IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No 6 of 2021
(FSD 120 of 2020 (ASCJ))

IN THE MATTER OF THE COMPANIES ACT (2020 REVISION)
AND IN THE MATTER OF CHANGYOU.COM LIMITED

BETWEEN:

CHANGYOU.COM LIMITED

Appellant

AND

(1) FOURWORLD GLOBAL OPPORTUNITIES FUND, LTD.
(2) CORBIN OPPORTUNITY FUND, L.P.
(3) CORBIN ERISA OPPORTUNITY FUND, LTD.
(4) BOOTHBAY DIVERSIFIED ALPHA MASTER FUND LP
(5) BOOTHBAY ABSOLUTE RETURN STRATEGIES, LP
(6) ATHOS ASIA EVENT DRIVEN MASTER FUND
(7) ATHOS SPECIAL SITUATIONS FUND SPC for and on behalf of ATHOS GLOBAL OPPORTUNITIES SP 1
(8) FMAP ACL LIMITED

Respondents

BEFORE:

The Rt. Hon Sir John Goldring, President
The Hon John Martin, Justice of Appeal
The Hon C Dennis Morrison, Justice of Appeal

Appearances: **Jonathan Crow KC, Alex Potts KC and Erik Bodden of Conyers Dill & Pearman LLP for the Appellant**

Jonathan Adkin KC, Rocco Cecere, Annalisa Shibli and Dawn Major of Collas Crill for the Respondents

Heard: **8 – 9 November 2021**

Draft Circulated: **9 September 2022**

Judgment delivered: **16 September 2022**

JUDGMENT

MARTIN JA:

Introduction

1. Part XVI of the Companies Act (2020 Revision) ("the **Act**"), consisting of sections 232 to 239A, sets out a statutory merger and consolidation regime. Section 233(1) permits two or more companies limited by shares and incorporated under the Act to merge or consolidate in accordance with the procedure identified in that section. Subsection (3) requires the directors of each constituent company participating in a merger or consolidation to approve a written plan of merger or consolidation, and subsection (6) requires that plan to be authorised by a special resolution of the members of each constituent company. A merger authorised in that way is known as a long-form merger. However, subsection (7) dispenses with the need for a special resolution if the merger is between a parent company and a subsidiary and a copy of the plan of merger is given to every member of the subsidiary. In that context, a parent company is one which holds at least 90% of the voting shares in the subsidiary. A merger effected in this way is known as a short-form merger.

2. Section 238 of the Act entitles members of a constituent company who dissent from a merger or consolidation to payment of the fair value of their shares. The section sets out steps leading to an appraisal by the court of the fair value. Those steps are predicated on the holding of a vote on the merger or consolidation. In a short-form merger, there will be no vote. The question which therefore arises is whether or not the section 238 appraisal right is available to minority shareholders in a subsidiary which merges in a short-form merger with a company holding a 90% or greater majority of the voting shares in the subsidiary.

3. This question was framed as a preliminary issue for determination in these proceedings in the following terms:

> "*Where a merger between a parent company and a subsidiary company is effected pursuant to section 233(7) of the Companies [Act], is a member of the subsidiary company entitled to payment of the fair value of their shares pursuant to section 238 of the Companies [Act] and, if so, what steps (if any) are required to be taken by such member to dissent from the merger?"*.

4. By Order dated 15 April 2021, following a judgment promulgated on 28 January 2021, the Chief Justice answered the preliminary issue as follows:

"a. where a 'short-form' merger between a parent company and a subsidiary company is effected pursuant to section 233(7) of the Companies Act (2020 Revision), a member of the subsidiary company is entitled to payment of the fair value of their shares as appraised by the court pursuant to section 238 of the Companies Act (2020 Revision) upon dissenting from the merger; and

b. a member of a subsidiary company wishing to dissent from a 'short-form' merger effected pursuant to section 233(7) of the Companies Act (2020 Revision) must give a notice of dissent within 20 days of the copy of the plan of merger being given to the member".

5. The present appeal is against that Order.

Background

6. The preliminary issue arises in proceedings brought under section 238 of the Act by eight former shareholders ("the **Petitioners**") in Changyou.com Limited ("the **Company**"). The Company is the appellant in this appeal, and the Petitioners the respondents.

7. The following short summary of the background is derived primarily from the Statement of Agreed Facts which formed the factual basis of the decision below. The Company invited us to have regard additionally to facts derived from the documents included in the bundle, in particular that a special committee of independent disinterested directors of the Company was formed to assess the proposed terms of the merger with the assistance of independent financial advice from Houlihan Lokey (China) Limited, as a result of which the merger price was increased from US$5 to US$5.40 per class A ordinary share – a price which Houlihan Lokey stated was fair to the minority shareholders. Although the Petitioners objected to the Company's reliance on this material, I think it helpful to recognise its existence, while at the same time bearing in mind that the Chief Justice based his judgment on the Statement of Agreed Facts.

8. The Company was incorporated in the Cayman Islands on 6 August 2007. At all relevant times it has been a leading online game developer and operator in China; has been engaged in the development, operation and licensing of online games for personal computers and mobile devices; and has operated the 17173.com website, a leading information portal in China providing news, electronic forums, online videos and other information services on online games to game players.

9. From its incorporation, the Company was a member of the Sohu group of companies ("the **Sohu Group**"). The Sohu Group is a leading Chinese online media, search and game service group providing comprehensive online products and services on personal computers and mobile devices in China. Relevant members of the Sohu Group are Sohu.com Limited ("**Sohu**") and its subsidiaries Sohu.com (Game) Limited ("**Game**") and the Company.

10. The authorised share capital of the Company has at all relevant times consisted of Class A Ordinary Shares ("**A Shares**") and Class B Ordinary Shares ("**B Shares**"). Holders of A Shares and B Shares vote together as one class. At a general meeting of the Company, each A Share carries one vote and each B Share carries ten votes.

11. As at 9 September 2019, Game held all the B Shares issued by the Company. These shares, together with a relatively small number of A Shares held by Sohu, carried 95.2% of the votes exercisable in a general meeting.

12. On 9 September 2019, with the goal of effecting an internal restructuring of the Sohu Group, Sohu sent the Company a proposal to acquire all of the outstanding A Shares not already owned or beneficially owned by Sohu in a going-private transaction. The offer price was US$5 for each A Share (or US$10 for each American Depository Share ("**ADS**"), equivalent to two A Shares, trading on the NASDAQ Global Select Market). The offer price was subsequently increased to US$5.40 for each A Share, US$10.80 for each ADS.

13. On 2 January 2020, Changyou.com Merger Co Limited ("Parent") was incorporated as an exempted limited liability company in the Cayman Islands; and on 13 January 2020 Game transferred to Parent all the B Shares in the Company.

14. On 24 January 2020, Game, Parent and the Company entered into an agreement and plan of merger ("the **Merger Agreement**").

15. On 19 February 2020, the Company, Sohu, Game and Parent jointly filed with the United States Securities and Exchange Commission a transaction statement setting out details of the Merger. The transaction statement was amended on 9 March 2020.

16. The Merger Agreement and the transaction statement contained statements to the effect that shareholders would not be able to exercise dissenters' rights under section 238 of the Act.

17. On 27 March 2020, attorneys acting for the Petitioners wrote to the Company giving written notice of the Petitioners' objection to the merger, stating that they proposed to demand payment for their shares if the merger became effective, giving written notice of their election to dissent from the merger in respect of all the shares they held, and demanding payment for the fair value of those shares. A further letter to similar effect was written in respect of some of the Petitioners on 1 April 2020.

18. On 13 April 2020, the Company sent a copy of the final form of the plan of merger to every member of the Company by express courier.

19. On 14 April 2020, the Company entered into and filed with the Registrar of Companies of the Cayman Islands a definitive plan of merger dated 14 April 2020, with an effective date of 17 April 2020.

20. On 17 April 2020, the merger became effective. Pursuant to it, Parent merged with the Company, with the Company as the surviving company; the Company became a private company wholly-owned directly and indirectly by Sohu; and the ADSs were no longer traded on the NASDAQ.

21. On 30 April 2020, 8 May 2020 and 14 May 2020 the Petitioners were paid the merger price in respect of their shares.

22. The Petitioners' petition seeking relief under section 238 of the Companies Act was served on the Company on 11 June 2020, and amended on 30 June 2020.

The relevant provisions of the Act

23. The whole of Part XVI of the Act, together with sections 86-8 (dealing with schemes of arrangement and squeeze-outs), is set out in an appendix to this judgment. It is, however, necessary to set out here the provisions most relevant for present purposes.

24. Section 232 is so far as material in the following terms:

> *"In this Part – ...*
>
> *"constituent company" means a company that is participating in a merger or consolidation with one or more other companies;*

"merger" means the merging of two or more constituent companies and the vesting of their undertaking, property and liabilities in one of such companies as the surviving company;

"parent company" means, with respect to another company, a company that holds issued shares that together represent at least ninety per cent of the votes at a general meeting of that other company;

"subsidiary company" means, with respect to another company, a company of which that other company is the parent company; and

"surviving company" means the sole remaining constituent company into which one or more other constituent companies are merged".

25. Section 233, headed "Merger and consolidation", is so far as material in the following terms:

"*(1) Without prejudice to sections 86 and 87, ... two or more companies limited by shares and incorporated under this Act, may, subject to any express provisions to the contrary in the memorandum and articles of association of any of such companies, merge or consolidate in accordance with subsections (3) to (15).*

...

(3) The directors of each constituent company that proposes to participate in a merger or consolidation shall on behalf of the constituent company of which they are directors approve a written plan of merger or consolidation.

(4) The plan referred to in subsection (3) shall give particulars of the following matters –

(a) the name of each constituent company and the name of the surviving or consolidated company;

(b) the registered office of each constituent company;

(c) in respect of each constituent company, the designation and number of each class of shares;

(d) the date on which it is intended that the merger or consolidation is to take effect, if it is intended to take effect in accordance with section 234, and not in accordance with subsection (13);

(e) the terms and conditions of the proposed merger or consolidation, including where applicable, the manner and basis of converting shares in each constituent company into

shares in the consolidated or surviving company or into other property as provided in subsection (5);

(f) the rights and restrictions attaching to the shares in the consolidated or surviving company;

(g) in respect of a merger, any proposed amendments to the memorandum of association and articles of association of the surviving company, or if none are proposed, a statement that the memorandum of association and articles of association of the surviving company immediately prior to merger shall be its memorandum of association and articles of association after the merger;

…

(i) any amount or benefit paid or payable to any director of a constituent company, a consolidated company or a surviving company consequent upon the merger or consolidation;

(j) the name and address of any secured creditor of a constituent company and of the nature of the secured interest held; and

(k) the names and addresses of the directors of the surviving or consolidated company.

(5) Some or all of the shares whether of different classes or of the same class in each constituent company may be converted into or exchanged for different types of property (consisting of shares, debt obligations or other securities in the surviving company or consolidated company or any other corporate entity, or money or other property, or a combination thereof) as provided in the plan of merger or consolidation.

(6) A plan of merger or consolidation shall be authorised by each constituent company by way of –

(a) a special resolution of the members of each such constituent company; and

(b) such other authorisation, if any, as may be specified in such constituent company's articles of association.

(7) Notwithstanding subsection (6)(a), if a parent company incorporated under this [Act] is seeking to merge with one or more of its subsidiary companies incorporated under this [Act], a special resolution under that subsection of the members of such constituent companies is not required if a copy of the plan of merger is given to every member of each subsidiary company to be merged unless that member agrees otherwise.

…

(9) After obtaining any authorisations and consents under subsections (6) …, the plan of merger or consolidation shall be signed by a director on behalf of each constituent company and filed with the Registrar together with, in relation to each constituent company –

…

(c) a director's declaration that the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the constituent companies;

(d) a director's declaration that –

(i) no petition or other similar proceeding has been filed and remains outstanding, and that no order has been made or resolution adopted to wind up the company …:

…

(11) Upon payment of the applicable fees under this [Act] and upon the Registrar being satisfied that the requirements of subsection (9) in respect of the merger or consolidation have been complied with …, the Registrar shall register the plan of merger or consolidation including any new or amended memorandum and articles of association and issue a certificate of merger or consolidation under that person's hand and seal of office ….

(12) A certificate of merger or consolidation issued by the Registrar shall be prima facie evidence of compliance with all requirements of this [Act] in respect of the merger or consolidation.

(13) Subject to section 234, a merger or consolidation shall be effective on the date the plan of merger or consolidation is registered by the Registrar.

…"

26. Section 234 states that a plan of merger may provide that the merger is not to become effective until a specified date or until the date of the occurrence of a specified event subsequent to the date on which the plan of merger is registered by the Registrar.

27. Section 237 provides that one or more companies incorporated under the Act may merge or consolidate with one or more overseas companies in accordance with subsequent subsections of that section. Subsection (2) provides that, where the surviving company is to be a company existing under the Act, the Registrar is to be satisfied in respect of any constituent overseas

company of the matters set out in that subsection "*in addition to compliance by each constituent company incorporated under this Act with section 233(3) to (10)*". Subsection (7) of section 237 requires the Registrar to be satisfied of the additional matters set out in that subsection "*in addition to compliance with section 233(2) to (10) (excluding section 233(9)(g))*". Subsection (10) of section 237 provides that, where the surviving company is to be an overseas company, the surviving overseas company shall file with the Registrar *"(a) an undertaking that it will promptly pay to the dissenting members of a constituent company incorporated under this [Act] the amount, if any, to which they are entitled under section 238*".

28. Section 238 is headed "Rights of dissenters". It is necessary to set it out in full; but the parts of it most relevant for present purposes appear in bold script.

> *"(1)* ***A member of a constituent company incorporated under this [Act] shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation****.*
>
> *(2)* ***A member who desires to exercise that person's entitlement under subsection (1) shall give to the constituent company, before the vote on the merger*** *or consolidation,* ***written objection to the action.***
>
> *(3) An* ***objection*** *under subsection (2)* ***shall include a statement that the member proposes to demand payment for that person's shares if the merger*** *or consolidation* ***is authorised by the vote****.*
>
> *(4)* ***Within twenty days immediately following the date on which the vote of members giving authorisation for the merger*** *or consolidation* ***is made, the constituent company shall give written notice of the authorisation*** *to* ***each member who made a written objection****.*
>
> *(5)* ***A member who elects to dissent shall, within twenty days immediately following the date on which the notice*** *referred to in subsection (4)* ***is given, give to the constituent company a written notice of that person's decision to dissent****, stating –*
>
> *(a) his name and address;*
>
> *(b) the number and classes of shares in respect of which that person dissents; and*
>
> *(c) a demand for payment of the fair value of that person's shares.*
>
> *(6) A member who dissents shall do so in respect of all shares that that person holds in the constituent company.*
>
> *(7) Upon the giving of a notice of dissent under subsection (5), the member to whom the notice relates shall cease to have any of the rights of a member*

except the right to be paid the fair value of that person's shares and the rights referred to in subsections (12) and (16).

(8) Within seven days immediately following the date of the expiration of the period specified in subsection (5), or within seven days immediately following the date on which the plan of merger or consolidation is filed, whichever is later, the constituent company, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase that person's shares at a specified price that the company determines to be their fair value; and if, within thirty days immediately following the date on which the offer is made, the company making the offer and the dissenting member agree upon the price to be paid for that person's shares, the company shall pay to the member the amount in money forthwith.

(9) If the company and a dissenting member fail, within the period specified in subsection (8), to agree on the price to be paid for the shares owned by the member, within twenty days immediately following the date on which the period expires –

(a) the company shall (and any dissenting member may) file a petition with the Court for a determination of the fair value of the shares of all dissenting members; and

(b) the petition by the company shall be accompanied by a verified list containing the names and addresses of all members who have filed a notice under subsection (5) and with whom agreements as to the fair value of their shares have not been reached by the company.

(10) A copy of any petition filed under subsection (9)(a) shall be served on the other party; and where a dissenting member has so filed, the company shall within ten days after such service file the verified list referred to in subsection (9)(b).

(11) 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.

(12) Any member whose name appears on the list filed by the company under subsection (9)(b) or (10) and who the Court finds are involved may participate fully in all proceedings until the determination of the fair value is reached.

(13) The order of the Court resulting from proceeding on the petition shall be enforceable in such manner as other orders of the Court are enforced, whether the company is incorporated under the laws of the Islands or not.

(14) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances; and upon application of a member, the Court may order all or a portion of the expenses incurred by any member in connection with the proceeding, including reasonable attorney's fees and fees and expenses of experts, to be charged pro rata against the value of all the shares which are the subject of the proceeding.

(15) Shares acquired by the company pursuant to this section shall be cancelled and, if they are shares of a surviving company, they shall be available for re-issue.

(16) The enforcement by a member of that person's entitlement under this section shall exclude the enforcement by the member of any rights to which that person might otherwise be entitled by virtue of that person holding shares, except that this section shall not exclude the right of the member to institute proceedings to obtain relief on the ground that the merger or consolidation is void or unlawful."

29. Section 239 provides that except in defined circumstances section 238 rights shall not be available in respect of any shares where an open market exists on a recognised stock exchange or recognised interdealer quotation system "*at the expiry date of the period allowed for written notice of an election to dissent under section 238(5)*".

The judgment below

30. The Chief Justice conveniently summarised his conclusions as follows in a series of bullet points following paragraph 159 of his judgment:

- *Subsection 238(1) is compendious in conferring the right to be paid fair value on any shareholder dissenting from a merger or consolidation. Ambiguity however arises from the mismatch between the compendious terms of subsection 238(1) and the subsequent provisions of section 238 when considered in the context of short-form mergers under subsection 233(7).*
- *Nonetheless, the subsequent provisions of section 238 describe the procedure by which a member may apply to the court for the appraisal of fair value without exclusion of short-form mergers.*
- *It would be absurd to exclude a dissentient member of a company subject to a short-form merger from the protection of section 238 simply because, unlike in the case of a long-form merger, that member is not allowed to vote. The need for protection is no*

less clear and so Parliament should not be taken as having intended such a consequence absent express words to that effect.

- *On the contrary, the exclusion of short-form mergers from section 238 appraisal rights, would be anomalous, having regard to the protections afforded minorities under schemes of arrangement and squeeze-outs elsewhere within the Act itself and under subsection 237(10) in the case of a merger acquisition by an overseas company.*
- *Instead of reading the procedural provisions of section 238 as excluding short-form mergers, they should be construed or read down, so as to allow for access to the protection of section 238 and so, to avoid any implication of minority shareholders being susceptible to having their shares compulsorily acquired at other than fair value as appraised by the court and without the need to assume the difficulties and risks of other doubtfully or not readily available recourses.*
- *Accordingly, I conclude that the Petitioners have taken the appropriate steps to dissent from the Merger and have the right to prosecute their petition. …*

31. This summary encapsulates the Chief Justice's views on a number of issues, carefully considered by him in preceding paragraphs of his judgment, which feature prominently in the appeal. They included the question of whether section 238(1) confers a free-standing right on dissenters, so that the subsequent provisions of section 238 are mere mechanics; or whether the subsequent subsections define exclusively the manner in which the right to dissent may be exercised. That issue is to be resolved initially by reference to the construction of the section, read in its context in the Act; but there is also an issue, implicit in the Chief Justice's statement that the procedural provisions of section 238 "*should be construed or read down*", as to whether there is a constitutional requirement to construe (if it is possible to do so) section 238 in a manner which makes it compliant with the Constitution.

The contentions summarised

32. In essence, the Company's case was that section 238(1) could not be read in isolation from the remaining subsections of the section; that, read as a whole, the section clearly and unambiguously defined what was meant by dissent in the section and made the ability to dissent conditional upon the taking of a vote on the merger, and thus clearly and unambiguously excluded the right in the case of a short-form merger, where no vote was taken; that that was consistent with the context of the legislation and the purpose of Part XVI; that the absence of an appraisal right in the case of a short-form merger did not create an incompatibility with section 15 of the Bill of Rights, and was not (as the Chief Justice had thought) absurd or anomalous; that there was no justification for rewriting section 238 so as to give an appraisal

right in a short-form merger, whether by a process of ordinary construction or pursuant to section 25 of the Constitution; and that if the absence of an appraisal right in a short-form merger was inconsistent with section 15 of the Bill of Rights (which it was not), the proper course was for the court to make a Declaration of Incompatibility after notice to the Attorney-General, not to read down the legislation.

33. The Petitioners' argument was, in summary, that in enacting provisions enabling a majority shareholder compulsorily to acquire the shares of a minority, Parliament also gave the minority shareholders a right to be paid fair value for their shares; that that right, which is set out in section 238(1), is in clear and unqualified terms, and makes no distinction between shareholders who dissent from a long-form merger (where a vote is required) and shareholders who dissent from a short-form merger (where no vote is required); that if Parliament had meant to confine appraisal rights to dissenters from long-form mergers, it would have said so in clear terms, but did not; that the evident purpose of section 238(1) is to protect dissenting minority shareholders from abuse by the majority by ensuring they are paid fair value for the shares of which they are compulsorily deprived; that that is the means by which, in this context, effect is given to the rights conferred by section 15 of the Bill of Rights, which permits the compulsory acquisition of property only where provision is made by the relevant law for the prompt payment of adequate compensation and access to the court for the determination of the amount of such compensation; that the object of section 238(1), and the constitutional rights to which it gives effect, apply just as much to short-form mergers as to long-form mergers, such that the appraisal rights conferred by that subsection apply to both; and that, since any other interpretation would give rise to incompatibility with section 15 of the Bill of Rights, the interpretation contended for by the Petitioners and accepted by the Chief Justice was the only one compliant with the constitutional requirement that the legislation be read and given effect to in a manner compatible with the Petitioners' section 15 rights.

The ordinary rules of construction

34. It is convenient to start with the ordinary construction of the legislation – that is to say, its construction uninfluenced by any interpretational requirement imposed by the Constitution.

35. Both parties agreed that the basic approach to construction was that stated in the context of section 238 of the Act by Lady Arden SCJ in *Shanda Games Limited v Maso Capital Investments Limited and others* [2020] UK PC 2 ("***Shanda Games***") as follows at [27]:

> "*the court has to ascertain the intention of the legislature from the words it has used in their context, and also in the light of any material which demonstrates the mischief that it was concerned to redress by the statutory provision"*.

36. Thereafter, the approach of the parties differed. The company placed its main focus on the limitations of the court's interpretative role. It referred in particular to three cases on this topic. The first of them was *Ming v R* [2009] CILR Note 28, where this court is recorded as stating that "*it was not the proper role of the court to give effect to what "the legislature must have intended" when, on a proper construction of the provision in question, that intention could not be discerned. The role of the court was to interpret the legislation as it had been enacted rather than determining what might have been enacted had the draughtsman being more skilful. It was not for the court to legislate under the guise of interpretation and mistakes were for the legislature to correct*". The second case referred to by the Company on this topic was *Attorney General of Belize & Ors v Belize Telecom Limited & Anor (Belize)* [2009] UKPC 10, where Lord Hoffman said (at paragraphs 16 to 17): "*The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means.... The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so*". Finally, reference was made to the following passage from the speech of Lord Nicholls in *Inco Europe Limited v First Choice Distribution Limited* [2000] 1 WLR 586, 592 ("***Inco***") (to which the Petitioners also referred):

> "*It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words... This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question;*

and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation.... Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In Western Bank Limited v Schindler [1977] Ch 1, 18, Scarman LJ observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation".

I find the last of these citations the most helpful, and return to it later in this judgment.

37. The Company also emphasised the importance of certainty and predictability, especially in the conduct of international business and corporate affairs. It cited *Re Easynet Global Services Limited* [2018] EWCA Civ 10, where the English Court of Appeal stated that "*corporate groups which plan to reorganise their structure by means of a cross-border merger need to know where they stand so that they can plan their affairs effectively. The principle of legal certainty indicates that the provisions of the [Cross-border Mergers Directive 2005/56/EC of 25 October 2005] should be given a straightforward interpretation according to their natural meaning*" (per Sales LJ at [31]).

38. The Petitioners relied in particular on the principle of legality, which assumes that the legislature intends legislation to be consistent with fundamental rights and will only interfere with those rights by using the clearest language. The approach was summarised by Lord Hoffman in *R v Home Secretary ex parte Simms* [2000] 2 AC 115, 131 as follows:

"*Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the*

democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual".

39. In the present case, the relevant fundamental right relied on is the right not to be deprived of property without the means of obtaining adequate compensation. This right has long been recognised at common law: see, for example, the statement of Brett MR in the English Court of Appeal decision of *A-G v Horner* (1884) 14 QBD 245, 257, that "*It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it*". The right is assured by section 15 of the Bill of Rights ("the **Bill of Rights**") annexed to the Cayman Islands Constitution Order 2009 ("the *Constitution Order*"), set out in paragraph 55 below.

40. The Petitioners suggested, as the Chief Justice had held, that the application of these principles of interpretation led clearly to the conclusion that the legislature had conferred a right of appraisal on all dissenters from statutory mergers, regardless of whether the merger was a long-form or a short-form merger. This was said to follow from the clear and unqualified language of section 238(1). That subsection was not expressed to be limited to members who dissented only from a long-form merger, and the language did not expressly or impliedly exclude members who dissented from a short-form merger. The purpose of the subsection was clear: the merger and consolidation provisions set out in section 233 permitted a majority of shareholders compulsorily to deprive minority shareholders of their property against their will, and in return the minority was given an entitlement to be paid fair value for their shares. That purpose was equally relevant to long-form and short-form mergers, and was designed to avoid the possibility that a shareholder might be deprived of his property against his will without the means of obtaining fair value. The subsequent subsections of section 238 were procedural, and could not be elevated to the status of substantive provisions which, by a side-wind and without expressly saying so, excluded short-form mergers from the scope of the appraisal right conferred in unqualified terms by subsection 238(1). The Chief Justice was right to recognise at [124] that the Company's contention to the contrary would exclude the Petitioners from the appraisal regime "*only because of an apparent mismatch between the mechanical provisions of that section, with the right of appraisal by the court given by section 238 itself*".

41. The Company's argument initially fell into three sections, following the quotation from *Shanda Games* set out in paragraph 35 above. First, so far as the wording of section 238 was concerned, it was said that the word "dissent" was not a term of art or one with a legally defined meaning; that it derived its meaning in section 238 from subsections (2) to (5); that those subsections

identified two steps, namely objection and dissent, dissent appearing only in subsection (5); that both of those steps depended upon the taking of a shareholder vote; that dissent therefore had the specific technical meaning throughout section 238 of dissenting from the authorisation resulting from the shareholder vote; and that the clear and unambiguous terms of the section meant that it did not apply, and could not be applied, to a short-form merger. As to the context, there was no conflict between the Company's interpretation and other provisions of the statutory merger regime, or between that interpretation and the provisions relating to schemes of arrangement and squeeze-outs, or between that interpretation and statutory regimes in other jurisdictions. Finally, as to the mischief or legislative policy, it was important to recognise that the rights of minority shareholders were not the only focus: in a case where majority shareholders held 90% or more of the voting rights in a subsidiary, the parent was for all practical purposes the owner of the economic value of the subsidiary. The purpose of section 233(7) was in those circumstances to provide a quick and practical means of satisfying the majority's commercial interests by enabling corporate restructuring. More generally, as evinced by statements made in Parliament before the amendments to the companies legislation made in 2009 and 2011, the overall purpose was to promote the economic well-being of the Cayman Islands by providing an attractive environment for the registration of companies.

42. The consequence, in the Company's submission, was that in a short-form merger the rights of a member were limited to being provided with a copy of the plan of merger, receipt of the merger price or consideration, and receipt of a copy of the certificate of merger. A member would also be entitled to expect that the directors of the company would have exercised their powers to approve, authorise and effect the plan of merger, and to approve the merger price or consideration, in good faith in what they believed to be the best interests of the company as a whole, and fairly as between different shareholders of the company. The obligation to act in good faith was recognised by section 233(9)(c), which required the filing of directors' declarations that the merger or consolidation was bona fide; and the obligation of fairness between different shareholders was vouched by cases such as *Howard Smith Limited v Ampol Petroleum Limited* [1974] AC 821. If, however, a member of the subsidiary company had a proper evidential basis for asserting that they were being treated unlawfully, oppressively, inequitably, or unfairly by being subjected to a short-form merger without an entitlement to appraisal rights, the member would have other statutory, contractual or equitable rights or remedies available to it (depending on the precise facts and circumstances), which might be either personal or derivative in nature. The availability of these remedies, which the Chief Justice had described as "plausible alternatives", meant that it was not the Company's case, as the Petitioners had argued before the Chief Justice, that a 90% majority shareholder could

compulsorily acquire the minority shares at whatever price they saw fit to pay or at no price at all.

Discussion

43. The key issue on the question of the ordinary interpretation of section 238 is the effect of section 238(1): is it, as the Petitioners contend, to be read as a free-standing provision conferring an appraisal right on all dissenters, or is it (as the Company contends) to be read in the context of the remaining subsections of section 238 and confined by them to long-form mergers? Applying the principles set out above, it is in my judgment clear that the Company is right on this issue. That is for the following reasons.

44. First, it is plain that subsections (2) to (16) of section 238 apply only to long-form mergers. That is evident from the fact that the opportunity to object and the opportunity to dissent depend upon the existence of a shareholder vote, and the timing of the matters set out in subsequent subsections depends upon the existence of such a vote. If section 238(1) were intended to confer a free-standing right on all dissentients, there is no plausible reason why those subsections of section 238 should be confined in this way. Nor, secondly, is there any plausible reason why the provisions of subsections (5) (requirement to dissent in respect of entire shareholding), (7) (cesser of membership rights), (8) (offer to dissentients), (15) (cancellation of shares acquired pursuant to the section) and (16) (enforcement of appraisal rights to exclude other membership rights) should apply only to long-form mergers (as they must do, because the timing is throughout determined by the presence of a vote) if appraisal rights were meant to apply in the case of short-form mergers as well. Put shortly, if the subsections following 238(1) are to be regarded as mechanics only, why are such mechanics not also necessary in the case of a short-form merger? It is not a matter of subsequent subsections cutting down a wide and general right conferred by subsection (1), as the Petitioners complained; it is simply that the whole section makes no sense unless, as the Company suggests, the manner of notification and the consequences of dissent are as set out in the subsections following subsection (1). In my view, therefore, section 238 as drafted is not apt to apply to short-form mergers.

45. It is, however, also my view that this is not what the legislature intended. The wording of section 238(1) is clear and unqualified in stating that "*a member... shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation*". The Company's thesis, most clearly articulated by Mr Crow QC when discussing the BVI legislation, that dissent in section 238 means dissent from the shareholder authorisation, not from the merger ("*it is striking ...to note that the dissent there is expressly from the merger, not a dissent from the shareholder authorisation as in the Cayman legislation*"), is thus simply

wrong. Although, as I have accepted, section 238 operates in such a way that dissent can only be notified once a vote approving the merger has been taken, that does not detract from the apparently wide intent of the section 238(1) wording. Moreover, I can see no plausible reason why the legislature should have sought to draw a distinction between the rights of dissentients from a long-form merger and those of dissentients from a short-form merger. It is true that the very fact that there is a distinction between a long-form merger and a short-form merger means that the legislature meant to differentiate between them; but the reasons of practicality prayed in aid by Mr Crow apply only to the need for a shareholder vote, there being no point in holding such a vote in circumstances where the support of the 90% majority shareholder makes the outcome of the vote a foregone conclusion. There is no practical reason why dispensing with the need for a vote should have the consequence of depriving minority shareholders of their shares without the possibility of obtaining an appraisal of their fair value. The Company's suggestion was that the value of a minority interest of 10% or less was so minimal as to make unjustifiable the expense and inconvenience of appraisal litigation; but that suggestion is both wrong in itself and suffers from a lack of consistency in the logic underlying it. A 10% shareholding may have little or no ability to influence the company's affairs, and for that and other reasons is likely to attract a minority discount in the course of the appraisal process (see *Shanda Games*); but that does not mean that it has no value, or that there is some policy reason why the merger price should be taken as conclusively representing fair value. Moreover, although the legislature clearly made a decision that 90% was the appropriate threshold for deciding whether or not a shareholder vote was necessary, there is no logical reason why the same threshold should apply to appraisal rights. No sensible distinction can be drawn between a situation in which one of the constituent companies has an 89% shareholding in the other (in which case the only form of statutory merger available will be a long-form merger with attendant appraisal rights for the 11% minority) and a situation where one company has 90% control of the other (when a short-form merger will be available). Nor can a sensible distinction be drawn between a long-form merger where no shareholder has a 90% majority but the total votes cast in favour of the merger exceed that percentage (in which case dissentient members with a small minority of shares will have appraisal rights) and a situation in which a single shareholder has 90% of the votes from the outset (in which case the minority will on the face of it have no appraisal rights).

46. Secondly, it is necessary to have regard to the other provisions of the Act which are capable of being used to effect a merger. These provisions are contained in sections 86-88 of the Act, and consist of schemes of arrangement and what are known as squeeze-outs. Schemes of arrangement are dealt with in sections 86 and 87. So far as material section 86 provides for an arrangement between a company and its members that is approved by a majority in number

representing 75% of the members by value to bind all members if sanctioned by the court. Section 87, headed "*Provisions for facilitating reconstruction and amalgamation of companies*", applies in the case of an application made for sanction of a scheme of arrangement proposed for the purpose of the amalgamation of two companies involving the transfer of the whole or part of the undertaking of one of those companies to the other; and it authorises the court to deal with, among other things, the provisions to be made for any person who dissents from the arrangement.

47. Squeeze-outs are governed by section 88. That section permits the offeror in a proposed takeover that has been approved by 90% by value of the shareholders of the target company to acquire the remaining shares on the same terms "*unless the Court thinks fit to order otherwise*". That formulation is capable of importing considerations of fairness - see *Re Hoare & Co Ltd* (1933) 150 LT 374: "*The other conclusion I draw is this, that again prima facie the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of the shareholders who are concerned. Accordingly, without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders the scheme is unfair*" (per Maugham J at 375).

48. The operation of an equivalent English provision (section 209 of the Companies Act 1948) was considered in *Re Bugle Press Limited* [1961] Ch 270. That case concerned a company in which there were three shareholders, two of whom each held 45% of the shares and the third of whom held the remaining 10%. The majority shareholders caused there to be incorporated a transferee company, in which they each had a 50% shareholding; and the transferee company then made an offer to all three shareholders at a price certified by independent valuers as fair. The 10% minority shareholder refused the offer, and the transferee company sought to compel acceptance by means of a squeeze-out. The transferee failed at first instance and on appeal. In the Court of Appeal, Lord Evershed MR said this (at 286-7): "*But if the minority shareholder does show, as he shows here, that the offeror and the 90 per cent of the transferor company's shareholders are the same, then as it seems to me he has, prima facie, shown that the court ought otherwise to order, since if it should not so do the result would be ... that the section has been used not for the purpose of any scheme or contract properly so called or contemplated by the section but for the quite different purpose of enabling majority shareholders to expropriate or evict the minority...*".

49. The Petitioners relied on this case as showing that a single 90% shareholder could not utilise the squeeze out provisions to expropriate a minority, and argued that the legislature could not be taken to have intended a different result when enacting Part XVI. The Company said that the case was merely about proper purpose and had no relevance to acquisition in a short-form merger, where the purpose necessarily was to allow a 90% majority to acquire the shares of the minority. For my part, I do not find the case of much assistance: its focus is on the ability of the majority to use the squeeze-out provisions for the purpose of acquiring the minority interest, something which plainly can be done under section 233; and it has nothing to do with compensation for expropriation, and thus nothing to say on the question whether the legislature intended appraisal rights to be available in a short-form merger.

50. What does, however, seem to me to be important is that each of these mechanisms - scheme of arrangement and squeeze-out - provides a means of access to the court in which the fairness of the transaction may be called into question. As the Company points out, neither of them confers an appraisal right, and in both of them the onus of establishing the unfairness or unsuitability of the transaction will ordinarily lie on the dissenter. It is moreover the case that section 233(1) is stated to be without prejudice to sections 86 and 87 (ie the scheme of arrangement provisions) but not to section 88 (ie the squeeze out provisions). Nevertheless, a right of access exists in those provisions which, on the Company's construction of section 238, the legislature did not intend to confer on dissenters in a short-form merger. I do not accept that that is the case. It seems to me that the availability to a dissenter of a means of challenge in a squeeze-out indicates an overall legislative intention that minorities of 10% or less should not be left without some means of disputing the fairness of the price at which their shares are to be taken; and again I can see no plausible reason why the legislature should have intended to depart from that position when introducing into the Act a different mechanism to achieve the same overall purpose. Had that been the intention, one would have expected a clear statement to the effect that appraisal rights were not to be available in short-form mergers. That is particularly so because, if the Company's construction is right, in a situation where the combined votes of separate shareholders will exceed 90% the protections given by section 88 could be circumvented by one of the majority shareholders buying out the others and then using the short-form merger provisions to acquire the minority shares without appraisal rights. Finally, the impression that the legislature intended to confer appraisal rights on minority shareholders without distinction between those expropriated in a long-form merger and those expropriated in a short-form merger is reinforced by the terms in which the Companies (Amendment) Law 2009 was introduced in the Legislative Assembly. What became sections 238 and 239 were explained as follows: "*Clauses 251G and 251H set out fair value share buy-out procedures for minority*

shareholders who have not agreed to a merger or consolidation". It is true, as the Company contended, that this statement is at a high level of generality and does not directly address an identified ambiguity in the legislation, and for that reason I treat it with caution and not directly as an aid to construction; but it is nevertheless consistent with the clear indication of legislative intent I derive from the legislation itself.

51. The fourth of the bullet points in the summary provided by the Chief Justice in his judgment and quoted at paragraph 30 above makes reference in this context to section 237(10) of the Act. That subsection, quoted in paragraph 27 above, applies in the case of mergers involving foreign companies, and requires a surviving overseas company to provide an undertaking that it will promptly pay to the dissenting members of a constituent company incorporated under the Act any amount to which they are entitled under section 238. It was the Petitioners' case, accepted by the Chief Justice, that the subsection required the undertaking to be given whether the merger was a long-form merger or a short-form merger, and so implied an understanding by the legislature that section 238 appraisal rights were available at least in short-form mergers involving foreign companies. The Company contended, however, that short-form mergers are not permissible at all if foreign companies are involved, because section 233(7) applies only where "*a parent company incorporated under this [Act] is seeking to merge with one or more of its subsidiary companies incorporated under this [Act]*"; and it was said to follow that no indication of the legislative intent could be derived from the undertaking required by section 237(10). In my view, the Petitioners are right about this. Although section 233 applies only to mergers or consolidations involving companies "incorporated under this Act" (subsection (1)), the purpose of section 237 is to extend the statutory scheme to mergers and consolidations involving foreign companies. It does so by requiring compliance by Cayman companies participating in the merger or consolidation with identified subsections of section 233, and imposing additional requirements primarily relating to participating overseas companies. Where the surviving company is to be a Cayman company, the participating Cayman companies are required to comply with subsections (3) to (10) of section 233: section 237(2). Where the surviving company is to be a foreign company (which is the situation in which the undertaking required by section 237(10) is to be given), the participating Cayman companies are required to comply with subsections (2) to (10) (except subsection (9)(g)) of section 233: section 237(7). In each case, one of the subsections to be complied with is subsection (7) of section 233, dealing with short-form mergers. On the face of it, therefore, the legislation does permit the use of short-form mergers where foreign companies are involved. But, since section 233(7) is stated to apply only if both parent and subsidiary are incorporated under the Act, and section 237 does not expressly or impliedly modify that statement, section 233(7) cannot apply where either the parent or the subsidiary is an overseas company. The upshot is that, by the combined effect of

sections 233(7), 237(2) and 237(7), a shareholder vote may be dispensed with in a merger or consolidation involving Cayman companies and overseas companies, but only in relation to a constituent (subsidiary) Cayman company where another constituent (parent) Cayman company has 90% or more of the voting shares in that Cayman subsidiary. That being the position, the section 237(10) undertaking to pay dissentients any compensation to which they are entitled under section 238 is required of a surviving overseas company whether the merger is a long-form merger or a short-form merger – even though, if the Company's construction of section 238 is right, no compensation could in fact be payable in the case of a short-form merger. This problem for the Company's construction is not overcome by reference to the words "*compensation ... if any*" in the undertaking, as the Company suggested: that qualification clearly relates to the possibility that an appraisal may not result in any compensation being payable, not to the possibility that dissentients may have no appraisal rights at all. The Chief Justice was accordingly right to treat the requirement of the undertaking as inconsistent with a legislative intention to disqualify dissentients from a short-form merger from access to the section 238 appraisal process.

52. For these reasons, it seems to me that the sensible and commercially justifiable decision to dispense with a shareholder vote in a short-form merger has had the unintended and hitherto unrecognised effect of depriving minority shareholders in a short-form merger of appraisal rights which the legislature intended them to have.

53. The question then is whether the court can do anything about this situation. As a matter of ordinary construction, it seems to me that the answer is no. As I indicated in paragraph 36 above, I have found helpful the passage from the opinion of Lord Nicholls in *Inco* there set out. That passage identifies a three-stage test: the court must be satisfied (a) as to the intended purpose of the provision in question, (b) that by inadvertence the legislature has failed to give effect to that purpose, and (c) as to the substance of the provision the legislature would have made, although not necessarily the precise words it would have used, had the error been noticed. I am satisfied as to each of these requirements: the purpose of section 238 was to give appraisal rights to all dissenters regardless of the form of merger used, as evinced by the wording of section 238(1); the legislature inadvertently overlooked that, by removing the requirement of a vote in a short-form merger, the provisions of section 238 would have no application to such a merger; and had the error been noticed, the legislature would have made identical provision for dissenters in a short-form merger to that which it made for dissenters in a long-form merger. However, notwithstanding that I am satisfied as to these matters, it seems to me impossible to rectify the situation by any a process of construction falling within the proper ambit of judicial interpretation. I bear in mind the warning in *Inco* that "*sometimes, even when these conditions*

are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of parliament. The alteration in language may be too far- reaching". That seems to me to be the position here: the lacuna in the legislative provisions is in my judgment too great to fill by a process of ordinary construction, even taking into account the principle of legality.

54. That brings into play the question whether the principles of construction mandated by the Constitution apply to produce a different answer.

The constitutional arguments

55. As mentioned in paragraph 39 above, section 15 of the Bill of Rights assures a right of peaceful enjoyment of property in terms which ordinarily preclude dispossession without compensation. The section is so far as relevant in the following terms:

> "*(1) Government shall not interfere in the peaceful enjoyment of any person's property and shall not compulsorily take possession of any person's property, or compulsorily acquire an interest in or right over any person's property of any description, except in accordance with law and where – (a) the interference, taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and (b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and (c) provision is made by a law applicable to that interference, taking of possession or acquisition - (i) for the prompt payment of adequate compensation; and (ii) securing to any person having an interest in or right over the property a right of access to the Grand Court, whether direct or on appeal from any other authority, for the determination of his or her interest or right, the legality of the interference with, taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he or she is entitled, and for the purpose of obtaining prompt payment of that compensation;....*
>
> *(2) Nothing in any law or done under its authority shall be held to contravene subsection (1) —*

(a) to the extent that the law in question makes provision for the interference with, taking of possession or acquisition of any property, interest or right—

(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract…".

In this context, the expression "government" includes the legislature: section 1(3).

56. The Company contended that section 15 had no application in the present case; but if it did apply, any dispossession was as an incident of a contract within the exception specified in section 15(2)(a)(iii).

57. In relation to the first of these contentions, the argument ran as follows. a) Companies are creatures of statute: no one has the right to trade with limited liability or to issue or acquire shares outside the statutory regime. b) Shares are choses in action: they consist of a bundle of rights, and are not property in a conventional sense. c) The sources of the rights attaching to shares are the articles of association and, importantly, the legislative framework. d) As a result, anyone who acquires a share does so subject to whatever rights and restrictions there are under the articles and the general law. e) In consequence, when someone buys shares in a company in circumstances where the legislative regime provides that those shares may be compulsorily acquired in defined circumstances, and those circumstances come about, there has been no interference with the peaceful possession of property. In essence, the argument was that the property held by the shareholder was not shares held outright but shares which were always subject to the risk of removal, so that when the risk became reality the shareholder was not deprived of an outright interest that he never had. As Mr Crow put it, "*if the legislation under which you acquire shares tells you that one of the restrictions on those shares is that they can be expropriated in a short-form merger, that is what you have bought*". The consequence, so it was said, was that expropriation in a short-form merger did not fall within section 15 at all.

58. In my judgment, this argument is fallacious. Shares in a limited liability company plainly are property for the purposes of section 15: section 33(1)(a) of the Act designates shares as personal estate, and Mr Crow himself conceded that the introduction of legislation which expropriated shares previously held would engage section 15. The remaining steps in the argument involve a sleight of hand. The introduction of Part XVI did not give rise to some sort of latent defect affecting the shares: all it did was to permit shares to be acquired compulsorily in a merger. The introduction of the statutory merger regime did not itself involve any dispossession, since any such dispossession was contingent upon a merger actually taking place. The introduction likewise had no immediate effect on the rights attaching to the shares: after the introduction the

shares represented the same entitlement to participate in the affairs and assets of the company as they had done before the introduction. Since all of the shares (and not merely those held by persons who might turn out to be dissentients) were affected by the possibility of expropriation in a merger, and since those shares collectively represented the entirety of the value in the company, there can have been no overall effect on their value. Only if a merger did occur, and depending on its terms, would a member be required to give up his shares; and in doing so he would be relinquishing his entitlement to participate in the affairs and assets of the company represented by the shares. If that relinquishment was against his will, the obligation to comply will have been a direct consequence of the introduction of Part XVI; and the resultant expropriation will have been just as much within section 15 as the situation conceded by Mr Crow. Moreover, the Company's argument depended upon treating shareholders differently depending on whether they bought their shares before or after the introduction of Part XVI: but I cannot see any sensible justification for treating the shares in the Company as falling into two informal classes of fluctuating size depending on whether or not they are sold.

59. The Company's second, and alternate, argument was that the case fell within the carve-out specified in section 15(2)(a)(iii). The contention was that the interference with the peaceful enjoyment of property in a short-form merger was as an incident of a contract. The contract in question was the contract between shareholders represented by the articles of association; and by virtue of the legislation it was an incident of that contract that minority shareholdings in a subsidiary company could be compulsorily acquired in a short-form merger. It was to be noted that the legislature had used the expression "incident", not the expression "term"; the significance being, according to the Company, that it was immaterial that the shareholder had not agreed to dispossession as a part of the contract.

60. In my judgment, this argument too is wrong. No attempt was made to define what constituted an incident of a contract for the purposes of the section 15(2)(a)(iii) carve-out; but it appears to me that the instances of relationships to which interference may be incidental specified in the same carve-out indicate what the legislature intended. Those instances are leases, tenancies, mortgages, charges, bills of sale, and pledges; and each of them has inherent in it a possibility of forfeiture. Leases and tenancies may be forfeit if the lessee or tenant fails to comply with covenants; mortgages, charges, bills of sale and pledges all give rise to security interests justifying remedies such as foreclosure or sale on failure to satisfy the charge. The possibility of forfeiture may be, but is not always, a term of the contract; but it is always a necessary incident of the relationship and will ordinarily be fortified by legislation and enforced by the courts. The potential for dispossession, which I regard as the common feature of these instances, is capable of being present in other contracts: indeed, it is not unusual for articles of association

to contain a provision for the forfeiture of shares if calls are not met. It is not, however, usual to find in articles of association a provision for forfeiture or dispossession in the context of a merger (and there is none in this case); and the possibility of such dispossession cannot be said to be inherent in the contractual relationship between the shareholders embodied in articles of association. Accordingly, in my judgment it cannot be said that dispossession in a short-form merger occurs as an incident of the contract between the shareholders. As I have said, it is solely a consequence of legislative intervention.

61. The Company also suggested that a relevant contract was the agreement and plan of merger, dispossession in a short-form merger being an incident of that contract; but it is clear that the section 15(2)(a)(iii) exception applies only to incidents of contracts to which the person dispossessed is a party, and a dissentient shareholder not only is not a party to the agreement and plan of merger but actively objects to its provisions.

62. For these reasons, I am satisfied that section 15 of the Bill of Rights applies. It is accepted by the Petitioners that the legislative intervention represented by the short-form merger provisions can be justified as being expedient in the interests of promoting the economic well-being of the community; but it is contended that the absence of any appraisal right means that the requirements of section 15(1)(c) (provision for the prompt payment of adequate compensation and a right of access to the Grand Court for the determination of the amount of any compensation and for the purpose of obtaining prompt payment of that compensation) cannot be satisfied. Subject to the Company's arguments about alternative remedies, to which I now turn, that contention is plainly correct.

63. In introducing the topic of alternative remedies in his oral submissions, Mr Crow was at pains to emphasise that he was not seeking to persuade the court either that any particular remedy available under the general law would necessarily succeed or that any general law remedies were an exact replica of the appraisal regime. But in setting out in the agreement and plan of merger the terms, including any consideration payable, the directors of the constituent companies were bound by their fiduciary duties, in particular the duty to exercise their powers in good faith in what they honestly believed to be the best interests of the company and the duty to exercise their powers for their proper purpose. They were also under a specific obligation to certify that the plan was bona fide. If a minority shareholder had a case for saying that the duties had been broken, a range of remedies would be available. Those remedies would include the possibility of applying to wind up the company on the just and equitable ground, and thereby gaining access to the alternative remedies set out in section 95(3) of the Act (one of which was an order for purchase of shares); the possibility of bringing a derivative action on behalf of the

company against the directors for breach of fiduciary duty; the possibility of a personal action for breach of fiduciary duty; and the possibility of a claim for an order under section 64(1) of the Trusts Act.

64. In considering these possibilities, it seems to me that there are two relevant questions: first, are they in conformity with the specific requirements of section 15 of the Bill of Rights? And secondly, is there reason to suppose that the legislature intended these possibilities to be a substitute in the case of short-form mergers for the appraisal rights undoubtedly conferred in long-form mergers? In my view, the answer to each of these questions is no.

65. Section 15 of the Bill of Rights is specific as to the provision which must be made by a law authorising interference, taking of possession or acquisition of property: it must include provision for the prompt payment of adequate compensation and for securing a right of access to the Grand Court for the determination of the amount of any compensation, and for the purpose of obtaining prompt payment of that compensation. Leaving aside the fact that, on the Company's case, Part XVI (which is the law authorising the acquisition of the shares) does not include provision for any of these matters, it is in my view clear that none of these suggested remedies satisfies the specific requirements of section 15. Whilst they may be said to afford a right of access to the Grand Court, none of them does so specifically for the purposes identified in section 15, and none of them directly (or, in many cases, indirectly) provides for the assessment by the court of compensation for the dispossession, or for the prompt payment of compensation. It seems to me impossible to suppose that the legislature either had in mind the existence of these remedies or could have thought that they provided an alternative to the appraisal regime that was both satisfactory and compliant with the Constitution.

66. Accordingly, I conclude that there are no other remedies available to a shareholder dissenting from a short-form merger which satisfy the requirements of section 15 of the Bill of Rights.

67. It is therefore necessary to consider how that fact may affect the construction of section 238 of the Act.

68. The Constitution Order came into effect on 6 November 2009, the appointed day for that purpose ("the appointed day"). It prescribes a different approach to ensuring conformity of legislation with the Constitution depending on whether the legislation came into effect before or after the appointed day.

69. In the case of legislation which took effect before the appointed day, the position is governed by section 5 of the Constitution Order. So far as relevant, that section provides as follows:

> *"(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution....*
>
> *(3) In this section "existing laws" means laws and instruments (other than Acts of Parliament of the United Kingdom and instruments made under them) having effect as part of the law of the Cayman Islands immediately before the appointed day*".

70. In the case of legislation which takes effect after the appointed day, the relevant provision of the Constitution Order is section 25 of the Bill of Rights. It provides as follows:

> "*Interpretive obligation*
>
> *25. In any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in this Part*".

71. It is necessary also to mention section 23 of the Bill of Rights, which requires the court to make a declaration of incompatibility if it concludes that primary legislation is incompatible with the Bill of Rights.

72. Before the Chief Justice, the Petitioners did not suggest that section 5 of the Constitutional Order applied, and the Chief Justice said nothing in his judgment about it. The point made its appearance on this appeal only in the Petitioners' skeleton argument, and it was not the subject of a respondents' notice. The Petitioners said that it was a point of law which involved no new facts, and that we should deal with it, if necessary giving the Petitioners leave to file a respondents' notice pro forma. The Company said that it was too late for the point now to be raised. We indicated that we would hear argument on the point without first deciding whether the Petitioners could properly raise it. I therefore propose to deal with the argument on its merits.

73. The position in the present case is that the statutory merger and consolidation regime contained in Part XVI of the Act was introduced by the Companies (Amendment) Law 2009, which came into force on 11 May 2009 - before the appointed day (6 November 2009). Part XVI was, however, amended in 2011 by the Companies (Amendment) Law 2011 - after the appointed day. The amendments included a modification of the definition of parent company, and the replacement of subsection 233(7) and subsection 238(15), but left Part XVI substantially untouched. Other provisions of the Act were also amended.

74. An unfortunate consequence of the way in which the section 5 point arose in this Court is that no authority was cited to us by either side on the question whether for the purposes of the present debate the whole of amended legislation was to be regarded as having taken effect afresh after the amendment or whether unamended provisions were to be regarded as having taken effect on the date when they first came into force. However, the amendments made in 2011 must necessarily have been made in full knowledge of the requirements of the Constitution; the amendments to other parts of the Act were extensive, justifying Mr Crow's phrase that the Act had been given a "shakedown"; and after the amendments had been made they, and the remainder of the Act, fell to be interpreted as a whole. For these reasons, the position in my judgment is that the whole of Part XVI in the form which it took after the amendments made in 2011 is to be regarded as legislation taking effect after the appointed day.

75. It follows that the provision of the Constitution governing the interpretation of that part is section 25 of the Bill of Rights; so that if the court concludes that the compatibility of section 238 with the Bill of Rights is unclear or ambiguous, the section "*must, so far as it is possible to do so, be read and given effect in a way which is compatible*" with the Bill of Rights. If, however, the court concludes that section 238 is not merely unclear or ambiguous but is incompatible with the Bill of Rights, it must make a declaration of incompatibility under section 23 of the Bill of Rights.

76. There are thus two questions: is section 238 incompatible with the requirements of section 15 of the Bill of Rights in its application to short-form mergers, or is its compatibility in that respect unclear or ambiguous? And if the latter, is it possible to read and give effect to the section in a way which is compatible with section 15?

77. As to the first of those questions, I consider that the answer is that section 238 is unclear or ambiguous as to its compatibility with section 15 of the Bill of Rights. The reasons are essentially those which I have given in relation to the ordinary construction of section 238. Although, as a matter of ordinary construction, the section cannot be read as applying to short-

form mergers, that was not the legislative intent. That intent appears clearly, in my view, from the terms of section 238(1); but the ensuing provisions of section 238 do not give effect to that intent in the case of short-form mergers, as a result of a failure to notice that the removal of the requirement of a vote in a short-form merger also removes a step essential to the operation of the appraisal provisions. There is thus to my mind a tension between the intent manifested by section 238(1) and the operative provisions of the section; and in my view that gives rise to a lack of certainty or to ambiguity as to the compatibility of section 238 with section 15 of the Bill of Rights.

78. That being so, the second question arises: is it possible to read and give effect to section 238 in a way which makes it compatible with section 15 of the Bill of Rights? An initial difficulty is that, when considering the question of ordinary construction, I have taken the view that it is not possible within the bounds of judicial interpretation to read section 238 so that it applies in the case of short-form mergers: although it is clear that there has been a legislative error, and clear what was the substance of the intended provisions, the task of making appropriate amendments is simply too large. It seems to me, however, that the effect of section 25 of the Bill of Rights is to give to the court a greater degree of interpretative latitude than is available under the ordinary rules of construction. Section 25 is mandatory in its terms: the legislation "must", so far as possible, be read and given effect to in a way which is compatible with section 15 of the Bill of Rights. The imperative is thus to resolve the uncertainty or ambiguity in favour of compliance with the requirements of the Bill of Rights.

79. In a note supplied to us after the conclusion of the hearing, but at our request, the Petitioners suggested four ways in which the wording of section 238 might be adapted so as to make it applicable to short-form mergers as well as to long-form mergers. One of these ways was that apparently adopted by the Chief Justice, namely the addition in section 238(5) of the words "*or the date on which the plan of merger is given to the member pursuant to section 233(7)*" immediately after the existing words "*the date on which the notice referred to in subsection (4) is given*", with the rest of the section left unamended. Reading the section in this way does have the effect of making it compatible with section 15 of the Bill of Rights, and justifies the Order made by the Chief Justice. It seems to me preferable, however, to adopt (with alterations) the substance of the fourth of the versions proposed by the Petitioners, so that subsections (1) to (5) would read as follows (deleted words being struck through and added words appearing in bold script), the remainder of the section being unchanged:

(1) A member of a constituent company incorporated under this Act shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation.

(2) A member who desires to exercise that person's entitlement under subsection (1) shall give to the constituent company, before the vote on the merger or consolidation **(if any such vote is to be held) or (if no such vote is to be held) immediately after the date on which the plan of merger is given to the member pursuant to section 233(7)**, written objection to the action.

(3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for that person's shares if the merger or consolidation is authorised ~~by the vote~~ **or approved**.

(4) Within twenty days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, **or (if no such vote is to be held) within twenty days immediately following the date on which the plan of merger or consolidation is filed with the Registrar pursuant to section 233(9),** the constituent company shall give written notice of the authorisation **or filing** to each member who made a written objection.

(5) A member who elects to dissent shall, within twenty days immediately following the date on which the notice referred to in subsection (4) is given, give to the constituent company a written notice of that person's decision to dissent, stating-

(a) that person's name and address;

(b) the number and classes of shares in respect of which that person dissents; and

(c) a demand for payment of the fair value of that person's share.

80. Read in this way, section 238 would confer appraisal rights on dissenters from a short-form merger, and would thus come into conformity with the requirements of section 15 of the Bill of Rights. It would also in my view conform to the intention of the legislature. The amendments so made are well within the realms of possibility mandated by section 25 of the Bill of Rights, and do the minimum necessary to adapt the mechanics predicated on the existence of a vote to a situation in which authorisation for or approval of the merger or consolidation is given otherwise then by means of a shareholder vote. In particular, the two stages of objection and dissent are preserved in the case of short-form mergers. Objection is to be given immediately after service on the member of the plan of merger, which it is implicit in the structure of section

233 must occur before the plan is filed with the Registrar. I am satisfied that it is both permissible and necessary to make these amendments.

Conclusion

81. For the reasons I have given, I consider that the Chief Justice reached the right conclusion and his order was justified; and I would dismiss this appeal.

Morrison JA:

82. I agree.

Goldring P:

83. I also agree.

APPENDIX

PART XVI - Merger and Consolidation

Definitions in this Part

232. In this Part —

"*consolidated company*" means the new company that results from the consolidation of two or more constituent companies;

"*consolidation"* means the combination of two or more constituent companies into a consolidated company and the vesting of the undertaking, property and liabilities of such companies in the consolidated company;

"*constituent company*" means a company that is participating in a merger or consolidation with one or more other companies;

"*merger*" means the merging of two or more constituent companies and the vesting of their undertaking, property and liabilities in one of such companies as the surviving company;

"*parent company*" means, with respect to another company, a company that holds issued shares that together represent at least ninety per cent of the votes at a general meeting of that other company;

"*subsidiary company*" means, with respect to another company, a company of which that other company is the parent company; and

"*surviving company*" means the sole remaining constituent company into which one or more other constituent companies are merged.

Merger and consolidation

233. (1) Without prejudice to sections 86 and 87, but subject to section 239A, two or more companies limited by shares and incorporated under this Law, may, subject to any express provisions to the contrary in the memorandum and articles of association of any of such companies, merge or consolidate in accordance with subsections (3) to (15).

(2) Nothing in this Part shall derogate from the Authority's powers in relation to any constituent company that is a licensee under the regulatory laws and that proposes to participate in a merger or consolidation, or from a constituent company's obligations under the regulatory laws.

(3) The directors of each constituent company that proposes to participate in a merger or consolidation shall on behalf of the constituent company of which they are directors approve a written plan of merger or consolidation.

(4) The plan referred to in subsection (3) shall give particulars of the following matters —

(a) the name of each constituent company and the name of the surviving or consolidated company;

(b) the registered office of each constituent company;

(c) In respect of each constituent company, the designation and number of each class of shares;

(d) the date on which it is intended that the merger or consolidation is to take effect, if it is intended to take effect in accordance with section 234, and not in accordance with subsection (13);

(e) the terms and conditions of the proposed merger or consolidation, including where applicable, the manner and basis of converting shares in each constituent company into shares in the consolidated or surviving company or into other property as provided in subsection (5);

(f) the rights and restrictions attaching to the shares in the consolidated or surviving company;

(g) in respect of a merger, any proposed amendments to the memorandum of association and articles of association of the surviving company, or if none are proposed, a statement that the memorandum of association and articles of association of the surviving company immediately prior to merger shall be its memorandum of association and articles of association after the merger;

(h) in respect of a consolidation, the proposed new memorandum of association and articles of association of the consolidated company;

(i) any amount or benefit paid or payable to any director of a constituent company, a consolidated company or a surviving company consequent upon the merger or consolidation;

(j) the name and address of any secured creditor of a constituent company and of the nature of the secured interest held; and

(k) the names and addresses of the directors of the surviving or consolidated company.

(5) Some or all of the shares whether of different classes or of the same class in each constituent company may be converted into or exchanged for different types of property (consisting of shares, debt obligations or other securities in the surviving company or consolidated company or any other corporate entity, or money or other property, or a combination thereof) as provided in the plan of merger or consolidation.

(6) A plan of merger or consolidation shall be authorised by each constituent company by way of —

(a) a special resolution of the members of each such constituent company; and

(b) such other authorisation, if any, as may be specified in such constituent company's articles of association.

(7) Notwithstanding subsection (6)(a), if a parent company incorporated under this Law is seeking to merge with one or more of its subsidiary companies incorporated under this Law, a special resolution under that subsection of the members of such constituent companies is not required if a copy of the plan of merger is given to every member of each subsidiary company to be merged unless that member agrees otherwise.

(8) The consent of each holder of a fixed or floating security interest of a constituent company in a proposed merger or consolidation shall be obtained but if such secured creditor does not grant that person's consent then the Court may upon application of the constituent company that has issued the security waive the requirement for such consent upon such terms as to security to be issued by the consolidated or surviving company or otherwise as the Court considers reasonable.

(9) After obtaining any authorisations and consents under subsections (6) and (8), the plan of merger or consolidation shall be signed by a director on behalf of each constituent company and filed with the Registrar together with, in relation to each constituent company —

(a) a certificate of good standing;

(b) a director's declaration that the constituent company is, and the consolidated or surviving company will be, immediately after merger or consolidation, able to pay its debts as they fall due;

(c) a director's declaration that the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the constituent companies;

(d) a director's declaration that —

(i) no petition or other similar proceeding has been filed and remains outstanding, and that no order has been made or resolution adopted to wind up the company in any jurisdiction;

(ii) no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the constituent company, its affairs, or its property or any part thereof; and

(iii) no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the constituent company are, and continue to be, suspended or restricted;

(e) a director's declaration of the assets and liabilities of the constituent company made up to the latest practicable date before the making of the declaration;

(f) in the case of a constituent company that is not a surviving company, a director's declaration that the constituent company has retired from any

fiduciary office held or will do so immediately prior to merger or consolidation;

(g) an undertaking that a copy of the certificate of merger or consolidation under subsection (11) will be given to the members and creditors of the constituent company and that notification of the merger or consolidation will be published in the Gazette; and

(h) a director's declaration, where relevant, that the constituent company has complied with any applicable requirements under the regulatory laws.

(10) A director's declaration under subsection (9) shall be in writing, signed by, and shall include the full name and address of, the director making the declaration.

(11) Upon payment of the applicable fees under this Law and upon the Registrar being satisfied that the requirements of subsection (9) in respect of the merger or consolidation have been complied with and that the name of the consolidated company complies with section 30, the Registrar shall register the plan of merger or consolidation including any new or amended memorandum and articles of association and issue a certificate of merger or consolidation under that person's hand and seal of office, and in the case of a consolidation section 27 shall apply in relation to the consolidated company.

(12) A certificate of merger or consolidation issued by the Registrar shall be prima facie evidence of compliance with all requirements of this Law in respect of the merger or consolidation.

(13) Subject to section 234, a merger or consolidation shall be effective on the date the plan of merger or consolidation is registered by the Registrar.

(14) A person who, being a director, makes a false declaration under subsection (9) commits an offence and is liable on summary conviction to a fine of twenty thousand dollars or to imprisonment for five years, or both.

(15) In any proceedings for an offence under subsection (14) it shall be a defence for the person charged to prove that that person took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by that person or any person under that person's control.

(16) Any director's declaration pursuant to this section may be given in the form of a declaration or an affidavit, as the director may determine.

Delay of effective date

234. A plan of merger or consolidation may provide that such merger or consolidation shall not become effective until a specified date or until the date of the occurrence of a specified event subsequent to the date on which the plan of merger or consolidation is registered by the Registrar, but such date shall not be a date later than the ninetieth day after the date of such registration.

Termination or amendment

235. (1) A plan of merger or consolidation may contain a provision that at any time prior to the date that the plan becomes effective it may be —

(a) terminated by the directors of any constituent company; or

(b) amended by the directors of the constituent companies to —

(i) change the name of the consolidated company;

(ii) change the effective date of the merger or consolidation, provided that the new effective date complies with section 234; and

(iii) effect any other changes to the plan as the plan may expressly authorise the directors to effect in their discretion.

(2) If the plan of merger or consolidation is terminated or amended after it has been filed with the Registrar but before it has become effective, notice of termination or amendment of the plan shall be filed with the Registrar, and shall have effect on the date of registration by the Registrar after that person has satisfied that person's self in accordance with section 233(11).

(3) A copy of the notice under subsection (2) shall be sent to any person entitled to vote on, consent to or be notified of the plan of merger or consolidation in accordance with section 233.

(4) The notice of termination or amendment filed in accordance with subsection (2) shall identify the plan of merger or consolidation that is to be terminated or amended and shall state that the plan has been terminated or state the amendments made and in the former case, the Registrar shall issue a certificate of termination.

Effect of merger or consolidation

236. (1) As soon as a merger or consolidation becomes effective —

(a) in the case of a consolidation, the new memorandum of association and articles of association filed with the plan of consolidation shall immediately become the memorandum of association and articles of association of the consolidated company;

(b) the rights, the property of every description including choses in action, and the business, undertaking, goodwill, benefits, immunities and privileges of each of the constituent companies, shall immediately vest in the surviving or consolidated company; and

(c) subject to any specific arrangements entered into by the relevant parties, the surviving or consolidated company shall be liable for and subject, in the same manner as the constituent companies, to all mortgages, charges or security

interests, and all contracts, obligations, claims, debts, and liabilities of each of the constituent companies.

(2) Where a merger or consolidation occurs —

(a) an existing claim, cause or proceeding, whether civil (including arbitration) or criminal pending at the time of the merger or consolidation by or against a constituent company, shall not be abated or discontinued by the merger or consolidation but shall be continued by or against the surviving or consolidated company; and

(b) a conviction, judgment, ruling, order or claim, due or to become due, against a constituent company, shall not be released or impaired by the merger or consolidation, but shall apply to the surviving or consolidated company instead of to the constituent company.

(3) Upon a merger or consolidation becoming effective, the Registrar shall strike off the register —

(a) a constituent company that is not the surviving company in a merger; or

(b) a constituent company that participates in a consolidation, and section 158 shall apply.

(4) The cessation of a constituent company that participates in a consolidation or that is not the surviving company in a merger shall not be a winding up within Part V.

Merger or consolidation with overseas company

237. (1) Subject to section 239A, one or more companies incorporated under this Law may merge or consolidate with one or more overseas companies in accordance with subsections (2) to (18).

(2) Where the surviving or consolidated company is to be a company existing under this Law, in addition to compliance by each constituent company incorporated under this Law with section 233(3) to (10) the Registrar is required to be satisfied in respect of any constituent overseas company that —

(a) the merger or consolidation is permitted or not prohibited by the constitutional documents of the constituent overseas company and by the laws of the jurisdiction in which the constituent overseas company is existing, and that those laws and any requirements of those constitutional documents have been or will be complied with;

(b) no petition or other similar proceeding has been filed and remains outstanding, and no order has been made or resolution adopted to wind up or liquidate the constituent overseas company in the jurisdiction in which the constituent overseas company is existing;

(c) no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the constituent overseas company, its affairs or its property or any part thereof;

(d) no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the constituent overseas company are and continue to be suspended or restricted;

(e) the constituent overseas company is able to pay its debts as they fall due and the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the constituent overseas company;

(f) in respect of the transfer of any security interest granted by the constituent overseas company to the surviving or consolidated company —

(i) consent or approval to the transfer has been obtained, released or waived;

(ii) the transfer is permitted by and has been approved in accordance with the constitutional documents of the constituent overseas company; and

(iii) the laws of the jurisdiction of the constituent overseas company with respect to the transfer have been or will be complied with;

(g) the constituent overseas company will, upon the merger or consolidation becoming effective, cease to be incorporated, registered or exist under the laws of the relevant foreign jurisdiction; and

(h) there is no other reason why it would be against the public interest to permit the merger or consolidation.

(3) Subsection (2)(a) to (g) shall be satisfied by filing with the Registrar a declaration of a director of the surviving or consolidated company to the effect that, having made due enquiry, that person is of the opinion that the requirements of those paragraphs have been met; and —

(a) the declaration shall include a statement of the assets and liabilities of the constituent overseas company made up to the latest practicable date before making the declaration; and

(b) a director of the surviving or consolidated company shall be deemed to have made due enquiry for the purposes of subsection (2)(a) to (g) and this subsection if such director has obtained from a director of the constituent overseas company a declaration that the requirements of subsection 2(a) to (g) have been met with respect to such constituent overseas company.

(4) A person who, being a director, makes a false declaration under subsection (3) commits an offence and is liable on summary conviction to a fine of twenty thousand dollars or to imprisonment for five years, or both.

(5) In any proceedings for an offence under subsection (4), it shall be a defence for the person charged to prove that that person took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by that person or any person under that person's control.

(6) Where the surviving or consolidated company is to be established under this Law, upon payment of the applicable fees under this Law and upon the Registrar being satisfied that the requirements of subsection (2) in respect of the merger or consolidation have been complied with and that the name of the consolidated company complies with section 30, the Registrar shall register the plan of merger or consolidation including any new or amended memorandum and articles of association and issue a certificate of merger or consolidation under that person's hand and seal of office, and in the case of a consolidation section 27 shall apply in relation to the consolidated company.

(7) Where the surviving or consolidated company is to be an overseas company the Registrar is required to be satisfied, in addition to compliance with section 233(2) to (10) (excluding section 233(9)(g)), by each constituent company incorporated under this Law, that —

(a) the merger or consolidation is permitted or not prohibited by the constitutional documents of the constituent overseas company and by the laws of the jurisdiction in which the constituent overseas company is existing, and that those laws and any requirements of those constitutional documents have been or will be complied with;

(b) no petition or other similar proceeding has been filed and remains outstanding, and no order has been made or resolution adopted to wind up or liquidate the constituent overseas company in any jurisdiction;

(c) no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the surviving company, its affairs or its property or any part thereof;

(d) no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the surviving company are suspended or restricted; and

(e) there are no reasons why it would be against the public interest to allow the merger or consolidation.

(8) Subsection (7)(a) to (d) shall be satisfied by filing with the Registrar a declaration of a director of each constituent company incorporated under this Law to the effect that, having made due enquiry, that person is of the opinion that the requirements of those paragraphs have been met; and a director of each constituent company incorporated under this Law shall be deemed to have made due enquiry for the purposes of subsection (7)(a) to (d) and this subsection (8) if such director has obtained from a director of the constituent overseas company a declaration

that the requirements of subsection (7)(a) to (d) have been met with respect to such constituent overseas company.

(9) A person who, being a director, makes a false declaration under subsection (8) commits an offence and is liable on conviction to a fine of twenty thousand dollars or to imprisonment for five years, or both.

(10) Where the surviving or consolidated company is to be an overseas company, the surviving or consolidated overseas company shall file with the Registrar —

(a) an undertaking that it will promptly pay to the dissenting members of a constituent company incorporated under this Law the amount, if any, to which they are entitled under section 238; and

(b) such evidence of the merger or consolidation from the jurisdiction of the surviving or consolidated overseas company as the Registrar considers acceptable, such evidence to include the effective date of the merger or consolidation.

(11) The effect of a merger or consolidation where the surviving or consolidated company is to be an overseas company under this section is the same as in the case of a merger or consolidation under this Part if the surviving or consolidated company is incorporated or established under this Law, and all of the relevant provisions of this Part apply, except insofar as the laws of the jurisdiction of the surviving or consolidated overseas company otherwise provide.

(12) For the purposes of this section —

(a) any references in section 233 to the shares of any constituent company shall be deemed to include references to any other equity interests in such constituent company;

(b) any references in section 233 to memoranda and articles of association shall be deemed to include references to the equivalent organisational documents of an overseas company; and

(c) any reference in section 233 or this section to a director of a company shall be deemed to include a reference to any officer, member or other person (howsoever called) in whom the management of an overseas company is vested.

(13) Where the surviving or consolidated company is to be an overseas company, upon payment of the applicable fees under this Law and upon the Registrar being satisfied that the requirements of subsections (7) and (10) have been complied with the Registrar shall, where the overseas company is the surviving or consolidated company, strike off constituent companies incorporated pursuant to this Law from the register and issue a certificate of strike off by way of merger or consolidation with an overseas company; and section 158 shall apply to the constituent companies so struck off.

(14) A certificate of strike off by way of merger or consolidation with an overseas company issued by the Registrar shall be prima facie evidence of compliance with all requirements of this Law in respect of such merger or consolidation.

(15) Subject to section 234, a merger or consolidation shall be effective on the date the plan of merger or consolidation is registered by the Registrar.

(16) The issuance of a certificate of merger or consolidation relating to the merger or consolidation of an overseas company registered under Part IX shall be deemed to constitute notice to the Registrar pursuant to section 192.

(17) Any declaration of a director pursuant to this section may be given in the form of a declaration or an affidavit, as the director may determine.

(18) The Registrar shall submit a copy of the certificate of strike off by way of merger or consolidation issued under subsection (13) to the Authority.

Rights of dissenters

238. (1) A member of a constituent company incorporated under this Law shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation.

(2) A member who desires to exercise that person's entitlement under subsection (1) shall give to the constituent company, before the vote on the merger or consolidation, written objection to the action.

(3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for that person's shares if the merger or consolidation is authorised by the vote.

(4) Within twenty days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, the constituent company shall give written notice of the authorisation to each member who made a written objection.

(5) A member who elects to dissent shall, within twenty days immediately following the date on which the notice referred to in subsection (4) is given, give to the constituent company a written notice of that person's decision to dissent, stating —

(a) his name and address;

(b) the number and classes of shares in respect of which that person dissents; and

(c) a demand for payment of the fair value of that person's shares.

(6) A member who dissents shall do so in respect of all shares that that person holds in the constituent company.

(7) Upon the giving of a notice of dissent under subsection (5), the member to whom the notice relates shall cease to have any of the rights of a member except the right to be paid the fair value of that person's shares and the rights referred to in subsections (12) and (16).

(8) Within seven days immediately following the date of the expiration of the period specified in subsection (5), or within seven days immediately following the date on which the plan of merger or consolidation is filed, whichever is later, the constituent company, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase that person's shares at a specified price that the company determines to be their fair value; and if, within thirty days immediately following the date on which the offer is made, the company making the offer and the dissenting member agree upon the price to be paid for that person's shares, the company shall pay to the member the amount in money forthwith.

(9) If the company and a dissenting member fail, within the period specified in Subsection (8), to agree on the price to be paid for the shares owned by the member, within twenty days immediately following the date on which the period expires —

(a) the company shall (and any dissenting member may) file a petition with the Court for a determination of the fair value of the shares of all dissenting members; and

(b) the petition by the company shall be accompanied by a verified list containing the names and addresses of all members who have filed a notice under subsection (5) and with whom agreements as to the fair value of their shares have not been reached by the company.

(10) A copy of any petition filed under subsection (9)(a) shall be served on the other party; and where a dissenting member has so filed, the company shall within ten days after such service file the verified list referred to in subsection (9)(b).

(11) 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.

(12) Any member whose name appears on the list filed by the company under subsection (9)(b) or (10) and who the Court finds are involved may participate fully in all proceedings until the determination of fair value is reached.

(13) The order of the Court resulting from proceeding on the petition shall be enforceable in such manner as other orders of the Court are enforced, whether the company is incorporated under the laws of the Islands or not.

(14) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances; and upon application of a member, the Court may order all or a portion of the expenses incurred by any member in connection with the proceeding, including reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares which are the subject of the proceeding.

(15) Shares acquired by the company pursuant to this section shall be cancelled and, if they are shares of a surviving company, they shall be available for re-issue.

(16) The enforcement by a member of that person's entitlement under this section shall exclude the enforcement by the member of any right to which that person might otherwise be entitled by virtue of that person holding shares, except that this section shall not exclude the right of the member to institute proceedings to obtain relief on the ground that the merger or consolidation is void or unlawful.

Limitation on rights of dissenters

239. (1) No rights under section 238 shall be available in respect of the shares of any class for which an open market exists on a recognised stock exchange or recognised interdealer quotation system at the expiry date of the period allowed for written notice of an election to dissent under section 238(5), but this section shall not apply if the holders thereof are required by the terms of a plan of merger or consolidation pursuant to section 233 or 237 to accept for such shares anything except —

(a) shares of a surviving or consolidated company, or depository receipts in respect thereof;

(b) shares of any other company, or depository receipts in respect thereof, which shares or depository receipts at the effective date of the merger or consolidation, are either listed on a national securities exchange or designated as a national market system security on a recognised interdealer quotation system or held of record by more than two thousand holders;

(c) cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a) and (b); or

(d) any combination of the shares, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a), (b) and (c).

(2) [Repealed by section 11 of the Companies (Amendment) (No. 2) Law, 2018 [Law 46 of 2018]].

Prohibition on being a segregated portfolio company

239A. No constituent company incorporated under this Law or any consolidated company existing under this Law may be a segregated portfolio company.

Arrangements and Reconstructions

Power to compromise with creditors and members

86. (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may,

on the application of the company or of any creditor or member of the company, or where a company is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.

(2) If a majority in number representing seventy-five per cent in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company.

(3) An order made under subsection (2) shall have no effect until a copy of the order has been delivered to the Registrar for registration, and a copy of every such order shall be annexed to every copy of the memorandum of association of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with subsection (3), the company and every officer of the company who is in default shall be liable to a fine of two dollars for each copy in respect of which default is made.

(5) In this section the expression "company" means any company liable to be wound up under this Law and the expression "arrangement" includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods.

Provisions for facilitating reconstruction and amalgamation of companies

87. (1) Where an application is made to the Court under section 86 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are specified in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purpose of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as "a transferor company") is to be transferred to another company (in this section referred to as "the transferee company") the Court, may either by the order sanctioning the compromise or arrangement or by any subsequent order make provision for —

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution, without winding up, of any transferor company;

(e) the provisions to be made for any person who within such time and in such manner as the Court directs dissents from the compromise or arrangement; and

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and any such property shall, if the order so directs, be freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a copy thereof to be delivered to the Registrar for registration within seven days after the making of the order, and if default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

(4) In this section —

"property" includes property, rights and powers of every description;

"liabilities" includes duties; and

"transferee company" means any company or body corporate established in the Islands or in any other jurisdiction.

Power to acquire shares of dissentient shareholders

88. (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to another company, whether a company within the meaning of this Law or not (in this section referred to as "the transferee company") has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than ninety per cent in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire that person's shares, and where such notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the

date on which the notice was given, the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company.

(2) Where a notice has been given by the transferee company under this section and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sum or other consideration were respectively received.

(4) In this section —

"dissenting shareholder" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer that person's shares to the transferee company, in accordance with the scheme or contract.