In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL LIST)
2021 Nos 107-109, 111-120 and 123-5

IN THE MATTER OF SECTION 106 OF THE COMPANIES ACT 1981

AND

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

AND IN THE MATTER OF JARDINE STRATEGIC HOLDINGS LIMITED

BETWEEN: **OASIS INVESTMENTS II MASTER FUND LTD** **PLAINTIFF**

AND

(1) JARDINE STRATEGIC HOLDINGS LIMITED
(2) JARDINE STRATEGIC LIMITED **DEFENDANTS**

Application for directions in relation to affidavits explaining methodology of disclosure and steps taken to satisfy the defendants of the capacity of directors and other directions for setting down for trial; RSC 1985 Order 24 rules 5 and 7

Hearing dates: 13 and 14 January 2026

Ruling date: **30 January 2026**

Appearances:

Sharif Shiffi KC of 4 Stone Buildings and *Mark Chudleigh* and *David Thom* of Kennedys Chudleigh Limited for the plaintiffs in actions 2021 Nos 111-120 and 123-125

Delroy Duncan KC of Trott & Duncan Limited for the plaintiffs in action 2021 No 109

Matthew Watson of Carey Olsen Bermuda Limited for the plaintiffs in actions 2021 Nos 107 and 108

Martin Moore KC of Erskine Chambers and *John Wasty* of Appleby (Bermuda) Limited for the defendants in actions 2021 Nos 107-9 111-120 and 123-125

RULING OF MARTIN J

Introduction

1. The plaintiffs in these related actions are the dissenting shareholders who have applied to the court for an adjudication of the fair value of the shares in Jardine Strategic Holdings Limited which were acquired from them under an amalgamation transaction on 12 April 2021. The amalgamation was between Jardine Strategic Holdings Limited and JMH Bermuda Limited by the terms of which the plaintiffs received US$33.00 for each share in Jardine Strategic Holdings Limited and Jardine Matheson Holdings Limited ("Jardine Matheson") became the 100% shareholder of all the issued voting capital of the amalgamated company, which continued under the name of Jardine Strategic Ltd ("Jardine Strategic"). Being dissatisfied that the acquisition price represented fair value for their shares, the plaintiffs exercised the right to demand a court appraisal of the fair value of the shares under section 106 (6) of the Bermuda Companies Act 1981 in these proceedings.

2. Directions for the conduct of the proceedings were made by Hargun CJ after a contested three-day hearing in November 2021. Special directions for the conduct of discovery (or disclosure) of documents that are relevant to the valuation exercise were given. The reason Hargun CJ departed from the conventional directions for disclosure was due to the unique scale and organisational complexity of the Jardine Matheson group of companies of which Jardine Strategic Holdings Limited and Jardine Matheson were the principal holding companies for the group and which were at the time both listed on the London Stock Exchange.[1]

3. Instead of comprehensive disclosure being ordered across all 1150 companies in the vast corporate structure which controls diverse business interests in a wide spectrum of international businesses and other investment and property holdings[2], Hargun CJ ordered disclosure on the basis of an "expert led" system of enquiry by which it was intended that the valuation experts could request disclosure of those documents they considered necessary to prepare their reports[3]. This has resulted in a series of requests being generated by Mr Mark Bezant who is the plaintiffs' principal valuation expert. These requests have been made in a series of "waves" over the last four years, the last request having been made over 2 years ago.

4. The principal area for the dispute in the application before the court is the extent to which the defendants have responded satisfactorily to Mr Bezant's requests for production of the documents that show the genesis and development of the transaction into the amalgamation that effected the acquisition of the dissenters' shares. These documents have been described as the "deal documents" for short. They are relevant to the valuation

[1] The group has also secondary listings on the Singapore and Bermuda Stock Exchanges.
[2] Hearing Bundle B tab 4 (HBB 4) per Hargun CJ in the Directions Judgement 12 November 2021 at paragraphs 4 and 29-34.
[3] HBB 4 Hargun CJ at paragraphs 81-7 and 94

exercise because the expert valuers need to take into account the strengths and weaknesses of the transaction process in their assessment as to whether and how far the transaction price is reliable evidence of fair value.

5. The plaintiffs consider that the method by which the defendants have gone about the search and disclosure of relevant documents that are responsive the Mr Bezant's requests must be flawed in some fundamental respect because they say the number of deal documents that have been disclosed is 'woefully' shy of the number of documents that they consider would be normal to expect in a transaction of this type and value. In particular, the plaintiffs say that the documents that have been disclosed raise serious questions as to the reliability of the methodology that has been applied to search for and produce documents that respond to the request appropriately and cite examples that (in their view) reveal serious shortcomings.

6. The plaintiffs[4] have applied to this court for orders that the defendants shall (i) explain by affidavit their methodology for searching for deal process documents relating to the amalgamation by which the dissenters' shares were acquired (ii) explain by affidavit the steps that they have taken to investigate the capacity in which the overlapping directors acted in relation to the amalgamation and (iii) be ordered to search for deal process documents from 1 December 2019. The defendants oppose the application as being unjustified and unprincipled. The defendants say that the defendants' list of documents is conclusive and that the court should not allow the plaintiffs to use the present application as a springboard to reopen disclosure. The details of the competing submissions will be considered in more detail below in this Ruling. This will be referred to as the "disclosure application" for short.

7. By a separate application the plaintiffs also seek an order from the court setting down the trial of the proceedings on a date certain in 2027 and have supplied a proposed fixture for a five-week hearing from 3 May to 11 June 2027. The dates have been agreed as being available to the parties in principle, but the defendants are unwilling to agree to list the trial until the disclosure phase of the proceedings has concluded. The defendants say (broadly) that it would be unjust to list the trial as a fixture while there is the prospect of continuing interlocutory battles over ongoing disclosure. This application will be referred to as the "listing application".

8. The defendants say that the witnesses of fact cannot be reasonably expected to prepare their witness statements until all disclosure is complete, and that as long as the plaintiffs seek to pursue ongoing disclosure it would be wrong as a matter of procedural fairness to 'box' the defendants in between ongoing disclosure disputes and trial preparation. The defendants say that the disclosure application should be refused, and the existing directions should remain unaltered. The defendants say that Hargun CJ's directions provided expressly for a Discovery Completion Date which is not triggered until all disclosure applications have come to an end. They say that this means that there can be no progress to setting a trial date until both the present application and the plaintiffs' separate third party

[4] Strictly the application for an order directing affidavits explaining the defendants' disclosure methodology was made by the plaintiffs in Actions nos 111-120 and 123-5 but at the hearing counsel for the plaintiffs in the other proceedings also supported the application.

discovery proceedings against Evercore Partners International LLP ("Evercore") in the United States have concluded. Because there is no certainty over when that will occur, the defendants say it is premature to set the trial date.

Summary and Disposition

9. For the reasons set out in detail below, the court has declined to give the relief sought in the plaintiffs' disclosure application. The principal reason is that the court is not satisfied that there has been a wholesale failure by Jardine Strategic to fulfil its duties of disclosure such as to justify the extraordinary measure of ordering the service of explanatory affidavits to explain their disclosure methodology. It is also impracticable and inappropriate for an order to be made to require Jardine Strategic to verify on affidavit the steps have been taken to investigate the capacity of the overlapping directors for the purposes of fulfilling its duties as to disclosure.

10. The court is however satisfied that it is appropriate to order Jardine Strategic (by a proper officer who has knowledge of the facts) to verify the list of documents in its latest (or a further final form) and to order that an appropriate member of the Bermuda legal team representing Jardine Strategic shall confirm on affidavit that the Bermuda legal team has supervised the disclosure process that Jardine Strategic has undertaken. Directions have been given that these affidavits shall be filed and served on the plaintiffs on or before 31 March 2026.

11. The court is also not persuaded that it is appropriate to extend the search parameters for deal documents to December 2019. In the court's view the basis for the extension of the search date parameters search is speculative, and the grounds are not sufficiently cogent to justify making this type of order. This decision is also partly influenced by the need to progress the trial and the proportionality of benefit to be gained by the extension of the date range weighed against the disruption to the progress of the proceedings.

12. For the reasons also given below, the court has granted the plaintiffs' application to list the matter for trial on the dates that have been provisionally agreed as being available for counsel, the parties and witnesses of fact and the valuation experts, namely for five weeks commencing 3 May 2027 and ending on 11 June 2027 (both days inclusive).

13. In order to give effect to the trial directions set in the Directions Order made by Hargun CJ on 12 November 2021, the court has set the Discovery Completion Date as 30 April 2026, so that the steps set out in the Directions Order can take effect from that date.

14. In a case of this magnitude, it is inevitable that applications will need to be made for the determination of important pre-trial matters. The results of this application were not all one way. Taking matters in the round, the court has determined that the costs of the disclosure and listing applications shall be the costs in the proceedings.

Background

15. It is unnecessary to rehearse the background to the proceedings in great detail. Earlier rulings of the court in this case have explained the history of the companies' operations and the scale of the businesses they own and control across the globe. It is relevant to say that

the sums potentially at stake are very large indeed. While it is not appropriate to speculate about the possible ranges of values that may be involved, it is reasonable to assume that *if* the transaction price of US$33 per share (which translated to an acquisition price of US$5.5 billion) is ultimately found to be lower than 'fair' value, the potential additional value that may be required to be paid to the plaintiffs could be very substantial.

16. As is common in high value litigation, a number of disputes have arisen in relation to the conduct of various aspect of the case which have resulted in interlocutory applications and appeals that have delayed the progress of the proceedings. The proceedings have not reached the end of the disclosure process and the directions for setting down the matter for trial have not yet been 'triggered' by the establishment of what has been referred to as the 'Discovery Completion Date'. The court does not here need to consider whether any party is to 'blame' for the length of time the case has taken to get to the present stage. The court's task is to address matters as they stand and give appropriate directions on the present applications.

17. For now, it will suffice to say that the plaintiffs are not satisfied that full disclosure has been made by Jardine Strategic. The remaining category of documents in respect of which the plaintiffs say they need full disclosure are the documents which relate to the genesis of and the progress of the proposed transaction from conception to completion which are in the possession custody or power of Jardine Strategic. This category of documents has been called "the deal documents" for short.

The documentary requests

18. The starting point is the nature of the request made by Mr Bezant for production of the deal documents. It is the relevance of this request that is central to the debate over whether there is a need for an explanation for the methodology or the potential demand for additional disclosure as a result of any perceived deficiencies in the method the Jardine Strategic has employed.

19. Mr Bezant's initial requests for relevant deal documents were made on 28 January 2022 in the following terms:

> *"Please provide documents in respect of the process by which the Amalgamation was designed, developed, proposed, reviewed, and subsequently determined by Jardine Strategic and/or Jardine Matheson to be an appropriate course of action for the group."* (Q3)
>
> *"Please provide documents in respect of the process by which the fair value of the Company's shares held by other shareholders was evaluated by Jardine Strategic and/or Jardine Matheson for the purpose of the Amalgamation"* (Q6)
>
> *"Please provide all documents in respect of the process by which the offer price of US$33 per share was proposed, evaluated, adjusted and subsequently concluded by Jardine Matheson."* (Q7)

"The Evercore Opinion states the "following discussions with Sterling (i.e. Jardine Strategic) / Morgan (i.e. Jardine Matheson) management, it is clear that there is no intention to embark on a disposal programme to sell Sterling assets individually nor to distribute to shareholders any of the underlying equity interests" and "Morgan has no intent to distribute or sell any of the core holdings to our knowledge, as confirmed by Sterling/Morgan management. In respect of all discussions between Evercore and the management of Jardine Strategic and Jardine Matheson in its capacity as the adviser to the Transaction Committee (defined below), please provide:

(1) All meeting minutes, notes of meetings, and written communications (including emails);

(2) Any documents prepared as inputs to the meetings, including meeting agendas, presentations, briefing or other documents; and

(3) *Any documents prepared as outputs from the meetings, such as annexes and exhibits attached to the minutes or meeting notes."* (Q12)

"I understand that the Company's board delegated responsibility for considering the Amalgamation to a committee of two directors who were not also directors of Jardine Matheson (the "Transaction Committee"). The members were Lord Powell of Bayswater KCMG and Mr Lincoln KK Leong. The resolutions constituting the Transaction Committee appear to have been passed on 19 February 2021. Please provide documents and email communications prepared, reviewed, sent and received by the members of the Transaction Committee in their capacity in this regard." (Q14)

20. Mr Bezant received 285 documents in response to the requests in Q12 and Q14 above. On 20 June 2022 he repeated his request for documents to respond to the other requests and identified a number of meetings referred to in the documents which had been disclosed but in respect of which he had not received any documents, in response to which Jardine Strategic produced 12 more documents.

21. The request for deal documents in this category was repeated again by Mr Bezant in July 2023. Mr Bezant asked for all documents and written communications not previously covered by his previous requests that concerned the Transaction Committee (including the need for and establishment of the Transaction Committee) prepared, reviewed, sent and received by the members of the Transaction Committee prior to 19 February 2021. He also explained what his previous requests were intended to cover and repeated his request for any further documents in those categories which had not already been disclosed. This request was answered by disclosure of a further 150 documents.

22. Jardine Strategic (initially) disclosed that 41 meetings had taken place between the Transaction Committee and personnel within the Jardine group and confirmed that all non-privileged documents described in the categories requested which were within its possession custody or power had been disclosed.

23. The plaintiffs' attorneys wrote to the defendants' attorneys in August 2024 complaining that no disclosure had been made of electronic messages sent over messaging services, and questioned which email addresses had been searched, and complained that only a handful of minutes or notes had been produced in relation to only some of the 41 meetings which had been identified as having taken place. The defendants' attorneys responded in

November 2024 and early December 2024 by producing a further 144 documents and an updated meeting list showing that 48 meetings had occurred involving members of the Transaction Committee.

24. The plaintiffs identified a number of criticisms of the production and wrote again in March 2025 asking for disclosure of the methodology the search parameters and process adopted by the defendants. The defendants' attorneys replied declining to engage in a description of its search and retrieval processes or provide a list of the custodians whose records had been searched.

25. Not having received a response to their concerns which satisfied them, the plaintiffs made the present application for an order requiring the defendants to explain the search processes that have been used to identify, locate and retrieve deal documents from relevant custodians in an affidavit. The plaintiffs have also raised concerns arising from some of the documents which have been disclosed. These are (i) that the records of the directors of Jardine Strategic who are also directors of Jardine Matheson (referred to as the 'overlapping' directors) have not been searched because of an unsafe assumption that the work they did on the transaction was exclusively in their capacities as directors of Jardine Matheson and (ii) the date range used by Jardine Strategic for the searches undertaken was too narrow because work on the transaction began much earlier than 2021. Accordingly, the plaintiffs have made applications for an order that Jardine Strategic explain on affidavit the steps that have been taken to ascertain the capacity in which the 'overlapping directors' undertook their functions in relation to the transaction.

26. The premise behind the applications is that when that information has been disclosed, the plaintiffs will be able to make further applications for relief if the responses do not satisfy their concerns.

The evidence in support of the disclosure application

27. The plaintiffs' application is supported by the sixth affidavit of Mr David Thom, an attorney acting on behalf of the plaintiffs. Mr Thom makes a number of points in his sixth affidavit which he says go to show that something has gone wrong with the disclosure process, and that these deficiencies justify the court making the orders sought in this application.

28. Having set out the background history of the documentary requests for deal documents (briefly explained above)[5], Mr Thom set out a number of complaints as to the quality and extent of the documentary production in response to the deal document requests. The principal features of the criticisms that are levelled at the defendants can be summarised[6] as follows:

    (i) The adequacy of the process adopted to search for and retrieve relevant documents has led to an incomplete disclosure of relevant material. The plaintiffs have broken these criticisms into the following categories:

[5] HBC 2 at paragraphs 29-64
[6] HBC 2 at paragraphs 68-75

(a) The absence of disclosure of the actual search terms used and details of the custodians, repositories and devices searched and the date ranges used;

(b) The 'drip feed' of relevant documents over a prolonged period without explanation leads to the conclusion that inadequate processes have been adopted by the defendants to identify and disclose relevant documents;

(c) The apparent failure to search 'off-channel' communications (e.g. whatsapp/weChat/Signal);

(d) The apparent absence of meeting records or minutes or notes for most of the 51 (up from 41 and later 48) meetings now confirmed to have taken place suggests serious gaps in the thoroughness of the search process.

(ii) The inappropriate characterisation of material held by the directors of Jardine Strategic who are also directors of Jardine Matheson (referred to as "the overlapping directors") has wrongly led to the conclusion that there is no material in the possession custody or power of the overlapping directors which is legally in the possession custody or power of Jardine Strategic. The plaintiffs say that this means that the disclosure given by the defendants in relation to the deal documents is likely to be incomplete.

(iii) The date range of the search for relevant documents should be expanded to 1 December 2019 because documents disclosed have revealed that the Transaction Committee directors knew about the proposed transaction before the 19 February 2021. A wider date range for the search is therefore required to ensure all relevant documents are identified and produced.

29. The plaintiffs' position is that the lists of documents that have been produced (and certified as complete by the defendants' attorneys on three occasions) have been amended each time to add the documents that were produced in answer to the plaintiffs' follow up requests, which demonstrates that the verifications of completeness on each occasion given were unreliable.

30. As a result, the plaintiffs say the only way to ensure that all documents have been properly disclosed in respect of Mr Bezant's request for the deal documents is to order the defendants to explain in an affidavit the processes they have adopted to search, identify and produce those documents. The premise behind the application is that if the plaintiffs identify omissions or shortcomings in the process, then further specific searches can be requested.

31. Mr Thom also challenges the stance of the defendants on the role of the 'overlapping' directors in relation to the transaction, and therefore their obligations to give disclosure in relation to documents in their possession custody or power as directors of Jardine Strategic.

Mr Thom gives detailed examples of documents which he says are inconsistent with the defendants' position that the 'overlapping' directors or the management of Jardine Matheson were not involved in the transaction in their capacities as directors of Jardine Strategic. These examples included[7]:

(i) a WhatsApp message from one of the Jardine Matheson directors who is also a director of Jardine Strategic to one of the independent directors on the Transaction Committee which said *"...ive* [sic] *deliberately kept a distance just to ensure some integrity but I hear you had good discussions today and just wanted to let you know how grateful I am for everything and your support...I am please with progress this* [sic] *far and the team is working as one which is good. Keeping it tight will be a challenge but so far so good"*

(ii) an email from the same director of Jardine Matheson directors who is also a director of Jardine Strategic to the other independent member of the Transaction Committee: *"...I just wondered if it might be useful for you and I to have a discussion on Project Leyland?* [redacted] *but having spent the last 14 mths on the project I might be able to assist in ensuring you have all the facts and assurances you might need. I don't think we need to spend that long but I just feel that at this juncture it might be of benefit."*

(iii) A reply email from one of the independent directors on the Transaction Committee to the same director of Jardine Matheson who was also a director of Jardine Strategic: *"...Further to our discussions, the Financial Adviser has agreed $6.5m BUT paid $3.25m end March and $3.25m after EGM."*

(iv) An email form one of the independent directors to directors of Jardine Matheson who are also directors of Jardine Strategic: *"..the purpose is for the non-conflicted directors to be able to say, if necessary, that they have not just been spoon-fed by the independent advisors but have taken steps to quiz management about Project Leyland, its rational [sic] and timing as well as future intentions of the Group. It's also a chance to anticipate questions from disgruntled shareholders (if there are any) and financial commentators".*

(v) An email between the independent directors: *"As the announcement of the Transaction is now proposed for Monday,* [two directors of Jardine Matheson who are also directors of Jardine Strategic] *would like to update us on the content of the Annual Results Announcement for Sterling* [Jardine Strategic]- *proposed time is FRIDAY 5 March at 3.30 pm ....This will be followed by our Transaction Committee call with Evercore/Slaughters at 5 pm....".*

(vi) An email from one of the members of the Transaction Committee to the same director who is also a director of Jardine Matheson and was a director of Jardine Strategic: *"...somewhat more hostile than I expected, Main grouse was failure to use NAV as a yardstick, particularly when we cited NAV so prominently in the JSH annual report. We took him through the arguments repeatable* [sic] *and sent him back to Graham for some de-NAV therapy. All a bit absurd since it is win win for Black Rock on JM and JS".*

[7] HBC 2 at paragraphs 82-6

32. Mr Thom suggested that these documents show that there was greater involvement by the overlapping directors and that it these items are "*difficult to reconcile with the notion that the Overlapping Directors were, at all times, always acting solely in their capacities as directors of [Jardine Matheson]*"[8].

33. These emails and messages also suggested to Mr Thom that the date range of the searches ought to be extended back to December 2019 which is 14 months prior to the email in which the reference is made to the project having been in development, not just the six to eight weeks from 19 February 2021 when the Transaction Committee members first became aware of the transaction until the conclusion of the transaction[9].

34. In addition, the disclosure of a further WhatsApp message revealed that one of the independent directors had accepted appointment as a consultant to Jardine Matheson in relation to the transaction before he was appointed as an independent member of the Jardine Strategic Transaction Committee. The details of this appointment have not been disclosed in the documents provided, and the plaintiffs consider that they are potentially relevant to the issues relating to deal process.

The evidence in opposition to the disclosure application

35. Mr Jeremy Parr swore an affidavit (his eighth affidavit) in answer to Mr Thom's sixth affidavit. In that affidavit Mr Parr makes a number of points to challenge the commercial realism of the approach that Mr Thom has taken to disclosure, responds to the criticisms that have been made, and challenges the legal premise on which it is suggested that the overlapping directors have disclosable documents in their possession custody or power. Mr Parr is the former group general counsel for the Jardine Matheson group who was in office at the time of the Amalgamation and is now a consultant to assist the defendants in their defence of these proceedings.

36. Mr Parr's response addresses the criticisms made by Mr Thom in the following way. First Mr Parr explains the professional background and experience of the two independent directors and suggests by implication that they were well aware that the proper and independent operation of the transaction committee was critical to the process established for determining the fair value of the shares acquired in the amalgamation[10]. Mr. Parr goes on to deal with the process undertaken by the Transaction Committee and explains that the Transaction Committee's decision to recommend the transaction was supported by the independent opinion of Evercore as financial advisor to the Transaction Committee, and that the Transaction Committee was independently advised by a highly reputable law firm.

37. Mr Parr says that the Transaction Committee had five "formal" meetings prior to the issuance of the final Evercore Opinion, in addition to one further meeting at which the Evercore Opinion was discussed. He says that during these meetings the Transaction Committee examined and tested the work done by Evercore. He says that these formal meetings were minuted and a record or notes were kept of "many" of the numerous other meetings that were held during the amalgamation process. He goes on to say that the

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[8] HBC 2 at paragraph 85
[9] The defendants say their searches went back to 1 January 2021: Parr 8 paragraph 108.
[10] HBC 5 at paragraph 30

Transaction Committee had extensive engagement with Evercore and the Transaction Committee's independent legal advisers, as evidenced by the frequent meetings and correspondence between them during the transaction process which has been disclosed. Mr Parr then dismisses the comparison of the deal process in this case as being unlike the unsatisfactory processes that were a feature of other cases referred to by Mr Thom[11].

38. Mr Parr also addresses a number of more general issues going to the merits of the parties' respective positions which it is not necessary for me to describe or comment on as they do not touch upon the disclosure issues with which this application is concerned. Mr Parr then discusses the background to the present directions order and the history of the proceedings and makes various criticisms of the plaintiffs' disclosure. It is not necessary to record all the points that Mr Parr makes because these go to support the general proposition that the present application is an attempt by the plaintiffs to undermine the Directions Order made by Hargun CJ and why the defendants say that it would be unjust to allow the plaintiffs' applications.[12]

39. Mr Parr goes on to explain the basis on which the defendants maintain that the 'overlapping' directors have no documents in their possession custody or power that relate to the valuation issues. The essential point that he makes is that the overlapping directors considered the amalgamation transaction in their capacities as directors of the acquiring company not the target company[13]. He says that the materials the 'overlapping' directors have relating to the transaction are not in the possession custody or power of those directors in their capacities as directors of Jardine Strategic.

40. Mr Parr then deals with the specific examples that Mr Thom has identified as being inconsistent with the defendants' position on this. Taking each category in turn, Mr Parr says that the documents in each respective case are (i) very few in number (ii) a mischaracterisation of a 'principal to principal' discussion in which each director was wearing a different hat, one speaking as a director of the acquirer and the other as a director of the target company (iii) a courtesy update on fee approvals for the transaction (iv) a mischaracterisation of the capacity in which Messrs Keswick and Witt were in attendance to discuss "management's" perspective (v) a meeting between the Transaction Committee and Messrs Witt and Baker to discuss year end results (of which Mr Bezant has been given a copy) and (vi) a meeting at which commentary on the offer was given by the board of Jardine Matheson as offeror rather than Jardine Strategic as the target company, and a discussion with an investor who held shares in both companies was attended by representatives of the boards of both companies[14].

41. Mr Parr explained the engagement of one of the members of the independent Transaction Committee of Jardine Strategic as an adviser to Jardine Matheson to advise on the transaction prior to the offer was that another financial adviser had initially been retained

[11] HBC 5 at paragraphs 33-34
[12] HBC 5 at paragraphs 42-92
[13] HBC 5 at paragraphs 95-108
[14] HBC 5 at paragraph 107 (2)

(JPM Cazenove) but that the Transaction Committee in fact appointed Evercore as its financial adviser in mid February 2021[15].

42. Mr Parr says that in his experience the deal process in this case was not deficient and that the documentary record reflects the fast pace of a high value and complex transaction that was accomplished in a short period.

43. Ms Khiyara Krige swore an affidavit (her eighth affidavit) as the attorney for the defendants who has had day to day responsibility for the conduct of this aspect of the litigation on behalf of the defendants. She explains her role in the case and describes the disclosure process and makes comments about the stance the plaintiffs have taken in relation to disclosure. She gives details of the number of deal documents disclosed, the number individual pages (976) and the categories of deal documents disclosed. She confirms that 51 meetings and calls were held during the transaction process and confirms the email addresses which were searched for responsive documents[16].

44. Ms Krige avers that Jardine Strategic, together with its advisers, has worked diligently to consider each request and sub-request made by Mr Bezant with responsive material as promptly and efficiently as possible. She says that the volume of documents disclosed overall exceeds 3000 individual documents comprising almost 29,000 pages[17]. Ms Krige says that it would be an impossible task to recreate all the search terms used to answer each individual request from Mr Bezant over the last three years[18].

45. The rest of Ms Krige's affidavit deals with the history of the proceedings and the various arguments that have been raised and sets out the defendants' position in relation to them. It is not necessary to set out what she says in detail here because all the main points are covered in the arguments presented by counsel which are considered below.

The evidence in reply

46. Mr Thom swore a further affidavit (his seventh affidavit) in answer to the affidavits of Mr Parr and Ms Krige. His affidavit did not add any further evidential content but was directed at defending the validity of the points he had made in his sixth affidavit. It is not necessary to set out the points he makes in detail because these are also covered in the arguments of counsel which are addressed below.

Brief commentary on the evidence

47. This is an interlocutory application. The supporting affidavits are (for the most part) designed by each party to justify their respective stances on the need for (or resisting the need for) an order requiring an affidavit to explain the disclosure methodology that has been employed by Jardine Strategic, and to a lesser extent setting out the framework for their positions on some of the issues that will be the subject of debate at trial. There is nothing inherently wrong with that, so far as it goes. However, the court should make a few observations about the usefulness of these skirmishes for present purposes.

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[15] HBC 5 at paragraph 108
[16] HBC 7 at paragraphs 28-34 and 48
[17] HBC 7 at paragraphs 21 and 46
[18] HBC 7 at paragraph 55

48. The first point is that the court cannot reach any conclusions on the matters of disputed fact and propositions of law that are set out in the affidavits. The court can only take the positions stated in those affidavits into account when assessing the need to grant relief, which comes down to the application of the court's case management powers as to what are proportionate and appropriate directions to give.

49. For example, while the court can take into account what Mr Thom and Mr Parr say about the way transactions of this sort are conducted in the 'real world', and apply its own experience and understanding to evaluate the cogency of the points they each make, the court cannot come to any conclusions as to what type of documents would likely have been produced, by whom, when and who is likely to have custody of them, or whether the documents produced are unusually small in number for a transaction of this scale in terms of value.

50. The amalgamation itself may not have been a complicated legal transaction, but the complexities may lie rather in the underlying business reasons for entering into the transaction and the calculation of the appropriate transaction price. Those matters will be determined at the trial of these proceedings, and the court can express no view until all the evidence has been given and tested by cross-examination, and submissions by all counsel have been made and carefully considered.

51. Mr Parr says a number of things about the way the Transaction Committee went about its task and offers conclusions about its rigour and independence. However, Mr Parr's evidence is inadmissible in relation to those matters. The first point is that he was not a member of the Transaction Committee; he was group general counsel and acted on the other side of the transaction to Jardine Strategic Holdings Limited (now Jardine Strategic). He cannot give direct evidence about the work of the Transaction Committee. The second point is that he is expressing his own opinion on the rigour and independence of the work that the Transaction Committee carried out (perhaps based on his review of the documents disclosed in the document room which he has seen).

52. In addition, Mr Parr offers a number of legal conclusions as to the capacity in which the 'overlapping' directors were acting at the time they attended some of the meetings, and characterises the nature of the meetings which 'overlapping' directors attended which were referred to by Mr Thom (and described above). Mr Parr did not attend those meetings. He also offers his opinion as to whether it was necessary or appropriate for the independent directors to keep notes or records in relation to other meetings for which records were not kept. It is appreciated that Mr Parr is (to an extent) commenting on what are in effect submissions made by Mr Thom in his affidavit in support of the application.

53. Mr Parr is not himself in a position to say in what capacity those directors attended those particular meetings, or seek to place his own characterisation on the meetings, or explain why things were said at those meetings. If any evidence were to be given about any of this, it would have to come from the independent directors of Jardine Strategic or the relevant 'overlapping' directors of Jardine Matheson themselves. If, for example, the 'overlapping' directors were to say what *they* understood their role to be at any particular meeting, the

court could perhaps take that into account. But none of the directors has yet given any evidence about these issues and Mr Parr cannot act as their proxy.

54. There was also a sterile debate about whether a telephone call is a meeting for the purposes of record keeping. A telephone meeting between two directors can (and often does) occur, but not every telephone call between directors is a meeting; conversely, even if a telephone call is not a meeting called by the giving of formal notice, the absence of formal notice will not invalidate decisions taken at that informal meeting if those decisions are ratified and carried into effect. As in life, a lot depends on context.

55. The real point at this stage is not whether minutes or notes should have been kept, but whether they in fact exist and have been disclosed. It will be for the valuation experts to express a view (and counsel to make submissions) at the trial as to whether the absence of records in relation to any particular aspect of the transaction process shows that the process failed to meet an appropriate level of objective 'rigour and independence' (to use Mr Parr's terminology), and consequently whether that affects the weight to be attached to the recommendation as to the acquisition price that was made by the independent directors in the court's overall assessment of fair value.

56. Ms Krige's evidence followed the same pattern of justifying the defendants' position and describing the history of the proceedings and the disclosures given, as well as criticising the plaintiffs. However, Ms Krige also gave direct and relevant evidence about both the process and the documents that have been disclosed by Jardine Strategic and gave evidence of the details of the custodians whose records have been searched. She also explained that it would not be possible for Jardine Strategic to recreate the search terms used to answer the large number of individual information requests that were made by Mr Bezant[19]. This is an important point to which I will return.

57. Ms Krige's evidence also explains that Jardine Strategic has, *together with its advisors*, worked diligently to produce documents to respond to the requests made by Mr Bezant[20], and that *Jardine Strategic has worked* diligently to check the *searches that it* has conducted and ensure that all responsive material in its possession custody and power has been produced[21]. This is also a point to which I will return.

The plaintiffs' submissions

58. Briefly summarised, Mr Shivji KC's submissions were to the following effect. Mr Shivji KC emphasised the need for as full disclosure as possible in appraisal cases, and noted the quasi-inquisitorial nature of the process, so that the valuation experts can bring to bear the most accurate valuation evidence to assist the court in carrying out its appraisal task. He said the task of giving disclosure may be onerous and expensive, but it is essential for the fair determination of the matter. The relevant material is in the possession of the company,

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[19] Ms Krige estimates the information requests include 400 separate questions and sub-questions: Krige 8 at paragraph 55.
[20] HBC 7 at paragraph 21
[21] HBC 7 at paragraph 46

not the dissenters, and the burden is not on the dissenters to company to comply with its disclosure obligations fully[22].

59. Mr. Shivji KC stressed the relevance of the deal documents for the valuation process both as expressed by Mr Bezant and in the appraisal cases that have considered the issue. Mr Bezant explained the relevance of the deal documents related to the *"... assessment of the Amalgamation, which would allow determination of the extent to which the terms of the amalgamation provide evidence of fair value."*[23] In **Trina Solar Limited**, the Caymanian Court of Appeal said that an analysis of the deal process is necessary to determine what weight can be placed on the merger price as evidence of fair value[24]. In **Glendina Pty Limited v NKWE Platinum Limited** this court identified a number of failings in the approach the independent directors took to carrying out their task, which were ultimately held to be relevant in the court's approach to its assessment of whether the transaction price represented fair value[25].

60. Accordingly, Mr Shivji KC submitted that the deal process documents enable the valuation experts to comment on and identify any potential weaknesses in the transaction process which might go to the expert's view and the court's ultimate assessment of the reliability of the transaction price as an indicator of the fair value of the shares. He submitted that the deal documents are therefore an essential part of the disclosure required by Jardine Strategic in this case.

61. Mr Shivji KC pointed to the numerous corrections and repeated updates to the disclosure given by Jardine Strategic after prompting by the plaintiffs' attorneys who had identified gaps or errors in the disclosure. He noted an apparent reluctance of Jardine Strategic to enter into the disclosure process in a co-operative and responsive way. He submitted that these gaps and errors demonstrated that something had gone 'seriously wrong' with the approach Jardine Strategic had taken to its disclosure obligations.

62. Mr Shivji KC pointed to the discrepancies that were identified in Mr Thom's sixth affidavit which included three principal areas of concern.

63. It was submitted that it was surprising that no minutes or records had been disclosed that relate to 30 out of 51 meetings involving members of the Transaction Committee and that no record of consideration of any other alternative proposals (save one) had been disclosed.

64. The most significant area of concern is that the records disclosed show a number on instances where some of the overlapping directors appear to have taken part in some of the matters which (on the plaintiffs' case) ought to have been the exclusive domain of the independent directors. In particular, reference was made to the preparation of questions and answers in relation to the reasons for entering into the transaction which were

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[22] Citing **Trina Solar Limited** [2023] (1) CILR 569 paragraph 255; **Re Qunar** [2017] (2) CILR 24 paragraph 25; **Re Qihoo 360 Technology** [2018] (1) CILR 585 paragraph 19; **JA Solar Holdings Co Ltd** (unreported) paragraph 28; **APS Holding Corp v Myovant Sciences Ltd** [2023] SC (Bda) 67 at paragraphs 19 and 35.and **Glendina Pty Limited v NKWE Platinum Ltd** [2025] SC (Bda) 15 civ paragraph 281.
[23] HBD 13/2
[24] **Trina Solar Limited** (supra) at paragraphs 112-3.
[25] **Glendina** (supra) at paragraphs 95-109.

discussed at a meeting with "management" in which he submitted it is clear that the directors present (which included two 'overlapping' directors) were acting as directors of Jardine Strategic Holdings Limited (code named 'Sterling') and not as directors of Jardine Matheson Holdings Limited (code named 'Morgan')[26]. On the basis of these emails and the records of the meeting that ensued, it was suggested that the 'overlapping' directors may have taken other steps in their capacities as directors of Jardine Strategic Holdings Limited which have not been revealed because a search of their individual records has not been undertaken. It was also submitted that the assumption that the 'overlapping' directors took no part in the transaction in their capacities as directors of Jardine Strategic Holdings Limited is unreliable because there is no documentary disclosure that suggests that the division of roles was addressed by the board prior to 19 February 2021, and therefore the searches that have been undertaken for relevant material are or may be incomplete[27].

65. Another area of concern is that one of the members of the Transaction Committee had been appointed as a consultant to Jardine Matheson in relation to the amalgamation transaction before he had been appointed to be one of the independent members of the Transaction Committee. This gives rise to an apparent conflict of interest. None of the details of this arrangement have been disclosed.

66. A further area of concern is that the date range of the searches needs to be extended because the materials disclosed have revealed that the process had started sometime around December 2019 and the searches undertaken only went back as far as 1 January 2021 (i.e about six weeks before the proposed transaction was announced).

67. Mr Shivji KC submitted that court has the power to intervene to address these concerns by requiring that Jardine Strategic provide an affidavit explaining their disclosure methodology. This, he submitted, would enable the plaintiffs to determine whether there are any deficiencies which could be remedied by further searches, which would then produce any other material which was relevant and which ought to be made available to the experts and the legal teams in preparation for the trial. Mr Shivji KC accepted that this was an unusual application, but he submitted that such an order was justified by the discrepancies that the plaintiffs' legal teams had identified.

68. Mr Shivji KC also questioned how far the defendants' legal teams had been in control of managing the disclosure process and referred to the way the process had been described by Ms Krige as the 'company' had responded to the disclosure requests 'with the assistance' of its legal advisers. The suggestion was that this may have given rise to an approach that did not meet the same rigour that would have been applied if the disclosure process had been conducted or managed by the legal team.

69. Mr Shivji KC submitted that an order of a similar kind to the one proposed had been made in **Ivanishvili v Credit Suisse Life (Bermuda) Ltd**[28] where the task of discovery in that action had been delegated to the defendant party's parent company Credit Suisse AG, and

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[26] HBC 10/701-6

[27] Other examples were referred to including the discussion about Evercore's costs, share prices after the announcement, and the meeting with representative from Blackrock Investments.

[28] [2020] SC (Bda) 11 Civ

Hargun CJ's order was upheld by the Bermuda Court of Appeal[29]. He invited this court to make an order on the same footing in this case.

The defendants' submissions

70. Briefly summarised, Mr Moore KC dismissed the application as being an attempt to 'weaponize' the disclosure process and was strategic in nature: together with the application to set down the trial, he said that the intention behind the application was to box the defendants in unfairly between ongoing disclosure battles and the work required to get the matter ready for trial. Mr Moore KC said that while the court has power to grant an order of the type sought, it was only very rarely done and in extreme circumstances of a nature that were far from those of the present case. He submitted that the facts in **Ivanishvili** were that of an alleged fraud and the wholesale delegation of disclosure to the defendant party's parent company overseas, and the deficiencies in the process in the case went far beyond the type of complaints made in the present case.

71. Mr Moore KC submitted that the disclosure process had been clearly defined in Hargun CJ's directions order and that the present application was an attempt to go behind that order, which was for a more limited expert led process, and try to re-open discovery on a wide-ranging basis. This would necessarily delay the setting down of the trial and drive up the costs of the litigation.

72. In addition, Mr Moore KC objected that the relief sought would go far beyond the category of deal documents which are the sole items of concern in this application, and it would be impossible for Jardine Strategic to recreate the individual search parameters used to search for documents that responded to each of these requests individually.

73. As to the requirement that Jardine Strategic should provide an affidavit that explained the basis on which it satisfied itself as to the capacity in which the 'overlapping' directors acted and held documents, this was objectionable in that (i) it fails to recognise the separate legal duties owed by directors of a company in relation to information held in that capacity and the duty owed to another company in their capacity and (ii) such an affidavit would necessarily involve Jardine Strategic in disclosing the nature of the legal advice it has received in relation to this issue, and destroy its right to legal advice privilege on this point.

74. Mr Moore KC also submitted that, in principle, a list of documents provided under the scheme of Order 24 of the Rules of the Supreme Court of Bermuda 1985 ("the RSC") is conclusive and that unless an application can be made for specific discovery of particular documents, that is the end of the matter. He submitted that disclosure is not an end in itself and while the object is to provide all the documents that are relevant, the requirement cannot be an absolute one, and the court should not allow the discovery process to involve a mini-trial over compliance with the disclosure rules.

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[29] [2020] CA (Bda) 13 Civ (which also approved Wallbank J's statements in **Ma Wai Fong v Incredible Power Limited** Eastern Caribbean Supreme Court 30 January 2020 per Gloster JA at paragraph 34.)

75. Mr Moore KC submitted that the court should not allow the plaintiffs to undermine the scheme of directions set out by Hargun CJ, there being no material change of circumstances to justify such a departure.

The court's analysis of the disclosure application

76. Although a considerable amount of time and detailed submissions were devoted to explaining the parties' respective criticisms of one another's approach to the disclosure process and the conduct of the litigation to date, the court is not inclined to address those submissions in detail or attempt to come to any conclusions about those submissions at this stage. No disrespect or discourtesy is intended by the court declining to itemise or repeat the various criticisms made by each side. The court has listened to, read and carefully considered all the points made, but these go primarily to justify the parties' respective stances, and (except in a general sense of reasonableness), they do not assist the court in determining the narrow questions that this application involves.

77. Before turning attention to those questions, it is first worth stating the obvious: either relevant deal documents exist or they do not. It is not the function of the court to debate how likely it would be that documents of a particular type exist based on general experience in other cases, or to discuss the implications of the absence of documents of a type that might typically be generated in the course of a transaction of the type with which we are here concerned. The absence of some type or number of deal documents and materials may well be 'surprising', as the plaintiffs put it, but that does not provide an evidential assumption on which the court can proceed. Mr Parr suggests that it is not surprising in a fast-paced transaction that minutes or notes may not be kept of every meeting. As I have noted, that is Mr Parr's opinion on which this court cannot place reliance as evidence, any more than it can rely on the plaintiffs' 'surprise' as evidence. The court is only concerned with giving appropriate directions for the production of any deal document materials that *do* exist in *this* case to inform the experts' opinions so that they can take into account the deal process in their respective valuations. The implications of any perceived absence of relevant materials will be debated at the appropriate time if it is necessary to do so.

78. The unspoken premise that lies behind the plaintiffs' criticisms is that the plaintiffs believe that additional relevant deal documents are likely to exist but have not been produced for some reason, the most benign of which is that the process by which the searches were undertaken must have been inadequate in some fundamental way. However, the plaintiffs are not able to show by evidence that the documents which they think are likely to exist do exist (for example by references in disclosed documents to other relevant deal documents which have not been disclosed). This means that they are unable to make an application for specific disclosure of those 'undisclosed' documents. However, that is the standard that the present disclosure rules require[30]. Speculative applications for disclosure are not permitted, no matter how cogently or persuasively they may be presented. The rules of disclosure are

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[30]See the notes and commentary to the Supreme Court Practice 1999 RSC Order 24 Rule 7/2 *"(1) There is no jurisdiction to make an order under RSC Ord 24 r 7 for the production of documents unless (a) there is sufficient evidence that the documents exist which the other party has not disclosed (b) the document or documents relate to matters in issue in the action (c) there is sufficient evidence that the document is in the possession custody or power of the other party."*

no different in the present context, even allowing for the quasi-inquisitorial nature of appraisal proceedings.

Explanatory affidavits

79. It is agreed that the court has power to make orders for explanatory affidavits as to disclosure processes that have been adopted, but these are extraordinary powers and are only rarely to be invoked where the circumstances warrant it. The question is whether the facts disclosed by the evidence justify the court in so doing in this case.

80. In approaching this question, I have borne in mind the scope of the disclosure ordered by Hargun CJ in the Directions Order dated 12 November 2021 ("the Directions Order") and the detailed reasons for that Order explained in the Directions Judgment of the same date[31]. Disclosure in this case has been more narrowly tailored to providing the documents requested that relevant to the preparation of the expert's analysis on valuation.

81. I have also applied the general principle these requests must also always be subject to the requirement of proportionality. In particular, I have borne in mind that the deal documents go to the expert's assessment of what weight can be attributed to the amalgamation transaction price as evidence of fair value. That weight will be a matter for the expert valuer's comment and observation. Those observations are not themselves direct empirical evidence that establishes or supports a conclusion as to fair value as a metric on their own.

82. If an expert considers that an absence of particular documents reveals a concern that justifies the expert in making observations about the "robustness" or "rigour" or "independence" of the Transaction Committee's work, then the expert is able to explain why this is significant and what conclusions he or she draws from it. The opposing expert can make responsive comments as appropriate. Therefore, it does not seem to me that it is necessary for the disclosure process to be extended and complicated by the provision of an affidavit of the type requested, only to serve as a platform for further disclosure applications to be made, so that the expert *might* make additional or more focused comments on the robustness of the deal process to support a conclusion that the transaction price is not reliable evidence of fair value.

83. That is not to say that the point is not an important one, nor that a failure of the independent directors (if so found at trial) to meet the required standard for the conduct of the transaction process would not be a factor which the experts (and the court) would take into account when attaching weight to the transaction price as evidence of fair value: it will clearly be relevant. That this is not a case of an alleged breach of duty on the part of the independent directors is not to the point[32].

84. If the independent directors give evidence at the trial, then the plaintiffs will be able to cross-examine them about the reasons for any relevant information 'gaps' or perceived

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[31] HBB 4-5

[32] Only the company could make such a claim in any event. The issues in these proceedings are entirely distinct. The court is not directly concerned with making any findings of breach of duty in the appraisal proceedings, but the performance of the directors' duties in the context of the conduct of the amalgamation will be relevant to the court's overall evaluation of the evidence on fair value.

failures to maintain an "independent" and "rigorous" deal process. If the independent directors do not give evidence, then it will be open to the valuation experts to comment upon the deal documents as they stand and for counsel to make such submissions about the significance of any perceived shortcomings as may seem appropriate. The court can then take those elements into account and reach a conclusion after hearing all the evidence and after full argument.

85. The court of course accepts the proposition advanced by Mr Shivji KC that as a matter of principle, full disclosure is a firmer basis for drawing conclusions than mere inference. But this application also involves, in my view, an analysis of proportionality. The court must weigh the need for a further round of disclosure applications and their relative probative value to the principal questions to be addressed against the need to bring the proceedings to a trial in a timely and cost-efficient manner. The procedural fairness and adequacy of the process of disclosure is always an important factor, but it has to be balanced against the overriding considerations of administering justice in a proportionate and effective way.

86. The court is accustomed to drawing appropriate inferences from facts or the absence of evidence. It does not seem to me that the plaintiffs will be hampered in any significant way in presenting their case on the deal documents as they have been disclosed. If there are some unexplained issues about the interrelationship of the directors on each of the boards involved and questions about some of the steps they took, and if they are not addressed in evidence, these points may lead to criticisms at the trial, as is normal in any case. The court may be invited to draw inferences in the light of the facts as found after hearing all the evidence. At this stage the court cannot (and does not) form any view as to the potential significance of the existence of any particular documents or the lack thereof.

87. Jardine Strategic has taken the position that the 'overlapping' directors did not participate in the transaction in their capacity as directors of Jardine Strategic and have therefore not disclosed any materials relating to the work of the 'overlapping' directors in their capacities as directors of Jardine Matheson because those documents are not in the possession custody and power of Jardine Strategic.

88. Without engaging in a *voir dire* on the correctness of this position, the court is unable to rule on it one way or the other. It is a delicate position and may be the subject of nice legal argument based on the particular facts in any given case. But the court cannot conduct a mini-trial on the point for the purposes of requiring Jardine Strategic to prove that it has approached its duties of disclosure correctly[33].

89. The Bermuda lawyers representing Jardine Strategic have the duty (as the relevant officers of this court) to supervise the conduct of Jardine Strategic's disclosure process in these proceedings[34]. I accept Mr Moore KC's submission that the requirement to explain the

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[33] See notes and commentary in the 1999 Supreme Court Practice RSC Order 24/3/8: "*It is not the purpose of discovery to give a party the opportunity to check whether discovery by the opposing party has been properly carried out.*"

[34] See notes and commentary in the 1999 Supreme Court Practice RSC Order 24 rule 2/9: *"It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, carefully to go through the documents disclosed by their client to make sure as far as possible that no relevant documents have been*

basis on which it has satisfied itself as to the capacity in which the 'overlapping' directors held documents necessarily involves the disclosure of information which is legally privileged. If (for example) Jardine Strategic's response were to be that the steps it took to satisfy itself as to the capacity in which the 'overlapping' directors held documents in relation to the transaction was to take and follow legal advice, that would not advance the matter any further.

90. Furthermore, I am bound to accept Ms Krige's evidence as the only direct evidence as to the practical reality of making the order sought in paragraph 1 of the plaintiffs' disclosure application: she said that it would now be impossible to recreate all the search terms that have been employed to give responsive disclosure to Mr Bezant's information requests. On that basis, it would be disproportionate in terms of time and expense to make an order of that kind unless there was clear evidence of some basic failure that went to the heart of the fairness and reliability of the disclosure process as a whole. Ms Krige's undisputed evidence is also that there has been substantial disclosure given about which no complaint or criticism has been made[35].

91. It is relevant to recall that because of the special nature of this particular case, Hargun CJ did not make an order requiring the parties to agree a range of search terms. It follows that the process by which disclosure searches are now often regulated in modern discovery protocols is not an appropriate analogy on which to base this application[36].

Affidavits verifying Jardine Strategic's list of documents

92. Mr Moore KC submitted that the list of documents is conclusive of itself. He also suggested that Jardine Strategic is represented in Bermuda and in Hong Kong by two independent and highly experienced firms who are fully conversant with the duties of disclosure in high value litigation, so that there is no credible basis on which it could be said that the legal teams have not understood their jobs properly. This may be the general rule where there are no anomalies or errors and corrections to the list.

93. In this case the list provided by Jardine Strategic (and certified by its lawyers) has been amended and corrected three times as a result of inconsistencies and omissions identified by the plaintiffs' legal team, and additional items produced without offering any explanations for the omissions and errors or why they occurred. Although there may be some ambiguity as to precisely what is meant by Ms Krige's expression that the company has conducted the disclosure exercise promptly and diligently '*with the assistance of its legal advisors*', I take her to mean that the lawyers have undertaken supervision of the process. However, a short affidavit to clear up any possible misunderstanding or ambiguity is not unreasonable in circumstances where it is vague as to who has assumed responsibility for supervision (i.e. Appleby or another firm in Hong Kong).

94. The court acknowledges that perfection is a high bar to achieve in matters of disclosure. Oversights and corrections are inevitable in a case of any size or complexity, and the court

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omitted from their client's affidavit." quoted from **Woods v Martins Bank Ltd** [1959] 1 QB 55,60 per Salmon LJ (as he then was).

[35] See HBC7/7 paragraph 21 Krige 8.

[36] HBC 2/25 Thom 6 paragraph 75.

duly accepts Jardine Strategic's apology for the late disclosure of some of the items which should have been disclosed at an earlier stage.

95. However, the absence of any brief explanatory remarks as to how these repeated omissions and errors occurred does give the court concern. On the basis that the omissions and errors have been repeated and unexplained, I am satisfied that it would be appropriate to order that (i) Jardine Strategic must by a proper officer (i.e. one who can speak directly to the disclosure process that has been undertaken) swear an affidavit verifying the most recent version of the list of documents to confirm that it is complete[37] and (ii) Ms Krige of Appleby (Bermuda) Limited (or such other person on the legal team who has had overall responsibility for the supervision of the disclosure process in this case) must swear an affidavit confirming that the disclosure listed in Jardine Strategic's latest list of documents[38] has been given under the ultimate supervision of Jardine Strategic's Bermuda lawyers. The court appreciates that another firm may also have had some involvement in this process, but the duty of supervision is on the attorneys on record in the case in this jurisdiction, so they must accordingly bear responsibility for the supervision of the disclosure process[39].

96. These affidavits will be conclusive at this stage[40]. It will not prevent the plaintiffs demonstrating that there are actual deal documents that have not been disclosed if there is clear evidence to support their existence and that it is appropriate for the court to make an order for specific disclosure of those specific undisclosed deal documents because they are relevant. That will have to be the subject of a separate application for specific discovery (if the issue arises).

97. In conclusion, for the reasons given above, I am not satisfied (i) that the information gaps and discrepancies relied upon by the plaintiffs demonstrate a wholesale failure by Jardine Strategic to observe and perform its duties of disclosure or (ii) that the evidence shows that it is necessary to grant the extraordinary relief sought requiring an affidavit to be sworn to explain (a) how the disclosure process has been conducted by Jardine Strategic or (b) the steps that have been taken to satisfy itself that the overlapping directors do not have deal documents in their possession custody or control in their capacities as directors of Jardine Strategic or (iii) that it would be proportionate or necessary to enable the court to adjudicate the issues in dispute fairly to order Jardine Strategic to provide the explanatory affidavits sought in paragraphs 1 and 2 of the plaintiffs' summons. Therefore, those applications are refused.

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[37] RSC Order 24 Rule 5 and the relevant forms require the affidavit verifying the list must be sworn by the client.

[38] The court anticipates that it may be necessary for a final list to be certified if there are any additional items that need to be added after a final check has been completed before filing the affidavit of verification.

[39] See notes and commentary in the Supreme Court Practice 1999 RSC Order 24 Rule 2/9 cited above. Only the attorneys at Appleby (Bermuda) Limited who are acting for Jardine Strategic are officers of this court, and therefore subject to the court's control in relation to any matters arising from the disclosure process.

[40] See notes and commentary in the Supreme Court Practice 1999 RSC Order 24 Rule 7/2: *"Thus where an affidavit or affirmation is made pursuant to and order under Order 24 rule 7 the other party is not entitled to contravene what is sworn or affirmed by a further contentious affidavit or by obtaining an order to cross examine that party since the latter's oath/affirmation in answer is conclusive at [the] interlocutory stage of the action (Lonrho plc v Fayed (No 3) (1993) The Times June 24)"*. The same must hold true in relation to an affidavit verifying the list of documents under RSC Order 24 rule 5.

98. However, for the reasons also explained above, I am satisfied that it is appropriate to order that affidavits verifying Jardine Strategic's list of documents and confirming that the disclosure process has been conducted under the supervision of Appleby (Bermuda) Limited as attorneys of record in Bermuda. The timeframe within which these affidavits must be sworn and served will be dealt with below.

Consulting documents

99. The plaintiffs have identified from a lately disclosed WhatsApp message that one of the independent directors who served on the Transaction Committee had been appointed by Jardine Matheson as a consultant to work on the transaction. This was addressed by Mr Parr who said that this appointment occurred before Evercore had been appointed as financial adviser to the Transaction Committee. It is otherwise unexplained[41]: it is not (for example) clear what (if any) steps were taken by the director as consultant or what involvement (if any) he had in the development of the transaction before he was appointed as one of the two independent directors of Jardine Strategic Holdings Limited (ie pre-amalgamation).

100. Consistent with the approach that the court has taken in relation to the lists of documents, it is for the attorneys supervising the disclosure process to ensure that Jardine Strategic has disclosed all documents in its possession custody or power that relate to the fair value, which includes documents that relate to deal process. It will therefore be for the defendants' attorneys to review any other documents that may be in the possession of its agents (including the independent directors) and determine if those documents are relevant or potentially relevant to the deal process, or its "independence" or "rigour". The list will be verified and will be conclusive of the disclosure on this point at this stage. The court will not make any specific orders in relation to this category of documents until there is evidence that they do in fact exist, they bear on a relevant issue and they have not been disclosed.

Date range

101. The plaintiffs have asked the court to expand the date range for disclosure. At the outset, I accept Mr Moore KC's submission that this can only be considered in relation to the deal documents, and there is no justification for considering a general expansion of the date range for disclosure in relation to the expert-led disclosure requests[42].

102. The apparent basis for the request is (a) a statement by one of the 'overlapping' directors to one of the independent directors that he had been working on the project for 14 months and this implied a genesis of the transaction sometime around December 2019 (b) an email exchange in which the same 'overlapping' director first addressed the appointment of the independent director to the Transaction Committee in which the existence of the transaction appears to have been already understood by the independent director and (c) the WhatsApp message referred to above that disclosed that the independent director had

[41] The court has assumed that on this issue Mr Parr *is* able to speak from his own direct knowledge because he was at the time the general group counsel and so he can speak directly in relation to the appointment of the independent director as a consultant to Jardine Matheson.
[42] The court proceeded on the basis that this was in reality what Mr Shivji KC was seeking.

already been appointed by Jardine Matheson as a consultant on Project Leyland which led to the ultimate amalgamation transaction.

103. Consistent with the approach taken with respect to the list of documents above, I am not persuaded that these references point to the existence of actual documents prior to the existing date range or their relevance to the integrity of the deal process. While it seems highly likely that the transaction was in development in some embryonic form at Jardine Matheson level (i.e. at the functioning group parent level) long before February 2021, that does not necessarily imply that deal documents came into Jardine Strategic's possession custody or power before the Transaction Committee was formed. To a large extent, this point is addressed by the court's decision in relation to the 'overlapping' directors' documents. It may be said that the independent director knew in his capacity as a consultant to Jardine Matheson that there was a proposed transaction under consideration before he was appointed as a member of the Transaction Committee, but that of itself is unlikely to take the matter further without more. At present the basis for an extension of the date range is speculative.

104. The court is therefore not persuaded that it is appropriate or proportionate to extend the date range for searches in relation to the deal documents as requested in paragraph 3 of the plaintiffs' disclosure summons.

The plaintiffs' listing application

105. By a separate summons the plaintiffs seek an order setting the trial down and listing it for a five-day hearing between 3 May and 11 June 2027. The date range has been confirmed as available to the parties, their counsel and the experts and potential witnesses of fact. However, Jardine Strategic opposes an order being made until the disclosure process is complete. This is because there are two separate matters outstanding. The first is the present disclosure application which the court has now dealt with. The second is an application for disclosure in separate third-party discovery proceedings commenced by the plaintiffs in the United States against Evercore under section 1782 of the US Federal Code.

106. There was some evidence and discussion about the likely timing of the resolution of the 1782 proceedings, with the plaintiffs expecting that those proceedings will be sometime in the next few weeks[43] and the defendants saying that it is impossible to tell how long the process will take or when it will conclude[44].

107. The essential points made by each group of plaintiffs were put in the following way. Mr Duncan KC submitted on behalf of the plaintiff in Action No 2021 No 109 that the court should fix the trial date now. The proceedings were commenced five years ago and if the trial is listed in May 2027, that will be six years after the transaction and the commencement of the appraisal action. On any view, he submitted that was far too long for the proceedings to get to a trial. He submitted that the fixing of the trial date should not be delayed on account of the present disclosure application or the pending 1782 disclosure proceeding in relation to Evercore in the United States. Mr Duncan KC submitted that both

[43] See paragraph 6 of the second affidavit of Ms Charlotte Donnelly on behalf of the plaintiffs in actions 2021 Nos 107-8 and paragraph 18.3 of the plaintiffs' skeleton regarding the listing application.
[44] See paragraphs 87-9 of Mr Parr' eighth affidavit paragraph 131 of the defendants' main skeleton.

these proceedings will be resolved by well before the experts are due to exchange their reports in November 2026.

108. Mr Duncan KC also submitted that fixing the trial date did not amount to a variation of the Directions Order, it would give effect to it. This was not a case, he submitted, of the court being asked retrospectively to amend an earlier order after the conclusion of the case, as in the case of **Tibbles v SIGC plc**[45]. Even if it could be construed as such, Mr Duncan KC maintained that the court always has power to vary its own case management orders to manage the progression of the case.

109. Finally, Mr Duncan KC referred to the ongoing prejudice to the plaintiffs, not only by being kept out of what they claimed was their entitlement to fair value for the shares that had been compulsorily acquired, but also because, if successful, the award of statutory interest would not compensate them adequately because the statutory interest rate of 3.5% was now below commercial rates of interest.

110. Mr Watson made substantially similar points and also submitted on behalf of the plaintiffs in Action nos 2021 Nos 107 and 108 that the Discovery Completion Date was not a hard cut off date, and the Directions Order contemplated that there may be ongoing disclosures after the Discovery Completion Date passed[46]. He submitted that the Discovery Completion Date had in effect been triggered in any event.

111. Mr Watson also pointed out that the 1782 proceeding is on a parallel track. He posited that if disclosure is given in those proceedings in the expected timeframe (i.e. by the end of March 2026) the defendants will have 5 months to prepare their factual witness statements before they are due under the Directions Order, and 14 months to prepare for trial.

112. Mr Shivji KC supported those submissions on behalf of the remaining plaintiffs in all the other actions.

113. Mr Moore KC complained that this is a really strategic manoeuvre on the part of the plaintiffs, and that it would be unfair to 'box' the defendants in between two competing work streams. He says the defendants will have to both fend off the disclosure applications in Bermuda and the United States and prepare for trial before all the evidence is in. This will mean that the evidential materials will have to be prepared for the witnesses of fact according to the trial timetable set in the Directions Order and that this is not supposed to occur until the "Discovery Completion Date" has been agreed or ordered by the court[47].

114. Mr Moore KC indicated that on Mr Parr's evidence the previous 1782 proceedings took 17 months to resolve, and those were resolved in Evercore's favour. Mr Moore KC suggests that it is unrealistic to expect the present 1782 proceedings to be concluded in March 2026.

115. Mr Moore KC maintained that setting the trial date now would amount to a variation of the Directions Order, for which there was no justification by reason of any material change

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[45] [2012] EWCA Civ 518 (which was cited in **Ivanishvili** by the Bermuda Court of Appeal).
[46] Directions Order at paragraph 7.2
[47] See paragraphs 7.1 and 7.2 of the Directions Order.

of circumstances. He submitted that it would be unwise to set a trial date now when the outcome of the 1782 proceedings was unknown. He submitted that even if the order is made in the plaintiffs' favour it will take time to arrange for the deposition of the relevant person(s).

116. Mr Moore KC submitted that the Overriding Objective 'requires' the court to keep the present terms of the trial timetable in place, and not to fix a date for trial until the outcome of both this application and after the 1782 proceedings have been concluded.

The Directions Order

117. The relevant terms of the Directions Order provide:

> *7.1 The Valuation Experts shall be entitled to make written requests of the Company and/or the Plaintiffs (in each case through their respective legal representatives) for (a) the provision of relevant documents and/or (b) the provision of relevant information, provided always that such documents or information are requested for the purposes of the preparation of their reports. The parties shall, so far as practicable, respond properly to any such requests and in any event no later than 28 days from the date of the request. The Company and/or Plaintiffs (as the case may be) shall upload any materials provided pursuant to this paragraph to the data room. There shall be liberty to apply if documents and/or information sought are not provided or the Company and/or Plaintiffs are unable to comply with the request within the 28 days.*
>
> *7.2 The parties shall use their best endeavours to agree the date when discovery has been completed pursuant to paragraph 7.1 (the "Discovery Completion Date"), failing which any party may apply to the Court for further directions.*
>
> *7.4 Information Requests may be made from the date that the upload of documents to the Data Room pursuant to paragraph 7 is to be completed until 21 days before the date fixed for the exchange of Expert Reports (as provided for in paragraph 19).*
>
> *16. The parties shall file and serve any factual witness evidence by no later than 56 days from the Discovery Completion Date.*
>
> *17. The parties file any factual witness evidence in reply by no later than 42 days after service of the factual witness evidence in paragraph 16.*
>
> *19. Signed reports of each of the Valuation Experts (the "Valuation Expert Reports") shall be:*
>
> *19.2 filed and exchanged 6 months after the Discovery Completion Date unless otherwise agreed by all parties.*

20. *The Valuation Experts shall meet at a mutually convenient time....but no later than 28 days after the exchange of Expert Reports, to discuss the differences between their respective Expert Reports with a view to narrowing the issues between them and producing a Joint Memorandum...*

25. *Unless the parties otherwise agree, a Case Management Conference ("CMC") shall be held at the earliest date convenient to the Court and the parties' counsel...*

28. *Liberty for any party to apply for further directions in respect of the matters addressed in this Order and any other matters, prior to the CMC.*

The court's assessment

118. The key date that drives all the other directions is the Discovery Completion Date. This was the regime that Hargun CJ carefully designed to ensure that the case progressed in an orderly and fair way, and it is not to be disturbed lightly. However, it is clear that the Chief Justice had in mind that if the parties could not agree the Discovery Completion Date, any party could apply to the court for an Order to set the Discovery Completion Date. It is also clear that the Chief Justice intended that any party could apply for further directions in respect of any of the matters addressed in the Directions Order.

119. It is therefore difficult to see any real force in the objections taken by the defendants that the Directions Order is in an immutable form or that a departure from the present directions would necessarily work an injustice on the defendants, or that it would require a material change of circumstances to alter it, or that a change would amount to an impermissible retrospective adjustment (as in **Tibbles**).

120. It is also readily apparent that information requests can be made right up to 21 days before the date for the exchange of expert reports. Any objection to ongoing disclosures at the same time as the preparation of witness statements therefore falls away. Mr Moore KC's concerns about late disclosures of new material disrupting the orderly preparation of factual evidence are not in reality borne out by the structure of the present Directions Order.

121. The court has refused the plaintiffs' disclosure application, so the potential impact of further 'springboard' applications for disclosure does not need to concern the defendants. Of course, there may be further applications as the matter progresses to trial. While the court does not encourage this, it does not discourage any applications which the parties may consider necessary for the proper determination of the issues in the case.

122. The 1782 proceedings may be dismissed (if the defendants' view of its prospects is correct) in which case, the defendants will not be distracted. If, however, the plaintiffs succeed, then there is no reason why the defendants cannot react to such disclosures as may be added from the 1782 disclosure process. It is worth bearing in mind that it is an application not directed against Jardine Strategic but against Evercore, so the point Mr

Moore KC makes about Jardine Strategic 'fending off' disclosure applications while at the same time as preparing for trial is a stretch.

123. Similarly, if the 1782 proceedings take much longer than anticipated, then that is a risk the plaintiffs take, namely that the materials they wish to elicit are not available to them by the time the trial occurs. Having sought the setting down of the trial now, the plaintiffs cannot look forward to a favourable reception to an application to adjourn the trial because their prediction of a quick resolution to those proceedings did not pan out. Of course, the court is not now prejudging any application that may be made in the future but is simply noting that obstacles will lie in the path to success of such an application.

124. It is also worth noting in this context that it is far from clear that Hargun CJ's Directions Order contemplated the possibility of third-party disclosure proceedings in another jurisdiction when he was setting the mechanisms for the Discovery Completion Date. Although the outstanding 1782 application can be taken into account in deciding what is appropriate to order, the court is not bound to give way to the timetable in those proceedings when setting the trial date in these proceedings.

125. The court is not persuaded that by setting the Discovery Completion Date now the defendants will suffer any measurable prejudice in their preparations for trial. The defendants have a very clear idea of the terrain that will need to be covered by their factual witnesses, and any lately emerging materials that need to be accommodated can be addressed either in the witness statement itself or (if need be) by making an application for leave to put in a supplemental statement to cover the point (if consent is not given). It also seems likely that any materials that may be disclosed by Evercore that are relevant to the preparation of the expert Valuation Reports can be accommodated by the end of October 2026. The defendants are also very well-resourced parties who can bring the necessary additional support to bear should the need arise.

126. The court's duty to manage the proceedings in a proportionate, cost-effective and efficient way is an ongoing responsibility which does not come to an end once the Order for Directions has been made (by consent or otherwise).

127. In my view, Hargun CJ's Directions Order contemplated a trial preparation process which was intended to achieve a hearing under a realistic and disciplined regime and set a pace that would maintain the jurisdiction's reputation for the efficient despatch of its commercial caseload. The court is here not making any indirect criticisms of any party or the various issues that have led to delays as a result of appeals in relation to other interlocutory applications. But the result has been that the case has not progressed according to the timetable laid down by Hargun CJ.

128. The court must also take into account that the process of appraising the fair value of the dissenters' shares under section 106 (6) of the Companies Act 1981 is intended to be a relatively quick one. Even allowing for the extraordinary nature of this particular case (in terms of the values involved and the large organisational structure which needs to be assessed), I agree with the sentiments expressed by Mr Duncan KC that it would be manifestly unjust for these proceedings to be prolonged any longer than is absolutely

necessary for the achievement of justice for all parties. Otherwise, there is a risk that confidence in the jurisdiction's ability to manage and control cases of this scale may be undermined by an unjustified perception that the court has become lost in the fog of interlocutory disclosure applications[48].

Trial Date

129. In my view it is necessary for the court to take positive steps to manage the case and set the matter down for trial. I am satisfied that it is appropriate to list the matter for hearing now on the dates already indicated as being convenient to the parties, counsel and the witnesses (including the experts). I therefore set down and list these combined proceedings for hearing for five weeks commencing 3 May 2027 until 11 June 2027 (both days inclusive) at the Commercial Court No 1, 30 Parliament Street Hamilton, Bermuda or such other court as may be assigned by the Registrar of the Supreme Court.

Discovery Completion Date

130. It is also necessary for the court to make some ancillary orders. In so doing the court is not amending the Directions Order but, as Mr Duncan KC put it, the court is giving it full effect. The first step is to determine the Discovery Completion Date which will mark the 'shotgun' start for the timelines for the preparation for trial. The court is doing so on the footing that the plaintiffs have sought directions for trial and this falls within the ambit of the provisions of paragraph 7.2 and 28 of the Directions Order. Alternatively, the court is making its own case management decision to remove any impediment to the proper progression of the case to trial.

131. The court has decided to establish the Discovery Completion Date as 30 April 2026. In setting this date the court has taken into account the following matters:

    (a) The plaintiffs predict that the disclosure in the 1782 proceedings will be around the end of March 2026. The court will assume this in the plaintiffs' favour (without expressing any views on the merits of that application or its relevance to these proceedings). Of course, it may be that those proceedings may take longer or have a negative result. The risk of any delay is on the plaintiffs. If the 1782 proceedings are concluded in March 2026 as predicted by the plaintiffs, this will allow the parties a month to address any disclosures which may emerge before the Discovery Completion Date takes effect.

    (b) The defendants will need to provide the affidavits verifying the list of documents and legal supervision referred to in paragraph 95 above. In order to allow a sensible time for reviewing the lists and making any necessary adjustments or further checks (or update the lists), the court will direct that those affidavits are to be filed and served on or before 31 March 2026.

132. It follows from the Discovery Completion Date that the date for witness statements as to fact will be 56 days after 30 April 2026 (i.e. Thursday 25 June 2026). The date for reply

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[48] "And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery." *Charles Dickens, Bleak House*.

evidence as to fact will be 42 days from 25 June 2026 (i.e. Wednesday 6 August 2026). The date for the mutual exchange of Valuation Reports will be 6 months from 30 April 2026 (i.e. Friday 30 October 2026). The date for the joint meeting of experts will be not later than 28 days thereafter (i.e. on or before Friday 27 November 2026).

133. The Case Management Conference date will be arranged after these steps are well under way, but it would be advisable to think in terms of available dates in January 2027 to give sufficient time to give effect to any further directions that may need to be made. In particular, the court will need to consider any special requirements for the attendance of witnesses, or any special facilities required to accommodate the trial process.

Costs

134. The costs of the application need to be considered. Although the plaintiffs did not succeed on the disclosure application, they did succeed on the listing application. While the defendants saw off the disclosure application, they have been ordered to verify the lists of documents and confirm the due supervision of the disclosure process by the Bermuda lawyers. The result was a mixed bag for both sides. It is not possible to untangle the costs associated with each application. It is also right to say that the plaintiffs' disclosure application was not made without foundation or realistic prospect of success.

135. Therefore, taking all this into account, in my view the appropriate order for the costs of these applications is that the costs shall be in the cause (i.e. in the totality of the combined proceedings). The plaintiffs will prepare and file an Order reflecting the orders and directions set out in this Ruling.

30 January 2026

THE HON MR. JUSTICE ANDREW MARTIN

PUSINE JUDGE OF THE SUPREME COURT