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: Mr Richard Boulton QC of counsel and Mr James Eldridge and Mr Malachi Sweetman, Maples and Calder, on behalf of Nord Anglia Education, Inc. ("**the Company**")

Mr Andrew Jackson, Appleby, on behalf of the Appleby Dissenters

Mr Guy Manning and Mr Hamid Khanbhai, Campbells, on behalf of the Campbells Dissenting Shareholders

Mr Robert Levy QC of counsel and Mr Christopher Harlowe, Mr Rocco Cecere and Ms Jessica Vickers, Mourant Ozannes, on behalf of the Mourant Dissenters

Before: **The Hon. Justice Kawaley**

Heard: **6 December 2018**

Draft Ruling Circulated: **17 December 2018**

Ruling Delivered: **21 December 2018**

HEADNOTE

Summons for Directions-section 238 of the Companies Law Petition –whether Company required to furnish Dissenters with electronic documents in native format-whether Company entitled to impose additional safeguards for confidentiality without directions from the Court and without express agreement of Dissenters

RULING

Introduction and Summary

1. The progress of the present Petition towards its intended destination has not been an entirely orderly and disciplined procession. Rather it has entailed a series of litigious dances, the literal or ritual significance of which the uninformed observer would probably find difficult to easily comprehend. Mr Robert Levy QC in opening the present application accused the Company of "weaponising" the access to the Data room process, while periodically himself hurling largely rhetorical forensic barbs at the Company and its advisers. In his reply, counsel sensibly conceded that whether or not there was a "dastardly plot" was beside the point. Mr Boulton QC invited the Court to bear in mind that the Dissenters' ranks included 'professional dissenters' seeking to profit from the section 238 regime while the Company's primary goal was to focus on its core business, running schools.

2. As a section 238 initiate, I found these exchanges were helpful in illustrating that a realistic case management approach to the present proceedings requires the Court to accept that sensible cooperation between the parties on procedural matters is an ideal which will only ever be incompletely achieved. The most powerful case management tool the Court is left with is the jurisdiction in relation to costs. In litigation where the parties find it difficult to cooperate in the pre-trial phase and there is a pronounced risk of interlocutory applications which are technically meritorious being deployed for collateral tactical purposes, the Court should be cautious about awarding the successful party their costs in any event.

3. The main Summons before the Court was filed by the Mourant Dissenters on October 25, 2018. It sought (a) to compel the Company to produce documents which were not Highly Sensitive Documents ("HSD") without any watermark to facilitate those inspecting them to have access to various functionalities, and (b) to extend the procedural timetable in the Directions Order as varied by the August 27, 2018 Consent Order. A supplementary Time Summons was also filed because the Dissenters wished to avoid being held to be in breach of the existing Directions Order.

4. By the date of the hearing the parties had sensibly agreed that the timetable should be extended. The Company's attorneys on November 28, 2018 had served a Notice of Draft Orders and Directions under GCR O.25 rule 7(1) which proposed:

(a) that the Mourant Dissenters' application for the documents uploaded to the Data Room to be capable of being downloaded in native format and with an ability to copy and paste from them, and further for the Company to be required on request to produce the documents without any watermark, should be refused;

(b) that the Mourant Dissenters' application for (i) the ability to print the documents to be enabled and for (ii) the inclusion of specified metadata fields, should be granted by consent;

(c) that the Mourant Dissenters' application to be able to view the documents in native and image format should be granted (i) as regards the Experts and the Dissenters' attorneys, (ii) in respect of such documents as they might reasonably request, and (iii) provided that a further confidentiality confirmation was signed in the form set out in Appendix 2 to the Notice;

(d) that the timetable should be modified in accordance with Appendix 3 to the Notice;

(e) that the Petition be fixed for trial on the first open date after September 2, 2019;

(f) that any further applications by Dissenters pursuant to s1782 of USC or any similar overseas third party discovery legislation should be made by December 20, 2018.

5. In my judgment it is obvious that the Mourant Dissenters' application has in part been motivated by a tactical desire to extend the timetable. Certain Dissenters are pursuing third party discovery in the United States under section 1782 of USC, a process the Company considers this Court should bring to an end. On the other hand it is also obvious that, although the Dissenters initially agreed that non-HSD documents could also be watermarked, the unforeseen technical consequences of the watermarking regime which was subsequently adopted by the Company created genuine difficulties in terms of the ability of those inspecting the documents, primarily the Dissenters' Expert team, to manipulate the electronic data as they would ordinarily do for the purposes of preparing their Report. Deloitte, who also manage the Dissenters' Data Room, acknowledged as much.

6. I accept the Company's submission that the Dissenters were unreasonably reluctant to accept even on a conditional basis the accommodations offered by the Company which

would have allowed the Expert team to progress the inspection process while dispute about wider access to the documents in native format was worked out. However I also accept the Mourant Dissenters' submission that the Company unreasonably sought, in effect, to blur the Court-approved lines between HSD and other documents, as far as access to non-HSD documents by the Dissenters themselves was concerned.

7. I accordingly dispose of the Mourant Dissenters' Summons and the Company's Order 25 rule 7 Notice on the following terms:

   (a) an Order is granted substantially in terms of paragraphs 2-3 of the Mourant Dissenters' Summons dated October 25, 2018;

   (b) unless otherwise agreed, the existing procedural timetable is modified on the terms set out in Appendix 3 to the Company's Order 25 rule 7 Notice;

   (c) the parties shall provide agreed dates and a time estimate by February 15, 2019 to enable the Court to fix by February 28, 2019 a trial date;

   (d) unless any party applies within 28 days to be heard as to costs, the costs of the Mourant Dissenters' Summons shall be the Dissenters' costs in the cause. Any discrete costs relating to the Company's Order 25 rule 7 Notice shall be in the cause.

The Directions Order

8. The Directions Order of March 6, 2018 governing disclosure by the Company provided for two broad access regimes to the Data Room:

   (a) (paragraph 7) "*access to the Experts, the Appointees, the Dissenters' Cayman Islands Attorneys…and the Dissenters, their employees, agents, representatives, advisors and consultants*";

   (b) (paragraph 11) "*access to the unredacted Highly Sensitive Documents restricted to the Experts, the Appointees as have been notified to the Company, and the Dissenters' Cayman attorneys*".

9. This dual regime was approved because I was persuaded that the Company's concerns about confidentiality were genuine and deserved both recognition and tangible protection. Attention at this juncture quite understandably did not focus on the technical minutiae of how documents would be uploaded to the Data Room. Nonetheless, the Company sought and obtained the Dissenters' agreement that both HSD and other documents could be 'watermarked' at an early stage. The Dissenters, astutely, agreed to this subject to the express condition that functionality would not be affected.

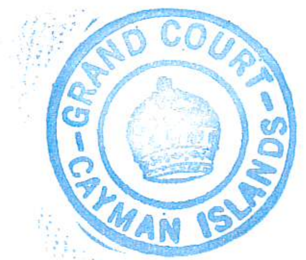
The Dissenters' complaints about the functionality of the Company's disclosure

The contending positions

10. The Mourant Dissenters' case on the non-functionality of the electronic documents made available for inspection was supported by two letters from Cornerstone Research (on behalf of the Dissenters' expert Professor Gompers and his support team) and two Affidavits sworn by Celia Hanna, an e-disclosure expert attached to LDM Global Ltd. John White of Deloitte deposed on behalf of the Company that his firm had been instructed by the Company to implement a watermarking system which would provide security and maximum functionality.

11. The basic system was "Relativity", which Cornerstone asserted normally provided access to documents in native format enabling inspecting parties to download and copy and paste. Cornerstone asserted in their first letter that the use of "Seclore" added security protections which were in their experience unprecedented even for highly sensitive documents. Ms Hanna, who has 18 years' experience, deposed that the watermarking deployed by the Company was unprecedented in its form and its adverse impact on the functionality of documents made available for inspection. She considered that the standard 'Relativity' platform must have been specially adapted with the result that the usual functionalities had been compromised. This evidence was largely unchallenged. Mr White of Deloitte (who also manage the Dissenters' Data Room) accepted that functionality was impaired, but explained that the Company had requested that documents be made available in "native format", an option which was feasible using "Seclore", and which would permit data to be exported into other secure documents. In effect, there were problems but they had been solved. Cornerstone Research in a second letter insisted that functionality was still problematic, for example it was only possible to copy and paste from a Seclore protected document into another Seclore protected document.

12. It was at the end of the day unclear precisely what issues had been resolved because it appeared (as the Company vigorously suggested) that the Mourant Dissenters had



encouraged the Dissenters' Expert team to focus more on supporting their present application rather than stretching every sinew to keep the inspection process show on the road. However, it was impossible to ignore the force of Mr Levy QC's submission that if the Company had wished to introduce what he characterised as a "bespoke" watermarking system, the proper way to proceed was on a consultative basis.

13. The Company's primary solution for any problems which had not been effectively addressed was to offer to provide documents to the Dissenters' Expert team (and Cayman attorneys) in native format, with the degree of functionality which would ordinarily apply, but on the condition that the Dissenters themselves would not have access to any documents in 'uncensored' form. To protect the Dissenters' Expert from being compelled to disclose the native form documents to the Dissenters, an additional non-disclosure letter was offered for him to sign. I should add that I understand the functionality complaints which were made applied to both HSD and non-HSD documents. The main difference was that as regards the former category, it was common ground that a limited range of users were eligible to inspect non-redacted versions of the HSDs under the terms of the Directions Order.

14. The Company's attempts to limit the range of users entitled to inspect non-HSD documents in unprotected form appeared to me to be more than 'mission creep'; it was 'mission leap' on a grand scale. The Company was effectively asserting the right to unilaterally create an expanded HSD regime which would all but extinguish altogether the distinctions created by the Directions Order between HSD and non-HSD documents. The most fundamental of those distinctions was that access to HSDs was limited to Experts and Cayman attorneys (which as defined included leading counsel). The Court's earlier acknowledgement of the Company's strong concerns about HSDs was expressed by way of conferring special protections in relation to a narrow range of documents while permitting standard access to the majority. The Directions Order did not authorise the Company to impose further protections over and above what Mr Levy QC described as "*triple-lock*" protections:

(1) the implied undertaking of confidentiality;

(2) the non-disclosure agreements; and

(3) the HSD regime.

15. I have considerable sympathy for the Company and its advisors and appreciate the pressures to which they are subjected in having to deal with what may well feel to them

like being hounded by a 'hungry pack' of Dissenters, whose commercial interests appear to lie in making the present proceedings as difficult for the Company as possible. However, section 238 of the Companies Law is designed to ensure due process for both majority shareholders implementing mergers and dissenting minority shareholders as well. Maintaining the integrity of this statutory process requires the Court (and the parties) to navigate a potentially treacherous course, often through largely uncharted waters. The Dissenters in the context of the present application nonetheless have principle firmly on their side as regards the following key issues:

(a) the Directions Order was made after a fully contested hearing on the confidentiality issue, and some cogent justification is required for the Court to reopen the confidentiality issue;

(b) the parties have not agreed that the Dissenters should have to justify access to unprotected non-HSDs or that "clients" should be deprived of access to such documents;

(c) it is admittedly technically possible for the Company to make non-HSDs available in native format and there is no suggestion that this will entail any disproportionate expense.

16. The Company advanced no formal case for varying the Directions Order to impose new confidentiality protections based on recently discovered facts. The large number of Dissenters and the fact that they included competitors of the Company were matters relied upon as a basis for establishing the HSD regime. To my mind, the only new development capable of justifying added security protections for non-HSDs was the post-Directions Order informal conditional agreement (by attorneys for one group of Dissenters) that watermarking was acceptable in principle. In its Written Submissions, the Company complained that, having initially agreed to watermarking, "*the Dissenters now seek the radical step of simply dispensing with watermarking altogether*" (paragraph 31). However the agreement by way of correspondence to watermarking was always conditional upon functionality not being compromised, and the Dissenters are merely seeking to enforce the status quo under the Directions Order. The bare submission that the Order sought by the Mourant Dissenters was inconsistent with paragraphs 5-7 of the Directions Order was not substantiated, save to the extent that the wording of paragraphs 2-3 of the Summons (set out below) may be viewed as modifying the HSD regime.

17. However, the following points of principle were also advanced:

> "*22. Watermarking is an important aspect of the confidentiality regime and is especially critical here given the number and nature of Dissenters accessing the Data Room. Watermarking serves two primary (related) purposes. Firstly it is a powerful psychological deterrent, and it further ensures that recipients of documents are mindful of their confidentiality obligations when viewing, accessing or disseminating the documents; and, secondly, watermarking ensures that in in the event that a document is disseminated contrary to the confidentiality regime under which the document was provided, whether inadvertently or deliberately, the source of the breach of confidentiality can be traced...*
>
> *30. The functionality provided by relativity, the functionality provided by Seclore, and the offer of access to such unwatermarked native documents as the Experts might reasonably require on the provision of a confirmation in the specified form) has provided all the Data Room functionality an Expert could reasonably require, taking into account the need for confidentiality of the Company's documentation...*
>
> *32. There is a balance to be struck between functionality and confidentiality, and this is a balance which the Company has tried to strike in the manner in which it has provided access to its Data Room, along with the other proposals outlined above....*"

18. As regards the principle of watermarking, the Dissenters relied heavily on the unchallenged 'expert' evidence of Celia Hanna that the form of 'watermarking' deployed by the Company in this case goes beyond what she is accustomed to in e-discovery, which is a static branding with a Bates number and occasionally the word "confidential". The system deployed by the Company displays the User's name, email address and date and time that they opened the document: '*Written Outline Submissions of the Appleby Dissenters*', paragraphs 23-24.

19. The Mourant Dissenters relied, *inter alia*, on legal authority supporting the general principle that discover should ordinarily be given of electronic documents in native format, including: the English CPR Practice Direction 31B; Matthews & Malek '*Disclosure*', 5th edition, paragraph 9.29; *Al Nehayan-v-Kent* [2017] EWHC 1347 (Ch) (paragraph 9); *Imperial Chemical Industries Ltd.-v- Merit Merrell Technology Ltd.*

[2018] EWHC 1577 (TCC) (paragraphs 153(4), 157 and 158-159); *Deutsche Bank AG-v-Chang Tse Wen* [2010] SGHC 125; *Re Qihoo*, FSD 129 of 2016 (IMJ), unported, judgment dated July 27, 2017, Mangatal J (paragraphs 105-106). The Company did not provide any basis for rejecting the general principle that discovery ought ordinarily to be given through making available electronic documents in native format.

Findings

20. In my judgment it is clear that there is a starting presumption in favour of the provision of documents in their native format and, in the present section 238 context, it was incumbent on the Company to justify a departure from this general rule. It is important for the governing principles not to be clouded by the peculiar circumstances of the present case. The Company, vexed by an apparently unusually large number of potential Data Room Users and (in my view) genuinely anxious about confidentiality concerns, sought to introduce additional security protections for non-HSDs which it considered would be uncontroversial. Having created a 'bespoke' e-discovery system, the Company's central preoccupation by the time the present application was heard had in my judgment by default become an essentially defensive one. The Company sought to justify its system by reference to logistical arguments untethered to any discernible legal principle.

21. I find the Company has failed to make out a case for providing only the limited class of Users entitled to view unredacted versions of HSDs with native format documents, because providing documents in such a format forms part of the Company's basic discovery obligations. It was not for the Dissenters to demonstrate any practical need for production in this form.

22. The Company has, nonetheless, established that the watermarking of native format non-HSDs (as described in the First Hanna Affidavit at paragraph 31), is justified in the unique circumstances of the present case. Although the matter should ideally have been addressed at the hearing of the Summons for Directions, the Dissenters cannot (and did not in correspondence before the present Summons was issued) object to the principle of watermarking. This assumes that 'watermarking' takes the form of an unobtrusive added layer of protection which will help to prevent accidental or intentional breaches of confidence. Indeed, the evidence of the Dissenters' own 'expert' in my judgment supports the view that static watermarking by way of a Bates number is standard e-discovery practice, and that the word 'confidential' has also been added under direction of the courts.

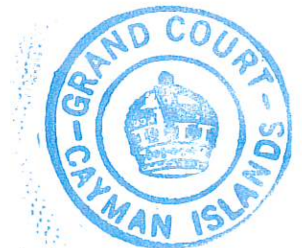
23. The Mourant Dissenters' Summons sought the following directions in this regard:

> "*1. That the Company provide proper discovery and inspection of all documents ordered by order of the Court to dated 6 March 2018 (the Directions Order) to be uploaded to the Data room to the Experts, the Appointees, the Dissenters' Cayman Islands attorneys and the Dissenters, their employees, agents, representatives, advisors and consultants (collectively, the Users) in accordance with paragraphs 2 and 3 below.*
>
> *2. Within three days of the date of this order, the Company shall provide the Users with the Documents in the Data Room hosted on the e-discovery platform, Relativity without any enhanced 'watermarking' or other document security measures applied, other than a static branding on Highly Sensitive Documents in the top right hand corner that states 'Highly Sensitive Documents' and enabling ready access to the following functionalities within Relativity:*
>
> *a. an ability to download or save the documents from Relativity to the User's own computer in a native format;*
> *b. an ability to print the documents;*
> *c. an ability to copy material from a document and paste it into another document outside of Relativity;*
> *d. an ability to view the documents in native format and image format; and*
> *e. the following metadata fields, where reasonably available: hash value, date created, date last modified, date last accessed, to, from, CC, BCC, Custodian, Author, Date Sent, Time Sent, Date Received, Time Received, File Size.*
>
> *3. The Company shall, within 3 business days of a written request from or on behalf of a User, provide the User with a hard drive or file transfer protocol (FTP) link giving the Users ready access to the Documents in their native format along with an associated load file with the associated User's work product, including all tags and coding currently associated with the Documents. The Documents shall be provided without any enhanced 'watermarking' or other document security measures applied, other than a static branding on Highly Sensitive Documents in the top right hand corner that states 'Highly Sensitive Documents'...*"

24. Paragraph 1 is in my judgment merely declaratory of the principle contended for and is not required to be embodied in a directions order. Paragraphs 2 and 3 should in my

judgment be expressed to be entirely without prejudice to the HSD regime under the Directions Order, as there is no suggestion that the Company is dissatisfied with the protections afforded by that regime (critically, redactions combined with limited access to HSDs). As presently drafted, paragraphs 2 and 3 could (perhaps implausibly) be read as overriding the redaction provisions of paragraph 11 of the Directions Order, which permits the posting of redacted versions of HSDs. I would accordingly give directions in terms of paragraphs 2 and 3 of the Summons modified as follows:

> "1. Without prejudice to the provisions of the Directions Order dated March 6, 2018 relating to Highly Sensitive Documents, *within three days of the date of this order, the Company shall provide the Users with the Documents in the Data Room hosted on the e-discovery platform, Relativity without any enhanced 'watermarking' or other document security measures applied, other than a static branding on Documents consisting of a Bates number and/or the word 'Confidential' in a corner of each Document and enabling ready access to the following functionalities within Relativity:*
>
> *a. an ability to download or save the documents from Relativity to the User's own computer in a native format;*
> *b. an ability to print the documents;*
> *c. an ability to copy material from a document and paste it into another document outside of Relativity;*
> *d. an ability to view the documents in native format and image format; and*
> *e. the following metadata fields, where reasonably available: hash value, date created, date last modified, date last accessed, to, from, CC, BCC, Custodian, Author, Date Sent, Time Sent, Date Received, Time Received, File Size.*"
>
> 2. Without prejudice to the provisions of the Directions Order dated March 6, 2018 relating to Highly Sensitive Documents, *the Company shall, within 3 business days of a written request from or on behalf of a User, provide the User with a hard drive or file transfer protocol (FTP) link giving the Users ready access to the Documents in their native format along with an associated load file with the associated User's work product, including all tags and coding currently associated with the Documents. The Documents shall be provided without any enhanced 'watermarking' or other document security measures applied, other than a static branding on Documents consisting of a Bates number and/or the word 'Confidential' in a corner of each Document.*"



The Timetable

25. If the substantive relief sought in respect of inspection was granted, the Mourant Dissenters and the Appleby Dissenters were content to agree with the Company's proposed revised timetable as set out in Appendix 3 to the Company's Order 25 rule 7(1) Order. Having substantially granted that relief, with modifications which can have no discernible impact on the timetable, the Company's proposed new timetable is adopted and approved.

26. The Company invited the Court to fix a trial date to focus trial preparations. The Appleby Dissenters felt that doing this was premature in light of the delays to the discovery process. In my judgment the appropriate time for the parties to identify convenient dates and properly estimate the length of the hearing is after fact evidence has been exchanged. This is now to occur on January 24, 2019. By that date at the latest, the parties will know who their opponents' fact witnesses are and be able to begin to sensibly address length of trial estimates. The time required for the experts (even if the areas of potential agreement are not yet known) should be capable of rough and ready approximation based on the legal teams' experience of past cases and grasp of the issues in controversy in the present case. I would accordingly make the following further direction based on paragraph 5 of the Company's Order 25 rule 7(1) Notice:

> "3. The parties shall no later than January 31, 2019 exchange convenient trial dates and length of trial estimates and seek to agree both dates and the estimated length of hearing. The parties shall no later than February 15, 2019 forward agreed or competing trial dates and length of hearing estimates to the Court. The Court shall on or before February 28, 2019 fix a trial date."

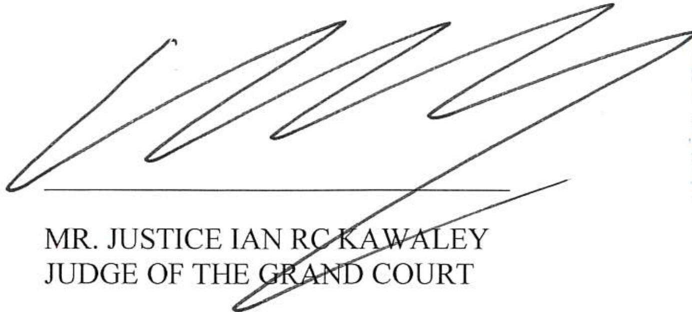
27. As I indicated in the course of the hearing, I do not consider it appropriate to make an order restraining the Dissenters from making third party discovery applications abroad after December 20, 2018 without a formal application supported by evidence. However, just as the extra confidentiality protections for non-HSD documents were unilaterally implemented by the Company without informed consent or Court approval, so the Dissenters have embarked on a frolic of their own by seeking relief from foreign courts, purportedly in aid of the present proceedings, without any involvement on the part of this Court. The pursuit of such foreign ancillary relief should have been integrated into the timetable set by this Court for the present proceedings. Against this background the Dissenters will not easily be able to persuade this Court to grant them further indulgences in relation to the timetable of the present proceedings based on any pending foreign proceedings.

Costs

28. The Mourant Dissenters have achieved substantial success on their firmly contested Summons, but exploited the fortuitous functionality problems thrown up by the Company's improvisational approach to e-discovery to obtain tactical benefits through extending the duration of the inspection process. I do not think the Dissenters should be awarded their costs in any event.

29. The option of accepting the offer to provide experts only with access to documents in native format could have been accepted without prejudice to the pursuit of the present application as a matter of principle. Not only would the trial preparations have been further advanced (it is, after all, primarily for the Experts to carry out the inspection process). The scope of argument could have been narrowed so as to focus not on the functionality issues, but on the principles and practice governing e-discovery. Unless any party applies within 28 days by letter to the Registrar to be heard as to costs, the costs of this Summons shall be the Dissenters' costs in the cause.

30. The separate costs relating to those portions of the Company's Notice which did not relate to the inspection controversy are probably *de minimis*. Some of the relief was agreed (the timetable), some of the relief was refused (the section 1752 applications) and some relief was substantially granted (fixing a trial date). However those were quintessentially pre-trial general case management issues. Unless any party applies within 28 days by letter to the Registrar to be heard as to those costs, those costs shall be in the cause.



MR. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT