

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

Cause No.: FSD 129 of 2016 (IMJ)

IN THE MATTER OF PART XVI OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF QIHOO 360 TECHNOLOGY CO. LTD

DEALT WITH BY WAY OF WRITTEN SUBMISSIONS RECEIVED SEPTEMBER 2017

On behalf of the

Dissenting Shareholders/Applicants: Mr. R Levy QC, instructed by Mr. R Bell and Mr. P McConvey of Walkers

On behalf of the Company/

Respondents: Mr. R Millett QC, instructed by Mr. P Madden and Mr. D Vekaria of Harneys

Before: The Hon. Justice Ingrid Mangatal

Judgment

Delivered: 18 October 2017

HEADNOTE

Section 238 Proceedings – Application for Discovery - Costs



JUDGMENT ON COSTS

The Dissenters Submissions on Costs

1. Submissions were filed on behalf of Maso Capital Investments Limited, Blackwell Partners LLC – Series A and Crown Managed Accounts SPC acting for and on behalf of Crown/Maso Segregated Portfolio (together the “**Dissenters**”) following the determination of their Summons dated 3 March 2017 (the “**Summons**”) seeking orders for, inter alia, the discovery of documents and for the appointment of an independent forensic expert to conduct an audit of the Company’s information technology systems.

2. In my Judgment dated 27 July 2017 (the “**Judgment**”), I made orders which may be summarised as follows:

- a) An order for preservation of electronic devices and data;
- b) An order for specific discovery of two categories of documents, including emails from Skadden, Arps in native format;
- c) An order for service of a verified list of documents, and
- d) The appointment of an expert to conduct a search of the Company’s IT systems and electronic devices for documents containing certain key words.



3. I determined that the Dissenters should recover a “*major portion*” of their costs of the application on the standard basis, and I indicated in my Judgment that the parties should attempt to agree costs on that basis.

4. In support of their submissions, Mr. Levy QC on behalf of the Dissenters argues that they have acted reasonably in prosecuting the Summons, because the Company’s discovery in the proceedings has been inadequate. He submits that in the Judgment the Court agreed with their argument that the Company’s approach was an “*inconsistent and cavalier approach to discovery resulting in insufficient discovery under previous orders*”. I held that the Court had the inherent jurisdiction to order discovery to be carried out by a forensic expert in exceptional circumstances and that this case was an exceptional case, such that a forensic expert should be appointed.

5. Mr. Levy QC also argues that the Company was given ample opportunity to provide discovery in the terms that were agreed in the Consent Order made 25 October 2016, and amended by order dated 21 December 2016. However, the Company repeatedly failed to do so, notwithstanding the urging of the Dissenters. Learned Queen’s Counsel submits that instead, the Company chose to contest the Summons, filing verifying affidavits in which he points out, (referring to my judgment at paragraph 92), that the affidavits “*would not be conclusive if there has been an insufficiency of discovery*”.

6. At paragraph 117 of my Judgment, the parties were invited to agree the costs, failing which the parties should file brief written submissions for my consideration.
7. In accordance with the Court's direction that the parties attempt to agree costs, the Dissenters made a proposal to the Company whereby the Company would pay 85% of the Dissenters' Costs to be taxed on the standard basis if not agreed. This proposal to the Company's attorneys along with various pieces of follow-up correspondence the Dissenters say have gone unanswered.
8. When considering the principles surrounding the issue of costs, the Dissenters invite me to consider the following, amongst other matters:
 - a) On any measure, the Dissenters were successful on their Summons. The discovery provided by the company was held by the Court to be insufficient and the process in itself incomplete and ineffective;
 - b) The Dissenters have obtained orders for:
 - i. specific discovery of two categories of documents sought;
 - ii. a List of Documents to be provided and verified with respect of all documents that relate in any way to the determination of fair value by the Court, and
 - iii. a process by which an independent forensic expert will be appointed and required to ensure that the Company does discover all documents containing certain key words (to include by not limited to the documents in Schedule A).
 - c) Walkers on behalf of the Dissenters wrote to Harneys who represent the Company, a letter marked 'Without Prejudice save as to Costs' dated 9 May 2017. In this letter the Dissenters proposed a consensual approach that would resolve the Summons without the need for a hearing. Pursuant to this proposal, the Company





would not have had to prepare and verify a List of Documents, and the process by which the Company would give discovery of the categories of documents sought would be by the appointment of the independent forensic expert. This would have resulted in subsequent upload after review of the result of the search by Harneys;

- d) The process put in place by the Court will result in the documents sought by the Dissenters being searched for, and, if they exist, then discovered by the Company which is exactly what the Dissenters asked for in the letter. The only difference in the Court's Order Mr. Levy submits, is that the Company is not asked to give specific discovery of all documents sought, given that the Company says that those documents do not exist. This may or may not be the case, and that task is therefore left to the independent forensic expert. The Company would still be asked to prepare and verify a List of Documents. Accordingly, the hearing of the summons would have been unnecessary if the Company had agreed to the proposed consensual approach in Walkers' letter.
- e) The guidance I gave in the Judgment on the issue of Costs was without the benefit of review this 'Without Prejudice Save as to Costs' letter, and Mr. Levy submits that in light of the offer now being brought to my attention, I might properly consider awarding all of the Dissenters Costs on the indemnity basis or alternatively a greater proportion than I might initially have had in mind, if not all costs.

9. The general rule in the Cayman Islands that costs should follow the event has been reinforced on numerous occasions by both the Grand Court and the Court of Appeal.

The Company's Submissions of Costs

10. On behalf of the Company, Harneys submit that notwithstanding the wide-ranging categories of specific discovery sought at paragraph 2 of the Dissenters' Summons, the Court directed at paragraph 116(a) of the Judgment that "*in paragraph 2, the specific discovery order is only made in respect of the JP Morgan correspondence discussed*

above and the Skadden emails in their native format..” They submit that the result is that the Dissenters succeeded in obtaining specific discovery in relation to only two out of the 42 categories of documents listed in the Dissenters’ Summons.

11. Further, Harneys refer to the view expressed by me at paragraph 117 of the Judgment that *“the Dissenters have largely succeeded on their application and are entitled to a major portion of their costs of the application on a standard basis...”* submitting that this does not take account of the real result. A proportionate costs order they submit, would have reflected the Dissenter’ limited success on the Summons.

Decision

12. Having reflected upon the issues, in my judgment it is appropriate to award costs following the event, and in favour of the Dissenters. However, in so far as a significant portion of hearing time was taken up with the Dissenters’ application for specific discovery, and discussing the related principles, and upon which they had limited success, the Dissenters should be deprived of 20% of their costs.
23. My Order is therefore 80% of Costs of the application are awarded in favour of the Dissenters, on the standard basis, to be taxed if not agreed.



THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT

