In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: Nos. 107-109, 111-121; 123-125

IN THE MATTER OF JARDINE STRATEGIC HOLDINGS LIMITED

AND IN THE MATTER OF THE AMALGAMATION AGREEMENT BETWEEN JMH INVESTMENTS LIMITED AND JMH BERMUDA LIMITED AND JARDINE STRATEGIC HOLDINGS LIMITED

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

RULING
(In Chambers)

Hearing Date: **21 and 22 October 2024**
Ruling and order Date: **5 November 2024**

Appearances:
Edward Davies KC with *Jennifer Haworth* of MJM Limited for Jardine Pacific Holdings Limited, Jardine Motors Group Holdings Limited, Jardine Matheson Limited, and Jardine Matheson Holdings Limited
Rod Attride-Stirling of ASW Law Limited for DFI Retail Group (formerly Dairy Farm International Holdings Limited), Hong Kong Land Holdings Limited, and Mandarin Oriental International Limited
(together referred to as "the Subpoena Parties" or the "Principal Subsidiaries" as the context requires)
Mathew Watson of Carey Olsen Bermuda Limited for the Plaintiffs in proceedings 2021 Nos 107 and 108
Delroy Duncan KC and *Ryan Hawthorne* of Trott and Duncan Limited for the Plaintiff in proceedings 2021 No 109
Mark Chudleigh, Laura Williamson, Eric Penz and *David Thom* of Kennedys Chudleigh Limited for the Plaintiffs in proceedings 2021 Nos 111-221 and 123-125
Jonathan Adkin KC for all the Plaintiffs in the above proceedings (together referred to as "the Dissenting Shareholders" or "Dissenters")

RULING AND ORDER of Martin, J

Summary of the background to the applications

1. This is the Court's ruling on the applications made by the Subpoena Parties to set aside the *sub poenas duces tecum* (hereafter "the Subpoenas"[1]) that have been served upon them by the Dissenting Shareholders. The Subpoenas require the Subpoena Parties to produce documents in connection with the ongoing appraisal proceedings that have been brought by the Dissenting Shareholders to value their shares in Jardine Strategic Holdings Limited ("Jardine Strategic") which were compulsorily acquired from them pursuant to an amalgamation transaction under section 104 of the Companies Act 1981.

2. The shares that were acquired by the amalgamation amounted to approximately 15% of all shares held in Jardine Strategic a price of US$33.00 per share[2]. The Dissenting Shareholders were shareholders at the record date for the amalgamation, who either did not vote in favour of, or voted against, the transaction. Being dissatisfied with the acquisition price, the Dissenting Shareholders exercised their rights to seek an appraisal of the fair value of their shares under section 106 (6) of the Companies Act 1981 (the "Appraisal Proceedings"). The effective date of the amalgamation was 12 April 2021 which is the relevant date for the purposes of the valuation of the shares in the Appraisal Proceedings (the "Valuation Date").

3. The Subpoena Parties are not themselves parties to the Appraisal Proceedings. They are strangers to that litigation in the strict legal sense, but they are associated with the transaction parties to the amalgamation because they are subsidiary companies of Jardine Strategic or are owned by companies in which Jardine Strategic has a significant ownership interest, although they also have independent third-party shareholders and independent boards. These subsidiary companies have therefore been referred to as the "Principal Subsidiaries" in these proceedings. Their connection to the Appraisal Proceedings is that these subsidiaries (and the underlying operating companies that each

[1] The induvial Subpoenas are set out in the Court Bundle at A1 to A7. Note that the references to documents in the Court Bundle in this Ruling are by letter, number of document and then page (eg A1/1/1 is page 1 of the first document in Bundle A1 etc).
[2] At the Effective Date this resulted in an acquisition price of US$5.5 Billion.

of them owns) are responsible for generating a substantial proportion of the Jardine Group's annual revenues[3], and they therefore contribute substantially to the value of the shares of Jardine Strategic that were acquired, and which are the subject of the Appraisal Proceedings[4].

4. That is the relevance and connection of the Subpoena Parties to the Appraisal Proceedings. But for the purposes of these applications, I have given no weight to their connection to the Jardine Group in determining whether the documents need to be produced. I have approached the questions I have been asked to decide as if the Subpoena Parties were entirely unrelated third parties who possess documents which are sought by the Dissenters, who claim that the documents they seek relate to the issues to be determined in the Appraisal Proceedings and ought to be produced.

5. In connection with the preparation of expert valuation evidence intended to be given in the Appraisal Proceedings, three information requests were made to Jardine Strategic (or their legal representatives) by Mr Mark Bezant, who is the expert valuer appointed by the Dissenting Shareholders to prepare an expert valuation report as to the fair value of the shares that were acquired by the amalgamation. Voluntary compliance with these requests (which will be described in more detail below) was refused by Jardine Strategic on the grounds that the documents requested do not fall within their possession, control or power ("PCP"), but belong to the Principal Subsidiaries.

6. The Dissenting Shareholders therefore issued the Subpoenas against the Principal Subsidiaries (i.e. the Subpoena Parties) in each of the related actions in which they had invoked their respective appraisal rights.

7. The Subpoena Parties have applied to this Court to set aside the Subpoenas on grounds that will be fully examined later in this Ruling.

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[3] As at 31 December 2020 the consolidated revenues of the whole Group were US$32 Billion.

[4] The Dissenting Shareholders refer to these companies as the "Principal Subsidiaries" as a shorthand reference. For consistency and ease of reference I shall refer to them by the same expression. I note that these companies are also the parent companies that hold many other subsidiaries of their own. In the Appraisal Proceedings the Hargun CJ explained the complex structure of the relationships of the whole group of companies associated with the Jardine Matheson conglomerate, adopting the analogy put forward by Group General Counsel of the Jardine Group (Mr. Parr) as "*a pyramid within a pyramid of holding companies*" (see Directions Judgment D1/1/10 at paragraph 34).

Disposition

8. For the reasons that are explained in this Ruling, the Court has decided to refuse the applications to set aside the Subpoenas, subject to the exception of some documents covered by the Subpoenas which are described in paragraphs 11 and 84 below. The Subpoenas will therefore need to be modified to remove references to the documents that have been disallowed, but the remaining items will stand.

The Subpoenas

9. The documents that required to be produced in the Subpoenas are set out below[5]:

Historical Information:

Category 1: Monthly management accounts (final) for each month in 2021.

Category 2: Quarterly management report/board papers for Q1 2021.

Category 3: Quarterly management report/board papers for Q2 to Q4.

Category 4: Audited annual consolidated financial statements for 2016 to 2020.

Forward-looking financial information:

Category 5: Budgets (final) for 2017 to 2021.

Category 6: The Excel version of the 2021 Budget for Jardines Financial Reporting System ("JFRS") (as referenced in Kelly Kong's email dated 4 September 2020)

[5] Each of the Subpoenas contains different lists of the same categories, with different numbering of the same material in each one depending on which Subpoena Party it related to. To avoid confusion over which category is referred to in relation to each different party, the descriptions of the categories were set out by the Dissenting Shareholders in their submissions has been adopted for consistency. No issue was taken by the Subpoena Parties that those descriptions did not accurately reflect the scope of the documents sought in each of the Subpoenas against each of the respective companies.

Category 7: The Excel version of the 2021 Budget JFRS (as referenced in Kelly Kong's email dated 4 September 2020) as completed by the relevant company.

Category 8: The documents constituting the "financial information of the draft 2021 budget" and the "strategic materials addressing the key discussion questions under the core themes as set out in the July memo" (as referenced in Jardine Matheson Holdings Limited 2021 Strategy and Budget Review-Financial Information Requirements) as sent by the relevant company.

Category 9: Financial projections prepared in 2017 to 2021.

Category 10: 7-to-15-year projections for its cash generating units as referenced in the 2020 audited financial statements of Jardine Strategic.

Category 11: Liquidity Template which the Dissenters understand was prepared as an input to the draft 2021 budget of JMHL and was completed by the relevant subsidiary.

Category 12: The July 2020 Memo on the 2021 Strategic & Budget Review (as referenced in Jardine Matheson Holdings Limited 2021 Strategy & Budget Review-Financial Information Requirements) which the Dissenters understand contains discussion questions to be addressed by the Principal Subsidiaries for the purposes of preparing the 2021 budget of JMHL.

Category 13: Valuation reports for properties prepared by Jones Lang La Salle as referenced in the annual report of Hong Kong Land and Mandarin Oriental.

10. The documents sought in each category set out above were sought from each of the Subpoena Parties is as follows:

Listed Principal Subsidiary:

Jardine Matheson Limited ("JML"):

Categories 5, 6, 9, and 12.

Jardine Matheson Group Holdings Limited ("JMHL"):

Categories 5, 6, 9 and 12[6].

Jardine Cycle and Carriage Limited ("JC&C"):

Categories 1, 3, 5, 7, 8, 9, and 11.

PT Astra International TbK ("Astra"):

Categories 1, 3, 5, 7, 8, 9, and 11.

DFI Retail Group Limited ("Dairy Farm"):

Categories 1, 3, 5, 7, 8, and 11.

Hong Kong Land Holdings Limited ("Hong Kong Land"):

Categories 1, 2, 3, 5, 7, 8, 9, 11 and 13.

Mandarin Oriental International Limited ("Mandarin Oriental"):

Categories 1, 3, 5, 7, 8, 9, 11 and 13.

Unlisted Principal Subsidiary:

Jardine Motors Group Holdings Limited ("Jardine Motors"):

Categories 1, 3, 4, 5, 7, 8, 9, and 11.

Jardine Pacific Holdings Limited ("Jardine Pacific"):

Categories 1, 2, 3, 4, 5, 7, 8, 9, and 11.

[6] The Subpoena served upon JMHL also contained requests in respect of Zhongzheng Group Holdings Limited ("Zhongzheng") which is a listed multinational automotive retail and services company. It is not a Bermuda registered company, so no *subpoena* was served on it separately.

Adjustments to the Subpoenas

11. At the hearing, the Dissenters agreed that they no longer sought documents from JMHL in respect of Zhongzheng and Astra (in categories 1, 3, 5, 7, 8, 9 and 11) because these documents were not in the PCP of JMHL. In addition, it was accepted that the document referred to in Category 7 does not exist, so this document was no longer sought. JMHL's 2019-2021 final budgets had been produced before the hearing and were not pursued further. (I note here that I have also decided to exclude the documents described in Category 8 for the reasons explained in paragraphs 82-84 below.) Therefore, the relevant Subpoenas will need to be modified to reflect these adjustments.

The Objections

12. The grounds of objection relied upon by the Subpoena Parties can be divided into four categories[7].

13. First, it was said that the whole of each of the Subpoenas issued should be set aside because none of them met fundamental "gateway" requirement that the documents sought must be **necessary**[8] to be produced for the fair disposal of the issues in dispute in the Appraisal Proceedings. The short point was that Mr. Bezant had said in his letter of 23 February 2024 that even without the materials he had requested he could still produce a valuation of the fair value of the shares[9]. This point was supplemented by expert testimony from one expert instructed by Mr. Davies KC's clients (Mr. Nicholas Good) and another expert instructed by Mr. Attride-Stirling's clients (Mr. Timothy McAnally) who questioned the value of the information sought by Mr. Bezant for the appraisal of the fair value of the shares, and sought to support the general point that the information Mr. Bezant is asking for is not necessary for him (or them) to produce a

[7] I have summarized the main themes of the arguments which spanned 150 paragraphs from Mr. Davies KC and 52 paragraphs from Mr. Attride-Stirling. In summarizing these points, I do not intend any discourtesy in not addressing each submission in turn, but it is unnecessary to set all the submissions out. This should not be taken as meaning that I have not considered all of the arguments, and the authorities cited in support of the submissions, carefully and completely.
[8] My emphasis in bold.
[9] C/4/23 at para 80: *"If no further information is made available and the valuation experts and the Court are limited to the information [provided] it will be possible to perform an assessment of the value of the Company's interest in each of the seven Principal Subsidiaries, and subsequently the fair value of the Dissenters' shares in [Jardine Strategic]. However, the information that is being sought will allow the valuation experts and the Court to undertake a significantly more informed valuation in a number of important respects."*

valuation of the fair value of the shares. The competing evidence on this aspect of the applications is considered more fully at paragraphs 24 to 36 below.

14. Mr. Attride-Stirling was prepared to say that the documents had to be necessary or at least that they must play a "direct and important" part in the determination of the issues that are to be decided[10]. He submitted that plainly they were not documents that would play an important part if Mr. Bezant could still produce his valuation report without them.

15. Second, it was said that even if the Court found that the information sought overcame the first hurdle of "necessity" or "important part", the Court should nonetheless refuse to allow the Dissenters from obtaining it on grounds that (i) it was confidential and/or commercially sensitive and (ii) there was a serious risk that it might be abused by the Dissenters, some of whom are "event-driven" hedge fund investors who might use the information disclosed for collateral purposes, and so it would be oppressive to order disclosure of the materials which were not necessary for the determination of the main issues in the case. The point that Mr. Bezant can produce his report without the information was repeated, and it was said that the confidentiality of the documents therefore outweighed the need for their production.

16. Third, it was said that some of the requests were defective on the ground that the request did not satisfy the test of stating the documents that are to be produced with sufficient specificity so as to identify the particular documents required. This objection was aimed at the description of the documents and information sought in Category 8.

17. Fourth, it was said that the issue of the Subpoenas was an attempt to go behind the directions given by Hargun CJ as to the disclosure requirements for the Appraisal Proceedings (the "Directions Order")[11]. It was said therefore that the issue of the Subpoenas was abusive.

[10] Adopting the language used by Lord Denning MR in **Senior v Holdsworth** [1976] 1 QB 23 at 34H ("…*have a direct and important place in the determination of the issues before the court."*)
[11] 12 November 2021 at D/2/1 to 37

The Dissenters' responses

18. In response[12] Mr. Adkin KC said that the test advocated by the Subpoena Parties was far too narrow on the authorities and that the proper approach was to take a commonsense view of what was required for the fair disposal of the issues in the case, viewed against the background circumstances of the particular case. He said that in a case where the central issue of the dispute is to determine what is the fair value of the shares, the documents and information sought in the Subpoenas was required to fairly dispose of the issues in this matter. The case law will be examined in more detail below.

19. Mr. Adkin KC said that confidentiality was not a bar to disclosure, but if the Court had any concerns about protecting the confidentiality of the information, the Dissenters would be prepared to abide by any regime that Court saw fit to impose to protect that confidentiality.

20. In relation to the Category 8 documents that were sought, Mr. Adkin KC said that the category was well enough described to identify the documents in question, and the respective Subpoena Parties knew very well what they had supplied in response to the direction that they received, and that it was very likely that they could easily lay their hands on the documents without difficulty.

21. Finally, in relation to the alleged attempt to do an "end run" around the Directions Order made by Hargun CJ, Mr. Adkin KC submitted that the Directions Order properly understood did not place any embargo on the Dissenters seeking documents from third parties, or the Principal Subsidiaries (ie the Subpoena Parties). Mr. Bezant had asked Jardine Strategic to provide them in their disclosure in the Appraisal Proceedings but had been told that these documents did not fall within the possession, custody or power of Jardine Strategic and so the documents did not fall within Jardine Strategic's disclosure obligations under the Directions Order. Therefore, the Dissenters could not get these documents from any other source except the Principal Subsidiaries themselves (i.e. the Subpoena Parties), and therefore the Dissenters had no choice but to issue the Subpoenas against them.

[12] Again, I summarize the main themes of Mr. Adkin KC's submissions which ran to 165 paragraphs, without setting them all out.

The Experts

22. It is relevant to explain briefly the position taken by the respective experts on the document requests. I will summarize the points made by Mr. Bezant in relation to his requests, and then set out the responses given by the Subpoenas Parties as to why Mr. Bezant's requests were not well founded or necessary in order to produce a valuation report on the fair value of the shares.

23. Under the Directions Judgment Hargun CJ directed that the experts were entitled to make information requests *"...to ensure that the experts will have all the relevant documents and information they require to express an opinion as to the fair value of the Dissenters' shares in the Company."*[13] In the course of analyzing the disclosure materials that had been uploaded to the electronic 'Data Room' database (which is the primary source of disclosure information provided by Jardine Strategic in the Appraisal Proceedings) Mr. Bezant identified some "gaps" in the information that he considered to be important for his analysis.

24. Mr. Bezant accordingly sent three requests for documents in accordance with Hargun CJ's Directions Order. A number of those requests were refused because the documents did not fall within the PCP of Jardine Strategic or were privileged from production[14]. The majority of the remainder of those requests are in substance the documents that form the classes of documents set out in the Subpoenas so I shall not repeat them here. Mr Bezant sent a short letter dated 15 September 2023 saying that he had reviewed the classes of documents annexed to the Subpoenas and confirming that they were *"relevant and that reviewing them will be necessary to assist me in producing a valuation of the Plaintiffs' shares in Jardine Strategic that is as informed as possible."*[15]

25. Mr. Good sent a letter in response to this saying that while he "*could not comment definitively at this stage on whether each item in each subpoena is in fact relevant and necessary to assist Mr. Bezant in producing a valuation of the Plaintiffs' shares"*[16] but he set out his initial comments based on the information then available to him. First, he

[13] D/1/32 at paragraph 94.
[14] See C/4/12 at para 45.
[15] See C/1/1.
[16] See para 1.7 on page C/2/3

noted that the provision of information to allow for a valuation to be as informed as possible may have little impact on the resulting valuation. He said his review suggested that a significant amount of information available in the disclosure that Jardine Strategic has provided including information requested in the Subpoenas and concluded that the information requested "*may not be necessary if it has already been disclosed."* Mr. Good added the caveat that he would need to understand what information is currently available to Mr. Bezant and to understand from Mr. Bezant why that is not sufficient for his purposes.

26. Mr. McAnally swore an affidavit dated 21 December 2023[17] also responding to the need for the information set out in Mr. Bezant's requests. He said he had "concerns" as to whether it is necessary for the documents requested in the Subpoenas to be disclosed. He added the caveat that he would need to know why specifically Mr. Bezant was requesting the documents and what documents he had already received[18]. He then went through the categories of document, and said that on the basis of the material that he had seen, he was of the view that the material requested by Mr. Bezant was overly broad and unnecessary in order to determine the fair value of the Dissenters' shares in Jardine Strategic at the Valuation Date.

27. Mr. McAnally said that in his view the most relevant material would be the financial information in the documents most proximate to the Valuation Date. He referred to the fact that the report prepared by Evercore Partners International LLP ("Evercore") who was instructed by the Transaction Committee of Jardine Strategic to prepare a fairness opinion and said that the documents provided to Evercore were exactly the types of documents that are necessary to determine the fair value of the shares compulsorily acquired in the amalgamation. He then went on to interpret the decisions of the Court in the Directions Order and the PCP Judgment of the Court of Appeal in the Appraisal Proceedings. He concluded that the board packs provided to the directors contain a "plethora" of information which (taken with the Evercore materials) should be sufficient for an expert to appraise the fair value of the Subpoena Parties shares in Jardine Strategic as at the valuation date. As these documents had been provided to Mr. Bezant in the Data Room, he questioned whether the additional documents were

[17] See C/3/1
[18] See para 11 at C/3/4

necessary, saying that he would only be able to form a definitive view once he had been informed of (1) why, specifically, Mr. Bezant was requesting the documents and (2) what documents Mr. Bezant has already received[19].

28. Mr. Bezant naturally responded to the requests giving an explanation why he needed the documents requested. He did so in great detail in his letter dated 23 February 2024[20]. It is a long and detailed letter and I will not set out all the reasons he gave, but I shall summarize what I consider to be the most important points.

29. First, Mr. Bezant explains why he needs to see the historic information (ie Categories 1-4). This information was objected to on the ground that it was stale or of marginal relevance to the task Mr. Bezant is undertaking, which is to value the shares at the Valuation Date (12 April 2021). Mr. Bezant explained however that this information is relevant to the tasks that he will need to undertake in assessing how the business has actually performed historically[21] and to fill in the gaps of historic information that are not available in the public domain or in the Data Room for the unlisted subsidiaries Jardine Motors and Jardine Pacific[22]. In addition, an analysis of historic patterns of optimistic or pessimistic management bias in forecasts may inform the predictions that were made for the purposes of the evaluation of the forecasts that were made (i) before the COVID pandemic (ii) during the period and social unrest in Hong Kong and (iii) during the COVID pandemic[23].

30. As to the historic information he said first that the information that he had been provided with or that is available in the public domain ends at 31 December 2020, i.e. the end of the quarter preceding the Valuation Date. As this was in the middle of the pandemic, the market was particularly volatile, so information about actual performance in the three and a half months immediately preceding the Valuation Date would result in a *"significantly more informed valuation analysis and conclusion."* In addition, there was no information in the public domain or in the Data Room for any period for the unlisted subsidiaries[24].

[19] C/3/8
[20] C/4/1
[21] Para 15 (1) at C/4/4
[22] Para 95 at C/4/29
[23] Para 101 at C/4/31
[24] Paras 54-55 at C/4/15

31. Second, Mr. Bezant explained why he needed the "forward-looking" financial information (Categories 5-10 and 12). These reasons included the fact that the information that he had received was limited to management's views on the financial prospects are in the 3-year budgets, with some aggregated information from the JFRS accounting system. He said this information was over too short a period and had limited breakdowns without any explanatory comments. He said that longer term projections would provide the experts (and the Court) with important information about longer term expectations within the principal Subsidiaries and the Jardine Group at the Valuation Date which would allow for a significantly more informed valuation analysis[25].

32. Third, Mr. Bezant explained that he needed the documents in Category 13 from Hong Kong Land and Mandarin Oriental because each of those companies operate businesses that own or operate a portfolio of significant real estate assets. A review of the property valuation reports would enable the experts to understand the third-party estimates of the properties' values and consider the scope for redevelopment of real estate assets and their effect on growth and profitability[26].

33. At paragraphs 72-79 of his letter[27], Mr. Bezant explains by reference to Dairy Farm (by way of example) the limitations imposed on the valuation experts by the segmented and aggregated information that has been supplied in the Data Room. He concludes his review of this aspect of the information provided by saying that the information that he is asking for will enable the experts (and the Court) to undertake *"a significantly more informed valuation analysis."*[28]

34. Mr. Bezant made other more detailed comments and gave more detailed explanations to the same general purport and effect, which it is not necessary to itemize.

35. Messrs. Good and McAnally put in responses to these explanations[29]. These responses were to the effect that (i) Mr. Bezant can still perform the valuation analysis with the information he had already had access to (ii) the 2017 to 2019 documents will be

[25] Para 100 at C/4/31
[26] Para 105 at C/4/32
[27] Page C/4/22
[28] Para 80 at page C/4/23
[29] C5/1 and C/6/1

unlikely to assist him (McAnally) (iii) that it was difficult to discern whether the information requested would result in a significantly more informed valuation, which was a subjective assessment and (iv) the documents he was asking for were not "necessary"[30] in order to perform the valuation task (Good).

36. Mr. Bezant replied[31] rejecting the comments made by Messrs. Good and McAnally and explaining why he disagreed with them. Messrs. Good and McAnally responded to rebut what Mr. Bezant had said. These additional reports did not move matters any further forward.

The Nature of the Appraisal Proceedings

37. It is important to consider the nature of the Appraisal Proceedings under section 106 in order to put the dispute between the experts into proper context. Once the right of appraisal has been triggered by a dissenting shareholder at the relevant date, it is for the Court to make an appraisal of the fair value of the shares. The Court will of course not possess the necessary expertise (except in the simplest of cases) to make that appraisal without the assistance of expert(s') reports. In this respect, it has been said that the process is 'inquisitorial' in nature[32].

38. The Court could (if it had thought it appropriate) have appointed a single joint expert, which would have retained a more inquisitorial atmosphere to the proceedings, but it did not do so. The Court has allowed Jardine Strategic and the Dissenters to adduce expert evidence in respect of each field of expert evidence for which leave was given and that one expert each was to opine on the fair value of the Dissenters' shares at the Valuation Date[33]. The Court considered that there were good reasons for doing so in a case of this size and complexity.

[30] It is relevant to note that in relation to this response Mr. Good was given the instruction that his task was to assess whether the documents were necessary, presumably in anticipation of the application to set aside the Subpoenas based on applying a legal test of "necessity".
[31] C/8/1
[32] See Ground CJ in **Golar LNG Ltd v World Nordic SE** [2011] Bda LR 9 at paras 5 to 6 and Hargun CJ in **APS Holdings Corp v Myovant Sciences Ltd** [2023] SC (Bda) 67 Civ (25 August 2023) at para 19.
[33] Paras 1 and 2 of the Directions Order at D2/1

39. Although this necessarily means that there is scope for disagreement between the experts at the trial of the Appraisal Proceedings, which may give the appearance of a conventional adversarial battle, the essential task of the valuation experts remains the same: to assist the Court in appraising the fair value of the acquired shares at the Valuation Date[34]. As has been seen in cases where the Court has exercised this jurisdiction both in Bermuda and elsewhere, this means the Court is not able to rely simply on the expert that seems to be more convincing. The Court must assess the competing merits of the points made in each of the reports and may pick and choose different features of each report in coming to its own assessment of the fair value of the shares at the Valuation Date[35].

40. This aspect of the Court's jurisdiction also informs the approach the Court should take in determining what information it is relevant for the experts to have in performing their tasks and preparing their reports. It is of vital importance, in my view, for the Court to ensure that both the process of making the appraisal and the final appraisal itself must be conducted fairly and transparently. When shareholders decide to challenge the value at which their shares have been compulsorily acquired under a "squeeze out" amalgamation of this type, it is (in my view) of paramount importance for the procedure by which the value of the shares is appraised to command the confidence and respect of (i) all the dissenting shareholders and (ii) the public. This consideration is made all the more acute by the fact that there is no right to review the Court's appraisal on appeal against either the process or the result of the appraisal[36].

Evaluation of the matters raised by the experts

41. The Court is not able to resolve the differences of opinion that Messrs. Good and McAnally have expressed bout Mr. Bezant's requests on paper. However, the Court has been able to take a view on their relative strengths and weaknesses for present purposes. It is noted that Messrs. Good and McAnally have addressed the question from the perspective of what they consider would be *necessary* for an expert to see or evaluate to prepare a valuation, and this reflects the instructions that they were given when they

[34] It is to be noted that the expert's overriding duty is to the Court not the party who instructed him or her: this duty appears as an incantation at the beginning of each of the expert's reports.
[35] The Court's duty is to reach its own decision: **Re Trina Solar Limited** [2023 (1) CILR 569] at paras 153-7.
[36] Section 106 (6) (6C) of the Bermuda Companies Act 1981.

were asked to submit their comments on Mr. Bezant's information requests. Mr. Bezant disagrees with their comments. He has indicated that he will be able to produce a "*significantly more informed*" report to the Court if he has access to the information he has requested.

42. Mr. Bezant has given cogent, coherent and comprehensive explanations why he needs to see the materials. The Court cannot second guess what an expert does or does not require to prepare a valuation report (except for eliminating material which is obviously not relevant or is fanciful or otherwise obviously inappropriate).

43. I also take into account that the scale of the valuation in this case is enormous[37], and the values involved are gargantuan. It follows that a gap in the underlying material may lead to a variation in the ultimate outcome which could have significant ramifications in terms of the Court's ultimate assessment of the fair value of the shares. It is not possible to tell at this stage how much variation in value will be at stake, but given the enormous sums involved, any variation will likely be correspondingly huge in value.

44. For the reasons I have given in paragraph 40 above, it is of paramount importance that any appraisal the Court makes is entirely transparent and fair. Therefore, it is equally important that the Court should receive as informed and accurate valuations from the experts as it is possible to achieve in an appraisal case of this size and complexity.

45. I consider that the detailed explanations that Mr. Bezant has given for his requests are reasoned, principled and coherent, and I reject the criticisms that Messrs. Good and McAnally have made of Mr. Bezant's approach. They will have the opportunity to make critical assessments of the final report(s) that are submitted, but their comments on the process, and whether the valuation method Mr. Bezant proposes to use to arrive at his valuation is the correct one, are unhelpful at this stage.

46. It is not appropriate for the parties to try to limit the approach that the other's valuation expert proposes to take in approaching their task. In the course of argument it was suggested that Mr. Bezant's approach of using a sum-of-the-parts valuation method

[37] See Hargun CJ who described this group to be a *"wholly exceptional business enterprise"* in the Directions Judgment D/1/27 at para 74.

would not or may not be appropriate, or that a discounted cash flow analysis may not or would not be required, and that a value based on historic trading prices on the stock market would or would not be the preferred or more appropriate valuation basis.

47. It is not for the Court to rule on any of those approaches or to speculate or prejudge which if any of those approaches will be the most appropriate at this stage of the case. That will be the Court's job on the hearing of the Appraisal Proceedings.

The legal test for the production of documents under a *subpoena duces tecum*[38]

48. The primary question in this application is whether the documents and/or information that have been sought under the Subpoenas fall within or without the scope of the Court's *subpoena* jurisdiction by which the Court can order a stranger to the litigation to produce documents under the compulsion of a *subpoena duces tecum*.

49. It is well settled that the issue of a *subpoena* is administrative in nature. The Court makes no assessment of the content of the *subpoena* when a party applies for it to be issued. Once it has been served, it is for the recipient to determine if it is objectionable. If objections are raised, it is for the party issuing the *subpoena* to defend the grounds on which it has been challenged[39].

50. The Subpoena Parties have not taken formal objection to the fact that the Subpoenas were/are not addressed to individuals, but have sensibly accepted for the purposes of the applications that the Subpoenas should be read as having been addressed to the relevant company by its proper officer to produce the documents in the Subpoenas.

51. No challenge has been made as to the existence of the documents requested (except for the Category 7 excel spreadsheet which has been mentioned above). I leave out of account for these purposes the other documents the Dissenters no longer pursue (see paragraph 11 above).

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[38] This is the jurisdiction for the production of documents as opposed to a *subpoena ad testificandum* which is to compel a witness to attend to give evidence at trial. The principles are the same.

[39] See RSC Order 38 and equivalent rules in the Supreme Court Practice 1999 at paras 38/19 and the explanation of Orr LJ in **Senior v Holdsworth** (supra) at page 35 G.

52. One specific challenge was made to the description of the documents in Category 8, with which I deal at paragraphs 81-83 below.

53. The main challenges to the rest of the Subpoenas were based on (a) necessity (b) confidentiality and (c) abuse. I shall deal with each in turn.

Necessity

54. In this case the Subpoena Parties say that the test is *necessity* for the fair disposal of the issues in dispute, and if the documents are not *necessary*, then production of them is not compellable under the relevant Subpoena. They say that Mr. Bezant has taken it upon himself to substitute a new test of "*significantly more informed*", which is not the legal test. They say because he has said that he *can* produce a valuation report of the true value of the shares that means the documents are not *necessary* for the fair disposal of the issues, and that accordingly the legal test for the issue of a *subpoena* has not been met, and the Subpoenas should be set aside.

55. Heavy reliance was placed upon the *dicta* of Gross J in **Council of the Borough of South Tyneside v Wickes Building Supplies Ltd**[40] in which the learned judge summarized the relevant principles and said (so far as material) "…. (ii) *the production of the documents must be necessary for the fair disposal of the matter or to save costs…."* and Nicholls VC in **Panayiotou v Sony Music Ltd**[41] where the Vice Chancellor said, *"the object of the subpoena [duces tecum] is to compel the witness to produce evidence directly material to the issues in the case."*

56. It was said that the rule allowing a party to compel a witness to produce a document under penalty of punishment for contempt was in stark contrast to the standard of production in inter party disclosure or discovery. The Court was reminded that different standards had to be clearly kept in mind and strictly observed and enforced. It was said that a *subpoena* was an intrusion into the rights of strangers who should not be forced to disclose their private documents[42] unless it was strictly necessary for the fair disposal

[40] [2004] EWHC 2428 at para 23.
[41] [1994] Ch 142 at 151E
[42] Or to be "dragged into the parties' bloodthirsty struggle" in Mr. Attride-Stirling's colourful phrase.

of the issues in dispute. The documents had to be necessary and directly relevant. Nothing less would do, and (it was said) these documents were neither.

57. Mr. Adkin KC said that this was putting an unnecessarily narrow gloss on the words used which is not justified by the case law. He said it was, more simply, a question of what the interests of justice require in the circumstances of any particular case. He relied on the statement of Peter Gibson LJ in an unreported case of the Court of Appeal in **Omar v Omar** (11 October 1996) in which he said:

> *"As the law now stands in the light of the authorities, including the decision of this court in Burchard v MacFarlane [1891] 2 QB 241, it is necessary, in order to justify the issue of a subpoena duces tecum, that the particular document or documents must be identified individually or compendiously, and that each document must be shown to be* ***likely to exist****, to* ***be relevant to some issue in the proceedings*** *and to be* ***admissible*** *in evidence in respect of that issue, as well as to be* ***necessary*** *for* ***fairly disposing*** *of the action.*[43]*"*

58. Further Mr. Adkin KC relied on the dictum of Steyn J[44] in **The Lorenzo Halcoussi** [45] where the learned judge said "*...the document or documents to be produced must be required as* ***relevant*** *and* ***admissible*** *evidence, or must at least* ***arguably*** *and on* ***reasonable grounds*** *come within that category.*[46]*"*

59. This case was cited with approval by Mance J as he then was in **London & Leeds Estates Ltd v Paribas (No 2)**[47].

60. It was also submitted that the Court can glean useful assistance from cases which deal will the approach to disclosure of documents in other contexts to show understand what is meant by the expression *"necessary to fairly dispose of the cause or matter."*

[43] My emphasis in bold of each of the essential elements of the test.
[44] Also later approved by the Court of Appeal in **Omar v Omar** (supra).
[45] [1988] 1 Lloyds Rep 180 at 184.
[46] My emphasis in bold.
[47] [1995] 1 EGLR 102.

61. In **Marcel v Commissioner of the Police of the Metropolis**[48] Dillon LJ said that the test under RSC Order 24 for the production of specific documents is the same as under the court's *subpoena* jurisdiction. Cases decided under that rule show that necessary for the fair disposal of the matter includes a consideration that one party should not enjoy an unfair advantage over the other in the proceedings[49]. In **Sarayiah v Royal and Sun Alliance**[50] Baring J reviewed the authorities in relation to "necessity" for production in *Norwich Pharmacal* applications for disclosure, citing with approval a dictum in **Omar v Sec. of State for Foreign and Commonwealth Affairs**[51] that *"the requirement of necessity is a requirement that must be dictated flexibly in the circumstances of each case."*

62. I would express my preference for the formulation of the test as it is set out in **Omar v Omar** (quoted above). The tests relied upon by the Subpoena Parties are expressed in slightly different terms but in the Court's view, they all come to mean the same thing. I agree that the principles set out above in paragraphs 57-61 above reflect the correct approach. I am therefore satisfied that the Court is able to take a flexible approach and to have regard to all the circumstances of the particular case in deciding what is necessary for the fair disposal of the issues.

63. In my view, the guidance given in the cases cited to the Court is no more than practical commonsense. I do not see how the Court could approach weighing the objections to the Subpoenas and the question of what is necessary for the fair disposal of the issues in the Appraisal Proceedings without taking into account the surrounding circumstances. This necessarily involves applying the principles in their particular context, which in turn requires flexibility if the Court is to do what is in the interests of justice in any given case.

[48] [1992] Ch 225, 258 D.
[49] See **Anderton v Taylor** [1995] 1 WLR 447, 462 per Sir Thomas Bingham MR.
[50] See **Sarayiah v Royal and Sun Alliance** [2018] 3437 (Ch) at paras 32-5 per Baring J.
[51] [2013] EWCA Civ 118

The Court's application of the test to the facts of this case

64. I have therefore applied that guidance in assessing what is necessary for the fair disposal of the issues in this matter, taking into account the relevant background, including the scale of the case and what all the experts have said about what will be involved in coming to an appraisal of the fair value of the Dissenters' shares at the Valuation Date.

65. Subject to the exclusion of the Category 8 documents which I will address below, in my view the remaining Subpoena documents are directly material to the main issue in dispute because:

(i) one of the experts says they are directly relevant to his analysis and, for the reasons already given, the Court accepts that it is for the experts to determine what they need do to perform their task, even if the experts disagree amongst themselves about what is or may be needed;

(ii) although the Court is not yet assessing the relative strengths of the positions that the experts may take at the trial, on a review of the explanation which Mr. Bezant has given, his reasons for needing to see the documents are cogent and persuasive;

(iii) Mr. Bezant has explained why the documents go to the key issue to be decided in the Appraisal Proceedings, i.e. to assist him determining the fair value of the shares, and so the documents are in my view "necessary";

(iv) the documents are admissible; and

(v) fairness requires the Court to allow the experts on *both* sides to put forward their respective views, based on what they respectively consider to be relevant and important to the appraisal exercise.

66. Therefore, in my judgment, irrespective of which formulation of the test that was advanced by the parties is adopted to describe the legal test, the Subpoena documents[52]

[52] In all categories except those identified in paragraph 11 or excluded in paragraphs 82-4 below.

fall within the plain meaning of the phrase "*necessary for the fair disposal of the matter*".

67. It is not permissible to divorce the word "necessary" from the rest of the phrase which qualifies it, as Mr. Davies KC and Mr. Attride-Stirling have attempted to persuade the Court to do. The documents are necessary for the fair disposal of the matter because, as Mr. Bezant says, the documents impinge directly on the process for determining fair value of the shares at the Valuation Date, which lies at the heart of the Appraisal Proceedings.

68. In my judgment it does not matter that an expert *could* proceed to conduct a valuation of the shares without the Subpoena documents requested. In my view this is a false point. What would happen if (for example) the documents sought did not in fact exist? The expert would have to make do with the materials that were in existence and do the best job possible on the available materials he (or she) had to assist him (or her) in the process. That does not mean that materials that *do* exist should be left out of account if they are relevant and admissible. There is all the more reason to include documents in the review if they will (or even may) result in a *"significantly more informed report".*

69. Of course, the Court will always be able to regulate the volume of documents required or the extent of the enquiry if the exercise would for other reasons be oppressive or vexatious or abusive. Although this was not taken as a ground of objection, I note that the volume of materials requested is (in the scheme of this case) narrowly focused and involves a relatively small number of documents, so that there is nothing oppressive about the Subpoena Parties having to produce them on that score.

Not fishing or speculative

70. The Court is acutely aware of the different standard for the production of documents in the course of inter party disclosure in the litigation and the standard for production of documents by a third party under a *subpoena*, and the need to keep the distinction between the relevant applicable principles clearly in mind.

71. Mr. Bezant makes it clear that he requires the documents to perform his analysis, not to pursue a line of enquiry or an investigation into other possible claims that might be made. His scope of work is to produce a valuation report to the Court within a defined focus, namely to appraise the fair value of the shares at the Valuation Date. The comparison of the request for production of documents under the Subpoenas in this case as being akin to seeking discovery from witnesses is (in my view) misconceived. There is no speculation or "fishing" involved in these requests. With the exception of Category 8, the Court is satisfied that the Subpoenas relate to specified documents or classes of documents which exist, and which are directly relevant to the main question in the Appraisal Proceedings.

Confidentiality

72. The second main objection to production is based on the confidentiality of the documents. The *subpoena* documents are, of course, confidential; all private documents are. The reasons that the Subpoena Parties have concerns about disclosing them are understandable. However, the interests of justice, and the due and effective adjudication of cases that come before the Court, require that documents which relate to the main issues in the proceedings in the hands of third parties must be accessible to litigants. Otherwise, the overriding constitutional right to a fair trial would be seriously undermined. Noone seriously disputes that principle. It is accepted by all parties that confidentiality *per se* is no bar to production of documents under a *subpoena*[53]. The question is rather whether in the circumstances of *this* case it would be oppressive or unfair or disproportionate to require production of the documents[54].

73. The Subpoena Parties rely on two points to support their objection on this ground.

74. First, they say that because the documents requested are of such marginal relevance to the issues to be determined, it is not appropriate to force them to make the disclosure. This point has already been dealt with above. I have found for the reasons set out in

[53] **Council of South Tyneside v Wickes Building Supplies Ltd** [2004] EWHC 2428 (Comm) Per Gross J at para 23 (iv) (and the rest of his summary of the principles).
[54] See **Senior v Holdsworth** (supra) and **Morgan v Morgan** [1977] Fam 122 as examples. I note that it was submitted that **Senior v Holdsworth** was relied upon as a case involving necessity (see footnote 9 above) but it is plain that the *ratio* of the case was that the *subpoena* was 'oppressive' (See Lord Denning MR at page 35 A-B, Orr LJ at page 36 B and Scarman LJ at pages 41 A and 43 F.

paragraphs 64-66 above that the documents are relevant, go to the main issue in the case and play an important part because they may have a significant impact on the ultimate determination of the fair value of the shares at the Valuation Date. Therefore, I decline to accept the submission that the Court should set aside the Subpoenas on this ground.

75. Second, they say that the Dissenters may abuse the information because they are event-driven hedge funds and arbitrageurs. I bear in mind the comments that Clarke P made in an earlier stage of this case that labels of this type do not matter very much to the legitimate exercise of legal rights[55]. I also bear in mind the commercial context of this case and the hard-fought positions that each side has taken at every stage.

76. In my view, any objections as to the disclosure on the grounds of confidentiality can be met by imposing a strict regime regulating the production and use of the documents as well as the information contained within them.

77. In that connection, I have had regard to the following matters: (i) the people who will have access to the information can be limited to the Dissenters' professional expert(s) who owe a duty to this Court (ii) Jardine Strategic's expert(s) who will clearly have duties to keep their client's information under strict conditions of confidentiality in any event (iii) the parties' legal advisers who are under strict duties to maintain the confidentiality of the documents and (iv) the use of the documents in the Appraisal Proceedings will in any event be governed by the implied undertaking that the documents shall be used only for the purposes of the Appraisal Proceedings. Any breach of the confidentiality regime imposed by the Court can be regulated and enforced by the Court.

Abuse

78. Next it is said that the Subpoenas are oppressive and abusive because they are an attempt to go behind the Directions Order and should be set aside on this ground. I am unmoved by this submission because it is clear on a fair reading of the judgment of

[55] **Re Jardine Strategic Holdings Limited** [2023] CA (Bda) 7 Civ at para 114.

Hargun CJ that his directions were aimed at regulating inter party disclosure and were not directed at restricting the Dissenters from exercising their ordinary rights to issue *subpoenas* against third parties. Indeed, in my view, it would not be appropriate for the Court to do so. In this case, the requests were made and refused in the Appraisal Proceedings, so the Dissenters had no practical alternative but to seek the production of the documents from the Principal Subsidiaries under *subpoena*.

79. Similarly, the complaint that the Dissenters have already unsuccessfully applied to the US Court for relief against other third parties under section 1782 of 28 US Code is irrelevant to the exercise of the Court's powers to regulate the use of *subpoena* powers in the Appraisal Proceedings in this jurisdiction.

Other points

80. Finally, it was said that a refusal to set aside the Subpoenas would (i) change the law and (ii) lead to a flood of *subpoenas* in appraisal and (perhaps) other types of proceedings. Again, in my view these submissions are much overstated.

81. In the first place, for the reasons I have given, the application of the principles that I have set out above is just a routine application of well-settled and conventional jurisprudence and does not change the law. Secondly, the Court is not put off by submissions aimed at discouraging parties from exercising their normal legal rights. The Court is armed with sufficient discretion and power to prevent abuse or oppressive use of the *subpoena* jurisdiction.

Specific Objection to Category 8

82. It is not in dispute that the documents that can be sought under a *subpoena* must be sufficiently described that the recipient can be under no doubt as to what is to be produced or have to undertake any work to reconstruct or exercise any judgment or discretion in what he or she is required to produce[56].

[56] See **Tajik Aluminium Plant v Hydo Aluminium AS** [2006] 1 WLR 767 at 773 H per Moore-Bick LJ.

83. On a fair reading of the description of the documents in Category 8, it is clear that (i) the description does not describe a document or class of documents and (ii) it requires the recipient to reconstruct or retrieve the unspecified group documents that were gathered and produced in response to the internal directive.

84. The Court agrees that the ambit of this Category of documents is too broad and does not specify the relevant documents to be produced with sufficient particularity, and is therefore impermissible. Therefore, the documents that are covered by Category 8 in each of the respective Subpoenas must be excluded.

Conclusions

85. Therefore, for the reasons I have given above I make the following findings:

(i) Subject to (ii), the documents sought in the Subpoenas are necessary for the fair disposal of the issues in the Appraisal Proceedings;

(ii) The documents referred to in Categories 7 and 8 of each of the Subpoenas (under whichever category or number they appear in each respective Subpoena) and the documents requested in any category that relate to Astra and Zhongzheng shall be deleted from each Subpoena in each case;

(iii) The remaining documents (other than those already produced[57]) in each category shall be produced by each of the Subpoena Parties by their proper officer to the Dissenters' Bermuda attorneys in accordance with a Confidentiality Regime that shall be approved by the Court pursuant to the Directions given in paragraphs 87-8 below.

86. It follows that the applications to set aside the Subpoenas are hereby dismissed, subject to the revisions necessary to give effect to the adjustments and deletions I have explained in paragraphs 11 and 84 above.

[57] These are described in paragraph 11 above.

Directions

87. The Dissenters and the Subpoena Parties shall prepare a draft Confidentiality Regime in terms that are designed to protect the confidentiality of all documents produced under the Subpoenas that cover (i) the method of production, use, and return of the Subpoena documents and/or the deletion of electronic copies, following the conclusion of the Appraisal Proceedings (ii) the persons to whom the Subpoena documents may be given or inspected or used (iii) the extent to which the Subpoena documents may be referred to in any eventual Report (iv) the extent to which the Subpoena documents may be referred to in the Appraisal Proceedings and (v) the form of undertaking the persons to whom the Subpoena documents are given shall give to this Court to comply with the restrictions set out above. The parties shall have regard to the limitations on who can see the materials disclosed that I have indicated in paragraph 77.

88. The Confidentiality Regime will be submitted to the Court for approval on or before 6 January 2025, unless the parties agree otherwise. If agreement cannot be reached on the terms of the Confidentiality Regime, any party may apply to the Court for directions and/or resolution of the dispute on 14 days' notice to the other parties.

89. I will hear the parties on costs.

Dated the 5th day of November 2024

THE HON. JUSTICE MR. ANDREW MARTIN

PUISNE JUDGE