IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD 14 OF 2016 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)
AND IN THE MATTER OF SHANDA GAMES LIMITED

IN OPEN COURT

Appearances:	**Mr. Nigel Meeson QC and Mr. Erik Bodden of Conyers Dill & Pearman for Shanda Games.** **Mr. Robert Levy QC and Mac Imrie, James Eldridge and Gemma Freeman of Maples & Calder for the Dissenting Shareholders.**
Before:	**The Hon. Justice Segal**
Heard:	**17 November 2016**
Draft Judgment Circulated:	**12th May 2017**
Judgment Delivered:	**16th May 2017**

HEADNOTE

Section 238(11) Companies Law (2013 Revision) - determination of fair rate of interest to be paid on the amount determined by the Court to be the fair value of the shares of shareholders dissenting from a statutory merger

JUDGMENT ON THE FAIR INTEREST ISSUE

Introduction

1. This is my judgment dealing with the fair rate of interest payable by Shanda Games Limited (**Shanda**) on the amount (the **Judgment Sum**) determined by me to be the fair value of the shares (the **Shares**) held by those shareholders who dissented from Shanda's merger. The dissenting shareholders are (1) Blackwell Partners LLC-Series

A (**Blackwell**) (2) Crown Managed Accounts SPC (**Crown**) and (3) Maso Capital Investments Limited (**Maso**) (together the **Dissenting Shareholders**).

2. In my judgment dated 25 April on Shanda's petition, which was presented on 4 February 2016 pursuant to section 238 of the Companies Law (2013 Revision) (the **Companies Law**), I determined the basis on which the fair value of the Shares was to be determined and I have subsequently held that the fair value is US$16.68 per ADS (and US$8.34 per share). As a result the Judgment Sum is US$73,575,995. This is the gross amount, before taking into account and deducting the interim payment already made by Shanda, that Shanda is required to pay to the Dissenting Shareholders. The Judgment Sum is to be apportioned as follows:

Maso:	US$ 27,495,011
Blackwell:	US$ 28,742,625
Crown:	US$ 17,338,359.

3. At the end of the trial, on the basis that no evidence had been submitted by either party and that the parties' submissions were not fully developed on the issue of interest (the Dissenting Shareholders had prepared and made more detailed submissions on the issue), I directed that further evidence (and written submissions) be filed by Shanda on 1 December 2016 and that it be open to the Dissenting Shareholders to file evidence in response and further written submissions within fourteen days thereafter. In accordance with this direction, Shanda's counsel (led by Mr Meeson QC) filed supplemental submissions on 30 November supported by the second affidavit of Sarah Lewis, an associate at Conyers Dill & Pearman, the firm of attorneys advising Shanda (the **Lewis Affidavit**). The Dissenting Shareholders' counsel (led by Mr Levy QC) filed their (further) submissions on interest on 15 December supported by the seventh affidavit of Rachel Baxendale, who is a litigation paralegal employed by Maples & Calder, the attorneys for the Dissenting Shareholders (the **Baxendale Affidavit**).

Conclusions as to the fair rate of interest

4. I set out in paragraphs 19-26 below my analysis and conclusions.

5. I have concluded that the fair rate of interest in this case is 4.295% per annum to be

applied in the manner set out in paragraph 26 below.

Section 238(11) and the approach taken in Integra

6. Before considering the submissions made by the parties and my decision as to the fair rate of interest it is helpful to set out the relevant statutory provisions and, since the parties made frequent references to it in their submissions and it is the only Cayman authority to date on the fair interest point, the approach taken by Jones J in *Integra.*

7. By section 238(11) of the Companies Law, the Court is required to determine the fair value:

> *"together with a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value."*

8. In *Integra* [2016] (1) CILR 192, Jones J held that the fair rate of interest was the mid-rate between the rate of return (being the interest earned by Integra) on cash deposits or cash equivalents held by Integra during the relevant period (0.2%) and the rate of interest payable by Integra on its US dollar denominated loans, which loans were used to discharge (in part) the merger consideration payable by Integra under the merger implementation agreement (9.7%). This resulted in a fair rate of 4.95%.

9. Jones J noted that section 238(11) appeared to have been reproduced from an earlier version of section 262(h) of the Delaware General Corporations Law (which had provided that "*the Court shall appraise the shares... together with a fair rate of interest, if any, to be paid upon the amount determined to be the fair value."*) and that:

> "*72. The Delaware courts interpreted this provision in a way which involves balancing the rate which the surviving corporation would have had to pay to borrow funds and the rate which a prudent investor could have earned on cash or cash equivalents during the relevant period. The 'legal rate' payable on judgment debts was treated as a useful default rate in cases where the parties failed to adduce any relevant evidence. (Cede & Co., Inc v. Medpoint Healthcare, Inc 2004 Del. Ch, Lexis 124 at page 21).*
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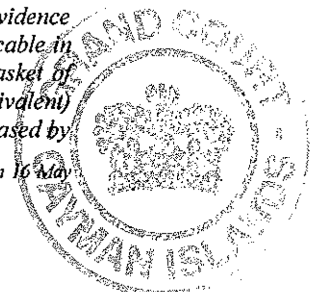
> *73. The 'legal rate' under Delaware law is the equivalent of the 'prescribed rates' payable on judgment debts under the Judgment Debts (Rates of Interest) Rules in the sense that it is the statutory rate payable on judgment debts, but I have no evidence about the way in which the Delaware rate is fixed. The prescribed rates applicable in this jurisdiction are fixed from time to time by the Rules Committee for a basket of different currencies using the following formula: 3- month LIBOR (or equivalent) rounded to the nearest one eighth per cent plus two percentage points or increased by*



125%, whichever is the greater. The prescribed rate for US$ has been fixed at 2.375% since 1 February 2013....

76. The Respondents [dissenting shareholders] have not adduced any evidence about the effective rate of interest which they actually earned or which a prudent investor could reasonably have expected to earn on cash or cash equivalents during the relevant period. Integra's audited consolidated financial statements reflect that it had the equivalent of S$59,468,000 in cash and cash equivalents as at 31 December 2013 but the notes do not disclose the results of its cash management operations..... In the absence of any affidavit evidence about the way in which Integra has actually been managing its treasury operation during the period since the merger, I think that it is reasonable to assume that it was generating around 0.2% per annum.

77. Counsel for the Respondents submits that the Court should adopt a mid-rate between the prescribed rate for US$ (2.375%) and Integra's assumed US$ borrowing rate (9.7%), which would be 6.0375% per annum. There is no obvious logic to this submission, The prescribed rate does not reflect the rate which a judgment creditor can expect to earn on cash deposits. The mid-rate between Integra's assumed return on cash (0.2%) and Integra's assumed US$ borrowing rate (9.7%) is 4.95% per annum. I conclude that this is a "fair rate of interest" which should be awarded to the Respondents from 2 July 2014 until payment."

10. Accordingly Jones J decided to adopt the mid-point approach in which the Court assessed and balanced (i) the benefit derived or assumed to be derived by the company as a result of retaining and being able to use the sums which ultimately are payable to the dissenting shareholders (referred to as the borrowing rate) and (ii) the loss suffered or assumed to be suffered by the dissenting shareholders, or an investor in their position, as a result of being out of their money and not having the opportunity to invest such sums (referred to as the prudent investor rate). I note that in *Integra* the dissenting shareholders had not offered any evidence as to the prudent investor rate by reference to what rate of interest they could have earned on the sums payable to them or what an objectively ascertained investor could have earned on such sums. There was some evidence of the rate earned by Integra on its cash and cash equivalents and in those circumstances Jones J decided in effect to use that rate (which he concluded was 0.2% per annum) as the proxy for the opportunity cost of or notional loss suffered by the dissenting shareholders (or prudent investors in a similar position) as a result of not being able to invest the sums to which they were entitled. Furthermore, Integra had borrowed funds under a dollar denominated loan facility which had been for the purpose of the merger and which established a rate of interest at which Integra borrowed funds in connection with the merger. This was therefore a reliable and readily available measure of the borrowing rate and the benefit derived by Integra from being able to utilise and avoid having to borrow the sums payable to the dissenting shareholders.

The parties' submissions – Shanda's submissions

11. Mr Meeson argued that the fair rate of interest in this case was 1.89%. The correct approach was to establish the mid-point between the borrowing rate and the prudent investor rate. The borrowing rate should be the interest payable during the relevant period on a loan of an amount equal to the Judgment Sum. The prudent investor rate should be the rate of interest which a prudent investor would earn on that amount during the relevant period. Mr Meeson submitted that in this case the borrowing rate should be Shanda's cost of borrowing and the prudent investor rate should be the rate of interest which a prudent investor could have earned on cash or cash equivalents during the relevant period.

12. As regards Shanda's cost of borrowing an amount equal to the Judgment Sum, Mr Meeson argued that the Court should use the prime rate. He submitted that this was the rate at which a prime borrower could borrow US dollars and that Shanda was to be treated as a prime borrower. Exhibited to the Lewis Affidavit was an email from the Cayman National Bank confirming that as at 28 November 2016 the prime rate was 3.5%.

13. As regards the prudent investor rate Mr Meeson submitted that in the present case a prudent investor could have earned 0.28% on cash by investing in a three months fixed deposit at a Cayman Islands bank. Exhibited to the Lewis Affidavit was a document provided by the Cayman National Bank setting out the interest rates payable by them on US$ deposits of differing terms. The rate for three month deposits of US$1 million or over was stated to be 0.28%. The rate for six (and nine) month deposits was 0.35%. Mr Meeson noted, by way of comparison, that the yield on US three month Treasury bills had fluctuated between 0.23% and 0.33% during 2016 and that the mid-point of this range was also 0.28% (a graph showing the yield on three month US Treasury bills on a month by month basis during 2016 was also exhibited to the Lewis Affidavit).

14. Mr Meeson referred to and relied on the opinion of Vice Chancellor Noble in *Cede & Co. Inc v. Medpoint Healthecare, Inc.*, (revised opinion dated 10 September 2004).

where the Vice Chancellor said that:

> *"The award of interest serves two important purposes. First, 'it compensates the plaintiff for the loss of the use of his money during this period,' and thus 'endeavours to place the dissenting shareholder in the position she would have been in had the corporation promptly paid the value of her shares.' Second, 'it forces the surviving corporation to disgorge the benefit it received from having the use of the plaintiff's funds.'*
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> *"'In determining the fair rate of interest, the Court may consider all relevant factors, including the rate of interest which the surviving or resulting corporation would have had to pay to borrow money during the pendency of the proceeding.' In addition to looking to the company's cost of borrowing, or 'borrowing rate', the Court 'has historically examined the return that a prudent investor would have received if he had invested the judgment proceeds at the time of the merger.' The Court may also consider the legal rate of interest; indeed, 'the legal interest rate serves as a useful default rate when the parties have inadequately developed the record on the issue.'*
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> *"The Petitioners' argument that the interest rate should be based solely on the borrowing rate or the rate 'a prudent investor would require to provide a substantial unsecured loan to the Respondent' must be rejected. As noted above, this Court traditionally looks at both the 'prudent investor rate' and the 'borrowing rate' in fixing the interest rate and the Petitioners have provided no compelling argument as to why this Court should deviate from this practice. Awarding the proposed [unsecured loan] interest rate of 9.940% would grant an 'undeserved windfall' given the volatility of the market.....*
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> *Although the Court may look at the actual cost of borrowing by the respondent company, the Court determines the petitioner's opportunity cost based on an objective standard. Several other decisions have similarly rejected consideration of a petitioner's subjective opportunity cost in awarding interest. Petitioner voluntarily relinquished funds it could have otherwise invested as it pleased and cannot now argue that in hindsight it would have used those funds to achieve higher returns than the objectively prudent investor.""*

15. Mr Meeson submitted that the Vice Chancellor's opinion supported his approach to the determination of the fair rate of interest. In particular that:

    (a). the Court should consider all relevant factors.

    (b). the Court should establish the "borrowing rate" of the relevant company and compare that with the "prudent investor rate".

    (c). the Court could take into account and use the applicable statutory rate in the relevant jurisdiction payable on judgment debts. In Delaware the relevant term is the legal rate which (as Jones J noted in *Integra*) is the

equivalent of the 'prescribed rates' payable under Cayman law on judgment debts under the Judgment Debts (Rates of Interest) Rules.

(d). the Court does not undertake a subjective analysis of the dissenting shareholder's opportunity cost but uses an objective standard of a notional prudent investor.

16. Mr Meeson also argued that the Court could only award simple and not compound interest. This point was not in dispute and was accepted by Mr Levy.

The parties' submissions – the Dissenting Shareholders' submissions

17. The Dissenting Shareholders position was that the Court should seek to identify a rate which was fair to both parties having regard to the evidence and the commercial reality of the merger regime in the Cayman Islands. They argued that the fair rate of interest in this case should be at least 5% per annum and put forward various bases for calculating the interest rate each of which resulted in a different rate above 5%.

18. In fact Mr Levy's written submissions proposed a large number of alternative methodologies – a menu of options from which the Court was invited to make its selection. I would summarise the different bases argued for by Mr Levy as follows:

(a). Mr Levy argued that the Delaware case law showed that there had been a change in approach in 2007 when there had been an amendment to the Delaware statute as it related to interest. After 2007 and currently, the approach generally adopted by the Delaware courts is to apply the Delaware legal rate which Mr Levy said is currently set at 5% per annum over the Federal Reserve Discount Rate. Before that date there were, he said, examples of the Delaware courts conducting an assessment that took into account both the cost of borrowing and the rate of return for a prudent investor during the period in question. Mr Levy submitted that this approach was permitted in the Cayman Islands and should be adopted by the Court in this case.

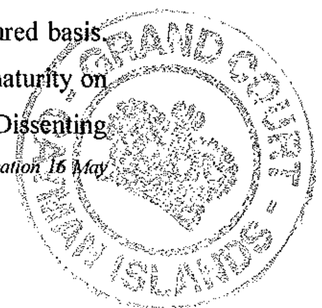
(b). an example of a case in which the Delaware court had adopted this approach was *Re Emerging Communication* 2004 Del. Ch. LEXIS 70 (Justice Jacobs). In this case the court determined, as best it could on the available evidence,

both the interest rate that the merged company paid on short term unsecured borrowings (7%) and what a prudent investor's expected rate of return was (5.54%). The mid-point of those two numbers resulted in an interest rate of 6.27%. I note that, to my mind importantly, the prudent investor rate relied on by the court in this case was based on the expert evidence and written report filed on behalf of the company by Duff & Phelps (Mr Bayston).

(c). as regards the borrowing rate, there were two alternative approaches, each focusing on the benefit derived by Shanda from having retained the Judgment Sum. One alternative was based on the rate Shanda could have earned if it had deposited the Judgment Sum in a commercially sensible albeit prudent manner. The other alternative was based on the rate of interest at which Shanda could borrow the Judgment Sum. Accordingly:

(i) the Court could use the rate of interest which Shanda could, had it behaved prudently and commercially, have earned on the Judgment Sum during the relevant period (the deposit rate). Mr Levy argued that Shanda could have deposited the Judgment Sum with Chinese banks for a one year fixed term and had it done so it would have been able to earn interest at the rate of (at least) 1.75%. This was the rate which was offered in December 2016 to retail customers for twelve month deposits by all but one of the Chinese banks in the sample of eight offers collected by the Dissenting Shareholders and exhibited to the Baxendale Affidavit; or

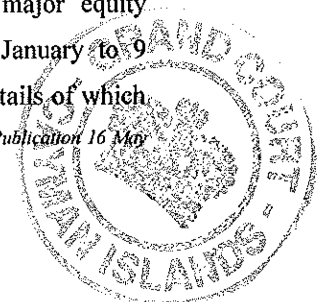
(ii). the Court could use the rate of interest that Shanda would have had to pay to borrow a sum equal to the Judgment Sum. By not paying the merger consideration until 18 March 2016 and not paying the actual fair value of Shanda to the Dissenting Shareholders until the judgment, Shanda had access to cash that it would otherwise have had to borrow. In the absence of evidence from Shanda of its actual post-merger borrowing costs, Mr Levy submitted that the Court should take into account Shanda's unsecured borrowing rate – the rate of interest at which Shanda could borrow funds on an unsecured basis. To establish this Mr Levy relied on evidence of yields to maturity on bonds on an Asian high yield bond index provided to the Dissenting



Shareholders by Morgan Stanley. This is the Markit iBoxx USD Asia ex-Japan High Yield Index. Mr Levy said that this evidence demonstrated that the January 2016 yield to maturity on bonds in this index was 8.3% and the average yield to maturity on bonds in the index taking the measurement daily during the period from 4 January 2016 to 9 December 2016 was 7%.

(d). as regards the prudent investor rate which the Dissenting Shareholders (or prudent investors in their position) could have earned on the Judgment Sum, Mr Levy argued that the Court should review different portfolios with different risk profiles and combining and mixing long and short term investments in a prudent manner and take into account the return that would be earned on each. Mr Levy submitted this was consistent with the approach taken in the Delaware case law before the 2007 change of approach. Under that Delaware jurisprudence the prudent investor rate was a mix of short and long term investments, the precise mix of which changed on a case by case basis. He provided a number of examples by way of illustration and relied in particular on *Cede & Co. v. JRC Acquisition Corp.* (10 February 2004, Chancellor Chandler) in which the rate was derived from a mix of 20% broadly diversified common stock from a number of indices, 40% U.S. treasury and corporate bonds and 40% money market / bank certificate of deposits. To support and provide the inputs for the determination of a suitable portfolio and calculation of the prudent investor rate, Mr Levy relied on data collected by the Dissenting Shareholders and their attorneys which was exhibited to the Baxendale Affidavit. The calculations and analysis were as follows (these were not contained in or supported by any expert evidence - the 22 March 2016 directions order, made by consent, only required the experts to opine on the fair value of Shanda as a going concern and did not deal with the fair rate of interest issue – see sub-paragraphs (g) and (j) – and there had been no request for further permission to instruct experts for this purpose):

(i). Mr Levy relied on calculations based on the returns generated by various exchange traded funds which track certain major equity (common stock) indices (during the period from 4 January to 9 December 2016). The indices relied on by Mr Levy (details of which



were exhibited to the Baxendale Affidavit) were:

(A). iShares Core S&P 500 ETF: 14.54% return.

(B). SPDR Dow Jones Industrial Average ETF: 18.06% return.

(C). iShares MSCI ACWI World (Developed Markets & Emerging Markets) ETF: 11.45% return.

The average return on these index tracking funds was 14.68%. Mr Levy submitted that while these numbers may seem high, they accurately portray the fact that the relevant period was one of high equity market returns even for prudent (index tracking) investors.

(ii). Mr Levy also relied on returns generated by various indices of US Treasuries and US corporate bonds for the same period. These were:

(A). the iShares iBoxx $ Investment Grade Corporate Bond ETF: 5.09% return.

(B). the iShares iBoxx $ High Yield Corporate Bond ETF: 12.96% return.

(C). iShares US Treasury Bond ETF: 0.26% return.

On average, equally weighting the return on these would be 6.1%

(iii). finally, Mr Levy referred to and relied on the interest rate on one year US$ fiduciary certificates of deposit. This is the annualized rate of interest that will be earned by purchasing or paid by offering a certificate of deposit. Mr Levy relied on evidence that the interest rate for such certificates of deposit in January 2016 was 1.14%.

(iv). Mr Levy then used the weightings set out in the *Cede & Co. v. JRC Acquisition Corp* case to establish the prudent investor return for the period 4 January to 9 December 2016 as follows:

(A). 20% times the average return on broad equity indices in the period of 14.68% (see sub-paragraph (i) above); and

(B). 40% times the return on US Treasury and Corporate Bond ETFs of 6.1% (see sub-paragraph (ii) above); plus

(C). 40% times the return on a Money Market/bank certificate of deposit of 1.14% (see sub- paragraph (iii) above).

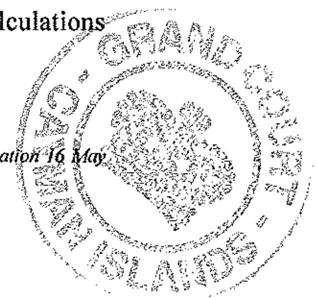
(v). applying the above calculation, the prudent investor rate for the period of 4 January 2016 to 9 December 2016 would be 5.83%.

(e). Mr Levy concluded by submitting that the mid-point analysis using the prudent investor returns and Shanda's borrowing rate as set above and calculated in line with the methodology applied in *Cede & Co. v. JRC Acquisition Corp* would be:

(i). the mid-point between 5.83% (the prudent investor returns as calculated above) and 8.3% (the YTM on Asian High Yield bonds as at 4 January 2016), being 7.1%.

(ii). The mid-point between 5.83% (the prudent investor returns as calculated above) and 7.0% (the average YTM of Asian High Yield Bonds across the relevant period), being 6.4%.

(f). Mr Levy also used these inputs to show the fair rate of interest that would be calculated using the approach approved in *Integra*. This Mr Levy said would be the mid-point between the rate that Shanda could have earned on deposits of cash or cash equivalents and the rate at which Shanda could have borrowed the Judgment Sum on an unsecured basis. His calculations were as follows:



(i). the mid-point between 1.75% (the most commonly offered deposit rate from Chinese banks) and 8.3% (the YTM on Asian High Yield bonds as at 4 January 2016), being 5.0%; alternatively

(ii). the mid-point between 2.50% (the deposit rate offered by certain large Chinese banks) and 8.3% (the YTM on Asian High Yield bonds as at 4 January 2016), being 5.4%; alternatively

(iii). the mid-point between 2.50% (the deposit rate offered by certain large Chinese banks) and 7.0% (the average YTM of Asian High Yield Bonds across the period), being 4.8%; or

(iv). the mid-point between 1.75% (most commonly offered deposit rate from Chinese banks) and 7.0% (the average YTM of Asian High Yield Bonds across the period), being 4.4%.

Discussion

19. It seems to me that the approach outlined by Vice Chancellor Noble in *Cede v Medpoint Healthcare* (see paragraph 14 above) is the proper approach for the Court to adopt. The Vice Chancellor's explanation of the purpose of the statutory right to an award of a fair rate of interest seems to me to be consistent with the nature and purpose of the statutory jurisdiction and language – to protect the dissenting shareholders from the effects of the forced merger and in particular to compensate them for being out of their money and to fix a "*fair*" rate of interest. Furthermore, the need to take into account all relevant factors having regard to the facts of the case also seems to me to be what is required in order to ensure that a fair rate is used.

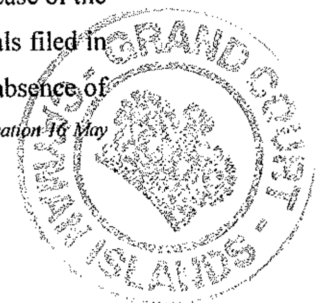
20. It also seems to me that the balancing of interests and positions involved in the mid-point approach is consistent with the statutory mandate to establish a fair rate. Interest should address the dissenting shareholders' financial disadvantage of being out of their money. The disadvantage materialises either in loss of earnings on the funds or in the costs of having to borrow a loan to substitute for the funds not received. Equally the debtor gains a financial advantage through withholding the sums payable to the dissenting shareholders. In the meantime he or she can yield returns from investing the funds or avoid the cost of a loan. Therefore the non-payment of a sum of

money results in what can be described loosely as an unjustified enrichment of the debtor. It follows that for the assessment of the financial consequences of the delay two different perspectives have to be borne in mind. The mid-point approach achieves this. In some respects the exercise which the Court is required to undertake is similar to that which the Court undertakes when exercising its discretion under section 34(1) of the Judicature Law (2013 Revision) to award interest on a debt or damages in respect of which a judgment is awarded.

21. I accept that the Court may have regard to the prescribed rate (that is the statutory rate of interest payable on judgment debts which is 2.375% for U.S. dollars, as set out in the Judgment Debts (Rates of Interest) Rules 2012) as a reference point, particularly in cases where there is no or insufficient evidence filed by the parties. However, it does not seems to me appropriate to place much weight on it. Had the intention been to use the prescribed rate section 238(11) could easily have referred to it. Furthermore, the statutory requirement to establish a fair rate, as I have noted, does seem to me to involve taking into account the purpose of the requirement to pay interest and to balance the position of and impact of the delay in payment on both the company (debtor) and the dissenting shareholders.

22. Both parties appear to accept that the assessment of the prudent investor rate and the dissenting shareholders opportunity cost should be based on an objective standard (which, as is confirmed by the quotation in paragraph 14 above from the opinion of Vice Chancellor Noble in *Cede & Co. Inc v. Medpoint Healthecare, Inc.,* has been the approach of the Delaware courts (I note that this also appears to be the approach, at least for some purposes, under section 34(1) of the Judicature Law – and see the English case of *Reinhard v Ondra LLP* [2015] EWHC 2943).

23. In making the fair rate of interest determination the Court depends on the parties to providing reliable evidence. There was a significant evidence gap in *Integra* and while the position is better in these proceedings it is still less than satisfactory. The evidence for the different interest rates, rates of return on various indices and the operation and relevance of the various indices and financial information has been provided by the parties'attorneys who have no doubt done their best to collect relevant and reliable material (with the assistance of Morgan Stanley in the case of the Dissenting Shareholders) but the evidence remains incomplete. The materials filed in evidence are of limited assistance to the Court because it is difficult in the absence of



relevance expert evidence from financial experts to form a view on the reliability and relevance of at least some of this evidence. In particular I have found it impossible to form a view as to which indices a prudent investor would use and in what combination and with what weighting. I have noted above (see paragraph 18(b)) that it appears that at least in some of the Delaware cases on this issue the parties filed and the Court relied on expert evidence on matters relevant to the fair rate of interest issue and it seems to me that this kind of expert evidence would be of great assistance if the parties wish the Court to make an assessment of different funds and investment strategies. (I have also noted in paragraph 18(d) above that in these proceedings the relevant directions relating to expert evidence did not cover the fair rate of interest issue and a further permission would have been needed for such expert evidence to be filed). This is, perhaps, a matter for parties to future proceedings under section 238 to consider and take into account.

24. In these proceedings I must decide, based on the evidence that has been filed, what the appropriate borrowing rate and prudent investor rate should be:

(a). as regards the borrowing rate (the benefit derived by Shanda from not having to pay the Judgment Sum):

(i). it seems to me that there are two alternative approaches that could be used. First, the cost to Shanda (or a company in Shanda's position) of borrowing the Judgment Sum or secondly the rate of interest which Shanda (or a company in Shanda's position) could earn on the Judgment Sum during the relevant period.

(ii). in the present case, as Mr Meeson pointed out in his submissions, Shanda did not and did not need to borrow funds for the purpose of the merger and has no debt. It might follow from this that the second alternative is more appropriate (although there is no evidence that Shanda will not need to borrow in order to fund the payment of the Judgment Sum, although that might be inferred).

(iii). under such an approach I would not limit the assessment of the fair rate by considering only rates offered by Cayman banks for US dollar deposits. I accept that in this case having regard to the fact that

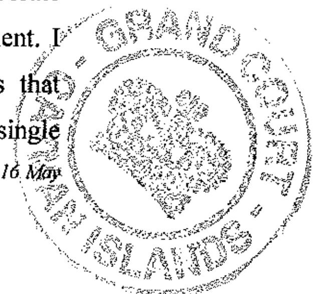
Shanda is a company with substantial Chinese operations it would be appropriate to have regard to rates offered by Chinese banks, as Mr Levy submits. Mr Levy relied on the rates generally offered to customers for twelve month deposits by Chinese banks in the sample collected by the Dissenting Shareholders' attorneys. The rate is 1.75% per annum. There is a question as to whether a twelve month fixture is too long in the circumstances of the proceedings. To my mind a six or nine month fixture would be more appropriate but in the absence of evidence of rates for deposits for these periods I would be prepared to accept and would use the rate of 1.75% as the borrowing rate.

(iv). the alternative approach focusses on the cost to Shanda (or a company in Shanda's position) of borrowing the Judgment Sum. Mr Meeson submitted that the preferred approach is to assume that Shanda was the type of borrower that could borrow at the prime rate and that the prime rate for dollars of 3.5% was the appropriate rate to use. Mr Levy argued for a higher rate, pointing out that there was no evidence to establish that Shanda should be treated as a prime borrower. Instead he relied (see paragraph 18(c)(ii) above) on evidence of yields to maturity on bonds on an Asian high yield bond index being the Markit iBoxx USD Asia ex-Japan High Yield Index. Mr Levy relied on the January 2016 yield to maturity on bonds in this index being 8.3% and the average yield to maturity on bonds in the index taking the measurement daily during the period from 4 January 2016 to 9 December 2016 being 7%. But the evidence does not establish either that Shanda is properly to be treated as only being able to borrow in the high yield bond markets.

(v). I have decided to use the rate determined by the cost of borrowing and to use the prime rate. It seems to me that since Shanda is debt free and has substantial revenues the balance of the evidence suggests that it is a prime borrower and would be able to borrow at the prime rate. That is therefore the rate to use and the evidence indicates that the rate is 3.5% per annum. It also seems to me right to use the cost of borrowing rather than the lower rate for interest on deposits since this

is in accordance with the Delaware jurisprudence and importantly is the approach which Mr Meeson invited the Court to adopt and submitted should be used.

(b). as regards the prudent investor rate, I have carefully considered the evidence filed and submissions made by both parties. I have considered the weighted investment portfolio approach adopted in the Delaware cases cited and relied on by Mr Levy and accept that in an appropriate case it might well be the preferred approach - where the evidence (probably expert evidence) is such that the Court can compare the different indices and funds and make an informed assessment of whether particular indices are appropriate, and if so which index is to be preferred to the others, whether the sample as a whole is reliable and which combination and weighting of investments is to be preferred. However, in the present case looking at the totality of the evidence filed I feel unable to make these judgments and assessments. The Court does not have sufficient information or the benefit of expert evidence which provides assistance on such matters. Equally, I am not prepared to accept Mr Meeson's argument that the prudent investor would be limited to investing all the funds in three month fixed deposits in Cayman banks. While it is important to remember and apply the *prudent* investor standard I think the Court is entitled to take into account that a prudent investor could justify a form of investment that offered an element of a higher rate of return than this. One of the indices referred to in the Dissenting Shareholders' evidence seems to me to be relevant and suitable, namely the index for investment grade corporate bonds (see paragraph 18(d) above). This produced a rate of 5.09%. This seems to me to be a reasonably low risk investment and an appropriate rate to use for the prudent investor rate. I note and give some weight to the evidence filed by the Dissenting Shareholders that suggests that the relevant period was one of high equity market returns even for prudent investors. Of the various alternative rates available in the evidence this one seems to me to be the most appropriate for prudent investors in the position of the Dissenting Shareholders and in the circumstances of this case. It seems to me to be reasonable that a prudent investor would invest in investment grade corporate bonds and the evidence provides a rate of return for such an investment. I appreciate that the Dissenting Shareholders' evidence also suggests that prudent investors would spread their risk and may not invest just in a single



category of investment. Such an approach would involve only a percentage of funds being invested in investment grade corporate bonds. Nonetheless, I do not consider that this of itself means that it is inappropriate to use the rate only derived from the index for investment grade bonds. I do not see why it would be unreasonable to assume or that it is inconsistent with the evidence to conclude that a prudent investor in the present circumstances would invest just in low risk investment grade corporate bonds.

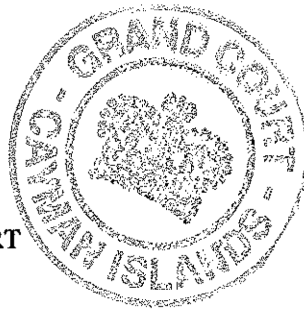
25. Accordingly I hold that the fair rate of interest is that represented by the mid-point between 3.5% and 5.09%, namely 4.295%.

26. The manner in which the fair rate of interest is to be applied and the interest calculation done is agreed between the parties, as follows:

(a). interest on the interim sum of US$31,318,320.10 (the "Interim Sum") from 4 January 2016 until the payment of that sum to the Dissenting Shareholders on 18 March 2016; plus

(b). interest on the difference between the Interim Sum and the Judgment Sum from 4 January 2016 until the date of payment.

DATED the 16th of May 2017



The Hon. Justice Segal
JUDGE OF THE GRAND COURT