IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 115 OF 2019 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND

IN THE MATTER OF EHI CAR SERVICES LIMITED

IN CHAMBERS

APPEARANCES:

Ms Caroline Moran, Ms Allegra Crawford and Mr Adam Huckle on behalf of Maples for the Petitioner.

Mr Robert Levy QC, Mr Rupert Bell and Mr Patrick McConvey on behalf of the Walkers Dissenters.

Mr Jeremy Goldring QC, Mr Marc Kish, Ms Marie Skelly on behalf of the Ogier Dissenters.

Mr Adrian Beltrami QC, Mr Rocco Cecere and Ms Farrah Sbaiti on behalf of the Collas Crill Dissenters.

Mr Hamid Khanbhai and Mr Morgan Brennan on behalf of the Campbells Dissenter.

BEFORE: THE HON. RAJ PARKER

HEARD: 20 January 2020

Draft Judgment: Circulated 18 February 2020

Judgment: Delivered 24 February 2020

Headnote

Summons for directions-s.238 of the Companies Law-Petition-determination of fair value of shares-whether 'standard' directions should be followed-jurisdiction to order management meetings-scope of dissenter discovery-timing of factual evidence -information request procedure-coordination by attorneys/counsel-disclosure of number of shares to be considered at trial.

Introduction

1. The Petitioner (the company) is an exempted limited company under the laws of the Cayman Islands and petitions the court to determine the fair value of the shares of the dissenting shareholders identified in the Petition dated 24 June 2019, together with a fair rate of interest, if any, on the amount to be paid pursuant to section 238 of the Companies Law (2018 Revision) (the Companies Law).

2. On 18 February 2019, the company entered into a merger agreement with another exempted company (Parent) and one of its wholly-owned subsidiaries (Merger sub). Pursuant to the merger agreement Merger sub was merged with and into the company and ceased to exist whereas the company continued and became a wholly-owned subsidiary of Parent. Prior to the merger the company was listed in the form of American Depository Shares on the New York Stock Exchange. The merger was effected by the company on 9 April 2019 under Part XVI of the Companies Law.

3. The company is a provider of car services specialising in short and long term car rentals and chauffeured car services in the People's Republic of China.

4. Prior to the merger, 28 dissenting shareholders held class A shares in the company. They consider that the price offered for the shares by the buyer group of US$12.25 per ADS or US$6.125 per share (the merger price) does not fairly reflect the value of the shares. The dissenters therefore delivered objections and notices of dissent under the mechanism in section 238.

5. The company now seeks directions for the further conduct of the proceedings. The parties have been unable to agree on a number of issues, including the timing of the information request process, whether there should be a management meeting(s), the timing of factual evidence, and the scope of dissenter discovery. There are also disputes about whether the company should be required to disclose information about the dissenters' former shareholdings and whether the five different legal teams representing 28 dissenters should be required to coordinate by order of this Court.

Departure from directions that have previously been made

Introduction

6. At the date of this judgment I am aware of only three section 238 cases which have been resolved at trial[1], although many such proceedings, I believe over 20, have made their way through the Grand Court and stopped short of trial.

7. This court has been making detailed directions orders in relation to section 238 litigation for about six years. The company applies to materially vary the directions orders made in similar cases, which have to some extent become fairly 'standard'. The overarching question in this application is how the court should approach the company's position on the contested issues. Many of the company's arguments are premised on the underlying assumption that the procedural regime that has built up is unfair to companies who bring section 238 petitions and that the dissenters are likely to put the company to needless time, trouble and expense by making unreasonable and excessive demands. The point was made that the pre-trial discovery process has become a bit of an information gathering 'free for all' at the expense of a company and should be reconsidered afresh.

8. There are also applications which seek to obtain additional dissenter discovery and to alter the sequencing of the provision of factual evidence.

9. Section 238 litigation is hard fought, often for high stakes and involves large teams of lawyers as well as highly experienced experts and their teams. Case management issues which might be thought capable of agreement are sometimes not agreed and the court is often asked to resolve such issues. These cases are without doubt very expensive for the parties to resolve.

10. Most of the 20 or so cases that have progressed to directions have received much attention from the teams of lawyers involved. Judges have either heard contested directions hearings or were asked to approve the agreed orders made. In that way considerable experience has been built up in a relatively short space of time. The orders made in each case are to some extent bespoke, but a uniformity of approach in relation to certain issues is discernible from the decisions and orders made.

11. In particular there has been a reasonably uniform approach concerning the extensive initial documentary disclosure required by a company by way of uploading relevant documents to a data room, the information request process initiated by the experts

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[1] *Re Integra Group* [2016] 1 CILR 192 Jones J, *Re Shanda Games Limited* (unreported 25 April 2017) Segal J and *Re Qunar Cayman Islands Limited* (unreported 13 May 2019) Parker J. *Nord Anglia* was tried just before Christmas and a judgment from Kawaley J is awaited. *Trina Solar Limited* went part-heard in May 2019, and judgment is awaited.

and the further questioning of company management by the experts at a management meeting. I accept that approach puts a company to considerable expense. The court has however been reluctant to accept the stated concerns and objections taken by companies who bring these proceedings.

12. In *JA Solar* (unreported 18 July 2019) Smellie CJ , (having, at §14, described the section 238 process as a 'vital safeguard' for minority shareholders designed to protect their economic interests), set out at §16 what he referred to as relatively 'standard form' directions which dealt with company discovery and then went on to add that other directions provided that:

> *"(iv) the dissenting shareholders upload* [to the electronic data room] *their documents that fall into the categories ordered by the Court of Appeal in* [Qunar (unreported, 10 April 2018)] *and which are relevant to fair value*;
>
> *(v) the parties be at liberty to file evidence of fact (before expert reports are exchanged) and leave given for cross-examination;*
>
> ...
> *(vii) up until close to the time of exchange of expert reports the company uploads to the data room any further documents or information that either of the valuation experts.....request of the Company within a specified period of time from the date of the request, for example within 14 days of the request, as was ordered in* [*Shanda Games* (unreported, 25 April 2017), Segal J];
>
> *(viii) the company makes available appropriate members of management to meet with the valuation experts (whether in person or by telephone) upon request to discuss information provided by the company and issues relevant to the valuation experts' reports; and*
>
> *(ix) the experts file reports and then meet to ascertain agreement/disagreement amongst them and file supplemental reports."*

13. At §17, he went on to say:

> "17. *The foregoing is not meant to suggest that there is a rigid 'standard form' of directions for section 238 cases. The directions may have to be somewhat tailored to the facts of any particular case. However, the various steps outlined in the previous paragraph have typically been ordered across most, if not all of the post Integra cases, often by Judges with experience of section 238 cases. "*

14. The Chief Justice went on to say at §21 and §22:

"21. Even while rendered with variations to the 'standard' order for directions in other more recent section 238 cases, I accept that the core directions set out above have largely been ordered given that the parties (and the Court) have found them effective and beneficial for the swift and proper resolution of the one issue that falls for determination on the Petition - what is the fair value of the dissenting shareholders' shares?

22. I am told that over the course of the last 18 months or so, there have been some disagreements between companies and the dissenting shareholders in a number of section 238 cases about how each step of the directions is to operate. In such cases, the recent authorities show that the Court should be guided by the Overriding Objective and "must do its best to adopt a balanced approach to opposing contentions. An approach which will encourage the parties to cooperate in the ensuing phases of the proceedings, and indeed, in future similar cases": see *Nord Anglia* (unreported 19 March 2018 Kawaley J) and *Xiaodu* (unreported 26 March 2018 Kawaley J.)

15. At §30, having dealt with the importance of the company's discovery in section 238 cases and the relevant authorities, which showed a tendency for companies to provide far more limited discovery than the dissenting shareholders sought, he went on to say:

> *"30. Indeed, companies in section 238 cases also have a tendency to offer directions that are far less obliging than those the dissenting shareholders seek (and have traditionally been ordered). The present appears to be just another example of such a case, given the areas of disagreement now presented for resolution. In view of the central importance of discovery by companies (and the directions generally) in such cases, I am satisfied that the Court should approach such attempts with scepticism."*

16. In this case Ms Moran for the company argues that the 'standard form' directions work in a way that is duplicative, unfair and disproportionately costly for the company (and by implication has done so with regard to the other companies that have been and are currently involved in such proceedings) and challenges whether they are consistent with the overriding objective. Although the submission was not expressly made, implicit in the submission that the "standard form" process is duplicative and disproportionate is the notion that professional experts and attorneys may not conduct themselves in a reasonable and proportionate manner and with regard to their obligations to the court.

17. As to these submissions:

A) This should not be the working assumption and if the court is shown to have misplaced its confidence in those professionals there are ways of correcting any abuse or unreasonable conduct.

B) As to the directions themselves, as long as they are not shown to work injustice in the particular case, I treat the 'standard form directions' that the courts have ordered as useful and the best 'starting point'. There is no purpose in reinventing the wheel.

18. I accept that directions made in other section 238 cases do not generally carry the value of precedent, especially if the points in question were previously agreed, rather than judicially determined. I also accept that the court must look at each case and decide whether the directions as a whole and as to their individual nature and effect are fair, necessary to do justice between the parties, and are economically sensible. I endorse the approach to produce a balanced outcome in order to encourage cooperation between parties as suggested by Kawaley J in *Nord Anglia* and note that expedition and economy are explicitly given a higher priority in this court's rules than in the Civil Procedure Rules in England.

19. Having reviewed the areas of disagreement in this case and heard Ms Moran for the company and three Leading Counsel for the three sets of dissenters, I have concluded that there is no good reason to vary the directions, as contended for by the company.

20. There is no evidence that has been shown to me which indicates the 'standard' directions that have been ordered and complied with on a regular basis in recent years have been working any material injustice or are otherwise unfair. There may have been relatively minor variations agreed or ordered as to timing and sequencing and the like, but I have not been shown any instance where there has been a significant departure from the norm.

21. As a matter of common sense, it seems to me that the directions that have been produced as 'standard' have the considerable benefit of being tried and tested. Indeed I saw how they worked out in practice in the lead up to and at the *Qunar* trial I presided over last year. This was one of six cases which have so far gone through a trial process.

22. I accept Mr Levy QC's submission that the 'standard' directions have been regularly assessed by this court to give effect to the aims of the Companies Law efficiently, fairly and in accordance with the overriding objective. Indeed a Practice Direction [No.1 of 2019] was issued, after consultation, to provide a framework for them.

23. I also accept that there is a value to the consistency of approach in relation to the same legal process because that in itself advances the overriding objective so that the parties can expect certainty or at least consistency, absent a good reason to the contrary.

24. The body of learning and practice around the section 238 jurisdiction shows that it has features which are different from ordinary civil litigation. The court only performs the

assessment of fair value with the assistance of experts. This gives rise to specific and somewhat unique procedural requirements.

25. For example, in reaching a fair value outcome the experts and in turn the court need to have all relevant information to understand the commercial reality in which the company operated both with regard to its existing business and future projections.

26. Ms Moran characterised the discovery process in section 238 proceedings as a complete departure from the discovery process set out in the GCR and puts the company to unnecessary expense.

27. The discovery process in section 238 cases is different, but it is consistent with the GCR and is necessary and geared towards producing all relevant information for the purpose of the expert valuation. The Court of Appeal in *Qunar* (unreported 10 April 2018) (*Qunar CICA*) at § 45 endorsed the general approach to a company's obligations at first instance - see also *JA Solar* at §27 (e).

28. In sum, I am unpersuaded that I should accede to the submission that significant variations to 'standard' directions should be ordered in this case unless a compelling reason exists to do so.

Management meetings

29. Ms Moran also sought to argue that the directions relating to management meetings have no jurisdictional basis. This stark proposition would, if correct, be surprising. Management meetings have been a feature of most section 238 proceedings since *Integra* in 2015. Ms Moran argued that although they may have become common practice, the court had no jurisdiction to order such meetings. There were no procedural rules under the GCR which suggested that the court could order them or regulate them, nor was there an inherent jurisdiction to order pre-trial discovery against third parties, such as the members of management of companies.

30. In the alternative she argued that even if the court had jurisdiction I should exercise my discretion against ordering such a meeting because it is unnecessary, inefficient and contrary to the overriding objective. The company was providing a huge amount of data and there was no need for a management meeting on top of that.

31. I accept Mr Beltrami QC's submissions on this topic. I find that the court has jurisdiction to order management meetings and that the source of its power is its inherent jurisdiction as a court of justice to make procedural orders to achieve justice.

32. I accept that the GCR does not deal with them, but the GCR are rules of practice only.

33. Furthermore, the court has specifically rejected the contrary argument in two reported cases – *Trina Solar Limited* (unreported 1 November 2017), Segal J at §4 and *KongZhong Corporation* (unreported 2 February 2018), Parker J at § 24 (in which the status of transcripts and protections for the company were also considered). These authorities were also cited by the Chief Justice in *JA Solar* at §105, where he further rejected an argument that there was no power to order management meetings. Where the court has determined an issue of law, such as the scope of its jurisdiction, then that determination should carry considerable weight and no convincing reason has been put forward as to why I should not follow these decisions on the basis that they were wrongly decided.

34. In any case the company is subject to this court's jurisdiction as a company incorporated in the Cayman Islands, which has invoked the statutory merger regime under Part XVI of the Companies Law. This court has power pursuant to its inherent jurisdiction to compel a party which has submitted to its jurisdiction, or is otherwise subject to it, to take procedural steps which it considers necessary or appropriate for the resolution of the proceedings before it.[2]

35. The existence of the inherent jurisdiction to make effective procedural orders beyond the specific confines of the GCR has been frequently recognised in the Cayman Islands, including by the Chief Justice in *Phoenix Meridian* [2009] CILR 342 at §13-14 applied by Kawaley J in *Nord Anglia* [2018] CILR 164 at §23. There is nothing inconsistent in the GCR with ordering management meetings. The GCR is not an exclusive code and relief can be obtained outside of the GCR in appropriate cases - see the *Norwich Pharmacal* and *Anton Pillar* types of relief available by way of example.

36. The fact that the section 238 jurisdiction leads to the implementation of new procedural steps either through management meetings or information requests which go beyond those identified in the GCR is well known. As I have said, the section 238 jurisdiction and the process which accompanies it is somewhat unique because the court needs to arrive at an assessment of fair value on the basis of all relevant information, relying to a large extent on the experts.

37. Moreover, the fact that these management meetings will often take place outside of the Cayman Islands and are attended by people who are not themselves parties is not relevant to the court exercising its jurisdiction over the company. The order is against the company, not against any individual, and mandates that the company will procure appropriate management personnel to attend the meeting and give answers. Orders relating to management meetings are not directed at third parties to provide information or discovery. Reliance on *South Carolina v Assurantie Maatschappij* [1987] AC 24 for the proposition that the court will not allow depositions taken in the United States to obtain pre-trial discovery for use in English proceedings is therefore

[2] See *Bremer Vulkan v South India Shipping Corp* [1981] AC 909, *Connelly v DPP* [1964] AC 1254 and *AJ Bekhor v Bilton* [1981] QB 923

misplaced. That case was dealing with the limitation on the scope of discovery against non-parties (disclosure and inspection of documents and the asking and answering of interrogatories). The House of Lords made clear that a non-party to an action in the English High Court could not be compelled to give pre-trial discovery in this way. Here the jurisdiction is against the company and it is the company that has to comply and provide information about itself, which it does through its management.

38. On discretion, I am satisfied that to order management meetings is in accordance with the overriding objective, proportionate and efficient and will achieve a fair outcome for both parties. As section 238 proceedings are to a large extent an expert driven process, the reliability of expert evidence at trial is critical. Because of the clear imbalance of information and understanding, which puts the dissenters and their expert at some disadvantage, it is necessary to attempt to correct that by members of the company's management being made available to answer questions. I agree that it is a 'crucial' part of the information gathering process (as the Chief Justice made clear in *JA Solar*) and has the advantage over written questions and answers and an analysis of the raw data of being an interactive method through which information can be given and points of relevance discussed. It enables dialogue and understanding to take place and allows the experts to get to the core issues in a much more efficient way than through written material being exchanged. That was certainly the experience of the court in the *Qunar* trial last year.

39. With regard to concerns expressed that the procedure may be used oppressively and unfairly against the company's management, I should stress that it is not a procedure to obtain oral evidence without the necessary safeguards with the result that the company is at risk. It is an expert driven process to obtain information, not to 'trap' or undermine company management. Oral evidence on oath or affirmation is to be provided only at trial through fact witnesses giving evidence in person and being cross-examined on that evidence.

40. There was argument concerning the production of a transcript of the meeting. The alternative to this would be that people at the meeting would be relying on their own notes. That is likely to be the source of disputes as to what was said. The transcript of any such meeting has no special status. It is not a deposition of oral evidence. Strictly speaking the record or transcript is hearsay evidence. It has a value because it is a practical, efficient and fair way of avoiding disputes as to what was in fact said. Any argument as to what was meant or whether the answer recorded was full or complete, if this is to be tested through witness evidence at trial, is assisted by having a transcript. The trial judge will ensure that no unfair advantage is taken because of the existence of a transcript and its admissibility will also be decided at trial.

41. Likewise there is much hearsay documentary evidence relied on by experts in section 238 proceedings in the form of reports and analyses by professional third parties,

technical experts and academics. It will be for the trial judge to assess its admissibility and what weight to give to it and how it may be deployed.

42. With regard to the concerns expressed concerning unreasonable and oppressive conduct by the dissenters' expert, the court's working assumption must be that both experts will perform their functions properly and professionally having regard to their overriding obligations to the court. It is to be inferred that management meetings will only be held where necessary and the only information required will be that which the experts consider necessary to discharge their obligation to assist the court to arrive at a determination of fair value.

43. I have reviewed the draft directions order relating to management meetings [at § 23 - 32 of the draft order] against the previous orders made in other cases, particularly in *JA Solar* and have concluded that the dissenters' proposed wording, which has not been agreed by the company, is to be preferred.

44. In simplified summary, the most important results which follow are that the meeting(s) with the company's management for the purpose of providing information and answering queries which are relevant to the preparation of the experts' respective reports are to be held within a certain period of time following a request by either of the experts.

45. The number of such meetings should not be restricted, save that there should be no meetings requested within a certain period of time [56 days] from when the expert reports are due to be exchanged. The question of whether more than one meeting is necessary is best left to the experts in my judgement and should not be limited in advance - I note that this accords with the ruling made by the Chief Justice in *JA Solar* at § 102.

46. A list of questions/topics is to be provided by each expert to the company within a certain period of time prior to the meeting, copied to the expert for the other party or parties, and reasonable follow-up questions at the management meeting may be asked. This is consistent with the directions in *Zhaopin* and *KongZhong* and avoids the risk of management being taken by surprise. If an expert reasonably wishes to raise a new question or topic not included in the list, the company may not unreasonably withhold agreement to deal with it. That seems to me to strike a fair balance.

47. There should be a transcript made of the meeting and the company will have an opportunity to correct errors and explain them as necessary. To the extent he/she considers it appropriate to do so an expert may refer to information provided in a management meeting in the report, the joint memorandum and/or supplemental report.

48. There was some argument about whether management meetings held by telephone conference may also be attended by representatives of the dissenters in an observatory capacity to better understand what is said. I have concluded that there can be no sensible objection to this by the company. They are parties to the litigation and are entitled to follow what is said. They would not be actively participating, simply listening in and should be announced so that everyone knows who is attending. I do not apprehend that this will in practice inhibit the free flow of information.

49. In summary, I reject the company's arguments on this topic and accept the dissenters' proposed directions.

Expert information requests

50. Ms Moran submitted that the dissenters' suggested procedure lacked sufficient safeguards to ensure proportionality and to avoid duplication of effort and costs. This was especially so against the background that the company would be providing extensive documentary discovery and has collated 2.4 million responsive documents within the relevant date range, of which half a million comprise the Review Data Set.

51. Before submitting the first information request, Ms Moran maintained that the experts must take a reasonable period of time to first review the documentary discovery uploaded to the data room. The wording proposed is that the information request process may only commence "*after the Expert has availed himself/herself of a reasonable period of time to review all of the documents uploaded.*" The argument assumes that the expert could readily find out answers to the information requests he/she might make in all the documents themselves from a full review of the data room and should be expected to do so before putting the company to the expense of having to answer questions.

52. The company also proposes a timetable to ensure that the experts could not submit a further information request until the deadline for answering the previous one had expired, or the answers had been provided, and which left time in-between for the company to respond before receiving the next request. This, it was submitted, would save time and resources, would avoid the risk of duplication and allow the company a fair time to respond so that it was not dealing with competing and concurrent information requests.

53. At the end of the process the company proposes that it should then file factual evidence seven weeks from the date of the last request. It proposes that that should take place before the exchange of expert reports. Factual evidence is normally provided in section 238 cases early in the process, long before the information request process has been completed. The company argues that this is unfair because the company's factual witnesses should have the opportunity to have reviewed the information requests which will have identified the points that will be in issue and

swear to the answers given, as well as to adduce any further factual evidence considered relevant. An Order made in *Xiaodu* seems to follow this procedure.

54. I am not persuaded that this change of approach to the usual orders dealing with information requests is appropriate or necessary.

55. To order that experts should first have reviewed the data room material is overly prescriptive and unworkable in practice. It is not workable to mandate that experts must take a reasonable period of time to review the documentary discovery in a data room first before submitting an information request. It is also unworkable to order that they must wait for answers to be given before asking further questions. In my view that sort of order would be likely to cause uncertainty and give rise to disputes as to the experts' judgements and approach on these issues. There needs to be a balance between the submission of information requests on an ongoing basis and fairness to the party providing answers in having sufficient time to deal with them. The imposition of prescriptive conditions in my view would not help the experts' ability to properly assist the court. They must be given some flexibility in which to perform their functions and be trusted to do so properly.

56. The working assumption must be that experts are highly experienced professionals with overriding obligations to the court who will act reasonably and proportionately. Their credibility is at risk at trial in cross examination and they have professional reputations to protect. These factors will regulate the potential for abuse or unreasonableness. If there are problems encountered in practice each party of course has liberty to apply on any of the directions for the court to intervene.

57. As to the submission that factual evidence should come some considerable time after the date of the last information request [49 days], this has not been the usual sequence across the run of previous section 238 cases, save for *Xiaodu* (unreported 26 March 2018) Kawaley J, where a case management conference was to be held after the service of the joint memorandum to include directions relating to the exchange of factual evidence and supplemental expert reports. In all the other cases, factual evidence has come at a fixed and early stage in the timetable at the conclusion of discovery [134 days from the case management order] and it is then followed by the expert request process. The exchange of reports date is fixed to be a certain amount of time following discovery. No evidence has been adduced that this process or the sequence has been successfully challenged in practice or that there has been any judicial concern as to how it has worked in the lead up to or at trial.

58. The factual evidence, although Ms Moran was not able to assist on what it might comprise in this case at this stage, will not be likely to comment on fair value questions, but will be important in relation to decisions made and the commercial reality in which the company operated and was projected to operate. It is important for the experts to consider such evidence when they are themselves reviewing the

disclosed materials and they can then have an opportunity to ask questions arising out of the factual evidence reviewed as a whole. It does not seem to me to be necessary or appropriate for the company to provide factual witness evidence 'in reply' at a stage when the experts will not then be able to properly comment on it or interrogate it by making further information requests. I do not consider that it is necessary for the company to put forward factual evidence at the end of the information request process to deny or explain issues: see also Mangatal J at § 23 and 24 of *Homeinns* 2017 (1) CILR 206 reaching the same conclusion and the Chief Justice in *JA Solar* at § 78 (c). It is not in practice necessary for anyone from the company to make any declarations through factual evidence as to the veracity and accuracy of the answers to information requests. Written information requests and answers are hearsay material which can be examined at trial for questions of admissibility and weight.

59. I am therefore not able to accept the company's submissions on this topic. I accept the dissenters' proposed directions, including that the cut-off date for submission of the final information request to the company is 28 days before the date fixed for the exchange of expert reports, which gives a clear space for consideration of the company's answer before exchange.

Dissenter discovery

60. The Court of Appeal in *Qunar CICA* made it clear that as in all other forms of litigation mutual disclosure should be the normal rule and that dissenters should disclose relevant material. It did not order general discovery by dissenters but limited it to certain categories of documents which related to the value of the company under consideration.

61. Rix LJ said at §75:

> *"...It seems to me that if dissenters have in their possession, as they are likely to do, documents, reports, analyses, projections and so on about companies in which they invest, their products, their industries, their markets, their competitors, in other words documentary material which relates to the value of such companies, then this material is as much a matter for disclosure as any documents in the hands of the companies..."*

62. The first affidavit of Daniel Ryan sworn on 12 December 2019 deals with basis for the company's argument that the categories it has proposed are relevant to the question of fair value. Mr Ryan is a managing director at Berkeley Research Group in London and has over 25 years' experience of valuing businesses. He is not the company's independent trial expert.

63. It may well be the case, as Mr Ryan points out, that the dissenters are sophisticated investors and were significant shareholders in the company, but that does not mean

that their views on the key inputs into the valuations are relevant to a fair value appraisal.

64. It is important to bear in mind that the characteristics of, and the motivations which might be guiding, dissenting shareholders are generally irrelevant to a fair value determination: see *Integra* at § 16 (8), *Zhaopin* at § 48-50 and *Qunar* at § 63. So is the timing and amount of their investment and whether they bought after the merger announcement with full knowledge of it and before the EGM or whether they voted for the merger or not. It is not relevant to ascertain whether they are speculative investors engaged in arbitrage or long-term shareholders who are being 'taken out' by the majority against their will, as fair value needs to be determined in one way for all dissenting shareholders irrespective of whether or not they might be said to be more or less 'deserving': see *Qunar* at § 63.

65. The purpose of these case management directions, as Mr Goldring QC reminded me, is to achieve a just and proportionate resolution of fair value, consistent with the statutory purpose of protecting the rights of dissenting shareholders in the context of the 'forced' appropriation of their shares.

66. I accept Mr Goldring QC's submission that the approach I should take is to decide whether the additional material is clearly defined, necessary for disposing fairly of the fair value question, proportionate and likely to be sufficiently probative so as to make the exercise worthwhile.

67. In both *Nord Anglia* at § 13 and 18 and *JA Solar* at § 59-62 the court decided to keep within the categories suggested in *Qunar CICA,* and the dissenters argue that the additional material the company seeks is of marginal relevance and will be disproportionate to discover.

68. Dealing with the additional categories requested, the *Qunar CICA* decision limits dissenter discovery to documents that are themselves *'valuations or similar analyses'*. The dissenters propose to replicate that in this case so that they will discover all documents reflecting or relating to any valuations or similar analyses of the company that they prepared, reviewed or considered. That seems to me to accord with the Court of Appeal's test of relevance to include documents which relate to the value of the company.

69. The company seeks to extend this category by adding reference to *'assessments or studies'*. This does not seem to me to be necessary or proportionate. The category of documents covered by *'valuations or similar analyses'* of the company the dissenters prepared reviewed or considered will contain the relevant valuation material that exists within the dissenters' possession or control.

70. The company seeks in addition disclosure of all documents or communications containing *'discussions or comments'* on valuations or similar analyses. This moves in my view illegitimately beyond *'valuation or similar analyses'* into the subjective views of investors and communications concerning those views which are not strictly relevant to the valuation exercise. Mr Ryan suggests that such material might provide additional context and purpose relevant to the weight to be given by a valuer to other valuations [at § 11-13 of his affidavit]. In my view the probative value of such documents is marginal and risks straying into an investigation as to what was in the minds, and matters concerning the motivations, of dissenting shareholders, which is not of relevance to the valuation exercise.

71. If there was material concerning valuation or similar analyses which was prepared for the basis of the valuation exercise carried out by dissenters, for example for the purposes of an investment committee, those materials are to be provided on discovery by the dissenters in any case.

72. As to *'financial projections or forecasts relating to the company and supporting documentation'*, this again is beyond what was ordered in *Qunar CICA*. There is likely to be a huge amount of internal company material that will be available to the experts and to the court, as well as analysts' material from the financial institutions commenting on the performance of the company and the sector, as well as academic and other studies. The extent of the company disclosure can be seen from Appendix 4 to the draft order which provides a comprehensive list of categories. Any material in the hands of the dissenters relating to financial projections and supporting documentation commenting on the company's performance or attempting to predict the company's future performance is in my view likely to be of marginal additional probative value and not necessary to be searched for and disclosed by the dissenters.

73. As to *'documents relating to the company's market, industry and competitors'* and the like, *'relevant to the market in which the company operates'*, this again goes beyond *Qunar CICA* and potentially covers a much wider range of material concerning the Chinese markets, internet businesses and car hire sector. To the extent that such material is relevant to valuation of the company, it is likely to be provided as publicly available material by the experts and adds to the extensive discovery the company will give. At the *Qunar* trial much of this material had clearly been augmented by in-depth research for further market related material and appended to the expert's reports. It would not be proportionate or necessary for the dissenters to have to search for and discover such documents, given the material which will be available to the experts and the court.

74. The dissenters have agreed to provide confirmation of the date and method of their purchase of shares in the company. The company seeks to go further and asks for material identifying purchase instructions/limits given to intermediaries. It may well be the case, as Mr Ryan points out, that the dissenters were sophisticated investors

keen to maximise value from their investment in the company and that is why information about the prices at which they were prepared to buy and sell shares in the company is sought. It is however not evidence of value. As I have said, the characteristics and motivations of dissenting shareholders are generally irrelevant, and the probative value to be given to any such material which might exist is peripheral. It is not a legitimate exercise to investigate the individual investors' commercial motivation for decisions and instructions given to intermediaries which do not go to the sole question at issue in this case: the fair value of the dissenters' shares.

Collaboration

75. The company asks for the court to regulate each dissenter's rights as litigants to make submissions to the court and to coordinate in order to protect it from the risk of liability for unnecessary costs. The court in complex litigation and in particular in section 238 cases relies upon the attorneys' obligations to the court and the common sense and experience of counsel to coordinate matters sensibly. It is not for the court to micromanage in advance the conduct of attorneys or counsel. I bear in mind that the statute provides that the dissenting shareholders may participate *'fully in all proceedings until the determination of fair value'* :see section 238(12) of the Companies Law.

76. If there has been any unreasonable or abusive conduct then the court has powers to curtail it and if necessary to impose punitive costs or other orders which deal with the problem. It does not seem to me to be necessary to require the dissenters to identify the issues on which they collectively agree at the same time as filing any written submissions, or to be restricted to one set of written and oral submissions on any issues on which they collectively agree on, or to only make separate written and oral submissions on issues on which they disagree. I will leave it to the good sense of the experienced attorneys involved to sensibly coordinate as I have seen they have done in relation to this application.

Total number of shares which are to be considered at the trial

77. The dissenters seek a direction that the company inform them of the total number of shares that is the subject of the trial and any change to that number. A company will usually set out in the Petition the number of shares that need to be valued by the court and I can see no reason why the company should not provide the information requested. A verified list pursuant section 238(9)(b) of the Companies Law containing the names and addresses of all shareholders with whom agreement as to the fair value of their shares has not been reached is appended to the Petition. It would simply seem to be a matter of adding the dissenting shareholders' shares together to reach a total number.

78. Confidentiality was put forward as a reason. It seems to me that confidentiality may not be a good reason as all the dissenters are involved in a process which is public and by which the value of their shares is to be determined by the court. Mr Levy QC submitted that the information was needed to determine the specific costs issues which have arisen and will arise between dissenters, which seems to me a sensible reason to request the information. If there are genuine concerns as to consents from the dissenters (or any of them), I trust that this can be worked out by the parties.

79. In any event there will be liberty to apply generally in relation to any of the Directions Orders made.

THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT