IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 235 OF 2017 (IKJ)

IN THE MATTER OF SECTION 238 OF THE COMPANIES LAW (2016 REVISION) AND IN THE MATTER OF NORD ANGLIA EDUCATION, INC

IN CHAMBERS

Appearances:	Mr Mac Imrie, Mr Malachi Sweetman and Mr James Eldridge of Maples and Calder on behalf of Nord Anglia Education, Inc ("**the Company**")
	Mr Jonathan Adkin QC and Andrew Jackson instructed by Appleby on behalf of the Appleby Dissenting Shareholders
	Mr Christopher Harlowe and Mr Rocco Cecere of Mourant Ozannes on behalf of the Mourant Dissenting Shareholders
	Mr Barry Isaacs QC and Hamid Khanbai instructed by Campbells on behalf of the Campbells Dissenting Shareholders
Before:	**The Hon. Justice Kawaley**
Heard:	**26 – 27 February 2018, on the Papers, 27 September 2018**
Date of Decision:	**9 October 2018**
Draft Judgment Circulated:	**9 October 2018**
Reasons Delivered:	**24 October 2018**

HEADNOTE

Summons for Directions - section 238 of the Companies Law Petition – costs of dissenter discovery application-whether application raised a discrete issue or whether costs should be in the cause-relevance of agreed costs position at hearing of Summons for Directions-conduct of litigation-duty of parties to act reasonably-distinction between level of scrutiny of litigants' conduct in freestanding interlocutory applications and general pre-trial directions applications-GCR Order 62 rules 4, 11

RULING ON COSTS OF DISSENTER DISCOVERY APPLICATION

Background

1. The background to the present costs application may best be described as a tale of two hearings. The first hearing was a two day affair with four parties (or groups of parties) each represented by leading counsel. That hearing disposed of the following issues as described in my Partial Ruling delivered on March 19, 2018 as follows:

> *"2.... The present Ruling seeks to resolve disputes relating to the following broadly defined topics:*
>
> *1)the scope of the Company's disclosure obligations;*
>
> *2)the management of the discovery and inspection process;*
>
> *3)whether there should be a process expert in addition to a valuation expert;*
>
> *4)miscellaneous other comparatively minor issues."*

2. The parties had been prepared to deal with the Company's application for Dissenter Discovery, which was addressed in written and oral argument, at the first hearing. In the event, this issue was adjourned for further argument, for the reasons explained in the same March 19, 2018 Ruling:

> *"3. The question of whether or not the Dissenters should be required to give discovery will be dealt with in a separate Ruling, as counsel for the Company and the Mourant Dissenting shareholders (the Campbells Dissenting shareholders having disagreed) agreed at the end of the hearing. Since reserving judgment I have received informal administrative indications suggesting that a decision of the Court of Appeal in a case called Re Qunar might well be handed down sometime this month. Subject to the proviso set out in paragraph 4 below, I accordingly direct that the parties be at liberty to submit supplementary skeleton arguments within 14 days of the sooner of (a) the Cayman Island Court of Appeal judgment in that case being received by local counsel, or (b) published on the Judicial Administration Department's website."*

3. The predominant consensus at the end of the first hearing on February 27, 2018, with the Campbells Dissenters alone expressly dissenting on this point, previously appeared to me to be that the pending Court of Appeal decision in *Re Qunar* would likely have a material impact on the way this Court decided the Dissenter Discovery issue, one way or another. Having regard to the fact that the Campbells Dissenters were assigned the task of advancing the Dissenters' joint position on the merits of the Dissenter discovery issue, and having further reviewed the Transcript, it would be more accurate to say that the other Dissenters did not expressly oppose my reserving judgment on the issue in their own right.

4. The Company positively encouraged the Court to defer deciding the Dissenter Discovery issue until the Court of Appeal ruled on the issue, early on the first day of that hearing[1]. Lord Grabiner QC for the Company in reply submitted that it was "*absolutely critical*" that I should "*wait and see*"[2]. I accepted this submission and rejected the opposing submission advanced by Mr Isaacs QC (on behalf of the Campbells Dissenters) that I should decide the point on the basis of the arguments advanced at the February 26-27 hearing. It is important to note that, in the Company's

[1] Transcript, Day 1, page 8, lines 9-18.
[2] Transcript, Day 2, page 191, line 12.

Written Submissions prepared shortly before the hearing (at paragraph 78), it was acknowledged that "*it is potentially wasteful of resources to argue this point before the Court of Appeal's decision in Qunar is released, and so one option is for this part of Nord's application for directions to be adjourned with liberty to revive it once the Court of Appeal decision is available*".

5. The second hearing took place on the papers and resulted in a Ruling delivered on June 1, 2018. In the introduction to that Ruling, I noted:

> "*2. On April 10, 2018, the Court of Appeal delivered its eagerly awaited judgment in Re Qunar Cayman Islands Ltd (CICA No. 24 of 2017). In short, the main holding was that dissenters in section 238 cases should ordinarily be required to give discovery, the longstanding contrary practice in this jurisdiction notwithstanding.*
>
> *3. On or about May 8, 2018, supplementary submissions were filed with the Court from the Company, the Mourant Dissenters and the Appleby Dissenters. The Campbells Dissenters elected not to lodge separate supplemental submissions and agreed with the submissions lodged on behalf of the Mourant Dissenters and the Appleby Dissenters.*"

6. I summarised how the issue of principle as to whether or not there should be Dissenter Discovery was decided by the Cayman Islands Court of Appeal in the following way:

7.

> "*13. In essence, the Court of Appeal found that the usual relevance-based principles of discovery apply to documents in the possession, custody or power of the company and dissenters alike. This Court is bound by those findings as counsel sensibly agreed. The approach the Court adopted to specific aspects of discovery, while fact-specific, does to some extent provide a helpful guide as to what may or not be appropriate in the typical case.*"

8. Not only was the *Qunar* appellate decision decisive on the crucial question of principle; the fact that it was decisive was conceded by the Dissenters. The only matters which were seriously contested for the purposes of the second hearing were fact-sensitive issues concerning the scope of the discovery the Dissenters should be required to give.

In resolving these issues I sought to follow whatever guidance was provided by the Court of Appeal on the scope of discovery.

9. On July 27, 2018 a contested hearing in relation to the Dissenters' desire to instruct a new Expert Witness was heard. In the course of that hearing, counsel pointed out that the issue of the costs of the Dissenter Discovery application was still outstanding. A draft order which had never been perfected contemplated a 21 day period after the order for submissions on costs to be filed. I expressed the "*strong provisional view*"[3] that costs should be in the cause, but indicated that written submissions on costs could be submitted if any party wished to seek a departure from what I understood to be the usual order in relation to discovery.

10. The Directions Order was not made until August 15, 2018 and was apparently sealed by the Court (and/or received by the Company) on or about September 6, 2018. It was agreed that submissions on costs should be filed within 21 days of the latter date. It is against this background that the present application falls to be determined and in light of the following preliminary observations:

    (a) the costs incurred in relation to the first oral hearing seem likely to be substantially more than the costs incurred in relation to the second hearing on the papers;

    (b) the Dissenter Discovery issue was argued at the first hearing as one of several issues arising on the Summons for Directions. It was only argued as a stand-alone issue at the second ancillary hearing on the papers;

    (c) it is a matter of pure speculation how the Dissenter Discovery issue would have been determined had I proceeded to decide the issue based on the initial arguments rather than opting to "wait and see" how the Court of Appeal decided *Re Qunar*;

[3] Transcript, page 74, lines 9-11.

(d) the ultimate practical result was that the Company clearly "won" the main 'should there be Dissenter Discovery?' issue;

(e) the costs of the Summons for Directions generally were ordered to be in the cause;

(f) my initial and largely instinctive provisional view, albeit expressed in the context of a hearing dealing primarily with other issues, was that costs should be in the cause following the same approach as was adopted in relation to other aspects of the Summons for Directions;

(g) the Company and the Dissenters are now[4] agreed that the relevant issue is a distinct one in relation to which costs should be dealt with separately from the general costs of the Summons for Directions. However, who should be entitled to be awarded their costs is in dispute.

The tacit agreement for the purposes of the present costs application that Dissenter Discovery costs should be treated as a discrete issue for costs purposes arises in a very odd way and invites the Court to dispose of the present application in a quite artificial way. Firstly, the new 'consensus' ignores the agreement up to the end of the first hearing that costs should be in the cause and offers no or no convincing reason for departing from this approach. Secondly, the Dissenters themselves rely (as regards the costs of the present costs application) on an offer to settle on the basis that all of the now disputed costs should be in the cause.

11. Against this background, I do not consider it would be proportionate for me to invite the parties to expend further costs on further written submissions to address the matters I consider to be obviously germane but which they have not only failed to address but also, bearing in mind their sophistication, clearly could have addressed if they wished to do so. My "*strong provisional view*" was designed to avoid the need for the present application altogether, so I see no need to expand the scope of it at this juncture. I am guided by the overriding objective set out in the Preamble to the Grand Court Rules which is designed to "*enable the Court to deal with every cause or matter in a just, expeditious and economical way*". Costs applications are particularly amenable to judges adopting a pragmatic efficiency-driven approach.

[4] Prior to submissions on costs, the Dissenters were willing to accept the Court's provisional view that these costs should be, in effect, "wrapped up" with costs incurred in relation to the Summonses for Directions generally.

12. Accordingly, dealing with the matter at far greater length than would ordinarily be required, I propose to:

(a) record my primary findings which (as will be seen below) are that there is no just cause for the parties to belatedly depart from their prior agreement that the relevant costs form an integral part of the Summons for Directions and should be ordered to be in the cause; and

(b) record my alternative findings in case my primary findings are held to be wrong.

The Company's submissions on costs

13. In the '*Company's Submissions on Costs of Dissenter Discovery*', it was submitted most broadly that "*the issue of whether the Dissenters were required to give disclosure was a distinct and discrete issue within the directions hearing, and within which the Company was successful*". The "distinct and discrete issue" limb of this submission was ultimately not in controversy, as noted above.

14. Addressing the factual position in relation to the first hearing, it is asserted that the Company was successful to the extent that it persuaded me to await the Court of Appeal's decision in *Re Qunar* and the Dissenters were unsuccessful in that I refused their invitation to immediately decline to order Dissenter Discovery.

15. Addressing the post-*Re Qunar* hearing on the papers and the Company's attempts to avoid the need for such hearing through agreement, it is conceded that "*arguments centred on the scope of disclosure*" (paragraph 11). In terms of who succeeded on the issues in dispute, it was submitted that:

> "*13. Having considered the written submissions, the Court delivered its Ruling in respect of Dissenter Discovery on 1 June 2018. On each of the disputed categories of documents, the Company's submissions were broadly accepted....*
>
> *14.The Company's position is therefore that, notwithstanding the Dissenters' opposition to the orders it had sought for Dissenter disclosure after the decision of the Court of Appeal in Re Qunar, orders were granted substantially in terms of those sought by the Company and it was therefore the successful party in the application...*"

16. The legal principles invoked were extracts from the following provisions of Order 62 rule 4 of the Grand Court Rules ("GCR") (and upon which the Appleby Dissenters also relied):

(a) **rule 4(2)**: "*The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and just manner, unless otherwise ordered by the Court*";

(b) **rule 4(5)**: "*If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case, some other order should be made as to the whole or any part of the costs.*"

17. It was then submitted:

> "*20.1 The Company is the successful party in respect of Dissenter Discovery;*
>
> *20.2 The Company conducted the proceeding in relation to Dissenter Discovery in an economical, expeditious and just manner;*[5]
>
> *20.3 The "event" (for the purposes of costs) is that the Court ordered the Dissenters to provide discovery, an order which they had opposed the making of;*
>
> *20.4 There are no circumstances justifying making any other order in relation to the costs of Dissenter Discovery.*"

18. The Company finally took issue with various points made by Mourant in their letter dated September 17, 2018, arguing:

(a) it was wrong to contend that *Re Qunar* changed the state of the law;

(b) it was wrong to suggest that the Company should have deferred applying for Dissenter Discovery until after the Court of Appeal decision. The

[5] It was noted that the Dissenters adopted different positions so that the Company had to respond to three sets of written and oral submissions. This reflected the position in relation to the first, oral hearing. Only two sets of written submissions were filed in relation to the second paper hearing, by Mourant and Appleby, with which the Campbells Dissenters signified their concurrence.

Dissenters were parties to the appeal and in a better position to know when the judgment might be delivered yet they did not suggest deferring the Dissenter Discovery issue;

(c) the Dissenters' positions on the scope of Dissenter Discovery were mostly rejected by the Court;

(d) Mourant's suggestion that if the Company did not agree that costs should be in the cause the Dissenters should be entitled to costs after the date of the firm's letter was described as "*an extremely odd position to take*" (paragraph 26)[6].

The Dissenters' Submissions on Costs

19. The Appleby Dissenters filed the only written submissions on costs on behalf of all Dissenters. Their broad position was opened in their '*Written Submissions of the Appleby Dissenters on the Costs of the Dissenter Discovery Issue*' as follows:

> "*4. For pragmatic reasons, and in light of the Court's indication as mentioned above, the Dissenters made an open offer to the Company, by Mourant's letter of 17 September 2018, to settle the matter on the basis of an order that the costs of the Dissenter Discovery issue be costs in the case. That offer was rejected by the Company. The Appleby Dissenters (and, it is understood, all Dissenters) now therefore revert to their primary position, for the reasons submitted below, that the Dissenters were successful on the preponderance of the Dissenter Discovery issues which the Court was eventually required to resolve, and that the appropriate costs order in respect of the Dissenter Discovery issue is that the Dissenters should have their costs of that issue from the Company in any event.*
>
> *5. The Dissenters also invite the Court, if it declines to award the Company those costs, to award them their costs of and occasioned by this further argument over costs on the indemnity basis, given that the Company has stubbornly rejected their offer as set out above.*"

20. This is a rather convoluted but nonetheless coherent submission which has the following elements to it:

(a) the Dissenters were for pragmatic reasons willing to settle the costs on the basis of the Court's provisional view;

[6] The approach to indemnity costs was illustrated by placing the following authorities before the Court: *Bennett-v-A-G* [2019] (1) CILR 478; *Al Sadik-v-Investcorp Bank BSG and others* [2012] (2) CILR 33; *Ahab-v-Saad* [2012] (2) CILR 1.

(b) since the Company rejected that offer, the Dissenters have decided to seek their costs of the supplementary scope of discovery application in any event since they prevailed on the preponderance of the issues the Court was actually required to decide;

(c) if the Company is not awarded its costs (implicitly, if the Court either awards the Dissenters their costs or orders that costs shall be in the cause), the Dissenters should be awarded the costs of the present costs application on the indemnity basis.

21. The initial position of the Dissenters, unsurprisingly as the threshold Dissenter Discovery issue was clearly resolved in the Company's favour, was to embrace my provisional view on costs without any elaboration. This view was tacitly based on the premise that the Dissenter Discovery issue should not be treated for costs purposes as a discrete issue, separate and apart from the other limbs of the Summons for Directions. Their fall-back position, once the Company declined to agree to their proposal that my provisional view should be accepted, was that there should be a costs Order in their favour as to Dissenter Discovery costs generally and as regards the costs of the costs application on the indemnity basis. At first blush the proposition that they should have their costs of the Dissenter Discovery application appeared a preposterous submission. However, on closer analysis, the submission was a more nuanced one and addressed the costs of the first and second hearings on different grounds.

22. In addressing the state of the law at the first hearing, it was argued that there was "*no realistic prospect of the Company being awarded an order for the discovery it sought from the Dissenters on the basis of the law as it stood at the time of the Directions Hearing*" (paragraph 10). Reliance was placed on two previous decisions which were said to support the proposition that Dissenter Discovery would not ordinarily be ordered in section 238 cases: *Re Homeinns Hotel Group* (unrep. 12 August 2016, Mangatal J) and *Re Qunar* (unrep. 20 July 2017, Parker J).

23. In addressing the Company's position at the first hearing, the Appleby Dissenters pointed out that the Company caused the Dissenters to file evidence and submissions in response to the Company's application for Dissenter Discovery and only in its oral submissions invited the Court to consider deferring determination of the issue. The main costs consequence was said to be as follows:

> "*15. In the event, however, no ... determination was made on the principal dispute between the parties at that stage, viz. whether the Dissenters ought to be ordered to give discovery, in respect of which the vast majority of the costs of dealing with the Dissenter Discovery issue were plainly incurred.*"

24. It was further argued that once the issue of whether there should in principle be discovery was resolved by the Court of Appeal in *Re Qunar*, the arguments advanced at the first hearing ceased to have any real relevance. As regards the four main scope of discovery controversies, it was submitted that I either accepted the Dissenters' position

altogether (trading history), or to some extent (decision to purchase, supporting models, and highly sensitive documents ("HSD")). Although I extended the temporal scope of the period covered by the obligation to disclose the Dissenters' internal and external analyses to some extent on July 27, 2018 (at the Company's request), it was noted that I extended the period by only 4 months rather than by the extra 4 years sought by the Company. This issue could, with more pragmatism on the Company's part, have been compromised.

25. The Appleby Dissenters sought their costs of the first hearing principally on the grounds that either (a) they would have won had this Court ruled, (b) the issue was not in any event determined by this Court (so the costs were wasted) and/or (c) the Company had acted unreasonably in causing the costs to be incurred. The costs of the second hearing on the papers were sought on the grounds that the Dissenters had achieved substantial success.

26. Finally, the costs of the present costs application were primarily sought on the following basis:

> "28. And GCR O.22, r.14(1) provides that:
>
> '*A party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be "without prejudice save as to costs" and which relates to any issue in the proceedings*'.
>
> *29. The offer which Mourant communicated (on behalf of the Dissenters) to the Company on 17 September 2018 to settle the issue regarding the Dissenter Discovery costs by accepting an order that they be costs in the cause was in the nature of a settlement offer which the Court should properly take into account when making its order as to the costs of and occasioned by this further argument. If the Court awards the costs of the Dissenter Discovery issue to the Dissenters or decides that they should be costs in the cause, it is submitted that the Court should impose the usual consequence of the Company having rejected the Dissenters' offer and require it to pay the Dissenters their costs of and occasioned by this further argument from 17 September 2018 on the indemnity basis, to be taxed if not agreed.*" [Emphasis added]

27. No authority was cited in support of the proposition that the "*usual consequence*" of a party losing an application after having unreasonably refused to accept a settlement offer was that they should be required to pay the costs of the application on the indemnity basis.

The main issues relevant to costs

28. In light of the above opposing submissions, I find that the main issues which are relevant to the determination of the present application are the following:

    (a) should the Dissenter Discovery issue be treated for costs purposes as a discrete issue or as an integral part of the Summons for Directions and if not what Order should be made? alternatively (if the issue is a discrete one)

    (b) which side (if any) achieved substantial success in relation to the first hearing?

    (c) which side (if any) achieved substantial success in relation to the second hearing? and

    (d) depending on how issues (a)-(c) are resolved, what award should be made in relation to the costs of the present application?

Findings: should the Dissenter Discovery issue be treated as a discrete issue or as an integral part of the Summons for Directions?

What principles inform deciding whether the Dissenter Discovery costs should be regarded as having been incurred in relation to a discrete issue?

29. The Company's assertion that the Dissenter Discovery issue should, for costs purposes, be treated as a discrete issue was not directly challenged, so the validity of the assertion was not subjected to critical scrutiny by way of opposing argument. Nor indeed was any legal test proposed for how the Court should decide whether or not the relevant costs should be regarded as properly allocated to the general Summons for Directions 'pot' or as attributable to a freestanding 'application' within the main application. The assertion was advanced as if it was a self-evident one.

30. In my judgment it is still incumbent upon me to test the validity of the 'agreed' discrete issue position on its merits. After all, I expressed the "*strong provisional view*" on July 27, 2018 that all costs incurred in relation to the Summons for Directions should be dealt with on the same basis. This, in part at least, prompted the Dissenters to offer to settle the costs on this basis, and their own formal application for their own costs appears to me to be in substance a tactical forensic position. What principles inform the question of whether one aspect of the same originating or interlocutory process should be dealt with as a discrete issue for costs purposes? In my judgment the same umbrella principles the parties agreed should apply are engaged. Order 62 rule 4 crucially provides:

"(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and just manner, unless otherwise ordered by the Court."

31. Thus the 'costs follow the event' principle is the governing principle of the costs regime, but it is subject to (a) a requirement that the successful party has pursued the proceedings "*in an economical, expeditious and just manner*", and (b) the Court's discretion to make some other order. The same rule provides examples of how broad that judicial discretion may be. Thus rule 4(7) provides that the discretion under Order 62 rule may be exercised by ordering a party to pay, most pertinently, "*(f) costs relating only to a distinct part of the proceedings*". At the outset it is important to recognise that ordering any costs to be 'in the cause' is an expression of the 'costs follow the event' principle, not a departure from it, in that only the overall winner will be able to recover those costs. Awarding costs in any event in relation to a discrete issue applies the predominant rule to a distinct part of the hearing, but this is without regard to overall success.

32. Costs orders in relation to distinct issues are almost invariably made in circumstances where an interlocutory application has been pursued as a freestanding application and the parties and the Court are consciously aware that the costs of that application are likely to be dealt with on a distinct basis. The predominant practice is that the costs of a Summons for Directions are generally ordered to be in the cause. Not only is this consistent with the 'costs follow the event' principle, because only the successful party will recover the costs. It also reflects the character of the Summons for Directions, conceptually at least, as an essentially neutral and necessary case management mechanism aimed at advancing the proceeding to trial for the mutual benefit of all parties. General discovery orders are typically made on a Summons for Directions. However, specific discovery applications would generally be viewed as freestanding applications in relation to which, if contested, a distinct costs order would be made.

33. In short, there is in my judgment a strong starting assumption that all costs arising in relation to the Petitioner's main Summons for Directions will be regarded as arising in the Petition or cause and will be subject to a commensurate costs order. Whether an issue should be treated as a distinct one for costs purposes turns on a fact-sensitive inquiry which does not lose sight of the central goal of the costs regime, as articulated in Order 62 rule 4(2). The question of whether the Dissenter Discovery issue in the present case should be dealt with as a distinct issue for costs purposes can best be explored through two different lenses:

    (a) analysing how the application for Dissenter Discovery was formally made; and

(b) analysing how the application was actually argued and disposed of.

How the Dissenter Discovery application was formulated and argued

34. The Summons for Directions was issued identifying the relief sought in outline terms with the parties thereafter exchanging competing, more detailed draft Orders. The Dissenters' draft Order produced for the purposes of the hearing of the Summons for Directions, it bears noting at the outset, envisaged "*costs in the cause*" (paragraph 24). However the main focus is the Company's own position as the party expressly seeking Dissenter Discovery. The Company's Summons for Directions itself sought the following directions:

> "*1.The manner in which evidence is to be given.*
>
> *2. Directions as to discovery and inspection of documents.*
>
> *3. Directions as to permission to adduce expert evidence, the service of expert reports, and meetings between experts.*
>
> *4.Such further or other directions as the Court may think fit.*
>
> *5. That the costs of the application shall be costs in the Petition.*" [Emphasis added]

35. The Company therefore not only formally sought directions in relation to discovery generally as one generic category of relief and formally applied for the costs of all directions to be "*costs in the Petition*", or costs in the cause. In addition, the Petitioner's Draft Order filed in court on or about February 21, 2018 also anticipated mutual discovery by the Company and the Dissenters and dealt with discovery in an holistic manner. For example, the obligation for all parties to upload documents was set out in consecutive sub-paragraphs of draft paragraph 7. The Order also provided as follows:

> "*14. In relation to the documents which are to be disclosed pursuant to this Order, the Company and each of the Dissenters shall on or before the date for compliance with paragraph 7 above, and from time to time thereafter as may be necessary, file and serve on the other party a list of documents complying with Order 24, rule 5 of the Grand Court Rules ("**GCRs**")....*
>
> *32. Costs in the cause, subject to paragraph 33 below.*
>
> *33. The Dissenters shall pay 50% of the cost of the recording and transcription of the hearing of the Company's Summons for Directions, the CMC and the hearing of the Company's Petition.*" [Emphasis added]

36. The Company's Written Submissions also provided no hint that the Company considered that Dissenter Discovery was a discrete issue for costs purposes. In the introductory section of those Submissions, it was noted (in paragraph 7.3) that:

> "*Parts D to J address the various substantive differences between the parties in the competing proposals. In each part, we seek to identify the substantive difference in approach between the Company and the Dissenters, and explain why the Company's approach is to be preferred.*"

37. Company Discovery and Dissenter Discovery were listed as separate topics, but so were six other topics which were treated for costs purposes as falling within the same costs 'pot'. The Submissions exhibited the Company's Draft Order proposing that the costs of the Summons overall should be "*costs in the cause*". A similar proposal was set out in the Dissenters' draft Order.

The costs up to and including the first hearing

38. In my judgment, absent some express indication that the Company wished to change its position, the Dissenters and the Court were entitled to proceed at and after the first hearing on the assumption that (1) all discovery issues would be dealt with as a single composite issue, and that (2) the Company accepted that it was appropriate for the costs of all issues identified in the Summons for Directions to be "*costs in the Petition*" or (as formulated in its draft Order) "*costs in the cause*". An important, usually tacit, element of the way in which civil litigation is subjected to the 'discipline of costs' is that opposing parties have a reasonable apprehension of the basis on which costs are likely to be dealt with at the end of the day. Where a party sets out his stall on the explicit basis that he is seeking costs in the cause, he cannot unilaterally at the end of the application decide that costs should follow the event. Nor should the Court without good cause merely 'rubber-stamp' an agreed retrospective change of a prior costs agreement.

39. As far the costs up to the end of the first hearing are concerned, I find unequivocally that it is not open to the Company to now contend that those costs should be dealt with as a discrete issue. The position thereafter is at first blush somewhat less clear-cut, because by the time the second hearing took place, the Court had made a case management decision to deal with the Dissenter Costs issue by way of a further hearing and discrete supplementary written submissions. Nevertheless, closer scrutiny leads to the same conclusion.

The costs of the second hearing

40. The adjournment of the Dissenter Discovery issue to be dealt with in light of the *Re Qunar* Court of Appeal judgment did not involve any conscious attention by the Court

or counsel to the implications as regards costs. On the face of it, one aspect of a composite prayer in the Summons for Directions in relation to discovery was simply being adjourned part-heard on the following basis.

41. At the end of the main hearing, I reserved judgment on all issues but signified my intention of dealing with all other issues before Dissenter Discovery. All parties agreed that if I decided to defer deciding the latter question, it was desirable that other, less contentious matters should be resolved sooner so that the timetable in those other respects could start to run. I stated:

> "*I'll give my decision as soon as possible decision on the case management issues and the dissenter discovery issue later.*"

42. In the Partial Ruling of March 6, 2018, I further directed:

> "*3...Since reserving judgment I have received informal administrative indications suggesting that a decision of the Court of Appeal in a case called Re Qunar might well be handed down sometime this month. Subject to the proviso set out in paragraph 4 below, I accordingly direct that the parties be at liberty to submit supplementary skeleton arguments within 14 days of the sooner of (a) the Cayman Island Court of Appeal judgment in that case being received by local counsel, or (b) published on the Judicial Administration Department's website.*
>
> *4.In the event that the Court of Appeal judgment in Re Qunar is not published or received by counsel by close of business on March 30, 2018, and there is no indication that its delivery is imminent, I will proceed to deliver my Ruling on this issue (unless all parties agree that my Ruling should be further delayed).*"

43. It might be said that all parties agreed on February 27, 2018, therefore, that the Dissenter Discovery issue should thereafter be dealt with as discrete issue, both practically and in costs terms as well. To my mind that is not an easy inference to draw. The following factors point more in favour to the formal "*costs in the cause*" consensus (as reflected in the competing draft Orders and confirmed orally by Mr Boulton QC[7]) position being maintained rather than being altered:

[7] Transcript, Day 1, page 157 lines 2-8.

(a) the main point of principle had been fully argued in the course of the main hearing of the Summons for Directions at which it was expressly agreed that costs should be in the cause;

(b) if I had declined to "*wait and see*" and decided the Dissenter Discovery Issue before the Court of Appeal judgment, there would have been no basis for asking for the costs of the issue to be dealt with separately on a costs follow the event basis;

(c) it was or ought to have been expected that, if I did not adjourn to await the Court of Appeal decision in *Re Qunar*, further argument would have been required in any event on the scope of discovery issue if Dissenter Discovery was ordered, because that essentially consequential issue had not fully been canvassed in oral argument. It would have been odd for either side, before the practical scope of discovery issue had been argued, to contend that the consensus that all costs of the Summons should be in the cause had lapsed merely because that sub-issue had been dealt with by way of a separate hearing;

(d) the appropriate time for any party to contend that an express agreement on costs should be modified in respect of a particular part of an application is before that part of the application has been heard, not after. Putting technical arguments such as waiver aside, it is inconsistent with the letter and spirit of the overriding costs objective that litigation should be conducted in a "*just manner*" (Order 62 rule 4(2)) to seek to move the costs goalposts after costs have been incurred.

44. Not only did the Company not raise the question of modifying the 'costs in the cause' consensus in the context of proposing a supplementary hearing, an omission for which it can easily be forgiven. It had a further and far more appropriate opportunity to raise the 'costs should follow the event' flag. After the Court of Appeal judgment was handed down on April 10, 2018, it was clear that (a) the Company had effectively won the point and that (b) a further hearing would indeed be necessary on the scope of Dissenter Discovery. In initially preparing for that hearing, the Company could have indicated that it regarded the supplementary hearing as a discrete hearing for costs purposes to which the prior costs consensus would not apply. That suggestion would, of course, have been easier to make as a bare assertion than to substantiate on cogent grounds.

45. Be that as it may, when Maples opened the supplementary hearing exchanges with a forcefully expressed letter on April 12, 2018 (which invited the Dissenters to consent to an Order instead of filing supplementary submissions), no express reference was made to costs. Instead, somewhat obliquely, the Company's attorneys warned (page 2 line 1):

> *"In the event that your clients decline to agree to make discovery on this basis, our client will rely on that refusal in any further submissions which are required to be made."*

46. Mourant responded a week later making it clear that, subject to a reservation of rights in the event of an Appeal by the *Qunar* Dissenters to the Privy Council, the only subsisting dispute was about the scope of discovery. The following day, April 20, 2018, Appleby wrote supporting the Mourant position. In my judgment the Company had not yet signified in any way which was easily discernible (without the benefit of hindsight) that it was seeking to depart from the agreed position that all costs of the Summons would be in the cause. Accordingly, the Dissenters prepared their supplementary submissions with only a hint that their refusal to agree to the scope of discovery sought might be visited with adverse costs consequences. (There was, I might add, no hint at all that any attempt would be made to impose any costs penalties with retrospective effect).

47. The position was made somewhat clearer with the filing of the '*Company's Supplementary Submissions on the Issue of Dissenter Discovery*' dated May 8, 2018. Those Supplementary Submissions attached a draft freestanding Dissenter Discovery Order which included the following proposed costs award:

> *"3. Costs of the Summons, to the extent referable to the Company's application for discovery from the Dissenters, be paid by the Dissenters on the standard basis, to be taxed if not agreed."*

48. The Company was for the first time proposing that Dissenter Discovery costs should be dealt with as a separate item of costs arising under the Summons for Directions. I have already ruled above that it was not open to the Company to seek to retrospectively alter the previously agreed costs position in relation to costs previously incurred up to the end of the two day oral hearing of the Summonses for Directions. I further find that it was also too late for the Company to contend that the balance of the Dissenter Discovery issues should, as a matter of general principle, be regarded as a distinct and separate issue for costs purposes so that costs should follow the event.

49. However, this is not what the Company actually contended on May 8, 2018. Rather, it was contended through the draft Order (without any supporting argument) that all costs relating to Dissenter Discovery should be borne by the Dissenters. The argument was, it seems to me, again advanced very obliquely, almost as if it was subliminally hoped the point might not be immediately noticed and shot down before it got off the ground. A quick word-search of the pdf version of the Supplementary Submissions reveals that the word "costs" appears once in the document, and that is in the draft Order. One has to scour the Submissions to find material which might have been intended to support the new dispensation as to costs which is proposed in paragraph 3 of the draft Order. Reading the Supplementary Submissions in a generous and purposive manner together with the April 12, 2018 Maples letter, it is possible to elicit the following central assertion. The Dissenters ought to have agreed to the Order proposed by Maples on

April 12, 2018 because there was no valid legal basis for refusing to do so. They had acted unreasonably since then in opposing the Company's application and should be punished in costs.

50. The clearest expression of this argument appears in the following single sentence in the Supplementary Submissions:

> "*6. It is regrettable that the Dissenters have not simply acceded to the Company's application for disclosure in the light of the clear decision of the Court of Appeal….*"

51. This is, quite obviously, far removed from suggesting, as the Company now submits after the 'event', that the Dissenter Discovery issue is a discrete issue which should be subject to the usual 'costs follow the event' principle. Obliquely expressed or not, the proposition that unreasonable conduct in respect of the supplementary hearing should be punished in costs was in all the circumstances an entirely coherent submission. Unreasonably opposing an obviously valid sub-application within the main application would indeed afford good grounds for departing from the previous agreement that all costs should be in the cause (or in the Petition), as regards the costs of that sub-application.

52. The discrete issue argument was seemingly first unambiguously advanced through correspondence and in Court on July 27, 2018. According to Maples' September 6, 2018 letter (at page 2):

> "*As previously indicated to your clients and to the Court on 27 July 2018, the Company believes it was the successful party on this discrete part of the application and intends applying for its costs. The direction sought was initially opposed by the Dissenters in its entirety and then, after the ruling from the Court of Appeal in Qunar, was opposed on more limited grounds. The learned judge, however, found in favour of the Company's position. We therefore invite the Dissenters to agree that the Company be awarded its costs of the Summons for Directions* [in] *respect of Dissenter Discovery on the standard basis, to be taxed if not agreed.*"

53. I find that it was not fairly open to the Company after the supplementary hearing had taken place to contend for the first time that that hearing (far less the main hearing) should fall outside the ambit of the prior costs in the cause agreement and be subjected to the usual costs follow the event rule. The most the Company could justly contend for was that, as was obliquely warned in the Maples April 12, 2018 letter and its Supplementary Submissions, the pre-existing costs dispensation should be displaced because the Dissenters had unreasonably contested the scope of discovery dispute.

54. At the end of the day, the Company did not have the temerity to contend that the Dissenters acted unreasonably in refusing to agree to an Order in terms of that proposed by the Company on April 12, 2018. Because at the end of the second hearing, the Company did not obtain such an Order. I resolved the disputes as follows:

(a) **trading history**: in substance the Company's form of Order was approved, but some wording proposed by Appleby was preferred (the need for a verified schedule was rejected);

(b) **documents relating to the decision to purchase**: the dispute about what should be disclosed was in substance resolved in favour of the Company, but on somewhat modified terms;

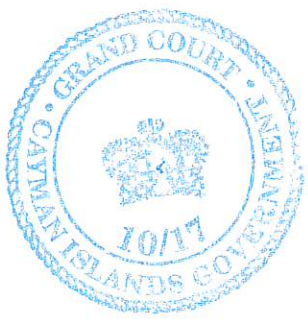
(c) **dissenters' internal and external analyses**: the Dissenters opposed any discovery of this category and the Company succeeded in in obtaining discovery. However, I excluded material over which the dissenters asserted proprietary rights and imposed temporal limits which were substantially less than originally sought by the Company;

(d) **HSD protection**: I refused the Dissenters' application for HSD protection on evidential grounds, but partly in light of my accommodating overlapping concerns under issue (c). They also were granted liberty to apply with further evidence.

55. There is no proper basis upon which it can be said that the Dissenters should be punished in costs because they acted unreasonably in refusing to consent to the Order proposed by the Company before the second hearing. It is unsurprising that this costs argument was discreetly dropped after my Partial Ruling on Dissenter Discovery was made on May 28 and delivered on June 1, 2018.

Summary of findings: the Dissenter Discovery issue was not a discrete issue for costs purposes

56. I confirm the "*strong provisional view*" which I expressed orally on July 27, 2018 that the costs of the Dissenter Discovery issue should be treated as an integral part of the costs of the Summons for Directions generally and that the appropriate Order was costs in the cause. It was expressly agreed that this was the position in the course of the first hearing and the Company first unambiguously suggested that the issue should be treated as a discrete one on or about July 27, 2018 (and in any event after the Partial Ruling on Dissenter Discovery). This was too late to alter the agreed treatment of these costs in relation to both the first and second hearings. From a costs perspective, the fact that the Dissenter Discovery issue ended up being finally determined outside the main hearing of the Summons for Directions (and separately from Company Discovery) was entirely



fortuitous. It did not change the character of the issue as simply one of several issues which was sought to be addressed through that Summons.

57. My primary findings, most unusually, do not resolve the issues directly addressed in the parties' submissions. They not only confirm a provisional view I had expressed, admittedly without any articulated reasoning, but more importantly adopt the basic position or result contended for in correspondence by the Dissenters through the Mourant letter dated September 17, 2018. More unusually still, but not inconsistent with the all too often pugnacious approach to these proceedings on both sides, the Dissenters only very belatedly formally advanced the unlikely argument that they had won the second hearing and should be granted their costs.

58. In case I may be wrong in deciding the case on a basis which neither side has expressly contended for (save the Dissenters for the limited purposes of the costs of the present application), I will set out below the alternative findings I would have made had I been required to find that the Dissenter Discovery issue was a discrete one for costs purposes, contrary to my primary findings which I have set out above. I will then deal summarily with the Dissenters' cross-application for costs and, more fully, the costs of the present costs application.

Alternative Findings: did the first hearing (and the costs incurred in relation thereto) generate a costs qualifying "result" in favour of the Company or the Dissenters?

59. In my judgment it is impossible to fairly construe the first hearing in isolation from the period immediately preceding the second hearing as generating or culminating in an adjudication of the Dissenter Discovery issue in favour of one side or the other. The respective arguments on this issue fall to be analysed according to their terms.

60. The Company only dared to suggest it achieved success at the initial hearing to the extent that it persuaded the Court at the hearing in oral argument to postpone the decision until after the Court of Appeal had decided the issue. The underlying premise for the postponement argument was that the appellate decision in *Re Qunar* was likely to have a decisive impact on the way this Court resolved the issue. The soundness of this thesis was confirmed when the Dissenters conceded that Dissenter Discovery should take place after the Court of Appeal ruled that the starting assumption should be as a matter of legal principle that all parties to civil litigation should give discovery. In effect, the issue which formed the centre of argument on Dissenter Discovery at the first hearing was not decided by me on the basis of those arguments. It was, in effect, decided by the Court of Appeal in a separate and unrelated case.

61. The Company is nonetheless correct to contend that the point was ultimately resolved in its favour. The Dissenters did elect to be bound by the Court of Appeal's decision (although they had little real option of doing anything else). But the costs analysis necessarily entails a practical and technical analysis of whether the costs claimed were incurred in achieving the result in the receiving party's favour. Or, to translate this factual enquiry into legal terms, the starting assumption being that costs should follow

the event, it is necessary to determine whether "*it appears to the Court that in the circumstances of the case, some other order should be made as to the whole or any part of the costs*" (Order 62 rule 4(5)). A closely related rule in this regard is Order 62 rule 11(2)which provides:

> "*(2) Where it appears to the Court in any proceedings that anything has been done or that any omission has been made improperly, unreasonably or negligently by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party.*"

62. The Appleby Dissenters are in my judgment clearly also right to point out that the issue was not formally adjudicated by this Court, but that is not by itself enough to defeat the Company's costs claim. The Company won the point, by whatever means, and *prima facie* (assuming for present purposes that Dissenter Discovery costs should be dealt with as a discrete issue) those costs would follow the event. The real controversy centres on this question: are there grounds for contending that the Company' costs should be disallowed? The relevant legal question is whether something unreasonable has been done by the Company to displace the starting assumption that the costs in relation to an application which it has won should follow the event.

63. In the somewhat unusual factual matrix of the present case, the critical factual inquiry is whether it was unreasonable for the Company to cause the parties to prepare for and argue the Dissenter Discovery issue only to invite the Court to adjourn the hearing because the issue would likely be resolved by a pending Court of Appeal decision. This question falls to be answered bearing in mind what both sides are agreed is the governing costs principle:

> "*The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and just manner, unless otherwise ordered by the Court*" (Order 62 rule 4(2)).

64. The critical submission advanced by the Dissenters in this regard was the following:

> "*25.2. Moreover, as the Company acknowledged might transpire in its written submissions for the Directions Hearing, it was wasteful for the Dissenter Discovery issue to have been addressed by substantial expert evidence and fully ventilated in detailed written and oral submissions prior to the delivery of the Qunar appeal judgment, which ultimately rendered all such efforts of little assistance to the Court when it came to rule upon the scope of the Dissenter*

Discovery Order in due course. This was necessitated by the position adopted by the Company, and the Dissenters should have their costs of responding to the application as they then did. In any event, for the same reason, it was neither economical nor expeditious for the Company to have taken that approach, and it would be wrong to award it such costs in the circumstances."

65. The Company's Written Submissions filed in advance of the February 26-27, 2018 Summons for Directions hearing do support a potential finding that that the Company was aware of such a wasted costs risk but insisted on ploughing ahead with its application anyway. The Company submitted:

> "*64 Parker J's decision in Re Qunar is on appeal. That appeal was heard on 13 November 2017, and the Court of Appeal's decision is reserved. A number of the Dissenters (and their attorneys) in this case are or act for respondents to that appeal, but Maples and Calder is not involved. The Dissenters have refused the Company's request for a copy of the skeletons filed in the appeal (which was made in an effort to ensure that this Court was fully appraised of the submissions made in that appeal, considering its direct relevance to this application), and have also resisted the Company's attempts to obtain those documents from the CICA itself. The Court of Appeal has also declined Maples and Calder's request to review the Court of Appeal submissions or any transcript. The Company has also not been able to determine the likely timing of the CICA's decision. At the time of writing, it seems unlikely this Court will have the benefit of the CICA's decision prior to the hearing of this matter. It is hoped that the relevant Dissenters will provide more assistance to this Court than they have to the Company on this topic. Specifically, it is expected that if the Dissenters who were involved in the Qunar case wish to rely on arguments or comments made in that case, they will share the relevant materials with the Company's attorneys in good time before the directions hearing so that the Court can have the benefit of full argument on the point....*
>
> *78 As explained above in paragraphs 63 - 64, the question of disclosure of this type of material was specifically dealt with in the Qunar case and appeal. When dealing with a similar application in Re Kongzhong Corporation (Unreported, FSD 112 of 2017, 2 February 2018), Parker J concluded that 'Of course, if the appeal in Qunar is successful... it is open for the company to reapply for disclosure in the terms sought. In the circumstances, it is potentially wasteful of resources to argue this point before the Court of Appeal's decision in Qunar is released, and so one option is for this part of Nord's application for directions to be adjourned with liberty to revive it once the Court of Appeal decision is available.*" [Emphasis added]

The Summons for Directions was issued on November 7, 2017, roughly a week before the *Re Qunar* appeal was heard by the Court of Appeal on November 13, 2017. The expert Affidavit of Daniel Ryan in support of the Company's application for Dissenter Discovery was sworn on January 30, 2018. The Company's Written Submissions filed

on or about February 21, 2018 disclosed unsuccessful efforts to ascertain when the appellate judgment would be delivered and acknowledged the risk of a waste of costs if this Court determined the issue before the Court of Appeal. Exposed by Mourant's September 17 criticism for having incurred these costs despite being aware of a risk that they might be wasted, the Company could only find a fig leaf to cover its nakedness:

> "25.2 *When the Directions Hearing was listed, the Company had no visibility as to when the Court of Appeal decision in Re Qunar might be delivered. This is in contrast with certain of the Dissenters, who were also dissenters in Re Qunar. At the Directions Hearing the Dissenters contended for an extremely aggressive timetable creating obvious logistical challenges with a deferred Dissenter Discovery application. It was never suggested by the Dissenters prior to the Directions Hearing that the Dissenter Discovery application should be held over, and the suggestion that the Court's ruling in this regard should be deferred pending the Court of Appeal's decision in Re Qunar was opposed by the Campbells Dissenters at the Directions Hearing, for the very reason that it was uncertain as to when this decision might be delivered.*"

66. The suggestion that the Dissenters had access to more information about when the Court of Appeal judgment in *Re Qunar* would be handed down lacks substance on its face. Unless a draft judgment has been circulated, parties typically have no idea as to when a judgment will be handed down. Judges working on reserved judgments are rarely keen to respond to enquiries as to when a draft judgment is likely to be finalised. The fact that the Dissenters did not agree to postpone the hearing on February 27, 2018 is not to any dispositive extent an answer to the criticism that the Company pursued an application relating to a discrete issue which could from the outset have been deferred and then, after the relevant costs had been incurred, invited the Court to defer deciding the issue.

67. The existing state of the law (upon which the Appleby Dissenters relied for other purposes) is in my judgment relevant only to the following extent. There was no precedent for automatic Dissenter Discovery in relation to section 238 petitions under Cayman Islands law. The Company bore the burden of persuading this Court to establish what amounted to new law while the Dissenters sought to persuade the Court to follow past practice, in particular the decisions of my sister and brother judges on the issue.

68. In these circumstances, it was or ought to have been obvious to the Company and its legal advisers upon learning (on a date uncertain) that the Court of Appeal judgment on Dissenter Discovery in *Re Qunar* had been reserved on November 13, 2017, that this judgment would likely be determinative of the question of principle this Court had to decide. It also was or ought to have been obvious that the Court of Appeal might deliver its judgment within the next three to six months i.e. between mid-February, 2018 and mid-May, 2018. It is a matter of record that reserved appellate judgments in this jurisdiction are generally now delivered within this approximate timeframe, but I accept

there can never be any rigidity to such timelines. Nonetheless the *Qunar* appeal involved only a one-day hearing, which would not on its face suggest the need for an exceptionally lengthy delivery time.

69. In my judgment, however, it is only fair to assume that there was no reasonable expectation of the appellate judgment being delivered within any specific period of time. On this basis it is difficult to see why the wait and see option was more compelling at the hearing of the Summons for Directions rather than well before. No coherent reason has been proffered as to why the option of waiting for the judgment was only advanced at such a late stage.

70. When did the Company and/or its legal advisers learn about the fact that the Court of Appeal had heard that appeal? I make no specific finding on this issue at this stage. It is true that neither the Company nor their legal advisers were involved in *Re Qunar,* but in my judgment it would be surprising, in the comparatively small local legal community involved in section 238 petitions, if the Company only belated learned of such a legally and commercially significant appellate case. In responding to the Mourant attack on the wasted costs issue, the Company has not advanced any 'defence' based on surprise or late notice. It is unarguably clear that the Company knew of the pending judgment before it prepared its Written Submissions in advance of the hearing of the Summons for Directions. Indeed, the Company admits (in paragraph 64 of those Submissions, which were finalised on or about February 21) to having made unsuccessful prior efforts to obtain copies of the skeleton arguments deployed by the Dissenters in the appeal, both from the Dissenters and the Court of Appeal.

71. In fairness it is admittedly also clear that the Company's assessment of when to pursue the Dissenter Discovery application was complicated by the fact that in an ideal world both Company and Dissenter Discovery (if ordered) would run on parallel tracks. There was therefore an inherent tension, which the Dissenters may well have sought to tactically exploit, between the need to expeditiously advance the Company Discovery portions of the Summons for Directions and the need to expeditiously and economically advance the Dissenter Discovery application. This is why, as I elaborate upon further below, the Company's conduct is only subject to serious criticism on the hypothesis that the Dissenter Discovery application was from the outset a freestanding application cleanly detached from the Company Discovery application.

72. On the assumption that the Dissenter Discovery application was a discrete one, I can see no good reason why the application to await the Court of Appeal decision in *Re Qunar* could not have been made before the Dissenter Discovery application was prepared and heard on February 26-27, 2018. By that date, it was still not known when the appellate judgment would be delivered. It was in fact delivered roughly six weeks later. I indicated in my Partial Ruling dated March 6, 2018 (delivered on March 19) that I would postpone ruling on the Dissenter Discovery application until March 30, 2018 and no longer unless otherwise agreed. The parties sensibly agreed after March 30,

2018 that I should await the Court of Appeal decision, which by early April was known to be imminent.

73. In my judgment, and again only on the hypothesis that the issue was a discrete one, the obligation to pursue the Dissenter Discovery application in an economical manner lay primarily with the Company as the party initiating the application. I would on this basis find that compliance with Order 62 rule 4(2) required the Company, once it became aware that a substantial portion of the Dissenter Discovery issue was likely to be decided in a manner which bound this Court by the Court of Appeal in *Re Qunar,* to at least propose deferring preparing for the application on those grounds. Had the Dissenters insisted that the Company pursue the matter before the Court of Appeal had ruled, the timing dispute could have been referred to this Court to resolve long before the Summons for Directions was actually heard. Even on the hypothesis that the Dissenter discovery application was a discrete one, I would have had considerable sympathy for the difficult position the Company's legal advisers undoubtedly found themselves in.

74. On balance, however, I would still have found that the Company acted unreasonably in incurring costs on preparing for the Dissenter Discovery issue to be determined by this Court once it became aware that a Court of Appeal decision on the same issue was pending and might be delivered within a reasonably proximate time.

75. If I was required to award these costs on the basis that the issue was a discrete one, contrary to my primary findings set out above, I would have found that the Company was entitled to its costs in principle (as regards the first hearing). However, I would have disallowed the Company's costs from the date (not yet ascertained) that it or its legal advisers became aware that the Court of Appeal had reserved judgment on November 13, 2018 in an appeal dealing with the Dissenter Discovery issue. These costs would be disallowed to the following limited extent. Rather than awarding the Company those costs in any event because it succeeded on the discrete issue, I would order that such costs should be in the cause.

76. For the avoidance of doubt, it may be helpful for me to explain why, in my judgment, it is appropriate for the Court to adopt a different approach to analysing the conduct of litigants in two different legal contexts and why I see no inconsistency between my primary and alternative findings. In the context of matters falling within the ambit of a Summons for Directions where the relevant costs are likely to be in the cause, the opposing parties share an equal risk of ultimately having to bear those costs depending on the merits of the substantive claim(s). Although the application is typically filed by the plaintiff or petitioner, all parties have a more or less equal stake in the case management directions. Further, the Summons for Directions is being issued not at the election of the claimant but because the Rules mandate it as a necessary pre-trial procedural step. Finally and most significantly, awarding costs in the cause does not

necessarily deprive the Court of the ability to make a further assessment of the reasonableness of the parties' conduct to the end of the proceedings when the overall winner is known. In obvious cases of unreasonable conduct by party A, the Court may of course award costs on terms that they are party B's costs in the cause.

77. As the Company rightly pointed out in the present case, the Dissenters could have complained about the risk of wasted costs flowing from dealing with the Dissenter Discovery rather than waiting to see if the Court of Appeal would decide the issue, but elected not to do so. In the context of my primary findings that the parties had agreed and did not resile from having the Dissenter Discovery costs being bundled together with the other costs, the Company's conduct was not sufficiently unreasonable as to justify overriding the agreed costs order. On the contrary, the Company's desire to move forward with the Summons for Directions as a whole was entirely understandable. With the date of the *Re Qunar* judgment uncertain and the ideal directions envisaging mutual discovery and an integrated timetable, the choice between proceeding full-steam ahead and waiting to see was a bedevilling one. In any event, it does not lie in the Dissenters' mouths to suggest that the Company acted unreasonably in this regard when they themselves failed to propose an abbreviated approach.

78. Where one party does in fact elect to make a freestanding interlocutory application in a relation to what for costs purposes is a discrete issue and the Court is likely to award costs to the successful party in any event, in my judgment the level of scrutiny is materially different. Firstly, it is an application which the applicant is compelling his opponent to defend. Secondly, Order 62 rule 4(2) expressly makes the costs follow the event principle subject to the successful party conducting the relevant proceeding "*in an economical, expeditious and just manner*". Thirdly and consequentially, it is essential that the Court assess the reasonableness of the conduct of the successful party before awarding costs in their favour in any event. Because such an award is a definitive finding that the party who has won the interlocutory application is entitled to that particular portion of their overall costs under Order 62 rule 4(2). It is probably beyond the jurisdiction of a taxing master to disallow altogether the costs of an application which the trial judge has definitively awarded to one of the parties.

79. For these reasons, if the Dissenter Costs issue as regards the first hearing had to be treated as a discrete issue which the Company won, I would have still ordered the costs to be in the cause in light of the Company's unreasonable conduct of the application on that assumed factual basis.

Alternative Findings: did the second hearing (and the costs incurred in relation thereto) generate a costs qualifying "result" in favour of the Company or the Dissenters?

80. If I were required to find that the second hearing was a discrete issue for costs purposes, I would find that the Company achieved substantial success overall in relation to the scope of discovery disputes. The mere fact that the Company did not obtain 100% of

what was set out in its draft Order does not extinguish the fact that, in broad brush terms, it was the successful party overall. I would have awarded the Company its costs of the second hearing on the standard basis to be taxed if not agreed.

Findings: the Dissenters' application for the costs of Dissenter Discovery

81. I summarily dismiss as wholly speculative and utterly misconceived the Dissenters' application for their costs as regards the first hearing. On superficial analysis, the argument holds together but on closer scrutiny it falls apart. It is based on the false premise that, based on the arguments and the legal position in this Court before the Court of Appeal decided *Re Qunar*, the Dissenter Discovery issue would have been resolved in their favour. What might have happened had I decided the issue based on the arguments at the first hearing is not only a matter of speculation but is also entirely beside the point. I decided to postpone immediately disposing of the issue and this resulted in the Dissenters accepting that they were required to give discovery in light of a judgment which was binding on this Court. The issue was ultimately resolved in the Company's favour by concession.

82. As far as the second hearing is concerned, the application falls short of being abusive, but only marginally so. The Dissenters had some measure of success and were justified in contesting the application, but the Company clearly succeeded overall.

83. Further and in any event, the application as regards both hearings must be rejected because the parties agreed that the costs of Dissenter Discovery should be treated as costs in the cause. The Dissenters advanced no valid grounds for being released from that agreement and no coherent explanation as to why the character of the application should be viewed as having fundamentally changed after the February 27, 2018 hearing.

Findings: costs of the present costs application

84. On September 17, 2018, Mourant offered to settle the costs application on the basis that costs should be in the cause in line with the "*strong provisional views*" I expressed in Court on July 27, 2018. The Appleby Dissenters relied on that offer and sought their costs of the present costs application on the indemnity basis in the event that the Company failed to obtain its costs.

85. *Prima facie*, the Appleby Dissenters are entitled to their costs because they were compelled by the Company to defend the present application despite having made what has now been proven to be a reasonable settlement offer. As noted above, and implicitly relied upon for the purposes of my alternative findings, Order 62 rule 11 provides as follows:

> *"(2) Where it appears to the Court in any proceedings that anything has been done or that any omission has been made improperly, unreasonably or negligently by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party."*

86. In my judgment the Appleby Dissenters acted sufficiently unreasonably in advancing superficially coherent but substantively unmeritorious costs arguments to justify depriving them of their costs of the costs application in any event. Had they merely contended for costs in the cause they would have been entitled to their costs, and probably on the indemnity basis. Their obtuse stance made it more difficult rather than easier for me to deal with the present application justly. In my judgment they should be able to recover these costs only if they achieve success overall.

87. In the exercise of my discretion, I find that the appropriate award in all the circumstances of the present case is that the costs of the present costs application should be the Appleby Dissenters' costs in the cause.

Summary

88. The Company's application for the costs of the Dissenter Discovery application is refused. The Dissenters' cross-application for their costs, which was misconceived, is also refused. The costs of that application shall be in the cause as was agreed at the hearing of the Summons for Directions. It is not open to the parties to re-characterise an issue as a discrete one after the issue has been adjudicated.

89. The costs of the present costs application shall be the Appleby Dissenters' costs in the cause.

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