
**Hilary Term**
[2025] UKPC 12
**Privy Council Appeal No 0018 of 2023**

# JUDGMENT

# Changyou.com Ltd (Appellant) *v* Fourworld Global Opportunities Fund Ltd and 7 others (Respondents) (Cayman Islands)

## From the Court of Appeal of the Cayman Islands

before

**Lord Briggs**
**Lord Hamblen**
**Lord Leggatt**
**Lord Burrows**
**Sir Christopher Nugee**

**JUDGMENT GIVEN ON**
**11 March 2025**

**Heard on 7 and 8 October 2024**

*Appellant*
Jonathan Crow CVO, KC
Erik Bodden
David Lamb
(Instructed by Conyers Dill & Pearman LLP and Sinclair Gibson LLP)

*Respondents*
Jonathan Adkin KC
Adil Mohamedbhai
Rocco Cecere
(Instructed by Collas Crill LLP (Cayman Islands))

**SIR CHRISTOPHER NUGEE:**

## Introduction

1. This appeal concerns a question on the companies legislation of the Cayman Islands. At the relevant time the legislation was found in Part XVI of the Companies Law (2020 Revision). This has now been renamed the Companies Act and the current version is the Companies Act (2025 Revision) but it has not been suggested that the text of Part XVI (now known as Part 16) has altered from what it was in 2020, and it is convenient to refer to the Companies Act as the legislation now is.

2. Part 16 (sections 232 to 239A) of the Companies Act contains provisions enabling two or more companies incorporated in the Cayman Islands to be merged or consolidated. Under the procedure laid down by Part 16, such a merger or consolidation normally requires a special resolution of each company concerned. A merger carried out in this way is commonly referred to as a "long-form" merger. But where company A is a parent of company B holding shares representing at least 90% of the voting power in company B, the requirement for special resolutions can be dispensed with if a copy of the plan of merger is given to the members of company B. This is commonly referred to as a "short-form" merger.

3. In the case of a long-form merger, members of a constituent company who dissent from the merger have a statutory right to payment of the fair value of their shares, and may, if agreement is not reached with the company, petition the Grand Court for determination of the fair value. These rights can be conveniently referred to collectively as "appraisal rights". The question raised by this appeal is whether shareholders in a short-form merger enjoy similar appraisal rights or not.

4. In the present case the appellant, Changyou.com Ltd ("the Company"), merged with its parent, Changyou Merger Co Ltd ("the Parent"), in a short-form merger, sending a copy of the plan of merger to every member of the Company. That included the various respondents. The merger plan provided for their shares to be cancelled in exchange for a cash sum representing US$5.40 per share. The respondents had already notified the Company that they objected to the merger and dissented from it, and subsequently petitioned the Grand Court for determination of the fair value of their shares. A preliminary issue was ordered as to whether members of a subsidiary company that is the subject of a short-form merger are entitled to appraisal rights.

5. The preliminary issue was heard in the Grand Court by Smellie CJ ("the Chief Justice"). In a judgment handed down on 28 January 2021 he decided the issue in favour of the respondents, holding that they were entitled to payment of fair value, and had taken appropriate steps to dissent.

6. The Company appealed to the Court of Appeal (Goldring P, Martin JA and Morrison JA). On 16 September 2022 the Court dismissed the appeal for the reasons given in the judgment of Martin JA, namely that although as a matter of ordinary statutory interpretation appraisal rights were not available in relation to short-form mergers, it was possible to read and give effect to the legislation in a way that made it compatible with section 15 of the Bill of Rights pursuant to the interpretive obligation under section 25 of the Bill of Rights.

7. The Company now appeals to the Privy Council. The Court of Appeal concluded that the Company was entitled to appeal as of right, but said that they would have given leave to appeal in any event in the light of the great general or public importance of the issue.

8. For the reasons given below the Board considers that the appeal should be dismissed and will humbly advise His Majesty accordingly.

**Part 16 of the Companies Act**

9. Part 16 of the Companies Act is set out in the Annexe to this judgment, and references hereafter to sections are to sections of the Companies Act unless otherwise specified.

10. The following points may be noted:

(1) Part 16 distinguishes between merger and consolidation, the difference being that in a consolidation two or more constituent companies are consolidated into a new company, whereas in a merger the constituent companies are merged, with one of the existing companies being the surviving company: see the definitions in section 232. The present case is one of merger in which the Parent was merged with its subsidiary, the Company, with the Company as the surviving company.

(2) Where (as here) all the constituent companies are Cayman Islands companies incorporated under the Companies Act (and limited by shares) the procedure for effecting a merger or consolidation is that set out in section 233. Provision is also made by section 237 for a merger or consolidation between one or more Cayman Islands companies and one or more overseas companies, in which case there are certain further requirements in addition to those in section 233.

(3) The ordinary procedure under section 233 consists of the following steps. First, the directors of each constituent company approve a written plan of merger or consolidation: section 233(3). Second, the plan is authorised by each constituent company by special resolution (or other authorisation as specified in the company's articles): section 233(6). Third, the plan is signed by a director of each company and filed with the Registrar of Companies together with certain confirmations in the form of a certificate, an undertaking and various director's declarations: section 233(9). Fourth, the Registrar (on payment of the applicable fees and on being satisfied that the requirements of section 233(9) have been complied with) registers the plan and issues a certificate of merger or consolidation: section 233(11). The merger or consolidation is effective as from the date the plan is registered by the Registrar (unless, as permitted by section 234, provision is made in the plan for it to be effective on a specified later date up to 90 days afterwards): section 233(13). Pursuant to the undertaking required by section 233(9)(g), a copy of the certificate is then to be given to the members of each constituent company and notification of the merger or consolidation published in the Gazette.

(4) The plan approved by the directors must give particulars as specified in section 233(4). By section 233(4)(e) this includes particulars of:

> "the terms and conditions of the proposed merger or consolidation, including where applicable, the manner and basis of converting shares in each constituent company into shares in the consolidated or surviving company or into other property as provided in subsection (5)."

(5) This is a reference to section 233(5) which provides that one of the provisions that a plan may contain is as follows:

> "Some or all of the shares whether of different classes or of the same class in each constituent company may be converted into or exchanged for different types of property (consisting of shares, debt obligations or other securities in the surviving company or consolidated company or any other corporate entity, or money or other property, or a combination thereof) as provided in the plan of merger or consolidation."

The effect of this therefore is that a plan may require the shares of minority shareholders to be exchanged for a specified cash consideration.

11. The appraisal rights of dissenting shareholders are found in section 238, which among other things provides as follows:

> "**Rights of dissenters**
>
> **238** (1) A member of a constituent company incorporated under this Act shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation.
>
> (2) A member who desires to exercise that person's entitlement under subsection (1) shall give to the constituent company, before the vote on the merger or consolidation, written objection to the action.
>
> (3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for that person's shares if the merger or consolidation is authorised by the vote.
>
> (4) Within twenty days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, the constituent company shall give written notice of the authorisation to each member who made a written objection.
>
> (5) A member who elects to dissent shall, within twenty days immediately following the date on which the notice referred to in subsection (4) is given, give to the constituent company a written notice of that person's decision to dissent…
>
> …
>
> (7) Upon the giving of a notice of dissent under subsection (5), the member to whom the notice relates shall cease to have any of the rights of a member except the right to be paid the fair value of that person's shares and the rights referred to in subsections (12) and (16).

(8) Within seven days immediately following the date of the expiration of the period specified in subsection (5), or within seven days immediately following the date on which the plan of merger or consolidation is filed, whichever is later, the constituent company, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase that person's shares at a specified price that the company determines to be their fair value; and if, within thirty 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 that person's shares, the company shall pay to the member the amount in money forthwith.

(9) If the company and a dissenting member fail, within the period specified in subsection (8), to agree on the price to be paid for the shares owned by the member, within twenty days immediately following the date on which the period expires —

(a) the company shall (and any dissenting member may) file a petition with the Court for a determination of the fair value of the shares of all dissenting members; and

…

(11) At the hearing of a petition, the Court shall determine the fair value of the shares of such dissenting members as it finds are involved, together with a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value.

…

(16) The enforcement by a member of that person's entitlement under this section shall exclude the enforcement by the member of any right to which that person might otherwise be entitled by virtue of that person holding shares, except that this section shall not exclude the right of the member to institute proceedings to obtain relief on the ground that the merger or consolidation is void or unlawful."

12. So much for the ordinary procedure. But in the case of a parent company merging with one or more of its subsidiaries, section 233(7) contains an exception or derogation from the requirement for special resolutions of each constituent company as follows:

> "(7) Notwithstanding subsection (6)(a), if a parent company incorporated under this Act is seeking to merge with one or more of its subsidiary companies incorporated under this Law, a special resolution under that subsection of the members of such constituent companies is not required if a copy of the plan of merger is given to every member of each subsidiary company to be merged unless that member agrees otherwise."

For this purpose a "parent company" is defined by section 232 as meaning, with respect to another company:

> "a company that holds issued shares that together represent at least ninety per cent of the votes at a general meeting of that other company"

and "subsidiary company" has a corresponding definition.

13. This gives rise to a difficulty in such a case in operating the procedure laid down in section 238. As can be seen, that provides for a member of a constituent company wishing to exercise their appraisal rights (i) to give to the company under section 238(2) written notice of objection "before the vote on the merger or consolidation" and (ii) to give to the company under section 238(5) written notice of their decision to dissent within 20 days after the giving by the company of notice of authorisation under section 238(4), with section 238(4) itself requiring that the company give such notice of authorisation within 20 days "immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made". So in the absence of a vote this procedure cannot be operated in accordance with its terms. The question in this appeal is whether this means that minority shareholders in a short-form merger have no appraisal rights such as dissenting shareholders in a long-form merger have, or, if they do, how such rights are to be exercised.

**The facts**

14. The Company was incorporated in the Cayman Islands in 2007 under the name TL Age Ltd as an indirect wholly-owned subsidiary of Sohu.com Ltd ("Sohu"), and changed its name to Changyou.com Ltd in 2008.

15. At all relevant times Sohu was the ultimate holding company of the Sohu group, a leading Chinese online media, search and game service group, and the Company was a leading game developer and operator in China, developing and licensing online games for personal computers and mobiles and operating the 17173.com website, one of the leading information portals in China.

16. At all relevant times the Company's share capital was divided into Class A Ordinary Shares with a par value of US$0.01, and Class B Ordinary Shares, also with a par value of US$0.01. The holders of Class A and Class B shares voted as a single class with Class A shareholders entitled to one vote per share and Class B shareholders 10 votes per share.

17. In 2009 American Depositary Shares ("ADSs") offered in the Company's initial public offering commenced trading on the NASDAQ Global Select Market. Each ADS represented two Class A shares.

18. On 9 September 2019 Sohu proposed to the Company that it take the Company back into private ownership by acquiring all outstanding Class A shares not already owned by Sohu at a price of US$5 per share (and US$10 per ADS). At that date Sohu directly held 1,500,000 of the Class A shares and indirectly held through its subsidiary Sohu.com (Game) Ltd ("Sohu Game") all 70,250,000 issued Class B shares. There were about 37m Class A shares in issue which meant that Sohu had some 95.2% of the total voting power.

19. This proposal was implemented as follows:

(1) On 2 January 2020 the Parent was incorporated in the Cayman Islands.

(2) On 13 January 2020 Sohu Game transferred all the issued B shares in the Company to the Parent. That gave the Parent more than 90% of the voting power in the Company.

(3) On 24 January 2020 the Company entered into a merger agreement with the Parent and Sohu Game. This provided among other things that at the effective time of the merger the shares and ADSs held by minority shareholders should be cancelled in exchange for the right to receive cash. The cash payable had by then been increased to US$5.40 per Class A share (and US$10.80 for an ADS). The Company issued a press release announcing the agreement on the same day.

(4) On 13 April 2020 the Company sent a copy of the final form of the plan of merger to every member of the Company in accordance with the short-form merger procedure in section 233(7). The plan of merger provided for the merger to take effect on 17 April 2020, and, as permitted by section 233(5), for each Class A share other than the 1,500,000 held by the Parent to be cancelled in exchange for the right to receive US$5.40.

(5) On 14 April 2020 the Parent and the Company entered into the final form of the plan of merger and filed it with the Registrar.

(6) Pursuant to the terms of the plan of merger the merger became effective on 17 April 2020, the Parent merging with the Company and the Company being the surviving company.

20. The respondents were dissatisfied with the proposal to acquire their shares for the sums payable in accordance with the plan of merger. By letters dated 27 March 2020 Collas Crill (the Cayman Islands attorneys acting for the respondents) wrote on behalf of each respondent to the Company contending that the members of the Company had appraisal rights notwithstanding that the merger was a short-form merger. The letters gave written notice of objection to the merger and written notice of the relevant respondent's election to dissent from the merger, and demanded payment for the fair value of their shares. (In some cases at the date of the letters the Company had not confirmed that the respondents had been entered on the register of the Company, and the letters were repeated on 1 April 2020 after this had been done.)

**Proceedings in the Grand Court**

21. On 9 June 2020 the respondents issued a petition in the Grand Court seeking the determination by the Court of the fair value of their shares and a fair rate of interest, and an order that the Company pay them the sums determined.

22. On 7 September 2020 the Chief Justice directed the trial of a preliminary issue, with the consent of the parties, in the following terms:

> "Where a merger between a parent company and a subsidiary company is effected pursuant to section 233(7) of the Companies Law, is a member of the subsidiary company entitled to payment of the fair value of their shares pursuant to section 238 of the Companies Law and, if so, what steps (if any) are required to be taken by such member to dissent from the merger?"

23. The preliminary issue was heard by the Chief Justice on 26 and 27 November 2020 and he handed down his judgment on 28 January 2021, reported at 2021 (1) CILR 294. He concluded that section 238(1) conferred the right to be paid fair value on any shareholder dissenting from a merger or consolidation; and that it would be absurd to exclude a dissentient member of a company subject to a short-form merger from the protection of section 238 simply because the member was not allowed to vote. Instead of reading the procedural provisions of section 238 as excluding short-form mergers, they should be construed or read down so as to allow access to the protection of section 238. That could be done by reading section 238 as requiring notice of dissent to be given within 20 days of the copy of the plan of merger being given to the member as required by section 233(7). In the present case the copy of the plan was given to the members by the Company on 13 April 2020 by which time the petitioners (the respondents) had already dissented from the merger. He therefore concluded that the petitioners had taken the appropriate steps to dissent from the merger and had the right to prosecute their petition.

24. By his Order dated 15 April 2021 he declared accordingly and gave the Company leave to appeal.

**Proceedings in the Court of Appeal**

25. The Company's appeal was heard by the Court of Appeal on 8 and 9 November 2021. The Court handed down their judgments on 16 September 2022 dismissing the appeal for the reasons given in the judgment of Martin JA.

26. He concluded that section 238 as drafted is not apt to apply to short-form mergers, but that this was not what the legislature intended. He then considered whether the Court could do anything about this, concluding that as a matter of ordinary construction it could not. But he accepted an alternative argument based on the requirements of the Constitution of the Cayman Islands. This was that section 15 of the Bill of Rights, which assures a right of peaceful enjoyment of property and permits interference with it only where provision is made by the relevant law for the prompt payment of adequate compensation and access to the Court for determination of the amount, applied; and that it was both possible and appropriate to read section 238 in such a way as to confer appraisal rights on dissenters from a short-form merger.

27. That could be done by (i) reading section 238(2) as requiring the member to give written notice of objection immediately after the date on which the plan of merger is given to the member; (ii) reading section 238(4) as requiring the Company to give to each member so objecting written notice of filing the plan with the Registrar within 20 days of such filing; and (iii) reading section 238(5) as requiring a member who elects to dissent to give written notice of his decision to dissent within 20 days of such notice.

28. On that basis he held that the Chief Justice reached the right conclusion and that the appeal should be dismissed.

29. On 20 December 2022 a supplementary judgment of the Court dealing with consequential matters was handed down. This rejected a number of points taken by the Company on the proposed order including a contention that the respondents had not in fact complied with the procedural requirements of section 238 as read down by the Court. As explained in more detail below the Court took the view that it was far too late to raise this point when it had not been argued during the hearing of the appeal. The Court also concluded that the Company was entitled to appeal to the Privy Council as of right.

**"Ordinary" construction**

30. The question before the Board is one of statutory interpretation. There is ultimately only one question which is whether on the true construction of Part 16 of the Companies Act the members of a company that is the subject of a short-form merger have appraisal rights. But it is helpful to approach this question, as the Court of Appeal did and as counsel did in their written and oral arguments, by first asking how the legislation should be construed leaving aside the constitutional points.

31. The relevant principles were not in dispute. Both counsel referred (as had Martin JA in the Court of Appeal) to the summary by Lady Arden in giving the Board's decision in *Shanda Games Ltd v Maso Capital Investments Ltd* [2020] UKPC 2, [2020] 1 BCLC 577 (itself coincidentally a decision on section 238) at para 27 as follows:

> "… [T]he court has to ascertain the intention of the legislature from the words it has used in their context, and also in the light of any material which demonstrates the mischief that it was concerned to redress by the statutory provision."

The reference to "the intention of the legislature", although a very common usage, is not without its critics, but the guiding principle is clear that the meaning of a statutory provision is to be ascertained from the words that the legislature has chosen to enact, read in their statutory context and in the light of the statutory purpose.

32. Here when one reads section 238 in its context, it is readily apparent that there is a tension between the wording of section 238(1) and that of section 238(2)-(5). Reading section 238(1) on its own it appears to confer an entirely general right on any member of a constituent company incorporated in the Cayman Islands to be paid the fair value of their shares upon dissenting from a merger. But section 238(2)-(5), which detail how

that right is to be exercised, are written on the assumption that there will be a vote and hence are only applicable to long-form mergers.

33. Mr Jonathan Crow KC, who appeared with Mr David Lamb and Mr Erik Bodden for the Company, submitted that this mismatch was to be resolved by understanding the legislation as intended to confer rights only on shareholders in a long-form merger. Although section 238(1) conferred an entitlement to payment of the fair value of their shares on a member of a constituent company, this only applied to a member "upon dissenting from" the merger or consolidation in question. There was no express definition of what it is to dissent (in contrast, for example, to section 88 which contains in section 88(4) a definition of "dissenting shareholder" for the purposes of that section); and hence to understand what it was to dissent one had to turn to section 238(2)-(5) which told one how a shareholder could dissent, and unless a shareholder could dissent in accordance with those sub-sections, they could not dissent at all. To put it another way, section 238(2)-(5) were not merely mechanical; they were definitional and identified the category of person who could exercise the right to payment of fair value.

34. These submissions were skilfully advanced but the Board does not accept them. It would require understanding the purpose of section 238 as being to confer appraisal rights on shareholders in a long-form merger but not on those in a short-form merger despite the fact that section 238(1), which is the substantive provision conferring the entitlement, simply refers to "[a] member of a constituent company incorporated under this Act" and "a merger or consolidation". There is nothing in section 238(1) itself to limit this to members of a constituent company which is the subject of a long-form merger or consolidation ("long-form shareholders") or to exclude members of a constituent company which is the subject of a short-form merger ("short-form shareholders"). Neither in section 238(1) nor in the heading to the section is there any indication or even hint that this is what is meant. If that had really been the intended purpose of the provision one would have expected those responsible for framing the section to have said so, expressly drawing the distinction between long-form shareholders and short-form shareholders. It would seem to be a particularly obscure way of confining the entitlement to long-form shareholders to confer it in unqualified terms on any member of a constituent company the subject of a merger and leave the exclusion of short-form shareholders to be teased out of the subsidiary provisions in section 238(2)-(5), especially as those provisions themselves do not in terms draw any express distinction between long-form and short-form shareholders.

35. Nor does the Board accept Mr Crow's characterisation of section 238(2)-(5) as definitional provisions. They are not framed as such, and rather than identify *who* enjoys the appraisal rights, they assume that the entitlement has been conferred by section 238(1) and tell one *how* that entitlement is to be exercised: see for example section 238(2) which begins "A member who desires to exercise that person's entitlement…". The Board accepts that these provisions are rather, as submitted by Mr Jonathan Adkin

KC (who appeared with Mr Adil Mohamedbhai and Mr Rocco Cecere for the respondents), mechanical provisions. Their purpose is not to provide a definition of what it is to dissent from a merger, but rather to explain how one goes about expressing dissent in practice. That means that "dissent" is left undefined by section 238, but it is an ordinary English word whose meaning is not obscure: to dissent from some proposed course of action is to express disagreement with it.

36. The Board therefore accepts Mr Adkin's submission that the legislation should be understood as intended to confer rights on all dissenting shareholders and not only on long-form shareholders. This was also the view taken by both Courts below. The Chief Justice said at para 136 that:

> "it is quite clear … that the intended purpose of the Act or provision in question was to confer the right to be paid fair value on all dissenting shareholders… ."

And Martin JA was of the same view, saying at paras 44-45 that although section 238 as drafted was not apt to apply to short-form mergers "this is not what the legislature intended". The Board agrees.

37. This conclusion is supported by a number of other considerations. First, no convincing rationale has been put forward as to why the legislature should have wished to distinguish between long-form shareholders and short-form shareholders in this way. Mr Crow referred us to statements in the Legislative Assembly (as the Cayman Islands legislature, which was renamed Parliament in 2020, was then known), first in 2009 on the second reading of the Companies (Amendment) Bill 2009, which introduced the merger and consolidation provisions now found in Part 16, to the effect that their introduction was in response to requests from, and reflected extensive consultation with, the private sector; and then in 2011 on the second reading of the Companies (Amendment) Bill 2011, which amended the provisions, to the effect that it would position the Cayman Islands at the forefront of the financial services market, there having been two rounds of consultation with the industry. There is no reason to doubt that the overall purpose of the legislation was to ensure that the Cayman Islands remained competitive in the market for financial services. But it was not suggested that the consultations in either 2009 or 2011 had given any consideration to whether the appraisal rights should be conferred on all members of merging companies or only on long-form shareholders, and there is therefore no reason to think that such a distinction was introduced at the specific request of the industry or to address some particular competitive concern.

38. Mr Crow suggested that it might nevertheless have been intended to attract business by making it easier for mergers to take place where a parent had at least 90%

of the votes of its subsidiary. But the Board did not find this suggested rationale convincing. In the ordinary case of a long-form merger, the effect of the statutory provisions is that a minority shareholder may find their shares compulsorily converted into other property (including, but not limited to, cash) against their will; but the quid pro quo for this is that such a shareholder is given the appraisal rights conferred by section 238 which entitles them to opt for payment of the fair value of their shares as appraised by the Court (as opposed to accepting whatever payment or other substitute property the directors and majority of the shareholders consider appropriate). That plainly represents what the legislature regarded as striking a fair balance between the ability of the majority to compulsorily take the minority's shares and convert them into something else, and the rights of the minority. It is true that in the case of a parent with 90% voting power the legislation contains a derogation in section 233(7) which is evidently designed to permit a streamlined procedure for the implementation of a merger. But the effect of such a short-form merger on minority shareholders is exactly the same as in a long-form merger – namely that they may find their shares compulsorily taken against their will. It is difficult to see any reason why the legislature should have decided that the quid pro quo for that should be radically different from that available in a long-form merger, as the minority's shares in each case comprise the same bundle of rights and the effect of the merger on those rights is the same. Indeed it would mean that a member with a 0.01% shareholding in a company where the majority held 89% of the voting power would enjoy the full appraisal rights; whereas a member with a 10% shareholding in a company where the majority held 90% of the voting power would not. That seems anomalous, and the Board is somewhat doubtful whether such a result would be attractive to those looking to invest as minority shareholders in Cayman Islands companies, or to Cayman Islands companies seeking to attract such investment from the public.

39. Mr Crow suggested that it was wrong to view the matter solely from the perspective of the investor or minority shareholder, and that viewed from the perspective of a 90% majority owner, it would nonetheless be an advantage to be able to merge with a subsidiary without the trouble and expense of what can be lengthy and costly appraisal proceedings. But again the Board is not persuaded. It was Mr Crow's own submission that denying short-form shareholders the full appraisal rights would not necessarily leave them without remedy if the price offered for their shares was demonstrably unfair. They could in an appropriate case challenge the decision of the directors to approve a merger on the basis that they were in breach of their duties to act in good faith in the interests of the company and fairly as between different shareholders; or apply to the Court for the winding up of the company on the just and equitable ground pursuant to section 92(e) of the Companies Act. Indeed Mr Crow at times suggested that denying short-form shareholders appraisal rights in effect did little more than transfer the burden of proof of unfairness to them. (That seems to the Board to overstate matters, as one of the things the appraisal rights give a member of a constituent company is the ability to opt for cash in place of whatever other property their shares are to be converted into, and in such a case there need be no unfairness in the value of what is offered under the merger at all.) As Mr Adkin pointed out, if

dissenting shareholders are able to and do exercise appraisal rights, this does not disrupt or affect the validity of the merger itself; it simply affects what the dissenting shareholders receive in place of their shares. If on the other hand dissenting shareholders in a short-form merger are unable to exercise appraisal rights, that would give rise to greater risks of disruption as the various putative alternative remedies suggested are likely to be more cumbersome and more expensive, and such as to cast doubt on the validity of the merger, or even stop it in its tracks entirely.

40. In these circumstances the Board has not been persuaded that any rational explanation has been put forward as to why the legislature should have wished to distinguish between the rights of long-form shareholders and short-form shareholders (other than denying the latter the opportunity to vote).

41. Second, and allied to the first point, is that if the Company's submissions were right it would mean that short-form shareholders could have their shares taken away without the same protections as the legislature thought appropriate for long-form shareholders. That seems fundamentally unfair and contrary to the principle of legality under which legislation is not to be interpreted as depriving people of their fundamental rights unless that is clearly and unambiguously stated. One of the rights protected by this principle is the right not to be deprived of property without adequate compensation. Mr Crow was at pains to point out that on his case it would not mean that a short-form merger could be used to expropriate the shareholders' property without compensation; under section 233(5) shares could not simply be cancelled but had to be converted into some other property, and the duties of directors would prevent that being done in a deliberately unfair way. He pointed out that in the present case the assessment of the cash to be paid was entrusted to an independent committee who had taken advice and that this had resulted in the price being raised from US$5 to US$5.40 per share. But what was in fact done in the present case cannot affect the principle, and in any event the legislature undoubtedly thought it appropriate that long-form shareholders should have the full appraisal rights. If that is what the legislature regarded as required to fairly compensate long-form shareholders for their shares being taken away, then it is difficult to see why any lesser protection was required to fairly compensate short-form shareholders for the same interference with their rights. This too seems to the Board a reason for being slow to accept the Company's submissions.

42. Third, there is a particular consequence of the Company's case which the Board regards as unlikely to have been intended, and that is its interaction with section 88. This section is a "squeeze-out" provision similar to provisions with a long history in UK company legislation and provides in section 88(1) as follows:

"**Power to acquire shares of dissentient shareholders**

> **88** (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to another company, whether a company within the meaning of this Act or not (in this section referred to as "the transferee company") has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than ninety per cent in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire that person's shares, and where such notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given, the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company."

43. This therefore permits a transferee company that has secured agreement from the holders of 90% by value of the shares of a transferor company to also acquire the shares of dissentient shareholders against their will. But it is subject to the power of the Court to order otherwise.

44. Suppose that in a particular case the Court on the application of the dissentient shareholders has ordered otherwise. It would appear that on the Company's case the transferee company could nevertheless complete the acquisition of the 90% and then (assuming this also carried 90% of the voting power) implement a short-form merger and acquire the dissentients' shares without the latter having any recourse to the Court under section 238. That would seem a curious position and not one that the Court should readily assume to have been intended by the legislation.

45. For these reasons the Board concludes that although the machinery in section 238(2)-(5) is not apt to apply to short-form mergers, the Court of Appeal was right that this was not the intention of the legislation.

46. That means that section 238 as drafted does not do what it was meant to do because it contains no machinery that enables the appraisal rights intended to be conferred on short-form shareholders to be exercised. The Board accepts that this must

have been an oversight on the part of the legislature. Mr Crow submitted that it was unlikely that the legislature, which had considered this Part of the Act not only on its introduction in 2009, but on its amendment in 2011 and again in 2018, to have overlooked the point. But although drafting errors of this type are uncommon, they do happen from time to time. The point is obvious enough once it has been pointed out, but the Board does not find it improbable that it may not have been spotted at the time.

**Can the mistake be corrected?**

47. The question then arises as to whether the Court can correct this omission as a matter of construction. The principles were summarised by Lord Nicholls in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 (*"Inco"*), 592C-H, as follows:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words…
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see per Lord Diplock in *Jones v Wrotham Park Settled Estates* [1980] AC 74, 105-106. In the present case these three conditions are fulfilled.

> Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd v Schindler* [1977] Ch 1, 18, Scarman LJ observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation."

48. Of the three conditions referred to by Lord Nicholls in *Inco*, the Board is satisfied that the first two are met. The Board is abundantly sure that the intended purpose of section 238 was to confer appraisal rights on all members of constituent companies who dissented from a merger whether in the form of a long-form merger or a short-form one; and is also abundantly sure that by inadvertence the drafter and the legislature failed to give effect to that purpose.

49. The difficulty is over the third *Inco* condition. There is no real doubt as to the general nature of the provision that the Legislative Assembly would have made, namely that it would have provided machinery enabling short-form shareholders to exercise appraisal rights. Mr Crow pointed to a passage in the Chief Justice's judgment at para 121 where he identified four options, namely (i) to amend the definition of "parent company" in section 232 so as to limit the availability of short-form mergers to wholly-owned subsidiaries; (ii) to delete section 233(7) so as to remove the ability to carry out short-form mergers at all; (iii) to amend section 238 to make it expressly applicable to short-form mergers; or (iv) to adopt a statutory mechanism for some other sort of Court application in a short-form merger. But the Chief Justice was not in this passage considering the third *Inco* condition. He was reciting a submission on behalf of the Company as to the options that would be open to Parliament if the Court were to make a declaration that the legislation was incompatible with the Bill of Rights. Options (i), (ii) and (iv) are not realistic contenders for the third *Inco* condition; and it seems clear that for this purpose what would have been done is to provide machinery to enable short-form shareholders to exercise the appraisal rights intended to be conferred on them.

50. That does not however answer the third *Inco* question. The provisions of section 238(2)-(5) set out a detailed timetable for the exercise of appraisal rights in the case of a long-form merger. It is not obvious how the legislature would have adapted these steps to the case of a short-form merger. Thus for example under section 238(2) the first step is for shareholders to give notice of objection before the vote which confers authority on the merger. There is no equivalent step to the vote in a short-form merger, which moves directly from the directors approving the plan under section 233(3) to a copy of the plan being given to the members under section 233(7). In these circumstances what provision would the legislature have made in a short-form merger in respect of a notice of

objection? It could scarcely have required the members to give notice of objection *before* the copy of the plan was given to them as this might be the first they heard of it, there being no obligation to notify them in advance. The legislature might have required the members to give notice of objection after the copy of the plan was given to them, but that raises the question of how long after? Or it might have omitted the requirement for members to give notice of objection at all. That might depend on what the purpose of requiring notice of objection in a long-form merger is, something that was touched on in argument but not answered to the Board's satisfaction. Similar points could be made on the steps in section 238(4) and (5), as indeed the differing solutions ultimately favoured by the Chief Justice and the Court of Appeal illustrate.

51. If therefore the question is, as it is under the third *Inco* condition, whether the Court is abundantly sure what the legislature would in substance have provided, the Board does not consider that this condition is fulfilled. The Board is satisfied that some machinery would have been provided but is not satisfied quite what form it would have taken. At this stage in the analysis the principles applicable are those of ordinary statutory interpretation, not those applicable to the more expansive exercise permitted or required by constitutional instruments; and to fill in the gaps by devising suitable machinery would be, in the Board's view, to cross the line between interpretation and legislation. No case was put before the Board in which the *Inco* principles had been used to achieve anything similar.

52. In those circumstances the Board agrees with the Court of Appeal that it is not possible to rectify, as a matter of ordinary construction, the omission to provide suitable machinery for short-form shareholders to exercise the appraisal rights. It is therefore necessary to consider the constitutional issues.

**Section 15 of the Bill of Rights**

53. The current Constitution of the Cayman Islands was introduced by an Order in Council, the Cayman Islands Constitution Order 2009, SI 2009 No 1379 ("the Constitution Order"). By section 1(2) the Constitution Order came into force on the day appointed by the Governor, which in the event was 6 November 2009; and by section 4(1) Schedule 2 to the Order had effect as the Constitution of the Cayman Islands from the appointed day.

54. Schedule 2 is divided into a number of Parts, of which Part I (sections 1 to 28) is headed "Bill of Rights, Freedoms and Responsibilities" and is commonly known as the Bill of Rights. Section 15 of the Bill of Rights provides as follows:

"**Property**

**15** (1) Government shall not interfere in the peaceful enjoyment of any person's property and shall not compulsorily take possession of any person's property, or compulsorily acquire an interest in or right over any person's property of any description, except in accordance with law and where—

(a) the interference, taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and

(b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that interference, taking of possession or acquisition—

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in or right over the property a right of access to the Grand Court, whether direct or on appeal from any other authority, for the determination of his or her interest or right, the legality of the interference with, taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he or she is entitled, and for the purpose of obtaining prompt payment of that compensation; and

(iii) giving to any party to proceedings in the Grand Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.

(2) Nothing in any law or done under its authority shall be held to contravene subsection (1)—

(a) to the extent that the law in question makes provision for the interference with, taking of possession or acquisition of any property, interest or right—

(i) in satisfaction of any tax, rate or due;

(ii) by way of penalty for breach of any law or forfeiture in consequence of a breach of any law;

(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;

(iv) by way of taking of a sample for the purposes of any law;

(v) where the property consists of an animal, on its being found trespassing or straying;

(vi) in the execution of judgments or orders of a court;

(vii) by reason of its being in a dilapidated or dangerous state or injurious to the health of human beings, animals or plants;

(viii) in consequence of any law with respect to prescription or the limitation of actions; or

(ix) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry, or, in the case of land, for the purposes of carrying out on it work of reclamation, drainage, soil conservation or the conservation of other natural resources or work

relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required, and has, without reasonable and lawful excuse, refused or failed to carry out),

except so far as that provision of law or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society; or

(b) to the extent that the law in question makes provision for the taking of possession or acquisition of any of the following property (including an interest in or right over property), that is to say—

(i) enemy property;

(ii) property of a person who has died, a person of unsound mind or a minor, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest in it;

(iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or

(iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

(3) Nothing in any law or done under its authority shall be held to contravene subsection (1) to the extent that the law in question makes provision for the interference with or

compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided from public funds."

**Is section 15 engaged – (i) is it limited to Government expropriation?**

55. Three points were taken by Mr Crow on the applicability of section 15. The first was that section 15 provided protection only against interference by Government, which this is not. The basis for this submission was section 1 of the Bill of Rights which provides as follows:

"**1** (1) This Bill of Rights, Freedoms and Responsibilities is a cornerstone of democracy in the Cayman Islands.

(2) This Part of the Constitution—

(a) recognises the distinct history, culture, Christian values and socio-economic framework of the Cayman Islands and it affirms the rule of law and the democratic values of human dignity, equality and freedom;

(b) confirms or creates certain responsibilities of the government and corresponding rights of every person against the government; and

(c) does not affect, directly or indirectly, rights against anyone other than the government except as expressly stated.

(3) In this Part 'government' shall include public officials (as defined in section 28) and the Legislature, but shall not include the courts (except in respect of sections 5, 7, 19 and 23 to 27 inclusive)."

Mr Crow relied on the terms of section 1(2)(c), and also pointed out that section 15(1) itself provides that "Government shall not interfere … and shall not compulsorily take possession ... or compulsorily acquire an interest in or right over…".

56. The Board does not accept this submission. By section 1(3) "government" includes the Legislature (which by section 59(1) then consisted of Her Majesty and the Legislative Assembly). Mr Crow accepted that for the Legislature to pass a law authorising the Government to acquire a person's property compulsorily itself would engage section 15. But the Board does not see why it would not equally engage section 15 if the Legislature passed a law authorising A to acquire the property of B compulsorily. That is just as much an interference by "government" in the shape of the Legislature with B's peaceful enjoyment of his property. So although the second and third limbs of section 15(1) prevent the Government from itself taking possession or acquiring an interest in or right over a person's property, the first limb preventing interference with enjoyment is in the opinion of the Board engaged by the passing of a law which deprives B of his property whether or not the Government acquires an interest in it.

57. As to section 1(2)(c), that would no doubt prevent B in such a case from bringing a claim against A for breach of section 15. But it would not in the Board's opinion prevent B from asking the Court to interpret the legislation in accordance with the interpretive obligations in section 5 of the Constitution Order or section 25 of the Bill of Rights as the case may be (as to which see below), and then relying on the legislation as so interpreted against A. That is what the respondents seek to do here.

58. This view of the scope of section 15 of the Bill of Rights is supported, as Mr Adkin submitted, by the list of exceptions in section 15(2), many of which are likely to be instances of property being taken not by the Government but by other persons. Thus for example section 15(2)(a) includes the cases of execution of judgments and acquisition of property by prescription or limitation, and section 15(2)(b) includes the administration of estates, administration of assets in insolvency and the vesting of trust property. The fact that all these exclusions are spelled out as they are tends to confirm that section 15 is not limited to cases where property is acquired by the Government but extends to cases where laws passed by the Legislature enable the enjoyment of property to be interfered with by someone else such as a judgment creditor, adverse possessor, executor, liquidator or replacement trustee.

**Is section 15 engaged – (ii) no interference?**

59. Mr Crow's second submission was that the provisions of Part 16 were not a case of interference with the respondents' property for the purposes of section 15. It is a commonplace that a share in a company is a bundle of rights. Such rights, he said, are

always subject to the provisions of the constitution of the company in question and the provisions of the company law under which they are obtained. If those provide for the shares to be taken in certain circumstances, that does not interfere with the shareholder's rights, as those rights were always subject to that possibility.

60. Mr Crow supported this submission by reference to three English cases: *Money Markets International Stockbrokers Ltd (in liquidation) v London Stock Exchange Ltd* [2002] 1 WLR 1150 ("*MMI*"); *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 ("*Wilson*"); and *Sims v Dacorum Borough Council* [2014] UKSC 63, [2015] AC 1336 ("*Sims*"). In *MMI* the claimant firm became a member of London Stock Exchange Ltd and was allocated a share in the company on terms that if it ceased to be a member it would transfer the share back for no consideration. Neuberger J (as he then was) considered it almost self-evident that a person could not be said to be deprived of a possession other than subject to the conditions provided by law if the manner and circumstances in which he was so deprived were pursuant to the very agreement under which he acquired the property, or to put it another way, were an integral part of that property (at para 142). In *Sims* the claimant and his wife were joint periodic secure tenants of a house belonging to the defendant local authority where the tenancy agreement provided that if either wished to terminate his or her interest in the tenancy he or she had to terminate the tenancy as a whole. Mr Sims' wife gave notice to quit and the tenancy terminated. Lord Neuberger (as he had become) said that as Mr Sims had been deprived of his property in circumstances specifically provided for in the agreement which had created it, the argument that this was a breach of article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("A1P1") was plainly very hard to sustain, accepting a submission that the loss of his right was the result of a bargain he had himself made.

61. The Board accepts that these authorities suggest that there is unlikely to be an unlawful interference with a person's rights where they acquired the rights under a contract which itself specified that the rights would be lost in particular circumstances. That principle might have been in point if at the time of acquisition by the respondents of their shares in the Company the Articles of Association of the Company had expressly provided for the respondents' shares to be cancelled in the event of a short-form merger. It might then indeed have been said that such provisions were an integral part of the respondents' property, and the result of the bargain they had themselves made. But it has not been suggested that that was in fact the case.

62. Rather less straightforward is the case where a contract under which rights are acquired does not itself provide for them to be lost but some statutory provision applies under which the rights can be interfered with or lost in particular circumstances. This was the case in *Wilson*. Mrs Wilson pawned her car to First County Trust Ltd ("FCT") in return for a loan of £5,000. The Court of Appeal held that the agreement mis-stated the amount of credit charged. This had the result that the agreement was wholly unenforceable as the amount of credit was a prescribed term and under the Consumer

Credit Act 1974 the failure to state all the prescribed terms prevented the agreement from being enforced.

63. One of the questions argued in the House of Lords was whether there was an interference with FCT's rights for the purposes of A1P1. It was not in the event necessary to decide this point as the House unanimously held that the Human Rights Act 1998, which incorporated the European Convention into domestic law, had no application to transactions carried out before it came into force. But it was considered by most of their Lordships. Their speeches however reveal a considerable range of views on the point. Lord Scott at para 168 took the view that A1P1 was concerned with interference with existing possessions or property rights and that the effect of the 1974 Act was that FCT never acquired any enforceable right at all. Lord Hope at para 107 took a similar view on the basis that the agreement that FCT entered into was from the outset an improperly executed agreement and subject to the statutory restrictions on its enforcement, so that A1P1 was not engaged. He did however say at para 106 that it was a matter for domestic law to define the nature and extent of the rights that a person acquires and continued:

> "One must, of course, distinguish carefully between cases where the effect of the relevant law is to deprive a person of something that he already owns and those where its effect is to subject his right from the outset to the reservation or qualification which is now being enforced against him. The making of a compulsory order or of an order for the division of property on divorce are examples of the former category. In those cases it is the making of the order, not the existence of the law under which the order is made, that interrupts the peaceful enjoyment by the owner of his property. The fact that the relevant law was already in force when the right of property was acquired is immaterial, if it did not have the effect of qualifying the right from the moment when it was acquired."

Lord Hobhouse at paras 136-137 considered that the answer depended on whether the car had been delivered to FCT (in which case the 1974 Act would have interfered with FCT's special property as pledgee in the car and there would be the basis for an A1P1 complaint), or had remained in the possession of Mrs Wilson (in which case FCT's complaint would be that they should have been allowed to seize the car in purported enforcement of a contractual right they had never in fact acquired). Lord Nicholls considered the question at paras 38-44. At para 41 he rejected a submission for the Secretary of State, advanced by Mr Crow in similar terms to that advanced before us, that a person who acquires property subject to limitations under a law which subsequently bite according to their tenor cannot complain that his rights under A1P1 have been infringed; Lord Nicholls considered that the exercise of powers such as

powers of compulsory acquisition or property adjustment powers on divorce prima facie engaged article 1, irrespective of whether the enabling statute was enacted before or after the property affected by the order was acquired (at para 42). He continued at para 44:

> "Thus the question in the present case is one of characterisation of the nature and effect of the relevant provisions of the Consumer Credit Act, considered as a matter of substance rather than form. In my view, consistently with the underlying objective of article 1 of the First Protocol, the relevant provisions in the Consumer Credit Act are more readily and appropriately characterised as a statutory deprivation of the lender's rights of property in the broadest sense of that expression than as a mere delimitation of the extent of the rights granted by a transaction."

64. To these cases should be added the decision of a 7-judge Chamber of the European Court of Human Rights in *J A Pye (Oxford) Ltd v United Kingdom* (2005) 43 EHRR 3. This concerned the question whether there was a breach of A1P1 where the title to land was extinguished by adverse possession for the statutory period under the Limitation Act 1980. The UK Government advanced a very similar argument to that advanced before us, namely that there is no interference for the purposes of A1P1 where the relevant law exists at the time the property is acquired and where the operation of the law is to be seen as an incident of the property right at the time of its acquisition (see at para 49). The majority of the Chamber rejected this argument at para 51 as follows:

> "However, Art. 1 does not cease to be engaged merely because a person acquires property subject to the provisions of the general law, the effect of which is in certain specified events to bring the property right to an end, and because those events have in fact occurred. Whether it does so will depend on whether the law in question is properly to be seen as qualifying or limiting the property right at the moment of acquisition or, whether it is rather to be seen as depriving the owner of an existing right at the point when the events occur and the law takes effect."

At para 52 they distinguished cases concerning the grant of licences which were from the outset subject to conditions, and the decision in *Wilson* on the basis that, in the view of the majority, the legislation bit from the outset and FCT therefore had no right to enforce of which it could be deprived. By contrast:

> "… [the Land Registration Act 1925 and the Limitation Act 1980] are in the view of the Court to be seen as 'biting' on the applicants' property rights only at the point at which the Grahams had completed 12 years' adverse possession of the applicants' land and not as delimiting the right at the moment of its acquisition."

The case was referred to the Grand Chamber which by a majority held that there was no violation of A1P1: *J A Pye (Oxford) Ltd v United Kingdom* (2007) 46 EHRR 45. But on the present point the Grand Chamber agreed with the Chamber. The majority said that although the land was subject to the ordinary law, including the various rules on adverse possession, A1P1 was engaged, saying at para 63:

> "It remains the case, however, that the applicant companies lost the beneficial ownership of 23 ha of agricultural land as a result of the operation of the 1925 and 1980 Acts. The Court finds inescapable the Chamber's conclusion that Art.1 of Protocol No.1 is applicable."

See also the minority judgment at O-I2.

65. On this state of the authorities there is a distinction for A1P1 purposes between a statutory provision such as the Consumer Credit Act 1974 in *Wilson* which prevents any rights being acquired, or qualifies or delimits the extent of rights acquired, at the outset of the transaction, and a statutory provision which can operate in the future to deprive the owner of, or interfere with, his or her rights such as those conferring power to acquire property compulsorily or to make property adjustment orders on divorce, or providing for the extinction of title on the completion of 12 years' adverse possession. Even though a person may acquire property subject to existing statutory provisions of this latter type, that does not prevent the subsequent operation of those provisions from constituting an interference with the person's rights such as to engage A1P1. The Board does not see any reason to take a different view of what constitutes an interference for the purposes of section 15 of the Bill of Rights, and on this test the fact that the respondents acquired their shares in the Company (assuming they did – there is no material before the Board as to when they in fact acquired them) at a time when the legislation already provided for the possibility of their shares being cancelled by means of a short-form merger does not prevent the subsequent implementation of such a merger from constituting an interference with the peaceful enjoyment of their property. The Board therefore does not accept Mr Crow's submission.

66. Quite apart from this, Mr Adkin had another answer to the point which is that it overlooks the position of those who were existing shareholders in Cayman Islands

companies at the time that what is now Part 16 was first enacted in 2009. On any view they cannot be said to have acquired their shares subject to the possibility of cancellation by means of a short-form merger. Yet the legislation (and in particular section 238) cannot be given one interpretation for them and another for those acquiring their shares after 2009. It is unnecessary for the Board to reach any conclusion on this point, but there would appear to be considerable force in it.

**Is section 15 engaged – (iii) incident of a contract?**

67. Mr Crow's third submission was that even if section 15 of the Bill of Rights would otherwise be engaged, the case fell within the carve-out in section 15(2)(a)(iii). This is set out above and repeated here for convenience:

> "(2) Nothing in any law or done under its authority shall be held to contravene subsection (1)—
>
> > (a) to the extent that the law in question makes provision for the interference with, taking of possession or acquisition of any property, interest or right—
>
> …
>
> > (iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;
>
> …
>
> except so far as that provision of law or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society."

68. Mr Crow's submission was that Part 16 was a "law" that "makes provision for the interference with … property … as an incident of a … contract".

69. This raises a short point of interpretation as to what is meant by making provision for interference as an "incident" of a contract. Mr Crow accepted that the effect of Part 16 was not to change the *terms* of the contract between the respondents as shareholders and the Company, but submitted that the possibility that their shares might

be cancelled (without appraisal rights) by means of a short-form merger was an incident of that contract.

70. The Board is not persuaded that that is so. To accept this submission would entail accepting that any law which affected rights under a contract was a law that made provision for interfering with those rights as an incident of the contract, and would therefore fall within the carve-out. That would in effect mean that there would be no limit to the interference with contractual rights that government could legislate for (subject to the proviso at the end of section 15(2)(a)), with the result that the exception would largely swallow the rule, so far at any rate as concerned contractual rights. But contractual rights are often among the most significant of property rights. It is difficult to believe that this is what section 15(2)(a)(iii) was designed to achieve; and given that it is a well-established principle that exceptions in constitutions are to be narrowly construed (*R v Hughes* [2002] UKPC 12, [2002] 2 AC 259, para 35), the Board concludes that it does not have this effect.

71. Moreover section 15(2)(a)(iii) contains a list of transactions ("lease, tenancy, mortgage, charge, bill of sale, pledge") each of which is itself a type of contract. If the intention had been to exempt all laws which provided for interference with any contractual rights, then it is not easy to see why this list is included at all. It is noticeable that the last four in the list are all types of security transactions under which the holder of security (mortgagee, chargee etc) may be or become entitled to take possession of the property of the other party (mortgagor, chargor etc) and sell it by way of enforcement of security; that suggests that the purpose of the sub-section was to make it prima facie unnecessary to justify laws that entitle the holders of security to enforce their rights even though doing so will necessarily interfere with the other party's enjoyment of their property. Read in that light, the reference to leases and tenancies is no doubt to be understood similarly as intended to make it prima facie unnecessary to justify laws entitling landlords to resume possession of property from their lessees and tenants. The rights of security holders to enforce their security, and of landlords to regain possession of their property, are quite naturally referred to as "incidents" of the respective contracts.

72. If that is right, then the reference in section 15(2)(a)(iii) to "provision for the interference with, taking of possession or acquisition of any property, interest or right … as an incident of a … contract" should be understood as referring to analogous rights arising out of a contract, that is where the effect of the contract itself is to enable one party to interfere with, or take or resume possession of, the property of another party. That is not the case here.

73. In those circumstances, the Board agrees with the analysis of this point by Martin JA in the Court of Appeal (at para 60), expressed as follows:

> "No attempt was made to define what constituted an incident of a contract for the purposes of the section 15(2)(a)(iii) carve-out; but it appears to me that the instances of relationships to which interference may be incidental specified in the same carve-out indicate what the legislature intended. Those instances are leases, tenancies, mortgages, charges, bills of sale, and pledges; and each of them has inherent in it a possibility of forfeiture. Leases and tenancies may be forfeit if the lessee or tenant fails to comply with covenants; mortgages, charges, bills of sale and pledges all give rise to security interests justifying remedies such as foreclosure or sale on failure to satisfy the charge. The possibility of forfeiture may be, but is not always, a term of the contract; but it is always a necessary incident of the relationship and will ordinarily be fortified by legislation and enforced by the courts. The potential for dispossession, which I regard as the common feature of these instances, is capable of being present in other contracts: indeed, it is not unusual for articles of association to contain a provision for the forfeiture of shares if calls are not met. It is not, however, usual to find in articles of association a provision for forfeiture or dispossession in the context of a merger (and there is none in this case); and the possibility of such dispossession cannot be said to be inherent in the contractual relationship between the shareholders embodied in articles of association. Accordingly, in my judgment it cannot be said that dispossession in a short-form merger occurs as an incident of the contract between the shareholders. As I have said, it is solely a consequence of legislative intervention."

74. The Board therefore agrees that Part 16 does not fall within the carve-out in section 15(2)(a)(iii) of the Bill of Rights.

75. Having rejected each of Mr Crow's three submissions, it follows that section 15 of the Bill of Rights is engaged.

**Is section 238 an existing law?**

76. Mr Crow did not dispute that if section 15 is engaged, then the failure of Part 16 effectively to provide appraisal rights for short-form shareholders means that it does not comply with the requirements of section 15(1)(c), namely that provision be made for prompt payment of adequate compensation, and for a right of access to the person affected to the Grand Court for determination of the amount of compensation and for the purpose of obtaining payment.

77. In these circumstances there are two potentially relevant statutory provisions imposing obligations on the Court to interpret legislation in conformity with the Bill of Rights. The first is found in section 5 of the Constitution Order as follows:

> "**Existing laws**
>
> **5** (1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.
>
> (2) The Legislature may by law make such amendments to any existing law as appear to it to be necessary or expedient for bringing that law into conformity with the Constitution or otherwise for giving effect to the Constitution; and any existing law shall have effect accordingly from such day, not being earlier than the appointed day, as may be specified in the law made by the Legislature.
>
> (3) In this section 'existing laws' means laws and instruments (other than Acts of Parliament of the United Kingdom and instruments made under them) having effect as part of the law of the Cayman Islands immediately before the appointed day."

That, as can be seen, only applies to "existing laws", namely laws having effect as part of the law of the Cayman Islands immediately before the appointed day, which was 6 November 2009.

78. For new laws passed after that date the relevant provisions are found in the Bill of Rights, as follows:

> "**Declaration of incompatibility**
>
> **23** (1) If in any legal proceedings primary legislation is found to be incompatible with this Part, the court must make a declaration recording that the legislation is incompatible with

the relevant section or sections of the Bill of Rights and the nature of that incompatibility.

(2) A declaration of incompatibility made under subsection (1) shall not constitute repugnancy to this Order and shall not affect the continuation in force and operation of the legislation or section or sections in question.

(3) In the event of a declaration of incompatibility made under subsection (1), the Legislature shall decide how to remedy the incompatibility.

**Duty of public officials**

**24** It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is required or authorised to do so by primary legislation, in which case the legislation shall be declared incompatible with the Bill of Rights and the nature of that incompatibility shall be specified.

**Interpretive obligation**

**25** In any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in this Part."

79. Before the Chief Justice the respondents did not contend that section 5 of the Constitution Order applied. In the Court of Appeal however they argued that it did on the basis that section 238 was an existing law. The Court of Appeal rejected that argument and proceeded to consider section 25 of the Bill of Rights, holding that section 238 could be read down under the interpretive obligation imposed by that section.

80. The respondents seek to revive the argument on the present appeal that section 238 is an existing law and hence that the relevant provision is section 5 of the Constitution Order rather than section 25 of the Bill of Rights. The Company objects to them doing that and the first question is whether they should be permitted to do so. The respondents did not initially identify the section 5 point as an issue for the appeal and

the Statement of Facts and Issues, which was agreed between the parties and signed on 16 August 2023, contains no reference to it. The first indication that the respondents intended to raise the point was on 31 July 2024, shortly before the Company's Written Case was due on 12 August 2024.

81. Mr Crow objected that the failure to raise the issue earlier was a breach of the requirement that the Statement of Facts and Issues "must set out the relevant … issues" (see rule 21 of the Judicial Committee (Appellate Jurisdiction) Rules Order 2009 and Practice Direction 5 at §5.1.7), and that it was unfair to the Company not to have an opportunity to respond in writing after seeing how the respondents put the point. The Board accepts that the failure by the respondents to raise the issue when agreeing the Statement of Facts and Issues was a breach of the procedural requirements, but the point is a pure point of law, and the Board considers that any prejudice to the Company in not having the opportunity to respond in writing to the respondents' argument could be remedied by giving the appellant the opportunity to file further written submissions after the hearing. That it has done, and in those circumstances the Board will permit the respondents to take the section 5 point.

82. That then raises the question whether section 238 is an "existing law" for the purposes of section 5 of the Constitution Order.

83. The relevant history of the legislation is as follows:

(1) The merger and consolidation provisions now found in Part 16 were first introduced by the Companies (Amendment) Law 2009, which was assented to by the Governor on behalf of Her Majesty on 2 May 2009 and came into force on 11 May 2009 (and hence before the appointed day of 6 November 2009 for the purposes of the Constitution Order). This added a new Part XVA to the Companies Law (2007 Revision) consisting of sections 251A to 251H. These sections corresponded closely to what are now sections 232 to 239A of the Companies Act, but as explained below the text is not in all respects the same.

(2) Between 6 November 2009 (the appointed day) and 17 April 2020 (the date when the merger in the present case became effective) the company legislation was amended on numerous occasions. Mr Crow identified no less than 23 changes to the Companies Law in this period. Of these, 6 consisted of restatements of the law in successive revisions, from the Companies Law (2010 Revision) to the Companies Law (2018 Revision). The other 17 were effected by passing amending legislation, starting with the Companies (Amendment) (No 2) Law 2009 and continuing up to the Companies (Amendment) Law 2019.

(3) Most of the amending laws amended other parts of the Companies Law and not the merger and consolidation provisions in Part XVA / Part XVI. But two in particular did amend these provisions, namely the Companies (Amendment) Law 2011, which made some quite significant amendments, and the Companies (Amendment) (No 2) Law 2018, which made a very minor change to section 239. The details are given below.

84. The original Part XVA introduced in 2009 included the following:

(1) The main features of the current Part 16 were present; in particular, the legislation then as now provided that a merger might provide for shares in a constituent company to be converted into other types of property including cash (section 251B(5)); it provided for long-form mergers requiring shareholder resolutions (section 251B(6)); and it provided for short-form mergers in which such resolutions were not required where a 90% parent was merging with one or more of its subsidiaries (section 251B(7)). These provisions however were not quite in the same form as the current section 233(5)-(7). The 2009 text of section 251(B)(5)-(7) was as follows:

> "(5) Some or all of the shares whether of different classes or of the same class in each constituent company may be converted into different types of property (consisting of shares, debt obligations or other securities in the surviving company or consolidated company, or money or other property, or a combination thereof) as provided in the plan of merger or consolidation.
>
> (6) A plan of merger or consolidation shall be authorised by each constituent company by –
>
> > (a) a shareholder resolution by majority in number representing seventy-five per cent in value of the shareholders voting together as one class; and
> >
> > (b) if the shares to be issued to each shareholder in the consolidated or surviving company are to have the same rights and economic value as the shares held in the constituent company, a special resolution of the shareholders voting together as one class,

and in either case a shareholder shall have the right to vote regardless of whether the shares that he holds otherwise give him voting rights

(7) Notwithstanding subsection (6), a shareholder resolution under that subsection is not required if a parent company incorporated under this Law is seeking to merge with one or more of its subsidiary companies incorporated under this Law, and in that case a copy of the plan of merger shall be given to every member of each subsidiary company to be merged unless waived by that member."

(2) Section 251B(7) also needs to be read with the then definition of "parent company" in section 251A, namely:

"a company that owns at least ninety per cent of the issued shares of each class in a subsidiary company that are entitled to vote."

(3) Section 251G of the 2009 legislation provided for the rights of dissenters. It was in precisely the same terms as the current section 238 save for section 251G(15) which was in the following form:

"(15) Shares acquired by the company pursuant to this section shall be cancelled unless they are shares of a surviving company, in which case they shall be available for re-issue."

(4) Section 251H of the 2009 legislation corresponded to the current section 239. It provided as follows:

"**251H** (1) Subject to subsection (2), no rights under section 251G shall be available in respect of the shares of any class for which an open market exists on a recognised stock exchange or recognised interdealer quotation system at the expiry date of the period allowed for written notice of an election to dissent under section 251G(5).

(2) Rights under section 251G shall be available in respect of any class of shares of a constituent company if the holders thereof are required by the terms of a plan of merger or

consolidation pursuant to section 251B or 251F to accept for such shares anything except –

(a) shares of a surviving or consolidated company, or depository receipts in respect thereof;

(b) shares of any other company, or depository receipts in respect thereof, which shares or depository receipts at the effective date of the merger or consolidation, are either listed on a national securities exchange or designated as a national market system security on a recognised interdealer quotation system or held of record by more than two thousand holders;

(c) cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a) and (b); or

(d) any combination of the shares, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a), (b) and (c).”

85. The Companies Law (2010 Revision) restated the legislation and what had been Part XVA became Part XVI (sections 232 to 239).

86. The Companies (Amendment) Law 2011 amended various different Parts of the Companies Law, which was then in the form of the 2010 Revision, including Part XVI. The amendments to Part XVI included the following:

(1) The definition of “parent company” in section 232 was amended to its current form so that it referred to holding 90% of the voting power in the subsidiary as opposed to 90% of each class of voting shares.

(2) Section 233(5)-(7) were repealed and replaced by new section 233(5)-(7) in their current form. The changes to section 233(5) and (7) were relatively minor, but that to section 233(6) was more extensive, reducing the majority required for shareholder authorisation from 75% to 2/3, and permitting companies to specify alternative methods of authorisation in their articles.

(3) Section 238(15) was redrafted to its current form, which was a clarification of the previous version.

(4) Section 239(1) was repealed and replaced by its current version.

(5) A new section 239A was added (in its current form).

87. The Companies (Amendment) (No 2) Law 2018 made one amendment to Part XVI which was to delete section 239(2).

88. Against this background, it is now possible to consider whether the present case involves an existing law in place before 6 November 2009 or not. Certain points seem relatively clear. First, one can put on one side the fact that the Companies Law has been periodically re-issued in revised versions. Such revisions were issued under the Law Revision Law (1999 Revision), section 3 of which provided as follows:

> "**Governor may authorise republication of laws in revised form**
>
> **3** The Governor may authorise the republication of any existing law in amended or revised form as hereinafter provided and such law shall in its revised form be, for all purposes, the only proper version of such law in the Islands:
>
> Provided that nothing in this section shall be taken to imply any power to make any alteration or amendment in any matter of substance of any law or part thereof."

As this shows, revisions to laws are not acts of the legislature and are not intended to alter the substance of laws. They are intended to enable the existing laws to be more readily accessible.

89. Second, Mr Crow submitted that *any* substantive amendment made after the appointed day to a pre-appointed day law would mean that the whole law was thereafter not to be treated as an existing law, even if the amendment had nothing to do with the relevant part of the law which raised the constitutional point in question. Thus many of the laws amending the Companies Law between 2009 and 2020 left Part XVI untouched. The Board does not consider this can be right. The effect of section 5 of the Constitution Order is very far-reaching. It affects the entire corpus of existing law as at 6 November 2009 and requires such laws to be "read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution". In the case of a lengthy law such as the Companies Act (which in its current form runs to 21 Parts and 7 Schedules), that means

that each of its Parts as it stood on 6 November 2009 was subject to the requirements of section 5 of the Constitution Order. It would seem very surprising if an amendment to one Part (such as Part 6 which deals with the removal of defunct companies) or even to a single section (such as section 229 which prohibits the issue of bearer shares) could have the effect that Part 16 should no longer be subject to the requirements of section 5 of the Constitution Order, even though such an amendment had nothing to do with merger and consolidation and made no difference either to the text, or the operation, of Part 16.

90. Mr Crow relied on the principle stated in *Bennion, Bailey & Norbury on Statutory Interpretation* (8th ed, 2020) at §8.6 that where an Act makes textual amendments to an earlier Act, the intention is usually to produce a text that may be construed as a whole in its revised form; and submitted that it would be incoherent for some parts of an Act after it had been amended to be existing law and subject to section 5 of the Constitution Order, and others to be subject to the different requirements of section 25 of the Bill of Rights. The Board does not doubt the principle as stated in *Bennion*, but does not agree that the suggested consequence follows: the Board sees nothing surprising in a lengthy Act having some provisions which pre-date the appointed day and are subject to section 5 of the Constitution Order and other provisions which post-date the appointed day and are subject instead to section 25 of the Bill of Rights.

91. But that still leaves the question of what the appropriate test is for whether any part of a law that has been amended is an existing law. Mr Adkin submitted that an existing law that is amended post the appointed day does not cease to be an existing law unless Parliament can fairly be taken, when enacting such amendments, to have addressed its mind to the constitutionality of the law it was amending. The Board does not consider that this can be right either. Quite apart from being objectionable on the basis that the idea that Parliament has a mind is a fiction, it does not provide anything like a workable test in practice. When can Parliament be taken to have thought about the constitutionality and when not? Such a test would be likely to lead to lengthy debate based more or less on speculation, and quite possibly speculation as to the internal workings of Parliament. There must be some simpler and more objective test which can be applied by reference to the substance of the law in question rather than by appeal to what Parliament must have been taken to have considered.

92. The Board was referred to certain decisions on other constitutions, but did not find them of much assistance. In some constitutions, provision is made for existing laws to be immune from challenge on constitutional grounds. In such a case the reference to existing laws should be given a strict and narrow rather than a broad interpretation: see eg *R v Hughes*, para 35, per Lord Rodger. But this is because such a provision is a derogation from constitutional guarantees and is therefore to be narrowly construed on well-known principles: see *ibid*, and also *Worme v Comr of Police of Grenada* [2004] UKPC 8, [2004] 2 AC 430, para 34, again per Lord Rodger. Where however a

constitution contains a provision designed to bring existing laws into conformity with the new constitutional provisions, this is a "different, and indeed beneficent, context" (*Worme* at para 34). In that case the Board of the Privy Council did not need to decide the point but left open the question whether in such a context a narrow construction was appropriate. In the present case the Board considers that since section 5 of the Constitution Order is not a derogation from constitutional guarantees, there is no reason to give it a particularly strict and narrow construction; it should be interpreted in accordance with the evident purpose of the provision, which was to bring existing laws into conformity with the rights guaranteed by the Constitution.

93. In these circumstances the Board has concluded that the test for whether a law has ceased to be an "existing law" for the purposes of section 5 of the Constitution Order is whether there have been any material amendments to the provisions in question. This has the practical effect that provisions of a pre-appointed day law that are either not amended at all, or that are amended in immaterial ways, continue to be existing laws and hence continue to be subject to the beneficent requirements of section 5 of the Constitution Order notwithstanding that amendments may be made to other parts of the same law.

94. It remains to apply this test to the relevant provisions in the present case. The relevant provisions are those in section 238(1)-(5), which on the one hand provide in section 238(1) for dissenting members of a constituent company to have appraisal rights but on the other contain in section 238(2)-(5) machinery for the exercise of those rights that on its face does not enable them to be exercised unless there is a vote. But the text, and effect, of section 238(1)-(5) has remained entirely unchanged from the form in which the corresponding provisions (section 251G(1)-(5) of the 2009 legislation) were first introduced before the appointed day. Therefore, the amendments to the provisions in question are not material.

95. In those circumstances the Board concludes that section 238(1)-(5) constitute an existing law for the purposes of section 5 of the Constitution Order.

**The application of section 5 of the Constitution Order**

96. By section 5(1) of the Constitution Order an existing law "… shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution". This is a mandatory requirement and more stringent than a provision which requires legislation to be given an interpretation conforming with some other instrument so far as it is possible to do so: see *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, para 120, per Lord Rodger.

97. Mr Crow submitted that nevertheless it was not possible for section 238 to be read in such a way as to confer appraisal rights on short-form shareholders, because it would involve impermissible judicial legislation in which the Courts were being invited to make policy choices that should be left to the legislature. The Board does not accept this submission. The obligation imposed by section 5 of the Constitution Order is sufficiently broad and cogent to enable the Courts to make the modest changes to section 238(2)-(5) which are required to adapt the machinery there set out to the case of short-form shareholders, as was done both by the Chief Justice and by the Court of Appeal, albeit in slightly different ways. These are "modifications" or "adaptations" necessary to bring the provisions of section 238(1)-(5) into conformity with the Constitution. The Board is conscious that the precise modifications made by the Chief Justice and the Court of Appeal were not identical. But no argument has been advanced that the Court of Appeal was wrong to substitute its modifications for the somewhat simpler one made by the Chief Justice, and the Board therefore does not address that question.

**The Compliance Issue**

98. One final point remains. This has been termed the Compliance Issue, namely whether the steps actually taken by the respondents in the present case to object to, and dissent from, the merger complied with the requirements of section 238 as modified by the Court of Appeal. Mr Crow's point was that, as so modified, dissenting shareholders had to give written notice of objection immediately *after* the date on which the plan of merger was given to them, and notice of dissent within 20 days immediately *after* notice was given by the Company that the plan of merger had been filed with the Registrar. The respondents however gave notice of objection and dissent *before* the plan of merger was given to them.

99. The Board entirely agrees with the Court of Appeal's treatment of this issue, and can summarise the position quite shortly. In the Grand Court the Chief Justice's Order at para 2 provided:

> "The Petitioners have taken appropriate steps to dissent from the Company's Merger and have the right to prosecute their Amended Petition dated 30 June 2020."

When the Company appealed the Order to the Court of Appeal it sought the reversal of the whole of the Chief Justice's Order. But, as recorded by the Court of Appeal in its supplementary judgment of 20 December 2022, nothing in the Company's Grounds of Appeal, skeleton argument or oral submissions addressed the question whether there had been compliance with the procedural requirements of section 238 or came close to even hinting that the point was or might become a separate live issue. In those

circumstances the Court of Appeal refused to allow the Company to raise the issue after its main judgment had been delivered, saying (supplementary judgment at para 8) that:

> "…it is now far too late for it to seek to raise an issue which could (and, if the appellant wished it to be resolved, should) have been raised during the hearing of the appeal. It is incorrect to say, as the appellant does, that it had no opportunity to raise the point until it saw the respondents' options for amendment (which were only provided after the end of the hearing) or until it received a draft of the judgment: the point was always available on the wording adopted by the Chief Justice. The reality is that the appeal was fought entirely on the question of principle of the availability of appraisal rights in short-form mergers, and the appellant lost that battle."

100. This was, in the opinion of the Board, a decision that the Court of Appeal was perfectly entitled to come to, and the Board sees no reason to disturb it. The Board in those circumstances expresses no view on the merits of the Compliance Issue, although the Company's position that the respondents had failed to exercise appraisal rights despite the fact that they had clearly notified the Company of their objection and dissent even before the plan of merger was provided to them is not one that appears overly attractive at first sight.

101. That makes it unnecessary to consider a cross-appeal by the respondents which was only advanced in the event that the Company succeeded on the Compliance Issue.

**Conclusion**

102. For the reasons given above the Board has concluded that the appeal should be dismissed and will humbly advise His Majesty accordingly.

**Annexe: Companies Act (2025 Revision)**
**PART 16 - Merger and Consolidation**

**Definitions in this Part**

**232** In this Part —

"consolidated company" means the new company that results from the consolidation of two or more constituent companies;

"consolidation" means the combination of two or more constituent companies into a consolidated company and the vesting of the undertaking, property and liabilities of such companies in the consolidated company;

"constituent company" means a company that is participating in a merger or consolidation with one or more other companies;

"merger" means the merging of two or more constituent companies and the vesting of their undertaking, property and liabilities in one of such companies as the surviving company;

"parent company" means, with respect to another company, a company that holds issued shares that together represent at least ninety per cent of the votes at a general meeting of that other company;

"subsidiary company" means, with respect to another company, a company of which that other company is the parent company; and

"surviving company" means the sole remaining constituent company into which one or more other constituent companies are merged.

**Merger and consolidation**

**233** (1) Without prejudice to sections 86 and 87, but subject to section 239A, two or more companies limited by shares and incorporated under this Act, may, subject to any express provisions to the contrary in the memorandum and articles of association of any of such companies, merge or consolidate in accordance with subsections (3) to (15).

(2) Nothing in this Part shall derogate from the Authority's powers in relation to any constituent company that is a licensee under the regulatory laws and that proposes to participate in a merger or consolidation, or from a constituent company's obligations under the regulatory laws.

(3) The directors of each constituent company that proposes to participate in a merger or consolidation shall on behalf of the constituent company of which they are directors approve a written plan of merger or consolidation.

(4) The plan referred to in subsection (3) shall give particulars of the following matters—

(a) the name of each constituent company and the name of the surviving or consolidated company;

(b) the registered office of each constituent company;

(c) in respect of each constituent company, the designation and number of each class of shares;

(d) the date on which it is intended that the merger or consolidation is to take effect, if it is intended to take effect in accordance with section 234, and not in accordance with subsection (13);

(e) the terms and conditions of the proposed merger or consolidation, including where applicable, the manner and basis of converting shares in each constituent company into shares in the consolidated or surviving company or into other property as provided in subsection (5);

(f) the rights and restrictions attaching to the shares in the consolidated or surviving company;

(g) in respect of a merger, any proposed amendments to the memorandum of association and articles of association of the surviving company, or if none are proposed, a statement that the memorandum of association and articles of association of the surviving company immediately prior to merger shall be its memorandum of association and articles of association after the merger;

(h) in respect of a consolidation, the proposed new memorandum of association and articles of association of the consolidated company;

(i) any amount or benefit paid or payable to any director of a constituent company, a consolidated company or a surviving company consequent upon the merger or consolidation;

(j) the name and address of any secured creditor of a constituent company and of the nature of the secured interest held; and

(k) the names and addresses of the directors of the surviving or consolidated company.

(5) Some or all of the shares whether of different classes or of the same class in each constituent company may be converted into or exchanged for different

types of property (consisting of shares, debt obligations or other securities in the surviving company or consolidated company or any other corporate entity, or money or other property, or a combination thereof) as provided in the plan of merger or consolidation.

(6) A plan of merger or consolidation shall be authorised by each constituent company by way of—

(a) a special resolution of the members of each such constituent company; and

(b) such other authorisation, if any, as may be specified in such constituent company's articles of association.

(7) Notwithstanding subsection (6)(a), if a parent company incorporated under this Act is seeking to merge with one or more of its subsidiary companies incorporated under this Act, a special resolution under that subsection of the members of such constituent companies is not required if a copy of the plan of merger is given to every member of each subsidiary company to be merged unless that member agrees otherwise.

(8) The consent of each holder of a fixed or floating security interest of a constituent company in a proposed merger or consolidation shall be obtained but if such secured creditor does not grant that person's consent then the Court may upon application of the constituent company that has issued the security waive the requirement for such consent upon such terms as to security to be issued by the consolidated or surviving company or otherwise as the Court considers reasonable.

(9) After obtaining any authorisations and consents under subsections (6) and (8), the plan of merger or consolidation shall be signed by a director on behalf of each constituent company and filed with the Registrar together with, in relation to each constituent company —

(a) a certificate of good standing;

(b) a director's declaration that the constituent company is, and the consolidated or surviving company will be, immediately after merger or consolidation, able to pay its debts as they fall due;

(c) a director's declaration that the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the constituent companies;

(d) a director's declaration that—

(i) no petition or other similar proceeding has been filed and remains outstanding, and that no order has been made or resolution adopted to wind up the company in any jurisdiction;

(ii) no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the constituent company, its affairs, or its property or any part thereof; and

(iii) no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the constituent company are, and continue to be, suspended or restricted;

(e) a director's declaration of the assets and liabilities of the constituent company made up to the latest practicable date before the making of the declaration;

(f) in the case of a constituent company that is not a surviving company, a director's declaration that the constituent company has retired from any fiduciary office held or will do so immediately prior to merger or consolidation;

(g) an undertaking that a copy of the certificate of merger or consolidation under subsection (11) will be given to the members and creditors of the constituent company and that notification of the merger or consolidation will be published in the Gazette; and

(h) a director's declaration, where relevant, that the constituent company has complied with any applicable requirements under the regulatory laws.

(10) A director's declaration under subsection (9) shall be in writing, signed by, and shall include the full name and address of, the director making the declaration.

(11) Upon payment of the applicable fees under this Act and upon the Registrar being satisfied that the requirements of subsection (9) in respect of the merger or consolidation have been complied with and that the name of the consolidated company complies with section 30, the Registrar shall register the plan of merger or consolidation including any new or amended memorandum and articles of association and issue a certificate of merger or consolidation under that person's hand and seal of office, and in the case of a consolidation section 27 shall apply in relation to the consolidated company.

(12) A certificate of merger or consolidation issued by the Registrar shall be prima facie evidence of compliance with all requirements of this Act in respect of the merger or consolidation.

(13) Subject to section 234, a merger or consolidation shall be effective on the date the plan of merger or consolidation is registered by the Registrar.

(14) A person who, being a director, makes a false declaration under subsection (9) commits an offence and is liable on summary conviction to a fine of twenty thousand dollars or to imprisonment for five years, or both.

(15) In any proceedings for an offence under subsection (14) it shall be a defence for the person charged to prove that that person took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by that person or any person under that person's control.

(16) Any director's declaration pursuant to this section may be given in the form of a declaration or an affidavit, as the director may determine.

**Delay of effective date**

**234** A plan of merger or consolidation may provide that such merger or consolidation shall not become effective until a specified date or until the date of the occurrence of a specified event subsequent to the date on which the plan of merger or consolidation is registered by the Registrar, but such date shall not be a date later than the ninetieth day after the date of such registration.

**Termination or amendment**

**235** (1) A plan of merger or consolidation may contain a provision that at any time prior to the date that the plan becomes effective it may be—

(a) terminated by the directors of any constituent company; or

(b) amended by the directors of the constituent companies to—

(i) change the name of the consolidated company;

(ii) change the effective date of the merger or consolidation, provided that the new effective date complies with section 234; and

(iii) effect any other changes to the plan as the plan may expressly authorise the directors to effect in their discretion.

(2) If the plan of merger or consolidation is terminated or amended after it has been filed with the Registrar but before it has become effective, notice of termination or amendment of the plan shall be filed with the Registrar, and shall have effect on the date of registration by the Registrar after that person has satisfied that person's self in accordance with section 233(11).

(3) A copy of the notice under subsection (2) shall be sent to any person entitled to vote on, consent to or be notified of the plan of merger or consolidation in accordance with section 233.

(4) The notice of termination or amendment filed in accordance with subsection (2) shall identify the plan of merger or consolidation that is to be terminated or amended and shall state that the plan has been terminated or state the amendments made and in the former case, the Registrar shall issue a certificate of termination.

**Effect of merger or consolidation**

**236** (1) As soon as a merger or consolidation becomes effective —

(a) in the case of a consolidation, the new memorandum of association and articles of association filed with the plan of consolidation shall immediately become the memorandum of association and articles of association of the consolidated company;

(b) the rights, the property of every description including choses in action, and the business, undertaking, goodwill, benefits, immunities and privileges of each of the constituent companies, shall immediately vest in the surviving or consolidated company; and

(c) subject to any specific arrangements entered into by the relevant parties, the surviving or consolidated company shall be liable for and subject, in the same manner as the constituent companies, to all mortgages, charges or security interests, and all contracts, obligations, claims, debts, and liabilities of each of the constituent companies.

(2) Where a merger or consolidation occurs —

(a) an existing claim, cause or proceeding, whether civil (including arbitration) or criminal pending at the time of the merger or consolidation by or against a constituent company, shall not be abated or discontinued by the merger or consolidation but shall be continued by or against the surviving or consolidated company; and

(b) a conviction, judgment, ruling, order or claim, due or to become due, against a constituent company, shall not be released or impaired by the merger or consolidation, but shall apply to the surviving or consolidated company instead of to the constituent company.

(3) Upon a merger or consolidation becoming effective, the Registrar shall strike off the register —

(a) a constituent company that is not the surviving company in a merger; or

(b) a constituent company that participates in a consolidation,

and section 158 shall apply.

(4) The cessation of a constituent company that participates in a consolidation or that is not the surviving company in a merger shall not be a winding up within Part 5.

**Merger or consolidation with overseas company**

**237** (1) Subject to section 239A, one or more companies incorporated under this Act may merge or consolidate with one or more overseas companies in accordance with subsections (2) to (18).

(2) Where the surviving or consolidated company is to be a company existing under this Act, in addition to compliance by each constituent company incorporated under this Act with section 233(3) to (10) the Registrar is required to be satisfied in respect of any constituent overseas company that —

(a) the merger or consolidation is permitted or not prohibited by the constitutional documents of the constituent overseas company and by the laws of the jurisdiction in which the constituent overseas company is existing, and that those laws and any requirements of those constitutional documents have been or will be complied with;

(b) no petition or other similar proceeding has been filed and remains outstanding, and no order has been made or resolution adopted to wind up or liquidate the constituent overseas company in the jurisdiction in which the constituent overseas company is existing;

(c) no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the constituent overseas company, its affairs or its property or any part thereof;

(d) no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the constituent overseas company are and continue to be suspended or restricted;

(e) the constituent overseas company is able to pay its debts as they fall due and the merger or consolidation is bona fide and not intended to defraud unsecured creditors of the constituent overseas company;

(f) in respect of the transfer of any security interest granted by the constituent overseas company to the surviving or consolidated company —

(i) consent or approval to the transfer has been obtained, released or waived;

(ii) the transfer is permitted by and has been approved in accordance with the constitutional documents of the constituent overseas company; and

(iii) the laws of the jurisdiction of the constituent overseas company with respect to the transfer have been or will be complied with;

(g) the constituent overseas company will, upon the merger or consolidation becoming effective, cease to be incorporated, registered or exist under the laws of the relevant foreign jurisdiction; and

(h) there is no other reason why it would be against the public interest to permit the merger or consolidation.

(3) Subsection (2)(a) to (g) shall be satisfied by filing with the Registrar a declaration of a director of the surviving or consolidated company to the effect that, having made due enquiry, that person is of the opinion that the requirements of those paragraphs have been met; and —

(a) the declaration shall include a statement of the assets and liabilities of the constituent overseas company made up to the latest practicable date before making the declaration; and

(b) a director of the surviving or consolidated company shall be deemed to have made due enquiry for the purposes of subsection (2)(a) to (g) and this subsection if such director has obtained from a director of the constituent overseas company a declaration that the requirements of subsection 2(a) to (g) have been met with respect to such constituent overseas company.

(4) A person who, being a director, makes a false declaration under subsection (3) commits an offence and is liable on summary conviction to a fine of twenty thousand dollars or to imprisonment for five years, or both.

(5) In any proceedings for an offence under subsection (4), it shall be a defence for the person charged to prove that that person took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by that person or any person under that person's control.

(6) Where the surviving or consolidated company is to be established under this Act, upon payment of the applicable fees under this Act and upon the Registrar being satisfied that the requirements of subsection (2) in respect of the merger or consolidation have been complied with and that the name of the consolidated company complies with section 30, the Registrar shall register the plan of merger or consolidation including any new or amended

memorandum and articles of association and issue a certificate of merger or consolidation under that person's hand and seal of office, and in the case of a consolidation section 27 shall apply in relation to the consolidated company.

(7) Where the surviving or consolidated company is to be an overseas company the Registrar is required to be satisfied, in addition to compliance with section 233(2) to (10) (excluding section 233(9)(g)), by each constituent company incorporated under this Act, that —

(a) the merger or consolidation is permitted or not prohibited by the constitutional documents of the constituent overseas company and by the laws of the jurisdiction in which the constituent overseas company is existing, and that those laws and any requirements of those constitutional documents have been or will be complied with;

(b) no petition or other similar proceeding has been filed and remains outstanding, and no order has been made or resolution adopted to wind up or liquidate the constituent overseas company in any jurisdiction;

(c) no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the surviving company, its affairs or its property or any part thereof;

(d) no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the surviving company are suspended or restricted; and

(e) there are no reasons why it would be against the public interest to allow the merger or consolidation.

(8) Subsection (7)(a) to (d) shall be satisfied by filing with the Registrar a declaration of a director of each constituent company incorporated under this Act to the effect that, having made due enquiry, that person is of the opinion that the requirements of those paragraphs have been met; and a director of each constituent company incorporated under this Act shall be deemed to have made due enquiry for the purposes of subsection (7)(a) to (d) and this subsection (8) if such director has obtained from a director of the constituent overseas company a declaration that the requirements of subsection (7)(a) to (d) have been met with respect to such constituent overseas company.

(9) A person who, being a director, makes a false declaration under subsection (8) commits an offence and is liable on conviction to a fine of twenty thousand dollars or to imprisonment for five years, or both.

(10) Where the surviving or consolidated company is to be an overseas company, the surviving or consolidated overseas company shall file with the Registrar —

(a) an undertaking that it will promptly pay to the dissenting members of a constituent company incorporated under this Act the amount, if any, to which they are entitled under section 238; and

(b) such evidence of the merger or consolidation from the jurisdiction of the surviving or consolidated overseas company as the Registrar considers acceptable, such evidence to include the effective date of the merger or consolidation.

(11) The effect of a merger or consolidation where the surviving or consolidated company is to be an overseas company under this section is the same as in the case of a merger or consolidation under this Part if the surviving or consolidated company is incorporated or established under this Act, and all of the relevant provisions of this Part apply, except insofar as the laws of the jurisdiction of the surviving or consolidated overseas company otherwise provide.

(12) For the purposes of this section —

(a) any references in section 233 to the shares of any constituent company shall be deemed to include references to any other equity interests in such constituent company;

(b) any references in section 233 to memoranda and articles of association shall be deemed to include references to the equivalent organisational documents of an overseas company; and

(c) any reference in section 233 or this section to a director of a company shall be deemed to include a reference to any officer, member or other person (howsoever called) in whom the management of an overseas company is vested.

(13) Where the surviving or consolidated company is to be an overseas company, upon payment of the applicable fees under this Act and upon the Registrar being satisfied that the requirements of subsections (7) and (10) have been complied with the Registrar shall, where the overseas company is the surviving or consolidated company, strike off constituent companies incorporated pursuant to this Act from the register and issue a certificate of strike off by way of merger or consolidation with an overseas company; and section 158 shall apply to the constituent companies so struck off.

(14) A certificate of strike off by way of merger or consolidation with an overseas company issued by the Registrar shall be prima facie evidence of compliance with all requirements of this Act in respect of such merger or consolidation.

(15) Subject to section 234, a merger or consolidation shall be effective on the date the plan of merger or consolidation is registered by the Registrar.

(16) The issuance of a certificate of merger or consolidation relating to the merger or consolidation of an overseas company registered under Part IX shall be deemed to constitute notice to the Registrar pursuant to section 192.

(17) Any declaration of a director pursuant to this section may be given in the form of a declaration or an affidavit, as the director may determine.

(18) The Registrar shall submit a copy of the certificate of strike off by way of merger or consolidation issued under subsection (13) to the Authority.

**Rights of dissenters**

**238** (1) A member of a constituent company incorporated under this Act shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation.

(2) A member who desires to exercise that person's entitlement under subsection (1) shall give to the constituent company, before the vote on the merger or consolidation, written objection to the action.

(3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for that person's shares if the merger or consolidation is authorised by the vote.

(4) Within twenty days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, the constituent company shall give written notice of the authorisation to each member who made a written objection.

(5) A member who elects to dissent shall, within twenty days immediately following the date on which the notice referred to in subsection (4) is given, give to the constituent company a written notice of that person's decision to dissent, stating —

(a) that person's name and address;

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

(c) a demand for payment of the fair value of that person's shares.

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

(7) Upon the giving of a notice of dissent under subsection (5), the member to whom the notice relates shall cease to have any of the rights of a member except the right to be paid the fair value of that person's shares and the rights referred to in subsections (12) and (16).

(8) Within seven days immediately following the date of the expiration of the period specified in subsection (5), or within seven days immediately following the date on which the plan of merger or consolidation is filed, whichever is later, the constituent company, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase that person's shares at a specified price that the company determines to be their fair value; and if, within thirty 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 that person's shares, the company shall pay to the member the amount in money forthwith.

(9) If the company and a dissenting member fail, within the period specified in subsection (8), to agree on the price to be paid for the shares owned by the member, within twenty days immediately following the date on which the period expires —

(a) the company shall (and any dissenting member may) file a petition with the Court for a determination of the fair value of the shares of all dissenting members; and

(b) the petition by the company shall be accompanied by a verified list containing the names and addresses of all members who have filed a notice under subsection (5) and with whom agreements as to the fair value of their shares have not been reached by the company.

(10) A copy of any petition filed under subsection (9)(a) shall be served on the other party; and where a dissenting member has so filed, the company shall within ten days after such service file the verified list referred to in subsection (9)(b).

(11) At the hearing of a petition, the Court shall determine the fair value of the shares of such dissenting members as it finds are involved, together with a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value.

(12) Any member whose name appears on the list filed by the company under subsection (9)(b) or (10) and who the Court finds are involved may participate fully in all proceedings until the determination of fair value is reached.

(13) The order of the Court resulting from proceeding on the petition shall be enforceable in such manner as other orders of the Court are enforced, whether the company is incorporated under the laws of the Islands or not.

(14) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances; and upon application of a member, the Court may order all or a portion of the expenses incurred by any member in connection with the proceeding, including reasonable attorneys' fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares which are the subject of the proceeding.

(15) Shares acquired by the company pursuant to this section shall be cancelled and, if they are shares of a surviving company, they shall be available for re-issue.

(16) The enforcement by a member of that person's entitlement under this section shall exclude the enforcement by the member of any right to which that person might otherwise be entitled by virtue of that person holding shares, except that this section shall not exclude the right of the member to institute proceedings to obtain relief on the ground that the merger or consolidation is void or unlawful.

**Limitation on rights of dissenters**

**239** (1) No rights under section 238 shall be available in respect of the shares of any class for which an open market exists on a recognised stock exchange or recognised interdealer quotation system at the expiry date of the period allowed for written notice of an election to dissent under section 238(5), but this section shall not apply if the holders thereof are required by the terms of a plan of merger or consolidation pursuant to section 233 or 237 to accept for such shares anything except —

(a) shares of a surviving or consolidated company, or depository receipts in respect thereof;

(b) shares of any other company, or depository receipts in respect thereof, which shares or depository receipts at the effective date of the merger or consolidation, are either listed on a national securities exchange or designated as a national market system security on a recognised

interdealer quotation system or held of record by more than two thousand holders;

(c) cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a) and (b); or

(d) any combination of the shares, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a), (b) and (c).

(2) [Repealed by section 11 of the Companies (Amendment) (No. 2) Act, 2018 [Law 46 of 2018]].

**Prohibition on being a segregated portfolio company**

**239A** No constituent company incorporated under this Act or any consolidated company existing under this Act may be a segregated portfolio company.