Neutral Citation Number: [2023] CA (Bda) 7 Civ

Case No: Civ/2022/14-31

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS CIVIL JURISDICTION (COMMERCIAL COURT)**
**BEFORE THE HON. CHIEF JUSTICE**
**CASE NUMBER 2021: No. 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 124, 125 AND 126**

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 24/03/2023

**Before:**

**THE PRESIDENT, SIR CHRISTOPHER CLARKE**
**JUSTICE OF APPEAL SIR MAURICE KAY**
**and**
**JUSTICE OF APPEAL GEOFFREY BELL**

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**Between:**

**IN THE MATTER OF JARDINE STRATEGIC HOLDINGS LIMITED**

**AND IN THE MATTER OF THE AMALGAMATION AGREEMENT BETWEEN JMH INVESTMENTS LIMITED AND JMH BERMUDA LIMITED AND JARDINE STRATEGIC HOLDINGS LIMITED**

**AND IN THE MATTER OF SECTION 106 OF THE COMPANIES ACT 1981**

Jonathan Crow KC and John Wasty of Appleby (Bermuda) Limited, for the Appellants

Mark Howard KC Mark Chudleigh and Lewis Preston of Kennedys Chudleigh Limited, Matthew Watson of Cox Hallett Wilkinson Limited, Delroy Duncan KC and Ryan Hawthorne of Trott & Duncan Limited, and Lilla Zuill of Harneys (Bermuda) Limited, for the Respondents

Hearing dates: 7-8 November 2022

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**APPROVED JUDGMENT**

**BELL JA:**

**Introduction and background**

1. This appeal concerns the right of a dissenting shareholder whose shares have been compulsorily acquired pursuant to section 106 of the Companies Act 1981 ("the Act") to claim an entitlement to be paid such amount as may be appraised by the court on an application being made pursuant to section 106(6) of the Act, in circumstances where the shareholder in question had acquired his shares after either the initial announcement of the particular company's intention to propose an amalgamation or merger, or where such shareholder had not been a shareholder of the company when the company had given notice of the proposed amalgamation pursuant to section 106(2) of the Act.

2. The particular amalgamation in this case concerns Jardine Strategic Limited ("the Company"), which is a subsidiary company within the Jardine Matheson group of companies ("the Group"), of which the parent company is Jardine Matheson Holdings Limited ("Jardine Matheson"). The Company is the product of an amalgamation ("the Amalgamation"), between Jardine Strategic Holdings Limited ("Jardine Strategic") and JMH Bermuda Limited ("JMH Bermuda"). Following amalgamation, those two companies continued as the Company. Prior to the Amalgamation Jardine Matheson held, directly or indirectly, 84.9% of the shares in Jardine Strategic.

3. The purpose of the transaction, according to the Company, was to simplify the structure of the Group. The planned simplification involved, first, the acquisition by Jardine Matheson, for cash, of the approximately 15% of the issued share capital of Jardine Strategic that it did not already own, and, secondly, the subsequent cancellation by Jardine Matheson of Jardine Strategic's almost 59% shareholding in it. These proceedings concern only the first step in the process.

4. On 8 March 2021, Jardine Strategic and Jardine Matheson announced ("the Announcement") that the former had agreed with the latter's proposal for a recommended cash acquisition of the 15% of the former's share capital that the latter and its subsidiaries did not already own. The Announcement explained that the acquisition would be implemented by way of an amalgamation under the Act, that a general meeting of Jardine Strategic would be convened to consider and vote on the Amalgamation, and that shareholders in Jardine Strategic would be entitled to receive US$33 in cash for each ordinary share held, explaining how the acquisition price represented a premium of different percentages when compared with the share price on the Singapore Stock Exchange (one of the three exchanges on which the Company's shares were traded) over various recent periods.

5. The Announcement carried on to explain that because a number of the directors on Jardine Strategic's board were also directors of Jardine Matheson, Jardine Strategic had established a transaction committee comprising directors who were not also directors of Jardine Matheson. Finally, the Announcement pointed out that because the Amalgamation required the approval of at least 75% of the votes cast by shareholders in Jardine Strategic, and because Jardine Matheson

had undertaken to Jardine Strategic that it would vote (and would procure that its subsidiaries would vote) in favour of the resolution, the requisite approval was certain to be secured.

6. On 17 March 2021, Jardine Strategic's board gave notice ("the Notice") to its shareholders pursuant to section 106(2) of the Act of a special general meeting to be held on 12 April 2021 to consider and, if thought fit, pass a resolution approving the Amalgamation. The Notice confirmed that for the purposes of section 106(2)(b) of the Act the fair value of the shares had been determined by Jardine Strategic to be $33 per share.

7. In the period following the Announcement, and more particularly following the Notice, a number of funds acquired interests in Jardine Strategic's shares at an average price, according to the Company, of US$33.66.

8. At the meeting of 12 April 2021, the resolution approving the Amalgamation was passed. Then on 14 April 2021 the steps necessary to complete the Amalgamation having been effected, the Amalgamation became effective, and Jardine Strategic and JMH Bermuda continued as the Company.

**These proceedings – an overview**

9. Between 12 and 15 April 2021, eighteen originating summons were filed in relation to the Amalgamation, pursuant to which the plaintiffs in those proceedings (to whom I will refer generally as "the Dissenting Shareholders") sought appraisals pursuant to section 106(6) of the Act, seeking to determine the fair value of their shares in Jardine Strategic. The Company defines those who bought shares after 17 March 2021 as Short-Term Shareholders, as compared to those claiming entirely in respect of shares held on or before 17 March 2021, whom they define as Long-Term Shareholders. There is in fact a third potential group, being those who held shares at the time of the Notice, and who subsequently bought more shares. The Dissenting Shareholders who are the Respondents to this appeal, which is taken by Jardine Strategic and the Company, used the definitions of Pre-Notice and Post-Notice Shareholders, arguably less pejorative, but since counsel on both sides and the judge tended to use Short-Term and Long-Term Shareholders, I shall use those terms.

10. Section 106 of the Act forms part of a section of the Act dealing with arrangements, reconstructions, amalgamations and mergers, and is the section dealing with shareholder approval for amalgamations and mergers. So far as material, it is in the following terms:

> *"(1) The directors of each amalgamating or merging company shall submit the amalgamation agreement or merger agreement for approval to a meeting of the holders of shares of the amalgamating or merging company of which they are directors and, subject to subsection (4), to the holders of each class of such shares.*

> *(2) A notice of a meeting of shareholders complying with section 75 shall be sent in accordance with that section to each shareholder of each amalgamating or merging company, and shall—*
>
> *(a) include or be accompanied by a copy or summary of the amalgamation agreement or merger agreement; and*
>
> *(b) subject to subsection (2A), state––*
>
> *(i) the fair value of the shares as determined by each amalgamating or merging company; and*
> *(ii) that a dissenting shareholder is entitled to be paid the fair value of his shares.*
>
> ...
>
> *(6) Any shareholder who did not vote in favour of the amalgamation or merger and who is not satisfied that he has been offered fair value for his shares may within one month of the giving of the notice referred to in subsection (2) apply to the Court to appraise the fair value of his shares"*

11. Jardine Strategic and the Company then sought to strike out the appraisal claims of the Short-Term Shareholders, who had acquired shares with the knowledge that the Amalgamation was a foregone conclusion, and who acquired their shares as an arbitrage opportunity. The Company's position was that the proceedings taken by the Dissenting Shareholders had no real prospect of success, and accordingly were liable to be struck out. The amended summons included shareholders who held neither legal title nor a beneficial interest in the shares of Jardine Strategic, in recognition of the fact that many of the shares in Jardine Strategic had been acquired and were held through custodians or nominees.

12. The strike out applications were argued before the Chief Justice on 22 and 23 February 2022, and he delivered his judgment on 20 April 2022, in which he dismissed Jardine Strategic's and the Company's applications to strike out the proceedings. The Chief Justice defined the two companies as "the Company". He set out the Company's case on the meaning of section 106 between paragraphs 23 and 40 of his judgment and that of the Dissenting Shareholders on the section between paragraphs 41 and 43, considering the object of section 106(6) of the Act, the language of section 106, its legislative history, the Company's construction regarding beneficial ownership, and the consequences of the Company's construction, before giving his conclusion at paragraph 87, rejecting the Company's case that only plaintiffs who were registered and/or beneficial shareholders as at 17 March 221 (the date on which the Notice was issued) could seek relief under the provisions of section 106(6) of the Act.

13. The Chief Justice then turned to the Company's argument that the Dissenting Shareholders' proceedings were an abuse of process, insofar as they were taken not in order to obtain relief from oppression, but with an intention to profit from the proceedings, having acquired their interests in Jardine Strategic with the knowledge that the Amalgamation would take place and for the sole

purpose of commencing proceedings under section 106(6) of the Act. The Company had relied upon the decision of Kawaley CJ in *Annuity & Life Reassurance Ltd v Kingboard Chemical Holdings Ltd* [2015] SC (Bda) 7 Comm. The Chief Justice accepted the submission of the Dissenting Shareholders that there was an important difference between a petition taken under section 111 of the Act, alleging oppressive conduct by the majority, the case in *Kingboard*, and an application made under section 106(6) of the Act.

14. The last of the Company's arguments which fell to be determined by the Chief Justice was in relation to the fair value of the shares. The Company argued that the court is not asked to appraise the fair value of the Company, or of all of its shares, or of a hypothetical share in the Company, but rather, as between the relevant parties to the proceedings, it appraises the fair value of the particular plaintiff's shares. In doing so the Company emphasised the use of the words "fair value for **his** shares" appearing in section 106(6), preferring to rely upon those words rather than the words "fair value of **the** shares" appearing in section 106(2) (emphasis added in each case). The Chief Justice took the view that the Company's interpretation read far too much into the term "his shares" and commented that the Company's approach would produce the astonishing consequence that in order to conduct an appraisal the court would be required to undertake an individual assessment of the circumstances of each shareholder, and the shares in question.

15. Accordingly, the Chief Justice dismissed the Company's application to strike out the originating summonses of the Dissenting Shareholders.

**The grounds of appeal**

16. The grounds of appeal follow those three heads – the correct statutory interpretation to be applied to section 106 of the Act, the abuse of process argument and the issue of fair value, and I will cover the arguments under each of those three heads, rather than set out the grounds of appeal in full.

**Statutory interpretation**

17. In his oral presentation Mr Crow KC for the Company began by dividing his argument on this issue into first, the purpose of the legislation, and, secondly, by reference to the interpretation of the legislation. Before delving further into the statutory purpose of the legislation, it will no doubt be helpful to summarise the Company's position on the manner in which section 106 of the Act operates. The starting point is the argument that the class of persons entitled to pursue the appraisal remedy is limited to those persons to whom the Notice was given, and who, according to the Company's argument, were, by the Notice, offered fair value for their shares pursuant to section 106(2). The Company submits that the purpose of section 106(6) is to provide a remedy to pre-existing shareholders, and since the Short-Term Shareholders were not given notice of the relevant general meeting, they do not fall within the class of persons whom the section is designed to protect. Mr Crow stressed the word "offered" appearing in section 106(6), submitting that the use of this word related back to the sending of the Notice effected by section 106(2). Hence only those shareholders to whom the Notice had been addressed were shareholders to whom the offer of $33

per share had been made, and therefore the only shareholders entitled to the benefit of the appraisal remedy.

18. In relation to the purpose of the section, Mr Crow first referred the court to the judgment of Hellman J in *MFP-2000, LP v Viking Capital Ltd* [2014] Bda LR 6, which judgment had been approved in the Court of Appeal. That case was concerned with the acquisition of shares owned by minority shareholders pursuant to section 103 of the Act, a step which required the majority to hold not less than 95% of the shares when notice was given to the minority. However, before the transaction closed, the majority shed some shares so that their holding fell below the 95% threshold. Rejecting the applicant's argument that the respondents were no longer entitled to proceed to acquire the minority's shares, Hellman J referred to the dominant purpose of all of the provisions within this part of the Act as being to facilitate corporate restructuring, noting that there was no obvious commercial reason why a purchaser, having served a section 103 notice, should be required to retain at least 95% of the shares until the appraisal process had been concluded.

19. Mr Crow submitted that if the interpretation of section 106 of the Act permitted speculative investors to take advantage of the appraisal remedy, that would increase the cost of the proceedings and also delay the process, and thus serve as a disincentive to corporate reconstruction. But he accepted, in response to questions from the bench, that the delay and expense occasioned by the appraisal process would also occur if one of the Short-Term Shareholders sought appraisal, although he maintained that the fact that there might be a number of arbitrageurs taking the same position as the Long-Term Shareholders meant that the proceedings would be more expensive and time-consuming. And consequently, he submitted, an interpretation which concluded that the appraisal remedy is available to those who buy into a company is an interpretation which will operate as an encouragement to appraisal arbitrage, and as such would increase the likelihood and cost of appraisal litigation. Specifically, he submitted that adopting an interpretation which widened the pool of well resourced, active, speculative investors, because that is their business model, is an interpretation which is inimical to the facilitation of corporate reconstruction. Mr Crow drew the Court's attention to comments made in the *Viking Capital* case in this Court, where Auld JA had referred to the clear intention of the section 103 provisions being to facilitate ready - and often necessarily speedy – corporate restructuring.

20. Mr Crow also referred to the Chief Justice's judgment in relation to directions in this case, where he had made reference to the fact that the Cayman Court of Appeal had recognised that the discovery process was capable of abuse by dissenting shareholders, and took a similar view in relation to the scope of discovery sought by the Dissenting Shareholders.

21. Mr Crow next turned to the Law Reform Committee report which had accompanied the draft bill, part of which became section 106 of the Act, and also referred to Kawaley on Offshore Commercial Law in Bermuda, which confirmed that in relation to the sections of the Act dealing with amalgamations and mergers, the Bermuda legislature had drawn heavily on the Canada Business Corporations Act. Specifically he referred to the Dickerson Report of 1971, which report set out the proposals for a New Business Corporations Law for Canada, and gave the rationale (at paragraph 347) for providing minority shareholders with the option to withdraw from the

enterprise in which they were shareholders, on payment of a fair value for their shares, as determined by an outside appraiser, where the majority seeks to change fundamentally the nature of the business in which the shareholder invested. It is to be noted that the Canadian proposals were an adaptation of similar provisions which had been contained in the New York Business Corporation Law. Every state of the United States bar one gave a minority shareholder a statutory right to dissent and demand the appraised value of his shares. So Mr Crow described the New York Business Corporation Law as being the grandfather of the Bermudian regime in relation to amalgamations and mergers.

22. And Mr Crow noted that a Short-Term Shareholder would not be in the position of a minority shareholder where the majority sought to change fundamentally the nature of the business in which he had invested, because that shareholder was investing in a company which has already made the proposal. So Mr Crow submitted that a person who buys into a company in order to litigate is not an aggrieved party seeking to resolve a problem, but rather is an opportunistic investor seeking to capitalise on a statutory remedy.

23. When it was suggested to Mr Crow that the difference between the Canadian and Bermudian legislation, meant that the Dickerson Report could not be prayed in aid of the construction of the Bermuda legislation, he maintained that where there are two competing constructions, the purpose of the legislation informed the choice between the two.

24. Mr Crow next referred to the Alberta Report, which effectively made the same general points as appear in the Dickerson Report. Mr Howard KC for the Dissenting Shareholders pointed out that the authors of the Alberta Report had recognised that the existence of the appraisal right gave rise to many difficulties, including that such rights could give an unfair or unprincipled minority an opportunity to extort benefits from the majority; that an unquantified potential liability to buy out minority shareholders might inhibit bona fide corporate action; that buying out the minority might bleed the company of cash needed for its ordinary affairs, or for the carrying out of the proposal which triggers the appraisal right; or that the proceedings to enforce the appraisal right might be complex, long-drawn out and expensive. Nevertheless, the authors of the Alberta Report were of the view that fairness to the minority required that the appraisal right be instituted.

25. Next by way of authority, Mr Crow referred to the New York case of *Application of Stern* NY Supr, 82 NTS2d 78 (1948). This was a case concerning the merger of a number of New York insurance companies. Rights of appraisal arose under section 503 of the New York Insurance Law where a stockholder objected to a merger and demanded payment for his stock. A merger agreement was executed on 24 February 1948, and notice of a special general meeting for the purpose of taking action on the proposed merger was sent to stockholders on 6 March 1948. Stern acquired substantial shares during the month of March 1948, but in his petition referred to shares which he had acquired before the announcement, without disclosing when he had bought the balance of his shares. The question for the court was whether Stern was a stockholder within the meaning of section 503. The judgment said in terms that a literal interpretation which will serve to defeat the purpose and policy of section 53 was to be avoided, and dealt with the argument as follows:

> *"It requires no extended argument to prove that the purpose and policy of section 503 will be defeated if a petition for appraisal can be predicated on shares of stock acquired after a plan for merger has been adopted by the directors and fully publicized. Section 503 was intended to avoid impediments to corporate activities consented to by a large majority of the shareholders. It was not intended as an additional hazard, which is what it necessarily becomes if shares acquired after promulgation of the plan by directors retain the right of appraisal.*
>
> *Shares of stock acquired prior to promulgation of a plan within section 503 are in the hands of stockholders who are met with the necessity of deciding whether it is in their interest to consent to or disapprove a substantial change in the nature of the business of the corporation. Shares of stock transferred after promulgation of the plan have been acquired in spite of the plan. The owners thereof face a choice of their own selection. They are not stockholders within the meaning and contemplation of section 503."*

26. Mr Crow asserted that he was not suggesting that the interpretation which was adopted on the language of the New York legislation could be read across to the Bermudian legislation, and that he was drawing the Court's attention to the case to demonstrate his case on legislative purpose.

27. His next case was *Matter of Dynamics Corp v Abraham Co.* 4 Misc. 2d 50, 152 NYS 2d 807. Proceedings were taken to determine which of the respondents were entitled to have the value of their shares in Reeves-Ely Laboratories Inc appraised, and to appraise the value of the shares held by those deemed so entitled. The judgment stated that the governing sections of the Stock Corporation Law did not qualify or limit in any way the stockholders who might invoke the appraisal proceedings, but said that the courts have applied the test of good faith, and citing from an earlier case, said that the statute "contemplated an objection by a bona fide stockholder and not one who purchases stock for the purpose of harassing and annoying the other stockholders".

28. Mr Crow's next case was the BVI case of *Nettar Group Inc v Hannover Holdings SA* BVIHCM 2021/0177, a merger case decided under the relevant regime operative in the BVI. I might just say at this point that included in the material provided to us was a helpful comparative document showing the appraisal regimes in a number of other jurisdictions, including BVI, Canada, Cayman Islands, Delaware, New Zealand, Singapore and South Africa, as well as a list of those jurisdictions with no comparable regimes, which include Australia, the United Kingdom, Hong Kong and Malaysia.

29. Hannover was a shareholder in Nettar, but was also a holder of four convertible promissory notes, which gave it the right to convert sums due to it into further shares, known to the parties as conversion shares, upon the happening of certain events which included a merger. Hannover contended that it should be bought out not just in respect of its existing shareholding, but also in respect of such conversion shares that it might acquire, so that it would exit Nettar's membership entirely. The answer on that point given by the judge was that the appraisal remedy was only

available in relation to existing shares, not to the conversion shares. Paragraph 136 of the judgment dealt with the legislative intent behind the BVI legislation and the purpose therefor. But the judge carried on to say that it was difficult to see why a shareholder should be provided with an exit - and compensation - mechanism if he deliberately acquired more shares in the company after he is informed it is going to be subject to a merger, and after he has given notice that he objects or dissents from it. And the judge continued by saying that acquiring more shares is his free choice, but choices have consequences, and it is not the task of the legislature to save an investor from them.

30. Mr Crow stressed that in relation to all these cases, the purpose of the legislation was so that a minority shareholder who does not want to consent to a merger does not have to be locked into a company that has become fundamentally different from that which he invested in. But as the President pointed out during the course of argument, ceasing to be a shareholder in a company whose business remains unchanged is not the same as being a shareholder in a company which fundamental changes the nature of its business.

31. Mr Crow then turned to the language of section 106, with particular emphasis on subsections 2 and 6. He took from the wording of subsection 6 that, the critical question being "on whom is the remedy contained in the section conferred?", the answer was that it was conferred upon a shareholder who is not satisfied that he has been offered fair value. And the only thing within the structure of section 106 that could constitute an offer of fair value came from the wording of subsection 2 (b) of section 106. Mr Crow emphasised that the offer contained within the section was not a contractual offer, but was the Company's statement, contained in subsection 2 (b), of what the Company assesses fair value to be, and hence is the only thing that can constitute the offer referred to in subsection 6.

32. Mr Crow next asked the question "who is the cohort of shareholders who were intended to benefit from this regime?", answering that question by submitting that it is the cohort of shareholders who were shareholders when the Notice was served. The reference in subsection 6 to an offer could only be a reference to the statement of fair value contained in subsection 2. And that offer is an offer which is made to those shareholders to whom the notice is addressed, namely the existing or Long-Term Shareholders. Mr Crow pointed out that on the interpretation of the section for which Mr Howard contended, if the general meeting is convened on more than one month's notice, there would be two categories of Short-Term Shareholders, one of which would be entitled to bring appraisal proceedings, and one of which would not.

33. At this point in his argument, Mr Crow turned to the terms of the section as originally enacted in 1981. Section 106(6) originally provided that the appraisal remedy was open to any shareholder who was "not satisfied that he has been paid fair value for his shares". The language which enables Mr Crow to advance the argument he does in relation to an offer having been made only to those shareholders to whom notice of the meeting called for the purpose of approving the amalgamation, was not included in the legislation until 1994. Nevertheless, Mr Crow maintained that because the 1994 amendment introduced both subsections 2 and 6, this supported the interpretation for which he contended. When asked whether shareholders who bought under the 1981 legislation would

have been entitled to the appraisal remedy, Mr Crow said firstly that it was not necessary for this Court to decide that question, and secondly, that it would easily have been open to the Court so to decide. It is to be noted at this point that the Chief Justice had said in paragraph 71 of his judgment that it was "common ground" that section 106(6) as it existed in 1981 would allow all shareholders, both Pre and Post-Notice, to bring a claim that they had not been paid fair value for their shares. But Mr Crow maintained that what the 1994 amendment had done was to achieve more perfectly what was intended but possibly unachieved in the 1981 wording. In fact the transcript of the proceedings before the Chief Justice shows Mr Crow as having said that he was agnostic as to whether the 1994 amendment changed anything in relation to the availability of the appraisal remedy. And after the short adjournment Mr Crow suggested that the question as to the effect of the original legislation did not need to be answered, but that there was a route by which the court could have found that only Long-Term Shareholders would have had locus standi even under the legislation as originally enacted.

34. Mr Crow next referred to the criticism set out in the Company's notice of appeal and skeleton that the judge dealt with issues in a fragmented way, and did not read across different factors from separate parts of the judgment. By way of illustration, he referred to paragraph 64 of the judgment, where the Chief Justice stated:

> *"The Court accepts the position of the Dissenting Shareholders that the reference to the shareholder being offered fair value for his shares is a reference to the terms that are set out in the proposal that is or is to be voted on and passed at the meeting of the shareholders of the company. If a shareholder is not satisfied with those terms and did not vote to approve them, he can ask the court to appraise the fair value of the shares. There is nothing in section 106(6) to suggest that the "offer" to shareholders being referred to is a technical concept, tied or restricted to any particular document or step. It is immaterial whether the "offer" of fair value is made in the amalgamation agreement, the notice under section 106(2) or the proposed resolution to approve the agreement or in combination of all the above. The Court accepts the submission that by tying and restricting the offer to a particular document at a particular time, the Company, for its own purposes, is seeking to introduce a limitation that is not present in section 106(6) and for which there is no good reason. There is nothing in section 106(6) or elsewhere that suggests that the only potential source of the relevant offer is the notice under section 106(2)."*

35. Mr Crow noted that the Chief Justice had accepted the argument at that point in the judgment, but then referred to paragraph 73 of the judgment, where the judge was dealing with the legislative history of the section. That, says Mr Crow, indicates that the Chief Justice accepted the point made on behalf of the Company that the requirement in section 106 (2)(b) is a requirement to state a fair value in cash terms. But the criticism that is made is that the judge failed to feed back his (correct) conclusion made in paragraph 73 to the conclusion he had reached at paragraph 64. And as the President pointed out, the judge had, in his conclusion in paragraph 64, noted that there was nothing in section 106(6) or elsewhere that suggests that the only potential source of the relevant offer is the notice under section 106(2).

36. Mr Crow also noted that the Chief Justice had stated at paragraph 67 of the judgment that the Notice was not in fact formally "addressed" to anyone in particular, when as a matter of logic and of company law, the Notice was addressed to the shareholders, and the fact that it might also be drawn to the attention of others was nothing to the point. The Notice was required to be sent to shareholders and was so sent.

37. Mr Crow next turned to the position of beneficial ownership of shares and the Company's construction of section 106(6), the heading just before paragraph 78 of the judgment. In this section of his judgment, the Chief Justice had noted that it was a notorious fact that shares in companies engaged in international business in jurisdictions such as Bermuda are commonly held through nominee shareholders. He then noted that the Company's original position had been that only the registered members of the Company to whom notice was sent in accordance with section 106(2) were entitled to seek an appraisal, referring to a letter sent by the Company's attorneys dated 13 August 2021. That position changed on 23 September 2021, when its attorneys set out their new position, referring to striking out the originating summons to the extent that the plaintiffs sought relief as to shares in the Company "in respect of which they held neither legal title nor a beneficial interest as at 17 March 2021". That position was then reflected in the wording of the amended summons.

38. In response to questioning from the bench as to why his clients had made the concession which they did in relation to shares held by beneficial owners who were not registered shareholders, Mr Crow did not accept that his clients had made such a concession. He referred to the fact that "shareholder" was not actually defined in the Act, but section 2(8) of the Act provided that "member" includes "shareholder" and vice versa. He noted that section 106 used the word "shareholder" and not "member", and suggested that it was entirely possible for the court to hold that the purpose of the legislation is served by interpreting "shareholder" in section 106 as including a beneficial owner as at the date the notice was served, and not only registered members. Because the word "shareholder" is not exhaustively defined in the Act, when used in the Act it is capable of having a meaning that is not to be confined to registered members. Mr Crow emphasised that he was not "pinning his colours" to that interpretation; but he did not want the point to be taken against him.

39. Mr Crow then concluded his submissions on the first ground of appeal. He addressed the manner in which the case had been put against the Company, namely that the right to bring appraisal proceedings is a right attached to the shares. His response to that was to say that it begs the very question in issue and reformulates it. It did not help the counter argument to say that it is a right attached to the shares if that is not what the statute says. He distinguished between a right attached to shares and a remedy conferred on a body of shareholders.

40. This led Mr Crow to address the "black hole" argument, which had found favour with the Chief Justice at paragraph 86 of the judgment, when he referred to the fact that the right to request appraisal disappeared when shares were sold after the Notice but before the meeting; it could not be exercised by the person who held the shares when the notice was issued, and could not be

exercised by the person who held the shares when they were taken by the Company. The Chief Justice took the view that it was unlikely that the legislature intended the right to appraisal to disappear in that way. Mr Crow submitted that the consequence was simply that while this particular remedy was not available to the shareholder, there were other remedies that might be available, such as a derivative action for breach of duty by the directors, or by way of unfair prejudice proceedings. But one would have to accept that this particular statutory remedy would not be available to this particular cohort of investor, something which he submitted was not a surprising result, given the nature of the remedy and its purpose. The appraisal regime is a bespoke remedy that has been created to deal with a particular function, or vice. And Mr Crow did not shy away from saying there was no unfairness if a shareholder who had received the relevant notice chose to sell his shares for $33 per share. If such a shareholder chose to sell his shares, he was making a commercial decision, and using the words of the judge in *Nettar* in relation to the shareholder who bought shares after being informed of the merger, acquiring more shares is his free choice, as referred to in paragraph 29 above, and having made a choice, the adage "you make your bed, you lie in it" applied. It was not a remotely surprising outcome that neither transferor nor transferee fell within the protected body. And of course the reality is that where a shareholder who sold his shares (and the transferee of those shares) lost the appraisal right, the Company benefitted if the appraisal figure turned out to be , say, $40 per share, $7 higher than the $33 offered by the Company. While the Company would be obliged to pay other shareholders an additional $7 per share held, it would not have to pay that sum in respect of shares sold after receipt of the Notice.

41. Mr Crow then turned to the manner in which the Chief Justice dealt with the principles of construction at paragraph 45 of his judgment, where he said this:

> *"Having regard to the principles of construction the Court proposes to consider (i) whether the object of section 106(6) necessarily leads to the conclusion that the Short Term Shareholders are excluded from the appraisal right/remedy set out in that subsection; (ii) whether, as a matter of construction of section 106(6), the Short Term Shareholders come within the scope of section 106(6); (iii) whether the construction of section 106(6) is consistent with the legislative history of section 106; (iv) whether the Company's construction is consistent with its own case as to the categories of shareholders who are entitled to exercise appraisal rights under section 106(6); and (v) the consequences of the Company's construction of section 106(6)."*

42. Mr Crow submitted that the Chief Justice had misdirected himself because he had dealt with the first three points in that order. In relation to the first point, he said that the Chief Justice had answered the question without looking at the legislation. He had gone through some of the overseas legislation, which was based on different statutory regimes, and had failed to take into account that the exercise which should be undertaken was an interpretation of the Bermudian legislation in light of the purpose that it was intended to achieve. Instead, he submitted, the Chief Justice had, at paragraph 47 of his judgment, turned to the Canadian authorities, which, he said, had consistently rejected the argument that shareholders who deliberately bought into the dissent and appraisal remedy should not be entitled to exercise the appraisal right. He referred to the case upon which

the Chief Justice had relied, *Silber v Pointer Exploration Corp* [1998] 64 Alta.LR (3rd) 134, and emphasised that what was being decided in that case (see paragraph 35 of the judgment) was that motive is not relevant to the exercise of dissent and appraisal rights.

43. The next case to which the Chief Justice had referred was *Silber v BGR Precious Metals Inc* [1998] 41 OR 3d 147). Mr Crow submitted that this case was concerned with the correct approach to valuation, and was not a locus standi case. The case is indeed concerned principally with whether the appropriate method of valuation should be net asset value or stock market price. But the Chief Justice quoted from that part of the judgment dealing with standing. The judge had commented that the suggestion had been made (but not pursued particularly enthusiastically) that the plaintiffs should not be able to bring a fair value application because they had bought their shares after the relevant announcement. The judge rejected that submission, relatively summarily, and that was the reason the Chief Justice had referred to the case.

44. The next case to which the Chief Justice had referred was *Brookdale International Partners LP v Legacy Oil & Gas Inc* [2018] AJ No. 728. Mr Crow again submitted that this was not a case dealing with locus standi. Indeed, he submitted that the passage quoted by the Chief Justice made that clear. The issue in the case was whether or not Short-Term shareholders should be given an interim payment on account. So, again, said Mr Crow, this was not a locus standi case.

45. The next case referred to by the Chief Justice was the British Columbia decision of *BC Ltd v Anthem Works Ltd* [2009] BCSC 657. Mr Crow submitted that the paragraphs cited by the Chief Justice demonstrated that this was not a decision about locus standi, and self-evidently not a decision touching on the interpretation of the Bermudian legislation.

46. So Mr Crow submitted that the Chief Justice had gone through irrelevant case law, before accepting Mr Howard's submission that the Canadian courts had categorically rejected the suggestion that the corollary of the Alberta Law Commission's Report is that appraisal arbitrageurs should not be entitled to exercise appraisal rights. Mr Crow queried how such a statement could find its way into a judgment on the interpretation of the Bermudian legislation when the Chief Justice had not yet started looking at that legislation. That criticism seems to me rather harsh; the Chief Justice reviewed the Canadian cases because the Bermudian legislation had drawn heavily on the Canadian legislation.

47. The judgment then turned to the Delaware cases, dealt with between paragraphs 52 to 54, and in relation to these cases Mr Crow submitted that it was not surprising that they had been decided as they had, given the language of the Delaware legislation. It was, he said, unjustified for the Chief Justice to derive as much assistance as he appears to have done from the Delaware cases.

48. Next were the Cayman cases, which the Chief Justice had dealt with between paragraphs 55 and 56. First was *Re Integra Group* [2016] 1 CILR 192. Mr Crow submitted that the passage the Chief Justice had referred to in his judgment demonstrated why the case had nothing to do with the points that we are concerned with. The Chief Justice had stressed a passage which referred to a fair value determination "even when the dissenters are engaged in arbitrage". But the case was concerned

with the correct approach to valuation, and as Mr Crow said, you only get to valuation once you have established that somebody has locus standi. And the position was no different in relation to the second Cayman case, *EHI Car Services Limited* FSD 115 of 2019, where the quotation highlighted by the Chief Justice referred to the irrelevance of whether the shareholders were long term shareholders or engaged in arbitrage. The case was not addressing locus standi.

49. Mr Crow then moved to the Chief Justice's conclusion at paragraph 57 of the judgment, in relation to the findings of the courts in Canada, Delaware and the Cayman Islands, where he commented that the courts of those jurisdictions have consistently held that the fact that a dissenting shareholder had acquired shares after the notice of the meeting to approve the amalgamation or merger was not a relevant consideration to his entitlement to the appraisal right / remedy. The short point for Mr Crow was that these cases were not dealing with the Bermudian legislation, and in large part were not dealing with locus standi. They were dealing with issues that arose after the question of locus standi had been established. Accordingly, the Chief Justice's approach to the foreign case law was, he submitted, misguided. And the Chief Justice had failed, he said, to feed into his interpretation the clear purpose of the legislation identified in the Dickerson and Alberta Reports.

**Abuse of process**

50. Mr Crow next turned to the second ground of appeal, and started by referring to the fact that whereas the critical date for locus standi was 17 March 2021, that for the abuse of process argument was 8 March, the date on which the proposed transaction was announced. He then submitted that the court will strike out a claim as an abuse of process if it involves an improper use of the court's machinery, or if it is being used as a means of vexation or oppression, or if it involves a use of the court's process for a purpose or in a way that is significantly different from its ordinary or proper use. And Mr Crow relied upon the case of *Attorney General v Barker* [2000] 2 FCR 1, and particularly paragraph 19 of the judgment of Lord Bingham in that case to back up that submission.

51. Mr Crow next referred briefly to the case of *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260. He took the Court to that case to demonstrate that the assessment of whether proceedings are an abuse of process is not a matter of the court's discretion; it is a matter of law in respect of which there is only one right or wrong answer. It is to be noted that nevertheless an appellate court will be reluctant to interfere with the decision of the judge where the decision rests upon balancing a number of factors. But Mr Crow maintained that the Chief Justice had "got the law wrong as a matter of principle". Simply put, the purpose of the legislation is to provide an exit route for existing shareholders who are faced with a fundamental change in the business of the company in which he had invested. In this case, he urged, the post-Notice Shareholders had bought shares in the Company knowing that the shares were going to be cancelled, because the transaction was bound to go through, and had bought shares only for the purpose of litigating. Hence, he submitted, those shareholders were using the section 106 remedy for a purpose or in a way that is significantly different from its proper purpose. Those shareholders were in a position entirely of their own choosing. And that led Mr Crow to the case of *Kingboard*, first mentioned at paragraph 13 above.

52. *Kingboard* was a case where proceedings were brought by a minority shareholder who complained that the affairs of the relevant company had been conducted in an unfairly prejudicial manner. The petitioner had previously acquired its shares, but in contemplation of success in its litigation had, with other related entities, increased its shareholding not just after its concerns had first been identified, but even after the presentation of the petition. In dismissing the respondents' strike-out summons. Kawaley CJ said, at paragraph 28 of the judgment that:

> *"It was nevertheless impossible to ignore the strong instinctive feeling that it ought not to be possible to commence proceedings seeking monetary compensation for an alleged injury and to increase the potential award by putting oneself in a 'worse' position than one was in when the suit was filed. It ought to be an abuse of process for a litigant to use legal proceedings designed to afford relief for a legally defined injury as an event with an uncertain outcome upon which one also places a post-filing 'bet', with a view to inflating the award to which the claimant would otherwise have been entitled. At the very least, the timing of such share acquisitions must constitute grounds for this Court, in the exercise of its discretion, declining to grant relief."*

53. Mr Crow submitted that the position of the Short-Term Shareholders was actually worse than the petitioners in *Kingboard*, because at least the petitioners in *Kingboard* held some shares, and were buying more to increase their recovery. This led to a question from the bench regarding the position of a shareholder in the Company who was both a Long-Term and Short-Term Shareholder; Mr Crow did not shy away from recognising that it would be abusive only in respect of half that shareholder's shares, even though that could result in a windfall for the Company in respect of the 50%. Mr Crow's response was that it was only a windfall for the Company if it had not offered fair value for the shares. But that of course would be the issue at trial, and it seems unrealistic to look at matters only on the basis that the Company's offer did indeed represent fair value. Mr Crow recognised that the remedy under section 111 was a discretionary one, and that what the judge in *Kingboard* was considering was whether buying shares later was relevant to the exercise of his discretion.

54. Mr Crow then turned to the Chief Justice's judgment to indicate the three errors that he said the judge had made. First he said the Chief Justice had erred at paragraph 94 in holding that if a shareholder had locus to bring proceedings, to do so was not abusive. The second was at paragraph 95, where Mr Crow said that the judge had made two errors; first in referring to the likelihood of the shares being acquired by the majority, when it was in fact a certainty, and secondly, that the Chief Justice was wrong to accept the submission that the Long-Term Shareholder was just as entitled to protection as any other shareholder. That, he said, ignored the purpose of the legislation. And the third error, he submitted, was for the judge to distinguish *Kingboard* on the basis that it involved the discretionary remedy afforded by section 111, whereas Mr Crow submitted that *Kingboard* had twin bases of abuse and discretion, and the judgment ignored the fact that if a factor is relevant to the exercise of discretion, then it is equally capable of being relevant to the determination of whether or not the proceedings are an abuse.

**Fair value**

55. Mr Crow then turned to the third ground of appeal, and started by referring to what was in play in relation to this ground. He referred to the Company's argument, rejected by the judge, that the greatest figure the Short-Term Shareholders could expect to recover was $33, because they knew, when they purchased their shares that this was the amalgamation price. The judge's rejection of that argument was not the subject of appeal, but Mr Crow criticised the judge for the fact that he had gone further than was necessary and had decided two points of general application, which, it was submitted, were unnecessary for decision, and wrong as a matter of substance. These were the judge's findings that the circumstances in which and the timing at which shares were bought in the Company were not relevant when assessing fair value. Mr Crow wished to be able to argue those matters before the trial judge. The court should determine fair value at trial on the basis of the material then before it.

56. The starting point for Mr Crow's argument is the wording of section 106(6), with particular emphasis on the words "not satisfied that he has been offered fair value for **his** shares". That can be contrasted with the language of section 106(2)(b)(i), which refers to the fair value of **the** shares, and section 106(2)(b)(ii) which uses the same language as section 106(6). Mr Crow submitted that there was no inconsistency between the two subsections; under the former the Company is required to make its own assessment of fair value, which forms the basis of an offer to shareholders. If that offer is refused and appraisal proceedings are commenced, the court is required to assess fair value according to its own principles – see paragraphs 152 and 153 of the Company's skeleton argument, where reliance is placed on the case of *Shanda Games Ltd v Maso Capital Investments Ltd* [2020] UKPC 2, an appeal to the Privy Council from the Cayman Islands. The issue in that case was whether the shareholder's shares should be discounted to reflect the fact that they represented a minority holding in the company. The Privy Council said that the approach of the courts to fair valuation in unfair prejudice cases is essentially the same as the process of fair valuation in relation to the appraisal regime, and a minority discount was applied.

57. Mr Crow maintained that the statutory function of the court was not to value the company or a hypothetical shareholding, but to value the dissenter's shares, and in this regard Mr Crow relied upon the different language of subsections 2 and 6 of section 106. The appraisal remedy was only available to shareholders if invoked, and, if invoked, context requires the court to reach a view on fairness, and fairness is context specific, and requires taking into account any number of considerations. The court was not being asked to assess the market value of the shares. But the essential point Mr Crow was making was that the exercise of determining fair value of the particular dissenting shareholder's shares was an exercise for the trial judge without being bound by constraints imposed by findings made in the context of a strike out application.

**The position of the Dissenting Shareholders – statutory interpretation**

58. Mr Howard started his submissions by saying that the issue in the case was whether the Company could expropriate the shares of the Dissenting Shareholders without the court having the opportunity to determine the true value of their shares. He stressed that at the date of the

shareholders' meeting, all of the plaintiffs were registered shareholders, all were entitled to vote on the proposed resolution which was the subject of the Notice and the circular, thirdly that the Notice and circular were available to be read and intended to be read by all shareholders attending the meeting, having been published online, and the statement of fair value and the statement that each shareholder was entitled to be paid fair value for his shares was a continuing statement right up to the date of the meeting, and not a one-off statement made on 17 March which ceased to apply thereafter. Hence all shareholders would know that the upshot of what was being proposed was that the Company was seeking to expropriate their shares in return for the payment of $33 per share, the figure which the Company maintained was the fair value of the shares. All shareholders were in the same position vis-à-vis the Company, irrespective of when they became shareholders. Mr Howard interposed that in relation to ground 3, that this meant shareholders would receive $33 per share and not something else. He said that the thrust of Mr Crow's submissions on fair value were that in fact no-one was entitled to receive $33 per share, because what they were entitled to receive would depend on their own particular circumstances. And returning to his main theme, the payment of fair value and the right to have the court assess fair value is simply the quid pro quo for the right given to the Company to hold sway over the minority and deprive them of their shares.

59. Mr Howard then turned to the legislation, and emphasised that section 106(6) started with the important word "Any". All of the plaintiffs in the court below fulfilled the criteria of the section; they did not vote in favour of the amalgamation, they were not satisfied they had been offered fair value for their shares, and they had made application for appraisal within one month. Hence they were entitled to seek appraisal of the fair value of their shares.

60. Mr Howard then went back to the way in which the Company put its case, and the great reliance placed on the word "offered' appearing in section 106(6). So the argument was that the word "offered" refers only to the Notice which was served under section 106(2)(b), and that only shareholders who are sent the Notice are within the class of persons who could be said not to be satisfied that they have been offered fair value for their shares. That, said Mr Howard made no sense at all, and he pointed out that the Company's use of Short-Term and Long-Term Shareholders was not to be found reflected in the Act or in any other material. What you did find was that Parliament chose to refer to "any" shareholder. So one had to ask what was the basis for saying that Parliament intended the word "offered" to represent some restricted or artificial concept. At this point Mr Howard turned to the legislative history and the terms of the Act in its original 1981 form. There could, he submitted, be no argument but that in 1981 the Short-Term shareholders would be entitled to the appraisal remedy.

61. Mr Howard then turned to the terms of the explanatory memorandum which accompanied the 1994 amendment to the Act. In respect of the amendment effected to section 106, the note is in the following terms:

> *"Clause 16 of the Bill amends section 106 of the Act. Section106 deals with the approval of shareholders in respect of an amalgamation. The main problem associated with section 106 arises in the context of dissenting shareholders. The section suggests that a dissenting shareholder can only apply to the Court for a*

> *proper valuation of shares after the completion of the amalgamation. Thus amalgamating companies cannot determine the liability due to dissenting shareholders before completion of the amalgamation. The amendments effected to section 106 are intended to overcome this hurdle."*

62. It is plain from this that what the draftsman perceived as a problem was the fact that under the legislation in its original form, a dissenting shareholder could only apply to the court for an appraisal after the completion of the amalgamation, which meant that amalgamating companies could not determine their liability due to dissenting shareholders before completion of the amalgamation. As Mr Howard pointed out, the purpose of the reference to "offer" was not to introduce a requirement for bringing a claim for appraisal, or to limit the class of shareholders who can exercise the appraisal right. The word "offer" was being used in contradistinction to "paid", not to limit the class of shareholders entitled to seek appraisal, but for a temporal purpose.

63. At this point Mr Howard turned to the manner in which Mr Crow had put matters before the Chief Justice, referring to the transcript in detail, and saying that what Mr Crow now sought to do was to brush aside the 1981 Act. Mr Howard accepted that what the memorandum explained was the vice in the existing legislation, as the Law Reform Committee saw it, but said that the important thing was to apply the proper approach to construction, which was common ground, and he referred to the manner in which the Chief Justice had addressed the proper approach, at paragraph 44 of the judgment, to which no issue was taken. And in relation to the change to the 1981 position effected in 1994, one needed to ask the question whether Parliament in 1994 had intended to create some restriction, rather than simply changing the time at which proceedings could be taken. As he put it, using Mr Crow's words, his interpretation only has legs by reason of the structure of the section as amended. And those legs, he submitted, were entirely flimsy and could only be sustained by a strained construction of the word "offered". And it was necessary to consider the position prior to amendment to determine the effect of the 1994 amendment. So both the language of the section and the legislative history make it clear and obvious that in 1994 Parliament did not intend to restrict the class of shareholders entitled to seek appraisal.

64. Mr Howard then examined the case for the Company in more detail. The effect of the Company's submissions was that there was a two step process; "any shareholder" meant "any shareholder to whom the Notice is addressed or given", and secondly, that notice of the meeting is addressed or given only to those who were registered shareholders as at 17 March. Both submissions, he said, were wrong. And he relied upon the manner in which the Chief Justice had dealt with the argument, saying that there was nothing to suggest that "offer" was meant to be a technical concept, tied or restricted to a particular document. It matters not what document is regarded as making the offer. The offer is simply what the Company is proposing is the fair value which the shareholder would be paid. And the Notice, he pointed out, does not refer to "offer". And of course the Short-Term Shareholders did attend and vote at the meeting, and were paid $33 per share for their holdings. So the notion that Short-Term Shareholders were not offered $33 per share, but Long-Term Shareholders were, did not reflect reality. And as Mr Howard pointed out, the terms of the Notice did not seek to draw a distinction between those who were shareholders at 17 March, and those who were not. And the terms of the Notice plainly treated shareholders as being registered

shareholders. And the Notice was clearly a communication to all shareholders, both as at 17 March and thereafter.

65. Mr Howard the referred to the Cayman case of *Gao v China Biological Products Holdings Inc* [2018] 2 CILR 591 (GC), a decision of Kawaley J. The relevant part of the decision for the purposes of this case concerned the standing of the beneficial owner of shares to bring personal claims to set aside an improperly motivated allotment of shares. The judge rejected the argument that the right attached to the shares rather than the to the legal owner. The point that Mr Howard drew from the case was that when a shareholder sold his shares, any right that such shareholder had to dissent by reason of being the addressee or recipient of the notice would obviously not remain with seller, but would pass to the plaintiff purchaser as an incident of ownership of the shares, together with the right to attend and vote on the proposal relating to the shares at the general meeting. And in relation to the Notice, bearing in mind how it was published, everyone was obviously aware of its contents. Mr Howard gave another example of the lack of logic in the Company's case, being where a shareholder bought after 17 March. Such shareholder would always be able to say that he had not been offered fair value by the Company. That, he conceded, was just a riposte, but demonstrated the Company's lack of logic, and the true position was that an offer was being made to all shareholders.

66. Mr Howard then moved on to the purpose of the legislation, and to the argument that the legislature must have intended that the right to apply for appraisal should be withheld from the Short-Term Shareholders. But as he pointed out, the argument applied not merely to the hedge funds who bought in after 17 March, but also to someone who inherited shares, or was gifted them in some way, and so did not become a shareholder until after 17 March. Such a person would have no right to object to the Company's fair value determination.

67. And in relation to the Canadian material, Mr Howard submitted that none of this suggested that the right to receive fair value and the right to request appraisal that goes with it should be withheld from the Short-Term Shareholders. He noted that Mr Crow had started his submissions on this point at paragraph 47 of the judgment whereas the proper starting point was paragraph 46, which started with the Dickerson and Alberta Law Commission Reports. He then moved to the first *Silber* case, and referred to what is set out at paragraph 43 above. Next in Silber was a reference to the case of *Palmer v Carling O'Keefe Breweries of Canada Ltd* [1989] 67 OR (2d) 161, and a quotation from Southey J in that case, dealing with the submission that shareholders buying after the announcement of the amalgamation had "bought into the oppression", which notion was firmly rejected by the judge.

68. Mr Howard then turned to the second *Silber* case, which he said Mr Crow had sought to dismiss because it was a case about public policy. His quotation from the case finished with this passage, from paragraph 35:

> *"I agree with the applicants that motive is not relevant to the exercise of dissent and appraisal rights. Assessing intentions is not relevant, not possible, and not the court's function."*

And Mr Howard referred at this point to the relevant part of the Alberta Report referred to in the judgment.

69. The last Canadian case to which Mr Howard referred was *Brookdale International Partners LP v Legacy Oil & Gas Inc* [2018] AJ No 728, where the same arguments as arise in this case were canvassed, and the appellate court said this, at paragraph 29:

> *"This finding was reversed on appeal in Deer Creek Energy Ltd. v Paulson & Co. Inc., 2009 ABCA 280 at para. 20, 460 AR 180:*
>
> > *'... we discern no legislative intent to distinguish between types of shareholders. It is the ability of investors like Paulson to move freely in and out of the market, and so set the price, that gives the market value approach part of its validity. We also consider the manner in which the appellants acquired their shares to be entirely in keeping with the provisions governing the rights of a dissenting shareholder...'*
>
> *Buying securities in anticipation of a Plan of Arrangement, and other examples of so called "event arbitrage", are an important and legitimate use of the stock exchange. Transactions of this sort promote liquidity and the constant re- setting of the market price."*

70. Mr Howard resumed his submissions with the example of the shareholder who bought shares on 18 March and asked the question "Why does that affect the Company in any way whatsoever?" – the answer to which was that it doesn't. The Company is obliged to pay fair value for the shares, so it makes absolutely no difference to the Company. And if Parliament had been concerned to prevent those who acquire shares with knowledge of a planned merger or amalgamation from being entitled to an appraisal for fair value, it could and would have done so explicitly. And there was nothing in the amendment to the Act or the preparatory materials to suggest that the legislature was at all concerned about appraisal arbitrage. And he reminded the Court that the Company's case was much broader than saying that people who are investment arbitrageurs should be denied a right of appraisal. And he said that what the Company was arguing for was that after the announcement, no-one could buy shares, because if they were to do so, they run the risk that they would be stuck with the Company's value, even if were to be way below fair value. How, he asked rhetorically, does that fit with Bermudian policy?

71. So he submitted that all that Mr Crow had been able to point to was that the suggestion that companies would face expensive proceedings, something which would happen anyway. And if the Company is wrong in its assessment of fair value, justice will be done and it will be required to pay fair value to all, and it would not make a windfall by confiscating shares at an inappropriate value. If the Company is right, it will succeed in the appraisal litigation and recover its costs.

72. Mr Howard then turned to authorities from other jurisdictions, starting with the 2011 Canadian Annual Review of Civil Litigation, and the eighth general proposition set out therein, that the characteristics and motivation of the dissenting shareholder are generally irrelevant to a fair value determination, even when the dissenters are engaged in arbitrage, citing *Silber* and *Anthem Works*. The only case which the Company had relied on was *Nettar*, in regard to which he said the Court had not been taken to the critical passage, to be found at paragraph 169, and particularly the last sentence thereof, which reads "This entire process, upon its natural reading, refers to shares a member held prior to the members' meeting and certainly no later than the time he gave notice of election to dissent". Mr Howard suggested that this paragraph meant that shares purchased after the signalling of an intention to propose a merger and the notice of a meeting to vote on the merger did carry appraisal rights, despite the buyer's knowledge of the merger, so long as they were purchased prior to the members' meeting, and no later than the time the member gave notice of election to dissent. This interpretation seems hard to square with what the judge said at paragraph 136, referred to by Mr Crow and covered at paragraph 29 above. And this does not seem to be the interpretation the Chief Justice put on the case at paragraph 58 of the judgment. But the short answer seems to be that there is nothing in section 179 of the BVI Business Companies Act 2004 comparable to the provisions of section 106(2) and (6) of the Act, which enabled Mr Crow to advance his argument based on the Notice and the cohort of shareholders to whom the offer was thereby made.

73. Mr Howard next referred to the Dickerson Report with a view to rebutting Mr Crow's submission that cases such as *Stern* are relevant, since the Canadian law was an adaptation of the relevant New York law, and hence could be said to have grandfathered the Act. The Dickerson Report refers in terms to the manner in which the Canadian legislation had been influenced by both the substantive and administrative provisions of the New York and Delaware laws.

74. Mr Howard then turned to the case of *Salomon Bros Inc v Interstate Bakeries Corporation* 576 12d 650 (Del Ch 1989), a case decided in the Delaware Court of Chancery by the Vice Chancellor. The case was taken by the respondent in appraisal proceedings by IBC in relation to a merger. During discovery, IBC had learned that Salomon had begun purchasing its shares in IBC after the merger plans had been announced. IBC contended that Salomon had lost its right to seek appraisal. It argued that the appraisal statute was not designed to protect those who wish to speculate on a judicial remedy, and that Salomon had acted in bad faith by purchasing shares with notice of the merger and then demanding appraisal. The Vice Chancellor rejected that argument, describing the judicial determination of fair value as a statutory right given the shareholder as compensation for the abrogation of the common law rule that a single shareholder could block a merger, in the following terms:

> *"The history of our appraisal statute does not support IBC's argument that the statute was designed to protect only those stockholders who purchased their shares prior to the announcement of a merger. Rather, its purpose was to replace the stockholder's veto power with a means of withdrawing from the company at a judicially determined price. None of the Delaware cases cited by IBC suggests otherwise.*

...

*In rejecting IBC's statutory purpose argument, I am aware that several New York courts have denied appraisal rights to dissenting stockholders on facts similar to those presented here. In Application of Stern, N.Y. Supr., 82 N.Y.S.2d 78, 82 (1948), the court found that stockholders who had bought shares "in spite of" a plan of merger were faced with "a choice of their own selection" and therefore were not entitled to appraisal. The court held that the term "stockholder" as used in the relevant statute must be held to mean "bona fide stockholder" – one who acquired his shares prior to the promulgation of a merger plan – in order to give effect to the purpose of the appraisal statute.*

...

*I am not persuaded by the Stern ruling. If appraisal rights were granted as the quid pro quo for the loss of veto power, there is no apparent reason why all stockholders who formerly could have exercised that veto power should not now be able to exercise appraisal rights. The common law veto power was exercisable without reference to the stockholder's motives and it seems reasonable to assume that appraisal rights, likewise, are not determined by reference to a stockholder's purpose."*

75. Mr Howard next turned to consider a number of different scenarios arising from the Company's interpretation of section 106. The first was that what the Company was saying was that it can forcibly acquire certain shareholders' shares without being required to pay fair value, as the legislature intended. He submitted that it would take very clear words indeed to achieve that result, if that was what Parliament had really intended. Mr Howard posited appraisal proceedings where the court found fair value to be $63 per share, and asked on what basis should some shareholders be entitled to $63 per share and others to $33 per share? His next point was the "black hole" point canvassed at paragraph 40 above. And he addressed the point made by Mr Crow that there was a four-week period within which to bring appraisal proceedings, which he said applied to all shareholders.

76. Mr Howard's next point was one raised by the President during the course of argument, in relation to a shareholder who owned 100 shares on 16 March, and bought another 100 shares on 18 March. Mr Crow's position was that such shareholder could only seek appraisal in respect of the 100 shares held on 16 March. Where, Mr Howard asked, do you get that from section 106? The shareholder had received the Notice – Mr Crow's basis for the offer – so further language had to be added to achieve the result for which Mr Crow contended.

77. Mr Howard next turned to the position of beneficial owners, and started with the terms of the Notice. Under the heading covering dissenters' rights, the Notice put matters on the basis that a beneficial owner who was not the registered shareholder was not entitled to exercise rights of

dissent under section 106(6); such a beneficial owner needed to make appropriate arrangements with the nominee holding the legal title, or alternatively have the shares registered in their own names. And in this regard, the Company's position was that it was not necessary to be a registered shareholder at the date of the Notice, but only at the date of the meeting, contrary to the position subsequently taken by the Company. And as Mr Howard pointed out, the Company in fact did a volte face after proceedings were commenced, in terms of a letter sent by the Company's attorneys dated 13 August 2021 to the attorneys for some of the Dissident Shareholders which said at paragraph 5 that the only persons entitled to seek an appraisal in this case are those who were registered shareholders on or before 17 March. And then in the Company's strike out summons the Company again changed its position in relation to beneficial owners of shares, seeking to strike out the originating summons of plaintiffs to the extent that such plaintiffs sought relief as to shares in respect of which the held "neither legal title nor a beneficial interest as at 17 March 2021".

78. In response to a question from the bench, Mr Howard referred to the judgment of Hellman J in *Viking Capital* in support of his contention that "shareholder" means those who are on the register and said that looking at the terms of the section, it would be impossible to think it could be referring to anyone else. So Mr Howard took the position that it was unrealistic to think that the section applied to beneficial owners, and found support for his position in the Delaware case of *Salomon*, where the Vice Chancellor said that the corporation achieves certainty in determining who the stockholders and avoids entangling itself in conflicts between record and beneficial owners by looking only to the record owners. So his submission was that the correct position was as taken in the Notice, and this meant that a beneficial has no right to vote, no right to receive a notice and no right to an appraisal. Only a registered shareholder can vote or seek an appraisal. And the position of beneficial owners was, he said, "informative of the position". The final reference Mr Howard made was the point made for the Company that because of Jardine Matheson's holding, the amalgamation would necessarily be approved. He said that made no difference to the legal position. All of the arbitrary and capricious results which he had identified flowed from the Company's case, trying to read into the section a limitation which is not there.

**Abuse of process**

79. Mr Howard started by noting the shift in the Company's case which he said made the Company's case more narrow and even more hopeless. And he started with the example of the purchase of a debt which was disputed, so that legal action was required to recover it. There is nothing wrong, he submitted, with the purchase of a chose in action where it is anticipated that legal action will be needed to enforce the rights concerned. The abuse of process argument seems to disappear to the extent that it is based on the assertion that anyone buying shares after 17 March was buying in to litigation. On the Company's case you are abusing the process of the section if your hope when buying shares is that there is going to be an amalgamation, and your intention is to appraise the value of the shares. Why, he asked, should that be an abuse of process? And the simple point was that if the Dissident Shareholders were right that any shareholder who dissented had a right to seek appraisal, how can it be an abuse of process to exercise the very right that Parliament gave you? It was, he submitted, a contradiction in terms; the problem for the Company was that once it lost on the construction argument, it was impossible to say that Parliament gave this right to all

shareholders, but when it comes to abuse of process, to say no, it only gave the right to some. The reality is that once you reach the position that the plaintiffs are entitled to bring this action, it is difficult to see how it could ever be an abuse of process to bring the action. And having a secondary purpose would be irrelevant.

80. At this point Mr Howard referred to the case of *In re Appraisal of Dell Inc* No 9322-VCL, 2015 WL 4313206, a case in the Court of Chancery of the State of Delaware where judgment was given by the Vice Chancellor. And dealing with appraisal arbitrage, and the fact that opponents of appraisal arbitrage frequently advocated elimination of the ability of appraisal petitioners to seek appraisal for shares acquired after the record date, he said:

> *"In my view, the rise of appraisal arbitrage suggests the need for a more realistic assessment of the depository system that looks through Cede to the DTC participants. But first, a caveat: Looking through DTC would not eliminate the ability of appraisal petitioners to seek appraisal for shares acquired after the record date, which is an outcome that opponents of appraisal arbitrage frequently advocate. As to that possibility, it is not clear to me why the law should treat a stockholder's right to seek an appraisal differently than how it treats other legal rights. An appraisal claim is simply a chose in action. As such, the claim passes with the shares. In a market economy, the ability to transfer property, including intangible property, is generally thought to be a good thing; it allows the property to flow to the highest-valuing holder, thereby increasing societal wealth. For creditors, the ability to sell a bundle of property rights that the buyer can enforce is unquestioned. When a creditor assigns a loan, even one in default, the right to enforce the loan passes to the new holder. No one objects that the assignee purchased a lawsuit. It is not apparent to me why a right held by the equity side of the capital structure should be treated differently, particularly when the right to bring an appraisal proceeding has been compared by the Delaware Supreme Court to a debt collection action."*

That, submitted Mr Howard, represented a powerful and reasoned explanation why it is not abusive to purchase shares in the knowledge that you may have to bring appraisal proceedings. It may have been more accurate to have said "intended" rather than "may have", but the underlying point remains the same.

81. Mr Howard then turned to the *Anthem Works* case, referring to paragraphs 24 and 26 of the judgment, which are in the following terms:

> *"[24] While the plaintiffs did invoke the jurisdiction of this Court, they did so only after dissenting from the Arrangement which Anthem proposed to its shareholders. They were entitled to do so, either individually or collectively, if Anthem declined to increase its offer for their shares after receiving notice of their dissent. The remedy they pursued was entirely open to them as shareholders, in the event that they were prepared to challenge the value placed upon their shares by Anthem.*

...

> *[26] As far as statutory intent is concerned, the CBCA provides for precisely the actions which the plaintiffs took. They speculated on the value of Anthem's shares, and purchased at least some of their shares at prices in excess of what Anthem was offering to its shareholders. They were then able to recover more for their shares than they paid for them. That is what most who invest in securities hope to accomplish."*

So it was clear, he submitted that there was absolutely nothing wrong with such a course; the plaintiffs are all seeking to exercise a right for the purpose for which it was given.

82. Mr Howard then turned to *Kingboard*, and Kawaley CJ's comments in paragraph, 28 set out at paragraph 52 above. And Mr Howard's immediate point was that this case had nothing to do with section 106 of the Act, and nothing to do with oppression. In the Court of Appeal, the appeal was allowed, but on Kawaley CJ's finding at paragraph 28, Clarke JA, as he then was, shared his view.

83. Mr Howard then endorsed the manner in which the Chief Justice had dealt with this argument, at paragraph 96 of his judgment, finding that there was an important difference between a section 111 petition and an application under section 106(6) of the Act. In *Kingboard* the shares were purchased after the petitioner had alleged oppression. In this case, the share purchases were all effected before the meeting approving the amalgamation, and before the appraisal request was made. And section 106 did not require any investigation into the conduct of the majority. It is concerned only with determining the true value of the shares in question. The case of *Kingboard* therefore had no relevance to these proceedings.

**Fair value**

84. Mr Howard started by saying that it was important to understand how the point had been put below, and referred to the Company's skeleton argument in which it had stated that the court does not appraise the fair value of the Company, or all its shares, but the fair value of the plaintiff's shares. That was the argument put before the Chief Justice, and Mr Howard maintained that it was brazen on the part of the Company to complain when the Chief Justice ruled on the argument which had been made to him, but in a way the Company did not like. Mr Howard referred to the transcript where the Chief Justice had asked Mr Crow whether he was aware of any case where a court valuing shareholders' interest under section 106(6) or similar legislation has given different values to different shareholders. The answer was no, with Mr Crow maintaining that the process was not one of valuing the Company. What was put before the court was that fair value meant fair in relation to the particular parties before the court, and the whole question of whether or not you engage in a subjective assessment of the circumstances of each shareholder, and in particular the subjective circumstances of each shareholder at the time he acquired his shares. And the Chief Justice heard the argument and rejected it.

85. Mr Howard then posited different circumstances under which a particular shareholder had acquired his shares, saying that had nothing to do with fair value, and involved the Company (which had said it would pay $33 per share) later saying that that was not the appropriate number for a particular shareholder. Because, as Mr Howard put it, it could not be said that $33 was the floor if the Company's case was that fair value depended on a shareholder's circumstances. And Mr Howard referred the Court to the relevant paragraphs of the judgment.

86. Mr Howard referred the Court to the Cayman case of *Re Qunar Cayman Limited* [2019] 1 CILR 611, where Parker J, addressing the question of fair value said:

> *"For example, the character and motivations of the dissenters are strictly irrelevant as is the timing and amount of their investment. It does not matter that the dissenters bought after the merger announcement with full knowledge of it and before the EGM, or whether they in fact voted for the merger or not. That does not affect their entitlement to be paid the fair value of their shares. Even if they can be described as speculative investors engaged in arbitrage, rather than long-term shareholders who are being "taken out" by the majority against their will, that is not relevant to the determination of the fair value of their shares. There is no more or less deserving dissenting shareholder in the assessment of "fair value." Fair value needs to be determined in one way for all dissenting shareholders."*

87. The same judge set out the same sentiment in Re *EHI Car Services Limited*, unreported, 24 February 2020, at paragraph 64. And Martin JA refused leave to appeal in the case of *58.Com, Inc v Dissenting Shareholders*, unreported, 18 August 2022, in which he agreed with Parker J's approach to this issue. Finally, Mr Howard referred to a speech given by Lady Arden, on which he had not relied, and which does not need to be addressed.

**The Company's reply – statutory interpretation**

88. Mr Crow began his reply by submitting that there was a wealth of material showing that the purpose of the legislation was to provide an opt-out for minority shareholders facing a fundamental change in the company, and there was no material showing that the purpose was to extend the remedy to anyone else. He urged the Court to start the process of interpretation understanding its purpose. The question the Court had to grapple with was what, in the context of section 106(6) was the offer. And the answer, suggested Mr Crow, was that the requirement for a statement of fair value in subsection 2 and the introduction of the word "offer" in subsection 6 of section 106 led to the conclusion that the Company's interpretation was to be preferred, and the reference to a shareholder not being satisfied that he had been offered fair value in subsection 6 was a reference to the offer contained in the Notice.

89. In relation to the effect of the 1994 amendment, Mr Crow first said that this was not a point that the Court needed to decide, but that if the Court felt inclined to decide it, the Court could perfectly easily have reached the same interpretation on the original language as the Company now urged. And he submitted that if the original purpose was not fulfilled, that did not support the argument

on the other side that in 1994 there was an unintended change of outcome. What might be the position, Mr Crow suggested, was that if the 1981 language did not achieve its purpose, then the 1994 amendment did. And the that might explain why there was no reference to it in the explanatory note, because the legislature did not consider it was introducing a fundamental change of purpose and outcome. When this theory was queried from the bench, Mr Crow said there was nothing remotely surprising about that.

90. Mr Crow then made reference to *Silber v BGR*, maintaining that contrary to Mr Howard's submissions, the case was not concerned with locus standi. And similarly with *Silber v Pointer*, Mr Crow said that the case was not about locus, but whether or not the motives of the claimants were a relevant factor in their entitlement to claim relief. Mr Crow said that the Company had never suggested that motive was relevant; their argument was based on the timing of the acquisition and its relevance to the existence of the entitlement to invoke the remedy. In relation to the foreign cases which the judge went through, Mr Crow said the Company's approach was no more than to identify the purpose of the legislation and then interpret the Bermudian statutory regime. Mr Crow submitted that Delaware's position on appraisal arbitrage had shifted, but the real point was to take an approach to statutory interpretation based on the purpose of the legislation.

91. Mr Crow then turned to the position of beneficial owners of shares. He said that the Jardine circular may or may not have got the position on the rights of beneficial owners, but right or wrong, the circular was not an aid to statutory interpretation. When pressed on how beneficial owners had a right of appraisal, Mr Crow said this was not an issue the Court had to decide and rehearsed the different possibilities, while maintaining that the only question for the Court was if a person was neither a beneficial owner nor a registered member at the date the Notice was served, are they entitled to bring appraisal proceedings.

**Abuse of process**

92. Mr Crow maintained that the abuse of process point was advanced irrespective of the outcome on statutory interpretation. He said it was not a sound proposition to say that if you have locus, it could not be an abuse to bring the claim. Abuse of process has a function where someone has a cause of action. In the present case, the Company was inviting the Court to take on board the purpose for which the legislation was introduced, and if that purpose was to confer an exit route on existing shareholders facing a fundamental change, somebody who buys shares in order to bring litigation is using the legislation for a purpose which is entirely different from what it was intended to achieve. He said that Mr Howard's example of buying debt entirely missed the point, because a debt is assignable whereas the appraisal remedy is a unique statutory remedy, and the question is "on whom is the remedy conferred?". And in *Dell*, to which Mr Howard had referred, what was being discussed was on the basis of the legislation in that particular jurisdiction. And the other case on which Mr Howard relied, *Anthem Works*, was a decision on different facts in relation to different legislation.

93. And finally, in relation to *Kingboard,* Mr Crow repeated that at least the shareholders in *Kingboard* had acquired shares at an earlier stage whereas the Dissenting Shareholders had bought only after the announcement had been made. But that argument had been made before.

**Fair value**

94. Mr Crow began by reference to the Cayman cases decided by Parker J, and said that they were, obviously, decided by reference to the Cayman legislation, but more importantly, were decided before the decision in *Shanda v Maso*. The case law made it clear that in the exercise of its jurisdiction in unfair prejudice cases, the court takes account of the circumstances of the petitioner. And it was, Mr Crow submitted, wrong to tie the trial judge's hands by making a pre-emptive ruling saying you cannot take into account things such as the timing and acquisition of shares. Mr Crow insisted that it was relevant to the fair value of the shares to know that shareholder A bought for $10, and shareholder B bought for $15. That, he said, was a matter for expert evidence, and it would be relevant if the expert said it was. And he maintained that it was open to the court to apply different fair values to different categories of shareholding. And he referred to the relevant section of the Cayman Companies Act, section 238(9), which required the company and the dissenting shareholder to agree on the price to be paid for the shares, and if they failed so to agree, to file a petition with the court and a list of dissenters, with their details. Mr Howard then referred to subsection 11, which referred in terms to determining the fair value of the shares of such dissenting members as it finds are involved.

**Findings – the proper construction of section 106 of the Act**

95. Mr Crow's starting point was that the class of persons entitled to pursue the appraisal remedy is limited to those persons to whom notice was given pursuant to section 106(2) of the Act, a contention which the Chief Justice rejected at paragraph 69 of his judgment. He had already held (paragraph 59) that he preferred the approach of the courts of Canada, Delaware and the Cayman Islands, and that the purpose of section 106(6) did not necessarily lead to the conclusion that the right to seek appraisal is limited to those who held shares prior to the date of the notice of the meeting called to approve the amalgamation.

96. The first point to be made in relation to the appraisal regimes in the other jurisdictions to which the Court was taken is that none of them uses the language of the Bermuda legislation, so that the cornerstone of Mr Crow's argument, (that the offer referred to in section 106(6) is circumscribed by the notice provisions of section 106(2), such that a shareholder who has not received the notice provided for in subsection 2, cannot be said to have received the offer provided for in subsection 6), is simply not present in the legislation of the other jurisdictions. It therefore seems to me that very little reliance can properly be placed on the case law from those jurisdictions, except in the most general of ways. And Mr Crow recognised this on a number of occasions.

97. And in relation to the purpose of the legislation, the general objective of providing a mechanism for shareholders whose shares were being expropriated to seek an appraisal of those shares, is

altogether a different question than the one raised on this appeal, which is the different question as to which of the shareholders is entitled to the benefit of the appraisal remedy.

98. It does seem sensible to me to look at what the draftsman of the Bermuda legislation passed in 1994 believed its effect to be. And in this regard the starting point is the 1981 provision in its original form. In relation to this issue, I would reject Mr Crow's assertion that the original legislation could be interpreted on the same basis as the Company is now urging in respect of the post 1994 legislation. The right to seek appraisal was originally given to "Any shareholder not satisfied that he has been paid fair value for his shares". There was no reference in the original section to any requirement that notice of the company's assessment of fair value be given, and, critically, the word "paid" was used rather than "offered". This earlier wording created the problem identified by the draftsman in the Law Reform Committee's report on the proposed legislation. The issue was one of timing, so that going forward, amalgamating companies could determine the extent of their liability to dissenting shareholders before completion of the amalgamation. As the report indicated, the amendments effected to section 106 were intended to overcome that hurdle. The notion that the legislative change in 1994 was intended to limit the shareholders entitled to apply for the remedy of appraisal in the manner contended for by the Company, without the draftsman having made any reference to such a dramatic change, is not realistic, and I would firmly reject it. The purpose of the 1994 amendment is, in my view, critical in understanding the interpretation of the section in its present form. And it should perhaps be remembered that there had, by 1994, been one high profile and long running case in Bermuda in which arbitrageurs were involved, in the form of the case concerning the attempted hostile take over of Sea Containers in 1989.

99. The next point to be made is that made by Mr Howard regarding the various difficulties he identified on the Company's construction; these include the Company's changing position in relation to whether, and if so how, the right to appraisal existed for beneficial owners as opposed to registered shareholders, a question which Mr Crow was unable to answer satisfactorily – see paragraph 38 above. Then comes the 'black hole' point - the disappearance of the right to request appraisal when shares were sold after the Notice but before the Meeting. And next is the position of the shareholder who was both a Short-Term and a Long-Term Shareholder, where the Company's position was that in the event of an appraisal at $63 per share, the shareholder would receive $63 per share in respect of some of his shares and $33 per share in respect of others. All of these examples demonstrate that the interpretation contended for by the Company simply does not work. And I would, as indicated, reject this ground of appeal and the Company's case as to the effect of section 106 of the Act.

**Abuse of process**

100. The manner in which this argument was put for the Company requires a rather nuanced approach. The Company accepted that even if it were to be wrong on the right of the Dissenting Shareholders to seek appraisal, nevertheless they could be prevented from doing so on the basis that the motive of the Dissenting Shareholders was not to take advantage of the purpose for which the legislation had been enacted, to confer an exit route on existing shareholders facing a fundamental change, in

the business of the company, but rather in buying shares in order to bring litigation. That, the Company maintained, was abusive.

101. No doubt I should deal with the *Kingboard* case straight away. It seems to me that there is a world of difference between the discretionary remedy available in a case of unfair prejudice, and the statutory remedy afforded by section 106 where the shareholder (assuming he has locus) is entitled to apply to the court to have his shares appraised. Any judge in the position that Kawaley CJ found himself in *Kingboard* would conclude that it simply could not be right for a shareholder complaining of the conduct of the majority to place a "post-filing 'bet'", as Kawaley CJ put it, with a view to inflating the award to which he would otherwise be entitled. The discretionary nature of the remedy alone is probably enough to put the case in a different category from the one before this Court. So I am firmly of the view that *Kingboard* can be distinguished and affords no assistance to the Company in this case.

102. I found myself asking the very question that Mr Howard posed during the course of his submissions. How can it be an abuse of process to exercise the very right given to you by Parliament? If a shareholder is entitled to seek appraisal, ie to bring the action by which the appraisal exercise is conducted, how can it be abusive to do so? The answer to Mr Crow's submission seems to turn on the motive of the dissenting shareholder. But as Mr Howard submitted, what had been put before the Chief Justice by the Company was that the court did not appraise the fair value of the Company or all its shares, but the fair value of the plaintiff's shares. That case had been put before the Chief Justice and he had rejected it. And the cases make it clear that the motive of the particular shareholder in making his purchase is not relevant – see, for instance, Parker J in *Qunar* and *Silber v Pointer*. If a shareholder is entitled to pursue a statutory right to appraisal, his motivation in doing so cannot be said to affect that right.

103. I agree with Mr Howard's submissions, and it follows that I would reject the Company's argument that even if the Dissenting Shareholders are entitled to pursue the appraisal remedy, they are precluded from doing so on the grounds that to do so would be an abuse of process. And I would therefore reject this ground of appeal.

**Fair value**

104. Essentially, the Company's complaint is that the Chief Justice went further than he needed to, or should have done, when dealing with the Company's submission that the greatest figure the Dissenting Shareholders could expect to recover was $33 per share, because they knew, when they purchased their shares, that this was the amalgamation figure. Mr Howard's response was to refer the Court to the Company's skeleton argument before the Chief Justice. The argument there, as I understand it, was that when assessing the fair value of the Dissenting Shareholders' shares, the court should take into account the circumstances under which the shareholder bought his shares. This, says the Company, includes the knowledge that they would be compulsorily acquired at $33 per share, so the court must inevitably find that the fair value of the shares cannot be more than $33 per share.

105. The Company also says that to do otherwise would be inconsistent with *Kingboard*. I have already said that I do not think that *Kingboard* has any relevance for the purpose of these proceedings. And the argument that the court must inevitably find that the fair value of the shares must be $33 per share seems to me to be inconsistent with the Company's argument (which I do not accept) that it was open to the court to find different values for different shares. For my part, I entirely agree with the comments of the Chief Justice made at paragraph 107 in relation to the court's ability to find that the fair value of the shares of one shareholder could be X and the fair value of the identical shares of another shareholder could be Y. And the Chief Justice also commented (paragraph 109) that the Company's approach would produce the astonishing consequence that in order to conduct an appraisal the court would be required to undertake an individual assessment of the circumstances of each shareholder, and of the Company, at the time they bought their shares. That seems like a recipe for extending the length of the appraisal proceedings by many months, and furthermore to produce an outcome which makes no sense at all. The Company asked its question, and the Chief Justice gave his answer, with which I agree. I would therefore reject this ground of appeal.

106. It follows that I would dismiss the appeal.

**KAY, JA:**

107. I agree with both judgments.

**CLARKE, P:**

108. I agree with my Lord's compendious judgment and would wish only to add the following.

109. The purpose of the Act, as it seems to me, is (when applied to present circumstances) that Jardine Matheson should be enabled compulsorily to purchase shares in Jardine Strategic provided it pays a fair value for them. The price which was offered was US $ 33 per share. That price may or may not have been a fair value. The fair value is the fair value as at the date of amalgamation; and is not determined by the date upon which the shareholder purchased his shares (or why he did so).

110. If, however, $ 33 was not, but $ 35 (say) would be a fair value, I see no good reason why all those whose shares were compulsorily purchased should not be paid $ 35 per share, whenever they acquired them. If it were otherwise, A, who acquired shares on 16 March 2021 would get $ 35 per share, if he held the shares at the date of amalgamation and timeously sought an appraisal. But B who bought shares on 18 March would only get $33 per share; as would A in respect of any additional shares he bought after 17 March. If A had held shares for a long time up to 20 March when he sold them, neither he nor the purchaser from him would have any appraisal rights either. Similarly, if on 20 March X inherited shares from, or was given, shares, by someone who had held them for years, he would only get $ 33 per share. For its part, Jardine Matheson would get the windfall benefit of shares whose fair value was $ 35 for $ 33.

111. I can discern no satisfactory basis upon which the Legislature could have intended such a result. If that was its intention, it could easily have said so clearly.

112. I agree that there are, also, a number of other significant considerations namely:

(a) under section 106 (6) of 1981 Act (before the amendment of 1994), the appraisal remedy was open to any shareholder "*who was not satisfied that he had been paid fair value for his shares*", in the light of which there could, in my judgment, be little doubt but that all those whose shares were compulsorily purchased would get $ 35 whenever they had purchased them;

(b) the reason for the 1994 amendment was to enable shareholders to apply to the Court for a proper valuation after an offer had been made, rather than being compelled to wait until the completion of the amalgamation; in this way the extent of liability to dissenting shareholders could be determined before completion of the amalgamation: see the Explanatory Memorandum; and

(c) no suggestion was made at the time of the 1994 amendment that its purpose was to prevent Short-Term Shareholders – a concept which finds no expression in the legislation - from receiving a fair value.

In those circumstances, the proposition that the construction which we favour is not in accordance with the purpose of the legislation seems to me unsustainable.

113. Further, as a matter of construction the Short-Term Shareholders who, in the present case, claim that $ 33 is not a fair price can readily be taken to come within 106 (6) of the Act. They fall within the expression "*Any shareholder*". They have not "*vote[d] in favour of the amalgamation or merger*"; nor are they "*satisfied that [they have] been offered fair value for [their] shares*". What has been offered to them is the $ 33 set out in the Notice and circular which were available and intended to be read by all the shareholders attending the meeting. I do not accept that the right of appraisal can properly be limited to those who were shareholders on 17 March.

114. I view with equanimity the fact that, on this approach, arbitrage may be more frequent. Arbitrage in this context means no more than that people may be prepared or encouraged to purchase shares after the $ 33 price has been announced in the hope that the fair value which is later determined may be greater than that. There is nothing wrongful, abusive or in bad faith in that; arbitrage is a legitimate part of the market place and contributes to liquidity; the preparedness of others to purchase may be advantageous to existing shareholders in a variety of differing circumstances; and whatever deals are done in relation to shares will not mean that anything other than a fair value is to be paid.

115. Lastly, our decision may not have the effect, no doubt desired by the appellants (for understandable reasons), of reducing the number of people who can claim to be paid more than $ 33 per share; and may mean that the costs of litigating the question of value (and the time necessary to do so)

will be greater than they would be if there were a more limited number of persons entitled to an appraisal of a fair value. But neither of these considerations justifies taking a different stance. The $ 35, in my example, ought to be paid to all shareholders as at the Amalgamation Record Time i.e. 14 April 2021. If the complaints that $ 33 is not a fair price are ill founded, then the costs of the exercise can be visited on those who made them; and the Court has enough weapons in its armoury to prevent unacceptable delays.

116. Accordingly, the appeal will be dismissed. We would expect that costs should follow the event. We, therefore order that the Respondents should have their costs of the appeal, to be taxed on the standard basis if not agreed, subject to the receipt within 14 days of any application in writing in respect of costs, in the absence of which our order shall become absolute.