In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2018: No. 347

BETWEEN:

GLENDINA PTY LIMITED & OTHERS
(as set out in Schedule One attached to the Originating Summons)

Plaintiffs

-and-

NKWE PLATINUM LTD.

Defendant

Before:	**Hon. Chief Justice Hargun**
Appearances:	**Ms Hannah Tildesley, Ms Luisa Olander of Appleby (Bermuda) Limited, for the Plaintiff**
	Mr Jonathan O'Mahony of Conyers Dill & Pearman Limited, for the Defendant
Dates of Hearing:	**14 February 2022**
Date of Judgment:	**31 March 2022**

JUDGMENT

Application for general discovery against dissenting shareholders in relation to an appraisal action under section 106 Companies Act 1981; relevant principles to be applied; application for additional security for costs; relevant principles to be applied

HARGUN CJ

1. By the Originating Summons, the Plaintiff minority shareholders ("**the Dissenting Shareholders**") seek the determination pursuant to section 106(6) Companies Act 1981 of the fair value of shares that they held in NKWE Platinum Limited ("**the Company**") before it underwent amalgamation. The Dissenting Shareholders number 456 companies and individuals.

2. There are two applications by the Company: one for discovery from the Dissenting Shareholders and the other for additional security for costs.

3. The Company has issued summons seeking an order that the Dissenting Shareholders either (i) provide discovery by list pursuant to Order 24 rule 2 or (ii) provide an Affidavit verifying that they have no documents which are or have been in their possession custody or power relating to any matter in question between them ("**Discovery Summons**"). The Discovery Summons is supported by (i) the First Affidavit of Jonathan O'Mahony ("**O'Mahony 1**") and exhibit JOM-1 dated 17 June 2020, (ii) the Second Affidavit of Zhiyu Fan ("**Fan 2**") and exhibit ZF2 dated 20 October 2020 and (iii) the Fourth Affidavit of Zhiyu Fan ("**Fan 4**") dated 4 May 2021 and exhibit ZF4 (the Discovery Summons and supporting affidavits together: "**the Discovery Application**"**);** (b) The Plaintiffs' response to the Discovery Application is set out in the Second Affidavit of Luke Matthews dated 9 December 2020 ("**Matthews 2**") and exhibit LDM2.

4. The Company has also issued summons seeking security for costs and is supported by the Third Affidavit of Zhiyu Fan dated 19 March 2021 ("**Fan 3**") and exhibit ZF3 (together:

"**the Security Application**"). The Dissenting Shareholders' response to the Security Application is set out in the Third Affidavit of Luke Matthews dated 20 September 2021 ("**Matthews 3**") and exhibit LDM3.

Background

5. The background to these proceedings is helpfully set out in the skeleton argument of both parties and is uncontroversial.

6. The Company is a Bermuda registered company and is predominantly engaged in the exploration and development of a platinum group metals ("**PGM"**) project in South Africa (namely, platinum, palladium, osmium, ruthenium, iridium and rhodium). The Company's primary asset is its 74% interest in the mining rights of the Garatau Project located in the Bushveld Complex in South Africa which holds the world's largest PGM reserves.

7. The Dissenting Shareholders held between them 197,006,422 of the shares in the Company which amounted to over 20% of the Company's share capital.

8. On 19 March 2018 the Company announced to the Australia Stock Exchange ("**ASX"**) (where the Company was listed at the time) that the Company's largest shareholder, Zijin Mining Group Co. Limited ("**Zijin"**), had made an indicative offer to acquire the shares in the Company which it did not already own at a price of Australian Dollars (**A$**) A$0.08 per share via an amalgamation under Bermuda law. Zijin, through its wholly owned subsidiary Jin Jiang Mining Limited (Jin Jiang), controlled, at that time, 60.47% of the shares in the Company. On 16 August 2018, the Company informed the ASX that an agreement had been reached with Zijin for Zijin to acquire 100% of NKP's issued capital via an amalgamation (Amalgamation). Under the Amalgamation shareholders would receive cash consideration of A$0.10 per share ("**Zijin Offer"**).

9. The amalgamation agreement is between the Company, Zijin and Zijin's wholly owned subsidiaries Gold Mountains (Bermuda) Investment Limited ("**BidCo"**) and Gold

Mountains (HK) International Mining Limited ("**Gold Mountains"**) pursuant to which the Company amalgamated with BidCo and 100% of the Company's issued and outstanding share capital was cancelled. The resulting amalgamated company is wholly owned by Gold Mountains, is controlled by Zijin, and is the Defendant in these proceedings.

10. On 11 October 2018, the Dissenting Shareholders launched the present Proceedings, applying under section 106(6) of the Companies Act 1981 for a Court appraisal of the fair value of the Company's shares.

11. In addition, the Dissenting Shareholders engaged SRK Consulting in Johannesburg ("**SRK**") to consider and opine on the Company's fairness opinion on the fair value of the Company shares. SRK produced an independent expert report dated 10 October 2018 which provided a range for valuation with a mid-point of A$0.192 and a high point of A$0.263 per share.

12. In a letter dated 18 March 2019, the Company informed the ASX that the Amalgamation became effective on 14 March 2019. The March 2019 announcements to the ASX contained indicative timetables for the Amalgamation and, specifically, the Company's intended course of action with regard to the cancellation of shares and the payment of A$0.10 per share to shareholders ("**Amalgamation Consideration**").

13. The Amalgamation Consideration was not paid to the Dissenting Shareholders on completion of the Amalgamation and the Dissenting Shareholders began proceedings in respect of the non-payment of the Amalgamation Consideration by Originating Summons filed on 28 March 2019 (Claim No. 101 of 2019). These 2019 proceedings were compromised by the Company agreeing to pay the Amalgamation Consideration. Subsequently, A$19,700,642.20 was paid to Bowen Buchbinder Vilensky ("**BBV**"), the Plaintiffs' Australian Attorneys.

The Discovery Application

14. The background to the Discovery Application is that by Consent Order dated 5 March 2020 ("**Consent Order**") the parties agreed to directions for trial and discovery. At Paragraph 1 of the Consent Order, it was agreed that discovery was only required from the Company and no order was made for discovery from any of the Plaintiffs:

> *"There shall be discovery by the Defendant of all documents which are or have been in its possession, custody or power relating to the matters in question in the action by the serving on the Plaintiffs a List of Documents together with electronic copies of those documents on or before 4pm on 6 April 2020"*

15. By Summons dated 30 September 2020 the Company seeks an order that the Dissenting Shareholders provide discovery by list pursuant to Order 24 rule 2 or provide affidavit verifying that they had no documents which are or have been in their possession custody or power relating to any matter in question between them in the action.

16. Mr O'Mahony, for the Company, relies upon the decision of Rix JA in *Qunar Cayman Islands v Athos Asia Event Driven Master Fund* [2018] (1) CILR 199 (Cayman Court of Appeal) and submits that:

    (1) Discovery in dissenting shareholders valuation cases is a mutual obligation and there is a requirement to provide general discovery but limited to those documents relevant to a fair value appraisal.

    (2) Accordingly, it is clear that dissenting shareholders are required to undertake the exercise of searching for relevant discoverable documents.

    (3) There is no distinction drawn between the "*sophisticated*" and the "*unsophisticated*" dissenting shareholder as to whether or not the exercise of searching for relevant discoverable documents is required to take place. In any event drawing such a distinction would be difficult and establish a dangerous precedent.

(4) The categories of documents that might be relevant are not closed and they can include documents, reports, analysis, projections and so on about companies in which they invest, their products, their industries, their markets, their competitors, in other words documents or material which relates to the value of such companies.

17. The Company justifies its application that the Dissenting Shareholders be required to give a general discovery on the following grounds:

(1) The rules require the parties to provide discovery (paragraph 16 (iii) of O'Mahony 1).

(2) If the Dissenting Shareholders do not give discovery it would potentially cause the Company a real injustice (paragraph 16(vi) of O'Mahony 1).

(3) The Company may have destroyed, or lost documents and the Dissenting Shareholders may have retained copies of those destroyed or lost documents (Conyers letter of 9 July 2020).

(4) The Company understands that the Dissenting Shareholders (or some of them) may hold material which they may have obtained from the Company outside the context of regular communications to all shareholders as a class (Conyers letter of 9 July 2020).

18. Ms Tildesley, for the Dissenting Shareholders, submits that the Dissenting Shareholders are highly unlikely to hold any documents relevant to the Proceedings:

(1) They are not sophisticated investors like the hedge funds frequently seen in Cayman Islands appraisal litigation. They were not undertaking Company valuation exercises with the benefit of experts and valuation committees in order to determine

if there was an arbitrage opportunity in purchasing the Company's shares ahead of the amalgamation.

(2) They are outsiders to the Company and obtained information about the Company only from the Company itself or pursuant to public filings the Company was obliged to make. The Company itself accepts that the shareholders are outsiders to the Company (save for three individuals identified in Fan 2 at para 4).

(3) They are certainly vanishingly unlikely to hold the categories identified in *Qunar*, namely (i) valuation analyses of those looking to invest in the market and (ii) contemporaneous reports containing research and opinions produced by securities analysts engaged by investors to gather and interpret data on companies.

(4) Many of the shareholders are individuals and do not own large shareholdings, quite simply, they will not have any relevant documents and to suggest they should be required to go through the discovery exercise is ludicrous. Any discovery ordered by the Court will have to be reviewed by Bermuda attorneys for due compliance and is bound to cause significant unnecessary legal expense.

(5) Glendina, the First Plaintiff, has, for its part confirmed that it does not hold any relevant documents and it is highly likely to be representative of the entire Plaintiff shareholder class.

19. Ms Tildesley argues that the Company has put forward a series of ever-changing arguments to attempt to justify its contention that the Dissenting Shareholders, who though they concede were entirely outsiders to the Company's affairs should, nonetheless, be required to go to the expense of a general discovery exercise. The Company's position amounts to a series of fanciful speculations about documents the Dissenting Shareholders might hold.

20. The Dissenting Shareholders submit that the reality is, if the Company genuinely believed its former shareholders held documents relevant to the matters in issue in these proceedings it would never have agreed to the Consent Order providing that only the Company was to give discovery. The change in tack is a transparent litigation tactic designed to frustrate, delay and exacerbate the costs of the Dissenting Shareholders' fair value claim.

Discussion

21. In *Jardine Strategic Holdings Limited* [2021] SC (Bda) 87 Com this Court reviewed the Cayman authorities relating to discovery and other directions to be provided in relation to appraisal actions in the Cayman Island courts. The Court found that the Cayman authorities provide valuable insight in relation to the effective management of appraisal actions. The Court also noted that the Cayman authorities emphasise that the court must look at each case and decide whether the directions as a whole and as to their individual nature and effect are fair, necessary to do justice, and economically sensible:

> *"66…. Thus, Chief Justice Smellie in JA Solar said at [17] that the Cayman practice "is not meant to suggest that there is a rigid "standard form" of directions for section 238 cases. The directions may have to be somewhat tailored to the facts of any particular case."*
>
> *67. In Homeinns Hotel Group [FSD 75 of 2016] Mangatal J noted at [4] that "directions given in any other case are not to be regarded as "precedents".*
>
> *68. In EHI Car Services Parker J addressed the same issue at [18] and held: "I accept that directions made in other section 238 cases do not generally carry the value of precedent, especially if the points in question were previously agreed, rather than judicially determined. I also accept that the court must look at each case and decide whether the directions as a whole and as to their individual nature and effect are fair, necessary to do justice between the parties, and are economically sensible."*

69. The requirements that the directions must be fair, necessary to do justice between the parties and economically sensible, referred to by Parker J in EHI Car Services, have been emphasised in other Cayman cases. Cayman authorities require the Court to consider in each individual case that the directions given, including the provision of discovery, must be proportionate in all the circumstances of the case.

70. In JA Solar Chief Justice Smellie expressly held at [44] that the requirement to provide discovery must be subjected to the test of proportionality:

> *"As a matter of basic principle, I accept however, that the purpose of the discovery regime in section 238 cases must be circumscribed in addition to the test of relevance, also by a test of appropriate proportionality. Thus, the question that ultimately arises on this aspect of the proposed directions is whether it is proportionate to require the Company to go back five years in producing that material."*

71. In FGL Holdings Parker J held at [16] that "The resourcing requirements for the exercise are significant and if the universe of documents that needs to be reviewed for relevance, privilege, and confidentiality is unnecessarily broad that requires even greater resources and would be disproportionate."

22. The decision of the Cayman Court of Appeal in *Qunar* has to be appreciated in its exceptional factual context. The dissenting shareholders who were seeking fair value appraisal of their shares such as *Athos Asia Event Driven Master Fund* were hedge funds who had purchased the shares in the company so as to have the opportunity to obtain a fair valuation from the Cayman court under section 238 of the Companies Law (2016 Revision). In those circumstances it can reasonably be expected that prior to the purchase of the shares the hedge funds likely would have obtained expert valuations of the shares.

23. The discovery sought by the company in *Qunar* from the dissenting shareholders reflects that it is primarily focused at valuations in the possession of the dissenting shareholders. In that case the company sought the following documents set out in Schedule B:

> *"1. All documents reflecting or relating to any valuations or similar analyses of the company that the respondents prepared, reviewed, or considered, including but not limited to—*
>
> *1.1 all written documents, including Excel files, that set forth, summarise, or otherwise reflect valuation analyses of the Company or Company shares;*
>
> *1.2 any internal valuations of the Company or the Company's shares; and*
>
> *1.3 any valuations of the Company or Company stock reviewed or considered by the Respondents in connection with this action."*

24. It is in this factual context the judgment of Rix JA has to be read and appreciated. It will be noted that Rix JA describes the dissenting shareholders as "*professional and sophisticated investors*". Furthermore, there was no suggestion that these documents were not in the possession of the dissenting shareholders:

> *"57 I approach this issue from the point of view that one-sided disclosure on the central issue of a case (*a fortiori *where that issue is one of fair value and the* ***dissenting shareholders are only shareholders in the first place because, as professional and sophisticated investors, they have taken a decision to invest in the company whose value is in issue),*** *is anomalous, unprecedented outside s.238 cases in the Cayman Islands, and* prima facie *counterintuitive, and therefore the argument in favour of such one-sided disclosure has to be considered with the greatest of care.*

60 … ***In my judgment, if third party valuations in the possession of the company are relevant, so are third party valuations not in the possession of the company but, for instance, in the possession of the dissenting shareholders****. After all, the question of fair value is closely related to the question of what a willing buyer and a willing seller would exchange for the shares of the company (or for the company as a whole): and that question is closely related to valuations conducted within the market generally. And if that is the case,* ***then analyses and valuations conducted by the dissenting shareholders, which may well in any event be based in part on "third party" valuations, assessments and analyses, are as relevant as any such valuations, assessments and analyses, or even more so for the very reason that the dissenting shareholders are not merely potential investors, but actual investors in the company. They are active members of the market who are willing to put their money where their analysis is.***

75 In my judgment, it is unhealthy in such a context, and in litigation especially, to form a priori *assumptions about relevance. The normal rule is that disclosure is a mutual obligation. Mutuality in this respect is equity and fairness. Of course, some litigants may have more of what needs to be disclosed than other litigants. And it is always possible that the documents of one party will turn out to be of greater influence than those of the other side. But I would need to be clearly persuaded that s.238 litigation is the unique field in which one-sided disclosure ought to be practised, and I would in principle regard that as a heavy task. Counsel have not suggested that there is one-sided disclosure in any other field. I am not persuaded of that extreme and unique position by repeated assertions that only the companies concerned, and not their sophisticated investors, have disclosure relevant to fair value.* ***It seems to me that if dissenters have in their possession, as they are likely to do, documents, reports, analyses, projections and so on about companies in which they invest, their products, their industries, their markets, their competitors, in other words documentary material which relates to the value of such companies, then this material is as much a matter for disclosure as any such documents in the hands of the companies, and it matters not whether such***

material is possessed by the one side or the other, or is simply available as a matter of efficient research*. In this context I find the evidence contained in Mr. Reid's second affidavit, which merits repeated re-reading (see at para. 18 above) highly persuasive. At any rate it is arguably highly persuasive, and that is all that is needed at this stage of the proceedings.*

78 ***Thus dissenting shareholders in this case have not submitted that they do not possess the documents which they have been requested to disclose pursuant to Schedule B. The list of documents within Schedule B is a short list, and certainly not a difficult list to answer, and there is nothing disproportionate about that list****. It has not been suggested that there is. The list has been sanctioned by the company's expert."* (emphasis added).

25. This Court of course accepts that discovery is a mutual obligation and appraisal actions under section 106 are not an exception. However, given the nature of the appraisal actions, the discovery sought is in relation to the narrow issue of the fair value of the shares in the company. If it is readily apparent that it is highly unlikely that the dissenting shareholder will have any relevant material, then the court will not impose upon the dissenting shareholder the financial burden of complying with a pointless exercise. This is necessarily required by the Overriding Objective: dealing with the case justly involves, so far as practicable, dealing with the case in ways which are proportionate to the amount of money involved and to the financial position of each party.

26. The Dissenting Shareholders in this case are not mega hedge funds involved in statutory appraisal arbitrage. As Matthews 2 confirms the Dissenting Shareholders in these proceedings are not sophisticated investors. The overwhelming majority of them are ordinary individuals owning small number of shares in the Company. Many of the Dissenting Shareholders held less than 100,000 shares in the Company, which the Company acquired compulsorily at A$0.10 per share (or $10,000 for 100,000 shares). The suggestion that these Shareholders may have in their possession valuations of their shareholdings in the Company seems wholly unrealistic and does give credence to the

submission made on their behalf that the entire discovery application is a transparent litigation tactic designed to frustrate, delay and exacerbate the costs of this claim pursued by the Dissenting Shareholders.

27. Mr Matthews further confirms that none of the Dissenting Shareholders are companies or individuals who purchased the Company shares with the express purpose of issuing and/or participating in these proceedings. Prior to the Amalgamation, the Dissenting Shareholders were complete outsiders to the Company (with a few exceptions referred to in Mr Matthews' affidavit). Collectively, the Dissenting Shareholders own just over 20% of the shares and none of the Dissenting Shareholders held a large enough shareholding to be privy to the Company information or documents beyond those made available by the Company pursuant to the disclosure duties as a member of the ASX. Given the volume and value of their shareholding, Mr Matthews states, the Dissenting Shareholders are also extremely unlikely to have undertaken their own private valuation of their shareholdings in the Company; it would not have made any economic sense for them to do so.

28. In all circumstances the Court agrees with Mr Matthews that the chances that any relevant documents not already discovered by the Company will be uncovered by the Dissenting Shareholders are "*vanishingly small*". In the circumstances, the Court agrees that to require that *all* 456 Dissenting Shareholders provide general discovery in these proceedings is disproportionate, unreasonable and a waste of time and costs. The Court accepts Ms Tildesley's submission that any discovery ordered by this Court will have to be supervised by Bermuda attorneys for compliance with the order and is bound to incur significant legal expense.

29. The Court notes that Mr Zhiyu Fan identifies, in Fan 2, certain individuals who he says are certainly not "*essentially outsiders*" to the Company's affairs. Mr Fan identifies Mr John Stratton, Mr Xuan Khoa Pham, and Mr Matthews. In the letter dated 26 November 2020, Appleby, the Dissenting Shareholders' Bermuda attorneys, state that Mr Pham is personally a Plaintiff in these proceedings; Mr Stratton is the director of Graceford Holdings Pty Ltd and Ferntree Consulting Pty Ltd, both of which are also Plaintiffs in these

proceedings. Mr Matthews is not personally a party to these proceedings, but he has confirmed under oath in his second affidavit that Glendina Pty Limited, of which he is a director, does not have in its possession, custody or control any relevant documents other than those made publicly available that any shareholder of the Company could have access to and to which the Company will certainly have access. Mr Matthews further confirms that Glendina's position is highly likely to be representative of the position of the entire Dissenting Shareholders class.

30. In the circumstances, the Court makes a limited discovery order, in accordance with the letter from Appleby dated 26 November 2020, requiring that Mr Xuan Pham (429th Plaintiff), Graceford Holdings Pty Ltd (249th Plaintiff) and Ferntree Consulting Pty Ltd (250th Plaintiff) provide discovery of any documents in their possession, custody or control in relation to the issues raised in this action. Such discovery is to be provided by list within the next 45 days. Otherwise, the Company's application for general discovery against all the Dissenting Shareholders is dismissed.

The Security Application

31. The Company made an initial application for security for costs on 12 February 2020 in which the Company sought security in the sum of $350,000. The application was compromised by Consent Order dated 27 February 2020. The Consent Order recorded in the preamble that:

> *"UPON Bowen Buchbinder Vilensky undertaking to hold the sum of $275,000, agreed to be paid to it by the Applicants as security for costs for the Respondent by no later than 19 March 2020, in escrow account in trust pending agreement between the parties as to costs or further order of the Court.*
>
> *…*
>
> *IT IS ORDERED BY CONSENT:*
>
> 1. *The Applicants shall provide the Respondent with security for costs in the sum of US $275,000*."

32. By summons dated 16 July 2021 the Company applied for further security for costs in the sum of $385,000. This sum is in addition to the sum of $275,000 already provided security in March 2020.

33. The reasons for seeking additional security for costs are summarised by Mr O'Mahony in his written submissions as follows:

    (1) The Company's original estimate of the case would cost to the trial was $350,000. This was estimated in February 2020 when little as yet had happened in the proceedings.

    (2) By December 2020, following a very extensive discovery exercise carried out by the Company at the demand of the Dissenting Shareholders in the letter of 3 July 2020, it was apparent to the Company that size and complexity of the case was such that the consequent costs burden was going to be much higher.

    (3) The discovery exercise resulted in many 100,000's of pages of documents being required to be given to be transferred (electronically) to the Dissenting Shareholders. In particular the feasibility studies from 2012 and 2017 of the Garatau mining areas and the modelling data are indicative of the complexity and volume of the material that will need to be dealt with.

    (4) The size of the Company's discovery was such that correspondence from the Dissenting Shareholders' Bermuda attorneys indicated in November 2020 the discovery was still being assessed. Thereafter the discovery process has continued to generate further correspondence.

    (5) In light of the discovery exercise undertaken by the Company in July and August 2020, as well as the costs of the discovery application and attendant correspondence, the Company's costs and expenses by December 2020 were $235,000.

34. In light of this Mr O'Mahony states that Conyers, the Company's Bermuda attorneys, has provided a new estimate of future anticipated costs to trial: $25,000 for completion of discovery; $50,000 for completion of factual evidence; $150,000 to provide complete experts' reports; and $200,000 for trial preparation and costs of the trial itself. The total assessment for cost trial is therefore $660,000. The Dissenting Shareholders have already provided security in the amount of $275,000 and the Company seeks the additional sum of $385,000.

35. This estimate of costs excludes the costs to be paid to English Queen's Counsel for the conduct of the trial. Mr O'Mahony advised the Court that the Company seeks to adjourn any application for security for costs in respect of the QCs costs (presently identified as Mr Barry Isaacs QC).

36. Ms Tildesley, for the Dissenting Shareholders, submits that the Court must assess three matters in relation to the renewed security for costs application made by the Company:

    (1) Has the Company shown a material change in circumstances from those which pertained or were envisaged when the existing security was agreed in the Consent Order of 27 February 2020;

    (2) If the Company has shown such change, should the Court exercise its discretion in order to, examining, in particular the principles summarised in *Gill v Appleby Spurling & Kempe (a firm) & Ors* [2000] Bda LR 21; and

    (3) If the Court is satisfied it should exercise its discretion in favour of ordering further security, in what amount should it be ordered.

37. Ms Tildesley submits that there has been no material change in circumstances, nor does the Company's evidence even attempt to set one out. By Consent Order dated 27 February 2020 the Dissenting Shareholders and the Company agreed security for costs in the sum of $275,000. This amount was to take the case through to trial:

(1) The Conyers' letter dated 24 December 2019 seeking security states, "*the costs of appraisal actions are invariably high. In addition to the professional fees of the attorneys involved, there will be costs associated with the expert witnesses. Based on our experience they can be expected to run from $150,000 to $200,000 once one includes the costs of preparation for and attendance at trial. Professional fees for a simple appraisal action are likely to run to a similar amount of $150,000 to $200,000… Accordingly at this time we would request that the Plaintiffs provide security for costs in the sum of $350,000, being a reasonable estimate of the amount that we consider will be incurred by our client in fees (including disbursements) in these proceedings*."

(2) The First Affidavit of Zhiyu Fan dated 3 February 2020 at para 10 (in support of the Company's first security for costs application – as compromised by the 27 February 2020 Consent Order) states, "*I am told by Conyers and believe that the likely costs of these proceedings, if they proceed to trial, will be considerable and that the figure set out… $350,000 – reflects this*."

38. Ms Tildesley argues that the Company's evidence in support of this application does not explain what material change in circumstances there has been to justify an increase in the security from $275,000 to $660,000, a figure nearly two and a half times that originally contemplated. The only justification set out in Fan 3 is the costs of the (i) "*very extensive discovery*" required of the Company, (ii) the cost of the discovery application and (iii) increases in other costs through to trial.

Discussion

39. Ms Tildesley cited the decision of Meerabux J in *Gill v Appleby, Spurling & Kempe*, which, the Court accepts, summarises the relevant principles to be applied in relation to an application for security for costs:

(1) The Court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances (*Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273).

(2) The possibility or probability that the plaintiff will be deterred from pursuing their claim by an order for security is not, without more, a sufficient reason for not ordering security (*Okotcha v Voest Alpine Intertrading GmbH* [1993] BCLC 474 at 479 per Bingham LJ).

(3) The Court must carry out a balancing exercise. On the one hand it must weigh the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security. Against that it must weigh injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant is unable to recover its costs from the plaintiff.

(4) In considering all the circumstances, the Court will have regard to the plaintiffs' prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (*Porzelack KG v Porzelack (UK) Ltd* [1987] 1 ALL ER 1074 at 1077 per Browne-Wilkinson VC).

(5) The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (*Roburn Construction Ltd v William Irwin (South) & Co Ltd* [1991] BCC 726).

(6) Before the Court refuses to order security on the ground that it would unfairly stifle a valid claim, the Court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled (*Trident International Freight Services Ltd v Manchester Ship Canal Co* [1990] BCLC 262).

(7) The Court should consider not only whether the Plaintiff can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from other backers or interested persons (*Keary Developments v Tarmac Construction* [1995] 3 ALL ER 534 at 540, 541 per Peter Gibson LJ).

40. The Court also accepts the Dissenting Shareholder submission that where an order for security costs has already been made a defendant will have to show a material change in circumstances in order to obtain an order for increased security. In *Stokors SA & Ors v IG Markets Limited* [2012] EWHC 1684 Popplewell J held at [13]:

> *"… where a security for costs up to a particular stage of proceedings has already been provided, a defendant who applies to increase the amount of security for the costs of that same stage in proceedings will generally have to justify a further order by reference to circumstances which did not exist or were not apparent at the time the order was made. For it to be just to order further security, a defendant will generally have to show a material change of circumstances from those which pertained or were envisaged when the matter was before the court making the order. Otherwise the court is simply being asked to reconsider a decision made on the basis of arguments which were made or could have been at the time…"*

41. The Court further accepts that the same test applies where the initial security was agreed by consent order or by the parties without an order (see: *Republic of Kazakhstan v Istil Group Inc* [2006] 1 WLR 596 at 605B).

42. In all the circumstances of this case the Court is not satisfied that it is either appropriate or just that the Dissenting Shareholders should now be asked to provide further security for costs to the Company. The Court's reasons for taking this view are as set out below.

43. First, the Court is not satisfied that there has been a material change in circumstances which justifies the Court making an order providing for additional security for costs sought by the Company. The Court accepts the Dissenting Shareholders' submission that the Company's

evidence in support of this application does not explicitly explain what material change in circumstances there has been to justify an increase in the security from $275.000 to $660,000. The only justification set out in Fan 3 is the costs of the (1) "*very extensive discovery*" required of the Company, (ii) the cost of the Discovery Application and (iii) increases in other costs through to trial.

44. In relation to the reliance upon "*very extensive discovery*", the Court accepts Ms Tildesley's submission that it would or should have been known to the Company at the time of the agreement to the existing security that they would need to give discovery and that, as is the norm in appraisal actions, that discovery would be significant and would include all documents relevant and potentially relevant to assessing its value.

45. In the initial List of Documents dated 11 May 2020 the Company disclosed just 21 documents. The earliest of the documents is dated 31 March 2017 and the latest of the documents is dated 11 September 2018. The Court accepts the Dissenting Shareholders' submission that it should have been obvious to the Company that disclosing 21 documents from an 18-month period prior to the amalgamation could not possibly comply with the Company's obligation to give discovery of all documents relating to the fair value of its shares.

46. Appleby summarised the categories of documents which should have been disclosed by the Company in order to comply with its discovery obligation in its letter of 3 July 2020. The Court accepts that these categories are drawn from the Cayman appraisal cases and this discovery is entirely standard in appraisal cases. That this discovery would be required should have been apparent to the Company at the outset. It is noteworthy that the Company's Bermuda attorneys, Conyers, in its letter of 28 August 2020, did not take issue with any of the additional documentation sought by Appleby.

47. The fact that the Company failed to properly account for it in the existing security is not, in the judgment of the Court, a material change in circumstances. The Court also accepts that, in any event, Fan 3 makes no attempt to explain why the "*very extensive discovery*"

constitutes a material change in circumstances nor to justify the extraordinary amount spent in preparing it.

48. In relation to the Discovery Application the position is that the Company has been unsuccessful in relation to that application and in the circumstances the Company should not have security for costs in relation to an application it has lost. The relatively minor discovery ordered by the Court was offered by the Dissenting Shareholders in the letter from Appleby dated 26 November 2020.

49. In relation to the increase in other costs, Fan 3 contemplates that the Company will require $50,000 to complete its factual evidence and that the Company will require $200,000 for trial preparation. The Court accepts that there has been no material change of circumstances to justify the additional $50,000 for the factual evidence. The content of the Dissenting Shareholders' appraisal application and its evidence in support was known to the Company at the time of the agreement to the existing security. The Company's original estimate for trial preparation costs was $150,000 to $200,000. The new security for trial preparation is $200.000. The Court accepts the Dissenting Shareholders' submission that save for in relation to the Discovery Application, there has been no material change in circumstances justifying the Company's request for increased security. The scope of the discovery to be given by the Company in relation to section 106 fair value appraisal actions and the scope of the actual trial should have been known to the Company at the time it agreed the existing security.

50. Secondly, even if the Court had concluded that there was a material change of circumstances the Court would still have held that it would not be just to order additional security in the circumstances of this case. As noted earlier the vast majority of the Dissenting Shareholders hold a relatively small shareholding in the Company. The consideration paid by the Company to the Dissenting Shareholders in the main is in the range of $10,000 to $50,000. The Dissenting Shareholders took the decision to pursue this litigation on the basis that $275,000 was the total amount of the security for costs they would be required to fund. Having proceeded with this litigation on that basis it would not,

in view of the Court, be just that they should now be required to provide further security in order to preserve their claims. Likewise, it would not be just or appropriate that the Dissenting Shareholders should be required to provide security for costs in relation to the Company's current desire to instruct an English QC.

51. In this regard and the Court keeps in mind the evidence of Mr Matthews that the Dissenting Shareholders are already in the invidious position of being deprived of the shares in the Company through the compulsory acquisition mechanism contained in section 106. For many of the Dissenting Shareholders, US$844 is a significant amount of money that is wholly disproportionate in light of the value of their shareholding in the Company. Many of the Dissenting Shareholders held less than 100,000 shares in the Company, which would be worth an additional US$11,800 if the Dissenting Shareholders succeed in obtaining a fair value judgment at the top and of the SRK valuation of the Dissenting Shareholders' shares in the Company. Mr Matthews states, and the Court accepts his evidence, that there is a real prospect therefore that some of the Dissenting Shareholders will drop out of the proceedings if they are asked to post additional security.

52. The Court also keeps in mind that the Dissenting Shareholders appear to have a good claim. The Company paid the Dissenting Shareholders A$10 cents per share. In coming to that price, the Board of Directors of the Company relied upon the valuation prepared by RSM. RSM valued the shares at A$0.080 (at the lower end of the range) and A$0.148 (at the high end of the range) and A$0.114 (at midpoint). The price offered by the Company to the Dissenting Shareholders is, therefore, less than the midpoint price of A$0.114.

53. Finally, the Court keeps in mind that the appraisal action under section 106 is the only remedy provided to the dissenting shareholders by the legislature in circumstances where the statutory majority of the shareholders are able to compulsorily acquire the property (the shares) of the minority shareholders. The Court of course accepts that the ordinary rules of civil litigation apply to an appraisal action under section 106 including the rules relating to security for costs. However, to the extent that the rules give discretion to the Court whether to provide security for costs and if so the amount of that security, the Court is entitled to

consider that it is desirable that the dissenting shareholders should be allowed to pursue the remedy under section 106 without undue hindrance.

54. For all these reasons the Court takes the view that in the circumstances of this case it is not just to require that the Dissenting Shareholders provide additional security for costs to the Company. Accordingly, the Company's application for security for costs is dismissed.

55. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 31st day of March 2022

NARINDER K HARGUN

CHIEF JUSTICE