IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 153 OF 2018 (ASCJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

IN THE MATTER OF JA SOLAR HOLDINGS CO., LTD.

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 16TH AND 17TH OCTOBER 2018, 18TH JULY 2019

Representations: Mr. Alain Choo Choy QC, instructed by Ms. Katie Pearson, Attorney-at-Law of Harney Westwood & Riegels for the Company;

Mr. Jonathan Adkin QC, instructed by Mr. Shaun Maloney, Attorney-at-Law of Ogier for the 1st to 8th and 13th to 17th Respondents;

Mr. Robert Levy QC, instructed by Mr. Rupert Bell and Mr. Patrick McConvey, Attorneys-at-Law of Walkers for the 18th to 20th Respondents

Cayman Islands company carrying on business in the People's Republic of China – Privatization of the company – Shareholders dissenting from acquisition on basis that fair value not offered for their shares – Application by the company under Section 238 of the Companies Law for the Court's assessment of fair value – Directions for trial of fair value issue – Review of decided cases – Grant of appropriate directions.

RULING

1. JA Solar Holdings Co., Ltd. (the "**Company**") is an exempted limited liability company incorporated in the Cayman Islands.

2. On 17 November 2017, the Company entered into an Agreement and Plan of Merger (the "**Merger Agreement**") to effect the privatization of the Company through its acquisition by its management and their affiliates (collectively, the "**Buyer Group**"), by way of merger pursuant to Part XVI of the Companies Law (2018 Revision) (the "**Law**") (the "**Merger**").

3. Prior to the Merger, the Company was listed on the NASDAQ Stock Exchange ("**NASDAQ Exchange**"), pursuant to which American Depository Shares ("**ADSs**") in the Company were publicly traded.

4. The Company is a global manufacturer of high-performance photovoltaic products, with a business portfolio including wafers, cells, modules and photovoltaic power stations based in the People's Republic of China (the "**PRC**").

5. In effect, the Merger resulted in:

   (a) a Cayman Islands company, JASO Acquisitions Limited, incorporated and controlled by the Buyer Group for the sole purpose of effecting the Merger, being merged into the Company with the Company continuing as the surviving company;

   (b) the Buyer Group becoming the ultimate beneficial holders of the Company through JASO Holdings Limited, which is the sole parent of JASO Parent Limited, and which in turn became the sole parent of the Company;

   (c) shareholders, other than members of the Buyer Group, having their shares cancelled in consideration for being offered USD1.51 per share (being USD7.55 per ADS – each ADS representing 5 shares) (the "**Merger Consideration**") by the Company for their shares;

   (d) those shareholders who dissented from the Merger (i.e. who did not agree that the Merger Consideration represented fair value) losing their shares and rights as shareholders in return for the right to be paid fair value at some future point (to be determined by the Court or by agreement with the Company); and

   (e) the Company ceasing to be a public company.

6. This is all further detailed in the Company's Proxy Statement dated 1 February 2018 (the "**Proxy Statement**") which was filed with the United States Securities and Exchange Commission (the "**SEC**").

7. In the Proxy Statement, the Company asserted that the Merger Consideration was the fair value for all shares in the Company. This was not accepted by a significant number of shareholders who dissented from the Merger and who are further identified below.

8. For present purposes, it will suffice to note without further enquiry into the process, that the Merger was approved by way of the required special resolution passed at an extraordinary general meeting of the company on 12 March 2018 (the "**EGM**") and on 16 July 2018, the Company announced that the Merger had completed.

9. As a result of the consummation of the Merger, the Company became a privately-held company beneficially owned by the Buyer Group.

Dissenting shareholders

10. As there are shareholders who dissented from the Merger by notice given as required by section 238(5) of the Law and no agreement was reached with the Company as to fair value, these proceedings were commenced by the Company by way of petition presented on 23 August 2018 pursuant also to section 238 of the Law. They are proceedings by which the Company seeks the Court's determination of the fair value of the shares of the dissenting shareholders, in keeping with sub-sections 238 (9)(a) and (11) of the Law. The summons which is now before the Court is presented by the Company, within the petition proceedings for directions which are required in preparation for the trial of the fair value determination. Some directions are agreed but several important ones are not agreed.

11. Maso Capital Investments Limited, Blackwell Partners LLC- Series A and Star V Partners LLC are among those shareholders who dissented from the Merger. In these proceedings they are the represented by Walkers and are referred to as the "**Walkers Dissenting Shareholders**". Ten other dissenting shareholders, the 1st to 8th and 13th to 17th Respondents, are represented by Ogier and are referred to as the "**Ogier Dissenting Shareholders**". Together, the two groups are referred herein to as the "**Dissenters**"[1].

12. As at the date of the EGM, the Dissenters together held 39,756,575 ordinary shares, representing 16.74% of the total issued and outstanding shares of the Company.

General outline of section 238 (or appraisal) cases

13. The following helpful outline of section 238 cases coming before the Court is adopted from the helpful submissions by Mr. Levy QC on behalf of the Walkers Dissenting Shareholders. It is uncontroversial.

14. Section 238 of the Law gives the Court jurisdiction to determine the 'fair value' of shares held by dissenting shareholders in the context of a merger carried out pursuant to Part XVI of the Law. The effect of section 238 is to afford those dissenting shareholders (who are generally minority shareholders) protection when their shares are taken against their will. Thus, section 238 is a vital safeguard for minority shareholders designed to protect their economic interest in the company sought to be acquired.

15. A relatively standard procedure has developed in order to bring section 238 cases to trial. These have evolved from the 20 or so sets of section 238 proceedings commenced following the first decision on the section in ***Re Integra Group***[2]. And so, typically:

[1] Two individual dissenters, Kevin Lu and Xin Wang, the 16th and 17th Respondents, have written to the Court confirming that they will conform to the judgment of the Court arising from these proceedings but do not wish to attend upon the proeeedings

[2] [2016 (1) CILR 192].

(a) if the company cannot reach agreement with the dissenting shareholder(s) as to the fair value of its/their shares then a petition is presented by the company to commence the section 238 proceeding. At the same time, a summons for directions is issued by the company; and

(b) in the event that directions cannot be agreed by consent, the parties attend a directions hearing shortly thereafter at which any directions that are still the subject of disagreement between the parties will be resolved by the Court. This is the stage at which the present summons arises in these proceedings.

16. The appropriate form of directions has been considered in a large number of the cases. The Court has now developed considerable experience of section 238 cases, and so, with the benefit of that experience, a relatively 'standard form' of directions has developed which broadly provides for the following:

(i) the opening of an electronic data room;

(ii) an initial (and swift) upload to the data room by the company of specific classes of documents that are immediately available to the company (being documents etc. generated for, or used in, the merger process, which, by definition, had only recently closed);

(iii) a further upload (within a reasonably short period of time) of all other documents in the company's possession, custody or power that are relevant to fair value;

(iv) the dissenting shareholders upload their documents that fall into the categories ordered by the Court of Appeal in ***Qunar Cayman Islands Limited v Athos Asia Event Driven Master Fund and Ors*** (Unreported,

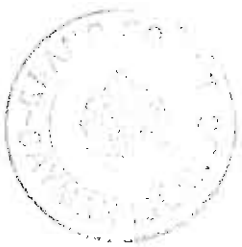
Goldring P, Rix JA and Field JA, 10 April 2018 – the "**Qunar Appeal**") and which are relevant to fair value;

(v) the parties to be at liberty to file evidence of fact (before expert reports are exchanged) and leave given for cross-examination;

(vi) each of the company and the dissenting shareholder(s) instruct a valuation expert (with the potential that the Court may also grant leave to the parties to instruct another type of expert, such as an industry expert or interest rate expert, if the Court believes this would be of assistance);

(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 (and if applicable, other 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 ***Re Shanda Games Limited***[3]);

(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.

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

[3] (Unreported, Segal J, 25 April 2017).

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. Indeed, Mangatal J in ***Homeinns***[4] stated at paragraph 4:

> *"In In re Charm Comms. Inc. (2), delivered on February 26th, 2015, cited by the petitioner's counsel, I made directions at a time when there had not yet been any decided local cases in relation to s.238 applications, although there had been directions given in In re Integra Group (3). I opined, in response to submissions in that case, that directions given in any other case are not to be regarded as "precedents." To my mind, that was stating the obvious. However, quite obviously, also, if an order for directions made in a previous case appears appropriate for the case currently before the court, and appears to achieve the overriding objective of dealing with cases in a just, expeditious and economical way, then the court will make such directions. Equally plain is that, by the nature of these types of cases, there will be some orders that are, or may become, for want of a better term, "standard" (as opposed to being precedents), in what may properly be described as the "usual" type of case. However, the point is that the court will make directions that accord with the overriding objective of dealing with each particular case in a just, expeditious and economical way".*

18. Following completion of the steps contemplated by the directions, the petition then proceeds to trial. Any factual witnesses and the experts are made available for cross-examination at the trial. The Court then determines the fair value of the dissenting shareholder(s)' shares, together with a fair rate of interest, if any, to be paid by the company on the amount determined to be the fair value[5].

19. As appears from the decided cases (for instance ***Integra*** and ***Shanda Games***), section 238 cases are rather technical, with the Court having to consider intricate issues of valuation including discounted cash flow analysis, together with the standard component aspects thereof), which are generally based on projections prepared by management that were used

[4] [2017 (1) CILR 206].
[5] Section 238(11) of the Law.

as the basis by which the company itself purported to determine fair value. Other valuation techniques are often also considered. An example of how each input was analyzed in order to reach the fair value determination can be seen in ***Shanda Games***. In that case, the Court made decisions on each input and asked the parties to use the final inputs to determine what the fair value of the shares should be.

20. It is important to note that there is no defined valuation methodology available to the Court for this purpose, rather it is a question of the Court's judgment which cannot be reduced to a prescriptive formula and instead is informed by the evidence which is put before the Court[6].

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*

[6] In this respect, Jones J in ***Re Integra*** at [21] cited with approval the dicta of Lamber JA in ***Cyprus Anvil Mining Corp v Dickson*** (33 D.L.R. (4th) 641, at paras. 50–51) -"*The one true rule is to consider all the evidence that might be helpful, and to consider the particular factors in the particular case, and to exercise the best judgment that can be brought to bear on all the evidence and all the factors*".

encourage the parties to cooperate in the ensuing phases of the proceedings, and indeed, in future similar cases"[7].

23. Although a number of the "standard" directions have been agreed in this case, there are still, as already mentioned, a number of fundamental disagreements between the Company and the Dissenters. The purpose of this judgment is to resolve those disagreements.

THE ISSUES OF DISAGREEMENT BETWEEN THE COMPANY AND THE DISSENTERS

24. The main issues of disagreement between the parties are as follows:

(a) Discovery:

By the Company:

(i) the time period for which the Company should be required to give specific and general discovery;

(ii) the timing and process for requests for information to be made of the Company by the parties' valuation experts;

(iii) how documents are to be inspected which cannot be uploaded to the data room because it would be contrary to the laws of the PRC;

By the Dissenters:

(iv) whether the Dissenters are required to give general discovery - that is, beyond the specified categories of relevant documents determined by the Court of Appeal in the ***Qunar Appeal*** (and as outlined below); and

[7] See paragraph 9 of ***In the Matter of Nord Anglia*** *(Unreported Grand Court Cause FSD 235 of 2017, Judgment delivered, per Kawaley J on 19 March 2018)* and paragraph 3 of the Judgment of Kawaley J in ***In the Matter of Xiaodu Life Technology Ltd.*** (Unreported, Grand Court, Kawaley J, 26 March 2018).

(v) whether the valuation experts can make requests for documents, etc. from the Dissenters; and

(b) Management Meetings:

(i) whether management meetings with the experts should be held on a "*without prejudice*" or open basis;

(ii) the reliance that can be placed on, and use, of the transcript of management meetings in expert reports and memoranda;

(iii) whether the valuation experts may convene multiple management meetings (if need be);

(iv) whether non-Cayman Islands legal counsel can attend management meetings; and

(c) the basis of valuation: whether the Company should be described as "*a going concern*" (as proposed by the Dissenters) for the purposes of the instructions to be given in paragraphs 1(a) and 32(a) of the Composite Comparison Draft Directions (the **"Draft Directions"**) to the Valuation Experts, for arriving at the "*fair value of the Respondents' shares*".

25. Each of these issues will be dealt with below by reference to the written submissions of the parties. Very extensive submissions were received in writing as well as oral submissions over the course of the two days of the hearing. I am obliged to the three sets of counsel for all their submissions and I record the fact that I have read and considered them all. I note in particular, my gratitude to the Walkers Dissenting Shareholders for the detailed examination of the prior case law presented in their submissions, much of which I adopt in my analysis below.

26. The parties have helpfully presented the already referenced composite document of Draft Directions which highlight the areas of disagreement. References will be made to this document throughout the course of my analysis.

DISCOVERY OF DOCUMENTS

Company Discovery

27. The importance of the Company's discovery in section 238 cases has been emphasized in numerous cases before this Court and the Court of Appeal. As alluded to above, the Court is heavily reliant on the evidence from the parties' valuation experts and from documents and information in a company's possession in order to make a determination of the fair value of dissenting shareholders' shares. By way of example:

(a) in ***Integra*** (at [11]), Jones J stated that "*It goes without saying that the information contained in Integra's own books and records is highly relevant to any appraisal of its fair value as a going concern*";

(b) in ***Homeinns Hotel Group v Maso Capital Investments Limited and Ors*** at [20] Mangatal J stated that it is the Company "*that will have the documents and information relevant to the determination of fair value*"; and

(c) in ***Shanda Games*** (at [55]), Segal J stated that the "*agreed directions established a process that was designed to ensure that all the documents and information held by Shanda and relevant to the fair value determination were disclosed via the electronic data room including the documents and forecasts prepared in connection with the Merger... ";*

(d) in ***Re Qunar Cayman Islands Limited***[8] ("**Qunar First Instance**"), Parker J made the following orders and observations:

(i) the Company shall give discovery "*by uploading all documents that are relevant to fair value...This is the usual order and I can see no good reason to depart from it in this case*" (at [22]);

(ii) "*This seems to me to be in keeping with the Court's approach in these types of cases. I do not think the Company should be made to do so [give discovery] only if an expert requires further documents and asks for them, rather it should be a general obligation of the Company to search for and produce all documents relevant to fair value*" (at [25]); and

(iii) "*if the Company is to be properly valued as a going concern [the dissenting shareholders] must have access to the information that the Company has, both with regard to its existing business and future projections*" (at [26]);

(e) the decision of Parker J was reinforced by the Court of Appeal in the ***Qunar Appeal***, which held at [45] that a company in section 238 proceedings has a general obligation to search for and produce all documents relevant to fair value, as it "*has put forward a price for the merger buy-out of its shares and it has done so on the basis of its own internal assessment of its business and prospects*";

(f) in ***Re Qihoo 360 Technology Co. Ltd***[9] *(*"**Qihoo First Instance**"), Mangatal J referred back to her decision in ***Homeinns*** and stated (at [78]) "*that in section 238 proceedings, the discovery exercise is absolutely central to the proper determination of fair value. The Company's own counsel stated in the Management Meeting, that the Company 'will start with a distinct advantage in litigation such as this since the company holds all the information. The purpose of discovery and a meeting such as this is to neutralise that information gap...'* "; and

[8] (Unreported, Grand Court, Parker J, 20 July 2017).
[9] (Unreported, Grand Court, Mangatal J, 27 July 2017].

(g) in ***In Qihoo 360 Technology Co. Ltd***[10] ("**Qihoo Appeal**"), Martin JA in the Court of Appeal said, at [3], "*proceedings under section 238 present two particular difficulties to the courts. First, all or nearly all of the financial information necessary to enable the Court to determine the value of a company's business, and hence of its shares, will inevitably be held by the company itself. The proper conduct of the valuation exercise will accordingly require that the company make adequate disclosure of that information. Secondly, although the task of determining the value is one for the Court alone, the Court will not usually be equipped to derive a value from the financial information without expert assistance. The consequent importance of the expert evidence means that the Court must have confidence that the valuations proposed are based on sufficient information; and that in turn means that the experts will often have to be given a substantial degree of autonomy in determining what information is needed for their valuations. ..... In general we agree with the statement of Jones J in* ***In the matter of Integra Group*** *..... that "the experts are the best judge of what information is or is not relevant for their purposes".*"

28. Accordingly, of critical importance to making an assessment of the fair value of a company is the ability of suitably qualified experts to gain a full and accurate understanding of the affairs and condition of the company, including information relating to its past history and future prospects as at the valuation date, in order to best assist the Court. If any element of the process is omitted, or if the company fails to comply with its discovery obligations, then the valuation is ineluctably prone to error. Complete and proper company discovery

[10] (Unreported, Court of Appeal, Martin JA, Newman JA and Morrison JA, 9 October 2017).

is therefore essential to ensure that the Court is properly able to determine the fair value of the shares.

29. It is also notable that discovery by companies has been a very vexed issue in a number of the post Integra cases. Since ***Integra*** there have been 20 or so section 238 petitions presented, almost all of which relate to Cayman Islands companies listed on United States stock exchanges with operating businesses in the PRC. In three of those cases extraordinary orders were made as a result of the company's failure to comply with its discovery obligations. In both ***Shanda Games*** (by that company's agreement) and ***Qihoo*** (by Court Order), independent forensic experts were appointed by the Court to conduct the discovery process on the part of the company due to each company's failings to properly address discovery. In ***Qihoo First Instance***, Mangatal J noted that such orders were *"exceptional"*[11] but nonetheless was satisfied that they were appropriate (the subsequent attempts by the company seeking leave to appeal from the Court and the Court of Appeal failed)[12]. In the case of ***Re Bona Film Group Limited***[13], McMillan J debarred the company from adducing expert evidence on the hearing of the petition as a result of the company's abject failure to provide discovery.

30. What this experience suggests, is that companies in section 238 cases have a marked tendency to seek to provide far more limited discovery than what dissenting shareholders seek and what would ordinarily be discovered in contested commercial litigation. 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).

[11] At [108].
[12] Qihoo Appeal.
[13] (Unreported, McMillan J, 13 March 2017) at [16].

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.

Paragraph 7 of the Draft Directions and its Appendix 3 (Merger Documents) – Period of time for specific discovery by the Company and categories of documents in Appendix 3

31. The Dissenters and the Company are agreed that the Company should upload to a data room all of the documents within its control that are listed in Appendix 3 of the Draft Directions, by way of specific discovery. This is reflected in paragraph 7 of the Draft Directions[14], where the Company has proposed that it uploads documents prepared or created in the two-year period[15] ending with the valuation date of 12 March 2018 (the "**Valuation Date**") and which fall into the categories of documents listed in Appendix 3 of the Draft Directions[16].

32. As confirmed in ***Integra*** (at [26]), the "valuation date" is to be the date of the extraordinary general meeting, as "*the fair value should be determined at the point immediately before the merger is agreed.*" The parties also agreed in ***Shanda Games*** (see [83(a)]) that the fair value should be determined as at the date of the extraordinary general meeting. The documents in Appendix 3 include those documents which should be readily to hand.

[14] Provided in the Hearing Bundle at Tab 6/Pg 3.

[15] The Company proposed in a letter from Harneys to Walkers dated 10 October 2018 a "*compromise*" of three years (instead of five years proposed by the dissenters) but would maintain that the appropriate time period was two years if the compromise was not accepted [Hearing Bundle/Tab 8/Pgs 218-220]. The offer was not accepted, and so the Dissenters approach this issue on the basis that the Company contends that two years is the appropriate time period.
In his submissions on behalf of the Company, Mr Choo Choy QC did however, contend for the three-year period. It therefore remained unclear whether the Company seeks directions for the two or three year period.

[16] Hearing Bundle/Tab 6/Pgs 15-18.

33. There is dispute in this case however- as mentioned above, as to how far back in time the Company should be required to go in relation to its discovery.

34. Before turning to the specific facts of the instant case, as a matter of general principle, I accept that it would be inappropriate to determine at a directions hearing that documents produced before a particular date could not be relevant (and therefore should not be discovered). The touchstone for discovery is relevance. Whilst it may well be the case that historic documents are less likely to be relevant to fair value than more recent ones, it is a dangerous principle to set down a recent cut-off point for discovery on the basis that the Court (which is not itself an expert valuation tribunal) can determine that documents created before the recent date are necessarily not relevant.

35. Furthermore, in order to arrive at an informed and credible valuation, the experts will need to understand the Company's business in considerable detail (see for example the judgment in ***Shanda Games*** which demonstrates the granularity with which experts should address their task). Setting a recent and arbitrary cut-off point would likely inhibit or even prevent the experts getting the full understanding that they need if their evidence is to fully inform and assist the Court.

36. In addition to these general points, according to the Proxy Statement, the Buyer Group submitted its first preliminary non-binding proposal letter to the board of the Company back on 5 June 2015. For whatever reason, the Merger was not approved until almost 3 years later at the EGM (i.e. 12 March 2018). As a result, it must be recognized, that if the two-year limit was applied up to the Valuation Date, this would (for no obvious, or good reason) exclude all documents, communications and other materials that were created or prepared before 12 March 2016. Such documents, communications and other materials

could well be relevant to the determination of fair value (or, at the very least, it certainly could not be said in the abstract at this stage that they are necessarily not relevant to fair value).

37. By way of example, following the announcement on 5 June 2015, a purported market check was undertaken and its results were prepared for reporting in October 2015. Clearly this falls outside of the two-year period proposed by the Company but would be relevant. Furthermore, if the relevant period does not cover the pre-announcement period, then the valuation experts will not have access to 'ordinary course of business' management projections; yet it is obvious that 'ordinary course of business' management projections produced prior to the announcement are relevant as they will need to be contrasted and compared to more recent projections produced by management with a view to completing the Merger transaction. To limit discovery of the documents set out at Appendix 3 to two years before the Valuation Date is unrealistic and does not allow for the robust testing of the projections or the material underlying it. For example, older projections can be analyzed for their accuracy when compared to more recent projections. If a company's historic projections have been more accurate then it may be that later projections are inherently more likely to be reliable and *vice versa* if historic projections have been proven to be unrealistic.

38. Turning to the directions made in other section 238 proceedings, in some cases, no time limit was placed on specific discovery made by companies - for example see:

Case	Order made where no time limit on Specific Discovery
Shanda Games	See Direction 4 of the Order for Directions dated 22 March 2016
Mindray	See Direction 5 of the Order for Directions dated 1 July 2016
Homeinns	See Direction 6 of the Order dated 12 August 2016
Bona Films	See Direction 4 of the Order for Directions dated 8 August 2016
Qihoo 360	See Direction 5 of the Order for Directions dated 25 October 2016
Trina Solar	See Direction 5 of the Order for Directions Approved by the Court dated 15 November 2016 .The Company cites Direction 5 (c) of this Order as an exception, pointing out that it called for "*any other sets of management projections in the three years immediately preceding the valuation date*". But this was not really an exception because there was no time limit imposed for the discovery of other wide categories of specific disclosure ordered by Direction 5 of this Order.

39. More recently, in ***Re KongZhong Corporation***[17] ("**KongZhong February**"), ***Re Nord Anglia Education, Inc.***[18] and ***Re Zhaopin Limited***[19], the Court required that specific discovery be completed by the companies for the five year period ending on the valuation date. For example, in ***KongZhong February***, Parker J held on this issue (at [29]), which was heavily contested by the subject company, that "*[t]here is no reason to shorten the period of disclosure to anything less than five years prior to the valuation date. That is a reasonable period of time over which to assess the relevant matters. Absent any evidence from the company as to why this should not be the case this seems to me to be a necessary and proportionate period concerning the exercise of a fair valuation and was adopted in Qunar.*"

[17] (Unreported, Grand Court, Parker J, 2 February 2018).
[18] (Unreported, Grand Court, Kawaley J, 19 March 2018).
[19] Order made on 25 October 2016 per Mangatal J.

40. I accept that similar considerations should apply in the present matter. For the above reasons, it is clear that the proposal put forward by the Company, first for a two-year, later by way of "*compromise*" for a three-year limit, is grossly inadequate and indeed contrary to the types of orders previously made by this Court.

41. The Walkers Dissenting Shareholders are content with the time period of two years prior to the date of the first offer on 5 June 2015 (which is less than the 5-year period ordered in the cases listed at paragraph 39 above). For their part, the Ogier Dissenters say that such documents that were created within the five years before the Valuation Date should be disclosed.

42. The reasons put forward by the Company for seeking to limit the period to less than five years are set out at paragraph 19 of its written submissions in these terms:

> "*In addition to obtaining access to 3 years' worth of discovery in relation to the issue of fair valuation, the valuation experts will also (i) have access to a significant amount of publicly available financial information about the (Company) (which has at all times been listed on NASDAQ and required to make public filings as to its business and financial position), and (ii) be able to request additional documents after having reviewed the (Company's) and the (Dissenters') discovery. Thus, there is scope under the Draft Directions for additional specific discovery to be requested, so as to expand the Company's discovery obligation beyond the 3-year period that it has proposed.*
>
> *Pursuant to the overriding objective, the Court should be wary of excessive and disproportionate volumes of discovery. This is especially so in circumstances where the valuation experts will have an opportunity to consider what further documentation should be produced either within or outside the 3-year period proposed by the Petitioner.*"

43. This submission is tantamount to an acceptance that while there may well be relevant discovery to be obtained going back beyond the three year period, the Company should only be obliged to provide it if and when the experts figure out what it should be, and so

ask for it. For all the reasons already mentioned, I do not consider that to be a sound basis on which to direct discovery in this matter.

44. As a matter of basic principle, I accept however, that the purpose of the discovery regime in section 238 cases must be circumscribed in addition to the test of relevance, also by a test of appropriate proportionality. Thus the question that ultimately arises on this aspect of the proposed directions is whether it is proportionate to require the Company to go back five years in producing that material.

45. As a starting point, it is common ground that the documents as originally set out at Appendix 3 and as proposed by the Company are relevant to the valuation. But the Dissenters contend that these categories are unduly restricted and do not reflect the full run of documents that the experts will likely require in order to be of the fullest assistance to the Court. While the bulk of the Company's disclosure may sensibly be targeted by reference to the specific categories of documents identified in Appendix 3, some categories, such as projections, accounts, management accounts and the like, will encompass documents generated more than two or even three years before the Valuation date. I accept that providing the earlier documents that fall within those well-defined categories will not be difficult for the Company.

46. Moreover, producing such material would not be an unproductive task. There are, as the Ogier Dissenters submit, sound reasons to believe that it will be helpful to the experts and the Court in determining fair value. It would for example, (and as already observed above) be useful to have the Company's more historic projections in order to assess how accurate the Company has been in making projections in the relatively recent past and, thus, how reliable the projections given prior to the Merger are likely to have been. It would similarly

be helpful, by way of further example, for the experts to know how the Company performed over a longer period so as to be able to identify any longer term trends in that performance that might be reflected in its future value. The list could go on.

47. More recent directions ordered such as in ***Nord Anglia***[20] and ***Zhaopin***[21] have been relatively expansive (recognizing the critical nature of the discovery process) and it is no doubt for such reasons that the five year period for the companies' discovery was directed in those cases. I accept that there is no proper reason why these fuller categories of relevant documents should have been excluded by the Company in its proposed directions, and there is no proper reason significantly to depart from the categories of documents ordered to be discovered by these cases. Accordingly, it is accepted that the additional categories of specific documents as would be disclosed over the five year period are appropriate to be discovered and it is so directed.

Paragraph 10 of the Draft Directions: Time period for general discovery of relevant documents by the Company

48. At paragraph 8 of the Draft Directions[22], the Company has sought to introduce mutual discovery of documents relevant to fair value by all parties. The issue of general discovery by the Dissenters will be dealt with below.

49. The fact that the Company should give general discovery is not controversial. The controversy is that the Company has sought to limit the general discovery of its documents to, again, the two or three-year period prior to the Valuation Date.

[20] [Walkers Authorities Bundle/Tab 14].
[21] [Walkers Authorities Bundle/Tab 32].
[22] [Hearing Bundle/Tab 6/Pg 3]

50. For reasons similar to the Company's proposal as regards its specific discovery, I accept that the two or three-year period proposed by the Company for the general discovery of its documents is wholly inadequate.

51. Further, it should be noted that in the following cases no time limit was ordered to be placed on the Company's general discovery:

Case	Order made where no time limit on General Discovery
Shanda Games	See Direction 5 of the Order for Directions dated 22 March 2016
Mindray	See Direction 4 of the Order for Directions dated 1 July 2016
Bona Film	See Direction 5 of the Order for Directions dated 8 August 2016
Homeinns	See Direction 7 of the Order dated 12 August 2016
Qihoo 360	See Direction 4 of the Order for Directions dated 25 October 2016
Trina Solar	See Direction 6 of the Order for Directions Approved by the Court dated 15 November 2017
KongZhong	See Direction 8 of the Order dated 5 February 2018

52. As mentioned above, more recently the Court in ***Nord Anglia*** and ***Zhaopin*** determined that a five-year period for general discovery was appropriate. In ***Nord Anglia***, Kawaley J stated at [12] that:

> *"[i]t has recently become customary to order disclosure for a period of 5 years prior to the transaction...I direct that the Company's basic obligation should be to:*
>
> *I) upload to the Data Room all documents (of whatever description etc.) which are relevant to the question of fair value created in the five year period ending with August 21, 2017, the Valuation Date (Dissenters' Order, paragraph 5, adding the explicit relevance limitation sought by the Company)...".*

53. In light of the cases referred to in paragraph 39 above, I accept that it has become customary for directions for general discovery by the Company to be given to cover at least the five-

year period prior to the Valuation Date. Accordingly, I direct that paragraph 8 of the Draft Directions be amended to refer to the "*five-year period ending with the Valuation Date*".

Discovery by Dissenting Shareholders

54. The Dissenters have agreed (see paragraph 8 of the Draft Directions) to disclose any documents they have within their possession, custody or power which fall within the categories listed in Appendix 4, insisting that their duty of disclosure should be subject to the over-arching limits of relevance to the fair value question.

55. The Court of Appeal in the ***Qunar Appeal*** ordered that the dissenting shareholders in that case make discovery of precisely those categories. The Company however disagrees with the insertion of the following phrase, "*subject to overarching limits of relevance to the fair value question*". This phrase ensures however, that the documents to be disclosed that fall within Appendix 4 are actually relevant to the question of fair value and an order in similar terms was recently made in ***Nord Anglia*** and ***KongZhong***, on the 16 August 2018 and 26 June 2018, respectively.

56. The Company has now also sought to introduce a general discovery obligation being imposed upon the Dissenters at paragraph 10 of the Draft Directions, seeking that they provide general discovery of all documents relevant to fair value in the three-year period up to the Valuation Date. Such a direction would require the Dissenters to search for documents outside the bounds of Appendix 4. In support, the Company cites what it understands to be an approval of a general mutual obligation by the Court of Appeal in ***Qunar*** at [75].

57. The Dissenters submit that such an approach is wrong. They have offered to provide exactly what the Court of Appeal considered was relevant in the ***Qunar Appeal*** and the

Company, which they say misunderstands ***Qunar***, has failed to set out any basis for broadening their discovery obligations. The Ogier Dissenters in particular[23], point out that the Court of Appeal in ***Qunar*** was only asked to consider whether or not dissenter discovery should be ordered in the form of Schedule B in that case, which is substantially similar to Appendix 4 in the present Draft Directions.

58. The Dissenters also submit that a general discovery order has never been made in respect of dissenting shareholders. Indeed, in keeping with those submissions, a review of the following cases demonstrates that discovery in respect of dissenting shareholders has only been ordered in respect of those categories prescribed by the ***Qunar Appeal*** or very similar:

Case	**Order where dissenter discovery has been ordered in respect of the categories prescribed by the Qunar Appeal**
Trina Solar	See Direction 1 of the Consent Order dated 25 April 2018
Qunar	See Direction 1 of the Further Directions Order dated 8 June 2018
Zhaopin	See Direction 1(a) of the Consent Order dated 19 June 2018
Kongzhong	See Direction 1(a) of the Consent Order dated 28 June 2018
Nord Anglia	See Direction 1 of the Order dated 16 August 2018

59. I accept that the process that the valuation experts will undertake is an "*insider*" valuation which necessarily means a review of the Company's books and records. It is obvious, as a result, why the Company would have a general obligation of discovery. In contrast, the Dissenters maintain that they have only ever had access to publicly available information

[23] At para 4 of their Reply submissions

to inform their decision to dissent from the Merger. This material (such as third party reports) is already the subject of discovery in Appendix 4.

60. Moreover, unlike the Company which is a single entity, the Dissenters constitute a significant number of different entities. They are "*outsiders*" to the Company's valuation process and are therefore unlikely to have in their control other than relatively little material relevant to that process. Indeed, as they assert, only such as might be publicly available. Accordingly, there is no reason why the Dissenters should be the subject of what would be a disproportionate general discovery order, as there is likely to be nothing else other than those categories in Appendix 4 that they could produce that would be relevant to fair value.

61. Indeed, the categories that were put forward by the company in the ***Qunar Appeal*** were the subject of scrutiny by the Court of Appeal who ultimately determined that at least one category of documents was not relevant. The Court of Appeal also had regard to the proportionality of the exercise it was then ordering the dissenting shareholders to undertake. The suggestion that the Dissenters should have to generally discover documents is, in my view, inconsistent with the careful analysis undertaken by the Court of Appeal in settling the categories of documents discoverable by dissenting shareholders.

62. In the absence of being told why I should stray outside of what the Court of Appeal held in the ***Qunar Appeal*** (and as has been ordered in the cases listed in the table above), I am obliged to reject the proposal that the Dissenters should be under a general discovery obligation. Accordingly, I accept as the Walkers Dissenting Shareholders propose, that paragraph 10 of the Draft Directions be amended to delete "*the Parties*" and replaced that phrase with "*the Petitioner*", so as to confine the general disclosure obligation to the Company.

Responses to requests from Valuation Experts – paragraphs 11 and 28 of the Draft Directions

63. The purpose of allowing the valuation experts to make additional requests for information from the Company is so that they are able properly to assist the Court with its determination of fair value. Obviously, in the course of considering the material disclosed by the Company, the valuation experts will discover information or documents that require clarification or elucidation. Similarly, they are likely to be put on enquiry by documents that are discovered, and need to ask for further documents or information. The ability of the experts to properly and fully assist the Court is aided by requiring the Company to supply further information and documents. Such further materials have proven to be of significant assistance in a number of section 238 cases: see ***Shanda Games***, as but one example.

64. It should be noted that it is not the case that it is just the dissenting shareholders' valuation experts in those cases who have asked (multiple) questions of companies. The company's valuation experts have the same right and, in previous section 238 cases, such company valuation experts have taken the opportunity to also ask (multiple) questions of the subject companies. An expert's requests are also copied to the other party's expert, so that the experts are fully and equally informed about what questions have been asked and whether further questions need to be asked.

65. Jones J in ***Integra*** at [11] stated that "*the experts are the best judge of what information is or is not relevant for their purposes*". This approach was endorsed by Mangatal J in ***Homeinns*** at [22], ***Qihoo First Instance*** at [77] and in ***In the Matter of Fountain Medical***

Development Ltd.[24] at [29]. The Court of Appeal in the ***Qihoo Appeal*** also endorsed Mangatal J's statement in respect of the expert's view on relevance at [15].

66. Further, it is established that where the parties and the Court had sanctioned the right of *experts* to make requests, the Company should provide further documents and information to the experts if requested. This was confirmed by the Court of Appeal in the ***Qunar Appeal*** at [45], and by Parker J in ***Qunar First Instance*** at [27].

67. I am informed that in ***Shanda Games***, the dissenting shareholders' expert issued six information requests over a four-month period, and asked at least 200 questions. Far from considering that volume of requests oppressive or excessive, Segal J praised the expert for his detailed understanding of the material (see [70b]). In ***E-House (China) Holdings Limited***[25] at [12]) Mangatal J noted that the experts submitted several hundreds of questions over a three month period for the purposes of producing the expert reports.

68. It is notable that despite the number of questions asked in section 238 cases, there is no recorded case of a company ever applying (let alone applying successfully) to be relieved of the obligation to answer questions or provide information on the ground that the questions were oppressive in number or frequency, or irrelevant.

69. At paragraph 11 of the Draft Directions, the Company has made a proposed direction for the Valuation Experts to be able to make information requests, but the wording is entirely different to the "*standard form*" of directions for such information requests seen in other section 238 cases. The Company has:

(a) sought to introduce an order by which the Dissenters are to respond to requests from the Valuation Experts;

[24] (Unreported, Grand Court, Mangatal J, 19 January 2018).
[25] (Unreported, Grand Court, Mangatal J, 3 November 2017).

(b) sought to introduce a "*two-round process*" of expert requests (in conjunction with paragraph 28 of the Draft Directions). After considering the Dissenters' Draft Directions, it has amended the deadline by which information requests must be received prior to the management meeting to 21 days, prior to the exchange of factual evidence. It has also belatedly inserted a deadline of 21 days rather than 14 days, by which the Company is supposed to provide responses to expert requests;

(c) refused to allow "*information*" (rather than documents) to be provided if so requested by a Valuation Expert; and

(d) objects to the Valuation Experts requesting documents, communications, materials or information produced after the Valuation Date.

Should Dissenters be required to respond to Valuation Expert requests?

70. The Dissenters submit that a dissenting shareholder in a section 238 case has never been subject to an order that it responds to Valuation Expert requests. They say that there are no cogent or sound principles or reasons why such an order should be made.

71. The Dissenters will be providing documents that are responsive to the categories of documents in Appendix 4 (as contemplated by the Court of Appeal in the ***Qunar Appeal)*** and so it is unclear what other documents, communications, information or materials they could possibly possess which could assist the Valuation Experts or why the Experts would need to request further information from them.

72. Of course, I have firmly in mind that the exercise the Court is undertaking is not to test any dissenting shareholders' assessment of fair value. Rather the question is 'what is the fair value of these shares?' Any amount which dissenting shareholders put forward as being

their determination of fair value would, in any event, be irrelevant because their case on fair value will stand or fall on their valuation expert's determination.

73. This is to be contrasted with the position of the Company. It has put forward a fair value determination; in the Proxy Statement it stated, to the entire world (and its regulators (including the SEC)) that the Merger Consideration equalled fair value. In its offer to the Dissenters under section 238(8), it repeated that it had determined that the Merger Consideration equalled fair value. Not only that, but these statements were based on a model produced by Houlihan Lokey, the global restructuring, investment and banking advisor.

74. In addition to this, as the extracts cited from the cases above demonstrate, the Company is clearly in possession of the essential material necessary to determine fair value "*from the inside*". It is obviously necessary that the Company will be asked for documents and information. The Company will also be filing lay evidence (as companies traditionally do in section 238 cases).

75. All this, I accept, is to be contrasted with the position of the dissenting shareholders. I am told that the Walkers Dissenting Shareholders will not be filing lay evidence; and Mr. Levy QC on their behalf informs from his extensive experience in these cases, that he is unaware of any dissenting shareholder in any of the recent section 238 cases filing lay evidence. Indeed it could be asked rhetorically, what questions could realistically be asked of dissenting shareholders?

76. I accept that there is no apparent good reason, nor is any explained, to require the Dissenters to answer questions. Such a requirement is not proportionate nor in keeping with the Overriding Objective.

The process for responding to expert requests

77. The Company has proposed a "*two-round process*" of expert requests. The proposal is that a "*sensible compromise*"[26] would allow the Valuation Experts to put the List of Questions and Issues (and reasonable follow up questions) to management at the Management Meeting (as per para 23 of the Draft Directions) and to put further questions and requests for further information and/or documents following that meeting (para 28 of the Draft Directions). However, the Dissenters submit that this is not only strange and unduly restrictive when considered in the context of the proposed deadlines but also contrary to the 'standard form' directions in previous section 238 cases.

78. The Company proposes to set the following limitations on the making of expert requests:

(a) first round – though it has now agreed to provide documents, communications and other material (minus information) within 21 days of receiving a request, no requests can be made within 21 days of the deadline for the exchange of factual evidence pursuant to paragraph 19 of the Draft Directions[27], until after the management meeting has taken place. According to paragraph 21 of the Draft Directions, the management meeting is to take place within 28 days of the exchange of any factual evidence;

(b) second round – the Valuation Experts would have only the period within 28 days from the holding of the management meeting (see discussion on this issue below) to submit further requests for documents and information, and such documents and information shall be uploaded within 21 days from the date of receipt of the request; and

[26] As explained at [21.3] of Mr Choo Choy's submissions.
[27] [Hearing Bundle/Tab 6/Pg 7].

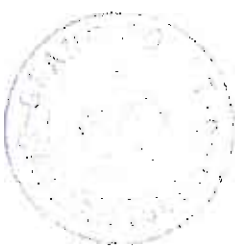
(c) the Company has not confirmed the date by which factual evidence should be exchanged, but this must necessarily take place prior to the exchange of the Valuation Reports. In ***Homeinns***, Mangatal J observed at [23] that "*it seems to me that it would be incorrect and cumbersome in any event to have factual lay evidence* led *after the experts have produced their reports. An appropriate order would be to have the affidavit factual evidence come first, after the discovery process, and before the expert reports*".

79. It is clear from the Company's proposal, that there will be many days (at least 49) both (a) between the exchange of factual evidence and the management meeting; and (b) the period between the 28 days after the management meeting and the exchange of Valuation Reports, in which the experts cannot make any requests. This "*two-round process*" would therefore result in an unreasonably limited period of time for the Valuation Experts to make expert requests in circumstances where it is likely that they will need to make on going requests as they continue preparing their expert reports.

80. The Dissenters argue persuasively that there is no basis for such a process for expert requests and that this would hinder the ability of the Valuation Experts properly to assist the Court, if there are arbitrary deadlines by which they must submit requests and there are large periods of time when they cannot make any requests at all. Indeed, Kawaley J in ***Nord Anglia*** stated at [28] that "*the efficiency of the trial preparation process would potentially be* impeded *if the Court were to impose arbitrary constraints on the number of questions which can be submitted at any particular time or within a particular period of time*". He considered that a minimum of 14 days was an appropriate amount of time between expert requests.

81. A direction that experts may make on going requests to companies which have an obligation to respond to such *requests* with a specific period of time for responding (mostly 14 days) is a form of direction that has been made in the following cases:

Case	Time limit for responding to requests
Shanda Games	"*within 14 days after receipt of the request, unless otherwise agreed or directed by the Court*" (see paragraph 8 of the Order for Directions dated 22 March 2016)
Mindray	"*within 21 days of receipt of such a request, unless otherwise agreed or directed by the Court*" (see paragraph 10 of the Order for Directions dated 1 July 2016)
Bona Film	"*within 14 days after receipt of the request, unless otherwise agreed or directed by the Court*" (see paragraph 8 of the Order for Directions dated 8 August 2016)
Homeinns	"*within 7 business days of receipt of such a request*" (see paragraph 11 of the Order dated 12 August 2016)
Qihoo 360	"*within 14 days after receipt of such a request, unless otherwise agreed or directed by the Court*" (see paragraph 8 of the Order for Directions dated 25 October 2016)
Qunar	"*within 14 business days of receipt of such a request, unless otherwise agreed or directed by the Court*" (see paragraph 11 of the Order dated 31 August 2017)
Trina Solar	"*within 14 days of receipt of such a request, unless otherwise agreed or directed by the Court*" (see paragraph 22 of the Order for Directions Approved by the Court dated 15 November 2017)
KongZhong	"*within 7 days of receipt of such a request, unless otherwise agreed or directed by the Court*" (see paragraph 13 of the Order dated 5 February 2018)
Nord Anglia	"*as soon as practicable with the target of responding within 14 days. To the extent that the Company is unable to respond to any aspect of a batch of Information Requests within 14 days, it shall, on the expiry of the 14 day period, notify the Dissenters' Expert of those outstanding Information Requests which it cannot answer, with reasons, and provide an answer to same with the following 14 days*" (see paragraph 19 of the Directions Order dated 6 March 2018)



Zhaopin	"*The Company shall provide written answers to the Information Requests within 3 weeks of receipt*" (see paragraph 17 of the Directions Order dated 18 April 2018)

82. The Company has provided no reasons setting out why there should be a deviation from such standard directions for expert requests that have been ordered in other section 238 cases. In litigation, deadlines are required or timelines will inevitably slip putting in jeopardy, and delaying, the listing of the trial. The responses from the Company will be required by the Valuation Experts in order to produce their reports and an on-going obligation to provide timely responses which will assist with this is required.

83. Further, it is submitted by the Dissenters that there has been a relatively standard direction in previous section 238 cases that no information requests can be submitted within 21 days of the date of exchange of valuation reports and that the "*within 21 days of the factual evidence*" deadline for the "*first round*" of requests" has no basis in any section 238 cases. Indeed, this direction is not consistent with Kawaley J's judgment in ***Nord Anglia*** (at [29]), where His Lordship agreed with the dissenting shareholders' proposal that the period should end 21 days before the exchange of reports, noting that "*the latter proposal is in my judgment the more sensible one, it being agreed that the purpose of the Requests is to furnish information for the reports*". This 21 days before exchange of reports deadline is also contained in:

Case	Time limit for responding to requests
Homeinns	"*such a request is made no later than 21 days prior to the exchange of the Reports pursuant to paragraph 15 below, unless otherwise agreed or directed by order of the Court*" (see paragraph 11 of the Order dated 12 August 2016)
Qihoo 360	"*such request for information of either Expert shall be made prior to the date 21 days before the exchange of expert reports, or any such date as mutually agreed by the parties*" (see paragraph 8 of the Order for Directions dated 25 October 2016)
Qunar	"*such requests for information of any Expert shall be made prior to the date 21 days before the exchange of expert reports, or any such date as mutually agreed by the parties*" (see paragraph 11 of the Order dated 31 August 2017)
Trina Solar	"*such request for information by either Valuation Expert shall be made prior to the date 21 days before the exchange of Valuation Expert reports, or any such other date as mutually agreed by the parties*" (see paragraph 22 of the Order for Directions Approved by the Court dated 15 November 2016)
Nord	"*Unless otherwise agreed, no Information Requests shall be submitted less than 21 days before the date fixed for the exchange of expert reports*" (see paragraph 19 of the Directions Order dated 6 March 2018)

Refusal to provide information to the Valuation Experts

84. It appears from paragraph 11 of the Draft Directions that the Company is not willing to upload "*information*" requested by the valuation experts. This would be odd. The cases *are* clear that the experts are the best judges of relevance - if the experts request "*information*" (just like "*documents*", "*communications*" or "*other materials*"), there appears to me no reason why it should not be uploaded. The order for the provision of "*information*", if so requested, has been made in the following cases (by way of example only):

Case	Experts allowed to request information
Shanda Games	"*The Petitioner shall upload into the Data Room...any additional documents, materials, communications...or information identified or requested by either expert*" (see paragraph 8 of the Order for Directions dated 22 March 2016)
Qunar	"*The Company shall upload to the Data Room any additional documents, materials, communications...or information requested by any Expert*" (see paragraph 11 of the Order dated 31 August 2017)
Trina Solar	"*The Petitioner shall upload to the Data Room any additional documents, materials, communications...or information requested by either Valuation Expert*" " (see paragraph 22 of the Order for Directions Approved by the Court dated 15 November 2017)
KongZhong	"*The Company shall upload to the Data Room any additional documents, materials, communications...or information requested by any Expert*" (see paragraph 13 of the Order dated 5 February 2018)
Nord	"..."*The Company shall upload to the Data Room any additional Documents or Information requested by any Expert*" (see paragraph 17 of the Directions Order dated 6 March 2018)
Zhaopin	"*The Company shall upload to the Data Room any additional documents, materials, communications...or information requested by any Expert*" (see paragraph 16 of the Directions Order dated 18 April 2018)

Documents, Communications, Materials or Information produced after the Valuation Date

85. The Dissenters propose at paragraph 11 of the Draft Directions that if any Valuation Expert requests documents, communications materials or information produced by the Company after the Valuation Date, these shall be uploaded to the Data Room. The Company objects, per Mr. Choo Choy QC, on the basis that this proposal "*violates*" the "*hindsight rule*". The objection is rejected by the Dissenters for two reasons.

86. Firstly, that neither the parties nor the Court should pre-judge by reference to a particular period of time, what will be relevant to the determination of fair value. The valuation experts will be professional people and will decide, prior to making a request, whether something they are seeking is relevant: it would not be appropriate to place limits on relevance by reference to time at this stage.

87. Of course, it is acknowledged however, that if the Company objects to a particular request, it will no doubt write to the valuation expert to express its view and, if not agreed, under the expert request regime being proposed by the Walkers Dissenting Shareholders, the Company may apply to Court to be relieved of the obligation to respond to the request.

88. Secondly, such an order for disclosure of post-Valuation Date material has been made in a number of previous cases:

Case	Time limit for responding to requests
Shanda Games	"*For the avoidance of doubt, if the experts so request, this may include documents, materials or information produced after the Valuation Date*" (see paragraph 8 of the Order for Directions dated 22 March 2016)
Bona Films	"*For the avoidance of doubt, if the experts so request, this may include documents, materials or information produced after the Valuation Date*" (see paragraph 8 of the Order for Directions dated 8 August 2016)
Homeinns	"*For the avoidance of doubt, if the Experts so request, this may include documents, materials or information produced after the Valuation Date*" (see paragraph 11 of the Order dated 12 August 2016)
Qihoo 360	"*For the avoidance of doubt, if the Experts so request, this may include documents, materials or information produced after the Valuation Date*" (see paragraph 8 of the Order for Directions dated 25 October 2016)
Qunar	"*For the avoidance of doubt, if the Experts so request, this may include documents, materials or information produced after the*

	Valuation Date" (see paragraph 11 of the Order dated 31 August 2017)
Trina Solar	"*For the avoidance of doubt, if any Valuation Expert so requests, this may include documents, materials or information produced after the Valuation Date*" (see paragraph 22 of the Order for Directions Approved by the Court dated 15 November 2017)
KongZhong	"*For the avoidance of doubt, if the Experts so request, this may include documents, materials or information produced after the Valuation Date*" (see paragraph 13 of the Order dated 5 February 2018)
Nord Anglia	"*For the avoidance of doubt, if the Experts so request, this may include materials produced after the Valuation Date* " (see paragraph 17 of the Directions Order dated 6 March 2018)
Zhaopin	"*For the avoidance of doubt, the Information Requests may be made from the date of the upload of documents to the Data Room pursuant to paragraphs 8 to 10 above and if the Experts so request, this may include documents, materials or information produced after the Valuation Date* " (see paragraph 16 of the Directions Order dated 18 April 2018)

89. I am satisfied and so direct that, if requested by a Valuation Expert, the Company shall provide documents, communications, materials or information produced after the Valuation Date and that paragraph 11 of the Draft Directions shall so provide.

Redaction due to laws of the PRC

90. At paragraph 16 of the Draft Directions, the Company has proposed that it effectively be exempted from uploading documents to the data room which would, by its understanding, be in breach of the laws of the PRC, including but not limited to China's State Secrets Laws, Confidential Communist Party Information Laws and the China Cyber Security Law.

91. At the hearing, no arguments were heard about this issue, apart from on behalf of the Walkers Dissenting Shareholders whose position is described below. I approach this matter

on the assumption that the Company maintains its position as set out above and in the Draft Directions.

92. Whilst the Walkers Dissenting Shareholders agreed that certain documents within the categories identified by the Company may need to be redacted due to PRC law, they are concerned that there is no proposal made by the Company by which the documents can at all be reviewed by the Dissenters.

93. The Walkers Dissenting Shareholders record that they do not wish to be difficult about this issue but consider it is likely that certain of the documents which the Company apparently wishes to withhold may be relevant to fair value (the Company's business being in the PRC and likely conducted in the PRC in Chinese).

94. I am concerned that the effect of the direction proposed by the Company would be that none of the Dissenters would be able to review such documents. As already noted, the Court itself is not an expert valuation tribunal and is invariably guided by the expert evidence. If any element of the process is omitted, or if the Company fails to comply with its discovery obligations, then the valuation would be prone to error.

95. The Walkers Dissenting Shareholders propose what I accept as a practical and workable solution to address this issue. It is proposed that *Direction 16* be amended so that the potential for documents to be redacted due to PRC law is specifically acknowledged but that: "*Upon request, the parties shall give reasons for a specific redaction. Upon request any document shall be made available in un-redacted form for electronic inspection by the parties' representatives within the PRC*".

96. I note that an analogous order was made recently in ***Zhaopin*** and I accept that it should be made in the present case.

MANAGEMENT MEETINGS

97. All are agreed that management meetings are a crucial element in the valuation process for ensuring the experts are able to determine the fair value of the Company. Key inputs into the valuation analysis will be derived from management projections and therefore it is crucial that the experts be given an opportunity fully to discuss matters with management in order that they properly understand the documents and inputs that they have to consider. Such meetings "*enable the valuation experts to obtain information about the merger company's business for the purposes of the experts' reports to this Court*" (see ***Nord Anglia*** at [38]).

98. The Company has sought to put the following limitations/conditions on management meetings:

(a) that there be only one management meeting;

(b) that the Valuation Experts cannot raise new topics or questions that were not included in the original List of Questions and Issues, unless the Company agrees;

(c) that non-Cayman Islands attorneys who are not engaged in this matter should be able to attend at management meetings;

(d) that management meetings be held on a "without prejudice" rather than an open basis. This would mean that:

(i) nothing said at management meetings can be referred to in the Valuation Reports, the Joint Memorandum or the Supplemental Valuation Report or otherwise become admissible as evidence; and

(ii) the transcript of the meeting would not be admissible in evidence and would not be uploaded to the data room.

99. The Dissenters oppose the above limitations for a number of reasons set out below which I largely regard as reasonable and acceptable. I note here that the deadlines referenced below as set out in the Draft Directions have regrettably been superseded by the passage of time due, to a large extent, to my unavailability to have completed this judgment before now. The deadlines will need to be adjusted accordingly.

Number of Management Meetings to be ordered – Paragraphs 20 and 21 of the Draft Directions

100. At paragraphs 20 and 21 of the Draft Directions, the Company has made reference to one management meeting being organized by 1 December 2018, with the meeting to take place within 28 days of the exchange of factual evidence or otherwise agreed.

101. Given the importance of management meetings, it is unclear as to why the Company is seeking to limit the number of management meetings to only one. In previous section 238 cases, it was accepted and/or directed that the valuation experts may convene such management meetings as they considered appropriate:

Case	Multiple Management Meetings or Single Management Meeting
Shanda Games	Multiple (see paragraph 9 of the Order for Directions dated 22 March 2016)
Mindray	Multiple (see paragraph 11 of the Order for Directions dated 1 July 2016)
Bona Films	Multiple (see paragraph 9 of the Order for Directions dated 8 August 2016)
Homeinns	Multiple (see paragraph 12 of the Order dated 12 August 2016)
Qihoo 360	Multiple (see paragraph 9 of the Order for Directions dated 25 October 2016)
Qunar	Multiple (see paragraph 12 of the Order dated 31 August 2017)

Trina Solar	Multiple (see paragraph 23 of the Order for Directions Approved by the Court dated 15 November 2017)
KongZhong	Multiple (see paragraph 14 of the Order dated 5 February 2018)

102. It must be recognized that at management meetings, the experts are afforded an opportunity to discuss and clarify important issues with representatives of the Company. Given that the valuation experts will be professional people with important reputations to maintain (and will also be subject to cross-examination in due course), they should be the best judges of whether more than one management meeting is necessary. It is, in my view, unduly restrictive to limit the number of management meetings to only one.

103. Further, it is submitted by the Dissenters that the requirement that the meeting take place within 28 days of the exchange of factual evidence is arbitrary and has no basis in law.

104. They propose that paragraph 20 of the Comparison Draft Directions be amended to be as follows and that paragraph 21 be deleted:

> *"20. Within 21 days of a request by a Valuation Expert, the parties shall agree on the time and date, format (telephone conference, video conference or in person), and (if applicable) location for a meeting between members of the Petitioner's management team and the Valuation Experts for the purpose of providing information and answering queries which are relevant to the preparation of the Valuation Experts' respective Valuation Reports (the Management Meetings)".*

105. It is understood by the Dissenters that despite the Company having volunteered to have a management meeting its position is that the Court does not enjoy jurisdiction to order them. In point of fact, as Mr. Levy QC submits, two judges, very experienced in section 238

cases, have concluded that the Court does have jurisdiction – see the judgments in ***Re Trina Solar Limited***[28] of Segal J, and Parker J in ***KongZhong*** at [24].

The ability to raise new topics or questions that were not included in the List of Questions and Issues – paragraph 23 of the Draft Directions

106. The Company has sought to set out the framework for questions to be asked by the Valuation Experts at management meetings by requiring a List of Questions and Issues to be sent beforehand. This requirement for a list has been accepted by the Dissenters but the Company also seeks to limit the ability for the Valuation Experts to ask follow up questions unless the Company agrees to this, mollifying this by the qualification that such agreement by the Company shall not be unreasonably withheld.

107. The Dissenters seek to allow the Valuation Experts to ask reasonable follow-up questions at management meetings, including new issues not included in the List of Questions and Issues, on the basis that reasonable accommodation shall be made by the Company without the Company having a right to refuse.

108. I accept that it is important to allow for further questions to be asked after the parties have submitted their List of Questions and Issues. Jones J in ***Integra*** states at [11] that "*the experts are the best judge of what information is or is not relevant for their purposes*". Far from assuming that professional people, such as the experts, will use the management meetings as an attempt to ambush, the Court should assume that they will act in a proper professional manner. The need to ask additional questions or address additional issues as they may arise is obvious and I accept that the Court should not be unduly prescriptive on this issue.

[28] (Unreported, Grand Court, Segal J, 2 November 2017).

109. The Valuation Reports in these types of cases are usually the focus at trial and so it is of the utmost importance that such reports are produced with sufficient information from management.

110. I accept that unreasonable or undue constraints should not be placed on the ability of the experts to raise new issues during management meetings. Such questions will have no bearing, as the Company suggests, on timetabling or trial progress. The principle that Kawaley J applied in ***Nord Anglia*** [28] about imposing "*arbitrary constraints on the number of questions which can be submitted at any particular time or within a particular period of time*" can equally be applied to this List of Questions and Issues. I accept that the experts should have some latitude to decide whether other topics or questions should be raised and would only expect the Company to act reasonably in this regard.

111. Indeed, in ***Re KongZhong Corporation*** (***"KongZhong August"***)[29], there was provision for the experts to prepare a list of questions and/or issues to be provided to the Company not less than 14 days prior to the meeting which had with it a "best endeavours" obligation for the experts to ensure that the Company is aware ahead of time of the questions and/or issues to be discussed. The experts were not to be limited to the matters set out in the list of questions, but rather could raise any matter they considered relevant to the question of fair value (see ***KongZhong August*** at [9]).

112. In addition, in ***Zhaopin***[30], the directions order also allowed the expert to raise a new issue if not included in the List of Questions and Issues, in terms the same (at paragraph 19.7) as those proposed in paragraph 23 by the Dissenters for the Draft Directions as follows:

> "*Each Valuation Expert shall submit to the Petitioner [ie: the Company] a list of questions and/or issues to be discussed (the List of Questions and*

[29] (Unreported, Grand Court, Parker J, 6 August 2018).

Issues) no later than 14 days before the agreed date for a Management Meeting. The List of Questions and Issues shall be copied by email to the Valuation Expert for the other party simultaneously. A Valuation Expert may ask reasonable follow-up questions at a Management Meeting, to the extent he considers necessary. If a Valuation Expert needs to raise a new issue not included in the List of Questions and Issues, reasonable accommodation shall be made by the Petitioner and agreement to provide a response shall not be unreasonably withheld."

I regard those terms as reasonable and so direct.

Attendance at Management Meetings – paragraph 24 of the Company Draft Directions

113. The Company has sought to delete the reference to the Parties' "*chosen Cayman Islands*" legal advisors attending management meetings, which would have the effect of allowing any legal advisors to attend at management meetings. No reason has been asserted as to why attorneys from other jurisdictions would need to attend at management meetings being convened in respect of these proceedings in this Court governed by Cayman Islands law. The Walkers Dissenting Shareholders submit that only the parties' respective Cayman Islands legal advisors (all of whom have offices in both the Cayman Islands and Hong Kong) should be able to attend given that they are the parties' chosen Cayman Islands legal advisors for this proceeding.

114. I am not persuaded that it would be appropriate to restrict the Company (or any other party for that matter) from being represented at management meetings by the lawyers they would wish to attend. This would of course, not mean that the costs of attendance by non-Cayman Islands lawyers would be recoverable in these proceedings.

"Without prejudice" v open basis – impact on what can be referred to in expert reports – paragraphs 27 to 29 of the Draft Directions

115. The Company has proposed to draft the directions in such a way that the management meetings will not only be held on a "*without prejudice*" basis, but that the valuation experts cannot refer to anything discussed at the management meetings in any of their reports. The Dissenters submit, reasonably in my view, that these restrictions will hinder the effectiveness of management meetings and also the ability of the experts to prepare their reports. An unacceptable, if extreme, outcome, could be the presentation of reports to the Court which do not truly reflect fair value because, although the Valuation Expert might have obtained relevant information, he would be precluded from relying upon it to explain or justify his report.

116. In the following previous section 238 cases, management meetings have been ordered to be held on the "*open*" rather than "*without prejudice*" basis:

Case	Management Meeting considered 'Open'
Shanda Games	Open (see paragraph 9 of the Order for Directions dated 22 March 2016)
Mindray	Open (see paragraph 11 of the Order for Directions dated 1 July 2016)
Bona Film	Open (see paragraph 9 of the Order for Directions dated 8 August 2016)
Homeinns	Open (see paragraph 12 of the Order dated 12 August 2016)
Qihoo 360	Open (see paragraph 9 of the Order for Directions dated 25 October 2016)
Qunar	Open (see paragraph 12 of the Order dated 31 August 2017)
KongZhong	Open (see paragraph 14 of the Order dated 5 February 2018)

Recent case law on whether management meetings should be held on a without prejudice or open basis

117. Mr. Levy QC acknowledges that there has been some recent conflicting jurisprudence on whether management meetings should be held on the "*without prejudice*" or open basis. For example, in ***Nord Anglia,*** Kawaley J ordered the management meetings to be held on a without prejudice basis while in ***KongZhong February***[31], Parker J ordered that the meetings be held on an open basis. In ***Nord Anglia*** at [32], the Court noted that in previous cases, *"parties have mostly agreed that management meetings should be open and that a transcript of the meeting should be prepared...In the most recent case (KongZhong), Parker J has affirmed that open meetings are to be preferred...".*

118. Kawaley J in ***Nord Anglia*** also set out the factors for the Court to consider when the parties disagree as to whether the management meeting should be "*open*" or "*closed*". He stated [35] that "*the Court must determine what meeting rules will best further the practical function of the meetings. This requires an assessment of what practical function such meetings serve and what the evidence suggests will best further the economical and expeditious advancement of the present Petition*".

119. In ***KongZhong February***[32], Parker J stated at [25] that "*parties should proceed on the basis that such a meeting is "open" so that experts are entitled to refer to and rely upon any information obtained during the course of such meetings in helping them to prepare their reports, unless good arguments are advanced as to why that should not be the case*".

120. Parker J also states (at [26]) that "*It seems to me that it would be much more productive if the experts were able to rely on information obtained at such meetings. If in this case any*

[31] **[Authorities Bundle/Tab 13]**
[32] Cause FSD 112 OF 2017 (RPJ), (unreported) 5 February 2018.

party wishes to suggest that the experts should not rely on information obtained at these meetings for the purposes of their reports...they may apply to the court with reasons as to why that should be so".

121. It is submitted, and I am persuaded, that it would ordinarily be wrong in principle for the Court to direct that management meetings be conducted on a without prejudice basis. In simple terms, there appears no reasonable basis for such a direction, at least not in this case. Nor is there anything about management meetings that would naturally attract "without prejudice" privilege. They are not an attempt to settle litigation, or agree issues. Certainly, as I am told, the Dissenters' valuation expert will not have instructions to settle any issues at such meeting, and neither will any of the Cayman Islands attorneys in attendance. Thus, the meetings would not generally be considered to be 'without prejudice'.

122. It follows that if a particular communication is not in fact or law 'without prejudice' it is difficult to see why the Court could direct that it should in fact or law be considered to be, or be, without prejudice.

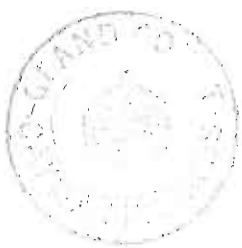
Why meetings should be held on an open basis

123. The Dissenting Shareholders respectively submit that Parker J's reasoning as to why the meetings should be held on an open basis should be accepted and that the Company's proposed directions should not be accepted for the following reasons expressed with more particularity:

(a) The directions proposed by the Company mean that the information gained from management meetings can only be referred to in specific information requests but not in the experts' reports or memoranda. Although the Company has compromised on this issue (as in the original proposed directions, it did not wish for such

information to be referred to at all), the Dissenters submit that this approach is unreasonable. If the meetings are to be held on a without prejudice basis, the Valuation Experts will not be able to refer to what was disclosed during the management meeting(s) as part of their evidence. If the experts are precluded from referring to the information provided during a management meeting, "*so that information supplied at the meeting which they considered relevant to fair value could not be explained in their reasoning and by reference to their reports*" the experts will be "*put in a very difficult and unfair position*" as put by Parker J at [44] of ***Kongzhong August***. As I already observed above, not only would this be unfair on such experts, it would also be of no assistance to the Court and could potentially affect the outcome by affecting the extent to which a report might be regarded as reliable. I agree with the Dissenters that it would be illogical that an expert could not rely on, and inform the Court of, a matter learnt during a management meeting in their reports.

(b) The practical function of the management meeting is for the Valuation Experts to derive information for the purpose of producing their expert valuation reports. If the Valuation Experts are unable to refer in their reports or memoranda to what was said in the management meetings, then the utility of having such meetings, for the experts and therefore the Court is greatly diminished. By way of further illustration, being able to use the transcripts of meetings will necessarily be important to ensure that the respective Valuation Experts are able to refresh their memories as to what was said in management meetings and consider whether there are any areas to focus



on or to follow up on. It will also ensure that there are no material miscommunications or misunderstandings so that a proper record was agreed.

(i) Here it is to be recognised that in ***Nord Anglia***, where the meeting was ordered to be held on the without prejudice basis, it appears that that basis would not be allowed to interfere with the valuation experts' reports being reliable for ensuring a proper outcome. Kawaley J held at [41] that: *"I find that having the Management Meeting recorded and a transcript prepared will clearly assist the experts in preparing their reports in a more efficient manner than being required to take manuscript notes. It is also in my judgment clear that the primary function of the Management Meeting, which it is agreed should take place, is to enable the experts to obtain information for use in preparing their reports."* (emphasis added) Kawaley J also allowed the transcript to be admissible if agreed or directed by the Court and allowed the experts to use the information obtained at the Management Meeting for the purposes of preparing their Reports (at [42(3)] and [42(4)];

(ii) In ***KongZhong August***, Parker J confirmed that while the transcript should not automatically be admissible as evidence, he confirmed at [35] that "[t]*he experts are free to rely on explanations, clarifications, comments and the like made by the Company's management at the meetings to the extent that they facilitate the preparation of their reports. For this they can also use the transcript*"; and

(iii) He also confirmed that "[t]*o further the overriding objective...all relevant information upon which ultimately to make a decision on fair value, the maximum benefit that can be derived from these meeting [sic] is desirable. The Court should do what it can to facilitate this. That is why the meetings should be open*" (at [37]).

124. To provide a practical example of the difficulty of allowing such meetings to be conducted on the "*without prejudice*" basis, the Court is invited to consider a situation based on the facts of ***Shanda Games***. Assume, said Mr. Levy QC, that the expert is aware that before the Valuation Date the company had a particular game that was a runaway success that had a material impact upon the expert's valuation of the company. Assume that that is not evidenced in the discovered documents. If such a matter is discussed in a management meeting but not evidenced in the documents, then there is a very real risk that the final report on fair value will be incomplete and/or misleading to the extent it is unable to deal with a point which materially affects valuation on the basis the information was provided on a without prejudice basis.

125. No question put in open correspondence could refer to the revelation in the management meeting, and even if interrogatories were served the Company could still answer in a manner which is at odds with what was said at the management meeting. So the expert would be required to sign a report that does not necessarily represent his/her true opinion, but s/he could not explain why, because the truth is cloaked in "*without prejudice*" privilege. The Valuation Experts would be in a somewhat difficult position because even if they can use what was said at the management meeting(s) to prepare information

requests, there would be some difficulty in using responses given in such circumstances in their reports.

126. On a more extreme level, assume that at the meeting an expert was told that a particular input in the Company's projections was simply wrong. It approaches the absurd for the expert to be unable actually to say as much in the report, leaving the expert to try and prove the point by reference to data (that may not be as clear or compelling). Further, this would not assist the Court with coming to a determination of fair value.

127. I agree and direct as proposed by the Dissenters that the management meeting(s) be held on an open basis, that the meeting(s) be recorded and that a transcript be prepared of the management meeting(s) as follows and that paragraph 30 of the Draft Directions be deleted and replaced:

> "*29. The Petitioner shall arrange for the Management Meeting(s) to be recorded and a transcript shall be prepared, with the recording and transcript each to be circulated to the parties and uploaded to the Data Room as soon as practicable thereafter; with the costs of the recording and transcript to be borne equally by the Petitioner and the Respondents (jointly), which costs are to be costs in the proceedings.*
>
> *31. To the extent he considers it appropriate to do so, a Valuation Expert may refer to information provided in a Management Meeting in his Valuation Report*".[33]

128. I also direct, in deference to any such concerns as the Company might have,[34] that as a first step, specific passages intended to be relied upon by the experts are to be put to the Company for formal confirmation or failing which, (as I interpolate) for *proposed* correction or expansion of such passages. This will lighten the burden of confirmation or correction if the Company is concerned about the accuracy of the transcript. Moreover,

[33] See [31] of the Draft Directions.
[34] And as proposed at [16] of the Company's Reply Submissions.

before it is circulated or uploaded to the data room, the Company will be permitted, as the Dissenters propose, to have a period of two weeks following receipt of the transcript to consider the transcript and, if so, explain to the Dissenters, if there are any errors in the transcript (with supporting documents demonstrating such error(s)). The actual recording of the management meeting(s) should be available also to assist in this regard.

129. One can anticipate that there might be disagreement over proposed corrections or expansions but if such disagreements proved relevant to the expert(s)' valuation(s), this can be noted and explained to the Court.

BASIS OF VALUATION

130. The Dissenters have proposed, at paragraph 1 (a) of the Draft Directions, that they and the Company each have leave to instruct a valuation expert to opine on the fair value of the Dissenters' shares in the Company "*as a going concern*" as at the Valuation Date. The Company objects to the inclusion of the words "as a going concern" in the Directions. It objects on the primary basis that the words do not appear in section 238(11) of the Law. The Company also objects on the basis (as explained in its Submissions)[35] that "*what is to be valued is the fair value of the dissenter's specific number of shares... this does not necessarily preclude a valuer from taking the view that the Company was in fact a going concern as at the valuation date, and that the best guide to the fair value of the dissenter's shares is as a proportion of the value of the Company as a going concern. But this should be a matter for the valuation experts to decide in light of their review of the Companies' financial position, not for the Court to direct at this early stage of the proceedings. The Court should not at this stage seek to preclude the valuation experts from identifying any*

[35] Most latterly at [11] of its Reply Submissions

and all valuation methodologies that they may consider to be appropriate for the purposes of determining the fair value of the dissenters' respective number of shares in the Company, whether or not such methodology is based on a going concern assumption".

131. Importantly, the Company further submits, the directions most recently made in ***Xiaodu*** on 5 September 2018[36] *(and so* after the Court of Appeal's judgment in ***Shanda Games***[37]**)** did not include the going concern language. This is to be contrasted with those made in ***Zhaopin*** on 18 April 2018 and so after the Court of Appeal's judgment in ***Shanda Games*** as well, where the words were included.

132. So, submits the Company, the post-***Shanda Games*** examples appear to be evenly split between the inclusion and non-inclusion of the going concern language and (it would follow) that there is no established practice which this Court should follow.

133. On this issue, the Reply of the Ogier Dissenters at [14] per Mr. Adkin QC is, to my mind, compelling having regard to my understanding of the decision in ***Shanda Games***.[38] As he submits, the question that arises is whether the Company is right to say that the going concern basis has been superseded by the decision of the Court of Appeal in ***Re Shanda Games***. As a starting point, it is fair to say that it would be extremely surprising if it had. The Dissenters' appeal in that case was concerned with three discrete points of valuation methodology which had nothing to do with the going concern basis of valuation and which

[36] At paragraph 22(1) the directions provided: "The Experts shall prepare reports… which shall be: (1) confined to **the issues of the fair value of the Dissenter's shares in the Company as at the date of the EGM** and the fair rate of interest for the purposes of section 238(11) of the Companies Law (2018 Revision)" [emphasis added]

[37] Reported at 2018 (1) CILR 352.

[38] The ratio appears at [50] of the Judgment on behalf of the Court per Martin JA: "*50. For these reasons, it appears to me that section 238 requires fair value to be attributed to what the dissentient shareholder possesses. If what he possesses is a minority shareholding, it is to be valued as such. If he holds shares to which particular rights or liabilities attach, the shares are to be valued as subject to those rights and liabilities. As a matter of mechanics, this can be done by adjusting the value that the shares would otherwise have as a proportion of the total value of the company; but failing to make such adjustments means that particular rights or liabilities will often be ignored and the shares will be valued as something they are not. It follows that the judge (and Jones J in Integra before him) was wrang to hold that a minority discount should not be applied in the assessment of the value of the Dissenting Shareholders' shares. I would allow Shanda's appeal on the minority discount point*".

were in any event dismissed. The company's appeal, other than raising a secondary point on interest, was mainly concerned with whether a minority discount should be applied to the valuation of the shares. That part of the appeal was allowed, but it had nothing to do with the going concern basis of valuation. -

134. For the following further reasons articulated by Mr. Levy QC, I am satisfied that I should now direct that the valuation of the shares of the Dissenters shall be done on the basis of the Company as a going concern.

135. Particularly given the plans to re-float the business of the Company as a going concern in the PRC, it cannot be suggested that it was not a going concern as at the Valuation Date. Whilst "*going concern*" is not a defined term in law its meaning is well understood. Thus by way of example, the Financial Reporting Standard applicable in the United Kingdom and Republic of Ireland (FRS 102) issued by the Financial Reporting Council[39] explains at paragraph 3.8 that "*an entity is a going* concern *unless management either intends to liquidate the entity or to cease trading, or has no realistic alternative but to do so*"[40]. This explanation of a going concern is very much along the lines explained Mr. Levy QC at the hearing, and, is in keeping with the analysis of Lord Millett on behalf of the Privy Council in ***Demarco***[41] to which the Court was then taken.

136. The notion that the Company was not a going concern, and should not be valued as such, is therefore plainly wrong. It had a business and there were no plans to wind it up.

137. The Court of Appeal's decision in ***Shanda Games*** was not to the effect that that company was not a going concern, or that companies that take advantage of section 238 are not, or

[39] The body that regulates auditors, accountants and actuaries in the United Kingdom.
[40] FRS 102 replaced FRS 18, but the relevant section is to materially the same effect.
[41] CVC/Opportunity Equity Partners Ltd and another v Demarco Almeida [2002] UKPC 16, 2002 CILR 77,

should not be valued as, going concerns. Rather all the Court did, in effect, was to value it on the second of the bases discussed by Lord Millett[42], namely as a going concern but subject to a minority discount.

138. As to paragraph 13 of the Company's Reply Submissions, it is agreed that subject to any appeal to Her Majesty in Council in ***Shanda Games***, that the shares of minority dissenting shareholders will be valued as a minority interest. However, whether the Company was a going concern or not is irrelevant to that point. Indeed, if the Company was not a going concern, then, per Lord Millett in ***Demarco***[43], the valuation would be on a liquidation basis and all shareholders would be entitled to a *pari passu* distribution (which would obviously be pro rata in accordance with long established authority).

139. However the Company errs (ominously says Mr. Levy QC) when it suggests that, absent a specific direction, the valuation experts in this case would not be precluded from valuing the Company as a going concern. It offers no evidence why the Company was not a going concern; it plainly was[44]. I accept that it is 'ominous' for the Company to state that the experts would not be precluded from valuing as a going concern because, as ***Demarco*** explains, there are, in law, only three bases for valuing a company. The first two are, as a matter of law, as a going concern. The third is on a liquidation basis. In not accepting the going concern basis, the Company is more than a little coy in this regard; if the Company is not to be valued as a going concern, then it should state, as a matter of both fact and law, what is it to be valued as, and why? These are the very parameters of the valuation experts' task, and should be clearly stated.

[42] And as discussed by the Court of Appeal at pp381-384

[43] At [41] of the CILR report.

[44] First, the business of the Company continued post-privatisation; secondly any flotation (which was apparently to occur imminently) would have been of the Company as a going concern – insolvent entities are not (honestly and lawfully) floated.

140. Moreover, I agree that this point is conclusively determined (against the Company) because, when the Special Committee was considering the value of the Company, it did so on a going concern basis. The following appears at page 33 of the Company's Form 13E3 dated 1 February 2018, which was filed with the SEC (and therefore amounted to a statement by the Company to the world at large (including its regulators and the NASDAQ Exchange upon which it was listed):

> *"Neither the Special Committee nor the Board considered the liquidation value of the Company's assets because* ***each considers the Company to be a viable going-concern business where value is derived from cash flows generated from its continuing operations****. In addition, the Special Committee and the Board believe that the value of the Company's assets that might be realized in a liquidation would be significantly less than its going-concern value for the reasons that (i) liquidation sales generally result in proceeds substantially less than the sales of a going concern; (ii) it is impracticable to determine a liquidation value given the significant execution risk involved in any breakup of a company; (iii) an ongoing operation has the ability to continue to earn profit, while a liquidated company does not, such that the "going-concern value" will be higher than the "liquidation value" of a company because the "going concern value" includes the liquidation value of a company's tangible assets as well as the value of its intangible assets, such as goodwill; and (iv) a liquidation process would involve additional legal fees, costs of sale and other expenses that would reduce any amounts that shareholders might receive upon liquidation.* ***Furthermore, the Company has no intention of liquidation and the Merger will not result in the liquidation of the Company.*** *Each of the Special Committee and the Board believe the analyses and additional factors it reviewed provided an indication of the Company's going-concern value. Each of the Special Committee and the Board also considered the historical market prices of our ADS as described under the section entitled "Market Price of the Company's ADSs, Dividends and Other Matters—Market Price of the ADSs" beginning on page 68. Each of the Special Committee and the Board considered the purchase prices paid in previous purchases as described under "Transactions in Shares and ADSs" beginning on page 104."* **(Emphasis added)**

141. Finally on this point and as already mentioned, the Company argues (in paragraph 13 of the Company's Reply Submissions) that the experts should not be precluded from identifying any and all methodologies they consider to be appropriate for the fair value of

the Dissenters' shares. That is of course correct; but the context in which it is written demonstrates what Mr. Levy QC describes (and I agree) is a surprising failure to understand the difference between methodology (i.e. the process of valuation – be it discounted cash flow, comparable company analysis etc.) and the subject matter of the valuation (i.e. the Company at the Valuation Date) about which there can be no dispute and which is what the "going concern" language defines. The experts are at liberty to choose whichever methodologies they prefer; but they are not at liberty to choose what they are valuing.

142. Accordingly I direct, as has been directed in all bar one of the section 238 cases (and little is known about that one case[45]), that the Company be valued as at the Valuation Date as a going concern.

Duplication of legal costs

143. The Company argues that the Court should now direct that, in the event that they are successful and entitled to recover their costs as a matter of principle, the Dissenters collectively shall be limited to recovery of only one set of attorney and leading counsel costs. This the Company would justify by analogy with the direction, agreed by the Dissenters, that they should among them be entitled to instruct only one valuation expert (and so be entitled to the attendant costs if successful).

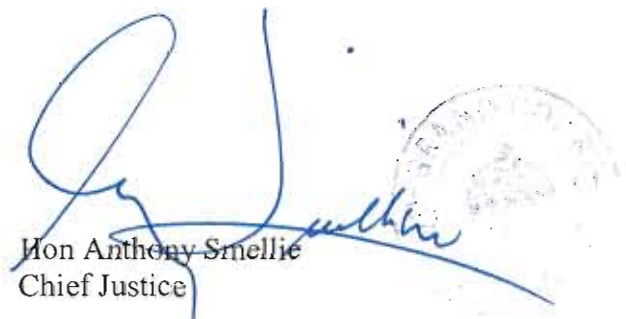
144. There are reasonable arguments in opposition from the Dissenters who, primarily, argue that as parties whose shares in the Company are being acquired against their wishes, it lies ill in the mouth of the Company to dictate how they should be represented. The primary

[45] For instance, Mr. Levy observes that it has not been ascertained whether the company was to continue as a going concern or be liquidated.

position is that any party should be represented by lawyers of their own choosing and if successful, should be entitled to their reasonable costs of representation.

145. Having noted the arguments and counter-arguments, I direct that the issue be reserved until after the trial on fair value, for resolution if needs be at the conclusion according to the outcome.

146. I invite the parties to settle the Draft Directions in keeping with the foregoing rulings and submit for execution by me as soon as possible. I am very mindful of the delay in the provision of this judgment and hope that the process may now proceed to obtaining of the valuation reports and trial, if not by the planned deadline of February 2020, then as soon as possible thereafter. The time since judgment was reserved in October last year has seen the ***Shanda Games*** appeal taken in the Privy Council (in March 2019) and that Court's awaited judgment, which is expected any day now, will resolve the questions of whether shares are to be valued on the basis of a minority discount and the applicability of interest. The time since judgment was reserved in this matter should also have allowed for at least the agreed aspects of the discovery exercise to have begun.



Hon Anthony Smellie
Chief Justice

18 July 2019