

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

CAUSE NO. FSD 92 OF 2017 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF TRINA SOLAR LIMITED

**JUDGMENT ON THE DISSENTING SHAREHOLDERS' APPLICATION FOR A
FREEZING INJUNCTION AND FOR THE APPOINTMENT OF RECEIVERS**

Appearances:	Mr. Michael Todd Q.C. instructed by Rupert Bell and Patrick McConvey of Walkers on behalf of the Dissenting Shareholders
	Ms Catherine Newman Q.C. instructed by Nick Hoffman and Katie Pearson of Harneys Westwood & Riegels for the Company
Before:	The Hon. Mr. Justice Segal
Heard:	5 October 2017
Further evidence and submissions:	6-10 October 2017
Note of Decision:	12 October, 2017
Judgment:	6 November, 2017

HEADNOTE

Application for a freezing injunction – section 238 of the Companies Law (2016 Revision) – dissenting shareholders seeking a freezing injunction based on valuation opinion evidence said to establish a good arguable case that they will succeed at the trial of the section 238 petition and post-merger transactions alleged to involve real risk of dissipation – approach to determining good arguable case where there is a dispute as to the valuation evidence – meaning of “unjustified” conduct – exercise of the Court’s discretion



Introduction

1. On 5 October 2017, I heard an application for a freezing injunction, the appointment of receivers and other consequential relief made by Maso Capital Investments Limited and Blackwell Partners LLC – Series A (the *Dissenting Shareholders*). The application was opposed by Trina Solar Limited (the *Company*).
2. Following the hearing, in accordance with permission granted by me at the hearing, the Company filed further evidence and further correspondence was sent to the Court (the last of which was filed on 10 October 2017). On 12 October 2017, I circulated to the parties a Note of Decision setting out my ruling on the application. I dismissed the application for a freezing injunction (and the other relief sought by the Dissenting Shareholders). I explained that the Note of Decision only provided an outline of my reasoning (delivered so that the parties understood as soon as possible the main points in my decision) and did not cover all matters or contain a full analysis of the evidence and legal issues, which would be set out in my full judgment. This is my full judgment on the application.

Background

3. This is the latest in a series of interlocutory applications in, and satellite litigation relating to, the petition (the *Petition*) presented on 9 May 2017 by the Company under section 238 of the Companies Law (2016 Revision) (the *Companies Law*) seeking a determination by the Court of the fair value of the Dissenting Shareholders' shares. The position can be summarised as follows:
 - (a). there have been three previous applications. First, on 7 July 2017, the Company issued a summons (the *Set Aside Application*) seeking an order setting aside an earlier consent order, dated 21 June 2017 (the *Consent Order*), which Consent Order required the Company to pay interim payments to the Dissenting Shareholders by no later than 5 July 2017. Secondly, also on 7 July 2017, the Dissenting Shareholders presented a winding up petition (the *Winding Up Petition*) based on the Company's failure to make the interim payments. Thirdly, on 10 July 2017, the Company issued a summons seeking to strike out the Winding Up Petition (the *Strike Out Application*).



- (b). the Set Aside Application was made after the Company unsuccessfully sought from the Dissenting Shareholders an extension of time and variation of the Consent Order to defer the time at which interim payments had to be made (and after the date on which the interim payments were required to be made under the Consent Order). Having failed to obtain the requested extension, the Company had then asserted that it regarded the Consent Order as invalid.
- (c). following a demand for payment on 6 July 2017, the Dissenting Shareholders presented the Winding Up Petition on 7 July 2017. The Company's response was to issue the Strike Out Application on 10 July 2017.
- (d). the Set Aside Application and the Strike Out Application were listed to be heard on 17 and 18 July 2017. By agreement, and in my view correctly, the Set Aside Application was heard first on 17 July 2017 and I handed down my decision on the morning of 18 July 2017 dismissing the Set Aside Application and refusing to grant the relief sought. I held that the Consent Order had been and remained effective and in force (the order dismissing the Set Aside Application and confirming the validity of the Consent Order was dated 19 July 2017). The Company is currently seeking leave to appeal the 19 July order.
- (e). following the handing down of my decision on the Set Aside Application, the Company indicated that it intended to make the interim payments. The Strike Out Application was then heard on 18 July 2017. I reserved judgment. Subsequently the Company and the Dissenting Shareholders agreed to amend the Consent Order to provide that the interim payments must be made by 5pm on 28 July and I indicated that it seemed to me right to delay handing down my judgment on the Strike Out Application until after 28 July 2017 since it was important to know whether the debt on which the Winding Up Petition had been based had in fact been paid. I delivered my judgment on 4 August 2017 (having circulated the draft judgment on 31 July 2017) in which I ordered that the Winding Up Petition be struck out and that the Company pay the Dissenting Shareholders' costs on the standard basis (since I considered that the Company's conduct had made the presentation of the Winding Up Petition justifiable and reasonable). The Company is also currently seeking leave to appeal my costs order.



The Freezing Injunction Summons

4. On 19 September 2017, the Dissenting Shareholders issued a summons (the *Freezing Injunction Summons*) seeking a worldwide freezing injunction in respect of the assets of the Company up to a value of US\$184,829,568, the appointment of receivers over assets of the Company and a disclosure order. The limit to be included in the freezing injunction was the difference between what the Dissenting Shareholders claimed to be the likely fair value of the Dissenting Shareholders' shares in the Company (US\$204,990,160) and the interim payments (US\$20,150,592) paid by the Company to the Dissenting Shareholders.
5. The Freezing Injunction Summons when issued was supported by the Second Affidavit of Mr Manoj Jain (*Mr Jain*) and the First Affirmation of Ms Rose Kehoe (*Ms Kehoe*). In accordance with directions made by me (in the absence of any agreement between the parties) the Company filed evidence in opposition in the form of a Second Affidavit of Mr Scott Davidson (*Mr Davidson*), a First Affirmation of Mr Lou Weiliang (*Mr Weiliang*) and the Second Affidavit of Mr Shuion Chan (*Mr Chan*) and the Dissenting Shareholders filed evidence in reply in the form of the Second Affirmation of Ms Kehoe and a Third Affidavit of Mr Jain sworn in response to Mr Chan's Second Affidavit. At the hearing of the Freezing Injunction Summons I gave the Company permission to provide further written details and a confirmation of or to adduce further evidence as to the terms governing the restructuring transactions and the conduct said to amount to dissipation about which the Dissenting Shareholders complained. Pursuant to this permission a further (the third) affidavit was filed by Mr Chan (*Mr Chan's Third Affidavit*).
6. Following the hearing, and without permission to do so, the Dissenting Shareholders filed a further affidavit, being the First Affidavit of Michaela Chi-Yan Lam of Walkers (Walkers are the Dissenting Shareholders' attorneys). On 6 October 2017, Walkers informed the Court by email that, according to the Accounting and Corporate Regulatory Authority in Singapore, the Company had transferred its 100% shareholding in Trina Solar (Singapore) Pte. Ltd. (*Trina Singapore*) to Trina Solar Energy Development Pte. Ltd. (*Trina Energy Singapore*) on 5 October 2017, the day of the hearing. Ms Lam's affidavit exhibited the results of a search of the register of members of Trina Singapore maintained by the Accounting and Corporate Regulatory Authority in Singapore showing the transfer. Walkers argued that this was material new information which they needed and were entitled to put in evidence after the



hearing and which was inconsistent with statements made in the skeleton argument of the Company's legal advisers (Ms Newman Q.C. and Harneys Westwood & Riegels (*Harneys*)) prepared for the hearing and further demonstrated misconduct by the Company. Paragraph 23 of the Company's skeleton argument had stated that:

"There is no evidence whatsoever to suggest that Trina, now controlled by Fortune Solar Limited, another Cayman company, intends to make any further transfers of its remaining subsidiaries for any purpose, still less dissipatory transfers. There is no evidence or fact based allegation that it intends to do anything improper with its remaining assets: it does not."

In response the Company's attorneys, Harneys, objected to the filing of Ms Lam's affidavit (in the absence of an application for leave and the granting of permission to serve further evidence after the hearing) and asked the Court to ignore it. They also said that while paragraph 23 appeared to be incorrect the error was inadvertent (and Ms Newman Q.C. helpfully wrote to the Court to confirm the position) and Walkers' complaint was wholly without foundation since it had been clear to the Dissenting Shareholders before and at the hearing that further steps in the restructuring process were in the course of being and would continue to be completed. I did read Ms Lam's affidavit but took the view that it did not deal with any material new evidence and therefore even if admissible would not affect my decision. The transfer of the Company's shares in Trina Singapore was contemplated by the evidence filed for the purpose of the hearing dealing with the range of transactions that would need to be made as part of the post-merger restructuring and I regard Ms Newman Q.C.'s explanation as demonstrating that the error in her skeleton was simply the result of an oversight.

7. I should add, for completeness, that before the hearing of the Freezing Injunction Summons the Company sought permission to cross-examine two of the Dissenting Shareholders' witnesses. By letter dated (Thursday) 28 September 2017 from Harneys, the Company applied for an order that Mr Jain and the Dissenting Shareholders' valuation witness, Ms Kehoe be required to attend for cross-examination at the hearing of the Freezing Injunction Summons. The Company requested that the application for cross-examination be dealt with on the papers without the need for a hearing and the Dissenting Shareholders agreed. Following the exchange of written submissions (the last being filed on 2 October 2017) I handed down my judgment on 3 October 2017 dismissing the application.



The position of the parties

8. The respective positions of the Dissenting Shareholders and the Company can be summarised as follows.
9. The Dissenting Shareholders say that:
 - (a). the valuation opinion evidence of Ms Kehoe is sufficient to establish that they have a good arguable case that the fair value of their shares in the Company on the valuation date is significantly higher than the merger consideration and is within the range of US\$1.19 to US\$2.36 per share (equivalent to US\$59.55 to US\$117.77 per American depository shares (*ADS*)). Accordingly, they have a good arguable case that they will secure a judgment of at least between US\$99,788,640 (83,856,000 shares multiplied by US\$1.19) and US\$204,980,160 (83,856,000 shares multiplied by US\$2.36) subject to deducting the interim payments.
 - (b). there is sufficient evidence to enable the Court to conclude that there is a real risk of dissipation because the Company has entered into post-merger transactions which have the effect of transferring away all its valuable assets, and has made or intends to make distributions of the proceeds paid or payable to it under such transfers, so that the Company will be left with insufficient assets from which to satisfy such a judgment. The Dissenting Shareholders argue that the transfers were to related parties, were inconsistent with the Company's public statements at the time of the merger such that there is evidence or a suggestion of concealment and were entered into at a time when the Company was attempting to avoid paying sums properly payable to the Dissenting Shareholders (relying on the Set Aside Application and the Company's conduct in relation to the payment of interim payments under the Consent Order). In addition, the Company has failed to provide a sufficient or satisfactory explanation of the terms on which the transfers were made to rebut the inference which the Court can and should draw that the transfers were not for fair or market value and that the Company has failed to retain, or will make further distributions such that the Company will not retain, sums sufficient to satisfy such a judgment (the Dissenting Shareholders assert that the directors of the Company appear to repeatedly confuse the interests and



position of the Company with the interests and position of the group as a whole).

- (c). in the circumstances, the balance of convenience clearly favours the grant of an injunction. There is a real risk that by the time the Petition is heard and a fair value judgment is delivered the Company will only retain an amount equal to its (unjustifiably low) estimate of its potential further liability to the Dissenting Shareholders and will effectively be judgment proof as to the balance. Indeed, even as regards the funds the Company retains, they will be held outside Cayman and are likely to be in the PRC (as are the transferees to whom the Company's assets have been transferred) so that a judgment will be difficult to enforce. The Company will have been able to structure its affairs so as to insulate itself from a judgment and put pressure on the Dissenting Shareholders to settle for less than the full amount they are awarded by this Court. The Dissenting Shareholders also note that a freezing injunction should not interfere with the completion of the Company's restructuring in so far as that involves further asset transfers by the Company in the ordinary course of business and for full value or by other group companies and the form of the injunction can be drafted to make this clear (if the Company had any doubts as to whether they were permitted to effect a particular transfer after the making of the freezing order it could always apply to Court).

- 10. The Company vigorously opposes the Freezing Injunction Summons and denies both that the Dissenting Shareholders have a good arguable case that the fair value of their shares is higher than the merger consideration (let alone that the fair value of the shares is in the sum which they are claiming) and that the post-merger transactions and group restructuring can support the assertion of dissipation. The Company says that:

- (a). it regards Ms Kehoe's valuation opinion as speculative (Ms Newman Q.C. in her skeleton argument uses words such as "flimsy", "unsupportable", "preposterous", "manifestly absurd" and "untethered to reality" to describe the Dissenting Shareholders' valuation evidence and claims). The Company considers that a claim for between five and ten times the merger price is inherently unlikely (having regard to the merger process and the fact that a number of major independent financial institutions accepted the merger price) and way beyond the sum usually awarded even in Delaware in appraisal



actions. Furthermore, the fact that Ms Kehoe is only able to propose an enormously wide range of values, with over US\$5 billion between the top and bottom of her valuation range, demonstrates that her valuation is unreliable and fails to establish that the Dissenting Shareholders are entitled to a certain or approximate sum as required in this type of case. In any event the Company relies on the valuation opinion evidence of Mr Davidson to show both that the merger price represents the fair value of the shares and that Ms Kehoe's valuation is flawed, inflated and unreliable. The Dissenting Shareholders cannot satisfy the burden of proof on the good arguable case test.

- (b). as regards the real risk of dissipation requirement the Company notes that the Dissenting Shareholders must show that the post-merger transactions are not justified. The Company says that they were justified. The post-merger transactions are all part of the steps required to enable the group of which the Company now forms part to achieve an advantageous PRC listing. The possibility of such a listing and the restructuring required to allow it to happen were signalled before the merger and should have been known and no surprise to the Dissenting Shareholders and anyone else. It is a well-known and frequently used post-merger arrangement where PRC-based companies complete a take private transaction. The Company had a legitimate business interest in proceeding with the PRC-listing. Furthermore, the Company had no obligation to provide the Dissenting Shareholders with details of the terms of and consideration payable under the transactions. The evidence relied on by the Dissenting Shareholders did not establish a prima facie case of a real risk of dissipation (did not establish that unjustified and dissipatory transactions were being or would be entered into) and so the Dissenting Shareholders and the Court could not rely on any failure by the Company to provide the information sought by the Dissenting Shareholders as justifying an inference that the Company has no good or satisfactory justification for the transfers.
- (c). damages would be an adequate remedy in the present case and the balance of convenience does not favour the grant of an injunction. There is no evidence that the Company intends or will do anything improper with its assets; the Dissenting Shareholders have unjustifiably delayed issuing the Freezing Injunction Summons (and misrepresented the need for urgency to the Court



when seeking an urgent listing of the Freezing Injunction Summons) and the grant of a freezing injunction would be likely to cause serious disruption and damage to the proper business operations of the Company by potentially interfering with, delaying or creating uncertainties concerning the PRC-listing process and the evidence now demonstrates that the Company has received substantial sums considerably in excess of the highest claim asserted by the Dissenting Shareholders and will retain an amount equal to a proper estimate of the further liability which the Company may have in the event that its defence of the Petition is unsuccessful. The Company and the group of which it now forms part is a reputable and substantial business and there is no basis for suggesting that it would structure its affairs with a view to avoiding, or avoid, any liability to which it is ultimately held to be subject.

The valuation opinion evidence

11. There are three different amounts which are put forward as representing the fair value of the Dissenting Shareholders' shares in the Company. First, there is the merger price of US\$11.60 per ADS. Second, there is Ms Kehoe's valuation of between US\$59.55 to US\$117.77 per ADS. Third, there is Mr Davidson's valuation of US\$8.97 per ADS.
12. The merger price is supported by a fairness opinion prepared by Citigroup Global Markets Inc. (*Citigroup*) for the purpose of advising the Special Committee of the Company's board established to review and evaluate the merger proposal. In connection with this opinion and its advice to the Special Committee Citigroup prepared a presentation to the Special Committee dated 1 August 2016 (the *Citigroup Presentation*). The Citigroup Presentation included a valuation analysis based on projections and forecasts prepared by the Company's management. It was these projections that Citigroup used in its discounted cash flow (*DCF*) analysis. The financial projections include projected cash flow amounts by year for the period 2016 to 2022 (the *Discrete Period* of the DCF analysis) and terminal year cash flows for 2023 (and beyond). The Citigroup Presentation, its fairness opinion and management's projections and forecasts were included in the Company's proxy statement dated 4 November 2016 (the *Proxy Statement*) filed with the U.S. Securities and Exchange Commission (*SEC*). Fairness opinions of this type are based on a series of assumptions which limit the amount of due diligence and testing done by the party giving the opinion. Thus Citigroup stated, as is usual, that it assumed and



relied without independent verification on the accuracy and completeness of all financial and other publicly available information and upon assurances from management that the information was complete and that they are not aware of any relevant information which had been omitted. Citigroup also assumed that management's forecasts had been reasonably prepared and stated that it expressed no view as to any projected financial data or the assumptions on which they were based.

13. Ms Kehoe determined her range of values of the Company's shares based only on public information. Ms Kehoe prepared a Valuation Opinion Report dated 18 September 2017 (*Ms Kehoe's Report*) in which she set out her valuation and her supporting analysis (which was filed as an exhibit to her First Affirmation). She subsequently supplemented this with her Second Affirmation in which she responded to the points and challenges made by Mr Davidson who had prepared his own report (*Mr Davidson's Report*) in response to Ms Kehoe's Report (Mr Davidson's Report was exhibited to his Second Affidavit). In Appendix B to Ms Kehoe's Report Ms Kehoe listed her sources of information. These were primarily the Proxy Statement (and attachments) filed with the SEC and certain other information obtained as a result of internet based research.
14. Ms Kehoe says that for the purpose of reaching her valuation opinion she has reviewed and generally accepted the management projections provided to Citigroup for the purpose of preparing its fairness opinion. However she has made a number of adjustments and undertaken her own valuation based on the DCF methodology (although she does also consider but ultimately does not rely on an alternative methodology, being the capitalisation of earnings approach). The DCF technique involves the value of the company being estimated based on its expected future net cash flows, converted to a capital sum as at the valuation date through the application of a discount rate and to which various valuation date balance sheet assets and liabilities are added and subtracted to arrive at total equity value. Ms Kehoe establishes a potential range of values of the Company's shares that she considers the designated experts appointed in the section 238 proceedings may reach based on a range of estimates of intrinsic value as determined by her DCF analysis.
15. Ms Kehoe noted and accepted that her valuation analysis and opinions were preliminary in light of the limited and incomplete information currently available and the speed with which she had been required to prepare her valuation opinion. So, for example, she included the following qualifications in her report:



- “3.7 *The time taken to prepare this report has been short in the interests of aiding the Dissenting Shareholders to approach the Court in a timely manner. Extensive additional analysis, and considerably more information and explanations, would be required to narrow the range of likely outcomes.....*
- 4.3 *This report is intended to outline, in terms of a range of potential values, what the 'fair value' of Trina Solar is, or may be determined to be; my analysis being of a high level nature, per the scope of this engagement. There has been insufficient time and insufficient information to allow for a determination to be made at a more detailed level, and I have relied on information available in the public domain for this purpose....*
- 7.3. *Whilst I have access to certain publicly available information, including but not limited to: (i) the audited financial statements of Trina Solar prior to the Valuation Date; (ii) the SEC filing of the Proxy Statement of the Company dated 4 November 2016 (the 'Proxy Statement'); and (iii) The Citi Presentation, to be clear, this is not sufficient for the purposes of conducting an analysis of fair value in which possible other factors, that are unknown at this time, may need to be taken into consideration....*
- 8.4. *The fairness opinion of the Citi Presentation is underpinned by the Management Projections that were provided by the Company for use specifically for the purpose of arriving at a fair value opinion regarding the Merger Offer Price. The Management Projections can be found in the Citi Presentation, and are replicated on page 43 of the Proxy Statement. In both instances, the information is very high level with only certain key line items being provided (namely Total Revenue, Gross Profit, EBIT, EBITDA, Net Income Attributed to Company and Manufacturing Capex)...*
- 8.5. *I would need access to the spreadsheet model from which these line items have been extracted to allow for a full assessment of how the summary output was derived. Without this actual model, I am unable to make this assessment or express an opinion as to the reasonableness of these forecast line items other than to examine trends relative to historical performance, consider revenue growth relative to overall market expectations and the trend in individual line performance relative to top-line revenue, all in conjunction with Company press releases.”*

16. Ms Kehoe’s valuation and opinion were therefore not based on the comprehensive disclosure of non-public financial information that is to be made available to the experts appointed in the section 238 proceedings. The practice in such proceedings has been for the company concerned, pursuant to directions given by the Court, to provide to the court appointed experts detailed non-public financial and other information required for the preparation of and relevant to an in depth valuation of the company. The experts are directed to prepare reports setting out their expert opinions as to the fair value of the company as at the valuation date and the trial of the petition will then involve extensive cross-examination of these experts and a review of their reports and opinions (and any factual evidence adduced by the parties). The section 238 proceedings in the present case remain at a relatively early stage with the



directions order having recently been settled after a contested directions hearing in July 2017 and subsequent discussions between the parties (albeit that certain orders I made at the directions hearing are currently subject to appeal). The directions in this case include directions for the disclosure of financial information; witnesses of fact; and the appointment and preparation of expert reports by industry and valuation experts. But the Company has yet to disclose and make available any non-public information.

17. Mr Davidson's valuation and opinion were also only based primarily on publicly available information and were also produced without the benefit of the detailed further information needed to ensure that they are reliable and complete. Mr Davidson's Report contained a section headed "*Restrictions and Limitations*" in which he listed three types of valuation report (as defined by the Canadian Institute of Chartered Business Valuators): Comprehensive, Estimate and Calculation. The reports are distinguished not only by the scope of review and amount of disclosure provided to the valuer but also by the level of assurance which the report provides to the recipient. The Comprehensive provides the highest and the Calculation report provides the lowest. Mr Davidson said that his report in this case was a Calculation report and that his report provided a similar level of assurance to that of Ms Kehoe's Report since both were subject to a limited scope of review. Mr Davidson is however satisfied that he has nonetheless been able to arrive at a robust conclusion. It should also be noted, though, that Mr Davidson had meetings with the Company's management and his valuation and report take account of the views of and information provided by management. Ms Kehoe, obviously, was not given similar access.
18. Mr Davidson disputed and disagreed fundamentally with Ms Kehoe's valuation and her analysis. It seems to me that the simplest and easiest way of focussing on the core issues in dispute is to consider the principal points of disagreement identified by Mr Davidson, Ms Kehoe's justification for the approach she has adopted and Mr Davidson's criticisms. I shall discuss these points in outline rather than in depth since in an interlocutory application of this kind it is not possible, nor, as I shall shortly explain, is it appropriate, for the Court to seek to resolve the complex disputes of fact and opinion.
19. There are three main areas of disagreement and five particular issues on which Ms Kehoe and Mr Davidson disagree. Both Ms Kehoe and Mr Davidson use the DCF



methodology and use as the valuation date 16 December 2016 being the date of the EGM (whereas Citigroup used 30 September 2016).

20. The three main areas of disagreement are as follows:

- (a). the calculation of the terminal cash flows used in the DCF valuation model;
- (b). the discount rate to be applied in the DCF valuation; and
- (c). the treatment of cash held on the Company's balance sheet for the purpose of the valuation.

21. As regards the calculation of the terminal cash flows:

- (a). Ms Kehoe considers that it is necessary and justifiable to significantly increase the terminal cash flows to be used in her model. She identifies a number of elements of management's forecasts which she considers to be unjustifiable and unreasonable. She notes that the management projections might in a number of respects be unduly pessimistic and thereby undervalue the Company.
- (b). she considers that management's estimates for the terminal level of manufacturing capex are too high. She adjusts these and instead assumes that such manufacturing capex will match depreciation and amortisation. Ms Kehoe did not use management's projected capital reinvestment requirements as projected at the end of 2022 and instead adjusted and reduced the projected requirements to the amount of the then accounting depreciation expense amount. Mr Davidson says that this adjustment involves a US\$162 million reduction in the projected capital expenditures and in isolation adds US\$3.080 to the valuation of the Company and an additional increment of 276% to the merger price.
- (c). Ms Kehoe also considers that management's forecast of changes to net working capital for the purposes of the terminal cash flow are unreasonable and that the amount of available working capital is too low. Net working capital reflects the balance sheet investment in, among other things, accounts receivable and inventory, net of accounts payable. She makes an adjustment



and projects a US\$7 million per annum release of working capital in perpetuity beyond 2022 in the terminal cash flows. Ms Kehoe argues that the reduction of US\$37.7 million made by management is due apparently to a lower accrued expense in 2022 and she argues that it is not logical to carry forward such an extraordinary item into perpetuity. Instead she relies on the average of the anticipated changes in the preceding three years from 2019 to 2021. Mr Davidson says that in isolation this adjustment adds US\$480 million to the valuation of the Company and an additional 43% increment over the merger price.

22. As regards the calculation of the discount rate:

- (a). as Ms Kehoe explains, for the purpose of the DCF valuation future cash flows have to be discounted to present value as at the valuation date by applying a discount rate. The discount rate is determined by a number of key inputs. It is reflective of the cost of capital of the company concerned. The cost of capital is in turn reflective of the required returns to equity and debt providers of the company, and so is driven in part by the targeted future capital structure of the company. The anticipated cost of equity and (after tax) cost of debt is weighted according to the targeted capital structure to arrive at the weighted average cost of capital (*WACC*).
- (b). Citigroup's fairness opinion was calculated based on a WACC of 11.60%. Ms Kehoe calculates and uses an *average* WACC of 7.41%. She explains that the difference in the WACC estimates is a function of the *cost of debt* and the additional discrete *cost of equity* components (a political risk factor and small stock risk premium). The average WACC of 7.41% on which Ms Kehoe's valuation opinion is based is an average of a range of potential WACC's (from 6.71% to 8.27%) calculated based on various combinations of relevant variables, and excluding very low and very high possible variations of WACC. The extent (6.71% to 8.27%) and average (7.41%) of the range of WACC utilised is reflected as drivers of potential value in the various calculations undertaken by Ms Kehoe although she narrowed her range estimates to reflect a notional underlying WACC of a range from 7.06% to 7.84%.



- (c). as regards the cost of debt, Ms Kehoe factored in the future average cost of debt for the Company in the range of 4.0% to 6.0% per annum for the purpose of calculating the WACC. Citigroup's calculations factored in a range of approximately 50% to 70% weighting of debt in proportion to total capital (Net Debt/Total Capital) in calculating the WACC. Ms Kehoe adopts a range of 55% to 70% Net Debt/Total Capital and her estimate of average WACC is calculated using 70%, the high end of her range. Ms Kehoe has assumed a slightly higher level of leverage (55% as compared to 50%) at the lower end of the band. She justifies this difference by reference to the historical levels of the Company's Net Debt/Total Capital of 59%; 56%; 53% and 62% in 2012; 2013; 2014 and 2015. Ms Kehoe justifies her selection of the range of 4.0% to 6.0% by reference to various reference points. She notes, for example, that based on the narrative of the Company's 2015 Annual Report, the average interest rate on short term borrowings was notionally 4.41% and 4.25% per annum in 2014 and 2015 respectively, and longer term borrowings included a range of credit facilities notionally attracting interest in the approximate range of 4% to 11% per annum with an estimated weighted average (based on total facility amount) of approximately 4.59% per annum. She also noted that the Company had been able to borrow at 6% per annum in connection with the merger and did not see any reasons why the Company would be unable to roll over debt with lenders on similar terms (within the historical range of 3%-5%).
- (d). Ms Kehoe calculated the cost of equity using the capital asset pricing model (*CAPM*), which relies on assumptions in respect of the risk free interest rate, the equity risk premium, beta, size premium country and political risk and possible other factors:
- (i). as regards the risk free rate Ms Kehoe uses the ten year U.S. Government bond yield of 2.6% as at the valuation date and an equity risk premium of 5.69% as a point estimate based on range of 5.50% to 6.50% using information published on line by a well-regarded and frequently used specialist Aswath Damodaran (updated on 5 January 2017). Therefore Ms Kehoe adopts a base cost of equity (comprising the risk-free rate and the equity risk premium) of 8.29%.
- (ii). Ms Kehoe does not consider that a size premium should be applied.



(iii). Ms Kehoe also did not apply or use a country risk premium since she assumed that the Company had assessed the effects of political risk in the management projections.

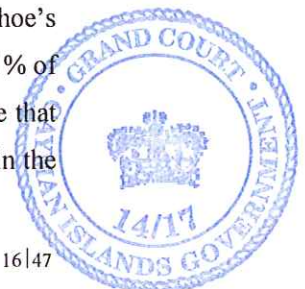
(iv). Ms Kehoe uses a stable terminal growth rate of 4.34% based on her assumption that the Company finds future markets in China (50%), the U.S. (20%), Japan (15%) and India (15%). Mr Davidson points out that this item represents an addition of US\$2.040 billion to the valuation of the Company and an additional 183% increment on the merger price.

23. As regards the treatment of cash on the Company's balance sheet:

(a). for the purposes of preparing the valuation of the Company, assets held by the Company at the valuation date that are not required for the Company's continuing operations are treated as "redundant" and their value is added to the valuation.

(b). the Company had substantial amounts of cash on its balance sheet at the valuation date. Ms Kehoe considers that it is reasonable to treat more cash as redundant and has treated US\$621 million as redundant, comprising US\$169 million of restricted cash and US\$452 million of unrestricted cash. According to Mr Davidson this adds US\$490 million to her valuation (which adds a further 44% increment to the merger price).

24. Mr Davidson considers that each of these adjustments and approaches is unjustifiable and unreasonable. I shall outline his objections and challenges below. But first I need to explain Mr Davidson's general response to Ms Kehoe's valuation. He considers that Ms Kehoe has materially overstated the value of the Company at the valuation date. He considers Ms Kehoe's valuation to be dependent on a number of speculative and unreasonable assumptions and approaches and does not consider it to be credible or likely that the fair value of the Company's shares is so much higher than the merger price (five to ten times higher, as I have already explained, on Ms Kehoe's analysis). He considers that US\$8.3 billion of value in Ms Kehoe's valuation (91% of the enterprise value calculated by Ms Kehoe) is derived from the terminal value that she uses and that such heavy reliance on one element (and indeed a component in the



DCF model that is difficult to quantify) demonstrates that Ms Kehoe's valuation should be treated as speculative and unreliable (Ms Kehoe uses as the projected cash flows for 2023 and beyond a figure that is three times the Company's own projected cash flows for 2022). He also tested the reliability and reasonableness of Ms Kehoe's valuation by asking whether a prudent purchaser would be prepared to buy the Company based on Ms Kehoe's valuation. He considered that they would not since a buyer would need to pay US\$9.1 billion in 2016 and accept an extremely protracted pay-back period (the buyer would only realise a recovery on their purchase price many years after 2022 without a return on the funds invested). Mr Chan, in his Second Affidavit in support of the Company's opposition to the Freezing Injunction Summons, also argues that Ms Kehoe's valuation is surprising and unlikely in the circumstances to be reliable. He says that:

"During the period 1 October to 28 November 2016 the ADS traded between \$9.06 and \$10.46, which means the [Dissenting Shareholders] acquired their ADS for a total acquisition cost of between US\$15,738,307 and US\$18,170,275. It therefore seems surprising that the [Dissenting Shareholders] are alleging that in a period of, at most, 2.5 months, their shares became worth up to US\$204,980,160 —surely an extraordinary return on investment over such a short period and one that other institutional investors would also have identified (particularly as [Ms Kehoe's Report] is based only on publicly available information) if it were true."

Mr Chan had also noted that the group of shareholders and investors who had become the Company's new shareholders following the merger (the **Buyer Group**) did not have the voting power to force the merger through at whatever price suited the Buyer Group; a majority of unrelated investors would have to be happy with the merger price; and that the merger price represented a premium of approximately 21.5% above the closing price of the Company's ADS on 11 December 2015, the last trading day prior to the Company announcing it had received a going-private proposal.

25. As regards the main and material adjustments made by, and the main elements in the valuation of, Ms Kehoe, Mr Davidson says as follows:

(a). he considers that Ms Kehoe's valuation involves improperly increasing the terminal cash flows, understating the discount rate and treating cash on the Company's balance sheet as redundant when it is not.



- (b). as regards Ms Kehoe's reduction of the projections for manufacturing capex, he considers that she ignores the capital reinvestment requirements that are needed by and reasonable for a business of the size that the Company's business is projected to be in 2022. He agrees that in principle over the long term accounting depreciation and the amount of capex required to sustain the business should be approximately equal but considers that the valuation should be based not on a modelling technique but business based projections of the required manufacturing capex. He considers that management's projections (of US\$400 million per annum) are reasonable and based on the size, likely performance and needs of the Company's business. So, for example, actual levels of manufacturing capex (US\$250 million in 2016) are higher than Ms Kehoe's figure in the projected terminal cash flows (US\$237 million) at a time when the Company's business was much smaller than is projected for the terminal period. The level of sustaining capex used by Ms Kehoe in the terminal cash flow cannot support the then projected business of the Company.
- (c). as regards Ms Kehoe's increase to net working capital, Mr Davidson argues that Ms Kehoe's reason for using the average change in net working capital projected for the period 2019 to 2021 is inadequate. He considers it necessary and reasonable to estimate working capital investment by considering the projected development and rate of expansion of the Company's business – as a business grows, more and not less working capital investment is required (typically because the Company will be carrying and have higher levels of inventory and accounts receivable). Accordingly, in his view it is reasonable to incorporate a modest investment (cash outflow) in net working capital annually in the terminal cash flows.
- (d). as regards the discount rate, Mr Davidson uses a (higher) rate of 10% (as compared with Ms Kehoe's rate of 7.41%):
- (i). Mr Davidson uses a higher pre-tax cost of debt (5.5% as compared with the mid-point percentage of 5% used by Ms Kehoe); a lower tax rate (15% compared with 17.5%) and a lower debt weighting percentage (60% to 70%). He uses an identical Beta to Ms Kehoe (2.19%).



- (ii). he justifies his use of 60% as the ratio of net debt/total capital because it is the mid-point of the numbers set out in the Citigroup Presentation based on the Company's historical capital structure and considered to be prudent by the Company's management, as confirmed in their discussions with Mr Davidson. His use of 5.5% for the pre-tax cost of debt is also based on such discussions. The tax rate is justified as being consistent with the Citigroup Presentation and as being reflective of the corporate tax rate payable on the Company's upstream business which constitutes the vast majority of the Company's business and value.
- (iii). Mr Davidson considers that Ms Kehoe's cost of equity is too low. He adopts a risk-free rate of 3.50%. He considers it to be reasonable to use a normalised risk-free rate that seeks properly to reflect the sustainable long term average rate and avoids the distortion in spot rates that he considers arises in the post-financial crisis period from the combination of a flight to quality and central bank intervention. Mr Davidson bases his estimate on Duff & Phelps publicly disseminated guidance.
- (iv). Mr Davidson considers that it is necessary and reasonable to use a size premium and that 1.62% is appropriate. He acknowledges that Ms Kehoe has the support of the academic work of some commentators and that there is a recognised controversy as to whether the use of a size premium is justified. However he cites other academic commentary (particularly from Mr Grabowski, who he says is widely considered to be a leading expert on discount rates) and Delaware jurisprudence (including a recent decision of Vice Chancellor Glasscock) which support the use of size premiums and a document from the International Valuation Standards Council that refers to size premiums being commonly applied.
- (v). Mr Davidson concludes that it is also necessary and reasonable to use a country risk premium in view of the Company's global operations and significant manufacturing activity in the PRC (and since the Company's management confirmed to him that they had not modelled the effects of political risk in their projections). He



selects 1% as appropriate (taking into account his estimated country risk premium for the PRC of 4%).

(e). as regards the terminal growth rate, Mr Davidson uses approximately 3.5% (as compared with Ms Kehoe's 4.34%). He considers that Ms Kehoe's assumptions (of sales as to 50% in China; 20% in the U.S., 15% in Japan and 15% in India) are incorrect and fail to reflect the Company's recent geographical spread and penetration (for the year 2015, Europe and the U.K. 10.9%, China 28.5%, U.S. 34.7%, Japan 11.4%, India 8% and others 6.5%). He adjusts the terminal growth rate to reflect this spread (to adjust it downwards to take account of the lower projected growth in Europe and the UK) and based on his own research as to each such country's GDP growth pattern.

(f). as regards redundant cash, Mr Davidson says that the Company's restricted cash of US\$169 million cannot be treated as redundant and not required for ongoing operations. It is set aside as collateral to secure sums owed under or to satisfy debt covenants contained in the Company's financing documents. The funds are not available for use. In relation to the balance (US\$452 million) the Company's management has confirmed that approximately US\$321 million is required for business operations (which Mr Davidson considers to be reasonable in the circumstances). This means that the correct redundant cash balance is US\$131 million which requires a reduction of US\$490 million from Ms Kehoe's valuation.

26. Ms Kehoe, in her Second Affirmation, confirms that Mr Davidson's Report had not caused her to revise her valuation. She addresses each of the points of disagreement identified by Mr Davidson and the main points she makes can be summarised as follows:

(a). as regards manufacturing capex, she considers that her approach follows a commonly applied normalising assumption in respect of capital expenditure during the terminal period. She quotes from a corporate finance textbook which confirms that Ms Kehoe's approach is often used "*to rectify errors that can arise because of using the final-year capital expenditures that come from the explicit period in a model, analysts sometimes assume that a level of capital expenditures equal to depreciation will sustain EBITDA growth.*" She



also notes that Citigroup adopted the same approach. She criticises Mr Davidson for an approach which involves matching manufacturing capex with the level of projected manufacturing capex for 2022 without explaining or justifying how that is appropriate in light of (and not inconsistent with) his assumed stable growth rate of 3.5%. Ms Kehoe considers that Mr Davidson's estimate is too high for and grossly mismatched with that growth assumption whereas her estimate of US\$237 million in the terminal period is consistent with her own and she considers the appropriate level of growth expectations.

- (b). as regards the change in net working capital in the terminal cash flow, Ms Kehoe refers to what she regards as a clear trend in the cash flows during the Discrete Period (from 2017 to 2021 but excluding 2022) of a net annual release in net working capital which she considers supports the conclusion that there are likely to be Company specific factors which will result in the continuation of the release. She says that Mr Davidson has made an arbitrary adjustment to reflect a cash outflow of US\$15 million in perpetuity (that is an annual net working capital investment of that amount in the terminal period) without providing any proper basis to justify the use of this amount.
- (c). as regards the discount rate, Ms Kehoe generally rebuts Mr Davidson's challenges. She emphasises that she uses for the WACC in her calculations an average of a range of potential WACC's based on a range of relevant variables. Mr Davidson's challenges to particular components of the WACC calculation therefore fail to take into account the balancing of factors and greater reliability obtained by using this approach. Thus Ms Kehoe says that her WACC was not based on a Net Debt/Capital ratio at the high end of 70% but is an average of possible WACC's which are discretely derived using the full range of the assumed Net Debt/Capital ratio of 55% to 70%. She justifies her use of a tax rate of 17.4% by pointing out that she has used the average tax rate for the four years from 2012 to 2015 and that Mr Davidson's approach is inconsistent with that of Citigroup (which used 25% in the calculation of the after-tax cost of debt). Ms Kehoe also notes that Mr Davidson may have made an error in calculating Beta and that if she is right on this Mr Davidson's WACC needs to be adjusted to 8.95% (from 10%) and his valuation needs to be increased to US\$14.34 per ADS (or one point two times the merger price). She also notes that if the Citigroup WACC were recalculated by changing Citigroup's average cost of debt of 13% to Mr



Davidson's 5.5%, the WACC is reduced from 11.6% to 8.3% and when applied to Citigroup's DCF analysis this results in a valuation of US\$31.40 per ADS (or two point seven times the merger price).

- (d). as regards the terminal growth rate, Ms Kehoe says that her approach appropriately gives greater weight to forward looking factors and the Company's stated strategy of expansion into global markets that include a number of high growth markets. Mr Davidson has given too much weight to historic data.
- (e). as regards redundant cash, Ms Kehoe says that she has simply followed and relied on the approach taken by Citigroup (which also arrived at a cash adjustment of US\$621 million). She notes that the Proxy Statement confirms that Citigroup's estimate was made after discussions with the Company's management and that their approach appears to be justifiable (for example because treating the restricted cash of US\$169 as redundant is appropriate when the valuation assumes a deduction of total debt including the debt which the restricted cash is held to secure). If Mr Davidson's subsequent discussions with management evidence a change of view that would need to be explained and justified before justifying a change from the Citigroup approach. Ms Kehoe noted that if the US\$621 million of redundant cash were included in her previously adjusted version of Mr Davidson's valuation (to take account of what Ms Kehoe considers to be his error in calculating Beta) then the valuation would increase to US\$19.44 (or one point seven times the merger price).

The Dissenting Shareholders' and the Company's evidence regarding the post-merger transactions

27. Mr Jain explains that the Dissenting Shareholders had discovered on or around 5 May 2017 that the Company was no longer a shareholder in Changzhou Trina Solar Energy Co., Ltd. (TCZ), the Company's core subsidiary all of whose shares had previously been held by the Company. TCZ held the shares in the group's operating subsidiaries and therefore was considered to be the most valuable subsidiary within the group. Following this discovery the Dissenting Shareholders undertook a series of further searches of the public records and identified a series of nine transactions



which evidenced a substantial restructuring of the Company's interests in its subsidiaries and of the whole group.

28. Mr Jain said that it appeared that the Company had transferred out almost all of its valuable assets through the transfer of its previously indirectly owned operating subsidiaries to the ownership of companies owned by related party owners (including the Chairman of the Company, Mr Gao) but not the Company (and had made certain other transfers). The restructuring was almost complete and the Dissenting Shareholders had become very concerned that the Company would have no assets against which a future judgment could be enforced, and that the effect of the restructuring (and the Company's intention in entering into the transactions) was to leave the Dissenting Shareholders with nothing but an empty shell to enforce against. The Dissenting Shareholders considered that the restructuring transactions were unjustified and improper in the circumstances and constituted dissipation of the Company's assets. They considered that it was necessary to take action to prevent further dissipation by preventing the Company from effecting further transfers (at least those transfers which could not be justified as for full consideration and otherwise appropriate) and by preserving the Company's rights to be paid the consideration which the Dissenting Shareholders assumed was outstanding under some of the transfers and retain the consideration once paid.
29. Mr Jain focussed in particular on the two steps in the restructuring process the combined effect of which was that the Company ceased to own any shares in TCZ (since the Dissenting Shareholders were relying on public disclosures they did not have the full details). First, on 24 March 2017 ten Chinese investment management companies became holders of 66.74% of the shares in TCZ and the Company's shareholding in TCZ was reduced from 100% to 33.26%. The new shareholders included Jiangsu Panji Investment Co., Ltd (*Jiangsu Panji*) (which held 6.74% immediately after 24 March 2017) and Shanghai Xingjing Investment Management Co., Ltd, (*Xingjing*) both of these companies being members of the Company and the Buyer Group (but the Dissenting Shareholders did not know whether other members of the Buyer Group were affiliated with or related to the new shareholders). Mr Jain noted that the new shareholders had apparently injected a total of US\$988,883,738.57 (the *Consideration*) for the subscription of shares in TCZ but as the public record did not require records of remittances to be filed with it, there was no record confirming whether the Consideration had been paid and the Company had refused to provide this confirmation when requested to do so (the Consideration was to be paid of course to TCZ and not the Company).



Subsequently, on 19 July 2017, a transfer by the Company of its remaining 33.26% shareholding was registered on the public register. The shareholding appeared to have been transferred to Jiangsu Qinghai Investment Co., Ltd. (*Jiangsu Qinghai*). Mr Jain says that the Dissenting Shareholders have discovered that the two shareholders of Jiangsu Qinghai are the Chairman of the Company (holding 99% of the shares) and his wife Ms Wu (holding 1% of the shares), that Jiangsu Panji is also wholly owned by the Chairman and that he is also the legal representative of TCZ. Accordingly, it appears that the Chairman has some control over TCZ through Jiangsu Panji and Jiangsu Qinghai.

30. Mr Jain argued that the timing of the transactions indicated that the Company had at least not been candid and possibly had been misleading in its public disclosure at the time of the merger because the Buyer Group had, inconsistently with that disclosure, been planning the restructuring all along and were entering into at least some of the transactions when they should not have done so without leave from this Court (the date on which the Company transferred its remaining shares in TCZ was after the presentation of the Winding Up Petition and judgment had been handed down on the Strike Out Application). Combined with the Company's action to avoid complying with its obligations under the Consent Order, there was clear evidence that the Company was behaving improperly and with a view to prejudicing the Dissenting Shareholders' ability to enforce a judgment obtained in the section 238 proceedings.
31. The Dissenting Shareholders said that they and their attorneys Walkers had raised their concerns with the Company and its attorneys, Harneys but that the response had been unsatisfactory. Mr Jain exhibited to his Second Affidavit copies of the correspondence between Harneys and Walkers. He explained that the Dissenting Shareholders had sought information regarding the terms of the transactions and assurances from the Company regarding its future plans and its financial position but such information and assurances had not been forthcoming. He was of the view that at the time at which the Freezing Injunction Summons had been issued the Company had failed properly to respond to the concerns raised by the Dissenting Shareholders and that in the absence of information and explanations from the Company which showed that the post-merger transactions had been entered into on terms that provided for the Company to be paid a proper price for its ceding of control of and transferring its shares in TCZ the Court should infer that the Company was unable to give a proper explanation of its conduct and that the transactions did not provide for the Company to receive full value and for the interests of the Company to be properly protected.



32. In his Second Affidavit Mr Chan had set out the Company's account of the relevant background and facts relating to the post-merger transactions, the reasons why the Company had proceeded with these transactions and an explanation of the Company's position (as I have outlined above). Mr Chan referred to various letters from the Company's attorneys. In Harneys letter dated 26 July 2017 to Walkers, they explained that the Company *"denies all allegations made [by the Dissenting Shareholders] ... in particular that it has stripped its assets to avoid recovery of a judgment sum and that it is acting in a manner to "defeat the purpose of section 238" of the Companies Law (2016 Revision) (the Law)." This letter further set out the reasons why the Company did not believe it was under an obligation to the Dissenting Shareholders to provide them with the confirmations or information sought. The Company's position had been set out most fully and recently in Harneys' letter dated 1 September 2017 in which they explained that the Company did not accept that the Dissenting Shareholders were contingent creditors of the Company, that the post-merger transactions were all part of its legitimate commercial business, that the Company was part of a substantial commercial enterprise that could not simply be stripped of its assets for no or nominal value in view of its audit and regulatory obligations and obligations to its stakeholders (which, post-merger, the Dissenting Shareholders were not) and that the decision whether or not to make provision for and retain sufficient funds to pay disputed or contingent liabilities was a business decision for the Company's directors (acting in the best interests of the Company's members which did not include the Dissenting Shareholders). Mr Chan went on to say the following about the reasons for and terms applicable to the transfers by the Company of its TCZ shares and other assets (underlining added):*

- "55. .. whilst the Company's interest in TCZ did decrease to 33.26%, the relative value of that interest increased. All of the new shareholders who subscribed for shares in TCZ paid the registered share capital price in the PRC, and the share capital of TCZ increased accordingly....
56. ... [the Capital Verification Report for TCZ as of 30 March 2017] confirms that the registered capital of TCZ increased from US\$420 million before this transaction, to just over US\$1.2 billion after the change ...
57. In July 2017 the Company's remaining stake in TCZ was acquired by PRC companies owned either directly or indirectly by Mr Gao: Jiangsu Qinghai Investment Company Limited (Jiangsu Qinghai) and Jiangsu Panji .



58. *The Company transferred 23.33% of its remaining holdings in TCZ to Jiangsu Panji (giving it a total stake of 30% in TCZ) and its final 10% holding in TCZ to Jiangsu Qinghai. These transactions were made for US\$ consideration....*
63. *There are additional steps to the restructuring that are necessary in order to achieve the optimal corporate structure ...*
64. *For the avoidance of any doubt, the restructuring is being undertaken on commercial terms and does not involve "stripping" of assets away out of the Company to defraud any actual or potential creditors. Any allegation by the Dissenters of this nature is entirely misconceived and inaccurate.*
65. *.... in order to relist in the PRC, the listed entity, TCZ, must first undergo internal restructuring to reorganise its subsidiaries. This process is necessary to ensure that the trading subsidiaries can be brought within the PRC holding entity which then in turn is amenable to being listed on the PRC stock exchange....*
66. *.... pursuant to the restructuring, Mr Gao and his fellow investors will hold TCZ directly and/or through an onshore special purpose vehicle (SPV) incorporated in the PRC, having purchased the Company's shareholding in TCZ."*

33. In his Third Affidavit Mr Chan gave more detail as to the amounts payable to the Company under the transfers and dealt for the first time with the approach which the Company was taking to making distributions to shareholders out of the sums received and to be received by it and as to the making of provision for and retaining out of the sums paid to it to cover its potential liability to the Dissenting Shareholders (and other creditors). He said this:

(a). as to the transfer of the 33.26% residual shareholding in TCZ:

"in July 2017 Jiangsu Panji and Jiangsu Qinghai between them purchased the remaining 33.26% of TCZ from Trina. This transaction, which is part of the restructuring, was undertaken on "commercial terms" in that consideration is being paid equivalent to the commercial value of the interest being purchased, as if it was, in effect, an arm's length transaction. As a result, although the Company no longer has an interest in TCZ, this transaction was for US\$ consideration at a level that is consistent with: (i) the unit price of the capital subscribed by the new investors; and (ii) the value of TCZ prior to the capital injection in TCZ. It must be remembered that when Trina held a 100% interest in TCZ, TCZ's share capital was only US\$420 million. Whilst for reasons of commercial sensitivity I cannot give an exact figure, the consideration is close to the pre-injection share capital amount of US\$420 million. In other words the consideration is well in excess of any possible judgment that the Dissenters could ever obtain and is clear proof that the restructuring was not undertaken in order to judgment proof itself or strip the Company of its assets."
[underlining added]



- (b). as regards the manner in which consideration received by the Company has been and will in the future be dealt with by the Company, Mr Chan said (in paragraphs 9 and 10) that:

"Of course, Trina do not intend to retain any consideration received indefinitely because this would not be commercially responsible. However, Trina has provisioned a substantial sum for contingencies, which will include any potential judgment debt that might become payable to the Dissenters (although this is of course without prejudice to the Company's position that the merger price was fair value or higher than fair value and therefore the Dissenters should not receive any additional consideration for their shares)...The provision has been calculated to ensure that there are sufficient funds available to cover all reasonably foreseeable contingencies and will not be disbursed until all contingencies have been resolved. However, the sum that has been provisioned is not in the range of the 5x to 10x multiple put forward by Ms Kehoe the idea that Trina would freeze US\$80 million (5x) to US\$186 million(10x) (less interim payment) on the basis of the Dissenters' threats and Ms Kehoe's vague report makes no commercial sense whatsoever and could not be justified to our stakeholders." [underlining added]

The issues and my conclusion

34. The well-established principles governing the grant of a freezing order were recently reviewed by the Chief Justice in *Classroom Investments Inc v China Hospitals, Inc and China Healthcare Inc* [2015 (1) CILR 451]. The Chief Justice noted that (at [59]-[63]):

"59. To obtain a personal worldwide freezing order, the court must be satisfied that [the applicant] has a good arguable case for damages on the merits, that there is a real risk of dissipation of assets, and that there is a reason to believe that the defendant's assets within the jurisdiction may be insufficient to meet the claimant's claims: see *Derby & Co Ltd v Weldon (No 1)* .. per Parker LJ"...

60. As to "good arguable case" in *Ninemia Maritime Corp v Trave Schiffahrts GmbH & Co. KG*, "*The Niedersachsen*"[1983] 1 WLR 1412 Mustill J pointed out ... that an applicant for relief need not prove to the judge that it is likely to win at trial: it is sufficient for an applicant to show a case that is "more than barely capable of serious argument, and yet not one which the judge believes to have a better than 50% chance of success." On appeal, Kerr LJ, giving the judgment of the Court of Appeal, expressly approved Mustill J's decision ..., and his approach has been adopted by this court in *Donnelly v Karess Properties Ltd* ... per Harre CJ...

61. As regards the risk of dissipation, as Kerr L.J. said in *The Niedersachsen* the test is whether, on the whole of the evidence before it, the court is of the view that the refusal of a freezing order would involve a real risk that the judgment or award in favour of the plaintiff would remain unsatisfied....



63. This court is also well aware of the following general principles to be applied in dealing with the question of risk of dissipation:

(a). The applicant must demonstrate a real risk that the respondent will engage in activities outside of the usual and ordinary course of its business which will have the effect of dissipating its assets and make it more likely that the judgment in favour of the plaintiff would go unsatisfied ...

(b). The applicant must adduce solid evidence of a real risk of the judgment remaining unsatisfied unless the defendant is prevented from dealing with his assets within the jurisdiction: *Bank of Nova Scotia v Emerald Seas Ltd* (1984-85 CILR 180, at para. 35). While this requirement may be entirely appropriate in a purely domestic Mareva-type situation, ... the notion of allowing a defendant access to its "assets within the jurisdiction" has to yield somewhat in a case where assets are held through a chain of entities across the globe, so that no one court would have jurisdiction over the defendant in the place where the relief is sought. In such a situation, there is the real risk of a legal void developing ...

(c). "Solid evidence," moreover, must be judged on a case-by-case basis. It may be possible to infer risk of dissipation from the surrounding circumstances, but it is impossible to lay down any general guidelines. The court must investigate not only the plaintiff's evidence, but also the merits of a defendant's evidence presented in opposition: *Ahmad Hamad Algozaibi & Bros Co v Saad Invs Co Ltd* (2011 (1) CILR 178, at para. 69). As the Court of Appeal's decision in *Ahmad* explains (*ibid*, at para.70), the court ordinarily requires evidence to show —

"(a) that there was reason to suppose that the defendant has some assets which (absent [injunctive] relief), were at risk of dissipation; or (b) that there was a real prospect that assets would be transferred to or otherwise be acquired by, that defendant in the future, which (i) would then become available to satisfy a judgment (whether against that, or some other, defendant), and (ii) would (absent Mareva relief) be a risk of dissipation while held by that defendant..."

(d) a strong emphasis is placed on the need to share a belief in the risk of removal of assets from the jurisdiction; however, risk may be more readily inferred, where the defendant is a holding company, without any substantial physical presence or operations within the jurisdiction.. Furthermore, it is submitted, and I accept, that this requirement has to yield somewhat in cases where assets are held by a Cayman entity through a string of subsidiaries across the globe."

35. A stronger case must be shown than merely that there is a serious issue to be tried. As is noted by Gee in *Commercial Injunctions* (6th ed., 2016) at 12-025 "cases involving [freezing] injunctions fall to be dealt with in accordance with the approach



laid down in the American Cyanamid case with the special feature that the minimum test to be satisfied is that of good arguable case as compared with the test ordinarily applicable to injunction cases, namely that there is a serious issue to be tried” although the test is not a particularly onerous one (the serious issue to be tried test only serves to cut out the frivolous or vexatious case).

36. The jurisdiction is essentially discretionary so that the court may refuse a freezing order notwithstanding that the applicant has satisfied the basic conditions if the court considers that it would be unjust or too burdensome to make such an order.
37. Accordingly there are three key issues to be considered in the present case. Have the Dissenting Shareholders demonstrated that:
- (a). they have a good arguable case that the fair value of their shares is at least above the merger price (so that they will obtain a judgment above the level of the interim payments at the trial of the section 238 petition) and, in order to obtain an injunction in the full amount which they seek, a good arguable case that the fair value of their shares is at the upper limit of the valuation range provided by Ms Kehoe?
 - (b). there is a real risk of dissipation?
 - (c). it is just and convenient to grant the freezing injunction and that a freezing injunction should be granted on the balance of convenience?
38. I have concluded (after having carefully considering the written submissions made before the hearing and the oral submissions made during the hearing and having read the post-hearing correspondence) that while I should accept that the Dissenting Shareholders have, on balance, established a good arguable case (and therefore crossed the jurisdictional threshold by showing to the requisite standard) that the fair value of their shares is at least above the merger price, the Dissenting Shareholders have not established (and discharged the burden of proof which is on them to establish) that there is a real risk of dissipation (and unjustified conduct). Had I concluded that there was a real risk of dissipation (and unjustified conduct) I would have been prepared to grant a freezing injunction although I would not have been prepared to do so in an amount equal to the upper limit of Ms Kehoe’s valuation range. While, on balance, I consider that Ms Kehoe has demonstrated a case that is



more than barely capable of serious argument for saying that the fair value of the Dissenting Shareholders' shares is both materially above the merger price and within her valuation range, there are sufficiently serious doubts raised by Mr Davidson and the limited nature of Ms Kehoe's analysis to justify the Court in the exercise of its discretion applying a substantial discount to the values put forward by Ms Kehoe. However, since I have decided that a freezing injunction should not be granted I have not sought to determine what the appropriate amount or limit of the freezing injunction would be. In all the circumstances I do not consider that in the circumstances of this case it is just and convenient or proportionate to grant the freezing injunction or the other relief sought by the Dissenting Shareholders.

A good arguable case?

39. An applicant must satisfy the Court that he has a good arguable case in support of his substantive claim. In the present case the substantive claim is the Dissenting Shareholders' statutory cause of action under and their entitlement to be paid the fair value of their shares in accordance with section 238 of the Companies Law. The statute establishes the right of a dissenting shareholder to a payment (by reference to the Court's determination of fair value). Liability is assumed. The only issue is one of quantum. On an application for a freezing injunction therefore the dissenting shareholder is not troubled by the need to establish that the elements of the cause of action on which it relies are established. But it must satisfy the Court, to the requisite standard, that it will succeed on the quantum issue.
40. Mr Todd Q.C. in his written submissions argued that "*The [Dissenting Shareholders] have a good arguable case for a very substantial recovery in the section 238 proceedings. The expert valuation evidence given by Rose Kehoe of Zolfo Cooper is that the fair value of the shares is up to approximately US\$204,000,000.*" Therefore, the Dissenting Shareholders seek a worldwide freezing order in respect of the Company's assets up to a value of US\$184,829,568, being the asserted fair value less the amount of the interim payments made by the Company. It follows, having regard to the case as so formulated, that the Dissenting Shareholders need to establish a good arguable case that the fair value of their shares is US\$204,000,000.
41. The Dissenting Shareholders rely on the valuation opinion evidence of Ms Kehoe. While noting the range and extent of Mr Davidson's challenges to Ms Kehoe's opinion Mr Todd Q.C. notes that Ms Kehoe has, in her Second Affirmation, explained



clearly the basis of her calculations and responded to each of the points of disagreement identified by Mr Davidson. She has confirmed and explained why she considers and remains of the view that the valuation as set out in Ms Kehoe's Report is correct. In these circumstances, Mr Todd Q.C. submits, the Court can be satisfied that the Dissenting Shareholders have at least a good arguable case that the merger consideration was less than the fair value of the Dissenting Shareholders' shares at the valuation date.

42. As my summary of the valuation evidence makes clear, there are substantial and fundamental disputes between Ms Kehoe and Mr Davidson concerning the appropriate valuation methodology to be applied and as to the fair value of the Dissenting Shareholders' shares. Not only are their valuations very widely apart but they disagree on the reliability of management's forecasts; how to analyse the financial information currently available; on the extent to which generally accepted valuation techniques and methodologies require or justify adjustments to managements forecasts and on what, in some important respects such as the application of a size premium, are (or are having regard to the relevant academic and expert literature, opinion and practice to be treated as) the generally accepted valuation techniques and methodologies to be applied. Mr Davidson identified as the principal drivers of the huge difference between the two valuations a number of elements of Ms Kehoe's valuation: the estimates for manufacturing capex (US\$162 million); the forecasts of changes to net working capital (US\$480 million); the terminal growth rate (US\$2.040 billion) and the calculation of redundant cash (US\$490 million) (while Ms Kehoe does not accept all of these calculations it seems to me that they are a reasonable guide to identifying the most significant valuation issues). The estimates for manufacturing capex involve issues both as to what is a reasonable approach to modelling manufacturing capex consistent with the best and accepted practice of expert valuers and an understanding of the relationship between the Company's projected future growth forecasts and its need for additional capital items to support and sustain such growth. The forecasts of changes to net working capital involve forming a view about the rate of growth of the Company's business and its impact on the working capital needs of the business as well as the reliability for future forecasting of the 2017 to 2021 forecasts and the extent to which 2022 represents a non-recurring extraordinary item. The terminal growth rate involve an analysis of the Company's future plans and the global markets in which it plans to operate and of the likely growth rates of those markets. The estimation of redundant



cash involves an assessment of how much of the Company's projected cash can properly be treated as available for ongoing operations.

43. The Court's approach to dealing with factual disputes (and disputes on points of law) on applications for freezing injunctions is well settled. As is well known, and both Mr Todd Q.C. and Ms Newman Q.C. accepted, it is no function of the Court on an interlocutory hearing to engage in a mini-trial. In a case where there are serious disputes on factual questions (and it seems to me that the valuation disputes – disputes in the opinion evidence of the valuers - in the present case are to be treated in the same way), the Court must not try to resolve conflicts of evidence on affidavit (see *Derby & Co Ltd v Wheldon* [1990] Ch. 48 at 57-58, per Parker LJ). As Lord Diplock said in *American Cyanamid* [1975] AC 396, 407:

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend. These matters are dealt with at trial."

44. But the Court cannot ignore the disputes presented by the evidence adduced on the application. As is explained in *Gee* in *Commercial Injunctions* at 12-026: "Nevertheless, the court will take into account the apparent strength or weakness of the respective cases in order to decide whether the claimant's case, on the merits, is sufficiently strong to reach the threshold and this will include assessing the apparent plausibility of statements in affidavits." As *Gee* also notes (in the same paragraph): "Although a good arguable case remains the minimum requirement, the judge's views on the merits of the claimant's case and his chances of ultimate success are important factors in the exercise of his discretion."

45. Furthermore, as Nugee J said in *Holyoake v Candy* [2016] EWHC 970 (Ch) [2017] 2 All ER (Comm) 513 (*Holyoake*) at [15] and [16]:

"In the case of purely factual questions I consider that it is sufficient for the claimant to meet the traditional test laid down by Mustill J in The Niedersachsen that the claimant needs to show a good arguable case in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success. Indeed I would regard it as wholly invidious in a case of this type which is likely to turn largely on the credibility of the principals on each side and their recollections of oral conversations for a judge faced with nothing other than the pleaded cases and assertions that each side's pleaded case represents the truth, to have to form a view as to where the better of the argument on such issues might lie, let alone where much the better of the argument might lie. ... I would regard it as wholly inappropriate to judge such matters on the basis of what are at this stage hotly disputed allegations on each side. [Nugee J was rejecting the use of the "much the better of the argument test"]"



... as I have .. said all these matters are hotly disputed and since they will remain for trial, it is not I think either appropriate or necessary to go into the merits in any detail. Suffice it to say that the Particulars of Claim detail serious allegations [and] I am not persuaded that they can be rejected at this stage as fanciful."

46. This is, obviously, not a case in which the Court only has the parties assertions set out in their pleadings. There are no pleadings in a section 238 case. As I have said, liability is presumed and the only issue is one of quantum. At trial, the Court is required to come to its own valuation of the Dissenting Shareholders' shares based on the expert evidence (prepared after full disclosure by the Company of all relevant information). The issues are defined by and in the valuation evidence (there may also be factual witnesses - this has not always been the case in previous section 238 petitions but in this case the case management directions provide for the parties to file witness statements by witnesses of fact - and therefore there may in addition be disputes of fact). At this interlocutory stage the Court has reports not prepared by the Court appointed experts and not based on the information which will be available to those experts for the purpose of their reports and opinions to be adduced in evidence at the trial. Instead the Court has preliminary – one might say desk-top – valuations based on publicly available information by two expert valuers (Ms Newman Q.C. did question Ms Kehoe's credentials and qualifications as a valuer but did not seem to me to establish any serious grounds for challenging her suitability to provide a valuation opinion or to justify giving her opinion less weight than that of Mr Davidson). Ms Kehoe prepared a carefully constructed and reasonably detailed report setting out a reasoned, careful and fully explained analysis supporting her valuation opinion. Mr Davidson prepared a briefer (partly because of the limited time available before the hearing) but nonetheless comprehensive and reasoned critique of the first report and his own valuation and a reasoned and reasonably detailed supporting analysis.

47. It seems to me that within the limitations I have described I need to consider and take into account the apparent strengths and weaknesses of the respective cases (in this case the two valuation opinions) in order to form a view whether the Dissenting Shareholders' case on the merits is sufficiently strong to reach the threshold of a good arguable case (applying the traditional test laid down by Mustill J in *The Niedersachsen* that the claimant needs to show a good arguable case in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than fifty percent chance of success). In a case like this one where the disputes arise out of valuation evidence it seems to me



important for the Court to isolate and identify the most significant issues in dispute and the arguments relied on by both sides (which is why I have taken the trouble to summarise the analysis and approach of Ms Kehoe and Mr Davidson and in particular Ms Kehoe's response to Mr Davidson's challenges) but the Court should not seek to delve into the detail and carefully analyse and form a view on each issue in dispute (this would be particularly difficult in any event at this stage in a case where the disputes raise a number of complex technical questions relating to valuation methodology and the theory, principles and practice of business valuation).

48. The Dissenting Shareholders have the burden of proof on this point and I focus in particular on Ms Kehoe's valuation. It seems to me, taking into account the explanations and analysis provided in Ms Kehoe's Report, the challenges made by Mr Davidson and Ms Kehoe's responses in her Second Affirmation, that Ms Kehoe's valuation is more than barely capable of serious argument. The Court cannot at this stage conclude that Ms Kehoe's analysis supporting her valuation range is less than seriously arguable or that it is less than barely arguable that she will be able to show that her valuation is reliable and to be preferred. She has based her adjustments to the merger price and the Citigroup fair value analysis, and set out a cogent and reasoned case by reference to recognised valuation methodologies supported in the literature. In my view the criticisms and challenges made by Mr Davidson are serious and in some areas powerful (for example in relation to the need to use a size premium and for an adjustment to reflect the fact that the Company has not factored in a country risk premium) but they do not at this stage demonstrate that he has the better of the argument on all or most of the critical issues in dispute or that Ms Kehoe's analysis is only barely capable of serious argument. It seems to me that Ms Kehoe has established that there is a case (and provided credible and cogent reasons) for saying in particular (recognising that she identifies a number of other important adjustments) that downward adjustments to manufacturing capex, increases to the available working capital and an increase in the growth rate are needed and that there are grounds for concluding that the level of redundant cash may justify a further upwards adjustment to the valuation.

49. What is more difficult is the likelihood that Ms Kehoe will be able to establish that a valuation above the lower end of her valuation range is more than barely arguable. Her valuation does result in a very substantial increase in value over the merger price and it seems to me that Mr Davidson's reasons for suggesting that such a huge difference is inherently unlikely have considerable weight as do his concerns that



where value is based and dependent on assumptions made in respect of the terminal period it is much more risky and should be given less weight. But it seems to me that on balance these issues do not prevent the Dissenting Shareholders from crossing the jurisdictional threshold of a good arguable case in the range of Ms Kehoe's valuation but they would need to be taken into account and given suitable weight in the exercise of my discretion and the determination of the amount for which a freezing injunction should be granted.

50. As I already noted, the valuation evidence in this case is limited and its weight is weakened by the fact that it is only based on publicly available information and a high level review of that. Indeed, the valuation evidence at trial is likely to be significantly different and based on substantially different information and give rise to different issues. I note and agree with the comments of Quin J (albeit in the different context of and a different legal test to be applied in an application for an order for interim payments) in *Re Qihoo 360 Technology* (unreported, 26 January 2017) that great caution needs to be applied in relying on valuation reports prepared at an early stage of section 238 proceedings. But it seems to me, at least in this case, that this problem is one that should primarily be taken into account at the discretion stage of the process. While limited, preliminary and qualified the valuation evidence is, as I have explained, reasoned, cogent and considered and I consider it to be wrong, as a matter of principle, to say that dissenting shareholders can never be entitled to a freezing injunction in section 238 proceedings in the period before the company has disclosed the full range of information on which the experts will rely, if the grounds for such an injunction can otherwise be made out. The Court will need to take carefully into account the limitations on the valuation evidence at the discretion stage but where such evidence is adduced and is credible and cogent dissenting shareholders should in my view be able to rely on it in order to establish a good arguable case and the Court must consider and form the best view it can of it, subject to and within the constraints of the interlocutory process.

Real risk of dissipation

51. I note the comments made by the Chief Justice in *Classroom Investments* which I have referred to above, in particular that there needs to be a real risk based on solid evidence that the respondent will engage in activities which will have the effect of dissipating its assets. I also refer to the principles relating to dissipation



set out by Timothy Walker J in *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* [2008] EWHC 532 (Comm) at [35]-[43]. He noted that:

- (a). freezing orders are not granted in order to provide security for a claim [36];
- (b). the risk of dissipation must involve a risk of impairing the claimant's ability to enforce a judgment or award [37]; and
- (c). the conduct in question must be unjustifiable [41].

52. In *Holyoake* Nugee J noted that:

*“A debtor is not obliged to keep his assets intact to meet a possible claim by a claimant and can continue to spend them in the ordinary course of business or on his ordinary living expenses, but he is not at liberty to dissipate them so as to render a judgment unenforceable, or indeed to dissipate them if that would be the effect. In such a case the Court will grant a freezing injunction in accordance with what is by now a very well established jurisprudence. See for example the statement of principle in *Halifax Plc v Chandler* [2001] EWCA Civ 1750 at [16]-[20]. In other words, a defendant must be regarded as owing an obligation to a claimant not to dissipate his assets for the purpose of, or with the effect of, rendering any judgment that may be given liable to be one that goes unsatisfied. That does not seem a surprising conclusion.”*

53. Ms Newman Q.C. submitted, correctly in my view, that the applicant for a freezing injunction must show that the risk of the judgment going unsatisfied is based on unjustifiable conduct. In the Court of Appeal in *Ketchum International v Group Public Relations Holdings* [1997] 1 WLR 4 Stuart-Smith LJ observed that the “court should be able to take steps to ensure that its judgments are not rendered valueless by an unjustifiable disposal of assets.” In *TTMI v ASM* [2005] EWHC 2666 (Comm) Christopher Clarke J noted that the formulation of the applicable principles set out in *The Niedersachsen*:

“cannot ... be regarded as a complete statement of the law. A defendant may be likely to make perfectly normal dispositions such as the payment of ordinary trading debts the effect of which may be that when any award is made it is, in whole or in part unsatisfied when, absent those payments, it might have been satisfied or satisfied to a greater extent. Something more than a real risk that the judgment will go unsatisfied is required.”

He then went on to refer to a judgment of the Court of Appeal of Ontario in which the Court said that the applicant must persuade the court that there was a real risk that the defendant is dissipating or disposing of its assets in a manner “clearly



distinct from his usual or ordinary course of business or living". He refused in the case before him (in light of the relevant agreements and relationships) to grant a freezing order in circumstances where ship owners might make an unjustifiable disposal of the proceeds of a judgment and use the proceeds to pay legal expenses. Furthermore there is English Court of Appeal authority (albeit in an unreported judgment) that confirms the need for the conduct in question to be undertaken *other than for normal and proper commercial purposes*. This authority is relied on and referred to by Walker J in *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* (above) where he noted that:

"Third, the mere fact that the actual or feared conduct would risk impairing the claimant's ability to enforce a judgment or award does not in every case mean that a freezing order should be granted: see Gee, Commercial Injunctions at paras. 12-037 and 12-038. The conduct in question must be unjustifiable. This statement of principle is found in the judgment of Stuart-Smith LJ in Ketchum International v Group Public Relations Holdings [1997] 1 WLR 4 at 10. The principle was put in a similar way by the Court of Appeal in Mediterranean Feeders v Bernd Meyering Schiffahrts (unreported, June 1997): 'there must be a risk that it [the asset] will be used otherwise than for normal and proper commercial purposes'." [underlining added]

54. In the present case, the Dissenting Shareholders have, as I have described above, relied on the various transactions entered into by the Company after the effective date of the merger in order to facilitate and prepare for the re-listing in the PRC of a new PRC incorporated entity that will be owned and controlled by the PRC based members of the Buyer Group. There are two aspects in particular that have caused the Dissenting Shareholders concern and upon which they rely:

- (a) that transfers and disposals of the Company's assets (and adjustments to the Company's rights and interests in its subsidiaries) which have been and are to be made to insiders (the members of the Buyer Group that include the Chairman of the Company) on terms that do or may not provide for the Company to receive proper value and which result in the Company being prejudiced; and
- (b) the risk that the Company will distribute to its shareholders (or other related parties) the consideration or other funds received by it as a result of the transfers, disposals and other transactions entered into as part of the pre-listing restructuring without retaining sufficient funds to enable the Company to satisfy a judgment obtained by the Dissenting Shareholders in the section



238 proceedings. The Dissenting Shareholders argue that since they have a good arguable case that they have a claim to be paid at least a substantial sum and in their view arguably a further US\$184,829,568 the Company should be making a proper provision having regard to the claim and the risk of such a claim being successful and should be retaining sufficient funds to ensure that it can satisfy the Dissenting Shareholders claim when a judgment is given at the end of the section 238 proceedings. I take the Dissenting Shareholders to be arguing that a failure to make at least a conservative provision and retention (perhaps the full amount claimed or a substantial percentage of that) is unjustifiable and improper conduct which satisfies the real risk of dissipation test.

55. Prior to the post-hearing service of Mr Chan's Third Affidavit the Company and its attorneys had provided only limited information concerning the terms on which the restructuring transactions had been entered into and the consideration payable or to be paid to the Company (or as to what the Company proposed to do with any proceeds). The Dissenting Shareholders have criticised the Company for this approach and for failing to provide adequate information and details concerning these matters. The Dissenting Shareholders invited the Court to and Mr Todd Q.C. submitted that the Court should as a result draw adverse inferences against the Company as to the likely terms and basis of such transactions. Mr Todd Q.C. argued that the Court should infer that the Company's failure to provide the requested information and explanations meant that it had no satisfactory explanation and could not show that the transactions were not prejudicial (I note that during the hearing Ms Newman Q.C. referred me to the judgment of the Cayman Court of Appeal in *BTU Power Management Company v Hayat* [2011 (1) CILR 315] as being the relevant authority on the circumstances in which the Court was justified in drawing adverse inferences). Mr Todd Q.C. also relied on other actions taken by the Company to demonstrate that the Company's conduct was suspicious and unjustifiable including the Company's attempts to avoid its obligation to make the interim payments, the timing of the transactions and the asserted failure to disclose the effect and elements of the proposed restructuring at the time of the merger. I agree with Mr Todd Q.C. that the Company's responses were unnecessarily cryptic and unhelpful. The Dissenting Shareholders had raised legitimate concerns which the Company could and should have sought to allay (even recognising the constraints imposed by commercial confidentiality and the fact that this has now become a fiercely fought dispute and a heavily contested piece of litigation in which the Company was entitled not to take steps that would weaken its



position in the litigation). The Company has, belatedly in the form of Mr Chan's Third Affidavit, provided a proper response and the case needs to be decided on the basis and in light of this evidence.

56. As I have noted above in his Second Affidavit Mr Chan had simply said that *"the restructuring is being undertaken on commercial terms and does not involve "stripping" of assets away out of the Company to defraud any actual or potential creditors. Any allegation by the Dissenters of this nature is entirely misconceived and inaccurate."* In his Third Affidavit, again as I have noted above, he provided further details. He deals with what appears to be the most material and significant transaction, namely the recapitalisation and dilution of the Company's previously 100% shareholding in TCZ in March 2017 and the subsequent transfer of the Company's remaining 33.26% interest in TCZ to Jiangsu Panji and Jiangsu Qinghai in July 2017. He also deals (for the first time) with the manner in which the Company has and plans in the future to deal with the consideration received by it.

57. As regards the manner in which consideration received by the Company has been and will in the future be dealt with by the Company, Mr Chan says (in paragraph8) that:

"this transaction, which is part of the restructuring, was undertaken on "commercial terms" in that consideration is being paid equivalent to the commercial value of the interest being purchased, as if it was, in effect, an arm's length transaction. As a result, although the Company no longer has an interest in TCZ, this transaction was for US\$ consideration at a level that is consistent with: (i) the unit price of the capital subscribed by the new investors; and (ii) the value of TCZ prior to the capital injection in TCZ. It must be remembered that when Trina held a 100% interest in TCZ, TCZ's share capital was only US\$420 million. Whilst for reasons of commercial sensitivity I cannot give an exact figure, the consideration is close to the pre-injection share capital amount of US\$420 million. In other words the consideration is well in excess of any possible judgment that the Dissenters could ever obtain and is clear proof that the restructuring was not undertaken in order to judgment proof itself or strip the Company of its assets"

58. As regards the Company's intentions and plans relating to making distributions he says (in paragraphs 9 and 10):

"Of course, Trina do not intend to retain any consideration received indefinitely because this would not be commercially responsible. However, Trina has provisioned a substantial sum for contingencies, which will include any potential judgment debt that might become payable to the Dissenters (although this is of course without prejudice to the Company's position that the merger price was fair value or higher than fair value and therefore the



Dissenters should not receive any additional consideration for their shares) ... The provision has been calculated to ensure that there are sufficient funds available to cover all reasonably foreseeable contingencies and will not be disbursed until all contingencies have been resolved. However, the sum that has been provisioned is not in the range of the 5x to 10x multiple put forward by Ms Kehoe because:

- (a). Trina is advised by its expert valuation consultants that for the reasons given in Chan 2 (and confirmed by Mr Davidson) the merger price represents fair value;*
- (b). Trina is also advised by its expert valuation consultants and its legal advisers (in respect of which I do not waive privilege) that there is no prospect of the Dissenters establishing at trial that the fair value of the Company's shares is 5x to 10x the merger price. In fact, the Company has been advised that such a finding would be unprecedented (particularly for a non-affiliated merger such as this merger was as the Buyer Group did not have anywhere near a controlling interest in the Company). In this regard, I am advised that in the Cayman Islands the only two substantive judgments on fair value resulted in fair value findings of 1.17 the merger price (Integra) and 2.35x the merger price (Shanda). In relation to Delaware judgments, which I am told are based on a comparable statutory regime, I have been provided with a table setting out comparable merger price to fair value ratios for the period 2010 to July 2017, which I exhibit at pages 25 to 26. This table shows that for non-affiliated transactions the highest fair value over merger price is 15.6% (or 1.15x merger price) and the highest fair value over merger price for affiliated transactions is 258% (2.5x);*
- (c). until the [Dissenting Shareholders] brought the Injunction Application, the [Dissenting Shareholders] had never given an indication of how much their claim is, therefore making any provision for their claim in excess of the merger price a difficult task particularly given 10(a) and 10(b) above (as Harneys repeatedly pointed out to them in correspondence); and*
- (d). the idea that Trina would freeze US\$80 million (5x) to US\$186 million (10x)(less interim payment) on the basis of the [Dissenting Shareholders'] threats and Ms Kehoe's vague report makes no commercial sense whatsoever and could not be justified to our stakeholders."*

59. Accordingly, on the basis of Mr Chan's evidence it appears that the recapitalisation and dilution of the Company's previous 100% shareholding in TCZ in March 2017 and the subsequent transfer of the Company's remaining 33.26% interest in TCZ were effected on arm's length terms and the result of these transactions and arrangements was that the Company has been or will be paid a sum "close to" the value of its interest in TCZ immediately prior to the dilution of its shareholding. The consideration is said to be substantial and "close to the pre-injection share capital amount of US\$420 million." Despite the fact that "close to" leaves some room for doubt this seems to me to be sufficient to establish that the transfer was not undertaken for less than a proper consideration or on terms that were improper or prejudicial to the Company and rebuts any inference which could otherwise



be drawn from the circumstances surrounding the transfers, transactions and arrangements (or the Company's previous limited and carefully crafted statements in evidence) that the effect of the transfers, transactions and arrangements was to diminish the Company's assets.

60. On the basis of Mr Chan's evidence it also appears that the Company is planning to make distributions and pay away the consideration or other funds it receives subject to retaining a substantial sum which represents what the Company considers to be a reasonable estimate of the liability which it might have, assuming that it is unsuccessful in its defence of the section 238 proceedings. But the sums to be retained will be less than the sum claimed by the Dissenting Shareholders (that is within the range of the 5 times to 10 times multiple put forward by Ms Kehoe or between US\$80 million and US\$186 million).
61. The question arises as to whether this approach, and the proposed payment by the Company of distributions, dividends or other payments, during the period in which the section 238 proceedings are continuing, is to be treated as unjustifiable (and whether the Dissenting Shareholders have established that it is unjustifiable) in the sense explained in the cases. As I have mentioned the formulation that has been used in the English Court of Appeal and which seems to me to capture well the underlying rationale of the requirement is conduct that is not undertaken for normal and proper commercial purposes. There are two aspects to this. Normal in the sense of usual having regard to the practice and operations of the relevant company (I note that some of the cases refer to permitting steps which are in the ordinary course of business which may be appropriate provided course of business is not given too narrow limited to trading activities). Proper in the sense of being for a legitimate commercial purpose, being a purpose connected with the business and commercial interests of the company and its stakeholders. It is necessary to have regard to the facts of the case and the context and also the purpose of the freezing injunction jurisdiction which is not intended to interfere with the defendant's conduct of activities that it would be expected to take in the absence of the litigation and are otherwise reasonable in the sense of not involving unusual or exceptional risks to or an exceptional diminution in the value of its assets. Ultimately the Court, as it seems to me, is required to consider all the facts and circumstances relating to the proposed conduct and make a judgment as to whether it falls within the type of conduct that a freezing injunction is intended to prevent. This inevitably involves in cases at the margin balancing the interests and risks of the claimant with the commercial interests of the defendant.



62. In my view completing the post-merger restructuring is justifiable in the sense I have just described to the extent that it is done on terms that provide for the Company to receive and that the Company does actually receive fair value for its assets. The post-merger restructuring does appear to be undertaken as part of the normal post-merger activities of the Company and for a legitimate commercial purpose of the Company's shareholders and provided the Company is and will remain solvent it seems to me that the Company is properly able to have regard to the commercial interests and wishes of its shareholders. As I have already noted, the Company's evidence does now demonstrate that as regards the principal transactions effected as part of the restructuring the Company did and will receive proper consideration and therefore the Company's separate position (and the interests of other stakeholders including creditors) will have been properly protected. I do not see that any further steps to complete the restructuring will change that conclusion.
63. But it would in my view be unjustifiable in this sense for the Company to complete the re-listing restructuring (with the effect of transferring away all or at least all its valuable subsidiaries and turning its assets into cash) and then distribute the cash to shareholders (thereby in substance implementing a winding up of the Company) without reserving and retaining in the Company an amount which represents a reasonable estimate of the Company's liability to the Dissenting Shareholders (taking into account the amount claimed, legal and valuation advice and the risks and uncertainties associated with litigation and valuation evidence). While the freezing injunction jurisdiction is not intended to prevent the defendant from continuing its ordinary and legitimate business operations pending the outcome of the litigation, it would not be legitimate for a defendant to dispose of all or a substantial part of its assets and then distribute the proceeds by way of what is in substance an informal winding up without making proper provision for its potential litigation liability. Making distributions to shareholders needs to be both normal and for proper commercial purposes. It seems to me that this test can be satisfied in a case where distributions would normally be made by a company out of surplus cash, which shareholders can earn more money on and use more effectively than the company can. The making of distributions would be normal and within the ordinary course of the company's activities and be for the company's proper commercial purposes, namely promoting the legitimate commercial interests of its shareholders. I do think though that since distributions involve the withdrawal of funds from the Company for no consideration they need a stronger justification (in order for them to be treated as



proper and legitimate) for freezing injunction purposes than other types of corporate transaction or activity that involves receipt of the price on a sale or the expenditure of funds as part of normal profitable business (of course the legitimacy of the distribution will be a function of and depend on the extent to which the provisioning and retention can be said to be sufficient). In the present case I take Mr Chan's evidence to indicate that the reason why the Company wishes and intends to distribute some of the proceeds it receives is to avoid surplus funds being held by the Company when it has no need for them and doing so is to the financial disadvantage of the Company's shareholders who can use the funds more effectively. To leave excess funds with the Company makes no commercial sense and would be unusual. I assume that this is both consistent with the Company's normal practice (although there is no direct evidence as to this) and consider that this approach and justification is consistent with the need for the distribution to be made for proper commercial purposes.

64. But if distributions can be said to be normal and for proper commercial purposes of the Company what is a proper provision that should be made? As I have said, in view of the nature of distributions there is a need to show that they are legitimate in the circumstances and that requires that the amount of the distribution properly and fairly takes into account the real risk and a realistic assessment of the defendant's potential liability. It seems to me that a proper provision need not necessarily be the full amount claimed by the claimant in the litigation provided that the provision is reasonable and prudent having regard to an assessment of the merits of the claim made after taking advice from legal and valuation advisers and forming a balanced and cautious view of the risks of the litigation. I would add that it also seems to me that a failure to undertake such an analysis and to make distributions without making proper provision is likely to result in a breach of duty by the directors. If the Company were to take or be contemplating action which would involve a breach of duty by its directors that would be another reason for saying that the action was improper and unjustified. Of course where a company is balance sheet solvent and creditors' interests are not at risk, the shareholders can ratify the directors' actions and breaches of duty but if there is a material risk that as a result of the directors' actions (in this case involving the making of distributions) creditors are put at risk (because the distributions will leave the Company with insufficient funds to pay creditors in full) the directors when deciding whether to take the action must take into account and have regard to the interests of creditors and the shareholders would be unable to ratify and release the directors from any breach of duty.



65. Paragraphs 9 and 10 of Mr Chan's Third Affidavit while incomplete do confirm that the Company's directors are basing their provisioning on its valuation and legal advice and that a "substantial sum" will be retained and not distributed until all contingencies are resolved (Mr Chan says that contingencies for this purpose include any judgment debt that might be payable to the Dissenting Shareholders). He explains the reasons why the Company is not intending to retain a sum in the valuation range provided by Ms Kehoe. These are that the Company's advice is that the merger price represents fair value and that there is "*no prospect*" of the Dissenting Shareholders establishing at trial that the fair value is within Ms Kehoe's valuation range; that the Company has only recently been made aware of the amount claimed by the Dissenting Shareholders and that freezing between US\$80-186 million makes no commercial sense and could not be justified to shareholders.
66. Some parts of Mr Chan's evidence are troubling. I have held that the Company's advice as described by Mr Chan is wrong as I do not consider that it can be said that the Dissenting Shareholders have no prospect of succeeding at an amount within Ms Kehoe's valuation range. Furthermore, to the extent that Mr Chan is suggesting that it would always be commercially unacceptable to have to retain between US\$80-186 million no matter what the proper and prudent provision for the Company's potential liability was, he would be wrong. But I take him only to be saying that in light of the advice received by the Company such a retention would be unjustifiable. Nonetheless I have concluded that on balance (recognising that in view of the incomplete nature of the Company's explanations the balance is quite close) Mr Chan's evidence does show that the Company is adopting a proper approach and basing their retention on a careful assessment of the Company's potential liability based on legal and valuation advice. It is not clear that the Company's estimate is in all respects based on the balanced and prudent approach which seems to me to be required but I am not, on the evidence, prepared to conclude that the Company is adopting an improper or unjustified approach. No doubt the Company's directors are being advised as to their duties in the current situation and the risks which they will assume if the provisioning exercise is not properly conducted and the interests of creditors are not properly taken into account and they may well be advised to take into account the conclusions reached and



points made in this judgment when determining the precise amount of the retention for the future.

67. I have considered the submissions made by Mr Todd Q.C. regarding the other conduct of the Company and whether this provides evidence to support the view that the Company has behaved improperly in a number of important respects and can therefore be expected to behave improperly when it comes to making distributions and forming a view on the provision to be made. However, I do not consider that the Dissenting Shareholders have been able to show that the Company misled shareholders and the market by failing to make proper disclosures in the Proxy Statement regarding the possibility of a post-merger PRC re-listing and restructuring (Mr Chan in paragraph 33 of his Second Affidavit quotes the section from the Proxy Statement that refers to the possibility of a further listing and I do not believe that a PRC re-listing could come as a surprise to any investor in PRC based companies). Nor do I consider that the Company's tactics in seeking to avoid payment of the interim payments ordered to be paid by the Consent Order is of itself sufficient to taint the Company's responses to these proceedings and approach to determining the amount of the provision as improper. The Company, no doubt in part in response to what it perceives to be the aggressive litigation strategy of the Dissenting Shareholders, has itself adopted a tough stance in defending these proceedings. In my view the Company did not have a seriously arguable basis for seeking to set aside the Consent Order and for delaying the payment of the interim payments and should take the costs consequences (both of the Set Aside Application and the Strike Out Application). But its conduct does not demonstrate that all its actions in response or with respect to these proceedings are and must be treated as improper and unjustifiable.

Balance of convenience and discretion

68. I have concluded that the Dissenting Shareholders have not established that there is a real risk that the Company's conduct in completing the restructuring and dealing with the proceeds of restructuring transactions paid to it will be unjustified. This is the main reason for concluding that it would not be just and convenient to grant a freezing injunction in this case and why the Freezing Injunction Summons should be dismissed.



69. But I consider that in the circumstances of this case it would not be just and convenient to grant the injunction. I have taken into account the impact of a freezing injunction on the Company and of not granting a freezing injunction on the Dissenting Shareholders. In my view the evidence demonstrates that while there is a risk for the Dissenting Shareholders, the Company is committed to retaining a substantial sum and making reasonable provision for its potential liability to the Dissenting Shareholders. Furthermore, if the directors behave improperly and act without reasonable care and later it turns out that the Company did retain insufficient funds they will be at risk of personal liability. This is not of course a complete answer to the need for a freezing injunction but a factor to be taken into account. I also accept the Company's evidence that there is no basis for concluding that the Buyer Group is anything other than reputable, has financial substance and will not wish to act in a manner that damages its business reputation. I have also considered the Company's evidence concerning the risk of prejudice and damage that the Company would be likely to suffer if a freezing injunction were granted. It seems to me that while the injunction is unlikely to operate in a manner that prevented the completion of the post-merger restructuring there is a real risk of reputational and credit damage and breaches of covenants and events of default that could adversely impact on the Company's financial position and the ability of the Buyer Group to complete the PRC listing.
70. I have noted the challenges that have been made to Ms Kehoe's high and widely ranging valuation. Ms Newman Q.C. in reliance on *JP Morgan Multi Strategy Fund LP v Macro Funds Limited* [2002] CILR 569, in which Henderson J said that the discretion to order a freezing injunction would only be exercised if the applicant could show that it is entitled to a certain or approximate sum, submitted that Ms Kehoe's valuation range was so wide that it failed to satisfy this test and this was another reason why the Court should not grant an injunction based on it. While I have been satisfied that Ms Kehoe's valuation and valuation analysis satisfies the good arguable case threshold, I do accept that the failure to provide a narrower range does weaken its weight and raise doubts as to its reliability.
71. Mr Todd Q.C. relied on the decision of Mr Justice McMillan in *Bona Film Group Limited* (unreported, 13 March 2017) in which Justice McMillan had made an order for the appointment of provisional liquidators on an application made by dissenting shareholders in a section 238 case (the Dissenting Shareholders were also parties in that case). Mr Todd Q.C. submitted that transactions which potentially render a debtor



judgment-proof are the abuse about which Justice McMillan was concerned. But the facts of *Bona Film* are very different and distinguishable from the present case. There, even though the company concerned also appears to have been involved in a post-merger restructuring with a view to a PRC-listing by a related company, as a result of serious and persistent defaults in complying with directions made by the Court the Court had ordered that the company be precluded from adducing any (expert) evidence at trial (so that the company was unable to put forward a positive case). The company had failed to engage properly in the section 238 proceedings and had demonstrated a persistent refusal to abide by court orders. There also appears to have been only limited evidence adduced by the company to explain the post-merger transactions and show that the transactions which gave rise to a suspicion of asset stripping were not dissipatory (or unjustified and improper). In such circumstances there was clear evidence from which the Court could conclude that the grounds for appointing provisional liquidators were satisfied. But these are not the circumstances of this case.

72. This is a case in which the Company is a large global corporation which following a statutory merger is in the process of preparing for a PRC listing for good and proper commercial reasons. It is engaged in hostile section 238 proceedings which at present remain at an early stage so that proper expert valuations to validate or challenge the merger price are not yet available. While the Company must take proper account of and make a suitable provision based on proper estimates of its potential liability it seems to me that in the circumstances it would be disproportionate and unjust to require the Company to make a provision and freeze funds (or assets) in a sum which is within a range for fair value determined by a valuer on the basis only of a preliminary desk top valuation, where there are serious questions as to the reliability of the valuation (even if it can be said to make out a good arguable case) and which is against the considered advice of its own legal and valuation advisors.
73. Since I have concluded that I should not grant the freezing injunction sought by the Dissenting Shareholders I have not gone on to consider separately the question of whether to appoint receivers or make the disclosure order sought. In my view it is not appropriate to make such an appointment or order.



THE HON. JUSTICE SEGAL
JUDGE OF THE GRAND COURT
6 November, 2017

