



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

Cause No FSD 76 of 2017 (RPJ)

**IN THE MATTER OF THE COMPANIES ACT (2016 REVISION)
AND IN THE MATTER OF QUNAR CAYMAN ISLANDS LIMITED**

BETWEEN

QUNAR CAYMAN ISLANDS LIMITED

Petitioner

AND

- 1. MASO CAPITAL INVESTMENTS LIMITED**
- 2. BLACKWELL PARTNERS LLC – SERIES A**
- 3. ATHOS ASIA EVENT DRIVEN MASTER FUND**
- 4. FMAP ACL LIMITED**
- 5. SENRIGAN MASTER FUND**
- 6. PAG ASIA ALPHA LP**
- 7. PAG QUANTITATIVE STRATEGIES TRADING LIMITED**
- 8. PAG-P ASIA FUND L.P.**

Respondents

IN CHAMBERS

Appearances:

Mr Tom Lowe QC, Paul Madden, James Eggleton, Paula Kay and James Granby of Harney Westwood & Riegels on behalf of Qunar Cayman Islands Limited.

Mr Simon Salzedo QC (instructed by Mourant Ozannes, Conyers Dill & Pearman and Appleby (Cayman) Ltd) on behalf of the Respondents.

Mr Erik Bodden of Conyers Dill & Pearman on behalf of PAG Asia Alpha LP, Quantitative Strategies Trading Limited and PAG-P Asia Fund LP.

Mr Andrew Jackson of Appleby on behalf of Athos Asia Event Driven Master Fund, FMAP ACL Limited and Senrigan Master Fund.

Mr Jonathan Moffatt of Mourant Ozannes on behalf of Maso Capital Investments Limited and Blackwell Partners LLC – Series A.

Before: The Hon Justice Raj Parker

Heard: 15 -16 February 2021

**Draft Judgment
Circulated:**

22 March 2021

Judgment Delivered: 29 March 2021



HEADNOTE

Fair rate of interest - s.238 Companies Law (2016 Revision) – methodology - expert evidence - examination of different rates - interest period - compound or simple interest-s.34(1) Judicature Act (2017 Revision) – costs – offers - assessment of overall result at trial-discretion.

JUDGMENT

Introduction

1. This judgment deals with interest and costs following a trial concluded in March 2019 and judgment in this matter handed down on 13 May 2019¹.
2. The issues for determination are:
 - a) the fair rate of interest pursuant to section 238(11) of the Companies Act;
 - b) the periods in respect of which interest has accrued; and
 - c) the liability for the costs of the proceedings.
3. In relation to the fair rate of interest, the parties exchanged expert reports² and supplemental reports³ from Ms Glass on behalf of the company and Mr Billiet on behalf of the dissenting shareholders.
4. Both experts gave live evidence and were cross examined by Leading Counsel on this application which was heard by video conference.
5. Mr Lowe QC appeared, as he did at trial, for the company. Mr Salzedo QC appeared for the dissenting shareholders.

Fair Rate of Interest

6. The company argues through the expert evidence of Ms Glass (who was the expert called by the company at trial), that the fair rate of interest is 2.55%.

¹ [2019](1) CILR 611

² Dated 25 June 2020

³ Dated 5 February 2021



7. This figure is arrived at on the basis that the court should adopt, contrary to the methodology approved by the Court of Appeal in Shanda⁴, a market approach⁵ and in doing so apply the rate at which the company could have borrowed from a third party lender.
8. Alternatively, it argues that Shanda was wrongly decided and the court should apply the investor borrowing rate, which is also 2.55%.
9. In the further alternative, if the court is minded to follow Shanda, it argues that the court should apply a rate based on a ‘damages approach’.
10. This relies upon the company cash deposit rate of 1.65% (as a company benefit) and a blended rate, between two different prudent investor rates (to calculate dissenter loss).
11. The first prudent investor rate would be the risk free rate of 1.65% and the second would be the iBoxx ETF used in Shanda, namely 3.00%.
12. The overall resulting range for the damages approach when combining the company benefit and dissenter loss elements is 1.60% to 2.20% (2% in Ms Glass’ table on page 4 of her first report).
13. The dissenters argue that the court should follow the orthodox approach that has been adopted in this court following the former Delaware jurisprudence, and specifically the methodology set out by the Court of Appeal in Shanda of taking a midpoint approach between the company borrowing rate and the prudent investor rate.

Analysis

14. Section 238(11) of the Companies Act (2016 Revision) provides:

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

15. There is no definition of ‘a fair rate of interest’.

⁴ [2018] (1) CILR 352

⁵ Glass 1 §§ 26-33



16. The first decision concerning the appropriate principles to apply when determining a fair rate of interest under this section was *Integra*⁶. Jones J held that the fair rate of interest was the mid-rate between:
- a) the rate of interest payable by the company on its outstanding loans, which loans were used to partially discharge the merger consideration payable by the company (*the company borrowing rate*); and
 - b) in the absence of any evidence of the loss suffered or assumed to be suffered by the dissenting shareholders, or an investor in their position, as a result of being out of their money and not having the opportunity to invest such sums (*the prudent investor rate*), the rate of return (the interest earned by the company or *company deposit rate*).
17. In doing so he followed the approach formerly adopted in Delaware and an earlier version of § 262(h) of the Delaware General Corporations Law upon which section 238(11) was based⁷.
18. Since he had no evidence about the effective rate of interest which the dissenters actually earned or which a prudent investor could reasonably have expected to earn on cash or cash equivalents, he took the company's assumed return on cash rate of 0.2%.
19. This was the proxy for the opportunity cost or notional loss suffered by the dissenting shareholders (or prudent investors in a similar position) as a result of not being able to invest the sums to which they were entitled. He then took the company's assumed US dollar borrowing rate of 9.7%, finding that the mid-rate was the fair rate of interest at 4.95%.
20. The second decision was *Shanda*⁸. Segal J was presented with an agreed position as between the company and the dissenting shareholders that the former Delaware approach should apply.
21. Nevertheless he gave reasons at §§19 to 21 of his decision which relied (as had Jones J) on the revised opinion of Vice Chancellor Noble dated 10 September 2004 in *Cede*⁹ in Delaware.
22. Segal J referenced the purpose of the statutory jurisdiction and language to protect the dissenting shareholders from the effects of the forced merger and in particular to compensate them for being out of their money and to fix a fair rate of interest.

⁶ [2016](1) CILR 192

⁷ §§ 72-73

⁸ (unreported, 16 May 2017 Segal J)

⁹ Chancery Court Delaware (revised August 16 and September 10 2004) C.A. No 1934

23. He also referenced the need to take into account all relevant factors having regard to the facts of the case to ensure that a fair rate is used¹⁰. He referred to the balancing of interests and positions involved in the midpoint approach, which he said was consistent with the statutory mandate to establish a fair rate. In doing so he examined the disadvantage to the dissenters of being out of their money and the advantage to the debtor (company) through withholding sums payable.
24. He said:
- “It follows that for the assessment of the financial consequences of the delay two different perspectives have to be borne in mind. The midpoint approach achieves this¹¹.”*
25. This decision was subsequently appealed to the Court of Appeal. The company advanced a new argument that the former Delaware approach which had been agreed in Shanda and which had been applied in Integra is inconsistent with the purpose of an award of interest under Cayman law and that the judge had accordingly erred.
26. In particular the company argued that the judge ought instead to have awarded a rate of interest representing only the cost to the dissenting shareholders of being deprived of their money, assessed as equivalent to the rate which they would have had to borrow money to replace the unpaid value of their shares (the investor borrowing rate).
27. The Court of Appeal in Shanda disagreed with this argument, which was not advanced before Segal J, and dismissed the appeal on this point.
28. It approved a rate which was at a midpoint between the rate at which the company could have borrowed the amount representing the fair value of the dissenting shareholders' shares in order to pay it to them, and the rate which prudent investors in the position of the dissenting shareholders could have obtained, if they had the money to invest.
29. This was on the basis of the reasoning set out at §§51 to 59 of the judgment which states at §58:

“.....A s.238 determination, however, does not proceed on the basis that any right of the dissentient shareholder has been infringed by the company. The legislative concern is not to restore him to some anterior position but to ensure that he receives fair value for what he is obliged by statute to give up.

¹⁰ Ibid §19

¹¹ Ibid §20



*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 midpoint 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.**" per Martin JA (my emphasis).*

30. The company in its new argument in the Court of Appeal relied upon the principles set out concerning awards of damages whereby a right had been infringed which was to be compensated¹².
31. The Court of Appeal rejected that argument and held that the legislative concern in section 238 is not to restore the dissenting shareholders to some anterior position, as would be the case with a damages claim, but to ensure that the dissenting shareholders have received fair value for what they are obliged by statute to give up.
32. This importantly removes the focus from the dissenting shareholders and places it on the entirety of the circumstances, which leads to both the disadvantage to the dissenting shareholders and the advantage to the company being taken into account (the mid-point method).
33. The Privy Council heard the point again on appeal but dismissed it on the basis that the company's argument before the Court of Appeal and the Privy Council was to the effect that Segal J had exercised his discretion on the rate of interest improperly, and the argument had not in fact been made to the judge at the first instance hearing.
34. The Privy Council held:

¹² Banque Keyser [1987] (2) Lexis citation 1106 per Steyn J



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

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

59. In short Shanda’s new argument is that the judge’s approach was contrary to principle. It submits that the principle is that set out by Steyn J in Banque Keyser

61...but the Board cannot see any good reason from the parties’ written cases why the exercise by the judge of his discretion in this case should be open to challenge on a ground which he was not asked to consider”¹³. per Lady Arden.

35. It therefore did not expressly decide the point.

Decision

36. The leading authority as to the legal principles that ought to apply under section 238(11) remains that of the Court of Appeal in Shanda. It is strongly arguable that the decision is binding on this court, but even if it is not because the Privy Council has somehow left the point open, and even though the court has a broad evaluative discretion to apply on the facts of each case, the settled practice of two first instance courts as upheld by the Court of Appeal should be followed by this court unless there are good reasons not to do so.

37. This court must therefore be guided by the principles the Court of Appeal has set out as to the approach to be adopted in determining the fair rate of interest, unless it is persuaded on the particular facts that the approach would be clearly wrong.

38. I am not so persuaded in this case. I am therefore unable to accept the damages approach urged upon the court by Mr Lowe QC, or Ms Glass’s market approach which only considers the company’s borrowing rate, or to consider only the investor borrowing rate.

39. The court should look at both sides of the equation and adopt the midpoint approach.

¹³ §§57- 61 at 61



40. However, I am also aware that this court has had the benefit of expert evidence on the issue which was not the position before the court in Integra or Shanda.
41. It is therefore in a better position to examine the rates which could be applied to the company advantages and the dissenter disadvantages. I have therefore also considered in the context of that expert evidence the appropriate measures to adopt.

Company borrowing rate or cash deposit rate?

42. The company benefit is intended to capture the potential benefit derived by a company as a result of retaining and being able to use the sums that are ultimately payable to the dissenting shareholders.
43. The company borrowing rate represents the advantage to the company by temporarily retaining the additional funds so that it might avoid the need to borrow, resulting in reduced interest expense on a loan.
44. The company cash deposit rate represents the advantage to the company through withholding the sums payable to yield returns or interest from investing the funds.
45. Mr Lowe QC argues that the company in Shanda did not contend for the lower company cash deposit rate. The court should not automatically follow Mr Billiet's opinion that the company borrowing rate is the correct approach as being consistent with the former Delaware approach.
46. For the reasons set out by Ms Glass¹⁴ he says the company had no debt at the valuation date and would be unlikely to borrow in the short term as it had sufficient cash balances which were treated as non-operating. It did not stand to benefit from any reduction in borrowing costs and it was logically inappropriate that the company borrowing rate should be used. Ms Glass estimated that the company cash deposit rate is 1.45% and that is the rate which should be used for the company benefit and allocated as 50% of the total approach.
47. Mr Salzedo QC points out that Segal J chose to adopt Mr Meeson QC's position for Shanda that the company borrowing rate should apply, even though Shanda was debt free and had substantial revenues and there was no evidence that it would have had to borrow.

¹⁴ SG1 §§ 56-60



48. In addition he argued, as to the company's case that it had cash which it had received from the buyer group, that it would not be fair to penalise the dissenters in the interest rate by reference to a possible payment from the buyer group who are themselves the people behind the company's decision about what to offer and pay at every stage.

49. The company borrowing rate was in fact assessed at the trial of this matter in 2019:

'363. The company was not profitable at any material time. Ms Glass estimates 4.8% and Mr Osborne 4.0% to represent the cost of borrowing on largely unsecured debt.

364. The experts both agree that a reasonable estimate of the cost of debt in the future would be 3.91% based on a US "BBB" rated company which assumes the US risk free rate and default spreads for US companies. I accept Ms Glass' evidence that since the Company was a Chinese company it would be expected to face higher borrowing costs and to apply a premium to this.'
(Judgment 13 May 2019 (Parker J))

50. The court having considered the evidence of the valuation experts, assessed it at 4.8%. Mr Billiet is content to adopt this figure¹⁵.

Assessment

51. I agree with the points made by Mr Billiet as to why the company borrowing rate is more appropriate to use than the company deposit rate.

52. I do not accept the submission that because the company may have had sufficient cash balances at the valuation date together with the injection of cash post-merger, this results in a position where it would be fair to use the company deposit rate.

53. I see no good reason to depart from the reason given by Segal J in Shanda¹⁶, that it was not only because of the invitation of Mr Meeson QC for Shanda to use the company borrowing rate, but because using the company borrowing rate was a fair rate to use and accorded with the Delaware jurisprudence.

¹⁵ Billiet 1 §4.11

¹⁶ §24 (a)(i) and (ii)



Calculation

54. The next question is how the company borrowing rate should be arrived at in the calculation of a fair rate of interest.
55. Ms Glass suggests that if a company borrowing rate is used, it should be 2.55%, assuming the company had borrowed on a secured basis, because in her opinion a one year borrowing rate is more relevant than the 10 year borrowing rate data used at trial.
56. The reason Mr Billiet disagrees with this time horizon is that the longer term rates compensate for the fact that the company did not have access to debt finance and that even if the short term rate were required it would be 4.3%,¹⁷ based upon a simple addition of the yield on a one year US government bond (USD risk free rate) plus the BBB premium for one year bonds plus the country risk premium for China based companies on one year bonds¹⁸.
57. Ms Glass in her evidence said this was a matter of currency calculation and maintained that she was right not to incorporate country risk.
58. Mr Billiet on the other hand says that Ms Glass' estimate is significantly lower than the rate at which even the Chinese government could borrow for one year at the relevant time¹⁹.
59. He also disagrees with the methodology that Ms Glass uses. The London Inter Bank Rate (LIBOR) is used as her starting point and she ignores country risk. This leads to a result which is in his opinion implausibly low. Having started with one year LIBOR, Ms Glass adds to it a small premium based on the difference between average LIBOR rates and the yield on average one year debt instruments issued by BBB rated borrowers.
60. Mr Billiet points out that the prime rate for US banks' most favoured customers was 4% in March 2017, 4.5% by December 2017 and 5% by June 2018²⁰.
61. As a further sense check he points out that Expedia (whose financial information and business were referenced at trial) had published average borrowing rates in the relevant period at

¹⁷ Billiet 2 §3.68

¹⁸ Billiet 2 §3.55

¹⁹ Billiet 2 §3.15

²⁰ Billiet 2 §3.58



between 4% and 4.9%²¹. As a specific country check he says that the yield on the S&P China High Quality Corporate Bond 3-7 Year Index during the relevant period was also 4%, despite most of its constituents being higher rated than the company²².

62. As to how the company borrowing rate should be calculated, I agree with Mr Billiet's opinion and his approach and in particular that a country risk premium should be used.
63. I accept that the company borrowing rate should be 4.3% on the basis of the assumption made in the alternative by Mr Billiet that the company could have accessed short term debt funding.

Prudent investor rate or investor borrowing rate?

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.
66. The investor borrowing rate represents the disadvantage to the dissenters in the cost of having to pay interest by way of a loan to substitute for the funds not received.
67. Mr Lowe QC submits that the company did not argue for the investor borrowing rate to be used in Shanda. The court should therefore not follow Mr Billiet's opinion that the prudent investor rate should be used, which is based purely upon what was done in previous cases.
68. Ms Glass considers that the investor borrowing rate is appropriate because that captures the cost that the dissenting shareholders would have incurred to replace the unpaid fair value of their shares over the relevant period²³. It is to be noted that Ms Glass' investor borrowing rate is 2.5% and is higher than her prudent investor rate which is 1.65% (risk free rate).
69. Mr Billiet's investor borrowing rate is 5.0 -5.5 % based upon a long term (7 and 20 year) debt issued by an investment fund, Pershing Square.

²¹ Billiet 1 table 4.1 and §4.19

²² Billiet 1 §4.21-4.24

²³ Glass 1 §74



70. Ms Glass notes that his analysis suggests that the rates at which Pershing Square could borrow in the long term are similar to those at which the company could borrow. Based on that logic, if the two companies are subject to similar long term debt rates they would likely be similar to short term debt rates. She therefore agrees that if the court determines that long term (10 year) rates are applicable then she would agree with the 4.8% suggested by Mr Billiet.
71. Alternatively, if the court determines that short term rates are applicable she would imagine that Mr Billiet would agree with her suggestion of 2.5%. Ms Glass is of the view that short term rates are more relevant than long term rates when one considers the time taken to repay borrowings from the funds examined.

Assessment

72. I reject the submission that the investor borrowing rate should be used on the basis that it is consistent with English and Cayman authority concerning compensation for damages on the Banque Keyser principle. That is not the exercise which the court is engaged in when assessing the fair rate of interest in section 238 cases for the reasons given by CICA in Shanda.
73. I also note in passing that in evidence Mr Billiet did confirm that to use the prudent investor rate accorded with his own view that this approach, based on the former Delaware position, was a reasonable approach from a financial and economic point of view and he was not just following decided cases.
74. In addition, in his evidence Mr Billiet said:

“But what I explained in addressing that question was it does not really make sense to think about the borrowing rate of the dissenters. They are hedge funds, they do not have access to unsecured capital. They do not have underlying cash flows from their operations and so they are generally not able to borrow on an unsecured basis. So I explained that it did not - it does not really make sense to think about their borrowing rate.”²⁴

75. He had only found one, Pershing Square that had borrowed and taken out debt.
76. In her evidence Ms Glass also said the following:

²⁴ Transcript page 13



“Q So that is what you said and it was on that basis that I suggested to you that you accept that, if the question is, what is the measure of the dissenters’ detriment, then the answer is best assessed by looking at a prudent investor rate rather than a borrowing rate.

A Well, I said that it might be. The fact of the matter is that, as an expert, I am unable to tell you what an appropriate borrowing rate for the dissenters might be or is, because I do not have any information about these dissenters. So, if the court says this must be based on the dissenter borrowing rate as opposed to some sort of average investor borrowing rate, then I guess you do not have any evidence, it seems to me, on what that dissenter borrowing rate is and, therefore, it seems to me you are going to have to turn to a prudent investor rate. That is what I am saying. I cannot determine - it could be anything from, you know, A to B. With no information, I cannot say what it is, if we are talking about the actual dissenters in this case, as opposed to some sort of average borrower rate.”²⁵

77. I agree with the point made by Mr Billiet concerning investors in the dissenters’ position as hedge funds. There is no evidence from which the experts can assist the court or from which the court can determine the dissenter borrowing rate.

78. In my view the best approximation to the position of dissenter disadvantage should involve the calculation of the prudent investor rate and not the investor borrowing rate.

Calculation

79. As to the calculation of the prudent investor rate, Mr Billiet estimates the prudent investor rate has an asset allocation of Equities 40%, Bonds 45% and Cash 15%.

80. He then examines several exchange traded funds (ETFs) in each category to estimate the returns to a prudent investor over each relevant period²⁶. Ms Glass accepts the ETF’s selected by Mr Billiet are appropriate²⁷ but favours a 20:50:30 asset allocation mix²⁸.

81. Ms Glass accepts that for a normal investment scenario, with an investor with low to medium risk appetite and an investment horizon of five years or more, that Mr Billiet’s allocation ratio is appropriate. However, the portfolios mixes are not intended for investors with short term investment horizons which ought to apply here. A portfolio mix of 85% in equities and bonds represents a much higher risk over the short term than the long term.

²⁵ Transcript page 30

²⁶ Table 5.10

²⁷ Glass 2 §95

²⁸ Glass 2 §87



82. If the court decides not to use risk free rates it should base the prudent investor rate on the basis of an extremely low risk portfolio of 20% Equities 50% Bonds and 30% Cash²⁹. In such circumstances an appropriate prudent investor rate would be in the region of 2.7% to 3%³⁰.
83. Moreover, in her opinion since the dissenting shareholders (despite being professional investors) would not be awarded negative interest by the court, they are not bearing the risk of losing money and so would have achieved nothing more than the risk free rate³¹.
84. Ms Glass is of the view that from a financial perspective it would be inconsistent to award interest based on higher rates of return (than risk free rates) which are only available to investors who are at all times subject to both positive and negative investment returns. Doing so would be to provide risk based returns to an investment that has no downside risk³². If the prudent investor rate is to be used it should be on the basis of risk free rates which Ms Glass calculates as being in the range of 1.6% to 1.7%.
85. Ms Glass also says that if the prudent investor rate is not to be based on risk free rates it should be based only on bonds by reference to the approach used in Shanda³³ or the basis of a very low risk portfolio. However, I note in passing that although the relevant expert evidence had not been adduced, Segal J did say that:
- “the weighted investment portfolio approach adopted in the Delaware cases citedin an appropriate case it might well be the preferred approach...”*³⁴
86. She fairly accepted if her assumption is wrong, then it would be proper to adopt the approach that Mr Billiet has adopted³⁵.
87. There would therefore be no material difference between the experts that a normal investor with a low to medium risk appetite and an investment horizon of five years or more would adopt the asset allocation that Mr Billiet puts forward.

²⁹ Glass 2 § 86

³⁰ Glass 2 §101

³¹ Glass 2 §§68-69

³² Glass 2 §§60-71

³³ Glass 2 §82

³⁴ §24(b) (unreported 16 May 2017)

³⁵ Glass 2 §71



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 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.
90. In reaching this conclusion, I do not accept Ms Glass' view, which she accepted was a matter of law, that one should use a prudent investor rate on the basis of risk free rates, because the court would not award the same rate if it were negative in real terms.
91. I accept that the prudent investor rates put forward by Mr Billiet in the Table 2.1 at page 7 of his first report, adjusted to a simple rate equivalent in accordance with Appendix 3 on page 49, should be used against a company borrowing rate of 4.3% to calculate the mid points over time.

Conclusion based on expert evidence

92. The assessment of a fair rate of interest should be approached in a way which is consistent with the nature and purpose of the statutory jurisdiction and language, which is to protect the dissenting shareholders from the effect of a forced merger and in particular to compensate them for being out of their money and to fix a fair rate of interest in this regard.
93. Having reviewed the judgments at first instance in *Integra* and in *Shanda* as well as the judgment in the Court of Appeal in the latter case, it seems to me that as a matter of principle it is right to follow the former Delaware approach of awarding a midpoint between the company's borrowing rate and the prudent investor rate in this case.
94. I have come to the view that Mr Billiet's approach fairly achieves this.



Interest period

Start date

95. The merger was approved by shareholders on 24 February 2017, which was the valuation date for the purposes of determination of fair value.
96. It was completed four days later on 28 February 2017 and the company's shares were cancelled in exchange for the right to receive the merger price.
97. On 23 March 2017 the company offered to pay fair value under section 238(8), the fair value offer date.
98. In *Integra*³⁶ the court said:
- “It can be said that the respondents have been kept out of their money since July 2nd 2014, the date on which Integra made its written offer to pay fair value of US \$10 per share pursuant to s.238(8). For whatever reason it did not offer to pay this amount (or any lesser amount) on account pending the outcome of the proceedings. It follows that Integra has had the use of the respondents’ money for more than a year.”* (my emphasis).
99. In *Shanda*, the parties apparently agreed that the fair value offer date was the appropriate start date, although the judgment does not deal with the point expressly.
100. Mr Salzedo QC argued that interest should run from the date on which the dissenting shareholders should have been paid fair value which he says is 28 February 2017, when the merger completed.
101. He submitted that in *Integra* and *Shanda* the start date does not appear to have been the subject of argument, and accepted that the court awarded interest as from the date of the company's fair value offer.
102. Mr Salzedo QC submitted that this approach was wrong in principle because it meant the company was rewarded and the dissenting shareholders penalised for every day that passed before the company complied with its statutory obligation to make the offer. Given that the

³⁶ §74 Jones J



offer was for the merger price it should be the merger date rather than the offer date which should trigger the start of the interest period.

103. Mr Salzedo QC argued that the court's determination of fair value as at the valuation date means that it should have been offered to shareholders, including the dissenting shareholders, on that date and paid to them on 28 February 2017. This is the date from which the company has benefited by paying less than fair value and from which the dissenting shareholders have suffered detriment by not receiving it.

Decision

104. Section 238 is silent as to the appropriate start date for the purposes of calculating interest under Section 238(11).
105. During the statutory negotiation period immediately following the written offer, section 238(8) provides that if the company and a dissenting shareholder agree on a price for the latter's shares, "the company shall pay to the member the amount in money forthwith."
106. There is no requirement to pay interest in such circumstances.
107. It seems to me that if it was intended that interest should run from a date earlier than when the fair value offer was made, it could have been provided for.
108. There is a statutory scheme for the making of a fair value offer. As the regime stands a member who elects to dissent has to give written notice of his decision in accordance with section 238(5).
109. Upon giving notice of dissent under subsection 5, the member ceases to have any of the rights of a member except the right to be paid the fair value of his shares (section 238(7)). Up until then the dissenting shareholder has not lost any rights.
110. It is logical that interest should run from the fair value offer date which follows the date when a dissenter's rights are lost.
111. I note that my conclusion, although there may not have been argument on the point, is supported by the decision in *Integra* and the outcome in *Shanda*.



End dates -Maso/Blackwell interim payments

112. On 8 August 2017 the court ordered the company to make an interim payment to Maso/Blackwell in the amount of approximately US\$10 million. On 21 August 2017 the company made an interim payment into court for the benefit of Maso/Blackwell pending its appeal to the Court of Appeal in connection with it. On 13 November 2017, following the company's appeal, the Court of Appeal ordered that the interim payment standing to the account of the company, in the court's nominated account with the Cayman National Bank be paid out of court. On 11 December 2017 the Court of Appeal issued a Certificate of Order to the same effect. On 3 January 2018 Maso/Blackwell received the money.
113. The company argues that the end date for interest should be 11 December 2017 when the Certificate of Order was obtained from the Court of Appeal. This was conceded at the hearing by Mr Salzedo QC and I need say no more about it.
114. It was agreed that the interim payments were made to all the other dissenting shareholders on 15 August 2018 and so that is the agreed end date for interest on those sums.

End dates -Remaining amounts due

115. On 17 June 2019, having reviewed correspondence between the parties on the subject of further payment, interest and costs, the court expressed the view that it preferred to deal with all matters including interest in one final order after the Shanda Privy Council decision.
116. The company argued that the court ought to take into account that on 5 July 2019 the company offered to pay the remaining balance of the fair value payment by way of further interim payment and that would have stopped interest running. The dissenting shareholders should not be able to now argue a counter factual case as to what they would have done with the money.
117. Mr Lowe QC invited the court to find that the accrual of interest stopped on 5 July 2019. Alternatively, that the dissenting shareholders' entitlement to interest ought to be limited to the company cash deposit rate of 1.45% from 5 July 2019 onwards and that they should not be allowed to contend that they would have earned any higher rate of interest from that point onwards.



118. Mr Salzedo QC argued that the end date for the remaining sums due should be the earlier of the dates when judgment is given or when they are actually paid. After judgment interest will run at the Judgment Act interest rate.
119. He argued that, notwithstanding Harney Westwood & Riegels' letter of 5 July 2019 to offer to consent to an order to make further interim payments, this was not appropriate in light of the court's communication of 17 June 2019 that it would prefer to deal with all matters in one final order after the decision of the Privy Council in Shanda.
120. He submitted that the company kept the money and the dissenting shareholders should have interest on the detriment of not having been paid.

Decision

121. I accept Mr Salzedo QC's submissions. Having reviewed the correspondence between the attorneys I am of the view that it was not unreasonable for the dissenters to respond as they did in the light of the court's indication on 17 June 2019.
122. The company has had use of the money and the dissenters are entitled to interest on the sum due until the earlier of judgment in this application or when they are paid. There should be no deduction as contended for by Mr Lowe QC. After judgment as Mr Salzedo QC says, interest will run at the judgment interest rate.

Compound or simple interest

123. Under section 34(1) of the Judicature Act (2017 Revision) the court has the power to award simple interest in proceedings for the recovery of a debt or damages. There is no express power to award compound interest save in relation to the enforcement of contracts which prescribe a rate higher than the rules of court³⁷.
124. Mr Salzedo QC argued that there is nothing under the Companies Act, section 238(11) to confine the jurisdiction to simple interest and there is no reason in principle why it should be read in that way. It was modelled upon Delaware legislation where it is common ground that compound interest could be awarded. He submitted that all the rates that could be used to

³⁷ See section 34(6) of the Judicature Act



derive a company rate and a dissenter rate are derived from compound rates in the real world, where interest is compound.

125. I do not accept this submission. The Delaware statute³⁸ expressly provides for compounding whereas the Cayman statute does not. The position in England is that one does not obtain compound interest even in restitutionary claims³⁹.
126. In *Integra* and *Shanda*, interest was awarded on a simple basis. In *Shanda* there was no argument from the dissenters that compound interest should apply⁴⁰.
127. There is no legal basis for awarding compound interest, and even if there were by reference to the Delaware jurisprudence, it would not in my view be appropriate to award compound interest where there is no statutory basis for it.
128. Simple interest should apply.

Costs

Legal principles

129. The relevant principles were set out in two relevant authorities⁴¹ from which the following propositions can be derived:
- a) Costs are in the discretion of the court.
 - b) Section 238(14) provides that the costs of the proceedings may be provided for ‘*as the court deems equitable in the circumstances*’. The discretion given to the court by section 238(14) is therefore a wide one to do justice in all the circumstances.
 - c) If dissenting shareholders participate actively in the trial it is equitable for GCR Order 62 rule 4 to apply, and normally costs should follow the event in accordance with the general rule.

³⁸ Section 262(h)

³⁹ *Prudential Assurance v Revenue and Customs* [2018] 3 WLR at p 967 §§76 to 77

⁴⁰ §16 per Segal J

⁴¹ *Integra* §§1, 6, 8 and 9 and *Elgindata* (no 2) [1992] 1 WLR 1207 at 1214



- d) It follows that a successful party should recover the reasonable costs incurred by him in conducting the proceedings in an economical, expeditious and proper manner, unless otherwise ordered by the court (Order 62 r.4(2)).
- e) In section 238 cases it is not helpful to attempt to lay down any generally applicable principles or criteria by which to determine what constitutes ‘success or failure’, save to say that it depends upon all the circumstances.
- f) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, unless that has caused a significant increase in the length or cost of the proceedings, in which case he may be deprived of the whole or part of his costs. In *Integra* for example, the court accepted that there may be circumstances in which it is appropriate to exercise the court’s discretion by reference to identifiable issues, where the valuation approach for example by an expert was preferred⁴². However, *Jones J* was not influenced in that case by deciding one big tax issue in favour of the company because it did not detract from the overall result.
- g) If the successful party raises issues or makes allegations improperly or unreasonably the court may not only deprive him of his costs, but may order him to pay the whole or a part of the unsuccessful party’s costs (Order 62 r.11(2)).
- h) A dissenting shareholder’s risk as to costs should be limited to the additional costs incurred by the company as a result of his participation if he is unsuccessful⁴³.

Company submissions on costs

130. Mr Lowe QC argued that the appropriate costs order in these proceedings should be that the parties bear their own costs, save from 7 February 2019 onwards at which stage the company made a without prejudice save as to costs offer to the dissenting shareholders which was unreasonably refused. Therefore the dissenting shareholders should be ordered to pay the company’s costs incurred from 7 February 2019 onwards.

⁴² *Integra* §9

⁴³ *Integra* §§4 and 6, Reasons for Costs Order (unreported 10 September 2015 *Jones J*)



Dissenters submissions on costs

131. Mr Salzedo QC argued that the dissenting shareholders were plainly the successful party at trial because the difference between the judgment as to the fair value of their shares (US\$31.20 per ADS) and the company's position at trial (US\$28.09 per ADS) was US\$3.11 per ADS, which amounted to value in the aggregate to the dissenting shareholders of US \$6,250,583.74.
132. The company's original fair value offer of the merger price (US\$30.39 per ADS), was also lower than the judgment value by US\$0.81 which would amount to value in the aggregate to the dissenting shareholders of US\$1,627,965.54. That is an amount which is enough to justify litigation in court.
133. Mr Salzedo QC argued that if the dissenting shareholder succeeds he can normally expect to recover costs on the standard basis against the company.
134. The appropriate costs order was that the company should pay the dissenting shareholders costs to be assessed on this basis if not agreed.
135. He cited *Integra* in which Jones J decided that the dissenting shareholders were successful because they recovered more than the original offer of the merger price and substantially more than the value for which the company contended at trial.
136. Mr Salzedo QC submitted that in this type of litigation the court should approach the question of who succeeded on the basis of who "writes the cheque at the end of the day".
137. Any attempt to divide up costs would lead to undesirable and complex satellite 'costs litigation' concerning the extent to which each issue added to costs and undermined the policy that favours parties making appropriate Calderbank offers, especially in commercial litigation which is ultimately concerned with the transfer of money⁴⁴.
138. In this regard he argued that the letter(s) of 7 February 2019 (the offer letter) written by the company was not to be treated as a written offer relevant to the court's cost discretion under Order 62 rule 10(d).

⁴⁴ See *Kupeli* [2019] 1 WLR per Hickinbotham LJ §§7-15



139. The offer letter was written to the dissenting shareholders just over two weeks before the trial started on 26 February 2019. The terms were expressed to be ‘without prejudice save as to costs’ offering, subject to contract, to paying the equivalent of US\$36.468 per ADS including interest on the basis of each party bearing its own costs. It was open for 14 days.
140. He argued that the offer letter had no relevance because no payment into court was made by the company under GCR Order 22.
141. The offer letter was not a written offer, because it was expressed to be on a ‘subject to contract’ basis and was incapable of immediate acceptance⁴⁵. Furthermore it indicated that the costs would be borne by each party and no offer was made by the company that it would pay the dissenting shareholders costs up to the date of acceptance, in accordance with the rules for payments into court.
142. It is therefore impossible without further detailed inquiry to ascertain whether the offer was more valuable to each dissenting shareholder than the result obtained at trial. If the offer letter was to be taken into account then it should have offered to pay the dissenting shareholders costs to date.
143. In any case it did not provide a reasonable time period for consideration as it was sent less than 21 days before trial, at a time when preparation was in full swing, and was only open for 14 days.
144. If contrary to that primary submission, the offer letter is to be treated as a written offer then the dissenting shareholders did not act unreasonably in not accepting it⁴⁶.
145. The offer letter was written on a ‘subject to contract’ basis and could not be accepted in law. At best a negotiation would have had to be entered into to form a legally binding contract, whilst continuing to prepare for trial. Furthermore the offer letter did not offer to pay the costs of the dissenting shareholders and they were entitled to treat it as not equivalent to a payment into court and not a matter that should distract them from trial preparation.
146. If these submissions were rejected and the court did conduct an inquiry which showed that the offer letter was more favourable to the company than the position determined at trial, then it

⁴⁵ Chitty on Contracts 33rd ed §2-216

⁴⁶ Ehi (unreported 31 March 2020) §§29 and 51 per Kawaley J



would be necessary to take the offer into account in exercising the court's discretion which would generally result in the court reversing the usual costs order only from the date when the offer expired⁴⁷.

Decision

147. This is a case where, in the exercise of my discretion, a more nuanced approach should apply than merely to look at 'who writes the cheque'.
148. True it is that the company 'writes the cheque' in this case, but it is not a cheque nearly as large as that contended for by the dissenting shareholders. The methodology engaged by their expert, whose evidence was that fair value ought to be 4.15 times the merger price, would have resulted in the dissenting shareholders receiving a 415% uplift rather than the uplift which they did receive of approximately 2%.
149. Save in two minor respects the court, following a three week trial, and the cross examination of the expert called by the company, Ms Glass, which took some 8 days, accepted her approach and her evidence.
150. The court rejected the dissenters' expert's central thesis that there was a systematic undervaluation of Chinese companies on US exchanges and his DCF calculations.
151. In these circumstances and applying the legal principles set out above it would not be fair to order that the company should pay the dissenters' costs. The common sense outcome in the real world is that the company succeeded at trial⁴⁸. This is to some extent counter balanced by the dissenters 'succeeding' in beating the fair value offer and the company's position at trial, but the case at trial was really about the vast delta between the two competing valuations.
152. Neither would it be fair to order that the costs of the proceedings from the date of the offer letter (7 February 2019) should be borne by the dissenting shareholders in the light of the submissions made by Mr Salzedo QC concerning the uncertainty caused by its wording, which I accept.

⁴⁷ Ehi supra §30

⁴⁸ BCCI V Ali (no 4) [1999] NLJ 1734 Lightman J as approved by Kawaley J in Ehi cars (unreported 31 March 2020) §24

153. I reject the argument that the offer letter has no relevance because no payment into court was made to protect the company's position under GCR Order 22⁴⁹. The company is not a defendant in an action for debt or damages. I take the offer letter into account.
154. However, even if the offer letter was capable of acceptance and even though the dissenters did not beat the offer at trial by some margin, I conclude that the dissenting shareholders were not conducting themselves unreasonably in their various responses in the circumstances of this case⁵⁰.
155. The fair overall result in my discretion is that there should be no order as to costs and that the parties should bear their own costs of the proceedings.



THE HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

⁴⁹ Kawaley J Ehi *ibid* §28

⁵⁰ Conyers 11 February and 1 March 2019, Mourant 11 and 28 February 2019, Appleby 14 and 19 February 2019. See also Kawaley J §§27-33 Ehi, *ibid*.