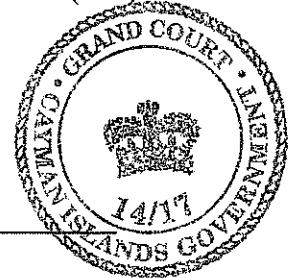


IN THE GRAND COURT OF THE
CAYMAN ISLANDS FINANCIAL
SERVICES DIVISION

CAUSE NO. FSD 92 OF 2017 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)
AND
IN THE MATTER OF TRINA SOLAR LIMITED



JUDGMENT ON THE COMPANY'S APPLICATION FOR AN ORDER FOR THE
CROSS-EXAMINATION OF MR JAIN AND MS KEHOE – ON THE PAPERS

Introduction

- 1 This is my judgment on the application (the *Application*) made by Trina Solar Limited (the *Company*) for an order that Mr Manoj Jain (*Mr Jain*) and Ms Rose Kehoe (*Ms Kehoe*) be required to attend for cross-examination at the hearing of an application made by Maso Capital Investments Limited and Blackwell Partners LLC - Series A (the *Dissenting Shareholders*) for a freezing injunction in respect of assets of, and the appointment of receivers over, the Company.
2. I have decided that cross-examination of Mr Jain and Ms Kehoe is not required or appropriate in the present circumstances. I explain my reasons for reaching this conclusion below. Before doing so I must briefly set out the background to the Application and the submissions made by the Company and the Dissenting Shareholders.

Background

3. On 9 May 2017 the Company issued a petition (the *Petition*) pursuant to section 238(11) of the Companies Law (2016 Revision) for the determination of the fair value of its shares held by the Dissenting Shareholders. The Petition has yet to be heard.
4. The Dissenting Shareholders assert that the Company has been taking steps to dissipate and transfer at less than a full or proper consideration its assets so that there is a real risk

that in the event that on the hearing of the Petition the Company is ordered to pay further sums to the Dissenting Shareholders (the Company has already made interim payments to the Dissenting Shareholders although it still seeks to set aside the orders pursuant to which such payments were made) the Dissenting Shareholders will be unable to recover the sum awarded. Accordingly, following correspondence between the attorneys acting for the Company and the Dissenting Shareholders, the Dissenting Shareholders issued a summons on 19 September 2017 (the *Summons*) seeking a freezing order and the appointment of receivers. The Summons was supported by the Second Affidavit of Mr Jain and the First Affirmation of Ms Kehoe. In accordance with directions made by me (in the absence of any agreement between the parties) the Company has filed evidence in opposition in the form of a Second Affidavit of Mr Scott Davidson (*Mr Davidson*), a First Affirmation of Mr Lou Weiliang (*Mr Weiliang*) and the Second Affidavit of Mr Shuion Chan (*Mr Chan*). Furthermore the Dissenting Shareholders have filed evidence in reply which to date includes the Second Affirmation of Ms Kehoe. The Summons is listed to be heard on Thursday 5 October.

5. The Petitioner made the Application by letter dated (Thursday) 28 September (the *28 September Letter*) from its attorneys Harneys Westwood & Riegels (*Harneys*) and requested that the Application be dealt with on the papers without the need for a hearing. The Dissenting Shareholders have agreed to this request.
6. I gave directions that the Dissenting Shareholders' attorneys, Walkers, should file any submissions they wished to make in opposition to the Application by 5pm Cayman time on 29 September and that Harneys should file submissions in reply before 1pm Cayman time on Monday 2 October (7pm London time). I also indicated that, since a rapid decision would be required ahead of the hearing on Thursday 5 October, I would aim to deliver my ruling on the morning (London time) of Tuesday 3 October.
7. Walkers (with Michael Todd QC) filed their written submissions on 29 September (the *Dissenting Shareholders' Submissions*). Harneys filed their reply submissions (the *Company's Reply Submissions*) on 2 October.

The Company's initial submissions – the 28 September Letter



8. In the 28 September Letter Harneys requested the Court to exercise its discretion under GCR O.38, r.2(3) to order the cross-examination of a deponent in an application made by summons in relation to Mr Jain and Ms Kehoe. Harneys submitted that:
- (a). cross examination will be ordered where it is necessary to dispose of a particular issue. Whether it is necessary will depend on the circumstances of the case (in support of these propositions Harneys referred to a decision of this Court in *Donnelly v Karess Properties Ltd and Kyle Invs Ltd* [1998] CILR N-13 a short note of which appears in the CILR and the judgment of Sir Donald Nicholls V-C in *Re Bank of Credit and Commerce International SA (No.6)* [1994] 1 BCLC 450).
 - (b). it is well settled that cross-examination will be necessary where there are substantial issues as to the credibility of the witnesses. Further, where there is extraneous material available to suggest that in some material respect the affidavit is not accurate, the court should order cross-examination.
 - (c). cross-examination of Ms Kehoe and Mr Jain on their respective affidavit evidence was necessary to determine whether the relief sought by the Dissenting Shareholders should be granted.

9. As regards Ms Kehoe:

- (a). Ms Kehoe is a director of Zolfo Cooper (Hong Kong) Limited. Pursuant to instructions from Walkers she prepared a report (which she designated as an expert report) setting out her opinion of the range of valuations of the Company that experts appointed in the proceedings on the Petition might reach and which would be relevant for the determination by the Court of the fair value of the Dissenting Shareholders' shares.
- (b). as Harneys note, Ms Kehoe's report is the evidence relied on by the Dissenting Shareholders to establish that they have a good arguable case that their shares in the Company were, at the valuation date, worth more than the price offered by the Company pursuant to the merger (*the Merger Price*) and Ms Kehoe had



concluded on the basis of publicly available evidence that the fair value of the Dissenting Shareholders' shares is in a range between 5.1 times and 10.2 times the Merger Price.

- (c). the Company wishes to challenge Ms Kehoe's conclusions, her competence and her independence.
- (d). the Company will argue that Ms Kehoe's conclusions are manifestly absurd and insupportable in circumstances where (i) the Dissenting Shareholders are the only dissenters; (ii) the Company was over 90% publicly held, including by a number of sophisticated institutional investors such as Franklin Resources, Inc and Goldman Sachs; (iii) the buyer group only controlled 5.6% of the Company prior to the merger; and (iv) 97.8% of those present and eligible to vote at the EGM voted in favour of the merger. The Company says that it is unclear (from her report) whether these factors have been brought to the attention of Ms Kehoe by the Dissenting Shareholders and the Company considers it important to establish whether this has been done in order to determine the reliability of Ms Kehoe's opinion and evidence.
- (e). Harneys also say that Ms Kehoe does not appear to possess the requisite skill and experience to opine as an expert on the fair value of the Company's shares. Ms Kehoe's curriculum vitae, a copy of which appears as Appendix A to her report, indicates that she is a restructuring specialist, who has completed only three valuation assignments, of which her report in this case appears to be one.
- (f). furthermore, the Company has concerns as to whether Ms Kehoe's evidence was prepared independently without influence from the Dissenting Shareholders citing *Governors of the Bank of Ireland v Watts Group* [2017] EWHC 1667 (TCC). This was a case involving a claim by a bank against quantity surveyors seeking damages for professional negligence. Coulson J concluded that the bank's expert was not a properly independent witness since he had a close relationship with the bank (which was his principal client providing the vast majority of his work and for whom he had spent most of the last few years acting as an expert).



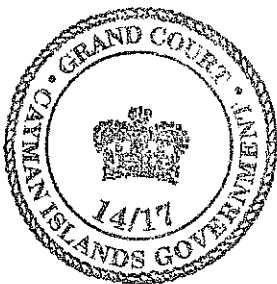
- (g). Harneys submit that it is important, in order for the Court to be able to evaluate Ms Kehoe's evidence (on one of the core issues that the Dissenting Shareholders need to establish in order to demonstrate that they are entitled to a freezing order), that she and her evidence (in particular her conclusions as to value, her competence and her independence) be tested by cross-examination.

10. As regards Mr Jain:

- (a). Mr Jain is Co-Chief Investment Officer of Maso Capital Partners Limited, the Investment Adviser for Maso Capital Investments Limited and the Investment Manager for Blackwell Partners LLC - Series A.
- (b). Harneys submit that the Dissenting Shareholders rely on Mr Jain's evidence to establish that various transactions which the Company has undertaken post-merger (the *Transactions*) are dissipatory transactions undertaken with a view to avoiding liability to the Dissenting Shareholders and that, in order to obtain a freezing injunction, the Dissenting Shareholders must establish that these transactions were dissipatory.
- (c). Harneys argue that there are serious issues as to the credibility of Mr Jain's evidence. In particular, they say that he makes repeated inflammatory allegations regarding the Transactions and there are inconsistencies between his evidence on the one hand and the evidence to be filed by the Company and statements made by another investment analyst at Mr Jain's firm on the other. The Company seeks to establish, as I read the 28 September Letter, that Mr Jain's concerns are (i) not genuine because he was aware that a re-listing in the People's Republic of China (*PRC*) was likely to follow the merger and that arrangements similar to the Transactions would be needed as a necessary preliminary to a re-listing and (ii) unreasonable because the Transactions are not improper or being carried out in order to dissipate the Company's assets but to allow a proper and ordinary course transaction to proceed, namely the PRC re-listing.



- (d). in particular, Harneys say that the Company will adduce evidence that:
- (i). the Transactions were fully justified as they were undertaken in order to enable the Company and the group of which it is now a part to list in the PRC;
 - (ii). the de-listing of PRC companies from US stock exchanges and re-listing in the PRC is a well-known phenomenon that was likely to be used by the Company following the merger and was well known to those in the industry (as is apparent from the interview with Bloomberg referred to at paragraph 69 of Mr Jain's Second Affidavit);
 - (iii). the Dissenting Shareholders, as sophisticated investors who have exercised their dissenting rights in relation to eight other PRC-based Cayman-incorporated companies, were well aware that a relisting in the PRC was a possibility and that the Transactions were a necessary precursor to such a re-listing.
- (e). Harneys say that in cross-examination, the Company will:
- (i). expose Mr Jain's extensive experience of investing in PRC companies which have delisted from US stock exchanges and sought, at a later stage, to list in the PRC in the usual course of events.
 - (ii). put to Mr Jain the transcript of the call between Mr Weingarten, an investment analyst of Mr Jain's firm, and the Company which took place on 13 October 2016 (before the merger was approved). In that call, Mr Weingarten admitted knowledge of a possible re-listing, stating:



"plan A is – plan A for running the business is that it gets – is that it ultimately gets taken private and it's going to be run as a private company and, sort of, in terms it's potentially relisted, do you, sort of, have a – have a, sort of, plan B if the deal goes away?"

11. Harneys submit that the Company will be prejudiced if the order for cross-examination

is not granted and that, given the lack of credibility and reliability that the Dissenting Shareholders' evidence in support of the Application evinces on its face, together with the fact that the Dissenting Shareholders bear the burden of proof, this Court cannot dispose of the issues in the Application without an order for cross-examination as sought.

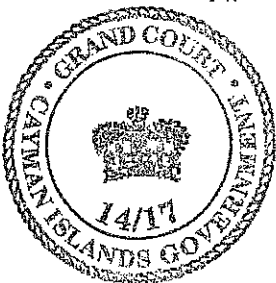
The Dissenting Shareholders' Submissions

12. Mr Todd QC (and Walkers) submit that the order for cross-examination should not be made. Cross-examination of Mr Jain and Ms Kehoe is neither necessary in order to enable the Court to dispose of the issues to which their evidence relates or the wider question of whether to grant the freezing injunction nor justified by the approach taken by this Court when exercising the discretion to order cross-examination on affidavits at interlocutory applications under GCR O.38, r.2(3). They also express concern that the Application is a tactic to delay the hearing of the Summons and to allow the Company more time to complete the Transactions.
13. Mr Todd QC (and Walkers) submit that an order for cross-examination of a deponent on an affidavit sworn in support of an interlocutory injunction is generally not consistent with the function of the Court at the hearing of such an application. Cross-examination will only being ordered in *rare* and *exceptional* cases. The Court seeks to avoid a *mini-trial*. They refer to the following passage in the commentary to the Supreme Court Practice Rules 1999 (the *White Book*) at 38/2/6:

*"There is a discretion as to ordering cross-examination on affidavits filed in interlocutory applications (see para. (3)). Cross-examination upon affidavits sworn in applications for interlocutory injunctions is very rare. It was ordered by consent, in *The Berkeley Hotel Co. Ltd. v Berkeley International (Mayfair) Ltd.*" (emphasis added)."*

14. They argue that the reasons for this approach are as follows:

- (a). the court should not attempt to resolve critical disputed questions of fact or law at this stage of proceedings: *American Cyanamid v Ethicon* [1975] AC 396;



- (b). the court should avoid turning such an application into a mini-trial involving unnecessary costs and court time: *Max Christopher Donnelly (Trustee) In Bankruptcy v Karess Properties Ltd et al* (Unreported, Grand Court, Harre CJ, 12 March 1998); and
- (c). the court will not allow roving cross-examination merely because a party harbours suspicions the deponent has not been entirely open: *Donnelly* (above).

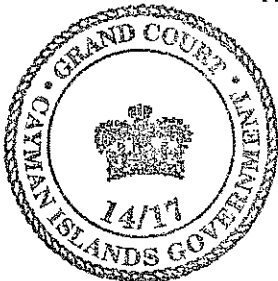
15. Mr Todd QC (and Walkers) submit that it is entirely inappropriate to seek to have disputed issues of fact determined at the hearing of an interlocutory injunction and that is what the Company is seeking to do. The Court is not required and should not seek to resolve disputes as to the core questions of fact or difficult points of law. They cite Lord Diplock's judgment in *Cyanamid* (above) at page 470G and the judgment of the Chancellor, Sir Terence Etherton, in *Sukhoruchkin v Van Bekestein* [2014] EWCA Civ 399 in which he said as follows:

"The general principle is now well established that, on an application for an interim injunction, the court should not attempt to resolve critical disputed questions of fact or difficult points of law on which the claim of either party may ultimately depend, particularly where the point of law turns on fine questions of fact which are in dispute or are presently obscure: Derby v Weldon [1990] Ch 48, 58F-G, 63G-FP".

Furthermore, as Hare CJ said in *Donnelly* (above):

"In particular the court ought not to be asked either to resolve disputed questions of fact whether relating to the merits of the underlying claim or the Mareva jurisdiction. These must be matters which are also to be given weight in relation to an application to discharge a Mareva Injunction. There are indeed disputed questions of fact in this case..."

And, discussing the purpose of the proposed cross-examination:



"On the other hand, the motives and reasons of Mr Larkins [a deponent of the plaintiff], while certainly a matter for investigation at trial, are not the main issue to be determined, nor indeed the subject of Mr. Larkins' affidavit... The court will always be concerned to see that an order for cross-examination is not made needlessly or when it would be oppressive. The purpose sought to be achieved when cross-examination is ordered is that this is necessary for disposing of the particular issue. Whether it is so necessary will necessarily depend on the circumstances of the particular case". [underlining added]

16. Mr Todd QC (and Walkers) point out that in *Cyanamid* Lord Diplock said (at page 409C):
171206 In the matter of Trina Solar Limited – FSD 92 OF 2017 (NSJ) Judgment on the Company's application for an Order for the cross examination of Mr Jain and Ms Kehoe .

"...The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party's case".

They submit that the principle underlying this approach is that at the interlocutory stage of the proceedings the evidence available to the Court is incomplete (see *Cyanamid* at page 406F-G). They rely on the judgment of Laddie J in *Series 5 Software Ltd v Clarke and others* [1996] 1 All ER 853 where Laddie J examined Lord Diplock's statement in *Cyanamid* and confirmed:

"The warning contained in the second of the quoted sentences is to avoid courts at the interlocutory stage engaging in mini-trials, which is what happened, at least in the Court of Appeal, in American Cyanamid itself. Interlocutory applications are meant to come on quickly and to be disposed of quickly" (emphasis added).

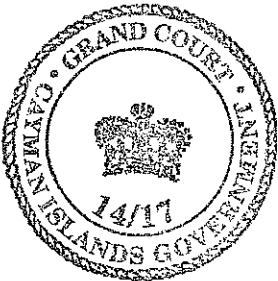
They argue that the principle that the court should not be expected to devote an inordinate amount of time to the hearing of such applications has been applied in the Cayman Islands in *Donnelly*, where Harre CJ noted:

"Although the court will not usually order cross-examination on an affidavit in support of an application to discharge or vary Mareva relief because this would tend to turn such an application into a mini-trial involving unnecessary costs and excessive use of court time..."

Accordingly, they submit, the Court should not accede to the Company's attempt to turn the hearing of the Summons into a mini-trial of the Petition and the section 238 proceedings.

17. Mr Todd QC (and Walkers) submit that the Court should follow the approach adopted in relation to an application for an order for the cross-examination of the defendant whose has provided affidavit evidence in response to an asset disclosure order in a freezing injunction case. They cite the judgment of Vos J in *Jenington International Inc v Assaubayev* [2010] EWHC 2351 (Ch) and submit that he established four requirements for such an order, namely:

- (a). generally cross-examination in aid of an asset disclosure order will be very much the exception rather than the rule;
- (b). it will normally only be ordered where it is likely to further the proper



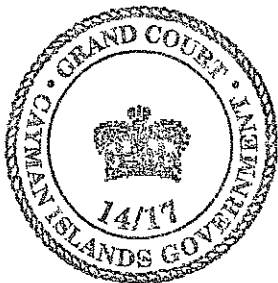
purpose of the order by, for example, revealing further assets that might otherwise be dissipated so as to prevent an eventual judgment against the defendants going unsatisfied;

- (c). it must be proportionate and just in the sense that it must not be undertaken oppressively or for an ulterior purpose. Thus it will not normally be ordered unless there are significant or serious deficiencies in the existing disclosure; and
- (d). cross-examination can in an appropriate case be ordered when assets have already been disclosed in excess of the value of the claim against the defendants.

These four criteria appear to be adapted from the five factors set out by Vos J at paragraph 22 of his judgment, adjusting them to make them relevant to a case not involving cross-examination of a defendant on his asset disclosure affidavit. Mr Todd QC (and Walkers) submit that a similar approach should be adopted in respect of the other applications for cross-examination of a deponent and to the disposal of the Application. They submit that, as regards Vos J's criteria (and appreciating that the criteria have been laid down in the context of an application to cross-examine a defendant on its asset disclosure), requirement (a) emphasises that the order would be exceptional; and requirement (c) is relevant because the effect of the Application is to cause delay and disrupt the hearing of the Summons.

18. Applying these principles and authorities, Mr Todd QC (and Walkers) submit that:

- (a). as regards Mr Jain, the cross-examination is not needed in order to enable the Court to decide whether to make a freezing order. The issues on which the Company wishes to cross-examine Mr Jain are not relevant to the core issues to be decided on the Summons, in particular the risk of dissipation. The state of Mr Jain's knowledge of the proposed PRC re-listing is, they say, irrelevant to those core issues. In any event, this point can be dealt with by written evidence without the need for cross-examination. For the same reason, it is not necessary to test Mr Jain's credibility. His evidence regarding the nature and terms of the Transactions



can be rebutted by the Company's own affidavit evidence.

- (b). as regards Ms Kehoe, the Company is seeking to have the Court review in depth and resolve the critical disputes relating to the valuation evidence. That, Mr Todd QC (and Walkers) submit, is wholly inappropriate. There are clearly substantial disputes of fact between the evidence of Ms Kehoe and Mr Davidson but these cannot and should not be resolved on an application for an interim injunction. The Court has reports from both of them and is able to determine by reference to the reports whether there exists a good arguable case for the relief sought by the Dissenting Shareholders. Furthermore, cross-examination of Ms Kehoe is also not required in order for the Court to be able to form a view on her competence or independence. Her qualifications are set out in the appendix to her report and her reading of and compliance with the General Requirements in the FSD Guide for Expert Witnesses are dealt with in her First Affirmation. Cross-examination is neither required nor appropriate at the interlocutory injunction stage.

19. Mr Todd QC (and Walkers) also refer to the following passage in the White Book (at 38/2/11) which emphasises need to avoid delaying urgent cases in order to allow cross-examination to take place:

"In urgent cases, e.g. on motions for or to dissolve injunctions, the hearing will not be postponed for the purpose of cross-examining a deponent (Normanville v Stanning (1853) 10 Ha., App XX; Bright v Spratt [1874] W.N. 72)".

They note that the hearing on 5 October is taking place by video link with me and Leading Counsel in London so that there is limited time (five hours currently being allocated) because the hearing can only start when the court in Cayman is available (the hearing is already due to start at 8am Cayman time). Furthermore, because I am unavailable on 6 October (since I need to travel abroad) there is no opportunity for the hearing to continue into Friday 6 October. Mr Todd QC (and Walkers) say that the introduction of cross-examination into the hearing is likely to result in the hearing being unable to be completed in the five hours allocated. This will, they say, certainly be the case if, as they say fairness demands, an order was made not only for the cross-examination of Mr Jain and Ms Kehoe but also of Mr Davidson. Should the Court be minded to order the cross-examination of Mr Jain and Ms Kehoe the Dissenting Shareholders will apply for the cross-examination



of Mr Davidson.

The Company's Reply Submissions

20. In the Reply Submissions Harneys (joined by Catherine Newman QC) seek to respond to the points made in the Dissenting Shareholders' Submissions.

21. Ms Newman QC (and Harneys) make the following submissions:

- (a). they deny that the effect or purpose of the Application is to deflect attention from the real issues before the Court or to delay the hearing of the Summons.
- (b). they say that the stated purpose of the Application is to demonstrate that the supporting material advanced is so flawed that the Dissenting Shareholders' application for a freezing injunction must fail. The Company highlights the flaws in that evidence and invites the Court to test it, before relying on it to grant relief that could cause huge loss to the Company. The issues raised by the Application are therefore central to the issue whether the Injunction Application should be granted.
- (c). they accept that the parties appear to be in agreement that the relevant test to be applied by the Court is that adopted in *Donnelly*, namely that the cross examination is necessary. They submit that *BCCI* is authority for the proposition that cross examination will be ordered where there is extraneous material to suggest that in some material respect the affidavit is not accurate and that in relation to both Ms Kehoe and Mr Jain, there is such material.
- (d). they submit that the 28 September Letter and the evidence in support makes it clear that:
 - (i). there is extraneous material to suggest that in some material respect the affidavit evidence is not accurate. In relation to both Ms Kehoe and Mr Jain there is such material.

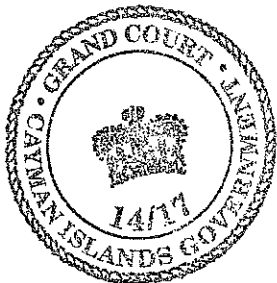


- (ii). this evidence goes directly to the threshold questions which the Court must decide.
 - (iii). the Dissenting Shareholders' Submissions do not dispute that such evidence exists.
- (e). they further submit that the 28 September Letter made it clear that this was the basis on which cross examination was sought. Paragraph 7 of the 28 September Letter (summarized at paragraph 8 above) states that in addition to cross-examination being necessary where there are substantial issues as to the credibility of a witness the court should order cross-examination where there is extraneous material to suggest that some material in the affidavit evidence is not accurate. Ms Newman QC (and Harneys) say that the Dissenting Shareholders' Submissions make no answer to this point.
- (f). they say that they accept that that the hearing of the Application must and is not to be a mini-trial and that it would not be appropriate for the Judge at that hearing to determine issues of fact. They argue that is not why cross examination is sought. Cross examination is sought they say because the evidence adduced by the Dissenting Shareholders is so flawed that, unless it is tested, it should not be relied on to grant the relief which the Dissenting Shareholders are seeking.
- (g). Ms Newman QC (and Harneys) then reiterate why they say that the evidence of Ms Kehoe and Mr Jain is flawed.
- (h). they note that Ms Kehoe's evidence is critical not only to establishing a good arguable case that the Dissenting Shareholders will recover more than the Merger Price but that they will recover the amount in respect of which the Dissenting Shareholders seek a freezing injunction, namely US\$204,980,160 (which is US\$184,829,568 more than the Merger Price). They submit that Ms Kehoe's opinion that supports such a valuation is in the circumstances manifestly absurd and that it is the absurdity (or putting it another way, the fact that the huge disparity between the Merger Price and the valuation contended for by Ms Kehoe, in circumstances where other major institutional investors accepted the Merger



Price, makes her conclusions inherently unlikely to be correct) which makes her evidence unsound and unreliable and therefore in need of testing by cross-examination.

- (i). they cite the opinion of Vice Chancellor Glassock in the Delaware case of *Re ISN Software Corp. Appraisal Litigation* (Delaware Ch., 11 August 2016, C.A. No. 8388-VCG) which indicates that experts who offer very high valuations (at large multiples of the valuation evidence given by other experts) will and should attract a substantial amount of judicial skepticism and that Ms Kehoe's valuation in this case should "*generate record levels of judicial skepticism*".
- (j). they do not accept that it would be necessary for the Court to order the cross-examination of Mr Davidson if an order for the cross-examination of Ms Kehoe and Mr Jain were to be made since the cross-examination of Ms Kehoe and Mr Jain is required to enable the Dissenting Shareholders to satisfy the burden of proof imposed on them, which they cannot do unless the evidence of Ms Kehoe and Mr Jain is tested by cross-examination.
- (k). they also submit that cross-examination of Ms Kehoe is needed to enable the Court to form a view on the limit to be applied to the freezing order, if the Court is otherwise minded to make such an order.
- (l). Ms Newman QC (and Harneys) reiterate that the matters on which the Company wishes to cross-examine Mr Jain are relevant to the issue of dissipation and the matters which the Court has to decide on the Summons. They say that Mr Jain mischaracterises the purpose behind the Transactions and this throws into doubt the reliability of his evidence. Moreover, the reasons why the Dissenting Shareholders delayed in bringing the Application are directly relevant to the strength of their evidence on this point and generally to the bona fides of their actions and their evidence. They also say that Ms Kehoe's evidence again throws into question the bona fides of the Application – it defies belief that the Dissenting Shareholders would be so dilatory in taking steps to protect a claim apparently worth over \$200 million.



- (m). they accept that if cross examination is ordered, it may be difficult for the hearing to be determined within the allocated time. However, they submit that it would be entirely wrong if the Application were refused for that reason. The Application must be determined on its merits and if, due to it being granted, the current listing becomes impractical, then the Summons will have to be relisted at a time when the Court has sufficient time to hear it. Given the extremely invasive nature of the relief sought, this is the only fair course. Futhermore, they submit that the case for relisting is made more compelling by the fact that the Dissenting Shareholders obtained the 5 October listing by claiming urgency whereas, in fact, the evidence shows that the Transactions were foreshadowed pre-merger, have been in the public domain since March 2017 and known to the Dissenting Shareholders since July 2017 at the latest so that the urgency is not made out and the prejudice to the Company if the Summons is decided without a fair hearing is clear.

Analysis and decision

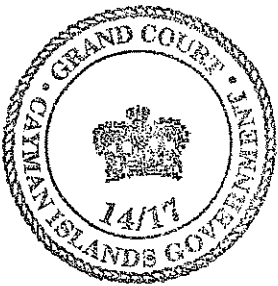
22. I have carefully considered the submissions of both Ms Newman QC (and Harneys) and Mr Todd QC (and Walkers) and have concluded that it would not be appropriate or permissible to order the cross-examination of either Mr Jain or Ms Kehoe.

23. There was not, as Ms Newman QC (and Harneys) acknowledge in the Company's Reply Submissions, a real dispute as to the applicable principles and I accept the summary of the applicable law and authorities provided by both Ms Newman (and Harneys) and Mr Todd QC (and Walkers). In particular I would note:

(a). that GCR O.38, r.2(3) permits the Court to order the cross-examination of a deponent in an application made by summons.

(b). the summary of the applicable principles and the proper approach for the Court to adopt set out in the Note of the Court of Appeal's judgment in *Domelly* [1998] CILR N-13 as follows:

"The court will exercise its discretion to order the cross-examination of a deponent under the Grand Court Rules, 0.38, r.2(3) upon an application for the discharge of a Mareva injunction only when the cross-examination is necessary to dispose of a particular issue. Whether it is necessary will depend on the circumstances of the case (Re Bank of Credit &



Commerce Intl. S.A. (No. 6), [1994] 1 BCLC 450, dicta of Nicholls, V.-C. applied). In particular, the court should seek to avoid turning the application into an expensive mini-trial by attempting to resolve disputed questions of fact on the merits of the underlying cause of action. Since the issue of whether a plaintiff has shown a good arguable case can normally be decided on relatively brief evidence (Derby & Co. Ltd. v. Weldon (No. 1), [1989] 1 All E.R. 469, dicta of Parker, L.J. applied) cross-examination of the defendant will rarely be necessary.”

- (c). that the Court of Appeal was following and applying the following comments made by Sir Donald Nicholls V-C in *Bank of Credit and Commerce International SA (No.6)* (above) at 453g:

“The purpose sought to be achieved when cross-examination is ordered is that this is necessary for fairly disposing of the particular issue. Whether it is so necessary will necessarily depend on the circumstances of the particular case.”

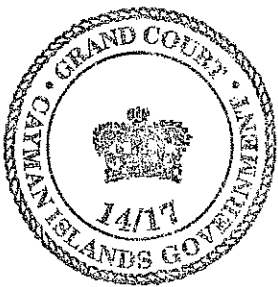
- (d). the commentary in the White Book cited by Mr Todd QC (and Walkers) at 38/2/6 that:

“There is a discretion as to ordering cross-examination on affidavits filed in interlocutory applications (see para. (3)). Cross-examination upon affidavits sworn in applications for interlocutory injunctions is very rare. It was ordered by consent, in The Berkeley Hotel Co. Ltd. v Berkeley International (Mayfair) Ltd..”

- (e). the principle that Court should not attempt to resolve critical disputed questions of fact or law at the this (interlocutory) stage of proceedings (in accordance with the approach established by *Cyanamid*).

- (f). that I do not find the cases dealing with the proper approach to be adopted to applications for the cross-examination of deponents who have filed affidavit evidence in response to a disclosure order to be directly relevant since they focus primarily on the a failure adequately to respond to the court ordered disclosure and the need to make the freezing order which has been made effective.

- (g). that neither of the parties have been able to cite a case whose facts are similar to those of the present case.



24. I also note, as helpful but not definitive guidance on the approach to be adopted by the Court, the following commentary from three leading English textbooks dealing with the 171206 *In the matter of Trina Solar Limited – FSD 92 OF 2017 (NSJ) Judgment on the Company’s application for an Order for the cross examination of Mr Jain and Ms Kehoe .*

provision in the CPR (CPR Pt 32 r.32.7(1)) dealing with the cross-examination of deponents on their affidavit evidence at interlocutory hearings (which provision replaced GCR O.38, r.2(3) and accepting that that the approach taken by and interpretation of the CPR can be different from that taken by and of the GCR):

- (a). in Zuckerman on Civil Procedure (3rd ed., 2013) Professor Zuckerman notes (at paragraph 22.138) that:

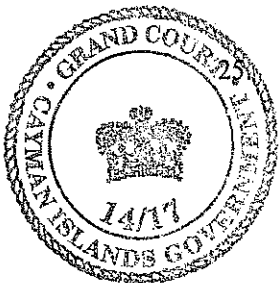
“Court permission is required in order to ensure that interim applications do not become min-trials or rehearsals for trial. For this reason permission would not normally be given. Permission would be given where the court ordered affidavit evidence and there is reason to doubt its accuracy. This may happen, for instance, where in connection with a freezing injunction the defendant has been ordered to disclose assets or where the court made a disclosure order against a third party”.

- (b). in Commercial Litigation: Pre-emptive remedies (2nd international edition, 2011) it is noted (at paragraph A2-328) that:

“Cross-examination may be ordered .. where there is reason to doubt the reliability, credibility or completeness of a statement or affidavit. Such orders should not be made as a matter of course but only where they serve the overriding objective”.

- (c). in Gee on Commercial Injunctions (6th ed., 2016) Steven Gee says (at paragraph 23-036):

“Whether the application is granted is a matter of discretion on the basis of the material available when permission is sought. In general the court is reluctant to allow cross-examination unless it is necessary to do justice between the parties. The court will not usually order cross-examination on an affidavit in support of an application to discharge or vary Mareva relief because this would tend to turn such an application into a mini-trial involving unnecessary costs and excessive use of court time. Exceptionally the court might order certain defined discovery for the purpose of testing factual assertions made in such an affidavit”.



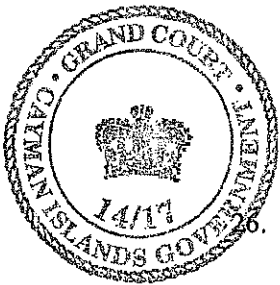
It seems to me that cross-examination of Mr Jain or Ms Kehoe is not needed in order to enable the Court to decide whether the Dissenting Shareholders have satisfied to the requisite standard the requirements for a freezing order and for the appointment of receivers nor that it is justifiable to depart from the usual practice of avoiding cross-examination of deponents on interlocutory applications. I accept that the Company has not

made the Application for improper purposes but I consider that the Application should be refused. I am not satisfied that the Company has established that Mr Jain's Second Affidavit is so incomplete or that there is a material amount of extraneous material available that seriously undermines the accuracy of his Second Affidavit such that cross-examination is needed before the Court can form a view on the reliability and accuracy of his description of the Transactions and the inferences he draws as to their effect and purpose. Furthermore the issue of what Mr Jain and the Dissenting Shareholders knew about the likelihood of a PRC listing and a group reorganization required for that purpose can be dealt with on the affidavit evidence having regard to the evidence filed on behalf of the Company. Nor am I satisfied that the Company has established that Ms Kehoe's evidence and opinions are so far outside a proper valuation opinion as to be self-evidently unreliable without being tested by cross-examination. Indeed, if the Company is right it is hard to see how cross-examination will assist, save in a manner that is helpful to the Dissenting Shareholders. The Company argues that Ms Kehoe's opinion is on its face manifestly absurd and so flawed that the Dissenting Shareholders' application for a freezing injunction must fail. If so, the Company can make out this case without any need for cross-examination. If however the Company's argument is that it needs to have the opportunity to cross-examine Ms Kehoe in order to establish and demonstrate that her views are flawed then they cannot be self-evidently and manifestly absurd. In any event, a cross-examination of Ms Kehoe is likely to involve a consideration of the disputed valuation issues that cannot and should not be resolved at the interlocutory stage and a mini-trial in respect of them. This is precisely what the authorities caution against. While I understand the Company's concern to ensure that the Court does not form a view on the core questions relevant to the application for the freezing injunction and appointment of receivers without adequate evidence, it will be open to the Court to decline to grant the relief sought if the Company can establish at the hearing of the Summons (as it wishes to do) that the Dissenting Shareholders' evidence is insufficient to establish its entitlement to such relief and satisfy the burden of proof. This can adequately be done on the basis of written evidence. It is true that this will not be on the basis of complete and fully tested evidence but that is in the nature of interlocutory applications.

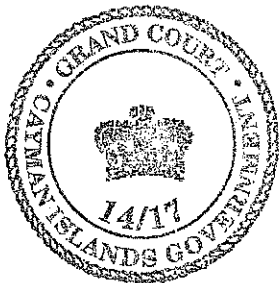
I would supplement these comments by making the following further points in relation to each of Mr Jain and Ms Kehoe.

27. As regards Mr Jain:

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- (a). he deals with the background to the merger; the steps taken by the Dissenting Shareholders pursuant to the merger; the relevant history relating to the interim payments; the steps taken by the Company since the merger and in particular the various different Transactions; the correspondence between Harneys and Walkers and the Dissenting Shareholders' reasons for seeking the freezing injunction and the appointment of receivers (and he cross-refers to the evidence and report of Ms Kehoe).
- (b). a critical and the main part of his evidence deals with the Transactions and their terms. Mr Jain focusses primarily on the *effects* of the Transactions as he understands them, based on publicly available documents.
- (c). this aspect of his evidence supports (indeed is the basis of) the Dissenting Shareholders' case that there is a real risk of a dissipation of assets. The Company does not say that cross-examination of Mr Jain is necessary fairly to dispose of that issue. Indeed when it comes to the effect and purpose of the Transactions, the Company's own evidence can and should deal with this and should be the primary focus of the Court's attention when considering whether the requirements for a freezing order and an order appointing receivers have been satisfied.
- (d). instead the Company wishes to establish that Mr Jain and the Dissenting Shareholders knew or should have known that the Company was likely to, and was probably planning to proceed with, the re-listing in the PRC. There is they say extraneous evidence which supports their view and needs to be put to Mr Jain to test the completeness and accuracy of his evidence. The Company says that this will demonstrate that the actions being taken by the Company have or should have come as no surprise to the Dissenting Shareholders and that the Dissenting Shareholders knew and know that the Transactions are market standard and done for a proper and unsurprising commercial reason. This will also demonstrate a lack of a genuine concern or belief on the part of the Dissenting Shareholders that the Company is acting for the purpose of dissipating assets and making itself judgment proof. Furthermore, it is no doubt right that evidence of a delay in bringing an application for a freezing order may demonstrate that the claimant

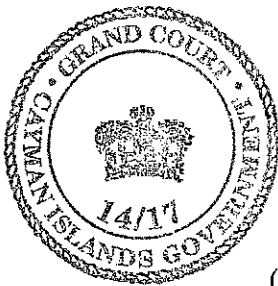


does not consider that there is a real risk of dissipation but that is only one factor to be weighed in the balance by the Court in considering whether to grant the order.

- (e). it seems to me that this is an issue the Court can fairly dispose of without the need for cross-examination. The conduct of the Dissenting Shareholders and their reasons for seeking a freezing order and the appointment of receivers are clearly relevant to the exercise by the Court of its discretion to grant such relief. But the Court can form a view, consistent with the approach which the Court is required to take on the hearing of an application for an interlocutory injunction (as summarized in the submissions of Mr Todd QC and Walkers), without cross-examination based on the written evidence filed in support of the Company's opposition which deals with what information was available and in the public domain and discussed as part of the merger process. There is a risk that cross-examination on this issue will become argumentative (although of course it is a matter for the judge to control the process) and unhelpful.

28. As regards Ms Kehoe:

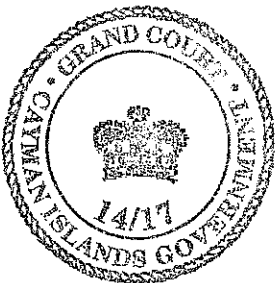
- (a). Ms Kehoe has given evidence on the value of the Dissenting Shareholders' shares. She has provided a preliminary view and a range of values and produced a reasonably detailed written report explaining the basis for her views (recently supplemented by her Second Affirmation).
- (b). I accept that the issue of whether the Dissenting Shareholders can establish that they have a good arguable case that their shares in the Company were, at the valuation date, worth more than the Merger Price (and are worth a sum at least equal to the limit of the freezing order contended for by the Dissenting Shareholders) is one of the critical issues to be determined on the Summons and that the Dissenting Shareholders rely only on Ms Kehoe's evidence in support of their case on this issue.
- (c). Harneys, in the 28 September Letter, submit that the Court needs to have the "*fullest opportunity possible to evaluate Ms Kehoe's evidence and not merely*



hazard a guess as to where within the range she posits the quantum [for the fair value] should lie.” While the Court clearly needs to consider and test carefully the disputed valuation evidence I agree with the submissions made by Mr Todd QC (and Walkers) as to the proper approach for the Court to adopt on the hearing of an application for an interlocutory injunction. The Court’s task is not to resolve the critical disputed questions of fact, which will need to be resolved at trial. The Company’s approach would involve a cross-examination in order to test the basis for Ms Kehoe’s valuation and would be bound to involve a detailed review of the applicable valuation principles and methodologies as well as the factual and documentary basis for Ms Kehoe’s report. While Harneys have explained that the Company wishes to test the basis on which Ms Kehoe has reached the conclusions, which it says are “*manifestly absurd*”, by reference to the circumstances identified by Harneys in the 28 September Letter this does not seem to me to result in the cross-examination being narrowly focused or confined or avoid the serious risk of the type of mini-trial which the authorities make clear must be avoided.

- (d). Ms Newman QC and Harneys wish to challenge the qualifications, competence and independence of Ms Kehoe. Once again it seems to me that cross-examination is not needed to do this. The written evidence is sufficient. It would no doubt assist the Company to be able to seek details of Ms Kehoe’s previous experience, of her relationship with the Dissenting Shareholders and of the manner in which she had done her work. But I do not consider that cross-examination is necessary or justified in the circumstances.

29. Finally I would add two further points. First, while I consider that the Dissenting Shareholders have fairly claimed that the Summons needs to be heard urgently and as soon as possible, and that it is important if possible to preserve the 5 October hearing date, I agree with Ms Newman QC (and Harneys) that had I concluded that in all the circumstances cross-examination of either of Ms Kehoe or Mr Jain or both of them was necessary or justified, and that sufficient time was not available at the 5 October hearing, then it would be right to vacate the listing and find another hearing date in order to ensure that the Summons could be fairly and properly disposed of. Secondly, I would note that I did consider whether it would make a difference if the proposed cross-



examination was limited to a narrower range of issues than those proposed by the Company but have concluded that it would not and that cross-examination is not necessary or appropriate, even on a more limited basis.

30. I will invite Ms Newman QC (and Harneys) and Mr Todd QC (and Walkers) to prepare an appropriate form of order and to seek to agree on the question of costs. If they are unable to do so they should file written submissions on a timetable to be agreed (or in the absence of agreement to be subsequently decided by me) and I shall rule on the issue.



JUSTICE SEGAL
JUSTICE OF THE GRAND COURT, CAYMAN ISLANDS
6 December 2017

