial, problems were caused by serious deficiencies in the factual record that required the experts and ultimately the Court to make certain assumptions or inferences. This was not a satisfactory position and it is right to say that the Court's decision would have been on a sounder footing had proper and clearer factual evidence been presented (and directions made for proper factual evidence to be given at trial as a foundation for the expert evidence – a deficiency in the directions that is being corrected in many of the petitions currently before the Court). To that extent introducing further evidence to correct these deficiencies would be helpful in ensuring that the Court could reach a proper decision. But this is not, in my view, a sufficient reason for concluding that the expert evidence given at trial was, as a whole or to a material extent, unsafe. Mr Inglis dealt with the evidential deficiencies properly and reasonably and in my view produced an opinion that was reasonable and reliable that was based on reasonable assumptions based on accepted professional practice. In fact, as I explained in my judgment, the evidential deficiencies and confusions could and should have been resolved by the Petitioner. The Petitioner's management was asked questions on these issues and gave at best cryptic and unhelpful responses. The Petitioner could have provided a full and clear explanation of the treatment of revenue intensities in its model but it did not do so. It could have explained and justified its approach to the treatment and forecasting of revenues from the Mir 2 mobile game. It failed to do so. These issues were live and hotly contested at trial and the Petitioner was in no doubt as to their significance and had the ability to assist the Court further and resolve them. Its conduct should be taken into account and the Petitioner should not, in my view, in such circumstances be allowed to complain about the experts' analysis of these issues in these circumstances.

49. As regards the main criticisms and challenges made by Mr d'Almeida, I would add the following brief further comments recognising that as I have said I am generally in agreement with the submissions made by Levy on this aspect (I too have not commented on each and every point raised by Mr d'Almeida and where I have not specifically commented on a point it is because I do not consider that it established a fundamental flaw in Mr Inglis' approach):

(a). ***country risk premium***; In my view, in agreement with Mr Levy's submissions I consider that Mr d'Almeida failed to establish that Mr Inglis'

evidence was unreasonable or outside the range of views that could reasonably be reached by a competent expert.

(b). ***terminal and long term growth rate***: Mr d'Almeida did not in my view offer any serious criticism of Mr Inglis' approach and analysis of this.

(c). ***equity risk premium***: For the reasons given by Mr Levy, as summarised above, I consider that Mr d'Almeida failed to establish that Mr Inglis' evidence was unreasonable or outside the range of views that could reasonably be reached by a competent expert.

(d). ***Mr Inglis' asserted failure to cash adjust his beta estimate***: Mr Inglis' justification for not cash adjusting his beta estimate was based on an assumption – that the large cash balances of Changyou and NetEase were the result of borrowings and so the net financial effect was neutral. In my view it might be said that Mr Inglis should have sought the missing information or in its absence he was not properly able to make the assumption he did, and that a more prudent approach would have been to assume that these companies had genuine cash balances and to prepare his beta estimates on a cash adjusted basis. Furthermore, it can be said that Professor Jarrell's approach in relation to cash adjusting his beta estimates based on the Petitioner's share price does not support Mr Inglis' argument that he was justified in not adjusting his beta estimates based on data relating to *Changyou and NetEase*. However I am not satisfied that Mr Inglis' approach can be said to be outside the range of reasonable approaches available to experts undertaking a valuation of this kind which inevitably involves a lack of complete information and the need to make some rough and ready assumptions.

(e). ***Mr Inglis' adjustment and treatment of mobile game revenue intensities***: I have noted above and in my judgment that I accept that the evidence at trial on this issue was unsatisfactory. However, I do not find Mr d'Almeida's analysis and discussion of the topic much clearer or more reliable than the evidence provided at trial. Mr d'Almeida has had the opportunity of sitting down with the Petitioner's management and working through the model and the nature and use in the model of the revenue intensity factor and yet he is still unable to explain convincingly whether there should be a correlation

between game type and revenue intensity and most importantly to explain whether and why management identified revenue intensities on a game by game basis (and if they did so, to show their reasoning and that they used reasonable and credible assumptions). I also note that this issue was dealt with extensively during cross examination and if one goes back to the transcript one can see that Mr Inglis' explanations were cogent and reasonable (see for example the transcript of his cross examination on 8 November at pages 69-70).

(f). ***Mir 2 mobile revenues***: Once again this was an issue on which the factual evidence at trial was unsatisfactory. However, once again, I do not find Mr d'Almeida's analysis convincing or clear. I note Mr Levy's criticisms which seem to me to raise serious and at present unresolved doubts as to the reliability of Mr d'Almeida's analysis.

(g). ***Mr Inglis' use and analysis of data relating to the Chinese market***: I agree with Mr Levy that since Mr Inglis made it clear that his analysis of the Chinese market issues did not form part of his valuation calculation the criticism of his approach cannot affect the reliability of his valuation and it is therefore not to be given any weight for the purpose of this application.

(h). ***the setting of depreciation as being equal to capital expenditures in the terminal period***: I agree with Mr Levy that Mr d'Almeida has failed to establish that Mr Inglis' approach was outside the range of approaches which properly qualified experts could reasonably adopt.

(i). ***Professor Jarrell failed to criticise Mr Inglis regarding his fair value standard***: I agree with Mr Levy that it cannot be credibly argued that Mr Inglis had failed to undertake his calculation by reference to the proper standard of and test for fair value.

(j). ***Professor Jarrell failed to criticise Mr Inglis regarding the risk-free rate***: I agree, once again, with Mr Levy's submission that Mr d'Almeida's report does not establish that Mr Inglis has clearly adopted an unreasonable approach or one outside the range of views reasonably open to a properly qualified expert on this issue.

50. I would add the following comments regarding the application of the *Ladd v Marshall* test to the current case, recognising that the authorities require a more lenient application of the test in the current context.

(a). the first limb of the *Ladd v Marshall* test requires that the new evidence to be admitted could not have been available to the party at trial acting with reasonable diligence. Mr Millett submitted that evidence within the first limb can cover expert evidence. He relied on the judgment of Mance LJ in *Paragon Finance v Gale* (see above). This is clearly right - see also for example the statement at paragraph 6.008 of Leadbeater, Ourchas, Mccafferty and O'Sullivan, *Civil Appeals* that "*the Ladd v Marshall test applies equally to all types of new evidence ... whether that evidence is witness, expert or documentary evidence*."). Mr Millett also submitted that the new expert evidence could not be excluded and outside the *Ladd v Marshall* rule merely because the Court's permission to introduce (further) expert evidence was required. The Court, he submitted, could and should, grant permission if satisfied, exercising its jurisdiction to admit new evidence and re-open the trial, that this was required in order to ensure a just resolution of the dispute. That too, in my view must be right.

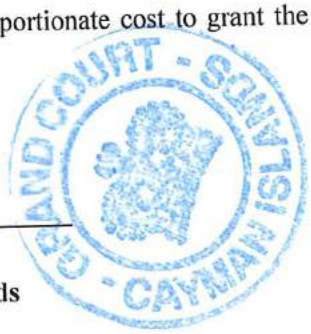
(b). However, in a case in which a new expert is proffered without there being new primary factual evidence it could be said that the new evidence, that is the opinion evidence from the new expert, could have been available at trial had the party selected and used the new expert at an earlier stage which it was open to him to do. The Petitioner was able to select whichever expert it chose for the trial and could have instructed Mr d'Almeida. This argument has some force because it reflects one of the policy points underlying the test for deciding whether to admit fresh evidence - to what extent is the omission or defect with the evidence at trial the fault or responsibility of the relevant party. If the problem flows from the party's own choice and action, namely his failure to select a competent expert, then it may well not be right to allow him to introduce a new expert identified subsequently following a more careful or extensive search just to allow the party to have the benefit of a more thorough or favourable opinion. Mr Millett submitted, as I have already noted, that the alleged incompetence of Professor Jarrell was not the

Petitioner's fault because they acted properly in selecting someone who reasonably appeared to be competent and could not know that he would fail to do his job properly. I am not convinced that this is a complete answer. But I do not need to decide the point on the present application. At present I am inclined to take the view that it would be wrong to exclude fresh expert evidence solely on this bases (that there has been a failure to satisfy the first limb of the test) but that the better approach is to treat this as a factor for the Court to take into account when deciding whether to grant the relief sought.

(c). The second limb of the test is that the evidence must be such that, had it been given at trial it would probably have had an important influence on the result of the case. It must be influential. The new evidence must therefore relate to relevant and material issues and it must be shown that it would have altered rather than reinforced the outcome at trial. Mr d'Almeida's detailed and substantial report does address issues that were relevant to and had a significant impact on the Court's fair value determination. He does offer a new analysis of and different opinion on most of the critical issues that affect the fair value determination. While I have concluded that his fresh and different opinion does not undermine the opinion evidence given at the trial and demonstrate that the other opinion evidence is outside the range of reasonable expert opinions, Mr d'Almeida's report is sufficiently cogent, at least at this stage (recognising the substantial criticisms raised by Mr Levy) such that it would need to be taken into account in any further deliberations of the Court. While I consider, in light of Mr Levy's serious criticisms, that when properly tested in cross-examination Mr d'Almeida's analysis might well be shown to be unable to affect my decision on any point in issue at this stage I am not able to say that it is incapable of doing so and therefore I am prepared to treat the second limb of the *Ladd v Marshall* test as being satisfied.

(d). The third limb of the test is that the evidence must be apparently credible although it need not be incontrovertible. I am satisfied that Mr d'Almeida's report, despite the serious criticisms raised by Mr Levy, satisfies this requirement. Mr d'Almeida appears to be a well-qualified expert who has prepared a detailed and comprehensive report which is credible.

51. Accordingly, after having carefully considered the submissions made by Mr Millett and Mr Levy, the evidence filed and taken into account the opinions of Mr d'Almeida contained in his report and after taking into account and balancing the matters and factors that are relevant in applying the overriding objective in the present case and circumstances, I have concluded that it is not consistent with the need to deal with this case justly expeditiously and at proportionate cost to grant the relief sought by the Petitioner.



The Hon. Justice Segal
Judge of the Grand Court, Cayman Islands