IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 72 OF 2022 (DDJ)
CAUSE NO: FSD 74 OF 2022 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)
AND IN THE MATTER OF NEW FRONTIER HEALTH CORPORATION

Before:	The Hon. Justice David Doyle
Appearances:	Mr Tom Lowe KC instructed by Grainne King, Aline Mooney and Catie Wang of Harney, Westwood & Riegels for New Frontier Health Corporation Ms Blair Leahy KC instructed by Nigel Smith and Kalyani Dixit of Carey Olsen for Hildene Opportunities Master Fund II, Ltd, Invictus Special Situations Master I, LP, Oasis Investments II Master Fund Ltd and Alpine Partners (BVI) LP and Katie Logan of Campbells for Blackwell Partners LLC – Series A, Maso Capital Investments Limited and Star V Partners LLC
Heard:	26 and 27 March 2024
Draft Judgment circulated:	15 April 2024
Judgment delivered:	24 April 2024

HEADNOTE

Company's application to extend time period within which to comply with discovery obligations in a Section 238 case on the grounds that there was a risk of prosecution under the law of the People's Republic of China if it complied without approval from the PRC authorities – no approval mechanism presently in place and unlikely to be in place in the near future – the relevant law and procedure – GCR's overriding objective – Section 7 of the Bill of Rights requiring a fair trial within a reasonable time – the importance of complying with court orders and local rules – a consideration of the relevant authorities including Bank Mellat and some American authorities – the approach – whether the relevant PRC law provisions apply – whether there is an actual risk of prosecution – the balancing exercise and the relevant factors to consider

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JUDGMENT

Introduction

1. Put simply and stripped of its detail and complications this case concerns the legal position when a company which has voluntarily chosen to be incorporated under and subject to the laws of the Cayman Islands, with management and operations on the ground in the People's Republic of China, seeks more time to disclose documentation relevant to a dispute with dissenting shareholders as to the fair value of shares in the company. The company says that it cannot disclose such documentation without the approval of the Chinese authorities but there has been no approval mechanism in place for over a year now and it is unlikely to be in place in the near future. The company is concerned that if it discloses the documentation without the approval of the Chinese authorities a real risk of prosecution will arise. Should yet more time be granted to the company

or not? On the facts and in the circumstances of this case, balancing the relevant factors and competing interests, and applying well established and internationally recognised principles of the common law and comity, I have decided that the requirements of the laws and interests of the Cayman Islands override the requirements of the laws and interests of the People's Republic of China and no more time should be granted to the company.

Background

2. A new low in cases brought under section 238 of the Companies Act ("Section 238") was about to be reached on 9 November 2023 until the point was conceded by New Frontier Health Corporation ("the Company"). The Company had been asking the court to determine at the case management conference on 9 November 2023 what "test" would be applied at the hearing of its summons dated 18 August 2023 (the "Application"). In effect an argument as to what law we would be arguing about at a subsequent hearing. Harneys, the attorneys acting for the Company, by letter dated 4 October 2023 had unhelpfully initially maintained the following stance:

> "We repeat that the issue of whether or not there is a real risk of criminal prosecution is irrelevant. Our client genuinely fears recrimination for breach of the relevant PRC laws, but is not seeking to avoid discovery, simply time to comply. *Bank Mellat* is simply not engaged."

By letter dated 5 November 2023 Harneys belatedly conceded that the court could deal with what was described as the *Bank Mellat* point at the hearing of the Application. In my judgment delivered on 9 November 2023 I decided the point as follows:

> "16. In respect of Issue 1, my conclusion is that the Court should not determine at this CMC "the test" which should be applied on the hearing of the Application. It will be for counsel for the parties to address the relevant law in their written and oral submissions at the hearing of the Application. It would be premature and inappropriate at this CMC, almost in the abstract and certainly without the benefit of full argument, for the Court to determine the test which should be applied in respect of the Application."

3. On 9 November 2023 I made an order setting down the hearing of the Application for 1.5 days commencing at 10am on 13 February 2024. The parties by agreement applied to vacate that hearing and by order made on 4 December 2023 the hearing was re-listed to commence at 10am on 26 March 2024. The Application was duly heard over two long but intensely interesting days and I reserved judgment, which I now deliver.

4. There was some considerable force in the submission of Blair Leahy KC, who appeared on behalf of Hildene Opportunities Master Fund II, Ltd, Invictus Special Situations Master I, L.P., Blackwell Partners LLC – Series A, Maso Capital Investments Limited, Star V Partners LLC, Oasis Investments II Master Fund Ltd and Alpine Partners (BVI) LP (the "Dissenters") that the Company, in failing to file the Application earlier and the way in which it sought to progress the Application including its approach to the case management conference in November 2023, has in effect already obtained through the back door a further extension of six months.

The Application

5. By the Application correctly described by Tom Lowe KC, who appeared on behalf of the Company, as a "very unusual" one as it sought an open-ended extension, the Company applied for an order that it be granted yet another extension of time in respect of the period provided for in paragraph 10a of the Order for Directions dated 12 August 2022 (the "August 2022 Order"), as extended by Order of the Court dated 31 March 2023 as regards its obligation to give discovery in these proceedings until the later of 7 days following:

   (a) the grant of regulatory approval by the government authorities of the People's Republic of China ("PRC")
   (b) the conclusion of the discovery processes pursuant to the applications ongoing in the United States under section 1782 of Title 28 of the United States Code related to the Company ("the Section 1782 Applications").

Summary

6. In this case there is a clash of the local laws of the Cayman Islands and the foreign laws of the PRC.

7. Pursuant to the August 2022 Order the Company was required to give discovery of the relevant documentation in this case by 19 December 2022. By application dated 19 December 2022 the Company initially sought an extension of time to 28 April 2023 and subsequently to 29 September 2023. By order made on 31 March 2023 it was given until 29 September 2023 to complete its discovery. On 18 August 2023 the Company filed the Application seeking an open-ended extension of time in view of issues arising under the law of the PRC.

8. For reasons which follow, I have dismissed the Application and have declined to extend the deadline for the Company's discovery beyond 29 September 2023.

9. I have held that the relevant provisions of the laws of the PRC do apply to *inter partes* discovery and that there is an actual risk of prosecution but such risk is low to moderate. I have balanced the relevant factors. I have concluded that the requirement that the Company comply with the August 2022 Order as varied and the interests of the Cayman Islands in the fair and expeditious determination of civil proceedings in effect trump the PRC's legitimate interests in data protection and security.

The August 2022 Order

10. Paragraph 10a of the August 2022 Order required the Company within 120 days from 12 August 2022 to upload to the Data Room all documents (of whatever description, whether electronic or in any other format) and communications (whether by email or otherwise) comprising the categories of documents set out in Appendix 3 of the Order which are (i) in its possession, custody or power, (ii) prepared or created in the 5 year period ending on the Valuation Date (6 January 2022, 9pm Cayman Islands time), and (iii) relevant to the determination of the fair value of the Dissenters' shares in the Company as at the Valuation Date. The categories of documents in Appendix 3 were specified under the following headings: Financial Advisor, Special Committee, Buyer Group and potential purchasers, Corporate and financial documents, Projections and valuations, Operations and strategy, Shares and Shareholders and the Merger.

11. Heading C of the August 2022 Order was headed Confidentiality and Non-Disclosure Agreement and required experts and the Dissenters to enter into such agreements in the same or substantially similar form as set out in Appendix 2 which ran to 13 pages, before they would be given access to

the Data Room. Under heading D Electronic Data Room and Company Disclosure Procedure at paragraph 12 it was provided that where documents in the Company's possession, custody or power "are required to be redacted in order to comply with the laws of the People's Republic of China the protocol set out at Appendix 6 shall apply". Appendix 6 contained a detailed 8-page protocol in respect of the redaction of documents, their review, production and inspection. It can be seen therefore that there were stringent provisions in respect of confidentiality and redaction.

12. By order made on 31 March 2023 the August 2022 Order was in effect varied and the Company was granted an extension of time until 29 September 2023.

The main issue

13. The main issue for the court's determination is whether a further extension should be granted to the Company as regards its obligations to give discovery, pursuant to the August 2022 Order as varied. In essence the court is involved in a discretionary case management decision. Issues as to the laws of the PRC also arise.

Law

14. I now turn to the relevant local law. It is well established that this court has a jurisdiction to extend the time period for compliance with an order requiring discovery and inspection to be provided within a certain time frame.

Grand Court Rules

15. Under Order 3 rule 5(1) of the Grand Court Rules ("GCR") the court may, on such terms as it thinks just, by order extend the period within a person is required by any order to do any act in the proceedings.

16. In my judgment delivered on 31 March 2023 in these proceedings I stated at paragraph 27 that "When considering an application to extend time the court is exercising a judicial discretion". At page 29 I referred to English authorities to the effect that the court will normally grant a reasonable extension of time if it does not impact on hearing dates or otherwise disrupt proceedings but the

need to comply with court orders was of paramount importance. At paragraph 30 I noted that the court should take careful account of the overriding objective and consider the impact on the administration of justice and other court users.

17. Practice Direction 2 of 2024 encourages, in addition to reference to the English White Book 1999, reference to the Hong Kong Civil Procedure as an aid to the interpretation and application of the GCR.

18. The commentary in the English White Book 1999 on the then equivalent English rule indicates that the object of the rule was to give the court a discretion to extend time with a view to the avoidance of injustice to the parties. The absence of good reason for the delay is not sufficient for the court to refuse to exercise its discretion to extend time. Once a party is in default it is for the party to satisfy the court that the discretion should nonetheless be exercised in his favour and for such purpose he may rely on any relevant circumstances. The court would however normally need to be satisfied that there was an acceptable explanation for the delay. If there was none the question of prejudice was unlikely to arise. If there was an acceptable explanation, the court might still refuse to extend time if the delay was substantial or if to do so would cause significant prejudice to the other side. It is important that the court's resources should be used as effectively as possible and that the proper and regular administration of business in general before the courts should not be disrupted as a result of breaches which occurred without any justification whatsoever and notwithstanding the absence of any prejudice to the other party involved. Time requirements must be observed. The overriding principle is that justice must be done. Litigants are entitled to have their cases resolved with reasonable expedition. There is a very wide inherent jurisdiction to enlarge any time which the court has ordered.

19. The commentary in the Hong Kong Civil Procedure 2024 indicates that the substantially similar Hong Kong rule explicitly confers the widest measure of discretion. Its object is to avoid injustice to the parties. A clear statement in the application for the extension of time of the reasons for the inability to comply with the stipulated time limit should normally be provided. An adequate explanation for the delay will normally be required but all matters (including the adequacy of any reasons for the delay) must be considered and weighed in the balance together with the overall justice of the application.

20. In this case, commenced by petition filed as long ago as 28 March 2022, discovery was required to be completed within a particular time frame (long since passed) imposed by a court order rather than pursuant to Order 24 rule 2 of the GRC which requires parties to an action to make discovery by exchanging lists within 14 days after pleadings in the action are deemed to be closed. Order 24 rule 3 gives the court power to order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to serve a list of documents.

21. In exercising its discretion as to whether or not to grant an extension of time the court should have regard to the overriding objective. The preamble to the GCR provides as follows:

> "1. The Overriding objective
>
> 1.1 The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way.
>
> 1.2 Dealing with a cause or matter justly includes, as far as is practicable —
>
> (a) ensuring that the substantive law is rendered effective and that it is carried out;
>
> (b) ensuring that the normal advancement of the proceeding is facilitated rather than delayed;
>
> (c) saving expense;
>
> (d) dealing with the cause or matter in ways which are proportionate
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case; and
>
> (iii) to the complexity of the issues;
>
> (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other proceedings.
>
> 2. Application by the Court of the overriding objective
>
> 2.1 The Court must seek to give effect to the overriding objective when it
>
> (a) applies, or exercises any discretion given to it by these Rules; or
>
> (b) interprets the meaning of any Rule.
>
> 2.2 These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.
>
> 3. Duty of the parties
>
> The parties are obliged to help the Court to further the overriding objective. In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to help in this respect.

4. Court's duty to manage proceedings

4.1 The Court must further the overriding objective by actively managing proceedings.

4.2 This may include —

(a) identifying the issues at an early stage;

(b) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

(c) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(d) helping the parties to settle the whole or part of the proceeding;

(e) deciding the order in which issues are to be resolved;

(f) fixing timetables or otherwise controlling the progress of the proceeding;

(g) considering whether the likely benefits of taking a particular step will justify the cost of taking it;

(h) dealing with as many aspects of the proceeding as is practicable on the same occasion;

(i) dealing with the proceeding without the parties needing to attend at court;

(j) conducting procedural hearings by means of telephone conference calls;

(k) making appropriate use of technology; and

(l) giving directions to ensure that the trial proceeds quickly and efficiently.

4.3 Whenever a proceeding comes before the Court, whether on a summons for directions or otherwise, the Court will consider making orders on its own motion for the purpose of giving effect to the overriding objectives of the rules."

The Constitution of the Cayman Islands – Section 7 of the Bill of Rights

22. In dealing with an application to extend time the court should take into account Section 7 of the Bill of Rights scheduled to the Cayman Islands Constitution ("Section 7") which provides that everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time. It is in similar terms to Article 6 of the European Convention on Human Rights and Fundamental Freedoms. There is a lot of European case law (see for example *Kudla v Poland* (30210/96) 10 WLUK 740; (2002) 35

E.H.R.R 11 (ECtHR) referred to in the latest English White Book) which places the duty to administer justice expeditiously on the courts.

The importance of complying with court orders and the local rules

23. The court should also take into account the importance of complying with court orders (see *Arnage v Walkers* FSD unreported judgment 25 January 2022 at paragraphs 78-103, presently subject to an appeal).

24. In *Richmark Corp v Timber Falling Consultants* 959 F.2d 1468 (9th Cir. 1992) the United States Court of Appeals, Ninth Circuit stated at page 1479:

> "Just as United States companies doing business in the PRC must expect to abide by PRC law, when Beijing [the company] availed itself of business opportunities in this country, it undertook an obligation to comply with the lawful orders of the United States courts…".

25. In a similar vein Hoffmann J (as he then was) succinctly stated in *MacKinnon v Donaldson, Lufkin and Jenrette* [1986] 1 Ch 482 at 494-495:

> "If you join the game you must play according to the local rules … a party may be excused from having to produce a document on the grounds that this would violate the law of the place where the document is kept … But, in principle, there is no reason why he should not have to produce all discoverable documents wherever they are."

26. The court may have regard to the fact that the relevant entity chose to be incorporated under the laws of the Cayman Islands and to be subject to its laws. The procedure in this court is governed by the *lex fori* – the law of the Cayman Islands. That is the norm internationally, as a matter of the conflict of laws. Discovery and inspection of documents form a part of the law of procedure governed by the *lex fori*. I hope it is not adopting too parochial a view but in the case presently before the court I think it important not to lose sight of the fact that the chosen place of incorporation of the Company was the Cayman Islands. The court should also not be blind to the fact that the location of the Company's operations and its management is the PRC. Carl Wu ("Mr Wu"), the Chief Executive Officer and a director of the Company, says at paragraph 16 of his first affirmation

of 21 July 2022, that he is ordinarily resident in Shanghai and is based in the Company's Shanghai office as is the Company's Chief Operating Officer.

Authorities

27. Counsel referred to various authorities including *Brannigan v Davison* [1997] AC 238, *Bank Mellat v Her Majesty's Treasury* [2019] EWCA Civ 449, *Byers v Samba Financial Group* [2020] EWHC 853 (Ch), *Tugushev v Orlov* [2021] EWHC 1514 (Comm), *The Public Institution for Social Security v Al Wazzan* [2023] EWHC 1065 (Comm), and *Re Sina Corporation* (FSD, RPJ unreported judgment 6 February 2024).

Brannigan v Davison

28. Mr Lowe relied heavily on *Brannigan* which he said informed the relevant law as subsequently referred to in *Bank Mellat*. In *Brannigan* it was held by the Judicial Committee of the Privy Council (on appeal from the Court of Appeal of New Zealand) that the common law privilege against self-incrimination did not apply where the witness was at risk under a law of a different country of criminal or penal sanctions and even if the secrecy legislation of the Cook Islands rendered the plaintiffs liable to prosecution if they gave the evidence in New Zealand required by a commission of inquiry, they were not privileged against giving such evidence. Lord Nicholls, delivering the judgment of their Lordships, at pages 249-251 stated:

> "Seen from the point of view of the witness, the right may be as much needed where foreign law is involved as where it is not. The difficulty confronting the individual may be just as acute when the feared prosecution is under the law of another country. There is, however, a real problem in letting this lead to the conclusion that the privilege should apply in such a case. The privilege is rigid and absolute. The witness has an unqualified right. Where the privilege applies the witness need not answer. Unless the case falls within a statutory exception, that is the end of the matter. There is no scope for the court to exercise any discretion.
>
> It is the unqualified nature of the right, so valuable as a protection for the witness, which gives rise to the problem when a foreign law element is present. If the privilege were

applicable when the risk of prosecution is under the law of another country, the privilege would have the effect of according primacy to foreign law in all cases. Another country's decisions on what conduct does or does not attract criminal or penal sanctions would rebound on the domestic court. The foreign law would override the domestic court's ability to conduct its proceedings in accordance with its own procedures and law. If an answer would tend to expose the witness to a real risk of prosecution under a foreign law then, whatever the nature of the activity proscribed by the foreign law, the witness would have an absolute right to refuse to answer the question, however important that answer might be for the purposes of the domestic court's proceedings.

This surely cannot be right. Different countries have their own interests to pursue. At times national interests conflict. In its simple, absolute, unqualified form the privilege, established in a domestic law setting, cannot be extended to include foreign law without encroaching unacceptably upon the domestic country's legitimate interest in the conduct of its proceedings … Their Lordships' conclusion is that the common law privilege does not run where the criminal or penal sanctions arise under a foreign law …

If the unqualified application of the privilege to foreign law is unsatisfactory, so also is the opposite extreme. The opposite extreme is that the prospect of prosecution under a foreign law is neither here nor there. Since the privilege does not apply to prosecution under the foreign law, the witness must always answer a relevant question in the domestic proceedings, regardless of the nature of the crime under the foreign law and regardless of the likely practical consequences for the witness under that law.

This would be a harsh attitude. It would be a reproach to any legal system. One would expect that a trial judge would have a measure of discretion …This important question need not be answered in the present case, and their Lordships consider it better to leave the answer to be supplied on another occasion. The reason why the question need not be answered is that in the present case the statutory "sufficient cause" and "just excuse" exceptions provide ample scope for all the circumstances to be taken into account …".

29. Lord Nicholls declined to answer the following "important question": "where the self-incrimination privilege does not apply because the feared prosecution is under foreign law, does the domestic court, under its inherent power to conduct its process in a fair and reasonable manner, nevertheless have a discretion to excuse a witness from giving self-incriminating evidence?"

30. Lord Nicholls at page 251 also referred to "the concept of weighing all the consequences of the refusal to give evidence: the adverse consequences to the inquiry if the questions are not answered and the adverse consequences to the witness if he is compelled to answer."

31. Lord Nicholls at page 253 added:

> "… their Lordships recognise that the contradictory commands of different states can give rise to acute problems for individuals. The resolution, or alleviation, of these problems is one object of the principles of foreign state compulsion, which have been developed particularly in the United States. For its part New Zealand has observed these principles."

32. It is interesting and informative to note that in the New Zealand Court of Appeal [1996] 2 NZLR 278 Cooke P at page 292 referred to issues "such as the likely ambit of the knowledge of witnesses, the degree of help likely to be obtained from their evidence, and the possibility of reasonably obtaining the required information from other sources …".

33. Richardson J at page 330 listed various considerations which should be weighed including:

(a) the vital national interests of New Zealand;
(b) the importance of the information sought;
(c) the alternative means of accessing that information from other sources;
(d) the nationality and ordinary residence of the prospective witnesses and the location of the documents;
(e) the nature and extent of the witnesses' commercial and personal connections with the foreign state; and
(f) the nature and extent of the risk to the witnesses and any others immediately affected that requiring testimony would impose and the professional and personal consequences for them.

34. *Brannigan* was followed by the Federal Court of Australia in *Bank of Valletta Plc v National Crime Authority* [1999] FCA 1099 and the court accepted that proper matters for consideration included the sovereignty of the foreign state, the absence of any evidence to indicate the importance, urgency or necessity of production of the documents, the seriousness of any contravention of the foreign legislation and the foreigner's good faith and aspects of the history of the matter. There was also reference to the lack of any alternative method of obtaining the necessary information (paragraphs [15] and [16]).

Bank Mellat

35. In *Bank Mellat* Gross LJ, sitting in the Court of Appeal of England and Wales, referred at paragraph 2 to on occasions a tension arising between local law requirements "for the inspection of documents and the provisions of foreign law in the home country of the litigant." At paragraph 3 he added:

> "Where such a tension arises, it is for the Court to balance the conflicting considerations: the constraints of foreign law on the one hand, and the need for the documents to ensure a fair disposal of the action in this jurisdiction, on the other. The balance is struck by a Judge sitting at first instance, making discretionary case management decisions. As is well-established, this Court will only interfere if the Judge has erred in law or principle or has (in effect) reached a wholly untenable factual conclusion."

36. From paragraph 52 onwards Gross LJ covered the legal framework including the law in respect of (1) evidence of foreign law and (2) production, inspection and contravening foreign criminal law.

37. At paragraph 63 Gross LJ pulled the threads together in respect of a local disclosure obligation and a foreign regulatory law clash and, in an oft quoted passage which is worth quoting in full, summarised the position as follows:

> "i) In respect of litigation in this jurisdiction, this Court (i.e., the English Court) has jurisdiction to order production and inspection of documents, regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in the "home" country of the party the subject of the order.

ii) Orders for production and inspection are matters of procedural law, governed by the *lex fori*, here English law. Local rules apply; foreign law cannot be permitted to override this Court's ability to conduct proceedings here in accordance with English procedures and law.

iii) Whether or not to make such an order is a matter for the discretion of this Court. An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e., foreign) criminal law, not least with considerations of comity in mind (discussed in *Dicey, Morris and Collins, op cit,* at paras. 1-008 and following). This Court is not, however, in any sense precluded from doing so.

iv) When exercising its discretion, this Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which this Court would be very mindful.

v) Should inspection be ordered, this Court can fashion the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected.

vi) Where an order for inspection is made by this Court in such circumstances, considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court. Comity cuts both ways."

38. At paragraph 64 Gross LJ felt it important, in the context of an actual risk of prosecution, to highlight that "it is concerned with the risk of *prosecution*, rather than the risk of subsequent sanction, if prosecuted and convicted…the question focuses on the *actual* risk of prosecution- not

on whether the conduct in question discloses a breach of Iranian criminal law, without more." (italics inserted by Gross LJ). Jackson LJ and Coulson LJ agreed with Gross LJ.

39. *Bank Mellat* was followed by Fancourt J in *Byers*, by Butcher J in *Tugushev* and by Henshaw J in *The Public Institution for Social Security*. *Bank Mellat* has also recently been followed in the Cayman Islands by Parker J in *Re Sina*.

Re Sina

40. In *Re Sina* Parker J helpfully dealt with the relevant law from paragraph 112 onwards and at paragraph 116 accepted that the relevant principles to be applied under Cayman Islands law were those as set out in the *Bank Mellat* case and subsequent English authorities including *Byers*, *Tugushev*, and *The Public Institution for Social Security*. Like Parker J, I too follow those English authorities.

41. At paragraph 155 Parker J accepted Professor Liu's evidence that the documents caught by a disclosure order constitute data for the purposes of the DSL and his interpretation that "foreign judicial or law enforcement" includes court ordered *inter partes* disclosure. At paragraph 169 Parker J noted that "the Court has concluded that Article 36 of the DSL applies to *inter partes* disclosure, approval should be sought, and if the data is transferred without approval, there is a breach of PRC law." In *Re Sina* it appears that disclosure of what was defined as the Remaining Documents had been refused by the PRC authority and the company had been formally warned to strictly comply with that decision or be subject to penalties (see paragraphs 30 and 32). It is also clear from paragraph 28 of the judgment that the Remaining Documents consisted of just 666 discoverable documents. From paragraph 45 of the judgment it appears that all parties had access to "45,199 PRC approved documents" and the total of documents uploaded to the data room was approximately 58,000. It appears that a further 6,000 documents had been omitted (see paragraph 51 of the judgment) but the company had wisely taken steps to ascertain whether any of the requested documents could be located overseas to obviate the need to seek regulatory approval. In particular the company had asked a legal entity in America whether it would provide it with the necessary material located overseas on a voluntary basis.

42. At paragraph 183 Parker J stated:

> "Considering the direction from the Chinese authority where there is no appeal, it seems to the Court that there is a real risk that enforcement action would be taken against the Company and its officers were it to nevertheless disclose the Remaining Documents."

43. At paragraph 185 Parker J added:

> "The Court is persuaded in all the circumstances … there is, as a matter of fact, a real risk that the disclosure in these circumstances would trigger a prosecution and serious sanction."

44. At paragraph 187 Parker J stated:

> "The Company has persuaded the Court that serious sanctions, such as revocation of its business licence would be applicable as a result of it performing its discovery obligations in breach of the PRC authorities approach to their jurisdiction and warning. The Court is not of the view on the evidence that the only sanction that would be available in this case would be the imposition on the Company of a modest fine in circumstances where the Company would be disobeying a specific instruction and warning. The Court accepts Professor Liu's evidence that given the importance of the Company's place in the internet information sector in China and the nature of its data involved in the case it is at least likely that its violation of Article 36 of the DSL will have serious consequences."

45. From paragraph 188 Parker J conducted the balancing exercise and stated:

(1) "One of the factors is the conduct of the party giving disclosure" (paragraph 189) and

(2) "Other factors are delay and prejudice" (paragraph 191)

46. From paragraph 218 onwards Parker J dealt with his conclusions and his reasons for the same. At paragraph 220 Parker J concluded that the fairest and most appropriate course, on the facts and in

the circumstances of the case before him, was "to approve the orders contained in the proposals made by the company on December 13 (as further directed by the Court – see below) and also to proceed with the letters rogatory process in order that the best possible chance of finding out more about the outstanding categories of material and obtaining it is facilitated."

47. At paragraph 227 Parker J pragmatically stated:

> "The concept of an independent suitably qualified expert in China expressing a view as to the importance of the Remaining Documents seems to the Court to be a sensible proposal. It is not ideal but provides a way forward as to the 'need' question."

48. At paragraph 232 Parker J added:

> "Once the China Independent Expert has opined on the Remaining Documents the 'need' question in relation to the importance of the documents to the issues in the case will become clearer and if necessary, the Court can make further decisions in relation to the Remaining Documents."

49. The Dissenters seek to distinguish *Re Sina* on various grounds including: (1) in *Re Sina* the company had already disclosed over 97% of the documents. In the case presently before this court, the Company has disclosed less than 10% of the relevant documents; (2) in *Re Sina* the PRC authority had denied its application to transfer the 666 documents as they were "highly sensitive". In the case presently before this court there is no evidence of any highly sensitive material and the Company has previously received approval in respect of its applications; (3) in *Re Sina* the company's primary business was to operate a high profile "Twitter-like" social media platform in the PRC called "Weibo". In the case presently before this court the Company is in the private healthcare business; (4) in *Re Sina* there was no criticism of the company's approach to the discovery process whereas in this case there has been; (5) in *Re Sina* there appears to have been no or only limited discussion about the possibility of redaction of sensitive documents whereas in this case a redaction process has taken place; and (6) in *Re Sina* there had been a formal warning issued by the relevant PRC authority, whereas in this case there has been no such warning. I agree that the facts and circumstances in *Re Sina* are very different to the facts and circumstances presently before this court. It is trite that each case must be decided on its own facts and circumstances.

The submissions on the authorities

50. Ms Leahy took a straightforward and easily understandable approach in respect of the relevant authorities. Ms Leahy referred to Order 3 rule 5(1) of the GCR and submitted that the court should follow what she referred to as the *Bank Mellat* test. Ms Leahy also referred to the subsequent authorities (including *Byers*, *Tugushev* and *Re Sina*) in which *Bank Mellat* had been followed and applied.

51. Mr Lowe, at times during his submissions, appeared to be subtly hinting that the Company had a less onerous test to pass than the *Bank Mellat* test.

52. Mr Lowe attempted to pray in aid the principles of foreign state compulsion, referred to in the American cases and the New Zealand case of *Brannigan*, and submitted in effect that Neuberger J, as he then was, in *Morris v Bank Arabe et International d'Investissement SA* [2001] I.L.Pr 37, 568 at page 578 had been wrong to attempt to pour cold water on this hot American topic. It is interesting to note in that case, although it was not necessary for his decision, Neuberger J at page 582 stated "the Court should normally lean in favour (probably heavily in favour) of ordering inspection, especially where a substantial number of important documents are involved."

53. Mr Lowe eloquently, and with much intellectual force, attempted to persuade the court that in certain respects (in particular sub-paragraph iv) the reference to the "actual" risk test and sub-paragraph vi), the emphasis on comity cutting both ways) the Court of Appeal of England and Wales in *Bank Mellat* "got it wrong" or did not properly take into account previous authorities and that the subsequent first instance decisions simply repeated the mistakes or misunderstood *Bank Mellat* and should not be followed. At paragraph 7 of his skeleton argument dated 26 February 2024 Mr Lowe submitted that on proof that compliance with a court order for discovery contravenes a foreign law the court must engage in a balancing exercise to determine whether as a matter of comity and fairness, it should modify the discovery obligation and added "The Company does not accept that this Court is bound to follow certain English decisions which may suggest that the Court should only exceptionally exercise such a discretion, even where foreign unlawfulness is proved." Mr Lowe was bold enough to add at paragraph 8 that:

> "… when the balance falls in favour of modifying the obligation of discovery, the Court should ordinarily do no more than require the party to make its best efforts to obtain the foreign documents for discovery but ought not to require the impossible. This is in essence the order that Parker J recently made in *Re Sina Corporation*."

54. I had to make great efforts not to be seduced into error by the attractive eloquence of Mr Lowe's submissions. Coming back down to earth I reminded myself that I was not sitting in the Supreme Court of the United Kingdom reviewing an appellate decision from the court below. I am just a mere first instance puisne judge in the Cayman Islands. Parker J, a fellow judge at first instance, with much experience in Section 238 cases and discovery and foreign law issues in *Re Sina* at paragraph 116 accepted that the relevant principles set out in *Bank Mellat*, *Secretary of State for Health v Servier Laboratories Ltd* [2014] 1 WLR 4383 and the subsequent English first instance authorities (*Byers*, *Tugushev* and *The Public Institution for Social Security)* were "to be applied under Cayman Islands law". Parker J from paragraph 131 also referred to some US authorities but did not find them to be "of great assistance because the facts and circumstances of each case and the approach of the US courts to the determination of the expert evidence is different. It is also clear that this is a developing area of jurisprudence in the US and the way in which the Chinese authorities approach the data security laws and enforce them is also recognised by them to be developing." I am far from persuaded that Parker J was wrong to find that the principles outlined in *Bank Mellat* were good Cayman law and I take into account the helpful guidance provided by the English authorities in this area of the common law. None of the factors listed at paragraph 70(3) of my judgment in *HQP Corporation Limited (in official liquidation)* (FSD unreported judgment delivered on 7 July 2023 and presently subject to an appeal) would justify this court declining to follow such English authorities.

55. Mr Lowe skilfully tried to move the court away from the words "actual risk" referred to in *Bank Mellat* and more towards the language used in the earlier English cases on domestic self-incrimination. By way of example, he went back to the 1930s and the legal battle between two glass companies and referred me to the language used in *Triplex Safety Glass Company v Lancegaye Safety Glass* [1939] 2 KB 395. Du Parcq LJ read the judgment of the court and at page 404 stated that, in the context of domestic self-incrimination the relevant danger was the existence, of which the court must be satisfied of the peril and possibility of being convicted as a criminal. A mere "remote and naked possibility" out "of the ordinary course of the law and such as no reasonable

man would be affected by" was not enough. In somewhat nuanced submissions, Mr Lowe seemed to be suggesting that when Gross LJ in *Bank Mellat* referred to the real – in the sense of actual – risk of prosecution all that was necessary was, relying on the privilege against self-incrimination authorities, a risk that was not fanciful. That is not my reading of *Bank Mellat*.

56. In his opening oral submissions Mr Lowe referred to the English authorities which required "a sliding scale of risk" but submitted that once the court is satisfied that there is a real risk of prosecution there is no basis for "grading the risk down" and invited the court not to follow the English cases insofar as they suggest the court should deal with "the magnitude of risk". Ms Leahy submitted that the court should assess the degree of the actual risk of prosecution when conducting the balancing exercise. That makes sense to me and is supported by authority. When questioned further on this topic during his reply submissions Mr Lowe submitted that once a party has got over the threshold of establishing a real risk the court should not subject it to even more stringent tests such as "grading the seriousness of the risk, because that violates the principles of privilege." Mr Lowe suggested that there was no basis for "grading the risk" and I note that in *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547, in the context of the privilege against self-incrimination and witnesses, Roskill LJ in the English Court of Appeal commented at page 579 that it was not for the court "to resolve problems of this kind by calculating odds." In subsequent authorities, in the present context, the courts have stated that an assessment of the degree and extent of the actual risk is a relevant factor to have regard to in the balancing exercise. Fancourt J in *Byers* at paragraph 107 v) referred to "the extent of the risk". Henshaw J in *The Public Institution for Social Security* at paragraph 156 stated that "a component of that assessment must be the court's view as to how likely it is that the disclosure and inspection would infringe Swiss law." Butcher J in *Tugushev* at paragraph 34, stated: "I consider that in [the balancing] exercise the smaller or less significant the risk which the court considers that there is, even if it surmounts the threshold of being a "real risk", the less weight it will be given in the balance." That makes good common sense to me. Insofar as Mr Lowe attempted to persuade the court that the grading of the risk was not appropriate I reject such attempts.

57. Mr Lowe took me to various extracts from the well-known House of Lords case of *Westinghouse*. Mr Lowe referred to the comments of Lord Denning MR in the Court of Appeal at page 574 where it was stated that once it appears that a witness is at risk then "great latitude should be allowed to him in judging for himself the effect of any particular question" adding "It is not necessary for him

to show that proceedings are likely to be taken against him, or would probably be taken against him. It may be improbable that they will be taken, but nevertheless, if there is some risk of them being taken- a real and appreciable risk- as distinct from a remote of insubstantial risk, then he should not be made to answer or disclose the documents."

58. In a transparent attempt to persuade me be a timorous soul, Mr Lowe also prayed in aid the cautionary words of Roskill LJ who at page 579 referred to "the degree of risk of penalty proceedings following", in the context of section 14 of the Civil Evidence Act 1968 and the privilege against self-incrimination which the common law had provided for three centuries, and gave the courts a stark warning as follows "In the absence of bad faith, to say that there is no risk of proceedings may in all but the plainest cases involve a court claiming to itself a degree of prescient foresight to which it would not be wise to pretend for if its forecast were wrong and if proceedings and penalties were to follow, damage will or at least may be done by an erroneous decision of the court which it would not be easy thereafter to undo or redress." It is interesting to note that at page 579 Roskill LJ, in the context of the privilege of self-incrimination in respect of a witness where once established the court has no discretion to exercise as the privilege is "rigid and absolute", stated:

> "It cannot, I think, be right in these cases for the court to attempt a quantitative assessment of the probability one way or the other of the risk of proceedings ultimately being taken, and then to seek to draw the line, one way where the probabilities in the view of the court are thought to be more or less evenly balanced and the other where the balance is more disparate. It is not for the court to resolve problems of this kind by calculating the odds. I think the right question to ask is that posed by Shaw L.J. on Friday afternoon. Can exposure to the risk of penalties (or in other cases to the risk of prosecution for a criminal offence) be regarded as so far beyond the bounds of reason as to be no more than a fanciful possibility?"

59. Mr Lowe also referred to the words in the House of Lords of Viscount Dilhorne at page 627. Viscount Dilhorne agreed with Lord Denning's "great latitude" comments and at page 628 added "Lord Denning contrasted a real and appreciable risk with a remote or insubstantial one, and once it appears that the risk is not fanciful, then it follows it is real. If it is real, then there must be a reasonable ground to apprehend danger, and, if there is, great latitude is to be allowed to the witness

and to a person required to produce documents." Finally on *Westinghouse*, Mr Lowe took me to the comments of Lord Fraser at page 647 who stated that "The test is not a rigorous one. All that is necessary is that it should be reasonable to believe that production would "tend to expose" (not "would expose") the possessor of the documents to proceedings. I agree with the Court of Appeal that that test is satisfied in the present case."

60. In my judgment the position of a Cayman company seeking not to provide discovery pursuant to a Cayman court order unless and until it obtains foreign regulatory approval cannot be fully equated to the position of an individual refusing to answer a question in local proceedings on the grounds that it would subject him to the peril and possibility of being convicted as a criminal in that local jurisdiction. Insofar as Mr Lowe's submissions on the law and the relevant test in the present context invited me to disregard any grading of the risk and appeared to invite me not to follow "the real- in the sense of actual- risk of prosecution in the foreign state" wording as referred to at the oft cited paragraph 53 iv) of *Bank Mellat*, and instead to follow the words used in earlier English cases (referred to above) on self-incrimination, I decline to accept such invitation. Instead I, like many English first instance judges (for example Fancourt J in *Byers*, Butcher J in *Tugashev,* and Henshaw J *in The Public Institution for Social Security)* and as Parker J did in *Re Sina*, follow *Bank Mellat* in the present context. Despite Mr Lowe's best efforts, I was not persuaded that Gross LJ in *Bank Mellat* or the various English judges at first instance who followed him placed insufficient attention to the earlier cases and "got it wrong".

Some American authorities

61. Mr Lowe, in his persistent and imaginative attempts to water down the *Bank Mellat* principles, also treated me to a lengthy but interesting excursion into several American authorities and I acknowledge that some of them were helpful insofar as they put some meat on the bones of the balancing exercise where local law requirements potentially collide with foreign law requirements, so I make brief reference to them.

Rogers

62. In *Societe Internationale v Rogers* (1958) US 113, 78 S Ct. 1087 Justice Harlan, delivered the opinion of the US Supreme Court, and at page 1095 referred to the petitioner's "extensive efforts

at compliance" and felt compelled to conclude "that the petitioner's failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control." And, displaying a sensitive international approach not always associated with subsequent American judges such as Scalia J, added "It is hardly debatable that fear of prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." The court felt that the petitioner's failure to comply with the pretrial production order was due to "inability, and not to wilfulness, bad faith, or any fault of petitioner."

Aerospatiale

63. *In Societe Nationale Industrielle Aerospatiale v United States District Court for the Southern* District of Iowa 482 US 522 (1987) Justice Stevens, writing for the majority, considered principles of comity and at footnote 28 referred to the Restatement of Foreign Relations Law of the United States (Revised 1986) which suggested that in the context of the scope of the district court's power to order foreign discovery in the face of objections from foreign states these factors are relevant to any comity analysis: "(1) the importance to the …litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." At 2557 the court, in the context of the wide-ranging pretrial discovery process in the US, emphasised that American courts "should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." And after referring to the oft cited *Hilton v Guyot*, 159 US 113 (1895) on comity concerns the court added "American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations for any sovereign interest expressed by a foreign state. We do not articulate specific rules to guide this delicate task of adjudication." In respectful dissent Justice Blackmun at page 2568 stated "I can only hope that courts faced with discovery requests for materials in foreign countries will avoid the parochial views that too often have characterized the decisions to date."

64. The Restatement (Fourth) of Foreign Relations Law 442 (2018) under the heading Foreign-State Compulsion provides "To the extent permitted by statute, regulation, or procedural rule, courts in the United States have discretion to excuse violations of law, or moderate the sanctions imposed for such violations, on the ground that the violations are compelled by another state's law, if: (a) the person in question appears likely to suffer severe sanctions for failing to comply with foreign law; and (b) the person in question has acted in good faith to avoid the conflict." Under the commentary the following appears: "The foreign-state-compulsion defense requires the likelihood of severe criminal or civil sanctions under the foreign law. The risk of punishment must not be purely hypothetical…A failure to raise the defense in a timely fashion will…bar reliance on it. Conversely, a person who identifies the contradictory foreign law at the outset and makes serious efforts to secure a release from or waiver of a foreign prohibition may be excused from compliance with federal law, if that law permits such discretion." Under the Reporters' Notes it is stressed that there must be a direct conflict and "the likely foreign sanctions must be severe" and this could include revocation of a business licence. In assessing the likelihood of sanctions, the courts have also considered whether the person in question has taken reasonable steps to avoid or mitigate the consequences under foreign law. The person in question must act in good faith. The courts must balance multiple factors to reach equitable outcomes. The location of the documents may be relevant but "In the contemporary world, where documents often exist in virtual form and may be accessed from many locations, territorial location may become less relevant…the question is not the physical location of the documents but rather the likelihood that the person will suffer severe sanctions for failing to comply with foreign law and the person's good faith in seeking to comply with the order." It is also indicated that "There is no established practice outside the United States of requiring the use of a foreign-state-compulsion defense." The defence "reflects the practice of states in the interests of comity".

Richmark

65. *In Richmark Corp v Timber Falling Consultants* 959 F.2d 1468 (9th Cir. 1992) the United States Court of Appeals, Ninth Circuit, applied *Rogers* and *Aerospatiale* and considered at pages 1475-1476 the importance of the documents ("the evidence is directly relevant…we have found this factor to weigh in favor of disclosure…it is crucial…The importance of the documents to the litigation weighs in favor of compelling disclosure"), the specificity of the request, the location of information and parties ("The fact that all the information to be disclosed (and the people who will

be deposed or who will produce the documents) are located in a foreign country weighs against disclosure , since those people and documents are subject to the law of that country in the ordinary course of business"), any alternative means of obtaining information and the balancing of national interests which the court felt was "the most important factor" and added "We must assess the interest of each nation in requiring or prohibiting disclosure, and determine whether the disclosure would "affect important substantive policies or interests" of either the United States or the PRC".

66. At 1477 the court made reference to the PRC's interest in the confidentiality of the information in question and added "This interest must be weighed against the United States' interests in vindicating rights of American plaintiffs and in enforcing the judgments of its courts. The former interest has been described as "substantial"…and the later as "vital"…To be sure , these interest are not so strong that they would compel disclosure in all cases…In this case, however, because Beijing [the company] and the PRC have been unable to identify any way in which the PRC's interests will be hurt by the disclosure, the interests of the United States must prevail. The balancing of the national interests is therefore a factor which weighs in favor of disclosure." The court stated that the effect that a discovery order is likely to have on the foreign company is another factor to be considered. If the foreign company "is likely to face criminal prosecution in the PRC for complying with the United States court order that fact constitutes a "weighty excuse" for nonproduction…In this case, Beijing has in fact been ordered by the Chinese government to withhold the information, and has been told that it will bear the "legal consequences" of disclosing the information. Beijing therefore seems to be placed in a difficult position, between the Scylla of contempt sanctions and the Charybdis of possible criminal prosecution."

67. The court at page 1478 concluded that "The United States has a strong interest in enforcing its judgments which outweighs the PRC's interest in confidentiality in this case."

Determination of the Application

68. I now turn to my determination of the Application.

The approach

69. In reaching my determination of the Application I must consider and have considered the law in respect of extensions of time and when there is a potential clash between local obligations such as discovery pursuant to a court order and foreign laws potentially impacting upon the same. I must also consider and have considered the relevant evidence and submissions. I note that each case must depend on its own facts and circumstances and that I should not construe previous authorities as statutory provisions. I have a discretion to exercise, and such is helpfully informed by principles referred to in previous authorities dealing with similar issues. That is the beauty and fascination of the common law.

70. This is not a case, like some of the others, where one side is objecting to a discovery or disclosure order being made. In August 2022 the Company was not objecting to giving discovery of documents located in the PRC, it simply wanted 180 days to do so rather than the 120 days contended for by the Dissenters. It said it needed this time to complete the redaction process. I gave it 120 days and criticised it for dragging its feet. Later it applied for an extension to 28 April 2023 and then to 29 September 2023. I granted an extension to 23 September 2023 "somewhat reluctantly". At no stage has the Company appealed against the August 2022 Order. I am now requested to grant yet a further extension of time with no end date presently in clear sight.

71. I think it also relevant to note that this case concerns not a foreign company facing difficulties in its "home" jurisdiction, like some of the other previous cases. The Company is incorporated under the laws of the Cayman Islands. Its "home" jurisdiction is the Cayman Islands, although I note that it has operations and management within the PRC. The initial presumption should be that it must, absent lawful and good excuse, comply with our local laws, rules and court orders. I do not however adopt a harsh, inflexible stance and I have considered the Company's connections to the PRC and the position it is in.

72. The Company's explanation for the delay in complying with the August 2022 Order as varied and the reason for its request for further time to comply is that if it does comply, without the approval of the PRC authorities, it will face a real risk of prosecution in the PRC. It says it needs further time to obtain those approvals as no approval mechanism is presently in place. To test whether that is an adequate explanation and a valid reason I need to consider issues of PRC law and I must also

consider the guidance provided in *Bank Mellat* and the subsequent English cases as applied by Parker J in *Re Sina* and exercise my discretion in the particular circumstances of this case.

Do the relevant PRC law provisions apply in the present context?

73. The first question is whether the relevant provisions of the law of the PRC apply in the present context. The Company relies on the expert evidence of Professor Han Liu ("Professor Liu") and the Dissenters rely on the expert evidence of Zhichao Duan ("Mr Duan"). The experts are unhelpfully at polar opposites on this issue but at least they refer to the same provisions of law of the PRC.

74. The agreed English translation of Article 36 of the Data Security Law of the PRC ("DSL"), which came into effect on 1 September 2021, provides:

> "Article 36 The competent authorities of the People's Republic of China shall handle requests for data made by foreign judicial or law enforcement authorities, in accordance with the relevant laws and international treaties or agreements concluded or acceded to by the People's Republic of China, or in accordance with the principles of equality and reciprocity. Without the approval of the competent authorities of the People's Republic of China, organizations or individuals in the People's Republic of China shall not provide data stored within the territory of the People's Republic of China to any overseas judicial or law enforcement body."

75. Counsel also referred me to Article 48 of the DSL which insofar as is relevant provides:

> "Whoever, in violation of Article 36 of this Law, provides data to an overseas judicial or law enforcement body without the approval of the competent authorities, shall be given a warning by the competent department, and may be concurrently fined not less than RMB 100,000 yuan but not more than RMB 1 million yuan, and the directly liable persons in charge and other directly liable persons may be fined not less than RMP 10,000 yuan but not more than RMB 100,000 yuan. If serious consequences are caused, the violator shall be fined not less than RMB 1 million yuan but not more than RMB 5 million yuan, and may be ordered to suspend the relevant business or suspend operations for rectification, or

have relevant business permits or the business license revoked. The directly liable persons in charge and other directly liable persons shall be fined not less than RMB 50,000 yuan but not more than RMB 500,000 yuan."

76. Article 1 of the DSL provides that the law is enacted for "the purpose of regulating data processing, ensuring data security, promoting development and utilization of data, protecting the lawful rights and interests of individuals and organizations, and safeguarding the sovereignty, security and development interests of the state."

77. The agreed English translation of Article 41 of the Personal Information Protection Law of the PRC ("PIPL"), which under Article 74 came into operation on 1 November 2021, provides:

> "Article 41 The competent authorities of the People's Republic of China shall handle foreign judicial or law enforcement authorities' requests for personal information stored within China in accordance with relevant laws and the international treaties and agreements concluded or acceded to by the People's Republic of China, or under the principle of equality and reciprocity. Without the approval of the competent authorities of the People's Republic of China, no organization or individual shall provide data stored in the territory of the People's Republic of China for any foreign judicial or law enforcement authority."

78. Counsel referred me to Article 66 of the PIPL which provides:

> "Where personal information is processed in violation of the provisions of this Law or without fulfilling the personal information protection obligations provided in this Law, the departments with personal information protection duties shall order the violator to make corrections, give a warning, confiscate the illegal gains, and order the suspension or termination of provision of services by the applications that illegally process personal information; where the violator refuses to make corrections, a fine of not more than RMB one million yuan shall be imposed thereupon; and the directly liable persons in charge and other directly liable persons shall each be fined not less than RMB 10,000 yuan nor more than RMB 100,000 yuan.

> In the case of an illegal act as prescribed in the preceding paragraph and the circumstances are serious, the departments with personal information protection duties at or above the provincial level shall order the violator to make corrections, confiscate the illegal gains, impose a fine of not more than RMB 50 million yuan or not more than five percent of the previous year's turnover; may also order the suspension of relevant businesses, or order the suspension of all the business operations for an overhaul, and notify the competent authorities to revoke relevant business permits or license; shall impose a fine of not less than RMB 100,000 yuan but not more than RMB 1 million yuan upon each of the directly liable persons in charge and other directly liable persons, and may decide to prohibit the abovementioned persons from serving as directors, supervisors, senior managers, or the persons in charge of relevant companies within a specific period of time."

79. Article 1 of the PIPL provides that the law is enacted for "the purposes of protecting the rights and interests on personal information, regulating personal information processing activities, and promoting reasonable use of personal information."

80. Counsel also referred me to Article 253 (1) of the Criminal Law of the PRC (2020 Amendment) which provides:

> "Whoever sells or provides any citizen's personal information in violation of the relevant provisions of the state shall, if the circumstances are serious, be sentenced to imprisonment of not more than three years or limited incarceration in addition to a fine or be sentenced to a fine only; or be sentenced to imprisonment or not less than three years but not more than seven years in addition to a fine if the circumstances are really serious."

81. Looking at these provisions simply on the plain wording on their face through Cayman common law as opposed to Chinese civil law eyes, and focusing on the opening wording "requests for data made by foreign judicial or law enforcement authorities" and "foreign judicial or law enforcement authorities'", "requests for personal information stored within China" and closing words "any overseas judicial or law enforcement body" and "any foreign judicial or law enforcement authority" I can see how it may be difficult for some to see how the Company's compliance with its discovery obligations is a request for data to be provided "to any overseas judicial or law enforcement body" or a request "for personal information stored in China" to be provided to "any foreign or law

enforcement authority." There is no direct request from "foreign judicial or law enforcement authorities". There is no direct provision of data including personal information "to any overseas judicial or law enforcement body" or "any foreign or law enforcement authority." This court however must look at more than simply the words of the provisions in isolation. I must also consider the expert evidence on the provisions and apply my own common sense.

Conclusion as to whether the relevant PRC law provisions apply in the present context

82. I accept Professor Liu's opinion that Article 36 of the DSL and Article 41 of the PIPL are likely to be applicable because providing relevant documents, pursuant to the August 2022 Order, is highly likely to be viewed by the Chinese authorities as equating to a court in a civil jurisdiction summoning evidence (paragraph 20 of the joint memorandum of experts). That opinion makes sense to me in the present context.

83. I have concluded that it is likely that disclosure and inspection of data and/or personal information stored within the PRC could infringe PRC law namely Article 36 of the DSL and Article 41 of the PIPL. I am persuaded by Professor Liu's experience and knowledge and his view that, despite the wording of the provision, DSL Article 36 will be construed as regulating the cross-border transfer of evidence for *inter-partes* discovery compelled by a foreign court. In this case the August 2022 Order required the Company to give discovery by way of uploading documents to the Data Room and some of these documents may be adduced into evidence and placed before the court. Birt JA in *Trina Solar Limited* (CICA unreported judgment delivered on 4 May 2023) at paragraph 256 referred to the reality of Section 238 cases and the "duty of the company to provide the court with all the information so that the court can fulfil the duty imposed on it under Section 238." It is easy to see why documents produced via the August 2022 Order could be regarded as being provided to an "overseas judicial body" namely the Grand Court of the Cayman Islands. Although Mr Duan's narrow view is under the literal wording of the provisions certainly arguable, I prefer Professor Liu's views as to the applicability of Article 36 of the DSL and Article 41 of the PIPL.

Is there an actual risk of prosecution?

84. The next question is whether the Company has established an actual risk of prosecution. As Beatson LJ stated in *Servier* at page 4424 "In the exercise of its jurisdiction, it is legitimate for the court to take account of the real risk of prosecution." In the subsequent *Bank Mellat* appeal Gross LJ stated at paragraph 63 iv) that "When exercising its discretion, this Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state." The burden is placed squarely on the Company to establish the relevant risk of prosecution (if any authority is required for that trite proposition see paragraph 70 ii) of *Bank Mellat*). The Company seeks to discharge this burden by placing primary reliance on the expert evidence of Professor Liu and the Dissenters attempt to counter with the expert evidence of Mr Duan. I have also considered all the other evidence before the court on this "mundane and, essentially, factual question" (paragraph 70 i) of *Bank Mellat*).

85. As Butcher J said in *Tugushev* at paragraph 32, applying *Bank Mellat*, "the relevant question is as to the risk of prosecution. It is not as to the risk of a sanction being imposed, but the question is one as to the actual risk of prosecution and not merely the question of whether the conduct which is relevant discloses a breach of the foreign criminal law."

86. Henshaw J in *The Public Institution for Social Security* at paragraph 156 stated that "It is for the applicant to establish a real risk of prosecution or (arguably) other prejudice …". In *Bank Mellat* (at paragraphs 63(iv) and 64) the reference is to a real – in the sense of the actual – risk of prosecution in the foreign state. It appears from paragraph 69 of *Bank Mellat* that a risk of prosecution without the risk of subsequent sanctions is sufficient to weigh in the court's discretion.

Lingjun (Judy) Wang's evidence on actual risk of prosecution

87. Lingjun (Judy) Wang, the Company's general counsel, in her first affirmation of 16 November 2023 at paragraph 6 says "we genuinely fear prosecution and genuine prejudice" and at paragraph 7 grades this as "a very high risk" stating "I and those members of staff and management working for the Company and its group genuinely fear that if we transfer the data identified for discovery and inspection, across the border, without regulatory approval then we, as individuals and the Company are at serious risk of prosecution or other forms of serious prejudice." She gives details

at sub paragraph a.-h., at a. referring to the Company operating, in what she describes as the "highly regulated sector" of healthcare services through a network of private hospitals and affiliated ambulatory clinics over 27 sites in the PRC.

Professor Liu's evidence on actual risk of prosecution

88. What does Professor Liu say about the actual risk of prosecution?

89. In his first affirmation of 13 March 2023, he says little about risk of prosecution but refers from paragraph 36 onwards to penalties for non-compliance under the DSL. In his second affirmation of 24 August 2023 again he says little about risk but from paragraph 20 onwards refers to penalties for non-compliance with the DSL. Finally in his third affirmation of 16 November 2023 at paragraph 9 he offers his opinion that "the Company, its management team and its employees are all at high risk of criminal prosecution as well as other forms of serious prejudice by way of administrative sanction were the Company to be caught transferring data cross-border without PRC regulatory approval." (my underlining). At paragraph 10 he refers to "criminal prosecution under the PRC Code". At paragraph 26 he refers to his understanding that "the risk of prosecution and enforcement" is not "fanciful but a real and present danger for companies operating in the PRC". At paragraph 28 he concludes that the risk of the Company and its management and staff having penalties imposed through "an administrative or criminal prosecution for breaches of Article 36 of the DSL or the PIPL" is "highly likely" and adds at paragraph 29 a reference "high risk" exposure to "prosecution or other forms of serious prejudice." In his fourth affirmation of 9 January 2024 Professor Liu at paragraph 7 provides what he describes as his "high-level summary" and at paragraph 7 (g) does not use the words "high risk" or indeed refer to a criminal prosecution but summarises his evidence as "The risk of sanction for the company (sic) upon breach by the Company of the DSL and/or PIPL is considerable…" (my underlining). Nowhere in his high-level summary does he refer to a high risk of prosecution, although in fairness there is a cross reference to paragraphs 44-62 but they do not refer to a high risk of prosecution.

Mr Duan's evidence on actual risk of prosecution

90. Mr Duan in his affirmation of 20 December 2023 refers to prior evidence from his colleague Zhihua Tang ("Mr Tang"). Mr Tang in his affirmation of 2 March 2023 did not refer to risk of prosecution

but did at paragraph 37 state that even if giving discovery without prior approval would result in non-compliance with Article 36 of the DSL (which he denied) "I consider that the risk of the Company being sanctioned by the PRC authorities for such a breach would be very low." (my underlining). Mr Duan at paragraph 13.7 of his affirmation says that even if the transfer of data was in breach of PRC law (which he denies) "the risk of the Company being prosecuted by the PRC authorities, and the risk of serious consequences (such as imprisonment of its officers) from any such prosecution, if it gave discovery in these proceedings, without first seeking approval to do so would be low." (my underlining). At paragraph 59 Mr Duan says that he does not consider that there is a risk of infringement of PRC laws but "even if there was a risk of infringement, it is my opinion that the risk of the Company being prosecuted (or suffering some other form of serious prejudice) is extremely low." (my underlining). At paragraph 60 Mr Duan adds that if a PRC law firm attended to the redaction process it is "extremely unlikely the Company would be punished…". At paragraph 77 Mr Duan says that if personal information and other important data is redacted the risk of "an imposition of penalties is extremely low; the likelihood that extreme punishment at the highest scale would be imposed is even lower". At paragraph 80 Mr Duan says that provided personal information is redacted (as required by the August 2022 Order) "the Company should not be at risk of failure to comply with the PIPL and hence any risk of punishment under Article 66 of the PIPL."

Conclusion on actual risk of prosecution

91. I must consider the issue presently before me on the evidence presented. As a matter of comity I should assume that the prosecution authorities in the PRC will act reasonably and fairly, there being no evidence to the contrary before me.

92. Ms Leahy accepted that there was not a lot of evidence before the court on the issue as to whether PRC law is the same as Cayman law on the issue of a prosecuting authority having a discretion whether to prosecute or not but submitted that the court was entitled to assume that PRC law is the same as Cayman law, in the absence of any evidence to the contrary. Mr Lowe submitted that there was no evidence in respect of PRC prosecutors having a discretion and to assume such would take the presumption of similarity of law to a whole new level.

93. In my judgment, the PRC authorities should reasonably and fairly take into account all relevant circumstances when they are considering whether to instigate a prosecution or impose a penalty. I note that Article 10 of a document entitled "Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of the Law in the Handling of Criminal Cases of Infringing on Citizens' Personal Information" dated 8 May 2017 provides that if "there are no "especially serious circumstances" where the offender is a first-time offender, the restitution is made in full and the offender truly expresses repentance about the crime, it can be held that the circumstances are minor, with prosecution dismissed or criminal punishment waived. If the criminal punishment is truly necessary, the offender shall be leniently punished." These appear to be fair considerations familiar to common law eyes. I also note a draft document dated 13 November 2023 whereby public comments are sought by the Chinese Ministry of Industry and Information Technology on the administrative penalty discretion guidelines for data security in industrial and information technology fields. There is reference to the DSL and the discretion in administrative penalties in respect of data security violations. It is clear from such document that the PRC authorities have a discretion and are directed to pay "equal attention" to "correcting the violation and educating the parties involved, so as to guide the parties to consciously abide by the law." Article 18 (1) provides that "where the violation is minor and is corrected in a timely manner, without causing any harmful consequences; or where the violation is committed for the first time with minor harm, is corrected in a timely manner, no penalty may be imposed." Under Article 19 (1) "lighter or mitigated administrative penalty shall be imposed" "when the party takes proactive action to eliminate or reduce the harmful consequences of the data security violation." Although review and redaction by PRC lawyers is not specifically mentioned such could reasonably fall within the phrase "proactive action to eliminate or reduce the harmful consequences" and such should be taken into account when the PRC authorities are making a decision whether to prosecute or not. The "Benchmarks for Discretion" documents refer to administrative penalties as including fines and suspension or revocation of licenses and to prior warnings and orders to make rectifications. Fair and reasonable prosecutors will have regard to various factors when considering whether or not to prosecute.

94. I also take into account Roskill LJ's stark warning in the *Westinghouse* case at page 579, albeit in a different context, flagged by Mr Lowe on a number of occasions during the hearing.

95. For present purposes erring on the side of caution and in favour of the Company, I am content to conclude that there is, in the circumstances of this case, an actual risk of prosecution. For the purposes of the balancing exercise that now follows I do not assess the risk of prosecution as "high" (Professor Liu) or "low" or "extremely low" (Mr Duan). I assess it as low to moderate. I state the reasons for such assessment below:

(1) despite my conclusion on the applicability of the DSL and the PIPL, from their plain wording there is some uncertainty as to their applicability and different experts take different views. Henshaw J in *The Public Institution for Social Security* went so far as to say at paragraph 156 that "there is force in the view that prosecution is relatively unlikely if there is a real doubt about the law";

(2) the provisions of the DSL and the PIPL refer to warnings or fines or "if serious consequences are caused" or if "the circumstances are serious" bigger fines and possible suspension or revocation of business licences rather than prosecutions and terms of imprisonment. The PIPL also refers to the position "Where the violator refuses to make corrections …". No warning has been given in this case;

(3) the DSL has been in force since 1 September 2021 and the PIPL since 1 November 2021 and there have been no prosecutions. Butcher J in *Tugushev* at paragraph 32 stated that the court should consider whether the foreign law "is regularly enforced". The experts are agreed that no entity "has been penalised or prosecuted (including the penalty of license revocation) for infringing DSL 36 or PIPL 41 or for the disclosure of data in discovery in foreign litigation proceedings." (paragraph 65 of the undated joint memorandum of experts);

(4) when an approval mechanism was in place the Company was given approval in respect of the applications it made;

(5) the PRC prosecution authorities should note that there has been no approval mechanism in place for over a year and no such mechanism is in clear sight for the future;

(6) the PRC prosecution authorities should consider comity issues including the fact that the Company's disclosure of the documents was to comply with an order of a court made in the place of the Company's incorporation to further the overriding objective and to enable that court to conduct a fair trial within a reasonable time;

(7) the PRC prosecution authorities should be conscious of the need for expedition and compliance with the overriding objective as the rules of one of the PRC's Special Administrative Regions refers to one of the main "underlying objectives" being "to ensure that a case is dealt with as expeditiously as is reasonably practicable." (Order 1A rule 1(b) of the Hong Kong Civil Procedure 2024. See also the judgment of Justice Geoffrey Ma, a former Chief Justice of Hong Kong, delivered in *Wing Fai Construction Company Limited (in compulsory liquidation) v Yip Kwong Robert* [2011] HKCFA 85 especially at paragraphs 31-34 and 64 where that internationally well-respected jurist stresses the need for expedition);

(8) the PRC prosecuting authorities should note that the August 2022 Order contains stringent provisions in respect of confidentiality and redactions to ensure the protection of the data;

(9) the PRC authorities should also take note of the considerable efforts the Company has gone to in respect of redactions. Indeed I note that Xiaomeng (Melody) Wang at paragraph 24 of her first affirmation of 12 October 2022 in *51Job, Inc* (FSD 155 of 2022 (DDJ)) and included in the bundles before the court in this matter stated: "redacting personal information contained in these documents is the only practical way to allow these documents to be transferred out of the PRC and provided to the Dissenters and the Experts without exposing the Company and its employees and officers to the risk of violating the Cybersecurity Law and/or the PIPL and facing the corresponding sanctions". I do not lose sight of Mr Lowe's point that Harneys in their letter dated 14 April 2023 indicated that the PRC authorities had referred to the need for authorisations by relevant personal information subjects and that "redaction only" may not suffice; and

(10) the PRC prosecuting authorities should note that the Cayman court took into account the important interests of the PRC in respect of the regulation of data processing, data security, the lawful rights and interests of relevant legal entities and the protection of personal information and safeguarding the sovereignty and security of the state.

96. Having concluded that there is a risk of prosecution, albeit a low to moderate one, I now go on to conduct the balancing exercise.

The balancing exercise

97. At the core of the balancing exercise is weighing on the one hand the risk of prosecution and on the other the need for and importance of the documents to ensure the fair determination of the Section 238 proceedings within a reasonable time. Various relevant factors need to be weighed in the balance and a just and fair conclusion arrived at.

98. In considering whether or not to grant a further extension of time for a party to comply with an order requiring it to provide discovery within a specified period of time, where there is a real – in the sense of actual – risk of prosecution in a foreign state, the court may take into account the following factors when undertaking the balancing exercise:

(1) the overriding objective of dealing with cases in a just, expeditious and economical way;

(2) Section 7 and the need for a fair trial within a reasonable time;

(3) the importance of complying with court orders and local rules;

(all of which are covered above)

and the following factors which I consider in further detail below:

(4) the actual risk of prosecution and the degree and extent of such risk;

(5) the need for and the importance of the documents;

(6) minimisation of the concerns under the foreign law;

(7) the location of the documents and the parties;

(8) comity considerations;

(9) the availability of alternative means of securing the documents;

(10) the conduct of the party seeking the extension;

(11) whether the delay causes any prejudice to the parties and the legal system generally;

(12) the extent to which non-compliance would undermine important interests of the Cayman Islands or compliance would undermine important interests of the foreign state;

(13) whether there is an acceptable explanation and good excuse for the delay; and

(14) what the justice of the case requires.

The actual risk of prosecution and the degree and extent of such risk

99. I have set out above my assessment of the "mundane, and essentially factual question" (Gross LJ in *Bank Mellat* at paragraph 70 i)) of the actual risk of prosecution in this case. I have concluded that there is a risk of prosecution and I assess it as low to moderate. I have full regard to that important factor in the balancing exercise, but as the prior authorities make plain it is not determinative of the balancing exercise.

The need for and importance of the documents

100. In respect of the need for and importance of the documents to the fair disposal of these proceedings I have been given very little help by the Company. I do not even have a list of the 444,000 outstanding documents in the PRC or a summary of the nature of them. Mr Lowe suggested that providing a list outside the PRC would run the risk of prosecution. The 440,000 documents are plainly relevant documents otherwise they would not be discoverable. Whether they are necessary to a fair determination of the proceedings is difficult to assess. I do not even have sight or a summary of the 36,000 documents discovered to date to enable me to assess the relative importance of the outstanding documents which are yet to be uploaded to the Data Room by way of discovery. The August 2022 Order specified the various categories of documents to be discovered and it is a reasonable inference that at least some of the outstanding 440,000 documents may be of some importance and some of them may prove to be very important.

101. In my judgment delivered on 31 March 2023 in these proceedings at paragraph 32 I referred to Parker J's judgment delivered on 20 January 2023 in *Re Sina* and his justifiable comments that:

> "Disclosure by the Company is fundamental to 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."

102. At paragraph 33 I added "It is common ground between the Company and the Dissenters that the Company's discovery in this case will be fundamental to a fair trial." The Company in its skeleton argument dated 23 March 2023 at paragraph 14 acknowledged that "vital materials concerning the petitioner's fortunes over the lookback period, and the deliberations of the special committee in the lead up to the statutory merger, are all in the company's control." And at paragraph 23 "… the Court cannot discharge its statutory duty without the relevant materials."

103. Catie Wang in her first affirmation of 2 November 2023 at paragraph 7 acknowledged "the urgency and necessity of providing the Documents in the Proceedings."

104. Martin JA delivering the judgment of the Court of Appeal in *In Re Qihoo 360 Technology* 2017 (2) CILR 585 at paragraph 3 stated:

> "… all or nearly all of the financial information necessary to enable the court to determine the value of a company's business, and hence of its shares, will inevitably be held by the company itself. The proper conduct of the valuation exercise will accordingly require that the company make adequate disclosure of that information … the experts will often have to be given a substantial degree of autonomy in determining what information is needed for their valuations … care must be taken to ensure that this autonomy is not abused … in general we agree with the statement … that "the experts are the best judge of what information is or is not relevant for their purposes"."

105. I have also considered paragraphs 250-261 of *Trina Solar Limited* (CICA unreported judgment delivered on 4 May 2023) where Birt JA emphasised the importance of the Company's discovery and evidence in Section 238 cases. Birt JA at paragraph 256 commented that the relevant "information will primarily be in the hands of the company and its financial advisers; dissenting shareholders are unlikely to have much information other than that in the public domain. It is

therefore the duty of the company to provide the court with all the information so that the court can fulfil the duty imposed on it under section 238." At paragraph 257 Birt JA added:

> "It follows that the court should make wide ranging orders for discovery as was done in this case. The company must comply fully with such an order …".

106. In view of the lack of evidence before the court as to the documents discovered to date and the outstanding 440,000 documents to be discovered it is difficult to assess the probative value of the outstanding documents but I take judicial notice of the necessity and importance of a company's discovery in Section 238 cases.

107. It would appear that some necessary and important documents have not yet been disclosed. Travis Taylor, the Dissenters' valuation expert, put forward an Information Request under the heading "Questions for Management" dated 23 February 2024 which included a request for items as basic as the Company's audited financial statements for the year ended 31 December 2021. There were also general requests in respect of financial results for each hospital and specific requests in respect of an increase in the offer price, and the total number of options outstanding at the Valuation Date and questions in respect of cash flows. Travis Taylor stated that as work continues on the report "I expect to have further requests."

Minimisation of the concerns under the foreign law

108. In this case there are already stringent confidentiality and redaction provisions in the August 2022 Order which should minimise any concerns under PRC law.

The location of the documents and the parties

109. The 440,000 documents appear to have originated in the PRC and are still located in the PRC. The Company is incorporated under the laws of the Cayman Islands and its registered office is within the Cayman Islands, although it has operations and personnel on the ground in the PRC. The Dissenters appear to be located outside the PRC, with addresses in the Cayman Islands, the British Virgin Islands and the United States of America.

Comity considerations

110. Dicey, Morris & Collins in *The Conflict of Laws* (Sixteenth Edition) at paragraph 7-002 referred to comity stating that "Comity is a term of very elastic content. Sometimes it connotes courtesy or the need for reciprocity." At paragraph 7-017 still in the section dealing with comity, it is stated that:

> "… the English court may order the disclosure of documents held abroad or the provision of information, even if the object of the order might be subject to the criminal sanctions in the country in which the documents are held …".

111. In 1895 the Supreme Court of the United States of America in *Hilton v Guyot* 159 U.S. 113 (1895) conducted, in the context of the recognition of foreign judgments and comity, an impressive review of the judgments and laws of many countries including England, Jamaica, Tobago, Australia, France, Holland, Belgium, Denmark, Germany, Switzerland, Russia, Poland, Romania, Bulgaria, Austria, Italy, Monaco, Spain, Portugal, Greece, Egypt, Cuba, Porto Rico, Mexico, Peru and Chile and at page 143 Justice Gray, delivering the opinion of the court, uttered on 3 June 1895 his now famous words, which still hold good in April 2024:

> ""Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislature, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."

Chief Justice Fuller dissented and Justices Harlan, Brewer and Jackson concurred in the dissent.

112. The expression "comity" is used in many senses (see paragraph 69 of *Shandong Chenming Paper Holdings Limited v Arjowiggins HKK2 Limited* [2022] HKCFA 11 at paragraph 69) but in the present context it is used to cover this court's respect for the laws and interests of the PRC and the PRC's respect for the laws and interests of the Cayman Islands.

113. In *GTI Holdings Limited* (FSD unreported judgment 15 March 2022) at paragraph 68, in respect of comity between the Cayman Islands and Hong Kong, a Special Administrative Region of the PRC, I commented as follows:

> "...The judges in the Cayman Islands take great care to avoid potential conflict with courts in friendly foreign jurisdictions, especially Hong Kong in view of the very strong connections between the two countries and the importance of the legitimate financial business conducted in and from them. It is plainly in the best interests of the Cayman Islands and Hong Kong that such business continues to flourish and that both jurisdictions have a mutual respect for each other."

114. Gross LJ in *Bank Mellat* at paragraph 63 vi) stated that "considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court. Comity cuts both ways." Butcher J in *Tugushev* at paragraph 36 stressed that "the English courts can expect foreign states to take into account the fact that if disclosure is given in contravention of their domestic law it was in compliance with an English court order." Fancourt J in *Byers* at paragraph 107 xi) stated:

> "The public prosecutor and SAMA can be expected to recognise, as a matter of international comity between friendly states, that the Bank's compliance with its disclosure duty is in response to a lawful order of a foreign Court that has jurisdiction over the Bank, and which was done so that the Bank can proceed to defend itself against a very substantial claim."

115. Furthermore, I am encouraged by Professor Liu's comment at paragraph 51 of his third affirmation of 16 November 2023 to the effect that the judicial trend in the PRC "has been, in recent years, to uphold" the "principles of comity".

116. I have carefully considered the comity concerns, but comity should be a two-way street. If a Cayman court refuses to give a Cayman company further time to comply with a Cayman court order this entails no disrespect to the relevant interests of the PRC or its laws. In this case, the PRC authorities, as a matter of comity, should take into account the fact that the documents are required to be disclosed pursuant to order of the Grand Court of the Cayman Islands (which includes express

and stringent provisions for confidentiality and redaction to deal with PRC law concerns), made in the place of incorporation of the Company, and that this court is constitutionally obliged to give the parties a fair hearing within a reasonable time. The PRC authorities should respect the need for the Company, incorporated under the laws of the Cayman Islands, to comply with the August 2022 Order.

The availability of alternative means of securing the documents

117. It is also relevant to consider the availability of alternative means of securing the documents and the Company's efforts in that respect.

(a) Generally

118. The Company has failed to comply with the August 2022 Order in a timely fashion. 440,000 relevant documents still remain outstanding. The Company, in essence, now says that if it provides them even in their redacted form it would run a real risk of prosecution in the PRC. The Company at paragraph 70 of its skeleton argument dated 26 February 2024 acknowledges that "A great deal of the financial information sought would be available from parties in the US …". In such circumstances, I would have expected to see evidence from the Company that it has taken all reasonable steps to secure access to any duplicates of the documents located outside the PRC. No such evidence has been provided. Mr Lowe took the court to an American case from 1987 (*Aerospatiale*) where there was reference to the availability of alternative means of securing the information. It is true that some of the Dissenters (namely those represented by Carey Olsen), as seems the norm in Section 238 cases, have filed numerous Section 1782 applications in America but I have seen no evidence that the Company has supported those applications or done its best to encourage voluntary production of outstanding documents outside the PRC. Indeed, in the correspondence between the Dissenters and the Company on the question of the disclosure of outstanding documents the Company seems to take an unduly combative stance and has not given an inch. By letter dated 16 October 2023 the Dissenters (via their attorneys) requested the Company (via its attorneys) to produce an affidavit verifying the categories of undisclosed documents by reference to the August 2022 Order which the Company says falls within the relevant PRC legislation. The Company has produced no such affidavit. Harneys unhelpfully responded on 25 October 2023 simply denying that the Company had "withheld documents from discovery pending

PRC regulatory approval which it should properly have disclosed" and added: "We do not believe additional evidence is required for the Court to deal with the Further Extension Summons." That is not an attractive position for the Company to adopt especially where it has failed to comply with the August 2022 Order.

119. In an endeavour to lead the court to conclude that the Company was doing all it reasonably could to enable it to transfer the outstanding redacted documents from the PRC to the Cayman Islands, and to persuade the court yet again to exercise its discretion in its favour and give the Company a further extension of time, Mr Lowe referred to the actions the Company had taken in respect of letters rogatory and the Cyberspace Administration of China ("CAC") self-assessment and it is to those belated attempts that I now turn.

(b) Letters rogatory

120. In the Company's written submissions dated 2 November 2023 for the case management conference on 8 November 2023 at paragraph 7 it stated that the process of review of the Company's documents collected within the PRC had been completed on 31 July 2023 and since the last hearing to the date of the skeleton 31,649 of the Company's discoverable documents had been approved by the PRC regulatory authorities for cross-border transfer and disclosed to the Dissenters. At paragraph 9 it was stated that on or around 31 March 2023 the Company's PRC legal counsel was informed by the Judicial Assistance Exchange Centre (the "JAEC") that it was no longer accepting applications for approval and that the Ministry of Justice was discussing with the relevant authorities in the PRC a new mechanism to handle such applications. At paragraph 19 (c) (vi) it was stated that "The Company is doing everything possible to identify means by which approval may be obtained in the absence of any new mechanism including Letters Rogatory and preparation of a self-assessment to facilitate an application to the Cyberspace Administration of China (CAC) for a security assessment in relation to the cross-border transfer of the Documents: both methods being uncertain." Catie Wang of Harneys in her first affirmation of 2 November 2023 at paragraph 7 stated: "the Company intends to apply shortly to the Ministry of Foreign Affairs for Letters Rogatory …".

121. The Company (via Harneys) wrote to the court by letter dated 29 December 2023 and stated:

> "… the Company will seek shortly to have the Letters Rogatory Application listed such that it may be determined, and matters progressed as soon as possible."

122. In a subsequent letter of 19 January 2024 "the Company will proceed to list the Letter Rogatory Application before this Court." Harneys in a letter dated 22 February 2024 to Campbells and Carey Olsen stated that the Company "will shortly issue its application".

123. As it transpires the application for a letter rogatory to be issued to the Ministry of Foreign Affairs of the PRC was not filed until 20 March 2024, shortly before the hearing was due to commence on 26 March 2024.

124. Catie Wang in her affirmation of 20 March 2024 filed on behalf of the Company at paragraph 17 states that the Company seeks the "issuance of the Request through diplomatic channels on principles of comity" and adds that:

> "(a) it is uncertain whether the PRC authorities will accede to the Request;
> (b) I understand that letters of request under the Hague Convention in the PRC usually only concern a handful of documents as opposed to thousands as is the case in this matter;
> (c) it is (at least in common law jurisdictions) unusual for a litigant to seek its own documents through such a request; and
> (d) the timeline within which the PRC authorities will deal with the Request, if made, is difficult to predict."

125. Professor Liu does not see a "legal barrier to the Company attempting this potential route to obtain approval, albeit I am unaware of any successful application having been made from the Cayman Islands to the PRC for such judicial assistance. It would be a novel approach to the present impasse and may in fact be better received by the JAEC and Ministry of Justice, since this is arguably a collection of evidence under the principle of comity, in respect of which the judicial trend has been, in recent years, to uphold" (paragraph 51 of his third affirmation of 16 November 2023).

126. Mr Duan, in his affirmation of 20 December 2023 at paragraph 91, is of the view that a letters rogatory approach will not be effective: "Whilst the letters rogatory application is theoretically possible, it is time-consuming and has not been successful in the past."

127. In *Byers* Fancourt J at paragraph 68 decided that the court should not issue a letter of request to the Ministry of Foreign Affairs of the Kingdom of Saudi Arabia essentially for the following reasons:

(i) such an order is "wrong in principle" adding "attempting to engage the support of a foreign government to remove an obstacle to a foreign litigant's compliance with an order for disclosure is not a request for assistance from a foreign court to secure material evidence. This court does not have diplomatic relations with foreign governments.";

(ii) there was no credible evidence that such an approach was likely to bear fruit;

(iii) even if there was a positive response, it would almost certainly be too late for a fair and effective trial to take place in October 2020.

128. Fancourt J is not alone in his reservations in respect of letters of request in such circumstances. Neuberger J at paragraph 80 in *Morris* rejected an argument that disclosure should be sought by a letter of request under the Hague Convention as such would have created unjust delay and it was not clear that it would succeed. Rimer LJ in *Secretary of State for Health v Servier Laboratories Ltd* [2013] EWCA Civ 1234; [2014] 1 WLR 4383 at paragraph 104 stated: "It is obvious that, as between obtaining disclosure (i) by a direct order against the parties, and (ii) by a "court to court" request … the former is plainly the more appropriate course. The latter is likely to be a slow, cumbersome and inadequate alternative, which may well … spawn follow-up applications …". Beatson LJ and Laws LJ agreed and the Supreme Court dismissed applications for permission to appeal. Henshaw J in *The Public Institution for Social Security* at paragraph 45 noted and applied these English appellate comments.

129. The concerns of the English courts over the effectiveness of letters rogatory in a discovery process are also echoed in the American courts. In *Milliken & Company v Bank of China et al* 758 F. Supp. 2d 238 (2010) at pages 239-243 the court said that requests via a letter rogatory "have not been particularly successful in the past. Requests may take more than a year to execute. It is not unusual

for no reply to be received or after considerable time has elapsed, for Chinese authorities to request clarification from the American court with no indication that the request will eventually be executed." In *Nidec Motor Corporation v Broad Ocean Motor LLC et al* 4.13-cv-01895 Sept (20 January 2022), sitting at the coal face, United States District Judge Sarah E Pitlyk at page 3 referred to Hague Evidence Convention procedures being often unduly time-consuming and expensive and less likely to produce needed evidence than the direct use of the Federal Rules of Civil Procedure "and courts have found such concerns especially acute with respect to China." In *Aerospatiale* Justice Stevens, delivering the opinion of the court, at page 2555 stated "In many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules. A rule of first resort in all cases would therefore be inconsistent with the overriding interest in the "just, speedy, and inexpensive determination" of litigation in our courts …".

130. Although I take into account the Company's belated efforts to proceed by way of a letter rogatory I do not attach any significant weight to them in the balancing exercise.

(c) CAC self-assessment

131. The Company (via Harneys) in a letter dated 14 July 2023 stated that its PRC counsel had approached local CACs in both Beijing and Shanghai on 14 July 2023 but to no avail and the central CAC stated that they were not the competent authority to deal with applications if no important data was involved.

132. Catie Wang in her first affirmation of 2 November 2023 at paragraph 7 indicated that the Company was in the process of preparing its self-assessment to facilitate an application to the CAC for a security assessment in relation to the cross-border transfer of documents.

133. The Company (via Harneys) wrote to the court by letter dated 29 December 2023 and stated:

> "The Company is in the process of finalising its CAC self-assessment application …"

134. By letter dated 19 January 2024 the Company (via Harneys) informed the court that "The Beijing CAC considers that the MOJ administers cross-border transfer of evidence for *inter partes*

discovery under foreign proceedings and it would not be able to provide any guidance if the MOJ does not take any applications." The Company stated that it "is in the process of preparing the self-assessment report and will submit the same to the CAC once it is completed."

135. The Company at paragraph 69 of its skeleton argument dated 26 February 2024 says that in order to avoid further delay the Company has continued to finalise the CAC self-assessment papers and "It is anticipated that the CAC Self-Assessment will be filed in the week commencing 26 February 2024." At paragraph 55 (vi) of its skeleton argument it is stated:

> "On 4 August 2023 Ms Liu was advised by the JAEC that no update was available. Ms Liu also tried again to approach the local CACs in both Beijing and Shanghai, as well as the central CAC, but was told once again that the CAC is not the appropriate authority to contact in relation to the cross-border transfer of the Company's PRC data."

136. Professor Liu in his third affirmation of 16 November 2023 at paragraph 50 refers to CAC self-assessment and says that he sees "no legal barrier to the Company attempting this course" and "there seems to me to be little to be lost in attempting this approach." In his second affirmation of 24 August 2023 Professor Liu at paragraph 14 had stated that it was unclear to him whether "any of the CACs will continue to have a role in approvals for materials sought for cross-border transfer where this concerns litigation…".

137. Mr Duan in his affirmation of 20 December 2023 at paragraph 92 raises, in a balanced and common-sense way, the possibility that "the CAC may not consider the application, as the CAC does not consider itself the competent authority for handling cross-border evidence transfer." He adds "even if the Company completes the self-assessment report, the CAC is unlikely to accept the Company's application."

138. In her fifth affirmation of 20 March 2024 Catie Wang at paragraph 13 (a) says that the Company is mindful of its discovery obligations and at paragraph 14 adds that "on 20 March 2024, the Company submitted a self-assessment to facilitate an application to the Cyberspace Administration of China (CAC) for a security assessment in relation to the cross-border transfer of Documents (the CAC Application), however, it is difficult to predict with any certainty whether the CAC

Application will be accepted by the CAC and if it is, the timeline within which the Company might receive a response."

139. It is difficult to see what will realistically be achieved by the CAC self-assessment route, other than further delay. Although I take into account the Company's references to CAC self-assessment I do not attach any significant weight to them in the balancing exercise.

The conduct of the party seeking the extension

140. The Company presented its petition dated 28 March 2022 seeking pursuant to Section 238 the court's determination of the fair value of certain shares. There was a heavy burden on the Company to provide discovery and to conduct itself accordingly.

141. In my judgment delivered on 12 August 2022 I recorded on page 7 that the Company was seeking an order that it provide the bulk of its discovery within 180 days rather than the 120 days as contended for by the Dissenters. My ruling was that a period of 120 days should be allowed. My reasons included the following:

> "I am not persuaded that the impact of the COVID 19 pandemic and the PRC Data Protection Laws mean that a longer period than 120 days should be allowed. 120 days should be adequate and realistic. The discovery process cannot be permitted to unduly delay the determination of the issues in this case within a reasonable time. The Dissenters have referred to authorities where a "customary" 70 days has been ordered in the past. The evidence before the Court goes nowhere near justifying 180 days. I noted with concern Mr. Wu's statement at paragraph 24 that "the company is yet to begin the process of collecting documents from custodians." The Company seems to have dragged its feet in starting the discovery process earlier than it did and must now get on with the process and devote sufficient resource to it. The Company has already had significant time to progress discovery. The Company must now focus on complying with its discovery obligations."

142. In my judgment delivered on 31 March 2023 I criticised (at paragraphs 2 and 3) the loose language the Company had used in its skeleton argument dated 23 March 2023. At paragraph 4, I referred to the August 2022 Order and stated that according to the Dissenters, the Company's discovery

should have been completed by 19 December 2022. I also referred to Appendix 6 to the August 2022 Order as containing "a very detailed protocol regarding documents required to be redacted in order to comply with the laws of the" PRC. I noted at paragraph 6 that the Company had failed to comply with the August 2022 Order. I referred to the evidence of Mr Wu in his affirmation dated 21 July 2022 and at paragraph 11 noted Mr Wu's reference to the Data Protection Laws of the PRC and his statement that "based on discussions with its advisers the Company anticipates being able to provide the Discovery Documents within 180 days of the Court's directions order, but not earlier than that". At paragraph 13 I noted:

> "At no stage did Mr Wu even hint that government approval was required in the PRC before documents could be released for discovery purposes."

143. At paragraph 17 I summarised the position of the Company. It initially applied for an extension to 28 April 2023 but at the hearing was seeking an extension to 29 September 2023. The Company referred to data security and protection regulations being introduced in the PRC "in c. late 2021", and that the "release [of the balance of the Company's data] must await the grant of government approval" and "On 17 December 2022 a first tranche of documents was sent to the Judicial Assistance Exchange Centre in Beijing for approval to make a cross-border transfer to the Cayman Islands." The Company's position was that the relevant legislation only came into force in late 2021 and the penalties for breach are serious including the revocation of licence, supervision of business and fines for corporate and individuals responsible for unapproved transfers.

144. At paragraph 19 I stated:

> "There is no evidence that the substantive Data Protection Law of the PRC has changed. On behalf of the Company there is evidence that on 1 September 2022 the Measures on Security Assessment for Cross-Border Data Transfer came into effect. There is evidence that the DSL came into force on 1 September 2021 and the PIPL on 1 November 2021, well before the August hearing."

145. At paragraph 28 I stated:

> "It is unfortunate that despite the comments I made in my judgment delivered on 12 August 2022 the Company has not progressed compliance with its discovery obligations in a timely fashion."

146. I added:

> "34. It is unsatisfactory, to say the least, that the Company has not complied with the August Order. The Company's changing positions in respect of PRC law is also of considerable concern. Frankly the Company's attitude to discovery at times was verging on an inappropriate mindset of "it will take as long as it takes in view of PRC requirements."
>
> 35. The Company in the evidence presented to the Court in August did not even hint that approval would be required from the authorities in the PRC before it could comply with its discovery obligations in this jurisdiction, the place of its incorporation. The clear message provided by the Company to the Court in August was to the effect that a further level of review by the Company and its agents was required and this would take some time. There was no reference whatsoever to any external State approvals being required in the PRC."

147. At paragraph 40 I stated:

> "The Company needs to inject a real and continually pressing sense of urgency into its processes for complying with its discovery obligations."

148. At paragraph 41 I added:

> "Valid criticism can be levied against the Company in respect of the way in which it dealt with the discovery issue both prior to and subsequent to the August hearing. It has dragged its heels. It has not acted expeditiously … It has given different messages to the Court in respect of PRC law. All in all a very unsatisfactory position."

149. At paragraph 43 I "somewhat reluctantly" gave the Company "one further extension to 29 September 2023 to comply with its discovery obligations. It is important that the Dissenters and the Court are provided with all the relevant documentation to enable a fair trial to take place. It is also important that such trial takes place within a reasonable time."

150. At paragraph 45 I stated "The Company should not underestimate the importance of complying with Court orders and the adverse consequences that may follow if orders are not strictly complied with. The Company needs to comply with its discovery obligations within the extended time period."

151. At paragraph 46 I endeavoured to underline to the Company the seriousness of the position and the need for the Company to comply with the August 2022 Order by stating:

> "Without fettering the Court's discretion I should add that it is unlikely that any further extensions will be granted even if the approval of the Chinese authorities is not obtained on a timely basis prior to 29 September 2023 … No further delays will be tolerated. The Company should not expect any further indulgence from the Court in respect of compliance with its discovery obligations."

152. I have covered some other aspects of the Company's conduct in the previous section headed *The availability of alternative means of securing the documents.* Suffice to say I have not been impressed with the Company's conduct in respect of its discovery obligations. It has dragged its feet in starting the initial discovery process blaming Covid and the redaction process and it then changed course to insist that approval of PRC authorities was essential. More recently in respect of the Application it initially sought to argue at a case management conference that *Bank Mellat* was not engaged but abandoned that unhelpful stance shortly before the case management conference. Neither have I been impressed with the Company's conduct in respect of seeking access to the documents outside the PRC. Its efforts and lack of expedition in respect of letters rogatory and CAC self-assessment do not instil confidence either. It mentioned letters rogatory on 2 November 2023 but did not file the application until 20 March 2024. The pretence for its delay was that it did not want to derail the March 2024 hearing. I do not find that excuse compelling.

The efforts in respect of what the Company refers to as the CAC self-assessment are equally unimpressive.

153. I take into account Mr Lowe's submission that when an approval mechanism was in place the Company actively engaged with the PRC regulatory authority and obtained approval for two tranches of about 30,000 documents and there is no approval mechanism presently in place for the outstanding 440,000 documents.

154. In fairness to the Company I do acknowledge that it has no doubt spent time and money in gathering together the relevant documents in the PRC and going through a comprehensive review and onerous redaction process and when there was an approval mechanism in place applying for and obtaining approval for two tranches of documentation. As Mr Lowe realistically recognised however the Company's "big problem" is that it has only disclosed 8% of the relevant documents to date. Standing back and looking at the Company's efforts to secure alternative access to the outstanding documents in accordance with the August 2022 Order I think they can fairly be described as inadequate and simply not good enough. There is no evidence that the Company has sought to gain access to any of the outstanding 440,000 documents from locations outside the PRC. There is no evidence that the Company has sensibly co-operated with the Dissenters in their Section 1782 Applications or made other efforts to secure documentation outside the PRC on a voluntary basis. Indeed, there is evidence, in the form of the voluminous correspondence placed before the court, that the Company appears to have adopted a hostile and unhelpful stance in response to any requests from the Dissenters for documents and information.

155. I am not presently convinced that the Company has been doing and is doing all it reasonably can to secure alternative access to the outstanding 440,000 documents or any of them, especially where they also exist in hard copy or electronic format outside the PRC.

156. Ms Leahy complained that the Company had dragged its feet and was playing tactical delaying games. I should make it clear, however, that Ms Leahy did not allege bad faith or lack of good faith on the part of the Company. Moreover, Mr Lowe was at pains to stress that the Company's difficulties in providing the remaining 440,000 documents were not of its own making and were outside its control, praying in aid the comments in *Rogers* at page 1095. In my judgment the Company has not taken a thorough or expeditious approach to complying with its discovery

obligations and seeking to obtain the outstanding documents from sources outside the PRC. I have considered all the submissions placed before the court in respect of the Company's conduct and it should be clear from the contents of this judgment that I have not been impressed with the Company's conduct.

157. I take into account the Company's conduct in respect of its discovery obligations and alternative steps to gain access to the documents and weigh it in the balance.

Whether the delay causes any prejudice to the parties and the legal system generally

158. There has already been a long delay in the Company complying with its discovery obligations. The Company was originally required to provide its discovery by 19 December 2022 and an extension was provided "somewhat reluctantly" to 29 September 2023. The Company maintains it cannot provide the outstanding 440,000 documents without approval of the PRC authorities. The experts are agreed that there is no current mechanism for the cross-border transfer of data. There is no public information or documentation indicating that government departments are in discussions or are initiating the establishment of a mechanism for reviewing data exports relating to overseas discovery proceedings. Professor Liu holds the view that a relevant mechanism and regulation is "forthcoming" (paragraph 18 of the joint memorandum of experts). Mr Duan does not consider that there are likely to be developments or new mechanisms introduced in the near future that would be applicable to the discovery in this matter. Professor Liu now says that a mechanism is "expected to be introduced in the first half of 2024" (paragraph 36 of the joint memorandum of experts). Professor Liu at paragraph 18 of his second affirmation of 24 August 2023 had predicted that a new mechanism would be "put in place by the end of 2023 or the beginning of 2024". By the time of his third affirmation of 16 November 2023 this had already slipped to "Q1 2024" but in fairness to him, he added that the "estimate may be subject to change depending on how efforts to set up the New Mechanism progress and other policy decisions including the publication of the Draft Regulation" (paragraph 44). We are now out of "Q1 2024" and no new mechanism is in sight. No firm timelines can confidently be predicted. No approval mechanism has been in place for over a year. On the evidence I have been provided with there is, in my judgment, no realistic hope of a new mechanism being put in place any time soon or approvals being granted before the end of the year. We simply cannot wait that length of time in addition to the two years that have already elapsed since the commencement of these proceedings, which are fast becoming stale.

159. The Company rightly acknowledged at paragraph 25 of its skeleton argument dated 23 March 2023 that "it may be said that *all* delay is prejudicial" (Company's italics). I have noted that the delay in producing the documents in the near future will not, so long as some of the Section 1782 Applications lodged by some of the Dissenters await determination, be unduly prejudicial to the Dissenters. Moreover, no trial dates have yet been set so an extension of time would not involve the vacation of existing trial dates. However more than a reasonable delay in progressing towards and completing the trial will risk breaching Section 7 and would be seriously prejudicial to the legal system and the constitutional obligations of the courts to secure a fair trial within a reasonable time.

160. I note also that the Dissenters wish to consider the Company's disclosure before deciding whether to forego certain aspects of discovery from the Section 1782 Applications or withdraw them altogether. The Company seeks to counter with a submission that it is common practice in Section 238 cases for the parties to agree that the conclusion of discovery will not take place until after the dissenting shareholders have given notice that the document productions in any Section 1782 proceedings have been concluded and refers to directions orders in *Re Sina* and *58.com*. In the case presently before me the Company should focus on its compliance with the August 2022 Order rather than trying to pray in aid the Dissenters Section 1782 Applications and which are no substitute for the Company giving proper and timely discovery.

161. It is trite that justice delayed can be justice denied. Delay can adversely affect not just the parties to these proceedings but also other court users and the administration of justice generally. Companies and their advisers must move away from the inappropriate and outdated mindset that Section 238 cases will take as long as they take. They must move much closer to the need for expedition and promptly taking all necessary steps to enable the courts to undertake fair determinations of disputed issues within a reasonable time. Parties and their advisers are obliged to help the court to further the overriding objective of dealing with cases in "a just, expeditious and economical way" and to comply with Section 7. Delay will normally add significantly to costs and is the enemy of justice and expedition. The parties, their advisers, and the courts must constantly be on their guard to confront and seek to minimise delays, wherever possible. In that way we will all contribute to the fair, just, expeditious and economical determination of legal disputes within a reasonable time.

The extent to which non-compliance would undermine important interests of the Cayman Islands or compliance would undermine the important interests of the foreign state

162. I take into account that non-compliance with the August 2022 Order as varied would undermine important interests of the Cayman Islands in respect of Section 7, the overriding objective and compliance with court orders and local rules. Non-compliance would undermine those important interests of the Cayman Islands. Mr Lowe was keen to stress that there were no other Cayman public interests engaged. In some of the cases national interests other than the interest in a fair trial within a reasonable time are engaged. I also take into account the fact that in many Cayman group corporate structures that come before the Grand Court at the top is a holding company incorporated under the laws of the Cayman Islands and subsidiaries and other affiliated companies below it incorporated in various foreign jurisdictions including the PRC. It is right and, I venture to suggest, in the best interests of the Cayman Islands that the Grand Court pays due respect to the laws and interests of those foreign jurisdictions and I have borne that firmly in mind when conducting the requisite balancing exercise in this case. I have taken into account the important interests of the PRC in respect of the regulation of data processing, data security, the lawful rights and interests of relevant legal entities and the protection of personal information and safeguarding the sovereignty and security of the state. At paragraph 76 of his affirmation of 20 December 2023 Mr Duan agrees with Professor Liu's observation that the PRC is strengthening its data regulation but adds that it has "simultaneously showed a growing interest in maintaining a free flow of data to and from China in facilitation of international trade ...". Ms Leahy submitted countries across the globe are mindful of trying to balance data security with economic growth and ensuring that the former does not thwart the latter. Compliance with the August 2022 Order as varied may be seen by the PRC authorities to potentially undermine some of the important interests of the PRC, but the strict confidentiality provisions and the comprehensive review and thorough redaction process should significantly reduce, if not eliminate such concerns.

Whether there is an acceptable explanation and good excuse for the delay

163. The Company has not produced an acceptable explanation and good excuse for the delay.

What the justice of the case requires

164. The justice of the case requires the Company to comply with the August 2022 Order as varied.

Conclusion on the balancing exercise

165. Weighing all the relevant factors, the balance clearly and firmly comes down in favour of declining to grant yet a further extension of time for the Company to comply with the August 2022 Order, as already varied. I therefore dismiss the Application.

166. I do not refuse the further extension of time lightly. I have considered the degree and extent of the risk of prosecution and the need for and importance of the outstanding documents to ensure the fair determination of the Section 238 proceedings within a reasonable time. I recognise the PRC's legitimate interest in data protection and security but in my judgment such is overridden by this court's constitutional obligation to secure a fair trial within a reasonable time, the overriding objective and the importance of Cayman companies complying with orders of Cayman courts in this jurisdiction. In my judgment the requirement that the Company comply with the August 2022 Order as varied trumps any remaining concerns the Company may have in respect of the laws of the PRC.

167. The 440,000 outstanding documents have been duly reviewed by the Company's PRC legal counsel and redacted. They are "ready for production" (see paragraph 40 of the Company's skeleton argument dated 26 February 2024). The Company should now press the button and upload them to the Data Room forthwith, without any further delay and these proceedings should be expeditiously progressed towards trial.

Ancillaries

168. In respect of any ancillary applications such as costs or leave to appeal any such applications should be filed and served within the next 14 days with concise written submissions in support (no more than 5 pages) and any concise written submissions in opposition (no more than 5 pages) to be filed and served within 14 days thereafter. I am minded to deal with any such applications on the papers.

Subject to any contrary submissions I am also minded to order that the Company pay the Dissenters' costs of the Application and such costs to be taxed on the standard basis in default of agreement.

The Order

169. Counsel should let me have within the next 7 days for my approval a draft order, agreed as to format and content, in respect of the determinations contained in this judgment.

The Honourable Justice David Doyle
Judge of the Grand Court