IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 235 OF 2017 (IKJ)

IN THE MATTER OF SECTION 238 OF THE COMPANIES LAW (2016 REVISION)

AND

IN THE MATTER OF NORD ANGLIA EDUCATION, INC

IN CHAMBERS

Appearances:	Mr Mac Imrie and Mr Lukas Schroeter, Maples and Calder, on behalf of Nord Anglia Education, Inc. ("the Company")
	Mr Andrew Jackson and Ms Heather Froude, Appleby, on behalf of the Appleby Dissenters
In attendance:	Mr Gary Hendrikse, Campbells, on behalf of the Campbells Dissenters
	Mr Harry Rasmussen, Mourant, for the Mourant Dissenters
Before:	**The Hon. Justice Kawaley**
Heard:	**21 June 2019**
Draft Ruling Circulated:	**25 July 2019**
Ruling Delivered:	**5 August 2019**

HEADNOTE

Section 238 of the Companies Law–dissenter discovery-legal advice privilege-litigation privilege-validity of privilege claims in relation to valuations-need for privilege claimant to particularise the relevant documents so that the validity of the claim can be assessed

RULING

Introductory

1. By Order dated August 15, 2018 (the "Dissenter Discovery Order"), the Dissenters were ordered to upload to the Data Room:

> *"1.1 a schedule detailing the history of its trading in the Company's shares (the '**Shares**') between 13 January 2017 and 21 August 2017 (the "**Valuation Date**") (including the number of Shares purchased, the date(s) on which the Shares were purchased, and the price(s) for which the Shares were purchased); and*
>
> *1.2All documents (of whatsoever description, whether electronic, hard copy or in any other format) and communications (whether by email or otherwise) ("**Documents**") which exist and are within its possession, custody or power relating to its decision to purchase the Shares, insofar as such purchases took place between 13 January 2017 and the Valuation Date, and provided that such documents need only be produced if the Company's expert seeks supporting documentation in relation to one or more of the specific transactions set out in the Schedule referred to in paragraph 1.1 above, and*
>
> *1.3Any internal or external valuation analyses, calculations and/or estimates of the value of the Shares, including any supporting models and documentation relied upon in deriving such analyses, calculations and/or estimates, created between 21 August 2016 and the Valuation Date but excluding any such supporting models and documentation relied upon in deriving such analyses, calculations and/or estimates in respect of which it asserts proprietary rights (without prejudice to the right of the Company to bring an application for specific discovery in respect of such supporting models and/or documentation)."*

2. By letter dated May 13, 2019, Compass Lexecon (on behalf of the Company's Expert, Professor Fischel, and renewing earlier similar requests) requested Appleby to provide supporting documentation for items listed in their clients' Schedules of Trades, previously disclosed on behalf of the Appleby Dissenters. This request was not complied with on the grounds of privilege. On the same date, the Company issued a Summons against the largest sub-set of Appleby's dissenting clients (the "Stockbridge Dissenters") requesting them to, inter alia, produce documents responsive to its Expert's requests.

3. By Summons dated June 19, 2019, the Company sought an Order compelling Appleby's other clients (the "Appleby Dissenters") to produce the documentation requested by Compass Lexecon. By paragraph 1 of a Consent Order dated June 11, 2019[1] (the "Consent Order"), it had already been agreed that they would provide further particulars of the privilege claim to allow the dispute to be adjudicated at the present hearing.

4. Paragraph 3 of the Consent Order made similar provision as regards the Stockbridge Dissenters (the single largest group of Dissenters represented by Appleby), who were subject to a discovery Summons dated May 13, 2019. The other Appleby clients herein (the "Appleby Dissenters") were served a separate discovery Summons dated June 19, 2019. The present Ruling focusses on the Summons relating to the Appleby Dissenters because they were in the final analysis the primary parties against whom the Company vigorously sought relief at the June 21, 2019 hearing.

5. Near the end of the present hearing, during Mr Imrie's reply, I expressed the provisional view that it appeared that the Stockbridge Dissenters had complied with their discovery obligations by satisfactorily explaining why they had asserted privilege in respect of some documents which were responsive to the Compass Lexecon requests.

6. The Company's June 19, 2019 Summons sought production of documents which were responsive to Professor Fischel's requests which had been withheld on the grounds of legal advice privilege (paragraph 1) and litigation privilege (paragraph 2). The present Ruling engages with a somewhat novel factual and legal matrix in the wake of the Court of Appeal's relatively recent decision[2] that dissenter discovery must be given in proceedings under section 238 of the Companies Law (2018 Revision) (the "Law").

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[1] The Consent Order was referred to as bearing this date. I have not been able to locate signed and dated version of the Consent Order.

[2] *Re Qunar* [2018 (1) CILR 199].

7. How does the doctrine of privilege apply in relation to documents relevant to dissenters' trading in the Company's shares immediately before and after the proposed merger has been announced?

Factual Matrix

Background to dispute

8. The Company's shares ("Shares") were listed on the New York Stock Exchange between March 26, 2014 and September 26, 2017. The Merger Agreement was announced on April 25, 2017. The Extraordinary General Meeting ("EGM") to approve the Merger was convened for August 21, 2017. Between August 14 and August 17, 2017, the Dissenters submitted objections. The Merger was duly approved. The Company made its written offer to Dissenters pursuant to section 238 (8) of the Law on October 9, 2017. The Petition was presented by the Company on November 9, 2017 seeking the Court's determination of the fair value of the Shares pursuant to section 238(9) of the Law.

9. The Order dated August 15, 2018, required the Dissenters to upload their disclosed documents within 8 weeks of the Order being filed. Compass Lexecon on behalf of Professor Fischel sent five letters to Appleby dated November 27, 2018, each in respect of one or more Appleby Dissenter, requesting "*supporting documentation for the Schedule of Trades*".

10. By a letter dated December 4, 2018, Maples on behalf of the Company complained that the discovery provided was inadequate. The documents expected to be disclosed were itemised in paragraph 3 and included valuation memos, valuation appraisals and communications with third party advisors in relation to the valuation analysis. It was asserted:

> "*9 It must be the case that the documents outlined at paragraph 3 above exist or have existed and are/were in the possession, custody or power of the Appleby Dissenters between 21 August 2016 and the Valuation Date (as defined in the Dissenter Discovery Order)....*"

11. Appleby responded by letter dated December 21, 2018 addressed solely to Maples to both the Compass Lexecon correspondence and the Maples December 4, 2018 letter. The respective responses may be summarised as follows:

(a) it was asserted, by reference to the May 28, 2018 Ruling on Dissenter Discovery, that the Company's Expert was entitled to no further documentation unless specific transactions were being challenged;

(b) that the Dissenter Discovery Order "*did not require a Dissenter to upload any document over which it claims privilege*". As the requests made by Maples appeared to be "*tantamount to a request that each of the Appleby Dissenters make a serve a list of documents*", lists would be prepared in a "*spirit of cooperation and furthering the Overriding Objective*".

12. Lists of Documents dated January 11, 2019 were served in respect of various subsets of the Appleby Dissenters group. Part 2A of each List described documents which the Dissenters objected to produce on the grounds of legal advice and litigation privilege. Part 2B described documents which the Dissenters objected to produce on the grounds that they contained proprietary information relating to "*internal methods of analysing, calculating and/or estimating the value of Shares*".

The disputed discovery requests

13. Compass Lexecon, in the letter to Appleby dated May 13, 2019 referred to above, made the following renewed request on behalf of the Company's Expert:

> "*In your letter of 21 December 2018 you refused our request for supporting materials under paragraph 1.2 of the Dissenter Discovery Order on the basis that no specific transactions were challenged, no reasons for any challenge were provided and no categories of supporting documents were suggested. We understand that the Company's position is that these preconditions are not in fact required for a valid request under paragraph 1.2 of the Dissenter Discovery Order.*
>
> *Accordingly, please provide the supporting documentation from the Schedule of Trades provided in document ATHOS000000001 disclosing transactions in Nord shares by Athos Asia Event Driven Master Fund and FMAP ACL Limited, between 13 January and 21 August, including any document not already produced that discusses the reasons for the transactions shown on the Schedule of Trades.*
>
> *In particular, please provide the following documents:*

1. *The last model prepared/modified before the first Nord share purchase by each of Athos Asia Event Driven Master Fund and FMAP ACL Limited post-merger announcement (regardless of when such model was first created); and*
2. *The last model prepared/modified before the last Nord share purchase by each of Athos Asia Event Driven Master Fund and FMAP ACL Limited post-merger announcement (regardless of when such model was first created).*"

14. Substantially the same request was made in relation to four other sets of Appleby Dissenters, namely Pembroke Way LLC and Standish Road LLC, Quadre Investments, L.P., Senrigan Master Fund and the Stockbridge Dissenters, in letters of the same date. Also on the same date, the Company filed the Summons against the Stockbridge Dissenters to which the present Ruling relates. By letter dated May 24, 2019 addressed solely to Maples, Appleby expressed doubts about the legitimacy of Professor Fischel's requests, but stated:

> "*Nonetheless, in the interests of assisting the Experts and the Court, and progressing these proceedings as efficiently as possible without the need for a further hearing on these issues, our clients are willing to produce such models or other documents which are responsive to these further requests (subject to any claims of privilege), provided that the Company agrees that such production will be made under the auspices of an HSD regime equivalent to the HSD regime in place for the Company's HSD material. We explain below the reasons why such a regime is highly important and necessary for our clients.*"

15. Maples' letter to Appleby dated May 28, 2019 primarily dealt with preparations for the hearing of the May 13, 2019 Summons. The privilege issue was raised again in Appleby's letter to Maples dated June 12, 2019. This letter began by referring to a Supplemental List of Documents enclosed on behalf of the Stockbridge Dissenters and then stated:

> "*We further confirm, pursuant to paragraph 1 of the Consent Order, that the remainder of the Appleby Dissenters do not claim privilege over any documents which are responsive to Professor Fischel's 13 May 2019 requests apart from any in respect of which privilege has already been claimed in their respective lists of documents dated 11 January 2019. In particular, they do not claim*

privilege over any models that informed their decision to purchase shares in the Company after the announcement of the Merger."

16. Mr Imrie submitted that the indication that privilege was not being claimed in respect of "*any models that informed their decision to purchase shares in the Company*" was not responsive to Professor Fischel's request. This was generally "*any document not already produced that discusses the reasons for the transactions shown on the Schedule of Trades.*" Particular requests were made for (1) the last model prepared or modified before first purchase of shares after the Merger was announced and (2) last model prepared or modified before the last purchase of Shares after the Merger was announced.

17. The claim to privilege was also said to be "opaque", because it did not expand upon the "blanket claims to privilege" set out in the Lists of Documents. While the legal advice privilege claims were, by their nature, asserted with specificity, the litigation privilege claims in the present context were less clear:

> "*2. Correspondence and other documents which came into existence after litigation with the Petitioner was contemplated or commenced and were created for the dominant purpose of that litigation, either for the purpose of obtaining or giving legal advice with respect to it, or obtaining evidence for use in such litigation, or for obtaining information that might lead to the obtaining of such evidence for use in litigation or of conducting or aiding in the conduct of litigation.*"

18. This complaint formed the centre of the Company's argument which was supported by legal argument. The lack of specificity point was first explicitly advanced by Maples in a letter dated June 14, 2019. Appleby's letter of June 18, 2019 set out the following particulars, which Maples had requested, in relation to the privilege claims asserted by the Appleby Dissenters:

> "*Standish Road LLC and Pembroke Way LLC*
>
> *1. Litigation was first in contemplation by Standish Road LLC and Pembroke Way LLC on or about 25 April 2017.*

2. *The date range for these documents is 25 April 2017 to 21 August 2017. Legal advice privilege is claimed. Such documents do not contain valuations of the Company.*

3. *The date range for these documents is 26 April 2017 to 21 August 2017. Litigation privilege is claimed. Such documents do not contain valuations of the Company.*

Athos Event Driven Master Fund and FMP ACL Ltd

1. *Litigation was first in contemplation by Athos Event Driven Master Fund and FMP ACL Ltd on or about 25 April 2017.*

2. *The date range for these documents is 25 April 2017 to 21 August 2017. Legal advice privilege is claimed. Such documents do not contain valuations of the Company.*

3. *The date range for these documents is 25 April 2017 to 21 August 2017. Litigation privilege is claimed. Such documents do not contain valuations of the Company.*

Senrigan Master Fund

1. *Litigation was first in contemplation by Senrigan on 21 July 2017.*

2. *The date range for these documents is 21 July 2017 to 21 August 2017. Legal advice privilege is claimed. Such documents do not contain valuations of the Company.*

3. *The date range for these documents is 21 July 2017 to 21 August 2017. Litigation privilege is claimed. Such documents do not contain valuations of the Company.*

Quadre Investments LP

1. *Litigation was first in contemplation by Quadre on 17 July 2017.*

2. *The date range for these documents is 17 July 2017 to 21 August 2017. Legal advice privilege is claimed. Such documents do not contain valuations of the Company.*

3. *The date range for these documents is 17 July 2017 to 21 August 2017. Litigation privilege is claimed. Such documents do not contain valuations of the Company.*"

19. Mr Jackson's broad response was that his clients had fully discharged their obligations in justifying their claim to privilege.

The Trading Schedules

20. The Trading Schedules' contents, as they relate to the Appleby Dissenters involved in the present dispute, may be summarised as follows:

(a) **Standish Road LLC and Pembroke Way LLC**: the combined trades were said to be worth approximately $100 million during the period April 17, 2017 to August 18, 2017, with significant buying and selling transactions taking place;

(b) **Athos Event Driven Master Fund and FMP ACL Ltd**: I understand it to be common ground that Athos' trades were worth around $41 million and FMAP's $13.46 million, primarily in purchases of the Shares between June 12, 2017 and 21 July 2017;

(c) **Senrigan Master Fund**: Senrigan engaged in buying (9 trades) and selling (7 trades) between July 21, 2017 and August 31, 2017;

(d) **Quadre Investments LP**: it appears that this Dissenter consistently made purchases between July 13 and August 3, 2017, after initially buying and selling on July 7, 2017. From August 3 to August 21, 2017, there was a more or less equal number of buying and selling transactions.

21. The most that I was able to extract from this information was that a significant amount of trading in the Shares had taken place during the period covered by the Compass Lexecon requests.

The Stockbridge Dissenters

22. The First Affidavit of Anil Seetheram dated February 15, 2019 was relied upon by the Company's counsel as casting doubt on the claim of litigation privilege asserted by the Stockbridge Dissenters from April 25, 2019. Paragraph 10.1 of that Affidavit deposed that Stockbridge on April 25, 2019 raised the availability of dissenter rights with the Company in expressing dissatisfaction with the Merger. However, Paragraph 10.3 stated that Stockbridge also on May 3, 2017 initiated discussions about "*the possibility of participating in the go-shop process with Houlihan Capital Inc. ("Houlihan')*". Paragraph 10.5 avers that the "*go-shop*" period had expired by May 25, 2017 when Houlihan advised that Stockbridge could still make an unsolicited bid, an option Stockbridge did not pursue.

23. While the position is subject to argument, on its face the Affidavit supports the view that Stockbridge first contemplated litigation (to some extent at least) as early as April 25, 2017, but considered this alongside other options until a later date.

24. The position of the Stockbridge Dissenters was overall quite distinct from the other Appleby Dissenters in the following main respects:

    (a) they had provided a Supplementary List of Documents to explain the basis of the privilege claim by reference to the categories of documents covered by the claim;

    (b) they had supplemented that Supplementary List by further explanations in correspondence (Appleby's June 19, 2019 letter); and

    (c) they had provided substantial additional discovery of material responsive to Professor Fischel's requests, literally on the eve of the hearing.

The respective submissions

25. Mr Imrie characterised the non-compliance with the Appleby Dissenters' discovery obligations, which he submitted had occurred, as "disgraceful". The focus of his attack was in substance on the scope of litigation privilege claimed in the factual matrix of the present case. The high point of his submissions was that the uploading

of the documents over which litigation privilege had been claimed should be ordered because it was impossible as a matter of logic and/or principle to assert that litigation was in contemplation before the final fair value offer was made by the Company on October 9, 2017. The Company's counsel sensibly accepted that this was an absolutist position, but argued that the most generous approach to the Appleby Dissenters' position would be to require them to verify their litigation privilege claims by affidavit.

26. In terms of legal submissions, reference was made to section 238 of the Companies Law (2018 Revision), which sets out the following timelines applicable generally and to the present case:

- the Dissenters were required to give the Company notice of their objections before the extraordinary general meeting to vote on the Merger ("EGM") (section 238(2));
- the company was required to notify objectors of an affirmative vote at the EGM within 20 days of the EGM (section 238(4));
- within 20 days of being notified of the approval of the Merger, the Dissenters were required to give notice of their decision to dissent (section 238(5));
- within 7 days of the later of the expiration of the period prescribed by section 238(5) or 7 days of the date of filing of the Merger plan, the Company was required to make a written offer to the Dissenters of what the Company considered to be the fair value of the Shares. That price was required to be paid if was agreed within 30 days of the offer being made (section 238(8));
- in the absence of an agreement on the price to be paid to a Dissenter within the statutory period, the Company was obliged to present the present Petition within the next 20 days (section 238(9)).

27. As it could not be known with certainty that the proposed Merger price announced in April would be the same as the formal offer made after the EGM in late August 2017, and the statutory scheme contemplated agreements being reached after the formal offers were made, it was fairly argued that the bare assertion that litigation was contemplated as early as April, 2017 seemed incredible.

28. Mr Imrie further submitted that the paucity of discovery made by the Appleby Dissenters in relation to documentation explaining their trading in the Company's

shares suggested that privilege was being asserted inappropriately. Documents such as third party valuations were clearly relevant: *Re Qunar*, [2018 (1) CILR 199] (Rix JA, at paragraph 60). And in the valuation context, it did not follow that the involvement of lawyers in what was in reality financial work would result in privilege attaching to their work product. In *Re the Appraisal of Dole Food Company, Inc.*, State of Delaware court of Chancery, C.A. No. 9079-VCL (unreported), Vice Chancellor Laster opined as follows:

> "*Absent a particularized showing about a specific document or communication, Ripe has failed to carry its burden of demonstrating that Neumark was acting as a lawyer.*"

29. The broad proposition that the burden was on the party asserting privilege to justify the claim was primarily supported by reference to Mathews and Malek, '*Discovery*' (Sweet & Maxwell: London, 1992), paragraphs 5.09 and 5.39:

> "*There are three main requirements in relation to documents in respect of which it is claimed that they are privileged from production. First, the documents for which privilege is claimed must be 'enumerated' in Schedule 1, Part II. However, this is to identify the documents: it is not necessary to specify the provenance, makers or dates of such documents. Secondly, the nature of the documents must be stated and in the case of classes of documents, the class must be clearly defined so it is possible to identify documents which fall within the class. Thirdly, the ground of privilege and the facts giving rise to the clam for privilege must be clearly stated. In particular, the wording must not be so wide that it is impossible to be sure it contains no description of documents which came into existence in circumstances not attracting privilege. It is not enough to state that the documents are privileged; the facts giving rise to that claim must be set out. It is not necessary to describe the documents so fully as to enable the opposing party to discover the contents of the privileged documents....*
>
> *Where there is a claim for privilege, this claim can only be controverted if it can be seen from the List or affidavit, the nature of the case or the documents themselves that the party has erroneously represented or misconceived their nature and effect. Where the claim is insufficiently stated the Court may require the party to provide a further List or to explain and verify the ground on affidavit.*"

30. In the Company's Submissions, reliance was placed on *Axa Seguros, SA De CV-v-Allianz Insurance plc & Ors* [2011] EWHC 268 (Comm) (Christopher Clarke J, as he then was, at paragraphs 14, 43), passages upon which the Appleby dissenters also relied. *Canadian National Railway Company-v-McPhail's Equipment Company Ltd* [1978] 1 C.F. 595 at 599 was also cited in support of the submission that the 'reasonable contemplation of litigation test' fell to be determined based on an analysis of the relevant factual circumstances.

31. Dealing with what the factual matrix was in general terms, Mr Jackson pointed out that the outcome of the EGM was, from the date when the Merger was announced, not quite as uncertain as his opponent invited the Court to assume. An April 25, 2017 PRNewswire story not only announced that the Company's shareholders would receive $32.50 per share; it also indicated that 67% shareholder Premier Education Holdings Ltd. had agreed to vote in favour of the Merger at the EGM. Mr Jackson submitted that the result was a "*foregone conclusion*". He buttressed that submission by reference to a list of 20 mergers demonstrating that the present case was the only instance where the eventual written offer was different (in this case $4.80 lower) than the original merger consideration announced at the outset.

32. Counsel for the Appleby Dissenters also argued that the claim to privilege had been satisfactorily justified by assurances given by Appleby in correspondence. Reliance was placed in terms of legal principle on *Derby & Co. Ltd.-v-Weldon (No 7)* [1990] 1 W.L.R. 1156 at 1179. There the Defendants' solicitors had written in correspondence:

> "*We and our counsel have been through the documents in respect of which privilege has been claimed and are satisfied that in each case there is a valid claim to privilege.*"

33. Vinelott J held (at page 1179H): "*The plaintiffs, in my opinion, are not entitled to go behind these assurances.*" However, I would note that these assurances were given in the context of expressly confirming that although lawyers had been engaged in non-legal work, privilege had been properly claimed. And Vinelott J earlier in the same passage in his judgment observed (at 1179C) that because of this non-legal engagement:

> "*The plaintiffs are entitled to satisfy themselves by means of a fuller description of the documents for which the privilege is claimed, that it is not claimed for documents outside its proper scope.*"

34. Mr Jackson referred to the Supplemental List of Documents served on behalf of the Stockbridge Dissenters which described the categories of documents over which privilege was claimed with considerable particularity. He was unable to point to a similar List in respect of the Appleby Dissenters and agreed that the Consent Order (extracts from which are set out in paragraph 3 above) crucially required his clients to provide particulars of the documents over which privilege was claimed so that the basis of the claim could be understood. Mr Jackson instead invited the Court to find that the Appleby Dissenters' attorneys' assurances were sufficient to justify the claim to privilege. On June 12, 2019 (the day after the Consent Order) Appleby wrote to Maples enclosing a Supplemental List on behalf of the Stockbridge Dissenters but also asserting as follows:

> "*We further confirm, pursuant to paragraph 1 of the Consent Order, that the remainder of the Appleby Dissenters do not claim privilege over any of the documents which are responsive to Professor Fischel's 13 May 2019 requests apart from any in respect of which privilege has already been claimed in their respective lists of documents dated 11 January 2019. In particular, they do not claim privilege over any models that informed their decision to purchase shares in the Company after the announcement of the Merger.*"

35. This explanation generated a critical response from Maples two days later. A more fulsome response came through Appleby's June 18, 2019 letter. Before turning to what Mr Jackson relied upon in that letter, it is convenient to note that Mr Imrie was right to complain that the third paragraph of Appleby's June 18, 2019 letter repeated the incomplete response made in the June 12, 2019 letter by merely confirming that no privilege was claimed over models that informed the decision to purchase after the Merger was announced. The relevant request was for:

(a) supporting documentation "*disclosing transactions in Nord shares*" covering the period "*between 13 January and 21 August, <u>including</u> any document…that discusses the reasons for the transactions shown on the Schedule of Trades*" [emphasis added] ;

(b) the "*last model prepared/modified*" before the first post-Merger announcement purchase and before the last post-Merger announcement purchase.

36. The general request was not limited to models; and the particular request for models was not limited to those which "*informed their decision to purchase*". The June 18,

2019 Appleby letter then proceeds to respond to concerns expressed about the adequacy of the Stockbridge Dissenters' Supplemental List. Under the heading "*Other Appleby Dissenters*", the particulars set out in paragraph 17 of this Ruling above are then supplied. In terms of what types of documents privilege is asserted over, all that is disclosed is that the documents "*do not contain valuations*".

37. Mr Jackson submitted that this letter, which he contended made it clear that no privilege was asserted over documents which were responsive to Professor Fischel's requests, was a complete answer but that if the Court had any "*lingering doubts*" a verifying affidavit could be supplied. He suggested the Company's suspicions were "*contrived*" to apply pressure to the Appleby Dissenters and that in reality there was no need for any further Order to be made.

38. The most important point that counsel made orally, however, was that the reasons for the supposedly inadequate response to the Professor Fischel requests reflected strict compliance with a slender strand of the Consent Order (paragraph 1(c)) which provided in salient regard as follows:

> "*...If an Appleby Dissenter intends to claim privilege over any models that informed the Appleby Dissenter's decision to purchase shares in the Company after the announcement of the Merger then this must be specified in the list required by this paragraph...*"

39. This aspect of the Consent Order, surely by accident rather than by design, does on its face appear to limit the discovery specification obligation in relation to privilege to a narrower class of documents than was embraced by the relevant Expert requests. No satisfactory explanation was however proffered as to why the Stockbridge Dissenters had provided a Supplemental List of Documents as required by the Consent Order and the other Appleby Dissenters had not. On a straightforward and simple view, there was a striking disparity between the abundance of the particulars provided by the Stockbridge Dissenters and the comparatively parsimonious serving of particulars supplied by the Appleby Dissenters[3]. Mr Imrie, like Oliver Twist, seemed entitled to ask for more.

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[3] For the avoidance of doubt, the Appleby Dissenters were not required by the Consent Order to produce a general Supplemental List of Documents. The Company's complaint (which I accepted) was that the combination of the comparatively small quantity of documents which they had uploaded combined with what appeared to be non-responsiveness to the Expert requests justified some form of relief from the Court.

40. Mr Jackson concluded his oral submissions by arguing that the present case was not an appropriate one for making "*bright line*" rulings about the time period over which

litigation privilege could be claimed. He relied in this regard on cases upon which the Company itself relied in its written Submissions. Mr Jackson referred most significantly to the following principles supported by *Axa Seguros, SA De CV-v-Allianz Insurance plc & Ors* [2011] EWHC 268 (Comm) (Christopher Clarke J, as he then was, at paragraphs 14, 43):

> "*14... Whether or not litigation is reasonably in prospect is an objective question...*
>
> *43. The dividing line between circumstances which afford a reasonable prospect of litigation (but not necessarily that litigation is more probable than not), on the one hand, and a (mere) possibility of litigation on the other, is not entirely clear. The fact that one or more conditions have to be fulfilled in order for a dispute to arise which requires the commencement of litigation in order to resolve it does not necessarily mean that litigation is only a possibility. Much may depend on what, at the relevant time, is the prospect that the conditions will be fulfilled.*"

41. I made it clear in the course of argument that I did not consider it appropriate to make any final determinations that privilege had been improperly claimed without a further and more focussed evidential inquiry.

42. In his reply submissions, Mr Imrie complained that the statement in Appleby's June 12, 2019 letter that no privilege was claimed except to the extent that it had already been claimed in the Lists of Documents was "*a tautology*". As far as models were concerned, he emphasised the disjuncture between the scope of models requested by Professor Fischel and the more limited assurance given by the Appleby Dissenters in their two June letters. Referring to the Consent Order, he argued that its primary obligation was to provide a List responsive to the requests, as reflected in paragraph 1 of the June 19, 2019 Summons. He tacitly conceded that there was also a disjuncture between the words of the Consent Order Mr Jackson relied upon, but contended that the reading relied upon was an "*artificially narrow*" one.

43. I put to Mr Imrie that the Stockbridge Dissenters' Supplemental List was sufficient. He conceded that when that list was combined with the June 19, 2019 letter, "*we are almost there*". He still relied on the inconsistency between the date range of the

privilege claimed by the Stockbridge Dissenters (litigation was said in the June 19, 2019 letter to have been in contemplation since April 25, 2017) and the evidence in the First Affidavit of Anil Seetharam that a rival bid was still being considered in May (paragraph 10.4). The Company's counsel explained that the night before the hearing the Stockbridge Dissenters had provided over 236 additional documents and 24 models; this was why he was not pressing the case against these Dissenters as strongly as against the others. But, Mr Imrie submitted, the extent of this recent disclosure only served to highlight how improbable it was that the Appleby Dissenters' comparatively negligible disclosure of supporting materials in relation to their trading in the Shares during the relevant time period was consistent with full compliance with their discovery obligations.

Findings

Governing legal principles

44. The governing legal principles on how a disputed claim for privilege should be judicially assessed as set out in the submissions summarised above were not in dispute. I accept that where the validity of a privilege claim is challenged, the privilege claimant must demonstrate by reference to a sufficiently particularised List of Documents or by way of correspondence, that there is an objectively ascertainable credible basis for the privilege which is claimed. As stated in Mathews and Malek, '*Discovery*' (Sweet & Maxwell: London, 1992) at paragraph 5.39, upon which the Company's counsel particularly relied:

> "*Where there is a claim for privilege, this claim can only be controverted if it can be seen from the List or affidavit, the nature of the case or the documents themselves that the party has erroneously represented or misconceived their nature and effect. Where the claim is insufficiently stated the Court may require the party to provide a further List or to explain and verify the ground on affidavit.*"

The Stockbridge Dissenters' Summons

45. Having regard to the Supplemental List of Documents, the further explanations provided in Appleby's June 18, 2019 letter and the Company's admission that further substantial discovery had been provided on the eve of the June 21, 2019 hearing, I find

that the Stockbridge Dissenters have adequately justified their privilege claim. There is no sufficient evidential basis for me to conclude that the period covered by their litigation privilege claim is inherently improbable. The mere fact that they were admittedly considering making a merger bid after the date when they first queried the extent of their dissenter rights with the Company is, in my judgment, not enough to support such a significant finding.

46. Subject to hearing counsel if required as to the form of the Order and costs, I would make no Order on the Company's May 13, 2019 Summons seeking relief against the Stockbridge Dissenters.

The Appleby Dissenters' Summons

47. The Appleby Dissenters agreed to the Consent Order which provided most significantly as follows:

> "*1 By 12pm on 2 June 2019 the Dissenters numbered 1,9,18,21,24,25,27 and 28 in Appendix 1 (each an '**Appleby Dissenter**' and together the '**Appleby Dissenters**') shall serve on the Company a list of those categories of documents in their possession, custody or control that are responsive to the requests in the 13 May 2019 letters from Compass Lexecon to each of the Appleby Dissenters ('**Appleby Dissenter Documents**') over which they claim privilege. The list shall:*
>
> *(a) identify the type of privilege claimed;*
>
> *(b) identify the basis for the claim of privilege;*
>
> (c) *be sufficiently detailed to enable the Company to meaningfully prepare to challenge the privilege claim at the 21 June 2019 directions hearing in accordance with the timetabling directions at paragraph 11 if it so chooses. If an Appleby Dissenter intends to claim privilege over any models that informed the Appleby Dissenter's decision to purchase shares in the Company after the announcement of the Merger then this must be specified in the list required by this paragraph.*
>
> *2 By 12 pm on 19 June 2019 the Appleby Dissenters shall:*

(a) Subject to any claim for privilege, upload to the Data Room all Appleby Dissenter documents in their possession, custody or control;

(b) *File and serve any affidavit they deem necessary to explain the documents referred to at paragraph 2(a).* "

48. As recorded above, Appleby's June 12, 2019 letter enclosed a Supplementary List of Documents on behalf of the Stockbridge Dissenters but failed to do in relation to the Appleby Dissenters. The primary requirement of paragraph 1 of the Consent Order was to provide a (supplementary) list of any documents responsive to the Compass Lexecon requests over which they claimed privilege which:

(a) identified the type of privilege claimed;

(b) identified the basis of the privilege; and

(c) was sufficiently detailed "*to enable the Company to meaningfully prepare to challenge the privilege claim at the 21 June 2019 directions hearing*".

49. The assurances offered in the Appleby June 12, 2019 letter fell well short of complying with paragraph 1 of the Consent Order. Firstly, indicating that no privilege was claimed apart from the privilege claimed in the original List of Documents was indeed a tautology as Mr Imrie complained. The underlying premise of paragraph 1 of the Consent Order was that the original List would be supplemented by a further List with the specified particulars[4]. Having regard to the dominant purpose of paragraph 1 of the Consent Order, it was obtuse (in light of the failure to comply with the key obligations under paragraph 1 of the Consent Order) to rely on the clearly erroneously and overly narrowly worded second sentence of sub-paragraph (c) to justify providing an equally limited assurance in respect of models:

"*...If an Appleby Dissenter intends to claim privilege over any models <u>that informed the Appleby Dissenter's decision to purchase shares</u> in the Company after the announcement of the Merger then this must be specified in the list required by this paragraph.*" [Emphasis added]

[4] For the avoidance of doubt, this is not intended to suggest that the Consent Order Order required the Appleby Dissenters to provide the particulars in the form of a traditional 'List of Documents'. The problem with the response was that the content of the particulars were deficient for the reasons explained in paragraphs 50-51.

50. The Compass Lexecon requests were clearly broader both (a) in temporal scope (the period covered commenced three months before the Merger was announced) and (b) in so far as the requests were not limited to models which informed the decision to purchase. Further particulars were provided (set out in paragraph 17, above) in Appleby's June 18, 2019 letter but these were problematic for three main reasons. Firstly, the purpose of the Consent Order was seriously misunderstood, because the June 18, 2019 Appleby letter asserted that Maples' June 14, 2019 letter was the "*first time*" that any complaints were being made about the adequacy of the original List of Documents. Secondly, the repetition of the tautology reflected a failure to meaningfully engage with the detail of the Compass Lexecon request. Thirdly, the additional particulars merely identified the date range of the privileged documents, stated what type of privilege was claimed (in most cases litigation privilege, but in two cases legal advice privilege as well) and stated that the documents "*do not contain valuations*".

51. These particulars were not in my judgment "*sufficiently detailed to enable the Company to meaningfully prepare to challenge the privilege claim*" as required by the Consent Order. More fundamentally still, the governing requirement which these particulars failed to meet was that "*the nature of the documents must be stated and in the case of classes of documents, the class must be clearly defined so it is possible to identify documents which fall within the class*": Matthews & Malek, '*Discovery*', paragraph 5.09.

52. I find that the Appleby Dissenters have failed to justify their privilege claims as regards documents which are responsive to the Professor Fischel/Compass Lexecon request. More than this, they have failed to comply with the discovery obligations they voluntarily assumed under paragraph 1 of the Consent Order, if that Order is purposively construed in light of the agreed governing legal principles and in light of the factual matrix of the present case.

53. What Order is appropriate? The Court has not conducted a full inquiry into the merits of the privilege claim so there is no sufficient basis for compelling the production of the documents over which privilege is claimed at this stage. What has happened has been that the deficient discovery which has been given has prevented the Court from being able to begin to properly conduct an inquiry as the merits of the privilege claims. I am not satisfied that these deficiencies are "disgraceful" (and implicitly deliberate) as the Company's counsel complained as opposed to being primarily attributable to a series of unfortunate missteps in dealing with the case of a sub-set of Dissenters whose commercial stake is apparently far smaller than that of the Stockbridge Dissenters. Mr Jackson invited the Court to accept that it was entirely plausible that the Appleby Dissenters simply had virtually no relevant documents to disclose. I am unable to reject

out of hand, the experience of dissenter discovery in this jurisdiction being limited, the possibility that some investors buy and sell shares without relying on extensive models and other trading information.

54. Even giving the Appleby Dissenters the benefit of the doubt as regards deliberate non-compliance, it is ultimately obvious that they have failed to comply with their discovery obligations having regard to both the agreed governing general legal principles and the specific terms of the Consent Order, sensibly read. It is clear that there has been a distinct failure to give adequate particulars in support of the relevant privilege claims.

55. Accordingly, subject to hearing counsel if required on the precise terms of the Order and as to costs, I find that the Company should be granted an Order in substantially the following terms:

> *"1 By 12pm on 2 August 2019 the Dissenters numbered 1,9,18,21,24,25,27 and 28 in Appendix 1 (each an '**Appleby Dissenter**' and together the '**Appleby Dissenters**') shall serve on the Company a list of those categories of documents in their possession, custody or control that are responsive to the requests in the 13 May 2019 letters from Compass Lexecon to each of the Appleby Dissenters ('**Appleby Dissenter Documents**') over which they claim privilege. The list shall:*
>
> *(a) identify the type of privilege claimed;*
>
> *(b) identify the basis for the claim of privilege;*
>
> *(c) be sufficiently detailed to enable the Company to meaningfully assess the validity of the privilege claim If an Appleby Dissenter intends to claim privilege over any models that are responsive to the said requests, then this must be specified in the list required by this paragraph; and*
>
> *(d) be verified by an affidavit sworn one of their local attorneys.*
>
> *3 By 12 pm on 9 August 2019 the Appleby Dissenters shall:*
>
> *(a) Subject to any claim for privilege, upload to the Data Room all Appleby Dissenter documents in their possession, custody or control;*

(b) *File and serve any affidavit they deem necessary to explain the documents referred to at paragraph 2(a).*

4 *The Petitioner's Summons dated June 18, 2019 shall be adjourned with general liberty to apply.*

5 *The costs of the Summons up to and including the date on which the terms of present Order are agreed or settled by the Court shall be paid by the Appleby Dissenters in any event, to be taxed if not agreed.*"

Conclusion

56. The Stockbridge Dissenters have justified their claims to privilege in respect of documents which are responsive to the Company's Expert's request for documents renewed on May 13, 2019. I would propose to make no Order in relation to the Stockbridge Dissenters and the Company's Summons dated May 13, 2019, subject to hearing counsel, *inter alia*, as to costs.

57. The Appleby Dissenters have failed to give sufficient particulars to enable the Court to verify the validity of their claims to privilege in respect of documents which are responsive to the Company's Expert's request for documents renewed on May 13, 2019. For the above reasons, and subject to hearing counsel as to costs and the precise terms of the Order, I find that the Company is entitled to the relief set out in paragraph 54 above as against the Appleby Dissenters in respect of its June 19, 2019 Summons.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

GRAND COURT - CAYMAN ISLANDS