**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**FINANCIAL SERVICES DIVISION**

**CAUSE NO. FSD 227 OF 2017 (IKJ)**

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

**AND IN THE MATTER OF XIAODU LIFE TECHNOLOGY LTD**

**IN CHAMBERS**

**Appearances:**

Mr Mac Imrie and Mr Malachi Sweetman of Maples and Calder on behalf of Xiaodu Life Technology Ltd ("the Company")

Mr Paul Girolami QC and Mr Shaun Maloney of Ogier on behalf of Waterwood 020 Project Limited

**Before:** **The Hon. Justice Kawaley**

**Heard:** **2 March 2018**

**Date of Decision:** **19 March 2018**

**Ruling Circulated:** **19 March 2018**

**Ruling Delivered:** **26 March 2018**

## HEADNOTE

*Summons for Directions- section 238 of the Companies Law Petition-determination of fair value of shares- scope of discovery by company- whether content and timing of information requests should be prescribed by the Court- whether management meetings should be open or "without prejudice"*

### Introductory

1. The Petition in this matter seeks the determination of the fair value of the shares of one dissenting shareholder whose shares have been acquired pursuant to a merger, Waterwood 020 Project Limited ("Waterwood"). At the end of the hearing I gave directions on certain matters (including the consolidation of the overlapping proceedings commenced by Waterwood with the present action) but reserved judgment on other issues which I felt unable to resolve at that point. These issues all



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overlapped with similar points on which I had reserved judgment earlier in the week in the *Nord Anglia Education* case mentioned below.

The present Ruling does not deal with the issue of dissenter discovery, because it was agreed that it would be prudent to await the Cayman Islands Court of Appeal judgment in *Qunar* which is expected (a) to lay down guidance on this topic, and (b) to be delivered later this month. I accordingly direct that the parties be at liberty to submit supplementary skeleton arguments on dissenter discovery 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.

2. At the beginning of the week in which the present Summons for Directions was heard, there was a two day hearing before me of the Summons for Directions in relation to another section 238 Petition case, FSD 235 of 2017(IKJ), *In the Matter of Nord Anglia Education, Inc.* In addition to the dissenter discovery issue, similar arguments were also advanced in that case to the following issues which were disputed in the present matter which are addressed in this Partial Ruling, in particular:

   (a) the scope of the Company's discovery and the use of keyword searches.

   (b) whether the number of Information Requests should be limited;

   (c) the number and conduct of Management Meetings, including whether they should be open or "without prejudice";

**Governing principle**

3. So far as is appropriate, I propose to adopt the same general approach to these issues as I adopted in my recently delivered (Partial) Ruling in *Re Nord Anglia Education, Inc, 235 of 2017 (IKJ)* (March 19, 2018). I am guided by the Overriding Objective and, in particular, ensuring that these proceedings are conducted in an expeditious and economical manner. In addition, as I observed in that case:

> *"9... 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."*

**The scope of discovery**

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4. There was a somewhat narrow dispute as to what categories of documents should be disclosed and as to the appropriateness of using keyword electronic searches.

5. Appendix 2 to the draft Order (documents to be disclosed by the Company) was substantially agreed by the end of the hearing. The date range of documents to be disclosed was not agreed. The Company proposed: "*Documents created between on or after the date of the Company's incorporation and the date of the EGM*". Mr Girolami QC rightly argued that documents outside of this date range might be relevant; Mr Imrie fairly conceded that this wording would not preclude the Experts from asking for relevant documents falling outside of this date range. In light of this concession, it is clearly sensible to limit the Company's primary discovery obligations to documents created during the time period most relevant to the fair value question.

6. I approve the Company's form of proposed Order permitting it to carry out keyword searches of all its documents to identify potentially relevant documents beyond those initially identified and uploaded to the Data Room. Such searches will only be tools used to identify potentially relevant, but likely only marginally relevant documents, in a proportionate manner. Authorising the use of such tools in no way dilutes the general discovery obligations of the Company in relation to all documents relevant to the fair value question which this Court has to decide.

7. Waterwood proposed amending paragraph i. of Appendix 2, which required disclosure of "*documents provided to or obtained from any financial adviser in relation to such valuation*". The Company seemingly objected to adding an express reference to any documents passing between such financial advisers and Rajax Holding (the company which acquired the Company's operations through the merger) on the grounds that there was no evidential basis for believing that the Company had such documents in their possession. In my judgment the only valid objection to this additional wording would have been that such documents would not have been relevant. Either the Company can or cannot disclose such documents. I accordingly approve the additional wording proposed by Waterwood.

8. For the avoidance of doubt I make no ruling at this stage on the question of whether or not the value of Rajax Holding has any bearing on the fair value of the Company's shares at the relevant time.

**Information Requests**

9. The Company's draft Order provided as follows:

   (a) the first Information Request may be made once documents have been uploaded to the Data Room;

   (b) the Company should provide answers to written Requests within 21 days;



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(c) after an initial batch limited to 50 questions, subsequent Requests should be limited to 30 questions at intervals of not less than 14 days;

(d) Requests for material post-dating the EGM could only be made if the Experts demonstrated the information was reasonably required for their valuation opinion;

(e) The last Information Request shall be made 84 days after the uploading of documents.

10. In the 'Skeleton Argument on Behalf of Waterwood', the following response was made to these proposals:

> *"25. Waterwood says that no such restrictions are necessary or appropriate. The experts appointed by the Court will each be professional people, bound by professional obligations and by the obligations set out in the FSD Guidelines...Any genuine request by an expert for something which he considers, in his professional opinion, he needs in order to prepare his report on fair value is a request that should be complied with in order to assist the experts, and the Court, to decide on fair value."*

11. It was agreed that the Company should provide answers to Information Requests within 21 days. In my judgment it is not necessary and overly prescriptive for this Court to impose rigid guidelines for the number of Information Requests and intervals which should be interposed between one Request and another. On the other hand, I find that the Company's proposals should be treated as a useful guideline as to what is likely to be a reasonable and proportionate way for this process to be managed. In terms of formal directions, I would merely make an Order, (accepting, for the avoidance of doubt) the Company's proposal as to when the first Information Request may be made, in substantially the following 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 answer each batch of Information Requests within 21 days 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*



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*of questions. Unless otherwise agreed, no Information Requests shall be submitted later than 84 days after the documents have been uploaded to the Data Room."*

**Management Meetings**

12. I make the following directions which were substantially agreed or not subject to what I considered to be any material dispute:

    (a) the Company and the Experts shall provide available dates for the Management Meeting within 3 days of the issuance of the List of Questions by the Expert;

    (b) The List of Questions shall be issued by the Experts to the Company and the opposing Expert within 14 days of the Company's written response to the last Information Request

    (c) the Management Meeting shall take place not later than 21 days after the List of Questions;

    (d) if agreement cannot be reached as to the location, time and format of the Meeting, either party may apply to the Court for directions on not less than 14 days' notice;

    (e) each party shall be responsible for its own Expert's travel, visa, accommodation and other logistical arrangements;

    (f) only the Company's management and the parties' respective experts and Caymanian attorneys should attend the Management Meeting.

13. The Company proposed that the Management Meeting should be in China and conducted in Mandarin. Although that is probably almost inevitably what will occur, I see no need to direct this at this juncture as the parties were agreed that the location and format should be subject to future agreement. Waterwood proposed that express provision be made for a second Management Meeting. I accept Mr Imrie's suggestion that this question should be left open for further consideration, if necessary, at the pre-trial Directions Hearing. The Company proposed no transcript and a without prejudice meeting, at which topics for discussion would be limited to



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those of which prior notice had been given. Waterwood proposed the converse on each point.

14. There was also a dispute about how many management meetings there should be. Waterwood proposed making express provision for the possibility of a second Management Meeting without demonstrating why such provision needed to be explicitly made. The usual practice appears to be that only one management meeting is expressly provided for, and I see no reason to encourage the parties to feel that one meeting is not likely to suffice.

15. I make the following directions in this regard:

(a) 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 (2) of the Company's draft Order );

(b) the Company shall record and prepare a transcript of the Management Meeting and the costs shall be shared (as set out in paragraph 17(3) of the Dissenters' draft Order);

(c) save as provided in (d)-(e) below, neither the transcript nor any of its contents shall be admissible in evidence, unless otherwise agreed or directed by the Court;

(d) the experts may use the information obtained at the Management Meeting for the purposes of preparing their reports;

(e) 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.

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

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