In The Supreme Court of Bermuda

CIVIL JURISDICTION
(Commercial Court)
2023 No: 126 to 131

IN THE MATTER OF ARGO GROUP INTERNATIONAL HOLDINGS INC. (FORMERLY ARGO GROUP INTERNATIONAL HOLDINGS LTD.)

AND IN THE MATTER OF A MERGER AGREEMENT BETWEEN ARGO GROUP INTERNATIONAL HOLDINGS LTD., BROOKFIELD REINSURANCE LTD., AND BNRE BERMUDA MERGER SUB LTD.

AND IN THE MATTER OF SECTION 106 OF THE COMPANIES ACT 1981:

BETWEEN

CORBIN ERISA OPPORTUNITY FUND LTD
CORBIN OPPORTUNITY FUND LP
FOURWORLD EVENT OPPORTUNITIES LP
FOURWORLD GLOBAL OPPORTUNITIES FUND LTD
FOURWORLD SPECIAL OPPORTUNITIES FUND LLC
FW DEEP VALUE OPPORTUNITIES FUND I LLC

Plaintiffs

and

ARGO GROUP INTERNATIONAL HOLDINGS, INC. (FORMERLY ARGO GROUP INTERNATIONAL HOLDINGS, LTD.)

Defendant

RULING

Date of Hearing: Thursday 02 May 2025

Date of
Further Appearance[1]: Thursday 04 December 2025

Date of Ruling: Friday 01 January 2026

Plaintiffs: Mr. Jonathan Adkin KC of Counsel and Mr. Delroy Duncan KC
(Trott & Duncan Limited)

Defendant: Mr. Richard Boulton KC of Counsel and Mr. Matthew Mason
(ASW Law Limited)

Pre-trial Directions: Legal Principles on Scope of Discovery in share valuation cases under s.106(6) Companies Act 1981- fair share valuations – General Discovery in cases begun by an originating summons- Whether Appendix 2 categories of materials for discovery is a suitable inclusion in Court Directions Orders

RULING of Shade Subair Williams J

Introduction

1. This is an interlocutory application for pre-trial directions for general discovery in litigation between the Defendant (the "Company"/ the "Argo Group") and the Plaintiffs, the Company's "dissenting shareholders" or "short-term shareholders". The underlying claim brought by the Plaintiffs is for the Court's sanction of an appraisal of the fair value of their common shares in the Defendant following a merger (the "merger") between Argo Group and Brookfield Wealth Solutions Ltd. (formerly known as Brookfield Reinsurance Limited) ("Brookfield Reinsurance") and its subsidiary BNRE Bermuda Merger Sub Ltd ("Merger Sub"). The merger was formally proposed on 8 February 2023 in the form of an Agreement and Plan of Merger.

[1] The primary purpose of the 4 December 2025 appearance (Mr. Delroy Duncan KC and Mr. Matthew Mason appearing) was to clarify the updated position for the Court on the issues which were agreed between the parties subsequent to the 1 May 2025 hearing and those which continued to be disputed. In this regard, the Court was greatly assisted by Mr. Delroy Duncan KC's elucidation on the updated position between the parties, as it was prior to the issuance of my 7 November 2025 draft of this Ruling.

At a special general meeting held on 19 April 2023, a quorum having been constituted, the majority shareholder vote was made in favour of the merger. on the same day, 19 April 2023, the Plaintiffs, having dissented, filed six Originating Summonses in exercise of their statutory entitlement to seek the Court's appraisal of 5,502,120 shares in the Argo Group, pursuant to section 106(6) of the Companies Act 1981 ("CA 1981"). The merger subsequently came into effect on 16 November 2023.

2. This application for pre-trial directions follows my earlier ruling of 3 December 2024 in these proceedings whereby I refused the Defendant's application for a stay (the "Stay Ruling"). The basic factual background is provided in the Stay Ruling.

3. On 13 January 2025 the Plaintiffs filed a Summons for Directions dated 27 January 2025 in prayer of the terms appearing in an attached draft Order for Directions with Appendices. Various portions of the proposed directions are opposed by the Company. In large part, the disputes relate to the scope of discovery to be made by the Company and the extent of the lookback period to which the material for discovery relates. There is also discord between the parties in respect of various other issues arising from the proposed Directions Order to be made by this Court.

4. The Plaintiffs' summons is supported by the Third Affidavit of Mr. Christopher Jaeger, a senior analyst at FourWorld Capital Management LLC. The Plaintiffs also rely on two reports from a valuation expert, Mr. Steven Taylor. Mr. Taylor's first report opines on the appropriate lookback period leading up to the valuation date. Also in his first report, Mr. Taylor addresses various categories of material in respect of which an order for general discovery is proposed. In Mr. Taylor's supplemental report, he further addressed some of the points made by Mr. Dages on the lookback period and the value of the Company's non-public information to the appraisal analysis.

5. Argo relies on the report of its own valuation expert, Mr. Kevin Dages, to support its objections to the Plaintiffs' proposals for general discovery and the longer lookback period. Those objections are also supported by the affidavit evidence from Mr. Michael Tiliakos, the General Counsel and Secretary of Argo.

6. In total, there are 12 distinct disputed issues to be determined by this Court. Having had the benefit of the parties' comprehensive research and skilful arguments formulated by legal teams armed with the appearances of eminent London Silks for both sides, I now provide this reasoned decision on each of the disputed issues.

Summary of the Overarching Issues

7. The Plaintiffs invite this Court to hand down a Ruling which recognises a standard approach to discovery in fair share valuation cases brought under s. 106(6) of the CA 1981. They encourage this Court to endorse directions which recognise a broad duty on a company in share valuation cases to make full discovery of all relevant documents in its possession, custody or power.

8. The Defendant, however, complains that the Plaintiffs are seeking to commission a "drains-up" disclosure project entailing hundreds of thousands of documents, even if those documents will not likely be relied on by the experts in the carrying out of the fair share assessment according to any one of the main valuation methodologies. The Company underscored that it remains willing to provide the Plaintiffs with access to over 9,300 documents stored in its Data Room which in turn would give the Plaintiffs access to all the material exchanged between the parties transacting the merger as well as the documents passing between the Company and its financial advisors in relation to the merger and a strategic review process which preceded the merger. The Defendant promotes an expert-led discovery process whereby the experts would be entitled to request any reasonably required information which falls outside of the scope of what the material proposed by the Company for discovery.

9. As to the relevant legal principles, I have been referred to a line of previous case law emanating from this jurisdiction and that of the Cayman Islands. Of course, the necessary starting point is the governing domestic statutory provisions.

The Law

The Relevant Domestic Provisions

Section 106(6) of the CA 1981

10. Section 106(6) of the CA 1981 created a statutory entitlement for the dissenting shareholders to seek the Court's determination on the question of fair share value in post-merger cases so long as those dissenting shareholders did not vote for the merger and they assert a deprivation of their fair share value. Section 106(6) provides:

"*Any shareholder who did not vote in favour of the amalgamation or merger and who is not satisfied that he has been offered fair value for his shares may within one month of the giving of the notice referred to in subsection (2) apply to the Court to appraise the fair value of his shares*."

11. At the hearing before me, Mr. Adkin KC confirmed that none of the Plaintiffs voted in favour of the Merger. Proceeding on that basis, I move on to consider the governing legal principles relevant to discovery in litigation commenced by an originating summons.

Mutual Discovery of Documents in Cases begun by Originating Summons

12. In writ actions mutual discovery by the parties after the close of pleadings is axiomatic. That obligation arises in accordance with the express wording of Order 24/1 of the Rules of the Supreme Court ("RSC") which provides:

"***24/1 Mutual discovery of documents***

1 (1) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action."

13. However, where an action has begun by an originating summons Order 24/1 does not apply. Instead, an application for a discovery order, failing an agreement between the parties, must be made under Order 24/3(1) which provides:

"***24/3 Order for discovery***

3(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party."

14. In cases begun by an originating summons, mutual discovery does not arise automatically as it does at the general discovery stage of writ actions. An entitlement to discovery is a matter for the Court's determination in answer to an application brought under Order 24/3(1). The question as to whether discovery will be mutual or one-sided is also for the Court to decide, having regard to all the varying circumstances of each case.

The Applicable Legal Principles

Relevance

15. Whether an order is made for specific discovery or general discovery, the entitlement under the order will not arise unless the information sought relates to the issues to be determined. The requirement for all items included in a List of Documents to be relevant is trite but fundamental. Relevance is the precursor to an order for discovery. That means that the Court will not move on to consider its discretionary powers to order discovery unless relevance has first been established.

The Discretionary Power: 'The Necessity Filter'

16. In *Wong v Grand View Private Trust and others* [2020] Bda LR 45 Kawaley AJ (now President of the Court of Appeal in Bermuda) said at para [12]:

"12. *Without need for recourse to the Overriding Objective, the relevant rules within Order 24 themselves superimpose a 'necessity' filter onto the broad discretion conferred on the Court to order specific discovery and order the production of documents for inspection under rules 7(1) and 13(1), respectively*."

17. The power to order or refuse discovery (as it relates to the creation of the List of Documents) under RSC Order 24/3(1) is subject to both Rule 4 (of no consequence to the present application [2]) and Rule 8. Under Order 24/3(1) as read with Rule 8 the Court has a broad discretionary power to refuse discovery where it deems the discovery sought to be altogether unnecessary or just unnecessary at that stage of the proceedings. However, the exercise of that discretionary power is limited to the extent that the Court is not empowered in any circumstances to allow discovery where the making of such an order is neither necessary for fairly disposing of the case nor for saving costs.

18. RSC Order 24/8 provides:

24/8 Discovery to be ordered only if necessary
8On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

[2] RSC Order 24/4 relates to cases in which an issue is to be determined prior to discovery.

19. The 'necessary' test prescribed by RSC Order 24/8 is subdivided. Firstly, the Court '*may*' dismiss or adjourn a discovery application if the discovery is either unnecessary or unnecessary at that stage. That wide discretion given to the Court creates a necessity test which may be grounded on any number of factors having regard to all circumstances of the case. The second tier of the test imposes an obligation on the Court to refuse discovery in circumstances where the Court finds that discovery is neither necessary for fairly disposing of the case nor for saving costs. These are the same boundary lines which govern applications for specific discovery under Rule 7 and Orders for the production of documents under Rules 12 and 13.

20. Especially relevant to cases in which the discovery pursuit is for hundreds of thousands of documents, the power to refuse discovery also comprises an implicit discretionary power to refine the overall scope of general discovery by reference to classes or specific documents and materials.

21. In the end, the role of the Court is to consider whether and to what extent it ought to exclude discovery of documents which, although relevant, are otherwise unnecessary. Ring-fencing that exercise is the Court's duty to refuse discovery where it is not needed to fairly dispose of the proceedings or to save costs. That is so for all cases, whether the proceedings begun by writ, originating summons or otherwise.

The Overriding Objective

22. The Court is ultimately driven by its duty to give effect to all the relevant components of the Overriding Objective under RSC Order 1A which provides:

1A/1 The Overriding Objective
(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.
(2) Dealing with a case justly includes, so far as is practicable-
(a) ensuring that the parties are on equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate-

(i) to the amount of money involved;
(ii) to the importance of the case;
(iii)to the complexity of the issues; and
(iv)to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases

1A/2 Application by the Court of the Overriding Objective
2 The court must seek to give effect to the overriding objective when it-
(a) exercises any power given to it by the Rules; or
(b) interprets any rule.

1A/3 Duties of the Parties
3 The parties are required to help the court further the overriding objective.

1A/4 Court's Duty to Manage Cases
4 (1) the court must further the overriding objective by actively managing cases.
(2) Active case management includes-
a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
b) identifying the issues at an early stage;
c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
d) deciding the order in which issues are to be resolved;
e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
f) helping the parties to settle the whole or part of the case;
g) fixing timetables or otherwise controlling the progress of the case;
h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
i) dealing with as many aspects of the case as it can on the same occasion;
j) dealing with the case without the parties needing to attend at court;
k) making use of technology; and
l) giving directions to ensure that the trial of a case proceeds quickly and efficiently

23. The Overriding Objective requires this Court to issue directions which are consistent with the Court's duty to "deal with the case justly". The Court's duty to ensure that expense is saved where reasonably possible is a factor relevant to the issue as to whether the Company's resources would be unduly burdened by a general discovery order as opposed to an alternative expert-led process. That also entails a level of particular care that the parties are given "equal footing" in the context of statutory framework which confers a right on dissenting shareholders to obtain the Court's appraisal of the fair share value.

24. For discovery applications in fair share value cases, the duty to safeguard overall proportionality is particularly key as the expense on the parties to produce all relevant material may prove mountainous. That puts the spotlight on the Court's statutory duty to exercise the discovery "necessity filter". The aim, at the end of that straining exercise, is to settle on a discovery order which imposes a duty on the party making the discovery to produce all of the material which is relevant, necessary and reasonably cost effective.

25. In the ordinary section 106(6) case, the sole purpose of discovery is to fully equip the valuation experts with all the relevant and reasonably necessary material needed to opine on the single issue of fair share value. So, the usual order would be a general discovery order. However, if, on all of the special facts and circumstances of the case, a normal general discovery order would amount to a flagrant divergence from the spirit of the Overriding Objective, the Court will prescribe a customised expert-led discovery process or order some other limited form of discovery.

26. As for the generality of what will be the Directions Order of this Court, the Overriding Objective calls for directions which will enable the case to proceed fairly and expeditiously, given its level of importance to both the Company and the dissenting shareholders. In this case, the dissenting shareholders seek the Court's appraisal of 5,502,120 shares in the Company. Defending the merger price, the Company contends that the fair value of each of these common shares is US$30.00. On that basis the Company paid the Plaintiffs approximately $160,000,000.00, representing the value of the merger price. The Plaintiffs claim that the fair value of the common shares is more and they are entitled to interest on the difference. Whichever lens is used, the monetary value of the claim is considerable and the case is of real importance to the parties. That is reflected by each party's employment of London Silks and reputable Bermuda law firms.

27. In final point, active case management is required pursuant to Rule 4 to achieve trial efficiency. Accordingly, the Directions Order ought to contain terms which expressly anticipate and give way to the Court's regular management of the case throughout the pre-trial period.

The Persuasive Effect of Jurisprudence from the Cayman Islands

28. While fair value share appraisals are by no means new to this jurisdiction of Court, there is not much more than a handful of reasoned decisions from merger-related fair value share proceedings under section 106(6) of the CA 1981. In *Jardine Strategic Holdings Limited* [2021] Bda LR 94 this jurisdiction of Court ruled on section 106(6) discovery issues without the benefit of any previously reported caselaw in Bermuda wholly on the point. The prevailing principles adopted by Hargun CJ in *Jardine* emerged from cases decided in the Cayman Islands

Grand Court (the "Grand Court") and the Cayman Islands Court of Appeal (the "CI Court of Appeal").

29. Providing a snapshot of the Bermuda Court's viewpoint on the Cayman authorities, Hargun CJ (now Justice of Appeal in Bermuda) said this [paras 64-66 and 69]:

"*64. The Cayman authorities relied upon by Mr Levy QC provide valuable insight in relation to the effective management of appraisal actions. These authorities emphasise that in assisting the expert valuers to give their opinion on fair value it is necessary for the Court to ensure that the expert valuers are provided with all the necessary relevant documentation and information. The Cayman authorities recognise the crucial importance of providing all necessary relevant information to the expert valuers and the fact that this information inevitably will be in the possession of the company* [citing *FGL Holdings* (FSD 184 of 2020) [paras12-13]].

65. As noted in the judgment of Martin JA in In the Matter of Qihoo Technology Company Limited [2017] (2) CILR 585 the Cayman courts give substantial degree of autonomy to the experts in determining what information is needed for their valuations as the court must have confidence that the valuations are based upon sufficient information [citing *EHI Car Services Limited* [para 25]].

66. The Cayman authorities emphasise that the court must look at each case and decide whether the directions as a whole and as to their individual nature and effect are fair, necessary to do justice between the parties, and economically sensible. Thus, Chief Justice Smellie in JA Solar said at [17] that the Cayman practice "is not meant to suggest that there is a rigid "standard form" of directions for section 238 cases. The directions may have to be somewhat tailored to the facts of any particular case.
… …

69. The requirements that the directions must be fair, necessary to do justice between the parties and economically sensible, referred to by Parker J in EHI Car Services, have been emphasised in other Cayman cases. Cayman authorities require the Court to consider in each individual case that the directions given, including the provision of discovery, must be proportionate in all the circumstances of the case."

30. The Order 24/8 'necessity' filter equally applies to the discovery procedure in the Grand Court. Order 24, r. 8, of the Grand Court Rules provides:

"*Discovery to be ordered only if necessary (O.24, r.8)*
8. On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss

or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

31. So, in both Bermuda and in the Cayman Islands the Court will refuse to make a discovery order if it finds that it is neither necessary for disposing fairly of the cause or matter nor for saving costs. Further both Courts are bound to act in accordance with the overriding objective which entails, *inter alia*, dealing with the matter proportionately.

32. In examining the Court's jurisdiction to direct both the dissenting shareholders and the company to make discovery, the Bermuda Courts have taken guidance from cases decided in the Cayman Islands where fair share valuation cases are tried in the Grand Court under section 238 of the Cayman Companies Law (2018 Revision) (the "Cayman Law"). Like section 106(6) of the CA 1981, section 238 of the Cayman Law gives shareholders a right to dissent from a merger of a Cayman Islands incorporated company and to reject the sufficiency of the merger consideration on the basis that it falls below what the dissenter considers to be the fair share value. Akin to section 106(6) in Bermuda, a dissenter may apply to the Grand Court for a judicial appraisal of fair value under section 238(1) of the Cayman Law which provides:

"*A member of a constituent company incorporated under this Law shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation*."

33. Procedurally speaking, the application process under the Cayman Law is more prescriptive than that which is required of a plaintiff under section 106(6) of the CA 1981. Section 238(8)-(9) of the Cayman Law carves out an initial mandatory period for the company and the dissenting member to attempt to agree on the share price; after which, either party becomes entitled to file a petition for the Court's determination on fair share price. Further, a petition filed by the company under section 238 must be accompanied by a list verifying the names and addresses of all members who filed a notice of objection to the merger as required in accordance with subsection (5). The company's verified list is also required to name each shareholder with whom agreements as to the fair value of their shares were not reached.

34. The notice of objection and formal share price communications required of section 238 petitioners in the Grand Court is not required of a Supreme Court plaintiff in section 106(6) litigation commenced by originating summons. That said, section 238 of the Cayman Law and section 106(6) of CA 1981 are materially similar to the extent that both provisions are triggered by a shareholder's dissent from a merger or amalgamation. In both jurisdictions, the right to obtain an appraisal by the Court is contingent on a shareholder's dissent to the merger and an impasse between the company and the dissenters on the fair price to be paid for the dissenting member's shares.

35. In the present case, I am narrowly concerned with the discovery aspect of s.106(6) fair value share proceedings. In the Cayman Islands, like Bermuda, the procedural approach to discovery is governed by rules of Court which provide for an automatic general discovery stage at the close of pleadings in a writ action. Comparable to RSC Order 24/1, the Grand Court Rules[3] Order 24, r.2(1) provides:

"*Discovery by parties without order (O.24, r.2)*
2.(1) Subject to the provisions of this rule and of rule 4, the parties to an action between whom pleadings are closed must make discovery by exchanging lists of documents and, accordingly, each party must, within 14 days after the pleadings in the action are deemed to be closed as between that party and any other party, make and serve on that other party a list of the documents which are or have been in the party's possession, custody or power relating to any matter in question between them in the action[.]"

36. For petitions filed under section 238 of the Cayman Law an application for a discovery order is made under Order 24, r. 3, which is the equivalent of RSC Order 24/3(1). The Grand Court rule similarly provides:

"*Order for Discovery (O.24, r.3)*
3. (1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in the party's possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order the party to make and file an affidavit verifying such a list and to serve a copy thereof on the other party."

37. The origins of section 238 are discussed by Parker J in Re *Qunar Cayman Islands Limited* (20 July 2017). In his judgment, Parker J listed the jurisdictions which had legislative influence on the passing of section 238 by the Cayman Legislative Assembly. Bermuda is included in that list together with Delaware (section 262 of the Delaware General Corporation Law), BVI and the United Kingdom. So, while the jurisprudence from the Cayman Islands emerged prior to the development of Bermuda case law, Bermuda's statutory regime for fair value applications was enacted prior to the implementation of section 238 of the Cayman Law, which was to some extent modelled after section 106(6) of the CA 1981.

38. Bermuda's jurisprudential alignment with the case law grown out of the Cayman Islands is inevitable. Both Bermuda and the Cayman Islands operate under a legal system based on English common law. In more modern terms, both jurisdictions belong to what is otherwise

[3] The 2022 Consolidated Revision

referred to as "*The British Cross-Border Financial Centre World*".[4] More so, the relevant statutory provisions are materially undistinguishable notwithstanding the procedural nuances during the stage preparatory to the filing of a section 238 petition. Having regard to these structural congruences, the Bermuda Courts have sensibly leaned on the Cayman Islands Courts for guidance on interlocutory and final issues related to fair value claims onset by a merger transaction.

39. In *Qunar*, the company was an exempted limited liability company incorporated in the Cayman Islands. It operated as an online travel agency in China. In June 2016, a merger transaction was proposed by a majority shareholder who sought to acquire certain outstanding shares of the company, thereby privatising and removing the company's listing on the NASDAQ Global Market. The merger transaction was approved by the company's board at an EGM. The shareholders who dissented from the merger had purchased their publicly traded shares after the merger announcement was made. Having dissented, they brought a section 238 application before the Grand Court for a fair value appraisal on the footing that the merger price and the company's valuation was significantly undervalued. Both the dissenters and the company in *Qunar* appointed experts. The conflict between the parties was marked by the experts' valuation methodology and conclusions on a fair value assessment.

40. At first instance, Parker J found that it was not appropriate to order discovery against shareholder dissenters on section 238 petitions. He also found that an order for specific discovery of documents should only be made in exceptional circumstances. However, the CI Court of Appeal in *Qunar* [2018] (1) CILR 199 (CICA) firmly rejected any proposition that one-sided disclosure could be treated as a norm or starting point. Rix JA described such a concept as anomalous, unprecedented and counterintuitive, cautioning that any such application would warrant the greatest of care. Denoting the Court's stance on mutual discovery, Rix JA said [75]:

"*…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 section 238 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 its sophisticated investors, have disclosure relevant to fair value*."

[4] Judicial Cooperation in Commercial Litigation – The British Cross-Border Financial Centre World (Third Edition) 2025 (General Editors: Mr. Ian R. C. Kawaley Mr. David Doyle and Mrs. Shade Subair Williams)

41. The CI Court of Appeal in *Qunar*, although not strictly binding on this jurisdiction of Court, established what is now a settled approach to the issue as to whether dissenting shareholders ought to be directed to make discovery in share valuation cases. Following *Qunar*, in *In the Matter of JA Solar Holdings Co. Ltd* (Unreported) 18 July 2019 [para 16], Smellie CJ (as he then was, now Justice of Appeal in Bermuda) outlined what he described as "*a relatively 'standard form' of directions*" (""the standard form"") drawn from the benefit of the Court's experience with a large number of section 238 cases[5]. Among those sample directions Smellie CJ included a direction which would require dissenting shareholders to upload their documents to an electronic data room. Smellie CJ carefully explained [para 17]:

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

42. Referring to "the standard form", in *In the Matter of EHI Car Services Limited* (FSD 115 of 2019) [para 17B] Parker J said:

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

43. Although the Company cited the CI Court of Appeal's reasoning in *Qunar* in support of its submissions, Mr. Boulton KC cautioned against a general reliance on the pre-2020 Grand Court decisions. He argued that these cases are of limited assistance as the judges of the Cayman Courts had not yet gained the benefit of testing the justifiability of the drains-up disclosure sought. Mr. Boulton KC also argued that these earlier rulings were customised to facilitate the Grand Court's need to manage Chinese companies shown to be delinquent and uncooperative in respect of their discovery obligations. That, on Mr. Boulton KC's submission, is a contrast to more modern practice and that the discovery orders made under the pre-2020 era of Grand Court decisions would be unsuitable for a cooperative corporate litigant, such as Argo.

44. Mr. Boulton KC's characterisation of the early Cayman cases does not apply to *Qunar* as Parker J rejected the dissenters' contention that the company was 'unwilling' litigant. Directly addressing "Lack of assistance from the company" Parker J stated the following in his judgment [192-194]:

[5] In *JA Solar Holdings* at [para 15] Smellie CJ reported that approximately 20 section 238 cases had been previously heard in the Grand Court.

"*The company was criticized at trial for being unwilling to give helpful answers to reasonable questions. Mr. Zhu was repeatedly asked about Q41 of FTI's second information request which did not receive a proper answer. He refused to accept that the response was unhelpful. The point had been taken up in correspondence…and the dissenters invite a finding that the company was unwilling to commit to writing the basis for the assumptions it was making.*

I do not think it fair to make any such finding in circumstances where the company has responded to hundreds of questions and requests for enormous amounts of backup material. I accept that Mr. Zhu did provide in his answers in cross examination at trial, information underlying the headcount growth assumption concerning transaction volumes and overall margin, which had not been provided in the response to Q41. That explanation could and should have been given earlier, but I do not make any adverse finding against the company which evidently has provided reasonable cooperation in all the circumstances.

Mr. Osborne for his part also fairly accepted that some of FTI's request[s] had been a little "heavy-handed" and that he did not follow-up himself on the basis that he had not received proper answers or was missing critical information."

45. Notwithstanding, in another pre-2020 case, the Cayman Islands Courts were indeed concerned with the issue of poor compliance in respect of the company's discovery obligations. In *In re Qihoo 360 Technology Co. Ltd* the Grand Court's finding that the company's discharge of its disclosure obligations had been carried out "in a cavalier and inconsistent manner" was characterised by the CI Court of Appeal as exceptional. On that special footing, the CI Court of Appeal upheld Mangatal J on her decision to direct the parties to jointly instruct an independent forensic technology expert to audit the company's discovery performance, albeit that such an order is recognised to be of an intrusive nature. Providing the leading judgment, Martin, J.A. said [para 19]:

"*The sole task of the Court is to determine the fair value of dissenters' shares. To do that, it needs full information*."

46. Here, I would point out that the approach by the Cayman Courts to remedy the company's uncooperative conduct was not to enlarge the company's scope of general discovery but rather to sanction an audit of the company's discovery performance. That investigative measure does not give way to an implication that the Cayman approach would have otherwise endorsed an expert-led discovery process as part of the "standard form" but for the uncooperative conduct of a litigant. What is to be extrapolated from the Grand Court's sanction of an audit in *In re Qihoo 360 Technology Co. Ltd* is its commitment to securing all information needed for the proper assessment of the fair share value, whether the company proves to be cooperative in the process or not.

47. Mr. Adkin KC urged this Court to follow the judicial reasoning from the Cayman Islands, underscoring the similar path taken by this jurisdiction of Court in previous cases.

48. In *Nord Anglia* 2018 (1) CILR, Kawaley J reserved the Grand Court's determination on the issue of a dissenting shareholder's duty to provide discovery in section 238 cases as the CI's Court of Appeal's decision in *Qunar* was then pending. However, in addressing the general approach of the Grand Court, he said at [paras 9-10]:

"*These guiding principles must inform this court's approach to the present summons for directions, taking cognizance of the fact that s. 238 is designed to accord substantive commercial justice to merger companies and dissenting shareholders alike. These increasingly common petitions should in my judgment be judicially managed in a way that will, so far as reasonably practicable, promote confidence in the processes of the court for all key stakeholders. Where, as here, the parties have achieved substantial agreement on the proposed directions but found certain issues to be intractable, the court must do its best to adopt a balanced approach to the opposing contentions. An approach which will encourage the parties to cooperate in the ensuing phases of the proceedings, and indeed, in future similar cases.*

Of particular importance will be the need, so far as is consistent with the facts of this particular case, strive for a consistent approach to similar issues on the part of various judges of this court. The starting assumption must be that the approach adopted in previous s. 238 cases will be of considerable assistance to me in the present case. The fact that the present case is of higher value and may involve more documents than previous cases does not to my mind undermine this starting assumption."

49. The key point made on both Bermuda and Cayman Islands caselaw is that the Court will not diverge from its ultimate mission to amass no more or less than what it considers at the interlocutory stage to be necessary relevant documentation and information having regard to what is proportionate in all the circumstances of each case.

THE DISPUTED ISSUES

Issue 1: The Non-Disclosure Agreement

50. The parties have agreed the terms of a non-disclosure agreement (the "NDA") as between themselves.

Refusal to Append the Non-Disclosure Agreement to the Directions Order of this Court

51. The contractual terms of the NDA are a private legal obligation between the parties. As a formal agreement was reached, it would not only be superfluous but also officious for this Court to sanction terms and duties which are intended to have independent contractual force.

52. For these reasons, I decline to append the private non-disclosure agreement between the parties to the Directions Order of the Court.

Issue 2: The Disclosure Protocol (Appendix 1)

53. The Disclosure Protocol shall hereinafter be referred to as Appendix 1.

54. The Company objects to the Plaintiffs' proposed wording at paragraph 12 of Appendix 1. This raises the question as to whether electronic documents are to be provided in their Native File Format with all functionality, as requested by the Plaintiffs. The Company, however, proposes that all of the documents should be produced as bates-stamped TIFF (Tagged Image File Format) images (JPEGs for color) along with an image load file, a data load file with fielded metadata, and document-level extracted text for EST or OCR text for scanned documents, the exception being Excel files and media files which would be slipsheeted and produced natively. In the case of an Excel spreadsheet, the Company's draft provides as follows: "*However, if producing a redacted Excel spreadsheet in Native Format or near Native Format would impose undue costs on the producing party, then the spreadsheet may be produced in TIFF*."

55. The Company objects to the Plaintiffs' proposed wording at paragraph 15 of Appendix 1:

> "*Subject to any claim to privilege, all family Documents are to be disclosed where only one (or more) member(s) of a family Document is identified as relevant.*"

Decision on paragraph 12 of the Disclosure Protocol

56. Electronic documents are to be provided in their Native Format. Priority must be given to minimising any risk of interference to the original file metadata and allowing for the most

optimal format for conducting document searches. For that reason, it seems to me, in the absence of any expert evidence to suggest otherwise, that the conservative approach is the better one, which means that the documents are to be produced in their Native Format.

Decision on paragraph 15 of the Disclosure Protocol

57. The Court's powers to order discovery of any one or more documents is always subject to the relevance test. For that reason, this paragraph is not appropriate for the Directions Order as it purports to compel discovery of documents which are not relevant.

Issue 3: Form of General Discovery Order against the Company

58. The following three main sub-issues arise under Issue 3:

(i) Whether the general discovery order sought against the Company is disproportionate.
(ii) Whether Appendix 2[6] should form part of the Directions Order of this Court.
(iii) Drafting disputes in relation to Appendix 2

Finding on whether a General Discovery Order against the Company is Disproportionate

59. The Company promotes an expert-led discovery process over the making of a general discovery order against it. Its overarching position is that the general discovery order as proposed by the Plaintiffs would amount to an unnecessary and abusive "drains-up" inspection of its affairs. Mr. Boulton KC cited the *Jardine* case as persuasive authority for the Court's refusal to make a general discovery order on the issue of proportionality. Below are the passages from Hargun CJ's ruling which were quoted in the Defendant's written submissions paras [92]-[93]:

"*92.*
The Court accepts that general discovery may be justified where there is a credible suggestion of wrongdoing, and a forensic audit is warranted to uncover that wrongdoing. There is no suggestion in this case of any wrongdoing. The Court is unable to accept Professor Zmijewski's view that for the purposes of determining the fair value of the Company's shares the valuation expert must examine "all available value relevant information that is known or knowable as of the valuation date" relating to the Jardine Group including its 1,150 companies. The Court must subject any such statements to the constraints of proportionality and the Court's obligation to make orders which seek to achieve the Overriding Objective.

[6] During the hearing this was referred to as Appendix 3. The renumbering is attributable to the exclusion of the Non-Disclosure Agreement from the Directions Order.

93.
The Court also notes that the general discovery sought in this case appears to be overly broad and open-ended. Paragraph 7(2) of the draft Order seeks discovery from the Company of "all additional documents (of whatsoever description, whether electronic, hard copy or in any other format) and communications (whether by email or otherwise) which, in accordance with RSC Order 24, are in their possession, custody or power and which were prepared or created or communicated in the five year period ending on the Valuation Date and which are relevant to the determination of the fair value of the Dissenters' shares in the First Defendant as at the Valuation Date."

60. Mr. Boulton KC invited this Court to take guidance from Hargun CJ's refusal to make the proposed general discovery order based on it being "overly broad and open-ended". However, the key differentiator in the *Jardine* case was the factual evidence relating to the size and structure of the Jardine group of companies. Size wise, the Jardine group consisted of 1,150 companies and it employed over 400,000 employees. Its consolidated revenue for the year ending in December 2020 was in the range of US$32 billion and its market capitalisation was at approximately US$38 billion. It is explained in Hargun CJ's ruling that Jardine Strategic Holdings Limited was merely an intermediate holding company which held shares in publicly listed companies. It did not, itself, operate any business and it had no employees. Pivotally, Hargun CJ found at para [76]:

"*The valuation exercise in this case does not relate to a single silo operating company*".

61. What is germane to the Court's refusal to order general discovery against the Jardine group of companies is its findings that the fair share value assessment for Jardine Strategic Holdings Limited could be achieved without having to subject the experts in that case to the disproportionate exercise of examining all the documents relevant to the fair value of each of the 1000 plus Jardine companies. In that regard, Mr. Dages' expert evidence for the company Jardine Strategic Holdings Ltd was accepted by Hargun CJ.

62. There is no factual similarity between the *Jardine* case and the present case. For example, there is no evidence before the Court on which I might reasonably find that a general discovery order would abusively target and illicit irrelevant material from any one or more of the companies within the Argo Group. Equally there is no evidence or suggestion in this case that, structurally speaking, any one or more of the Argo companies operate in silo, thereby raising questions of relevance. To the contrary, Mr. Dages does not dispute the relevance of the material categorised at Appendix 2.

63. The only reference to the impact of a discovery order is made directly from the Company's Counsel in the form of submissions. At para [8(b)] of the written submissions filed on behalf

of the Company, it states "*the Plaintiffs' strategy ("tried and trusted") is to cause the Company to spend millions of dollars and months of management time in the next few months on a massive disclosure exercise, which is an essential backdrop to demands that the Company should pay a significant uplift on the merger price in order to end the Proceedings*." While the Overriding Objective ultimately governs the Court's managerial scope over litigation expense, the Defendant's misgivings about the Plaintiffs' discovery 'strategy' do not draw near to the special factors which arose on the *Jardine* case.

64. Mr. Boulton KC also pointed to the *Jardine* case to suggest that a general discovery order should be reserved for cases in which there is wrongdoing on the part of the company. At [92] Hargun CJ said:

"*The Court accepts that general discovery may be justified where there is a credible suggestion of wrongdoing, and a forensic audit is warranted to uncover that wrongdoing. There is no suggestion in this case of any wrongdoing…*"

65. However, that statement is not a statement of general principle. Instead, it is to be taken in the context of the exceptional facts of that case. The Court determined that the general discovery order proposed by the dissenters was overly broad because the valuation exercise did not relate to a single silo operating company within the Jardine group of companies. That is how the Court came to state that the proposed general discovery order "*may well be appropriate in the case of a single silo company and where there are grounds for suspecting wrongdoing*." para [78]. In making these statements, the Court was referring to the specific facts and exceptional circumstances of the *Jardine* case, not the ordinary section 106(6) case.

66. The Court's position was that in order to overcome the disproportionality which would arise as a consequence of a general discovery order against the whole group of companies or even a single silo company, there would have to be evidence of wrongdoing to justify the otherwise overly broad scope of discovery. Such wrongdoing is of the kind that would likely necessitate a forensic audit.

67. Significantly, the Court's decision not to order general discovery against the entire group of companies did not disturb or conflict with the general principle requiring the experts to be given access to all that they reasonably require to assess fair share value. This point was expressly reinforced by Hargun CJ at [94] where he said:

"*94. The Court desires to reiterate that the intent of the mode of discovery adopted by the Court, at paragraphs 81 to 87 above, is to ensure that the experts will have all the relevant documents and information which they reasonably require to express an opinion as to the fair value of the Dissenting Shareholders' shares in the Company. In case there is any difficulty in*

obtaining that information or other issue in relation to the process ordered by the Court, the parties are entitled to come back to the Court to seek further directions."

68. These passages are also relevant to understanding the Court's meaning where it earlier stated at para [72]:

"*The Cayman Court of Appeal has recognised that the discovery process in aid of section 238 claims is capable of abuse by the dissenting shareholders. The Court of Appeal has warned of the possibility of abuse by dissenting shareholders conducting a "drains up" inspection of the entire business, regardless of the relevance to fair value. The Court of Appeal has also recognised that the latitude given to the experts to define what is relevant to value could be abused and even used to put pressure on a company to agree an inflated value for the dissenting shareholders' shares rather than accept an external inspection of its physical and electronic records*."

69. Whether the scope of a general discovery order amounts to "*a "drains up" inspection of the entire business*" is necessarily fact specific. The *Jardine* case is an example of the kind of factual extremity which would render a general discovery order an abuse. As hammered down by Mr. Adkin KC, in this case there is no factual evidence before the Court. That means that the Court cannot refer to any case-specific facts evidencing the asserted disproportionality in this case. The general discovery objections made in *Jardine* were successful because the Court was persuaded that the fair-value material relevant to each of Jardine's 1000 plus subsidiaries was not so relevant to the question of fair value before the Court in respecting of Jardine Holdings Limited. That is the material distinction between this case and the *Jardine* case.

70. Further, I am unable to accept that the previous line of section 106(6) cases are suggestive of any principle that an expert-led discovery process should be the norm in share valuation cases in Bermuda. It is only in cases where the facts demonstrate that the proposed general discovery order trespasses on irrelevant and/or unnecessary material that the Court will consider limiting the discovery order. Again, the discovery order will be restricted to what is relevant, necessary, and sensible, costs-wise.

71. For these reasons, I am bound to reject the Company's invitation for an expert-led discovery process. In this case, I see no sound reason to withhold a general discovery order against the Company.

Finding on whether Appendix 2 should form part of the Directions Order of the Court

72. Under Appendix 2[7] to the Plaintiffs' draft Order, the Plaintiffs set out seven separate categories of documents required for general discovery. The general relevance of the information required under these categories is not in dispute; however, the Company's position is that Appendix 2 should be treated as a guide rather than an instruction carrying the force of all other terms to be contained in the Order of this Court.

73. The seven categories are as follows:

- The strategic review process and the strategic review committee and its advisors;
- Investor complaints, communications and proposals;
- Potential counterparties
- Board and management meetings and communications in respect of the merger;
- Financial documents
- Operations and strategy; and
- Shares, shareholders and subsidiaries

74. The "strategic review process" is introduced in Appendix 2 with the following definition offered by the Plaintiffs:

"*Documents sent, received, considered, created or produced as part of or relating to the strategic review process that was commenced on 26 April 2022…including but not limited to those matters referred to in the Proxy*"

75. For context, the review process which commenced on 26 April 2022, is said to have been initiated by the Company's board of directors (the "Board"). As may be seen from the Company's 20 March 2023 Proxy Statement to the shareholders (the "Proxy Statement") [page 25] on 26 April 2022 the Board resolved to initiate the strategic review process which would include the exploration of a potential sale and merger, having entered into the 8 February 2023 Agreement and Plan of Merger with Brookfield Reinsurance and Merger Sub. In this regard, Goldman Sachs was engaged as the Company's financial advisor.

76. Shortly thereafter, in or around 1 June 2022, the Board decided in favour of the formation of the "strategic review committee" (hereinafter referred to as the "SRC") which is said to have comprised existing members of the Board. The Plaintiffs seek general discovery of documents relating to the consideration and selection of each member, information as to the exclusion of

[7] Although the Plaintiffs' draft refers to this document as "Appendix 3", this appendix is referred to as "Appendix 2", accounting for this Court's decision not to include a signed NDA as an appendix.

any person from the SRC and the consideration and selection of the SRC's advisors. The Plaintiffs also contend that discovery should also disclose the reasons for the formation of the SRC and its mandate.

77. Beyond the structural aspect of the SRC, the Plaintiffs specify that this category of general discovery ought also to require the Company to identify documents relating to the conduct, activities and deliberations of the SRC. That would entail documents internal to the SRC and documents exchanged between the SRC and its various advisors. This class of the discovery search would also apply to documents which are relevant to any potential purchasers, counterparties or interested parties, or shareholders relating to or identified during the strategic review process or the merger or the Proxy Statement.

78. The "investor complaints, communications and proposals" category expressly relates to Voce Capital Management ("Voce"). The "potential counterparties" category relates to information and communications connected with the strategic review process, the merger and any other alternative transactions considered or proposed. The following three of the remaining categories relate to the internal strategies, operations, finances and records of the Company itself.

79. The final category "shares, shareholders and subsidiaries" would require discovery of documents which detail the number, terms and class of shares issued by Argo in addition to documents detailing the terms and conditions of any outstanding share options and or any stock buybacks. In this category of discovery, there is a specific reference to documents which relate to any transaction which resulted or would have resulted in an investor holding or controlling at least 2.5% of the total of Argo's common shares. The Plaintiffs further contend that discovery under this head would necessarily include documents which relate to share accumulation by Brookfield Reinsurance and/or Merger Sub and any share buy-backs from Argo. Additionally, under this portion of the discovery proposed under Appendix 2 the Defendant would be required to search for documents which relate to the value of the Company's subsidiaries and any potential or actual transactions involving the transfer of Argo's assets, liabilities, or capital.

80. The Plaintiffs instructed Mr. Taylor, a managing director in the Valuations Team at Interpath Ltd, to provide his expert opinion on the parties varying drafts of what is to be the directions order of this Court. Mr. Taylor's 11 March 2025 report is the first of his two reports.

81. In the introductory paragraphs of Mr. Taylor's first report, he outlined his work experience and expertise fortifying his standing to provide expert evidence in fair share value cases. He spoke to his background as a non-testifying expert advising on similar high-value transactions in section 238 fair share value applications in the Cayman Islands. Mr. Taylor also shared that he

is an expert witness in another section 106(6) in this jurisdiction of Court. In these other matters the litigation was similarly triggered by a merger or acquisition of billions of dollars. Against this background, I readily accept that Mr. Taylor's experience and qualifications position him to properly provide expert opinion evidence on the suitability of directions as to the scope and nature of pre-trial discovery in this case.

82. Mr. Taylor's clear opinion is that each of the categories of discovery proposed by the Plaintiffs under Appendix 2 are both "obviously relevant" and "important" to a fair value assessment, albeit, he said, that Appendix 2 does not catalogue all the relevant material needed.

83. Mr. Taylor also explained the relevance and importance of a surgical review of the members of the SRC to vet for any likelihood of internal biases which would impact of the fairness of the merger price. At [4.4.9]-[4.4.10] he said:

"*It is appropriate for the expert valuer to properly understand the qualifications, expertise and experience of the members of the committee, on what basis they were appointed and what role they performed, and any potential personal conflicts of interest or motivations behind anyone in the committee and voting for or approving a particular deal or matters relating to the Merger, including the Merger Price. This will include for example a proper understanding of the independence of any members or advisers, their remuneration for deal completion, and their potential future employment by the purchaser.*

The background, remit and potential biases in the strategic review committee are an integral part of the expert valuer's review of the whole sales process in order to inform what weight if any to place upon the Merger Price in the determination of fair value."

84. At paragraph 3 of Appendix 2 the Plaintiffs seek all valuation analyses performed by the Board, the SRC, Voce and its advisors. In support of paragraph 3 Mr. Taylor said [paras 4.4.15]-[4.4.16]:

"*Further, and by way of non-exhaustive example only, the expert valuer would be interested in the views expressed either by the Board, the [SRC], Voce, and Goldman Sachs as to the value of the Company, and how this might vary.*

Beyond highly relevant communications between key players, I would expect this category of documents to contain reports and valuation analyses, akin to an intrinsic valuation, that would aid an expert in the preparation of such a valuation."

85. Mr. Dages, Executive Vice President of Compass Lexecon, was instructed as the Company's valuation expert. In his report of 2 April 2025, he stated that he regularly serves as a consulting

or testifying expert in valuation and damages matters and that his previous experience as expert witness includes appraisal and quasi-appraisal matters previously before the Delaware Court of Chancery and other state and federal courts. As earlier noted, Mr. Dages also appeared as an expert witness for Jardine Strategic Holdings Limited in respect of the directions orders made by Hargun CJ in the *Jardine* case.

86. In the present case, Mr. Dages does not dispute the relevance of the categories of documents sought by the Plaintiffs. At footnote 13 of Mr. Dages' report he said:

"*I do not disagree that the categories of documents are relevant to assessing a company's fair value, but rather the scope of certain of the document requests…*"

87. Mr. Boulton KC explained that it is not the Defendant's case that the Appendix 2 categories are irrelevant; the Defendant's objection is occasioned by the Plaintiffs' application for the Court to sanction Appendix 2 as an Order of the Court rather than a reference guide. Mr. Boulton KC pointed out that no Appendix 2 equivalent was issued as a part of the Court's directions order in *Jardine*. He also cited the case of *APS Holding Corporation and Alpine Partners (BVI) LP v Myovant Sciences Ltd* [2023] SC (Bda) 67 Civ (25 August 2023) in which the Court declined to make a similar order, emphasising Hargun CJ's treatment of Appendix 2 as a "guide" rather than a component of the Court's order.

88. Before I come on to the other authorities cited by the Defendant, I will note that my previous decision in *Athene Holding Limited v Siddiqui and Ors (Discovery)* [2021] Bda LR 58 was also cited by Mr. Boulton KC as an example of a directions order which did not import an Appendix 2 equivalent. However, that was not a discovery application brought under the statutory framework of section 106(6) and the issue of an Appendix 2 equivalent was not an issue argued before this Court. For that reason, I am not assisted by that previous decision.

89. I move on to *APS Holding and Alpine Partners v Myovant.* In the *Myovant* case the company objected to its dissenters' application for general discovery against it. As an alternative to an order for general discovery, the company proposed an expert led process whereby, as a starting point, the experts would review all relevant public information in addition to the transactional material[8] that might be provided by the company. The second stage of the company's proposal entailed an opportunity for the experts to seek any further documents reasonably required from either party, pursuant to agreement or a further order of the Court. It is this process which is proposed by the Company in the case before me.

[8] The transactional material related to "Sumitovant" due diligence documents. (Sumitovant Biopharma Ltd was the company which, as a consequence of the merger, came to wholly own the company, Myovant Sciences Ltd ("Myovant"), in which the Court was concerned with the fair share value.) Other transactional material included materials exchanged between Goldman Sachs, the Board and the Audit & Special Committee.

90. As is so for the present case and for most of these kinds of cases, the draft order before the Court in *APS Holding and Alpine Partners v Myovant* originally comprised an Appendix 2 by which the dissenters set out the categories of material sought for general discovery against the company. However, at this stage of the proceedings, the Company had not obtained leave to adduce its own expert evidence; yet it cautioned that it would reserve its right to call expert evidence if the Court was inclined to admit the expert evidence of the dissenters. Facing the prospect of delay, the dissenters effectively agreed to exclude what Hargun CJ referred to as "the customary Appendix 2" in exchange for an adjournment *sine die* of the company's application to adduce expert evidence in the discovery application. Those are the circumstances which led to the exclusion of Appendix 2 in *Myovant*.

91. Arguing on behalf of *Myovant*, Mr. Martin Moore KC characterised the dissenters' pursuit for general discovery as a fishing expedition which was unfair, unworkable, unnecessary, disproportionate and premature. He set out five grounds to support the company's position, all of which were rejected by Hargun CJ who, guided by Cayman Island caselaw, held that an expert-led process was no appropriate substitute for general discovery. At paras [29]-[30] Hargun CJ found:

"*In the circumstances, the Court is satisfied that the considerations which apply to section 106 proceedings as set out at paragraph 19 above, necessitate that the company, as a general rule, should be required to provide general discovery of all documents and information which are relevant to the issue of fair value. There is no evidence before the Court which would lead it to conclude that the general rule should not apply in this case. Accordingly, the Court orders that the Company shall upload to the Data Room , within 180 days of the date of the Order, all Documents (as defined in the draft orders) within the Company's possession, custody or power created since October 2019 which are relevant to the determination of the fair value of the Plaintiff's shares in the Company as at the valuation date…*

As a guide to complying with its obligation to give general discovery, the Company should seek to comply with the requests set out in Appendix 2 to the previous draft of the Directions Order provided by the Plaintiffs. In the event that the parties are unable to agree in relation to a particular provision of Appendix 2 they are at liberty to make an application to the Court."

92. Hargun CJ's treatment of Appendix 2 as "guide" rather than a limb of the Court's order is contextual to the dissenters' agreement to withdraw Appendix 2 and proceed without expert evidence. In fact, Hargun CJ's reference to Appendix 2 as "customary" suggests that inclusion of Appendix 2 in an Order of the Court should be viewed as the usual position or at least the normal starting point. The exclusion of Appendix 2 was driven by a case management agreement between the parties. Put another way, the Court did not find, as a matter of principle, that Appendix 2 was unsuitable for embodiment in the order; rather, it accommodated the

parties' agreement to its exclusion. Given that background, *APS Holding and Alpine Partners v Myovant* cannot be properly cited as an example of the Court preferring Appendix 2 as a guide rather than a component of its order for general discovery in section 106(6) fair value cases.

93. The case of *Myovant* more so supports a general starting point that Appendix 2 is part of a standard form of order in section 106(6) cases. This is clearly the position in the Cayman Islands and for good reason, as I see it. Because the starting approach to these cases supports a general discovery order, there is a heightened need for the parties to manage the costs and time of the ensuing litigation by defining the categories of information and material sought. I am bound to reject the position advanced by Mr. Boulton KC limiting the value of Appendix 2 to its service as a non-binding guide. These proceedings were convened for the Court's determination not its opinion. Should it prove necessary for the Court to later vary any part of the directions as it relates to discovery or otherwise, it is not only at liberty to do so but also duty-bound to keep the suitability of those directions under review.

94. Section 106(6) confers a statutory right on the dissenting shareholders to seek the Court's judgment on the fair value of its shares timed to the relevant valuation date. The case law for section 106(6) and section 238 cases recognises the importance of making all of the relevant and necessary evidence available to the valuation experts. In this case both Mr. Taylor and Mr. Dages agree that the categories of evidence listed under Appendix 2 are relevant. On Mr. Dages' evidence, however, it is suggested, implicitly at least, that the material external to the strategic review process is unnecessary. That dispute is examined more closely in respect of the lookback period. However, on the issue as to whether Appendix 2 should form part of the Court's Order, I am satisfied that it should for the reasons outlined above.

<u>Findings on Drafting Disputes in relation to Appendix 2 (Paragraphs 1-20)</u>

95. The relevance of the SRC and the strategic review process is not in issue.

96. At paragraph 1 the parties are in dispute as to the appropriate start-date in relation to the strategic review process documents. The disputed draft provision is as follows:

"*Documents sent, received, considered, created or produced as part of or relating to the strategic review process that was commenced on [28 March] [26 April] 2022 (the "Strategic Review Process"), including but no limited to those matters referred to in the Proxy*."

97. Further above, I referred to the Company's 20 March 2023 Proxy Statement to the shareholders (the "Proxy Statement") [page 25] in which it is stated that on 26 April 2022 the Board resolved

to initiate the strategic review process. In my judgment, the date of 26 April 2022 should be stated in paragraph 1, as proposed by the Company.

98. As between the parties, it is accepted that the material and communications sought under paragraph 3 would form part of the Company's general discovery. However, at the hearing the drafting of paragraph 3 was not agreed between the parties. The variance is not reflective of differing views in substance; rather, it is a question of form. In my judgment, the suitable wording for paragraph 3 is as follows:

"*3.*
Documents relating to the conduct, activities or deliberations of the Board or the Strategic Review Committee, including but not limited to any minutes or agendas or notes of meetings;

Documents passing between the Board and the Strategic Review Committee or amongst the members of the Board or amongst the members of the Strategic Review Committee; and

Documents sent, received, considered, created or produced by or passing between:

(i) Argo Group including the Board and management of Argo Group;

(ii) one or more of the Strategic Review Committee members and any third party including:

a. Skadden;
b. ASW;
c. Goldman Sachs;
d. Any other advisors to the Strategic Review Committee;
e. Merger Sub and/ or Merger Sub's advisors;
f. Brookfield Reinsurance and/or Brookfield Reinsurance's advisors (including Debevoise);
g. Voce and/or Voce's advisors (including Schulte);
h. Any other potential purchaser or counterparty or interested party identified during the Strategic Review Process; and/or
i. Any shareholders of Argo Group, relating to the Strategic Review Process, the Merger, or otherwise the matters set out in the Proxy.."

99. On the subject of "Investor complaints, communications and proposals", paragraphs 4 and 5 of Appendix 2, as proposed by the Plaintiffs, are accepted. Under the sub-headings "Potential counterparties" and "Board and management meetings and communications in respect of the Merger", I find that the drafting of paragraphs 6-8 should employ both the wording proposed by the Plaintiffs and the Defendant.

100. The disputes under paragraph 9 pertain to the financial documents. The parties agree to the disclosure of the Company's financial books and records (including native versions and drafts). However, the Company seeks to limit this disclosure category to information which "materially relate[s] to the Defendant's Fair Value". To insert the word "materially" is to wrongly interfere with the relevance test prescribed by RSC O.24/3 which requires one to reasonably suppose that the document in question contains information which may enable the Plaintiffs to either to advance their own case or to damage that of the Defendant. For that reason, I must reject this wording proposed by the Defendant.

101. Under paragraph 9. a. the parties agree that the financial books and records should include historical data and they agree to the particularisation of those materials save for the Defendant's inclusion of the words "competitors; and". The insertion of those two words does not provide the clarity which is provided by the Plaintiffs' wording: "*Historical and forecasted analysis of Argo Group's key performance indicators relating to both management targets and key competitors; and*". For that reason, I prefer the wording employed by the Plaintiffs at paragraph 9.a.

102. At paragraph 9.b. the Plaintiffs seek the supporting assumptions, notes and commentary to the forecast data. The relevance of that material is not disputed, so I see no reason for its exclusion. I thus find in favour of the Plaintiffs at paragraph 9.b.

103. Applying that same reasoning, grounded on a finding of relevance, I find in favour of the Plaintiffs' proposals for the remainder paragraphs, 11, 18 and 20.

104. Returning to the preceding paragraphs for the purposes of the Defendant's proposals, I am bound to reject the use of the word "material" at paragraph 10. It imports a subjective test, inviting further dispute as to what is or is not a "material" asset or liability. The fact of the matter is that all of Argo's assets and liabilities are relevant to a fair share valuation. So, I see no justification for the use of the term "material" at paragraph 10.

105. As for the Defendant's proposals in respect of paragraphs 18-20, I refer to my findings further below on the appropriate look-back period.

<u>Findings on Drafting Disputes at paragraphs 7.2 and 8 of the Updated Proposed Order in relation to Appendix 2 categories</u>

106. The Plaintiffs' draft of paragraph 7.2 is approved, save for the inclusion of the term "potentially relevant". The Plaintiffs' entitlement to obtain discovery from the Company may arise only after it has been established that the document relates to a matter in question, not where it might relate to a document in question. Consistent with the commentary portion of

the 1999 White Book at 24/2/11 on the meaning of the words *"relating to matters in question",* it must be reasonable to suppose that the document in question contains information which may enable the Plaintiffs to either to advance their own case or to damage that of the Defendant. In my judgment, "potentially relevant" falls short of the RSC O. 24/3 threshold, and more so, it fails the "necessity filter" imposed by Rule 8. Applying this reasoning, I also find against the Plaintiffs' use of the term "or potentially relevant" at paragraph 7.3.

107. Notwithstanding, paragraph 7.2, on the Plaintiffs' draft, aligns with my findings on the look-back period. Given the passage of time which has already lapsed in these proceedings, I also find that the 90-day period proposed by the Plaintiffs is reasonable.

108. For the avoidance of doubt, I find that the Defendant's proposed paragraphs 7.2.1.-7.2.5. are unnecessary as the categories of disclosure are already covered by Appendix 2. Also, the Defendant's date-reference in paragraph 7.3 is rejected on account of my findings on the appropriate look-back period.

109. Paragraph 8, as proposed by the Defendant, is rejected for the reasons stated in this Ruling in answer to Issue 5.

Issue 4: The Discovery Lookback period

110. This issue arises on the coverage period of the Company's search for relevant documents. The Plaintiffs propose a 5-year look back period while the Company contends that the search should span no more than a preceding 2-year period up to the relevant valuation date. Thus, it is for this Court to grapple with two competing expert opinions on how far the look-back period ought to extend. That exercise requires scrutiny of the expert reports before me.

The Plaintiffs' Expert Evidence on the Look-back Period:

111. Summarising his view on the look-back period of his first report, Mr. Taylor stated [paragraph 2.2.1-2.2.4]:

"*The appropriate lookback period in respect of documents to be disclosed by the Company is five years from the Valuation Date. A five-year lookback period is the norm adopted by the valuation practitioners in the context of a fair value appraisal.*

In this particular case five years would be consistent with:

a) the period reviewed by Goldman Sachs as financial advisor to the Company in the preparation of their fairness opinion supporting the transaction;

b) the practice in Section 238 fair value appraisal cases;

c) academic resources and IRS practice; and

d) my own personal experience.

112. Mr. Taylor's view promotes the longer period on the premise that a study of the greater historical period will likely yield a more reliable valuation. He reports that this is particularly so in respect of a discounted cash flow analysis. Illustrating the point, Mr. Taylor said [paragraph 4.2.6]:

"*As a simple example, if a company has been growing steadily at five per cent per annum for the last five years, then a forecast with growth at 10 per cent would stand out as requiring more diligence to understand the underlying reasons for this*."

113. He pointed to the Proxy Statement which annexed Goldman Sachs' opinion as to the fairness of the merger price. That opinion, Mr. Taylor said, was formulated on five years of statutory accounts to 31 December 2021. This, according to Mr. Taylor, illustrates a standard review period of 5 years correlating with the discovery period which is "routinely adopted" for section 238 fair value applications in the Cayman Islands and endorsed by no less than seven cited extracts from recognized practitioners' text. Mr. Taylor's bottom-line position is that not only is the five-year period textbook standard but that anything less than that in this case would be inappropriate and would impede on an expert's ability to properly opine on the fair value of the dissenters' shares.

114. Mr. Taylor also explained that the Company's operations are cyclical in that it undergoes cycles of expansion and contraction due to the nature of the insurance industry. This, he explained, distinguishes the Company from companies whose profits grow steadily every year or those companies whose profits essentially remain the same every year. So, in Mr. Taylor's opinion, the shorter look back period would not adequately capture the full cycles of the Company's insurance business. To make good this point, Mr. Taylor quoted from Chris Mercer, Chairman of Mercer Capital and author of Appropriate Period of Historical Financial Analysis:

"*The basic answer to the questions is that it depends on a variety of facts and circumstances relevant to each particular appraisal situation. It is true that many appraisals provide a five year historical analysis. It is also true that other appraisals use shorter or longer time periods for analysis, as appropriate.*

In my experience, companies in cyclical industries and those whose customer bases are cyclical in nature often require analysis for longer time periods than the "typical" five-year look. When companies have cyclical earnings or are dependent on cyclical customers, it is often appropriate to consider the use of an earning power estimate based on a longer period than five years."

115. Mr. Taylor pointed to what he viewed as two case-specific factors which would be missed by a 2-year lookback period but which would be captured and analysed in the case of a discovery search spanning a 5-year lookback period:

(i) Investor complaints: Voce Capital Management ("Voce")
(ii) Covid-19 Global Pandemic

Investor Voce complaints

116. The investor-complaint material of interest to the Plaintiffs relates to Voce, a shareholder hedge fund, which launched a series of complaints against the governance and operational costs of the Company. Voce's complaints were ventilated via a letter to the shareholders dated 25 February 2019. Mr. Taylor critically pointed out that those complaints, however, were not suggestive of a handicap in the Company's revenue-making ability. Mr. Taylor asserts a high degree relevance to Voce's intervention and the Company's response to these complaints, particularly highlighting that Voce's complaints did not result in any fundamental change to the Company's business operations. However, as Mr. Taylor also pointed out, those communications would fall outside of the lookback period proposed by the Company. Reinforcing the need for the longer lookback period, Mr. Taylor also observed, for comparative value, that the review carried out by Voce appears to have been based on a 10-year review of the Company's financial performance.

The Covid-19 Pandemic

117. Flatly rejecting the April 2021-April 2023 period promoted by the Company, Mr. Taylor highlighted that this two-year period sits within the timeframe of the Covid-19 global pandemic. Speaking to the grave impact of the Covid-19 global pandemic on the insurance industry, Mr. Taylor described it as the third largest global catastrophe behind Hurricane Katrina of August 2005 and the 11 September 2001 attacks on the World Trade Center and Pentagon. The most notable period of impact on the industry was between 2020 and early 2022 according to Mr. Taylor. In his first report Mr. Taylor said [4.2.15] and [4.2.17]:

"…*In any valuation where this period forms part of the period examined, I would extend the review by an additional two years before the commencement of Covid-19 (i.e. to 2018) to gain a better understanding of Covid-19's impact and the context for the business in which it sits*.
…

The shorter lookback period put forward by the Company of April 2021 to April 2023 clearly sits in the Covid-19 period with the risk that the key performance indicators and relative performance, for instance, analysed across that period may provide an unreliable picture of the business's actual longer term potential."

The Company's Expert Evidence on the Lookback Period:

118. Countering Mr. Taylor's opinion supporting a 5-year lookback period Mr. Dages made two main points. Firstly, Mr. Dages pointed out that while the categories of documents pursued by the dissenting shareholders are either relevant or are of limited relevance, the underlying information ought not to be discoverable against the Company to the extent that such material is already publicly accessible. The second part of Mr. Dages' counter is that the Company's strategic review undertaken within two years leading up to the Valuation Date, makes it unnecessary to look any further back than a two-year period for discovery. At [paragraph 12.2] Mr. Dages stated:

"*Mr. Taylor's conclusion that the use of a "five-year lookback period is the norm adopted by valuation practitioners in the context of a fair value appraisal" does not support Dissenters' request for five years of data and documents from the Company's internal records for purposes of appraising Argo's fair value as of the Valuation Date. It is my opinion that the use of a five-year lookback period for disclosure of internal company data and documents is unwarranted in this matter. This is because the type of data ordinarily used in a historical company financial analysis (e.g., the company's income statement, balance sheet and cash flow statement data) is publicly available in Argo's filings with the SEC and reports issued by equity analysts. Moreover, the use of a lookback period longer than two years is less relevant (and possibly irrelevant) for a company such as Argo that has undergone a strategic review and divestitures of material operations within the two years leading up to the Valuation Date*."

119. Mr. Dages emphasises throughout his report that it is open to the dissenting shareholders to obtain their discovery from public platforms and not from the Company's internal sources. At [para 20] of his report he stated:

"*…While I agree that "the more years of business operation and underpinning data" is typically desirable when conducting an appraisal analysis, I disagree with the premise behind Mr. Taylor's opinion that the Company's disclosure is the sole* (*or even necessarily the primary) source for such historical information*."

120. Mr. Dages pointed to other publicly available sources of relevant information. At [para 21.2] he said:

"*Argo (and its predecessor companies) filed quarterly and annual reports with the SEC since the year-ended December 31, 1999.25 Argo's Form 10-Q (quarterly) and 10-K (annual) reports contain its financial statements and other information regarding its operations and financial performance, financial position, and other information relevant to assessing the Company's fair value as of the Valuation Date*."

121. Having provided a table summarizing five years of the Company's combined loss and expense ratio information for 2018 through to 2022, Mr. Dages set out some of the detail which would be shown on the Company's 10-K filings. Additionally, he pointed out, the Company also filed statutory financial statements on a quarterly and annual basis with state insurance departments. Mr. Dages stated that these may be retrieved from the National Association of Insurance Commissioners.

122. In defence of the 2-year lookback period, Mr. Dages also highlighted the Company's management handovers which he stated occurred during the five-year look back period. In doing so, he minimised the relevance of strategic measures and forecasts of the CEOs and CFO prior to the 2-year lookback period. He said at [para 23]:

"*23. Mr. Taylor states that a "longer period of historical analysis may help inform on the reasonableness and reliability of forecasts, which play a key role in any valuation," but fails to note that there was turnover in Argo's executive management team during the five-year lookback period.*

23.1 At the time Argo issued its 2017 Form 10-K (on February 27, 2018), approximately the beginning of Dissenters' proposed five-year lookback period, Mark Watson was CEO and Jay Bullock was CFO.

23.2 At the time Argo issued its 2019 Form 10-K (on February 28, 2020), Kevin Rehnberg had replaced Mr. Watson as CEO and Mr. Bullock remained as CFO.

23.3 At the time Argo issued its 2021 Form 10-K (on March 16, 2022), Thomas Bradley had replaced Mr. Rehnberg as CEO and Scott Kirk had replaced Mr. Bullock as CFO.

23.4 As of the Valuation Date, the top two executives had been in their positions for approximately 1.25 years (Mr. Bradley) and 2.25 years (Mr. Kirk). It is my opinion that the strategies undertaken and forecasts prepared by the CEOs and CFO in place before the Company's proposed two-year lookback period are therefore of limited relevance for determining Argo's fair value as of the Valuation Date."

123. Mr. Dages also sought to discredit Mr. Taylor's comparative reference to the review period used by Goldman Sachs, explaining that the Plaintiffs will in any event be provided with all of the material which was made available to Goldman Sachs. In his report, Mr. Dages said [24.1]:

"*Mr. Taylor references Goldman Sachs' use of five years of statutory accounts through December 31, 2021. Mr. Taylor misinterprets the disclosure in the Merger Proxy, which instead states that "Goldman Sachs reviewed, among other things … annual reports to shareholders and Annual Reports on Form 10-K and 10-K/A of Argo Group for the five years ended December 31, 2021" (i.e., which contain the Company's GAAP financial statements but not statutory financial statements). Moreover, the Parties already contemplate that the documents provided to potential bidders as well as all materials provided to Goldman Sachs and relied upon in producing its fairness opinion will be provided to Dissenters. Therefore, to the extent that the potential bidders or Goldman Sachs received non-public information regarding Argo's statutory accounts (or relied on that information), those documents will be provided to Dissenters*."

124. In answer to Mr. Taylor's attachment of importance to the review period giving way to discovery of Voce's complaints, Mr. Dages highlighted that the information used by Voce was publicly sourced, not derived from any internal disclosures provided by the Company. On that footing, Mr. Dages took the position that the Company ought not to be made to source that publicly available information from its internal sources.

125. As for Mr. Dages' response to Mr. Taylor's points on the Covid-19 Global Pandemic, Mr. Dages's response, effectively, is that the strategic review process entailed sweeping changes to the Company's material operations thereby making the preceding period less relevant, if not altogether irrelevant. Mr. Dages stated at [para 25]:

"*Mr. Taylor cites to the disruptions to Argo's business between 2020 and early 2022 resulting for the Covid-19 outbreak as well as the cyclicality of the insurance industry as further support for his claim that a two-year lookback period is inadequate. While these two factors might support a longer lookback period for other companies, the use of a lookback period longer than two years is less relevant (and possibly irrelevant) for a company such as Argo that has undergone a strategic review and recent divestitures of material operations*."

126. So, to summarise the opinions advanced on the Company's expert evidence, a five-year lookback period is unnecessary considering the Company's recent management and operational changes and the strategic review process which entailed a full analysis factoring in the longer lookback period. The Company's position is that in any event, the lion share of the information sought by the Plaintiffs is publicly available and that it ought not to shoulder the burden of producing those documents when the Plaintiffs are at liberty to access them as members of the public community.

127.Mr. Boulton KC argued the two main points made out in Mr. Dages' report.

128.Firstly, an analysis of the longer lookback period was built into the financial assessment of the Company during the course of the strategic review process, rendering it unnecessary for the Company reproduce documents which precede the strategic review process. On this first point, emphasis was placed on the Company's commitment to provide the Plaintiffs with all the material passed between the merger transaction parties and the material as between the Company and its advisors. This includes all the material made available to Goldman Sachs (that is non-public information regarding the Company's statutory accounts) and any other financial advisor to the Company.

129.Secondly, Mr. Boulton KC submitted that the Company ought not to be made to assume the burden of a general discovery order looking further behind the strategic review period because in addition to it being unnecessary, it is open all the same to the Plaintiffs to access the Company's publicly available financial reports. As pointed out on the expert evidence, the Company's financials were regularly lodged with the Securities Exchange Commission ("SEC"). Additionally, as argued by Mr. Boulton KC, the Plaintiffs also have access to other equity analysts' financial reports.

130.Against this background, the Defendant argues that a proper application of the 'necessity filter' imposed by RSC Order 24/8 can only result in a refusal to order discovery extending beyond the 2 year lookback period on the grounds that (i) a fair trial is not contingent on the Company's production of the documents for the additional 3 year period running from 2017-2020 and (ii) the production of those materials under a general discovery order would have the effect of doing anything but save costs. The Defendant also argues that a general discovery order for a five-year lookback period is inconsistent with the Court's duties under the Overriding Objective to ensure that the matter is dealt with proportionately.

<u>Findings on the lookback period in relation to Appendix 2 (Paragraph 9)</u>

131.The five-year lookback period, on the Defendant's arguments, is neither necessary nor proportionate, no matter which method of valuation is employed. If the market price valuation is used, then the experts would need only to focus on the quoted share price and any material non-public information, according to the Defendant. For a merger price valuation, the events and documents of focus would be those relating to or arising out of the strategic review process which commenced on 26 April 2022. And for the discount cash flow analysis, Mr. Boulton KC submitted that the experts would be primarily concerned with forecasts of future cash flow and perhaps the Company's historic ability to forecast and budget. Effectively, the Defendant took its shot at arguing that share price information dating more than two years prior to the

agreed valuation date (19 April 2023) (the "valuation date") is not relevant to any standard method of fair share valuation.

132. However, these submissions made on behalf of the Company do not align with the Company's own expert opinion evidence in which Mr. Dages carefully avoided an unequivocal rejection of the relevance of the five years' worth of material sought by the Plaintiffs. Mr. Dages did not positively assert in his evidence that the five-year look back period ought to be refused on the basis that the financial documents for April 2017-2020 are wholly or principally irrelevant to a fair share value assessment. Instead, his evidence was that a discovery order requiring more than two years' worth of the Company's financial information would lead to the production of "relevant", "less relevant" and "possibly irrelevant" material.

133. Notwithstanding, Mr. Dages' discord with the five-year lookback period was more so grounded on the Plaintiffs' alternative means of accessing the Company's publicly available historic financial information. At para [31] of his report Mr. Dages stated:

"*I do not disagree that these categories of documents are relevant to assessing a company's fair value [footnote omitted]. As I discuss above…, however, much of this information is also contained in publicly available documents. For example, Argo's SEC filings already contain extensive information relevant to the Financial documents, Operation and strategy, and Shares, shareholders and subsidiaries categories. And for certain other categories (e.g., the Strategic review process and Potential counterparties). The production of non-public information can reasonably be limited to the two-year lookback period offered by the Company as explained above…*"

134. The Company, having publicly traded on the New York Stock Exchange ("NYSE") from 7 May 2018 through to the valuation date, filed quarterly (Form 10-Q) and annual reports (Form 10K) with the SEC since the year-end 31 December 1999. Exhibited to Mr. Dages' evidence are SEC filings disclosing the Company's financial statements relating to that period. The value of financial statements to a fair share valuation is emphasized in Mr. Dages' report with reference to supporting industry quotes lifted from Mr. Taylor's report. In summary, the Company's case is that the most important documents needed for a fair share valuation are the Company's financial statements which are publicly available through a search of the Company's SEC filings.

135. Mr. Dages' view was that it is also unnecessary to make the 2017-2020 materials discoverable because this period formed part of the underlying information considered by Goldman Sachs in forming its opinion on the fairness of the merger price.

136. Under the cover of Annex B to the Proxy Statement is the 8 February 2023 Goldman Sachs' opinion (the "GS Opinion") which sets out the material and information obtained and reviewed to produce the Opinion. On the second and penultimate page of the GS Opinion, Goldman Sachs stated at page [B2]:

"*In connection with this opinion, we have reviewed, among other things, the Agreement; annual reports to shareholders and Annual Reports on Form 10-K and 10K/A of the Company for the five years ended December 31, 2021; certain interim reports to stockholders and Quarterly Reports on Form 10-Q of the Company; certain other communications from the Company to its shareholders; certain publicly available research analyst reports for the Company; and certain internal financial analysis and forecasts for the Company prepared by its management, as approved for our use by the Company (the "Forecasts"). We have also held discussions with members of the senior management of the Company regarding their assessment of the past and current business operations, financial condition and future prospects of the Company; reviewed the reported price and trading activity for the Shares; compared certain financial and stock market information for the Company with similar information for certain other companies the securities of which are publicly traded; reviewed the financial terms of certain recent business combinations in the insurance industry and in other industries; and performed such other studies and analyses, and considered such other factors, including Sections 2.06 and 6.01(a)(i) of the Agreement, as we deemed appropriate*."

137. The GS Opinion was produced in the course of Goldman Sachs' provision of financial advisory services to the Company. In addition to the provision of financial advice, Goldman Sachs participated on behalf of the Company in "*certain of the negotiations leading to*" the merger transaction in consideration for fees for their services. Payment of those fees was "*contingent upon consummation*" of the merger transaction. Otherwise, an agreement was made between Goldman Sachs and the Company in respect of certain reimbursements and indemnities. It is also noted in the GS Opinion that historically Goldman Sachs "*from time to time*" had provided the Company other financial advisory and/or underwriting services. So, as between the Company and Goldman Sachs there was an ongoing client advisory relationship.

138. That is the background to the production of the GS Opinion. I now turn to the substance portion of the GS Opinion which appears only in the concluding paragraph:

"*Based upon and subject to the foregoing, it is our opinion that, as of the date hereof* [8 February 2023], *the $30.00 in cash per Share to be paid to the holders (other than Brookfield Reinsurance and its affiliates) of Shares pursuant to the Agreement is fair from a financial point of view to such holders of Shares*."

139. The GS Opinion was formed from an analysis of five years of the Company's statutory financial statements running up to 31 December 2021. Goldman Sachs was advising its client, the Company's Board of Directors, on the fairness of the proposed $30.00 merger price. The GS Opinion does not disclose the valuation analysis performed nor the valuation methodology considered and or used. It is also relevant, for contextual purposes, that Goldman Sachs had an interest to see the merger transacted in order for it to receive payment of its fees. All of that to say, it is unsurprising that the Plaintiffs wish to independently feed on a larger helping of the relevant documents rather than settling for receipt from the Company of the non-public documents which were provided to Goldman Sachs for the 5 year period in question.

140. The Plaintiffs, having been privy to the GS Opinion, rejected it and thus deem it necessary to go behind the formulation of that opinion by commissioning a fresh and independent examination of all the documents and information relevant to a fair value assessment.

141. It seems that the Company's real position is this: The Plaintiffs should be satisfied to receive the approximate total of 9,300 documents which the Company is prepared to upload to the Data Room. Those documents would sufficiently underpin a fair valuation as they comprise the whole of the material and information submitted by and between the Company, its advisors and the merger counter-parties as part of the strategic review process and the merger. Otherwise, the Company will be wastefully forced to return to first base and suffer the time and expense of recompiling five years of its financial information and documents in circumstances where all of that data and information has already been built into the strategic review process and is, in any event, publicly available.

142. The Company's position is that a 5-year lookback period would also erroneously drag in less relevant material from the period prior to the Company's divestitures of material operations brought on by the strategic review process. However, there is no factual evidence of consequence before this Court about the Company's operational and management changes, putting aside what was said by Mr. Dages, a witness of expert opinion rather than a witness of fact.

143. Having assessed the expert opinion evidence before me, I am satisfied that a 5-year lookback period is a standard starting approach. That period will be altered where the factual circumstances of the case make it necessary to do so in order to stay within the boundaries set by RSC Order 24/8 and within the spirit of the Overriding Objective. In my judgment, there are no special factual circumstances which would cause this Court to conclude that the Company's projections and performances during the period of 2017-2020 are irrelevant to a fair share value as at April 2023.

144. As explained in Mr. Taylor's report, the nature of the insurance industry is cyclical and distinguishable from other industries in which a steady annual cash flow is more typical or likely. So, logically, a longer lookback period would be more telling for a valuation based on cash flow. The longer lookback period would also capture a pre-Covid19 period and the impact and recovery from the pandemic strike which was notoriously damning for the insurance industry.

145. The fact that a significant portion of this information has been consumed and analysed by the Company's advisors has no real bearing in this case on the Plaintiff's general discovery rights. The aim of the discovery exercise is to feed into the expert opinion witness all of the relevant and necessary information need to dispose fairly of the issues in a cost-effective manner. However, the burden of compiling all such relevant material and information in the Company's possession belongs to the Company, not to the Plaintiffs. So, the fact that the discoverable information may be otherwise accessed from a public source does not relieve the Company from its litigation duties. More so, I accept Mr. Taylor's evidence that the valuer will need to consider both the information in the public domain and the material non-public information which was known to the Company. At paras 3.3.1-3.3.3 Mr. Taylor stated:

"*The reliability of the share price of a listed entity as an indicator of fair value will likely be questionable if the stock has limited liquidity (i.e., is not freely traded) and particularly if its movement on the stock market does not respond as one would expect to announcements or news, which might suggest that the market for the company's shares may not be "efficient".*

Additionally, the listed share price may not represent fair value if there is material information known to the company that has not been released to the market (i.e. material non public information, or MNPI). This could be the case where, for example, company management knows that a new product has been approved for commercialization that will lead to significant increases in revenues, but has not yet announced this information. This is one of the several reasons why it is crucial for an expert valuer to have access to and to consider both publicly available, and internal, information about the subject company.

The material non-public disclosure of information requires the valuer to compare what is in the public domain against what the company has kept confidential to itself, and to determine the extent to which that (in addition to the above factors) may undermine the reliability of its traded price."

146. At trial the Court will decide which valuation method(s) signifies the fair share value in this case. The scope of the discovery period must allow for the experts to opine on a discounted cash flow analysis, whether based on an assumed sale or on an assumed retention of shares. There being a real chance that the Court may ultimately find in favor of a discounted cash flow

analysis, the appropriate look back period must be sufficient to enable the experts to examine enough of the Company's cash flow history to reasonably allow for an opinion to be formed on the likely cash flow for future years.

147. For these reasons, I find in favour of the five-year lookback period as proposed by the Plaintiffs.

Issue 5: Whether the scope of the Company's search for documents should be limited

148. The Defendant proposes the following direction:

> "*The Defendant shall identify relevant documents by carrying out a reasonable and proportionate search for Documents within the possession, custody and power of certain Custodians. The said search may include the use of search terms and technology assisted review*…"

149. The Plaintiffs take issue with the restricted scope of the direction in so far as it only imposes a burden on the Company to search for documents in the possession, custody and power of "certain Custodians" rather than documents in the possession, custody and power of the Company at large. At paragraph 49 of the Plaintiffs' written submissions it is argued:

> "*49. The effect of the proposed wording is: (i) to limit the Company's discovery obligations to documents within the possession, custody and power of "certain Custodians" as opposed to those in the Company's possession, custody or power (cf. Plaintiffs DDO, at [6]); and (ii) to exonerate the Company from disclosing all Documents relevant to fair value in the ordinary way. The Company's draft is notably silent as to the identity of the relevant "Custodians" in any event*."

150. That said, the Defendant's response is that this wording is consistent with the Defendant's obligation to carry out a reasonable and proportionate search.

Decision on the scope of the Company's search for documents

151. In my judgment, the question is ultimately about the material and information which is in the Company's possession, power and or control. If the Company intended to aver that it would be excessively and disproportionately burdened by an order requiring all of its custodians to perform a search and that such an exhaustive search would produce no real better result than that which would have been performed by select Custodians, then such a postulation ought to have been supported by factual evidence. It was not. For those reasons, I find that I have no cause to limit the search to "certain" custodians, as proposed by the Company.

Issue 6: Whether the Plaintiffs should make discovery

152. At the hearing before me, it was understood that the Defendant was seeking and Order for discovery against the Plaintiffs, and it appeared to me during the hearing that the parties were prepared to agree a 90-day period for the Plaintiffs to upload their documents to the Data Room.

153. It is evident from the reasoning provided in Rix JA's judgment in *Qunar* that the CI Court of Appeal was primarily concerned with the amassing of all relevant and necessary material for discovery, regardless as to whether those documents were within the possession of the company or the dissenters. Rix JA referred to expert analyses, valuations and all other third-party assessments as examples of relevant information which could be with either the company or the dissenters.

154. While the judgment in *Qunar* fiercely rejected the concept of a standardised exemption from general discovery for a dissenter, Rix JA considered varying factors for the Court's exercise of discretion in making a discovery order against a dissenting shareholder. In doing so, Rix JA distinguished between sophisticated investors who are active members in the market and unsophisticated dissenters with minimal or no resources to privately engage industry experts. Rix JA reasoned that what a sophisticated investor is willing to pay for shares on the market is equally material to what the company is willing to sell for. That analysis underpins the CI Court of Appeal's refusal to endorse an exemption for dissenting shareholders from making discovery of relevant documents needed for a trial on fair share value.

155. In *Glendina Pty* [2022] SC (Bda) 22 Com (31 March 2022) Hargun CJ followed the reasoning of Rix JA in the CI Court of Appeal in *Qunar Cayman Islands v Athos Asia Event Driven Master Fund* at [paras 57, 60, 75 and 78]. In both cases, the contentious issues concerned the jurisdiction and discretionary powers of the Court to make a mutual discovery order. Also in both cases, it was argued that a general discovery order ought not to be made against dissenting shareholders.

156. In *Glendina Pty Limited et al v NKWE Platinum Ltd* Hargun CJ relied on *Qunar*, *JA Solar Holdings Co. Ltd* and *EHI Car Services Limited*. In *Glendina Pty* originating summonses were filed on behalf of 456 companies and individuals who were dissenting minority shareholders seeking the determination of their fair value of shares held in NKWE Platinum Limited ("NKWE") before an amalgamation with Gold Mountains (Bermuda) Investment Limited ("BidCo"). On one of the two applications before the Court, NKWE sought discovery from the dissenting shareholders. Its basis for doing so was advanced, in part, on a submission that discovery in dissenting shareholders valuation cases entails, like in all other kinds of cases, a mutual obligation to provide general discovery. The Court accepted this proposition as a matter

of legal principle but went on to reject its arbitrary application to any and all plaintiffs, especially in the case of dissenters lacking the resources of sophisticated and active investors.

157. Following the principles approved by the CI Court of Appeal in *Qunar*, Hargun CJ in *Glendina Pty* limited the discovery order so to make it apply against only 3 out of the 456 plaintiffs, distinguishing those plaintiffs caught by the discovery order by their sophistication as investors. In doing so, Hargun CJ clearly accepted that fair share value cases are not arbitrarily exempt from an obligation for mutual discovery no more than the Court can be considered bound to make a discovery order against both the dissenting shareholders and the company in every case or instance.

158. The suitability of a mutual discovery order in a section 106(6) case can only properly be decided according to the circumstances of the case at hand. Ultimately, the Court will not impose a discovery obligation on a party where the fairness of the proceedings would be wholly unimpacted by the withholding of the order. In the course of that analysis, the Court will carefully safeguard its duty not to offend the economically sensible position as it relates to the costs of the litigation. The application of these principles is necessarily fact sensitive. The proportionality of a discovery order will plainly vary according to the facts and circumstances of each case.

Post-Hearing Agreement on Plaintiffs' Discovery Obligations

159. Generally speaking, the following factors are relevant, if not determinative, to whether a discovery order ought to be made against a dissenting shareholder:

(i) Whether the dissenting shareholder is a sophisticated investor and market trader and

(ii) Whether the dissenting shareholder has or has likely engaged third party advisers to assess the company on issues relevant to a fair share valuation.

160. In the end, these questions are all designed to assist the Court in forming a conclusion as to whether the dissenting shareholder likely has or has likely had possession, custody or power of the documents relevant to the fair value assessment. Where the answer is in the affirmative, a discovery order will be made where it is also the case that the fairness of the proceedings depends on the inclusion of the material in the discovery pool and where the making of the order is proportionate and economically sensible in all circumstances of the case. This anchors the Court's focus on the need to assemble all the relevant and necessary material for the fair valuation of the company's shares, whether or not that entails a requirement for the dissenting shareholders to also make discovery.

161. In the present case, I was prepared to make a discovery order against the Plaintiffs. However, the Plaintiffs' discovery obligations were agreed between the parties post-hearing. For the avoidance of doubt, the timeframe within which the Plaintiffs are to upload their documents to the Data Room is 90 days.

Issue 7: Management Meeting

162. These refer to standard post-discovery meetings between the experts and the Company's management. Management meetings are a standard part of the pre-trial stage of fair appraisal cases in the Cayman Islands, and they are usually transcribed and used in the trial. The manner and extent to which they may be used to impugn witnesses is discussed in the *obiter* remarks of the *Jardine* judgment and in the Grand Court authorities. As put by Parker J in *Qunar* at para [39]:

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

163. For present purposes, however, the question before this Court is more simply whether a management meeting should be ordered at this stage. In this case, the parties were unable to agree on the specifics of any such meeting and neither party pushed for a direction mandating the fixture of a management meeting. The Defendant proposed that the Directions Order be made to contain a provision which gives the party liberty to hold a management meeting. That proposition was not vigourously opposed by the Plaintiffs.

164. In *Jardine Strategic Holdings Limited* at [para 100], Hargun CJ confirmed the Court's jurisdiction to order management meetings in section 106(6) cases. Following Parker J's reasoning in *EHI Car Services*, Hargun CJ found that the source of the Court's power to order such meetings is rooted in its inherent jurisdiction to make procedural orders to achieve justice. Hargun CJ also quoted from Smellie CJ's decision in *JA Solar Holdings* on the utility of management meetings in the appraisal process at [97]:

"*All are agreed that management meetings are a crucial element in the valuation process for ensuring the experts are able to determine the fair value of the Company. Key inputs into the valuation analysis will be derived from management projections and therefore it is crucial that the experts be given an opportunity fully to discuss matters with management in order that they properly understand the documents and inputs that they have to consider. Such meetings*

"enable the valuation experts to obtain information about the merger company's business for the purposes of the experts' reports to this Court" (see Nord Anglia at [38])."

Decision in relation to Management Meeting

165. At this stage of these Court proceedings, I find that it would not be practicable to mandate a management meeting, nor would it be sensible to prescribe any procedural particulars for such a meeting. However, the dissenting shareholder's right for their expert to engage in direct discussion with the Company's management ought to be reserved. I find that logic dictates the Court's refrain until after the stage at which the issues to be addressed in the meeting are carved out by the experts and their instructing parties. This is consistent with the stance taken by Hargun CJ in *Jardine* at para [105]:

"*The issue whether the Court should order the management of the Company to attend meetings with the experts is essentially a discretionary case management decision. In the Court's judgment, the final decision as to whether management meetings in the circumstances of this case would promote the Overriding Objective should be taken once the issues to be discussed at such meetings have been defined and the relevant management persons have been identified either by name or function*…"

Issue 8: Information requests by valuation experts

Whether mutual information requests should be permitted

166. A provision for the making of information requests by the experts appears under section H of the Draft Order. In this Ruling I decided in favour of mutual discovery. By extension, or so it initially seemed, both parties would be entitled to have their experts make information requests. The Defendant submitted that the mutual information requests would reflect the principle that discovery obligations are two-way, notwithstanding the fact that the Company has the vast majority of the relevant documents (citing Rix JA in *Qunar*). The Defendant's Counsel also relied on the directions orders made in *Athene* and *Myovant* under which the respective plaintiffs' experts were also obliged to answer to information requests.

167. However, Mr. Adkin KC discouraged any order compelling the Plaintiffs' expert to respond to information requests from the Defendant and pointed out that the issue as to whether a plaintiff's expert should be made to answer to the company's information requests was never argued in either *Athene* or *Myovant*. Mr. Adkin KC, drawing this Court's attention to a case in which the question was based on reasoned judicial analysis, relied on the decision of Smellie CJ in *JA Solar.* Of note, the dissenters in that case agreed to provide discovery following the Court of Appeal's decision in *Qunar.*

Findings as to whether mutual information requests should be permitted

168. From the relevant passages of Smellie CJ's decision *JA Solar*, it is readily apparent that it would be wrong to impose an obligation on the Plaintiffs to receive and respond to information requests by the Company when it is the Company which possesses the full body of documents and material which underpins its position that the merger price is the fair value of the dissenting shareholders' shares. That is hardly tantamount to equal footing in the sense of its term under the Overriding Objective.

169. The premise of mutual discovery (as opposed to the notion of mutual information requests by the experts) is simply this: sophisticated shareholders, particularly resourceful and regular market traders who have likely retained third party advisers to assess fair share-relevant issues, should be made to produce the information and analysis upon which they rely to establish the unfairness of the merger price. That does not bring the dissenting shareholders' view of the fair share value into issue. The production of information in the dissenting shareholders' possession is required only to assist in determining the actual fair share value, not the dissenters' view or opinions on the fair share value. The Plaintiffs' information for discovery is and can only be responsive to the Company's overarching stance that the merger price represents fair share value. That stance taken by the Company was drawn from documents and information internal to the Company. That is what the Court is primarily concerned with. So, the relevance of any information request must equally narrow its focus to the fairness and accuracy of that public declaration made by the Company.

170. These points were informed by Smellie CJ's reasoning in *JA Solar* at paras [70]-[76]:

"Should Dissenters be required to respond to Valuation Expert requests?

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

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

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

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

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

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

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

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

Whether information requests should be limited to "one per 28 days"

171. Moving on from the question of mutual information requests, both parties agreed that the Plaintiffs' valuation expert ought to be entitled to make written requests of the Company for the provision of relevant documents and information. However, the Defendant's position is that such information requests ought to be limited to one per 28 days. Mr. Dages, at footnote [102], contended that an expert's ability to make multiple "rolling" requests of the Company would result in a costly and inefficient process for both parties.

172. At the hearing before me Mr. Adkin KC argued against the one per 28-day intervals. He submitted that such a provision would be impracticable for two main reasons: (i) because it would bar the Plaintiffs' expert from the usual practice of making a list of requests in one go and (ii) because it would further protract the progress of the expert's enquiries by imposing a

28-day period before which further queries could be made. Mr. Adkin KC pointed to the Cayman authorities to illustrate the Grand Court's consistent rejection of similar stringent proposals advanced by the company in those cases.

173. Mr. Adkin KC returned to Smellie CJ's decision in JA Solar where the company was proposing periods of at least 49 days during which the experts would be barred from making requests. Explaining the company's proposals and remarking on this, Smellie CJ said at paras [79]-[80]:

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

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

174. Smellie CJ then listed ten previous cases from the Grand Court jurisdiction in which deadlines were imposed on each of the respective companies for a response to be made in answer to information request within either a 7-day, 14-day or 21-day period. Six of those ten cases imposed a 14-day deadline for a response from the company involved.

175. Mr. Boulton KC, however, criticised Mr. Adkin KC's characterisation of the single request provision as mischievous. Mr. Boulton KC explained that the custom is for 'single' information requests to be comprised of multiple sub-questions which are often prepared with the assistance of the expert's professional team. Mr. Boulton KC shared that information requests are ordinarily made over a small number of huge sprawling complex requests, the first request usually be the most elaborate of them all. Mr. Boulton KC argued that such requests could contain an oppressive number of sub-questions running up the hundreds. Providing support for

this proposition, Mr. Boulton KC referred to a passage from Kawaley J's Grand Court decision in *Nord Anglia* where he, Mr. Boulton KC, also appeared as Counsel of record for the company. In that case, Mr. Boulton KC relied on *In re E-House China (Holdings) Ltd. (2)* as an example of information requests which reached oppressive heights. As is stated in the *Nord Anglia* ruling, in the case of *In re E-House China* the dissenters' expert submitted 176 questions, many of which included sub-questions, over a 99-day period. In that case, it is said that Mangatal J refused to direct the company to answer to any further questions from the dissenters' experts. Speaking to the risk of excessive information requests, Kawaley J said at para [28]:

"*28 In my judgment there is an obvious risk in a case on the present scale, with three separately represented teams of dissenters, that the number of information requests might reach oppressive levels. On the other hand, the efficiency of the trial preparation process would potentially be impeded if the court were to impose arbitrary constraints on the number of questions which could be submitted at any particular time or within a particular period of time. I accept the submissions of Mr. Adkin, Q.C. in this regard. As the company has suggested an interval of 14 days between requests that should probably be the target period within which the company would aim to provide answers to each batch of questions, as the dissenters' draft order proposed. That should correspondingly be the minimum period the experts should wait before forwarding another information request. What is actually reasonable in relation to any specific information requests will depend on the number and nature of the questions (including sub-questions). The company having suggested an upper limit of 50 questions (its initial position was 30), a series of requests containing substantially more questions would, without imposing any specific limit, likely attract heightened scrutiny if a complaint of oppression were made to the court. While most of one batch of questions is still outstanding, it is difficult to see why it would be reasonable to forward a further fulsome information request*."

176. The risk of a mountainous accumulation of information requests, Mr. Boulton KC argued, would be mitigated by a direction enabling the Company's expert team to prepare its response and focus on one batch of questions at a time, without the disturbance of other intervening deadlines activated by successive information requests. As Mr. Boulton KC put it during the hearing: "*Is it fair to give the Company, which…has a business to run, … a period to answer that before deluging the company with the next one?*"

177. Mr. Boulton KC turned to the first instance decision by Parker J in *Qunar* to illustrate the voluminous nature of other "single" expert information requests. At footnote [53] under para [191] of *Qunar* Parker J referred to a pre-management meeting letter by the plaintiffs to the company in that case. This information request comprised 93 requests for information with a 7-page appendix. Mr. Boulton KC pointed out that if the Company receives a similarly voluminous information request, it will be necessary for the Company to manage any such single multi-faceted request made. For example, the family of questions will likely need to be

parcelled and redirected by the Company to its appropriate officers e.g. the financial comptroller, the public relations department etc.

Post-Hearing agreement restricting information requests to "one per 28 days"

178. In considering the arguments made before me at the hearing, I saw no reason why the position in Bermuda ought to deviate from that which is so widely recognised by the Grand Court. For that reason, I was prepared to sanction a 14-day period within which a reply by the Company was to be provided by the Company, subject to a provision allowing for a 21-day period for a response to the first request. Thereafter, a 14-day period would have been mandated for the Company's response-period to the subsequent information requests. In each case, the timeline for the subsequent request would not have commenced until either the mandated period for the first or preceding request(s) had expired. That analysis was guided by the usual timeframes set by the Rules of the Supreme Court for the filing of pleadings and other Court documents. That is the usual rate of incremental progress expected in civil and commercial litigation, barring factual circumstances which warrant more customised directions.

179. However, in this case, the parties reached a post-hearing agreement which allowed for the Defendant to respond to information requests within 28 days. So, the value of the above analysis on this issue is now no more than *obiter dictum*.

180. Both parties agreed to a provision which entitles information requests to be made in respect of information which came into existence before and after the Valuation Date. However, the Defendant proposes that where the request relates to information which came into existence after the Valuation Date it be limited to information that was known or knowable on or before the Valuation Date. In Mr. Dages' evidence at footnote [102] he deposed that such a restriction, judging from his experience, is "*typical*" and is "*consistent with the standard of fair value as applied in appraisal cases litigated in the Delaware*". In Mr. Dages' words:

"*Such a restriction is typical in my experience and Chancery Court. See, e.g., Exhibit KD-30 - Matthews, Gilbert E., "Statutory Fair Value in Dissenting Shareholder Cases: Part I, Business Valuation Review Volume 36: Number 1 (2017), pp. 20 & 21. Moreover, this limitation is necessary in order to ensure that the expert does not rely on information or events occurring after the Valuation Date that were outside the control of the management team in place prior to the Merger as such factors do not pertain to the subject company's fair value as of the appraisal date*."

181. The Plaintiffs object to any such limitation, however. In my judgment, it will be a matter for the experts to opine on what is relevant to their assessment on fair value. This is not an issue for the Court's micro-management. Accordingly, I decline to impose this restriction which was

not robustly defended by Mr. Boulton KC, in any event. Equally, I decline to place any prohibition on the Defendant's ability to supplement its responses with additional documents or information, so long as the stage for making and responding to the information requests comes to an end prior to the exchange of expert reports. *JA Solar* also supports a standard direction that information requests should close within a fixed period prior to the exchange of expert reports. Citing Kawaley J's decision in *Nord Anglia*, Smellie CJ agreed that the purpose of information requests is to furnish the information needed to compile the expert report.

Issue 9: Third Party Discovery Applications

182. As acknowledged by the Defendant, it is not uncommon for dissenters to bring third party applications, particularly before the Southern District Court of New York pursuant to 28 U.S.C. § 1782 (a "1782 Application"). However, the Company proposed that any application for third party discovery be made within 28 days from the Order.

183. Prior to reaching an agreed position, the Plaintiffs objected to this proposal on the basis that the deadline would operate as a *de facto* anti-suit injunction upon the expiry of the 28-day period which would occur prior to the Plaintiffs' receipt of any discovery from the Company. Citing Martin J in *Alpine Partners (BVI) L.P. v Sumitomo Pharma UK Holdings Ltd* [2024] SC (Bda) at para [64], the Plaintiffs relied on the following quote from the Court's ruling:

> "*As a matter of Bermuda law (following English law principles) it is open to any litigant to take whatever steps appear to be best suited to gather the evidence that is required to present the case at trial. This includes steps taken outside the jurisdiction of this Court. In exercising the anti-suit injunction jurisdiction, the Court needs to be satisfied that there is a solid legal basis upon which to invoke the Court's power to restrict a litigant's rights to take proceedings in a foreign court*."

Post-hearing Agreement between the Parties on Third Party Applications

184. The parties reached the following agreement post-hearing:

> "*Application (if any) for third party discovery shall be made no later than 28 days from the completion of factual witness evidence ... Any deposition evidence obtained other than pursuant to Order 38, Rule 9, and/or Order 39 of the Bermuda Rules of the Supreme Court will not be considered as deposition evidence obtained pursuant to those rules for the purposes of these proceedings.*
>
> *The Parties will promptly disclose to the other parties any and all documents received from a third party or non-party as a result of any applications for third party discovery*…"

Issue 10: Supplemental Factual Witness Statements

185. The Company seeks a direction granting it liberty to apply to file additional factual evidence following the exchange of the expert reports. The Plaintiffs object to the granting of any such direction from this Court on the basis that such a course "would rarely be appropriate" as factual evidence should normally be completed prior to the completion and exchange of the expert reports.

186. The Plaintiffs relied on the Grand Court's decision in *51job, Inc* FSD 155 of 2022 at para [29] where Doyle J rejected a similar proposition as follows:

> *"29. Mr Imrie submitted that supplemental affidavits were appropriate because experience in recent cases suggests that it would be helpful to allow for the possibility that one or both experts misapprehended a key factual issue in their first reports, which can and should be clarified in a short supplemental factual affidavit and taken into account in the experts' supplemental reports…*
>
> *30. Mr Adkin submitted that the Company's proposed direction departs from the standard approach in section 238 cases and makes little sense as all the factual evidence should be finalised before the experts express a concluded view on fair value. Mr Adkin referred to Parker J's judgment in Re eHi Car Services Limited (FSD 115 of 2019 (RPJ) unreported judgment, 24 February 2020) at paragraph 58, Mangatal J's judgment in Re Homeinns Hotel Group (FSD 75 of 2016 (IMJ), unreported judgment, 7 February 2017) at paragraphs 23 and 24, and the comments of Smellie CJ (as he then was) in Re JA Solar Holdings Co., Ltd. (FSD 153 of 2018 (ASCJ), unreported judgment, 18 July 2019) at paragraph 78 (c).*
>
> *31. In my judgment it is not appropriate to permit supplemental factual evidence. It would be a departure from the spirit of the standard approach to section 238 cases and I am not persuaded that such proposed departure has been justified.*
>
> *32. …On this disputed issue…the Court has previously made it plain that the factual evidence should be finalised before the experts finalise their reports. I do not think that what the Company proposes would be in accordance with the overriding objective or the approach rightly adopted in previous cases. It would in effect be a second bite at the evidential cherry and despite the restrictions placed in the Company's proposed paragraph 45 it would be open to abuse. If there are clear and obvious factual errors in the reports of experts these can be raised by way of correspondence and the experts can, if appropriate, deal with same. I do not think it is necessary or appropriate to include the Company's proposed paragraph 45 in the directions order."*

187. The Defendant, however, argued that the Plaintiffs would rarely file factual evidence in post-merger appraisal cases. This means that until the Plaintiffs file their expert report, the Company will often be at a loss as to the case it will be required to meet at trial. Mr. Boulton KC relied on the approach taken by Ramsay-Hale CJ in *58job, Inc* FSD 155 of 2022. At paras [91]-[92] of the Defendant's written submissions, it was said:

91. As to the second issue, appraisal cases are highly unusual. There are no pleadings. The Plaintiffs do not normally file and serve their own factual evidence. The Company often has no idea as to the case it will face until it receives the Plaintiffs' Expert report.

*92. In 58.com Inc., the Dissenters' expert made serious allegations of wrongdoing against the company's senior executives. There had been no warning of what would be alleged. The Chief Justice gave permission for the company to serve reply factual evidence to deal with what were serious factual allegations. The Company therefore suggests the parties should have liberty to apply to serve additional factual evidence if required***.**

188. Be that as it may, Mr. Boulton KC, in his written submissions also accepted that it would be of no surprise to the Defendant to learn that the Plaintiffs' case is premised as follows:

"…
(a) The market for the Company's shares was not semi-strong efficient and therefore cannot be relied upon;

(b) There was material non-public information (MNPI) such that the market price must anyway be rejected;

(c) The merger process was significantly flawed and beset by conflicts of interest such that the merger price cannot be relied upon. (What the Company does not know is precisely what factual allegations of conflict of wrongdoing will be alleged);

(d) The only approach that can be used in this case is the DCF; and

(e) The Plaintiffs' Expert will conclude that the Fair Value of the Company's shares is somewhere between double and triple the merger price)"

<u>Decision on Supplemental Factual Witness Statements</u>

189. In share appraisal cases, the factual evidence will likely be primarily, if not exclusively introduced by the Company, not the dissenting shareholders. However, if factual evidence is to be led by the Plaintiffs, it ought to come from a witness of fact, not an

expert witness. It is, after all, a matter of trite law that expert witnesses are not witnesses of fact. Their opinions are based on the factual information provided by the witnesses of fact or on agreed facts. It is on this basis that the exchange of expert reports ordinarily follows the exchange of factual witness statements.

190. Indeed, it would be irregular procedural practice to provide for the exchange of supplemental factual evidence in anticipation that the Plaintiffs' expert witness might assert new factual evidence. The proper course in such a scenario, would more likely be for the Defendant to object to the admissibility of new factual evidence out of the mouth of an expert witness.

191. For these reasons, I decline to include any provision in the Directions Order of this Court for the possible exchange of supplemental factual witness statements following the exchange of expert reports. That said, the fact that I do not see fit to include such a direction at this stage of the proceedings does not, in any event, bar the Defendant from later bringing an application for leave to file further evidence.

Issue 11: Whether to limit the scope of Supplemental Expert Reports

192. A direction allowing for the exchange of supplemental valuation reports confined to the points of difference between the valuation experts is sought by the Company. The Plaintiffs argue against this on the basis that it would not be uncommon for further disclosure or other relevant information to be provided or obtained after the initial exchange of reports. It is Mr. Adkin KC's contention that the experts should be at liberty to address any such new information in the form of supplemental expert reports.

Decision on whether to limit the scope of Supplemental Expert Reports

193. Earlier in this Ruling I agreed that the exchange of all factual evidence should be made prior to the exchange of the expert reports. However, I also provided for all third-party discovery applications to be commenced within a 28-day period after the close of the mutual discovery stage. That does not mean that any discovery ordered pursuant to a third-party discovery application will be received and served prior to the closing of the factual witness statements and the exchange of expert reports. For those reasons, it is only fair that the Directions Order of this Court allows for the subsequent receipt of third-party discovery.

194. For that reason, I deem it appropriate to restrict the scope of any supplemental expert reports to (i) the points of difference between the valuation experts and (ii) to address any opinions arising out of the receipt of new information received by way of third-party discovery.

Issue 12: Whether Liberty to Apply should be given for Enhanced Confidentiality of Specific Documents

195. The Company seeks liberty to apply for further directions for enhanced confidentiality measures in relation to documents individually or within a specific narrow category of documents. However, Mr. Boulton KC conceded that such a direction is purely cautionary and unlikely to be necessary.

Post-Hearing Agreement on Liberty to Apply for Enhanced Confidentiality

196. Post-hearing, it was agreed that both parties agreed will have liberty to apply for further directions for enhanced confidentiality measures in relation to documents individually identified, or within a specific narrow category of documents by either party.

Costs

197. Either party may be heard on the issue of costs upon filing a Form 31TC within 28 days of the date of this Ruling.

Dated this 2nd day of January 2026

HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT