GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 275 OF 2020 (MRHCJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF 58.COM, INC.

IN CHAMBERS

Appearances:	**Mr. Richard Boulton KC with Caroline Moran, Malachi Sweetman and Daniel Mills of Maples for the Company**
	Mr. Jonathan Adkin KC instructed by Dunzelle Daker of Ogier, Katie Logan of Campbells, Sam Dawson, Mark Ffrancon Dowds and Tom Stuart of Carey Olsen and Rocco Cecere of Collas Crill for the Dissenters
Before:	**The Chief Justice, the Hon. Justice Ramsay-Hale**
Hearing Date:	**14 March 2023**
Draft Circulated:	**1 March 2024**
Judgement handed Down:	**2 April 2024**

HEADNOTE

Companies - arrangements and reconstructions - dissenting shareholders - fair value of shares - dissenting shareholders' expert request for post-valuation date disclosure - whether Company entitled to seek a determination from the court where the scope of the request is unclear or its relevance disputed - whether necessary for the dissenters' expert to demonstrate that the information or documents requested is likely to be relevant to the fair value of the shares at the valuation date

JUDGMENT

1. This is the decision on the summons filed on 6 January 2023 on behalf of the dissenting shareholders (the "Dissenters") in these proceedings, which are pursued under section 238 of the Companies Act (the "Act") and by which the Dissenters seek payment of the fair value for their shares in 58.com, Inc (the "Company").

2. The Dissenters seek an order, pursuant to paragraphs 18 to 24 of the Directions Order and section 31 of the **Judicature Act (2021 Revision)** and/or the inherent jurisdiction of the Court that,

   a. the Company shall provide written answers and any responsive documents, communications and materials, to each of the information requests which have been submitted to the Company by the Dissenters' expert within 7 days.

   b. As regards any future information requests, the fact that information, documentation or material requested by an expert was created or relates to a date after the Valuation Date is not a basis for the Company objecting to the provision of such information, documentation or material or requiring an explanation of its relevance.

The Directions Order

3. The relevant parts of the Direction Order are set out below:

   F. Experts' Information Requests of the Company

   18 An Expert may submit to the Company written requests for any additional information, documents (of whatsoever description, whether electronic, hard copy or in any other format), and communications (whether by email, or otherwise) and any other materials prepared or created for this purpose which are or have been in its possession, custody or power or information requested by any Expert for the purpose of preparing his/her Expert Reports ***("Information Requests").*** *For the avoidance of doubt, an Information Request may include requests for information, documents, communications or materials created after the Valuation Date.*

   ...

   21 The Company shall provide written answers to each batch of Information Requests and shall upload the written answers and any other responsive documents to the Data Room as soon as practicable, and in any event (unless otherwise agreed) within 21 days. For the avoidance of doubt, should the Information Request be received by the Company after 5.30pm (Cayman Islands lime), the timeframes above shall begin to run from 8.30am (Cayman Islands time) the following business day (being any

calendar day on which banks are open in the Cayman Islands and Beijing ***("Business Day")).***

...

23 If an Expert submits an Information Request ***("Subsequent Request")*** *before the earlier of the: (a) deadline for the Company to respond to the Expert's immediately prior Information Request; or (b) date the Company actually responded to the Expert's immediately prior Information Request* ***("Prior Request Deadline"),*** *then for the Subsequent Request the time period in paragraph 21 shall run from the Prior Request Deadline (rather than the date the Subsequent Request is submitted to the Company).*

24 The Experts' Information Requests shall be made periodically and the Experts shall use their best endeavours to submit only concise and clear Information Requests.

The Background to this Application

4. The Company has refused to respond to certain information requests made by the Dissenters' expert on the ground that the requests relate to material which post-dates the valuation date. The Company's position is that unless the Company agrees, the Dissenters' expert is required to demonstrate to the satisfaction of the Court that the response is likely to be relevant to the issue of fair value. The Dissenters' position is that there is no such rule and the experts are best placed to assess what information might be relevant to their task and the Court ought not to second-guess them. The requests should only be refused if they are oppressive or burdensome.

The Information Requests

5. The disputed Information Requests made by Dissenters' expert, Prof. Yilmaz in their original form were as follows:

YAS 1.6

Please provide all Materials supporting the valuation implied in Zhuan Zhuan's US$390 million Series C round of financing or its $100 million Series D-1 round of financing? In respect of any such Materials, please identify:

YAS.2.6

Please provide the Share Purchase Agreements, any related agreements, and any presentations, analysis and valuation materials relating to the indicated financing rounds for the following long-term investments. Please also provide such materials for any contemplated fund-raising transactions, including those that were not consummated or are in the process of being consummated:

a. Zhuan Zhuan (Series A, Series B, Series C, Series D)
b. Guazi (Series A, Series B, Series B-1, Series C, Series C-1, Series D, Series D-1, Series E,
Series E-1)
c. Tubatu (Series A, Series B, Series C)
d. Tujia (Series A, Series B, Series C, Series D, Series E)
e. Sweetome (Series F)
f. 58 Daojia (Series A, Series B)
g. 58 Freight (Series A, Series B)

The Dispute in Summary

6. Mr. Adkin KC, who appeared on behalf of the Dissenters, submitted that YAS 1.6 had been subsumed in YAS 2.6 and need not be given separate consideration. He noted further that the scope of YAS 2.6 was narrowed in *inter partes* correspondence as follows:

"*YAS 2B.6: to the extent necessary, this request can be narrowed so as to apply to any company (including its affiliates) or third-party valuation analyses supporting the implied valuations for the financing rounds listed in the request.*"

7. Mr. Adkin explained that the value of the assets owned by the Company at the valuation date was important to the fair value of the shares. Certain assets owned by the Company had undergone various financing rounds after the valuation date. In order to raise the finance sought, the assets would have to have been valued and the request was concerned with the valuations undertaken for these financing rounds.

8. He referred to the response made by Prof. Yilmaz to queries raised by the Company as to the relevance of the material that could be obtained from these financing rounds which was in the following terms:

> *"The Company has several long-term investments. The value of those long-term investments informed by information post-dating the valuation date, is relevant to my expert reports and fair value of the Company's share because it allows me to determine the extent to which the earlier valuation of certain long-term investments provided by management accurately reflected more recent data from the time of the valuation date."*

9. Prof. Yilmaz illustrated the point with respect to the financing rounds for the asset known as Zhuanzhuan:

> *"Zhuanzhuan's series C round was closed in April 2021. Typically, the relevant valuation materials are prepared and shared with investors well in advance of the closing date of funding rounds. The only way to understand how much of the information relevant to Zhuanzhuan's valuation was available as of the Valuation Date is to obtain agreements, presentations,*

analysis and valuation materials related to series C round and to analyze them."

10. By way of further explanation, Prof. Yilmaz says with respect to the same transaction:

> "*In respect of Zhuan Zhuan and my requests at YAS 1.6, 15 June2020, Houlihan Lokey concluded a fair equity value range of between $552 million to $1.035 billion based on DCF analysis and $637 million to $948 million based on selected companies analysis, whereas the value of 58.com's equity interest in Zhuan Zhuan based on Zhuan Zhuan's acquisition of ZLJ in May 2020 was $863 million. If the round of financing for Zhuan Zhuan in April 2021 indicates a value closer to the value implied by the May 2020 transaction, some of the data used as part of that valuation could be relevant to my assessment of Zhuan Zhuan's fair value."*

11. He said further, on the issue of relevance:

> *"In my opinion, the documents that I have requested will themselves indicate the extent to which they comprise or are based on data available at the valuation date. In my experience, I would expect that internal preparations regarding significant funding rounds to be underway months before the rounds themselves are completed and the date used as part of those preparations to have been in existence even earlier."*

12. The Company refused to comply with the requests on the basis that Prof. Yilmaz had not established that the material produced for the financing rounds which occurred sometime after the valuation date would be relevant to the issue of fair value, save for the request related to the funding rounds for 58 Freight which closed a matter of 10 days after the valuation date and which the Company conceded might contain material which pre-dated the valuation date.

13. The Dissenters contend that the Company is not entitled to refuse to answer a request on the basis that the Dissenters' expert had not demonstrated the information sought was relevant and filed the summons seeking, *inter alia,* an order barring the Company from inquiring as to the relevance of a request for post-valuation date information.

The Issue

14. The Company's position is that, while the Company has a positive obligation to disclose relevant documentation, requests for documents which post-date the valuation date fall into a different category and that the expert is required to explain the relevance of the material he is seeking.

15. In his oral submissions, Mr. Boulton KC framed the issue this way: is the Company entitled to push back on certain requests where the Dissenters' expert appears to be seeking information which the Company's expert says is unlikely to be relevant. In other words, is the power to request post-valuation date information absolute, as

suggested by the Dissenters and their expert, or should it be subject to some basic test of relevance. If the requests are unclear or are unreasonable, is the Company at liberty to dispute those requests and seek a determination from the Court.

The Authorities

16. The issue of post-valuation date data disclosure has been subject of prior judicial determination. It was considered by Smellie CJ as he then was in the matter of *JA Solar Holding* (Unreported, 18 July 2019) at para 85 *et seq* the learned Chief Justice said this:

> ***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. ...”*

17. Here the Learned Chief Justice listed a number of cases in which a direction in similar terms to paragraph 18 of the Directions Order was made. He then directed at [89] 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.

18. One of the cases cited by Smellie CJ which made provision for disclosure of post-valuation date information is *In the matter of Integra Group* [2016 (1) CILR 192] in which Jones J set out how the Courts should approach the issue of relevance. At [11] of the judgment, under the heading “***Establishment of an electronic data room”***:

> *"11 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. The court's intention was that all the relevant material should be uploaded into an electronic data room where it would be available for inspection by the experts (and those instructing them) subject to giving appropriate confidentiality undertakings.* ***The experts are the best judge of what information is or is not relevant for their purposes.*** *It was the court's intention, expressed in para. 7 of an order for directions made on October 27th, 2014, that all documentary information requested by either expert should be uploaded into the data room. This did not happen. A great deal of material was uploaded, but Integra's management took it upon themselves to control what information would be made available to the experts and refused to upload some of the material requested by Mr. Taylor (or did so in a heavily redacted form) on the ground that they considered it to be irrelevant. There is no means of knowing whether material withheld by Integra's management might have affected the experts' judgments in any way."*

19. In *Homeinns Hotel Group v. Maso Capital Investments Limited* [2017 (1) CILR 206], Mangatal J relied on the principle in *Integra* saying this at [22] under the heading "**Further documents and/or information, at request of either expert or joint request":**

> *"22 In my view, para. 8 of the DSD draft, which provides for the uploading to the data room of any additional documents or information* ***that either expert considers necessary,*** *with any request or response to such a request being provided to the expert on the other side, is more appropriate than PAD, para. 7. I am of the view that the additional requirements should relate not only to documents but also to information. In my judgment, para. 8, as proposed by the dissenting shareholders, is appropriate and consistent with Jones, J.'s views as expressed in Integra (2016 (1) CILR 192, at para. 11 to the effect that* ***the experts are the best judges of what is relevant when it comes to disclosure."***

20. The principle was affirmed in the Court of Appeal in *Qihoo* [2017 (2) CILR 585]. Martin JA who gave the judgment on behalf the Court of Appeal stated that:

> *"3 Proceedings under s.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. Although care must be taken to ensure that this autonomy is not abused … in general we agree with the statement of Jones, J. in In re Integra Group (4) (2016 (1) CILR 192 at [11] that "the experts are the best judge of what information is or is not relevant for their purposes."*

21. On the risk of potential abuse arising from the autonomy of the experts to decide what was relevant, Martin JA noted the submission of leading counsel in the proceedings below *"that s.238 fair value claims must not be allowed to become a carte blanche for dissenters to conduct a 'drains up' inspection of the entire business, regardless of relevance to fair value'* and stated,

> *"We think there is a danger that the liberty given to the experts to define what is relevant to value could be abused, and even used to put pressure on a company to agree an inflated value for dissenters' shares rather than accept the wholesale disruption of an external inspection of its physical and electronic records."*

22. The approach to be adopted by the Court to ensure that the autonomy of the experts is not abused was considered by Parker J in *Qunar* (Unreported, 20 July 2017) at [37] to [39] of the judgment:

> *"37. I do not believe that any additional check or balance needs to be specifically built into the discovery order… to give the company some added protection. Since the question of fair value is matter for the Court's judgment to be reached in light of all the factual evidence put before it and on the basis of expert assistance from valuation experts from both sides, it is not for the Company or its experts to seek to limit in advance the expert's line of enquiry. Of course, if the requests are oppressive or disproportionate or calculated to embarrass or harass the Company, the Court will step in if asked to do so. Likewise, the Court will step in if the Company is unreasonably delaying or failing to give proper discovery.*
>
> *38. I do not think it is necessary to provide for these eventualities in an order which protects the Company in advance as there is a risk that the dissenting shareholders' expert would be overburdened with having to justify by reference to relevance and necessity each and every request made.*
>
> *39. The experts' overriding duty is to assist the Court and that should ensure that the requests are proportionate and of relevance to the fair value issues and not any other issue. I accept there may be different approaches and what one expert considers necessary and relevant another expert*

may not. That does not mean that the dissenting shareholders' expert should have to justify each and every request."

40 This could in my view lead to further interlocutory applications and could result in scarce court resources being taken up with matters which could and should be dealt with by parties who have instructed expert professionals to assist them in the presentation of their cases."

23. On appeal from the decision of Parker J, the Court of Appeal approved the engagement of experts in the disclosure process, noting that the judge had allowed that any objection to the process could be met by the fact that parties had liberty to apply if it were not being followed or was being circumvented in some way: see 2018 (1) CILR 199 at [50].

The Submissions

24. The Dissenters' position is that clause 18 of the Directions Order is a standard direction which plainly allows for post-valuation date data to be disclosed. Referring to the authorities, Mr. Adkin submits that pulling the threads together, the authorities establish that:

11.1 there can be no in principle objection to providing information after the valuation date: per Smellie CJ in *JA Solar*;

11.2 Whether the information requested is likely to be relevant is a matter for the experts to determine; per Jones J in *Integra*;

11.3 There may be differing views between the experts as to what is capable of being relevant but which view is to be preferred is not to be determined by the Court at the interlocutory stage: per Parker J in *Qunar;* and

11.4 If the request is abusive or oppressive, the Courts will intervene: per Parker J in *Qunar*

25. Mr. Adkin submits that relevance is not constrained by what is available at the date of valuation and that evidence as to value *after* the valuation date can be relevant to the value *at* the date of the transaction. He relied on case of *Segama NV v Penny Le Roy* [1984] 1 ECLR 109, as illustrative of the point. In that case, an arbitrator charged with determining the market rent for premises. In his decision, the arbitrator held that:

"I accept that the further away from the review date one progresses then the rental evidence will become progressively unreliable as evidence of rental values at that date. This is, however, a question of weight and not admissibility and is a matter for me to consider when reviewing the evidence."

26. In his judgment allowing the application for leave to appeal against the arbitrator's decision, Stoughton J held that the arbitrator was right to hold that rents after the relevant date might be relevant to determining the market rent at the date itself.

27. Mr. Adkin also submits that the Company cannot refuse to disclose any information or documents requested on the ground that the Dissenters' expert cannot establish the information requested is relevant and that the Company is asking the wrong question. The right question is whether the request is oppressive or disproportionate.

Submissions on behalf of the Company

28. Mr. Boulton maintains that the Company's position in these proceedings is wholly consistent with the decision in *JA Solar* and that the Company was not inviting the Court to pre-judge the issue of relevance. Rather, the Company's position is that it has not been shown by the evidence that the information sought is likely to be relevant and, in the circumstances where it will require the Company to reopen the disclosure exercise to look at financing rounds in 2020 and 2021, the requests are both burdensome and oppressive.

29. Referring to the decision of Parker J in *Qunar*, Mr. Boulton submits that the Judge at [36] anticipated that the experts would communicate with each other to seek to clarify and explain the relevance of requests. Contrary to the criticism levelled at the Company by the Dissenters, Mr. Boulton says that the course adopted by the Company, which was to ask Prof. Yilmaz in correspondence to state how the information was relevant to fair value, was appropriate and measured.

30. Mr. Boulton submits further that the Company is not seeking to limit in advance the expert's line of enquiry as disapproved by Parker J in *Qunar* at [37].

31. Rather, having received the request and the later explanation which did not in fact explain the relevance of the request, the Company comes after the fact to ask the Court to say that the request in YAS 2.6 should be refused because the expert has not shown how the information was *"known or knowable"* at the valuation date.

32. Mr. Boulton submits that the concept of *known or knowable* is central to valuations and if information was not known or knowable at the valuation date it is irrelevant and the Company should not be asked to respond to the request.

33. He protests that Prof. Yilmaz does not address the issue of known or knowable in his responses nor does he say in terms that the information produced in response to this request will be relevant or, as he said with respect to 58 Freight, that he expects it to be relevant. Prof Yilmaz says instead that it might turn up some data of relevance to the value of the assets at the valuation date which suggests the request is an improper fishing expedition.

Discussion

34. I make no criticism of the Company's conduct in respect of YAS 2.6. I consider that, notwithstanding the dicta to the effect that the question of what is relevant is a matter for the experts who must necessarily have a substantial degree of autonomy in determining what information they need, the decision of Parker J in *Qunar* left open the possibility of questions as to relevance being raised and being clarified - or, as here, narrowed - by the experts. It would be extraordinary if, not being satisfied with the answers provided, the Company were unable to ask the Court to determine whatever questions as to relevance remained between them. Smellie CJ made it clear in *JA Solar* that recourse may be had to the court if the Company objected to a particular request. Although it was said in that case to be part of the regime proposed by the dissenters, the Court of Appeal in *Qunar* considered that parties had liberty to apply if the process for requesting information was not followed.

35. There is no requirement in any disclosure regime to disclose irrelevant material. In my view, the Company was entitled to bring this application on the basis that the Dissenters' expert did not explain how the information sought could be relevant to the issue of fair value at the valuation date.

36. In developing his submissions, Mr. Boulton rightly placed emphasis on the evidence of his expert, Mr. d'Almeida, that the overriding principle in valuations is that they are to be arrived at using information that is "*known or knowable"* as at the valuation date and are not to be derived using hindsight. I do not demur from the correctness of the decision in *Segama* which would permit subsequent actual performance of shares, for example, to be taken into account if nothing significant had changed in the market, such as the incidence of COVID to which Mr. Boulton referred. But *Segama* is not directly relevant to the issue at hand where the question is whether valuations undertaken by the Company for events subsequent to the valuation date may be taken into account.

37. *Known information* is anything the Company or management would have known about at the valuation date. As I understand it from the learning exhibited to Mr. d'Almeida's affidavit, *knowable information* includes events that happen *after* the valuation date but were reasonably foreseeable at the valuation date and are relevant to the valuation of the business. The Company accepts that *knowable information* includes the financing round for 58 Freight which closed in September 2020.

38. The question Mr. Boulton poses with respect to Prof. Yilmaz's request for information relating to the financing rounds for the other entities that appear in YAS 2.6 which closed several months after the valuation date, is whether the information sought was "*known or knowable"* at the valuation date.

39. It seems to me that if the funding rounds in respect of which the requests were made were being considered at or before the valuation date, then the funding rounds are post-valuation events that were knowable.

40. Despite the criticism made of Prof. Yilmaz's defence of his requests, I do not think he can say more with respect to the information he seeks in YAS 2.6 than that he thinks it might be relevant, given that he does not, in fact, know whether the funding rounds were being considered at or before the valuation date.

41. What he says at paragraph 11 of his email is that, given his experience, he *"would expect that internal preparation regarding significant funding rounds to be* ***underway months before the rounds themselves were completed****, and the data used as part of those preparations to have been in existence even earlier."* [emphasis mine]

42. In other words, in existence at or near the valuation date.

43. This is how I understand his explanation at paragraph 12 of his memo, rejecting the evidence of the Company's expert that information from April 2021 would likely not be informative of a valuation in September 2020. Prof. Yilmaz says, and I accept, that whether the information is informative will depend, *inter alia*, "*on how contemporaneously [the information] started to be prepared for the financing round relative to the Valuation Date*."

44. I do not think this explanation of relevance is so tenuous that it should be rejected by the Court and the request refused. Prof. Yilmaz has explained his reason for believing that the valuations for the funding rounds would be relevant and makes a case for the Company to provide the documents responsive to the request in YAS2.6.

45. Mr. Boulton suggested that if valuations were done with respect to the Company's assets at or near the valuation date, and they were relevant to the fair value of the shares, then those valuations would already have been disclosed.

46. In response to that suggestion I note that the Company has conceded that material relating to the funding round for 58 Freight is relevant. The Company did not suggest that because the material was relevant it would already have been disclosed. To the contrary, the Company agreed that it should be produced. It is difficult to see why, in respect of the later funding rounds, it should be inferred that material relating to those rounds, if relevant, would already have been disclosed.

47. In my view, the Company's position is contradictory and unsustainable. If the funding rounds for the other assets were already under consideration and, therefore, knowable at the valuation date, the information is likely to be relevant to the fair value of the Company's shares and the Company is obliged to provide it. If the funding rounds were not being considered before or at the valuation date, it is open to the Company to say so.

48. I therefore order that the valuations requested in YAS2.6 be provided to the Dissenters' expert by the Company.

49. It only remains for me to thank Counsel and their clients for their patience in awaiting this decision and to apologize for the delay.

DATED 2 APRIL 2024

FILED 2 APRIL 2024

The Hon. Justice Margaret Ramsay Hale
CHIEF JUSTICE