IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

C.I.C.A NO 26 OF 2017

ON APPEAL FROM CAUSE NO FSD 92 OF 2017 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF TRINA SOLAR LIMITED

BETWEEN:

(1) MASO CAPITAL INVESTMENTS LIMITED

(2) BLACKWELL PARTNERS LLC - SERIES A

APPELLANTS

AND

TRINA SOLAR LIMITED

RESPONDENT

BEFORE **The Hon John Martin QC, Justice of Appeal**
The Hon Sir George Newman, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

CERTIFICATE OF ORDER OF THE COURT

UPON hearing Leading Counsel for the Appellants and Leading Counsel for the Respondent on the Appellant's appeal dated 10 November 2017 from an order made by the Honourable Mr. Justice Segal dated 6 November 2017 (***Appeal***)

AND UPON reading the evidence filed in support of the Appeal

AND UPON reading the skeleton arguments filed on behalf of the Appellants and the Respondent

I **HEREBY CERTIFY** that an Order was made on the 18th day of December 2017 as follows:

1. The Appeal is dismissed.
2. The Respondent's costs of and occasioned by the Appeal shall be paid by the Appellants to be taxed on the standard basis if not agreed.

Given under my hand and the Seal of the Court this 9th day of February 2018

COURT OF APPEAL · CAYMAN ISLANDS · 11/17

JBSimpson

REGISTRAR OF THE COURT OF APPEAL

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CICA Civil 26 of 2017
(FSD 92 OF 2017 (NSJ))

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Appellants

AND

TRINA SOLAR LIMITED

Respondents

BEFORE **The Hon John Martin QC, Justice of Appeal**
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The Rt. Hon Sir Alan Moses, Justice of Appeal

Appearances: **Mr. Paul McGrath QC instructed by Mr. Rupert Bell and Mr. Patrick McConvey of Walkers for the Appellants**
Ms. Catherine Newman QC instructed by Mr. Nick Hoffman and Ms. Katie Pearson of Harneys for the Respondents

Date of Hearing: **18 December 2017**

REASONS FOR DECISION TO DISMISS APPEAL

MARTIN JA:

1. On 18 December 2017 we heard an appeal by Maso Capital Investments Ltd and Blackwell Partners LLC - Series A ("the Dissenting Shareholders") against an order dated 6 November 2017 by which Segal J. dismissed their application for a worldwide freezing injunction over the assets of Trina Solar Limited ("the Company") and its subsidiaries up to a value of US$184,829,568. At the end of the hearing, we announced that we dismissed the appeal for reasons to be given later. These are my reasons.

2. The order was made in proceedings brought by the Company by way of petition seeking determination by the Court under section 238 of the Companies Law of the fair value of the Dissenting Shareholders' shares. Section 238 provides a mechanism for such a determination where shareholders have elected to dissent, as the Dissenting Shareholders have done, from a merger or consolidation of Cayman registered companies.

3. The application for a freezing injunction was made by summons dated 19 September 2017. It claimed also the appointment of receivers, and a disclosure order. The financial limit to be included in the freezing injunction was the difference between (a) the figure the Dissenting Shareholders said was the upper limit of the range suggested by their expert, Ms Rose Kehoe, as being the fair value of their shares (US$204,990,160) and (b) interim payments already made by the Company to the Dissenting Shareholders (US$20,150,592).

4. The interim payments, which represent the value of the Dissenting Shareholders' shares at the merger price, were paid only after other interlocutory hearings. The Company initially consented to making interim payments, but failed to do so in due time. Two days after payment should have been made, the Company applied to set aside the consent order and the Dissenting Shareholders presented a winding-up petition based on the failure to pay. The Company then applied to strike out the winding-up petition. The application to set aside the consent order was dismissed by Segal J.; and he subsequently struck out the winding-up petition after the Company had made the interim payments, awarding costs to the Dissenting Shareholders.

5. The Dissenting Shareholders' injunction application was based on the contention that the Company had entered into post-merger transactions which had had the effect of transferring away all its valuable assets, and that it intended to dispose of the proceeds of the transactions, with the result that the Company would be left with insufficient assets to satisfy the judgment that the Dissenting Shareholders were likely to obtain when the fair value of their shares was determined. The transfers were said to have been to related parties and to have been inconsistent with public statements made at the time of the merger. It was claimed that no adequate explanation had been given of the terms on which the transfers were made, so that the Court should draw the inference that they were not for full value. It was also contended that the failure to give an adequate explanation, and the interlocutory history, showed that the Company was attempting to avoid paying sums that were or would be properly due to the Dissenting Shareholders.

6. These contentions were summarised by the judge in paragraphs 27 to 31 of his judgment. In paragraph 32 and 33 he summarised the Company's response, which was in essence that it was engaging in a post-merger restructuring with a view to obtaining a listing in the

People's Republic of China ("the PRC") and that it would make a proper retention against the Dissenting Shareholders' claims. Reference should be made to these paragraphs for further detail.

7. In paragraph 34 of his judgment, the judge set out the principles governing the grant of a freezing order by reference to *Classroom Investments Inc v China Hospitals Inc and China Healthcare Inc* [2015] (1) CILR 451. The Court had to be satisfied that the applicant had a good arguable case for damages, that there was a real risk of dissipation of assets, and that there was reason to believe that the defendant's assets within the jurisdiction might be insufficient to meet the applicant's claims. He then, at paragraph 37, identified the following three issues: (a) had the Dissenting Shareholders demonstrated that they had a good arguable case that the fair value of their shares was above the merger price, and also (in order to justify the financial limit claimed) that the value was at the upper limit of their expert's valuation range? (b) had they demonstrated that there was a real risk of dissipation? and (c) had they demonstrated that it was just and convenient to grant the freezing injunction?

8. The judge's conclusions on those issues, as expressed in paragraph 38 of his judgment, were (a) that the Dissenting Shareholders had established a good arguable case that the fair value of their shares was above the merger price, but (b) had not established that there was a real risk of dissipation and unjustified conduct. If a real risk of dissipation had been established, then (c) the judge would have been prepared to grant a freezing injunction but not in an amount equal to the upper limit of the expert's valuation range. However, in all the circumstances it was not just and convenient or proportionate to grant the freezing injunction or the other relief sought by the Dissenting Shareholders. These conclusions were elaborated in subsequent paragraphs of the judgment, and I shall refer to them as necessary below.

9. The judge's main reason for refusing the injunction was, as I have indicated, that the Dissenting Shareholders had failed to discharge the burden that was on them of proving a real risk of dissipation. He dealt with this in paragraphs 51 to 67 of his judgment. He pointed out that the purpose of a freezing order was not to provide security for satisfaction of a judgment, but was to restrain disposals of assets that would have the effect of defeating or hindering enforcement of it and were unjustifiable as being otherwise than

for normal and proper commercial purposes. He identified the Dissenting Shareholders' concerns arising out of transactions entered into by the Company for the purpose of facilitating and preparing for relisting in the PRC of a new PRC-incorporated entity owned and managed by the PRC members of the Buyer Group, in particular (a) that transfers to insiders, and adjustments to the Company's relationship with its subsidiaries, had been or would be made otherwise than for proper value, to the prejudice of the Company; and (b) that the funds received by the Company in respect of the transactions would be distributed to its shareholders and related parties without retaining assets to satisfy a judgment obtained by the Dissenting Shareholders in the section 238 proceedings. He took the Dissenting Shareholders to be arguing that a failure to make at least a conservative provision and retention, perhaps in the full amount or a substantial proportion of the sum claimed, would be unjustifiable and improper conduct satisfying the real risk of dissipation test.

10. The judge noted that it was not until service of the Company's evidence after the end of the hearing that more than limited information had been provided about the transactions, the consideration payable under them and what the Company intended to do with the proceeds. The Dissenting Shareholders had invited the Court to draw adverse inferences from the failure to provide proper information, and to conclude that the transactions would be prejudicial to the Dissenting Shareholders. The judge categorised the Company's responses as unnecessarily cryptic and unhelpful, and said that the Company could and should have sought to allay the legitimate concerns raised by the Dissenting Shareholders. However, the Company had belatedly provided a proper response and the case had to be decided on the basis and in the light of the late evidence. The judge's ultimate conclusion, on the basis of that evidence, was that completing the post-merger restructuring would be justifiable if the Company received the proceeds, and that distribution of those proceeds would not be objectionable provided that proper provision was made against the Dissenting Shareholders' claims. On balance, the Company's late evidence did establish that the Company was adopting a proper approach to making provision against claims. Accordingly, as expressed in paragraph 68 of his judgment, the judge concluded that the Dissenting Shareholders had not established that there was a real risk that the Company's conduct in completing the restructuring and dealing with the proceeds of restructuring transactions paid to it would be unjustified. Finally, at paragraph 69, he said this:

"I consider that in the circumstances of this case it would not be just and convenient to grant the injunction. I have taken into account the impact of a freezing injunction on the Company and of not granting a freezing injunction on the Dissenting Shareholders. In my view the evidence demonstrates that while there is a risk for the Dissenting Shareholders, the Company is committed to retaining a substantial sum and making reasonable provision for its potential liability to the Dissenting Shareholders. Furthermore, if the directors behave improperly and act without reasonable care and later it turns out that the Company did retain insufficient funds they will be at risk of personal liability. This is not of course a complete answer to the need for a freezing injunction but a factor to be taken into account. I also accept the Company's evidence that there is no basis for concluding that the Buyer Group is anything other than reputable, has financial substance and will not wish to act in a manner that damages its business reputation. I have also considered the Company's evidence concerning the risk of prejudice and damage that the Company would be likely to suffer if a freezing injunction were granted. It seems to me that while the injunction is unlikely to operate in a manner that prevented the completion of the post-merger restructuring there is a real risk of reputational and credit damage and breaches of covenants and events of default that could adversely impact on the Company's financial position and the ability of the Buyer Group to complete the PRC listing."

11. Mr McGrath QC, for the Dissenting Shareholders, recognised that the appeal against the refusal of the injunction involved challenging the judge's exercise of a discretion. He did not criticise the judge's statement of the relevant principles, but contended that the judge had failed to apply them properly. In summary, his submissions were as follows:

    (a) The judge had found that the Dissenting Shareholders had a good arguable case that the fair value of their shares would fall within the range specified by their expert, Ms Kehoe.

    (b) Whether or not the Company's transfer out of its control of its subsidiaries amounted to a dissipation of assets, the Company's intended distribution of the consideration it received from the restructuring transactions was not an ordinary commercial transaction

and would have the effect of defeating the Dissenting Shareholders' claims or making them harder to enforce.

(c) The judge should have recognised that distributing the proceeds would be a dissipation of assets, and should have granted the injunction accordingly, as he had said in paragraph 38 of his judgment he would have done had he considered there to be a real risk of dissipation.

(d) The only reason that he did not do that was because he accepted that the Company would make proper provision against its debts, including reasonable provision in respect of the Dissenting Shareholders' claims. However, the Company had made it clear that it would not make provision even at the bottom end of Ms Kehoe's valuation range; and, since the judge had determined that the Dissenting Shareholders had a good arguable case that the value of their shares was within that range, he could not properly have been satisfied that the making of provision would prevent there being an unjustifiable dissipation. Moreover, the judge should not have attached any weight to the Company's evidence about making provision, because it was provided after the end of the hearing without the Dissenting Shareholders having a proper opportunity to answer it and lacked clarity and openness, and because the Company's conduct in the litigation, in particular its attempt to avoid making interim payments, indicated that it would try to avoid meeting the Dissenting Shareholders' claims by any means possible.

12. In dealing with these submissions, the first question to consider is whether the judge concluded that the Dissenting Shareholders had a good arguable case that the value of the shares fell within the valuation range identified by Ms Kehoe, or merely that they had a good arguable case that the fair value was greater than the merger price. Certain parts of his judgment suggest the latter, notably in his formulation of the issues and in paragraph 38: there, he says that he accepts "*that the Dissenting Shareholders have, on balance, established a good arguable case (and therefore crossed the jurisdictional threshold by showing to the requisite standard) that the fair value of their shares is at least above the merger price*". However, that paragraph is merely a summary of the judge's conclusions, and it is necessary to look to the subsequent parts of the judgment in which he dealt with Ms Kehoe's evidence.

13. Her report, which she acknowledged was based primarily on publicly available evidence and was preliminary only, valued the Company's American Depository Shares ("ADSs") at between US$59.55 and US$117.77 each. The merger price was US$11.60 per ADS, so that Ms Kehoe's range was between roughly five and ten times the merger price. The judge discussed her evidence, and that of the Company's expert Mr Scott Davidson, who valued the shares at US$8.97 per ADS, in paragraphs 11 to 26 of his judgment, and again between paragraphs 42 and 50. In the course of that discussion, he recorded the Company's evidence (a) that the Dissenting Shareholders would have paid between US$9.06 and US$10.46 for their shares, making a total acquisition cost of between US$15,738,307 and US$18,170,275, so that on Ms Kehoe's valuation those shares would have increased over a period no longer than two and a half months to as much as US$204,980,160; (b) that since Ms Kehoe's report was based largely on publicly available information, other investors would have been as well placed as she to consider that the merger price was greatly undervalued if that were indeed the case; but (c) since the Buyer Group promoting the merger did not have enough shares to force through the merger at whatever price suited them, a majority of largely institutional investors would have had to be satisfied with the price; and (d) that the merger price was approximately 21.5% above the closing price of the Company's ADSs on the last day of trading unaffected by the merger. His conclusion, expressly informed by the need to avoid attempting to resolve conflicts of evidence at an interlocutory stage, was expressed as follows in paragraphs 48 and 49:

> "*48. The Dissenting Shareholders have the burden of proof on this point and I focus in particular on Ms Kehoe's valuation. It seems to me, taking into account the explanations and analysis provided in Ms Kehoe's Report, the challenges made by Mr Davidson and Ms Kehoe's responses in her Second Affirmation, that Ms Kehoe's valuation is more than barely capable of serious argument. The Court cannot at this stage conclude that Ms Kehoe's analysis supporting her valuation range is less than seriously arguable or that it is less than barely arguable that she will be able to show that her valuation is reliable and to be preferred. She has based her adjustments to the merger price and the Citigroup fair value analysis, and set out a cogent and reasoned*

case by reference to recognised valuation methodologies supported in the literature. In my view the criticisms and challenges made by Mr Davidson are serious and in some areas powerful (for example in relation to the need to use a size premium and for an adjustment to reflect the fact that the Company has not factored in a country risk premium) but they do not at this stage demonstrate that he has the better of the argument on all or most of the critical issues in dispute or that Ms Kehoe's analysis is only barely capable of serious argument. It seems to me that Ms Kehoe has established that there is a case (and provided credible and cogent reasons) for saying in particular (recognising that she identifies a number of other important adjustments) that downward adjustments to manufacturing capex, increases to the available working capital and an increase in the growth rate are needed and that there are grounds for concluding that the level of redundant cash may justify a further upwards adjustment to the valuation.

49. What is more difficult is the likelihood that Ms Kehoe will be able to establish that a valuation above the lower end of her valuation range is more than barely arguable. Her valuation does result in a very substantial increase in value over the merger price and it seems to me that Mr Davidson's reasons for suggesting that such a huge difference is inherently unlikely have considerable weight as do his concerns that where value is based and dependent on assumptions made in respect of the terminal period it is much more risky and should be given less weight. But it seems to me that on balance these issues do not prevent the Dissenting Shareholders from crossing the jurisdictional threshold of a good arguable case in the range of Ms Kehoe's valuation but they would need to be taken into account and given suitable weight in the exercise of my discretion and the determination of the amount for which a freezing injunction should be granted."

14. It seems to me clear from the penultimate sentence of that quotation that the judge did hold that the Dissenting Shareholders had established a good arguable case "*in the range of Ms Kehoe's valuation*". On the face of it, therefore, the Dissenting Shareholders are

able to say that they were entitled to protection from dissipation by the Company of its assets below the bottom of the valuation range. But that fails to take into account the judge's remarks about the exercise of his discretion. What he was saying was that the Dissenting Shareholders had crossed the "*jurisdictional threshold*" (a concept he used at least four times) so as to be entitled to ask for the grant of an injunction in the amount they sought; but whether an injunction should be granted, and if so in what amount, was a matter for the judge's discretion taking into account all relevant factors, including the problems with Ms Kehoe's evidence.

15. Between paragraphs 50 and 67 of his judgment the judge dealt with the question whether there was a real risk of dissipation; and these paragraphs give a clear indication of the way in which he reconciled his finding that there was a good arguable case on Ms Kehoe's valuation range with the fact that the Company had said in terms that it was not intending to make provision in an amount falling within that range. At paragraph 59 he concluded that the Company had established that the restructuring transactions were not undertaken for less than proper consideration or on terms that were improper or prejudicial to the Company. In paragraph 60 he noted that the Company was planning to make distributions and pay away the consideration or other funds it received, subject to retaining a substantial sum which represented what the Company considered to be a reasonable estimate of the liability which it might have in the section 238 proceedings; and in paragraph 61 he posed the question whether this approach and the making of distributions were to be treated as unjustifiable. As to completion of the post-merger restructuring, his answer (in paragraph 62) was that it was justifiable so long as it was done on terms that meant that the Company actually received fair value for its assets; and as to the making of distributions, his answer (in paragraph 63) was that they were justifiable if the Company would normally make distributions out of surplus cash, since the shareholders could make more effective use of the money than the Company could and leaving excess funds in the Company made no commercial sense and would be unusual. The crux of his decision is contained in paragraphs 64 to 66, which I set out in full.

> "*64. But if distributions can be said to be normal and for proper commercial purposes of the Company what is a proper provision that should be made? As I have said, in view of the nature of distributions there is a need to show that they are legitimate in the circumstances and that requires that the amount of the distribution properly and fairly takes*

into account the real risk and a realistic assessment of the defendant's potential liability. It seems to me that a proper provision need not necessarily be the full amount claimed by the claimant in the litigation provided that the provision is reasonable and prudent having regard to an assessment of the merits of the claim made after taking advice from legal and valuation advisers and forming a balanced and cautious view of the risks of the litigation. I would add that it also seems to me that a failure to undertake such an analysis and to make distributions without making proper provision is likely to result in a breach of duty by the directors. If the Company were to take or be contemplating action which would involve a breach of duty by its directors that would be another reason for saying that the action was improper and unjustified. Of course where a company is balance sheet solvent and creditors' interests are not at risk, the shareholders can ratify the directors' actions and breaches of duty but if there is a material risk that as a result of the directors' actions (in this case involving the making of distributions) creditors are put at risk (because the distributions will leave the Company with insufficient funds to pay creditors in full) the directors when deciding whether to take the action must take into account and have regard to the interests of creditors and the shareholders would be unable to ratify and release the directors from any breach of duty.

65. *Paragraphs 9 and 10 of Mr Chan's Third Affidavit while incomplete do confirm that the Company's directors are basing their provisioning on its valuation and legal advice and that a "substantial sum" will be retained and not distributed until all contingencies are resolved (Mr Chan says that contingencies for this purpose include any judgment debt that might be payable to the Dissenting Shareholders). He explains the reasons why the Company is not intending to retain a sum in the valuation range provided by Ms Kehoe. These are that the Company's advice is that the merger price represents fair value and that there is "no prospect" of the Dissenting Shareholders establishing at trial that the fair value is within Ms Kehoe's valuation range; that the Company has only recently been made aware of the amount*

claimed by the Dissenting Shareholders and that freezing between US$80-186 million makes no commercial sense and could not be justified to shareholders.

66. *Some parts of Mr Chan's evidence are troubling. I have held that the Company's advice as described by Mr Chan is wrong as I do not consider that it can be said that the Dissenting Shareholders have no prospect of succeeding at an amount within Ms Kehoe's valuation range. Furthermore, to the extent that Mr Chan is suggesting that it would always be commercially unacceptable to have to retain between US$80-186 million no matter what the proper and prudent provision for the Company's potential liability was, he would be wrong. But I take him only to be saying that in light of the advice received by the Company such a retention would be unjustifiable. Nonetheless I have concluded that on balance (recognising that in view of the incomplete nature of the Company's explanations the balance is quite close) Mr Chan's evidence does show that the Company is adopting a proper approach and basing their retention on a careful assessment of the Company's potential liability based on legal and valuation advice. It is not clear that the Company's estimate is in all respects based on the balanced and prudent approach which seems to me to be required but I am not, on the evidence, prepared to conclude that the Company is adopting an improper or unjustified approach. No doubt the Company's directors are being advised as to their duties in the current situation and the risks which they will assume if the provisioning exercise is not properly conducted and the interests of creditors are not properly taken into account and they may well be advised to take into account the conclusions reached and points made in this judgment when determining the precise amount of the retention for the future."*

16. In my judgment, the judge was entitled to adopt this approach and reach the conclusions he did. In particular, I consider that he was entitled to hold that a failure to make provision for an amount that fell within Ms Kehoe's valuation range did not demonstrate a real risk of dissipation even though he had found that there was a good arguable case for that range. As the judge recognised at various points in his judgment, notably in paragraph 47, a good

arguable case means a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success. Such a case enables an applicant to overcome the initial obstacle to obtaining injunctive relief; but that does not mean that the judge must thereafter ignore obvious difficulties with the case. It is of course true that often, perhaps ordinarily, a judge will be in no position at the interlocutory stage to make an assessment of the facts beyond whether or not there is a good arguable case. But in the present case, there were plain and obvious problems with Ms Kehoe's evidence: the judge identified the majority of them in paragraphs 48 and 49 of his judgment, which I have set out above, and in paragraph 70 he said: "*While I have been satisfied that Ms Kehoe's valuation and valuation analysis satisfies the good arguable case threshold, I do accept that the failure to provide a narrower range does weaken its weight and raise doubts as to its reliability*". In reality, the primary difficulty concerning Ms Kehoe's evidence was that it was based (as is often the case in a section 238 case) on a discounted cash flow calculation that produced a result for the overall value of the Company vastly greater than that produced both by the merger price and by the unaffected market capitalisation. In many cases, the merger price will itself be suspect, since a merger will often be promoted by, and the price fixed by, a buyer group that has the voting power to force through the merger. Again, the market price will seldom be regarded as indicative of the fair value of the shares in a section 238 case, not least because all the shares will be trading at a discount. However, in the present case, the Buyer Group did not have the ability to force through the merger; indeed, more than 90% of the shares were held by institutional investors, and it is striking that they or a majority of them regarded the merger price as acceptable. Moreover, the merger price represented an uplift of over 20% above the unaffected market price, which is likely to more than offset any discount. These two factors, leaving all else aside, suggested very strongly that, whilst Ms Kehoe's methodology might be sound, her outcome was likely to be overstated. Faced with these factors, in essence the judge was saying that, whilst he could not rule out the possibility that the fair value fell within Ms Kehoe's valuation range, he considered it to be unlikely.

17. In those circumstances, I consider that the judge was entitled to take the view that it was for the Company to determine what amounts it should properly retain by way of provision against the Dissenting Shareholders' claims. As he said in paragraph 72:

> " *This is a case in which the Company is a large global corporation which following a statutory merger is in the process of preparing for a PRC listing for good and proper commercial reasons. It is engaged in hostile section 238 proceedings which at present remain at an early stage so that proper expert valuations to validate or challenge the merger price are not yet available. While the Company must take proper account of and make a suitable provision based on proper estimates of its potential liability it seems to me that in the circumstances it would be disproportionate and unjust to require the Company to make a provision and freeze funds (or assets) in a sum which is within a range for fair value determined by a valuer on the basis only of a preliminary desk top valuation, where there are serious questions as to the reliability of the valuation (even if it can be said to make out a good arguable case) and which is against the considered advice of its own legal and valuation advisors.*"

18. I would, however, emphasise, as did the judge (primarily in paragraphs 64 and 69), that the provision to be made must be proper. That means that the risk that the fair value ultimately awarded to the Dissenting Shareholders will substantially exceed the merger price must be fully taken into account, and the general approach must be balanced and cautious and formulated after taking full financial and legal advice. The judge was also right to remark that the terms of his judgment should be carefully considered when a decision on provision is taken. The whole of the judge's decision is premised on an acceptance that the Company will, despite its resentment of and hostility to the Dissenting Shareholders' claims, act reasonably, responsibly and in good faith when deciding what retention should properly be made against the section 238 claim. If any of the foundations of that premise turn out to be misplaced, the points made by the judge about directors' duties – and, I would add, similar points about the duties owed by financial and legal advisers – will assume real importance.

19. Two further points remain to be addressed. First, the Dissenting Shareholders contended that the judge should not have accepted that the Company's evidence about providing against liabilities could be relied on, in view of the Company's late acceptance of the need to make provision, the general imprecision of its evidence, and its conduct at the interlocutory stages of the litigation. In my judgment, it was a matter well within the ambit

of the judge's discretion to determine what reliance he could place on the evidence. He had dealt with the earlier interlocutory disputes, and was well placed to identify to what extent the Company's conduct cast doubt upon its bona fides. There was an obvious reason why the Company might not wish to give a hostage to fortune by identifying the value it put on the Dissenting Shareholders' claims. He considered these matters carefully in paragraph 67 of his judgment (and to an extent also in paragraph 55), and concluded that the Company's conduct did not demonstrate that all its actions in response or in respect to the proceedings were and must be treated as improper and unjustifiable. He concluded also that he could reasonably rely upon the Company's evidence. No sufficient reason has been advanced as to why we should, or indeed are entitled to ignore his conclusions on these matters.

20. The second point concerns the judge's reliance upon evidence about making provision that was provided by the Company only after the conclusion of the hearing, and without any formal opportunity being given to the Dissenting Shareholders to answer it. That evidence consisted of the third affidavit of Shuion Chan, which was filed with the permission of the judge in order to allow the Company "*to provide further written details and a confirmation of or to adduce further evidence as to the terms governing the restructuring transactions and the conduct said to amount to dissipation about which the Dissenting Shareholders complained*". Although Mr Chan did deal with those matters, he went further – in particular in relation to the making of provision against debts, which had not previously been mentioned by the Company. It would in my view have been preferable for the judge to have provided a formal opportunity for the Dissenting Shareholders to answer Mr Chan's evidence before relying on it for the purposes of his judgment. However, it is possible that he realised that, if the Dissenting Shareholders had anything they wished to say, they would say it whether or not formal permission had been granted; and indeed that is what happened. On 9 October 2017 Walkers, acting for the Dissenting Shareholders, wrote directly to the Court about a number of matters, including Mr Chan's third affidavit. In relation to the making of provision, the letter said this:

> " *Paragraphs 9 and 10 of Chan 3 now claim that the Company has made a provision for a judgment in our clients' favour. That assertion is contrary to all of the correspondence provided by Harneys to date and indeed the way in which the case was put at the Hearing when Ms Newman QC*

submitted that it was entirely reasonable that the Company had made no provision.

Throughout the Company's skeleton argument (see, for example, paragraph 16), it is asserted that the merger price should be considered fair because apparently it was acceptable to "so many independent and professional investor shareholders", which suggests that the Company continued to have no intention of making any provision. There is no explanation given for this sudden volte face, let alone, when and by whom the decision was made to establish a provision.

The only quantitative information that Mr Chan does provide about the amount of the purported provision is to confirm categorically that on the Company's own case the provision is below the bottom of Ms Kehoe's range as Mr Chan states at paragraph 10: "However, the sum that has been provisioned is not in the range of 5x to 10x multiple put forward by Ms Kehoe". Our clients have already demonstrated that there is a good arguable case for all numbers within Ms Kehoe's range.

The Court should place little, if any, weight on the claims made by Mr Chan as regards the alleged provision. It is notable that the amount of the provision is not stated, nor is any evidence exhibited confirming that a provision has in fact been made. This is merely another bare assertion by Mr Chan with no supporting evidence."

21. It is common ground that the judge read this letter before he released his judgment. It is the case that the letter does not seek to put forward independent facts in answer to what Mr Chan says, but that appears to be because the Dissenting Shareholders have no such facts to put forward. In connection with this appeal, they sought to adduce further evidence from a Mr Jain, which we read although in the event no formal application was made to adduce it in evidence. What is observable, however, is that although Mr Jain talks of the possibility that no consideration may under PRC law ever be paid at all, and of the difficulty in pursuing a judgment in the PRC, he does not seek to challenge the facts set out in Mr Chan's third affidavit. The furthest he goes is to indicate how provision was dealt with in another of the section 238 cases currently before the Cayman courts. In the circumstances, there was no injustice to the Dissenting Shareholders in the judge's reliance upon what Mr Chan had said about the making of provision.

22. For these reasons, it seems to me that the judge was entitled to exercise his discretion as he did, and the challenge to his decision fails.

23. For the sake of completeness, I should record that I have not thought it necessary to deal with the respondent's notice filed by the Company, or to give separate consideration to the Dissenting Shareholders' applications for the appointment of receivers and for disclosure, which stand or fall with the injunction.

NEWMAN JA:

I agree.

MOSES JA:

I also agree.