In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2023: Nos. 62 & 63

IN THE MATTER OF THE AGREEMENT AND PLAN OF MERGER BY AND AMONG MYOVANT SCIENCES LTD., SUMITOVANT BIOPHARMA LTD., ZEUS SCIENCES LTD., AND SUMITOMO PHARMA CO., LTD. DATED AS OF 23 OCTOBER 2022

AND IN THE MATTER OF A PROPOSED STATUTORY MERGER AGREEMENT BY AND AMONG MYOVANT SCIENCES LTD., SUMITOVANT BIOPHARMA LTD., ZEUS SCIENCES LTD., AND SUMITOMO PHARMA CO., LTD.

AND IN THE MATTER OF SECTION 106 OF THE COMPANIES ACT 1981

BETWEEN:

Case 2023: No. 62

APS HOLDING CORPORATION

Plaintiff

- and -

SUMITOMO PHARMA UK HOLDINGS, LTD.

Defendant

AND BETWEEN:

Case 2023: No. 63

ALPINE PARTNERS (BVI) L.P.
(ACTING THROUGH ITS GENERAL PARTNER
ALPINE GLOBAL MANAGEMENT, LLC)

Plaintiff

- and -

SUMITOMO PHARMA UK HOLDINGS, LTD.

Defendant

RULING

Date of Hearing: **15 July 2024**
Date of Ruling: **12 February 2025**

Appearances: **Richard Millett KC (Instructed by Trott & Duncan Limited), Delroy Duncan KC and Ryan Hawthorne, Trott & Duncan Limited, for the Plaintiffs**

Sonia Tolaney KC (Instructed by Appleby (Bermuda) Limited), John Wasty, Appleby (Bermuda) Limited, for Defendant

RULING of Mussenden CJ

Introduction

1. This matter appears before me on the Summons by the Plaintiffs dated 11 January 2024 (the "**Definition Summons**"/"**Application**") in which, in respect of an order for directions made by Chief Justice Hargun (as he then was) dated 25 August 2023 (the "**Order for Directions**"), following his reserved judgment of 25 August 2023 (the "**August Judgment**"), they ask the Court for the following relief:
    a. A declaration that the definition of the word "Document", as set out in Section A of Appendix 1 to the Order for Directions, includes, without limitation, communications made by messaging platforms such as WeChat and Signal.
    b. Alternatively, an order that the definition of the word "Document", as set out in Section A of Appendix 1 to the Order for Directions, be varied, by way of clarification, as including, without limitation, "*communications made by messaging platforms such as WeChat and Signal*".

c. Alternatively, pursuant to Order 24 Rule 17 of RSC 1985 (as amended) or the Court's inherent jurisdiction, an order that the definition of the word "Document", as set out in Section A of Appendix 1 to the Order for Directions, be varied to state as follows:

"Document means original or copies (as available) of all written or printed items and electronically stored information (which for the avoidance of doubt includes communications made by messaging platforms such as WeChat and Signal)".

2. Hargun CJ retired from office in December 2023.

Background

3. These proceedings are in the context of proceedings under section 106(6) of the Companies Act 1981 (the "**1981 CA**") for a determination of the fair value of the Defendant company following a merger (the "**Merger**") which was valued by the Defendant as over US$2.9 billion.

4. For the purposes of background, I have used the Plaintiffs' version, although I recognize that the Defendant may dispute some of the background, to be resolved, if necessary, at some other point. Prior to the Merger, the company which has now become the Defendant (then known as Myovant Sciences Ltd ("**Myovant**")) was listed on the New York Stock Exchange. The Merger was a "take private" transaction pursuant to which Sumitovant Biopharma Ltd (i.e the Company's 52% shareholder and member of the "**Sumitomo Group**", the large Japanese conglomerate) bought out Myovant's minority shareholders, and took Myovant private. According to the Plaintiffs, this type of transaction is often called a "squeeze-out" because minority shareholders (including the Plaintiffs) are forced to sell their shares and the remedy is to challenge the fairness of the price in appraisal proceedings under section 106(6) of 1981 CA.

5. Immediately prior to the date of the Merger, Sumitomo Group held three seats on Myovant's board of directors. The Plaintiffs claim that the Merger was therefore a conflicted, non-arm's length transaction. To try to ameliorate conflicts of interest, Myovant's board formed a "**Special Committee**" for the purpose of evaluating Sumitomo Group's offer. The Special Committee's function was to mimic the function of an independent board of directors in considering such an offer and, to represent and promote the interests of the minority shareholders in ensuring that a fair merger price was reached. The Special Committee appointed legal and financial advisors to assist in negotiations with the Buyer and its legal advisors and financial advisors.

6. As a result of the Merger, Myovant became wholly-owned by Sumitomo Pharma Co., Ltd ("**SMP**", a Japanese company). The Merger was announced in October 2022, and the Plan of Merger and Statutory Merger Agreement came into effect on 10 March 2023.

7. The Plaintiffs claim that given the structure of the Merger, and a subsequent re-structuring within the Sumitomo Group, the Defendant is the same legal entity as Myovant (i.e. the seller in the Merger) and Sumitovant (i.e. the buyer in the Merger). The Plaintiffs state this unusual situation means that the Defendant is the same legal entity as, and therefore must disclose all relevant documents that were and/or are held by, the Buyer and Seller.

8. The Court's task at trial will be to determine the "fair value" of the Plaintiffs' shares in the Defendant within the meaning of section 106(6), which will involve the Court hearing expert valuation evidence. The approach to such valuations has been established in some jurisdictions, including the Cayman Islands, although less so in Bermuda.

The Evidence

9. The Plaintiffs filed affidavit evidence of:
    a. Michele Gavin-Rizzuto ("**Gavin-Rizzuto2**" and "**Gavin-Rizzuto5**") which contain the Plaintiffs' attorney evidence on the Application.
    b. Susannah Lloyd-Jones ("**Lloyd-Jones1**") who is an e-discovery manager at Kennedys and addresses the time and expense of giving the relevant discovery. She

explained at paragraphs 4 -5 that the landscape of business communication has undergone a significant shift with an explosive growth of communication platforms other than traditional emails, such as WhatsApp, WeChat, Slack, Signal, Telegram and Skype. She referred to such messaging platforms as "**Off-Channel Platforms**". She stated that it has become increasingly common for individuals to conduct business over Off-Channel Platforms such that she has seen a significant increase in the number of off-channel communications in the discovery given by parties to commercial and financial services litigation, such as appraisal cases. Her view was that it would be extremely unusual for no off-channel communication to be disclosed in such proceedings.

10. The Defendant filed affidavit evidence of:
    a. Khiyara Fatima Krige ("**Krige1**" and "**Krige2**") which contain the Defendant's attorney evidence on the Application.
    b. Robert DuPuy ("**DuPuy1**") and Gabriel Wilson ("**Wilson1**") which addresses Lloyd-Jones1.
    c. Myrtle Potter ("**Potter1**"), Mark Guinan ("**Guinan1**") and Uneek Mehra ("**Mehra1**") which address specific instances of reply evidence in Gavin-Rizzuto5.

The Issue before the Court in the Application

11. It is common ground that the Defendant is required to disclose all relevant documents that were held by the seller Myovant and the buyer (known at the time of the Merger as Sumitovant Biopharma Ltd ("**Sumitovant**")).

12. The Application is intended to resolve a dispute that has arisen since the Order for Directions about whether the Court intended that a specific form of medium of communications should be excluded from the parties' general discovery. For the purposes of general discovery, the word "Document" is defined in Section A of Appendix 1 to the Order for Directions (the "**Definition**") and states "***Document means original or copies (as available) of all written or printed items and electronically stored information***".

13. The Plaintiffs' position is that "electronically stored information" in the Definition simply means what it says: any information stored electronically, which would naturally be taken to include messages sent by text or on off-platform systems such as WhatsApp, WeChat, Signal, SMS or Teams used by its employees and officers (the "**Electronic Messages**") as well as from other email accounts of custodians used for the purposes of the Defendant's business. The Defendant refers to such messages/documents as Instant Message Documents but, for convenience, I will use the term "Electronic Messages".

14. The Plaintiffs assert that the Defendant's narrow approach finds no support in the natural meaning of the Order for Directions or in standard practice. Since the Electronic Messages consist of "Documents" in the ordinary meaning of that word and consist of "electronically stored information", they are caught by the natural wording of the Order for Directions. However, the Defendant has argued that it is unlikely to have any relevant Electronic Messages anyway, due to it having adopted a formal policy restricting the use of such communications to administrative/logistical matters. The Plaintiffs argue that the Defendant's position seeks to reverse the normal approach on the basis that because it is unlikely to have any Electronic Messages, therefore it should be treated as having been excluded from general discovery. The Plaintiffs maintain that this position conflicts with the straightforward point that the Defendant is obliged under the Order for Directions to search for and give discovery of such documents. Further, contrary to the assertions of the Defendant, there is a real prospect of significant valuable material being contained in the Electronic Messages. The Plaintiffs stress that the normal approach is that the relevant documents are searched for and if there are actually none then none are disclosed, describing the Defendant's approach as out of step with modern discovery practice, case law and civil procedure in other jurisdictions, noting it would be anachronistic for Electronic Messages to be excluded from discovery as contended by the Defendant.

15. The Defendant's position is that the Definition positively excludes all electronic communications apart from emails. Thus, it has given no discovery at all of Electronic Messages because it says that it is not required to do so, and, to the extent it is so required, it is too burdensome to do so.

The Law on Interpreting the provisions of a Judicial Order

16. The Plaintiffs and the Defendant relied on the case of *Sans Souci Ltd v VRL Services Ltd* [2021] UKPC 6 (Jamaica) as set out below.

17. The case of *SDI Retail Services Limited v The Rangers Football Club Limited* [2021] EWCA Civ 790, involved a dispute between the parties about the supply and sale of the Club's replica kits and other branded merchandise. In that case Phillips LJ made reference to the legal principles in respect of the construction of a judicial order. He stated as follows at [44]:

> *"i) In Sans Souci Ltd v VRL Services Ltd [2012] UKPC 6 (Jamaica) at [13] Lord Sumption described the correct approach to the construction of a judicial order as follows: "…the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve."*
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> *ii) In Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd [2017] EWCA Civ 1525 Flaux LJ, with whom Gross and Lewison LJJ agreed) summarised the relevant principles as follows, drawing in particular on the judgment of Lord Clarke of Stone-cum-Ebony JSC in the Supreme Court in JSC BTA Bank v Ablyazov (No. 10) [2015] 1WLR 4754:*
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> > *"(1) The sole question for the Court is what the Order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction;*
> > *(2) In considering the meaning of an Order granting an injunction, the terms in which it was made are to be restrictively construed. Such are the penal consequences of breach that the Order must be clear and unequivocal and strictly construed before a party will be found to have broken the terms of the Order and thus to be in contempt of Court;*
> > *(3) The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order."*

18. Phillips LJ went on to state at [66]:

> "*Engaging in an excavation and analysis of the parties' submissions to discover their motives for seeking particular orders seems to me to be a difficult and dubious*

exercise, with parallels to admitting evidence of negotiations in construing a contract. As far as I am aware, such an approach finds no support (even if not expressly forbidden) in the authorities." Baker LJ agreed stating [paragraph 80] "*Like Phillips LJ, I am cautious about the extent to which it is appropriate to consider submissions made in argument before an order is made as relevant to the interpretation of the order. The starting point must be the terms of the order and the judgment in which the court explains its reasons for making it. ...*"

19. In *Sea Master Special Maritime Enterprise v Arab Bank (Switzerland) Ltd* [2022] EWHC (Comm) at [43] Picken J stated:

"*As I see it, the Tribunal were right to approach matters on the basis that the exercise is to ascertain (objectively) the intention of the court or arbitral tribunal and, in this respect, it is permissible to have regard to parties' submissions, albeit being careful to avoid placing too much emphasis, in order to ascertain what the issues to be decided were or were understood to be. In addition, where a judge or arbitrator accepts a party's submissions, these can (and should) be looked at because they thereby become part of that judge's or arbitrator's reasons for making the relevant order or award. Beyond that, however, there is a real need for caution."*

The Rules of the Supreme Court on Discovery

20. RSC Order 24/8 provides as follows:

24/8 Discovery to be ordered only if necessary

On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

21. RSC Order 24/13 provides as follows:

24/13 Production to be ordered only if necessary, etc.

No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

22. In *Wong v Grand View Private Trust and others* [2020] Bda LR 45 Kawaley J held at [12] that Orders 24/8 and 24/13 "superimpose a 'necessity filter'". In *Terceira v Terceira* BM 2010 SC 58 Kawaley J held at [11 – 13] that "*These requests are oppressive and insufficiently linked to any specific matters in issue in the present action to justify ordering disclosure ... So it is not enough for the plaintiff to show that potentially relevant*

documents have not been disclosed. They must be shown to be sufficiently material to justify the time and costs involved of complying with an order for specific discovery".

23. In *Berkeley Administration Inc. v McClelland* [1990] FSR 381 Mustill LD stated at [383] "*It is plain, as I have said before, that the plaintiffs just do not believe anything that the defendants have said in the course of discovery, and would like to hunt around the documents in the hope that something useful would turn up enabling them to controvert what the defendants have said on oath. That is not what discovery is about at all. …"*

The Rules of the Supreme Court on Variation of an Order

24. RSC Order 24/17 provides as follows:

> **24/17 Revocation and variation of orders**
> Any order made under this Order (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial of the cause or matter in connection with which the original order was made.

The Plaintiffs' Submissions

25. The Plaintiffs submitted that the Defendant relies on the fact that the Hargun CJ did not, in the Definition, adopt the Plaintiffs' proposed specific inclusory "for the avoidance of doubt" language, which reads "*and includes communications (which for the avoidance of doubt includes any electronic transmission of information including communication made by messaging platforms such as WeChat and Signal*". The Plaintiffs urge that it is important to note that the Defendant does not (and cannot) say that there is any exclusionary language contained in the Definition, noting thus that its entire case on construction stands on the fact that Hargun CJ did not use the extra words suggested by the Plaintiffs, not on the words he actually used.

26. The Plaintiffs submitted that the obvious inference is that Hargun CJ chose not to adopt the Plaintiffs' extra inclusory and clarification language because it was not necessary as "electronically stored information" was simple, economical and broad enough to include all types of electronic data, whatever the medium of communication. Further, had Hargun

CJ intended positively to exclude that material he would not only have done so expressly, but would have gone on to identify a reason for doing so because that would have been a departure from the norm, adding that he did not. This was in the context that Hargun CJ was addressing a protocol to be appended to an order based on his August Judgment in which he spelled out in clear terms the need for the Defendant to give very full general discovery and rejected the Defendant's attempt to narrow it down[1]. Thus, the Plaintiffs raise the question, that if the Definition includes email, then what was in the language of the order that excluded other forms of electronic communication or electronically stored information, suggesting that the answer is nothing, as Hargun CJ would have inserted language which had that effect; which he did not.

The plain meaning of the Order for Directions

27. The Plaintiffs' primary position is that the Court can simply grant a declaration as to the plain meaning of the words in the Order for Directions. This is on the basis that the broad wording of the Definition includes (because it does not expressly exclude) communications made by messaging platforms such as MS Teams, WhatsApp, WeChat, SMS and Signal. Such a declaration would also mean that the Plaintiffs must give discovery of certain categories of documents.

28. The Plaintiffs submitted that Court orders are to be construed by reference to the ordinary interpretation of the language used in the order, taking into account the context in which the order was made, noting it is impermissible to refer to the parties' underlying submissions. They relied on the case of *SDI Retail Services Limited v The Rangers Football Club Limited* [2021] EWCA Civ 790 as set out above.

29. Thus, the Plaintiffs submitted that the broad language of the Definition, which included (all) written and (all) electronically stored information, clearly included communications made by messaging platforms such as WhatsApp, We Chat and Signal, because they are written and or electronically stored.

[1] August Judgment at [19]-[29].

30. The Plaintiffs submitted that the position was consistent with the authorities and the position in other jurisdictions as set out below.

    a. In the case of *In the Matter of Lehman Re, Ltd* [2011] Bda LR 56, where Kawaley J said at [Footnote 2] that "*The term 'Documents' in the modern era clearly includes electronic data as well.*"

    b. In England CPR Practice Direction 31B "Disclosure of Electronic Documents" which defined at [5(3)] Electronic Document to mean *"'Electronic Document' means any document held in electronic form. It includes, for example, email and other electronic communications such as text messages and voicemail, …"*

    c. In Hong Kong, Practice Direction SL1.2 (concerning discovery and provision of electronically stored documents in cases in the Commercial List) defines "Electronic Document" as *"any data or information held in electronic form, including e-mails and other electronic communications such as text messages and voicemail,…"*

    d. In the Australian case of *Sony Music Entertainment (Australia) Ltd and Others v University of Tasmania and Others* (No 1) [2003] FCA 532 at [48] where the Court stated that the Rules Order 1 Rule 4 considered that CD ROMS used to store data were records of information from which writings could be reproduced were documents within the rules.

    e. In the United States Courts, Federal Rules of Civil Procedure 34 set out that the term "electronically stored information" meant *"(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form;*" The 2006 Amendment to the Rule stated as follows:

> *"Subdivision (a). As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term*

> *"documents" to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a "document." Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."*
>
> *Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers—either as documents or as electronically stored information—information "stored in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments."*

31. The Plaintiffs submitted that in respect of discovery, there was no systemic difference between the Bermuda and the Cayman Islands regimes, both being based on the Rules of the Supreme Court prior to its replacement in England. Further, that is why the Court held that, in keeping with the practice in the Cayman Islands, the "norm" in appraisal actions is that there should be wide general discovery. They relied on the case of *Glendina Pty Limited & Ors v NKWE Platinum Ltd.* [2022] SC (Bda) 22 Com at [44] where Hargun CJ accepted "*that discovery would be significant and would include all documents relevant and potentially relevant to the assessing its value.*"

32. The Plaintiffs also submitted that in the Cayman Islands, the question of whether orders for general discovery in appraisal actions include discovery of text messages has never arisen because it is glaringly obvious that it does include such messages and there is no reason why it should not. They submitted that in the Cayman Islands merger appraisal cases, electronic documents are disclosed by both sides, citing several cases (i) *58.com Inc* FSD 275 of 2020; (ii) *Sina Corporation* FSD 128 of 2021; (iii) *New Fronter Health Corporation* FSD 74 of 22; and (iv) *51job, Inc* FSD 155 of 2022. The Plaintiffs stressed that as Hargun CJ was at pains to ensure that the scope of discovery was no less than that of the Cayman Islands approach in appraisal actions, it would have been inexplicable for him to have reduced the scope of the discovery so radically.

33. Thus, the Plaintiffs submitted that in the circumstances, a declaration be granted that the definition of "Document" in Section A of Appendix 1 to the Order for Directions clearly includes communications made by messaging platforms such as WeChat and Signal, noting that should be the beginning and end of the Summons.

The relevance of Electronic Messages

34. The Plaintiffs submitted that the Court should appreciate why discovery of the Electronic Messages are liable to be so important as that would be relevant background to what Hargun CJ decided in the Order for Directions and whether it was plausible that he intended to exclude Electronic Messages.

35. The Plaintiffs submitted that in order for the Court to determine the "fair value" of the Plaintiffs' shares in the Defendant, it will hear expert valuation evidence, using an approach now well established in some jurisdictions including the Cayman Islands. They relied on the case of *Re Trina Solar Limited* CICA No 9 of 2021 ("**Re Trina Solar**") where the Court of Appeal opined that all relevant facts and matters are to be considered in reaching the fair value. The selection of the appropriate valuation methodology to assess the fair value is a fact-sensitive question to be determined on a case-by-case basis having regard to all the circumstances of the case. In doing so, three main valuation methodologies will generally

be considered by the Court, namely DCF Valuation, Market Price methodology and Deal Price.

36. DCF Valuation Methodology - The Plaintiffs submitted that the DCF Valuation methodology produces a valuation implied by the present value of a company's future free cash flows, a process which involves an assessment of the company's projections. Thus, the Court would have to make determinations about such projections which was a question of fact for which various types of communication are likely to be highly relevant, namely: (i) Electronic Messages passing between those individuals at Myovant involved in preparing Myovant's projections; (ii) Electronic Messages between members of the Special Committee and its financial advisor, whose job it was to consider the reliability of Myovant's projections; and (iii) Electronic Messages between those involved in preparing Sumitovant's (as buyers) projections in respect of the Merger.

37. Market Price Methodology – The Plaintiffs submitted that the Court may place reliance on the company's trading price as a data point for fair value based on some criteria including about "material non-public information" ("**MNPI**"). It submitted that MNPI did not refer to information the company was compelled to disclose to the market pursuant to law or regulations.

38. Deal Price Methodology – The Plaintiffs submitted that the Deal Price Methodology can be a reliable indicator of fair value if the process to arrive at the merger price was sufficiently robust. If there were substantial flaws in the process, then the Court would likely give the deal price little or no weight when assessing fair value. Thus, the Court's analysis will be highly fact specific and will include consideration of factors as set out in *Re Trina Solar* at [139] including robustness of public information and ease of access to deeper non-public information. Thus, the Plaintiffs submitted that some examples of Electronic Messages that will be crucial to determining whether the deal process was sufficiently independent and robust as well as complied with the factors set out in *Re Trina Solar* include:

a. Electronic Messages passing between the members of the Special Committee. The Plaintiffs asserted that the Company has disclosed just 318 custodial documents (i.e. documents taken) from Mark Guinan, the Chairman of the Special Committee, and just 25 custodial documents from another member of the Special Committee (Terrie Curran).

b. Electronic Messages passed between the members of the Special Committee on the one hand, and the Special Committee's legal advisors (Skadden) and financial advisors (Goldman Sachs), on the other. The Plaintiffs asserted that notably few emails have been disclosed between the Special Committee and Goldman Sachs (the Special Committee's financial adviser).

c. Electronic Messages between the Special Committee and its advisers on the one hand and Sumitovant's (i.e. the buyer's) special committee and its advisors on the other. The Plaintiffs asserted that such messages will give insight into the robustness of the deal process and negotiations between buyer and seller, noting that, again, few emails have been disclosed between the Special Committee and anyone from Sumitovant/SMP.

d. Electronic Messages amongst and between Sumitovant's Special Committee and its financial and legal advisors. The Plaintiffs asserted that such communications will show, amongst other things, Sumitomo's views on the value of the Company and whether Sumitovant thought it was paying a fair price for the shares.

e. Electronic Messages in respect of Pfizer's consideration of a bid for the Company. The Plaintiffs asserted that the Special Committee did receive an expression of interest from another large pharmaceutical company, described in the Proxy Statement for the Merger as "Company A", now known to be Pfizer Inc. However, Pfizer ultimately decided not to enter the bidding process, such that there was no serious comparative bid, assumed by its own production in response to a section 1782 request in the US.

39. The Plaintiffs submitted that given the broad-ranging factual discovery enquiry on which the Court must engage, the importance of the discovery requires that full discovery of all relevant documents the Company possesses is given. They relied on the case of *Glendina*

where Hargun CJ said at [44] "*the norm in appraisal actions [is] that [the company's] discovery would be significant and would include all documents relevant and potentially relevant to assessing its value.*" They also relied on the Cayman Islands case of *In re FGL Holdings* (unreported, 18 December 2020) where Parker J said at [12] that "*It is well settled that extensive discovery of documents within their possession, custody or power of petitioner companies is essential in section 238 proceedings. This is because the company is the object of the valuation exercise and will have a large amount of information and material of critical relevance to that exercise. This 'information gap' has been emphasized in numerous discussions of this court and the Court of Appeal.*" The Plaintiffs stressed that this decision was adopted with approval by Hargun CJ in paragraphs 21 and 26 of the August Judgment.

40. The Plaintiffs submitted that the Defendant complains that it had made substantial discovery already, some 16,000 documents in a recent batch with 4,000 initial documents. However, the Plaintiffs argue that there are substantial gaps in the discovery, noting that such discovery is abnormally small compared to two recent Cayman Islands appraisal cases, where discovery from the company consisted of 475,000 documents and 228,000 documents respectively. Thus, it was vital for the Court to have access to all relevant Electronic Messages because, without such, there was a risk that the Court will preside over an unfair trial where it had not had access to all value-relevant information and where the outcome will not be a fair value.

41. The Plaintiffs gave examples of cases in other jurisdictions where questions and issues of electronic communication disclosure arose:
    a. In *Pipia v Bgeo Group Limited* [2021] EWHC 86 (Comm) where the Court found at [59] that communications on messaging platforms to be vital in giving an "*unguarded picture*" or private attitudes and information which "*may very well be significant, in a case which raises major issues concerning [a party's] good or bad faith at relevant times*".
    b. In *ED&F Man Capital Markets Limited v Come Harvest Holdings Limited* [2021] EWHC 229 (Comm), at [105] where in relation to the use of WhatsApp, that the

"*group was clearly accustomed to using this form of communication*" and at [124] concluded that the Court was entitled to draw adverse inferences from the defendants' deliberate destruction of WeChat messages.

c. In *Shichuang Xie v Qingheng Meng* [2022] EWHC 1819 (Ch), a case about bubble tea, where substantially all of the commercial discussions relevant to the issue were conducted by way of WeChat (at [34] the Chinese equivalent of platforms such as WhatsApp).

d. In the United States, in *Brooks Sports, Inc. v Anta (China) Co.,* No. 117CV1458LOTCB, 2018 WL 7488924, in a judgment in a case about discovery in a trademark case, Judge Buchanan stated:

> *"[*9 D] While litigating its Motion for Sanctions, Brooks expressed concern regarding Anta's employees use of WeChat, a popular Chinese communication platform, to conduct substantive business. (Dkt. 65 at 18-19.) At the time Brooks moved for Sanctions, Anta had not yet produced any WeChat communications, which serves as a "primary means of communicating for Anta.*
>
> *[15 B] Finally, Anta insists that WeChat is not used for substantive business purposes, yet the co-founder of the company will not even allow the company he owns to search his apparently non-responsive WeChats. Mr. Ding's refusal is especially alarming given the wealth of information contained in Mr. Bond's recently produced WeChat communications. As a result, the Court is left to conclude that Brooks is harmed by Anta's refusal to search and produce WeChat communications."*

e. In the United States, in *Fed. Trade Comm'n v Noland*, No. CV-2000047-PHX-DWL, 2023 WL 3372517, [*5], a case involving an investigation by the Federal Trade Commission where the defendants, having discovered they were the subjects of an investigation, switched to using a pair of encrypted communication platforms called Signal and Protonmail (a Switzerland-based encrypted email service) , where Judge Lanza remarked upon the defendant's use of Signal, WhatsApp and Telegram for the conducting of substantive business.

42. The Plaintiffs submitted that given the nature of the use of Off-Channel Platforms, e-disclosure exercises in the present day invariably do include such Electronic Messages, such as the direction order in appraisal cases in the Cayman Islands and the English CPR PD31B. Thus, the Company's position is highly unusual and wholly out of step with modern commercial litigation and the approach to general discovery in the Cayman Islands and with the August Judgment of Hargun CJ.

The Defendant has relevant Electronic Messages

43. The Plaintiffs submitted that based on their review of the Defendant's discovery thus far, the Defendant does have Electronic Messages. However, they stressed the following:
    a. Relevant communications will only be identified if a search and review of the Electronic Messages is carried out and disclosure given, as until then, the Plaintiffs do not know what they are looking for.
    b. The Defendant's refusal to conduct basic testing to assess whether it holds discoverable Electronic Messages hamstrings both the Plaintiffs and the Court in making a proper assessment of the argument that its policies were routinely complied with by all its employees.
    c. The documents which the Plaintiffs have been able to identify have been so identified after a review of the Defendant's email discovery, some of which made reference to WhatsApp, Slack, etc. Thus, in the circumstances, including a breach of policy about the use of Off-Channel Platforms, the number of Electronic Messages referred to in emails is of no relevance to the ultimate number of Electronic Messages.
    d. As an order for general discovery has been made, then the burden falls on the Defendant to justify non-compliance with the order.
    e. There are significant gaps in the Company's discovery thus far, and the email discovery suggests that relevant communication took place otherwise than by email, thus, the Electronic Messages are all the more important.

44. The Plaintiffs submitted that Gavin-Rizzuto5 referred to a number of examples of emails where a custodian referred to a substantive communication sent using Electronic Messages or indicated use of such Off-Channel Platforms. These were responded to in Krige2, Potter1, Guinan1 and Mehra1. The Plaintiffs submitted that the Court is unlikely to be assisted by the responses but make the following high-level points.
    a. As this is general discovery, and not specific discovery, it is for the Defendant to justify the absence of relevant material, noting that the burden on the Defendant should not be reversed to make the Plaintiffs prove that such documents exist.
    b. Potter1, Guinan1 and Mehra1 all refer to text messages, without exhibiting them, to say that they are non-substantive. Thus, it appears that they have reviewed them as they couldn't possibly have remembered the content of text messages years after communicating them.
    c. Potter1 indicates that she sent an email saying she would send questions by text message. Thus, she was sending substantive material by text message, and as lead negotiator for the buyer in the Merger, documents held by her will be of critical importance.
    d. Krige2 speculates on what particular emails relied on by the Plaintiffs mean. Further, Krige2 asserts that some of the off-channel communication would not be relevant to fair value; such response being irrelevant as the Defendant disclosed them so they must have been arguably relevant; and the fact of the Off-Channel Platform communication supports the assertion that the Defendant's polices were not being followed.
    e. Counsel for the Defendant and the Special Committee members has indicated the Special Committee Members – Mark Guinan, Terrie Curran and Nancy Valente – have responsive Off-Channel Platform communications that the Defendant has not produced.

<u>The policies relied on by the Defendant are no answer</u>

45. The Plaintiffs submitted in essence that the policies of the Defendant about the use of Electronic Messages and Off-Channel Platforms have no merit when considering whether

such documents exist. They challenged the evidence in Krige1 noting that she does not say what the source of her evidence is, but appears to be giving her view of the meaning of the policies without having consulted any of the Defendant's representatives as to how the policies were understood or enforced or complied with at the time. They note that there is no evidence on the point from Myovant. The Plaintiffs contrast that with the evidence in Gavin-Rizzuto5, stressing that there is weighty and credible evidence that the policies were not in fact followed, not only by junior employees, but also by very senior custodians including Mr. Guinan and Ms. Potter, who were either not subject to the policy at all or routinely disobeyed it. Thus, the Plaintiffs take the view that although the policies formally existed, that is not evidence that there are no Electronic Messages. They referred to Gavin-Rizzuto5 where it was explained that there have been a large number of prosecutions of major banking institutions by the US Securities and Exchange Commission in recent years – including both JP Morgan and Goldman Sachs, the two investment banks acting on this Merger – resulting in substantial fines in connection with their employees' use of Off-Channel Platforms in violation of the firms' own policies. The Plaintiffs submit that the Defendant should have a sampling exercise, at least across key custodians, to enable it to assess the likely volume of responsive documents held, for instance in MS Teams, Slack and/or WhatsApp. However, not having done so, the Defendant is not in a position to say there are no such documents.

46. The Plaintiffs submitted that in respect of the use of MS Teams, Krige1 acknowledged that the Company did sanction instant messaging on MS teams, although it asserted that employees were discouraged from using it for substantive Company business. However, the Plaintiffs assert that that policy appears not to have been followed. Further, there were emails that indicate that minutes of meetings were stored on MS teams. Thus, the Plaintiffs argue that in granting the order for disclosure will lead to a substantial volume of relevant documentation being disclosed.

The relief sought on the Summons

47. The Plaintiffs submitted that they seek as their primary position a declaration, pursuant to the Court's inherent jurisdiction, that the definition of the word "Document", as set out in Section A of Appendix 1 to the Order for Directions, includes, without limitation, communications made by messaging platforms such as WeChat and Signal.

Clarification (Alternative Position)

48. Alternatively, (i.e. if the Court thinks that the existing definition is ambiguous such that it requires clarification), the Plaintiffs seek an order pursuant to the Court's inherent power to clarify its own orders, that the definition of the word "Document" be varied, by way of clarification, as including, without limitation, "communications made by messaging platforms such as WeChat and Signal".

49. The Plaintiffs submitted that the Court has an inherent jurisdiction to vary its orders so as to make the meaning and intention of the Court clear. They relied on the White Book (2023) (commentary to the English Civil Procedure Rules), note 3.1.17.6 "*The court has an inherent jurisdiction to vary its own orders to make the meaning and intention of the court clear*." They submitted that, although there is no Bermudian authority making it clear that this Court has an inherent jurisdiction to vary its orders so as to make the meaning and intention of the Court clear, the Bermuda Court must enjoy this inherent power.

Variation (Further Alternative Position)

50. In the further alternative (i.e. if the Court concludes that the existing definition falls to be construed consistently with the Defendant's position), the Plaintiffs seek an order pursuant to Order 24 rule 17 of RSC 1985 or the Court's inherent jurisdiction, that the definition of the word "Document", be varied so that it states as follows: "*Document means original or copies (as available) of all written or printed items and electronically stored information (which for the avoidance of doubt includes communications made by messaging platforms such as WeChat and Signal)*".

51. The Plaintiffs submitted that the test for relief under Order 24 rule 17 of RSC 1985 is that there is "*sufficient cause*" for the Court to vary its own order, this test contemplating some "*material change of circumstances*" or that "*the judge was misled in some way, whether innocently or otherwise*". They relied on the case *Ivanishvili* [2021] Bda LR 50 at [22] where reference was made to the test set down in *Par-la-Ville Hotel and Residences Ltd (in Liquidation) v Mora and anor* [2016] Bda LR 17. The Plaintiffs submit that the Court was misled (however innocently) as its attention was not brought to the facts and matters referred to in the evidence in support of the Summons and the importance of communications by way of Off-Channel Platforms to commercial negotiations in the Merger. Further, there is sufficient cause in the matter for the Court to exercise its power to vary the Order for Directions.

Proportionality and Cost

52. The Plaintiffs submitted that the Defendant's arguments that granting the order for such discovery is disproportionate and expensive should be rejected for a number of reasons as follows:
    a. If there is in fact significant documentation, then it follows that there is likely to be valuable and probative discovery to give. Thus, expense should not be a reason to not grant the order. Further, the costs of such discovery estimated at US$2.8M to US$3.8M is irrelevant in the context of a merger acquisition valued at US$2.9 billion.
    b. Ms. Krige has given various estimates of the time it will take to extract the data and/or to review it without considering proper factors.
    c. The Defendant has not provided sufficient detail for a proper assessment.
    d. The Defendant's cost estimates appear to be substantially overstated:
        i. Ms. Lloyd-Jones's estimate of 158,000 documents and as many as 62,500 MS Teams messages seems overstated given that the Defendant's discovery was 22,000 documents. However, if it is 158,000 then it cannot be the case that there are only a few relevant documents.
        ii. Krige1 suggests that there will be 40 custodians of Electronic Messages, however their identity has not been revealed. Although the Company had

disclosed 58 custodians, the Company did not engage with the Plaintiffs to narrow the discovery to a reduced number of custodians.

iii. The Defendant is not willing to use software or Technology Assisted Review instead relying on attorneys when it could use software or paralegals.

iv. Krige1 suggested that ordering the production of text messages specifically would increase the costs of gathering and processing the data tenfold without providing a basis for it, until Wilson1 stated that each custodian would be required to be visited or travel to Freshfields' offices for text message retrieval, at a cost of $700,000, an amount being hardly credible.

53. The Plaintiffs submitted that if the Court was minded to order an incremental approach to the Electronic Messages then in the first instance it should order that Electronic Messages be disclosed from material held by those the Plaintiffs consider to be the most important custodians, that is, those who played a central role in the Merger.

The Defendant's Submissions

54. The Defendant submitted that the application is an abuse of process and should be rejected for several reasons:

a. The issue raised in the application had already been determined by Hargun CJ in his Decision dated 17 October 2023 ("**October Decision**") when he determined that the parties' discovery obligations should not extend to Instant Messaging Documents; and such decision is binding.

b. The Plaintiffs' argument that Hargun CJ did not make a Ruling should be rejected as it is clear that he did make such a ruling;

c. On the basis that Hargun CJ did make a ruling, the Plaintiffs seek to re-argue the point which should be rejected as: (i) Hargun CJ's October Decision determined the point which is binding and the Plaintiffs did not seek leave to appeal – such position which should end the matter; (ii) there is no basis to allow the Plaintiffs to re-open the issue that has been determined and the attempt to do so is an abuse of

process. The Plaintiffs assertion that Hargun CJ was misled is a hopeless argument; and (iii) the Plaintiffs have failed to explain why they waited to file this application until 3 months after Hargun CJ had ruled in favour of the Defendant, 6 weeks after they had threatened to make an application and just 6 weeks before the Defendant was due to provide its general discovery – such discovery having long since been completed, so the delay is particularly egregious and prejudicial to the Defendant.

d. There is no basis for the matter to be considered afresh. However, if the Court intended to consider the matter afresh, then there is no doubt that the October Decision was correct. As Hargun CJ was right to rule that the parties should not be required to conduct a general search of Electronic Messages, which would be a lengthy and expensive obligation with very little, if any, utility. Further, it would be unnecessary and disproportionate in the context of the proceedings and not meet the test in the RSC for an order for discovery.

55. By way of background, the Defendant submitted that at the Direction Hearing on 18-19 July 2023, the parties resolved a number of matters including in relation to the parties' discovery obligations and the procedural timetable. The August Judgment resolved further matters leaving a number of supplemental or consequential points to be determined. After further written submissions, the points were resolved by Hargun CJ in the October Decision when Hargun CJ decided that the Defendant's proposed definition of "Document" should be accepted. The Order for Directions dated 25 August 2023 (sealed on 17 November 2023) gave effect to the August Judgment and the October Decision, including in relation to the Application.

56. The Defendant submitted that since the Directions Hearing the following procedural steps had taken place:

a. One month after the Order for Directions, on 25 September 2023, the Defendant provided initial discovery, by way of upload to an electronic data room, of over 4,000 documents comprising approximately 37,000 pages.

b. Almost three months later on 19 December 2023, the Plaintiffs signed Non-Disclosure Agreements to protect the confidentiality of information disclosed by the Defendant, and were given access to the Defendant's discovery.
c. On 28 December 2023, the Plaintiffs provided discovery of just 171 documents. The Defendant has repeatedly raised concerns as to the inadequacy of this discovery, but the Plaintiffs have not engaged with those concerns.
d. On the 11 January 2024, almost three months after the October Decision, the Plaintiffs filed the summons for this Application.
e. On 27 February 2024, the Defendant provided general discovery of a further approximately 16,000 documents comprising over 230,000 pages, thus fulfilling the Defendant's obligation to provide discovery of "*all Documents (as defined in Appendix 1) within the Defendant's possession, custody or power created since October 2019 which are relevant to the determination of the fair value of the Plaintiffs' shares in Myovant as at the Valuation Date*".
f. Discovery was completed about 5 months prior to the hearing date of this Application.

The Declaration Order

57. The Defendant submitted that on 17 October 2023, Hargun CJ decided that the Defendant's proposed definition of "Document" should be accepted. In doing so, he had considered and specifically rejected the Plaintiffs' proposal (which was otherwise substantively identical) that the definition should include Electronic Messages. He did so because he accepted the Defendant's submission that Electronic Messages should be excluded from the definition of Document.

58. The Defendant set out the chronology of events between 12 May 2023 and 17 October 2023:
    a. On 12 May 2023, the Plaintiffs shared their proposed draft of the Order for Directions which included Electronic Messages.

b. On 8 May 2023, the Defendant shared its proposed amendments to the draft, including the definition of "Document" (which was ultimately ordered). The only substantive amendment to the definition of "Document" was the deletion of the reference to Electronic Messages.

c. On 4 July 2023, the Plaintiffs filed their skeleton argument for the Direction Hearing. In Annex 1, the Plaintiffs made submissions as to why their proposed definition of "Document" should be preferred, and in particular as to why discovery of Electronic Messages should be ordered.

d. On 11 July 2023, the Defendant filed its skeleton argument for the Direction Hearing. It noted that there were differences in respect of discovery and if they were unresolved the parties can come back to Court to seek specific directions.

e. Neither party addressed the definition of "Document" in oral submissions at the Direction Hearing and nor did the Court in the August Judgment.

f. On 25 August 2023, the Defendant filed a note dealing with supplemental/consequential matters which had not been determined in the Directions Judgment. At the hand-down hearing Hargun CJ gave directions for further submissions on supplemental/consequential matters and indicated he would give a ruling on any points remaining in dispute.

g. On 1 September 2023, the Plaintiffs filed their responsive note on supplemental/consequential matters, referring to its written submissions for the Directions Hearing.

h. On 5 September 2023, the Defendant filed its reply note, setting out that the Defendant should not be ordered to give discovery of Electronic Messages.

i. On 17 October 2023, the October Decision was communicated to the parties by email from Hargun CJ's executive assistant, informing of consideration of the further written submissions and stating "*The Court accepts the wording proposed by the Defendant in relation to the definition of 'Document'. Please submit a draft order which accords with these directions*".

j. The Plaintiffs were entitled to file an application for leave to appeal the October Decision within 14 days but elected not to do so.

k. The October Decision was accordingly reflected in the definition of 'Document', specifically excluding any reference to Electronic Messages, in the Direction Order sealed on 17 November 2023 after the October Decision was made – but dated 25 August 2023.

59. The Defendant submitted that Hargun CJ was asked to rule on the point as between the Plaintiffs' version (including Electronic Messages) and the Defendant's version (excluding Electronic Messages) and, unequivocally, he ruled in favour of the Defendant.

60. The Defendant submitted that the Plaintiffs have made a number of arguments in an effort to evade the Ruling, but which should be rejected:

a. The Plaintiffs suggestion that the Court may have intended that the parties should be required to give such discovery rather than should not. However, the Defendant submitted that the Court indicated that it had considered the further written submissions and the October Decision therefore ruled upon the substantive question of whether the parties should be obliged to provide discovery of Electronic Messages. Similarly, suggestions that Hargun CJ was saving on words in his judgment should be rejected as well as the contention that deletion of an express obligation should be construed as the imposition of an identical implied obligation.

b. The Plaintiffs attempt to characterize the October Decision as a mere "indication on the wording of the Directions Order" and assertion that "*the Chief Justice did not communicate any reasoning for or decision on whether [discovery of Instant Messaging Documents] should be given.*" However, even though no reasons were provided, the Defendant submitted that Hargun CJ had actually indicated that he would rule on the papers, thus it was a final, binding decision.

c. The Plaintiffs assert that Hargun CJ did not have sufficient material available to him to make a decision. The Defendant submitted that if the Plaintiffs were dissatisfied with the October Decision or the grounds on which it was made, then they could have sought leave to appeal. Further, the question of whether discovery of Electronic Messages should be ordered was a short, consequential point, which did not require lengthy, detailed submissions. In any event, Hargun CJ did have the

benefit of submissions before him. Additionally, the Defendant submitted that the Plaintiffs have understood the effect of the October Decision as they have not made discovery of any Electronic Messages.

Variation Orders

61. The Defendant submitted that the Court has inherent jurisdiction to prevent its procedures from being misused, including that the Court will not usually permit a party to raise in litigation a matter which should have been raised earlier. It relied on the case of *Henderson v Henderson* (1843) 67 ER 313 (CH) in respect of the principle that the Court requires parties to litigation to bring forward their whole case and will not, except in special circumstances, permit the same parties to open the same subject of litigation which might have been brought forward before but was not due to negligence, inadventure or even accident.

62. The Defendant also cited the following cases:
    a. *Johnson v Gore Wood & Co.* [2002] 2 AC 1 (HL), which cited *Henderson v Henderson*, for the principle that there is a public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter.
    b. *Chanel Ltd v FW Woolworth & Co. Ltd* [1981] 1 WLR 485 (CA) where Buckley LJ held at [page 492] "*Even in interlocutory matters a party cannot fight over again a battle which had already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter*."
    c. *Woodhouse v Consignia Plc* [2002] EWCA Civ. 275 where Brooks LJ stated at [55] that "*There is a public interest in discouraging a party who makes an unsuccessful interlocutory application from making a subsequent application for the same relief, based on material which was not, but could have been, deployed in support of the first application. In some contexts, this is partly because … there is a need for the court to allot its limited resources to other cases. But at least as important is the*

general need, in the interest of justice, to protect the respondents to successive applications in such circumstances from oppression".

d. *Thevarajah v Riordan* [2015] UKSC 78 where Lord Neuberger held at [18] that "*as a matter of ordinary principle, when a court has made an interlocutory order, it is not normally open to a party subsequently to ask for relief which effectively requires that order to be varied or rescinded, save if there has been a material change in circumstances since the order was made*", going on to cite *Chanel Ltd*.

e. *Koza Ltd v Koza Altin* [2020] EWCA Civ. 1018, where Popplewell LJ summarised the test and stated that the same test applies to interlocutory hearings as it does to final hearings, and emphasized that unappealed interlocutory decisions should, absent special circumstances, generally be regarded as final.

63. The Defendant submitted that these principles have been accepted and followed in Bermuda in relation to applications to vary an order pursuant to its inherent jurisdiction and applications to vary a discovery order pursuant to RSC Order 24/17:

a. *Telecommunications (Bermuda & West Indies) Ltd (t/a Digicel) v Bermuda Digital Communications Ltd (t/a CellOne)* [20212] Bda LR 11 where Ground CJ held at [36] "*whether it is regarded as strictly res judicata, as the defendants argue, or whether simply as a matter of good practice, I take it to be established beyond argument that the courts will not reopen even an interlocutory decision unless there has been a material change of circumstances*".

b. *Par-La-Ville Hotel and Residences Ltd v Shane Mora* [2016] (Bda) 16 Com where Kawaley CJ concluded that it was not open to the defendant to re-argue an application by taking a point which had been available to it the previous day but had not, for whatever reason, been employed.

c. *Ivanishvili v Credit Suisse Life (Bermuda) Ltd* [2021] SC (Bda) 47 Civ in respect of an application to vary an existing discovery order pursuant to RSC Order 24/17, where Hargun CJ held at [22] "*that the requirement in Order 24 of "sufficient cause" being shown contemplates that there has been a material change in circumstances or that the judge was misled in some way, whether innocently or*

otherwise, consistently with the test articulated in the Par-La-Ville Hotel and Tibbles v SIG cases."

64. The Defendant submitted that: (i) there has been no change in circumstances since the October Decision was made, let alone a significant and material one; (ii) no new information has come to light which bears on the question, let alone information which "*could not reasonably have been discovered at the time of the first hearing*"; and (iii) Hargun CJ was not misled in any way when making the October Decision. They rejected the argument that the Court was misled by the Plaintiffs' decision not to advance arguments it is now choosing to advance, stressing that if it were correct that the Court was misled every time a litigant chose not to pursue all of the arguments it might pursue, the abuse of process doctrine would have no application at all, as it would be open to parties to relitigate points *ad infinitum*. Thus, whether the variations are sought pursuant to the Court's inherent jurisdiction or pursuant to RSC Order 24/17, the Variations Orders are an impermissible abuse of process which should not be entertained.

65. The Defendant submitted the Plaintiffs' application to vary is more abusive than the cited cases which first, were in circumstances where a party had had an opportunity to seek its desired relief at an early stage but had not done so. However, the Plaintiffs in the present application did seek the very same relief at an earlier stage of the proceedings, which was expressly denied. Thus, asking the Court to grant them the identical relief which it had previously refused offended the interest identified in *Johnson*, namely the Defendant's private interest of not being vexed twice and the public interest in ensuring finality of litigation. Second, in respect of prejudice, cost and delay, the Plaintiffs failed to apply immediately to vary the Order for Directions, instead waiting almost 3 months after the October Decision and 6 weeks before the Defendant was due to provide its general discovery, without any explanation. Thus, the Defendant argued that its discovery process has long since completed and it would have to be a compelling change of circumstances in order to require it to reopen an expensive and burdensome discovery exercise.

66. The Defendant submitted that if the Plaintiffs had wished to challenge the October Decision, then they were entitled to seek leave to appeal but chose not to, instead seeking

to persuade Hargun CJ to change his mind by email. The Defendant set out the chronology of correspondence that flowed from 7 November 2023 – 29 November 2023 wherein the Plaintiffs tried to have the October Decision revisited but which Hargun CJ, on 21 November 2023, stated that he was not able to provide further guidance and if the Plaintiffs wishes to pursue the matter then it must be pursued by way of formal application. On 29 November 2023, the Defendant rejected the Plaintiffs' request of 27 November 2023 for agreement that "Document" included Electronic Messages stating that the Court had expressly decided not to order such discovery. Thus, the late application to vary the October Decision was an abuse of process.

Necessity and Proportionality

The nature of the proceedings and the discovery already provided

67. The Defendant submitted that the Court should bear in mind the risk of weaponization of discovery in appraisal proceedings where the dissenting shareholders have already received from the defendant company the merger consideration equivalent to the price at which they acquired their arbitrage investments. The costs of discovery fall on the defendant company and it will always be in the interest of the arbitrageur to request further searches. Thus, the Court should keep in mind the necessity and proportionality of searches, particularly where they are unsupported by any evidence from the Plaintiffs' expert that such documents are required in order to opine on fair value. The Defendant cited the case of *Re Jardine Strategic* [2021] Bda LR 94 where Hargun CJ stated: "*The Cayman Court of Appeal has recognized that the discovery process in aid of [appraisal] claims is capable of abuse by the dissenting shareholders. The Court of Appeal has warned of the possibility of abuse by dissenting shareholders conducting a 'drains up' inspection of the entire business, regardless of the relevance to fair value…*".

68. The Defendant submitted that in the case of *Re FGL Holdings* KY 2023 GC 44, the defendant company was required to disclose 228,000 documents, most of which were ultimately irrelevant to the valuation question as the dissenting shareholders' expert relied upon only 125 of these documents in his various reports. Following trial, the Court held

that the transaction price was fair value resulting in an adverse costs order against the dissenting shareholders estimated to be US$9.8 million, no doubt in part due to the large volume of irrelevant documents it was required to produce.

69. The Defendant submitted that this was not a case of fraud or wrongdoing where root-and-branch discovery is required to reveal the hidden fraud. Thus, it was unlikely that documents necessary to assist the valuation (management accounts, budgets, forecasts, etc) would be found in Electronic Messages without being duplicated elsewhere, that is in documents already produced.

70. The Defendant submitted that after 17 months into the proceedings and the review of thousands of documents produced by the Defendant as well as by Goldman Sachs, JP Morgan (Sumitovant's financial advisor) and Pfizer, the Plaintiffs had yet to indicate why they say that fair value was not paid and what they say fair value was. This was in the circumstances where the Merger was approved by independent shareholders. Further, on the basis that the Plaintiffs were paid $227 million for their 8.66% shareholding in Myovant, if the Court were to conclude that the Defendant underpaid by 1%, the aggregate value of the claim would be US$2.27 million, less than the projected costs of discovery of Electronic Messages and less than what has already been incurred. Thus, the Defendant asserts that the Defendant has complied with its disclosure obligations by undertaking a process which took approximately 7 months, cost well over US$1.5 million, involved collecting and reviewing documents from 58 custodians and resulted in discovery being provided of approximately 22,000 documents comprising approximately 267,000 pages. Further, the parties' valuation experts have access to far more information than they could reasonably need in order to opine on "fair value" although the Order for Directions provides a mechanism for requests for additional documents. Thus, the necessity and proportionality or ordering the Defendant to provide additional, highly burdensome discovery of Electronic Messages needs to be viewed in that light.

Myovant's policies and their compliance

71. The Defendant submitted that Myovant had policies in place which strictly prohibited and/or limited the use of Off-Channel Platforms for business purposes, namely the Records Management and Retention Program Policy (which applied to all employees, contractors, temporary workers, and third parties acting on Myovant's behalf) and the Acceptable Use Policy setting out that Myovant business must be conducted on Myovant Computer Systems and that it was prohibited for personnel to store any Myovant information on any third party systems absent express written authorization – which no employee was granted. The Defendant submitted that Myovant's compliance Department would routinely send email reminders to all personnel reminding them of the prohibition and encouraging them to use Microsoft Teams only for short business communications.

72. The Defendant rejected the Plaintiffs' suggestion that the policies were not complied with and the reference to other large companies generally or companies that were issued with fines from the SEC. Also, they provided responses to the circumstances of the 14 documents referred to in Gavin-Rizzuto5:
    a. 1 referred to receipt of a Slack message, which was used by employees of Sumitovant 2 years before the Merger;
    b. 10 referred to the possible sending/receipt of text messages – the majority of which appeared to concern "administrative tasks" and/or "logistical and non-substantive business information" which would be in accordance with Myovant's policies; and
    c. 3 referred to the sending/receipt of messages on Microsoft Teams which were within Sumitovant.

73. The Defendant submitted that these examples do not demonstrate general non-compliance with Myovant's policies, rather the reasonable conclusion is that, at least generally, the policies were complied with.

The lack of benefit from discovery of Electronic Messaging Documents

74. The Defendant rejected the Plaintiffs' assertion that they are likely to benefit from the Defendant providing discovery of Electronic Messages, noting rather that the Electronic

Messages are very unlikely to contain anything substantive about Myovant's business, due to: (i) Myovant's policies; (ii) the short-form nature of instant messages means that they are ill-suited to substantive communications about business, such that it is implausible that they are going to contain "material non-pubic information" or otherwise be a "rich source of value-relevant materials"; and (iii) the valuation experts and the Courts are unlikely to be helped by logistical communications.

The cost of discovery of Electronic Messages

75. The Defendant submitted that the cost of discovery of Electronic Messages is likely to be a burdensome and costly exercise for the Defendant, with estimates that it would take many months and the cost would be anywhere between $2.8 million to $3.8 million for the following reasons as set out below. Thus, there would need to be a very significant potential benefit to the Plaintiffs in order to justify the costs to the Defendant, but there is no such benefit.
    a. All data on phones need to be harvested including all non-business data which could be very voluminous;
    b. Phone data would have to be collected at the custodian's location by one or two document vendors travelling to each custodian to copy the data to hard drives;
    c. The process would require imaging each custodian's entire phone including copying, replication for back-up and encryption;
    d. Search terms can only be applied once the data has been collected and processed – after the costs have been incurred; and
    e. Electronic Messages are usually burdensome to review as Mr. Wilson explains the substances of the messages can vary line-to-line and require more time to review both for responsiveness and privilege.

Summary of Defendant's position

76. The Defendant submitted that if the Plaintiffs were to be permitted a second bite of the cherry, ordering the Defendant to provide discovery of the Electronic Messages is not necessary to dispose fairly of the proceedings as it is likely to produce very little benefit to

the Plaintiffs, the valuation experts or the Court and is in reality a fishing expedition. Also, making the Variation Orders would be grossly disproportionate and contrary to the Overriding Objective.

Plaintiffs Reply Submissions

77. The Plaintiffs submitted reply submissions which I have read fully.

Analysis

78. In my view, the Application should be granted for several reasons.

General Discovery Approach

79. In analysing the issues in this matter, I take as my starting point the task of the Court at trial which is to determine the "fair value" of the Plaintiffs' shares in the Defendant which will involve the Court hearing expert valuation evidence. It follows then that the experts as well as the Court will need to have before it, relevant factual evidence upon which any opinion or determination will be based.

80. I have reviewed the August Judgment of Hargun CJ, in particular the section in relation to the issue of general discovery to be provided by the Defendant at paragraphs 14 – 29. At paragraph 29, Hargun CJ stated that "*In the circumstances, the Court is satisfied that the considerations which apply to section 106 proceedings as set out in paragraph 19 above, necessitate that the company, as a general rule, should be required to provide general discovery of all documents and information which are relevant to the issue of fair value.*" Thus, the Court ordered that the Company should upload to the Data Room all Documents (as defined in the draft orders) within the Company's possession, custody or power created since October 2019 which were relevant to the determination of the fair value of the Plaintiffs' shares in the Company as at the valuation date. In my view, in paragraphs 14 – 29 of the August Judgment, it was clear that Hargun CJ had analysed the merits of the

narrow approach as proposed by the Defendant and had rejected such an approach in favour of general discovery as sought by the Plaintiffs.

Draft Orders and Directions Hearing

81. I remind myself here that in the case of *SDI Retail Services Limited*, Phillips LJ and Baker LJ cautioned against engaging in an analysis of the parties' submissions in order to determine their motives for seeking an order, clarifying that the starting point must be the terms of the order and judgment in which the Court explains its reasoning for making it. I also remind myself that in *Sea Masters Special Maritime Enterprise* Picken J stated in essence, that in order to ascertain (objectively) the intention of the Court, it was permissible to have regard to the parties' submissions, albeit being careful to avoid placing too much emphasis on such submissions.

82. Thus, I find it useful at this stage to review the genesis of the proposed draft orders of the parties. Upon review of the evidence, the Defendant did not engage on the substantive issue of the definition of "Document" until 5 September 2023 when the Defendant set out in its Note in Reply that there was no reason to include Off-Channel Platforms in the definition as the collection and review of such communication would be 'notoriously burdensome and disproportionate' to do so.

83. In examining how and when the draft orders came about, it is not in dispute that on 12 May 2023 then counsel for the Plaintiffs, Kennedys Chudleigh Ltd. provided Appleby with a draft order setting out the Plaintiffs' proposed directions which included in Appendix 1 in the definition of "Document" the words "electronically stored information" which included communications made on Off-Channel Platforms, such as WeChat and Signal. Appleby responded on 8 June 2023 with its version of the draft order which included in Appendix 1 its definition of "Document" which in turn included "electronically stored information" but did not include communication made by Off-Channel Platforms such as WeChat and Signal.

84. In my view, consideration should be given as to why Appleby chose to remove the reference to Off-Channel Platforms in its version. I note that Appleby's letter dated 12 June 2023 to Kennedys addressed Appendix 1 at [3.12] and stated that its draft order narrowed the scope of Appendix 1, which contained an unnecessary and onerous level of detail that they did not consider appropriate for purposes of a case management directions order. It stated that as an example it intended to exercise its best efforts to produce documents ordered to be disclosed, but they saw no reason why any additional disclosure protocols not covered by Appendix 1, could not be agreed between the parties.

85. It is also of some significance as to what the position was of the parties at the Directions Hearing. The Plaintiffs, in their skeleton argument dated 4 July 2023 set out the reasons for the "inclusory language" adding that it would be helpful for the Court to spell out that the meaning of the phrase "written or printed items and electronically stored information" included such Off-Channel Platforms, which were commonly interrogated and disclosed in Cayman Appraisal Proceedings. The Defendant did not address the issue in its skeleton argument filed 11 July 2023, instead repeating the essence of its letter dated 12 June 2023. That position was repeated in the Direction Hearing when the Defendant's leading counsel reiterated the position.

86. Hargun CJ issued the draft August Judgment, and on 25 August 2023, the Defendant filed a note reiterating that the Court should not trouble itself with the detail of Appendix 1 on the basis that the parties should seek to agree it. By its note in reply dated 1 September 2023, the Plaintiffs once again sought to have the Court rule on the text of Appendix 1. As stated above, it was on 5 September 2023 that the Defendant for the first time indicated that Off-Channel Platforms should not be included because collecting such would be notoriously burdensome and disproportionate. It is interesting to note that Gavin-Rizzuto2 stated at [16] that the Plaintiffs had no opportunity to respond to that note. Taking into account the history of correspondence that was flowing at that stage, I am not satisfied that they did not have the opportunity to respond to that note, as I am not aware that there was any prohibition on the Plaintiffs simply to file a reply. In any event, the Plaintiffs did not file a reply.

87. The Court accepts that when Hargun CJ issued the October Decision adopting the Defendant's version of the definition of "Document" in Appendix 1, he did so without providing any reasons or clarification as to the scope of the definition. He had said as much when dealing with the correspondence when he stated that he would make a decision based on the papers. I take into consideration the case of *SDI Retail Services Limited* where Phillips LJ cited the case of *Sans Souci Ltd* where Lord Sumption described the correct approach to the construction of a judicial order as being "*a single coherent process*", later saying that "*the reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant*." Thus, for the October Decision, I accept that we do not have the benefit of what Hargun CJ considered to be relevant in the circumstances of the Definition.

88. There was further correspondence in November 2023 as the parties attempted to resolve the issue with Hargun CJ. I have reviewed that November 2023 correspondence in detail which shows the positions of the parties. In essence, the Plaintiffs were seeking clarification from Hargun CJ as to whether the Definition included the Electronic Messages on the Off-Channel Platforms. However, in the 8 November 2023 email from Appleby, the Defendant took the position that Hargun CJ had ruled they were not included in the Definition, relying on the email of 17 October 2023 wherein it was stated (i) Hargun CJ had considered the documents in respect of the issues in relation to the draft order; (ii) Hargun CJ had considered further written submission in relation to the provisions in the draft orders which are not agreed by the parties; (iii) in relation to Appendix 1, Hargun CJ accepted that the wording proposed by the Defendant in relation to the definition of "Document". I note that Appleby in its email: (i) stated that it was highly irregular for the Plaintiffs to have Hargun CJ's October Decision reconsidered via email; (ii) made reference to any appeal being out of time; and (iii) reiterated that should Hargun CJ be minded to consider the issue further, they requested the opportunity to respond to the Plaintiffs' submissions before a decision was made. To my mind, the Defendant had contemplated that Hargun CJ might wish to reconsider the matter.

89. I have reviewed the email dated 21 November 2023 wherein the parties were informed of Hargun CJ's position that as the parties disputed resolving the matter by email, he was not able to provide further guidance, with the direction that if they wished to pursue the matter, it must be by way of a formal application. As we are aware, Hargun CJ demitted office in December 2023 and time did not allow for him to deal with the matter further. Thus, it is clear to me that Hargun CJ was prepared to hear the parties on the issue of the Definition. To my mind, it follows that if he was inclined to do so, then it was open to him to consider the submissions of the parties and if necessary, clarify or vary the October Decision. To that point, I have considered the Defendant's argument that the Plaintiffs' application is an abuse of process. I am not satisfied that it is such an abuse as Hargun CJ indicated to the parties that a formal application would have to be made to resolve the dispute. The Court accepts that the Plaintiffs followed this directive and filed its Application.

The Plain Meaning of the Order for Directions

90. In this section, I turn my mind to the plain meaning of the words in the Order for Directions. Again, I bear in mind the principles of the cases of *SDI Retail Services Limited* which cited *Sans Souci Ltd* and in particular *Pan Petroleum AJE Ltd* where the thrust was that the words of the order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and regard to the subject of the order.

91. In my view, the natural and ordinary words of the meaning include Electronic Messages on the Off-Channel Platforms for several reasons. First, the parties have agreed that in the Definition, electronically stored information includes email communication. The words "email communication" are not expressly included in the Definition but in the modern era, it is commonly accepted that documents include electronic data. To that point, I rely on the Plaintiffs' submissions and reference to a number of authorities in other jurisdictions: *In the Matter of Lehman Re, Ltd*, the English CPR Practice Direction 31B "Disclosure of Electronic Documents", in Hong Kong, Practice Direction SL1.2 (concerning discovery and provision of electronically stored documents in cases in the Commercial List), *Sony*

Music Entertainment (Australia) Ltd and Others and the United States Courts, Federal Rules of Civil Procedure 34 and the 2006 Amendment to the Rule.

92. Second, I see no distinction between an email as a form of electronically stored information and electronic messages on Off-Channel Platforms as a form of electronically stored information. By way of a simple example, if a party sends the same message by email, text message and WhatsApp, then to my mind, they have all been sent by electronic means and thus considered forms of electronically stored information. To that point, I again rely on the cases cited in the preceding paragraph. In the modern era, especially as technology rapidly advances, as reflected by those cases, it would not be possible to draw a line between any of the forms of electronic communication to say that one or more were not a form of electronic communication.

93. Third, I rely on the Plaintiffs' submissions in respect of the experience in the Cayman Islands merger appraisal cases and the cases cited there. I agree with the Plaintiffs that Hargun CJ was concerned that the scope of discovery in the present case was no less than that of the Cayman Islands approach in merger appraisal actions. Thus, I accept that in Cayman Islands cases, electronic documents are disclosed by both sides, which includes various forms of electronically stored information.

94. Fourth, when looking at the natural and ordinary meaning of the words of the order, I am obliged to reject the Defendant's submissions that Hargun CJ rejected the Plaintiffs' version of the order. I recognize that there is a tension between construing the natural and ordinary words of the Order and the history of the submissions leading to the Order, but simply put I am satisfied that the natural and ordinary words mean that the Definition includes Electronic Messages on the Off-Channel Platforms.

95. Fifth, I am fortified in my conclusion in the preceding paragraph, as in construing the order I am obliged to do so in their context, including their historical context and regard to the subject of the order. In my view, I agree with the Plaintiffs that the context was that Hargun CJ was addressing a protocol to be appended to an order based on his August Judgment in

which he spelled out in clear terms the need for the Defendant to give very full general discovery and rejected the Defendant's attempt to narrow it down.

96. In light of the reasons stated above, in my view the natural and ordinary meaning of the words of the Order in respect of the Definition includes Electronic Messages on Off-Channel Platforms.

97. As a postscript to this section, in my view, it would have been inconsistent with the August Judgment for Hargun CJ to exclude discovery of the Electronic Messages on the Off-Channel Platforms in the definition of "Document" for several reasons:
    a. First, Hargun CJ was fully cognizant of the approach in the Cayman Islands appraisal cases, having earlier adopted the general discovery approach and rejected the narrow approach as sought by the Defendant.
    b. Second, Hargun CJ did not expressly rule out the Electronic Messages and Off-Channel Platform wording from the Definition. To that point, the Defendant's version also did not use exclusory language of Electronic Messages on the Off-Channel Platforms.
    c. Third, Hargun J was faced with the initial and repeated submissions of the Defendant that the details of the Plaintiffs' proposed draft order contained an unnecessary and onerous level of detail but only a brief later position of the Defendant that collecting the Electronic Messages would be notoriously burdensome and disproportionate.
    d. Fourth, Hargun CJ, if he had meant to rule out Electronic Messages on the Off-Channel Platforms, knowing the potential value of such information, would have issued reasons for such exclusion.

<u>The relevance of Electronic Messages</u>

<u>The Defendant has relevant messages Electronic Messages</u>

98. In my view, having determined that electronically stored information includes Electronic Messages on Off-Channel Platforms, I now turn to the issue of relevance. The starting point again is to remind myself of Hargun CJ's approach of general discovery. I also remind myself of the approach Hargun CJ took in: (i) *Glendina* in respect of the norm in appraisal

cases being significant as it includes all documents relevant and potentially relevant to assessing its value; and (ii) in the present case in the August Judgment. Thus, the Court accepts that some Electronic Messages may be relevant to the selection of the appropriate issues of the fact-sensitive question to be determined on a case-by-case basis. The Court also accepts the Plaintiffs' submission about the examples of Electronic Messages that will be crucial to determining whether the deal process was sufficiently independent and robust, namely the Electronic Communications between the Special Committee and others.

99. I have considered the policies of the Defendant in respect of the prohibition on the use of Off-Channel Platforms for substantive business of the Company. In my view, whilst the policies do exist, I am persuaded by the Plaintiffs' submissions that there has been some use of the Off-Channel Platforms for communication by the Defendant. I am also persuaded by the Plaintiffs' submissions that in other unrelated cases, the use of Off-Channel Platforms for communicating about substantive company business is a common practice.

100. I am also satisfied that the Defendant has relevant Electronic Messages based on the evidence of Gavin-Rizzuto5 as well as the evidence of Krige1 that the use of MS Teams was sanctioned by the Defendant.

101. However, I also remind myself of the concerns expressed by the Defendant about: (i) the disclosure already provided; and (ii) the extent of the disclosure in an unrelated case which resulted in minimal use by the expert and the resulting costs orders, much which arose from the discovery of the Electronic Messages.

102. Therefore, I am satisfied that discovery is required in respect of Electronic Communications on the Off-Channel Platforms. However, I will return to the extent of such discovery below in the section on proportionality and costs.

Relief sought on the Summons

Alternative Positions

103. I have considered the submissions in respect of the relief sought and the alternative positions. In my view, I should grant the declaration, pursuant to the Court's inherent jurisdiction, that the definition of the word "Document", as set out in Section A of Appendix 1 to the Order for Directions, includes, without limitation, communications made by messaging platforms such as WeChat and Signal.

104. I have considered the extensive submissions about the law on variation of orders and the need for special circumstances to order such variation. In light of granting the declaration in the preceding paragraph, it is not necessary for me to deal with the issue of variation of the October Decision and the Order for Directions.

Necessity and Proportionality

105. I have considered the submissions in respect of necessity and proportionality. I recognize that there is a cost to be incurred for the discovery process, and in this case the Defendant has submitted estimates at US$2.8M to US$3.8M. Although the Plaintiffs say that those estimates appear to be substantially overstated, I am not satisfied that that assertion is accurate as the Defendant has made substantial efforts in the discovery process.

106. In my view it is important to bear in mind what Hargun CJ stated in *Re Jardine Strategic* in respect of the statements by the Cayman Islands Court of Appeal that the discovery process in appraisal cases is capable of abuse by the dissenting shareholders in seeking a 'drains up' inspection of the entire business, regardless of the relevance to fair value. Thus, I am cautious to grant an order that results in a 'drains up' approach or a fishing expedition without relevance to fair value.

107. In my view, as suggested by the Plaintiffs, I am satisfied that it is appropriate to order an incremental approach to the discovery of the Electronic Messages on the Off-Channel Platforms, that is, to be disclosed from material held by those the Plaintiffs

consider to be the most important custodians, that is, those who played a central role in the Merger. In any subsequent phases, for any custodians further removed from the Merger, the Plaintiffs should be able to demonstrate the relevance of the custodian and the material in order to avoid abuse and fishing expeditions. To that point, the Plaintiffs should bear in mind the risks of adverse costs orders for wasteful discovery exercises.

Conclusion

108. In light of the reasons set out above, I grant the Plaintiffs' application as follows:

a. I grant the declaration that the definition of the word "Document", as set out in Section A of Appendix 1 to the Order for Directions, includes, without limitation, communications made by messaging platforms such as WeChat and Signal.

b. I grant an order that the discovery process for the Electronic Messages on the messaging platforms such as WeChat and Signal, be performed on an incremental basis.

109. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiffs against the Defendant on a standard basis, to be taxed by the Registrar if not agreed.

Dated 12 February 2025

THE SEAL OF THE SUPREME COURT OF BERMUDA
SIGNED

HON. LARRY MUSSENDEN
CHIEF JUSTICE