IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 129 of 2016 (IMJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF QIHOO 360 TECHNOLOGY CO. LTD

<u>IN CHAMBERS</u>

Appearances:	Mr. R Levy QC, instructed by Mr. R Bell and Mr. P McConvey of Walkers on behalf of the Dissenters/Applicants Mr. R Millett QC, instructed by Mr. P Madden and Mr. D Vekaria of Harneys on behalf of the Company/Respondent
Before:	**The Hon. Justice Ingrid Mangatal**
Heard:	**11th and 12th May 2017**
Draft Judgment Circulated:	**24 July 2017**
Judgment Delivered:	**27 July 2017**

HEADNOTE

Section 238 of the Companies Law (2016 Revision) - Discovery application by Dissenting shareholders - Specific Discovery - Application for appointment of forensic expert to conduct forensic audit - Order 24 of the Grand Court Rules (1995 Revision)

JUDGMENT

1. This is an application by Maso Capital Investments Limited ("**Maso**"); Blackwell Partners LLC – Series A ("**Blackwell**"); and Crown Managed Accounts SPC acting for and on behalf of Crown/Maso Segregated Portfolio ("**Crown**"), together referred to as "**the Dissenters**".

2. The Dissenters make an application by way of summons dated 3 March 2017 (the "**Summons**") seeking an order against Qihoo 360 Technology Ltd (**"the Company"**), as follows:

> " *1. The Company shall forthwith take all steps necessary to preserve all computers, servers, network systems, cloud storage, laptops, back-up tapes, archives, handheld electronic devices or other means of transmitting or receiving or storing data ("**Electronic Devices**") and all or any data in the Company's possession, custody or power which may be relevant to these proceedings which is held or stored on or by Electronic Devices or similar means in any jurisdiction whatsoever until the conclusion of the cause or further Order of the Court.*
>
> *2. The Company do, in the manner hereinafter appearing, give specific discovery pursuant to Order 24, rule 7 of the Grand Court Rules, paragraphs 4, 5 and 8 of the Order for Directions dated 25 October 2016 (the "**First Directions Order**") and paragraph 1 of the Order for Directions dated 21 December 2016 of the documents listed in Schedule A ("**Discovery Schedule**") to this Order.*
>
> *3. The Company shall prepare and serve a list of documents by ..., such list to identify all relevant documents including of any electronic file type (and for the avoidance of doubt such documents must include inter alia (whether hard copy or electronic form on an Electronic Device wherever they may be) memoranda, graphic files, office based documents, drafts, notes of meetings and discussions, including telephone conversations and emails (including attachments) or other data sent to or from any email address used by any of the beneficial owners, directors, officers or employees or anyone else on its behalf, which relate in any way to the determination of the fair value of the shares in the Company as at*

*the Valuation Date (as defined in the First Directions Order) ("**Documents**") which are or have been in the possession, custody or power of the Company (the "**List**")).*

4. *The List shall be verified by an affidavit sworn by a director of the Company and such director shall attend in person at the trial of the cause to be cross-examined unless the director's attendance is not required by the written agreement of the Dissenters or further Order of the Court.*

5. *Within 7 days following the provision of the List, the Dissenters and the Company shall designate specific key words to be used to search all Electronic Devices used by or available to the Company and its beneficial owners, directors, officers or employees or anyone else on the Company's behalf for the Documents (the "**Keywords**").*

6. *Subject to the provision of appropriate undertakings (which, in the event that there is no agreement, the Court shall determine such terms), the Company and the Dissenters shall jointly appoint an independent forensic technology expert (the "**Forensic Expert**") to conduct an audit of the Company's information technology systems and all Electronic Devices used by or available to the Company and its beneficial owners, directors, officers or employees or anyone else on the Company's behalf for documents containing the Keywords (the "**Forensic Audit**").*

7. *The Forensic Expert shall be a person with considerable experience of conducting forensic examination of electronic sources and the appointment shall be approved in advance by agreement of the parties, failing which the Court shall determine the identity of the Forensic Expert on the application of any of the parties.*

8. *The Company shall provide all such assistance and access as requested by the Forensic Expert, including but not limited to providing access to the Company's information technology systems and all Electronic Devices referred to in paragraph 6 above and to allow the Forensic Expert to take forensic copies and/or image any emails (including attachments) and/or other electronic Documents.*

9. *The Forensic Expert shall report to the Court and the Dissenters' Cayman Islands attorneys ("**Walkers**") on a weekly basis, such report to contain details of the progress of the Forensic Audit, including but not limited to what has been searched, the Keywords used, the results of the Forensic Audit, the assistance and access provided by the Company pursuant to paragraph 8 above and any impediments to the Forensic Audit.*

10. *The Forensic Expert shall provide all results of the Forensic Audit to the Company's Cayman Islands attorneys ("**Harneys**") on a rolling basis.*

11. *Harneys shall review the documents obtained from the Search for privilege and shall cause all non-privileged documents to be uploaded to the Data Room (as defined in the First Directions Order) within 3 days of receipt from the Forensic Expert.*

12. *The Forensic Expert shall give notice to the Court, Walkers and Harneys when the Search has been completed.*

13. *The Company take steps to compel J.P. Morgan Securities (Asia Pacific) Limited to produce all documents in the Company's possession, custody or power held by it which are relevant to the determination of the fair value of the shares in the Company as at the Valuation Date (as defined in the First Directions Order).*

14. *The time for exchange of experts' reports in accordance with paragraph 11 of the First Directions Order be extended to the date falling four weeks after either the final document has been uploaded to the Data Room pursuant to paragraph 11 above or the Forensic Expert has given notice pursuant to paragraph 12 above, whichever is later.*

15. *The Company pay the costs of the Summons on an indemnity basis, to be taxed if not agreed.*

……"

3. The background to this application is that proceedings were commenced by way of Petition filed on 22nd August 2016 by the Company, whose registered office is Codan Trust Company (Cayman) Limited, Boundary Hall, Cricket Square, Hutchins Drive, PO Box 2681, Grand Cayman, Cayman Islands.

4. The Company is a Cayman Islands exempted limited company whose operations and business have largely been conducted in the People's Republic of China (the "**PRC**"). Its 2015 Annual Report described it as "*a leading internet company in China*".

5. The Petition is brought pursuant to section 238(9) of the ***Companies Law*** (2016 Revision) (the "**Law**") for the Court to determine the fair value of the Dissenters' shares in the Company, together with a fair rate of interest, if any.

6. The Petition avers that at all material times Blackwell was the registered owner of 165,105 Class A ordinary shares, Crown was the registered owner of 36,219 Class A ordinary shares, and Maso the registered owner of 127,773 Class A ordinary shares.

7. On 15 July 2016, (the "**Effective Date**") a merger was effected between the Petitioner and New Summit Limited ("**New Summit**"), an exempted limited company under the

laws of the Cayman Islands, pursuant to which New Summit merged with and into the Petitioner (the "**Merger**").

8. Pursuant to the Merger, and on the Effective Date, each Class A ordinary share of the Petitioner issued and outstanding immediately prior to the Effective Date was cancelled in exchange for the right to receive US$51.33 in cash per share without interest, ("**the Merger Price**") save that the shares of the Dissenters (the "**Dissenting Shares**"), having each given written notice of objection to the Merger on 24 March 2016 pursuant to section 238(2) of the Law, were instead exchanged for the right to receive the fair value of the Dissenting Shares determined in accordance with the provisions of section 238 of the Law, the Dissenters having maintained their objection.

9. On 19 April 2016, the Petitioner gave written notice of the authorisation of the Merger to each of the Dissenters pursuant to section 238(4) of the Law.

10. On 5 May 2016, the Dissenters each gave written notice of their decision to dissent from the Merger pursuant to section 238(5) of the Law.

11. On 22 July 2016, pursuant to section 238(8) of the Law, the Petitioner made a written offer to each of the Dissenters to purchase their shares at a price that it determined to be their fair value. The price offered was US$51.33 per share, which was the same as the Merger Price.

12. The Company and the Dissenters were unable to agree a fair value for the Dissenting Shares within the time provided for in section 238(8) of the Law.

13. On 25 October 2016, an Order was made by consent (the "**Consent Order**"), giving Directions to the parties in preparation for the final hearing. At that time the Company had different legal representation than it does now. The Consent Order directed as follows:-

"It is Ordered that:

*(1) The Petitioner shall, by 4.00 pm on 1 November 2016 (Cayman Islands time), open an electronic data room (the "**Data Room**").*

(2) The Data Room shall be accessible to each of the parties and the parties' respective advisors, consultants and experts for inspection of the documents contained therein each upon the entry into an agreement ....

(3) Documents in the Data Room will be appropriately indexed and usage reports will only be run with the consent of both parties.

*(4) By 4.00 pm on 18 November 2016 (Cayman Islands time), the Petitioner shall upload to the Data Room all documents (of whatsoever description, whether electronic, hard copy or in any other format) and communications (whether by email or otherwise) and other materials which are or have been in their respect possession, custody or power and which are relevant to the determination of the fair value of the shares in the Petitioner as at 30 March 2016 (the "**Valuation Date**").*

(5) Provided that such documents are within the possession, custody or power of the Petitioner, paragraph 4 shall include for the avoidance of doubt the following categories, namely all documents and communications (including, without limitation, emails);

*a. previously provided to or obtained from J.P. Morgan Securities (Asia Pacific) Limited or its affiliates (the "**Financial Adviser**") in relation to the fair value opinion, including those passing between the Financial Adviser and*

i. The independent directors or Special Committee of the Petitioner; and

ii. The Petitioner's other directors, management, employees, counsel and/or advisors; and *iii. The bidding consortium,*

for the purposes of compiling the fair value opinions; and/or

b. *previously provided to or obtained from the Petitioner's financiers, (whether from any of the persons mentioned in 5 (a) above) for the purposes of securing finance for the merger transaction (including but not limited to all management forecasts provided to the same); and/or*

c. *previously provided to or obtained from the bidding consortium or former members thereof (whether provided to or from any of the persons mentioned in 5 (a) or (b) above) or passing between such persons for the purposes of undertaking due diligence on the Petitioner, (including but not limited to all management forecasts provided to the same).*

(6) ....

*(7) The (a) Petitioner and (b) Dissenting Shareholders shall each have leave to separately instruct an expert witness in the field of valuation in order to opine upon the fair value of the shares in the Petitioner as a going concern as at the Valuation Date (both such experts together, the "**Experts**"). The Experts shall be appointed by no later than 1 November 2016, and on that date each of the Petitioner and the Dissenting Shareholders shall advise the other in writing of the identities and email addresses of the respective Experts so appointed.*

(8) The Petitioner shall upload to the Data Room any additional documents, materials, communications (whether by email or otherwise) or information requested by either Expert for the purposes of preparing their own opinion within 14 days of receipt of such a request, unless otherwise agreed or directed by order of the Court...

*(9) The Petitioner shall procure that appropriate members of its management team be available to meet with both Experts together, in person, or by telephone or by way of video-link, ...for the purpose of providing information and answering queries which are relevant to the preparation of the Experts' respective opinions (the "**Management Meetings**")......*

(10) Any factual evidence to be relied upon on the hearing of the Petition shall be given by affidavit......

*(11) Signed reports of each Experts ("**Reports**"):*

a. shall be confined to the issue of the fair value...

b. for the avoidance of doubt, be in accordance with the Rules for Expert Witnesses in the FSD Guide; and

c. shall be exchanged simultaneously but by no later than 9 January 2017.

....

*(16) A case management conference ("**CMC**") shall be held on the earliest date convenient to the Court and the parties' counsel after the exchange of any Supplemental Reports ...*

..."

14. Following a directions hearing on 21 December 2016, the following varied directions were ordered (the "**Varied Directions**"), *inter alia:*

a. The time for uploading documents to the Data Room be extended to 10 January 2017.

b. The time for service or exchange of any factual affidavit evidence be extended to 10 January 2017.

c. The time for exchange of experts' reports be extended to 6 March 2017.

d. The trial be fixed not before 29 May 2017.

e. The Management Meeting take place on or before 14 January 2017.

f. The Company would provide additional responses to FTI's first request dated 1 December 2016 on or before 10 January 2017. The order contemplated that the Company would communicate directly with the Dissenters' expert, Mr. Nicholson.

g. Where the Company states that documents do not exist, the Company will provide an affidavit verifying (a) what searches have been undertaken to locate the documents and where; (b) the results of those searches; and (c) that in the deponent's knowledge, information and belief the document requested does not exist.

15. By agreement, the timeframes for service of factual affidavit evidence, responding to Mr. Nicholson's request, and filing a verifying affidavit were extended to 12 January 2017.

16. The Parties also agreed that the management meeting (the "**Management Meeting**") take place on 16 January 2017.

The Application Evidence

17. A number of affidavits have been filed on both sides. In particular, on behalf of the Dissenters, there are the affidavits of Manoj Jain, the Co-Chief Investment Officer of Maso Capital Partners Limited, the Investment Manager for Blackwell, the Trading Advisor for Crown and the Investment Advisor for Maso("**Mr. Jain**"). On behalf of the Company, there are the affidavits of Alex Zuoli Xu, the Co-Chief Financial Officer of the Company ("**Mr. Xu**"). References hereafter to "Jain 2" or "Xu 5" etc. denote the affidavits of the deponents in these proceedings by reference to the sequence in which they were sworn.

The Dissenters' Arguments

18. In written skeleton arguments prepared by Mr. Levy QC on behalf of the Dissenters, it is stated that the Summons seeks proper discovery and related orders. Further, it is stated

that the essence of the related orders is for there to be an independent review, by a jointly instructed forensic expert, of the Company's hitherto allegedly inadequate discovery.

19. It was submitted that the orders sought are not unusual in cases where there are real concerns that a party has not complied with its discovery obligations.

20. Of note is that reference was made to the unreported decision of Segal J in ***In the matter of Shanda Games Limited*** of 25 April 2017, at paragraphs 57 and 59, where the Dissenters say that an order similar to the one proposed here was made, albeit by mutual agreement of the parties.

21. The agreed order in ***Shanda Games*** required, amongst other things, that Shanda swear to an affidavit explaining the search process carried out in detail, and that Alvarez and Marsal be engaged to conduct a review of Shanda's IT systems for the purposes of ascertaining whether Shanda's position as outlined in its evidence was correct.

22. The submission continues that the Company is a massively valuable company, which in its recent privatisation was valued at the Merger Price, in the region of US$9.8 billion. It employs around 10,000 people. Until completion of the Merger, the Company was listed on the New York Stock Exchange and issued American Depositary Shares ("**ADSs**"), with two ADSs representing three shares in the Company.

23. It was submitted that, despite the vast scale of the Qihoo enterprise, the Company's discovery in these proceedings has been miniscule. Further, that it has never gotten its story straight on what information was provided to whom and by whom.

24. Mr. Levy QC also refers to the failure of the Company to obtain documents from J.P. Morgan Securities (Asia Pacific) Limited ("**JP Morgan**") (which JP Morgan also refuses to discover), and its own attorneys, Skadden Arps, Slate, Meagher & Flom LLP ("**Skadden**"). It was submitted this demonstrates the concerning lack of transparency on the Company's part.

25. At paragraph 11 of the Dissenters' Skeleton Argument it is asserted as follows:

> *"11. Chief amongst the Dissenters' concerns are that:*
>
> *a. the Company's responses are not credible and cannot be relied upon...;*
> *b. the Company cannot (or will not) properly identify the scope of the searches it has conducted, and the searches it says it has conducted are flawed...;*
> *c. the Company has overstated the extent of its discovery to date....;*
> *d. the Dissenters can take no comfort that the Company's discovery is "complete"...; and*
> *e. the Company is forcefully seeking to cause the Dissenters to agree to the exchange of expert reports when the Company's discovery is not remotely complete."*

26. Mr. Levy QC made reference to my unreported decision in ***In the matter of Homeinns Hotel Group***, delivered 12 August 2016.

27. At paragraph 24 of the Dissenters' Skeleton Argument the point is made that the very essence of assessing the fair value of the Company "*is to gain a full and accurate understanding of the condition of the Company, its past history and future prospects as at the valuation date, and to allow that data and information to be considered by a suitably qualified expert for the benefit of the Court. If any element of that process is omitted, then the valuation is prone to error and potentially prone to manipulation. The Dissenters' approach in bringing the instant application is brought in furtherance of this goal and the information sought is not only preferable; it is essential to ensure that the Court is properly able to determine the fair value of the shares of the Company as required by section 238(11) of the Law.*"

28. At paragraphs 56-94 (inclusive) of the Dissenters' Skeleton Argument, the Dissenters provide a summary of the documents sought. Broadly, they are as follows:

(A) Documents and communications related to the 2025 Projections;

(B) Documents and communications to and from, or in the possession of, JP Morgan;

(C) Documents and communications to or from the Company's financiers;

(D) Meeting file notes;

(E) Documents and communications to and from the Buyer Group;

(F) Internal employee communication, documentation and analysis;

(G) Skadden emails; and

(H) Tax analysis.

(A) Documents and communications related to the 2025 Projections

29. It was submitted that the documents referred to at items 1 to 4 of the Schedule to the Summons concern materials that went to make up the 2025 Projections. It was argued that there can be no question that the documents sought under those heads are crucial to a proper understanding of the 2025 Projections (and therefore to the work the experts have to undertake). All of these documents, it was submitted, are discoverable pursuant to the Consent Order.

30. Further, at Jain 2 from paragraph 132 onwards, it is averred that the Company has made inconsistent responses to the FTI Requests concerning the data underlying the 2025 Projections. Mr. Levy QC argues that this confirms that the Pre-Management Meeting responses were untruthful.

31. In his affidavit, Jain 2, at paragraph 138, Mr. Jain claims that there is only one document of substance in the Data Room that relates to the 2025 Projections and that there is no documentation underlying the inputs into those Projections.

(B) Documents and communications to and from, or in the possession of, JP Morgan

32. It was further submitted that JP Morgan was provided with data, and plainly is in possession of relevant documents. Reference was made to JP Morgan's letter of 7 April 2017. Such documents are discoverable by the Company if they are in its possession, custody or power. By way of example of the type of material that is sought from JP

Morgan, Mr. Nicholson of FTI has requested a copy of the analysis communicated by JP Morgan to the Special Committee on 9 December 2015, following which the Special Committee instructed its advisors to seek an increase in the purchase price to US$80.00 per ADS (Request No 15 by way of FTI's letter dated 1 December 2016).

33. Reference was made to the well-known case of ***Lonrho v Shell Petroleum*** [1980] 1 WLR 627 as authority for the proposition that documents are within a litigant's power if he has a presently enforceable right to obtain them from the holder without the need to obtain the consent of anyone else.

34. As regards the Special Committee, Mr. Levy QC submitted that the Company has sought to distance itself from the Special Committee as if they were not somehow members of the Company's board of directors (the ***"Board"***). However, that the members of the Special Committee *were* members of the Board properly so called, and even if (which is not the case) before the Merger completed, the other members of the Board or the Company itself could not have access to their papers concerning the then-proposed merger, once the Merger had completed there could not possibly be any objection to them producing their documents to the Company; the documents belong to the Company.

(C) Documents and communications to or from the Company's financiers

35. The Dissenters say that it is only after the Summons was filed that the Company discovered the contents of the virtual data room ("**VDR**") set up for the purposes of the take-private transaction.

(D) Meeting File Notes

36. The Company's position is that all face-to-face meetings and all phone calls which took place between the Company and JP Morgan were not transcribed, minuted or recorded in any way. Mr. Levy QC contends, that given the vast scale of the transaction which was being consummated, the number of people involved and the range of tasks which were required to be completed by both JP Morgan and the Company, this is so improbable as to be implausible.

(E) Documents and communications to or from the Buyer Group

37. It was stated that no file notes of meetings between the Company/Special Committee and the Buyer Group or its advisers have been discovered. Mr. Levy QC contends that given that the Merger Agreement mandated that the Company would provide certain documentation to the Buyer Group, it is simply implausible that all relevant documents have been discovered.

(F) Internal employee communication, documentation and analysis

38. It was submitted that in essence, the Company has stated that it does not conduct any internal valuation analysis whatsoever of the Company's strategic acquisitions or business units. It was submitted that this was surprising, given that the Company spent almost US$2 billion on acquisitions and investments in 2014 and 2015.

39. Reference was made to paragraphs 29, 42 and 48 of Xu 5, where Mr. Xu respectively said that it is the practice of the Company's senior management to engage in *"lengthy discussions internally and hold numerous meetings at senior management level"* when it comes to considering the Company's acquisitions and strategic direction. Mr. Xu states further that *"much of Qihoo's structure, communications and business is done on a very informal basis"*, and that it does not take notes of meetings held with members of the Company's staff.

40. This was said to be difficult to reconcile with what is said on behalf of the Company at paragraph 133 of Xu 4, as follows:

> *"Before [November 2016], the Company's investment and acquisition activities were approved through internal e-mails, which usually briefly set out the business rationale for such investment or acquisition as well as key transaction terms for management review without internal or third-party valuation report."*

(G) Skadden e-mails

41. It was contended that the Company's approach to the Dissenters' request that copies of the documents obtained from Skadden be uploaded to the Data Room in their native form has been evasive. Reference was made to Xu 4 at paragraph 118, where he says that these documents *"are simply not in the power, possession or custody of Qihoo."*

42. It was submitted that this was wrong, since Skadden are the Company's former attorneys, and on well-accepted principles, the client is entitled to his attorney's file and that Skadden should be directed by the Company to deliver up its file in the usual way in respect of an attorney/client relationship.

(H) Tax analysis

43. Mr. Levy QC made a number of submissions that are to the effect that the Company has taken inconsistent positions, or at best, unclear positions in relation to the extent of the Company's internal tax analysis.

The Dissenters' Submissions seeking the appointment of a forensic expert in order to ensure that the Company's discovery is properly conducted

44. It was submitted that the discovery sought in this application is necessary for the fair disposal of the proceedings and will ultimately permit the expeditious and cost-effective resolution of the proceedings, in accordance with the overriding objective and Order 24, Rule 8 of the Grand Court Rules (the "**GCR**").

45. Further, that there is a substantial body of case law from various common law jurisdictions recognising the power of the court to order the supervision of a party's discovery by a (usually independent) expert.

46. It was submitted that many cases (in England in particular) base the power to make such orders on the court's inherent jurisdiction. That being so, it was submitted that the Grand Court would possess a similar power. Mr. Levy QC remarks that it is of course notable that in ***Shanda Games*** the company consented to a similar order, and Segal J did not there suggest there was no jurisdictional basis for such an order to be made by the Court.

47. Reference was made to ***Marlton v Tectronix UK Holdings*** [2003] EWHC 383 (Ch) where Pumfrey J found that the claimant's disclosure had been inadequate.

48. Reference was also made to the decision of Deputy Judge Catherine Newman QC in ***Hunter Worldwide Premium Sourcing Ltd v Lawless and another*** [2016] EWHC 1031 (Ch) who ordered that the claimant, in order to comply with the previous disclosure order, should instruct its expert, Baker Tilly, to conduct further searches of laptops formerly used by the defendant and relevant computer servers for certain spreadsheets responsive to agreed search terms. It was also ordered that neither the parties nor their solicitors were to be present or interfere with the independent work of the computer expert searching the files.

49. In ***CBS Butler Ltd v Brown*** [2013] EWHC 3944 (QB), after a search order, an application was made that the defendant's disclosure be given by an expert doing the search rather than the defendant. Tugendhat J referred to the decision in ***Mueller Europe Ltd. v Central Roofing (South Wales Limited)*** [2012] EWHC 3417 (TCC). At paragraph [38], Tugendhat J discussed the issues as follows:

> "*[38] In my judgment, an order which would deprive the Defendants of the opportunity of considering whether or not they shall make any disclosure is (in the words of Hoffmann J) an intrusive order, even if it is made on notice to the Defendant. It is contrary to normal principles of justice, and can only be done when there is a paramount need to prevent a denial of justice to the claimant.* ***The need to avoid such a denial of justice may be shown after the Defendant has failed to comply with his disclosure obligations, having been given the opportunity to do so (as in Mueller). Or it may be shown before the Defendant has had the opportunity to comply with his disclosure obligations****. But in the latter case it is not sufficient for a claimant such as the employer in* **Lock v Beswick***, or the Claimant, to show no more than that the Defendant has misused confidential information or otherwise broken his employment contract.*

*The position is a fortiori where the claimant has not even shown that much. What a claimant must show is substantial reasons for believing that a Defendant is intending to conceal or destroy documents in breach of his obligations of disclosure under the **CPR**."*

(My emphasis)

50. Mr. Levy QC referred to ***Patel v UNITE the Union*** [2012] EWHC 92 (QB), where the claimant sought, as part of the proceedings for ***Norwich Pharmacal*** relief against the defendant, disclosure of the identities, home addresses and IP addresses of persons who had posted allegedly defamatory comments about the claimant on a forum run by the defendant. Following the defendant's contention that, having taken the forum offline and deleted its contents, it was unable to comply with the order, the claimant sought an order that an independent expert be given access to the relevant database and permitted to make an image of the database and/or such other electronic copy of data on the database (existing or deleted) as the expert might consider necessary in order to prepare a report limited to the identification of the information sought.

51. At paragraphs [28] and [31] Judge Richard Parkes QC discussed the court's power to make such an order. At paragraph [28] the Judge discussed this as follows:

> *"[28] The order sought by Mr. Patel is undoubtedly intrusive. It would require Unite to allow an independent expert access to their database and to permit that expert to make an image or some other copy of the database with a view to preparation of a report limited to identification of the information sought. The first question is whether there is any power to make such an order. Mr. Edwards conceded that the court has the power, while arguing that it would be neither necessary nor proportionate to exercise it. No domestic authorities on the point have been brought to my attention, and it appears that no mention is made of such a step in CPR 31BPD, which governs electronic disclosure, but I was shown a passage at paragraph 9.29 of Matthews & Malek on Disclosure (Sweet & Maxwell,*

2007), which asserts that the court has the power to order inspection of a database and to give access to a party's computer or to direct the provision of an imaged version of a database, but that it will only do so if it can be shown to be necessary and proportionate. The editors suggest that where it is not appropriate to allow a party to have access to the material, the court may permit inspection and interrogation of the computer system by an independent expert, who would be subject to undertakings necessary to protect the interests of the disclosing party. That, of course, is what is sought here. ***<u>In my judgment, it must be open to the court, where there is reason to believe that a previous order of the court has not been fully complied with for reasons of lack of technical understanding, to make such further order as is necessary and proportionate to enable and assist the Respondent to comply and to ensure that the earlier order is not frustrated by an innocent failure to understand the technical issues, which in this case concern the scope for retrieval of the deleted data. As I say, Mr. Edwards did not seek to argue otherwise."</u>***

(My emphasis)

52. The Dissenters referred to other English cases, the ***Mueller*** case, and ***M3 Property v. Zedhomes*** [2012] EWHC 780(TCC). Also to ***Hollander's Documentary Evidence,*** para. 8-18 and ***Matthews & Malek*** para. 9.35, as well as to decisions from other common law jurisdictions.

The Company's Position

53. Mr. Millett QC, who appeared for the Company, early in his Skeleton Argument makes the point that the Summons was filed on 3 March 2017, a mere three days prior to the date on which the exchange of expert reports was due to take place. Since then numerous documents have been uploaded to the Data Room (on 3 April 2017). The Company states that it is concerned that the Summons bespeaks a tactic to delay the exchange of expert evidence and thereby hold up the progress of the matter. The Company queries such an

approach, when, the Dissenters say, they are keen to get paid the fair value. However, the Dissenters, Mr. Millett QC states, are arbitrage investors who are frequent visitors to this Court as dissenting shareholders in section 238 petitions. It is asserted that the Company believes that the Dissenters think that the Company will relist in the PRC and hope that a re-listing will result in an increase in its value. This has not occurred, and the Dissenters' expert, it is submitted, has clearly been unable to provide the Dissenters with a valuation that is commensurate to a return that the Dissenters have promised investors. Further, that there is no other plausible explanation for the timing and content of the application, when the correspondence is closely analysed.

54. By way of summarising the Company's position, Learned Counsel asserts that the Summons is oppressive, disproportionate and pointless. Although the Dissenters argue that the Company's disclosure is deficient, they have failed to file any evidence as to how these alleged deficiencies are preventing their expert from preparing his report and/or how they are relevant to valuation.

55. What is more, the argument continues, whether or not the Dissenters believe it, the Company through Mr. Xu has explained at length in Xu 4 and Xu 5 why it is that the documents in the various categories sought by the Dissenters either do not exist or are anyway not in the Company's possession, custody or power. The application was characterized by the Company as really just being a way of seeking to cast doubt on Mr. Xu's credibility so as to set up adverse inferences against the Company at the trial.

56. The submission continues that, in addition to Xu 4, the Company has filed two verifying affidavits, Xu 3 and Xu 5. The Dissenters have not sought to challenge the primary facts deposed to in them, and in law cannot do so anyway.

57. The Dissenters it is argued, have failed to provide any evidence that:

(a) the documents and information set out in Schedule A to the Summons are necessary "*in order to dispose of the claim fairly*"; and/or

(b) objectively there is reason to believe that the requested documents exist and/or that they are or have been in the possession, custody or power of the Company.

58. Learned Counsel contends that the relief sought by the Dissenters in the form of a forensic IT audit is not a relief available under Order 24, Rule 7 of the GCR. It is, it was submitted, highly intrusive injunctive relief, akin to an Anton Pillar Order. Draconian relief like that is wholly inapposite in a section 238 fair value claim and in particular at the stage that this case has reached.

59. The Company also says that it has been mindful of its ongoing disclosure obligations, has continued to conduct searches and where searches have been made, it has made further disclosure - see Xu 5.

60. The Company maintains that it has:

(a) uploaded 4998 documents to the Data Room in all;

(b) responded to 349 requests from the Dissenters' expert, in some instances on 3 separate occasions, in 52 pages of correspondence;

(c) responded to 44 requests from the Company's expert;

(d) attended a Management Meeting and answered additional questions from the experts; and

(e) filed two verifying affidavits in respect of the searches conducted and documents that are not within its possession, power and custody.

61. The Company submits strongly that the Court needs to be very wary of what this application is all about where:

(a) the Company's expert, Mr. d'Almeida of Duff & Phelps, has been able to prepare a report based on the document and information provided by the Company, and has said so;

(b) the Dissenters' expert, Mr. Nicholson of FTI, has not once advised that he cannot provide his report without the documents sought, nor provided any explanation as to why he considers specific documents to be relevant; and

(c) where Schedule A to the Summons is a request from the Dissenters, <u>not</u> their expert.

62. Mr. Millett QC submits that all of this tends to suggest that it is the Dissenters and their lawyers driving this application (for their own forensic reasons) and not their expert based on his own (independent and expert view) of what he needs to complete his valuation work.

63. Learned Counsel posits that section 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. As Jones J pointed out in ***In the Matter of Integra Group*** ...*"The experts are the best judge of what is and what is not relevant for their purposes"*. It was submitted that Mr. Nicholson's assertion as to relevance is a global and bald assertion of relevance: i.e. no explanation at all.

64. It was submitted that it is striking that this application is not supported by any evidence from Mr. Nicholson, the Dissenters' expert, even in hearsay form, that the documents are <u>necessary</u> for him to complete his work.

65. Learned Counsel submitted that what is even more striking, is that, as a late post script, on 2 May 2017, 24 hours before the exchange of skeletons was due, Mr. Nicholson wrote to Harneys, referring to the documents uploaded on 3 April 2017 (so a month before) saying that he had been asked by Walkers to consider the extent to which the 11 categories of documents addressed his requests. He then set out some four pages of

comments. It was submitted that the importance of this letter is that it serves as further confirmation that (i) it was not Mr. Nicholson who needed the documents to do his work, but Walkers who wanted him to comment on the adequacy of the disclosure (presumably for the purposes of this application) and (ii) that this application is part of a delaying tactic.

66. Mr. Millett QC made extensive reference to the correspondence between the parties in order to support his points. Reference was made to Harney's letters of 17 March and 10 April 2017, wherein Harneys asked that Walkers/its clients provide an undertaking that:

(a) FTI has advised that it cannot provide its report without the documents listed in Schedule A to the Summons in circumstances where there is no such evidence filed; and

(b) FTI's information requests are totally independent and have been made by FTI unilaterally without any consultation between Walkers and their clients.

67. Walkers refused to provide those undertakings, asserting that neither they nor their clients are required to give any such undertaking, and that if there are questions as to relevance beyond Mr. Nicholson's assertion of relevance, then the Company will be entitled to cross-examine Mr. Nicholson regarding his valuation methodologies in due course at the substantive trial of the matter (see Walkers letter dated 31 March 2017).

Other Developments

68. This application, and the shape of it, has undergone numerous changes. On 7 April 2017, Harneys wrote to FTI indicating that, in accordance with their client's continuing obligation of disclosure, it had recently uploaded a number of documents which it listed in that letter.

69. By letter dated 2 May 2017, Mr. Nicholson responded to Harneys, indicating which of the requests he now considered satisfied, and which he did not. He indicated that he

considered that the majority of requests remain unaddressed or had only partially been addressed. Reference was made to the "*discovery schedule*".

The Relevant Law and Procedure

70. It was submitted that, under Order 24, Rules. 7 and 8 of the GCR, the onus is on the Dissenters applying for specific discovery to persuade the Court that not only is there a proper foundation for the belief that the documents sought exist or did at some time exist, but that discovery (i) is reasonable, (ii) is proportionate, and (iii) does not go beyond what is necessary to dispose fairly of the claim, by reference to the Varied Directions and the Petition.

71. Reference was made to a number of English cases, as well as to the local decision ***Embassy Investments Limited v Ascot Corporate Name Ruling & Ors***, (Unreported, delivered 7 August 2007), where Henderson J held as follows:

> *"There must be some evidence, apart from the subjective opinion of the applicant, which gives the court reason to believe that the document exists. In other words, compliance with Rule 7(3) is necessary but not dispositive. The applicant carries a limited burden of showing objectively that there is reason to believe the requested document exists and that it is or has been in the possession, custody or power of the respondent. If the rule were otherwise, Order 24 Rule 7 could become a supposed justification for meritless and abusive applications."*

72. It was Mr. Millett QC's submission that, given the potential for abusively wide requests for discovery and which places undue burdens on any petitioning company, the Court must be astute in section 238 cases to see that the categories of documents are not too wide, that they are relevant, that they exist or existed and are or were in the company's possession, custody or power.

73. It was contended that the Dissenters have shown nothing more than a subjective belief that the documents exist and have not therefore discharged the burden that rests upon

them. They make a submission and no more, says Mr. Millett QC, based on their perception of common sense.

74. The Company also refers to the fact that it has filed two verifying affidavits; Xu 3 and Xu 5. Learned Counsel referred to the following authorities in support of the submission that the verifying affidavits are as a matter of law, conclusive: ***Lonrho v Fayed No. 3 (The Times 24 June 1993)***, ***Cepheus Shipping Corpn v Guardian Royal Exchange Assurance plc*** [1995] 1 Lloyds Rep. 622, ***West London Pipeline & Storage Ltd. v Total (UK) Ltd.*** [2008] EWHC 1729 (Comm), and **Hollander on Documentary Evidence**, (12th Ed., 2015) at 11.22 and 11.23.

75. Reference was also made to **Matthews and Malek** at 6.44 where it is stated as follows:

> *E. Conclusiveness of List or Affidavit*
>
> *Subject to applications for a further and better list or an affidavit as to specific documents or classes of documents under RSC Order 24 rr. 3 and 7, a List of Documents, whether or not verified by affidavit, or an affidavit of documents served under the former rules was normally regarded as conclusive as to its contents. In particular the List or affidavit served under the old rules was regarded as being normally conclusive as to the following:*
>
> *(a) Whether* [or] *not the party has or has had any relevant documents other than those disclosed in his custody, possession or power.*
> *(b) ...*
> *(c) ...*
>
> *Whilst the affidavit of discovery was normally regarded as exclusive* [sic] (conclusive), *it would not be so where it could be shown that there had been an insufficiency of discovery. This insufficiency could be established from:*

> (a) *the pleadings, the list and affidavit of documents themselves, or documents referred to therein;*
> (b) *any other source that constitutes an admission of the existence of a discoverable document not so far discovered;*
> (c) *an apparent exclusion of documents from discovery by a party under a misconception of the case."*

76. The Company asks the Court to refuse the application, and award costs in its favour.

Discussion and Analysis

77. In most cases to which the rules of discovery apply, relevance is determined by the pleaded issues and is not a matter of opinion. In a section 238 petition, by contrast, the sole issue for the Court is what was the fair value of the Company as at the Valuation Date. That is a matter for the Court to determine, but the Court is informed and assisted in that task by expert opinion. Experts have a special role to play in this type of proceeding. As Jones J stated in ***Re Integra***, and I accepted in ***Re Homeinns***, in section 238 proceedings, the experts are the "*best judge*" of relevance.

78. I accept, as I did in ***Re Homeinns,*** that in section 238 proceedings, the discovery exercise is absolutely central to the proper determination of fair value. The Company's own Counsel stated in the Management Meeting, that the Company "*will start with a distinct advantage in litigation such as this since the company holds all the information. The purpose of discovery and a meeting such as this is to neutralise that information gap…*".

79. In his letter dated 10 March 2017, Mr. Nicholson wrote to Harneys stating that, with the exception of his request 317 (which he realised on further reflection that he did not need <u>in order to complete his work</u>, and which he therefore withdrew), he considered that all the information and documents requested in his letter dated 16 February 2017 are relevant to his assessment of fair value as at the valuation date. (My emphasis)

80. By a letter dated 19 April 2017, after the Summons was issued, Mr. Nicholson again wrote to Harneys, and this time stated that he considered that a review of the information

and the documents contained in an enclosed Schedule A, is relevant to his assessment of fair value as at the Valuation Date. The Schedule A is the same schedule as the Schedule A attached to the Summons.

81. On 7 April 2017, Harneys wrote to Mr. Nicholson regarding further documents that have been uploaded. By letter dated 2 May 2017, Mr. Nicholson has described the documents which he still considers to be outstanding. As I understand it, in terms of the documents in Schedule A to the Summons, the only item in respect of which he considers that the request has been fully addressed is Item 40, i.e. all documents in the VDR as at the closing of the Merger.

82. The Company complains that although the Experts may be the best judges of relevance, the expert must ensure that, when asked, (i) a cogent explanation for relevance can be given; (ii) that the expert must consider and weigh against perceived relevance the burden on the company of searching for and disclosing the documents so as to be able to certify that the request is reasonable and proportionate; and (iii) not to allow the privilege to become that of the instructing client, but that the expert must give his views as to relevance with independence. It is essential, says Mr. Millett QC, to the fair functioning of the discovery rules that the question of relevance does not depend on assertion by the dissenter, via his expert.

83. I accept the proposition that the expert must express his views as to relevance with independence, and that the expert must not allow the instructing party or its attorneys to dictate relevance to him, or to take over the consideration of that issue, with the expert acting merely as a rubber stamp.

84. However, as with many other propositions, the proof is in their application to a given situation. Whilst I appreciate that the Company has asserted that it is concerned because Walkers and the Dissenters were not prepared to give the undertakings requested, at the same time this Court is not in a position to say that Mr Nicholson's assertion that the documents and information in Schedule A are relevant to his assessment of fair value is

untrue, or that Mr. Nicholson has not exercised his own professional expertise, or has voiced views that are not independent. Also, as late in the day as Mr. Nicholson's statements are in relation to the documents and information sought in Schedule A, the Court cannot ignore his statements.

85. In my judgment, it would be highly speculative for me to come to the view on this interlocutory application, without cross-examination, (which would in any event have been inappropriate at this stage), that this was not Mr. Nicholson's own opinion and considered view of what is relevant for his assessment, and what is needed to complete his work.

86. I have also thought about Mr. Millett QC's well-articulated and powerful submission that it is not enough for Mr. Nicholson to simply state, by way of a bald statement, that the documents are relevant to his assessment of fair value. If that statement were to be viewed in isolation, I would find that submission somewhat more difficult to resist. However, the circumstances have to be considered against the backdrop of the hundreds of requests, and repeated requests made by FTI.

87. In my judgment, it is clear that Mr. Nicholson and FTI have been asking for a number of the documents and information for a long time. It is not a matter of dispute that Mr. Nicholson is an expert in his field. All of the requests in Schedule A to the Summons, with the exceptions of Items 8 and 39, reference the FTI requests to which they relate. Item 8 seeks all correspondence between the Company and JP Morgan regarding JP Morgan's refusal to provide documentation, and Item 39 seeks corporate brochures, business reports and promotional material describing the Company's activities.

88. It is true that Mr. d'Almeida had indicated that he can do his report without these documents. However, that does not have the effect of convincing me that Mr. Nicholson and FTI are being unreasonable in requesting to see these documents and to obtain this information. It is well known, and indeed, as Mr. Levy QC was at pains to point out in a number of the cases under section 238 that have already proceeded to trial, i.e. ***Integra***

and ***Shanda Games***, experts may differ on approach and also as to the degree of detail or information required in order to give their valuation. Additionally, Mr. d'Almeida had indicated his readiness prior to the April uploading of further documents, so he too will have other documents to consider if he considers them relevant.

89. This Court is not in a position to second-guess or to sift through Mr. Nicholson's assertion of relevance.

90. Indeed, the parties themselves have also arrived at certain positions consensually. The Company tried to make the point that some of the requests from FTI, for example, Requests 302-303, which relate to whether the Company has, since the take-private transaction, considered a re-listing in the PRC, are not relevant to valuation (see Harneys letter of 3 March 2017). However, as Walkers pointed out in their letter dated 10 March 2017, such requests in relation to documents after the Valuation Date are contemplated by the First Directions Order which was agreed by consent, where at paragraph 4 it is stated clearly and expressly:

> *"For the avoidance of doubt, if the experts so request, this may include documents, materials or information produced after the Valuation Date..."*

91. In my judgment, it is true that for a vast majority of the documents sought, the Dissenters rely upon a subjective view that the documents exist. This would apply to documents that the Company says that it does not create or procure and which Mr. Xu has sworn do not exist, such as the basis for the 2025 projections, valuations, long-term forecasts or tax analysis, internal communications or correspondence with the Buyer Group, meeting file notes, internal employee communications, documentation and analysis.

92. In my judgment, Mr. Millett QC is correct that the verifying affidavits of Mr. Xu would normally be conclusive as to whether or not the party has or has had any relevant documents other than those disclosed in his custody, possession or power. However, they would not be conclusive if there has been an insufficiency of discovery which can be established from:

(a) the pleadings, the list and affidavit of documents themselves, or documents referred to therein;

(b) any other source that constitutes an admission of the existence of a discoverable document not so far discovered; and

(c) an apparent exclusion of documents from discovery by a party under a misconception of the case.

93. What has caused me concern in this case is not so much that there is evidence of deliberate concealment or deletion of documents. Rather, it has been that the Company's approach to the discovery process has been in instances somewhat careless and cavalier, resulting in incomplete and ineffective discovery. There are areas where the Company has given inconsistent responses to requests. For example, before the Management Meeting, the Company had responded to some of the FTI Requests (albeit it says that this was done in haste). Request 6 of the First FTI Request asked for confirmation of the names and positions of the individuals involved in the production of the 2025 Projections and the way in which the information was gathered and assembled into the spreadsheet, including the time period over which the process took place. The Company's response was that *"the 2025 Projections were prepared by JP Morgan based on their understanding of the Company's business, street consensus and sell side analysis."* The Company's written response to the Second FTI Request also spoke of JP Morgan's role in the preparation of the 2025 projections. However, at the Management Meeting, Mr. Xu suggested that those responses were not correct, and that he himself had provided this information to JP Morgan in the undocumented and un-minuted meetings, and that he had kept no notes or records of the basis of what he had told them. By way of what the Company called *"revised responses*", in that response, it was suggested that it was only Mr. Xu that communicated with JP Morgan in relation to the 2025 Projections, and that he filled in all the cells that required manual input. It was stated that the 2025 Projections were prepared by Mr. Xu based upon the template provided by JP Morgan in July 2015, which included JP Morgan's estimates of inputs, presumably derived from third party research reports. After analysing the inputs in the template, Mr. Xu is said to have arrived

at his own inputs from his knowledge and understanding of the business and his role and involvement as a member of senior management and from his regular meetings with various business units, departments and management during the normal course of business. The response goes on to claim that, to the extent that clarification of certain detailed inputs was necessary, Mr. Xu conducted oral discussions with the Company's accounting team. Further, that Mr. Xu did not specifically consult various business units or senior management for the purpose of discussing the input as Mr. Xu was already very familiar with the business operations and trends of the Company. He then gave his feedback to JP Morgan to produce the final model of the 2025 Projections.

94. However, in Xu 4 and Xu 5 the Company has adopted a further position. In paragraphs 42 and 43 of Xu 5, Mr. Xu now says that when he attended meetings and calls with JP Morgan, he had his laptop and was logged into the Company's system. He states that he was therefore able to confirm some numbers internally without the need for additional personnel involvement. Further, that on the rare occasion when he was not able to confirm a number or was unsure, he would meet/sit with the relevant person with his laptop and their system and discuss the potential growth over each year or the 'split' in business when JP Morgan had included line items that the Company does not report on.

95. There are variations in these responses, some of which are hard to reconcile without full or complete discovery.

96. In addition, in relation to documents provided to or from the Company's financiers, FTI requested all projections and other documents made available to China Merchants Bank ("**CMB**") (one of the financiers of the take-private transaction) and other potential financiers. In response 9 of Harney's letter dated 8 February 2017, the Company asserted that all documents provided to CMB by the Company had been uploaded to the Data Room. It specifically said, that:

> *"Due diligence requests were passed onto* [sic] *our client by JP Morgan and uploaded to the virtual data room (VDR) set up for the purposes of the*

'take private transaction.' Our client did not maintain an internal record of which or what documents were uploaded in response to each due diligence request. As the VDR no longer exists, our client is unable to determine which documents were specifically provided to China Merchant Bank or other financiers..."

97. Yet, as pointed out by Mr. Levy QC, the engagement letter to the providers of the VDR explained that a custom closing archive was given to the Company, which would include "*a complete copy of contents, plus user/audit information and Q & A history.*" It is only since the Summons was filed that the Company has now uploaded the contents of the VDR. The point about this is that the Company seems to have been content to say that as the VDR no longer existed, they could not determine which documents had been provided to CMB and others. However, the Company has now plainly been shown to be in possession of the VDR archive. As I understand it, no explanation has been given as to when the Company came to be in possession of it, or how.

98. I have also found it strange that, at least initially, the Company has sought to distance itself from the documents available to the Special Committee. Even if those documents were not available to the Company up to the time of the Merger, it could not be correct that the Company would not thereafter have access to such documents.

99. There are a number of other examples, but I will just cite two more. On 1 December 2016, Mr. Nicholson had asked that the Company provide all quarterly accounts, budgets and forecast financials from 2012. The Company stated on three separate occasions (15 December 2016, 12 January 2017, and 8 February 2017) that it does not create month-by-month or quarterly budgets or forecast. Yet on 3 April 2017, after the Summons was filed, the Company is said to have uploaded 431 documents relating to its quarterly budget for the period 2012-2016. The Company's position now seems to be, as stated in Xu 5 at paragraph 36, that it is not the Company's practice to prepare *monthly* management accounts or budgets (my emphasis).

100. Before this substantial number of documents was uploaded, in its Fourth Request by letter dated 16 February 2017, at Request 321, FTI had pointed to discrepancies between the Company's response and between the 2014 annual budget and the quarterly projections amounts provided during the course of the year, which suggested that the quarterly projections took into account updated information as the year progressed. FTI repeated its request for the quarterly budgets. Whilst taking the point that FTI's Fourth Request, by way of letter dated 16 February 2017, was late, and outside the time provided for in the previous Orders made, in response to request 321, the Company was still maintaining up to then that it had no quarterly budgets or forecasts.

101. At request 322, FTI indicated that although the Company had stated that Mr. Xu was the only representative of the Company who communicated with JP Morgan in relation to the 2025 Projections, documents in the Data Room show that Mr. Mingyi Jin, Mr. Fan Zhang, and Ms. Jue Yao were also copied in on correspondence between the Company and JP Morgan. In paragraph 15 of Xu 5, Mr. Xu says that those persons, as well as Mr. Xu, Hongyi Zhou, and Yiyi Wang have also searched for the relevant email correspondence. The Dissenters referred to the Proxy Statement where eight people are named as being directors of the Company. The Dissenters, in my view, reasonably query why the only director asked to search for emails was Mr Zhou.

102. In my judgment, the Company has not misunderstood the case or mis-conceptualised it. What it is saying is that a lot of categories of information do not exist and never have existed in document form, which the Dissenters say is incredulous and incapable of belief. The position taken by the Company may well be strange. By itself, that is not sufficient for the Dissenters to discharge their burden of demonstrating objectively that the documents exist. However, in light of the Company's inconsistent positions, coupled with its cavalier approach to previous aspects of the discovery process, in my judgment there has been an insufficiency of discovery. If anything, the Company may have mis-conceptualised the discovery process. This insufficiency has been established, based on the specific facts, as well as the surrounding circumstances. It is such that I cannot say that I find the Company's statements that it has given complete and full disclosure

reliable. I make a distinction between credibility and reliability, because I am not saying that there has been deliberate concealment or deletion, but rather that the discovery process has not been handled with the care required in order for the Court to ensure that its Orders are carried out and that the discovery process is carried out fairly.

103. As regards the JP Morgan request at Item 8, whilst this was not set out in the FTI requests, in order to properly understand the context of JP Morgan's letter of 7 April 2017, which has been disclosed, it does seem to me that the correspondence between the Company and JP Morgan's refusal to provide documentation should be discovered. This is in my view relevant, necessary and proportionate. However, in relation to the item at letter (a) of page 2 of the JP Morgan letter, i.e., the valuation model which is JP Morgan's internal document, that document cannot be said on the evidence before me to be or to have been in the possession, custody or power of the Company and is therefore not discoverable.

104. Skadden has made a number of objections to producing documents in native form. The proffered reason for asking for the documents in native form, advanced at paragraph 7.1 of Walkers' letter dated 15 February 2017, is that the emails from Skadden that have been uploaded are in pdf format and that only if the emails are uploaded in their native format, will the experts be enabled to see the attachments.

105. A number of reasons have been given by the Company why it says that the Skadden documents in their native form are not in its power, possession or custody. I accept that as Skadden are the Company's former attorneys, the Company as a client is entitled to seek documents from its attorneys. The fact that Skadden was instructed by the Special Committee is irrelevant now that the Merger has been completed, and in any event, the Special Committee was no more than a committee of the Board. None of the correspondence between the Company and Harneys seeking these documents has been exhibited. Xu 4 at paragraph 107, and Xu 5 at paragraph 24, simply provides an excerpt of such correspondence. Two of the reasons quoted as to Skadden's stance in relation to refusal to provide the emails in their native format are as follows:

"It is not protocol to provide "native" files, especially not to an adversarial party in litigation, due to various reasons:

> *(1) If the documents are provided in their native format, there is no way to place identifying markers on them (eg. bates stamping is not possible), so there is no way to maintain appropriate control over the documents and what is being claimed or discarded as part of the production set.*
>
> *(2) Additionally, when documents are provided in their native format, all of the information related to the documents, (i.e. the forensics) are inevitably provided, including but not limited to each time it was edited, saved, opened, what edits were made, and the author of the edits. Such information could potentially be privileged and cannot be removed from the documents. We do not provide the forensics unless ordered to do so by a court."*

106. However, in my judgment, any question of privilege attaching would be the privilege of the client, the Company, to waive, and I therefore accept Mr. Levy QC's submission that the Company ought to be able to compel Skadden to hand over the documents for uploading to the Data Room in their native form. In my judgment discovery of these documents is relevant, reasonable, necessary and proportionate.

107. In my view, the Dissenters are entitled to ask for a Further and Better List of Documents from the Company, because in all probability the Company has or has had other relevant documents other than the ones disclosed. However, save for the correspondence regarding JP Morgan's refusal to provide documentation, and the Skadden documents, in my judgment the Dissenters have not satisfied the standard required for the Court to order the specific discovery sought in paragraph 2 of the Summons and as set out in Schedule A. This is because they have not demonstrated objectively the existence of these specific documents or categories of documents.

108. However, the issue of specific discovery is a separate issue from the application for the appointment of a forensic expert to conduct a forensic IT audit. I now turn to deal with this latter aspect of the application. The authorities make it quite clear that such a remedy

is an exceptional remedy but that in particular circumstances it may be made, and normally after there has been a failure to comply with discovery orders. At paragraph 8.18 of Hollander's work, cited by Mr. Levy QC, it is stated as follows:

"D. Disclosure under Supervision of Opponents or Experts

8-18 This is a point which has come up on a few occasions recently. What happens if one side manifestly fails to give disclosure? The problem tends to arise in relation to searching computers. A strike out application is a possible remedy. But there are a number of cases where the applicant may wish to consider other possible remedies. A strike out might be disproportionate. The disclosure might be useful in pursuing related claims against other parties. ***Sometimes it may be thought better to have the disclosure than to ask the trial judge to draw inferences from its absence.***

It is obvious that an order requiring a party to give access to his opponent to enable disclosure to be effected is an exceptional remedy and gives rise to serious issues which need addressing. *Thus in Nucleus Information Systems v Palmer Lewison J was told that the applicant did not accept that the other party had given proper disclosure of the relevant contents of his home computer, and sought an order that he should have access to the computer in order to search through his lawyers. The judge refused direct access to the computer, pointing out that it raised ECHR and privilege issues.*

In Mueller Europe Ltd. v Central Roofing (South Wales) Ltd. the issue was lack of the relevant expertise rather than deliberate failure. It had become apparent that the relevant individual from the defendant did not have the expertise to perform a meaningful search for back-up tapes, which had been previously ordered. Coulson J held that he had power to order that the search be carried out by a suitably qualified IT consultant on behalf of that party in order to ensure that the orders of the Court were effectively complied with…

……

> ***<u>From this line of cases, it is apparent that the court has power to order inspection of a computer by an expert, or that disclosure be given in whole or part by an expert rather than the party, but that this is an exceptional order which will only be given when the particular circumstances justify it, and normally after there has been a failure to comply with disclosure orders."</u>***

(My emphasis)

109. In response to a question from the Court, Mr. Levy QC readily agreed that it is a special and exceptional remedy. However, he was quick to assert that this is an exceptional case.

110. In my view, this Court does have the inherent jurisdiction to order discovery to be carried out by a forensic information technology expert who will perform a forensic audit. It is also in keeping with the overriding objective of dealing with cases justly, in a way which is proportionate to the amount of money involved, the importance of the case, and the complexity of the issues, to give that flexible interpretation to the GCR set out in Order 24 as to discovery. (See the Preamble to the GCR, rules 1, 2 and 4 providing respectively for the "*Overriding Objective*", "*Application by the Court of the Overriding Objective*", and the "*Court's Duty to manage proceedings*").

111. As regards this particular matter, it is plainly a high-value case of considerable complexity.

112. This case is also in my judgment an exceptional case, not only because of the central importance of discovery in section 238 proceedings and the Company's role in that process, but also because of the Company's inconsistent and cavalier approach to discovery resulting in insufficient discovery under previous orders. The factors at play in this case are more analogous to the ***Mueller*** case where there was a lack of expertise in carrying out the discovery process.

113. The circumstances of this case warrant the Court granting the orders in relation to the appointment of a forensic expert to carry out a forensic audit. This is necessary to avoid a

denial of justice to the Dissenters, as well as to allow the Court to properly carry out the function which it will have to carry out at the end of the day, namely appraising the fair value of the Dissenting Shares. Whilst the Order is undoubtedly intrusive, it is justified in this case. In furtherance of such appointment, it is also in my view appropriate to order that the Dissenters and the Company designate specific key words to be used to search electronic devices, as sought in paragraph 5 of the Summons. The scope of the audit should logically include the documents and information in Schedule A (excluding the Request #40 – VDR documents), which Mr. Nicholson considered relevant and necessary to complete his work.

114. For the avoidance of doubt, I wish to make it clear that I am not at all holding that an order for appointment of a forensic expert will be appropriate in every section 238 proceeding. Each case will turn upon its own facts and circumstances.

115. In the penultimate paragraph of the letter of 7 April 2017, JP Morgan makes reference to the fact that other relevant documents should already be in the Company's possession. If that is so, the order for the forensic audit should deal with those matters.

116. There will therefore be an Order in terms of paragraphs 1, 2, 3 to 12 and 14 of the Summons, with the Order in paragraphs 2, 3, 5 and 6 amending the Summons as follows:

   a. In paragraph 2, the specific discovery order is only made in respect of the JP Morgan correspondence discussed above and the Skadden emails in their native format;
   b. Paragraph 3, the Company should have until 21 August 2017 to prepare and serve the List of Documents;
   c. In relation to paragraphs 3, 5 and 6, there is no justification for searching electronic devices used by or available to the Company's beneficial owners, so the term "*its beneficial owners*" is to be deleted.

117. In my view, the Dissenters have largely succeeded on their application and are entitled to a major portion of their costs of the application on a standard basis. I invite the parties to

agree those costs, failing such agreement within 14 days of delivery of this judgment the parties are to file brief written submissions.

118. The costs related to the appointment of the Forensic Experts and the performance of the audit should in my view be reserved.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT