



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

**CAUSE NO. FSD 128 OF 2021 (RPJ)**

**IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)**

**AND IN THE MATTER OF SINA CORPORATION**

**Before:** The Hon. Justice Parker

**Appearances:** Mr Jasbir Dhillon KC of counsel instructed by Collas Crill LLP, Ogier (Cayman) LLP, Mourant Ozannes (Cayman) LLP and Carey Olsen, attorneys for the Dissenters

Mr Stephen Atherton KC of counsel instructed by Harneys Westwood & Riegels for the Company

**Heard:** 15 April 2024

**Draft judgment  
circulated:** 21 May 2024

**Judgment delivered:** 3 June 2024

*Section 238 Companies Act-disclosure by Company-price sensitive events post valuation date-observations of Cayman Islands Court of Appeal-determination of valuation date relevant to scope of discovery-principles to be applied-discretion-variation of Directions Order.*

240603- In the matter of Sina Corporation – FSD 128 of 2021 (RPJ)- Ruling on CICA Discovery

## RULING

### Introduction

1. On 28 September 2020, the Company (acting by its board of directors) executed a merger agreement with a buyer group for the purchase of the Company's shares at a price of US\$43.30 which was equal in amount to the Merger Consideration.
2. On 20 November 2020, notice of the EGM was sent to the Company's shareholders. Between 15 and 22 December 2020, dissenting shareholders sent their objections to the Company (as required by s.238 (2) of the Companies Act). On 23 December 2020, the Merger Agreement (including the amount of the Merger Consideration) was approved at the EGM by the requisite majority of the Company's shareholders.
3. On 12 January 2021, the Company gave formal notification of the approval of the Merger to dissenting shareholders (in accordance with s.238 (4) of the Companies Act). Between 13 and 26 January 2021 the Dissenters notified the Company of their non-acceptance of the terms of the Merger (in accordance with s.238 (5) of the Companies Act).
4. On 26 March 2021, the Company made a "fair value" offer to the Dissenters for their shares in the sum of US\$43.30 per share (pursuant to s.238(8) of the Companies Act, and without prejudice to the Company's position at any subsequent trial to determine the fair value of the Dissenters' shares). This offer was not accepted by the Dissenters.
5. Between the date of the EGM (23 December 2020) and the Merger Completion Date (23 March 2021), the market price of the shares in Weibo (the principal trading subsidiary of the Company) increased in value by approximately 14%.
6. The Dissenters contended that the valuation date ought to be fixed by reference to the Merger Completion Date rather than the date of the EGM (the latter date being that contended for by the Company).

### *The Valuation Date*

7. On 25 January 2022, the Court decided various issues as between the Company and the Dissenters in a written Judgment. In particular:

- (1) The valuation date (for determining the fair value of the Dissenters' shares under s.238 of the Companies Act) was to be the date of the EGM (the "**Valuation Date**");<sup>1</sup> and
- (2) The "usual order" was made in relation to discovery (in accordance with standard directions made as to discovery in relation to s.238 proceedings). The Company was to disclose (i) the categories of documents listed in Appendix 3 of the Directions Order, and (ii) all other documents relevant to the determination of the fair value of the Dissenters' shares in the Company as at the Valuation Date, in the Company's possession, custody or power that had been prepared or created in the five-year period ending on the Valuation Date.<sup>2</sup>

*The arguments before the Cayman Islands Court of Appeal ("CICA") and its observations*

8. An argument made by the Dissenters in support of their contention that the Valuation Date should be the Merger Completion Date was that, in the three months between the EGM Date and the Merger Completion Date, the value of the Company's shareholding in its listed subsidiary Weibo, at market prices, increased by over US\$660 million ("**Weibo Increase**").<sup>3</sup>
9. The CICA concluded that, notwithstanding the Weibo Increase, as between the date of the EGM and the Merger Completion Date, the appropriate Valuation Date in the present case (and in s.238 cases more generally) was the date of the EGM. That was the starting point for most cases, although there may be exceptions where a different date was considered to be more appropriate.
10. The CICA made some further observations as to the importance of price sensitive events which occurred after the Valuation Date. The Dissenters now apply for further discovery from the Company pursuant to these observations.

*Price sensitive events*

11. As to a price sensitive event which occurs subsequent to the Valuation Date the CICA (Birt JA) said this:

*"28. Secondly, even where there is a material delay and a price sensitive event occurs between the EGM and the merger completion date, such event will often be reflected in the*

---

<sup>1</sup> See §§ [26] to [50] of the Judgment

<sup>2</sup> See §[72] of the Judgment

<sup>3</sup> Hoskin 2, paras 9-10

*valuation even if the valuation date is as at the EGM. That is because, when valuing on a particular date, any valuer looks forward to see whether any event that might affect the profitability of the company in question is likely to occur in the foreseeable future. To take a simple example, if at a valuation date there is a general expectation in the market that the selling price of an item sold by a company is likely to increase substantially in the foreseeable future or the demand for such item will increase substantially, thereby increasing the profitability of the company, that would be reflected when valuing the company as at the valuation date. Conversely, if a totally unforeseeable event occurs after the valuation date, that event would not be taken into account when valuing the company as at the valuation date. The weight to be placed on a subsequent price sensitive event when valuing a company at a particular date will depend on the degree to which the event, as at the valuation date, would be considered likely.*

*29. The essential point is that, unless the subsequent event is wholly unforeseen, a valuation as at a particular date will take the subsequent event into account to a greater or lesser extent. As Field JA put it during argument, if the subsequent event is due to causes which ‘were at an early stage of fermentation’ at the valuation date, valuers would be bound, when valuing as at the valuation date, to see whether there were indications of the subsequent event such that it should be taken into account when assessing the value of the company as at the valuation date.*

*30. Transposing that to the present case, if the subsequent increase in the share price of Weibo was foreseeable as at the EGM, whether as a certainty, likely, possible or remotely possible, the increase would be taken into account when valuing as at the EGM, with the weight to be given to the increase to be determined by reference to the degree of likelihood as at the valuation date of the subsequent increase occurring.”*

12. The CICA also indicated at §44 of the Judgment that price sensitive events occurring after, but foreseeable at, the Valuation Date, are not limited to events occurring before the Merger Completion Date:

*“Just as there may be a price sensitive event subsequent to an EGM but before the merger completion date, so there may similarly be a price sensitive event subsequent to the merger completion date. In either case, if this is an event which could have been foreseen as reasonably possible as at the valuation date, it will need to be reflected in the valuation process.”*

*Disclosure*

13. The CICA went on to make the following observations at §§87-89 of the Judgment in relation to disclosure:

*“Disclosure*

*“86. On 18 May 2022, the judge gave a number of directions, including for disclosure by the Company of all documents which are relevant to the determination of fair value. The time period for such disclosure was stated to be documents prepared or created ‘in the five year period ending with the Valuation Date’ i.e. the date of the EGM.*

*87. In Maso Capital Investments Limited v Trina Solar Limited, CICA (Civil) Appeal 9 of 2021, 4 May 2023, this Court emphasised at [256]-[262], and in the concurring judgment of Field JA, the importance of a company giving full disclosure in section 238 cases. Where, as here, there has been a significant price-sensitive event (i.e. the increase in value of the Weibo shares) not long after the valuation date, it seems to me essential that any order for discovery should cover the period of such event **so that the court can be as well informed as possible about the causes of such event, when such causes may have arisen, and therefore the extent to which the event should be taken into account as part of the valuation process.** (Emphasis added)*

*88. This is a general point not related specifically to the fact that the valuation date is the date of the EGM. If the valuation date were to be the merger completion date and the price sensitive event were to occur not long after that valuation date, disclosure would need to cover the period of the relevant event.*

*89. There is no appeal in respect of the disclosure order and the matter is therefore not before us. Nevertheless, it seems to me essential that the disclosure order should be varied so that the period covered by the order is extended to, say, the Completion Date in order to cover the period of the Weibo increase. No doubt an early application for variation can be made to the judge. (Emphasis added)*

*The Application*

14. The Directions Order in this case currently provides for the Company to give discovery of documents prepared or created on or before the Valuation Date. The Dissenters apply for the

*240603- In the matter of Sina Corporation – FSD 128 of 2021 (RPJ)- Ruling on CICA Discovery*

directions order to be varied to include, *inter alia*, later price sensitive events provided that those events could be said to have been foreseeable to any degree as at the Valuation Date.

15. The Dissenters' application is wider than documents relevant to the value of the shares in Weibo. The extension asked for, relating to the period of time during which documents relevant to the determination of fair value were created, concerns *all* documents as referred to in Appendix 3 of the Directions Order and which are in the Company's possession, custody or power. It also specifically seeks to include material relating to the initial public offering ("IPO") of *TuSimple, Inc* ("*TuSimple*"), one of the Company's investments (see below).

16. The Dissenters apply for an order the Company give discovery of:

*(a). all documents (of whatsoever description, whether electronic, hard copy or in any other format) and communications (whether by email or otherwise) and other materials which are in its possession, custody or power comprising the categories of documents set out in Appendix 3 of the Directions Order which were prepared or created in the period beginning on the Valuation Date (as defined in the Directions Order) and ending on 22 March 2021 (the [Merger] Completion Date), save that in respect of documents set out in category r(i) of Appendix 3 the period shall end on 15 April 2021, which are relevant to the determination of the fair value of the Dissenters' shares in the Petitioner as at the Valuation Date;*

*(b). all additional documents (of whatsoever description, whether electronic, hard copy or in any other format) and communications (whether by email or otherwise) and other materials which are in its possession, custody or power which were prepared or created in the period beginning on the Valuation Date and ending on the Completion Date which are relevant to the determination of the fair value of the Dissenters' shares in the Petitioner as at the Valuation Date."*

17. The variation sought by the Dissenters' Summons at paragraph (a) is such that the Company would be required to give discovery of additional documents, being:

(i) Documents relevant to the determination of the fair value of the Dissenters' shares comprising the categories of documents set out in Appendix 3 to the Directions Order that were created between the Valuation Date and 22 March 2021. In effect, therefore, extending discovery that the Company must give to documents relevant to the determination of the fair value of the Dissenters' shares as were created in the 5 years prior to 22 March 2021 (and beyond the current date of 23 December 2020); and

(ii) Communications and Documents relating to the value of investments including, but not limited to, all documents and Communications related to the IPO and pre-IPO funding of *TuSimple* between the Valuation Date and 15 April 2021 (and therefore beyond the current date of 23 December 2020).

18. The variation sought by the Dissenters' Summons at paragraph (b) is such that the Company would be required to give discovery of all documents prepared or created in the period 5 years prior to the Completion Date (23 March 2021) and are relevant to the determination of the fair value of the Dissenters' shares in the Petitioner as at the Valuation Date.

*Appendix 3*

19. The documents referred to in Appendix 3 of the existing Directions Order included the following:

- (1) At sub-paragraph (h): "Communications, Documents and other materials relating to [Weibo]...,
- (2) including:
- (i) the Company's valuations or valuation analyses of Weibo and any financial statements of Weibo created or received in the five year period ending on the Valuation Date;
  - (ii) in relation to any proposed or potential sale of the Company's shares in Weibo and/or any proposed or potential privatization or delisting of Weibo, including Communications, Documents and other materials created by or passing between the Company, the Special Committee, the Financial Advisor, Weibo and/or New Wave (or any other member of the Buyer Group) in relation to the same; and
  - (iii) in relation to the indication from New Wave that it would not acquire the Company without Weibo and that it did not wish to break up the Company."

.....

At sub-paragraph (r) of the Directions Order: "Communications and Documents relating to the value of investments including, but not limited to, all Documents and Communications:

- i. related to the IPO and pre-IPO funding of *Tusimple*;
- ... "

20. The evidence deployed for this application consists of the Second Affidavit of Zachary Paul Hoskin dated 16 January 2024 (for the Dissenters), the Affidavit of Tavish MacLean dated 22 February

2024 (for the Company), and the Affidavit of Professor Bilge Yilmaz dated 29 March 2024 (for the Dissenters).

21. Mr Jasbir Dhillon KC appeared for the Dissenters. Mr Stephen Atherton KC appeared for the Company.

*Dissenters' submissions in summary*

22. Mr Dhillon KC reminded the Court that the fundamental importance of Company discovery for the fair trial of s.238 proceedings has been repeatedly recognised by the Court, including in previous judgments in these proceedings, and by the CICA.<sup>4</sup>
23. The CICA made it clear in this case that the Directions Order which currently provides for the Company to give discovery of documents prepared or created on or before the Valuation Date, should be varied so as to provide for discovery of more recently created documents. In relation to the CICA's reference to the scope of that extension to the Company's discovery ("to, say, the Merger Completion Date"), the only evidence that was before the CICA in relation to any post-Valuation Date price sensitive event concerned the Weibo Increase, which occurred prior to the Merger Completion Date.
24. It is clear from the CICA Judgment that it is equally important that any later price sensitive event should also be the subject of discovery, provided that that event could be said to have been foreseeable to any degree as at the Valuation Date.
25. The Dissenters rely on the expert opinion of Professor Yilmaz, the Dissenters' appointed valuation expert for the trial of these proceedings. He has reviewed the parts of the CICA Judgment which address post-Valuation Date discovery.
26. Professor Yilmaz's expert opinion is that the views expressed in those parts of the Judgment:

*"are consistent with a large body of accepted valuation literature and reflects valuation best-practice" ...Professor Yilmaz goes on to explain the reason for the foregoing opinion is that "[t]he more that is known about the causes of price sensitive events that occurred after the Valuation date, and when they arose, the better equipped a valuation*

---

<sup>4</sup> CICA Judgment, [87]; 2023 Judgment in these proceedings, at [1]: "Disclosure by the Company is fundamental for a fair trial of this section 238 proceeding. Disclosure by companies, as experience shows, is of central significance in the context of fair value cases and is central to the analysis of the experts"; 2022 Judgment at [74]; and FSD No 72 & 74 of 2022 (DDJ), Unrep., 4 April 2023 ("New Frontier Health I") at [32]-[33]



*expert will be to assess whether and to what extent those price-sensitive events should form part of their valuation”.*<sup>5</sup>

27. In light of the foregoing, the Dissenters argue that there should be a variation of paragraph 8 of the Directions Order, obliging the Company to give discovery of all documents and communications in its possession, custody or power, created in the period between the Valuation Date and the Merger Completion Date, comprising the categories of documents set out in Appendix 3 of the Directions Order and all additional documents relevant to the fair value of the Dissenters' shares as at the Valuation Date. This has the effect of extending the period covered by the discovery order to the Merger Completion Date, as contemplated by the CICA.

*TuSimple*

28. *TuSimple* is a company incorporated in Delaware which develops self-driving technology. The Company had a significant investment in *TuSimple* (held via an affiliate, Sun Dream Inc), and Mr Chao and Ms Zhang (who were respectively the Company's CEO and CFO at the time of the Merger), were also members of *TuSimple*'s Board<sup>6</sup>.
29. The financial advisor to the Special Committee, Morgan Stanley, provided an opinion to the Special Committee that the Merger Price of US\$43.30 per share for the Company was fair. In that opinion, Morgan Stanley valued the Company's interest in *TuSimple* to be between US\$186 million (based on book value as at 30 June 2020) and US\$288 million (based on a US\$1.2 billion valuation of *TuSimple* as of September 2019)<sup>7</sup>.
30. On 23 December 2020, being the EGM Date and the Valuation Date, *TuSimple* filed a confidential draft S-1 registration statement with the US Securities and Exchange Commission (“SEC”), which referred to its intention to be listed on a US exchange. While this document was not public, *TuSimple*'s intention to be listed would necessarily have been known to, at least, *TuSimple* itself, as well as its advisors in relation to the intended listing (which included a Morgan Stanley entity<sup>8</sup>).
31. On 23 March 2021, just one day after the Merger Completion Date, *TuSimple* filed its public S-1 registration statement with the SEC. *TuSimple* then underwent the IPO on 15 April 2021 (*the*

---

<sup>5</sup> *Yilmaz 1 §12*

<sup>6</sup> *Hoskin 2 paras 26-29*

<sup>7</sup> *Hoskin 2 para 30*

<sup>88</sup> *Hoskin 2 para 32*

“*TuSimple IPO Date*”). The IPO was at a price of US\$40.00 per share which valued *TuSimple* at nearly US\$8.5 billion and valued the Company’s stake in *TuSimple* at US\$2.2 billion<sup>9</sup>.

32. The *TuSimple* IPO is therefore a significant price sensitive event in relation to the fair value of the Dissenters’ shares in the Company. The difference between the value of the Company’s stake in *TuSimple* at the IPO price, and the value assumed for the purposes of the fairness opinion, is approximately US\$2 billion. That, submitted Mr Dhillon KC, is a vast sum on any view and is all the more so on the facts of this case, where the value of the Company in its entirety at the merger price was US\$2.6 billion.
33. This significant price sensitive event was foreseeable as at the Valuation Date. This must be so because *TuSimple* filed its confidential S-1 registration statement (a 250-page long document) on that date. The *TuSimple* IPO was therefore, at the very least, “*at an early stage of fermentation*”, to follow the words used by CICA, as at that date.
34. Professor Yilmaz has confirmed that, in his view, the documents sought by the Dissenters are likely to be relevant to the determination of the fair value of the Company, and has stated in terms that he “*would be assisted by disclosure of such documents for the purposes of providing [his] expert opinion as to the fair value of the Dissenters’ shares in the Company as at the Valuation Date*”, including, in the case of documents relating to the *TuSimple* IPO, documents created up to the date of that IPO.”<sup>10</sup>

#### *The Company’s submissions in summary*

35. Mr Atherton KC submitted that the Dissenters’ application should be dismissed on the basis that it is opportunistic, abusive and lacking a good evidential base for any further discovery.
36. The increase in value of the Company’s stake in Weibo occurred and was known to the Dissenters before the Petition was presented (on 18 May 2021). Yet the extension sought relating to the period of time during which documents relevant to the determination of fair value were created relates to all documents as referred to in Appendix 3 of the Directions Order and which are in the Company’s possession, custody or power (not just Weibo related documents).
37. The *TuSimple* IPO likewise took place prior to the date of the presentation of the Petition and was known by the Dissenters to have occurred prior to that date. Yet the discovery relating to the period

---

<sup>9</sup> *Hoskin 2 paras 35-36*

<sup>10</sup> *Yilmaz 1 §16*

during which documents were created in relation to the investment in *TuSimple* is sought to be extended beyond the date of the EGM (23 December 2020) to 15 April 2021, being the *TuSimple* IPO Date. The Dissenters have been in possession of documents of direct relevance to the *TuSimple* IPO since before the Directions Order was made.

38. There is no need for the present application since documents relevant to the determination of fair value and which were created after the date of the EGM can be the legitimate subject of Information Requests made by the Expert Witness retained by the Dissenters and have already been the subject of such requests.
39. There is no legitimate basis for the extension of the Company's obligations as sought under paragraph 1 (b) of the Dissenters' Summons, (discovery of all relevant documents prepared or created in the period 5 years prior to the Completion Date (23 March 2021)) which is unprincipled and without any proper evidential foundation.
40. As was noted by the CICA, there was no appeal by the Dissenters against the relevant dates contained in the orders made in relation to discovery. As a consequence, there was no issue before the CICA that required determination in this regard and, importantly, the variation of the relevant date for discovery was not the subject of submission or argument on the part of the Dissenters or the Company.
41. The relief sought by the Dissenters goes beyond that which was intimated by the CICA, in the *obiter dicta* remarks of Birt JA. In particular the Dissenters' Summons does not purport to limit the discovery sought in paragraph 1 (a) to information concerned with the increase in the market value of the Weibo shares.
42. Although the CICA made reference to the possible need in certain cases to tailor discovery to the occurrence of a price sensitive event, the Dissenters have not identified any such event either in relation to the Weibo shares or the Company's investment in *TuSimple* or the relevant date of any such event. As regards the former, the Dissenters have simply identified that from after the date of the EGM the value of the shares of Weibo increased in value. As regards the latter, the Dissenters rely on the actual IPO (which took place on 15 April 2021) and that the creation of documents up to this date is the relevant date by reference to which the Company should be required to give discovery.
43. However, there is no explanation as to why it is said the IPO is the relevant price sensitive event, particularly when the IPO was formally announced a month earlier and its likely occurrence known of from around December 2020.

44. The comment made by Birt JA (to the effect that it seemed to him to be essential that the Directions Order should be varied so that the relevant period covered by the order should be extended to, say, the Completion Date in order to cover the period of the increase in the market value of the Weibo shares) was plainly *obiter dicta* and is not binding on this Court or on the parties before the Court. That Birt JA (and the CICA) were of the same view is apparent from: (i) the fact that specific reference was made to there being no appeal by the Dissenters against the orders made as to discovery and that therefore such matters were not before the CICA; (ii) the fact that the CICA did not make any order or give any direction in relation to discovery; and (iii) the fact that the CICA envisaged that an “early” application be made to the Judge at first instance to vary the Directions Order, making clear that any such variation was a matter for determination by the Court at first instance.
45. No argument as regards the scope of the Company’s discovery by reference to the *TuSimple* IPO and the date of 15 April 2021 was advanced by the Dissenters either at first instance or before the CICA. Moreover, the content of Appendix 3, in particular the terms of sub-paragraph r.i. was not the subject of any argument (either at first instance or in the CICA) save tangentially as regards the determination of the Valuation Date that was to be included in paragraph 8 of the Directions Order. It is illegitimate for this issue to be raised now.
46. Further as regards the *TuSimple* IPO, albeit this took place on 15 April 2021 and the announcement of the IPO was made on 23 March 2021 (the day after the Merger Completion Date), it is obvious from the evidence filed on behalf of the Dissenters that they have in their possession a large amount of information relevant to the *TuSimple* IPO and, in particular, the price at which the *TuSimple* shares were to be offered to the market.<sup>11</sup> A large part of the information which the Dissenters possess no doubt post-dates the EGM, and the provision of documents and information in the possession, custody or power of the Company that pre-dates the EGM is already provided for in the Directions Order.
47. The experts are free to make and have made Information Requests that relate to the production of information and documents that post-date the Valuation Date. There is therefore no necessity for any relief to be granted, whether in the terms sought by the Dissenters’ Summons or otherwise.
48. The Company also made arguments based on issue estoppel and abuse of process as follows. Before this Court, the Dissenters originally sought discovery from the Company of documents relevant to the determination of the fair value of the Dissenters’ shares that were created in the 5 years prior to their proposed valuation date, being the Merger Completion Date (i.e., 22 March 2021). This whole

---

<sup>11</sup> See *Hoskin 2 and Yilmaz 1*

argument was founded on the contention that the Merger Completion Date was the more appropriate valuation date (rather than the date of the EGM – 23 December 2020) because of the increase in the market price of the Weibo shares during the period between the date of the EGM and the Merger Completion Date.

49. At no time did the Dissenters, albeit advancing a case based upon the apparent critical importance of the value of the Weibo shares on the determination of the fair value of their shares in the Company, seek (in the alternative to the order for discovery that was ultimately made) an order that the Company (regardless of the valuation date fixed by the Court) be required to give discovery of documents relevant to the determination of the fair value of the Dissenters' shares as were created in the 5 years prior to the Merger Completion Date (i.e., 22 March 2021). That is the order that they now seek.<sup>12</sup>
50. They could have and should have sought such relief in order to cater for the possibility that they were unsuccessful in advancing a case that the valuation date should be the Merger Completion Date and not the date of the EGM. They failed to do so.
51. Although the Dissenters appealed against the fixing of the Valuation Date (as the date of the EGM) they did not appeal against the orders made as to the scope of the documentation said to be relevant to determination of the issue of fair value that was to be given by the Company.
52. It is too late for the Dissenters to raise this issue as to discovery now and, indeed, they are prohibited from doing so. The issue as regards the scope of the discovery to be given by the Company has already been determined against the Dissenters, in respect of which decision they did not appeal and cannot now seek to re-open.<sup>13</sup>
53. Even if it might be argued that the pursuit of the Dissenters' Summons is not something to which issue estoppel can apply, or not conduct susceptible to the application of the *Henderson v Henderson* principle, it can nevertheless properly be considered to represent conduct which is unduly oppressive and as such, should not be permitted to continue.
54. The Company also argued that the Dissenters' application constituted an application for specific discovery under GCR O.24 r.7. As such the burden is on the Dissenters to satisfy this Court that discovery is necessary either for disposing fairly of the cause or matter or for saving costs. The Company argued that on the evidence the Dissenters had not discharged that burden.

---

<sup>12</sup> By reference to the transcript of the CICA hearing Mr Dhillon KC was able to submit that the Dissenters had made some arguments as to the scope of disclosure by reference to the valuation date and events subsequent to it.

<sup>13</sup> See *para.8 and Appendix 3 of the Directions Order*

*Decision*

55. In the Court's view the Company's arguments based on issue estoppel and abuse of process are not persuasive. The Dissenters naturally took the, albeit *obiter dicta*, comments of the CICA as providing guidance as to the approach to price sensitive events and the approach to disclosure that a trial court should adopt. That can be viewed as a material change in circumstances having regard to the Dissenters' previous stance.
56. It is relevant that in deciding that there was no good reason to depart from the starting point of the EGM date, the CICA observed that if the increase in Weibo shares was wholly unforeseeable as at that date there was no unfairness to the Dissenters if they did not benefit from that price increase. On the other hand, if the "*seeds of the Weibo price increase were ascertainable*" as at that date, then valuation could take that into account to such extent as the court considers fair.<sup>14</sup>
57. Although the Dissenters may have known about the Weibo increase in share price and the *TuSimple* IPO that does not relieve the Company of its discovery obligations.
58. It is the case that, whilst not binding on this Court, the CICA's observations are clearly directed to guide the exercise of the Court's discretion and assessment of what is the fairest scope of discovery to be ordered.
59. In view of the CICA's observations, there is nothing abusive in the Dissenters applying to this Court to vary the Directions order. The application is not made at a stage in the proceedings which causes undue prejudice to the Company.
60. Properly characterised the Dissenters' application is for a variation of the Directions Order, not an application for specific discovery under GCR O.24 r.7. It is an application made pursuant to the 'liberty to apply' provision contained in the Directions Order.
61. As to the nature and scope of the Company's discovery obligations, the Court once again notes the fundamental importance of a company's disclosure obligations in s.238 cases<sup>15</sup>. That is the information bank from which the experts can perform their analyses and the Court can be assisted in its task at arriving at the fair value of the Dissenters' shares.
62. As an expert driven process, the Court relies heavily on the independent and objective expert opinions of specialist valuers. Valuation experts are in the best position to identify and request

---

<sup>14</sup> *CICA Judgment* § 90

<sup>15</sup> *CICA Judgment*, [87]; *2023 Judgment in these proceedings*, at [1]; *2022 Judgment* at [74]; and *FSD No 72 & 74 of 2022 (DDJ)*, *Unrep.*, 4 April 2023 ("*New Frontier Health I*") at [32]-[33]

relevant documents to their determination of fair value (which, as has been confirmed by numerous s 238 cases, includes documents created after the valuation date). They are best placed to determine what information they wish to rely on in support of their valuation methodologies. That autonomy should not be abused, and the Court will be alive to the arguments concerning the ‘tyranny of experts’ and the ‘weaponisation of discovery’<sup>16</sup>. It will be the Court that is the ultimate arbiter of the fair value, assisted by the experts, whose views it may accept or reject, partially or entirely.

63. Having regard to the evidence on this application, it is to be noted that Professor Yilmaz is the expert who is to testify at trial for the Dissenters. Mr MacLean is a valuer and forensic accountant instructed by the Company, but is not the Company’s appointed valuation expert for the trial of these proceedings.
64. Both valuation experts can assist the Court with the relevance of factual information to their assessment of the fair value of the Dissenters’ shares. Both Professor Yilmaz and Mr McLean agree an expert may consider some documents or information post-valuation date to be relevant for the purposes of preparing his/her own opinion of the fair value of the Dissenters’ shares in the Company as at the Valuation Date. They differ on what that should encompass in this case.
65. In the Court’s preliminary view both the Weibo and *Tusimple* transactions were foreseeable as at the Valuation Date. The Court agrees with the observations of CICA that significant price-sensitive events which occur after the Valuation Date, and which were foreseeable are relevant to valuation as at the Valuation Date.
66. Having regard to the expert evidence on this application, and in light of the CICA’s comments, the Court has come to the view that the Directions Order should be varied. It should be varied to the extent that the Weibo and *Tusimple* events are temporally covered so that the experts and the Court can be as well informed as possible about the causes of those events (as Birt JA emphasised). The experts will then be able to assist the Court on the effect, if any, of those events on the valuation process. The Court will then assess if, and if so how, the outcome of their views affects the fair value of the Dissenters’ shares.
67. The Directions Order should also, as a matter of fairness in the exercise to obtain all relevant data, be varied (in a modified form of the Dissenters’ Summons at paragraph (b.) as set out below in italics) such that the Company should give discovery of all additional documents prepared or created from the Valuation Date to the Completion Date, which *are related to price sensitive events that may have had an impact on the value of the company as at the Valuation Date* and are relevant

---

<sup>16</sup> *Qihoo [2017 (2) CILR 585] § 23*



to the determination of the fair value of the Dissenters' shares in the Petitioner as at the Valuation Date.

68. The Court does not accept Mr MacLean's evidence that this type of information is at best irrelevant, or at worst misleading in that it could well result in hindsight infecting the evaluation process.
69. On the contrary, the further disclosure as regards the significance of the increase in value of the shares in Weibo and when and why it occurred, is likely to assist the expert process and so the Court in arriving at the fair value of the Dissenters' shares at the Valuation Date.
70. It would appear from Hoskin 2 that the Dissenters already have a considerable amount of information and documentation that relates to the *TuSimple* IPO and which appears likely to be relevant to the assessment of the fair value of the Dissenters' shares as at the date of the EGM.
71. However, it is in the Court's view necessary for fairly dealing with the central issue in this case, namely the fair value of the Dissenters' shares, for the Company to provide the further disclosure ordered by the Court. That is so that the experts can review that material and explain to the Court how and, if so, to what extent the IPO of *TuSimple* in April 2021 is relevant to the assessment of the fair value of the Dissenters' shares in the Company as at the Valuation Date.
72. It follows, as the CICA recognised, that the determination of the Valuation Date is a substantive issue in relation, not only to the date at which fair value is to be assessed, but it is also in most cases relevant to the scope of the discovery which the Company should be required to give.
73. The Court acknowledges that the experts are also able to use the Information Request process to ask for further and better information having first obtained and reviewed the Company's disclosure<sup>17</sup>. However, they are not to be tasked with asking questions without the relevant disclosure<sup>18</sup> as is in effect suggested by Mr MacLean. It is well-established that the primary means by which documents are produced in s.238 proceedings is through discovery, with Information Requests operating as a useful follow up procedure.
74. Professor Yilmaz says that without further disclosure he would be unable to formulate Information Requests in anything more than the most general terms<sup>19</sup>. The Court agrees that in all the circumstances it would be unjust for the Company to be able to avoid disclosure of relevant post-

---

<sup>17</sup> *FGL Holdings (unrep. 18 December 2020)* §§18-20

<sup>18</sup> *MacLean 1 § 21* ("If the Financial Advisors are believed by the Experts to have prepared or recorded information after the EGM ... this material can be specified and requested by the Experts through the information request regime. "); and *MacLean 1 § 23* ("if the Special Committee are believed by the Experts to have prepared or considered information relevant to fair value, or to subsequent price movements in Weibo stock, this material can be specified and requested through the information request regime.")

<sup>19</sup> *Yilmaz 1 §§20-21*



Valuation Date material on the ground that Professor Yilmaz has not first established that such material exists.

75. The parties should provide a draft Order for approval which reflects the Court's decision.
76. If the parties cannot agree costs the Court will determine the matter on written submissions of no more than 5 pages in length.



---

**THE HON. MR. JUSTICE RAJ PARKER**  
**JUDGE OF THE GRAND COURT**