

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No FSD 76 of 2017 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)
AND IN THE MATTER OF QUNAR CAYMAN ISLANDS LIMITED

QUNAR CAYMAN ISLANDS LIMITED

Petitioner

-and-

1. MASO CAPITAL INVESTMENTS LIMITED
2. BLACKWELL PARTNERS LLC – SERIES A
3. ATHOS ASIA EVENT DRIVEN MASTER FUND
4. FMAP ACL LIMITED
5. SENRIGAN MASTER FUND
6. PAG ASIA ALPHA LP
7. PAG QUANTITATIVE STRATEGIES TRADING LIMITED
8. PAG-P ASIA FUND L.P.



Respondents

IN OPEN COURT

Appearances:

Mr Tom Lowe QC, Paul Madden and Lachlan Greig of Harney Westwood & Riegels on behalf of Qunar Cayman Islands Limited.

Mr Erik Bodden of Conyers Dill and Pearman on behalf of PAG Asia Alpha LP, PAG Quantitative Strategies Trading Limited and PAG-P Asia Fund LP.

Mr Tony Heaver-Wren, Mr Andrew Jackson and Ms. Heather Froude of Appleby on behalf of Athos Asia Event Driven Master Fund, FMAP ACL Limited and Senrigan Master Fund.

Mr Rocco Cecere of Mourant on behalf of Maso Capital Investments Limited and Blackwell Partners LLC – Series A.

Before: The Hon Justice Raj Parker

Heard: 8 June 2018

Draft Judgment: 14 June 2018
Circulated

Judgment Delivered: 19 June 2018

HEADNOTE

Summons for directions-section 238 of the Companies Law-scope and method of discovery to be given by dissenting shareholders.

JUDGMENT

Introduction

1. The judgment of the Court of Appeal (CICA No. 24 of 2017, unreported 10 April 2018) allowed the company's appeal against my refusal of the orders sought for the dissenters to give discovery at a directions hearing on 23 June 2017. The parties (the company as petitioner and the respondents as dissenting shareholders) have been unable to agree consequential directions despite having made attempts to do so for the last three months.
2. I heard the parties' contentions on Friday 8 June 2018 and gave my directions/decisions on the contested matters orally at the hearing as requested. I said I would give the reasons for these in writing and they now follow.

The Test

3. It is clear from the Court of Appeal's decision that, contrary to the practice which was developing in the Grand Court in section 238 Petitions, there is now a general requirement for automatic mutual disclosure to be imposed in these cases. It follows that the Court's approach to discovery should be similar to that which applies generally in civil litigation where there is a mutual obligation to search for and to list all documents which are relevant to the issues in dispute and which are necessary to be disclosed for disposing fairly of the action or for saving costs.
4. A further aspect of this approach is provided for by the Overriding Objective - see Financial Services Guide B4.3 and the Preamble of the GCR in which expedition and economy are emphasised in this jurisdiction. Incidentally I do not see any tension



between this approach and the English approach under the CPR to deal with cases 'justly'. In this regard I am assisted by Justice Kawaley's approach in *In the matter of Nord Anglia Education, Inc.* (unreported 19 March 2018) in particular at paragraphs 8 and 9.

He found that section 238

"...is designed to accord substantial commercial justice to merger companies and dissenting shareholders alike." - see paragraph 9 on p 4.

5. In section 238 cases the issue in dispute is the fair value of the dissenter's shares, an exercise to be carried out by the trial judge with assistance from the experts. For this the Court needs as much information as is available which is relevant to that issue.
6. In holding that dissenters should give discovery, particular emphasis was placed in the reasoning of Rix JA (with whom the other two members of the Court of Appeal agreed) of the relevance of material held by those who were contemplating and making decisions to invest in the company whose shares are now in issue.

He says at paragraph 68

"[The Respondents'] reports are likely to be all the more pertinent in that they are likely to be highly contemporaneous and professional reports of sophisticated members of the market who are not only observers but ready to act on their own research and scholarship."

7. The approach which the court will adopt to contested aspects of discovery will of course be fact specific, but the general proposition to now be followed is that both the company and dissenters are to give mutual disclosure of all material relevant to the issue of fair value which is, or has been, in their possession, custody or power.
8. It will of course ordinarily be the case that the company will have considerably more relevant material than will the dissenters, who will usually have a much more limited amount.

The company's case

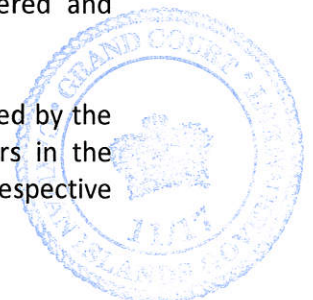
9. That is the position in this case where in summary, the company seeks documents reflecting or relating to any valuations or similar analyses of the company that were prepared, reviewed, or considered by the dissenters. Following the Court of Appeal's decision, these documents are clearly in scope.
10. It also seeks communications that the dissenters had with any representative of the company prior to the date of the merger in relation to the value of the company or its shares. It may be that those documents, or at least some of them, have already been provided by way of discovery by the company.



11. Finally it requires confirmation of the date upon which the dissenters purchased their shares in the company, including the method of purchase, a history of the dissenters' trades in the shares and all material shared between the company's investment manager and/or investment adviser and the company's investment committee for their consideration of the company's "go private" action, including notes of meetings, agenda's and communications.
12. All of those categories have been put into a schedule comprising five paragraphs.

The parties' contentions

13. Mr Lowe QC for the company referred me to passages in the judgment of Rix JA which showed that discovery against dissenters should be given on the same conditions as in any other proceedings governed by GCR Order 24. He submitted that, when considering discovery to be ordered against a dissenting shareholder to a section 238 petition, the test was no different to that which applied to the company, as a matter of general obligation. Following the decision of the Court of Appeal I readily accept that general proposition.
14. He then further pointed out that the respondents had not filed any evidence in response to the company's summons in order to justify any different approach in relation to dissenter discovery. It is to my mind important in applications seeking a specific regime in the context of disclosure actions that evidence in support for the argument is provided - see for example *In the matter of E-House (China) Holdings Limited* (unreported, 3 November 2017) where Mangatal J emphasised the need for the Court to make an 'informed decision' on both the attorneys' arguments and the evidence.
15. He also took me to the correspondence between the parties in which it is clear that the respondents have changed their positions over time as to the basis upon which they argue that some form of restricted discovery should be ordered.
16. Mr Heaven-Wren, whose submissions were largely supported by Mr Cecere and Mr Bodden, (who between them covered all the dissenters in this action), told me that the parties had reached agreement on a number of the issues raised by the further directions sought by the company. Indeed it became clear in argument that important further agreements were reached, which I briefly now record.
17. First, that the company accepts that it will enter into a non-disclosure agreement with the respondents in substantially similar terms to that which the respondents had entered into in respect of the documents which the company discovered and produced in this case.
18. Second, that because of the commercial sensitivity of the material requested by the company (in circumstances where various respondents were competitors in the market), it was agreed that the respondents would discover their respective

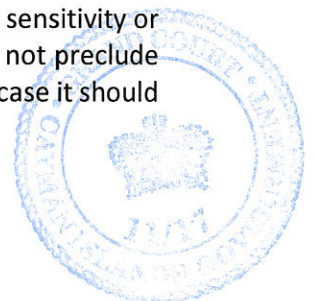


documents to the company and the experts only, rather than uploading them into a data room. That way none of the respondents would have access to materials which might give them a competitive commercial advantage.

19. It was also agreed that the date by which the respondents would provide discoverable documents identified in the schedule and a list of documents complying with Order 24 was to be 9 July 2018, with corresponding extensions of the deadline for the experts' supplemental reports to be agreed to enable the experts to consider the respondents' documents.
20. Third, that the company would engage in a constructive dialogue to protect material which is commercially sensitive and confidential or which contains business or personal information which is non-public and which might cause commercial harm or enable competitors to gain a commercial advantage if not protected. Such a dialogue would work towards an agreement which follows the general approach to these types of directions as recently adopted by Justice Kawaley in *Nord Anglia (unreported 19 March 2018)* - see at paragraph 26.

Specific restrictions

21. Mr Heaven-Wren urged me to exclude any models and documentation relied on by the respondents in respect of which his clients assert proprietary rights. He submitted that his clients view their investment strategies and processes as containing proprietary information and as such that documentation should be kept confidential from all other participants in the market.
22. As to the respondents' concerns generally concerning confidentiality and valuable proprietary rights there is of course the implied undertaking of each litigating party not to use the material discovered in the case for any ulterior or collateral purpose. That is enforceable in the breach - see *Phoenix Meridian Equity Limited v Lyxor Asset Management S.A. and Scotiabank & Trust (Cayman) Limited* [2009 CILR 153].
23. Adopting a sensible approach to restrictions upon accessibility and use, as well as redaction, it seems to me that the risk of commercial harm to the respondents can be managed in the lead up to and at trial. The Court in any case has an inherent jurisdiction to protect litigants against the risk of abuse of the discovery process by requiring, for example, further express undertakings and the like. I indicated to the parties that I would be prepared to deal with those sorts of applications where appropriate on the papers and urgently.
24. It follows that I am not prepared at this stage to provide any exclusion from the obligation to give relevant discovery of material over which commercial sensitivity or confidentiality or proprietary rights or interests are asserted. That does not preclude such an application being made in due course and if necessary, in which case it should be supported by evidence.



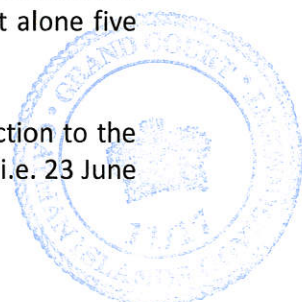
25. Mr Heaven-Wren also argued that a protection needed to be provided for that such material should not be produced in the bundles at trial or referred to at the trial unless either expert wishes to rely upon it.
26. Again, at this stage I am not prepared to make an order regulating what use, if any, will be made of documents disclosed by the respondents to the company or experts. Such an application can be made if necessary in due course in which case again it should be supported by evidence.

Confirmation of trading history

27. A further controversy concerned the respondent's information concerning the date upon which any or all of their shares in the company were purchased, including the method of purchase, together with a history of the respondent's trades in the shares of the company.
28. What if the company wished to obtain confirmation of such information? Mr Heaven-Wren submitted that a respondent should be obliged to confirm such matters by producing underlying documents only if the request for production is supported by *bona fide* grounds for requiring the underlying documents. He relied upon paragraph 79 of the Court of Appeal's judgment in this case where Rix JA said that the dissenting shareholders should stand ready to confirm the schedule by documents "*if the schedule is challenged*". That, he says, indicates something more than production upon request.
29. In my view there is no reason to set up any preconditions to the request. If a request is made and it is a reasonable request the matter will be adequately dealt with where the respondents are able to verify by evidence and/or documents the matters raised. If it is alleged that it is not a reasonable request or if the respondent wishes to allege that it was made in bad faith, that should be supported by evidence and I will deal with it.

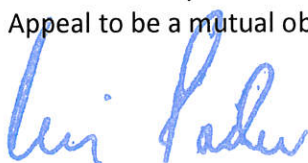
The relevant period for discovery

30. Mr Heaven-Wren submitted that it was not necessary either for disposing fairly of the action or for saving costs under GCR Order 24 r 8 that the dissenters should be asked to search for documents over a five year period (which the company has complied with). It was not necessary or proportionate, he argued, to order the respondents to do so because there is no evidence to suggest that they would be likely to have any documents which could potentially have any material bearing on the determination of fair value prior to the announcement of the take-private proposal, let alone five years prior to that date.
31. He argued that the appropriate course was to limit discovery and production to the period beginning with the date that the merger proposal was announced i.e. 23 June



2016, and ending with the valuation date, which is a seven-month period. While various assertions of fact were made in Mr Heaver-Wren's written submissions as to whether his clients had prepared any valuations prior to the announcement of the proposed take-private action and the likelihood of them having had any valuation related communications with the company prior to the date of the announcement, as I have said no evidence in support was provided by the dissenters.

32. At this stage we are not concerned with the evidential value of any material to be discovered but rather its relevance. It seems to me that there is no good reason advanced as to why the respondents should not give discovery in the same way and over the same period as the petitioner. Discovery has been confirmed by the Court of Appeal to be a mutual obligation requiring equity and fairness.



THE HON. Mr. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

