

**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**

**ON THE PAPERS**

**Post- judgment  
Submissions**                                    **27 November 2020**

**Draft Decision  
circulated:**                                    **11 December 2020**

**Decision delivered:**                         **18 December 2020**

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**POST-JUDGMENT DECISION**

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1. On 23 September 2020, I handed down my judgment (the *Judgment*) following trial. In the Judgment (at [8(i)]) I requested that the parties and their valuation experts (Mr Edwards for the Dissenting Shareholders and Ms Glass for the Company) seek to agree the revised DCF valuation and the fair value of the Dissenting Shareholders' ADS based on the conclusions and decisions reached in the Judgment.
2. Subsequently, discussions have taken place and Mr Edwards and Ms Glass have exchanged a number of detailed letters with a view to reaching agreement on all points. Agreement has been reached on all but three issues. The parties now ask the Court to decide these three open issues. In this Decision, I use the same definitions as were included in the Judgment.
3. The issues are as follows:
  - (a). beta: there is a dispute as to the figure to be used for the unlevered and levered beta. The Company (based on Ms Glass' analysis) argues that an unlevered beta of 1.05, which is equivalent to a levered beta of 1.93, should be used whereas the Dissenting



Shareholders (based on Mr Edwards' analysis) argue that an unlevered beta of 0.975, which is equivalent to a levered beta of 1.79, should be used.

- (b). terminal cash flow: there is a dispute as to what terminal cash flow figure should be used in the DCF valuation of the Company. Mr Edwards' and the Dissenting Shareholders' position is that the correct figure is US\$300.1 million whereas Ms Glass and the Company contend for US\$279.2 million.
- (c). minority discount: there is a dispute as to whether the 2% minority discount which I held was to be applied should be applied to that part of the fair value determination based on the Merger Price. The Company says that it should be but the Dissenting Shareholders argue that it should not be.

4. As regards beta, I accept the Dissenting Shareholders' position. An unlevered beta of 0.975 and a levered beta of 1.79 should be used. The dispute has arisen as a result of my error in using the results of, and slightly mischaracterising the methodology used in, Ms Glass' beta calculation in Glass 1 rather than using Ms Glass' updated figures in Glass 2 (and an overly cryptic explanation of my reasons for preferring Ms Glass' approach):

- (a). Ms Glass' different calculations were noted in the Company's Closing Submissions after the trial as follows (underlining added):

*"14.25 [Ms Glass'] evidence is to be found in the following sections of [her] reports:*

- (a). *Glass 1: Section 5.3.4 [J/1/33] and Appendix J [J/1/122-129]. Ms Glass comes up with an unlevered beta range of 1.03 to 1.13 (selecting a mid-point of 1.08) and levered beta in the range of 1.89 to 2.07, (selecting a mid-point of 1.98).*

.....

*14.26 As a result of discussions during the experts' joint meeting, Mr Edwards revised his beta upwards and Ms Glass revised her beta downwards. As a result, Ms Glass uses an unlevered beta of 0.975 (levered beta of 1.79) ...."*

- (b). in Glass 1, Ms Glass had reviewed five year monthly betas and two year weekly betas (see table J2 at [J38]). 1.33 was the Company's five-year monthly beta at the Acceptance Date, while 0.94 was the Company's two-year weekly beta on that date. Ms Glass did not consider that either was acceptable or supportable on its own (see [J40]) and concluded that a reasonable approach was to take and rely on an average



between the two, being 1.13 (see [J41]). She also considered that further analysis and adjustments were required. She also calculated (see Table J3) the Company's unlevered two-year weekly beta as at the Acceptance Date using weekly stock returns at the end of each weekday as opposed to focusing solely on end-of-week returns (which had resulted in the 1.13 figure). This produced a beta of 1.11. She also calculated the standard error and R-squared for the various betas.

- (c). her conclusions were summarised at [J49] as follows:

*“Nevertheless, to err on the side of caution, I have concluded that Trina’s [unlevered] beta at the Valuation Date is most appropriately measured based on a beta of 1.13 at the high end (the high Acceptance Date beta with no adjustment) and 1.03 at the low end (which reflects the low Acceptance Date (1.11) beta less 7.4%, reflective of the decline in the average two-year peer beta).”*

- (d). in Glass 2, Table 6.3 stated that Ms Glass' unlevered beta was adjusted to 0.98 (stated to be 0.975 at [242]) and her levered beta was adjusted to 1.79. She explained her adjustments as follows (see [241]):

*“As a result of discussions during our Joint Meetings, Mr Edwards revised his beta upwards and I revised my beta downwards. As a result, the betas of the two Experts are closer than they were. Mr Edwards currently uses an asset (unlevered) beta of 0.86, while I use an asset beta of 0.975. [Footnote 133 stated that “I used a beta in the range of 0.90 to 1.05. The 0.975 quoted above is the midpoint of this range.”]*

- (e). she provided no further discussion of the basis for or the methodology used for the purpose of her calculation of the 0.90 and 1.05 figures. I had assumed that she had adopted the same basic methodology in Glass 2 as she had in Glass 1. Ms Glass has subsequently confirmed this in her letter to Mr Edwards dated 27 October 2020 (underlining added):

*“10. Perhaps it might be helpful to explain the source of the betas used in my prior reports [Glass 1 and Glass 2]). ..... in [Glass 1], I used a beta in the range of 1.03 (low) to 1.13 (high). The 1.03 (low) was based solely on my analysis of the two-year beta, while the 1.13 (high) was based on an average of the two-year and five-year beta.*

*11. In [Glass 2], I revised the betas slightly to reflect your treatment of operating cash. This change had no impact on the .... levered betas, but did impact the unlevered betas slightly. In [Glass 2], I then used a beta in the range of 0.90 (low) to 1.05 (high). As was the case in my earlier report, the low end (0.90) was based solely on my analysis of the two-year beta, while the high end (1.05) was based on an average of the two-year and five-year beta.”*



- (f). in paragraph 311(b) of the Judgment I said as follows (underlining added):

“two or five year betas: I also consider that Ms Glass’s balanced approach to dealing with the different durations of the beta data was reasonable. She balanced the two and five year betas by taking an average of the two. Her unlevered beta of 1.13 was the average of her two-year weekly beta (end of week) (0.94) and her five-year monthly beta (end of month) (1.33). She concluded that “faced with two betas – one that appeared to me as high (1.33) and one that appeared to me as low (0.94), I considered the average of the two (1.13). I also observed that a beta of 1.13 approximated 73% of both the peer average five-year beta and two-year beta at the Valuation Date, which appears reasonable given historical trends.” I do not accept the Dissenting Shareholders’ argument that the beta should have been based exclusively on the two-year data.””

- (g). my conclusion was that I accepted and preferred Ms Glass’ methodology and calculation of beta. Paragraph 311(b) was intended to explain that I considered her *overall* methodology and approach, which I have now set out above more fully, was suitably “*balanced*” and “*reasonable*” because she had taken into account and given weight to both the two-year (weekly) betas (both end of each weekday and end-of-week returns) and the five-year (monthly) betas (as well as other reasonable adjustments that took into account and reasonably balanced the risks and uncertainties).
- (h). paragraph 311(b) of the Judgment incorrectly referred to the Glass 1 figures and only to the weighting and balancing that Ms Glass had done in calculating one of her inputs for calculating unlevered beta. It should have used the Glass 2 figures and more fully explained Ms Glass’ overall approach, which I found to be “*balanced*” and “*reasonable*”.
- (i). in any event, my conclusion was and remains that Ms Glass’ approach and calculation of beta, as set out in Glass 1 and as modified by Glass 2, is to be preferred and used so that the figure for unlevered beta to be used is 0.975 (which equates to a levered beta of 1.79).

5. As regards the terminal cash flow, a dispute has arisen as to whether the Judgment required the figure for the terminal cash flow calculated by Ms Glass (US\$279.2 million) to be used or whether adjustments could and should be made to reflect other decisions I had made on issues which impacted the assessment and calculation of the terminal cash flow. Ms Glass (and the Company) considered that that since I had specifically referred to US\$279.2 million when saying that I regarded her approach as the one to be preferred I must have meant that further



adjustments were not to be made and argued that further adjustments were not required. Mr Edwards (and the Dissenting Shareholders) argued the Judgment must be understood as requiring adjustments and recalculations of the figures calculated by Ms Glass where other decisions made them necessary. I agree with the Dissenting Shareholders. The Judgment dealt with a large number of valuation points and my intention was to decide the issues that had been raised before me and then to request the valuation experts to review and revise the valuation analysis to reflect all those decisions (including the decisions which accepted Mr Edwards' methodology) and make appropriate adjustments. In my view, for the reasons given by Mr Edwards, adjustments to the US\$279.2 million terminal cash flow figure calculated by Ms Glass are needed. It appears that Ms Glass agrees that if the adjustments proposed by Mr Edwards are to be made, the terminal cash flow should be adjusted to US\$300.1 million. That is therefore the figure to be used for the terminal cash flow:

(a). in the Judgment (at [329]) I said as follows:

*“In my view, Ms Glass’ terminal cash flow of US\$279.2 million and terminal growth rate of 3.5% are to be preferred. I find her criticisms of Mr Edwards’ approach and analysis to be convincing. 3.5%, as I have noted, is the rate used by Mr Edwards for his calculation based on RE-Mgmt which I consider, in line with the decisions set out above, the forecast of Mr Edwards that is closest to the forecast I consider to be preferred. I have, as discussed above, rejected the forecasts and the adjustments to the Management Projections proposed by Mr Russo and generally followed the Management Projections (without the need to make adjustments to give effect to Dr Goffri’s different forecasts in those limited number of cases where he disagreed with and did not support the Management Projections). I therefore do not consider that the terminal growth rate proposed by Mr Edwards for use with RE-Russo is appropriate for use in the DCF valuation.”*

(b). Mr Edwards acknowledged that the figure of US\$279.2 million was referred to in this passage of the Judgment. However, he pointed out that the figure was taken from Glass 1 and was based on assumptions including several assumptions which had been rejected in other parts of the Judgment, including:

(i). Ms Glass’ module price forecasts (which were lower than those forecast by the Company’s management, and in relation to which I had determined that the management's forecast prices should be preferred).



- (ii). the amended exchange rates that Ms Glass had used to forecast profits in the downstream segment (which were different from the exchange rates assumed by the Company management).
  - (iii). management's capital expenditure forecasts (I had held that the Capex forecast in the Management Projections should be accepted, subject to making the adjustments proposed by Mr Edwards to adjust down the growth Capex).
  - (iv). a 3.0% terminal growth rate (rather than the 3.5% specified in the Judgment).
- (c). Mr Edwards argued that in order to give effect to the Judgment it was necessary to use Ms Glass' approach to modelling terminal period cash flows but to make adjustments to incorporate and use Mr Edwards' explicit period Capex forecasts. This necessitated two simple arithmetic adjustments to elements of terminal period cash flow, as follows:
- (i). Ms Glass' approach to calculating terminal period Capex (which I had endorsed in the Judgment at [321(b)]) was to add together the following: (a) the calculated annual depreciation figure (depreciation was an accounting entry rather than a cash flow item, however Ms Glass had used it as a proxy for the Capex that would need to be made to maintain property, plant and equipment at current levels, and I had endorsed that approach); and (b) growth Capex equal to 3.5% of the capital base (required to fund capital growth at the terminal growth rate of 3.5% as found by the Court).
  - (ii). because I had accepted Mr Edwards' forecast of Capex in the explicit period, and this was lower than the Management Projections, it followed that the Company's capital base in the terminal period (i.e. at the end of the explicit period) would be lower than forecast by the Company's management (because in Mr Edwards' forecast less expenditure was made to add to the capital base).
  - (iii). since on my findings the capital base in the terminal period was smaller than the Management Projections, the Company's annual depreciation in dollar terms was smaller so that, adopting Ms Glass'



approach and treating that as a proxy for replacement Capex, the Capex required to maintain the existing base was commensurately smaller.

- (iv). similarly, since the capital base in the terminal period was smaller than the forecast in the Management Projections, Ms Glass' terminal period growth Capex calculation (which was 3.5% of that capital base) must be commensurately smaller.
  - (d). in summary, because on the Court's own adopted assumptions, less money was spent building up manufacturing assets during the explicit period, there was less Capex required to replace it over time (corresponding to a reduced depreciation figure), and less Capex required to grow that asset base at 3.5% to support growth of 3.5% (corresponding to a reduced growth Capex figure).
  - (e). these adjustments generated an adjustment to Ms Glass' overall terminal period cash flow figure of US\$279.2 million. Ms Glass agreed that, if these adjustments are to be made, the resultant terminal cash flow figure is US\$300.1 million.
  - (f). accordingly, Mr Edwards considered that the terminal period cash flow should be calculated in a manner that was consistent with my findings on other related points and that it was to be inferred that this was what I had intended in the Judgment. As I have noted above, this view correctly reflects the approach taken in the Judgment and what I consider to be the right approach. I regard Mr Edwards' analysis to be reasonable and appropriate.
  - (g). I have carefully reviewed and considered Ms Glass' analysis and arguments for not making all the adjustments proposed by Mr. Edwards (including with respect to Capex) and the Company's position as set out in its submissions. However, I consider that Mr. Edwards approach is correct and should be adopted.
6. As regards minority discount, a dispute has arisen as to whether the 2% minority discount which I held was to be applied should be applied to that part of the fair value determination based on the Merger Price. The Company says that it should be but the Dissenting Shareholders argue that it should not be. I have concluded that in this case, based on and in light of Ms Glass' evidence at trial but without deciding the point for the future, I should accept Ms Glass' opinion and approach and therefore, as the Company submitted, the





minority discount will be applied to the part of the fair value calculation based on and derived from the Merger Price.

- (a). in the Judgment (as summarised at [8(d)]), I held that it was appropriate to take into account but to attribute different weightings to each of the three valuation methodologies referred to and relied on by the experts, namely the Merger Price, the unaffected or adjusted market price and the DCF valuation. I decided that it was appropriate to attribute 45% to the Merger Price, 30% to the adjusted market price and 25% to the DCF valuation.
- (b). as the Dissenting Shareholders rightly point out, I did not however consider whether the minority discount was to be applied to each of the various elements of the valuation.
- (c). Ms Glass and Mr Edwards have now considered this issue and adopted different approaches. Their different approaches can be seen from the table prepared by Ms Glass and included in her letter dated 13 November 2020 to Mr Edwards (see Table 2 in which the columns were as follows: minority value (1); control premium (2); control value (3); weight (4); and weighted value (5) – with the emphasis and underlining added by me):

	1	2	3	4	5
<b>Susan Glass Conclusion</b>					
Discounted Cash Flow			14.71	25.0%	3.68
Market Trading Approach	7.26	102.0%	7.41	30.0%	2.22
Merger Price -			<b>11.60</b>	45.0%	<u>5.22</u>
Fair Value per ADS prior to minority discount -					11.12
Minority Discount @ 2%					<u>(0.22)</u>
Fair Value per ADS after minority discount					10.90
<b>Richard Edwards Conclusion</b>					
Discounted Cash Flow			18.17	25.0%	4.54
Market Trading Approach	7.26	102.0%	7.41	30.0%	<u>2.22</u>
Merger Price	11.60	<b>102.0%</b>	<b>11.83</b>	45.0%	<u>5.32</u>
Fair Value per ADS prior to minority discount					12.09
Minority Discount @ 2%					(0.24)
Fair Value per ADS after minority discount					11.85

- (d). as can be seen from this table, Ms Glass applied the 102% figure only to the adjusted market price. She considered that both the Merger Price and the value produced by the DCF analysis represented control prices, whereas the trading price represented a minority price. As a result, her approach was first to add a control premium to the trading price. The relevant weightings were then applied to the three values to





produce what she called a control value for the Company. The minority discount of 2% was then applied to the control value figure. She pointed out that this was consistent with her approach in Glass 1 and Glass 2 (which had not been called into question by Mr Edwards in his reports or at trial). Mr Edwards instead applied the 102% figure to both the adjusted market price and the Merger Price. Mr Edwards regarded both the adjusted market price and the Merger Price, using Ms Glass' terminology, as minority prices. He considered that the Merger Price ought to be thought of as a measure of the value of a share to a minority and, therefore, that it should be treated in the same way as the adjusted trading price in the calculation of fair value (that is, that no minority discount should be applied to the Merger Price, which was why he had applied the 102% figure to the Merger Price before applying the 2% minority discount). In his view, treating the Merger Price as an undiscounted valuation suggested that a merger price indicated that the fair value of a share owned by a dissenting shareholder was less than the value actually realised by another minority for an equivalent share.

- (e). the Dissenting Shareholders argued that Mr Edwards' approach was correct and should be adopted. The Dissenting Shareholders relied on two arguments, one based on principle and one based on an asserted concession made by Mr Jones Q.C. during the final day of the hearing at the trial.
  
- (f). the Dissenting Shareholders argued that as a matter of principle, as Mr Edwards had stated in his letter to Ms Glass dated 15 October 2020, the Merger Price ought to be thought of as a measure of the value per share *to a minority*. That was because it was a price that was actually paid to minority shareholders, in exchange for their shares, pursuant to the merger. Conversely, as Mr Edwards had said in his 6 November 2020 letter, "*treating the merger price as an undiscounted valuation suggests that the merger price indicates that the fair value of a share owned by a dissenter is less than the value actually realised by another minority for an equivalent share*". The Dissenting Shareholders submitted that Ms Glass' approach should not be followed. The implication of her approach was that if in any section 238 case the merger price was considered to be a wholly reliable guide to fair value and to be given a 100% weighting by the Court in the fair value calculation, the conclusion would be that the fair value of the dissenting shareholders' shares was less than the merger price (because it would be discounted). That they argued would be a strange conclusion in circumstances where, *ex hypothesi*, the Court had found that the merger process had been a well-designed and robust arms-length process that was apt to produce a price



that was a reliable guide to fair value. The fact that Ms Glass' approach would produce that absurd result in that hypothetical case demonstrated that it was not an appropriate approach to be followed in these proceedings.

- (g). the Dissenting Shareholders also asserted that it was not open to the Company to dispute this point because it was conceded by Mr Jones Q.C. for the Company in his oral closing submissions, after the point had been specifically raised by the Court requesting the parties' positions in relation to it. They relied on the following exchange (recorded in the transcript for day 14 of the trial):

*“MR JONES: If one goes for the merger price because one feels - - all the evidence is pointing to the merger price so one has got a Dell - type situation.*

*JUSTICE SEGAL: Yes.*

*MR JONES: Where you've got competing bidders, et cetera, et cetera. So it's really a no brainer for the merger. And if you have offered all the shareholders that sum, then prima facie there isn't a minority discount because you are offering everybody the same.*

*JUSTICE SEGAL: Indeed.*

*MR JONES: So I find it difficult to argue that if you go for the merger price, there is the minority discount.*

*JUSTICE SEGAL: Yes.”*

- (h). the Dissenting Shareholders argue that the position of the Company put forward by Mr. Jones Q.C. as recorded in the transcript was quite clear and constituted a clear concession, no doubt, they say, made on instructions for good reasons, including tactical ones, from which the Company cannot now resile.
- (i). the Company, however argued that the Dissenting Shareholders are wrong on both points, the argument based on principle and the alleged concession. The Company submitted that the issue in dispute was whether, for the purpose of determining the fair value of the Company (i.e. before applying a minority discount to determine the fair value of the shares), the Merger Price should be treated as already including a control premium or whether it should have added to it a control premium. The Company submitted that the Merger Price does already include a control premium while the Dissenting Shareholders submitted that one should be added. The Company gave an example to illustrate the point as follows:



*“Assume that, as has happened in the present case, the Court wishes to determine the fair value of the shares by first ascertaining the fair value of the Company and then applying a minority discount to calculate the fair value of the shares. Assume, also, that the Court considers that it can place 100% reliance on the Merger Price to determine the fair value of the Company. The issue is whether in ascertaining the fair value of the Company one simply relies on the Merger Price itself or whether the Merger Price is a price which is equal to the minority discounted value of the shares so that one has to add a control premium for the purpose of determining the fair value of the Company.”*

- (j). on the point of principle, the Company relied on Ms Glass’ analysis:
- (i). in her letter dated 27 October 2020 to Mr Edwards (and repeated in her letter dated 13 November 2020 at [22]) she summarised her view as follows (at [29]):

*“.... both the Merger Price and the value emanating from a DCF analysis represent a control price, whereas the trading price represents a minority price. As a result, my approach was to first add a control premium to the trading price (revised to reflect a 2% minority discount). That control price was then blended with the two remaining control prices (the Merger Price and the DCF value), resulting in a control value for Trina. My approach was not called into question in any of your reports, at trial, or in the Judgment. As a result, I see no basis for altering my approach.”*

- (ii). she said that the impact of using Mr Edwards’ approach was that no minority discount was applied to the Merger Price component of fair value. His approach, in effect, resulted in deducting a 1.1% minority discount from the control value (i.e., the fair value of a control position in the Company), rather than the 2% ordered by the Court.
- (iii). Mr Edwards’ approach was unusual. In her view a minority discount was applied to a control value and accordingly standard practice was to calculate the fair value of a 100% interest in the company, then to calculate the fair value per share on a controlling basis, and to then (as and if relevant) apply a minority discount to determine the fair value per share of the minority interest. She had never seen a minority discount deducted prior to an adjustment for the weighting, for the simple reason that one cannot determine the control value in advance of doing the weighting. She was also unaware of any recognised textbook or other valuation publication that would recommend using such an approach. There were, however, many sources to support her position that a trading price was a minority value,



whereas a merger price was a control value. She referred to a document which Mr Edwards had relied on, namely a paper by Bradford Cornell, a financial economist and an expert on valuation. In Edwards 1, Mr Edwards had noted that *“The paper examines ... whether a premium should be added to a valuation based on trading multiples to account for the incremental value associated with control.”* Professor Cornell had said that *“Due to data limitations, many appraisers and courts have taken a short-cut to estimating the “control” premium used to adjust for the implied minority discount. The short-cut equates the control premium with the average difference between the price of the target firm’s stock a specified number of days before the first announcement of a control transaction (the unaffected stock price) and the price at which a deal is consummated.”* Given that the control premium used by many appraisers and courts was estimated based on the difference between the unaffected stock price and *“the price at which a deal is consummated”* (i.e., the merger price), it was clear that appraisers and courts (along with Professor Cornell) view a merger price as a control value (as Ms Glass did), not a minority value (as Mr Edwards did).

- (iv). she noted that the approach she had taken in the post-Judgment discussions and analysis was the same as she had taken in Glass 1 and Glass 2.
- (v). a merger price was *not* stated net of a minority discount. A merger price reflects a control price, not a minority price. Indeed, the entire valuation community and the entire investment community determine the difference between a merger price and the trading price immediately before a merger announcement, and that difference is referred to as the “control premium”, which Mr Edwards had accepted was the inverse of a minority discount. The trading price was believed to reflect a minority value (and thus already reflected any minority discount). That was not true for a merger price.
- (vi). in a case where fair value was based solely on a merger price, and a court ordered a minority discount to be deducted, then the price received by the dissenting shareholders would be lower than the price received by the assenting shareholders. From a valuation perspective, she did not find that result to be illogical. Shareholders who participated in a merger received their pro-rata share of the control value, whereas under Cayman law, dissenting shareholders are not entitled to a pro-rata share of the full value of



the company. Whether such a result was illogical, fair or reasonable from the perspective of the parties to a dissent was a legal issue on which she could not comment. In any given case, a court was entitled to conclude that a minority discount should not be applied to the merger price component of a fair value calculation (Mr Edwards' approach), if the Court believed that such an approach was required by law. However, such an approach was not supported by valuation principles.

- (k). the Company pointed out that Ms Glass' approach in Glass 1 and Glass 2 had been that no control premium should be added to the Merger Price when using the Merger Price for the purpose of calculating the fair value of the Company. Table 1.1 in paragraph 14 of Glass 1 *was* based on Ms Glass' determination that a 10% minority discount from the fair value of the Company should be applied in calculating the fair value of the shares. Her unaffected market price for the shares was US\$7.26. She considered that a 40% weighting should be attributed to the unaffected market share. On the basis that she considered that the trading price of the shares would include the 10% minority discount, Ms Glass added a control premium to the unaffected trading price for the purpose of calculating the fair value of the Company. This was why the shares were inserted at a price of US\$8.07 (and Ms Glass explained in note 1 to Table 1.1 that this was US\$7.26 plus a control premium to take into account the fact that the US\$7.26 would include a 10% minority discount). Noticeably, however, she did not do this in respect of the Merger Price (nor the DCF figure) because she considered that these figures already had a control premium included in them and did not need one to be added. Mr Edwards had now asserted, for the first time, that a control premium should be added to the Merger Price. This was not something he put forward for the purpose of the trial. He of course considered that the Court should use exclusively a DCF and should not place any reliance on the Merger Price. But he did not say that, if he was wrong, and the Court wished to place some, or exclusive, reliance on the Merger Price that it would need to add a control premium because it was a price that included a minority discount. Nor was this point ever put to Ms Glass in cross-examination. Nor was this point advanced by the Dissenting Shareholders in their closing submissions. It therefore could not be raised at this late stage.
- (l). as regards the concession point, the Company argued that the exchange relied on by the Dissenting Shareholders occurred on the last day of the hearing and took place prior to the decision of the Privy Council in *Shanda*. There were further submissions after the JCPC *Shanda* Advice and the Company's primary case was that the trading



price of US\$7.26 should be taken as the fair value of the shares. The alternative case was that Ms Glass' fair value should be adopted. Ms Glass' approach was not to add on a control premium to the Merger Price. The approach now argued for by Mr Edwards and supported by the Dissenting Shareholders and the issue to which it gives rise did not raise its head at all during the trial. It would therefore be wrong to treat Mr Jones Q.C.'s comments during his exchange with me as a binding concession on that issue.

- (m). at the trial the manner in which a minority discount would be applied in a case where the fair value determination was based on the weighted aggregation of valuations calculated using a number of different valuation methodologies (a ***Blended Approach***) was not the subject of written or oral (leaving aside the alleged concession by Mr. Jones Q.C.) submissions. The Company is right to point out that Ms Glass did, in a footnote to Table 1.1 in paragraph 14 of Glass 1, note that for the purpose of her blended valuation she had, before applying her minority discount of 10%, added a control premium to her figure for the market price but not to her figure for the Merger Price or the DCF valuation (she had said in that footnote that “*Fair value assessed using the market trading approach equals the estimated unaffected price of \$7.26 at the Valuation Date, plus a control premium*”). The Company was also correct to say that this approach had not been challenged by Mr Edwards. Mr Edwards was aware that Ms Glass had argued in favour of the Blended Approach and had studied her evidence. He could have challenged her approach or at least provided an opinion as to the proper approach to applying a minority discount in a case where the Blended Approach was to be used (even though in his view the fair value determination was to be based solely on a DCF valuation). He did not do so.
- (n). Ms Glass' evidence on the minority discount issue showed that she had also taken into account her use of the Blended Approach for the purpose of deciding on the appropriate minority discount to apply and for this purpose differentiated between market prices and the Merger Price. As I summarised at [348] of the Judgment:

*“[Ms Glass] concluded that the appropriate discount in this case should be 10%, which was at the high end of her range for two main reasons:*

- (a). *the low end of her range (0%) would only be supportable if her fair value conclusion was based solely on market trading prices and/or her ultimate conclusion was the same or similar (in amount) to the market trading price, which was not the case.*



- (b). *her valuation (before minority discount) was influenced by the Merger Price, which in turn reflected a relatively high takeover premium of 21.5% measured at the Proposal Date and 40.6% measured at the Acceptance Date. She recognised that the existence of these premiums was a factor considered in her selection of weightings. Nonetheless, the 40% weighting that she ultimately selected did not amount to a full removal of the premiums. Indeed, even with a 40% weighting and a 10% minority discount, her conclusion as to the fair value of a controlling interest probably still reflected a premium element.”*
- (o). Ms Glass’ opinion was that only market prices did not include or assume an element of a control premium and so did not need to be adjusted by applying a minority discount. The Merger Price and the DCF valuation did include or assume an element of a control premium and so did need to be adjusted by applying a minority discount (so that it was inappropriate to gross-up the Merger Price and DCF valuation before applying the minority discount).
- (p). I have some sympathy with the view that Mr Edwards now expresses. It seems to me that it is at least arguable that for the purpose of a section 238 fair value determination, where the Court’s valuation is based exclusively or in part on the merger price, a minority discount ought not to be applied (to the whole or the relevant part of the fair value determination). The principle confirmed by the JCPC Shanda Advice is that what is to be valued are the rights of the shareholder, which the shareholder could sell or which the shareholder is required to give up. The merger price represents a price at which the dissenting shareholder’s shares could have been sold. However, there are counter-arguments that need to be considered. For example, it can be said that where a shareholder dissents from the merger and gives up the right to be paid the merger price, he/she is precluded from relying on the merger price as a price payable to him/her and as a fixed measure of the value of his/her share (this is an argument alluded to by Ms Glass). If it is right to say that a merger price is regarded, as a matter of generally accepted valuation methodology and practice, as including a control premium – that is a sum representing the value of control that the bidder is to acquire – then I can see the force of the argument that on dissenting from the merger, the dissenting shareholder can no longer treat the merger price as separately available to him/her and as representing a separate, personal, value of his shares. He/she must recognise that fair value will be determined by reference to the normal and appropriate valuation methodologies and will not assume that it remains open to the dissenting shareholder to accept and be paid the merger price without taking into account any adjustment to reflect a minority discount.





- (q). but in my view it would be wrong to decide the point of principle in this case, by reference only to written post-trial submissions and without the benefit of detailed written legal submissions and further expert evidence, together with cross-examination. As I have outlined above, it seems to me that there are a number of issues which arise which require proper and full examination, which I am not currently in a position to undertake.
- (r). nonetheless, in the circumstances of this case, where Ms Glass' evidence at trial was based on a Blended Approach and where in her written evidence she expressed the view that only market prices did not include or assume an element of a control premium and so did not need to be adjusted by the minority discount (and that the Merger Price and the DCF valuation did include or assume an element of a control premium and so did need to be adjusted by the minority discount); where Mr Edwards had the opportunity to challenge this view but did not do so and where the issue could have been raised properly and dealt with by way of written and oral submissions at trial, it seems to me that the right approach is to adopt Ms Glass' evidence and approach.
- (s). the Court is dealing with issues which fall to be addressed to give effect to the decisions contained in the Judgment. The particular minority discount point that has now arisen was dealt with in the evidence of one of the experts but that part of the evidence and the issue that has now arisen was not focussed on or debated during the trial. The Judgment in consequence did not address the issue either.
- (t). I note that the Dissenting Shareholders argued, in footnote 13 of their written post-Judgment submissions, that since no consequential order had yet been made, the Court retained full power to correct any matter coming to its attention which was not correct in the judgment (and referred to the judgement of Justice Mangatal in this Court in *Midtown Acquisitions L.P. v Essar Global Fund Limited* [2017 (2) CILR 776]). I have had regard to that decision but do not consider that it requires or justifies a different approach to that I have taken and explained above.
- (u). I do not consider that Mr. Jones Q.C.'s brief statements during the hearing which are relied on by the Dissenting Shareholders constitute or should be treated as giving rise to a binding concession. They were made during an exchange with me and did not involve a clear and considered statement of the Company's position on the minority

discount point that has now arisen (although Mr Jones Q.C.'s remarks, as he acknowledges in footnote 4 of the Company's written post-Judgment submissions, did suggest that he agreed with and accepted the view that because minority shareholders were offered the merger price there should be no minority discount). I do not see that the Dissenting Shareholders relied on these statements to their prejudice so as to be misled or prevented from making submissions on the issue that has now been raised (including at the further hearing following the handing down of the JCPC Shanda Advice).

A handwritten signature in blue ink, appearing to read 'Segal', is centered on the page. The signature is written in a cursive, flowing style.

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**Mr. Justice Segal**  
**Judge of the Grand Court, Cayman Islands**  
**18 December, 2020**