IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 275 of 2020 (MRHJ)

IN THE MATTER OF THE COMPANIES ACT (AS REVISED)

AND IN THE MATTER OF 58.COM, INC.

VIA VIDEO LINK

Appearances:	Mr. Richard Boulton QC with Mr. Mac Imrie, Mr. Malachi Sweetman and Mr. Lukas Schroeter of Maples and Calder (Cayman) LLP for the Company
	Mr. Adrian Beltrami QC with Mr. Guy Manning Mr. Hamid Khanbhai and Ms. Katie Logan of Campbells; Mr. Marc Kish, Ms. Marie Skelly and Ms. Dunzelle Daker of Ogier; Mr. Rocco Cecere, Mr. Zachary Hoskin and Ms. Charlotte Walker of Collas Crill; and Mr. Sam Dawson and Mr. Nigel Smith of Carey Olsen for the Dissenters
Before:	**Hon. Mme Justice Margaret Ramsay-Hale**
Heard:	**26, 27 July and 4 August 2021**
Draft Judgment circulated:	**25 February 2022**
Judgment Delivered:	**8 March 2022**

HEADNOTE

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 - scope of Dissenter disclosure - Re Qunar Cayman Islands Ltd (CICA no. 24 of 2017) - whether subject - matter expert required.

RULING ON SUMMONS FOR DIRECTIONS

Introduction

1. 58.com, Inc. (**the Company**) is as an exempted limited company under the laws of the Cayman Islands. The Company operates China's largest online classifieds business, as measured by traffic and revenue. Until the merger transaction described further below, the Company's American

depositary shares (**ADSs**), each representing two Class A shares of the Company, were publicly traded on the New York Stock Exchange.

2. On 10 November 2020, following the merger transaction pursuant to which the Company was de-listed and taken into private ownership, the Company presented a petition asking the Court to determine the fair value of the Dissenters' shares in the Company pursuant to s.238 of the Companies Act (**the Act**), together with a fair rate of interest, if any, on the amount to be paid by the Company to the Dissenters (**the Petition**).

3. The Summons for Directions came on for hearing on 26 and 27 July and 4 August 2021. Whilst the parties were agreed on a number of matters, the Court was asked to resolve those items which remained in dispute. These were in summary:

   (i) The Company's request for discovery from the Dissenters;
   (ii) The Dissenters' request for permission to adduce expert evidence in the field of deal process;
   (iii) The period of time the Company should be afforded to provide disclosure;
   (iv) The Company's proposed redaction regime in respect of matters relating to specific laws of the People Republic of China (**the PRC**); and
   (v) The timing for certain procedural steps.

4. Directions were given for the matters at (ii) to (v) but the Court reserved judgment on the Company's application for Dissenter disclosure.

Dissenter Discovery

5. The Dissenters have agreed to provide as Appendix 7 to the Directions Order what has become standard Dissenter discovery following the decision of the Court of Appeal in *In re Qunar* 2018 (1) CILR 199 (the "*Qunar* categories") (the"*Qunar* Appeal") as set out below:

   Category 1: All documents reflecting or relating to any valuations or similar analyses of the Company that the Dissenters prepared, reviewed, or considered, including but not limited to:

   1.1 All written documents, including Excel files, that set forth, summarise, or otherwise reflect valuation analyses of the Company or Company's shares;

   1.2 Any internal valuations of the Company or the Company's shares; and

   1.3 Any valuations of the Company or Company stock reviewed or considered by the Dissenters in connection with the above.

Category 2: A list of any communications that the Dissenters had, whether in writing, electronically or verbally, with any representative of the Company prior to the date of the merger in relation to the value of the Company or its shares.

Category 3: Confirmation of the date the Dissenters purchased any or all of their shares in the Company, Including the method of purchase.

Category 4: A schedule setting out the history of the Dissenters' trades in the shares of the Company.

Category 5: All documents, information and material issued or shared between the Dissenters' investment manager and/or investment advisor and the Dissenters' investment committee for their consideration of the Company's go-private transaction including file notes of meetings, meeting agendas and all forms of written communications.

The Company's Application

6. This Appendix 7, which was agreed by the Dissenters, was circulated by the Company with the proviso that it would consider its position after the judgment in *In re FGL Holdings* (Unrep. 18 December 2020), in which the Company's attorneys appeared, was handed down and after any appeal.

7. In *FGL Holdings,* as will be seen below, Parker J emphatically rejected the company's application for wider discovery than the *Qunar* categories. There was no appeal from the decision of that Court.[1]

8. The Company subsequently presented the Dissenters with a revised draft Appendix 7 seeking discovery substantially wider than the *Qunar* categories which the Dissenters had agreed and which the Dissenters say are materially the same as the categories sought in *FGL Holdings* and rejected by Parker J.

9. The Company says Parker J got it wrong and contends - as was argued before Parker J - that the limited discovery ordered in the *Qunar Appeal* simply reflects what was sought by the company in that case and that, properly construed, the decision admits of more expansive discovery by dissenters.

10. The Company, therefore, invites me to make an order for disclosure by the Dissenters of documents in the following Categories:

[1] . Leave to appeal was refused by Parker J and the application for leave was renewed before the CICA, and was disposed of by way of a consent order.

Category 1: All documents reflecting or relating to any valuations or similar analyses of the Company that the Dissenting Shareholder prepared, reviewed, or considered, including but not limited to:

1.1 All written documents, including Excel files or other models, that set forth, summarise, or otherwise reflect valuation inputs and analyses of the Company or Company's shares;
1.2 Any internal valuations of the Company or the Company's shares, or modelling of its actual or potential financial performance; and
1.3 Any valuations of the Company or the Company's shares reviewed or considered by the Dissenting Shareholder in connection with the above.

Category 2: All documents and communications reflecting, documenting, discussing, considering, summarising, noting, referring to, constituting, memorialising, modelling, or evidencing the value of the Company or its shares or other securities pertaining to the Company, including all such documents pertaining to the Dissenting Shareholder's decision:

2.1 to purchase or sell, or attempt to purchase or sell, the Company's shares or other securities pertaining to the Company;
2.2 to vote for or against the Merger;
2.3 to accept or reject the Merger Consideration;
2.4 to demand or refrain from demanding appraisal of the Company's shares;
2.5 to commence or pursue any action seeking appraisal of the Company's shares; or
2.6 to direct, request, or encourage that another person do any of the foregoing.

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For the avoidance of doubt, such documents and communications include but are not limited to those between and among any Dissenting Shareholder and their representatives, advisors (including their investment managers), broker, bank or financier, investor, investment manager or advisor, investment committee, or any other party, and includes documents recording the valuation of the Company's shares for the purposes of financial or regulatory reporting or providing updates or net asset value or other account value information to investors.

Category 3: All documents and communications reflecting, documenting, discussing, considering, summarising, noting, referring to, constituting, memorialising, evidencing, or relied upon to support any valuation methodologies, analyses, or inputs pursuant to which the fair value of the Company or the Company's shares might be determined, including but not limited to all documents and communications identifying:

3.1 any other publicly traded companies that any Dissenting Shareholder believes to be comparable to the Company for purposes of determining fair value; and

3.2 any transactions that any Dissenting Shareholder believes to be comparable to the Merger for the purposes of determining fair value.

Category 4: All documents relating to communications that any Dissenting Shareholder had with the Company or any representative of the Company prior to the date of the Merger including draft documents, file notes and internal messages, or calendar appointments, and a list of any such communications that were wholly oral and for which there is no documentary support.

Category 5: Any other documents and communications about the Company, its directors, officers, or business, whether created by the Dissenting Shareholder or anyone else.

Category 6: A schedule (the "**Dissenting Shareholder's Trades Schedule**") detailing the history of each Dissenting Shareholder's trades in the Company's shares between 6 September 2015 and 6 September 2020. The Dissenting Shareholder's Trades Schedule will include the following categories of trades in the Company's shares or derivative securities (including options and equity swaps); the Dissenting Shareholder's:

1.1 long trades for their shares subject to these proceedings;
1.2 long trades for any shares that were then sold prior to the Valuation Date and are not subject to these proceedings;
1.3 short sales and covers.

For each of these trades, the Dissenting Shareholder's Trades Schedule will identify the type of transaction (purchase, sale, short sale, purchase to cover a short sale, or transfer between Dissenting Shareholders or between a Dissenting Shareholder and its related (including by a common fund manager) entities), the date of the transaction, the quantity of shares traded, and the trade price per unit. For trades of derivative securities, the Dissenting Shareholder's Trades Schedule will also include all additional information needed to identify the security (e.g., strike price, maturity), as applicable.

Category 7: All documents and communications given by the Dissenting Shareholder, its agents, or representatives to execute the trades referred to in the Dissenting Shareholder's Trades Schedule or any other attempted trades that did not result in a purchase, sale or transfer and all documents discussing the rationale for such trades.

Category 8: All documents and communications recording the Dissenting Shareholder's consideration of and/or views about the potential and actual effects of COVID-19 on the Company, other comparable companies, governments, markets, and the economy generally.

11. The three major issues between the parties in regard to the disclosure proposed by the Company are as follows:

(i) the definition of the specific disclosure categories that the Dissenters should be ordered to produce;

(ii) whether the Dissenters' obligation to produce documents responsive to the specific disclosure categories should be subject to a 'relevance filter'; and

(iii) whether the look back period should be 2 or 5 years.

The Law

12. In *Re Qunar* [2018 (1) CILR 199] (the *"Qunar Appeal"*) the question of whether dissenting shareholders had a disclosure obligation in *'fair value'* proceedings pursuant to section 238 of the Act was considered by the Court of Appeal.

13. Having reviewed the relevant Cayman cases which held that there was no disclosure obligation on the dissenting shareholders and that third-party documents in their hands were unlikely to be relevant to the issue of the fair value of their shareholdings, Sir Bernard Rix JA who gave judgment on behalf of the Court said this at [57]:

> "*I approach this issue from the point of view that one sided disclosure on the central issue of a case … is anomalous, unprecedented outside section 238 cases in the Cayman Islands, and prima facie counter-intuitive, and therefore the argument in favour of such one-sided disclosure has to be considered with the greatest of care.*"

14. With respect to third-party documents in the hands of dissenters, Rix JA said this:

> *"60. In my judgment, if third party valuations in the possession of the Company are relevant, so are third party valuations not in the possession of the Company, but, for instance in the possession of the Dissenting Shareholders. After all, the question of fair value is closely related to the question of what a willing buyer and a willing seller would exchange for the shares of the Company (or for the Company as a whole): and that question is closely related to valuations conducted within the market generally. And if that is the case, then analyses and valuations conducted by the Dissenting Shareholders, which may well in any event be based in part on "third party" valuations, assessments and analyses, are as relevant as any such valuations, assessments and analyses, or even more so for the very reason that the Dissenting Shareholders are not merely potential investors, but actual investors in the Company. They are active members of the market who are willing to put their money where their analysis is."*

15. The learned Judge also considered the jurisprudence in Delaware which he noted at [63] "*has had long familiarity with the concept of fair value in the context of dissenting shareholders and a statute with similar wording to section 238."*

16. While recognising the judgment did not have the force of precedent, he cited with approval Vice Chancellor Laster's Opinion in *Dole,* stating that, irrespective of the foreign source of the remarks, there was wisdom in them. Rix JA excerpted the following passages from the judgment in *Dole* on which the Company relies in its application:

"Several Court of Chancery decisions have ordered production of pre-suit valuation material prepared by appraisal petitioners. These decisions recognize that the pre-litigation valuations are relevant to the central issue in the proceeding, which is the value of the subject company. They are also relevant to issues of such as the appropriate inputs and considerations for valuation methodologies…

The petitioners argue that their valuations are opinions, not facts, and that the question of valuation in an appraisal is purely a matter for the experts…In my view, the valuation-related information that Dole seeks easily satisfies the potential admissibility requirement. A statutory appraisal proceeding is not a fault-based case in which one side has the burden of proof and loses if it fails to meet its burden…

…In making its determination, this court can consider a wide range of factual evidence, including, but not limited to, the market price, the merger price, other offers for the company or its assets, prices at which knowledgeable insiders sold their shares, internal corporate documents from the respondent, and valuation work prepared for non-litigation purposes. Even when the parties have retained valuation experts and the court relies on their opinions when determining fair value, the court has considered factual evidence relating to valuation as a cross-check, or reality-check, on the litigation-driven figures generated by the experts. The fact that a party has retained an expert does not enable the party to shield factual material relating to valuation that otherwise would be discoverable and admissible…

…Nor, in this case, are the petitioners' witnesses unqualified to express views on value. In my view, their testimony and their pre-litigation valuations will be "helpful to…the determination of a fact in issue," namely the determination of the fair value of Dole…

Experts on valuation in this court often consider other valuation work when rendering their opinions. For example, when developing a weighted average cost of capital for the subject company, an expert may prepare her own calculation and then demonstrate the reasonableness of the selected inputs by showing that other valuations have used the identical or similar inputs, or that the inputs that the expert selected were more conservative than the inputs used by others. The expert may employ similar reasoning to attack the opposing expert's work by showing that other valuations have not used comparable inputs or that the approach selected by the other side's expert was particularly aggressive. Comparisons are made frequently to reports from securities analysts, presentations by the investment bankers who worked on the deal, or internal materials prepared by corporate personnel…

The petitioners' internal, contemporaneous valuations are real-world assessments by "astute investors" who must "back their beliefs with their purses". Their views may prove to be as or even more credible than the litigation-crafted opinions of valuation experts…

Experts can act strategically when selecting comparable companies or precedent transactions, when picking multiples, or when choosing inputs for their cost-of-capital calculations. Perhaps more importantly, academic studies have shown that experts unconsciously reach higher or lower results depending on whether they represent the plaintiff or the defendant due to cognitive phenomena like attachment bias. It is helpful to check an expert's litigation-driven work or a party's litigation-inspired arguments against other valuations, particularly pre-litigation analyses…

Discovery into the petitioners' analyses also should help promote settlement…Access to both sides' pre-litigation valuations should help de-bias the litigation positions, constrain the range, and promote settlement…"

17. Rix JA then said this:

"It has been my experience, in cases in which experts, and share valuation experts, play a significant or dominant role, that such experts, however professional and loyal to Court or tribunal rather than party, always tend to diverge from each other in favour of their appointing party. It has also been my experience in share valuation cases that there can be much room for issues on the facts of a company's history, its financial performance, the validity of its predictions, projections as to the state of an industry, or markets, or products, or technological developments, and so on. However important a company's own documents may be on such matters, the company and its personnel and advisors have no monopoly on understanding of or insight into the world in which the company operates. The company's own documents, however important to the issue of fair value (and no one would doubt that) must be exposed to the arguments which can flow from the findings, analyses, evaluations and factual selections which other sophisticated entrepreneurs, investors and analysts in the market have made or performed. Moreover, it must be remembered that the documents of investors prior to litigation are not driven by the litigation itself but by their willingness to put their own cash to work in support of those findings and evaluations. There is a reality to that which must not go unrecognized."

18. The learned Judge then set out his conclusions as follows:

"74. In sum, dissenters live in the same world as companies whose fair value has to be assessed. Such companies may have internal information and projections which are not in the public domain, albeit in the case of a listed company like Qunar the room for such private information may be more limited than in the case of unlisted companies. In any event, no one disputes the relevance and potential importance of such companies' documents. It remains true, nevertheless, that value, and the market, is for the world, not only the companies concerned, and that often such companies may not understand the world in which they operate as well as outsiders understand it. ***But whether that is true or not, value depends on a multiplicity of factors, and methodologies, about which sophisticated analysts have different insights, and no one is more relevantly***

concerned with getting the research and analysis and those insights right than those who are thinking of investing in or have invested in a company*. However, "getting it right" is not the point at this stage of the proceedings. What is needed is for the Court, at the end of the day, to get it right, having been exposed to all the material and all the arguments.*

75. In my judgment, it is unhealthy in such a context, and in litigation especially, to form a priori assumptions about relevance. ***The normal rule is that disclosure is a mutual obligation.*** *Mutuality in this respect is equity and fairness. Of course some litigants may have more of what needs to be disclosed than other litigants. And it is always possible that the documents of one party will turn out to be of greater influence than those of the other side. But I would need to be clearly persuaded that section238 litigation is the unique field in which one-sided disclosure ought to be practised, and I would in principle regard that as a heavy task. Counsel have not suggested that there is one-sided disclosure in any other field. I am not persuaded of that extreme and unique position by repeated assertions that only the companies concerned, and not their sophisticated investors, have disclosure relevant to fair value.* ***It seems to me that if dissenters have in their possession, as they are likely to do, documents, reports, analyses, projections and so on about companies in which they invest, their products, their industries, their markets, their competitors, in other words documentary material which relates to the value of such companies, then this material is as much a matter for disclosure as any such documents in the hands of the companies: and it matters not whether such material is possessed by the one side or the other, or is simply available as a matter of efficient research.*** *In this context I find the evidence contained in Mr Reid's second affidavit, which merits repeated re-reading (see at para 18 above) highly persuasive. At any rate it is arguably highly persuasive, and that is all that is needed at this stage of the proceedings." [emphasis mine]*

19. The Company prays in aid the following principles which emerge from the *Qunar Appeal* in arguing that the categories of disclosure are not closed:

(i) Disclosure is a mutual obligation;

(ii) The experts and the Court are to have regard to all *relevant* documents and information, not just publicly available information, whether in the hands of the Company or the Dissenting Shareholders;

(iii) If the Dissenting Shareholders have in their possession documents, reports, analyses, projections about the companies in which they invest, their products, their industries, their markets, their competitors, in other words documentary material which relates to the value of such companies, then this material is as much a matter for disclosure as any such documents in the hands of the companies (into which broad description Mr. Boulton QC says the disclosure the Company seeks falls); and

(iv) It is not for the Company or the Dissenting Shareholders and/or their respective experts to limit in advance the expert's line of enquiry.

20. The Company submits that the Court should be slow to rule at an interlocutory hearing that documents that an expert says he would find useful in the preparation of his report will not be permitted to him and says, in essence, that if Dr Cliff says documents would be useful to the expert then the disclosure sought should be ordered.

21. The content of that mutual obligation of disclosure was considered by Parker J in *In re Ehi Car Services Limited* (Unrep. 24 February 2020) who said this at para 60:

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

22. In *In re JA Solar Holdings Co., Ltd.* (Unrep. 18 July 2019) the Chief Justice heard an application by the company that the dissenters provide general discovery of all documents relevant to fair value in the three-year period up to the Valuation Date. In refusing to subject the dissenters to the general discovery obligation for which the company contended on the basis of mutuality of obligation, the learned Chief Justice noted that, after the *Qunar Appeal,* the Grand Court had consistently made orders in the *Qunar* categories and went on to hold that the *Qunar Appeal* had settled the categories of documents discoverable by dissenting shareholders.

23. In *eHi* the company sought an expanded category of dissenter disclosure. The company's expert contended that the views of the dissenters on the key inputs into the valuations were relevant to a fair value appraisal.

24. Parker J said this at para 64:

> *"It is important to bear in mind that the characteristics of, and the motivations which might be guiding, dissenting shareholders are generally irrelevant to a fair value determination: see Integra [2] at § 16 (8), Zhaopin[3] at § 48-50 and Qunar[4] at § 63. So is the timing and amount of their investment and whether they bought after the merger announcement with full knowledge of it and before the EGM or whether they voted for the merger or not. It is not relevant to ascertain whether they are speculative investors engaged in arbitrage or long-term shareholders who are being 'taken out' by the majority against their will, as*

[2] *Re Integra Group* [2016] 1 CILR 192 Jones J
[3] *In re Zhaopin Limited* FSD 260 of 2017 (IKJ) Unrep 21 June 2018
[4] *Qunar Cayman Islands Limited v. Maso Capital Investments Limited and Seven Others* [2019 (1) CILR 611]

fair value needs to be determined in one way for all dissenting shareholders irrespective of whether or not they might be said to be more or less 'deserving': see Qunar at § 63."

25. At para 66, the learned Judge observed that the correct approach is for the Court to decide whether the additional material is clearly defined, necessary for disposing fairly of the fair value question, proportionate and likely to be sufficiently probative so as to make the exercise worthwhile.

26. At para 68, Parker J held that that the *Qunar Appeal* decision limits dissenter discovery to documents that are themselves '*valuations or similar analyses'*.

27. Turning to the categories of disclosure sought by the company, the learned Judge rejected the company's request for ***"all documents or communications containing 'discussions or comments' on valuations or similar analyses,"*** as going beyond *"'valuation or similar analyses' and into the subjective views of investors and communications concerning those views which are not strictly relevant to the valuation exercise."* He held further that *"the probative value of such documents is marginal and risks straying into an investigation as to what was in the minds, and matters concerning the motivations, of dissenting shareholders, which is not of relevance to the valuation exercise."*

28. He also refused the company's request for ***'financial projections or forecasts relating to the company and supporting documentation'***, as also going beyond the *Qunar* categories and, at para 72, and likely to be of marginal additional probative value and not necessary where there was likely to be a large volume of material from the company on those matters.

29. With respect to the company's request for "***documents relating to the company's market, industry and competitors"*** Parker J held again, at para 73, that this category went beyond the *Qunar* categories and potentially covered *"a much wider range of material concerning the Chinese markets, internet businesses and car hire sector."* He observed that, *"To the extent that such material is relevant to valuation of the company, it is likely to be provided as publicly available material by the experts and add to the extensive discovery the company will give."*

30. He noted further that in the *Qunar* trial, he had found "*that much of this material had clearly been augmented by in-depth research for further market related material and appended to the expert's reports. It would not be proportionate or necessary for the dissenters to have to search for and discover such documents, given the material which will be available to the experts and the court."*

31. In *In re FGL Holdings* Parker J considered yet another application for extended dissenter disclosure. As in the case at Bar, the company argued that the limited discovery ordered in the *Qunar Appeal* simply reflects what was sought by the company and that, properly construed, the decision admits of more expansive discovery by dissenters including documents relating to the views of the dissenters.

32. This submission was rejected by Parker J who rehearsed his conclusions in *eHi* and held, at paras 61 and 62, that documents relevant to the **dissenters' "rationale" or their expectations are not useful** to the assessment of fair value:

> *"The particular motives or commercial positions taken by the dissenters or other persons is not relevant. Neither are their subjective views and decisions they may have made as to valuation, as the exercise of the court, and the valuation experts assisting it, is not one of 'weighting' valuations produced by the parties -see eHi.[5] The exercise the court is engaged in is independent of the subjective views and the commercial decisions of the parties as to value."*

> *"A line of enquiry that pursues how the dissenters dealt with their shareholdings in the company and their decisions to trade company shares, which is said to reveal the dissenters' views of the value of the company's shares and potential inconsistencies between their actions and their position on fair value at trial, is therefore in principle impermissible. Documents which go to reasons why the dissenters may have believed the merger price was undervalued are not relevant. If any such views were based upon valuations or similar analyses those documents will be produced in any event."*

33. He held that documents relating **to how the dissenters dealt with their shareholdings in the company and their decisions to trade company shares**, which the company's expert said would reveal the dissenters' views of the value of the company's shares and potential inconsistencies between their actions and their position on fair value at trial were therefore, in principle, impermissible.

34. Parker J also refused the company's request **for all documents and communications concerning the company, its business and competitors, and the merger** as being too broad and tantamount to a request for the dissenters to give general discovery. He noted that if there was material relevant to valuation of the company, the dissenters had agreed to disclose it and it would not be necessary or appropriate to expand the obligation on the dissenters to search for large quantities of irrelevant material.

35. The company also sought disclosure of the dissenters' **brokerage records -** in addition to the trading records of the share transactions which the dissenters had agreed to be provide - but the request was refused by Parker J who held at [77] that a review of the brokerage records to ascertain trading activity went to the dissenter's motivations and commercial strategies and were not relevant to fair value of the company. He said this:

[5] *eHi Car Services Ltd (Unreported, 24 February 2020),* §70

"To try to discover whether the dissenters' subjective views at the time were different to those they may put forward at trial does not assist the court."

The Company's Position

36. The Company submits that the documents responsive to the categories proposed in the revised appendix 7 are likely to be relevant as enabling the experts to form their view on fair value and likely to assist counsel when cross examining the experts and any factual witnesses put forward by the Dissenters and in settlement negotiations.

37. The Company's expert, Dr. Michael Cliff, posits that the process of forming a view on fair value requires an expert, *inter alia*, to *"cross-check the preliminary valuation results across the various approaches against the views on value expressed by market participants."*

38. Dr. Cliff says further, in paragraphs 12- 18 of his first affidavit, that in addition to such objective facts such as historical financial results, current interest rates or that a market participant made a bid to purchase a certain number of shares, valuation experts will also consider what he describes as *"subjective information"* such as future revenue, future interest rates, future legislative and policy development, future consumer preferences and such other variables about which the experts will have to exercise judgment.

39. Dr. Cliff explains that while a company will prepare financial forecasts and form certain *"subjective"* views about those inputs - i.e. future revenue, future cost of capital, future consumer preferences and such other variables - which the expert will take into account, the company's views about these inputs will not be necessarily more accurate than the views on these inputs of other market participants.

40. Indeed, he says, market participants may have a better view of those inputs than the company itself, whether because they have better data about the company's competitors or better insight into changing consumer preferences or better analytic models and the expert will be generally interested in obtaining information about those views.

41. He suggests that having access to multiple viewpoints of these various *"subjective"* valuation inputs can enhance the reliability of the expert's valuation and that information in the hands of market participants, including dissenters, relevant to valuation issues, might provide helpful insights. He explains that market participant information includes all the categories of information set out in the Company's proposed dissenter disclosure categories, including explicit valuations of the Company and data about their trades in the Company.

42. Mr. Hopkins, on whose expertise the Dissenters rely, says that if Dr. Cliff intended to suggest that valuation experts would cross-check the preliminary valuation results against the views of **specific market participants,** then he would disagree that it is either beneficial or common practice to do so and that he would disagree too with the proposition that individual outsider opinions can add any value to those of company management who have full information.

43. Mr. Boulton submits that Mr. Hopkins evidence is at odds with the *Qunar Appeal* and in particular with the statement of Rix JA at [65] that,

> *"… saying that the views of others are irrelevant involves also saying, albeit implicitly, that **their views of everything which goes to make up a business's value are irrelevant: not only their ultimate view of value, but every ingredient which goes to make up that ultimate view, such as the state of the industry, the state of the market the position of competitors, the state of the company's products and competing products, the ability to predict the future, the discount which has to be made for that uncertainty, the cost of capital, both loan and equity, and so on and so on…."***
>
> [emphasis supplied by Counsel]

and at odds with the Opinion of the Delaware Court of Chancery in *Dole* and the statement of that Court at [64] that,

> *"The [dissenters'] internal, contemporaneous valuations are real-world assessments by 'astute investors' who must 'back their beliefs with their purses.' **Their views** may prove to be as or even more credible than the litigation-crafted opinions of valuation experts …."*[6]

44. He contends that insofar as the Company's categories seek to elicit the subjective views of the Dissenters, this is consistent with the guidance given by the Court of Appeal which extends more broadly than the categories which were before the Court and that Parker J was wrong to have held otherwise in *eHi* and *FGL Holdings.*

Category 1

45. I turn now to consider the Company's proposed categories:

The Company's revised Category 1 requests documents reflecting or relating to value which the Dissenters have already agreed to provide. It is substantially in the same terms as the original Category 1, save that the original Category 1 does not include the words "*or modelling of its actual or potential financial performance*" at paragraph 1.2. The Dissenters' expert, Mr. Hopkins says the

[6] *In re Appraisal of Dole Food Company, Inc.* 114 A.3d 541 (2014), Consolidated C.A. No. 9079–VCL

additional words add nothing. Nothing in Dr. Cliff's evidence explains the surplusage. I am satisfied the additional words are superfluous and I make the order for disclosure in terms of the Category 1 agreed by the Dissenters.

Category 2

46. Mr. Beltrami QC says, and I accept, that the first part of Category 2, which seeks all documents and communications *"reflecting, documenting, discussing, considering, summarising, noting, referring to, constituting, memorialising, modelling, or evidencing the value of the Company or its shares or other securities pertaining to the Company"* adds nothing to the disclosure which the Dissenters have agreed to give in Category 1.

47. The further request in Category 2 is for documents relating to the Dissenting Shareholders' decision to purchase or sell the Company's shares or to vote for or against the merger or accept or otherwise the merger consideration and so forth and is aimed at the Dissenters' motivation. Mr. Boulton submits that what the Dissenters were willing to pay for shares, why they were buying shares, whether they were buying simply to dissent or whether they thought there was a significant upside to paying a certain value, may be relevant depending on what the documents in their hands may show.[7]

48. Why the Dissenters made the decisions they did does not appear to me to bear upon the need to have *"**subjective information** about such inputs as future revenue, future interest rates, future legislative and policy development, future consumer preferences among other variables"* on which this application for wider disclosure appeared to me to be premised.

49. In his prefatory remarks, Dr. Cliff's evidence was that dissenters may have a better view of those inputs because they might have better data about the Company's competitors or better insight to changing consumer preferences or better analytic models.[8] That is to say, they might have valuations and analyses that were better than the Company's, consistent with the dicta of Rix JA in the *Qunar Appeal.*

50. In support of the Company's application in respect of this category, his evidence is that *"documents related to a Market Participant's decision to dissent from a merger transaction, including information about how they hope to generate a return on investment from such an action (eg from a fair value award, interest or settlement) can be relevant to an Expert as this represents another view on value."* Dr. Cliff's evidence does not go far enough, in my view, to connect the disclosure sought in Category 2 to his "*subjective information analysis",* as it was

[7] Transcript Day 3 page 68
[8] Cliff 1 para 14

dubbed by Mr. Boulton,[9] which was advanced to explain the need for the expanded categories of discovery being sought.

51. As I see it, the reason for a dissenter's decision to dissent is wholly unrelated to the *"subjective information"* of which Dr. Cliff referred in his evidence which mirror the factors enunciated by Rix JA at [67] of the *Qunar Appeal*, including *"the ability to predict the future, the discount which has to be made for that uncertainty, the cost of capital, both loan and equity."*

52. Mr. Boulton seeks to strengthen his argument by drawing the Court's attention to the order made by the Court of Chancery in *Dole* in the following terms:

> *"Document Request No. 11:* ***All … documents pertaining to the decision*** *of any* ***of the*** *Plaintiffs or* ***Dissenters (i) to purchase or sell shares*** *of Dole stock or other Securities pertaining to Dole at any time during the Relevant Time Period****, (ii) to vote for or against the Merger, (iii) to accept or reject the Merger Consideration****, (iv)* ***to demand or refrain from demanding appraisal*** *of Dole stock, (v) to commence or pursue any of the Actions …"*

53. Mr. Boulton in his oral submissions says that the decision of the Dissenters to purchase or sell shares or to accept or reject the merger consideration is an area ripe for cross-examination on matters going to the credit of the Dissenters and/or their experts. By way of example, he says if the Dissenters truly believed that the shares were undervalued, they would have been buying up all the shares even at the post-merger stock price, and if that is not what happened, he would wish to explore why not.

54. His submission does not accord with the way in which the Court in *Dole* approached the question of how disclosure might bear on witness credibility. What Laster VC said there[10] was,

> "*that pre-suit valuation material prepared by [the] petitioners may bear on witness credibility, for example if a petitioner or its expert advances positions in litigation that differ materially from the petitioner's pre-litigation views."* [emphasis mine]

55. Looked at in that context, documents *"pertaining to the decision"* to buy or sell or vote for or against the merger, etc. is a request for the valuation material that informed the pre-litigation views of the petitioning (dissenting) shareholders. To put it in the language of our Court of Appeal, it is a request for disclosure of the findings, analyses, evaluations and factual selections which the Dissenters, as sophisticated entrepreneurs and investors and analysts in the market, have made or performed, to which the Dissenters have already agreed.

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[9] Transcript Day 3 page 73

[10] *re Appraisal of Dole Food Company, Inc.* 114 A.3d 541 (2014), Consolidated C.A. No. 9079–VCL]

56. I am content to accept Mr. Boulton's central thesis that dissenter disclosure obligations may extend to more than valuations and analyses, but I struggle to see how requiring the Dissenters to say, *inter alia*, why they bought shares or opposed the merger will elicit anything relevant to fair value that cannot be gleaned from the valuations and analyses obtained by them and on which they have acted by putting their purses where their analysis is.

57. On this issue, then, I prefer Mr. Hopkins' evidence that it will not, and that information with respect to the decision making process of external parties who are not the subject of the valuation exercise, including their motive to dissent, is of no value to a valuation expert.

58. His evidence to the same effect was accepted by Parker J in *FGL Holdings* who held that "*the particular motives or commercial positions taken by the dissenters or other persons are not relevant. Neither are their subjective views and decisions they may have made as to valuation…*"[11]

59. I am content to follow my learned brother's decision as the Company has not demonstrated that he fell into error.

Category 3

60. The Company's revised Category 3 at paragraphs 3.1 and 3.2 seeks documents that identify any other publicly traded companies that the Dissenters believe to be comparable to the Company for the purposes of fair value and any transactions the Dissenters believe to be comparable to the Merger for the purposes of determining fair value.

61. In his first affidavit, Dr. Cliff states that,

> *"A Market Participant's view about what other companies are comparable to the subject company can be relevant information to an Expert when assessing the applicability of the comparable companies' valuation methodology. Similarly, a Market Participant's view about what other transactions are comparable to the merger transaction can be relevant information to an expert when assessing the applicability of the precedent transaction methodology."*

62. Expanding on this evidence in response to Mr. Hopkins, Dr. Cliff states[12] that the *identity* of the companies and transactions may be useful to the valuation expert, who will need to evaluate the set to use (if any) in her valuation.

63. If the Dissenters undertook a comparable company analysis or a comparable transaction analysis which informed their views of the business's value, then those analyses, which would necessarily

[11] *Supra* para 32
[12] Para 18 of Cliff 3

include the companies and transactions which the Dissenters believed were the best comparables, would fall to be disclosed under Category 1.

64. It is not clear to me what more the Company seeks.

65. Mr. Beltrami suggests this category is aimed at trying to discover the Dissenters' reasons for considering a particular company or particular transaction to be comparable which would be irrelevant for the reasons I have already set out. What is required, as stated in the *Qunar Appeal,* is that the company's own documents *"be exposed to the arguments which can flow from the findings, analyses, evaluations and factual selections which other sophisticated entrepreneurs, investors and analysts in the market have made or performed."*

66. The comparable analyses undertaken by the Dissenters will contain the factual selections made by the Dissenters.

67. The Company has not made a case out for an additional category of disclosure with respect to comparables.

Category 4

68. **Category 4** relates to communications between the Dissenters and the Company. As Mr. Beltrami observes, the proposed category departs from the standard order which was agreed by the Dissenters in their Category 2 which was to provide a list of any communications with the Company whether in *writing, electronically or verbally*, with any representative of the Company prior to the date of the merger *in relation to the value of the Company or its shares*. The Company's proposed Category 4 seeks communications which are not limited to those going to the value of the Company's shares.

69. It also seeks all documents relating to the communications that any dissenting shareholder had, including draft documents, file notes, internal messages or calendar appointments and a list of communications that were wholly oral.

70. As Mr. Hopkins put it in his evidence, the Company is seeking to transform the disclosure that the Dissenters agreed to provide from a list of communications regarding value to copies of everything *regardless* of topic.

71. Dr. Cliff's evidence in support of this category is that,

> *"Market Participants may contact the Company during the merger process to ask questions or set out their views about the proposed transaction. These documents and communications have the potential to provide an Expert with useful insight on potential*

valuation issue and are an additional indication of potential subjective information in the possession of Market Participants."

72. His evidence does not explain why a category which does not limit the request to communications going to the value of the Company's shares is relevant.

73. In his submissions, Mr. Boulton attempts to put the meat on the bones of Dr. Cliff's evidence with respect to this category. He submits, *inter alia*, that it is *"obvious"* that communications between a shareholder and a company, beyond those that expressly discuss value, may be relevant when one considers that such communications may illustrate the extent to which market participants were informed about the Company. This, he says, can be relevant to market efficiency arguments and the market price methodology.

74. Not only is it not obvious, but Dr. Cliff does not give any evidence that would explain how individual investor communications with a company would be relevant to market efficiency arguments which are premised on the assumption the market will act on information available to *all* market participants who *"in trading the company's stock, recalibrates its price to reflect the market's adjusted, consensus valuation of the company."*[13]

75. Mr. Boulton says further that such documents may also illustrate what aspects of the Company's business were of most interest to market participants and why, which can be relevant when the expert is assessing the Company's projections and growth assumptions. Again, why knowing what a disparate group of Dissenters thought about various aspects of the Company's business is relevant, in the circumstances where the Company will have the valuations and analyses which informed their decision to purchase shares in the Company, is not explained by Dr. Cliff.

76. Mr. Boulton also contends that such documents may illustrate what information the market participants already had, or anticipated about the Company (particularly if the market participants put questions to the Company about issues the market participants had been researching) which can be relevant when considering what information was and was not 'material non-public information'. There is nothing in Dr. Cliff's evidence that supports this proposition.

77. Mr. Boulton submits that the Dissenters' view on their interactions with the Company is relevant for the reason, as set out in the *Qunar Appeal*, that the Dissenters' ultimate view on value and "*every ingredient which goes to make up that ultimate view"* is relevant. With respect, communications *not* related to value are unlikely to capture the Dissenters' views of the *subjective valuation inputs* on which Dr. Cliff premised the Company's proposed disclosure categories.

[13] Part C Appendix 4 Company's Skeleton

78. Mr. Boulton accepts that in the *Qunar Appeal,* the Court had stated that the communications with the Company should be confined to communications regarding the value of the company or its shares. He says, however, that what other reasons there might be for wanting to understand what information the Dissenters had obtained from the Company, was not argued at first instance.

79. The evidence he has relied on in this application has failed to establish that communications not related to value have any relevance at all to the task before the Court.

80. As to the relevance of file notes and internal messages, Mr. Boulton submits their relevance follows from the relevance of the communications themselves. Mr. Beltrami describes the disclosure sought as access to the *"the internal chat"*: the note made by a Dissenter after a communication with the Company or the email sent to a third party expressing a view about it, the hinterland of what individual Dissenters thought about the communications and their views on a particular point which, he submits, is aimed at the motives or subjective intentions of the Dissenters which is irrelevant as Parker J has held.

81. I accept that.

82. Disclosure is ordered in the Category 2 agreed by the Dissenters.

Category 5

83. This category relates to any document *"about the Company, its directors, officers or business, whether created by the Dissenting Shareholder or anyone else*", irrespective of its relevance to fair value. Mr. Beltrami submits, and I accept, that it would impose an obligation akin to general disclosure on the Dissenters by the back door, which the Chief Justice in *JA Solar* held was impermissible and was a fishing exercise that [would?] catch anything at all *"in the Dissenters' repositories"* that mentions the company or its business.

84. Similarly expansive requests were rejected by Parker J in *eHi* at [73] and *FGL Holdings* at [70]. I adopt Parker J's statement in *FGL Holdings* that if there is material which is relevant to valuation of the Company, the Dissenters have agreed to disclose it and anything beyond that is irrelevant to the exercise of trying to determine the fair value of the shares.

Category 6

85. Category 6 concerns a trading schedule detailing the history of trades in the Dissenters' shares. The Dissenters are agreeable to provide the trading schedule ordinarily provided by dissenters in s.238 proceedings following the *Qunar Appeal.*

86. However, Category 6 also extends to detailing the Dissenters' (i) trades in derivative securities; as well as (ii) long trades "*for any shares that were then sold prior to the Valuation Date and are not subject to these proceedings*."

87. Mr Hopkins' evidence is that, beyond the agreed trading schedule, Category 6 relates to documentation surrounding the trading history of the shares and is not relevant to fair value. His position is that a review of brokerage records in order to ascertain the Dissenters' trading activity is aimed at discerning the Dissenters' motivations and commercial strategies, rather than the Company's commercial prospects, and is, therefore, irrelevant.

88. Dr. Cliff's evidence is that,

> *"Understanding how Market Participants' traded a subject company's stock (or other securities) can provide relevant information to an Expert. For example, if a Market Participant sold shares at a given price, then that could suggest that the Market Participant felt that the shares were not worth more than that amount (subject to consideration of other factors such as liquidity demands and portfolio constraints)."*

89. He says further that trading patterns can be useful for assessing the weight to give to other information provided by the Dissenters.

90. Elaborating on Dr. Cliff's evidence, Mr. Boulton submits that a Dissenter's actions are a data point that reflects a view on value. He says that Mr. Hopkins offers no rational explanation as to why formal valuations prepared by Dissenters should trump valuations implied by their actions. In his oral submissions,[14] Mr. Boulton contends that the Dissenters' trades in derivatives and shares before the valuation date would be indicators of value or at least that the Dissenters thought that their value was not higher than the price they obtained from selling them.

91. The *Qunar Appeal,* in my judgment, provides the explanation for not expanding this category of Dissenter discovery as the decision speaks to the analyses and assessments conducted by the Dissenters which informed their views, not valuations to be implied from how the Dissenters traded in the Company's shares.

92. Mr. Boulton's submissions make it clear that the Company seeks the information about the Dissenters' trades only to undermine the Dissenters' credibility in taking certain positions on value in these proceedings by challenging them on their pre-litigation views of the value of the Company. In *FGL Holdings,* Parker J held that discovery for the purpose of undermining the credit of a party or its witnesses is generally not appropriate in fair value proceedings as the court is

[14] Transcript Day 3 page 83

engaged in a process of arriving at the fair value of the dissenters' shares, assisted by the experts who play a vital role and who owe duties to the court.[15]

93. In accepting Mr. Hopkins' evidence in the same terms as given in these proceedings, Parker J said this:

> *"77. A review of brokerage records to ascertain trading activity by the dissenters is plainly designed to go to the dissenters' motivations and commercial strategies. To try to discover whether the dissenters' subjective views at the time were different to those they may put forward at trial does not assist the court."*

94. The Company's arguments in support of this category have not persuaded me that my brother Parker J was wrong and that I should decline to follow his decision. The Company has failed to make out a case for disclosure beyond the agreed schedule of trades.

Category 7

95. As Mr. Boulton says, Category 7 builds on Category 6 and relates to communications between the Dissenters, their agents or representatives and extends to documents and communications (i) given by the Dissenters to its agents or representatives to execute trades, "*or any other attempted trades*" and (ii) "*all documents discussing the rationale for such trades*".

96. Dr. Cliff says that Category 7 is intended to capture information about trades that were attempted but did not actually occur as this information can be informative about the Dissenters' views on value. He illustrates the way in which this information would be helpful with the following example:

> *"[S]uppose a Market Participant, when dissenting, contends that the subject company's stock was worth $30 /share. If a Market Participant tried to purchase shares at up to $10/share, but no transaction occurred because the market price was $11/share, then the category 6 schedule will not reveal any trades. Yet the information about the attempted trade would still be of potential use to the Expert. For example, if an Expert is trying to evaluate whether a Market Participant's contention that the subject company's stock is worth $30/share is credible and thus indicates that the Expert's own preliminary valuation of the Company at less [than] $30/share undervalues the company, then the Expert's conclusion, might be different depending on whether or not there is evidence of the Market Participant attempting to trade at a price that is consistent with a $30/share valuation."*

[15] At para 64

97. Mr. Beltrami points out in his submissions on behalf of the Dissenters, that Dr. Cliff's central thesis is that Market Participants possess multiple forms of information that can provide helpful insights into what the most suitable valuation methodology is and, in turn, the value of the company including explicit valuations of the company and data about its trades in the company. He says, and I accept, that the Dissenters agreed to provide these and that Dr. Cliff's evidence in support of this category, as for category 6, does not explain how the additional information the Company seeks will assist the experts or the Court in determining fair value.

98. With respect to the example Dr. Cliff gives *supra*, Mr. Beltrami says it is clear that this category is aimed, as Mr. Hopkins says in his evidence, at "*checking individual market participants' views versus their conduct and deciding who is credible.*"[16] In his affidavit in response, Dr. Cliff appears to concede this as he says the expert must assess the reliability of the information from Dissenters and that the documents in Category 7 *"can be useful in that regard*."[17]

99. Parker J has already held that the credibility of individual dissenters is not relevant to determining the fair value of the shares. Nothing in the *Qunar Appeal* or in Dr. Cliff's evidence persuades me that Parker J was wrong to so hold and that I should order the disclosure sought by the Company in this category.

Category 8

100. Category 8 relates to the Dissenters' views on COVID not only in relation to the Company but other comparable companies, governments, markets, and the economy generally.

101. Dr. Cliff's evidence in support of this category says,

> *"An expert may want to consider the views of Market Participants when forming or testing her own views about the impact of Covid 19 on the company, including the extent to which it might affect its future performance as modelled in any discounted cash flow calculation."*

102. Mr. Boulton submits that when one is performing a valuation at a valuation date that is within the pandemic period, then expectations as to the impact that may have on value generally are clearly highly relevant, including whether, at the time, the Dissenters thought that COVID was a short-term blip that would have no long-term impact or whether there were concerns that the potential effects of COVID would be deep and long-lasting. He submits further that to be able to test what

[16] Para 64
[17] Cliff 3 para 22

the dissenters themselves thought about the likely impact of COVID is relevant to the issue of fair value and relevant to cross-examination.[18]

103. The proposition that the subjective views of the Dissenters which this category seeks to capture are relevant is supported by the statement of Rix JA said:

> *"… dissenters live in the same world as companies whose fair value has to be assessed. Such companies may have internal information and projections which are not in the public domain, albeit in the case of a listed company like Qunar the room for such private information may be more limited than in the case of unlisted companies."*

104. Mr. Beltrami described this category in his oral submissions as *"beyond general discovery and absurd"* and unable to meet the test for disclosure articulated by Parker J in *FGL Holdings at* [82] that the additional material be clearly defined, necessary for disposing fairly of the fair value question, proportionate and likely to be sufficiently probative so as to make the exercise worthwhile.

105. Mr. Beltrami submits that an expert will have his or her own views on value and the suggestion that their views will be impacted by the views of forty-five dissenters on the impact of COVID-19 on the economy is unrealistic.

106. He makes the point that insofar as any analyses were conducted by the Dissenters on the effect of COVID -19 on the fair value of the Company's shares this will be caught by the discovery the Dissenters have agreed to give in Category 1. I accept that and refuse the Company's invitation to order disclosure in this category.

107. The Dissenters are ordered to give disclosure in the categories they have agreed.

The Relevance Filter

108. The Dissenters propose that they should be permitted to apply a relevance filter to their disclosure categories to the following effect:

> *"and which are relevant to the determination of the fair value of the shares in the Company as at the Valuation Date".*

109. The Company asserts that such a filter would be wrong both as a matter of principle and precedent. In the Company's skeleton argument, it is suggested that two points of principle arise. The first is that the entire rationale for a specific disclosure category is to identify (potentially) relevant documents. The fact that a document responds to the category means that it should be

[18] Transcript, Day 3 page 85

produced. Secondly, the dispute between the parties about Dissenter disclosure illustrates that the Dissenters' views of relevance are vastly different to the Company's. Permitting them to read down the categories via a relevance filter would thus be particularly problematic.

110. Mr. Boulton says that the point of precedent arises from the judgment in *Qunar Appeal* which stated that the Court (and by extension the parties) should be slow to pre-judge relevance and should instead err on the side of ordering the production of documents that either party's witnesses reasonably say might be relevant.

111. The Company submits that this proposition arises from the following passages from the judgment at [70]:

> *"It is a **strong thing indeed**, in the face of a general regime for mutual disclosure, or even in the absence of such a regime, **to rule at an interlocutory hearing that documents that an expert says that he would find useful** in the preparation of his report **would not be permitted to him**"* (emphasis added)

At [74]:

> *"**"getting it right" is not the point at this stage of the proceedings**. What is needed is for the court, at the end of the day, to get it right, having been exposed to all the material and all the arguments"*
> (emphasis added)

and at [75]:

> *"In my judgment, it is unhealthy in such a context, and in litigation especially, to form a priori assumptions about relevance. The normal rule is that disclosure is a mutual obligation. Mutuality in this respect is equity and fairness…. "*

112. The passages cited by Mr. Boulton do not have the effect for which he contends. The *a priori* assumption to which Rix JA referred was the assumption that nothing in the hands of the Dissenters could be relevant. The dismissal of that argument by Rix JA is not an argument for holding that everything in the Dissenters' possession that relates to the Company is relevant to the issue of fair value.

113. The Chief Justice noted in *JA Solar* that the insertion of the phrase, "*subject to overarching limits of relevance to the fair value question*", ensures that the documents to be disclosed by the Dissenters are actually relevant to the question of fair value. Parker J made such an order, holding that it was a sensible stipulation and has been endorsed by this court on a number of occasions. Parker J in *FGL Holdings* held that it is intended to ensure that documents that are irrelevant are

not disclosed. It seems to me this is a sensible stipulation in the circumstances and has been endorsed by this court on a number of occasions.[19]

Look back period for Dissenter disclosure

114. The parties disagree about the look back period for Dissenter disclosure. The Company has asked for 5 years, the Dissenters propose 2.

115. The Company favours 5 years on the basis of the principle of mutuality articulated in the *Qunar Appeal* and says simply that if the Company's documents are relevant going back 5 years then the Dissenters' documents are similarly relevant.

116. The submission conflates mutuality with equivalence, as Mr. Beltrami observes. The Grand Court has limited the look back period for Dissenter disclosure to between 1 and 2 1/2 years. The 2 year look back period proposed by the Dissenters is consistent with the decisions of this Court. In the absence of any evidence to suggest that a 5 year look back would assist the experts in the valuation exercise, I'm inclined to accept Mr. Beltrami's submissions that the Dissenters' views on value are *"blisteringly irrelevant"* at 3 years and beyond that.

Deal Process Expert

117. The issue of whether the Dissenters should be permitted to rely upon the evidence of a "deal process" expert was decided summarily at the hearing. I now amplify my reasons for dismissing the Dissenters' application.

118. The Dissenters seek leave to appoint a "deal process" expert in addition to a valuation expert. In support of their application, the Dissenters rely on affidavits sworn by Prof. Guhan Subramanian who is an academic at Harvard University who has given evidence in several Delaware proceedings.

119. The Dissenters contend that there are a number of aspects of the deal process in this case which would make the testimony of a deal process expert of particular assistance to the Court.

120. The evidence of a deal process expert is intended to deal with such issues as:

(i) whether the deal should be classified as a "freezeout", that is to say whether the Buyout Group in 58.com was a controlling shareholder and the transaction should, therefore, properly be classified as a freezeout;

(ii) in which event, what are the implications for market efficiency in determining share price;

[19] *JA Solar § 55*

(i) the importance of a majority-of-the-minority condition ("MOM condition") in a freezeout as a check against an ineffective or conflicted special committee and in subjecting the controlling shareholders' offer to a 'market check';

(ii) assessment of the 'holdup risk', that is to say, the potential risk posed by arbitrageurs seeking to hold up the deal in order to force a higher price per share which would not produce a fair value, and

(iii) the implications for the deal process where management is part of the buyout group.

121. In the course of their submissions, the Dissenters suggested that specialist expertise on the effect of the absence of a MoM condition in the merger agreement between the buyer group and the Company would be of particular assistance to the Court.

122. In his affidavit, Prof. Subramanian recounts the recent freezeout of the minority shareholders of Amtrust Financial Services Corp. as an illustration of how the MOM condition, as a source of leverage, can play out in practice. In that case, he says, it allowed *"activist investor"* Carl Icahn to obtain a 9% higher price for shares than was on offer ($14.75 instead of $13.50). That may be, but it would not be open to the Dissenters to argue that this Court should apply a premium of 9% to the deal price because of the absence of the MoM condition in this take private transaction.

123. In other words, while a deal process expert can explain how the inclusion of a MoM condition can affect the transaction price and illustrate it, what they cannot do is give evidence of what the deal price of the shares would have been if this merger had included a MoM condition (in the absence of any holdup risk).

124. Likewise, while a deal process expert may be able to demonstrate that the deal process was badly flawed, they would not be able to opine on what weight the Court should give to the deal price in determining the fair value of the shares.

125. The limits of this expertise in informing the Court is illustrated by the decision in *Dell* where the Court of Chancery, persuaded by Prof. Subramanian that there was a flawed deal process, declined to give any weight to the deal price and so fell into error as the Delaware Supreme Court later held.

126. Having considered all the evidence, it appeared to me that, in the circumstances where (i) it was proposed to call a deal process expert merely to impugn the deal process and not to give any evidence of value and (ii) the valuation experts were able to speak to the issue of whether this merger was or was not at arm's length, whether the company was a controlled company or the deal process robust (as acknowledged by Prof. Subramanian with the caveat that their evidence

would not be as nuanced as his), the Court did not require a deal process expert to determine the fair value of the shares.

127. I would have excluded the possibility of giving leave for such an expert at any stage, but the Company, in its submissions, made the argument that the application was premature as the utility of a deal expert could only be assessed by the valuation experts themselves after they had been appointed and in the event they identified the nuances of the deal process to be a gap in their own expertise.

128. I indicated that, on that basis, the Dissenters would have leave to renew their application at a later stage.

Conclusion

129. There has been some considerable delay in the provision of this judgment. I thank Counsel and the parties for their patience. I anticipate that the Dissenters would have made the disclosure in the *Qunar* categories and trust that, as the wider disclosure the Company sought has not been ordered, the delay will not impact the agreed deadlines for obtaining valuation reports.

130. I will hear Counsel on the form of Order on any order consequential to the Ruling.

DATED THE 8TH DAY OF MARCH 2022

Hon Mrs Justice Ramsay-Hale
Judge of the Grand Court