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: **28 May 2018**

Draft Reasons Circulated: **28 May 2018**

Reasons Delivered: **1 June 2018**

HEADNOTE

Summons for Directions - section 238 of the Companies Law Petition –whether dissenting shareholders should be required to give discovery

(PARTIAL) RULING ON SUMMONS FOR DIRECTIONS

Introductory

1. Following the hearing of the Summons for Directions in this matter which concluded on February 27, 2018, it was agreed that I should reserve judgment on the controversial issue of dissenter discovery until the Cayman Islands Court of Appeal delivered its judgment on the same topic which was expected to be relatively soon. My Partial ruling on most of the controversial issues arising on the Summons for Directions, circulated on March 6, 2018, was delivered on March 19, 2018.

2. On April 10, 2018, the Court of Appeal delivered its eagerly awaited judgment in *Re Qunar Cayman Islands Ltd* (CICA No. 24 of 2017). In short, the main holding was that dissenters in section 238 cases should ordinarily be required to give discovery, the longstanding contrary practice in this jurisdiction notwithstanding.

3. On or about May 8, 2018, supplementary submissions were filed with the Court from the Company, the Mourant Dissenters and the Appleby Dissenters. The Campbells Dissenters elected not to lodge separate supplemental submissions and agreed with the submissions lodged on behalf of the Mourant Dissenters and the Appleby Dissenters.

The Company's submissions

4. On Day 1 of the February 2018 hearing, Lord Grabiner QC opened his oral submissions with the following distillation of the Company's position:

> *"First of all, as a matter of common sense, your Lordship may think that such evidence in the possession, custody or power of the dissenters would be welcomed by the court. It might not like the amount of it, but it would be welcomed by it, given the task that it has to perform. The task of the court is to determine the fair value of the dissenters ' shares and one would have thought that in an appropriate case evidence from the dissenters ought to be provided to the court as part of the exercise. It is a common sense proposition.*
>
> *Your Lordship will see, when we look at the Delaware cases -- there are two Delaware cases I'll show you -- the point is made that judges are not valuers, they are lawyers. They have to reach a conclusion on the evidence before*

them, from experts. Evidence from the dissenters would, or might improve the quality of the material available to the judge and would assist him in reaching his conclusion. Again, in my submission, this is a common sense proposition.

It is also the case that the Delaware experience is much more sophisticated than has been the case here, because they have been doing it for a lot longer and they are much more used to dealing with this problem. There you will see the cases make it perfectly clear that there is nothing special about an order for dissenters ' disclosure..." [1]

5. Counsel went on to submit that most of the local cases rejecting dissenter discovery provided no fully reasoned basis for declining to order discovery. However, he commended to the Court the flexible approach adopted by Jones J in *Re Integra Group Limited* where he spoke of considering "all the evidence that might be helpful" (at paragraph 21) and stated that "*The experts are the best judge of what information is or is not relevant for their purposes*" (at paragraph 11). A new argument the Company also wished to advance at trial was identified, namely that the "undisturbed share price" was the appropriate fair value measure. The Company believed that the Dissenters' own trading conduct shortly before the merger had disturbed that price.

6. In the Company's Supplementary submissions, it was submitted, *inter alia*:

> "3. *The Qunar decision could not be clearer in supporting the proposition that dissenter discovery ought to be ordered in s.238 proceedings. Moreover, the scope of the discovery sought by the Company in this case is materially the same as (indeed, is narrower than) the dissenter discovery ordered by the CICA in Qunar. The Qunar decision was unanimous, and is binding on this Honourable Court. The terms of Qunar are such that there is now no scope for the Dissenters bona fide to maintain their position that they are immune from discovery in these proceedings...*
>
> *10...it appears from recent correspondence that the Dissenters will argue that the Court of Appeal decision in Qunar does not provide any support for the categories of documents sought by the Company in this case. Any such contention is absurd in the light of the very significant overlap between the categories of documents sought by the Company and those ordered by the Court of Appeal in Qunar..."*

The Dissenters' Submissions

7. At the hearing of the Summons for Directions, the Dissenters broadly submitted that as a matter of principle based on previous local practice in relation to section 238 and

[1] Transcript, Day 1, pages

based upon the irrelevance of contrary authority from Delaware, no dissenter discovery should be ordered.

8. In the Supplemental Skeleton Argument of the Mourant Dissenters, it was argued, *inter alia*, that:

> *"12. It is accepted in light of the Qunar Judgment that discovery in s. 238 proceedings is no longer a one-way process. However, the Qunar Judgment does not 'open the floodgates' for dissenter discovery in s.238 proceedings. Crucially, the Court of Appeal did not cast doubt on the proposition that in most cases the vast majority of discovery in s.238 proceedings will inevitably come from the company (see paragraph 45). The categories of potentially relevant documents held by a dissenting shareholder will be very limited.*
>
> *13. Indeed, it is clear from Re Qunar that the Court of Appeal was concerned with only a very narrow request for dissenter discovery and, in significant part, its judgment focused on the relevance of one category of documents in particular, namely valuations in the hands of dissenting shareholders.*
>
> *14. To this end, it is submitted that the scope of dissenter discovery ordered by the Court of Appeal in Re Qunar is likely to be the extent of discovery that could be required of a dissenting shareholder in s.238 proceedings. Further, it is clear from Rix JA's judgment that the Court of Appeal relied heavily on the company's evidence before it to conclude that the scope of discovery sought was appropriate.1 The Court should therefore be slow to require a dissenting shareholder to disclose any category of documents unless there is well-reasoned and compelling (or "arguably highly persuasive" per the Qunar Judgment at [75] evidence justifying the relevance of the discovery sought to the question of fair value."*

Their response to the various categories of documents sought may be summarised as follows:

(a) **Trading history**: it was agreed that that a schedule setting out trading history should be supplied, but not that it should be verified on oath;

(b) **Documents relating to the decision to purchase**: this request is too broad and not supported by re Qunar or the evidence filed by the Company at the Directions Hearing;

(c) **Dissenters internal and external analyses**: an offer has been made to provide: ""*Each of our clients' valuation analysis, calculations and/or estimates of the fair value of the Company's Shares prepared and created by any of their directors, officers or employees between 13 January 2017*

and 21 August 2017". It is argued that the same date range should apply to all categories, and that no sufficient case has been made out by the Company seeking third party valuations or the dissenters' underlying models and documents from which the valuations were derived.

9. The Mourant Dissenters also seek 'HSD' protection for their own highly sensitive documents.

10. The Appleby Dissenters' Supplemental Submissions summarise the opposing positions on dissenter discovery as follows:

> "8. *By paragraph 7.3 of its draft Order the Company seeks a direction that each of the dissenters uploads to the electronic data room the categories of documents set out in Appendix 5 of its draft Order. Before turning to the terms of Appendix 5, it is worth noting that paragraph 7.3 of the Company's draft Order is not in terms limited to documents within a dissenter's possession, custody or control, although such a limitation might be thought to be implicit. Of much greater concern is the fact that the Company's draft Order does not exclude from the obligation to upload documents falling within the categories set out in Appendix 5 such of those documents as are privileged. It is quite plain that the dissenters cannot properly be required to produce privileged material to the Company, and such a proviso ought expressly to be included within any Order that is made.*
>
> *9. Appendix 5 of the Company's draft Order sets out the categories of documents which the Company contends should be produced by the Dissenters. Those categories are as follows:*
>
> *9.1. A Dissenter's trading information in connection with the Company's shares (or beneficial interests therein) from 13 January 2017 to the Valuation Date1 (including, without limitation, all documents which relate to the number of shares purchased, the date(s) of purchase and the purchase price);*
>
> *9.2. All documents relating to the Dissenter's decision(s) to purchase the shares, insofar as such purchases took place between 13 January 2017 and the Valuation Date; and*
>
> *9.3. The Dissenter's 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.*

10. The Appleby Dissenters contend that these categories cast the net far too wide. They have advanced a more sensibly limited counter-proposal and contend that the Dissenters should be required to produce the following material (save to the extent that it is privileged):

10.1. A schedule detailing the history of their respective trading in the Company's shares between 13 January 2017 and 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

10.2. Any valuation analyses, calculations and/or estimates of the fair value of the Company's Shares within their possession, custody or power which were prepared and/or created between 13 January 2017 and the Valuation Date (excluding any supporting models and documentation relied upon in deriving such analyses, calculations and/or estimates).

11. In addition, the Appleby Dissenters propose that the giving of disclosure by the Dissenters be subject to the Company and the Experts entering into NDAs in relation to such discovery in the same form as those at appendix 2 and 3 of the 6 March 2018 Order, and that a Highly Sensitive Document regime should be put in place in relation to the Dissenter Discovery in much the same way as has been imposed in relation to the Company's Discovery."

Re Qunar: principles relevant to the present case

11. The first principle which I extract from the Court of Appeal's decision in Qunar is that the normal presumption in favour of mutual discovery which applies generally in civil litigation also applies to section 238 petitions. Sir Bernard Rix JA began his analysis as follows:

"57. I approach this issue from the point of view that one sided disclosure on the central issue of a case (a fortiori where that issue is one of fair value and the Dissenting Shareholders are only shareholders in the first place because, as professional and sophisticated investors, they have taken a decision to invest in the Company whose value is in issue), is anomalous, unprecedented outside section 238 cases in the Cayman Islands, and prima

facie counter-intuitive, and therefore the argument in favour of such one-sided disclosure has to be considered with the greatest of care."

12. After explaining why he was assisted by the Delaware case of *Dole* and that jurisdiction's longstanding experience of fair value assessments, Rix JA (delivering the Court of Appeal's leading judgment) reached the following broad conclusions:

"74. In sum, dissenters live in the same world as companies whose fair value has to be assessed. Such companies may have internal information and projections which are not in the public domain, albeit in the case of a listed company like Qunar the room for such private information may be more limited than in the case of unlisted companies. In any event, no one disputes the relevance and potential importance of such companies' documents. It remains true, nevertheless, that value, and the market, is for the world, not only the companies concerned, and that often such companies may not understand the world in which they operate as well as outsiders understand it. But whether that is true or not, value depends on a multiplicity of factors, and methodologies, about which sophisticated analysts have different insights, and no one is more relevantly concerned with getting the research and analysis and those insights right than those who are thinking of investing in or have invested in a company. However, 'getting it right' is not the point at this stage of the proceedings. What is needed is for the Court, at the end of the day, to get it right, having been exposed to all the material and all the arguments.

75. In my judgment, it is unhealthy in such a context, and in litigation especially, to form a priori assumptions about relevance. The normal rule is that disclosure is a mutual obligation. Mutuality in this respect is equity and fairness. Of course some litigants may have more of what needs to be disclosed than other litigants. And it is always possible that the documents of one party will turn out to be of greater influence than those of the other

side. But I would need to be clearly persuaded that section 238 litigation is the unique field in which one-sided disclosure ought to be practised, and I would in principle regard that as a heavy task. Counsel have not suggested that there is one-sided disclosure in any other field. I am not persuaded of that extreme and unique position by repeated assertions that only the companies concerned, and not its sophisticated investors, have disclosure relevant to fair value. It seems to me that if dissenters have in their possession, as they are likely to do, documents, reports, analyses, projections and so on about companies in which they invest, their products, their industries, their markets, their competitors, in other words documentary material which relates to the value of such companies, then this material is as much a matter for disclosure as any such documents in the hands of the companies: and it matters not whether such material is possessed by the one side or the other, or is simply available as a matter of efficient research. In this context I find the evidence contained in Mr Reid's second affidavit, which merits repeated re-reading (see at para 18 above) highly persuasive. At any rate it is arguably highly persuasive, and that is all that is needed at this stage of the proceedings."

13. In essence, the Court of Appeal found that the usual relevance-based principles of discovery apply to documents in the possession, custody or power of the company and dissenters alike. This Court is bound by those findings as counsel sensibly agreed. The approach the Court adopted to specific aspects of discovery, while fact-specific, does to some extent provide a helpful guide as to what may or not be appropriate in the typical case.

Findings: appropriate scope of dissenter discovery

Trading history

14. I find that the Dissenters in the present case should give discovery of their trading history as requested by the Company by way of a Schedule as was approved by the Court of Appeal in Qunar. At this stage I need no justification for directing that the Schedule be verified by affidavit, unless the Company has a corresponding obligation

to verify its discovery which I have overlooked. As Sir Bernard Rix observed in relation to the broad issue of dissenter discovery: "*Mutuality in this respect is equity and fairness*" (paragraph 75). An Order substantially in the form proposed by the Appleby Dissenters and set out in paragraph 10.1 of their Supplemental Submissions is approved in substitution for paragraph 9.1 of the Company's draft Order.

Documents relating to the decision to purchase

15. It was at first blush somewhat difficult to discern what the main dispute between the Dissenters and the Company appears to be in relation to this category of documents. The Appleby Dissenters propose to omit the second category altogether. The Mourant Dissenters also object to being asked to explain the reasons for the trading history which will be explained in the Schedule provided under paragraph (a). They argue that the Schedule should suffice.

16. In my judgment the category (b) request should not be viewed as a request for information (which the Court of Appeal in *Qunar* refused to accede to: see paragraph 79[2]) but a request for the main supporting documentation evidencing the scheduled trades. Sir Bernard Rix approached the question of such supporting documentation in Qunar in the following practical way designed to achieve the overriding objective of efficiency:

> "*74...it is much simpler if the position is simply scheduled, as requested. If the schedule is challenged, the Dissenting Shareholders should stand ready to confirm it by documents.*"

17. I make a direction substantially in the following terms as regards category (b):

> "*All documents relating to the Dissenter's decision(s) to purchase the shares, Insofar as such purchases took place between 13 January 2017 and the Valuation Date, 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 above.*"

[2] It is not clear whether the relevant request was the same, but I am guided by the principle that documents and not information should properly be all that is sought.

Dissenters' internal and external analyses

18. The principal dispute in relation to this category appears to be whether or not the Dissenters should be required to disclose "*any supporting models and documentation relied upon in deriving such analyses, calculations and/or estimates*" in addition to "*internal or external valuation analyses, calculations and/or estimates of the value of the shares*", between January 13, 2017 and the valuation date. The Dissenters object in principle and because such disclosure was not contemplated by the Court of Appeal in *Qunar*. I agree that seeking the Dissenters' own supporting models is, at this juncture at least, a bridge too far. On the face of it, any models belonging to the Dissenters would be proprietary and give rise to the need to consider an HSD regime mirroring that approved in principle for the Company.

19. I accordingly approve a direction sought by the Company "excluding *any supporting models and documentation relied upon in deriving such analyses, calculations and/or estimates in respect of which the Dissenters assert proprietary rights*". I would not explicitly exclude all such supporting documentation as the Dissenters proposed as it seems plausible that some supporting documentation referenced in the documents to be disclosed in this category may be highly relevant and quite uncontroversial. The Dissenters' only legitimate objection is to being required to disclose proprietary material which is, on the face of it (and at this stage), not directly relevant to the fair value question. This direction does not preclude a future application for specific discovery should the Company deem it necessary.

HSD protection

20. The HSD regime approved for the Company was designed to protect commercially sensitive proprietary information peculiar to the Company's business which was clearly explained in its supporting evidence. The Dissenters' submissions fall short of establishing a cogent case for such extraordinary protections. Their concerns were understandable to the extent that discovery was sought in relation to their own financial models, but I have (for the time being, at any rate) declined to accede to this aspect of the Company's case. The application for blanket HSD protections mirroring those afforded to the Company is accordingly refused, without prejudice to the Dissenters' right to make a subsequent application supported by evidence should the need arise.

Conclusion

21. The Company's application for Dissenter discovery is accordingly granted to the extent set out above. If costs are not agreed (as occurred in respect of the balance of the Summons for Directions, with costs in the cause being agreed), the parties should file written submissions on the costs of this aspect of the Summons for Directions within 21 days.

HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

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