



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 227 OF 2017 (IKJ)

**IN THE MATTER OF PART XVI OF THE COMPANIES LAW (2016 REVISION)
AND IN THE MATTER OF XIAODU LIFE TECHNOLOGY LTD**

IN CHAMBERS

Appearances: Mr Mac Imrie and Mr Malachi Sweetman, Maples and Calder, on behalf of Xiaodu Life Technology Ltd (“the Company”)

Mr David Chivers QC of counsel instructed by Ms Marie Skelly and Mr Bryan Little, Ogier, for Waterwood 020 Project Limited (the “Dissenter”)

Before: **The Hon. Justice Kawaley**

Heard: **15 and 16 March 2021**

Date of partial decision: **16 March 2021**

**Draft Ruling
Circulated:** **25 March 2021**

Ruling Delivered: **28 April 2021**

HEADNOTE

Petition under section 238 of the Companies Law-cross-applications for discovery by petitioning company and dissenter- application by dissenter for letter of request-Grand Court Rules Order 24 rule 7 and Order 39 rules 1-3.

**RULING ON COMPANY’S APPLICATION FOR DISSENTER DISCOVERY AND REASONS
FOR DECISION ON RELATED APPLICATIONS.**



Introduction

1. On March 15 and 16, 2021, the following Summonses were heard:
 - (a) the Dissenter's November 25, 2020 Summons seeking the issuance of a Letter of Request;
 - (b) the Dissenter's Summons dated November 25, 2020 for Specific Discovery;
 - (c) the Company's Summons dated February 5, 2021 seeking Specific Discovery.
2. At the end of the hearing I granted the first two applications and reserved judgment on the third. The present Ruling decides the latter application and sets out the reasons for my March 16, 2021 decision to grant the first two applications.
3. The Company presented the Petition herein following a merger between the Company and a subsidiary of Rajax Holding (Rajax Merger Sub Limited) on August 24, 2017 (the "Merger"). Prior to the Merger, the Company was 66% owned by Baidu (Hong Kong) Limited ("Baidu HK"). Its subsidiaries conducted an online food purchasing and delivery business in the People's Republic of China.
4. In July and August 2015, the Company raised US\$250 million through the issuance of Series A preferred shares, US\$125 million of which were purchased by the Dissenter. The Merger consideration was US\$480 million paid for partly in cash and partly in Rajax Holding shares. Baidu HK received US\$300 million in the form of Rajax Holding shares pursuant to purportedly separate Business Cooperation Agreements ("BCAs") pursuant to which Baidu HK's parent agreed to provide technological support to Rajax Holding after the Merger.

The Dissenter's Letter of Request Summons

5. The Dissenter sought Orders that:

"1. A Letter of Request be issued to the proper judicial authority of Hong Kong SAR for the examination of a duly appointed officer of Baidu (Hong Kong) Limited ("Baidu HK") and production of documents in the possession, custody or power of Baidu HK as specified in the Schedule to the draft Letter of Request attached hereto.



2. *This proceeding be stayed until the Return Date of the Letter of Request and examination and documents.*

3. *The costs of and incidental to the application and the Letter of Request be costs in the cause.”*

6. This application was an *ex parte* application which was heard on notice to Baidu HK whose local lawyers (Harneys) attended but did not participate. The factual basis of the application can be shortly stated. Electronic documents which the Company accepted were relevant to the valuation exercise to be carried out in the present proceedings were held on servers belonging to Baidu HK. Prior to the Merger, which took place on August 24, 2017, Baidu HK was the Company’s majority shareholder. The Company’s efforts to obtain the relevant documents, which spanned a period of over 2 years did not bear fruit. The Company initially (prior to the directions hearing in paragraph 22 of the First Affidavit of Won Cheol Shin) expressed the hope that it would obtain documents from Baidu HK by March 2, 2018. In June 2020, the Company’s attorneys Maples invited the Dissenter’s attorneys Ogier to communicate directly with Harneys, who indicated that, inter alia, all relevant documents had already been provided by Baidu HK to the Company.
7. The Company did not oppose the application, which I regarded as providing compelling support for the proposition that the documents sought by the Dissenter (a) had not been provided and (b) were relevant documents. It seemed clear that they were documents which would have been disclosed by the Company but for the fact that it no longer had effective control over the servers on which the documents were presumed to be stored. The application was supported in part by the First Affirmation of William Waldron dated November 25, 2020 (paragraph 51). The deponent explained why it was believed such documents existed and were held by Baidu HK. The main categories of documents sought were the following:
- (a) emails and underlying documents discussing the determination of the Merger Consideration;
 - (b) emails and underlying documents detailing the determination of the 2017 BCAs;
 - (c) emails and underlying documents relating to a potential sale to a competitor (“Meitung”); and
 - (d) documents relating to the determination of the Company’s valuation at its financing rounds.



8. However, and more importantly still, the application was supported by the Dissenter's valuation Expert Mr Mark Bezan's Second Affirmation dated November 18, 2020, which set out at pages 124-132 of Exhibit "MB-2" (a) the additional documents he would require from Baidu HK, (b) why they should exist and be in Baidu HK's possession and (c) the importance of these documents to his valuation.
9. The Schedule to the draft Letter of Request added greater specificity to the first category by indicating that the documents of 11 named former officers were particularly sought. The description of documents sought under the fourth category expressly indicated that the request applied to "*the Company's valuations for its Series A and Series B financing rounds*". In oral argument, Mr Chivers QC referred to the correspondence documenting past attempts to obtain this documentation. He submitted that a recent offer of future compliance "*does not ring true*"; also that questions of confidentiality and costs were matters properly to be addressed by the Hong Kong Court.
10. I took into account Baidu HK's contention in correspondence (page 2 of Harneys' August 11, 2020 letter to Ogier) that the negotiations were mainly oral so that no further documents existed. I accepted the response of Mr Chivers' QC to my query as to the cogency of this point that, on the face of it, this assertion lacked plausibility having regard to the size of the relevant transaction (US\$480 million in Merger consideration, ignoring the US\$300 million attributable to the BCAs). Further and in any event, Mr Bezan deposed that he believes further documents should exist.
11. The Dissenter's Skeleton Argument referred the Court to the following provisions of Order 39 of the Grand Court Rules:

"Power to order depositions to be taken (O.39, r.1)

1. (1) The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order for the examination on oath before a Judge, the Clerk of the Court, an attorney or some other person at any place, of any person.

(2) An order under paragraph (1) may be made on such terms (including, in particular, terms as to the giving of discovery before the examination takes place) as the Court thinks fit and may contain an order for the production of any document which appears to the Court to be necessary for the purpose of the examination.



Where person to be examined is out of the jurisdiction (O.39, r.2)

2. (1) *Where the person in relation to whom an order under rule 1 is required is out of the jurisdiction, an application may be made –*

- (a) *for an order under that rule for the issue of a letter of request to the judicial authorities of the country in which that person is to take, or cause to be taken, the evidence of that person; or*
- (b) *if the government of that country allows a person in that country to be examined before a person appointed by the Court, for an order under that rule appointing a special examiner to take the evidence of that person in that country.”*

12. In oral argument, the following passage from my judgment in *Re Nord Anglia Education, Inc*, FSD 235 of 2017 (IKJ), Judgment dated September 9, 2019 (unreported) was commended to the Court:

“19. The Appleby Dissenters rightly submitted in their Skeleton:

‘28... it is recognised that certain conditions need to be met in order for the Court to be issue a letter of request to a foreign court, and that these mirror the conditions to be met by incoming letters of request to this Court. These conditions have been applied by the Cayman courts on numerous occasions, particularly in respect of incoming letters of request, and may be summarised as follows:

(1) The documents sought must be described with sufficient particularity;

(2) The request must be for evidence, which can itself be used in the proceedings, and cannot amount to a fishing expedition (or roving enquiry), carried out in search of information which may or may not lead to the discovery of admissible evidence;

(3) The documents sought must be directly material to the matters in issue in the proceedings for which they are sought; and

(4) The Court must be shown that there is good reason to believe that the documents actually exist and are likely to be in the possession of the witness.”

13. Applying these principles, I was satisfied that the grounds for me to exercise my discretion in favour of granting the application for the issuance of a Letter of Request to the Hong Kong Court had been made out.



The Dissenter's Specific Discovery application

14. The Dissenter's Specific Discovery Summons primarily sought an Order requiring the Company to serve an affidavit stating:
 - (a) whether any of the documents in the Schedule to the Summons "*is or has at any time been, in the possession, custody or power of the Company and if not now in the possession, custody or power when it parted with it and what has become of it*"; and
 - (b) (i) to explain the basis upon which it is said that the documents are not in the possession, custody or power of the Company since the Custodians (defined in the Schedule to the Summons) were officers and/or employees of the Company at the material time, and (ii) to explain what steps have been taken by the Company to recover such documents from a third party.
15. The Schedule to the Summons set out the following broad categories of documents: (a) documents held by Custodians which had not yet been produced, (b) the Skadden documents, (c) a complete set of operational raw data from the Company's operating platform system, (d) documents relating to weekly managements meetings, (e) documents relating to the negotiation of the Merger terms, in particular the Merger consideration and (f) documentation relating to the valuation of the Company in the Series A and Series B financing rounds.
16. The First Affirmation of William Waldron also supported the Specific Discovery Summons. He avers, inter alia, that the Company has never explained how it is that the Custodians' documents came to be stored on servers to which the Company does not have access.
17. The application was otherwise substantially supported by the First Affirmation of Mark Bezant, the Dissenter's valuation Expert. I considered that I should give some weight to the fact that the application was not merely designed to enforce general discovery obligations on an adversarial basis. It was supported by an Expert saying, in effect: 'I need these documents for my Report and to assist the Court'. He states at paragraph 10 of his First Affirmation: "*I understand that my duty is to help the Court on the matters within my expertise, and that this duty overrides any obligation to the Dissenter or to Ogier.*"
18. The most pertinent portions of Mr Bezant's First Affirmation dated November 18, 2020 may be summarised as follows:



- (a) of the 22,870 documents in the Data Room, 13,259 represent the Company's Initial Disclosure, 8,651 were uploaded in response to information requests by himself and the Company's Expert Mr John Utting, and 959 in response to Mr Bezant's further requests;
 - (b) he exhibits a list of additional documents which he requires (Exhibit "MB-1" pages 638-647), explaining why he believes they should exist and be in the Company's possession and their importance to his investigation. These documents comprise the following broad categories:
 - (1) operating data for October 2015 to August 2017;
 - (2) documents relating to weekly management meetings;
 - (3) documents relating to the valuation of the Company during the financing rounds; and
 - (4) emails and underlying documents relating to the negotiation of the Merger terms including emails between the Company and Skadden.
19. The Company's opposition to the application was supported by the First Affirmation of Jinping Jiang, Rajax Holding's general legal counsel. He deposed that:
- (a) the Custodian documents are not in the possession custody or power of the Company. The business was formerly run from within Baidu using its email platform. After the business was transferred to the Company, with Baidu as the majority shareholder, "*it continued to use Baidu's email platform as it did before*" (paragraph 11) and asserts that the reason why this happened "*should be very clear*";
 - (b) as regards the Skadden documents: "the Company has uploaded all relevant Skadden documents (being the documents referred to in paragraph 2 of the Dissenter's application) within its possession, custody or power to the Company's data room (with the exception of privileged documents)...This disclosure has been reviewed by the Company's legal advisors and I confirm that there are no other documents to be disclosed" (paragraph 19). In a footnote it is asserted that "common interest privilege" applies;
 - (c) as regards the request for all the operational raw data, logistical considerations arise;
 - (d) as regards weekly meetings, he confirms that "there are no other documents to be disclosed under this category" (paragraph 22);
 - (e) as regards negotiation of the Merger terms: "Any discussions and communications about the amount that Rajax was willing to acquire the Company for took place directly between Baidu and Rajax. The Company did not have copies of correspondence relating to such negotiations between Baidu and Rajax, and only obtained what it has disclosed via requests to Rajax and Baidu...The potential merger deal with Rajax was first



communicated to Xiaodu in mid-June 2017, and thereafter certain documents relating to merger began to be generated which are within the Company's possession, custody or power" (paragraph 23); and

- (f) as regards the financing rounds data, he confirms that "the Company has no other documents to be disclosed under this category" (paragraph 24).
20. As regards the logistical problems of providing all of the operational raw data, the Company relied on the First Affidavit of William Kennedy, a managing director of Duff & Phelps. His critique of the practicality and utility of Mr Bezant's request resulted in the Third Bezant Affirmation in which the Dissenter's valuation Expert rowed back on this issue, and offered to "*work with the Company and its advisors in obtaining access to the database...in order to produce the extracts and summaries I originally requested*" (paragraph 32). At the end of the hearing it was agreed that no Order should be made in relation to this limb of the Summons to enable a possible compromise to be reached. Mr Chivers QC withdrew his initial objections to the Kennedy Affidavit as providing expert evidence without leave in the face of Mr Imrie's trenchant submission that such evidence was routinely deployed in section 238 matters.
21. As regards all other categories of documents, the Dissenter's counsel broadly argued that the Jiang Affirmation (a) failed to adequately explain the Company's position, having regard to the queries that had been raised and (b) failed to indicate the sources of his information and belief about record-keeping occurring before Rajax Holding acquired its stake in the Company. Mr Imrie submitted most broadly that there was no basis for going beyond the clear statements in the Jiang Affirmation that the Company had no further documents to produce.
22. In many cases, it is possible to simply accept evidence from an officer of a company that it has complied with its discovery obligations and that no further documents exist which must be produced. Such averments "*would normally be conclusive*": per Mangatal J in *Re Qihoo 360 Technology Ltd* [2017 (2) CILR 72]. This is not a normal case. Firstly, Mr Jiang, the Company's main deponent is not an officer of the Company at all. He is an employee of the post-Merger parent company and does not even seek to suggest that he has personal knowledge of the Company's record-keeping practices before the Merger occurred and when the Merger was being negotiated. Moreover, despite promising (at paragraph 2) to indicate the sources of his information and belief on matters he has no personal knowledge of, he fails to do so when making various critical assertions in relation to the present application.



23. The legal importance of discovery in the section 238 petition context is also significant in the context of an application such as the present one which is primarily designed to test the adequacy of the Company's disclosure by requiring a fuller explanation of what the true position is. The Dissenter's counsel aptly relied upon the Cayman Islands Court of Appeal's observations in another section 238 case, *Re Qihoo 360 Technology Co. Ltd* [2017 (2) CILR 585 (at paragraph 3):

*“3.Proceedings under s.238 present two particular difficulties to the courts. First, all or nearly all of the financial information necessary to enable the court to determine the value of a company's business, and hence of its shares, will inevitably be held by the company itself. The proper conduct of the valuation exercise will accordingly require that the company make adequate disclosure of that information. Secondly, although the task of determining the value is one for the court alone, the court will not usually be equipped to derive a value from the financial information without expert assistance. The consequent importance of the expert evidence means that the court must have confidence that the valuations proposed are based on sufficient information; and that in turn means that the experts will often have to be given a substantial degree of autonomy in determining what information is needed for their valuations. Although care must be taken to ensure that this autonomy is not abused (a point to which we return at the end of these reasons), in general we agree with the statement of Jones, J. in *In re Integra Group (4)* (2016 (1) CILR 192, at para. 11) that “the experts are the best judge of what information is or is not relevant for their purposes.”*

24. As regards the Custodian documents, the Company's evidence fails to adequately engage with the central thrust of the Dissenter's question. It is "very clear" in superficial narrative terms why it is that the Company happened to be using Baidu HK's email server. What is unclear (or as 'clear as mud') is why the Company claims to have used another company's server on contractual terms that, by the Company's own account, gave it no legally enforceable right to access its own documents, before and/or after the Merger occurred. Such an unusual way of conducting business calls for an explanation especially since the Company's post-Merger discovery obligations in the section 238 proceedings which were admittedly anticipated ought to have been in the forefront of the Company's agents' minds.
25. Mr Imrie complained that the privilege asserted over the Skadden documents in the Company's List had never been formally challenged. It was only in the Dissenter's Skeleton that the claim to privilege had first been clearly challenged. In my judgment the Dissenter's submissions fell short of a positive challenge to privilege. The submissions merely invited the Court to find that in this commercial context, in which an Expert had formed the view that more Skadden documents ought to have been disclosed, a more fulsome explanation was called for. Mr Chivers QC



referred in this regard to *CAS (Nominees) Ltd-v-Nottingham Forest* [2001] All ER 954, approved by Mangatal J in *In the Matter of Capitalhold Limited*, FSD 218 of 2015, Judgment dated March 14, 2016 (unreported), there is no claim for legal professional privilege between a company and a shareholder. Moreover in a May 14, 2020 letter (at paragraph 27), Ogier invited Maples to explain the basis on which privilege was claimed and why in any event privilege was not being waived. Maples' response (June 4, 2020 letter, paragraph 10) was that all documents had been uploaded “*with the obvious exception of legal advice and litigation privilege*”.

26. The Company's tacit acceptance of the proposition that privilege did not generally apply as between a shareholder and a company appeared to be reflected in Mr Jiang's Delphic footnote reference to a third head of privilege, common interest privilege. It mattered not if the Company had been “bushwhacked” (in the American sense of the term) by the Dissenter's privilege submissions. I was satisfied that privilege had been claimed over a category of documents which the Dissenter's valuation Expert felt would normally be discoverable and that the non-disclosed documents were important for his valuation. The common interest privilege claim accordingly called for a more fulsome explanation, obviously without any waiver of privilege being deemed to have occurred.
27. The weekly management meetings document request was also not sufficiently grappled with by the Company in its evidence. In essence all that was asserted was all relevant documents had been disclosed and if any appeared to be missing it was because they did not exist. This would be all well and good falling from the lips of a member of the Company's management team in the pre-Merger period when the relevant meetings occurred. How Mr Jiang, the general counsel of the post-Merger parent of the Company, has personal knowledge of this is unexplained. If his averments are based on information supplied to him by others, who those persons are and how reliable they are as sources is wholly unexplained.
28. The position may well be, as Mr Imrie suggested, that meetings were or became irregular in the lead-up to the Merger so that the documentary record is a patchy one. That does not absolve the Company from placing more solid evidence before the Court to explain the true position in circumstances where the Dissenter's Expert has asserted that (a) more documents are to likely exist and (b) are required in order for him to properly assist this Court in valuing the Shares.



29. As regards documents evidencing the Merger negotiations, what Mr Jiang deposed at paragraph 23 has already been set out above. Mr Chivers QC fairly queried what the source of the deponent's information and belief was for the assertion that the Company did not have copies of communications between Rajax and Baidu HK at the time and only began to create its own documents after mid-June after it learnt of the proposed Merger. That seems plausible on its face. It is said that Baidu HK and Rajax have provided some documents relating to the negotiations. However, it is completely unclear whether the documents provided by Baidu HK and Rajax are all documents that exist in relation to the negotiations, as opposed to a more limited sample. Mr Bezant's view is that more documents should exist. The Company's response is incomplete.
30. As regards the Series A and Series B financing rounds documents, the Company's response is almost cavalier. Again, in substance, Mr Jiang's evidence amounts to this: all relevant documents in the Company's possession, custody and power have been disclosed. Mr Chivers QC aptly asked: where has the information gone? It was not contended that the Company at one time must have had documents relating to its valuation of the Company when investors including the Dissenter were being invited to purchase shares. No effective attempt was made to adequately respond to Mr Bezant's request, based on his professional judgment that more documents should exist and are important. He clearly did not accept the Company's initial response to an information request that the financing rounds were the product of negotiation and current management had no ability to deal with the issue. This confirms that Mr Jiang is unlikely to have any personal knowledge of what documentation was created at the time of the financing rounds and raises a real question as to whether he obtained information on this topic from a reliable source. The bare assertion that there is nothing more to be disclosed cannot be accepted in all the circumstances of the present case.
31. Mr Imrie rightly pointed out that there was an overlap between this limb of the Dissenter's application and the Company's own Specific Discovery Summons. The Company's position was that the Dissenter had been party to the Series A financing round negotiations and should have documents of its own. This missed the point that the Dissenter was seeking discovery of documents which had been compiled by the Company for use in those negotiations but which had not necessarily been openly deployed. The Series B documents would not on any view have been in the Dissenter's possession, custody or power. I was again satisfied that a further and better explanation was required.



32. For these reasons I ordered the Company to provide the affidavit sought under paragraph 1 of the Dissenter's Specific Discovery Summons within 28 days.

The Company's Specific Discovery Summons

The categories of documents sought

33. The Company's Specific Discovery Summons sought either a list of the Documents in the Schedule ("Schedule Documents") pursuant to GCR Order 24 rule 3 or an affidavit pursuant to GCR Order 24 rule 7 stating whether any of the Schedule Documents were in the Dissenter's possession, custody or power and, if not, the basis on which it was contended that this was so.
34. The Schedule Documents were described as follows in the Company's Skeleton Argument:

*“Category 1: Calculation of the Company's Series A Valuation
Category 2: the Dissenter's Analysis of the Company's valuation as at 31 December 2016
Category 3: The Dissenter's consideration of Baidu's offers for its shareholding and why they were rejected
Category 4: The payout analysis in respect of the Dissenter's shares in the Company
Category 5: The Dissenter's negotiations with other potential investors
Category 6: The Dissenter's internal recommendations to Fude Resources.”*

The evidence

35. The First Yi Yang Affirmation primarily supported this application:
- (a) as regards Category 1 documents, it is said to be clear from the Dissenter's present disclosure, that underlying documents relating to the Series A round negotiations have not been produced;
 - (b) as regards Category 2 documents, supporting documents relating to the Dissenter's February 18, 2017 Investment Report to its own shareholders about its investment in the Company in 2016 are said to have been clearly not produced;
 - (c) as regards Category 3 documents, it is averred that missing documents relating to the Dissenter's consideration of the Baidu HK offers which it rejected are likely to exist, have not been produced and/or have not been adequately explained;



- (d) as regards Category 4 documents, it is averred that the Dissenter has not satisfactorily explained why its payout analyses are either not relevant or not in its custody, possession or power;
- (e) as regards Category 5, the Company seeks disclosure of all documents relating to the Dissenter's role as advisor to the Company and identifies as missing documents relating to discussions the Dissenter had with potential investors/buyers in/of the Company. the Dissenter's right to assert that missing documents are held by other entities within its Group is challenged;
- (f) as regards Category 6, the Company seeks disclosure of all documents relating to internal recommendations made by the Dissenter to Fude Resources.
36. The Second Affirmation of Fang Fang (a director of the Dissenter) responds to the Company's evidence. At first blush, it resembles a case study on separate corporate personality. As regards the Category 1 request, he deposes that a key document was prepared by "WIML", which is not in the same corporate group as the Dissenter despite the common "Waterwood" name. The Dissenter was incorporated in 2015 in the British Virgin Islands as a special purpose vehicle ("SPV") to invest in the Company. Its parent is Fude Resources International Investment Holding Company Limited ("Fude Resources"). At the top of this Group is Funde Sino Life Insurance Co., Ltd., a PRC company. Although the deponent and Mr Wills Cheung were directors of the Dissenter, it had no employees.
37. WIML is a Cayman Islands company in the middle of an entirely separate corporate group comprising five corporate entities, four of which have "Waterwood" in their corporate names. WIML provided advice to the Dissenter's parent company, Fude Resources, in relation to, inter alia, its investment in the Company, under a Consultancy Agreement. Despite the corporate separation between the Dissenter and WIML, Mr Fang was between 2014 and 2017 also a director of WIML. (From his First Affirmation it is clear that he was a director of the Company as well, between July 2015 and August 2017). However, at all material times, he maintained "separation between [his] different roles." Before proceeding to suggest that most relevant information WIML had would have originated from the Company in any event, he critically deposes as follows:

"23. As the Respondent does not have a right to obtain documents from WIML, it has no background information or supporting documents to the proposal in its possession, custody or power to disclose."



38. The Category 2 position is somewhat different. Here Mr Fang makes the more substantive point that the Investment Report was not prepared by the Dissenter at all. It was prepared by Mr Jun Wang, an employee of WIML's Hong Kong subsidiary who was seconded to the Company from November 2016 to May/June 2017, during which period the Report was prepared. The Dissenter accordingly has no right to access the supporting documents utilised by Mr Wang in preparing the Investment Report.
39. As regards Category 3 documents, Mr Fang explains that he used the same email address when acting as a director of the Dissenter, of WIML, of the Company and when acting as a director of other of WIML's client companies. Without seeking to explicitly respond to the specific bases on which the Company contends the Dissenter should have more documents to disclose about commercial offers made to it which were rejected (First Yang, paragraph 18), the deponent critically avers :

“33. I understand that all documents which were received /sent/copied in the email accounts of myself and/or Wills Cheung, when we were acting in our capacity as directors of the Respondent, have been uploaded to the Respondent's data room.”

40. Mr Fang's response seemed at first blush adequate, subject to understanding the significance of the underlined words in the below text:

“34. The Respondent does not have documents within its possession, custody or power relating to the category of documents sought at paragraphs 19 to 20 Yang 1, as WIML did not copy these communications to myself and/or Wills Cheung in our respective capacities as directors of the Respondent.” [Emphasis added]

41. A far more detailed response is given to the Category 5 request. The nub of it is that any discussions Mr Fang had with potential investors took place in his capacity as a director of the Company and all relevant documents have been disclosed. The Dissenter did not have documents relating to a proposed advisory agreement between the Company and Waterwood Resources, because the latter entity was wholly unconnected to the Dissenter. He explains why various specific emails are not in the possession custody or power of the Dissenter.



Governing legal principles

42. In the Company's Submissions in support of its Specific Discovery Application, reliance was placed on Mangatal J's conclusions in *Re Qihoo 360 Technology Ltd* [2017 (2) CILR 72]:

"102. In my judgment, the Company has not misunderstood the case or mis-conceptualised it. What it is saying is that a lot of categories of information do not exist and never have existed in document form, which the Dissenters say is incredulous [sic] and incapable of belief. The position taken by the Company may well be strange. By itself, that is not sufficient for the Dissenters to discharge their burden of demonstrating objectively that the documents exist. However, in light of the Company's inconsistent positions, coupled with its cavalier approach to previous aspects of the discovery process, in my judgment there has been an insufficiency of discovery. If anything, the Company may have mis-conceptualised the discovery process. This insufficiency has been established, based on the specific facts, as well as the surrounding circumstances. It is such that I cannot say that I find the Company's statements that it has given complete and full disclosure reliable. I make a distinction between credibility and reliability, because I am not saying that there has been deliberate concealment or deletion, but rather that the discovery process has not been handled with the care required in order for the Court to ensure that its Orders are carried out and that the discovery process is carried out fairly."

43. On the basis of this analysis, it was then argued:

"23. Applying the test set out in Qihoo, the Company submits that:

- 23.1 *What Mr Fang says about the documents in question not being in the Dissenter's possession, custody or power is incredible and incapable of belief.*
- 23.2 *The approach adopted by the Dissenter distils down to a position that if a document has been disclosed it was in the Dissenter's possession custody or power, whereas any related undisclosed documents are confidential communications not in its possession, custody or power, and instead in the control of another related Waterwood entity or consultant. This is clearly cavalier, and should be treated with suspicion.*
- 23.3 *The Dissenter's position is inconsistent, not least in respect of Mr Wang's previous statements but also in relation to the delineation of possession of documents more generally.*
- 23.4 *The Dissenter may have mis-conceptualised the discovery process. It is impossible to say without a better understanding of the process established to differentiate its documents from other documents not in possession, custody or power, but in the email accounts of its*



representatives. The absence of those explanations must count against the Dissenter in this application.”

44. In oral argument, Mr Imrie referred to the breadth of the Dissenter’s discovery obligations under Appendix 1 to the Consent Order dated August 20, 2018 and Maples’ letter dated September 29, 2020, which laid the foundation for the present application. He submitted it was obvious that underlying documents existed which had not been disclosed, and the legal principles relied upon by the Dissenter for the purposes of its own application were not in dispute. Reference was made in this regard to *Fairstar Heavy Transport NV-v-Adkins* [2013] 2 CLC 272 at paragraphs 51 to 56. Accordingly, the Dissenter’s various agents and representatives (such as WIML) were under a duty to produce any documents it held as a result of its business relationship with the Dissenter.
45. The Dissenter’s Skeleton Argument dealt with the application summarily, noting that it was not supported by the Company’s Expert, Mr Utting. Mr Chivers QC in his oral argument referred the Court to the corporate structure chart and Mr Fang’s evidence as the basis for advancing the following points of principle. The Dissenter was an SPV, which was formed to hold its investment in the Company, not to decide anything (except at the exit stage). Any decision-making occurred higher up the corporate chain, and there was no legal precedent for a subsidiary having a right to require its parent to produce documents. If the Dissenter was not a party to the Consultancy Agreement with WIML, it had no right to obtain documents relating to that agreement.
46. As I noted in the course of the hearing, these arguments were very unattractive as they implied that dissenters could, merely through incorporating an SPV, avoid the usual discovery obligations. Of course I was well aware that the Merger in this case took place before the right to dissenter discovery was established by the Court of Appeal’s April 10, 2018 judgment in *Re Qunar* [2018 (1) CILR 199].
47. Mr Imrie in reply pointed out that there were common directors in both (apparently separate) structures and that directors must have access to the relevant emails. There was, in any event, no evidence of reasonable efforts to obtain the documents the Company sought. As to the corporate character of the Dissenter as an SPV, it was argued that such entities can only act through agents and representatives. There had been many people taking steps to protect the Dissenter’s investment in the Company and reporting to the Dissenter. Rajax had provided many documents



without standing on legal technicalities; it was argued that the controllers of the Dissenter should do the same.

48. In broad legal policy terms, I found the Company’s pragmatic agency analysis to be more attractive than the Dissenter’s seeming reliance on corporate formalities to evade what would otherwise be straightforward discovery obligations. On the other hand I was mindful of the fact that ignoring the legal formalities of corporate structures is generally impermissible save on exceptional and compelling grounds. Mr Imrie’s submissions encouraged me to ponder whether veil-piercing, or something akin to this, was required, even though these principles were only indirectly invoked. The Company’s application accordingly raised somewhat nuanced issues of fact and law.

49. In *Prest-v-Petrodel Resources Limited* [2013] 2 AC 415, Lord Sumption opined as follows:

“35. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. Like Munby J in Ben Hashem, I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in VTB Capital who suggested otherwise at para 79. For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy.”

50. The veil-piercing principle has traditionally been applied in the context of looking through top-down control by the ultimate owner of a company or corporate structure. As such it has no application whatsoever here. But in broad legal policy terms, the veil-piercing rules do support the view that as matter of general principle using corporate structures to evade discovery or other legal obligations is not something that courts should be keen to facilitate. In my judgment, this broader policy principle underpins the approach to discovery in the commercial context which the



Dissenter prayed in aid in support of its own Specific Discovery Summons. In *Fairstar Heavy Transport NV-v-Adkins* [2013] 2 CLC 272, Mummery LJ deprecated an overly technical approach to a practical discovery problem:

“50. In my judgment, the judge ought to have made an order for inspection of the emails on the computer. He was not prevented from doing so by his conclusion that there was no proprietary right in the content of the emails. The absence of a proprietary right would not affect the legal right of the principal to an inspection and copying remedy against a former agent in respect of the emails. It was not necessary to decide the property issue in order to make the order for inspection or copying. To ask in a case like this the questions such as ‘Is there property in an email?’, or “Who owns the content of an email?” is not a helpful way of stating the real issue, which is not one of ownership of property claimed against the world. The issue is one of enforcement, as between the parties, of particular rights of access by a remedy of inspection and copying, which is based on rights and duties incidental to the relationship that existed between the parties at the relevant time.”

Findings: Category 1 documents

51. I consider that the proposition that Documents generated under a Consultancy Agreement between Fude Resources and WIML in connection with the Dissenter’s investment in the Company are not in the Dissenter’s custody, possession or power is inconsistent with commercial and legal reality. The Dissenter’s legal right to obtain documents relevant to how it manages its investments cannot be shaped entirely by how the Dissenter in practice conducted its affairs. The Dissenter's interests were clearly aligned with the interests of its 100% owner, Fude Resources. This makes it entirely understandable if, as Mr Chivers QC suggested was the case, the Dissenter's directors in practice did as they were told and that all operational tasks were not performed by its own employees.
52. But this does not explain why these arrangements should, in effect, extinguish the Dissenter's separate legal personality altogether, depriving its directors of all right to exercise independent judgment in any circumstances by calling for documents relevant to an important decision. More strikingly still, no explanation (that I discerned) was proffered by the Dissenter to explain why its director also served as a director of WIML, a supposedly unconnected company in an entirely separate corporate group. The most obvious explanation is that Mr Fang was there because WIML was in reality the Dissenter's agent and it was convenient for both principal and agent to have some level of common management and control. As WIML was on any view doing



important work for the benefit of the Dissenter, it would be most surprising if Mr Fang, donning his Dissenter hat, could not require WIML to supply him documents pertinent to the fair value of Dissenter's shares in the Company. The fact that Fude Resources contracted with WIML and that Fude Resources happens to be the Dissenter's parent company should not be permitted to completely obscure the commercial reality underpinning the relevant relationships in real world terms.

53. I would provisionally find that based on the information presently before the Court, the Category 1 documents are within the Dissenter's possession custody or power because they are held by parties who were in substance acting as the Dissenter's agents. However, I would afford the Dissenter an opportunity to file further evidence (if it can) substantiating its opposition to this limb of the Company's application by reference to any express contractual arrangements which potentially undermine my provisional conclusions.

Category 2 documents

54. The Dissenter's position on the Category 2 documents is more straightforward. Its position in effect is (or appears to me to be) that these documents are more properly to be obtained by the Company rather than by the Dissenter, because they were prepared by a person who was at the material time seconded to the Company, albeit the Investment Report was published by WIML's own subsidiary. This request was premised on there being a corporate connection between the Dissenter and WIML. This premise has, just, been refuted despite the oddity of Mr Jun Wang having sworn two Affirmations on behalf of the Dissenter, the first of which elided what Mr Fang subsequently deposed were two separate corporate groups.
55. The preponderance of the evidence presently before the Court suggests that the Company is best placed to compel production of documents created by one of its own employees, albeit deployed in a report published by Waterwood Investments, a Hong Kong company. This limb of the Company's application is refused.

Category 3 documents

56. The Second Fang Affirmation identifies two email addresses which Mr Fang and Mr Cheung used in their capacity as directors of the Dissenter. He deposes that Alvarez and Marshall's



forensic technology team has “searched and reviewed” these email accounts. As a result:

“33. I understand that all documents which were received /sent/copies in the email accounts of myself and/or Wills Cheung, when we were acting in our capacity as directors of the Respondent, have been uploaded to the Respondent’s data room.”

57. The Company submitted most significantly in its Skeleton Argument in response to this evidence:

“15.1 Given that it is now undisputed that Mr Fang and Willis Cheung used those email addresses for the Dissenter’s business, there is no evidence as to how A&M were enabled to sort between and distinguish those emails relating to the Dissenter’s business and otherwise...”

58. In light of my provisional findings in relation to Category 1, above, that WIML appears to have been acting as the Dissenter’s agent, I accept the submission that further evidence should be filed by the Dissenter to explain the basis upon which these searches were carried out. It may well be that these two directors of both the Dissenter and WIML received emails in their capacity as directors of WIML which the Dissenter was entitled to compel them to produce. It may be that Mr Fang received emails from WIML in his capacity as director of the Company which the Company can require him to produce as a former director. That all relevant documents have been produced is not adequately explained because:

- (a) it is unclear what relevance test was applied when the pertinent searches were carried out; and
- (b) the test which is incompletely described appears at first blush to be an unjustifiably narrow one.

Category 4 documents

59. Should the Court accept as sufficient evidence that all relevant documents have been produced the bare assertion that communications not copied to the Dissenter’s directors by WIML in their capacity as such need not be produced? For the reasons set out above in relation to the Category 3 request, in my judgment the Dissenter’s evidence in relation to Category 4 documents is far from conclusive in the unique circumstances of the present case. I accept the Company’s submission that the Dissenter should file further evidence explaining the relevance test which has been applied in its production to date.



Category 5 documents

60. I find that for similar reasons as set out above in respect of Category 3 and 4 documents, Mr Fang's evidence that all relevant documents have been produced is not in all respects conclusive and should be supplemented by further evidence:
- (a) Paragraph 35 of his Second Affirmation is ambiguous, because it can be read as suggesting that (1) documents received at his email address in his capacity as a director of the Dissenter have been disclosed, and (2) that documents received in the capacity of a director of the Company have not been produced;
 - (b) paragraph 37 of his Second Affirmation is materially unclear, because the deponent fails to address the central factual issue of whether any emails relating to the draft advisory agreement were sent to his relevant email address, irrespective of what capacity he received them in. Although the present application is strictly made against the Dissenter, it would be obtuse for that fact to justify a former director of the Company in not disclosing documents he is obliged to disclose in that capacity. It is also not clear without further explanation that simply because the Dissenter was not a proposed party to the draft advisory agreement, that it would not have been able to access the related documents; however
 - (c) no further clarification of paragraphs 35, 38 and 39 is required.

Category 6 documents

61. The critical question in relation to this Category is whether it is sufficient for the Dissenter to make the bare assertion that the July 31, 2017 letter from WIML to Fude Resources and emails dated August 4, 2017 from Wai Kit Lau and Jun Wang, respectively, are not in the custody, possession or power of the Dissenter. Despite related documents being disclosed, it is said without elaboration that:
- (a) the letter was "*a confidential communication between WIML and Fude Resources*" (paragraph 41 of the Second Fang Affirmation); and
 - (b) the Dissenter was not involved in the restructuring recommendations made in August 2017 by persons that were not its employees, therefore the documents are not in its custody, possession or power (paragraph 42).
62. Mr Imrie rightly emphasised the technical nature of this response. Mr Chivers QC disputed the suggestion that the WIML consultancy arrangements were "unusual". It is impossible to judge

because the arrangements have not been disclosed or adequately explained. As I found when dealing with the Category 1 request, my provisional finding is that any advice given by WIML to Fude Resources in relation to the management of its indirect investment in the Company through its direct investment in the Dissenter involved it acting as the Dissenter's agent. The Dissenter would on that basis be entitled to see all the relevant communications. The Dissenter should file further evidence explaining the basis on which it contends that is not the true legal and factual position in relation to the Category 6 documents.

Summary of findings on Company's Specific Discovery Application

63. To the extent set out above, the Company's Specific Discovery Application is granted as regards Categories 1, 3, 4, 5 and 6 but refused as regards Category 2.

Conclusion

64. For the above reasons, the Dissenter's Letter of Request and Specific Discovery Applications were granted on March 16, 2021. The Company's Specific Discovery Application is hereby granted to the extent and for the reasons set out above.

65. I will hear counsel, if required, as to costs or any other matters arising from this Ruling.

THE HON. MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

