IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 32 OF 2019 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2018 REVISION)

AND IN THE MATTER OF IKANG HEALTHCARE GROUP, INC.

BETWEEN:

IKANG HEALTHCARE GROUP, INC.

Petitioner

AND

(1) BLACKWELL PARTNERS LLC – SERIES A
(2) CORBIN HEDGED EQUITY FUND, LP
(3) CORBIN ERISA OPPORTUNITY FUND, LTD
(4) CORBIN OPPORTUNITY FUND, LP
(5) FOURWORLD EVENT OPPORTUNITIES, LP
(6) FOURWORLD SPECIAL OPPORTUNITIES FUND LLC
(7) KEVIN X LU
(8) LAMMA FUND
(9) LANTAU FUND
(10) MASO CAPITAL ARBITRAGE FUND LIMITED
(11) MASO CAPITAL INVESTMENTS LIMITED
(12) STAR V PARTNERS LLC
(13) S2 HOLDINGS

Respondents

HEADNOTE

Section 238(11) of the Companies Act (2018 Revision) – determining the fair rate of interest following the Court's decision as to the fair value amount – the proper approach to determining the Prudent Investor Rate – the nature of the objective test to be applied – the approach in the Delaware jurisprudence considered in detail and whether that approach should be followed with or without modification in this jurisdiction – the asset allocation and returns to be assumed for the purpose of determining the Prudent Investor Rate – liability for the costs of the main section 238 proceedings

Before:	**The Hon. Justice Segal**
Appearances:	**Ms Camilla Bingham KC, instructed by Ms Anya Allen and Ms Catie Wang of Harneys for the Petitioner**
	Mr Barry Isaacs KC, instructed by Mr Andrew Jackson and Ms Charlotte Walker of Appleby and Mr Shaun Maloney and Ms Farrah Sbaiti of Ogier for the Dissenting Shareholders
Heard:	**24-25 June 2024**
Further submissions on Delaware law:	**26 July 2024**
Draft judgment Circulated:	**5 September 2024**
Judgment delivered:	**11 September 2024**

JUDGMENT

Introduction

1. This is the hearing, listed pursuant to a consent order dated 7 February 2024, to determine the following three matters consequential upon my judgment dated 21 June 2013 (the ***Judgment***):

   (a). the fair rate of interest pursuant to section 238(11) of the Companies Act (2018 Revision) (the ***Act***).

   (b). the period or periods in respect of which interest has accrued.

   (c). the costs order to be made.

2. The background to the proceedings and my decision are set out in the Judgment (and I use in this judgment the definitions adopted in the Judgment). The following facts and matters are relevant to the issues now arising:

(a). the Company was privatised by way of a merger at a price of US$41.20 per share which was approved at an EGM held on 20 August 2018 and which became effective on 18 January 2019.

(b). the Dissenting Shareholders are former shareholders in the Company who dissented from the merger. I refer to all the respondents as the Dissenting Shareholders although Mr Kevin Lu, the Seventh Respondent, has not participated or been represented in these proceedings.

(c). on 25 January 2019 (the ***Offer Date***) the Company made written offers to the Dissenting Shareholders to purchase their shares at the merger price, pursuant to section 238(8) of the Act.

(d). interim payments based on the merger price (the ***Interim Payments***) were made to the Dissenting Shareholders in respect of their shares on dates in February and April 2019 (the ***Interim Payment Dates***).

(e). on 21 June 2023, the Judgment was handed down. Based on the Judgment the fair value of the Dissenting Shareholders' shares (as at 20 August 2018) was calculated by the parties' valuation experts to be US$45.074 per share.

(f). at the trial, the Company had contended that the fair value of the Dissenting Shareholders' shares was US$38.42 per share while the Dissenting Shareholders had argued that the fair value was US$65.16 (and US$64.43).

(g). the Company made further payments (the ***Final Payments***) to the Dissenting Shareholders equal to the outstanding balance of the fair value due to them on dates in January and February 2024 (the ***Final Payments Dates***).

3. The periods in respect of which interest has accrued having been agreed, I have decided as follows:

(a). the Prudent Investor Rate should be calculated based on an asset allocation of 45% equities, 45% bonds and 10% cash to be applied in both the first period and the second period (see [96] below).

(b). for the purpose of determining the returns on those assets, Mr Good's data and methodology should be used (see [96(e)] below).

(c). the Company must pay 85% of the Dissenting Shareholders' costs to be taxed on the standard basis if not agreed (see [123] below).

4. I shall invite the parties and their experts to agree the interest calculation based on these decisions and to seek to agree the costs order to be made in relation to this application. If they are unable to reach agreement on any of these matters, the parties should file brief written submissions within 21 days of the date of this judgment setting out the issues in dispute and their submissions on each and I shall deal with the matter on the papers.

The fair rate of interest

The issues

5. Further expert evidence has been adduced by the parties in relation to the fair rate of interest issue. Two reports were filed by Mr Nicholas Good (***Good 1*** and ***Good 2***) on behalf of the Company and two reports were filed by Mr Braden Billiet (***Billiet 1*** and ***Billiet 2***) on behalf of the Dissenting Shareholders. The first reports were dated 25 April 2024 while the second and responsive reports were dated 6 June 2024. Both experts were cross-examined at the hearing.

6. As regards the fair rate of interest:

(a). the mid-point approach has been adopted by both Mr Billiet and Mr Good in estimating the fair rate of interest.

(b). under the mid-point approach, the fair rate of interest is taken to be the mid-point between the Company Borrowing Rate and the Prudent Investor Rate.

(c). the Company Borrowing Rate is the rate at which the Company could have borrowed the amount representing the fair value of the Dissenting Shareholders' shares during the relevant period (or periods).

(d). the parties have agreed the amount of interest payable in respect of the Company Borrowing Rate in the aggregate sum of US$2,546,224.

(e). the parties (and the experts) have agreed the periods in relation to which interest has accrued (following the approach adopted in previous cases). These periods are as follows. In relation to the Initial Payments, the period between the Offer Date and the Interim Payment Dates. In relation to the Final Payments, the period between the Offer Date and the Final Payment Dates.

(f) the basis on which the Prudent Investor Rate is to be determined is in dispute. Put neutrally for the purpose of this summary it is the rate of return which a prudent investor could have obtained if he/she had invested the amount of the fair value of their shares at the relevant time for the relevant period (or periods).

(g). there are a number of disputes regarding what, as a matter of law, is meant and covered by the reference to prudent investor and also, as a matter of fact, what is the most appropriate methodology and data to be used for the purpose of calculating the Prudent Investor Rate in this case.

7. At the hearing I pointed out that in the previous cases in this jurisdiction there had only been a limited analysis of the implications of treating the prudent investor standard as involving an objective test and no detailed review of what the Delaware cases had said about why an objective test was adopted and precisely what this involved. I said that it seemed to me that the parties' positions in this case now raised directly the question of what the objective nature of the test required (and indirectly why an objective test was justified) and that in order to decide this case I really needed to see what the Delaware cases had said on the nature and content of the prudent investor standard and its objective aspects. I invited the parties, and the parties agreed, to prepare and file after the hearing, supplemental submissions dealing with three issues:

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(a). what do the Delaware cases say about the meaning to be given in Delaware law, before the 2007 amendments, to a "*prudent investor*" or the "*prudent investor basis*" for the purposes of the midpoint calculation when considering the award of the fair rate of interest under section 262 of the Delaware General Corporations Law (the ***DGCL***)?

(b). in particular, to what extent, if at all, did Delaware law (at that time) require or permit a court to categorise particular investors and to have regard to their position or their characteristics?

(c). alternatively, is it the case that the approach taken in Delaware law (at that time) to the meaning of "*prudent investor*" or "*prudent investor basis*" was independent of and without reference to the position and characteristics of the particular dissenting shareholders?

8. A directions order was made on 8 July 2024 to provide for these further submissions.

9. At the hearing I also pointed out that for the purpose of the trial in these proceedings I had directed that Delaware case law should only be cited if supported by expert testimony because the Court needed to be satisfied that the case law being cited was comprehensive and up to date and for this purpose needed a Delaware qualified attorney to confirm that this was the case (it was unsatisfactory in my view to have English and Cayman qualified attorneys citing in submissions the Delaware authorities without any support and confirmation as to the Delaware law position from a Delaware qualified attorney). This had not been intended to prevent the citation of Delaware cases but merely to ensure that the citations were properly validated. I said that for the purpose of the further submissions on these three issues I would want to see that they had been approved by a Delaware qualified attorney but would not require expert reports. The directions order therefore provided that the further written submissions would be prepared in the name of the parties' Cayman Islands attorneys and accompanied by a brief statement from a qualified Delaware lawyer confirming the nature and extent of their involvement in the preparation of the submissions.

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10. In accordance with the agreed timetable, on 26 July 2024 the Company and the Dissenting Shareholders simultaneously filed their further written submissions with bundles of relevant Delaware authorities. The Company's submissions were accompanied by a statement from Professor Lawrence A Hamermesh, a qualified Delaware lawyer, confirming that he assisted with research for, and had reviewed and provided comments on, the submissions and that he was satisfied that the submissions accurately reflected applicable Delaware law. The Dissenting Shareholders' submissions were accompanied by a statement from Mr Richard Murphy, a partner in the well-known Delaware law firm of Richards, Layton & Finger, that he had collected and conducted a full review of the relevant Delaware law and authorities, with assistance from colleagues at his firm, and had provided comments on the submissions when in draft and then reviewed them and had reviewed the submissions in their final form, and was satisfied that they accurately reflected Delaware law.

Mr Billiet's opinion

11. Mr Billiet noted that a number of the Cayman authorities had referred to "*prudent investors in the position of the dissenting shareholders*" and took the view that this meant that when determining the risk appetite and investment strategy of the prudent investor it was permissible (and necessary) for the valuation expert to take into account what approach a hypothetical investor with the general characteristics of the Dissenting Shareholders would adopt. In his opinion the Dissenting Shareholders (save for Mr Lu) were to be categorised as hedge funds. He therefore assessed the returns available to a prudent investor by reference to a hypothetical prudent hedge fund investor.

12. In his opinion, supported by various articles he cited, hedge funds are a sophisticated type of institutional investor which generally seek to enhance returns through leverage and to manage risk through the positions they take. He considered that they generally deliver more consistent returns with lower volatility than traditional investors and have a track record of mitigating losses during periods of market stress. Mr Billiet assumed that a prudent hedge fund was one that would take a medium level of risk in the context of its usual investment strategies.

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13. Mr Billiet considered that an asset allocation of 60% equities, 35% bonds and 5% cash was appropriate for such a prudent hedge fund investor. This view was based on the recommended asset allocations for portfolios of several of the world's largest asset managers that allow for growth while controlling risk. He also took into account, based on the data he relied on, the fact that the returns on equities were relatively high, and bond returns were relatively low, over the period from January 2019 to February 2024. A hedge fund investor, in his opinion, would be expected to react to market conditions such as these in setting its asset allocation.

14. To determine the returns that would be made on this portfolio of equites and bonds Mr Billiet reviewed and relied on the returns of certain exchange traded funds (***ETFs***) for the period from the Offer Date to 21 February 2024. For equities, he considered the returns of four ETFs and decided to rely on the returns produced by one of them (iShares MSCI World ETF) which was lower than the average returns across the four ETFs, on the basis that it reflected a broadly diversified equity investment across global markets. Mr Billiet pointed out that this ETF had been used by the Court in *Re Qunar Cayman Islands Ltd* (unreported, 29 March 2021, Parker J) (***Qunar***) and *Re Trina Solar Ltd* (unreported, 8 December 2021, a judgment of mine) (***Trina***). For bonds, he reviewed the returns on five ETFs including the iShares iBoxx $ High Yield Corporate Bond ETF (***iBoxx High Yield***). But he relied on average returns of three of them, including iBoxx High Yield. He considered that these reflected a broadly diversified investment in bonds including both corporate and government bonds in the US and non-US markets. Mr Billiet included iBoxx High Yield on the basis that it was an appropriate reference point in this case because a hedge fund investor was likely to hold both investment-grade and high-yield bonds although he noted that the investment in bonds was still assumed to be predominantly investment grade corporate bonds and government bonds. He pointed out that the other two ETFs had also been used by the Court in *Qunar* and *Trina Solar*.

15. Mr Billiet's conclusion on the fair rate of interest was as follows:

    (a). in the period from the Offer Date to 26 February 2019, the Company Borrowing Rate was 5.84% and the Prudent Investor rate was 38.62%, giving a mid-point of 22.23%.

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(b). in the period from the Offer Date to 29 April 2019, the Company Borrowing Rate was 5.84% and the Prudent Investor rate was 26.67%, giving a mid-point of 16.25%.

(c). in the period from the Offer Date to 19 January 2024, the Company Borrowing Rate was 5.36% and the Prudent Investor rate was 9.67%, giving a mid-point of 7.51%.

(d). in the period from the Offer Date to 22 January 2024, the Company Borrowing Rate was 5.36% and the Prudent Investor rate was 9.71%, giving a mid-point of 7.53%.

(e). in the period from the Offer Date to 6 February 2024, the Company Borrowing Rate was 5.36% and the Prudent Investor rate was 10.03%, giving a mid-point of 7.70%.

(f). in the period from the Offer Date to 21 February 2024, the Company Borrowing Rate was 5.36% and the Prudent Investor rate was 10.11%, giving a mid-point of 7.73%.

Mr Good's opinion

16. Mr Good (in Good 1 at [4.2.3]) took a different approach to the meaning of the Prudent Investor Rate. He defined it as being the rate "*which reflects the amount of interest that the [Dissenting Shareholders], investing prudently, may have earned on the [fair value amount] during the [relevant interest periods] had they been able to invest [the fair value amount] at the start of the [relevant interest periods]*". In Good 2, having seen Billiet 1, he explained (at [3.2.5]) that he had taken the reference to prudent investor to mean "*a general investor (whether retail or institutional) that takes some degree of risk, although is careful and cautious such that its risk appetite is lower than the average investor. My approach results in a Prudent Investor Rate that is intended to be applied to any dissenter, whether a hedge fund or individual investor*". He said that he had been instructed by the Company's attorneys that the assessment of the Prudent Investor Rate and the Dissenting Shareholders' opportunity cost was, as a matter of law, based on an

objective standard so that it was inappropriate to have regard to the specific risk appetites of the Dissenting Shareholders. In response to Mr Billiet's approach, in addition to saying that he considered it to be inconsistent with the methodology which the law required to be adopted, Mr Good said (at [3.2.9] of Good 2) that he was unable to "*generalise as to a hypothetical hedge fund investor, its risk appetite, and therefore how it might seek to invest prudently in the context of the Prudent Investor Rate*". He said that hedge funds, as Mr Billiet had acknowledged, were not a homogenous group and their returns varied across strategies and individual funds. He also noted that his approach applied the same standard to any dissenting shareholder and avoided the additional costs and complexity that would flow from having to distinguish between different types of dissenting shareholders (as would be the case here because Mr Lu clearly could not be treated as a hedge fund). Furthermore, he said, he had not been given any documentation by the Dissenting Shareholders which established their status and enabled him to decide how they should be categorised.

17. Mr Good noted that it was unclear from the case law whether the asset allocation to be adopted should take account of the fact that interim payments had been made. The effect of the interim payments was that there were two different periods during which the Dissenting Shareholders had been kept out of their money. The first period ran from the Offer Date to the Interim Payment Dates and was relatively short (being between one and three months). The second period ran from the Offer Date to the Final Payment Dates and was considerably longer (being approximately five years).

18. If the proper approach required that the prudent investor be treated as having lost the opportunity to invest the full fair value amount in and for the first period and the second period separately, it would follow that the asset allocation should take into account the short-term nature of the investment in the first period. The prudent investor would need to consider (or be treated as having to consider) what asset allocation was appropriate for an investment of only a few months. The view of the prudent investor as to what assets to invest in was necessarily informed by the time period of the investment. It was highly risky and speculative to invest in equities or bonds in a short term investment given that returns on such investments are highly volatile and could go down in the short term even though it would be reasonable to anticipate an overall positive return in the long-term (the upside achieved in the longer term would enure to the investor's benefit if he/she

was prepared to hold on to the investment for a sufficiently long period). Mr Good considered that under such an approach (following what he labelled a short-term view) it would be appropriate for the asset portfolio for the first period to include the types of assets which would likely commend themselves to a prudent investor embarking on a very short-term investment. In his view, such an investor would not adopt an asset allocation strategy appropriate to a medium/long term investment but rather was likely to hold 100% cash.

19. If, however, the proper approach required that the prudent investor be treated as having lost the opportunity to invest the full fair value amount on the Offer Date for an optimal time period (or at least for the period until the section 238 proceedings had been or were expected to be concluded) then, following what Mr Good labelled the long-term view, the asset allocation (even for the first period) should reflect what assets a prudent investor would invest in over the long term. The prudent investor would then be treated as having received (or as having been entitled to receive) the full fair value of his/her shares on the Offer Date and as being able to invest that sum for a sufficiently long period to optimise and maximise returns. Mr Good considered that for this purpose an asset allocation of 40% equities, 45% bonds and 15% cash was appropriate. He followed the asset allocation that had been adopted and accepted by the Court in both *Qunar* and *Trina*. He noted that in *Trina* I had found at [44(b)(iv)] that (on the basis of the evidence in that case) an asset allocation of 40% equities, 45% bonds and 15% cash "*properly reflects the asset mixes that are commonly used by leading fund managers for moderately conservative portfolios, which is appropriate as a measure of what a prudent investor in the position of the Dissenting Shareholders was likely to adopt, even in the context of section 238 proceedings*". He also noted that many of the Dissenting Shareholders in this case were also dissenters in *Qunar* and *Trina Solar.* Furthermore, he noted that data collected by the Thinking Ahead Institute (based on data from 191 asset managers) showed that the average asset allocation for asset managers between 2018-2022 was approximately 50% equities, 40% bonds and 10% cash. Accordingly, the asset allocation adopted in *Qunar* and *Trina Solar*, which Mr Good had followed, was broadly aligned with the Thinking Ahead Institute data.

20. As regards the second period, Mr Good considered that it was on both approaches he had identified appropriate to adopt the long-term view and so he once again used an asset allocation of 40% equities, 45% bonds and 15% cash.

21. To determine the returns that would be made on the equites in this portfolio Mr Good reviewed the returns of eight ETFs that predominantly comprise equities. These included the five largest ETFs by dollar volume and three ETFs that had been referred to in the evidence and in my judgment in *Re Shanda Games* (unreported, 16 May 2017) (***Shanda -GC***). However, he excluded one of those ETFs from further consideration because including it would, in his opinion, result in placing undue emphasis on the returns of companies in the S&P 500 Index which were already tracked by two of the other ETFs he had selected. He then used the simple average cumulative returns for the remaining seven ETFs.

22. As regards bonds, Mr Good considered the returns of four ETFs that primarily comprise bonds. Once again, he selected the two largest ETFs by dollar volume and two additional ETFs that had been referred to in the evidence and judgment in *Shanda-GC*. He then used the simple average cumulative returns for these ETFs. He did not use the returns for iBoxx High Yield.

23. His conclusions were summarised in Good 2 as follows:

> *"3.4.11 Having reviewed the ETFs that were adopted by the Grand Court in Qunar and Trina Solar, I have updated my Fair Rate of Interest calculation in section 7 to utilise the ETFs for equities, bonds and cash that were adopted in those cases:*
>
> *i) Cash – I update my calculation to adopt the SPDR Bloomberg 1-3 Month T-Bill ETF, which Mr Billiet also utilises. Whilst there are several forms of cash investments, I agree that it is reasonable to assume that the investor would have invested in a cash ETF that reflects the performance of short-maturity US Treasury bonds over the Interest Periods, rather than in CDs (as I assumed in my First Report). The resulting rates of return are higher compared to my First Report (Table 7 above).*
>
> *ii) Equities and Bonds – as set out above, the cumulative returns on equity ETFs and bond ETFs calculated by Mr Billiet and I in our respective First Reports are generally similar. I cannot definitively conclude that either myself or Mr Billiet are correct*

or incorrect in choosing the particular ETFs that we have relied on. As such, for consistency I have adopted the same ETFs as were relied on in Qunar and Trina Solar.

3.4.12 Therefore, I effectively adopt the same selection of financial instruments as Mr Billiet, except I do not include the iShares iBoxx $ High Yield Corporate Bond ETF. Mr Billiet included this ETF on the basis that he considers "a hedge fund investor likely to hold both investment-grade and high-yield bonds." On the one hand, this particular ETF was one of the four bond ETFs that I relied on in my First Report such that I do not disagree, in principle, that a Prudent Investor may seek to invest in it as part of a balanced portfolio of bond ETFs. On the other hand, for the reasons set out in paragraph 3.2.9 above, I do not agree with Mr Billiet's approach in generalising as to the strategy of a hypothetical hedge fund investor and as such I do not agree with his rationale for including this bond ETF. Therefore, for consistency I have instead chosen to adopt the same ETFs as were relied on in Qunar and Trina Solar."

24. Mr Good's calculations of the fair rate of interest was as follows:

(a). in the period from the Offer Date to 26 February 2019, the mid-point of 21.33% using the long-term view and 7.23% using the short-term view.

(b). in the period from the Offer Date to 29 April 2019, the mid-point of 13.40% using the long-term view and 3.58% using the short-term view.

(c). in the period from the Offer Date to 19 January 2024, the mid-point of 5.26% using the long-term view.

(d). in the period from the Offer Date to 22 January 2024, the mid-point of 5.23% using the long-term view.

(e). in the period from the Offer Date to 6 February 2024, the mid-point of 5.28% using the long-term view.

(f). in the period from the Offer Date to 21 February 2024, the mid-point of 5.31% using the long-term view.

The Company's submissions

25. The Company noted that there were three main issues in dispute:

(a). whether a different asset allocation was permitted and justified for the first period and if so what approach should be taken to deciding the asset allocation for that period.

(b). whether when determining the asset allocation that would be adopted by the prudent investor it was permissible to have regard to the characteristics of the Dissenting Shareholders and in particular the Dissenting Shareholders' assertion that they (save for Mr Lu) should be treated and categorised as hedge funds with a greater appetite for risk and financial sophistication than retail investors.

(c). subject to determining the proper approach for the first period and the second period, what asset allocation should be adopted in this case.

26. The Company submitted that in fixing the Prudent Investor Rate for the short (but critical) first period it was appropriate for the asset allocation to mirror the sort of assets which would likely commend themselves to a prudent investor embarking on a very short term investment. Mr Good had applied the "*backward-looking*" approach favoured by me in *Trina* at [44(b)]. This involved assuming that in cases where there had been interim payments the prudent investor had only lost the opportunity to invest the fair value amount for the period between the company's offer and the interim payment and that the investor, with hindsight, was to be taken as having understood that the investment he would have (and to be) made was only for such a short duration. This involved taking into account and having "*regard to … the time taken to make interim … payments to the dissenting shareholders*" (see [44(b)(iii)] of *Trina*) and reasoning that an investor who anticipated cashing out his/her investment within that period (three months in the case of the first period) would not adopt an asset allocation strategy appropriate to a medium/long term investment. Mr Good's approach of assuming an asset allocation of 100% cash was reasonable on this basis.

27. By contrast Mr Billiet had applied a simple "but for" basis by asking what the Dissenting Shareholders would have done with the full funds had they been remitted in January of 2019 and invested "*in accordance with their usual investment strategies/time horizons from that date*". He had also maintained that even if it was appropriate to anticipate that the Dissenting Shareholders would have made a short term investment, his asset allocation remained appropriate because (in his view) a hedge fund would not hold substantial sums in cash. The Company submitted that Mr Billiet's approach was wrong both in principle and as being contrary to the reasoned practice of this Court as established in *Trina*.

28. As regards the position in principle, when identifying a fair rate of interest the Court does not seek to award a windfall. It sought to compensate dissenting shareholders for not having the use of funds to which they had been adjudged entitled and only over the periods when they have been deprived of them. Any approach which awarded dissenting shareholders interest at a rate in excess of the risk free rate erred on the side of generosity because in fact dissenting shareholders were obtaining a return without ever having had to take any risks. The Company accepted that the authorities permitted this but argued that there was a need for balance and to take into account the Company's position by bringing into account the actual investment time horizons over which the dissenting shareholders were kept out of their money. The Company submitted that where a party had been kept out of a sum of money for three months the appropriate question to ask was what could and would that party plausibly have done with the relevant funds within that period (even if their "ordinary" investment strategy would have been to undertake longer term investments). Put another way, if the object of the exercise is to compensate the party for being out of funds over a very short term, it was unrealistic to ask what the party concerned would have done with the relevant funds over a much longer period. The Company submitted that this was the approach I had adopted in *Trina* (see [44(b)(ii)]) and that it was the proper approach.

29. The Company submitted that in determining the asset allocation that would be adopted by the prudent investor it was not permissible to have regard to the characteristics of the Dissenting Shareholders. The Company argued that the Cayman authorities had held, following the pre-2007 Delaware jurisprudence, that the prudent investor standard

involved an objective test. In my judgment in *Shanda-GC* I had noted that both parties had accepted that an objective standard was to be applied. At [22] I had said that:

> *"Both parties appear to accept that the assessment of the prudent investor rate and the dissenting shareholders opportunity cost should be based on an objective standard (which, as is confirmed by the quotation in paragraph 14 above from the opinion of Vice Chancellor Noble in Cede & Co. Inc v. Medpoint Healthcare, Inc., has been the approach of the Delaware courts (I note that this also appears to be the approach, at least for some purposes, under section 34(1) of the Judicature Law - and see the English case of Reinhard v Ondra LLP [2015] EWHC 2943)."*

30. The Company noted that the Court of Appeal had upheld the adoption of the mid-point approach and of the pre-2007 Delaware jurisprudence. Martin JA had said (*Re Shanda Games* [2018] (1) CILR 352 at [58] (***Shanda-CA***)) that the putative investment returns that a prudent investor in the position of the dissenting shareholder could have achieved was one measure of the dissenting shareholder's lost opportunity and consequently the disadvantage to him/her of being out of his/her money.

31. As regards the position in Delaware, the Company submitted that the authorities showed that in the period before the amendment in 2007 to section 262 of the DGCL the prudent investor was always understood to be a strictly objective construct. The Delaware courts were neither required nor permitted to categorise particular investors or to have regard to their position or characteristics in assessing an award of pre-judgment interest. The Delaware courts had repeatedly rejected the notion that rates of return available to particular dissenting shareholders could or should be reflected in awards of interest under section 262 of the DGCL. In 2007 amendments to the DGCL Corporations Law were made to establish a presumptive interest rate in response to judicial and academic commentary to the effect that the continued devotion of expert, attorney and judicial time to the endeavour of calculating interest in appraisal actions was of dubious social value (see *Finkelstein v Liberty Digital, Inc*. 2005 WL 1074364, Del. Ch. Apr. 25, 2005).

32. The Company's further submissions provided a helpful review of the history of the changing treatment of pre-judgment interest in appraisal actions and of the development and understanding of the prudent investor standard, with extensive reference to the case law. The following extract sets out the core parts of the analysis (my underlining):

"3. The statutory appraisal right introduced by the General Corporation Law of 1899 was silent as to the availability of pre-judgment interest….

5. … in 1949 the Delaware statute was amended to provide as follows:

> *" … The Court shall by its decree determine the value of the stock of the stockholders entitled to payment therefor and shall direct the payment of such value, together with interest, if any, as hereinafter provided. …" (section 61(4)).*
>
> *"… The Court may, on application of any party in interest, determine the amount of interest, if any, to be paid upon the value of the stock of the stockholders entitled thereto." (section 61(5)).*

With effect from that time, interest has been awarded by the Delaware courts in appraisal proceedings as a matter of course, with interest running from the date of merger until the date of payment…..

7. The concept of the "prudent investor" appears to have been common currency by 1975: see the decision of the Supreme Court of Delaware in Universal City Studios Inc v Francis I duPont & Co Del.Supr., 334 A.2d 216 (1975). There, Justice McNeilly confirmed that the purpose of the award of interest was fairly to compensate plaintiffs for their inability to use the money during the period in question. In that context it "was proper to focus on what would have been the rate of interest at which a prudent investor could have invested money …"

*8. As to the application of that test, by 1980 the practice had developed of establishing the rate of return available to an ordinary prudent investor "by averaging the return from a mixed portfolio of short, medium, and long term United States treasury bills, savings deposits held in commercial banks, savings deposits held in mutual savings banks, Moody's triple A corporate bond average, and finally the values found in the Dow Jones industrial common stock average.": Lebman v National Union Elec Corp Del.Ch., 414 A.2d 824 (1980) (**Lebman**).*

9. <u>There is no suggestion in the authorities that the weightings of those asset classes were to be adjusted according to the genus of the stockholder or his/her idiosyncracies</u>. Lebman illustrates the reverse. In that case the dissenters urged that "they as seasoned and successful investors have realised up to 16% on their investments since the early 1960s and have been able recently to earn a return of 13.25% on notes." While accepting that "extraordinarily high rates of interest" had been paid to lenders, the Delaware court was clear that the dissenters should be confined to an award of interest at 6.59% reflecting the return that a prudent investor might have secured. In the words of Chancellor Marvel: "… I am satisfied … that plaintiffs here are entitled to interest solely in the form and amount above outlined as the return they might have expected to receive on a prudent investor basis had they received the fair value of their shares … on August 1, 1975 and thereupon invested such moneys prudently."

10. *The investment classes to which the Delaware court had regard in arriving at a prudent investor rate were never set in stone ….. In Charlip v Lear Siegler, Inc., 1985 Del Ch. LEXIS 455 Vice Chancellor Walsh considered …..that "…this Court is not bound to any specific 'formula' of investments but may exercise its discretion in terms of relevancy".*

11. *The jurisprudential underpinning of the "prudent investor" basis was addressed by Vice Chancellor Chandler in 1994 in the context of Chang's Holdings S.A. v Universal Chemicals and Coatings Inc., C.A. No. 10856, Mem.Op. at 2-3, 1994 WL 681091 (Nov. 22, 1994) (**Chang's Holdings**). As at that time, the Court was not confining its gaze to the "prudent investor" rate, but looking more broadly to "all relevant factors, including the rate of interest which the surviving or resulting corporation would have had to pay to borrow money during the pendency of the proceeding."*

…….

13. *As to the "prudent investor rate", the experts in Chang's Holdings disagreed over the types of investments that the court should consider. For its part the court confirmed that "the prudent investor standard is really a legal standard." A given dissenter's "personal investment prowess has no bearing on the prudent investor rate." Citing the court's decisions in Lebman, Charlip and Tennetic …. Chandler VC observed that "The prudent investor standard incorporates all investments that a hypothetical objective prudent investor would consider." The "ordinary prudent investor" does not only invest in debt instruments but also in stocks. "The prudent investor takes both a long term and short term investment strategy, suggesting that some of the investor's money can be placed in mutual funds or other long term investments." Although his "overall approach is conservative," the prudent investor "employs a long term and short term strategy" and "would employ a mix of … conservative investments … and … riskier investments." Applying that approach, the court adopted the following asset allocation: 1 year certificates of deposit (10%); 90 day treasury bills (15%); 90 day commercial paper (14%); 10 year treasury bonds (20$); Moody's AAA corporate bonds (20%) and average risk mutual funds (20%).*

14. *The decision of Chandler VC in Grimes v Vitalink Communications Corporation is of especial interest because in that case the dissenter's bid for a heightened rate of interest equal to its investments was expressly pinned to the compensatory principle which underlies the English court's approach in the Reinhard v Ondra LLP seam of authority invoked by the Dissenters in these proceedings in their bid to establish that the "general attributes" of the dissenters as hedge funds should be treated as relevant in ascertaining the 'prudent investor' rate. The dissenter in Grimes v Vitalink argued: "only a rate based on actual investment returns … would adequately compensate [the dissenter] for the loss of the use of their funds. … because Grimes was 'involuntarily' removed from Vitalink and because the only way Grimes could continue to invest in similar companies with the funds he had invested in Vitalink was to accept the 'merger amounts' offered in the merger, he*

should be compensated for the loss of the use of his funds at the same rate of return he achieved by investing in similar, high-risk, high return companies."

15. *The court emphatically rejected both the claim for enhanced interest and more fundamentally the notion that the compensatory principle was to be used in appraisal proceedings to fix the rate of interest payable. As the court emphasised, "an appraisal proceeding is not akin to an action in tort." Embarking on a merger is not tortious conduct and in ascertaining fair value the court is not engaged in an exercise in awarding damages. In the words of Chandler VC: "… petitioners' election to exercise their statutory right to reject the merger amount and to pursue appraisal does not shift to the corporation all responsibility for losses they may incur as a result of their inability to use the funds retained by the corporation. Petitioners could have mitigated their losses and obtained perfect compensation for the loss of the use of their funds by borrowing the fair value of their shares. Respondent correctly notes that this Court has repeatedly rejected the use of a petitioner's investment rate of return (as a rate reflective of the compensatory principle) in favour of an objective standard."*

16. *Similar sentiments appear from the judgment of Chancellor Chandler (as he by then was) in Gonsalves v Straight Arrow Publishers, Inc [2002] Del.Ch. LEXIS 105, Sep. 10, 2002 at [49]-[50]. There, the court rejected the dissenter's approach which was geared towards her "subjective opportunity cost", observing that "Although the Court may look at the actual cost of borrowing by the respondent company, the Court determines the petitioner's opportunity cost based on an objective standard." Put another way, "… for appraisal purposes, an objective prudent investor model is used."*

17. *In that case the 'objective prudent investor model' consisted of 20% broadly diversified common stocks, 40% US Treasury and corporate bonds and 40% in money market-type instruments or their equivalent, i.e. bank certificates of deposit. That asset allocation found support in a 1983 Survey of Consumer Finances focusing on the typical US family and published by the Board of Governors of the Federal Reserve. In the view of the court in Gonsalves, those portfolio allocations fairly represented those of an ordinary prudent investor. They were accepted by Strine VC in the case of Finkelstein v Liberty Digital, Inc C.A. No. 19598. (Del. Ch. Apr. 25, 2005).*

18. *Those same asset allocations were adopted on behalf of various investment funds in Cede Co v JRC Acquisition Corp. 2004 Del.Ch. LEXIS 12, Feb 10, 2004 (**Cede**). It bears emphasis that there appears to have been no argument to the effect that, as professional investment funds, the dissenters – Cede Co (who feature in a number of the Delaware appraisal decisions) should be entitled to an enhanced rate of interest reflecting the risk appetite of hedge funds in general. To the contrary, the authorities show the Delaware courts awarding a uniform rate of interest to dissenters of different stripes, see e.g. the mix of individual and professional investment dissenters (including Cede Co) in Gholl v Emachines Inc 24 Nov. 200440, where the Delaware court fixed a single 'prudent investor rate' across the board using the Gonsalves*

asset allocation of 20% stocks, 20% corporate bonds, 20% U.S. Treasuries and 40% money market returns.

19. *The Delaware courts have rejected both direct and indirect attempts to arrive at interest rates by reference to the subjective opportunity costs of a given dissenter. The latter tactic was tried and failed in Cede Co v JRC Acquisition Corp (supra). Arguing that the dissenter's usual returns "were higher than an objective prudent investor portfolio", the dissenter's expert invited the Court to weigh the prudent investor rate at just 25%, allowing the company borrowing rate to be weighed at 75%. Chancellor Chandler gave the argument short shrift:- "… this Court rejected approaches geared towards a petitioner's subjective opportunity cost in Gonsalves. … Several other decisions have similarly rejected consideration of a petitioner's subjective opportunity cost in awarding interest. Petitioner voluntarily relinquished funds it could have otherwise invested as it pleased and cannot now argue that in hindsight it would have used those funds to achieve higher returns than the objectively prudent investor. Respondent's cost of borrowing and Petitioner's opportunity cost shall have equal weight."*

20. *A further example of a hedge fund seeking, unsuccessfully, to secure interest at a rate reflecting the returns it might have secured is furnished by In re Emerging Communications (Del. Ch. May. 3, 2004). There, Greenlight Capital L.P. and certain of its affiliates argued that in calculating pre-judgment interest the Court should use its actual rate of return on its invested capital: 37%. Citing the Delaware court's decisions in JRC Acquisition and Gonsalves, Jacobs J agreed with the company that Greenlight's subjective claimed 37% return on its investments was irrelevant as a matter of law: the opportunity cost "is to be determined on the basis of an objective 'prudent investor' standard, not Greenlight's subjective claimed 37% investment return.""*

33. The Company further submitted that even if it was appropriate to take into account the idiosyncrasies of dissenting shareholders in the section 238 context, there was no evidence before the Court from which the particular risk appetites of the Dissenting Shareholders could safely be derived. Had the Dissenting Shareholders wanted to persuade the Court that they had a given (and uniform) risk appetite, or that classically their focus was on (say) equities rather than bonds, nothing could have been simpler than for them to disclose their constitutional documents/prospectuses and investment management arrangements identifying the levels of risk assumed by participating investors. Knowing that the asset allocation adopted by this Court in *Qunar* and *Trina* was 40:45:15, it was obvious that the Court would need persuasion that that asset allocation was inapposite. Nothing had been produced.

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The Dissenting Shareholders' submissions

34. The Dissenting Shareholders argued that the interim payments had no impact on asset allocation. Their only relevance was to reduce the principal balance outstanding on which interest accrued over time. The Company received the benefit of the interim payments because the applicable interest rate, determined by the Court using the mid-point methodology, would be applied to a lower principal sum after the interim payments had been made. The proper approach when determining the Prudent Investor Rate was to assume that the full amount of the fair value sum had been paid to the Dissenting Shareholders on the Offer Date and then to assess the rate of return that a prudent investor in the position and with the characteristics of the Dissenting Shareholders would have been able to earn if that amount was invested in an investment portfolio comprising assets of a type appropriate for such a hypothetical investor with an investment time horizon (being the period from the investment to the date on which the investor expected to sell and cash-in the relevant equities or bonds) that reflected what was usual for such an investor. The Dissenting Shareholders argued that it was wrong in principle to impose or assume a short-term time horizon based on the timing of the interim payments.

35. In relation to the meaning of the prudent investor standard, the Dissenting Shareholders submitted that Mr Billiet's approach was (while Mr Good's approach was not) supported by the decision in *Trina.* They referred to [44(b)(i)] of the judgment in which I said that "*the issue for the Court is what a prudent investor in the position of the Dissenting Shareholders would have done with the funds had they been received having regard ... to the investment strategy that they generally adopted...*".

36. They argued that this approach properly and adequately recognised that the assessment of the prudent investment rate is based on an objective standard. They noted that in *Shanda-GC* I had referred to the English case of *Reinhard v Ondra LLP* [2015] EWHC 2943 (Ch) (***Reinhard***) in which it was said (at [6]) that statutory pre-judgment interest was to be determined by reference to "*plaintiffs having the general attributes of the particular plaintiff*" and that (at [9]) the court will "*recognise relevant characteristics of the party who was awarded interest and reflect them " when determining the appropriate rate*". The relevant characteristics of the Dissenting Shareholders in the present case were to be derived from their being hedge funds and were to be taken to follow the investment

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strategies generally adopted by hedge funds. Mr Billiet's asset allocation properly and reasonably reflected these characteristics and attributes while Mr Good's did not. His asset allocation of 60% equities/35% bonds/5% cash was appropriate for an investor in the position of the Dissenting Shareholders and was based on the recommended asset allocations for portfolios that allowed for growth while controlling risk from several of the world's largest asset managers.

37. As regards the pre-2007 Delaware jurisprudence, the Dissenting Shareholders (in their further written submissions) said that they had found no case which expressly considered (rather than assumed) whether Delaware law required or permitted a court to categorise particular investors and to have regard to their position or their characteristics in this context. They said that this was not surprising since the dissenting shareholders in the Delaware cases that had been cited by the parties were all individuals (e.g. Messrs Felder, Finkelstein, Gonsalves, Grimes, Hintmann, Lane, Lebman, and Pinson) and corporates. There was a dissenter hedge fund in only one case, namely *Re Emerging Communications Inc.* 2004 WL 1305745 (Del. Ch. May. 3, 2004) (*Emerging Communications*).

38. The Dissenting Shareholders noted that section 262(h) of the DGCL was in materially different terms to section 238(11) of the Act and that these statutory provisions had not been interpreted in the same way. Therefore, the Court should be cautious before simply following the Delaware jurisprudence dealing with the fair rate of interest.

39. In any event, there were pre-2007 Delaware cases in which the court categorised particular investors and had regard their position or characteristics for the purpose of determining the Prudent Investor Rate.

40. In *Felder v Anderson, Clayton & Co* February 2, 1960, 39 Del Ch 76 159 A 2d 278, (*Felder*) at page 92 the court in determining a fair rate of interest had regard to the fact that the dissenting shareholder was an individual and not a business:

> *"The evidence I deem pertinent is limited but I believe 'rough justice' will prevail if I strike an average from the chart showing bank rates on short term loans to business for the last several years and adjust it on the basis that we are dealing with a somewhat longer term and with an individual borrower."*

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41. In *Gonsalves* the court had enlisted the assistance of a neutral expert who compared the prudent investor models provided by the parties' experts. The expert concluded that the model of the company's expert (Whitman) was more appropriate. The expert suggested that if the ordinary prudent investor is viewed "*as a typical investor represented by the typical U.S. family*" an objective standard could be determined. The expert stated that based on an ordinary prudent investor standard *"the Survey of Consumer Finances data provide strong support for the portfolio allocations suggested by Whitman and adopted by the Court of Chancery in this matter"*. The court adopted Whitman's prudent investor portfolio allocation as representative of the dissenter's (Gonsalves') opportunity cost. In so doing, the court had regard to the characteristics of the dissenting shareholder since the prudent investor was considered to be *"a typical investor represented by the typical US family"* and the prudent investment rate was considered by reference to the Survey of Consumer Finances data.

42. The dissenting shareholders in *Hintmann v Fred Weber Inc* (Court of Chancery of Delaware, February 17, 1998, WL 83052) (*Hintmann*) were participants in an employee stock ownership plan (***ESOP***). In determining the prudent investor rate applicable to the dissenting shareholders, the court had regard to the general characteristics of the dissenting shareholders, namely that they were participants in an ESOP. Vice-Chancellor Steele had stated as follows:

> *"At the time of the merger, all ESOP participants could allocate their assets among four funds: the Money Market Fund, the Bond Fund, the Index Fund and the Value Equity Fund. Three additional funds were made available to ESOP participants between 1994 and 1996. The non-dissenting employees of FWI, thus, recently have been able to allocate their assets among as many as seven funds. Because I cannot know how Petitioners would have allocated their assets had the funds been available, and cannot speculate, I will assume an allocation of Petitioners' assets among the four original funds in the precise manner they were allocated on the date of the merger, and the prudent investor rate shall be the actual interest rate earned on those funds since the merger date."*

Discussion and decision

43. It seems to me that the Company's (and Professor Hamermesh's) view of the Delaware authorities is to be preferred. The cases cited in the post-hearing supplemental submissions appear to support their view and establish that under Delaware law the

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applicable rule (and it is a legal rule or standard and not a practice) is that the dissenting shareholder's subjective opportunity cost (of his/her lost opportunity to invest) is to be disregarded. The dissenting shareholder's opportunity cost is instead based on an exclusively (and strict) objective standard. While formally expert evidence has not been adduced (and technically foreign law does not govern an issue on this application but instead applicable Delaware law is said to be a strong indicator and starting point for an assessment of Cayman Islands law on the prudent investor standard), I have adopted the same approach to the determination of the applicable Delaware (foreign) law as would be applied if such evidence had been adduced (I have considered the submissions made with the approval of, and the opinions therein expressed by, the Delaware attorneys and assessed which view is to be preferred as representing Delaware law).

44. The clearest statement of what the objective prudent investment standard requires is set out in the opinion of Vice Chancellor Chandler in *Chang's Holdings* (1994) at [4] (my underlining):

> *"……. The prudent investor standard incorporates all investments that a hypothetical objective prudent investor would consider. See Charlip, supra, Let.Op. at 3; Tennetic, supra, at 351-352; Lebman, 414 A.2d at 829. This Court's decisions in Lebman v. National Union Elec. Corp., Tennetic, Inc. v. A.J. Industries, Inc. and Charlip v. Siegler Lear, Inc. all included an average return on stocks as part of the mix of investments for an ordinary prudent investor. Charlip, supra, at 3; Tennetic, supra, at 351-352; Lebman, 414 A.2d at 829. The prudent investor takes both a long term and short term investment strategy, suggesting that some of the investor's money can be placed in mutual funds or other long term investments. See Charlip, supra, at 5-6. Dr. Tannian testified that stocks have outperformed bonds over the long run, and a prudent investor would take note of that fact in developing a long term investment strategy.*
>
> *Petitioner is correct that returns from mutual funds can be a part of the prudent investor rate, but Dr. Tannian relied exclusively on this long term approach. The prudent investor employs a long term and short term strategy even though the investor's overall approach is conservative. See Lebman, 414 A.2d at 829. Dr. Tannian's opinion gives no weight to short term investment strategies and his overall mix of investments is too risky. In Dr. Tannian's report, the prudent investor loses money in the year 1990. The prudent investor would employ a mix of the conservative investments advocated by Mr. Koch, and the riskier investments detailed in Dr. Tannian's testimony. Because the prudent investor standard is an objective test, Mr. Chang's personal investment prowess has no bearing on the prudent investment rate. Lebman, 414 A.2d at 829".*

45. In *Gonsalves* (2002) Chancellor Chandler (as he had by then become) referred to the return that an *ordinary* prudent investor would probably achieve (see *Gonsalves* at page 17, right hand column and page 18, left-hand column) and in *Felder* Chancellor Seitz referred to what would have been earned on the fair value amount if it had been safely invested (see *Felder*, page 9, left hand column).

46. In *Gonsalves* (2002) Chancellor Chandler said as follows (at pages 16-17):

> *"I conclude that Gonsalves' opportunity cost should be measured against the prudent investor rate as set forth in Whitman's report. Although I believe that the Expert's methodology is sound, I reject the use of the Expert's alternative approach. In my opinion, the record evidence does not support the premise that Gonsalves' SAP shares were purchased and held as part of an investment strategy resulting in a portfolio of fixed risk thereby lending itself to the Expert's alternative approach. More importantly, however, that approach is geared towards Gonsalves' subjective opportunity cost. Although the Court may look at the actual cost of borrowing by the respondent company, the Court determines the petitioner's opportunity cost based on an objective standard.[56] That is also why Gonsalves is incorrect in her assertion that the Expert's report indicates that Kobak and Whitman each suggested equally appropriate prudent investor models to estimate Gonsalves' opportunity cost in this appraisal action. The Expert did say that:*
>
> > *Footnote 56 See, e.g., Grimes v. Vitalink Communications Corp., 1997 WL 538676, at *10 (Del.Ch.)(**Grimes**) ("Respondent correctly notes that this Court has repeatedly rejected the use of a petitioner's investment rate of return (as a rate reflective of the compensatory principle) in favor of an objective standard."); Chang's Holdings, S.A. v. Universal Chems. Coatings, 1994 WL 681091, at *4 ("Because the prudent investor standard is an objective test, Mr. Chang's personal investment prowess has no bearing on the prudent investment rate.").*
>
> > *"[T]here is no single portfolio that is applicable to all prudent investors. A prudent investor is best described as one who invests in a manner that is consistent with the investor's investment needs and ability to accept risk. The prudent portfolio is that portfolio that best satisfies the investor's investment needs and ability to accept that risk.... . . . Thus, two investors, both economically rational and prudent, could have two quite different investment portfolios, both of which would be considered prudent."*
>
> …..
>
> > *Footnote 59 Final Report at 65-66. Kobak's suggested prudent investor portfolio consists of 60% broadly diversified common stocks, 30% intermediate-term and long-term U.S. Treasury notes and bonds, and 10% money market-type instruments. Whitman's suggested prudent investor portfolio consists of 20% broadly diversified common stocks, 40% in U.S. Treasury and corporate bonds, and 40% in money market-type*

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> *instruments or their equivalent, i.e., bank certificates of deposit. Id. at 61-62."*

47. A reference to an ordinary prudent investor is also to be found in one of the earlier cases, *Lebman* (1980). In that cases Chancellor Marvel said (at page 5) that the Supreme Court of Delaware had established the ground rules for making a discretionary award of interest and that:

> *"In applying such test, this Court has established the rate of return available to an ordinary prudent investor by averaging the return from a mixed portfolio of short, medium, and long term United States Treasury bills, savings deposits held in commercial banks, savings deposits held in mutual savings banks, Moody's triple A corporate bond average, and finally the values found in the Dow Jones industrial common stock average, Gibbons v. Schenley Industries, Inc., Del. Ch. , 339 A.2d 460 and Universal City Studios, Inc. v. Francis I. duPont Co., ..."*

48. As Vice Chancellor Chandler held in *Chang's Holdings*, the investment expertise (prowess) of the particular dissenting shareholders is to be disregarded. This point was emphasised by Justice Jacobs in *Emerging Communications* (2004) (at pages 72-75):

> *"Greenlight claims that it is entitled to an interest award of 22%, compounded daily, from the merger date. To further the compensatory purpose of the interest award, Greenlight argues, the Court should use Greenlight's actual rate of return on its invested capital --37% --for the period beginning October 1, 1998. Because 37% is what Greenlight claims it would have earned on its appraisal award had that award been paid on the merger date, only that rate would restore Greenlight to the financial position it would have had if the merger price were entirely fair.*
>
> ………………………
>
> *As for the compensatory purpose of an interest award, the defendants claim that because this Court has historically applied an objective "prudent investor" standard, (viz., what a prudent investor would have achieved if it had invested the proceeds at the date of the merger) Greenlight's subjective claimed 37% return on its investments is irrelevant as a matter of law. In this case, the prudent investor rate, as determined by Mr. Bayston who relied on the mix of investments specified by Delaware case law, implied an interest rate of 5.54% as of the date of the Duff & Phelps report, and 3.88% as of the date of trial.*
>
> ………………………………….
>
> *As for Greenlight's opportunity cost, JRC Acquisition and Gonsalves establish that that cost is to be determined on the basis of an objective "prudent investor" standard, not Greenlight's subjective claimed 37% investment return. The defendants argue that the prudent investor rate of return was 5.54% as of the date*

> *Duff & Phelps submitted its report and 3.88% at the time of the trial. Greenlight does not propose any alternative "prudent investor" rate of return. To err on the conservative side, the Court adopts 5.54% as the prudent investor rate of return."*

49. In *Gonsalves* the court (with the assistance of an independent expert) accepted the evidence that the prudent investor portfolio consisted of 20% broadly diversified common stock, 40% US Treasury and corporate bonds and 40% in money market type instruments or their equivalent. In *Chang's Holdings* the court (based on the principles that Vice Chancellor Chandler had set out and the expert testimony) adopted the following asset allocation: 10%: 1 year certificates of deposit; 15%: 90 day treasury bills; 15%: 90 day commercial paper; 20%: 10 year treasury bonds; Moody's AAA corporate bonds (20%) and average risk mutual funds (20%).

50. In *Cede* (2004), Chancellor Chandler noted (at page 18) that the selection and choice of representative indices of the types of stocks (or bonds) that a prudent investor would hold is not fixed. A case can be made for the appropriateness of different indices and indeed the experts can, as the examples of the different asset allocations I have just cited demonstrate, recommend different asset allocations. But the standard against which the asset allocations and selected representative indices are to be judged is that of the ordinary prudent investor who is seeking to hold a balanced and overall a conservative portfolio.

51. In the Delaware cases the time horizon for the investments is also balanced, mixing both long term and short term investments.

52. I did not find the Dissenting Shareholders' supplemental submissions very helpful or persuasive. I preferred the analysis and explanations of the Delaware approach given by the Company (and Professor Hamermesh) which relied on the cases I have referred to above, which appear to support their view that there is a clear rule of law that the prudent investor test is applied without regard to the attributes or position of the dissenting shareholders. The Dissenting Shareholders failed to discuss in detail and confront most of these cases (of course the Dissenting Shareholders supplemental submissions were filed at the same time as the Company's supplemental submissions and so they were not expected to respond to them but I would have expected the Dissenting Shareholders to have identified and dealt with those authorities even if only to distinguish them). The fact

that these cases did not, save with one exception, deal directly with the position of a hedge fund does not seem to me to be of great significance. The rule articulated and relied on in these cases is clearly intended to apply to all and any dissenting shareholders, whatever their character.

53. The Dissenting Shareholders sought to show that there were cases in which the Delaware courts had taken into account the characteristics of the particular dissenting shareholders but the authorities they cited did not seem to me to undermine the existence of or establish a material qualification to what I have referred to as the clear rule. In *Felder* (1960) the court appears to have used bank rates on short term loans to businesses and found that the rate of return on a prudent investment for the relevant period was not sufficiently explicit to be meaningful (and in any event the brief analysis in the old opinion cannot undermine the clear statement of principle in the other and later cases I have cited). In *Hintmann* the company itself had proposed that the prudent investor rate in that case should be based on the (actual) returns of ESOP participants (see [11]). I do not accept that in *Gonsalves* the court had regard to the characteristics of the dissenter. The expert equated the ordinary prudent investor with the typical US family for the purpose of finding an objective correlative and the model for the independent investor whose approach to investing was to be followed. This was not done because of the characteristics of Ms Gonsalves. The extract from the opinion quoted above shows the approach adopted by the court and the following further extract from Chancellor Chandler's opinion makes the point clearly (page 17, right hand column):

> *"The Expert suggested that if the ordinary prudent investor is viewed as a typical investor represented by the typical U.S. family, an objective standard could be determined. The expert compared the portfolio of this objective standard with the portfolios suggested by Kobak and Whitman…… The Expert stated that based on an ordinary prudent investor standard "the Survey of Consumer Finances data provide strong support for the portfolio allocations suggested by Whitman and adopted by the Court of Chancery in this matter"* [58]
>
> > *58 The Expert compared the portfolios suggested by the parties' experts to an objective standard based on the holdings of the typical U.S. family as set forth in the 1983 Survey of Consumer Finances published by the Board of Governors of the Federal Reserve System. As Gonsalves notes, the information contained in this publication predates the merger by nearly three years. This publication. however, is not the basis on which the Expert formulated his own prudent investor model but was merely an objective*

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> *model which he used to compare the prudent investor portfolios suggested by Whitman and Kobak."*

54. The reasons and justification for adopting this exclusively objective approach were explained by Chancellor Chandler in *Cede*: (my underlining):

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

55. The point seems to be that shareholders who dissent from a statutory merger must accept that by acquiring and investing in shares in the company they have limited their freedom to invest the value of their shares elsewhere. Their freedom to make other investments has been constrained and they must accept the consequences of having made an investment in the company and that, having done so, in the event of a statutory merger, their rights are subject to and limited by the court's mandate to fix a fair rate of interest. Furthermore, the dissenting shareholders' decision to exercise their statutory rights to reject the merger price and seek a fair value determination does not shift to the company all responsibility for losses they may incur as a result of their inability to use the funds retained by the company (the dissenting shareholder could always have protected its position and preserved the opportunity to make more advantageous investment returns by borrowing the fair value amount: see the opinion of Vice Chancellor Chandler in *Grimes* at [10]). The interest award is not intended to be punitive or to increase the recovery of the principal award.

56. It seems to be implicit that it would not be fair (to the company) to take into account, for the purpose of establishing the estimated return on investments that has been forgone, higher than average returns that could be earned by ordinary investors using a safe and conservative investment strategy. Using a portfolio of investments and an asset allocation that would be used by an investor without specialist or unusual expertise (that is an ordinary investor) and assuming a conservative investment strategy that is designed to keep the investments safe but is balanced in order to obtain the best returns available

within those constraints, ensures that a material rate of return is presumed to be available to the dissenting shareholders while avoiding high returns that penalise the company.

57. I must now consider whether this approach should be followed in this jurisdiction with or without some adjustment.

58. In my view, while (a) a qualified objective approach, which requires the Court to assess the dissenting shareholders' assumed loss of investment returns by reference to which investments an investor with the general characteristics of the dissenting shareholders in question would have made, is appropriate (in order to ensure that the procedure for determining section 238(11) interest is proportionate and cost-effective) and (b) it is also appropriate to apply the prudent investor standard (in order to balance the interests of the dissenting shareholders and the company and establish a fair rate, to avoid the company being liable, indirectly via a high rate of interest, for the loss of the full and special, and potentially very large, investment returns that the dissenting shareholders might have made by adopting a relatively high risk strategy, which they would usually use, above that used by non-specialist cautious investors), it is not appropriate to apply the strict objective approach adopted in the Delaware cases that requires the position and all characteristics of the dissenting shareholders always to be ignored (for the purpose of determining the Prudent Investor Rate). This would, in my view, improperly fetter the Court's broad discretion to fix the fair rate of interest and would therefore be inconsistent with the way in which section 238(11) has been applied and interpreted in this jurisdiction.

59. It is necessary to review the earlier decisions in this jurisdiction but, as will become apparent, while the cases discuss the prudent investor standard and the extent to which the position of the dissenting shareholders can be taken into account, the precise issue raised on this application (whether the characteristics of the Dissenting Shareholders, in particular the fact, if established, that some of the Dissenting Shareholders are hedge funds with a greater appetite for risk and financial sophistication than retail investors, may be taken into account when deciding what investments were assumed to be made by a prudent investor and the mix of such investments) was not in dispute or argued in the previous cases and the Court has not previously had the benefit of the full citation of the Delaware jurisprudence. Furthermore, there was no detailed consideration of what

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aspects of the Dissenting Shareholders' position or characteristics could be relevant and the manner in which they should be taken into account.

60. The starting point, as it seems to me, is the authoritative statement of the approach to determining the fair rate of interest made by Martin JA in *Shanda-CA*. The Court of Appeal in *Shanda-CA* accepted that in this jurisdiction in interpreting and giving effect to section 238(11) of the Act the Court should follow the Delaware mid-point approach. In explaining his reasoning but without specifically and separately considering whether the prudent investor standard permitted the Court to take into account the general characteristics of the relevant dissenting shareholders, Martin JA referred to the Court having regard to the putative investment returns of a prudent investor *"in [that investor's] position"*. The learned Justice of Appeal said (at [58]) this (my underlining):

> *"[.]…. It is important, however, to appreciate that it is a statement about the principles to be applied in assessing interest on damages. Such an assessment can of course be made only when damages have been awarded, and damages can be awarded only when some right of the plaintiff has been infringed. The purpose of an award of interest will be to ensure that the plaintiff is put back, so far as money can, in the position he would have been in had his right not been infringed. That inevitably places the focus solely on the plaintiff: it is only his position that is of relevance. A section 238 determination ... does not proceed on the basis that any legal right of the dissentient shareholder has been infringed by the company. The legislative concern is not to restore him to some anterior position but to ensure that he receives fair value for what he is obliged by statute to give up. In my view,* ***that has the effect*** *when it comes to an assessment of the fair rate of interest of removing the entire focus from the dissentient and instead* ***placing it on the entirety of the circumstances****. When those circumstances are considered, it is right to say — as the judge did — that both the disadvantage to the dissentient and the advantage to the company should be taken into account. To adopt the mid-point approach is a logical way of balancing the advantage and disadvantage, with a fall-back reliance on the judgment rate — which must theoretically itself represent a rate deemed to be fair — if the evidence supports no other conclusion. Although it is possible to take the view that the cost of borrowing is a better measure of the dissentient's loss than the putative investment returns a prudent investor* ***in his position*** *could have achieved, both measures represent the dissentient's lost opportunity and consequently the disadvantage to the dissentient of being out of his money. Overall, it seems to me that Jones J and the judge were right to adopt the (former) Delaware practice in relation to the award of interest. That practice, as explained in Cede, provides a principled approach that is not in conflict with Caymanian law or practice."*

61. The fact that the Delaware mid-point approach has been held to reflect the statutory mandate in this jurisdiction to fix a fair rate of interest suggests that the methodology

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adopted by the Delaware courts for applying that approach should also be adopted in this jurisdiction and treated as being in accordance and consistent with our statute.

62. On the other hand, Justice of Appeal Martin does refer to the need to consider the returns that might be achieved from a portfolio suitable to a prudent investor *in the position of the dissenting shareholders* and this suggests that the dissenting shareholder's position is relevant and to be taken into account. Having said that, it has to be borne in mind that the meaning and scope of the prudent investor standard was not in dispute in *Shanda-GC* or *Shanda-CA* and that it was not argued that the position, investment practices and investment expertise of the dissenting shareholders could be taken into account. Therefore the judgment of Martin JA did not directly address that issue.

63. In *Shanda-GC* (while no expert evidence was adduced) the parties accepted that the prudent investor standard involved an objective test based on a notional prudent investor. I decided, in the absence of such expert evidence, that the best evidence of the approach which such a prudent investor would adopt indicated that they would invest in low risk corporate grade bonds.

64. At [15(d)] of *Shanda-GC* I noted that the company had submitted that the Delaware court did not (and that the Court should not) undertake a subjective analysis of the dissenting shareholder's opportunity cost but that the Delaware court used (and this Court should use) an objective standard of a notional prudent investor (the company had relied on the passage in the opinion of Vice Chancellor Noble in *Cede* in which he said that the court determined the dissenting shareholders' opportunity cost based on an objective standard). The dissenting shareholders did not challenge that approach and submitted that under that Delaware jurisprudence the prudent investor rate was a mix of short and long term investments, the precise mix of which changed on a case by case basis. They said that the Court should review different portfolios with different risk profiles combining and mixing long and short term investments in a prudent manner taking into account the return that would be earned on each. They relied on the weightings approved in *Cede* (20% broadly diversified common stock from a number of indices, 40% U.S. treasury and corporate bonds and 40% money market/bank certificate of deposits) and applied those to various indices which they argued were relevant. I concluded that (my underlining):

"22. Both parties appear to accept that the assessment of the prudent investor rate and the dissenting shareholders opportunity cost should be based on an objective standard (which, as is confirmed by the quotation in paragraph 14 above from the opinion of Vice Chancellor Noble in Cede & Co. Inc v. Medpoint Healthcare, Inc., has been the approach of the Delaware courts) (I note that this also appears to be the approach, at least for some purposes, under section 34(1) of the Judicature Law - and see the English case of Reinhard v Ondra LLP [2015] EWHC 2943).

………

24(b) as regards the prudent investor rate, I have carefully considered the evidence filed and submissions made by both parties. <u>I have considered the weighted investment portfolio approach adopted in the Delaware cases cited and relied on by Mr Levy and accept that in an appropriate case it might well be the preferred approach - where the evidence (probably expert evidence) is such that the Court can compare the different indices and funds and make an informed assessment of whether particular indices are appropriate, and if so which index is to be preferred to the others, whether the sample as a whole is reliable and which combination and weighting of investments is to be preferred.</u> However, in the present case looking at the totality of the evidence filed I feel unable to make these judgments and assessments. The Court does not have sufficient information or the benefit of expert evidence which provides assistance on such matters. Equally, I am not prepared to accept Mr Meeson's argument that the prudent investor would be limited to investing all the funds in three month fixed deposits in Cayman banks. <u>While it is important to remember and apply the prudent investor standard I think the Court is entitled to take into account that a prudent investor could justify a form of investment that offered an element of a higher rate of return than this</u>. One of the indices referred to in the Dissenting Shareholders' evidence seems to me to be relevant and suitable, namely the index for investment grade corporate bonds (see paragraph 18(d) above). This produced a rate of 5.09%. <u>This seems to me to be a reasonably low risk investment and an appropriate rate to use for the prudent investor rate. I note and give some weight to the evidence filed by the Dissenting Shareholders that suggests that the relevant period was one of high equity market returns even for prudent investors. Of the various alternative rates available in the evidence this one seems to me to be the most appropriate for prudent investors in the position of the Dissenting Shareholders and in the circumstances of this case. It seems to me to be reasonable that a prudent investor would invest in investment grade corporate bonds and the evidence provides a rate of return for such an investment</u>. I appreciate that the Dissenting Shareholders' evidence also suggests that prudent investors would spread their risk and may not invest just in a single category of investment. Such an approach would involve only a percentage of funds being invested in investment grade corporate bonds. Nonetheless, l do not consider that this of itself means

> *that it is inappropriate to use the rate only derived from the index for investment grade bonds. I do not see why it would be unreasonable to assume or that it is inconsistent with the evidence to conclude that a prudent investor in the present circumstances would invest just in low risk investment grade corporate bonds."*

65. As can be seen, I applied an objective test and considered, in light of the evidence adduced, what investments a hypothetical (notional) prudent investor would (be assumed to) have made. But I did consider that it was relevant to have regard to the position of the dissenting shareholders and the circumstances of the case, although in *Shanda-GC* there were no particular facts or matters relating to the dissenting shareholders' position that were relied on as being relevant to the determination of the prudent investor rate. My formulation of the approach to be followed by the Court reflected the need for the Court, when exercising its broad discretion to find the fair rate of interest, to take into account the position of the parties and what in the circumstances of the case was considered to be fair.

66. I briefly noted that using an objective standard to establish the prudent investor rate would reflect to some extent the practice of the English courts when exercising the discretionary statutory power to award pre-judgment interest under section 35A of the Senior Courts Act 1981 (which provision is reflected in section 34 of the Judicature Act (2021 Revision)). I had in mind, as I explain further below, that, while the basis for the exercise of that jurisdiction is different from the jurisdiction to fix the fair rate of interest under section 238(11), for the reasons given by Martin JA in *Shanda-CA*, the English courts had decided, at least in commercial cases for reasons primarily of proportionality and cost-effectiveness, to avoid an assessment of the position of the particular claimant and instead to consider the position of claimants in general, although the general attributes of the claimant could be relevant and taken into account.

67. The reference to taking into account the position of the dissenting shareholders appears to have been reflected in the judgment of Martin JA in *Shanda-CA*. On appeal, the company accepted that if as a matter of law it was proper to adopt the mid-point approach my decision (and exercise of the Court's discretion) as to the applicable rate of return of a prudent investor could not be challenged.

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68. In *Trina* the company's primary case was that the mid-point approach should not be followed. I rejected that argument although I did say (at [27(e)]) that I accepted that there were some benefits to applying the *Banque Keyser* methodology, in particular because it limits the number of relevant issues and reduces the evidence that needs to be filed and assessed by the Court when determining the fair rate of interest (and thereby reduces the costs and complexity of the exercise) and removes a number of the uncertainties and difficulties (and arguable unfairness) that arise when determining the prudent investor rate.

69. The dissenting shareholders' expert (Mr Billiet) had estimated that a prudent investor in the relevant period would have allocated assets as follows: 40% equities; 45% bonds and 15% cash and they argued that, as Mr Billiet's evidence showed, this asset mix was reflective of the asset mixes that were commonly *used by leading fund managers for moderately conservative portfolios*. I preferred Mr Billiet's evidence and adopted (see [44(b)(iv)]) his asset mix and prudent investor rate (for all periods and without adjusting the asset mix to reflect the interim payments). So the dissenting shareholders, as in *Shanda-GC*, did not seek to adjust the investment portfolio or the mix of investments assumed to have been made by a prudent investor to take into account their own characteristics (relevant to the determination of an investment strategy).

70. I said that I accepted that Mr Billiet's approach "*properly reflects the asset mixes that are commonly used by leading fund managers for moderately conservative portfolios, which is appropriate as a measure of what a prudent investor in the position of the Dissenting Shareholders was likely to adopt, even in the context of section 238 proceedings*".

71. But I did go on to discuss my understanding of how the Court should apply the prudent investor standard. I said this (underlining added):

> "*44(b)(i). it seems to me that the issue for the Court is what a prudent investor <u>in the position of the Dissenting Shareholders would have done with the funds had they been received having regard both to the investment strategy that they generally adopted and to the likely duration of the investment. The objective is to establish a fair sum representing the Dissenting Shareholders' loss in the circumstances of the section 238 proceedings. The Dissenting Shareholders should be assumed to have</u>*

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made an investment of a sum equal to the fair value of their shares taking into account the fact that the investment was to produce a return in the period up to time at which the fair value of the Dissenting Shareholders' shares was paid by and received from the Company.

……..

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

72. Once again, I indicated that in my view it was relevant to have regard to the position of the dissenting shareholders and the circumstances of the case although as in *Shanda-GC* there were no particular facts or matters relating to the dissenting shareholders' position that were relied on as being relevant to the determination of the prudent investor rate, so that point did not arise or affect the outcome of the case.

73. Justice Parker in *Qunar* also considered that the position of the dissenting shareholders was relevant and to be taken into account (but once again the issue that arises in this case did not arise before Justice Parker and he did not have the benefit of the full citation of the relevant Delaware case law). He said this (underlining added):

"*64. The dissenter loss is intended to capture the potential loss suffered by the dissenters, or an investor in their position, as a result of being out of their money and not having the opportunity to invest such sums.*

65. The prudent investor rate represents the disadvantage to the dissenters in loss of earnings on the funds which should have been paid.

……..

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> 88. *Mr Salzedo QC argues that the dissenting shareholders are professional investors and if their investment funds had been added to by the sums due to them then they would have achieved at least the returns estimated by Mr Billiet.*
>
> 89. *I have decided that the appropriate asset allocation of Mr Billiet [Equities 40%, Bonds 45% and Cash 15%] is to be preferred as is his view of the prudent investor's investment horizon. This takes account of investors in the position of the dissenters who tend to take a long term view and would not, for example, keep 30% in cash.*"

74. I have already mentioned (as the Dissenting Shareholders had noted in their submissions) that in *Shanda-GC* I referred to the English court's practice in commercial cases when exercising the discretionary statutory power to award pre-judgment interest under section 35A of the Senior Courts Act 1981, which has been driven by the need to establish a proportionate and cost-effectiveness procedure for adjudicating on the rate and quantum of such interest. It is worth briefly looking at the dicta in some of the case law which explains this practice and approach.

75. In *Tate & Lyle Food and Distribution Ltd v GLC* [1982] 1 WLR 149, 154 Forbes J said that the right approach involved looking "*at the rate which plaintiffs with the general attributes of the actual plaintiff in the case (though not, of course, with any special or peculiar attribute) could borrow as a guide to the appropriate interest rate*" (my underlining).

76. In *Fiona Trust & Holding Corporation and 75 ors. v Yuri Privalov and 28 ors.* [2011] EWHC 664 (Comm) Mr Justice Andrew Smith considered the reasons for adopting this approach (once again, my underlining):

> *"A "broad brush" is taken to determine what rate of interest is just and appropriate: it would be neither practical nor proportionate (even in a case involving as large sums as these) to attempt a minute assessment of what will precisely compensate the recipient. In particular, the courts do not have regard to the rate at which a particular recipient of compensation might have borrowed funds. This policy is adopted in order to control the extent of the inquiry to ascertain an appropriate rate: see the Banque Keyser Ullman case (cit sup). The court will, however, consider the general characteristics of the recipient in order to decide whether to assess interest at a rate that is higher or lower than is conventional. So, for example, in Jaura v Ahmed, [2002] EWCA Civ 210 , Rix LJ awarded interest at base rate plus 3% to reflect that "small businessmen" had been kept out of their money and in recognition of the "real cost of borrowing incurred*

by such a class of businessman". Thus, the court will examine what was been called "a question of categorisation of the plaintiff in an objective sense" (see the Banque Keyser Ullman case, cit sup), recognise relevant characteristics of the party who is awarded interest and reflect them when determining the fair and appropriate rate. Any doubts expressed about this by Nourse LJ in Re Duckwari PLC (2), [1999] Ch 268 at p.273 have been set aside, and it was not in dispute before me."

77. Mr Justice Warren's judgment in *Reinhard* shows the court's thought process in seeking to find a fair rate of interest (my underlining):

> *"14. The final case to which I was referred is Challinor v. Juliet Bellis Limited [[2013] EWHC 347 (Ch)]. It is, so far as I am aware, the first modern case to attempt to grapple with the question of interest in a principled way. In that case the claimants were investors who had invested in a property investment scheme operated by a single purpose company. The claimant paid monies into the defendant's account. They used most of the money to reduce the company's short-term bank borrowing. The scheme was unsuccessful and the company was placed into administration. The claimants sought recovery of their money from the defendants. The claimants were successful before Hildyard J, although unsuccessful on an appeal. Hildyard's J judgment on interest was, of course, given in the context of the liability which he held to have been established. This case, like Attrill, concerned individuals, although their situation was markedly different in that they loss arose out of a failed commercial transaction rather than from the breach of an employment contract. The claimants sought interest at five per cent above base. The claimants produced some evidence about the cost of borrowing to an individual and reliance was also placed on Attrill. The judge eventually awarded three per cent over base.*
>
> *15. I need to refer to some passages in the judgment. At paragraph 21 the judge referred to the purpose of the award as achieving restitutio and he referred to the decision of Steyn J in Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd Q.B.D. (Com. Ct.) (Steyn J.) — December 1987. In sub-paragraph 2 of paragraph 21 he said this:*
>
>> *"(2) However, the Court adopts a broad brush. For practical reasons it will not make an enquiry into the claimant's actual loss; nor will it enquire or speculate as to what the claimant would have done with the money had he not been deprived of it. The Court almost invariably adopts as its measure what it would have cost a person in broadly the same position as the claimant to borrow the money of which he was deprived. Thus, to quote Steyn J in Banque Keyser Ullman again, the aim is to establish the rate(s) at which "a person in the position of the claimant would have had to pay to borrow the money" over the period for which interest is awarded."*
>
> *That paragraph may be overstating matters. It is certainly true of commercial cases and I accept there is authority in the shape of Attrill for the same approach in other cases…..*

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…….

> 22. *And so, in my view, the present calls falls into neither category (a) nor category (b); and whether or not it falls precisely in Hildyard's J category (c), (I think it does), it certainly does, in my judgment, fall into a category separate from (a) and (b). The class of claimant into which Mr Reinhard falls for the purposes of assessing interest can be described in the same way as Hildyard J described the claimants in the case before him in paragraph 34 of his judgment. I accept, of course, that I am not engaged on an enquiry as to the returns which members of the class, still less Mr Reinhard himself, might have made. They or he might have lost everything or they might have made a fortune. However, to restrict him to a rate of return in respect of low interest lending or the rate of the special investment account would, in my judgment, be unfair to him. But to award five per cent over base would be unfair to the defendants.*
>
> 23. *What then is a fair figure? I have not been provided with evidence about interest rates. But I think that I am entitled to take the flavour of the available borrowing rates from the recent cases; and on the other side the rate on the special investment account can be seen. Give the low interest rates which have recently prevailed and the recognition that the presumption of one per cent above base is no longer appropriate, I consider that the appropriate rate is three per cent over base."*

78. The pre-judgment interest statute has been interpreted as only permitting interest to be determined on an objective basis by reference to a claimant with the general (but not special or particular) attributes of the claimant in question (although in some cases the personal circumstances of the claimant have been considered). The court as a general rule follows the categorisation of the claimant in an objective sense ignoring their special and specific features. General attributes are usually taken to refer, for example, to the fact that the claimant is a global bank, a prime bank, a small bank, a small business or an individual. As regards what counts as general attributes, see Kramer, *The Law of Contract Damages* Third edition, 2022 at [7-50] and *McGregor on Damages*, Twenty-Second edition, 2024, at [20-115] – [20-123] (this last paragraph deals with the approach where the wrong done to the claimant causes him/her to miss out on investments rather than cause him/her to borrow).

79. Accordingly, in exercising the broad statutory discretion to award pre-judgment interest the English courts have adopted a practice in commercial cases designed to limit the scope of the inquiry so as to ensure that the procedure is proportionate and cost-effective. These English cases establish one basis for adopting an objective standard albeit not a

strict objective standard that ignores all of the claimant's characteristics. They have limited the factual matters to be taken into account when determining statutory pre-judgment interest.

80. It seems to me that this policy and reasoning applies equally to section 238(11) cases. There is a need to establish a procedure that is proportionate and cost-effective and avoids a further mini-trial just to determine the fair rate of interest. Interest is important but it is ancillary to the primary issue of the determining the fair value of the dissenting shareholders' shares. This justifies limiting the scope of the inquiry and an element of what is described in the English cases as rough justice.

81. It is clear that, as I have explained, the section 35A jurisdiction is different from the jurisdiction under section 238(11). This is because the jurisdiction to award pre-judgment interest involves a plaintiff-focussed assessment of interest on damages for a civil wrong (whether in tort or contract). The court is required to find a rate of interest that restores the claimant to the position it would have been in had it been paid compensation for the wrong at the relevant time. It has been held that the court's discretion is a broad one driven by the same compensatory aim as damages and exercised with that in mind, focussing only on the cost to the plaintiff of being deprived of the money which he/she should have had and not on the profit to the defendant of the use of the money (see Steyn J in *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd,* 11 December 1987). The court in a case involving the award of statutory pre-judgment interest is focussed on compensation for the loss caused to the claimant, the victim of the wrong. In the section 238(11) context, the Court is required to find a fair rate balancing the interests of the company and the dissenting shareholders. As Martin JA said in *Shanda-CA* in section 238 cases the entire focus is removed from the claimant/dissenting shareholders and is instead placed on the entirety of the circumstances taking into account both the disadvantage to the dissenting shareholders and the advantage to the company.

82. Despite this difference, it seems to me that the approach taken in these English cases provides a useful guide as to the need to establish a, and as to what may be an appropriate, proportionate and cost-effective procedure for the determination of interest in the section 238 context. An objective standard should be applied to determine the dissenting shareholders' opportunity cost and assumed lost returns because investigating the

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particular and special attributes of each dissenting shareholder will involve in each case a detailed factual inquiry with the need for substantial evidence about which there may be factual disputes and the need for cross-examination of witnesses. The procedure for establishing the fair rate of interest needs to conducted in accordance with the overriding objective and therefore to be proportionate and cost-effective. It is clearly important to ensure that the procedure and rules applied to determine interest under section 238(11) allows the Court to deal with the application justly but it is desirable to avoid the determination of the fair rate of interest requiring a further full trial.

83. But is it necessary or appropriate to go further and establish a rule of law (or a practice) that requires that all the characteristics of the dissenting shareholders always be ignored? Does the nature and purpose of the section 238(11) jurisdiction, or the differences between that jurisdiction and the statutory jurisdiction to award pre-judgment interest, require or justify the application of a strict objective test for the purpose of determining the Prudent Investor Rate?

84. As I have noted, for the purpose of determining pre-judgment interest the English authorities (and practice in commercial cases is to) apply, as a matter of practice, an objective standard albeit not a strict objective standard that ignores all of the claimant's characteristics. The English courts in the context of a section 35A case will only consider the general characteristics of the claimant in order to decide whether to assess interest at a rate that is higher or lower than is conventional. The Delaware courts appear to justify the application of a strict objective approach that ignores all the characteristics of the dissenting shareholders by saying that having regard to the nature of an appraisal action under section 262 of the DGCL and the relative rights of the company and dissenting creditors created by the statute, it would not be fair (to the company) to take into account, for the purpose of establishing the estimated return on investments that has been forgone, higher than average returns that could be earned by ordinary investors using a safe and conservative investment strategy. Using a portfolio of investments and an asset allocation that would be used by an investor without specialist or unusual expertise (that is an ordinary investor) and assuming a conservative investment strategy that is designed to keep the investments safe but is balanced in order to obtain the best returns available within those constraints, ensures that a material rate of return is presumed to be available to the dissenting shareholders while avoiding high returns that penalise the company and

improperly shift the full responsibility for the dissenting shareholders' losses on to the company. Having invested in the company and subjected themselves to the statutory merger and appraisal regime, dissenting shareholders cannot complain, when bringing an appraisal action, that their freedom to invest and make above average returns achievable by most investors is constrained and ignored when the interest rate is being assessed.

85. I can see that it can be strongly argued that this analysis should be applied without modification in section 238 (11) cases. As I have noted, for the purpose of determining the Prudent Investor Rate, the Court of Appeal has held that the Delaware approach (as represented by the mid-point approach) is consistent and in accordance with the policy underlying and the proper interpretation of section 238. Furthermore, the need to limit the inquiry to be conducted when determining the fair rate of interest weighs in favour of using a standardised measure for the dissenting shareholders' opportunity cost. Having said that, it seems to me that it would be wrong to adopt the Delaware rule in its entirety and to adopt a blanket rule (or practice) that requires the position of the dissenting shareholders must always to be completely ignored. While the policy identified by the Delaware courts of avoiding penalising the company by allowing dissenting shareholders to rely on high and above average returns which can be assumed to be available to non-specialist investors does apply in section 238 cases, I do not consider that the strict objective approach is consistent with the broad statutory discretion that applies to the determination of interest under section 238(11). In my view, it is necessary to maintain and not fetter the Court's broad discretion to award a rate of interest that is fair in all the circumstances. Nor do I consider that the strict objective standard must be adopted in order properly to give effect to the mid-point approach.

86. I consider that the preferable approach is as follows (which respects both the policy of limiting the scope of the inquiry to promote proportionality and cost-effectiveness and the policy of finding a fair rate by limiting the company's responsibility for all the dissenting shareholders' losses, but also recognises that the Prudent Investor Rate is supposed to reflect the lost opportunity to invest of the dissenting shareholders before the Court). The legal principle, mandated and made applicable by section 238(11), is that dissenting shareholders are entitled to a rate of interest that in all the circumstances is fair. But when determining what is fair (having regard to the position of both the dissenting shareholders and the company) the Court should adopt and start with a

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presumption that adopting the prudent investor rate based on the returns that would have been obtained by an average (ordinary or broadly typical) retail or professional investor acting prudently will be fair but this presumption can be rebutted in cases where the dissenting shareholders can show that adopting the average/ordinary investor model would be unfair to them having regard to their position (taking into account the type or category of investor they are).

87. This approach does not change the burden of proof – each of the parties must establish their case on the balance of probabilities standard – but sets out how the Court should establish what is a fair rate of interest by using the prudent average investor standard. Wherever dissenting shareholders rely on their general characteristics for the purpose of establishing the Prudent Investor Rate, the Court must assess whether in determining a fair rate it is necessary to take these into account and if so the effect of doing so.

88. This approach seems to me to be in accordance with the purpose of section 238(11) and to be consistent with the authorities in this jurisdiction interpreting it, which have recognised a broad evaluative discretion focussed on all the relevant circumstances and the dissenting shareholders' position. It is also consistent with the approach and practice adopted to the exercise of a broad discretionary power to determine interest in related (albeit different) contexts.

89. The Prudent Investor Rate is one component of the mid-point formula. It is focussed on the putative investment returns that the dissenting shareholders would have received had the fair value amount been paid at the time of the merger. It is not an assessment of compensation in the context of determining damages for a wrong. But the purpose of the exercise is nonetheless to establish what rate of return on investments would compensate the dissenting shareholders before the Court for *their* lost opportunity to invest.

90. I appreciate that the approach I have adopted involves applying the core feature of the Delaware methodology for determining the fair rate of interest (the mid-point approach) without adopting that methodology in full. But I do not consider that adoption of the mid-point approach requires the adoption of the Delaware rule or practice relating to the prudent investor standard in full. The rationale for adopting the Delaware prudent investor standard goes beyond and is separate from that behind the mid-point approach.

But importantly, it seems to me that the full application of the Delaware prudent investor standard is not justified by the language and purpose of section 238 as applied in this jurisdiction and the practice and approach of this Court in broadly similar cases (of which the English section 35A authorities are examples).

91. It seems to me that the approach taken in the English cases on section 35A which I have discussed as to which aspects of a party's position are relevant and to be taken account represents an appropriate and pragmatic balance between the need to be fair to the party concerned and to limit the extent of the inquiry. Where justified by the dissenting shareholders, their broad characteristics can be taken into account. They need to establish that in light of their characteristics as investors, which would have a material effect on the approach to be adopted by a prudent investor investing the fair value amount, it would be unfair in all the circumstances to limit the prudent investor rate to that which the average non-specialist investor would obtain. I have said that the average non-specialist investor can be assumed to be either a retail or a business investor because it seems to me that if the dissenting shareholders are operating a business then it is fair and appropriate to use the business investor assumption but also because in this context, assuming that they are both to have the same investment horizon and to be acting prudently, the differences in approach to the selection of investments for the relevant investment portfolio is unlikely to be material.

92. To determine the Prudent Investor Rate the Court (with the benefit of expert evidence) must assess how a prudent investor with the relevant characteristics would have invested the fair value amount had they been paid in full at the time of the merger. This involves an assessment of the types of investments that such an investor would have purchased, and this is influenced both by the investor's risk appetite and the appropriate investment horizon. The requirement of prudence is important and regulates the first of these elements, namely risk appetite. The prudent investor standard, as it seems to me, requires a conservative strategy with low to moderate risk (to achieve a balanced and overall a conservative portfolio) albeit that as Vice Chancellor Chandler said in *Chang's Holdings* there can be a mix of investments with different risk profiles to achieve that overall balance. Insofar as short and long term investments have different risk profiles, with long-term investments tending to be less risky compared to short-term investments (since they have more time to overcome market fluctuations and potential downturns), once

again there can be no objection, as Vice Chancellor Chandler also said in *Chang's Holdings*, to some short term investments being included because a prudent investor can be assumed to consider it appropriate to select a balanced portfolio.

93. As regards the relevant time horizon, in *Trina* I was concerned to ensure that the Prudent Investor Rate was not based on unrealistically and unreasonably high investment returns by assuming that the dissenting shareholders could base their investment decisions (what investments to purchase) on the assumption that they would be out of the money for a long period so that the investments they were making would only fall to be realised in the long term. It seemed to me that while the Court was not assuming that the investments to be made by the dissenting shareholders were only to be held until the fair value amount was paid (by way of interim payments or final payment) if the investment portfolio and asset mix proposed by the dissenting shareholders was based on above average returns generated by long term investment well beyond the duration of the section 238 proceedings it could be said that this was unfair to the company, since the core objective is to compensate the dissenting shareholders for the loss of the use of their money during the period they are kept out of it, and in the context of section 238 proceedings the dissenting shareholders will only ever be out of their money for the relatively short duration of the proceedings. In the event, I was satisfied that this issue did not arise because, as I explained, there was no evidence to suggest that Mr Billiet's asset allocation was based on such an assumption.

94. But I accept that the Court does not generally require the assumption to be made, when deciding on what investments are assumed to be acquired and the relevant asset mix, that the investments to be acquired by the prudent investor will and must be realised at the end of the litigation (or when the interim payments are received). The limited duration of the litigation is taken into account by only permitting the investment returns that are assumed to have been earned during the period of the litigation (and in the period before the interim payments are made) to be used. In this way, the dissenting shareholders are only compensated for the loss of the use of their money during the period of the litigation. It is right to say that the award of interest under section 238(11) is intended to compensate the dissenting shareholders for the loss of the use of their money and endeavours to place them in the position they would have been in had the company promptly paid them the value of their shares. The Prudent Investor Rate is based on the return that a prudent

investor would have received if he/she had invested the fair value amount at the time of the merger.

95. Accordingly, the applicable principles can be summarised as follows:

(a). section 238(11) requires the Court to determine a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value.

(b). the Court has a broad discretion to determine what is fair. The focus is on the entirety of the circumstances in deciding what is a fair rate of interest balancing the disadvantages suffered by the dissenting shareholders and the benefits received by the company. For this reason, the mid-point approach is appropriate (as a logical way of balancing the advantages and disadvantages).

(c). the Court takes into account the fact that a section 238 determination does not proceed on the basis that any legal right of the dissenting shareholder has been infringed by the company. The legislative concern is not to restore him/her to some anterior position existing before the commission of a wrong but to ensure that he/she receives fair value for what he/she is obliged by statute to give up.

(d). the cost of borrowing a sum equal to the fair value amount and the putative investment returns that could have been achieved had the fair value amount been invested at the time of the merger both represent the dissenting shareholders' lost opportunity and consequently the disadvantage to the dissenting shareholders of being out of their money.

(e). in determining what assumed investment returns are fair an objective standard is used. An objective standard is used both because (as a matter of practice) it is necessary to ensure that the procedure for assessing the fair rate of interest is proportionate in terms of expense and Court time and because (giving effect to the statutory policy of balancing advantages and disadvantages) it is necessary to limit the level of returns assumed to have been lost by the dissenting shareholders so as to avoid penalising the company by making it liable for all and above average losses incurred by the dissenting shareholders.

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(f). in determining what is a fair (assumed) investment return using this objective standard the Court presumes that investment returns that would have been generated by an ordinary non-specialist retail or professional investor acting prudently will be fair. The ordinary non-specialist retail or professional investor is representative of, and has the level of expertise held and follows an investment strategy that is used by, most of such investors.

(g). the prudence requirement acts as a material constraint on available returns. Acting prudently involves adopting a conservative investment strategy with low to moderate risk (to achieve a balanced and overall a conservative portfolio) albeit that there can be a mix of investments with different risk profiles to achieve that overall balance.

(h). but the Court may award a higher rate of interest than would be determined using the prudent ordinary investor model and assume that higher returns would be generated by investors with the general (but not any special or peculiar) characteristics of the relevant dissenting shareholders where the evidence demonstrates that such returns would be likely to be made and the dissenting shareholders can show that it would be unfair not to do so.

(i). the Prudent Investor Rate endeavours to place the dissenting shareholders in the position they would have been in had the company promptly paid them the value of their shares, and is based on the return that a prudent investor would have received if he/she had invested the fair value amount, at the time of the merger. Dissenting shareholders are not limited to returns assumed to be made on investments that will have to be realised and cashed-in once the company pays over the fair value amount (by interim or final payment). The assumed investments do not stand as substitutes for the fair value amount which can only be assumed to be retained until payment is made. However, since the core objective is to compensate the dissenting shareholders for the loss of the use of their money during the period they are kept out of it, namely the relatively short duration of the section 238 proceedings, the Court retains a discretion, as it seems to me, to treat as unfair high returns assumed to be generated by a very long term investment strategy.

96. In the present case, it seems to me that:

(a). on balance, the preferred approach is to adopt an asset allocation of 45% equities, 45% bonds and 10% cash to be applied in both the first period and the second period.

(b). this is based on applying the ordinary/average prudent investor standard and using (i) the data in the Thinking Ahead Institute study for the period 2019-2022 (53%/39%/8%) as the basic benchmark for the asset allocation that would be adopted by most professional asset managers (covering private wealth managers, insurers, and banks) as representatives of the ordinary/typical investor but (b) adjusting down the Thinking Ahead Institute study allocation for equities (53%) to reflect the more prudent asset allocations represented by the more conservative/moderate Black Rock, Vanguard and Fidelity portfolios, which Mr Good supports and which suggest that an allocation below the 53% for equities indicated by the Thinking Ahead Institute study for the period 2019-2022 is appropriate. I note that all the conservative and moderate portfolios have equity allocations of 40% or below. 45% seems to me to represent a reasonable and conservative figure to adopt to achieve a balance between these figures. The bond allocation needs to be increased (I consider that the evidence indicates that a considerably higher allocation for bonds above cash is appropriate even for a conservative strategy) and I note that conservative/moderate Black Rock, Vanguard and Fidelity portfolios have allocations for bonds of between 45% and 70% and once again 45%, involving an uplift of 6% from the Thinking Ahead Institute study figure, seems me to be reasonable as a prudent allocation. The residual cash figure of 10% also seems to me to represent a reasonable balance of the allocations contained in the evidence and a prudent figure.

(c). I take the private wealth managers, insurers, and banks covered by the Thinking Ahead Study to stand as representatives of the ordinary/typical investor and note that professional investors were accepted to be appropriate for this purpose by Mr Good.

(d). this asset allocation involves a higher allocation to equities than was used in *Qunar* and *Trina* primarily because the evidence in this case relied on by Mr Good for his ordinary/average prudent investor analysis appears, even when adjusted to give some weight to the asset allocations adopted by the more conservative portfolios relied on by Mr Billiet, to require it. I have started with the figures in the Thinking Ahead Institute study for the period 2019-2022 (53%/39%/8%) but have reduced the allocation to equities (by moving most of the adjustment to bonds) to reflect a more conservative approach which seems to me to be justified by reliance on the more conservative (and moderate) Black Rock, Vanguard and Fidelity portfolios and also to take account of the fact that even Mr Good did not consider that complete reliance could properly be placed on the Thinking Ahead Institute study which involved some approximation and whose dates were less than perfectly aligned with the dates applicable in this case. It seems to me that some rounding down of the equity allocation and an increase in the bond allocation is an appropriate adjustment to the cautious and conservative side. It seems to me that while it is desirable where possible to maintain a consistent approach to asset allocation in similar cases, and for that reason the 40/45/15 allocation used in *Qunar* and *Trina* is relevant and may be a useful starting point or benchmark, each case has to be decided by reference to the evidence adduced and the circumstances of the case.

(e). as regards the returns assumed to be made on these investments/assets, I would use Mr Good's data and adopt Mr Good's methodology which seems to me to be reasonably and properly based on indices that properly reflect returns generated by conservative investment strategies.

(f). I consider that the asset allocation and returns produced by this methodology are fair in all the circumstances. Even if the status of the Dissenting Shareholders who are hedge funds is taken into account, I do not see how the asset allocation and returns proposed by Mr Billiet can be regarded as being consistent with a prudent investment strategy. In any event, the asset allocation and returns produced by the ordinary/average prudent investor standard are not so low when compared with, or so far removed from, the allocation and returns which the Dissenting Shareholders (who say they are hedge funds) say should be adopted and assumed for hedge funds

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(being investors with their general characteristics) as to make it necessary to increase the equity/bond allocation and the rates of return in order to achieve a fair balance between the dissenting shareholders and the company. The Dissenting Shareholders have not shown that their status as hedge funds justifies imposing on the company a higher rate of interest. I agree with Mr Good that the evidence filed by the Dissenting Shareholders as to their own position and status as hedge funds was sketchy and too limited and that finding a suitable investment strategy that fits all hedge funds is problematic but it does seem to me that the Dissenting Shareholders can show and have established that hedge funds do and should be assumed to adopt higher risk (and event driven) investment strategies.

97. The assumed returns must be based on a prudent investment strategy. As I have held, acting prudently involves adopting a conservative investment strategy with low to moderate risk (to achieve a balanced and overall a conservative portfolio). It seems to me that, as Mr Billiet acknowledged, his selection of ETFs, both for the purpose of determining asset allocation and returns, involved including those with higher risk above that consistent with a cautious and conservative approach.

98. Mr Good has assessed the investments to be made, the investment mix and the returns assumed to be made by reference to the approach that in his opinion (Good 2 at [3.2.5]) would be taken by a prudent investor being "*a general investor (whether retail or institutional) that takes some degree of risk, although is careful and cautious such that its risk appetite is lower than the average investor. My approach results in a Prudent Investor Rate that is intended to be applied to any dissenter, whether a hedge fund or individual investor*". As can be seen from my discussion above, this is consistent with my view as to what is required by the ordinary prudent investor standard. I have a slight quibble with his statement that the prudent investor has a risk appetite lower than the average investor. There is a distinction between the type of investor and the investor's risk appetite. The average retail or institutional investor is an investor whose expertise and knowledge of investing is typical and representative of most such retail or institutional investors. I can see that not all such investors will adopt a conservative risk strategy but some, and maybe many, will do so. The prudent ordinary investor will then be adopting a risk strategy which many other ordinary investors adopt.

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99. Mr Good noted that the data collected by the Thinking Ahead Institute that he relied on (Good 1 at [6.4.9(i)]) showed that the average asset allocation across 2018 to 2022 based on 191 asset managers (approximately 50% equities, 40% bonds and 10% cash) was higher than the allocation he favoured. But he noted that 40/45/15 had been accepted in *Qunar* and *Trina*, in light of the evidence adduced in those cases, as being in accordance with what a prudent investor in the position of the dissenting shareholders would adopt, and considered that this was a reasonable allocation to be used in this case.

100. During his cross-examination (see the transcript for 24 June 2024 pages 99-103), Mr Good was challenged as to why he had relied without modification on the Thinking Ahead Institute study.

101. First, Mr Isaacs KC noted that Mr Good had not sought to balance the different asset allocations shown by that study and the allocation in *Qunar* and *Trina*. He had not taken the mid-point between them or a weighted average.

102. Secondly, Mr Isaacs KC noted that the Thinking Ahead Institute study covered the period 2018 to 2022 whereas the applicable interest period in this case started on 25 January 2019. In Billiet 2, Mr Billiet had said (at [4.46]-[4.49] of Billiet 2) that the data reported by the Thinking Ahead Institute indicated that the average asset allocation from 2019 to 2022, based on the 191 asset managers covered, was approximately 53% equities, 39% bonds and 8% cash. Mr Billiet had noted that this produced a higher allocation to equities than Mr Good had selected and furthermore the Thinking Ahead Institute study appeared to reflect the position of asset managers such as private wealth managers, insurers, and banks and not hedge funds. Mr Billiet commented that it was not clear which firms were included in the set of 191 that provided data to the Thinking Ahead Institute on their holdings and he understood that Mr Good did not know. Through his instructing attorneys he had asked to see the underlying data but was informed that Mr Good did not have any further information. Mr Billiet said that he understood that the wider set of 500 firms discussed in the source document were primarily private wealth managers, insurers, and banks and that some private equity firms (which may have similar risk tolerances to hedge funds) were identified but these represented only a small part of the overall set and it was not clear whether any had been included in the subset of 191 firms to which Mr Good referred. Mr Isaacs KC put it to Mr Good that it was inappropriate in these

circumstances to take into account interest rates in 2018 and that if Mr Good had used the figures for the period from January 2019 the percentage of equities would have been higher at 53%. During the cross-examination the following exchange took place:

> *"Q. So if you take from me that the average allocation of equities from 2019 to 2022 is 53% to the nearest -*
> *A. It's 42.7 I think according to Mr Billiet.*
> *Q. Yes. Which you say - and you say you adopted the allocation as in Qunar and Trina Solar of 40% equities, 45% bonds and 15% cash, which broadly aligns with the asset allocation referred to in the Thinking Ahead Institute data; correct?*
> *A. Yes.*
> *Q. Well 53% doesn't broadly align with 40%, does it?*
> *A. I'm not -- that's not comparing like with like. You're comparing the average from here with a prudent investor. Of course that will depend on your definition of a prudent investor.*
> *A. I'm comparing what you said, which is that the asset allocation in Qunar and Trina broadly aligns with the asset allocations referred to in the Thinking Ahead Institute data. That's your words not mine?*
> *A. Yes, I stand by those.*
> *Q. So the asset allocation in the Thinking Ahead Institute data of 53% that I discussed with you, doesn't broadly align with 40% equities in Qunar and Trina, does it?*
> *A. Yes, taking account of, firstly, the - that you're never going to get perfect alignment and also the nature ever of what we're looking at here.*
> *Q. 53% more broadly aligns with 60% than 40%, doesn't it?*
> *A. It's closer arithmetically, yes."*

103. These challenges seem to me to be justified and undermine placing weight on the unadjusted figures for the Thinking Ahead Institute study covering the period 2018 to 2022. I also consider, for the reasons I have given, simply to rely on the 40/45/15 allocation used in *Qunar* and *Trina* would be wrong.

104. But I agree with Mr Good that Mr Billiet's asset allocation of 60/35/5 was based on too high a risk strategy for the ordinary/average prudent investor. Mr Billiet had relied on what he regarded as balanced/growth model portfolios using guidance produced by Blackrock, Vanguard and Fidelity (what Mr Good defined as the ***Model Portfolios***). Mr Billiet had said that these Model Portfolios were for use by general investors and appeared to be intended for retail (i.e., non-institutional) investors.

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105. Mr Good seems to me to have demonstrated that Mr Billiet's methodology adopted was based on assuming unacceptably high risk investment strategies. Mr Good noted that Mr Billiet had selected riskier portfolios from the Model Portfolios compared to those selected in *Qunar* and *Trina* and portfolios which he considered involved a level of risk that was not appropriate or suitable for a prudent hedge fund investor:

(a). in relation to Black Rock, Mr Billiet had selected the Growth portfolio (60% equities and 40% bonds) rather than the Conservative (30% equities and 70% bonds) or Moderate (40% equities and 60% bonds) portfolios. Mr Good disagreed that this would be suitable for a prudent general investor. Mr Billiet opined that it would be appropriate for a prudent hedge fund investor that takes selected risks to pursue returns (and allowed for a somewhat higher level of risk than he had previously assumed for a general investor). Mr Good considered that the Conservative or Moderate portfolio would be more appropriate for the prudent investor.

(b). in relation to Vanguard, Mr Billiet had selected the LifeStrategy Moderate Growth Fund portfolio (60% equities and 40% bonds) as being the most suitable for a prudent hedge fund investor (by allowing for some risk in pursuit of higher returns). Once again, Mr Good considered this to be inappropriate for a prudent investor. He considered that the LifeStrategy Conservative Growth Fund portfolio (40% equities and 60% bonds) was more suitable for the prudent investor.

(c). in relation to Fidelity, Mr Billiet had selected the Growth with Income portfolio (60% equities, 35% bonds and 5% cash) as once again being suitable for a prudent hedge fund investor, allowing for a medium level of risk in pursuit of higher returns. Mr Good considered that the Conservative (20% equities, 50% bonds and 30% cash), Moderate with Income (30% equities, 50% bonds and 20% cash) or Moderate (40% equities, 45% bonds and 15% cash) portfolios would be more appropriate for the prudent investor.

106. As regards assumed returns on bonds, as I have noted, Mr Good decided to use only the ETFs relied on in *Qunar* and *Trina* and to exclude high yield bonds, which are covered by iBoxx High Yield. He said that he could not definitively conclude that Mr Billiet was

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wrong to include the iBoxx High Yield index but that he thought it appropriate to use the same ETFs as were relied on in *Qunar* and *Trina* so as to apply a consistent approach across equities and bonds and also because in his view it was preferable to assume that the ordinary prudent investor would not take the higher risk of high yield bonds. Mr Billiet considered, as I have also noted, that this index was an appropriate reference point in this case because a hedge fund investor was likely to hold both investment-grade and high-yield bonds.

107. Mr Billiet was clear that he had assessed his asset allocation and returns on the basis of what would be appropriate for a hypothetical prudent hedge fund investor. In his opinion, the approach of the average asset manager was inappropriate in this case since the Dissenting Shareholders (other than Mr Lu) were hedge funds. In his opinion, the investment objectives and risk profiles of an average asset manager and a hedge fund manager were different: while asset management typically involved a more conservative approach to investing, with a focus on minimising risk, hedge funds were known for their aggressive investment strategies and high-risk investments. Therefore, he considered it to be reasonable to assume that the hypothetical prudent hedge fund investor would take on a higher level of risk than was reflected in the average reported by the Thinking Ahead Institute (that is a higher equity allocation than 53%, with lower bond and cash holdings than 39% and 8%).

108. For the reasons I have given it seems to me that this higher risk strategy is not consistent with the average/ordinary prudent investor standard. It is certainly not prudent. Furthermore, like Mr Good, I am also not convinced that the concept of a prudent hedge fund is coherent. Mr Billiet's evidence was, as I have noted, that hedge funds were known for their aggressive investment strategies and high-risk investments. It seems to me, on this basis, to follow that they never (or at least generally do not) adopt a prudent investment strategy. I can see that it can be said that some hedge funds adopt a more conservative and lower risk strategy than others so that they could be classified as prudent hedge funds. But that distorts the meaning of prudent investor in this context. A prudent investor, as I have held, is an investor who adopts a conservative investment strategy with low to moderate risk (to achieve a balanced and overall a conservative portfolio). On Mr Billiet's evidence and definition, hedge funds do not do so. The investment strategy on which Mr Billiet relies is not in my view consistent with the prudence

standard. This does not, as I have said, prevent the Dissenting Shareholders arguing that the use of the prudent ordinary/average investor standard is on the facts unfair to them and that a fair rate of interest should be at a higher rate but I do not consider that they have established that fairness requires a higher rate in this case.

The costs of the proceedings

109. There was no dispute as to the applicable law. It was accepted by the parties that the applicable principles had been summarised by Mr Justice Parker in *Qunar* (at [129]), whose summary had been endorsed by me in *Trina* (at [71]) and approved (but qualified or refined) by the Court of Appeal in *Maso Capital and Blackwell Partners v Trina Solar* (unreported, 4 August 2023) (***Trina-CA***).

110. Section 238(14) of the Act provides that the costs of the proceedings are to be determined "*as the Court deems equitable in the circumstances*." Where dissenters participate actively, the Court's practice is to start by asking who is the successful party within the meaning of GCR Ord 62 r 4: (see Justice Parker's judgment in *Qunar* at [129(c)]).

111. In *Trina-CA* Birt JA noted (at [23]) that whilst courts may be more willing than in the past to make orders which reflect success or failure on particular issues, the principles summarised in *Re Elgindata (No 2)* [1993] 1 All ER 232 (***Elgindata***) remain applicable in this jurisdiction so that, in particular, before a successful party is ordered to pay the costs of the other party in relation to a particular issue upon which the successful party has failed, it must be shown that the issue has been raised properly or unreasonably. However, there is no requirement for an issue on which the successful party has failed to have been raised improperly or unreasonably for the court to deprive the successful party of the costs of that issue. Nevertheless, it must be an issue which has caused a significant increase in the length or cost of the proceedings.

112. The relevant passage in *Elgindata* is in the judgment of Nourse LJ at [237] as follows:

> *"The principles are these. (1) Costs are in the discretion of the court. (2) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (3) The general rule does not cease to apply simply because the successful party raises issues or makes*

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allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or part of his costs. (4) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or a part of the unsuccessful party's costs."

113. What amounts to success in any given case depends upon all the circumstances (see Justice Parker in *Qunar* at [129(e)]). Where fair value is determined to be materially above the statutory offer made to dissenting shareholders pursuant tosection 238(8) of the Act the Court is entitled to treat the dissenting shareholders as the successful parties, but a more nuanced approach should apply than merely to look at who writes the cheque (see, once again, Justice Parker's judgment in *Qunar* at [147]).

114. The Company, in summary, submitted as follows:

(a). on the key valuation battleground, and in particular the big ticket time-consuming issues, the Company's expert evidence was preferred to that of the Dissenting Shareholders so that, given the very sizable delta between the fair value contended for by the Dissenting Shareholders and fair value as assessed by the Court, there should either be no order as to costs or one quarter of the Company's costs should be paid by the Dissenting Shareholders (other than Mr Lu).

(b). the material numerical parameters of the debate over the Company's value which should be taken into account were:

(i). the statutory offer made by the Company was equivalent to the Merger Price of US$41.20.

(ii). at trial the Company argued that fair value was US$38.42.

(iii). at trial the Dissenting Shareholders initially argued that fair value was US$65.16 and subsequently that it was US$64.43.

(iv). the Court determined the fair value at US$45.074.

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(c). therefore this was a case in which the party writing the cheque will be the Company but the cheque is not nearly as large as that contended for by the Dissenting Shareholders.

(d). the expert evidence put forward by the Company through Mr Good was overwhelmingly preferred by the Court, in particular on the big ticket items and those which occupied most of the time at trial.

(e). the headline issues on which the experts did not agree in relation to the disputed DCF inputs were the size premium ($16.94); the terminal value methodology ($3.22); the terminal growth rate ($8.57); the foreign exchange rate ($4.13) and the minority discount ($3.35).

(f). the headline issues on which the experts did not agree in relation to comparator companies were reliance on EV/revenue multiples; the use of companies listed in mainland China; whether a comparable transaction could be identified and whether the Company's trading price was a pointer to fair value.

(g). size premium was by far the single biggest ticket item. It dominated both the paperwork and the trial itself. While the Dissenting Shareholders succeeded on the question of the quantum of the size premium their primary case was that a size premium should not, and most of the Court's time was devoted to the issue of whether a size premium should, be applied. On this issue the Company was successful. Even though the Company failed in its case that the size premium should be fixed at 1.58%, neither had Mr Beaton advocated for such a size premium.

(h). Mr Good's opinion was accepted and preferred by the Court on many issues. His terminal growth model was preferred. As between the terminal growth rates contended for (Mr Good: 3.5%) and Mr Beaton (4.5%) the Court largely accepted Mr Good's approach, adopting only a small scale adjustment in fixing the terminal growth rate at 3.75%. Mr Good's approach to foreign exchange was accepted outright and the Court accepted Mr Good's opinion that a minority discount should

be applied, albeit that the Court adjusted the premium downwards from 5% to 2.5%.

(i). the Court had accepted the Company's submission that it should treat as comparator companies the four companies agreed upon by the experts and had agreed with Mr Good that EV/revenue multiples were not illuminating and that mainland Chinese companies should not be included in the CoCo valuation. The debate concerning the A-H premium was another big ticket item which occupied considerable hearing time and on which the Dissenting Shareholders were unsuccessful.

(j). the Court declined to adopt Mr Beaton's Co-Trans valuation. This had been based on the acquisition by Meinian of 72% of Ciming in October 2017 and had occupied significant Court time and generated a substantial corrections report from Mr Beaton before the entire valuation method was openly disparaged by Mr Beaton. The Court also refused to afford any weight to the Company's market trading price, and refused to accept the Company's position on this issue but did so by reference to admitted shortcomings in the data available. The Dissenting Shareholders' arguments focusing on Mr Beaton's event study achieved no traction whatsoever.

115. The Dissenting Shareholders, in summary, submitted as follows:

(a). they were the successful parties at trial and therefore in accordance with the general rule the Company should pay the Dissenting Shareholders' costs of the proceedings to be taxed on the standard basis if not agreed.

(b). their success at trial was evident from a comparison between the fair value determined by the Court (US$45.074 per share) and the merger price (US$41.20 per share). The difference was US$3.874 per share, an aggregate amount of US$13,252,524 and an uplift of 9.4% on the Merger Price.

(c). their success was also evident from a comparison between the fair value determined by the Court and the Company's position at trial (US$38.42 per share). This

difference was US$6.654 per share, an aggregate amount of US$22,762,595 and an uplift of 17.3%.

(d). the Dissenting Shareholders should not be liable to pay any of the Company's costs. They were the successful party and there was no suggestion in the Court's judgment that supported the conclusion, or any proper basis for concluding, that in relation to any issue on which they had failed the issues or their arguments had been raised improperly or unreasonably.

(e). the Dissenting Shareholders had been more successful than the Company on the following issues:

(i). DCF weighting: 90% weighting was attributed by the Court, compared to 75% by Mr Beaton, whereas Mr Good attributed a 60% weighting.

(ii). CoCo weighting: 10% was attributed by the Court compared to 15% by Mr Beaton, whereas Mr Good ascribed a 30% weighting.

(iii). market trading price: no weight was given to Mr Good's market trading price valuation.

(iv). Merger Price: the Merger Price was not a cross-check on other valuation methodologies, as Mr Good contended.

(f). furthermore, the Company's case had not been accepted in relation to the following issues:

(i). size premium: Mr Good had supported a size premium of 1.58% but the Court had applied a size premium of 0.87% based on Mr Beaton's secondary case, which the Court held was preferable.

(ii). minority discount: the Court had applied a minority discount of 2.5%, which was between the estimate of Mr Beaton (0%) and Mr Good (5%).

(iii). growth rate: the Court had applied a terminal growth rate of 3.75%, which was between the estimates of Mr Beaton (4.5%) and Mr Good (3.5%).

(iv). EBITDA multiples: the Court had applied multiples for FYE, FYE+1, and FYE+2 higher than those contended for by Mr Good.

(g). this was not a case in which the Dissenting Shareholders failure on certain issues justified the disallowance of any of their costs. In the two appraisal cases in which dissenting shareholders had been successful but where there had been departure from the general rule, the case at trial had "*really [been] about the vast delta between the two competing valuations*" (*Qunar* at [151]). In *Qunar*, the dissenting shareholders had claimed an uplift of 415% on the merger price, but obtained only 2% and in *Trina*, the dissenting shareholders had claimed an uplift of 1,565% but had only obtained 1% (and the Court had concluded that their claim "*was on any basis an extravagant claim*" (at [48])).

116. Having carefully considered the parties' submissions I have concluded that the Dissenting Shareholders are right to say that they should be treated as the successful parties. The key metric in my view is that they achieved a material uplift on the fair value for which the Company contended at trial. The uplift achieved above the figure for which the Company contended at trial was, as the Dissenting Shareholders said, 17.3% (in the aggregate amount of an aggregate amount of US$22,762,595). This seems to me to be a material sum which is sufficient to justify treating the Dissenting Shareholders as the successful party. I also give some weight to the fact that the Dissenting Shareholders were awarded a material amount above the Merger Price, which the Company had offered to pay to the Dissenting Shareholders (9.4%). These premia to the sum for which the Company contended at trial and offered to pay the Dissenting Shareholders are substantial and far from insignificant. It is true that the fair value determined by the Court is not as high, and indeed is considerably less, than the sum claimed by the Dissenting Shareholders at trial. But this does not mean that the Dissenting Shareholders cannot be treated as the successful parties.

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117. As I explained in *Trina* (at [75]):

> *"(b). the starting point is that the Dissenting Shareholders did recover a material sum above the amount which at trial the Company claimed was payable both on its primary and secondary case… In my view, for costs purposes the Court should give particular weight to the extent to which the Dissenting Shareholders obtained a judgment above the sum which the Company claimed at trial was owed. The principle behind the general rule that the unsuccessful party should pay the costs of the successful party is that a defendant who owes the claimant a substantial sum albeit less than the amount claimed, has had to be brought to Court to enable recovery to be made (and the unsuccessful party always has the opportunity and can be expected to protect its position on costs in the event of an award of less than the full sum claimed by making a without prejudice save as to costs offer). While the procedural rules laid down in section 238(9) of the Companies Act require the company to commence the proceedings by filing a petition, and most of the issues in dispute relate to the expert evidence concerning the proper valuation of the dissenting shareholders' shares, in substance the proceedings involve an inter partes dispute about how much the company owes and should be required to pay the dissenting shareholders. As the Dissenting Shareholders argued, they are to be treated as being in a position analogous to claimants seeking payment from a defendant in pursuit of a legal right. The Company has had to be brought to Court to enable the Dissenting Shareholders to recover what is owed to them.*
>
> *(c). the fact that the Dissenting Shareholders claimed to be owed a substantially larger sum than the amount awarded therefore does not of itself mean that they should not be treated as the successful parties."*

118. This is also not a case in which the Dissenting Shareholders unreasonably sought at trial an extravagant sum. In such a case, the Court is entitled to treat and substitute the very large claim as the benchmark for determining who was the successful party (focussing on the reality of the dispute at trial), as I believe Justice Parker did in *Qunar*.

119. I do not consider that any of the Dissenting Shareholders' arguments were raised unreasonably or improperly but it is clear that a number of these arguments were unsuccessful. The question therefore is whether there should be any deduction to reflect the fact that they failed on these arguments and, if so, the amount of any such deduction.

120. I accept the Company's submissions in relation to two issues in particular, which seem to me to be of particular significance. In my view, a significant amount of time was

devoted to these two issues on which the Dissenting Shareholders failed, namely whether a size premium should be applied and the Co-Trans valuation. As a result, a deduction from the costs to be awarded to the Dissenting Shareholders is appropriate. The question arises as to what level of deduction is appropriate. In this type of case, the Court is left to form a general and somewhat impressionistic view.

121. As regards the size premium, I have noted the Company's submissions (supported by the analysis in Annex 1 to its written closing submissions on this application) that the Court should take into account the fact that Mr Beaton had not himself advocated for a size premium of 0.87% and that it had been no part of the Dissenting Shareholders' case in (written or oral) opening that the Court should apply such a size premium but as I noted at [87] (and see [166]) of the Judgment this had been the Dissenting Shareholders' secondary case at trial and it seems to me that when assessing the significance of the Dissenting Shareholders' failure to establish that no Size Premium should be applied the Court should take into account that this secondary case was (albeit reluctantly) accepted. As I noted at [85] of the Judgment the standalone impact of including Mr Good's size premium of 1.58% was to reduce Mr Beaton's DCF valuation by $16.94 per share. Accepting a size premium of 0.87% reduced that impact by just over half. As can be seen from the Judgment, and importantly, it is also clear that the time spent in written submissions, evidence and at trial (in cross-examination and oral submissions) dealing with the issue was substantial.

122. As regards the Co-Trans valuation, Mr Beaton gave a 10% weighting to his Co-Trans valuation. The failure to establish this valuation methodology should be used had a material effect on the Court's determination of fair value. Furthermore, once again as can be seen from the Judgment, a material part of Mr Beaton's evidence, the Dissenting Shareholders' submissions and the time at trial was devoted to this issue.

123. Taking all these matters into account, and giving some weight to the other issues on which the Company succeeded (as set out by the Company and summarised above) which involved a material amount of time but balancing the impact of the time devoted to the issues on which the Company failed (which the Dissenting Shareholders had fairly summarised, as noted above) I have concluded that a 15% deduction is appropriate.

Therefore I shall order that the Company pays 85% of the Dissenting Shareholders' costs of and occasioned by the proceedings as agreed or as determined by taxation on the standard basis.

The Hon. Justice Segal
Judge of the Grand Court, Cayman Islands
11 September 2024