IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

AG LINK, INCORPORATED, a Washington corporation,	)	**No. 27397-1-III**
	)	
Respondent,	)	
	)	
v.	)	
	)	
BRADLEY T. SHRUM and J. SHARDELL SHRUM, husband and wife, JEFFREY A. OSWALD and PAULA R. OSWALD, husband and wife, MURRAY CEDERBLOM, BRIAN CEDERBLOM and CYNTHIA CEDERBLOM, husband and wife,	)	**Division Three**
	)	
Appellants,	)	
	)	
MIKE PAUL individually and as personal representative of THE ESTATE OF MAXINE COLE, deceased, and THE ESTATE OF VERN ANDERSON, deceased,	)	**UNPUBLISHED OPINION**
	)	
Defendants.	)	
	)	

Schultheis, C.J. — Edwall Chemical Corporation and Lincoln Mutual Service, Inc. #1 planned to merge into Ag Link, Incorporated. Several of Edwall's shareholders dissented and sought fair value for their shares. The parties followed the corporate dissenters' rights statutory scheme, chapter 23B.13 RCW, and came before the court for judicial resolution of the price owing the dissenters for their shares. The trial court held that because Edwall acted as a cooperative association, the price of shares was subject to the remedy for dissenters' rights under RCW 23.86.145, the cooperative association statute, which permits payment of shares to a dissenting cooperative association member at less than fair value if allowed by the cooperative's articles of incorporation.

We conclude that Edwall was formed as a for-profit corporation and, although it amended its bylaws to operate as a cooperative association for tax purposes, it declined to form a cooperative association under chapter 23.86 RCW by amendment of its articles of incorporation. Additionally, Edwall did not include in its articles of incorporation a valuation method for the payment of shares at less than fair value. Therefore, Edwall may not pay the dissenters less than fair value for their shares pursuant to the cooperative association dissenters' rights statute, RCW 23.86.145.

We further conclude that Edwall's bylaws and the membership and stock purchase agreements signed by the dissenters, which permitted the board of directors to set the price of shares in an amount no greater than book value in the event of redemption or

termination, does not apply to the merger that occurred here. Instead, dissenters to the merger are entitled to fair value for their shares as provided for in the corporate dissenters' rights statutes, chapter 23B.13 RCW. Finally, we deny Ag Link's motion to dismiss that it sought under RAP 2.5(b).

We therefore reverse and remand for valuation of the shares according to the procedures of RCW 23B.13.300 and .310 and for the trial court to consider whether the dissenters should provide a bond to secure Ag Link's interests during the pendency of the action. *See* RAP 2.5(b).

FACTS

On September 20, 2006, Edwall Chemical Corporation sent notices to its shareholders of its intent to merge with Lincoln Mutual Service, Inc. # 1, forming Ag Link, Incorporated. The notices informed the shareholders that the proposed action would create dissenters' rights under chapter 23B.13 RCW, the chapter of the Washington Business Corporation Act that deals with corporate dissenters' rights. Shareholders Bradley T. Shrum, J. Shardell Shrum, Jeffrey A. Oswald, Paula R. Oswald, Murray Cederblom, Brian Cederblom, and Cynthia Cederblom informed Ag Link of their dissent to the merger and demanded payment for their shares.

Ag Link sent each dissenter payment of the book value of $0.15 per share plus each dissenter's pro rata share of Edwall's unallocated retained margins for 2005 and

2006 at an interest rate of 8.10 percent for 30 days. The dissenters rejected the payment and demanded payment of fair value under the corporation dissenters' rights provisions of chapter 23B.13 RCW.

Ag Link filed a petition pursuant to RCW 23B.13.300(1) for judicial resolution of the share price. Ag Link moved for summary judgment, alleging that its payment to the dissenters of the book value of $0.15 per share was in accordance with Edwall's bylaws and that book value plus each dissenter's pro rata share of unallocated retained margins constituted fair value for the dissenters' shares because Edwall was a cooperative association.

The dissenters opposed Ag Link's motion and also moved for summary judgment, asking the court to find that Ag Link failed to comply with chapter 23B.13 RCW in providing its estimation of fair value, which must be in accordance with generally accepted valuation practices.

At the conclusion of the October 11, 2007 hearing on the matter, the trial court requested supplemental memoranda to explore whether Edwall was a cooperative association and whether the cooperative association dissenters' rights statute, RCW 23.86.145, applied to the proceedings. The court also ordered an evidentiary hearing to determine whether Edwall was a cooperative association. The court ruled that Edwall was a cooperative and concluded that the share value advocated by Edwall was fair value.

Findings of fact and conclusions of law were thereafter entered. Edwall sent payment to the dissenters.

The dissenters appealed. Edwall moved on the merits to affirm, asserting that the dissenters have lost their right to review because they accepted the benefits of the superior court decision. RAP 2.5(b). A commissioner of this court referred the issue to us.

DISCUSSION

a. Standard of Review

This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000). Whether a trial court's reading and application of a statute is correct is a question of statutory construction and is also reviewed de novo on appeal. *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 612, 146 P.3d 914 (2006).

Ag Link contends that the dissenters did not properly assign error to the trial court's findings and conclusions. Findings of fact and conclusions of law are superfluous on summary judgment review. *Wash. Optometric Ass'n v. County of Pierce*, 73 Wn.2d 445, 448, 438 P.2d 861 (1968). Failure to assign error to the individual findings and conclusions has no effect on the dissenters' appeal.

b. Edwall is a For-Profit Corporation,
Not a Cooperative Association

The dissenters dispute the trial court's determination that Edwall is a cooperative association, which makes it subject to the dissenters' rights for cooperative associations under chapter 23.86 RCW. The dissenters argue that Edwall was formed as a for-profit corporation and it did not amend its articles of incorporation, as it must, to alter its corporate form. The dissenters acknowledge that Edwall contemplated a change of the corporate form to that of a cooperative association, but they assert that Edwall ultimately elected to maintain its status as a for-profit corporation.

Ag Link does not dispute that Edwall was formed as a for-profit corporation, as evidenced by its articles of incorporation filed July 20, 1953. Instead, Ag Link asserts that "[i]n 1961 the directors and shareholders of Edwall voted to convert to an agricultural supply co-op." Resp't's Br. at 6. The record does not support that assertion.

The record shows that in late 1960, Edwall's board began contemplating changes to the corporate structure to take advantage of the tax benefits available to cooperative associations. The board considered different ways to achieve eligibility under the tax code.

At a special meeting on November 30, 1960, "[a] discussion ensued relative to a contemplated change of the corporation to a cooperative form." Ex. 5(a). A meeting was

scheduled with Edwall's accountant "to discuss the plan further." Ex. 5(a).

A special meeting was called on December 16, during which "[a] report was delivered" by the board president regarding his meeting with the accountant "relative to the changing of the company from a corporation to a cooperative form." Ex. 5(b). The minutes reflect that "[a] detailed discussion on the matter followed," but the substance of that discussion is not set forth. Ex. 5(b).

At the regular meeting of the board on February 7, 1961, the board again addressed "the possibility of changing the corporate form to that of a cooperative." Ex. 5(c). A committee was appointed by the board president to meet with corporate counsel "to discuss at the earliest possible date the contemplated change." Ex. 5(c).

On April 21, at a regular meeting of the board, "[t]he Board discussed the method of dissolution presented by the company attorney." Ex. 5(d). Attached to the minutes is a draft of a "Plan of Complete Liquidation and Dissolution" of Edwall. Ex. 5(d). The document proposed that Edwall "sell its assets, property and business to the Edwall Fertilizer Company, a Cooperative." Ex. 5(d). The minutes reflect that "[a]fter a full discussion, the Board felt that a complete dissolution at this time would be risky and that another method should be pursued." Ex. 5(d). Instead:

> A motion was made . . . and seconded . . . that the Board of Directors have drawn up and present to the stockholders, at a special stockholders meeting, amendments to the by-laws to enable the company to be operated as a partially tax exempt Co-operative beginning June 1, 1961.

The motion was carried unanimously.

Ex. 5(d).

At the regular meeting on May 27, "the directors agreed to call a special stockholders' meeting and submit the Amendment of By-Law procedure for the purpose of obtaining a partially exempt tax status for their approval and adoption." Ex. 5(e).

A notice issued regarding a special meeting on June 9. The proposed changes to the bylaws were included in the notice. The proposed amendment restricted the issuance of capital stock to "those persons engaged in the production of farm products" and provided for payment of patronage to members based upon the amount of business conducted with Edwall. Ex. 5(f).

The June 19 minutes of the special shareholders meeting reflect that, after a discussion "on the matter of changing the by-laws of the company so it can operate as a partially tax exempt company" the motion passed by a majority of shares. Ex. 5(g). The board also met that day and implemented a membership agreement instituting the subscription of minimum shares.

At the annual shareholders meeting on October 24, the secretary "reported on the condition of the Corporation's business activities as a co-operative since the by-law changes approved last June became effective." Ex. 5(i).

A special meeting of the stockholders was called on May 29, 1963 when the

stockholders approved "changing the by-laws of the company so it can conform to the requirements of the new Internal Revenue Act of 1962." Ex. 5(j). The amendment provided for a mechanism for new and existing members to consent to including patronage refunds in his or her gross income.[1]

At the annual shareholders meeting on October 29, 1969, a company auditor "explained that the company is a corporation operating as a co-operative." Ex. 5(k). As a result, tax was required to be paid by the shareholders on retained income.

The record clearly states that Edwall sought to obtain tax benefits under 26 U.S.C. §§ 1381-1388. That section of the tax code, related to nonexempt cooperatives, provides that cooperative patronage refunds are excluded from the gross income of the cooperative if the member consents to include them in his or her gross income. 26 U.S.C. §§ 1382, 1385(a), and 1388(c). It applies, with limitations not relevant here, to "any corporation

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[1] The amendment reads:

"Each person who hereafter applies for and is accepted to membership in this corporation and each member of this corporation on the effective date of this By-Law who continues as a member after such date shall, by such act alone, consent that the amount of any distributions with respect to his patronage occurring after May 31, 1963, which are made in written notices of allocation (as defined in 26 U.S.C. 1388) and which are received by him from the corporation, will be taken into account by him at their stated dollar amounts in the manner provided in 26 U.S.C. 1385(a) in the taxable year in which such written notices of allocation are received by him.

"Each person that hereafter applies for and is accepted to membership in this corporation, shall receive a copy of this section of the by-laws and notification of the significance of this section, before such person becomes a member of the corporation." Ex. 5(j).

operating on a cooperative basis." 26 U.S.C. § 1381(a)(2). Conversely, the statute that exempts farmers' cooperatives from tax, 26 U.S.C. § 521, provides that the farmers' cooperative must be both "organized and operated on a cooperative basis." 26 U.S.C. § 521(b)(1).

As one commentator has explained:

> Cooperatives generally are organized under state cooperative statutes, but not always. *An organization may operate on a cooperative basis for federal tax purposes, even though it is organized under a business corporation statute*. The Internal Revenue Service (IRS) has ruled that a corporation was taxable as a cooperative because it adhered to three basic principles of cooperatives, as developed by case and administrative law: (1) subordination of capital; (2) return of the fruits of the activity in proportion to the participation in the cooperative endeavor; and (3) democratic control.

Lewis D. Solomon & Melissa B. Kirgis, *Business Cooperatives: A Primer*, 6 DePaul Bus. L.J. 233, 277 (1994) (emphasis added).

In general, the articles of incorporation of an entity govern its corporate status. *In re Appeal of Constitutional Gov't League*, 23 Wn.2d 792, 799, 162 P.2d 453 (1945). A corporate entity cannot avoid its obligations under the law by incorporating in a certain manner but operating in another. For instance, a corporation filed as and purported to be a nonprofit organization cannot avail itself of a nonprofit exemption for the contributions to the state unemployment compensation fund when evidence showed that the amounts paid to an incorporator could be considered none other than wages. *Id*. at 800.

The reorganization of a corporate entity into a cooperative association is governed by RCW 23.86.195, which provides:

> Any cooperative association *organized under any other statute may be reorganized under the provisions of this chapter by adopting and filing amendments to its articles of incorporation* in accordance with the provisions of this chapter for amending articles of incorporation. *The articles of incorporation as amended must conform to the requirements of this chapter, and shall state that the cooperative association accepts the benefits and will be bound by the provisions of this chapter*.

(Emphasis added.)

The requirement in RCW 23.86.195 that the articles, upon amendment, state that the cooperative accepts the benefits and is bound by the provisions of chapter 23.86 RCW puts the shareholders on notice that conversion of the business form to a cooperative association under chapter 23.86 RCW implicates different dissenters' rights. *See* RCW 23.86.145. But if a cooperative association is not formed under the terms of chapter 23.86 RCW, the appraisal method set forth in the corporate dissenters' rights statutes in chapter 23B.13 RCW applies. RCW 23.86.145(1).

Nothing in the record shows that Edwall amended its articles of incorporation to alter its corporate form. Instead, Edwall elected to amend only its bylaws because that was all that was required to gain the benefits under the tax code, which was the express purpose of the amendment. Edwall chose this option after it considered and rejected liquidation of the corporation and forming a cooperative association.

Ag Link argues that Edwall's failure to amend its articles is a mere technical deficiency. It relies on *Washington Co-operative Egg & Poultry Ass'n v. Taylor*, 122 Wash. 466, 210 P. 806 (1922)[2] and *Boyle v. Pasco Growers' Ass'n*, 170 Wash. 516, 17 P.2d 6 (1932).[3]

The basic premise of both of these cases is that irregularities in forming a corporation are matters of which only the sovereign can complain. 18A Am. Jur. 2d *Corporations* §§ 159, 189, 190. While these irregularities make a corporation vulnerable to quo warranto proceedings for involuntary dissolution by the state, individuals may not allege these irregularities make corporate acts void or a nullity. *Id*. But here, the dissenters are not attempting to deny Edwall's existence. They merely seek to hold Ag

[2] In *Taylor*, a cooperative brought an action against one of its members for breach of their contract requiring that the member sell his eggs exclusively to the cooperative. The member attempted to avoid liability for breach by asserting that when the contract was made, the association's capital stock had not been subscribed and paid in as required by the statute. The court held that because the cooperative was a "*de facto* corporation," it was entitled to do business and contract with the member and "only the state would be authorized to take advantage" of the statutory violation. *Taylor*, 122 Wash. at 472. The issue in *Taylor* did not directly involve the corporate structure as is the claim by the dissenters here.

[3] In *Boyle*, after managing members of a cooperative were voted out of office, they filed suit claiming that, because the cooperative never adopted valid bylaws, its corporate acts were unlawful. 170 Wash. at 519. The court rejected the claim, concluding that the claimants "were as much responsible for the lack of formality in adopting by-laws as were any other members of the corporation." *Id*. at 520. Here, none of the dissenters were involved in amendments to the bylaws in the 1960s. That the corporation continued to conduct itself as a cooperative for tax purposes is of no significance.

Link to the statutes under which Edwall chose to incorporate.

In any event, none of the cases cited by Ag Link supports its argument. Instead, the record shows that Edwall consciously elected to amend only its bylaws to avail itself of tax benefits and maintain its corporate form.

Changes to the form of business associations are permitted through the amendment of articles of incorporation. *E.g.*, *Melvin L. Knight, Ph.D., Inc. v. Munro*, 42 Wn. App. 589, 595, 712 P.2d 327 (1986). Otherwise, a business association desiring to change its form must dissolve and then re-establish itself in the desired form. *Id*. Edwall rejected dissolution and chose to amend only its bylaws.

Finally, it is worth noting that in the plan of merger at issue here, Lincoln is identified as "a Washington cooperative corporation organized under RCW 23.86." Ex. 52. But Edwall is identified as "a Washington corporation organized under RCW 23B." Ex. 52. Ag Link must be held to the statutory scheme under which it admits Edwall was formed.

c. The Dissenters are Entitled to Valuation According to Chapter 23B.13 RCW

Because Edwall is not a cooperative association, the dissenters contend that the dissenters' rights statute for cooperative associations, RCW 23.86.145, does not apply to the valuation of their shares. As a result, the court erred by applying to them the

provision in the bylaws for determining the value of their stock upon termination or redemption. Instead, the dissenters claim, the corporate dissenters' rights scheme in chapter 23B.13 RCW applies here.

A corporation is obligated to adhere to the dissenter's rights statutes, chapter 23B.13 RCW. As previously mentioned, unless the provision under the cooperative association statutes applies, the appraisal remedy in the corporate dissenters' rights statute applies to cooperative members. RCW 23.86.145(1). The cooperative dissenters' rights statute provides:

> The *articles of incorporation* of an association subject to this chapter *may provide* that a dissenting member *shall be limited to a return of less than the fair value* of the member's equity interest in the association, but a dissenting member may not be limited to a return of less than the consideration paid to or retained by the association for the equity interest unless the fair value is less than the consideration paid to or retained by the association.

RCW 23.86.145(2) (emphasis added).

Here, as previously stated, Edwall is not a cooperative under Washington law because it did not change its form by amendment of its articles of incorporation. It is therefore not subject to the cooperative association statutes, chapter 23.86 RCW.

Even if Edwall was a cooperative, it did not limit the return price with its articles of incorporation, which is required by RCW 23.86.145. But Ag Link asserts that the valuation set forth in Edwall's bylaws, which is recognized in the membership contract,

controls over the valuation rights and remedies under the corporate dissenters' rights statute.

The bylaws state, "In any event of stock termination or redemption, reimbursement will be at no greater amount than book value at the discretion of the Board of Directors." Exs. 2, 62. The membership agreement signed by the dissenters includes a provision that they agree to be bound by the bylaws. Ag Link argues that the merger is "any event" for which it is authorized to pay less than fair value pursuant to the dissenters' rights statute.

The terms of Edwall's bylaws that invoke the book valuation of stock upon "any event of stock termination or redemption" is not triggered by merger. Exs. 2, 62. In fact, the plan of merger at issue here refers to "conversion" of shares by "exchange" for the new shares and "cancel[lation]" of the old shares or, if the member does not wish to proceed with the surviving association, the member will "surrender" the shares for payment, at which time the shares will be "canceled." Ex. 52. A merger is neither a termination nor redemption of the shares under the terms of the bylaws. *Eg., Rauch v. RCA Corp.*, 861 F.2d 29, 30 (2d Cir. 1988) ("a conversion of shares to cash that is carried out in order to accomplish a merger is legally distinct from a redemption of shares by a corporation"); *In re Appraisal of Metromedia Int'l Group, Inc.*, 971 A.2d 893, 904-06 (Del. Ch. 2009) (holding that a merger did not trigger the redemption clause of a certificate of designation).

Edwall could have included the event of a merger within the events triggering the valuation clause, but it did not. Such an event should not be read into the clause. *Metromedia Int'l Group*, 971 A.2d at 906 ("If the parties had intended that a transaction, such as the merger, constituted an 'effective redemption' of the preferred holders then they should have included language to that effect in the contract."). Further, any ambiguity in the terms of the bylaws would be construed against Edwall as the drafter. *Joinette v. Local 20, Hotel & Motel Rest. Employees & Bartenders Union*, 106 Wn.2d 355, 364, 722 P.2d 83 (1986).

Moreover, as the dissenters point out, other jurisdictions have found that statutory rights, such as the right to receive "fair value" for shares in the event of a corporate merger, may only be waived by "clear affirmative words or actions." *In re Appraisal of Ford Holdings, Inc. Preferred Stock*, 698 A.2d 973, 979 (Del. Ch. 1997). Accordingly, contractual provisions that do not expressly address share value in the event of a corporate merger are "too frail a base upon which to rest the claim that there has been a contractual relinquishment of rights." *Id.* Such a conclusion can be sustained by Washington law.

Chapter 23B.13 RCW creates a statutory right to appraisal for dissenters to corporate action. Appraisal under the dissenters' rights statute is the exclusive remedy for dissenting shareholders, in the absence of actual fraud. *Matteson v. Ziebarth*, 40

Wn.2d 286, 297, 242 P.2d 1025 (1952).

The institution of this statutory remedy balances both the interests of the corporation and the minority shareholder. Because unanimous approval for fundamental corporate change is not needed as it was under common law, minority shareholders may no longer extract a large premium for their stock by arbitrarily seeking to enjoin or refusing to approve proposed transactions. *China Products N. Am., Inc. v. Manewal*, 69 Wn. App. 767, 773, 850 P.2d 565 (1993).

This balance is grounded in the public policy favoring the protection of the welfare of corporate entities as well as the welfare of persons who invest their money in the corporation. *See, generally*, Nelson Ferebee Taylor, *Evolution Of Corporate Combination Law: Policy Issues And Constitutional Questions*, 76 N.C. L. Rev. 687 (1998). It is well established that "[w]hile one may decline to take advantage of a privilege given to him by . . . statute, he may not bind himself by or be held to a contract which denies to him a right which the law has allowed to him on grounds of public policy." *Grandview Inland Fruit Co. v. Hartford Fire Ins. Co.*, 189 Wash. 590, 605-06, 66 P.2d 827 (1937). The verbiage in the membership agreement does not constitute a waiver of the dissenters' statutory rights.

The dissenters are entitled to a valuation under the terms of chapter 23B.13 RCW. Because the court erred in applying the cooperative association dissenters' rights statute,

RCW 23.86.145, it erred in not considering the fair value, which is required under the corporate dissenters' rights scheme, chapter 23B.13 RCW. Edwall's payment of patronage to the dissenters may offset a portion of the value owed to the dissenters. Nonetheless, the trial court must determine fair value as required by the corporate dissenters' rights statute. RCW 23B.13.300(6) ("Each dissenter made a party to the proceeding is entitled to judgment (a) for the amount, if any, by which the court finds the fair value of the dissenter's shares, plus interest, exceeds the amount paid by the corporation, or (b) for the fair value, plus accrued interest, of the dissenter's after-acquired shares for which the corporation elected to withhold payment under RCW 23B.13.270."). To make this determination, the trial court may appoint an appraiser. RCW 23B.13.300(5).

Finally, the trial court must determine and assess costs associated with the appraisal against the corporation "except . . . to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment under RCW 23B.13.280." RCW 23B.13.310(1). Attorney fees are also available. RCW 23B.13.310(2).

d. Acceptance of Benefits

Ag Link moves to dismiss the appeal, asserting that the dissenters have lost their right to appeal by accepting the benefits of the trial court decision. RAP 2.5(b). That

rule relevantly provides:

> (1) *Generally.* A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.
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> (2) *Security.* If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.
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> (3) *Conflict With Statutes.* In the event of any conflict between this section and a statute, the statute governs.

RAP 2.5(b).

AG Link asserts that this appeal must be dismissed because none of the exceptions identified in the rule apply and the dissenters have not provided security. Because the value of the shares was not, in and of itself, an issue relevant to either the trial court's decision or our decision on appeal, we cannot say whether RAP 2.5(b)(1)(iii) applies, as the dissenters argue. We therefore hold that RAP 2.5(b)(2) applies to the unusual facts of this case.

The trial court applied the cooperative association dissenters' rights statute. RCW 23.86.145. We hold that the corporate dissenters' rights procedure set forth in chapter 23B.13 RCW is the proper scheme. Because the trial court applied RCW 23.86.145 instead of chapter 23B.13 RCW, the trial court did not consider the judicial resolution contemplated by RCW 23B.13.300 or the assessment of costs required by RCW 23B.13.310. These matters simply were not at issue before the trial court, given the statutory procedure that it enforced. The trial court's assessment of costs will certainly not result in restitution owing Ag Link, which costs are recoverable regardless of the dissenters' acceptance of benefits. *State v. Trask*, 91 Wn. App. 253, 264, 957 P.2d 781, 974 P.2d 1269 (1998).

The issue before this court on appeal was the procedure implemented by the trial court and we cannot say, on the present record, that the dissenters will certainly be entitled to judgment in their favor in at least the amount previously ordered by the court. Therefore, we hold that the trial court, in its discretion, may condition the reopening of the case upon the giving of reasonable security for its repayment. The security contemplated by RAP 2.5(b)(2) need not be made before the benefits are accepted. RAP 2.5(b)(2) (drafters' comments to 1994 amendment). The requirement for security need not be imposed if it is plain to the trial court that the dissenters will ultimately prevail at least to the extent of the judgment they have obtained.

CONCLUSION

We conclude that the trial court should have applied the corporate dissenters' rights statutory scheme set forth in chapter 23B.13 RCW. We therefore reverse the trial court's order to the contrary. We remand for a determination of the value of the dissenters' shares according to chapter 23B.13 RCW and for consideration of whether the dissenters should provide security.

Reversed and remanded.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, C.J.

WE CONCUR:

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Kulik, J.

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Korsmo, J.