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:	Maples and Calder on behalf of Nord Anglia Education, Inc. ("**the Company**")
	Appleby on behalf of the Appleby Dissenting Shareholders
	Campbells on behalf of the Campbells Dissenting Shareholders
	Mourant on behalf of the Mourant Dissenting Shareholders
Before:	**The Hon. Justice Kawaley**
Heard:	**On the papers**
Date of Decision:	**18 June 2018**
Draft Reasons Circulated:	**18 June 2018**
Reasons Delivered:	**11 July 2018**

HEADNOTE

Summons for Directions - section 238 of the Companies Law Petition –terms of directions order and non-disclosure agreements-Highly Sensitive Documents regime-need for parties to apply common sense and proportionality to logistical disputes

RULING ON THE DIRECTIONS ORDER AND NON-DISCLOSURE AGREEMENTS

Introductory

1. Following the hearing of the Summons for Directions in this matter which concluded on February 27, 2018, I delivered Partial Rulings on March 19, 2018 and May 28, 2018, dealing firstly with a miscellany of contentious issues and secondly with dissenter discovery.

2. Meanwhile, on May 18, 2018, Maples (for the Company) submitted its proposed form of order and Non-Disclosure Agreements ("NDAs") and requested the Court to resolve the dispute between the parties as to the terms of the order and the NDAs on the papers. Appleby and Campbells communicated their submissions on behalf of the Appleby Dissenters and the Campbells Dissenters, respectively, by letters dated May 28, 2018. Mourant indicated by email on 28 May 2018 that the Mourant Dissenters did not intend to provide a further response to the Company's submissions, but agreed with the submissions made on behalf of the Appleby Dissenters and the Campbells Dissenters.

The Company's position on the disputed issues

Definition of "Appointee"

3. An "Appointee" is a person appointed by an Expert to assist in the preparation of the Expert Report. The Company submitted:

> *"1.3 The Dissenters say that an Appointee need only be 'a member of an Expert's team' and have rejected the Company's proposed definition of 'being each person whom he/she appoints to assist him /her in any work relating to the Proceedings, including the preparation of the Expert Reports and the Joint Memorandum (as defined in the Directions Order) and any other preparations in relation to the Proceedings'. The Dissenters' position is misconceived as it would mean that their clients' expert could designate representatives of their client to be 'Appointees'. That would wholly undermine the HSD regime, and moreover would be completely inappropriate as regards independence."*

Whether each Appointee (including attorneys) should sign an NDA

4. The Company proposes that Appointees should individually sign NDAs while the Dissenters object. According to the Company:

> *"2.2 We submit that this is misconceived, as;*
>
> *(a) To be effective, NDAs must be personally binding, and must be signed by the individuals who are to be bound by them. There is nothing unusual or onerous about Expert's appointees, individual attorneys or consultants and advisors personally signing (or agreeing to be bound by) NDAs. It is in fact, as the Dissenters argued in the context of the Directions Hearing more generally, a standard order which is made in this scenario.*
>
> *(b) The Court has already accepted that the Company has well-founded and acute concerns about the commercial sensitivity of its documents,*

as evidenced by the HSD regime. We submit the Dissenters' suggestion that individuals who have not signed NDAs personally should be granted access to unredacted HSDs is wholly inconsistent with this.

(c) The Dissenters' position in respect of the Dissenter's attorneys serves to undermine the HSD regime. It would mean that the Company would have no recourse in the event of a breach of confidentiality (whether intentionally or inadvertently) by any attorney or firm of attorneys.

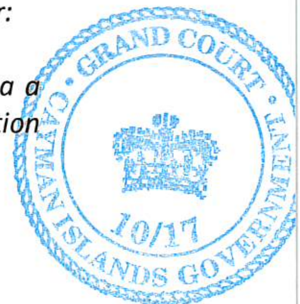
(d) The Dissenters' current position is at odds with the position adopted by them from the very beginning. In paragraph 2 of their own original draft Order (Tab 2B, Core Book) they contended as follows '[t]he Data Room shall be accessible to each of the parties and the parties' respective advisors, consultants and any Experts...together with the Experts' team members for inspection of the documents contained therein ***each*** *upon the entry into a non-disclosure agreement in the form set out..." (emphasis added). In the accompanying draft NDA, at Paragraph 3, it says "A Respondent shall be entitled only to make copies for the benefit of its legal advisors or expert advisors who shall each expressly agreeing in writing to be bound by this Agreement prior to the receipt of Confidential Information.'*

(e) This position is also at odds with the position set out in Paragraph 5 of the Dissenters' draft Order of 30 March as follows "No Expert (or member of an Expert's team) shall be given access to the Data Room (as defined below) until and unless the Company and the Experts (including all relevant Expert's team members) enter into a Confidentiality and Non-Disclosure Agreement". And in the Dissenters' draft Order of 23 April, it was expressly accepted that the respective firms of attorneys representing the dissenters should sign NDAs, although this position has since been abandoned as of 4 May. Again, no explanation has been offered for this radical change in position by the Dissenters."

Timeline for uploading Batch 2 documents to the Data Room

5. The Company submitted that the following wording in its draft Order accurately reflects this Court's Partial Ruling of March 19, 2018:

> *"8. At the same time as the Data Room is opened, the Company shall upload to the Data Room all documents (of whatsoever description, whether electronic, hard copy or in any other format) and communications (whether by email or otherwise) ("Documents") in its possession, custody or power:*
>
> *8.1. that were made available by the Company to the Buyer Group via a transaction due diligence data room utilised in the merger transaction*



*negotiations ("**Transaction Due Diligence Documents**") and in doing so the Company will disclose and upload both unredacted and redacted versions of any Highly Sensitive Documents (as defined at paragraph 10 below) in accordance with paragraph 11 below.*

*9. Within 77 days of the Data Room being opened, and subject to the disclosure of Highly Sensitive Documents (as defined in paragraph 10) in accordance with paragraph 11 below, the Company will upload to the Data Room all additional Documents in its possession, custody or power which are relevant to the determination of the fair value of the Dissenters' shares in the Company, valued as a going concern as at the Valuation Date, (the **"Valuation Question"**) and which were created in the five year period ending on the Valuation Date :*

9.1. All documents falling within the categories of documents identified at Appendix 4 of this Order which were prepared and created in the five year period ending with 21 August 2017, subject to the overarching limits of relevance to the Valuation Question (as defined at paragraph 9.2 below); and

*9.2. all additional Documents in its possession, custody or power which are relevant to the determination of the fair value of the Dissenters' shares in the Company, valued as a going concern as at the Valuation Date, (the **"Valuation Question"**) and which were created in the five year period ending on the Valuation Date.*

In so doing, the company shall be at liberty to search for electronic documents, inter alia, through the identification of key custodians and through the use of keyword searches (such keywords to be agreed by the parties as far as possible). For the avoidance of doubt, the use of keyword searching shall not in any way limit the Company's general obligation under this paragraph."

Information requests

6. The Company submitted that its wording requiring the Company to respond to requests within a target of 14 days and imposing a 14 day interval for further Information Requests reflected with the Partial Ruling and should be approved.

Management Meeting(s)

7. The Company submitted that the singular rather the plural was more appropriate as was the "reasonable" constraint on follow-up questions.

Expert's NDA

8. The Company submits:

> "*6.2 In Clause 3.1, the Dissenters have deleted the entitlement of the Company to watermark documents which are not HSDs. We submit that documents which are not HSDs are or may be nonetheless commercially sensitive (hence the need for an NDA, which the parties accept) and the right to watermark non-HSDs is entirely consistent with the principles behind the NDA. There is no prejudice to the Dissenters here.*
>
> *6.3 In Clause 5.1, the Dissenters have deleted the provision that the Company should have the election as to whether the Expert should be required to return or destroy the Confidential Information. Wording equivalent to this provision is found in Paragraph 5 of the Dissenters' original draft NDA, and the Company is not therefore willing to agree to the deletion. We believe that it is reasonable, and in no way unreasonably onerous on the Expert, for the Company to have the right to choose what should become of the Confidential Material at the conclusion of the proceedings. Again, there is no prejudice to the Dissenters here.*"

Dissenters' NDA

9. The Company submits its proposed wording should be preferred if Appointees and the Dissenters attorneys are required to individually sign NDAs and its contentions as regards the Expert's NDA are accepted. Its version of clauses 2.8 and 2.81-2.83 is defended.

The Dissenters' position

Definition of "Appointee"

10. It is submitted that:

> "*1. The company's concern over the simpler language used by the dissenters is unfounded. It is unambiguous as a matter of construction that a "member of an Expert's team" is limited to members of the Expert's firm who are assisting the Expert in his or her task; it does not include the dissenters themselves or the dissenters' attorneys.*"

Whether each Appointee (including attorneys) should sign an NDA

11. The Campbells Dissenters oppose individual Appointees and attorneys being required to sign NDAs for the following reasons:

> "9. *Maples' letter at para 2.2 (a) seems to suggest that a requirement for each individual to contract with the Company is "a standard order which is made in this scenario" and is not 'unusual onerous'. These comments are simply misleading. Quite the reverse is true and it would be entirely unprecedented. So far as we are aware the position adopted by the Company has not been adopted in any other section 238 proceedings (and certainly none that we or our clients have been involved in). Nor are we aware of this approach being taken in other types of proceedings.*
>
> *10. This is unsurprising. There is no jurisdictional basis on which the Court could order individuals to enter into an NDA in these circumstances. Nor is there any practical benefit to the company in having a direct cause of action for breach of an NDA against any such individuals, each of whom would be uninsured.*
>
> *11. The company's position also means that each such individual signing the agreement should properly obtain independent legal advice before doing so. The additional legal costs which would be incurred in this regard cannot be justified as being proportionate. Further, and perhaps more fundamentally, it would be perfectly understandable if an individual member of the Expert's team, or an individual member of a dissenter's team, or their other respective agents or representatives, chose not to subject themselves to the risk of personal liability to the company, even though they had no intention of disclosing confidential information. The company's proposed language could therefore have the effect of limiting or altering the composition of the team used by the dissenters, their advisors, and their Expert. This is unwarranted, unfair and unprecedented.*
>
> *12. The company's proposed requirement that dissenters' attorneys sign Schedule A (at paragraph 5 of the order enclosed with Maples' letter), is an after-thought that does not reflect the company's position as at the directions hearing. Nothing in the company's order or appended NDAs at the directions hearing suggested that attorneys, whether as firms or individually, would be asked to sign NDAs (no draft of which has ever been provided by the company) or sign Schedule A. It would be both unnecessary and inappropriate to require a firm of attorneys to sign a NDA by which they exposed themselves to the risk of contractual liability to their clients' opponent in litigation. The attorneys involved are all subject to and well aware of their duties of confidentiality to their respective clients, and are all within the jurisdiction of this Court. Requiring individual attorneys to sign an NDA would be even more inappropriate for the reasons stated above in relation to the teams of the dissenters and their expert. The attorneys dealing with the matter at this firm*

have never previously been asked to sign such NDAs in the context of any litigation."

Timeline for uploading Batch 2 documents to the Data Room

12. It was conceded that the dispute about when Appendix 4 documents should be uploaded was now an "arid one" because all documents had to be uploaded by June 12, 2018. In any event, it was insisted that the Court's Ruling envisaged that Appendix 4 documents would be uploaded as part of Batch 1.

Information requests

13. The Dissenters submitted that:

> *"15. The dissenters' language is drawn from the dissenters' draft order that the Court considered at the directions hearing, and which the Court expressly relied on in coming to its decision: 'As the Company has suggested an interval of 14 days between Requests that should probably be the target period within which the Company will aim to provide answers to each batch of questions, as the Dissenters' draft Order proposed' (emphasis added).*
>
> *16. Without 'hard' time limits in place the company is afforded carte blanche to delay in responding to questions in order to 'run down the clock' and avoid answering questions during the period provided to experts to complete their reports. The dissenters' proposed language allows for the time limit to be extended by consent of the parties and if it is not possible for the parties to agree for the company to apply to the court for an extension of time to respond. It simply does not make sense for there to be an open-ended time limit and the potential for abuse is obvious.*
>
> *17. In every s.238 directions order that we are aware of the court has ordered a time limit for responses to questions."*

Management Meeting(s)

14. The Dissenters provide several examples of cases were multiple meetings were referenced in section 238 Directions Orders and argue that there is no harm in leaving open the possibility of multiple meetings. As far as the requirement that follow-up questions should be "reasonable", it is submitted that:

"22...The Experts are professionals and there should be no reason to doubt that questions asked by the Experts at any management meetings will be reasonable. Introducing that qualifier in paragraph 20.2 gives rise to the risk that management refuses to answer a follow-up question on the alleged ground that it is not reasonable. With no mechanism provided for assessing reasonableness at the meeting, the practical effect is that management could merely avoid answering a question by that route."

Expert's NDA

15. The Campbells Dissenters response to the Company's submissions on this topic are as follows:

> *"23. In Maples' letter, the company takes the position that the Expert NDA is not a bilateral contract. That is incorrect. The Expert NDA is a contract with only two parties. The fact that, by an agreement contained in another document, a third party assumes the obligations created under the Expert NDA does not convert the Expert NDA into a tripartite contract.*
>
> *24. The Expert should not assume any responsibility in respect of the acts or omissions of the dissenters' attorneys. That is the legal effect of the company's language at clause 2.7 and 3.4.*
>
> *25. For the reasons above, there should be no (unprecedented and extremely onerous) requirement in clause 2.3 (or elsewhere) that the Expert's team members or attorneys sign Schedule A and thereby accept personal liability for the obligations of the Expert (including liability in respect of any act or omission of the Expert).*
>
> *26. The company's amendments to clause 2.3 are also inappropriate and should be rejected in that they incorrectly suggest that the Dissenters are not permitted access to the Data Room (as opposed to access to Highly Sensitive Documents within the Data Room).*
>
> *27. Clause 5.1 should be at the election of the dissenters how best to dispose of the documents. The company does not (and could not) dispute that both are acceptable methods of document disposal, so there is no prejudice to the company in either method being employed. However, there may be logistical reasons why one or other method is preferred or more cost effective to the Dissenters. it should therefore be at their election which method to use.*
>
> *28. The dissenters have no objection to the change at clause 3.1 to allow the Company to add a watermark to documents not limited to HSDs, as long as access to documents not designated as HSDs are not thereby restricted."*

Dissenters' NDA

16. The Dissenters submit:

> *"29. The same arguments made above are made in relation to the company's unprecedented and extremely onerous additional wording at clauses 2.1, 3.3 and Schedule A of the Dissenter NDA.*
>
> *30. Clause 2.8.1, which amongst other things prevents the downloading or printing of HSDs, is unacceptably onerous, not least given the obligations under clause 5 for the return or destruction of material provided by the company.*
>
> *31. The language used by the company at clauses 2.8.2 and 2.8.3 is vague, too wide and entirely unworkable. The company provides for an indiscriminate and undefined waiver of rights in relation to material which, by its very nature, will be privileged to the dissenters. The dissenters' language provides the necessary protection – namely that the dissenters shall not call for material from the expert which has included or referred to unredacted parts of HSDs that the dissenters are not entitled to see."*

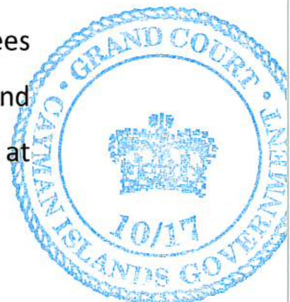
Findings: definition of "Appointee"

17. There is no dispute in principle on what the term "Appointee" means. It is common ground that it means persons appointed by the Experts who are independent of their clients. I approve the definition proposed by the Company.

Findings: whether each Appointee (including attorneys) should sign an NDA

18. Prior to recent skirmishes over the terms of the NDAs, it was common ground that all persons accessing the Data Room (other than attorneys) would agree to be bound by the terms of the NDA between the Experts and/or the Dissenters and the Company. The Dissenters' belated *volte face* is unexplained and unconvincing.

19. It may be right that the Court has no jurisdiction to compel any person to enter into an NDA with the Company. That is beside the point. This Court is being asked to approve the terms on which the Dissenters and their Experts can access the Data Room. I find that the Company may make access conditional upon Appointees agreeing to be bound by the terms of the NDAs entered into between the Expert and the Company in the manner proposed. Had this position not been broadly agreed at



the outset, I might otherwise have inclined to the view that only those persons seeking access to HSDs could reasonably be required to enter into an individual NDA.

20. The position of the Dissenters' attorneys is different. In this regard it is the Company that is seeking to expand the scope of protections it initially sought by belatedly imposing the same requirements it was initially agreed should apply to Experts and Dissenters to attorneys as well. I accept the submissions of the Dissenters and find that attorneys need not assume direct contractual confidentiality obligations to the Company in respect of their access to the Data Room.

Findings: Timeline for uploading Batch 2 documents to the Data Room

21. Paragraph 9.1 of the Partial Ruling of March 19, 2018 clearly contemplated that Appendix 4 documents would be uploaded as part of Batch 2 documents within 77 days. I accept the Company's submission and reject the Dissenters' submission in this regard.

Findings: Information Requests

22. Paragraph 28 of the Ruling states (so far as is material for present purposes) as follows:

> "...As the Company has suggested an interval of 14 days between Requests that should probably be the target period within which the Company will aim to provide answers to each batch of questions, as the Dissenters' draft Order proposed. That should, correspondingly be the minimum period the Experts should wait before forwarding another Information Request. What is actually reasonable in relation to any specific Information Requests will depend on the number and nature of the questions (including sub-questions). The Company having suggested an upper limit of 50 questions (its initial position was 30), a series of requests containing substantially more questions would, without imposing any specific limit, likely attract heightened scrutiny if a complaint of oppression was made to the Court. While most of one batch of questions is still

outstanding, it is difficult to see why it would be reasonable to forward a further fulsome Information Request…"

23. Paragraph 30 of the Ruling states:

> "30. In place of the wording presently set out in the first sentence of paragraph 19 of the Company's draft Order, I accordingly make a direction in the following (or substantially similar) 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 use its best endeavours to answer each batch of Information Requests as soon as practicable 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 of questions. Unless otherwise agreed, no Information Requests shall be submitted less than 21 days before the date fixed for the exchange of expert reports.*'"

24. Whilst I appreciate that my proposed direction is somewhat unusual, I have not been persuaded by the Dissenters that I should modify it.

Findings: Management Meeting(s)

25. This is perhaps the most unsubstantial dispute which has been referred to this Court to determine. All that was contemplated at the hearing and referred to in the Partial Ruling of March 19, 2018 was a single "Management Meeting". It is appropriate for the Order to refer to a single meeting, even if multiple meetings may in fact take place. The dispute over the inclusion of the word "reasonable" is also largely a matter of semantics. It is correct that the Partial Ruling does not provide any positive support

for an express direction that follow-up questions must be "reasonable", even if in general terms the Ruling contemplates that the supplementary questions asked ought not to be oppressively excessive in their number or scope. I accept the submission of the Dissenters that no need to insert the word "reasonable" arises.

Findings: Expert's NDA

26. In light of my finding that the Dissenters' local attorneys ought not to be required to enter into an NDA with the Company, it follows that references to the attorneys in e.g. clause 2.3, 2.7 and 3.4 should be excised.

Findings: Dissenter's NDA

27. The findings set out in paragraphs 19 and 20 above apply with equal force to the Dissenter's NDA. The Company's language based on the assumption that Appointees will sign separate NDAs should prevail. Attorneys may not be required to confirm acceptance of the terms of the NDA. Is clause 2.8.1 too onerous? Are the waiver requirements too broad? The following proposed terms are complained of :

> *"In addition to these stipulations, in relation to unredacted Highly Sensitive Documents:*
>
> > *2.8.1 the Dissenter shall not (and shall ensure that its respective agents or representatives do not) download, print, photocopy, photograph, record, obtain screenshots of, or otherwise reproduce by any method, any Highly Sensitive Documents uploaded to the Data Room (redacted or otherwise);*
> >
> > *2.8.2 Save where the Dissenter's Expert may refer to an unredacted part of a Highly Sensitive Document (by agreement or order), subject to clause 2.9 below, the Dissenter acknowledges and agrees to waive any rights to any copies of any portion of its Expert's opinion, advice, memorandum or other work product (electronic or otherwise), in un-redacted form, and which refers to, encloses, or exhibits, any copies, excerpts, extracts or summaries of that unredacted part of the contents of Highly Sensitive Document Documents; and*

2.8.3 Save where the Dissenter's Expert may refer to an unredacted part of a Highly Sensitive Document (by agreement or order), subject to clause 2.9 below, the Dissenter acknowledges and agrees to waive any rights to any un-redacted copies of the Experts' Reports and the Joint Memorandum which refer to, enclose, or exhibit, any copies, excerpts, extracts or summaries of that unredacted part the contents of the Highly Sensitive Document that have not been made available to the Dissenter.

2.9 Where the Dissenter's Expert wishes to rely on a Highly Sensitive Document (or portion thereof) in its unredacted form in their report, the procedure to be followed is set out at paragraph 11 of the Directions Order. "

28. The central question is whether the proposed terms substantially seek to implement or overreach the HSD regime approved by this Court on March 19, 2018. The relevant findings were as follows:

"26. *I find that:*

1)the Company should be permitted to designate documents as HSDs in the general manner it proposes;

2)the Company should *__not__* *be permitted to decide unilaterally that some HSDs should not be posted in the Data Room at all;*

3)all HSDs shall be placed in the Data Room in redacted and un-redacted form with access to un-redacted HSDs limited to Experts and counsel in the first instance;

4)each Expert shall provide the Company with a list of his/her team members who will be given access to HSDs;

5)where the Dissenters' Expert wishes to refer to HSDs or extracts therefrom in a memorandum or draft report to be shared with clients, only the redacted versions of the relevant HSD may be mentioned or referred to and best efforts shall be made to protect the confidentiality of information which is not central to the valuation analysis;

6)where the document the Dissenters' Expert wishes to rely upon has been redacted in whole or in part, the Dissenters' counsel shall seek to agree the terms of such reliance with the Company's counsel with liberty to apply to the Court as a last resort;

7)for the avoidance of doubt I find that proposed paragraphs 2.71 and 2.72 of the draft Confidentiality and Non-Disclosure Agreement between the Company and the Experts are unreasonably restrictive of the ability of the Experts to carry out their professional valuation task; 8)the parties shall use their best endeavours to agree the final wording of the proposed non-disclosure agreements and any matters not expressly addressed in the present Ruling."

29. Clause 2.8.1 of the Dissenters' NDA as proposed by the Company is plainly consistent with the letter and spirit of paragraph 26 (3) of the Partial Ruling and the governing principles of the HSD regime approved by this Court. The waiver provisions of clauses 2.82-2.83, far from being vague as the dissenters complain, are in my judgment quite specific and consistent with the letter and spirit of paragraph 26(5) of the Partial Ruling. I approve the Company's proposed wording, mindful of the fact that the proposed waivers are not absolute in character in terms of denying the Dissenters sight of unredacted HSDs. Where an Expert considers that an unredacted portion of an HSD needs to be disclosed, paragraph 11 of the Order creates a mechanism (contemplated by paragraph 26 (6) of the Partial Ruling) for the attorneys to agree or for this Court to order that such disclosure should take place.

Conclusion

30. It is hoped that all issues in dispute have now been resolved. The parties are reminded of their general and specific obligations to seek to reach agreement on logistical discovery matters in a manner consistent with common sense and proportionality. The Court reserves the right in the future, notwithstanding the general approach of

awarding interlocutory costs in the cause, to summarily disallow costs in respects of disputes which are unreasonably referred to this Court to resolve.

HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT