

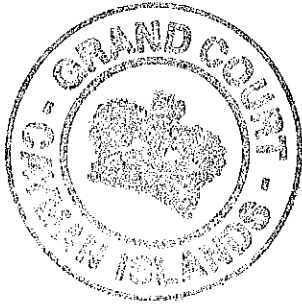
**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

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:



Lord Grabiner QC, Mr Richard Boulton QC and Mr James Eldridge of Maples and Calder on behalf of Nord Anglia Education, Inc ("the Company")

Mr Alan Steinfeld QC and Mr Rocco Cecere of Mourant Ozannes on behalf of the Mourant Dissenting Shareholders

Mr Barry Isaacs QC and Mr Guy Manning of Campbells on behalf of the Campbells Dissenting Shareholders

Mr Jonathan Adkin QC and Mr Andrew S Jackson of Appleby on behalf of the Appleby Dissenting Shareholders

Before: **The Hon. Justice Kawaley**

Heard: **26 – 27 February 2018**

Date of Decision: **6 March 2018**

Draft Reasons Circulated: **6 March 2018**

Reasons Delivered: **19 March 2018**

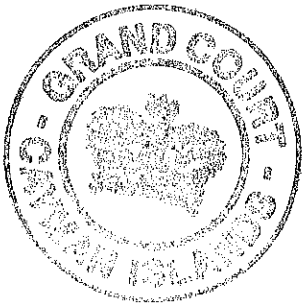
HEADNOTE

Summons for Directions - section 238 of the Companies Law Petition - determination of fair value of shares - whether 'standard directions' should be followed - scope of discovery by company - whether highly sensitive documents should be protected - whether management meetings should be open or "without prejudice"- guiding principles

(PARTIAL) RULING ON SUMMONS FOR DIRECTIONS

Introductory

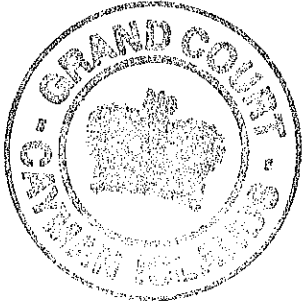
1. The Company operates international schools in various parts of the world. Its principal management has been based in Hong Kong since 2012. Its shares were listed on the New York Stock Exchange between 2014 and 2017. In or about early 2017 the Company initiated negotiations which culminated in the 66.8% majority shareholder voting in favour of a merger agreement (“**the Merger**”) at an extraordinary general meeting held on August 21, 2017 (“**the EGM**”). The effect of the Merger was to privatise the Company and to acquire the shares of the minority for the price of \$32.50. This was, of course, subject to the right of dissenters to have the fair value of their shares determined by this Court under section 238(9) of the *Companies Law*.
2. The Petition herein was presented by the Company on November 9, 2017. On the same date the Company issued its Summons for Directions. The present Ruling seeks to resolve disputes relating to the following broadly defined topics:



- 1) the scope of the Company’s disclosure obligations;
- 2) the management of the discovery and inspection process;
- 3) whether there should be a process expert in addition to a valuation expert;
- 4) miscellaneous other comparatively minor issues.

Dissenter Discovery

3. The question of whether or not the Dissenters should be required to give discovery will be dealt with in a separate Ruling, as counsel for the Company and the Mourant Dissenting shareholders (the Campbells Dissenting shareholders having disagreed) agreed at the end of the hearing. Since reserving judgment I have received informal administrative indications suggesting that a decision of the Court of Appeal in a case



called *Re Qunar* might well be handed down sometime this month. Subject to the proviso set out in paragraph 4 below, I accordingly direct that the parties be at liberty to submit supplementary skeleton arguments within 14 days of the sooner of (a) the Cayman Island Court of Appeal judgment in that case being received by local counsel, or (b) published on the Judicial Administration Department's website.

4. In the event that the Court of Appeal judgment in *Re Qunar* is not published or received by counsel by close of business on March 30, 2018, and there is no indication that its delivery is imminent, I will proceed to deliver my Ruling on this issue (unless all parties agree that my Ruling should be further delayed).

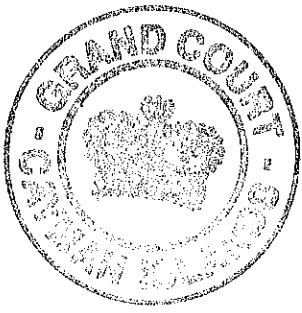
Governing legal principles for discovery and inspection in relation to section 238 petitions

5. There was more disagreement over the application of the principles governing discovery in section 238 proceedings than their content. For example, the Company's counsel placed before the Court English authority cited by the Dissenters' counsel to the effect that discovery should be limited to what is "*necessary*" (Practice Direction 31B under the CPR). This principle finds general support under local law and practice.

6. The Financial Services Guide provides as follows:

"B4.3 *The overriding objective places considerable emphasis on the need for the Court to ensure, inter alia, that a cause or matter proceeds and is determined on its merits in the most expeditious way, that it is not delayed and that a trial proceeds quickly and efficiently. The parties legal representatives are expected to co-operate with each other and with the Court in achieving these objectives. The FSD will give these obligations particular regard in giving directions concerning timetables and setting hearing and trial dates...*"

7. Order 1 of the Grand Court Rules pertinently provides:



"1.1 The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way" [emphasis added].

8. Expedition and economy are explicitly given a higher priority in this Court's Rules than under the English CPR, which opens by formulating the purpose of the overriding objective as being to "*enable the court to deal with cases justly*". Order 1.2 of this Court's Rules defines "*justly*", non-exhaustively, in terms which largely mirror the corresponding rule in the English CPR, and which includes the proportionality principle. However it adds, with implicit priority, the following additional elements:

- "(a) ensuring that the substantive law is rendered effective and that it is carried out;*
- (b) ensuring that the normal advancement of the proceeding is facilitated rather than delayed..."*

9. These guiding principles must inform this Court's approach to the present Summons for Directions, taking cognizance of the fact that section 238 is designed to accord substantive commercial justice to merger companies and dissenting shareholders alike. These increasingly common petitions should in my judgment be judicially managed in a way that will, so far as is reasonably practicable, promote confidence in the processes of this Court for all key stakeholders. Where, as here, the parties have achieved substantial agreement on the proposed directions but found certain issues to be intractable, the Court must do its best to adopt a balanced approach to the opposing contentions. An approach which will encourage the parties to cooperate in the ensuing phases of the proceedings, and indeed, in future similar cases.

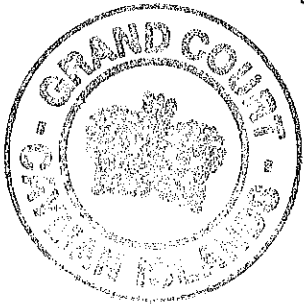
10. Of particular importance will be the need, so far as is consistent with the facts of this particular case, to strive for a consistent approach to similar issues on the part of the various judges of this Court. The starting assumption must be that the approach adopted in previous section 238 cases will be of considerable assistance to me in the

present case. The fact that the present case is of higher value and may involve more documents than previous cases does not to my mind undermine this starting assumption.

The Scope of the Company's Discovery Obligations

Guiding principles identified in previous section 238 cases

11. The following 'bite-sized' extracts from two of the various judgments referred to by counsel provide a helpful snapshot of the governing legal principles to be applied to the particular facts of the present case on the scope of discovery issue:

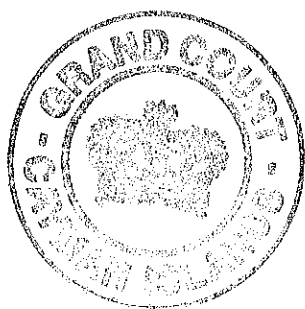


- *Re Qihoo 360 Technology Co., Ltd* (unreported, October 9, 2017 CICA. Martin JA at paragraph 19): *"The sole task of the Court is to determine the fair value of the dissenters' shares. To do that, it needs full information"*;
- *Re Qunar Cayman Islands Limited* (unreported, July 20, 2017, Parker J at paragraph 17): *"The Company should give discovery by uploading all documents that are relevant to fair value, after having first uploaded to the data room the specific classes of documents which came into being in the course of the take private process, which it should have readily available...This is the usual order..."*

Categories of documents and date range

12. The two camps were ultimately essentially agreed (1) that the Company's disclosure obligations were limited to discovering all documents relevant to the question of fair value, and (2) that the discovery process would be facilitated by identifying at this stage the main categories of documents to be produced. Controversy turned on the scope of the categories and what date range should be covered. It seems clear that the so-called Transaction Due Diligence Documents ("**TDD documents**") will likely embrace the vast majority of documents. It has recently become customary to order

disclosure for a period of 5 years prior to the transaction. The Company complained that this period was too long, while tacitly conceding that financial data going back that far might well be relevant to the fair value question. Mr Steinfeld on behalf of the Mourant Dissenters persuasively argued that the 5 year time limit actually assisted the Company rather than burdened it. I direct that the Company's basic obligation should be to:

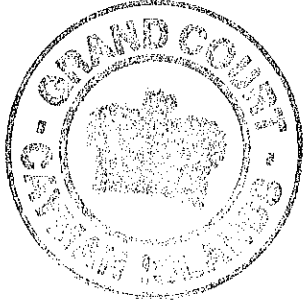


- 1) upload to the Data Room all documents (of whatever description etc.) which are relevant to the question of fair value created in the five year period ending with August 21, 2017, the Valuation Date (Dissenters' Order, paragraph 5, adding the explicit relevance limitation sought by the Company); and
- 2) without limiting the generality of the obligation described in (a), documents comprising the categories of documents set out in Appendix 2 to the Dissenters' Order, which categories are of course all subject to the overarching limits of relevance to the fair value question.

Management of the Discovery and Inspection Process

Should all or some of the TDD documents be uploaded?

13. The Company proposed to deal with the uploading of the TDD documents in the following way. It would upload an Index only of all those documents, and require the Dissenters' Expert team to identify which they wished to inspect. The Dissenters contended that all of these documents should be uploaded. The Company's concern was not simply to limit up-front Data Room storage costs, but also, implicitly, to avoid a wasting of inspection costs. In its Written Submissions, uploading "*10,000+ documents*" was described as "*a massive number for a valuation exercise*". The Dissenters submitted that all of these documents should be uploaded at the outset. There was also, it was contended, an inherent restraint on an excessive approach to the inspection process because the parties were agreed that the costs of the Data Room would be costs in the cause.



14. It appeared to me that the Company's approach would potentially result in unnecessary costs being incurred and staff time lost through 'toing and froing' over inspection requests and dealing with queries as to what documents the Index actually referred to. No evidence was referred to substantiating the suggestion that the storage costs would be disproportionate. I see no basis for assuming that expert professionals, whose livelihoods depend on their professional reputations, would adopt an approach to the inspection process which is wasteful of costs. It is also possible (it emerged in the course of the hearing) that the Dissenters will agree to assume up-front Data Room hosting responsibilities, including costs in any event.

15. Be that as it may, the usual direction is for all TDD documents to be uploaded, and I see no convincing reason to depart from this approach in the present case.

Can the Company use keyword searches to identify relevant documents?

16. The use of electronic searches is clearly consistent with the Overriding Objective as distinctively formulated in the Grand Court Rules and other authorities referred to in the Company's Written Submissions, particularly *Goodale and ors-v-The Ministry of Justice and ors* [2010] EWHC B40 (QB) (at paragraphs [10]-[14]).

17. At the end of the day there did not appear to be any meaningful dispute that the Company was entitled to identify electronic documents which needed to be discovered using keyword searches. Properly understood, using this tool was not intended to be a substitute for the Company's overarching obligation to identify all documents relevant to the valuation question. Such documents included emails sent and received by persons involved in the Merger process and who were described for convenience in the Company's Written Submissions, borrowing from the terminology used in *Goodale*, as "*Custodians*". Such searches will no doubt utilize terms or words which have, as far as possible, been agreed between the parties.

Data room costs



18. If the Company is responsible for the up-front costs of hosting the Data Room, I find that it would be appropriate for them to charge the Dissenters an access fee on terms to be agreed or subject to further direction of this Court. This is on the basis that, subject to the need for special treatment for highly sensitive documents dealt with below, the Dissenters themselves, not just the experts, may play a role in the inspection process.

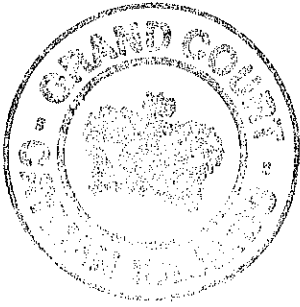
Highly Sensitive Documents (“HSDs”)

19. The HSDs issue was far more contentious. The Company was concerned about the general commercial desirability of protecting the confidentiality of, in particular, valuable proprietary research, but personal information (e.g. about staff) as well. Its evidence at its highest identified a generalised risk of inadvertent leakage rather than a particularised one. The Dissenters might at most be investors in competitor companies, not actual competitors. However, press interest in the case was also relied upon.
20. The definition of HSDs in the Company’s draft proposed Confidentiality and Non-Disclosure Agreement between the Company, the Experts and the Dissenters reads as follows:

“2.1 Definition. A ‘Highly Sensitive Document’ is one which:

- 2.1.1 Is commercially sensitive and confidential; or*
- 2.1.2 Contains business and personal information which is non- public; and*
- 2.1.3 Would, if viewed by the Company’s competitors or the public generally, be likely to cause commercial harm to the Company or enable its competitors to gain a commercial advantage over the Company.”*

21. The regime proposed had the following central elements to it:



- 1) the confidentiality agreements to be signed in relation to 'ordinary' documents would be fortified in relation to HSDs;
 - 2) the Company would decide whether HSDs should be posted in the Data Room marked as HSDs, redacted or unredacted or whether they should be posted at all;
 - redacted versions of HSDs only could, at the Company's discretion, be made available to the Experts and local attorneys only, and not to the Dissenters at all; and
 - Experts would be prohibited from downloading or printing HSDs and be required to ensure that references to HSDs are redacted from any Reports or memoranda shared with the Dissenters.
22. Mr Steinfeld QC with some force described what was proposed as "*a quite draconian protective regime*". Mr Boulton QC persuasively argued that there is nothing unusual about a special protective regime.
23. In terms of the correct legal approach I am guided by the following observations of Smellie CJ in *Phoenix Meridian Equity Limited –v- Lyxor Asset Management S.A. and Scotiabank & Trust (Cayman) Limited* [2009 CILR 153]:

"13 It is settled law in England, and elsewhere in the Commonwealth, that the courts have an inherent jurisdiction to protect litigants against the risk of abuse of the discovery process by requiring further express undertakings. The leading case is Warner-Lambert Co. v. Glaxo Labs. Ltd.(5). It has been followed in subsequent cases, including in the landmark English Court of Appeal decision in Church of Scientology of California v. D.H.S.S. (1), and,



according to textbooks, in similar decisions in other jurisdictions of the Commonwealth (see generally, *Matthews & Malek, Disclosure*, 3rd ed., at ch. 11 (2007)).

14 From these sources, it appears that the court is required to adopt a flexible approach to discovery and inspection in which it must balance, on the one hand, the need to afford a plaintiff the ability to prove its case while, on the other, allowing the defendant the ability to prevent its competitors from gaining access to its trade secrets. The court must in each case decide what measure of disclosure is appropriate, to whom it should be made and on what terms it should be given.”

24. The key guidelines for deciding this issue are (a) flexibility, (b) balancing the proprietary interests of the Company with those of the Dissenters, and (c) deciding what is appropriate in this particular case. It is instructive that while Chief Justice Smellie in *Phoenix Meridian* declined to require further undertakings to be given to the Court, he did seek to supplement the general implied undertaking which arises upon discovery by directing that a list of all persons to whom the confidential information was being disclosed should be supplied to the owner of the information.

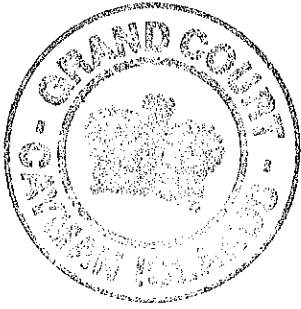
25. In the present case, unlike in *Phoenix Meridian*, it is common ground that further confidentiality obligations should be assumed by all parties accessing the Data Room. In my judgment the fact that it is agreed that there should be confidentiality agreements signed reflects a current consensus that in the circumstances of today extra protections will generally be required to protect confidentiality. It is a notorious fact that electronic data can be released accidentally to unintended recipients and end up entering the public domain, in many respects more easily than paper documents. The only question is how far those protections should be permitted to go.

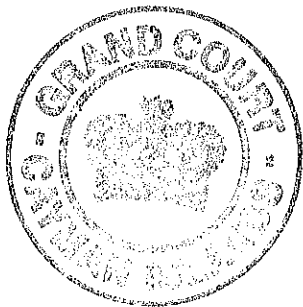
26. I find that:



- 1) the Company should be permitted to designate documents as HSDs in the general manner it proposes;
- 2) the Company should not be permitted to decide unilaterally that some HSDs should not be posted in the Data Room at all;
- 3) all HSDs shall be placed in the Data Room in redacted and un-redacted form with access to un-redacted HSDs limited to Experts and counsel in the first instance;
- 4) each Expert shall provide the Company with a list of his/her team members who will be given access to HSDs;
- 5) where the Dissenters' Expert wishes to refer to HSDs or extracts therefrom in a memorandum or draft report to be shared with clients, only the redacted versions of the relevant HSD may be mentioned or referred to and best efforts shall be made to protect the confidentiality of information which is not central to the valuation analysis;
- 6) where the document the Dissenters' Expert wishes to rely upon has been redacted in whole or in part, the Dissenters' counsel shall seek to agree the terms of such reliance with the Company's counsel with liberty to apply to the Court as a last resort;
- 7) for the avoidance of doubt I find that proposed paragraphs 2.71 and 2.72 of the draft Confidentiality and Non-Disclosure Agreement between the Company and the Experts are unreasonably restrictive of the ability of the Experts to carry out their professional valuation task;
- 8) the parties shall use their best endeavours to agree the final wording of the proposed non-disclosure agreements and any matters not expressly addressed in the present Ruling.

Experts' Information Requests

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27. The Company invited the Court to direct that information requests should, unless otherwise agreed or directed by the Court, be made periodically in batches of no more than 50 questions. Mr Boulton QC cited *Re E-House China (Holdings) Limited* (unreported, FSD 170 of 2016, Judgment dated 3 November 2017, Mangatal J), as an example of a case where Mangatal J declined to direct that further questions be answered by the Company. The Dissenters' expert in that case had submitted 176 questions (many with sub-questions) over a 99 day period. This was said to demonstrate the risk that questioning could get out of hand and become oppressive. The Dissenters countered that it was inappropriate to assume that their joint Expert would act unreasonably and bombard the Company with questions and that any limit would be arbitrary.
28. In my judgment there is an obvious risk in a case on the present scale, with three separately represented teams of Dissenters, that the number of Information Requests might reach oppressive levels. On the other hand, the efficiency of the trial preparation process would potentially be impeded if the Court were to impose arbitrary constraints on the number of questions which can be submitted at any particular time or within a particular period of time. I accept the submissions of Mr Adkin QC in this regard. As the Company has suggested an interval of 14 days between Requests that should probably be the target period within which the Company will aim to provide answers to each batch of questions, as the Dissenters' draft Order proposed. That should, correspondingly be the minimum period the Experts should wait before forwarding another Information Request. What is actually reasonable in relation to any specific Information Requests will depend on the number and nature of the questions (including sub-questions). The Company having suggested an upper limit of 50 questions (its initial position was 30), a series of Requests containing substantially more questions would, without imposing any specific limit, likely attract heightened scrutiny if a complaint of oppression was made to the Court. While most of one batch of questions is still outstanding, it is difficult to see why it would be reasonable to forward a further fulsome Information Request.



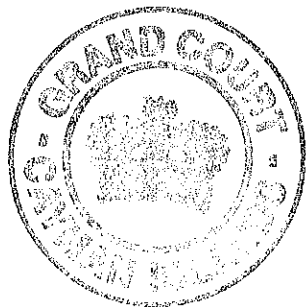
29. Two more minor controversies on Information Requests arose. The first was when the last one could be sent. The Company sought a 12 week time-frame starting with the date when it uploads the documents to the data room. The Dissenters proposed the period should end 21 days before the exchange of reports. The latter proposal is in my judgment the more sensible one, it being agreed that the purpose of the Requests is to furnish information for the reports. The second was whether Information Requests for post-Valuation Date material should be excluded unless the Experts could demonstrate that it was reasonably required, as the Company proposed. In my judgment it is self-evident that all questions raised should be reasonably required to assist in the formation of valuation opinions and that general requirement is all that need be spelt out in the directions.

30. In place of the wording presently set out in the first sentence of paragraph 19 of the Company's draft Order, I accordingly make a direction in the following (or substantially similar) terms:

"The Experts' Information Requests shall be made periodically and the Experts shall use their best endeavours to submit only concise and clear questions that are reasonably required to assist in the formulation of valuation opinions. The Company shall use its best endeavours to answer each batch of Information Requests as soon as practicable and the interval between Information Requests shall be sufficient to afford the Company a reasonable opportunity to answer all or most of the previous batch of questions. Unless otherwise agreed, no Information Requests shall be submitted less than 21 days before the date fixed for the exchange of expert reports."

31. The aim of this direction is to signal the importance the Court places on the discovery and trial preparation processes being carried out in a proportionate manner in the present case.

Management Meetings: open or without prejudice?

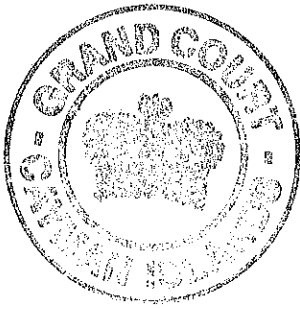


32. The practice in relation to management meetings in previous cases appears to be as follows. The parties have mostly agreed that management meetings should be open and that a transcript of the meeting should be prepared. In at least one case (*Shanda*) the way in which the transcript was deployed at trial was problematic, prompting Segal J to direct without prejudice meetings in two subsequent cases (*Trina* and *E-Commerce*). In the most recent case (*KongZhong*), Parker J has affirmed that open meetings are to be preferred.

33. The Company in the present case contended for “without prejudice” meetings based on previously notified questions (or topics) designed to assist the Dissenters’ Expert to find out informally about documents they had inspected. These meetings could be followed by formal questions designed to elicit answers which would be admissible in evidence. The Dissenters sought open meetings with the Company required to prepare a transcript and no rigid requirements for prior notice to be given of questions. Both approaches have been adopted by different judges of this Division of the Grand Court.

34. The Company relied on the approach of Segal J, noting that it was shaped by his experience as the trial judge in *Shanda*, a case where an open meeting and a transcript were deployed. In the subsequent cases of *Trina* and *E-Commerce* following contested hearings, he directed that without prejudice meetings take place. The Dissenters relied in particular on Parker J’s recent decision in *KhongZhong*, FSD No. 112 of 2017 (Judgment dated February 2, 2018) where he declined to follow Segal J’s approach:

“25. *I also take the view that the parties in this case should proceed on the basis that such a meeting is “open” so that the experts are entitled to refer to and rely upon any information obtained during the course of such meetings in helping them to prepare their reports, unless good arguments are advanced as to why that should not be the case. I note in passing that I am not following Segal J’s approach in Trina as to the status of discussions held at such meetings (i.e. that they should be held ‘without prejudice’ so that nothing said in the meeting is*



admissible as evidence unless the parties agree to waive the without prejudice privilege). I am of course not privy to the specific facts and circumstances which pertained in Trina.

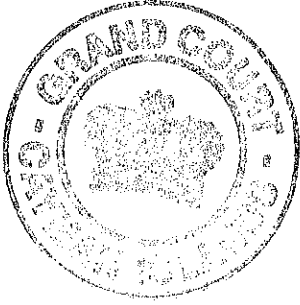
26. *It seems to me that it would be much more productive if the experts were able to rely on information obtained at such meetings. If in this case any party wishes to suggest that the experts should not rely on information obtained at these meetings for their reports (i.e. to the extent that they consider it relevant to the question of fair value) they may apply to the Court reasons as to why that should be so."*

35. The dominant principle which I extract from Parker J's quoted observations in *KongZhong* (where the Company filed no evidence and only advanced submissions in support of a "without prejudice" meeting) is the following. In each section 238 case where the parties are agreed that a management meeting should take place but disagree as to whether it should be 'open' or 'closed', the Court must determine what meeting rules will best further the practical function of the meetings. This requires an assessment of what practical function such meetings serve and what the evidence suggests will best further the economical and expeditious advancement of the present Petition.

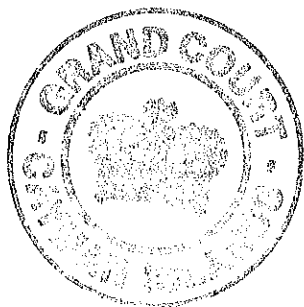
36. In the 'Company's Written Submissions', it was argued that:

"84. In Integra and in Shanda, transcripts of the management meetings were (with the tacit consent of the company in each case) effectively treated like the transcript of a deposition or Hague Convention examination. In fact, they are nothing like that: the examinee(s) is not under oath or produced at trial, the examiners are not attorneys, and there is no application of any of the rules which usually apply to the examination of witnesses for trials. The company's representatives are not re-examined and are unable to correct, clarify or expand on answers. How

important that is depends in part on the (perceived or actual) purpose of the management meeting.



85. *The proper purpose of a management meeting is, or should be, to assist in educating and informing the experts. It can be a useful part of an iterative valuation process. Documents (and particularly documents like financial models) may sometimes not be entirely self-explanatory and/or may lack context. It can be helpful for valuers to ask questions and have a discussion with management in real time about matters which have arisen during their forensic review. The Company appreciates that, and welcomes the opportunity to engage constructively with the experts.*
86. *However, the purpose of a management meeting is not to serve as a litigation tool or device. It ought not to function as a "trap" for management. That is not to suggest that experts would intentionally seek to use a meeting in this way. But expert valuers are not expert cross-examiners. They may ask questions which may not always be clearly put, or which proceed on an incorrect (or controversial) premise, or which are compound, or which are capable of misinterpretation by management and the attorneys present. The relevant documents may also not be brought to the attention of or put before the member of management answering the questions. Different persons, with varying degrees of knowledge and seniority, may be asked questions. Questions are often not structured in a way which would be required in a formal legal setting such as a cross examination, and there is no clearly established right to object. Sometimes management meetings involve more than one person (because different people at the Company may know about different areas) which confuses matters even further. The subject matter of these examinations, relating as it does to the operations of a complex and dynamic*

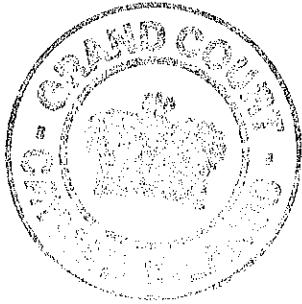


global business, can be complex. The management meetings may take place many months or years after the events in question, sometimes without the benefit of the relevant documents (which might or might not be put to the examinee, or possibly an incomplete set of relevant documents may be put to the examinee). Management are human; they cannot reasonably be expected to know everything off the top of their heads and have perfect recall of tens of thousands of documents. That problem is compounded if there is no binding requirement to provide a list of questions or even topics for the meeting. The result can be a free-wheeling, multi-party exchange between experts and company employees who in their quest to be helpful and conclude the meeting on time may not appreciate the need for precision or clarification. There is also no way of knowing the context of the expert's questions or whether and how it will be utilised in a report. With the best will and preparation in the world, this is a recipe for a meeting transcript which is evidentially unreliable, confusing and hard to follow. It may be the Dissenters are pressing for this approach in the hope of creating an ambush or a concession or some helpful sound bite from the kind of confusion that can often result. But that is not what these meetings should be for."

37. In the 'Skeleton Argument of the Appleby Dissenters', the following analysis was set out:

"46. The Dissenters and the Company agree that there should be a meeting between the Valuation Experts and the management of the Company in which matters relating to the assessment of fair value can be discussed. Since In re Integra Group (supra), such management meetings have become a common feature of section 238 proceedings, because they provide an efficient means for the valuation experts to obtain further information and assistance

from the relevant company's management properly to assess fair value.



47. *There is however a dispute as to the basis upon which the management meeting should be conducted in the present case. The Company proposes at [20] of its draft Order [Core/2a] that such a meeting should be subject to the following restrictions, amongst others:*

47.1. *Unless the Company agrees otherwise, the Management Meeting shall be conducted on a 'without prejudice' basis and no transcript shall be made of the meeting';*

47.2. *'Notes may be taken at the Management Meeting but no audio recordings are to be made'; and*

47.3. *'Nothing said at the Management Meeting may be referred to in the Experts' Reports, Joint Memorandum or Supplemental Reports (as defined in paragraphs 22, 24 and 25 respectively) unless the Company has subsequently confirmed it in writing after the meeting'.*

48. *The problem with these restrictions is that they would, if imposed, rob the management meeting of much of its value. The exercise upon which the Valuation Experts will be engaged is the production of expert evidence for the assistance of the Court in the determination of the fair value of the Company's shares, and the management meeting should be tailored to that end. Neither the experts nor the Court will be much assisted in that endeavour by the management meeting if the experts are unable to refer to what is disclosed in that meeting as part of their evidence. Moreover, holding the meeting on such terms could well place the*



experts into a difficult position, if they were precluded from referring the Court in their reports to information supplied at the meeting which they considered to be relevant to fair value, or explaining their reasoning in arriving at fair value if such reasoning involved reference to material disclosed at the meeting. That is not a position in which the experts should fairly be put. These difficulties were fairly identified by Mr Arboit at paragraph 6.16 of his Report..."

38. It was accordingly common ground that the function of management meetings in the context of section 238 petitions is to enable the valuation experts to obtain information about the merger company's business for the purposes of the experts' reports to this Court.
39. What evidence supplements the submissions of counsel on the "without prejudice"/open management meetings issue? The Company's evidence may be summarised as follows. The First Halder Affidavit primarily addressed the proposed approach to providing access to the Company's documents and the HSDs issue. The First Ryan Affidavit set out an expert view on why the Dissenters should be compelled to provide discovery (to enable the "undisturbed share price" to be assessed). The First Wong Affidavit (sworn by a Maples and Calder associate) explained the document review carried out by the Company to date and dealt with data room costs. In the Report exhibited to the First Arboit Affidavit, the Dissenters' expert avers (at 6.16):

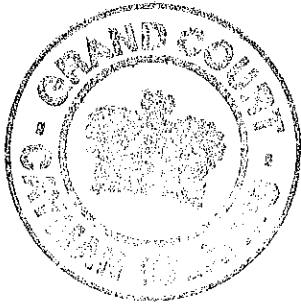
"The proposed terms (regarding restrictions on the gathering of information) have the potential to add confusion or frustration. There may realistically be instances where information shared on a without prejudice basis is not aligned with information shared on an open basis and to allow for the transcription provides documentary evidence of discussions that can aid both the expert and the Company"

40. The Second Ryan Affidavit joins issue with the Arboit Report's assertions in relation to the need for Dissenter discovery but does not address the management meeting issue at all. The Second Wong Affidavit avers that Mr Arboit's assertions about "*how management meetings ought to be conducted*" are "*in the nature of submissions and/or appear to fall beyond the scope of Mr Arboit's area of expertise*" paragraph 5). The Company has filed no evidence about the practical implications of the management meeting protocols it proposes, preferring to rely on legal submissions alone.

41. I find that having the Management Meeting recorded and a transcript prepared will clearly assist the experts in preparing their reports in a more efficient manner than being required to take manuscript notes. It is also in my judgment clear that the primary function of the Management Meeting, which it is agreed should take place, is to enable the experts to obtain information for use in preparing their reports. In my judgment it is wrong as a matter of legal principle, however, for a transcript of such a meeting to be used as a form of deposition in the absence of the legal protections present in the deposition process. Permitting a transcript to be used in such a fashion would undermine the informality which should prevail and would potentially stem the free flow of information from the management pseudo-witnesses. I am guided by the wisdom and experience of both Segal J and Parker J, and have sought to reconcile the apparently conflicting approaches they have adopted to this emergent issue.

42. Having regard to the evidence and the submissions on this issue, I find that the efficiency and productivity of the process for preparing expert reports will be enhanced by the following directions in relation to the disputed aspects of paragraph 20 of the Company's draft proposed Directions Order:

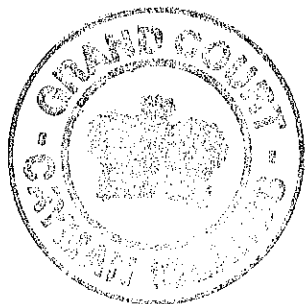
- (1) experts shall submit a list of questions and/or topics to the Company and ask follow-up questions only, unless the Company otherwise agrees (as set out in paragraph 20.1 of the Company's draft Order);



- (2) the Company shall record and prepare a transcript of the Management Meeting and the costs shall be shared (as set out in paragraph 12e-f of the Dissenters' draft Order);
- (3) save as provided in (4)-(5) below, neither the transcript nor any of its contents shall be admissible in evidence, unless otherwise agreed or directed by the Court;
- (4) the experts may use the information obtained at the Management Meeting for the purposes of preparing their reports;
- (5) if the Dissenters' Expert proposes to place reliance on any specific oral statements made on behalf of the Company in support of any express finding or conclusion, the Expert shall afford the Company a reasonable opportunity to clarify or comment upon the relevant statement, in writing, before the expert completes his or her final report.

Management Meetings

- 43. The Company wished only experts and local lawyers to be able to attend the Management Meeting. Mr Adkin QC argued that it would be appropriate for Dissenters to attend to give instructions. Mr Boulton QC argued that the right atmosphere would not be created if actual clients were to attend. I agree that, especially if the Meeting is not being held on a "closed" basis, a 'professionals only' attendance restriction is more likely to be conducive to a free flow of information.
- 44. The Company's Draft Order provided that a List of Questions shall be submitted to the Company within two weeks of the Company's response to the final Information Request and that the Management Meeting should take place 21 days after the List of Questions (paragraphs 20.1 – 20.2). The Dissenters' Draft Order proposed it should take place not later than 30 days before the Exchange of Reports and within 21 days of a request by the Expert (12a). It is in substance common ground that the Expert should request a meeting on 21 days' notice but disagreement as to whether the



Information Request process should end before or after the Management Meeting. On balance, it makes more sense to leave open the possibility of further Information Requests after the Management Meetings, and so I substantially adopt the Dissenters proposed directions as to the Meeting being held within 21 days of a request for the Meeting and not less than 35 days prior to the Exchange of Expert Reports, unless otherwise agreed. The 35 day period is of course a minimum and the parties should cooperate to agree adjustments to the timetable if more time is reasonably required.

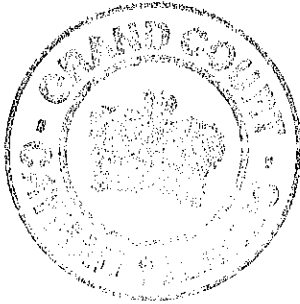
Other issues

Should there be Sales Process Experts in addition to Valuation Experts?

45. Mr Steinfeld QC made a valiant plea for a Sales Process Expert, indicating that his clients wished to instruct Mr Subramanian, an eminent Harvard professor with qualifications in both law and economics. Mr Boulton QC essentially argued that if the merger process needed to be addressed, it could be dealt with by the valuation expert. There was no precedent for such experts being used in section 238 cases. He also doubted whether such an area of expertise existed. Mr Isaacs QC for the Campbells Dissenters agreed with the Company that this additional expert evidence was not required.
46. Having regard to the Overriding Objective and the lack of consensus that the sales process issue is likely to be so central to the valuation exercise as to justify incurring the costs of an additional layer of expert evidence, I refuse the application for an extra expert to deal with this issue. I accept on the material before me that the structure of the Merger process may be an issue in controversy, but in my judgment it does not appear likely to be a substantial issue viewed in light of the case as a whole. This in no way precludes the Dissenters who wish to attack the Merger process as an incident of contending for a higher fair value doing so through their valuation expert.

Fact witnesses: leave to cross-examine

47. The parties disagreed as to whether leave to cross-examine should be granted now, or only after any factual evidence was filed in affidavit form. The Company submitted that the Grand Court Rules (1995 Revision) pointed to the latter option being the most apposite one. Mr Adkin QC in response argued that it was obvious that the parties would wish any fact evidence which was filed to be subject to cross-examination. Order 38 rule 2(3) provides:

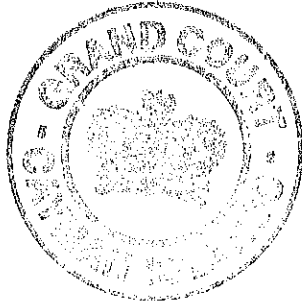


“(3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.”

48. The most straightforward and economical way of dealing with this issue is to grant general leave to cross-examine on any factual affidavits which may be filed and to require the parties to give reasonable notice before trial of which fact witnesses (if any) are actually required to attend. In the unlikely event that any presently unforeseen controversies arise in this regard, these can be resolved under the liberty to apply provision in the Directions Order. This does not exclude the possibility that it might be appropriate in other cases, less contentious and more costs-sensitive than the present one, to require a separate formal application for leave to cross-examine to be made or to defer deciding the issue until fact evidence has been filed. In all the circumstances of this case, it is difficult to imagine circumstances in which an application for leave to cross-examine in relation to materially contentious factual issues would be made and refused.

Timelines

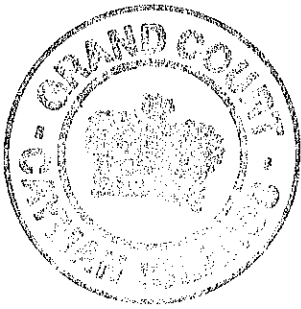
49. The Campbells Dissenters' counsel prepared a helpful table setting out the parties respective positions on various timelines, together with the timelines ordered in eight previous section 238 cases. The table shows in broad outline:



- a) the Dissenters in this case generally seek shorter timelines than the Company (the exception is the time for appointing experts, from the date of the Order on the Summons for Directions. The Company suggests 14 days and the Dissenters 21 days);
- b) the time proposed by both sides (ranging between 14 and 35 days) is within the range of what was directed in previous cases as regards the appointment of experts, the opening of the data room and the supply of "Batch 1" documents;
- c) the times proposed by the Company appear to be substantially longer than the longest time-limit in any previous cases as regards the following items:
 - i. the supply of Batch 2 documents,
 - ii. the filing of factual evidence,
 - iii. the exchange of experts' reports,
 - iv. the experts' meeting,
 - v. the completion of the Joint Memorandum,
 - vi. the Supplemental Report exchange.

50. Overall the Company is seeking a longer timetable and the Dissenters a shorter one. It is reasonable to infer that the Company may genuinely need more preparation time based on the scale of the present case and that the Dissenters may need less as they have three sets of legal teams who can (and should, as was done at the present hearing) focus on various aspects of case preparation without any one party having to deal fully with all issues. The Court clearly needs to strike a balance between setting the shortest timelines it can with the need to set realistic timelines rather than unworkable ones. It is common ground that the present case is more demanding in size than any previous case and that longer timelines than were ordered in previous cases are appropriate here. On the shorter time periods, the passage of time between the hearing and the date of this Ruling (seven days) will absorb significant portion of

the difference between the respective positions of the parties. It is reasonable to assume, all other things being equal, that a mid-point between the time-limit contended for by adversarial parties will likely be a fair one. Doing my best in the absence of any concrete evidential basis for what is an appropriate period in most instance, I Order as follows:



- (1) Experts should be appointed within 14 days of the date of the Order on this Summons for Directions (i.e. the "Date of Decision" on page 1 of this Ruling) (as proposed by the Company);
- (2) the Data Room should be opened within 21 days of the Order (as proposed by the Dissenters);
- (3) the Batch 1 documents should be uploaded within 21 days of the Order (as proposed by the Dissenters);
- (4) the Batch 2 documents should be uploaded within 77 days (roughly midway between the 28 days and 119 days proposed by either side. I accept the Company's submission, which is supported in general terms by the First Wong Affidavit, that Batch 1 is likely to contain the preponderance of the most relevant documents);
- (5) the factual evidence should be served and filed within 126 days of the Order (roughly midway between the 28 days and 227 days proposed by either side);
- (6) Expert Reports shall be exchanged within 225 days of the Order (roughly midway between the 178 days and 269 days proposed by either side);
- (7) the Experts Meeting shall be held within 242 days of the Order (roughly midway between the 192 days and 297 days proposed by either side);



- (8) the Joint Memorandum shall be prepared within 21 days following the Experts Meeting (midway between the 14 and 28 days contended for respectively); and
- (9) the Supplemental Report exchange shall take place within 28 days of the Joint Memorandum (nearer to the 21 days contended for by the Dissenters than the 42 days contended for by the Company).

Transcription Costs

51. I approve the Company's proposed direction for the costs of hearing transcripts to be equally shared as between the Company and the Dissenters.

Conclusion

52. I have attempted to deal with all issues in controversy (save for the Dissenter Disclosure Issue) at a 'fair clip' so that the final Order can be finalised as soon as possible and the trial preparations can proceed. I am grateful for the supplemental submissions made by counsel on issues which required clarification after the initial draft of this Ruling was circulated.

**HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT**

