

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



CAUSE NO. FSD 14 OF 2016 (NSJ)

**IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)
AND IN THE MATTER OF SHANDA GAMES LIMITED**

OUTLINE NOTE OF RULING

I have, as indicated in my recent email, settled and prepared the form of order which I propose to make.

This is attached (in a clean version and a blackline showing changes made to the draft provided to me by Maples).

I would make the following comments.

1. This is a note briefly outlining the decisions I have made. I will in due course deliver a short judgment explaining my findings and reasons. I have provided this note on an expedited basis before my judgment is ready in order to assist the parties in view of their wish (expressed at the hearing) to maintain if at all possible the 7 November trial date and to progress rapidly the litigation progress. You will need to bear in mind therefore that the explanations I have provided are limited and not complete.
2. I do not consider it appropriate to make a debarring order at this stage.
3. Nor do I consider it appropriate to issue, or possible to craft in the present circumstances an acceptable form of, an unless order.
4. However:
 - (a) the Petitioner is, in my view, in breach of at least part of the orders dated 22 March and 19 May (together the **Orders**);



- (b). the Petitioner has failed properly to perform its disclosure obligations in material respects and properly to explain the action it has taken, and the reasons for failing to take the action required by the Orders;
- (c). the conditions set out in GCR O.62, r.4(11) are satisfied and it is appropriate to make orders for the payment of costs by the Petitioner on an indemnity basis;
- (d). even though I have not made an unless order on the present application, the Petitioner should be aware and can expect that further failures fully to discharge and perform its discovery obligations and to co-operate with the Dissenting Shareholders and Alvarez & Marsal (*A&M*) in ensuring that the parties' experts have sufficient documents and information to enable them to prepare their expert reports on a satisfactory basis will result in further sanctions in costs and possibly additional orders (which may involve the appointment by the court of its own expert with powers to take possession of the relevant documents and computers and exercise the Petitioner's rights against third parties who have relevant documents). Such further default could jeopardise the 7 November trial date and if the evidence demonstrates that the need to vacate the 7 November date and find a new trial date was the responsibility of the Petitioner, the wasted costs would be payable by the Petitioner;
- (e). *A&M* will have an important role in the further document production and discovery process to ensure that the process for collecting further documentation and searching the data base of documents is properly conducted. *A&M* will be required to provide further reports to the Court and the parties if *A&M* considers that the Petitioner has tampered with or destroyed documents on the eight computers that were not delivered up to *A&M* previously or that the Petitioner has failed to comply with its obligations to deliver computers, DVSs and documents and provide access to *A&M*. *A&M*'s further work will be at the expense of the Petitioner;
- (f). in order to ensure that preparation for the trial is on track and that further orders are not required I will require a pre-trial review – this should be after the experts have met but more than one month before the start of the trial. I have suggested 4 or 5 October.



5. I do not consider it appropriate to make an order requiring the Petitioner's Cayman counsel to attend the Petitioner's office in the People's Republic or to provide daily updates, as proposed in the draft order. However, I do consider that the Court has jurisdiction to make orders against the Petitioner's counsel and would remind Conyers of their duties with respect to the disclosure process, including the duty of supervision (see chapter 18 of Matthews and Malek). I do not rule out, depending on how the discovery exercise is conducted, the need and appropriateness of an investigation into how and whether these duties have been properly discharged.
6. I will, as noted above, order that the Petitioner be liable on an indemnity basis for the costs of the Dissenting Shareholders incurred in connection with the 6 June summons (as proposed in the draft order submitted to me) – and for three quarters of the Dissenting Shareholders' costs incurred in connection with the 24 June summons (the balance of the costs should be costs in the Petition to be dealt with at the trial – a provision to this effect will need to be added to the order).

I must record that I have found very troubling the Petitioner's failure to retain or maintain a proper written record and retain and have available at least the most important documents, its apparent failure actively to exercise its rights against third parties who must owe it an obligation to provide documents and information, its failure to locate (on a timely basis) potentially relevant documents and its failure properly to explain the steps it has taken and the reasons why it has been unable to locate documents or obtain co-operation from key third parties. Indeed, I had previously been asked to issue and did issue a letter of request to the Court in Hong Kong requesting that Court to make orders against the key advisers to the Petitioner's special committee and was informed by the Petitioner of the need for and importance of such relief. However, the Petitioner has failed to provide the Court with a proper update on the steps it has taken and I only found out during oral submissions at the hearing that the Petitioner has decided not to progress or make an application to the Hong Kong Court (at least for the time being).

7. The order I propose to make gives effect to the Petitioner's latest proposal and offer to take further steps with the assistance of A&M to provide further and better, and to remedy its deficient, discovery.
8. The order requires the Petitioner and the Dissenting Shareholders to amend A&M's engagement terms (with the consent of A&M) and then for the Petitioner to deliver to A&M



what A&M needs in order to be able (under the supervision of but with interference by the Petitioner) to facilitate a proper search and the identification of responsive documents (using word search terms provided by the Petitioner and the Dissenting Shareholders).

9. A&M needs to have access to:
 - (a). the 8 computers from which A&M have not yet been able to copy and image (“forensically acquire”) emails and electronic documents (see paragraph 1.7.12 of the A&M Report) – so they can make the copies and images;
 - (b). the electronically stored information derived from the 31 computers which have previously been delivered to A&M (see paragraph 1.7.13 of the A&M Report). If A&M need access to the relevant computers again they must have it;
 - (c). the Petitioner’s servers (on which further relevant emails and electronic documents may be located) – to include but not be limited to the Finance Network Share server (see paragraphs 1.7.8 and 3.3.1.6 of the A&M Report).
 - (d). the two DVDs (see paragraph 3.1.1.2 of the A&M Report)
10. While the Petitioner remains responsible for the discovery exercise and A&M when conducting the word searches required by it will operate under the supervision of the Petitioner, the copies and images of the relevant documents will be in A&M’s possession and the search process will be conducted by A&M. A&M will be acting as an expert appointed pursuant to the Court’s order and having, pursuant to the amended engagement letter, the Petitioner’s authority to act as required by the order. This will ensure that an expert is involved with the requisite authority and that there is a suitable degree of independent oversight of the process.
11. I would expect the Petitioner and A&M to be able to agree the time at, and manner in, which computers are to be delivered to A&M and when and how A&M is to be given access to the Petitioner’s servers. These servers should come offline at a time agreed by the Petitioner and A&M but absent such agreement they will need to come offline at a time and for a period reasonably designated by A&M (with a view to minimising the disruption to the Petitioner’s business).



12. A&M will have copies and images of the relevant documents taken from the computers, servers and DVS and be able to run word searches on this data base.
13. I do not consider that it is necessary or appropriate for A&M to be involved in a search of workflow system.
14. The key word search terms will be those provided by both the Petitioner and the Dissenting Shareholders – but they must be designed to identify the relevant documents (those covered by paragraph 1 of the 19 May order).

A&M will be able to ignore search terms which A&M consider to be too wide and which would be likely to produce a substantial number of documents other than those relevant documents or prevent the search being completed within the time period set out in the order.

15. The Petitioner must also provide proper responses to FTI.
16. As regards the timetable for the required action, I envisage that:
 - (a). all computers and DVDs that A&M need will be provided to them by, and that they will be given access to the servers from, 20 July;
 - (b). A&M will be given word search terms by 20 July;
 - (c). A&M will be able immediately (or rapidly) to commence their searching of the emails and documents already imaged;
 - (d). A&M will after 20 July progress and complete the imaging and forensic acquisition of the further computers (and, if required, the DVDs although these may be examined only to check that there are no additional documents on them);
 - (e). A&M will then subsequently conduct the word search on the further emails and documents once they have been imaged and forensically acquired;

- (f). A&M will be able to complete their searches and deliver documents identified by the searches to the Petitioner (and Conyers) within 2 weeks of 20 July, i.e. 3 August;
 - (g). the Petitioner will be able to complete its review of these documents and provide relevant documents to the Dissenting Shareholders and the experts (and to the data room) by 17 August;
 - (h). the Petitioner will have provided the responses to the questions raised by FTI on or before 29 July (but further discovery of documents requested by FTI by 17 August);
 - (i). the experts will be able to exchange reports by 7 September and meet on or before 16 September with their joint report by 30 September (14 days after the meeting) and supplemental reports limited to issues on which they disagree will be exchanged by 14 October (and lodged with the Court by 18 October);
 - (j). there would be a pre-trial review on 4 or 5 October (by video link).
17. The dates proposed are in square brackets and suggested only because I wish to give those involved in completing the necessary tasks the opportunity to indicate if they consider it to be impossible or impracticable to operate within the time periods and dates I have provisionally set. Accordingly, I would wish the parties and A&M to settle, consistently with the approach and principles I have established, a suitable timetable and to confirm their agreement to me or if agreement is not possible to provide me with written submissions setting out their position.



The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
15 July 2016