IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 184 OF 2020 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF FGL HOLDINGS

Appearances:

Mr. Tom Lowe KC instructed by Mr. Sam Dawson and Mr. Tom Stuart and Mr. Nigel Smith of Carey Olsen for the Dissenters

Mr. Mac Imrie KC instructed by Mr. Malachi Sweetman and Ms. Christiana McMurdo of Maples and Calder (Cayman) LLP for the Company

Before:	The Hon. Justice Parker
Heard:	27 February 2023
Date of Decision	19 April 2023
Draft Judgment Circulated	3 April 2023
Judgment Delivered	19 April 2023

HEADNOTE

Costs-s.238 petition-successful party-costs of discovery exersise-indemnity costs-interim payment-specific costs of e discovery -interest.

JUDGMENT

Introduction

1. Following the Court's determination that the fair value of the Dissenters' shares in the Company was the transaction price on the Valuation Date, by its Summons dated 25 November 2022, the Company seeks an order that it may recover its costs from the Dissenters pursuant to GCR O.62 r.4 on a standard basis.

2. It also seeks orders that the costs of providing discovery that it has incurred should be payable on an indemnity basis and that there should be an interim payment.

3. There is also an application for specific costs of the Company's *e discovery* provider (the Relativity database platform) if the Court were to award costs on a standard basis and for interest on those costs.

4. The Dissenters oppose each of the orders sought and submit that the Court should make no orders as to costs in the proceeding.

Company arguments

5. Mr Imrie KC submitted:

a) The Company was the successful party in the proceedings because fair value was equivalent to the Merger price (referred to as the "Transaction Price" in the Ruling) and therefore the Dissenters did not recover more than they would have received if they had accepted the Merger consideration and not exercised their dissent rights under s.238.

b) Similarly, the Dissenters did not recover more than if they had accepted the Company's offer made on 15 July 2020 pursuant to the mandatory provisions of s.238(8). Therefore the Dissenters are the unsuccessful parties in the litigation and the Company is entitled to a costs order in its favour on the basis that it was the successful party and that "costs should follow that event": this result follows from an application of the usual cost principles and in particular the application of those principles to s.238 cases, as per the rulings in *Integra*, *Qunar*, and *Trina Solar*.

c) Further and alternatively, following negotiations on a without prejudice except as to costs basis, on 28 August 2020 the Dissenters received from the Company a non-refundable interim payment for more than the Transaction Price. Applying the Cayman Islands principles applicable to *Calderbank* offers and interim payments, including in the context of s.238 cases, the Company is entitled to claim its costs incurred after the date of the Dissenters' acceptance of that payment; and

d) Alternatively, if the Court was to apply an issues-based approach to the question of costs, the Company succeeded on all of the main issues in the case, subject to only one exception, and it should nevertheless be entitled to a full costs order in its favour.

Dissenters arguments

6. Mr Lowe KC for the Dissenters submitted that at trial the Company asserted that the Merger Consideration was more than fair, and that it should not be expected to compensate the Dissenters by the same amount.

7. The Company argued that fair value could be determined by exclusive reference to the market price of FGL shares as at the Valuation Date, with adjustments to reflect the value ascribed to the Merger transaction (the "Unaffected Adjusted Market Price"). It proposed not to pay the Dissenters the Merger Equivalent Price, but instead to pay them an 'unaffected adjusted market price' of $8.60 per share (i.e. only 25 cents more than the cash portion of the merger consideration).

8. At trial the Dissenters argued that the market price of FGL Holdings was unreliable, and that the Merger Consideration was unfairly low. They proposed that fair value should be determined by reference to the forecasted dividends of FGL (had it continued as a going concern). The Dissenters' valuation expert, Scott Davidson, gave evidence proposing that the Court ascribe a 10-20% weighting to the Merger Equivalent Price and a 80-90% weighting to the output of a Discounted Dividend Model.

9. Mr Lowe KC submitted that by its judgment of 20 September 2022 the Court rejected both sides' case: it declined to adopt the Unaffected Adjusted Market Price contended for by the Company, but also declined to accept the Discounted Dividend Model (DDM) contended for by the Dissenters.[1] Essentially, the Court found that the former was unduly skewed by the short-term

[1] *In the matter of FGL Holdings* (Unreported Judgment, 20 September 2022 (Parker J)) at [583] – [584]

impact of Covid-19 and the latter was unreliable in the context of an insurance company subject to particular capital requirements[2].

10. The Court held that the fair value was the Merger Consideration. The Company was ordered to pay the Dissenters $11.06 per FGL share outstanding at the time of the merger, which was the experts' best estimate of the Merger Equivalent Price as at the Valuation Date. The Court determined that the Merger Consideration was neither an upper-bound nor a lower-bound of fair value. Rather, it was an "*estimate which the Court considers is equally likely to be below fair value, as it is to be above it*"[3].

11. Mr Lowe KC also submitted that properly analysed, the interim payment was less than the fair value: the Company is seeking to take advantage of a collateral gain on the sale of FNF shares, which was not part of the interim payment.

The Law

12. Section 238 (14) of the Companies Act provides: "*..the costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances".*

13. In the first s.238 case to come to trial the Court held that a shareholder who does nothing more than record his dissent and decline the Company's offer, thereby triggering his right to a judicial determination, should not be liable for the Company's costs[4]. No subsequent case has proceeded to trial on that basis. Dissenting shareholders have advanced vigorous positive cases.

14. Where a shareholder actively participates in the proceeding and asserts a positive case, Order 62, Rule 4 of the Grand Court Rules will apply[5].

15. O. 62, r 4(2) provides that:

> "*The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by the successful party in*

[2] Ibid at [384] and [443]
[3] Ibid at §598
[4] *In the Matter of Integra Group* [2016 (1) CILR 192] at [6]
[5] Ibid § 6 Jones J; *Qunar Cayman Islands Limited* (FSD 76 of 2017, Unreported Judgment, 29 March 2021 (Parker J)) at [129].

conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court."

16. The Court needs to assess who the successful party was.[6] The meaning of 'success' in s. 238 cases is, necessarily, fact dependent. It is not simply a question of 'who writes the cheque' but depends on matters such as the arguments advanced by the parties at trial, their conduct in the lead up to and at trial, the opinions provided by valuation experts, the decision ultimately reached by the Court, and any prior offers made by the Company[7]. Some of the previous cases are illustrative,but each case is highly fact dependent.

Integra

17. In *Re Integra Group*[8], the Dissenters contended that the value of their shares was $135 million, and not $85 million as alleged by the Company. The Court determined that the 'fair value' was somewhere between the parties' positions – US$105 million. This led both parties to argue that they had been the successful party.

18. Jones J concluded that fair value was more (in fact 17% more) than the merger price, and that the Dissenters were therefore the successful party because they had recovered more than had been offered to them in the merger and much more than the Company contended for at trial.

19. At § 8 Jones J stated:

"*I do not think that it is helpful for me to attempt to lay down any generally applicable principles or criteria by which to determine what constitutes success or failure in an appraisal action, save to say that it must depend upon the circumstances of the particular case. In this case the Company's fair value offer made pursuant to section 238(8) was US$10 per share (or $20 per GDR). In effect, the Company thereby confirmed its determination that the amount of the merger consideration constituted fair value. There is no evidence before the Court about any negotiations which may or may not have taken place at this stage or at any later stage during the course of the proceeding*[9]*. All I know is that the Respondents rejected $10 per share. However, the Company resiled from this*

[6] *Elgindata (no 2)* [1992] 1 WLR 1207 at 1214 per Nourse LJ
[7] *Qunar* ibid at § 147
[8] (FSD 92 of 2014, Unreported Judgment, 10 September 2015 (Jones J))
[9] Integra was heard before it had been established by CICA in Qunar that the interim payment provisions in the G.C.R. applied to appraisal proceedings under s.238 of the Companies Act.

position and put its case on the basis that the fair value was US$8.41 per share with the result that the principal amount payable to the Respondents collectively would be US$13,073,513.20. In the event, I concluded that the fair value was US$11.70 per share, resulting in a principal amount payable of US$18,187,883.00. On this basis I think that the Respondents must be regarded as the successful party."

20. The Court also regarded the Dissenting Shareholders as successful because it had relied on and preferred the Dissenters expert evidence.[10]

"*I regard the [Dissenters] as the successful party because I preferred Mr Taylor's valuation approach which led me to conclude that the fair value of Company shares was substantially greater than the mid-point of the value advanced by Mr Robinson".*

21. The Company, as the unsuccessful party, argued for an issues based costs award. The Court rejected that argument[11]. Jones J stated at §9:

"*The Company argues that the Court should take a more nuanced approach. Whilst there may be circumstances in which it is appropriate to exercise the Court's discretion by reference to the outcome of identifiable issues rather than the overall result, I do not think that there is an appropriate basis for doing so in this case. I valued Integra at US$105 million. This was substantially less than the value of US$130/135 million contended for by Mr Taylor, the Respondents' expert witness. It was also substantially more than US$85 million, which was the value contended for by the Company based upon the mid-point of Mr Robinson's range of values. I do not think that the Company can be regarded as the successful party because the Court's valuation of $105 million is closer to $85 million than $135 million. Nor do I think that the Company should be regarded as the successful party because the Court's valuation is only $5 million more than the high end of Mr Robinson's range. I regard the Respondents as the successful party because I preferred Mr Taylor's valuation approach which led me to conclude that the fair value of Company shares was substantially greater than the mid-point of the value range advanced by Mr Robinson. The fact that I decided the "big tax issue" in favour of the Company does not detract from the overall commercial result. The Respondents recovered more than the fair value of US$10 per share originally offered and substantially more than the fair value of US$8.41 for which the Company contended at trial. On this basis I regard the Respondents as the successful*

[10] §9 ibid
[11] §9 ibid

party and I am not persuaded that there are any circumstances which would lead me to depart from the conclusion that they should have their costs of the proceeding to be taxed on the standard basis, if not agreed'.

Qunar

22. In *Qunar*, the fair value at trial was held to be US$31.20 per ADS, slightly more than the merger price of US$30.39, but lower than an offer of US$36.468 per ADS made without prejudice save as to costs (WP offer) on 7 February 2019, about two weeks before the trial was scheduled to commence. The Dissenters did not accept the WP offer.

23. *Qunar*[12] therefore resulted in a marginal victory by the Dissenters in excess of the merger price (US$0.81 or 2.6%) which again led both parties to argue that they had been the successful party.

24. The Company's position on its costs application was that each party should bear their own costs up to the date of the WP offer, but that the dissenting shareholders should be ordered to pay the Company's costs from that date forward.

25. The Dissenters argued that the WP offer should not be taken into account because it was not a "true written offer" that complied with the requirements of GCR O.22, it was not an offer capable of acceptance, because it was sent less than 21 days before the trial was due to commence, and because the Dissenters had not acted unreasonably in not accepting it. The Dissenters argued that, as the WP offer should be ignored, the Company was the unsuccessful party because it had to "write the cheque", for an amount greater than the original fair value offer and the amount it contended for at trial.

26. In its trial judgment the Court, which had fundamentally rejected the expert evidence of the Dissenters decided that there should be no order for costs.[13] The Court decided that it was more important to take a more nuanced approach than merely looking at which party "writes the cheque".

27. The Court took into account that: the fair value which the Company had to pay was not nearly as large as the Dissenters had contended for (around 2% higher than the merger price, rather than the 415% the Dissenters had claimed); the Company's expert witness' evidence had been accepted, except in two minor respects; and the Court had rejected the Dissenters' expert's central thesis about

[12] *Qunar Cayman Islands Limited* (FSD 76 of 2017, Unreported Judgment, 29 March 2021 (Parker J))
[13] Ibid at§ 152

systematic undervaluation of Chinese businesses on US exchanges, and the Dissenters' expert's DCF calculations.

28. The Court concluded that it would not be fair to order that the Company pay the Dissenters' costs because the "real world outcome" was that the Company succeeded at trial even though the Dissenters succeeded in beating the fair value offer and the Company's position at trial.

29. The Court also agreed with the Dissenters that the wording of the WP offer was uncertain, but considered that, even if it was capable of acceptance, and even though the Dissenters did not beat the offer at trial, the Dissenters had not been conducting themselves unreasonably in their various responses to the offer.

30. In the exercise of the Court's discretion, in order to achieve a fair outcome, there was no order as to costs and each party was left to bear its own costs.

31. The relevant principles to be applied were set out at § 129 of the Judgment:

> *a) Costs are in the discretion of the Court.*
> *b) Section 238(14) provides that the costs of the proceedings may be provided for 'as the Court deems equitable in the circumstances'. The discretion given to the Court by section 238(14) is therefore a wide one to do justice in all the circumstances.*
> *c) If dissenting shareholders participate actively in the trial it is equitable for GCR Order 62 rule 4 to apply, and normally costs should follow the event in accordance with the general rule.*
> *d) It follows that a successful party should recover the reasonable costs incurred by him in conducting the proceedings in an economical, expeditious and proper manner, unless otherwise ordered by the Court (Order 62 r.4(2)).*
> *e) In section 238 cases it is not helpful to attempt to lay down any generally applicable principles or criteria by which to determine what constitutes 'success or failure', save to say that it depends upon all the circumstances.*
> *f) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, unless that has caused a significant increase in the length or cost of the proceedings, in which case he may be deprived of the whole or part of his costs. In Integra for example, the Court accepted that there may be circumstances in which it is appropriate to exercise the Court's discretion by reference to identifiable issues, where the valuation approach for example by an expert was preferred. However, Jones J*

was not influenced in that case by deciding one big tax issue in favour of the Company because it did not detract from the overall result.

g) If the successful party raises issues or makes allegations improperly or unreasonably the Court may not only deprive him of his costs, but may order him to pay the whole or a part of the unsuccessful party's costs (Order 62 r.11(2)).

h) A dissenting shareholder's risk as to costs should be limited to the additional costs incurred by the Company as a result of his participation if he is unsuccessful."

Trina

32. In *Re Trina Solar Ltd*[14], the merger price was $11.60 per ADS, the Company had argued a primary case for a fair value of US$7.26 per ADS, and a secondary case of US$8.96 as put forward by its expert in her reports and at trial, and the Dissenters had argued for a fair value of US$193.19 per ADS.

33. The Court rejected the Company's primary position at trial and awarded $11.75.[15] The difference between the Company's case at trial and the fair value was over 17.5% but there was only a minimal uplift on the merger price. The Court concluded that fair value was $11.75 per ADS, a 1.29% uplift on the transaction price for the Dissenters, which equated to US$260,569 in respect of fair value (above the merger price) to be paid to the Dissenters at the end of the trial.

34. The Court rejected the argument that the Dissenters' win was *de minimis* and decided that the Dissenters were clear winners (see [75] per Segal J).

35. The parties and the Court accepted that the summary of the costs principles in *Qunar* referred to above reflected the applicable law and the approach to be adopted by the Court.

36. As fair value was determined to be much closer to the Company's value than the Dissenters, the Company argued that even though it was the paying party, in "real life" or "common sense" it had been successful in defeating the Dissenters' case for a very much higher payment.

37. The Company also argued that it had been successful on the vast majority of issues, including those critical to the determination of fair value, and that the Court had preferred the Company's valuation evidence over that of the Dissenters. In addition, the Company also relied on WP communications

[14] *In the matter of Trina Solar Limited* (FSD 92 of 2017, Unreported Judgment, 23 September 2020 (Segal J)) at [340(f) – (i)]
[15] Ibid at § 48

in which the Company had offered to pay US$500,000 and forego about US$450,000 payable to it as a result of earlier costs orders in its favour.

38. The combined value of that offer exceeded the amount payable by the Company to the Dissenters under the judgment by about 3.65x, and the Company claimed that the Dissenters had acted unreasonably in refusing it. The Dissenters claimed that the offer was defective because it was not compliant with the requirement of GCR O.22, r.14, particularly as regards the treatment of legal costs, and the time for which it was available for acceptance.

39. The Court concluded that the Dissenters were the successful parties in the case as they had recovered a payment, albeit small, from the Company, but went on to find there were other factors which were relevant to the award of costs. The circumstances of the case made an issues-based approach appropriate and that there were strong reasons for not applying the general rule.

40. As to the issues in dispute, the views of the Company's expert were accepted by the Court on most of the disputed issues arising out of the valuation evidence and it was significant that the Dissenters' submissions in relation to the management projections were rejected.

41. A critical plank in the Dissenters' claim for a value of US$193.19/ADS had failed, and that issue had given rise to a substantial amount of costs and Court time. The Dissenters had also failed in their argument that the Court's valuation should be based solely on a DCF argument, whereas the Company's valuation methodology had largely been adopted (albeit with some adjustments to the weightings).

42. The Court noted that the Company had failed on some significant issues, including a point of law about the approach to assessing fair value on which a substantial amount of time had been spent, and the amount of the minority discount.

43. If the only consideration was an issues-based order, which could clearly have been justified by reference to separation of the issues, the Company would have been awarded some part of its costs.

44. Taking into account the fact that the Dissenters were the successful parties, the Court concluded that the equitable and fair result would be that there should be no order as to costs and each party was required to bear their own costs.

45. In conclusion, the Court noted that[16]:

> "*it has become the practice of the parties to section 238 cases to adopt what can only be classified as extreme positions at trial, pressing their case for a particularly high or low valuation across a wide range of possible outcomes. While it is right to say that ultimately it is for the Court to decide on what it considers to be the fair value in light of all the evidence, and that parties can legitimately point to different elements of the evidence to highlight valuation issues, parties who fail to adopt a focussed and proportionate approach in their cases will be at risk in costs.*"

Decision

46. 'Success' in each case has to be assessed in accordance with the specific facts relevant to the issue which need to be taken into account.

47. The trial involved a US merger and was conducted within two years of the EGM, with minimal interlocutory applications to delay the progress to trial.

48. Unusually, the Dissenters whilst beating the Company's fair value price contentions at trial, received no uplift on the transaction price, which had been determined following the conclusion of the deal process. In the other cases which have reached trial fair value has been determined to be higher than the transaction price. The Court takes that factor into account.

Interim payment

49. More commonly, an interim payment was negotiated. The parties sought to agree the terms of an interim payment to be made by the Company to the Dissenters. The Court accepts the Company's submissions that the Dissenters received more by way of the interim payment than the fair value ruling provided for.

50. The terms on which the interim payment was made in this case are set out in an interim payment Deed dated 24 August 2020 (the "Interim Payment Deed" or "Deed").

51. The Court accepts the Company's evidence[17] that the value of the interim payment to the Dissenters was US$133,563,306.45, which sum was agreed between the Company and the Dissenters by way

[16] Ibid §75
[17] *Baxendale 4 § 8*

of an exchange of emails dated 3 September 2020. This represented US$11.13 per share, which is more than the fair value ruling of the Transaction Price, which was deemed by the experts (and accepted by the Court) to be US$11.06 per share.

52. As a consequence, the Court accepts the Company's submission that the Dissenters failed to recover more than the amount of the interim payment, which was paid to them on 28 August 2020. This requires a little more explanation.

53. The Court accepts Mr Imrie KC's submissions that the reason the amount of the interim payment was more than the fair value determined by the Court relates to the timing of the share component of the interim payment.

54. The merger consideration was based on a partial cash payment, and payment by way of shares in Fidelity National Financial, Inc ("FNF Shares").

55. That mechanism was replicated for the interim payment, such that the Dissenters agreed to receive under the Interim Payment Deed: a Cash Payment (as defined in Clause 2.1.1) of US$100,158,523.51; and 1,019,956 FNF Shares.

56. Clause 2.2 of the Interim Payment Deed gave the Dissenters an option to hold the FNF Shares (with the guarantee from the Company that they would receive a minimum of $11.03/FGL share) or to have the Company sell the FNF Shares on their behalf.

57. All the Dissenters elected to have the Company sell the FNF Shares on their behalf, and in due course, the Company sold the Dissenters' FNF Shares and transferred to the Dissenters the Gross Proceeds of the sale of the FNF Shares (as defined), in the amount of US$33,404,783.

58. As defined in Clause 3.1 of the Interim Payment Deed, the Court accepts the Company's submission that the Dissenters have therefore received an Interim Payment Value of US$133,563,306.45, being the sum of the Cash Payment and the Gross Proceeds of the sale of the FNF Shares, equivalent to US$11.13 per share.

59. The Deed made it clear by clause 7.3 that no party may ask the Court (or the Court of Appeal) to find that the value of the interim payment should be higher or lower than the value set out at clause 3.1. By clause 6 it was a non refundable payment.

60. The Court has carefully considered Mr Blitzer's affidavit[18] concerning the lead up to the Deed and his understanding of it. Mr Blitzer's understanding set out at §23 is that the Dissenters by agreeing to the interim payment Deed would receive a non refundable interim payment of at least $11.03.

61. In §24 he makes the point that to the extent the broker was able to achieve a higher price for the FNF shares, it was his understanding and that of the Dissenters, that it would have no bearing on the fair value of their FGL shares and was solely a reflection of market fluctuations in FNF stock to which the Dissenters were already entitled. That may have been the understanding, but that does not accord with the terms of the Deed.

62. On the date on which the interim payment Deed was signed by the parties the closing price of FNF stock would have equated to an interim payment of $11.17 (based on the closing price of FNF stock at $33.43 per share). The 'floor price' ($31.57 which equated to $11.06 per share) was the figure negotiated and guaranteed as a minimum.

63. Mr Lowe KC argued that the FNF shares, once the Deed was concluded, belonged to the Dissenters and became their property so that the Company could not claim credit for the profit that was made after the Deed was entered into.

64. He submitted that Clause 7 of the Deed made it impossible for the Dissenters to say later that the interim payment should be different than that provided for in the Deed. However, it was not intended to have changed the proprietary consequences of the FNF share becoming beneficially owned by the Dissenters.

65. The Court does not accept that this changes the analysis. In the Court's view, the terms of the interim payment including its agreed value and timing can be taken into account in determining that the Company was the successful party.

66. As the Dissenters received $11.13 per FGL Share on a non-refundable basis at the outset of the proceeding by way of interim payment, and failed to recover more than that amount following the trial of the Petition, they may be viewed as the unsuccessful parties in the litigation.

67. It is clear that the issue of how to value the consideration in the Deed needed to be addressed in circumstances where the Court had not yet determined the transaction price. The value of the FNF

[18] Blitzer 1

shares fluctuated on a daily basis. The transaction price was determined by the experts who both agreed that it was $11.06 on the valuation date which the Court accepted as fair.

68. The Court accepts the Company's submission that the Dissenters received the merger consideration namely the same cash payment and the same number of the FNF shares that they would have received had they not dissented from the merger in the first place and received what the other shareholders received had they accepted the Company's offer.

69. The interim payment is a costs protection mechanism for the Company, analogous to a payment into Court with the added benefit to the Dissenters that they received the agreed cash sum, and that amount was not liable to be reduced / refunded in the event that the fair value was less than the interim payment. Either party could refer the Court to the Deed and the amount of the payment as part of any future costs arguments depending on the outcome of the trial. The Dissenters agreed to accept the $11.13 interim payment[19] and continued the litigation to try to beat that price. Having failed to do so, the Court can consider that costs should be awarded against them and in the Company's favour.

70. The Court also accepts Mr Imrie KC's submission that had an interim payment been made into Court, then at the conclusion of the trial under the normal procedures, $11.06 a share would have been paid out to the Dissenters, and seven cents a share would have been returned to the Company, and all of the costs incurred after the date that the payment had been made, are very likely to have been ordered in favour of the Company, the paying party.

71. By further analogy had that proposal been made by way of a without prejudice save as to costs communication that demonstrated an offer capable of acceptance, and the Dissenters were determined to have acted unreasonably in refusing it, then the Company would have had a very strong claim for costs from that date forward in the usual way.

Additional reasons

The evidence called

72. There are additional reasons which the Court takes into account to award the Company its costs.

[19] See Mourant letter of 1 September 2020.

73. There were three fact witnesses and two expert valuers who gave live evidence. The Court accepted the evidence of all three fact witnesses called on behalf of the Company. The Dissenters' numerous challenges to the deal process[20] and to the reliability of the transaction price and to the efficiency of the market in the Company's shares failed.

74. The Company's factual case succeeded. The result was that the Company spent a significant amount of money and time to demonstrate that the Dissenters had been offered fair value in the merger. It successfully did so on the main issue of the robustness on the transaction process, and that fair value did not exceed the Transaction Price. The Transaction Price was a part of the Company's case, with parts of the factual evidence, expert evidence and submissions directed at supporting it, albeit as the upper bound of fair value.

75. Furthermore, as is usual, a substantial portion of the trial was taken up by the cross-examination of the expert valuers based on their voluminous and detailed reports. The Court accepted the main opinions of the Company's expert. The Dissenters' extensive cross examination to undermine his credibility and theories largely failed.

76. The Company expert's primary method of valuation (accepted by the Court) was to use a market price analysis cross checked against the transaction price and a comparable companies analysis and he concluded that the transaction price provided a ceiling or upper bound for the fair value.

77. The only significant point that the Court rejected from the Company's expert was that it was possible to extrapolate fair value using a roll forward market price, illustrated by an analysis in respect of comparable companies, because the market for the Company's shares was disrupted at the relevant time due to the impact of COVID and that there was variability in the roll forward comparisons of 20%.

78. On that point the Court accepted the Dissenters expert's views that the pandemic caused unprecedented short-term market disruption which made the estimation of the hypothetical adjusted market trading price speculative and inappropriate.

79. However, by contrast with the Company's expert, the Court found that the Dissenters expert's valuation methodology was wholly unreliable and some of his judgements were unsupported by

[20] Including arguments as to alleged defects such as conflicts of interest, the lack of an arms' length transaction with informational asymmetry in FNF's favour, the lack of a robust sales process generally and deterrents to third party offers, no open or competitive bidding process, and that the Special Committee made decisions without proper analysis

detailed analysis of data and biased towards a high valuation. As such he did not provide the Court with a balanced view or central estimate.

80. True it is that the Company maintained a case at trial that fair value was US$8.60 per FGL share and alternatively that the transaction price was at the upper bound of fair value, but equally he Dissenters disavowed any reference to the Transaction Price, and departed from their own expert's report, suggesting instead that "no weight" should be given to the Transaction Price which they argued significantly undervalued the Company.

81. As a consequence of these additional matters relating to the evidence, the Court finds that the Company was the successful party overall and there are no grounds to proportionately reduce those costs.

82. The Dissenters' rationale for exercising their appraisal rights namely to get a higher price than that of the merger consideration which they had refused failed.

Other reasons

83. There were also significant other points where the Company's expert's evidence was preferred over the Dissenters case. They took up a sizeable proportion of the trial. In summary these were:

a) The Court did not accept the Dissenters' case that the market for FGL's shares was inefficient and the market price did not reflect FGL's intrinsic value. Instead, the Court accepted the Company's expert's view that market efficiency can and usually is evaluated by empirical tests of how quickly the price of a security responds to new information that semi-strong efficiency was present, and that there was a well-informed and liquid market with a large widely held free-float.

b) The Company successfully demonstrated the absence of MNPI, and semi-strong efficiency.

c) The Dissenters' expert's opinion on the market's knowledge of management's views on long-term growth were not accepted whilst the Company's expert's views were, as was its broad position on market reaction.

Indemnity costs regarding disclosure

Company submissions

84. Mr Imrie KC submitted that in this case the Dissenters had acted unreasonably to a high degree in relation to the Company's disclosure, causing immense costs for the Company throughout the proceedings and in a manner which merits the Court exercising its discretion to award costs in relation to disclosure on an indemnity basis in accordance with O.62, r.13(3).

85. He submitted that the approach of the Dissenters in relation to the timing and extent of the Company's disclosure obligations was unreasonable, and intended to put undue and unnecessary pressure on the Company in circumstances where:

a) The Dissenters were not "out of their money" at the time of the directions hearing in November 2020. They had already been paid more than the Transaction Price on a non-refundable basis and had sold their FNF Shares.

b) To the extent that there was any additional payment to them at the end of the proceeding they would have a claim for interest under s.238.

c) There was no evidence to support the Dissenters' estimate of 42 days for the Company to complete its disclosure. It was a contrived figure based on timetables in previous (and in some cases very historic) s.238 proceedings.

d) The Dissenters did not seek to advance the proceeding with due speed. By way of example, they did not bring their s.1782 applications against Blackstone and CC Capital until just before the deadline, and too late for any responsive material to be collected in time for the trial.

86. The approach of the Dissenters in relation to the scope of the Company's disclosure obligation was also unreasonable to a high degree in circumstances where:

a) The Dissenters, through their experienced Cayman counsel, knew that Company disclosure in 238 proceedings often produces vast numbers of documents not referenced at trial or relied upon by either expert.

b) The Dissenters themselves are managed by a sophisticated investment manager who is a repeat litigant in the mergers and acquisitions space which had a litigation strategy in relation to the appraisal from the moment the merger was announced and which was heavily involved in directing and coordinating their litigation strategy and which was very familiar with the Company. They had no reason to believe that the documents responsive to Blackstone (see below) would be relevant to fair value.

c) As evidenced by their pursuit of a s.1782 against Blackstone and CC Capital, the Dissenters had other means of obtaining documents relating to the Company's interactions with Blackstone and CC Capital (including, potentially, depositions); and the Dissenters knew that the inclusion of the Blackstone documents (see below) in particular was likely to be very onerous to comply with/liable to result in the production of a very large number of documents that would likely not be relevant to fair value.

87. Mr Imrie KC reminded the Court that a major disputed category of documents in this case related to the performance of the companies investment management agreement with Blackstone. The Dissenters sought production of numerous documents and communications relating to the performance of that agreement. After a contested hearing the Court was persuaded by the evidence of the Dissenters' expert and made wide-ranging disclosure orders sought by the Dissenters. In order to comply with its disclosure obligations the Company had to review and produce over 3 million documents which fell within the ambit of disclosure and required review and engaged a large team of contract reviewers in the US. The Company produced over 228,000 documents of which more than 99,000 discussed or were directed to or from Blackstone.

88. At trial the Dissenters expert only referred to 125 documents from the Company's disclosure in his various reports of which 107 were non public which could only have been obtained through the Company disclosure and none of which went to the Blackstone issue.

89. The Dissenters' expert focused on the potential for Blackstone's economic interests at a high level to be conflicted which the Court rejected. Whilst Blackstone issues and the IMAs themselves were in issue in the trial, the Company's complaint concerns the associated communications for those IMAs which were totally irrelevant. Mr Imrie KC alleged that the Dissenters must have known that and it was highly unreasonable to require the ongoing review, production, uploading and curation and maintenance of the database, knowing that a team of contract reviewers was working around the clock to comply with the timing on that discovery request.

90. The Company seeks to recover the expense it incurred in its efforts to locate review and disclose all of the documents sought by the Dissenters. In order to reduce the costs of the disclosure exercise and to expedite the process the Company utilised the *e discovery* platform of its parent Company FNF to host the data for review and production and it also asks for the costs of doing so.

Dissenters submissions

91. Mr Lowe KC submitted that there was nothing in the Dissenters' conduct which deserved a mark of disapproval. As to the Blackstone documents, the Dissenters had indeed pressed for discovery of correspondence between the Company and its business partners in relation to investment management agreements. Blackstone was a key investment adviser and player in the merger transaction and any communication between the Company and it was potentially relevant to the question of fair value.

92. It was reasonable to suppose those documents contained information which may either directly or indirectly enable the Dissenters to have advanced their case or damaged that of the Company[21].

93. He submitted that the Company's communications with Blackstone were clearly relevant to the Dissenters' case and relied on at trial as it was a key component of the Dissenters case that other potential purchasers were deterred from advancing competing bids because they knew Blackstone had negotiated a five year extension to their investment management agreement with the Company.

The law

94. The law in relation to indemnity costs can be shortly stated.

95. GCR O.62, r.4(11) provides that the Court may order indemnity costs if it is satisfied that the paying party has conducted the proceedings "improperly, unreasonably or negligently".

96. The principles to be considered by the Court in the exercise of its discretion can be summarised as follows[22]:

[21] Peruvian Guano principles were applied in the Cayman Islands, for example, in *Renova Resources Private Equity Limited v. Gilbertson* [2011 (2) CILR 148] at 185
[22] *Talent Business Inv v China Yinmore Sugar Co* [2015 (2) CILR 113] [35]-[41]

a) The Court should primarily focus on the unsuccessful party's conduct, not the merits of its position.[23]

b) It is an exceptional order: "*the discretion [to award costs on the indemnity basis] is to be exercised only in the most exceptional cases" because awarding costs on the indemnity basis is "a punitive measure of taxation".*[24]

c) There should normally be an element in the unsuccessful party's conduct which deserved a mark of disapproval - *"[t]hat conduct would need to be unreasonable to a high degree".*[25]

d) Pursuing a novel claim, even one unlikely to succeed, does not itself justify the award of costs on the indemnity basis, unless the claim was advanced improperly, unreasonably or negligently.[26]

97. It is not appropriate to award costs on the indemnity basis if the plaintiff's case is merely weak or unlikely to succeed. To be awarded indemnity costs, the paying party's case must have been "manifestly hopeless" to the extent that it was unreasonable to maintain the claim, and this assessment must be made without the benefit of hindsight[27].

Decision

98. The Court is not persuaded that the Dissenters acted unreasonably to a high degree in relation to the categories of documents they sought, nor that they deliberately put pressure on the Company by causing the Company disproportionate, unnecessary and excessive expense.

99. There was negotiation and give and take in the lead up to the directions hearing in relation to the categories of documents in dispute, which although hard fought, was not out of the ordinary. This resulted in a Judgment[28] which specifically considered the request for contractual agreements with business partners and investors related to the Company. The Company argued that it should not be

[23] *Ahmad Hamad Algosaibi & Bros. Co. v. Saad Invs. Co. Ltd* [2012 (2) CILR 1] at [11]-[12]
[24] *Ibid at [9] and Headnote, Para 1*
[25] *Ahmad Hamad Algosaibi & Bros. Co. v. Saad Invs. Co. Ltd* [2012 (2) CILR 1] at Headnote, Para 1
[26] *Sagicor General Insurance (Cayman) Limited v Crawford Adjustors (Cayman) Limited* [2011 (2) CILR 471] at [25]-
[26]
[27] *Bennett v Attorney General* [2010 (1) CILR 478] at [6]-[9] See also *Ritter v Butterfield* [2018 (2) CILR 638] at [36]-[38]).
[28] 18 December 2020 (Parker J unreported)

obliged to disclose related communications concerning these agreements because it would be unreasonably burdensome to search for such a broad range of documents. The Company suggested that if the experts wished to ask about the contracts and wanted to see more detailed information they could do so during the Information Request process[29].

100. The Court was however persuaded that the Dissenters had proposed wording which mitigated the risk of a disproportionate search by the Company by narrowing the scope of the request as set out at § 25 of the judgment.

101. Having reviewed the expert evidence put forward by the parties on this issue, the Court accepted the reasons put forward by the Dissenters expert as to why the material would assist the valuation experts.

102. The Court decided:

> *"Communications concerning high value contracts may contain an insight into amendments, corrections or assumptions which may otherwise be difficult to ascertain. They may give an insight into the internal processing, amendment, approval and execution of these high revenue generating contracts…*
>
> *In my judgment this would be a proportionate exercise to conduct, by restricting them to the value threshold, on the basis of the approach and language proposed by the Dissenters and should be ordered."*[30]

103. It would not be fair or just in all the circumstances to penalise the Dissenters with hindsight because the expert reports did not expressly refer to communications with Blackstone. It does not follow that the Company's communications with Blackstone cannot have been material to the issue of fair value or that they had conducted themselves unreasonably to a high degree in seeking this material.

104. The Court is not persuaded that there was unreasonable or improper conduct by the Dissenters in the way they negotiated the draft directions order or the position they took at the directions hearing

[29] Ibid §23
[30] Directions Judgment of Parker J dated 18 December 2020 (FSD 184 of 2020) at [27] and [28]

on other issues which takes this case out of the norm for section 238 cases in a way that justifies an order for costs on an indemnity basis[31]. The Company's application for indemnity costs fails.

Other costs

E discovery platform and reviewers in the US

105. There is an application by the Company for the costs of the *e discovery* platform (Relativity platform) of the Company's parent Company FNF which hosted the data for review and production and its first level review which took place outside the Cayman Islands and which was not conducted by Cayman Islands attorneys.

106. The Company is not seeking foreign lawyers costs. The costs the Company is seeking is for the overseas contract reviewers (non lawyers) and the associated costs of the Relativity platform.

107. The fees incurred by *e discovery* professionals outside of the Cayman Islands when preparing, hosting and producing the Company's discovery may be recoverable on a standard basis taxation under *Grand Court Practice Direction No.1/2001.*

108. Practice Direction No.1/2001(the PD), specifies that the costs of organising, cataloguing and filing documents for the purposes of discovery, inspection and/or trial are recoverable; and that the investigative and other work done by non-lawyers may be recoverable on taxation (if allowed by the Court pursuant to O.62 Rule 18)[32].

109. Paragraph 1.5 of the PD indicates that the guidelines relating to the taxation of costs (O.62, r,17) apply to both taxations on the standard basis and taxations on the indemnity basis.

110. Work done by persons other than attorneys is covered by paragraph 8.1 which provides:

> *'Legal work done by in house counsel who are in the employment of the successful party is not normally recoverable on taxation. It will only be recoverable if the successful party can satisfy the taxing officer that it is work of a kind which would otherwise be done by outside lawyers. For example, the work involved in instructing outside lawyers is not recoverable; time spent receiving and considering advice from outside lawyers is not*

[31] *Jian Ying Ourgame High Growth Investment Fund & Ors* §§7 to 14
[32] Grand Court Practice Direction No.1/2001 at [7.8], [8.1] and [8.2]

recoverable; but time spent preparing a draft list of documents under the supervision of outside lawyers may be recoverable.'

111. Paragraph 8.2 provides:

'Investigative and other work done by non lawyers will be recoverable on taxation only to the extent that a direction has been given pursuant to rule 18 that it should be allowed.'

112. In the Court's view, the Company is entitled to an order on the standard basis for its costs for the data hosting platform and the contract reviewers with an Order 62 Rule 18 direction.

Interim payment

113. The Company claims recoverable costs of approximately US$9.8m [33]which it argues is a reasonable sum in the context of a heavily contested appraisal dispute in which there were voluminous disclosure obligations placed on the Company, a three-week trial with three fact and two expert witnesses gave evidence, in the context of a claim by the Dissenters for in excess of US$135 million (a claim for a significant uplift on the transaction price).

114. The Company asks for an interim payment of costs in the sum of US$5 million pending taxation on the basis that the actual costs ordered after a taxation will significantly exceed that sum and may not be finally determined for many months.

115. The Dissenters accept that GCR O.62 r. 4(7)(h) confers on the Court a discretion to order the paying party to pay to the successful party a reasonable sum up-front on account of the total costs subject to taxation.

116. They say that the purpose must be to provide immediate relief to the paying party to avoid the injustice of delayed payment and the Court should typically take a high level broad brush approach to heavily discount the amount of the interim payment to a level that would be safe in terms of being significantly below what will finally be permitted appropriate and just.[34]

[33] Baxendale 4 § 17
[34] *Al Sadik v Investcorp Bank* [2019 (2) CILR 585] (Kawaley J) at [25(d)] *; Aquapoint LP (In Official Liquidation)* (Unreported, 14 October 2022, Doyle J).

117. The Dissenters argued that the Company has not provided sufficient evidence for its application and the Court is not in a position properly to assess the Company's costs to arrive at a figure which would be fair and just.

Decision

118. A taxation of costs in a case of this complexity is likely to take many months to resolve. It would be fair in all the circumstances for an interim payment to be ordered of the likely minimum safe level of recoverable costs. This sum should be significantly below an amount that is likely to be determined on taxation. Such a sum is to be assessed summarily in order that the successful party should be paid some of its costs well before taxation is concluded.[35]

119. Judgment was given in September 2022 and most of the costs were incurred well before that. Notwithstanding the Dissenters' submission, the Court is able to summarily assess an appropriate sum based on the supporting material and evidence that the Company has prepared and provided on this application.

120. Sufficient broad particulars of the breakdown of the headline figure of U.S.$9.8 million is provided at §§17.1 to 17.6 of Baxendale 4. Having regard to this evidence (which is not contested) the likely minimum safe level of recoverable costs is in the Court's estimation US$4m.

Interest

121. The Company also asks for an award of interest on unpaid costs pursuant to GCR O.62 r.4(7)(g) and the Judgment Debts (Rates of interest) Rules (2021 Revision) on the basis that the Company has been forced to make the application and has been out of its money in respect of costs for many months at a time of high interest rates. The Court will make that Order.

Joint and several liability

122. Finally, Mr Lowe KC submitted that each of the five Dissenters is a distinct corporate entity. The liabilities of one are not the liabilities of the others. He submitted that a pro-rata award of costs is most appropriate in the circumstances.

[35] *Al Sadik v Investcorp Bank BSC ibid*

123. The Court is not persuaded that this is likely to produce a fair or just outcome. The Dissenters dealt with the litigation as a group making common cause. Joint and several liability for the Company's costs of that litigation would be a fair outcome. The Dissenters in this case were on notice after the fair value Judgment was handed down that provision was to be made for their joint and several liability to the Company in respect of its reasonable costs. If they wish to apportion cost internally that is a matter for them.

124. The Company should not be exposed to the risk of having to pursue different entities in respect of a costs award rendered against the Dissenters as a whole on a joint and several basis in the circumstances of this case.

Conclusion

125. The Dissenters should pay the Company's costs of the proceeding including those occasioned by its discovery exercise to be taxed on the standard basis if not agreed.

126. The Company's application for indemnity costs in respect of the Company's costs of providing discovery is refused.

127. The Company's costs of and occasioned by its *e discovery* provider and its first level document review are to be recoverable on taxation and an Order 62 rule 18 direction is given.

128. The Dissenters should pay US$4m in respect of the Company's costs summarily pending taxation.

129. The Dissenters should pay the Company interest on its costs from the date of the fair value judgment's costs order until the date of payment to be calculated at the prescribed rate.

130. There is to be no other order as to costs of this application.

131. The parties are to provide a draft agreed order for the Court's approval reflecting this judgment.

THE HON. MR JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT