EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2021/0177

BETWEEN: -

NETTAR GROUP INC

Claimant

and

HANNOVER HOLDINGS S.A.

Defendant

Appearances:
Mr. Robert Levy QC, with him Mr. Liam Faulkner for the Claimant
Mr. Michael Todd QC, with him Miss Arabella di Iorio and Mr. Andrew Blake for the Defendant

---

2021: November 8;
December 15.

JUDGMENT

[1] **WALLBANK, J. [Ag.]**: This is the Court's judgment in respect of the Amended Fixed Date Claim filed by Nettar Group Inc. (the '**Company**') seeking declarations pursuant to section 246 of the BVI Business Companies Act, 2004[1] (the '**Act**') on a question of interpretation of section 179 of the Act and also, on the meaning of a 'shareholder', as contemplated by the Company's memorandum and articles of association ('**Articles**').

[1] No. 16 of 2004.

[2] The matter arises because the Company is a party to an intended corporate merger. Section 179 of the Act provides a procedure for a member of a company who does not agree with a merger to indicate his dissent and to have his shareholding bought out for fair value. The Defendant here, Hannover Holdings S.A. ('**Hannover**'), is a shareholder of the Company. Hannover dissents from the merger. Hannover wishes to avail itself of its right to have its shareholding bought out.

[3] But Hannover is not just an existing shareholder. As an investor in the Company, it is also a holder of four convertible promissory notes issued by the Company (together the '**Hannover Notes**' or '**Notes**'). The Hannover Notes, in broad terms, give Hannover a contractual entitlement to convert sums due to it into further shares, known to the parties as 'Conversion Shares', upon the happening of certain events, including a merger (in other words, an option to swap debt for equity). Hannover contends that it should be bought out, not just in respect of its existing, registered shareholding, but also in respect of such Conversion Shares that it might acquire, so that it would exit the Company's membership entirely.

[4] The Court's decision is that Hannover's entitlement to be bought out at fair value extends merely to its existing, registered membership in the Company. The right does not extend to shares which Hannover does not yet hold. This conclusion may seem anodyne, but Hannover argued vigorously for a contrary proposition.

[5] The declarations claimed by the Company were as follows, that:

(1) a member, in relation to the Company, means a person whose name is entered in the Company's register of members as the holder of one or more shares, or fractional shares, in the Company;

(2) the right to exercise dissenter rights under section 179 of the Act is a right which attaches to a share in the Company which can only be exercised by the registered holder of that share;

(3) in order to exercise dissenter rights under section 179 of the Act, a person must be the registered shareholder of the share(s) in respect of which he

seeks to dissent as at (i) the date of giving written objection pursuant to section 179(2) of the Act or (ii) where an objection is not required under section 179(2) of the Act, the date of giving written notice of election to dissent pursuant to section 179(5) of the Act; and

(4) reference in section 179(6) of the Act to 'all shares that [a dissenting member] holds in the company' means all shares of the company for which the member is the registered shareholder as at (i) the date of giving written objection pursuant to section 179(2) of the Act or (ii) where an objection is not required under section 179(2) of the Act, the date of giving written notice of election to dissent pursuant to section 179(5) of the Act.

Background

[6] The Defendant, Hannover, is both a shareholder of certain issued shares in the Company ('**Hannover's Current Shareholding**') and the holder of the Hannover Notes. The Company has issued other convertible promissory notes in substantially the same terms to other investors.

[7] The Hannover Notes, which are governed by New York law, are convertible at the election of the Defendant into a certain number of 'Conversion Shares' that would be issued by the Company to the Defendant upon the occurrence of one of more specified contingencies.

[8] Pursuant to clause 2.3(c) of the Hannover Notes, in the event of a 'Corporate Transaction', which is defined to include the consummation of a merger or consolidation of the Company with or into another entity, prior to full payment of the Notes, the Company shall give Hannover ten business days' advance notice of the anticipated closing of such Corporate Transaction (the '**Change of Control Notice**'). Upon receipt of such a Change of Control Notice, Hannover may elect either to (i) be repaid an amount equal to the outstanding principal and unpaid accrued interest on the Note (the '**Transaction Payment**') in full and final payment and discharge of the Note or (ii) convert all of the outstanding principal and unpaid accrued interest due on the Note into '**Conversion Shares**' 'immediately prior to

the Corporate Transaction' in accordance with a contractual conversion mechanism. Clause 2.3(c) provides materially as follows:

> "Corporate Transaction. In the event of a Corporate Transaction prior to full payment of the Notes or conversion of the Notes, the Company shall give each Lender ten business days advance notice of the anticipated closing of such Corporate Transaction (the "Change of Control Notice"). After being provided a Change of Control Notice, each Lender may elect to either:
>
> (i) be repaid an amount equal to the outstanding principal of such Note plus the unpaid accrued interest on such Note (the "Transaction Payment") and such Transaction Payment, when made, shall represent a full and complete accord and satisfaction of the Note and shall discharge the Note in full; or
>
> (ii) convert all of the outstanding principal and unpaid accrued interest due on such Note into Conversion Shares immediately prior to the Corporate Transaction.
>
> The number of Conversion Shares to be issued upon a conversion under this Section 2.3(c) shall be equal to the number obtained by dividing the outstanding principal and unpaid accrued interest due on the Note by the Conversion Price.
>
> The reference in this Section 2.3(c) to all outstanding principal and unpaid accrued interest due on a Note being converted into Conversion Shares implies that prior to the date of the Change of Control Notice, the Company and its directors and shareholders, as the case maybe, (X) shall have amended the Articles and duly authorized the issuance of the applicable number of Conversion Shares to the holder of the applicable Note; (Y) shall treat the applicable number of Conversion Shares as having been duly subscribed for and fully paid in by the holder of the applicable Note; and (Z) shall have updated the Company's Register of Members to reflect the issuance of the applicable number of Conversion Shares to the holder of the applicable Note."

[9] There is also clause 2.3(e), which provides:

> "(e) Mechanics of Conversion. Notwithstanding any provision to the contrary, the Company shall not be required to issue the Conversion Shares until the Note holder has surrendered the Note to the Company. Such conversion maybe made contingent upon the closing of the Next Equity Financing or Corporate Transaction in case of conversion pursuant Sections 2.3(a) and 2.3(c) hereto."

[10] So, in basic terms, the Company would have to give Hannover ten days' advance notice of the proposed merger, so that Hannover could, if it so chose, be issued

shares in the Company immediately before the merger. Once Hannover would elect to convert the Notes, and has surrendered the Notes to the Company, no further action on the part of the Company would be required for Hannover to be treated as a holder of the applicable number of Conversion Shares.

[11] Hannover observes that if it were not to exercise dissent rights, then, in common with its existing shares, the Conversion Shares would be cancelled pursuant to the merger, and Hannover would receive the merger consideration for those Shares.

[12] The Company has entered into an Agreement and Plan of Merger dated 5th July 2021 (the '**Merger Agreement**') between itself and four other companies. The merger is expected to complete in the fourth quarter of 2021 but remains subject to, *inter alia*, approval by the Company's members in accordance with the Company's constitutional documents.

[13] It appears to be common ground between the parties that, upon becoming effective, the proposed merger would constitute a Corporate Transaction within the meaning of the Hannover Notes and a 'merger' within the meaning of section 179(1)(a) of the Act.

[14] Hannover claims that it has a right to dissent under section 179(1)(a) of the Act in respect of (a) Hannover's Current Shareholding in the Company (which is accepted by the Company, subject to the statutory formalities being complied with) **and** (b) any Conversion Shares that would be issued to it by the Company upon the Merger becoming effective. This latter, (b), is for present purposes the main point in dispute.

[15] The Company submits that as a matter of the true and proper construction of section 179 of the Act, in order to exercise dissenter rights, a person must be the registered shareholder of the shares in respect of which they seek to dissent as at (i) the date of giving written objection pursuant to section 179(2) of the Act or (ii) where an objection is not required under section 179(2) of the Act, the date of giving written notice of election to dissent pursuant to section 179(5) of the Act.

[16] The Company remarks that Hannover wishes to dissent in respect of both its current shareholding and any Conversion Shares it might be issued with, notwithstanding that the issuance of such Conversion Shares is contingent upon, *inter alia*, the merger being approved by the Company's members, the merger becoming effective and Hannover validly exercising its right to convert the debt into Conversion Shares under the applicable contractual terms.

[17] Hannover, for its part, explains that it has serious reservations about the merger, which it has expressed since at least March this year. Hannover says that the Company has been on notice since at least 27th July 2021 that Hannover may exercise its dissent and appraisal rights under section 179 of the Act. The Company disputes this, but nothing substantive turns on this for present purposes.

[18] Hannover moreover explains that the number of Conversion Shares it would hold after conversion of the Hannover Notes is certain, as there are agreed and precise conversion formulae by which this is to be done.

[19] Hannover submits that dissenter rights attach to a member in respect of all its shares, including its Conversion Shares.

[20] Hannover relies upon evidence that the parties agreed (when entering into the Note Purchase Agreements, pursuant to which the Hannover Notes were issued), that the shares Hannover would hold upon conversion would possess all the rights of the Company's other shares.

[21] Hannover furthermore says that the Hannover Notes will indisputably convert into Conversion Shares prior to the merger, and thus be available for dissent prior to the merger.

[22] The Company submits, on the contrary, that the conversion of the Hannover Notes is 'far from certain' and would depend upon the happening of several contractually governed steps, within a contractually agreed time limit, which may or may not occur. These steps are:

(1) First, the Company must give a Change of Control Notice;

(2) Then, within 10 days of delivery to Hannover of this notice, Hannover may (but does not have to) elect to require the Company to repurchase the outstanding principal and all unpaid accrued interest thereon or to convert the Hannover Notes into Conversion Shares.

[23] It is to be borne in mind that conversion of the Hannover Notes into Conversion Shares – or not, as the case may be – is a matter of contract between the Company and Hannover. There is a separate statutory procedure that concerns the rights of shareholders who wish to dissent from a merger. We will look at this shortly. The Court's present task is to consider both procedures together.

[24] The parties agree that whether or not Hannover (or any other holder of convertible promissory notes issued by the Company) can exercise dissenter rights in respect of 'Conversion Shares' is a pure question of interpretation of section 179 of the Act and the interpretation of the meaning of a 'shareholder' under the Company's Articles.

Procedural Background

[25] On 19th October 2021, the Company filed a Fixed Date Claim Form seeking the same declarations that it has sought in the Amended Fixed Date Claim Form, but without joining any other party to the proceedings.

[26] An Amended Fixed Date Claim Form was filed on 27th October 2021 joining Hannover as a defendant to the proceedings at its request.

[27] By a consent order of this Court (by Justice Jack) dated 28th October 2021, it was ordered that Hannover be joined as a defendant to the proceedings, that the first hearing of the matter be listed on an *inter partes* basis for hearing on 8th November 2021 and that the Court should treat this first hearing as the trial of the claim and endeavour to deal with the claim summarily at the hearing. With the assistance of Counsel for both sides, this was achieved.

Section 246 of the Act

[28] The Company's application has been brought pursuant to section 246 of the Act. This provides that:

> "(1) A company may, without the necessity of joining any other party, apply to the Court, by summons supported by an affidavit, for a declaration on any question of interpretation of this Act or of the memorandum or articles of the company.
>
> (2) A person acting on a declaration made by the Court as a result of an application under subsection (1) shall be deemed, in so far as regards the discharge of any fiduciary or professional duty, to have properly discharged his duties in the subject matter of the application."

[29] The Company relies on the decision of this Court (by Justice Leon) in **In the matter of Olive Group Capital Limited,**[2] in which the learned Judge commented that section 246 of the Act is an 'innovative and useful' remedy[3] available to a company under the Act and that the section demands a 'liberal interpretation'.[4] As such, provided there is a 'real' question to determine, the jurisdiction is available and appropriate. The Company submits that none of the declarations sought is academic in nature as they all relate to important facts and issues concerning the proposed Merger.

[30] This was not in dispute. I accept that each of the declarations sought is a question of interpretation of the Act and/or the Company's Articles and, as such, the relief sought falls squarely within the scope of section 246(1) of the Act. What was (procedurally) in dispute was that the Company had sought to apply for the declarations it seeks without having Hannover before the Court. In the circumstances, it was clearly correct for Hannover to be joined, and it was. Hannover would potentially be seriously affected by the outcome. Hannover had a direct interest in the matter. Hannover needed to have a proper opportunity to be heard. I am satisfied that ultimately Hannover has been afforded such an opportunity. I would go further and say that the Court found it most useful to hear

---

[2] BVIHC(COM) 2015/0115 (unreported, delivered 21st January 2016).
[3] BVIHC(COM) 2015/0115 (unreported, delivered 21st January 2016) at paragraph [37] (Leon J).
[4] BVIHC(COM) 2015/0115 (unreported, delivered 21st January 2016) at paragraph [41] (Leon J).

Hannover's contentions made directly by its own Counsel, in their own words, rather than indirectly through the Company.

Principles of statutory interpretation – plain meaning vs legislative purpose?

[31] The Company relies on what it submits is the effect of the plain meaning of, in particular, section 179 of the Act. The Company relies on the principles of statutory interpretation summarised by Hariprashad-Charles J in **Brantley Inc. v Antarctica Asset Management Ltd**,[5] a case which concerned the construction of section 179(9) of the Act, at [31]:

> "The dominant purpose in construing statutory provisions is to ascertain the intention of the Legislature as expressed in the statute, considering it as a whole and in its context. The intention is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous, be applied as they stand, however strongly it may be suspected that the result does not represent the real intention of Parliament. If the words of the Statute are not clear, that is where it becomes necessary to enlist aids for interpretation."

[32] The Company submits that there are any number of other canons of statutory construction that may be prayed in aid, however this is not a case in which anything other than a 'plain meaning' construction is necessary.

[33] Hannover submits, on the other hand, that the purpose of statutory interpretation is to ascertain the intention of the legislature by determining the meaning of the words used, read in their context in the particular statute [6] and that an interpretation that would promote the purpose or object underlying the enactment is to be preferred to an interpretation that would not promote that purpose or objective.[7]

[34] Hannover submits that the clear intention of section 179 of the Act is that a member of a company who dissents from a merger under Part IX of the Act is

---

[5] BVIHCV2007/0227 (unreported, delivered 9th May 2007) (Hariprashad-Charles J).

[6] Grant v Maduro BVIHCVAP 2019/0001 (unreported, delivered 13th November 2019 at paragraphs [26]-[30] (Pereira CJ).

[7] Section 42(1) of the Interpretation Act 1991, Cap. 136.

entitled to exit the Company entirely and receive the fair value of the shares he holds at the date the proposed merger becomes effective.

[35] Hannover reaches this conclusion by contending that 'the fair value of his shares' can only mean the fair value of all of his shares immediately before the merger becomes effective, i.e. at the time of the transaction from which the member dissents, because it is at that time that the member suffers the compulsion and expropriation against which the right to dissent affords protection and provides compensation. Hannover argues that the purpose of section 179 is to confer on a member who elects to dissent from the transaction an opportunity to withdraw from the transaction and receive the fair value of his shares. That purpose is served, contends Hannover, by providing dissenting members with an entitlement to receive the fair value of **all** of the shares held by that member which are the subject of the transaction from which he dissents.

[36] Hannover argues also that where a statutory provision interferes with property rights by providing for expropriation, the Court imposes a strict construction: Bennion, Bailey & Norbury on Statutory Interpretation (8th edn., LexisNexis Butterworths 2020) at 27.6. Such legislation is construed in favour of the party who is to be expropriated: **Methuen-Campbell v Walters,**[8] **Chilton v Telford Development Corpn.**[9] Again, contends Hannover, if there were otherwise any doubt as to the correct interpretation of section 179, which Hannover says there is not, the Court should construe that provision in favour of the minority, the shares of whom will be expropriated. In any case, submits Hannover, it is inherently unlikely that the legislature would have intended to introduce a regime which provides a mechanism for entitling an expropriated minority shareholder to receive fair value in respect of **only some** of his shares, while, simultaneously, denying that entitlement in respect of others.

---

[8] [1979] QB 525 and 541.
[9] [1987] 1 WLR 872.

The meaning of a 'member'

[37] There is no dispute between the parties as to the meaning of the word 'member'. It is common ground that the true construction of sections 2 and 78 of the Act, taken together, is that (a) a member, in relation to a limited company, means a shareholder and (b) a shareholder is defined as a person whose name is entered in the company's register of members as the holder of one or more shares, or fractional shares, in the company.

[38] It is also common ground that the Act is consistent with the Company's Articles which define 'Shareholder' and 'Shares' as follows:

(1) 'Shareholder' means 'an Eligible Person whose name is entered in the register of members of the Company as the holder of one or more Shares': Section 1.1. of the Memorandum;

(2) 'Share' means 'an Ordinary Share, a Series A Preference Share, a Series B Preference Share, a Series B-1 Preference Share or a Series X Preference Share issued or to be issued by the Company': Section 1.1. of the Memorandum; and

(3) A Share is deemed to be issued when the name of the Shareholder is entered in the register of members: Article 2.9.

[39] The Company also cites the following provisions of the Act as being of relevance to the issue in dispute:

(1) section 33 provides that 'a share in a company is personal property';

(2) section 42(1) provides that 'the entry of the name of a person in the register of members as a holder of a share in the company is prima facie evidence that legal title in the share vests in that person';

(3) section 42(2) provides that 'a company may treat the holder of a registered share as the only person entitled to:

(i) exercise any voting rights attaching to the share;

(ii) receive notices;

(iii) receive a distribution in respect of the share; and

(iv) exercise other rights and powers attaching to the share.' (Emphasis added.)

(4) section 43 provides that any person who is aggrieved by the omission, inaccuracy or delay in entering information that is required to be entered in the register of members can apply to the Court for an order that the register be rectified; and

(5) section 50 provides that a share is deemed to be issued when the name of the shareholder is entered in the register of members.

The substantive issue in dispute

[40] The substantive issue of statutory interpretation in dispute between the parties is whether under section 179(1) of the Act:

(1) a member is entitled to dissent only in respect of shares for which he is the registered shareholder as at (i) **the date of giving written objection pursuant to section 179(2) of the Act** or (ii) where an objection is not required under section 179(2) of the Act, **the date of giving written notice of election to dissent pursuant to section 179(5) of the Act** (the Company's position); **or**

(2) a member is entitled to dissent, and can only dissent, in respect of all shares he holds **as at the date the proposed merger becomes effective**, which would include the Conversion Shares to be issued to it immediately prior to the merger becoming effective, regardless of whether legal title to those shares is to be acquired after the date on which the member is required to give notice under sub-sections 179(2) and (5) of the Act (Hannover's position).

Overview of the Company's position

[41] The Company's position can be summarised as follows. Nothing in this part is to be treated as a finding of the Court unless stated otherwise. Such findings are to be found in the Discussion and Conclusion part.

[42] In short:

(1) a shareholder of a company is not a shareholder in respect of a hypothetical share in a company, or of a share that may or may not be issued to him if he decides to make an election, but in respect of actual shares issued to him which constitute his personal property;

(2) the Act does not recognise the concept of a 'contingent shareholder', only a registered shareholder. This is consistent with the general principle of share valuation that the court (or in the present case, the appraisers) should value the actual shareholding which the shareholder has to sell and not some hypothetical share (and much less one which may or may not come into existence if the shareholder makes a subsequent election under a separate contractual agreement);

(3) the right to dissent to a merger under section 179(1)(a) is a right which attaches to each share actually in existence and issued by the company. It follows that a member can only exercise such rights in respect of such shares held by him as at the relevant time, i.e. at the time of exercising the right to object and/or to dissent in accordance with section 179(2) and (5);

(4) pursuant to section 42(2) of the Act, the Company may treat the registered shareholder as the only person entitled to exercise rights attaching to shares issued in the Company;

(5) section 179(1) is clear – the member is entitled to the fair value of his shares upon dissenting. The member is not entitled to be compensated for rights that do not attach to those shares. Further, the Act cannot be construed in a way whereby 'his shares upon dissenting' includes shares that may (or may not, depending upon an as yet unmade election) be issued after the date on which the shareholder is required to dissent; and

(6) the purpose of the appraisal is to put the minority shareholder (as such – not as an investor under a relationship other than that of shareholder and company) in the position he would have been in but for the merger from

which he dissents and what is to be valued is what the shareholder has to transfer as at the close of business on the day prior to the merger being approved by the requisite majority of the company's members.

[43] In more detail, the Company submits as follows.

[44] Section 179(1) provides that:

> "A member of a company is entitled to payment of the fair value of his shares upon dissenting from:
>
> (a) a merger, ..."

[45] Upon a true construction of section 179(1)(a):

(1) a member's entitlement to payment of the fair value of his shares is conditional upon, and arises by virtue of, that member validly dissenting from the merger in accordance with subsections (2) to (7);

(2) the right to dissent from the merger can only be exercised by a member of the company; and

(3) a member who validly dissents from the merger is entitled to payment of the fair value of his shares in the company.

[46] Section 179(2) provides that:

> "A member who desires to exercise his entitlement under subsection (1) shall give to the company, before the meeting of members at which the action is submitted to a vote, or at the meeting but before the vote, written objection to the action; but an objection is not required from a member to whom the company did not give notice of the meeting in accordance with this Act or where the proposed action is authorised by written consent of members without a meeting."

[47] Section 179(3) provides that:

> "An objection under subsection (2) shall include a statement that the member proposes to demand payment for his shares if the action is taken."

[48] The Company submits that on a true construction of section 179(2) and (3), in the context of a merger under subsection (1)(a), where a company convenes a meeting of members to vote on the merger, a registered shareholder of the company who desires to dissent and exercise his entitlement under section (1) to

payment of the fair value of his shares <u>must</u> give to the company, prior to the vote at the meeting, written objection to the merger (the '**Written Notice of Objection**') which includes a statement that the member proposes to demand payment for his shares if the action is taken, i.e. the merger becomes effective. In this scenario, the provision of a Written Notice of Objection is the first mandatory step which a member is required to take in order validly to exercise dissenter rights under section 179(1).

[49] Where a Written Notice of Objection is required to be given under section 179(2):

(1) such notice can only be given by a member of the Company;

(2) the right to give notice is a right which attaches to a share actually in existence and issued by the Company;

(3) a member can only exercise the right in respect of shares held by him as at the date of giving notice (the Act speaks of 'his shares upon dissenting'); and

(4) a member who is required to do so but fails to give notice in the prescribed form prior to the vote taking place at the meeting of members has failed to exercise his right to dissent and the right attaching to that share is extinguished.

[50] A Written Notice of Objection under section 179(2) is not required in one of two scenarios: (a) the company does not give the member notice of the meeting of members in accordance with the Act or (b) the proposed merger is authorised by written consent of the members without a meeting.

[51] Hannover agrees that where a Written Notice of Objection under section 179(2) is required, a member is required to give such a notice. However, Hannover submits that a member who gives notice of objection under section 179(2) does so as a member of a company and that such objection is not confined to the shares for which he is the registered shareholder as at the date of giving notice but instead constitutes notice in respect of all of the shares held by the dissenting member immediately before the merger becomes effective by virtue of section 179(6). The

Company disagrees, for a number of reasons which emerge from subsections (4) to (7), as read together.

Sections 179(4) to (7)

[52] Section 179(4) provides that:

> "Within 20 days immediately following the date on which the vote of members authorising the action is taken, or the date on which written consent of members without a meeting is obtained, the company shall give written notice of the authorisation or consent to each member who gave written objection or from whom written objection was not required, except those members who voted for, or consented in writing to, the proposed action."

[53] Section 179(5) provides that:

> "A member to whom the company was required to give notice who elects to dissent shall, within 20 days immediately following the date on which the notice referred to in subsection (4) is given, give to the company a written notice of his decision to elect to dissent, stating -
> (a) his name and address;
> (b) the number and classes of shares in respect of which he dissents; and
> (c) a demand for payment of the fair value of his shares..."

[54] Section 179(6) provides that:

> "A member who dissents shall do so in respect of all shares that he holds in the company."

[55] Section 179(7) provides that:

> "Upon the giving of a notice of election to dissent, the member to whom the notice relates ceases to have any of the rights of a member except the right to be paid the fair value of his shares."

[56] The Company submits that on a true construction of section 179(4) to (7):

(1) a member dissents from the proposed merger upon the valid exercise of a right to give written notice of election to dissent in accordance with section 179(5) (a '**Written Notice of Election to Dissent**');

(2) the date of dissent is the date on which the Written Notice of Election to Dissent is given by the member to the company;

(3) only those members to whom the company is required to give written notice of authorisation under section 179(4) (a '**Written Notice of Authorisation**') have a right to elect to dissent within the prescribed period by providing the company with a Written Notice of Election to Dissent under section 179(5) stating certain information including the number and classes of shares in respect of which he dissents and a demand for payment of the fair value of his shares;

(4) a member, or any other person, to whom the company was not required to give a Written Notice of Authorisation has no right to give the company a Written Notice of Election to Dissent and no right to dissent or entitlement to payment of fair value of his shares under section 179(1), such right having been extinguished to the extent it previously existed; and

(5) a member who is entitled to give a Written Notice of Election to Dissent but fails to do so in the prescribed form or within the prescribed period fails to dissent in accordance with the Act and any right he had under section 179(1) is extinguished upon the expiry of the period prescribed by section 179(5).

[57] The Company submits that its construction is consistent with section 179(9)(c), which provides that:

> "the 3 appraisers shall fix <u>the fair value of the shares owned by the dissenting member as of the close of business on the date prior to the date on which the vote of members authorising the action was taken or the date on which written consent of members without a meeting was obtained</u>, excluding any appreciation or depreciation directly or indirectly induced by the action or its proposal, and that value is binding on the company and the dissenting member for all purposes;" (emphasis added).

[58] In its written submissions filed in advance of the hearing, the Company submitted that:

(1) a member is entitled to dissent only in respect of the shares owned by him (i.e. shares which are actually in existence, have been issued by the company and are registered in his name) as at the date of the member giving a Written Notice of Election to Dissent pursuant to sections 179(2) to (7);

(2) on a true construction, section 179(9)(c) defines the valuation mandate of the appraisers in respect of the shares for which a member has validly exercised dissenter rights pursuant to sections 179(2) to (7). The appraisers are required to value those shares as at the close of business on the date prior to the merger being approved by a majority of the company's members; and

(3) as a practical point, and construing section 179 in a commercially sensible manner, it could not have been the intention of the legislature to enable a person to exercise dissenter rights and be paid fair value for shares which were not in existence, nor issued by the company, nor held by the dissenter as at the statutory share valuation date. This would be contrary to the established principle of share valuation which requires the appraisers to value the actual shareholding which the shareholder has to sell and not some hypothetical share in the company.

[59] In oral submissions, leading Counsel for the Company submitted that on a true construction of section 179(9)(c), the mandate of the appraisers was to appraise the value of the shares 'owned' by the dissenting shareholder as at the date when the company's members authorised the action.

Overview of Hannover's position

[60] Hannover summarized its position in its skeleton argument as follows. Nothing in this section should be taken as a finding by the Court, unless indicated otherwise. Such findings are to be found in the Discussion and Conclusion part.

[61] Section 179 is within Part IX of the Act. The provisions of Part IX of the Act are facilitative. They apply to a number of different transactions ('Part IX

Transactions') which a company and/or some of its members may wish to undertake. Mergers and consolidations of companies within the BVI are addressed in sections 170 and 172. No Part IX Transaction (other than (a) a merger of a parent company with one or more subsidiaries: section 172(1); (b) a forced redemption of Shares: section 176 or (c) an arrangement (unless the Court so directs: section 177(4)) may be effected unless the consent or approval of members as required by the particular provisions relating to the transaction has been sought and obtained.

[62] A company can therefore carry out a Part IX merger or consolidation only with the consent or approval of members. However, that consent or approval enables the majority of members to coerce the minority.

[63] Notice of the intention to execute any Part IX Transaction is required, by the provisions of Part IX, to be given to the company's members (save in respect of Arrangements, unless the Court so directs: section 177(4)).

[64] The requirement for authorisation by members of a plan of merger or consolidation of companies within the BVI is contained in section 170(5)(a).

[65] Section 179 entitles a member to dissent in respect of all Part IX transactions, as more particularly explained below.

[66] Mergers and consolidations (sections 170-171, 172) become effective upon the registration of the articles of merger or consolidation (see sections 171(1) and (2), and section 172(5)) by the Registrar of Companies or on such later date, not exceeding 30 days, as is stated in the articles of merger or consolidation: section 173(1).

[67] The rights of members under Part IX Transactions existing immediately before the Transactions are effective.

[68] Each of the Part IX Transactions is coercive in nature, and even though contrary to the will of a minority, may be authorised, approved or directed by particular majorities.

[69] Indeed, a key feature of the statutory regime for Part IX Transactions in the BVI, including mergers, is that it gives significant rights to a dissenting shareholder.

[70] Those rights include: (a) a right to payment of the fair value of his shares: section 179(1); and (b) a right to have that fair value determined (fixed) by 3 appraisers: section 179(9)(c).

[71] Where a member dissents, that member must do so in respect of all of his shares: section 179(6). This requirement is consistent with a dissent right which, when exercised, enables or requires members to exit the company in respect of all, rather than some only, of their shares.

[72] Upon giving notice of election to dissent the member to whom the notice relates ceases to have any of the rights of a member except the right to be paid the fair value for his shares: section 179(7).

[73] The obvious purpose of those rights to dissent is to provide those members, who are dissatisfied with the terms of the Part IX Transaction, with a right to exit the company fully, receive the fair value of their shares, and to have that fair value determined by independent appraisers.

[74] In essence, it allows the member who elects to dissent to withdraw from the company and to receive the fair value of his shares: see, for example:

(1) The leading case in commonwealth appraisal actions, **Shanda Games Ltd v Maso Capital Investments Ltd**:[10]

> "A key feature of the statutory regime for mergers in the Cayman Islands is that it gives significant rights to dissenting shareholders ("dissenters"). They include an appraisal right, that is, the right to apply to the Grand Court for determination of the "fair value" of their shares and a right to the payment of "a fair rate" of interest on the outstanding consideration."

(2) **In the Matter of JA Solar Holdings**,[11] in which Smellie CJ described the very similar provision included in section 238(1) of the Cayman Islands Companies Law ('**CICA**') as a 'vital safeguard for minority shareholders

[10] [2020] UKPC 2 at paragraph [1] (per Lady Arden).
[11] (Cayman Islands, unreported, delivered 18th July 2019,) at paragraph [14].

designed to protect their economic interests in the company sought to be acquired'.

(3) The Dickerson Report: Proposals for a New Business Corporations Law for Canada (1971). The Dickerson Report preceded the Canada Business Corporations Act 1947-75, which itself has informed the appraisal regimes in most commonwealth jurisdictions. At pages 115 and 158, it explained:

> "347. For these reasons a basic change of policy is recommended in part 14.00. Instead of relying on common law standards to restrict the conduct of majority shareholders who propose to make a fundamental change, the provisions in this Part **confer upon a shareholder who dissents from the fundamental change the privilege of opting out of the corporation and demanding fair compensation for his shares**. In short, if the majority seeks to change fundamentally the nature of the business in which the shareholder invested, and if the shareholder dissents from the change, he may demand that the corporation pay him the fair value of his shares as determined by an outside appraiser...Instead of placing the minority shareholder at the mercy of the majority, these provisions permit the minority shareholder to withdraw from the enterprise and, if enough minority shareholders are affected, to bar the proposed change..."
>
> 476. ...the "appraisal" right conferred upon each shareholder by s. 14.17...entitles a shareholder to withdraw his investment at an objectively appraised price in the event of a fundamental change in the business or affairs of the corporation." (Emphasis supplied).

(4) The New Zealand Law Commission's Report, 'Company Law Reform and Restatement' (June 1989), which preceded the New Zealand Companies Act 1993 (pages 49-50):

> "203....The [buy-out procedure] is designed to ensure that in the case of fundamental change to the nature of the enterprise and to the class rights enjoyed by the shareholder, a dissenting minority shareholder does not inevitably have to accept the majority decision. The shareholder will instead have the option of leaving the company..."
> "206...The buy-out provision recognises...that there is a level of change to which it is unreasonable to require shareholders to submit..."

[75] The Grand Court of the Cayman Islands has made clear that the statutory appraisal right (pursuant to section 238 of CICA) protects the shares of all minority

shareholders, even appraisal arbitrageurs who acquire shareholdings for the very purpose of pursuing appraisal litigation: see **Re Qunar Cayman Islands Limited**:[12]

> "Some of the Dissenters in this case are fairly regular users of the section 238 process...They are protected in every case because the statutory mechanism prevents the shares of minority shareholders from being expropriated at an undervalue by the majority at a time and in circumstances of the majority's choosing. They are entitled to have the fair value of their shares assessed by the court if they are not satisfied by the company's offer however many times they choose to appear as litigants..."

[76] The right to dissent is a personal right of a member. Section 179(1) provides:

> "A member of a company is entitled to payment of the fair value of his shares upon dissenting from (Part IX Transactions)"

[77] In other words, section 179(1): (a) establishes an entitlement to dissent; (b) confers that right on members; and (c) establishes that a member who dissents is entitled to fair value of his shares.

[78] The right to dissent is thus conferred on members. It is a personal right of those who are members. That is what section 179(1) says.

[79] A member, in relation to the company, is a person who satisfies the requirements of both sections 2 and 78 of the Act, that is to say: (a) he is a shareholder of the company: section 2, and (b) his name is entered in the company's register of members as the holder of one or more shares or fractional shares in the company: section 78.

[80] A person becomes a member by fulfilling those two requirements. That identifies the persons who may exercise the statutory right to dissent. It is a right conferred on members by the Act.

[81] That person must be a member of the company.

[82] The right to dissent is not a share right. The Company seeks a declaration that: 'the right to exercise dissenter rights under section 179 of the Act is a right which

[12] 2019 (1) CILR 611 at paragraph [68] (Parker J).

attaches to a share in the Company which can only be exercised by the registered holder of that share…'. It is not clear where this is thought to take the Company. Section 179(1) is clear that a member is entitled to payment of the fair value of 'his shares'.

[83] In any case, the Company's position is incorrect. For the reasons set out above, the right is a personal right of a member. It is not a right that only attaches to the shares held by that member at the precise time that he notifies the Company that he is dissenting.

[84] The right to dissent does not attach to a share. The Act specifically deals with shares and share rights in Part III.

[85] Section 33 provides that a share is personal property.

[86] Section 34(1) provides for the rights that attach to shares by the Act. It provides:

> "Subject to subsection (2), a share in a company confers on the holder (a) the right to one vote has a meeting of the members of the company or on any resolution of the members of the company; (b) the right to an equal share in any dividend paid in accordance with this Act; and (c) the rights to an equal share in the distribution of the surplus assets of the company."

[87] It does not provide that the rights to dissent conferred by section 179 of the Act are attached to a share.

[88] Section 42(1) provides that the entry of the name of a person in the register of members as a holder of a share in a company is prima facie evidence that legal title in the share is in that person. That, of course, does not determine the rights attaching to the shares in the company, and says nothing about the right conferred by section 179(1) of the Act.

[89] Section 42(2) provides:

> "A company may treat the holder of a registered share as the only person entitled to - (a) exercise any voting rights attaching to the share; (b) receive notices; (c) receive a distribution in respect of the share; and (d) exercise other rights and powers attaching to the share."

[90] That section is permissive. It is concerned with the identity of the person(s) to whom a company can look to the exclusion of others in respect of a share. It entitles the Company to ignore the beneficial owner of a share. However, it says nothing about any right under section 179 of the Act being attached to any shares in a company.

[91] The Company refers to section 50 of the Act, which provides for when a share is deemed to be issued. It does not advance the present application.

[92] Accordingly, there is no justification whatsoever for contending that the right to dissent conferred by section 179(1) is a right attached to any shares in a company.

[93] In respect of the right to dissent, the Company contends that: 'in order to exercise dissenter rights under section 179 of the Act a person must be the registered holder of the share(s) in respect of which he seeks to dissent...'

[94] However, that is not what section 179 says. Section 179(1) stipulates that a member may dissent and, upon doing so, is entitled to payment of the fair value of his shares.

[95] Section 179(1) confers the substantive right upon those who dissent. Sections 179(2) to (11) set out the mechanism by which that substantive right is vindicated: see **Re Changyou.com Limited,**[13] in which Smellie CJ held at [26] by reference to the analogous provisions in section 238 of CICA:

> "Subsection 238(1) provides that a member of a constituent company incorporated under the Act, shall be entitled to payment of fair value of that person's shares upon dissenting from a merger or consolidation, and the other provisions of section 238 set out the mechanism by which the Court is to determine such fair value..."

[96] Smellie CJ observed at [41] in relation to section 238 of CICA that:

> "The words Parliament has chosen to use in subsection 238(1) are, indeed, unqualified. That provision establishes that "a member of a constituent company incorporated under this Law shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation..."."

[13] (Cayman Islands, unreported, delivered 28th January 2021).

[97] Like section 238(1) of CICA, section 179(1) of the Act is unqualified. It entitles the dissenting member to the fair value of 'his shares', not to the fair value of some part only of his shares.

[98] In **Re Changyou.com Limited**, the company had sought to build into section 238(1) of CICA a limitation derived from the subsequent provisions in section 238(2) to (16) of CICA. As Smellie CJ held at [124], those provisions 'are clearly concerned with the mechanics or procedure by which a dissenting shareholder can seek to obtain fair value for their shares.' The Chief Justice held at [127] that:

> "The unattractiveness of that argument, I agree with Mr. Adkin, is that it elevates the procedural or mechanical provisions contained in subsections 238(2) to (16), for the access to and conduct of an appraisal, to the status of substantive provisions which, at least potentially, cut down the scope of the substantive right to fair value appraisal conferred by subsection 238(1), which rights are given as subsection 238(1) states expressly, to every member who dissents. I accept that this is clearly not what subsections 238(2) to (16) were intended by Parliament to do."

[99] Section 179(2) to (11) address mechanics.

[100] Section 179(2) merely requires that:

> "a member who decides to exercise his entitlement under subsection (1) shall give to the company ... written objection to the action;"

[101] Section 179(3) merely provides that:

> "An objection under subsection (2) shall include a statement that the member proposes to demand a payment for his shares if the action is taken."

[102] Neither section 179(2) nor 179(3) requires the member who dissents to be the registered holder of the shares in respect of which he seeks to dissent, nor do they require that member to identify in his written objection the number of shares in which he seeks to dissent.

[103] Whilst section 179(5)(b) provides that the written notice given by a member who elects to dissent shall: 'state the number and classes of shares in respect of which he dissents' it does not provide that, at the date he gives that notice, he must be the registered holder of all of those shares.

[104] The purpose of section 179(5)(b) is presumably to enable the company to know the number of shares in respect of which it must make an offer under section 179(8):

(1) There is no difficulty in complying with it. The Note Purchase Agreements contain precise conversion formulae that eliminate any uncertainty. Hannover has already identified in correspondence the number of Conversion Shares which it understands that it will hold.

(2) Indeed, if the conversion takes place within 40 days of the vote of members authorising the Merger, the Conversion Shares will be in existence before any notice under section 179(5)(b) is required to be served.

(3) Further, it would be absurd, and contrary to the intention of the legislature, if a member's right to dissent under section 179(1) were to turn on whether conversion takes place 39 days or 41 days after the meeting.

(4) In any event, section 179(5)(b) is simply a mechanism which should not be construed so as to cut back the substantive right in section 179(1): see **Re Changyou.com Limited**.

[105] Section 179(6) provides that:

> "A member who dissents shall do so in respect of all shares that he holds in the company."

[106] Clearly, that is a reference to those shares held by the dissenting member as at the date on which the Transaction becomes effective. That is so for the following reasons:

(1) The rights of members under a Part IX Transaction fall to be determined at the date it becomes effective in accordance with the Act;

(2) It is that date when the mutual obligations under the Transaction become enforceable or are performed; and

(3) The consideration payable or provided by a party will be by reference to that which it receives from its counterparty, that is to say, in the case of a merger, consolidation, forced redemption or arrangement, the members of the company. Section 179(6) does not say or identify that those shares in

respect of which a member is entitled to dissent are only those which he holds at the date on which he gives notice of dissent.

[107] As stated above, a key feature of the statutory regime for Part IX Transactions in the BVI, including mergers, is that it gives significant rights to dissenting shareholders.

[108] The obvious purpose of those rights is to provide for those members, who are dissatisfied with the terms of the Part IX Transaction, to exit the company entirely and receive the fair value of their shares, and to have that fair value determined by independent appraisers.

[109] In essence, it allows the member who elects to dissents to withdraw from the company and to receive the fair value of his shares.

[110] Leaving a shareholder bound into a Part IX Transaction in respect of which he has dissented in relation to some of his shares (being those of which, for example, he was not the registered holder as at the date of his notice of dissent) is contrary to the obvious purpose of the Act.

[111] There are many reasons why a member may not be registered in respect of all of the shares which he holds. For example: (a) they may be held in a bare trust for him; they may be held in a street name, and it may not be possible by the date by which he is obliged to dissent, to have those shares registered in his name in the company's register of members; or (b) as in the present case, they may be shares not held by him at that date but to which shares he is, at that date, contractually entitled as against the Company and which will be held by him at the date upon which the Merger will become effective.

[112] In those circumstances, it would be manifestly contrary to the obvious purpose of the Act to allow the member to obtain the fair value only of the shares registered in his name as at the date of his notice of dissent, but not in respect of those to which he is at that date contractually entitled and which he will own pre-merger, thereby leaving that member bound and at the mercy of the Transaction in respect of which he has dissented.

[113] Further, the clear policy of the Act is to prevent a member from 'riding two horses'. That is to say, the clear policy of the Act prevents a member from dissenting in respect of some only of his shares while at the same time being bound by, and taking any benefit of, the Part IX Transaction in respect of other of his shares in the company.

[114] This is further supported by section 179(7), which provides that:

> "upon the giving of a notice of election to dissent, a member to whom the notice relates ceases to have any of the rights of a member except the right to be paid the fair value of his shares."

[115] Section 179(7) could not function if a member were entitled to ride two horses by dissenting in respect of some only of his shares: upon dissenting, the member ceases to have any rights of a member except the right to be paid fair value of his shares.

[116] Whilst section 179(9)(c) provides:

> "the three appraisers shall fix the fair value of the shares owned by the dissenting member as of the close of business on the day prior to the date on which the vote of members authorising the action was taken or the date on which written consent of members without a meeting was obtained, ..."

that provision merely fixes the date of valuation of the dissenting member's shares. On its own, or together with the other provisions of section 179, it does not purport to identify those shares of the member which are to be valued.

[117] Hannover concludes that for those reasons, the Court should dismiss the claim and grant declarations that:

(1) upon dissenting from a merger pursuant to section 179(1)(a) of the Act, a member is entitled to payment of the fair value of the shares he holds immediately before the merger becomes effective; and

(2) upon dissenting from the merger pursuant to section 179(1)(a) of the Act, Hannover will be entitled to payment of the fair value of all of the shares it holds immediately before the merger becomes effective, including any Conversion Shares.

Discussion and Conclusion

[118] It is instructive to set out the material parts of section 179 of the Act in their entirety, so that they can be seen and read together, as opposed to in disparate parts:

> "179. Rights of dissenters
>
> (1) A member of a company is entitled to payment of the fair value of his shares upon dissenting [present tense] from
>
> (a) a merger, if the company is a constituent company, unless the company is the surviving company and the member continues to hold the same or similar shares;
>
> (b) a consolidation ...;
>
> (c) any sale, transfer, lease, exchange or other disposition of more than 50 per cent in value of the assets or business of the company, if not made in the usual or regular course of the business carried on by the company ...;
>
> (d) a redemption of his shares by the company ...; and
>
> (e) an arrangement, ...
>
> (2) A member who desires to exercise his entitlement under subsection (1) shall give to the company, before the meeting of members at which the action is submitted to a vote, or at the meeting but before the vote, written objection to the action; but an objection is not required from a member to whom the company did not give notice of the meeting in accordance with this Act or where the proposed action is authorised by written consent of members without a meeting.
>
> (3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for his shares if the action is taken.
>
> (4) Within 20 days immediately following the date on which the vote of members authorising the action is taken, or the date on which written consent of members without a meeting is obtained, the company shall give written notice of the authorisation or consent to each member who gave written objection or from whom written objection was not required, except those members who voted for, or consented in writing to, the proposed action.
>
> (5) A member to whom the company was required to give notice who elects to dissent shall, within 20 days immediately following the date on which the notice referred to in subsection (4) is given, give to the company a written notice of his decision to elect to dissent, stating

(a) his name and address;

(b) the number and classes of shares in respect of which he dissents; and

(c) a demand for payment of the fair value of his shares;

and a member who elects to dissent from a merger under section 172 shall give to the company a written notice of his decision to elect to dissent within 20 days immediately following the date on which the copy of the plan of merger or an outline thereof is given to him in accordance with section 172.

(6) A member who dissents shall do so in respect of all shares that he holds in the company.

(7) Upon the giving of a notice of election to dissent, the member to whom the notice relates ceases to have any of the rights of a member except the right to be paid the fair value of his shares.

(8) Within 7 days immediately following the date of the expiration of the period within which members may give their notices of election to dissent, or within 7 days immediately following the date on which the proposed action is put into effect, whichever is later, the company, or, in the case of a merger or consolidation, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase his shares at a specified price that the company determines to be their fair value; and if, within 30 days immediately following the date on which the offer is made, the company making the offer and the dissenting member agree upon the price to be paid for his shares, the company shall pay to the member the amount in money upon the surrender of the certificates representing his shares.

(9) If the company and a dissenting member fail, within the period of 30 days referred to in subsection (8), to agree on the price to be paid for the shares owned by the member, within 20 days immediately following the date on which the period of 30 days expires, the following shall apply -

(a) the company and the dissenting member shall each designate an appraiser;

(b) the 2 designated appraisers together shall designate an appraiser;

(c) the 3 appraisers shall fix the fair value of the shares owned by the dissenting member as of the close of business on the day prior to the date on which the vote of members authorising the action was taken or the date on which written consent of members without a meeting was obtained, excluding any appreciation or depreciation directly or indirectly induced by the action or its proposal, and that value is binding on the company and the dissenting member for all purposes; and

(d) the company shall pay to the member the amount in money upon the surrender by him of the certificates representing his shares.

(10) Shares acquired by the company pursuant to subsection (8) or (9) shall be cancelled but if the shares are shares of a surviving company, they shall be available for reissue.

(11) The enforcement by a member of his entitlement under this section excludes the enforcement by the member of a right to which he might otherwise be entitled by virtue of his holding shares, except that this section does not exclude the right of the member to institute proceedings to obtain relief on the ground that the action is illegal.

(12) ... ."

Statutory interpretation

[119] The parties differ as to their approach to statutory interpretation. The Company insists upon what it says is the plain meaning of words in section 179, whereas Hannover stresses the need to discern the legislative purpose behind the section.

[120] The Company prays in aid *dicta* of the BVI High Court in **Brantley Inc. v Antarctica Asset Management Ltd**[14] whereas Hannover relies upon *dicta* of the Court of Appeal in **Grant v Maduro.**[15]

[121] A close analysis of both these cases, read side-by-side, indicates that there is in fact no tension between these two authorities. Both recognize that the goal of statutory interpretation is to discern the intention of the legislature, in which the plain or ordinary meaning of words only plays a part. For completeness, the operative passages are the following. First, from **Grant v Maduro**, which is the later case and of higher authority:

"[26] This brings me to the issue as stated at paragraph 8 above. The specific question of construction which arises is whether the general words "no action" in section 11A(1) ought to be interpreted literally and broadly (as the master did), to include any conceivable action pertaining to injury or damage arising from a motor vehicle accident, or restrictively (as the

[14] BVIHCV2007/0227 (unreported, delivered 9th May 2007) at paragraphs [31] and [32] (Hariprashad-Charles J).

[15] BVIHCVAP2019/0001 (unreported, delivered 13th November 2019) at paragraphs [26] to [31] (Pereira CJ).

appellant urges), to cover only actions commenced under the provisions of the MVIO.

[27] The Court, in its quest to interpret statutes, has concerned itself with discerning and giving effect to the intention of parliament when it passed the enactment. Traditionally, heavy reliance has been placed on the strict and literal meaning of words as evidencing that intention. Cases such as The Sussex Peerage ((1844) 8 ER 1034) and Abel v Lee ((1871) LR 6 CP 365) well-encapsulate that traditional approach.

[28] For several decades now, there has been a discernible shift from a slavish insistence on the literal meaning of words in an enactment, and it is now well settled that the immediate, legislative context of statutory words, along with the statute's object and purpose, are required to inform the assessment of parliament's intention. There is now a strong stream of jurisprudence supporting this purposive approach to interpretation. The House of Lords in Pepper v Hart ([1993] A.C. 593 at 617E – F) remarked: "...The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

[29] This Court, very recently, in Rajiv Gunness v Saint George's University Limited (Owners and Operators St. George's University) et al (GDAHCAP2016/0040 (delivered 3rd May 2018, unreported)) recognised the high-importance of the purposive interpretation of legislation, stating: "It is a well-established principle that in interpreting legislative provisions the court would adopt a purposive interpretation so as to give effect to what is taken to have been intended by Parliament. The court will presume that Parliament does not intend to legislate so as to produce a result which is inconsistent with the statute's purpose or make no sense or is anomalous or illogical."

[30] Importantly, there is statutory weight to this purposive approach to interpretation in the Virgin Islands. Section 42(1) of the Interpretation Act states as follows: "In the interpretation of a provision of an enactment, an interpretation that would promote the purpose or object underlying the enactment (whether that purpose of object is expressly stated in the enactment or not) shall be preferred to an interpretation that would not promote that purpose or object."

[31] With that said, it is apparent that the literal meaning of the phrase "no action" contained in section 11A(1) is merely the starting point of the analysis on the meaning of the words in section 11A(1). The operative question therefore becomes, what is the context, object and purpose in respect of which the words of section 11A(1) must be given effect?"

[122] Next, there are the following paragraphs from **Brantley Inc. v Antarctica Asset Management Ltd**:[16]

> "[31] The dominant purpose in construing statutory provisions is to ascertain the intention of the Legislature as expressed in the statute, considering it as a whole and in its context. The intention is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous, be applied as they stand, however strongly it may be suspected that the result does not represent the real intention of Parliament. If the words of the Statute are not clear, that is where it becomes necessary to enlist aids for interpretation.
>
> [32] In Charles Savarin v John William ((1995) 51 W.I.R. 75 at 79) Sir Vincent Flossaic C.J. expresses the principles thus: "I start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard the statutory context comprises every other word or phrase used in the statute, all implications therefrom and all relevant surrounding circumstances which may properly be regarded as indications of the legislative intention."

[123] It should be stated at the outset that both these cases concerned the approach the Court should take towards interpreting ambiguous words or phrases, that is, words or phrases that are capable of bearing more than one meaning.

[124] Neither of these cases is authority for a proposition that the plain meaning of words is to be ignored – as if those words had not been used, or wrongly used – if this contradicts the perceived intent of the legislature.

[125] Both these cases treat discerning the intention of the legislature as the goal.

[126] Both these cases treat the primary meaning of the word or phrase in question as merely the starting point for its interpretation.

[127] Both these cases consider that the next step is to consider the word or phrase in question in its statutory context as a whole.

---

[16] BVIHCV2007/0227 (unreported, delivered 9th May 2007) at paragraphs [31] and [32] (Hariprashad-Charles J).

[128] In the present case, Hannover contends that there is ambiguity concerning the words 'his shares' in section 179(1): whether 'his shares' should be taken to mean only those shares a member holds when he elects to dissert from a merger (or earlier, when he gives his notice of objection thereto) or, also those shares that the member may hold immediately before the merger takes place.

[129] To see whether the Act supports the latter position, we need to look more specifically at section 179.

[130] Considered as a whole, we can see that section 179 has been drafted primarily to address a situation where a member of a company, holding a minority of shares, is faced with a decision by the majority to commit the company to a merger that the minority member does not consent to. The section makes provision for what is to happen then. The section provides some flexibility as to timings, in the interests of the company, the majority and also the minority. But the section does not deal specifically with a situation where an existing member might decide to acquire more shares immediately before a merger but after the member has objected to the merger or elected to dissent therefrom. The section does not specifically address whether those further acquired shares also stand to be bought back from the member at the same fair value as the shares the member held earlier.

[131] The question thus arises: does 'his shares' in section 179(1) include such further shares, or merely the existing shares at the time of objection or dissent to the merger. Ultimately this is an exercise in statutory construction, and discernment of legislative intent.

[132] So, how then does section 179 fall to be construed?

[133] Before looking more closely at the provisions contained in section 179, it should be recalled that Hannover's right to acquire further shares arises not from rights inherent in its existing shares but from contractual arrangements independent and separate from those shares. That is an important factor. If the right to acquire further shares did arise from the existing shares, then it could perhaps more readily be understood that the value of such a right should form part of the 'fair

value' to be ascribed to the existing shares that the Company would buy back. But that is not the case here. Hannover's options are no more than contractual rights, unconnected with its current shareholding.

[134] Hannover argues that it must be the legislature's intent that upon dissenting to a merger a minority shareholder should exit a company entirely, since it must dissent in respect of all its shares.

[135] But let us suppose that the minority shareholder duly objects and gives notice of his election to dissent from a merger, but then goes into the market and buys other shares in the company from another member. He is free to do so. The legislature could have prohibited him from doing so, but it did not. Can it really be said that the intention of the legislature was that the new owner of these shares should be able to invoke the fair-value buy back mechanism? I am persuaded that the answer is 'no'.

[136] There is a clear legislative intent behind section 179 to give a minority shareholder an opportunity to relinquish its shareholding in exchange for fair value if he does not want to consent to a merger. The purpose is obvious: so that a minority shareholder who does not want to consent to a merger does not have to be locked into a company that has become fundamentally different from that which he invested in and then suffer a depreciation in the value of his shareholding as a result of such a merger. This is abundantly clear from the various Commonwealth legal writings on similar provisions elsewhere that Hannover itself relies upon. The legislature thus gave such minority shareholders a remedy for what, on one level, could be seen as an unfairness. Section 179 provides for a fair way out.

[137] On the other hand, it is difficult to see why a shareholder should be provided with an exit – and compensation - mechanism if he deliberately acquires more shares in the company ***after*** he is informed it is going to be subject to a merger and after he has given notice that he objects to or dissents from it. Acquiring more shares is his free choice and indeed right; but choices have consequences, and it is not the task of the legislature to save an investor from them. There is not even a

penumbra of unfairness about it. As the adage goes, 'you make your bed, you lie in it'.

[138] I detect no legislative intent to avail such an investor of the exit mechanism intended for a different category of persons, namely members who were minority shareholders ***before*** a merger has been decided upon and confirmation thereof has formally been communicated to them.

[139] Indeed, the legislative intent appears to be to allow a member to give up his membership and receive full fair value for his shareholding without any detrimental effect which a decision to merge may have upon the value of his shareholding. In other words, the legislative intent is to permit a member then to have a no-loss exit, if that is what he wants.

[140] The words of section 179 stand to be construed against this intention.

[141] The exit mechanism is not intended to assist persons who decide to buy shares in the company after a decision to enter into a merger has been made known.

[142] I see no material difference between such a situation and one where the minority shareholder decides to exercise options to have Conversion Shares issued to him.

[143] Speaking of fairness, Hannover submitted that it was facing expropriation of its shares and contingent interest in the Company, and so it should be able to benefit to the full from the 'fair value' purchase mechanism contained in section 179, as well as to a favourable interpretation of the scope of section 179. The flaw in this argument, concerning its contingent interest, is that Hannover does not face expropriation in any real sense. It has a contractual choice, at least between acquiring the Conversion Shares on the one hand, and, on the other hand, receiving the principal and accrued interest due to it – i.e. full value - pursuant to the Notes. This choice is clearly intended to let Hannover exit from the Note contractual relationship fully paid up, or to remain invested in the Company and take its chances in respect of the value of its shares. Hannover thus has the benefit of a contractual compensation scheme that would see it made whole, if it does not want to take the risk of depreciation of the Conversion Shares.

[144] Against the background of these general observations, we should look more closely at section 179 to see if it supports the broad interpretation contended for by Hannover.

[145] Section 179(1)(a) makes a general statement of entitlement: a dissenting member is entitled to payment of the fair value of his shares upon dissenting from a merger.

[146] Subsection (2) envisages (as one would expect) that a meeting of shareholders is to be called at which the members can vote on whether or not the Company should merge with another. It provides that a dissenting member shall give the Company a written objection to the merger before the meeting or at the meeting but before the vote.

[147] There is a possible situation catered for also where no meeting or actual vote would be held (where a majority can consent to a merger proceeding without a meeting), in which case, understandably, no written objection needs to be given. In that case, a minority member might not get to know about the intended merger before it has been decided upon.

[148] Subsection (3) requires that a written objection shall include a statement that the member proposes to demand payment for his shares. A written notice in these terms leaves all concerned clear as to the dissenter's position and his desire to be paid for his shares. This established, the Company can move ahead with the merger.

[149] Before we look at the next steps, it merits noting that a shareholder in Hannover's position would, at the meeting, only be able to vote the voting shares it holds at that point. Without wishing to belabour the obvious, it would not be able to vote any Conversion Shares it does not yet hold at that point.

[150] The next steps to a merger and the buy out of the dissenting shareholder's shares do not have a fixed time-table ascribed to them. That is clearly sensible, as commercial circumstances vary enormously. That said, subsections (4), (5), (8) and (9) set out certain time limits. These are intended to keep the process within certain timing bounds, to bring finality to the process.

[151] After the members' meeting (or decision to merge without a meeting), the next step (in summary form) is that the company must give written notice to the dissenting member of the decision to go ahead with the merger. By subsection (4) the Company is to give this notice within 20 days of the meeting or decision.

[152] Delivery of the Company's notice sets another clock running against the dissenting member. I do not see that the Company's notice goes so far as to establish a member's entitlement or standing to dissent, as the Company has argued – a member could complain and seek relief from the Court if he is not afforded due opportunity by the Company to dissent.

[153] By subsection (5), the dissenting member has 20 days from receipt of the notice, or of a plan or outline of the merger, to give the Company a written notice of his decision to elect to dissent. This notice must contain some more information than his original objection did, in that he has to give his name and address, the number and classes of shares in respect of which he dissents and a demand for payment of the fair value of his shares.

[154] There are two other circumscriptions to this notice of election to dissent. Subsection (6) provides that '[a] member who dissents shall do so in respect of all shares that he holds in the company'. 'Holds' is expressed in the present tense. Its natural meaning suggests that the dissent is to be in respect of shares that the member holds at the time he gives notice of his election to dissent. Subsection (7) sets out the effect of giving notice of election to dissent: from that moment the member ceases to have any of the rights of a member except the right to be paid the fair value of his shares.

[155] It should be observed at this point that the number of shares a member holds at the time he gives notice of his objection may be different from the number he holds when he gives notice of election to dissent. For instance, he may have divested himself of some shares in the interim (in which case, of course, those shares would not fall to be valued and bought back by the company as part of the exit mechanism). Or it is possible that not all the shares a member was entitled to have registered in his name, and ought to have been registered in his name, were

so registered at the time he gives his notice of objection, but that they may have been added to the register before he gives notice of his election to dissent.

[156] The ensuing steps, provided for by subsections (8), (9) and (10) make provision for the company to pay for the dissenting member's shares, upon him surrendering his share certificates and for fixing the buy-in price.

[157] By subsection (8) the company is required to make a written offer to repurchase the dissenting member's shares, at a price the company considers fair, no later than 7 days immediately following the date on which the proposed merger is put into effect. Hannover says this means that it would already have become the holder of the Conversion Shares by this point, because it would, pursuant to the terms of the Notes, be issued with them, or treated as having been issued with them, immediately before the merger. We will come back to this.

[158] If the price is not acceptable to the dissenting shareholder, then the provisions of subsection (9) lay down an appraisal arrangement. Subsection (9)(c) provides:

> "...three appraisers shall fix the fair value of the shares owned by the dissenting member as of the close of business on the day prior to the date on which the vote of members authorising the action was taken or the date on which written consent of members without a meeting was obtained, excluding any appreciation or depreciation directly or indirectly induced by the action or its proposal, and that value is binding on the company and the dissenting member for all purposes".

[159] Hannover submits that the opening lines of this passage specify only that the valuation date and time for the shares is to be the close of business on the day prior to the members' meeting at which the decision was taken to merge the company or the date on which the written consent of members without a meeting was obtained; they do not lay down any requirement that it is only the shares the dissenting member holds as at that date that should be appraised for valuation. The Company contends that both share ownership and valuation are to be as of that date.

[160] The phrase or phrases in question here is/are:

"...**appraisers shall fix the fair value of the shares owned by the dissenting member as of the close of business on the day prior to the date** on which the vote of members authorising the action was taken or the date on which written consent of members without a meeting was obtained..."

[161] The words in bold are capable of both the meanings argued for by the Company and Hannover respectively.

[162] We can ask ourselves why the legislature chose that date. There are, after all, various other potentially competing possibilities: including the date the member gives notice of election to dissent, or completion of the merger itself. The reason, it appears to me, is because the vote to go ahead with the merger at the members' meeting is the first clear step that would potentially (indeed, in practice, almost inevitably) change the value of the shares in the company. This is an event the potential adverse consequences of which the legislature saw fit to protect an eventually dissenting shareholder from. Thus, it would be fair to pay the dissenting shareholder the value of his shares as at the evening before the day of the meeting.

[163] Since the point of the dissenter exit mechanism is to let a member exit the company **and** be compensated for giving up his shares for value as if the decision to merge had not occurred, the natural focus of the provision is on obtaining a valuation of shares the member **owned at close of business on the day before the decision was taken**. Indeed, as the Company argued, it would not make commercial sense to value shares as at that date for Hannover's benefit, if Hannover did not already own them then.

[164] Thus I am persuaded that the Company's interpretation accords more with the legislature's intentions than Hannover's does.

[165] Hannover's construction would require Conversion Shares, which it might be issued with immediately before the merger, to be valued as if they had already been issued and transferred to Hannover on the day before the members' meeting (or decision without a meeting), which, of course, they have not. This contention need only to be stated to highlight its artificiality.

[166] Another troubling question arises: why should Conversion Shares be taken into consideration for valuation purposes, on a date even prior to their issuance to a particular shareholder, but not for any voting rights that would be attached to them? After all, a dissenting member ordinarily only loses his rights as shareholder (e.g. to vote shares) ***after*** the members' meeting (or decision without a meeting), upon giving his notice of election to dissent. This construction requires one to accept that an unissued Conversion Share should be treated as a share already held by Hannover as at the date of the members' meeting, and thus as one of Hannover's assets, but not one that Hannover can actually use.

[167] One can also ask whether Hannover would be entitled to claim dividends in respect of Conversion Shares in the event that the Company had declared dividends to be payable on the same day as the members' meeting. Absent some special - and unusual - deeming provision in the Company's Articles, clearly Hannover could not.

[168] Hannover sets store by the provisions of subsection (8), arguing that since the Company may make its offer to purchase Hannover's shares after the merger has taken effect, this implies that Hannover's shares must at that point also include Conversion Shares Hannover will by then have become entitled to. A flaw in this contention is that it requires subsection (8) to be read on its own. It needs to be read together with all the other subsections of section 179.

[169] From these we see that they deal with an entire process in consequential order: the signaling of an intention to propose a merger and (ordinarily) the calling of a members' meeting to vote on it, a dissenter's notice of objection (if there is a meeting), confirmation by the company of the meeting's decision to proceed with the merger, then a dissenter's notice of election to dissent (which also disables his shares), then the company's offer to buy the dissenter's shares, then, if the price is not agreed, an evaluation and finally an exchange of the purchase price for the dissenting member's share certificates. This entire process, upon its natural reading, refers to shares a member held prior to the members' meeting and certainly no later than the time he gave notice of election to dissent.

[170] The words of section 179 do not provide for any 'relation back' in respect of shares a member acquires after he has given notice of election to dissent. It would have been easy for the legislature to make provision for such shares to be included, but it did not.

[171] It would similarly have been easy for the legislature to prohibit a dissenting member from acquiring further shares in the company for a particular period, or permanently, if it had been the legislature's intention to exclude a dissenting member from a company entirely, but it did not.

[172] Had it been the legislature's intentions to include such shares, then the fact that it did not do so would mean that section 179 presents us with a piece of rudimentary and indeed inarticulate but discursive legislative drafting. This is an unattractive reading of legislation, which clearly has been drafted with care.

[173] The legislature's manifest desire for clarity should be seen in the context of another factor. This is that section 179 provides a statutory exception to the ordinary course of commercial affairs. By this, I mean that when someone decides to become a shareholder in a company, he knows and accepts that those who have greater control over the business and affairs of a company can take it in a direction that he does not like, or which might damage his economic interest in the company. He also knows and accepts that he might find himself locked in and literally at a loss. In that sense, there is no unfairness in leaving such an investor to languish. The section 179 exception is one of the features which renders the BVI Business Company attractive. It makes perfect sense that such an exception should be clearly stated and clearly applied. This inclines a reader away from interpreting section 179 in an unnatural, artificial and strained manner.

[174] Hannover's construction also assumes that it will elect to take Conversion Shares, as opposed to payment of principal and accrued interest due under the Notes, within the contractually agreed time period, and that it will duly surrender its Notes to the Company pursuant to clause 2.3(e) of the Hannover Notes. Hannover makes light of these requirements, as being merely procedural, not substantive.

However, Conversion Shares will not automatically flow into Hannover's hands: Hannover will need to take a number of steps before becoming entitled to them.

[175] What we can see happening here is that Hannover is seeking to shoe-horn Conversion Shares, which it would not hold at a time it objects to a merger or gives a notice of election to dissent, into the current shareholding buy-back scheme. But such Conversion Shares do not fit. To make them fit, Hannover:

(1) seeks to do violence to the present tense word 'holds' in subsection (6);

(2) espouses the illogical proposition that Conversion Shares, which might or might not eventually be issued, should be valued as at a date before their issuance.

[176] In reality, Hannover seeks to persuade the Court that there is an ambiguity in the words 'his shares' in section 179(1) where there is none. The scheme of the ensuing subparagraphs pellucidly refer only to shares a member holds as at the date he objects to a merger or at latest gives notice of election to dissent from a merger.

Conclusion

[177] Thus, in conclusion, I accept the Company's submissions and find that, on the true construction of the provisions of section 179 of the Act, a member is entitled to dissent only in respect of shares for which he is, or ought to be, the registered shareholder as at (i) the date of giving written objection pursuant to section 179(2) of the Act or (ii) where an objection is not required under section 179(2) of the Act, the date of giving written notice of election to dissent pursuant to section 179(5) of the Act.

[178] The right to dissent to a transaction under section 179(1) is a right which is conferred upon a member, but it attaches to each share actually in existence and issued by the company to the member. A shareholder of a company is not a shareholder in respect of a hypothetical share in a company but in respect of actual shares issued to him which constitute his personal property.

[179] The purpose of the appraisal is to fix the price that would put the minority shareholder in the position he would have been in but for the transaction from which he dissents. The *chose* that is to be valued, is the shares that the shareholder has to transfer, as at the time of his objection to the merger or latest upon his election to dissent.

[180] In my judgment the purpose of section 179 of the Act is not to entitle a member to dissent in respect of shares which he acquires after the date prescribed for giving a written notice of election to dissent pursuant to section 179(5) of the Act.

[181] Hannover's rights under the convertible promissory notes issued to it by the Company are contractual. I accept the Company's submission that these are not rights which arise in Hannover's capacity as an existing member of the Company. Under the Hannover Notes, upon receipt of a Change of Control Notice, Hannover has a right to elect whether to take the Transaction Payment (i.e. the principal and interest due to him from the Company under the Notes) or be issued with the Conversion Shares. If Hannover elects to take the Conversion Shares, then it does so with full knowledge of the proposed merger. If Hannover is dissatisfied with the terms of the proposed merger and its impact on the value of the Conversion Shares to be issued such that it wants to exit the Company, then it can elect to take the Transaction Payment. That is the contractual bargain under the Hannover Notes. Alternatively, Hannover can elect to take the Conversion Shares and then seek to sell those shares on the secondary market. What it cannot do is exercise dissenter rights in respect of shares for which it is not the registered shareholder as at the date of giving written objection pursuant to section 179(2) of the Act or, where an objection is not required under section 179(2) of the Act, the date of giving written notice of election to dissent pursuant to section 179(5) of the Act.

[182] I take this opportunity to thank Counsel, and in particular for their work in assisting with the preparation of this judgment.

Orders

(1) For the reasons set out above, I grant the declarations in the terms sought by the Claimant in the Amended Fixed Date Claim Form.

(2) On the issue of costs, having heard submissions from leading Counsel for both parties and having regard to all of the circumstances, I ruled at the hearing on 8th November 2021 that, for reasons I gave then, Hannover should pay 50% of the Company's reasonable costs of and incidental to the proceedings from the date when Hannover was joined to them, to be assessed if not agreed between the parties within 21 days.

Gerhard Wallbank
High Court Judge

By the Court

Dep. **Registrar**