IN THE CAYMAN ISLANDS COURT OF APPEAL

CICA (Civil) 25/2017
FSD 92/2017

BETWEEN:

TRINA SOLAR LIMITED

Appellant

-AND-

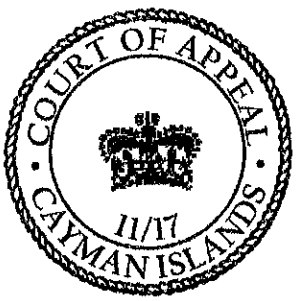
(1) MASO CAPITAL INVESTMENTS LIMITED
(2) BLACKWELL PARTNERS LLC – SERIES A

Respondents

BEFORE **The Hon John Martin QC, Justice of Appeal**
The Hon Sir George Newman, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal

JUDGMENT DELIVERED: 4th May 2018
(for comments)

JUDGMENT FINALISED
AND RELEASED: 17th May 2018



JUDGMENT OF THE COURT

MARTIN JA:

1. By order dated 27 October 2017 Segal J refused an application by Trina Solar Limited ("Trina") for disclosure of documents by Maso Capital Investments Limited and Blackwell Partners LLC – Series A ('the Dissenting Shareholders"). The application, which formed part of a wider application for directions, was made in proceedings brought by Trina under section 238 of the *Companies Law (2016 Revision)* seeking determination

of the fair value of the shares in Trina formerly held by the Dissenting Shareholders.

2. On 31 October 2017 Trina filed a notice of appeal, confined to the question of disclosure by the Dissenting Shareholders.

3. Segal J gave leave to appeal on 2 November 2017. In his reasons for doing so, he referred to an impending appeal from a decision of Parker J in *In the matter of Qunar Cayman Islands Limited* (FSD 76 of 2017 (RPJ)) ("*Qunar*"), which he had in effect followed and applied on the disclosure issue; and he indicated that he was doing so "*to allow the appeal to be expedited and, if the Court of Appeal agrees and so directs, heard at the same time as the Qunar appeal*".

4. In the event, the Court of Appeal was unable to consider Trina's appeal at the same time as the *Qunar* appeal. The latter appeal was heard on 17 November 2017, and judgment was reserved. Judgment was ultimately handed down on 10 April 2018.

5. In the meantime, the Trina appeal was listed for hearing in the 2018 Spring session. On 15 February 2018 the Registrar circulated a filing schedule requiring a core bundle and skeleton argument to be lodged by Trina by 9 March 2018 and a skeleton from the Dissenting Shareholders to be lodged by 3 April 2018.

6. On 5 March 2018 Walkers, acting for the Dissenting Shareholders, wrote to Harneys, acting for Trina, suggesting that the hearing of Trina's appeal should be deferred until the *Qunar* judgment had been delivered. Harneys rejected this suggestion, and filed the core bundle and Trina's skeleton on 9 March 2018 in accordance with the schedule.

7. By 3 April 2018, when the Dissenting Shareholders' skeleton was due to be lodged, a draft judgment in *Qunar* had been provided to the parties in that appeal under embargo. Both Walkers and Harneys knew this; indeed,

Harneys had acted for one of the parties in the *Qunar* appeal and so knew the contents of the draft judgment, but were not at liberty to reveal them to Trina or to Walkers. One of the Dissenting Shareholders – Maso Capital Investments Limited - was a party to the *Qunar* appeal and so was aware of the outcome of the *Qunar* appeal but not the embargoed contents of the draft judgment.

8. The Dissenting Shareholders accordingly lodged a skeleton argument making its arguments without knowledge of the *Qunar* decision; but that skeleton expressly stated that it was without prejudice to any further submissions the Dissenting Shareholders might wish to make in the light of the *Qunar* judgment if it were delivered before the hearing of Trina's appeal.

9. That hearing was listed for 30 April 2018. As we have said, the *Qunar* judgment was in the event handed down on 10 April 2018. It allowed the appeal against the order of Parker J and directed disclosure to be given by the *Qunar* dissenting shareholders.

10. It was quickly recognised by Trina and the Dissenting Shareholders that the *Qunar* decision was determinative of the substantive issue in this appeal. They agreed an order that required the Dissenting Shareholders to give disclosure equivalent to that ordered on appeal in *Qunar*. This disclosure, although extensive, was not identical to that originally sought by Trina.

11. The parties were, however, unable to agree how the costs of the appeal and at first instance should be dealt with. They invited us to deal with the costs on the papers, instead of sitting to hear oral submissions on 30 April 2018, and we agreed to do so. This is our determination of the costs issues.

12. Trina's case is in essence that it has succeeded on the appeal; that it could not reasonably have been expected to agree to deferment of the appeal when it was uncertain when the *Qunar* judgment would be delivered and uncertain whether or not the Dissenting Shareholders would accept that it was determinative of this appeal; that it is only in exceptional circumstances that

a successful party should be deprived of its costs; and that it should accordingly have its costs of the appeal and at first instance.

13. The Dissenting Shareholders' case is in essence that Trina's refusal to await the decision in *Qunar* was plainly unreasonable and resulted in wasted time and effort spent on preparation that could have been avoided without prejudice to either party. They suggest that the proper order on the appeal is no order for costs, and that the first instance order reserving costs should not be disturbed.

Costs of the appeal

14. We approach this issue from the standpoint that Trina was successful on the appeal. What was in dispute was the principle of disclosure by section 238 dissenters, and the Dissenting Shareholders were contending that such disclosure was neither relevant nor necessary. Although the disclosure ultimately agreed may have been less than originally sought by Trina, there is no doubt that the point of principle went Trina's way.

15. It inevitably follows that Trina is entitled to its costs at least of initiating the appeal – that is to say, its costs of the notice of appeal and grounds of appeal.

16. In our judgment, however, its success does not carry with it the right to any further costs of the appeal. We consider that it was inevitable that the resolution of the appeal would have had to await the outcome of the *Qunar* appeal. It would have been an obvious waste of judicial and court resources to consider an issue that had already been considered by this Court without waiting for the outcome of the previous appeal; and to proceed to judgment in ignorance of that outcome would have involved a plain risk of inconsistent appellate decisions. In our view, Trina should have agreed to the Dissenting Shareholders' suggestion that the appeal be deferred, and its failure to do so has led to the incurring on both sides of unnecessary costs.

Costs at first instance

17. The costs at first instance were reserved. The order to that effect was made by agreement, the prior correspondence demonstrating that the parties were unable to resolve a dispute over the appropriate order to be made in the light of the outcome of the directions hearing. In substance, the positions were that the Dissenting Shareholders claimed costs against Trina, and Trina asserted that the costs should be costs in the petition. That disagreement was resolved by reserving the costs for future argument.

18. We see no reason to change that order. When the costs come to be considered, the court will be able to take into account that Trina succeeded on appeal on one of the directions issues; but it will also no doubt take into account that the dissenter disclosure issue was only one of a number of issues that arose at the directions hearing.

Disposition

19. For the reasons we have given, we order the Dissenting Shareholders to pay Trina's costs of the notice of appeal and the grounds of appeal, those costs to be taxed in ordinary course if not agreed, but otherwise make no order for the costs of the appeal; and we leave the costs order below undisturbed.