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 Mac Imrie, Mr Malachi Sweetman and James Eldridge, Maples and Calder, on behalf of Nord Anglia Education, Inc. ("**the Company**")

Mr Jonathan Adkin QC and Mr Andrew Jackson, Appleby, on behalf of the Appleby Dissenters

Mr Barry Isaacs QC and Mr Hamid Khanbhai, Campbells, on behalf of the Campbells Dissenting Shareholders

Mr Christopher Harlowe, Mr Rocco Cecere, Mr Zachary Hoskin and Ms Jessica Bush, Mourant Ozannes, on behalf of the Mourant Dissenters

Before: **The Hon. Justice Kawaley**

Heard: **27 July 2018**

Date of Decision: **27 July 2018**

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Circulated:

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HEADNOTE

Summons for Directions-section 238 of the Companies Law Petition –whether Dissenters should be granted leave to replace their initial expert witness-governing principles-whether conditions should be imposed if leave granted.

REASONS FOR RULING ON APPLICATION FOR LEAVE TO REPLACE INITIAL EXPERT WITNESS

Introductory

1. On March 6, 2018, directions were ordered on the Company's November 9, 2017 Summons for Directions. The Order provided, so far as is material for present purposes, as follows:

> "*3. The Company and the Dissenters shall have leave to instruct one expert witness each (the Dissenters to jointly and severally instruct one expert between them) in the field of valuation in order to opine upon the fair value of the Dissenters' shares in the Company, valued as a going concern as at 21 August 2017 ("**Valuation Date**") (together, the "**Experts**").*
>
> *4. The Experts shall be appointed no later than 14 days from the date of this Order, and on that date the Company and the Dissenters shall each advise the other in writing of the identities and email addresses of the respective Experts so appointed.*"

2. The Dissenters did not jointly and severally instruct their expert. Appleby raised concerns with Maples by letter dated April 12, 2018 about the fact that Mr Osborne and the Company's expert (Professor Fischel) both had links to FTI Consulting. On June 5, 2018, Appleby advised Maples that it had terminated Mr Osborne's retainer to resolve the conflict issue. Mr Osborne himself notified Mourant that he was withdrawing, and this development was reported by Mourant to Maples by letter dated June 14, 2018. The Campbells Dissenters were seemingly left out in the cold.

3. By paragraph 1 of the Company's Summons for Directions issued on June 19, 2018, the following relief was sought:

> "*1. Directions as to the identity of the Dissenters' joint expert.*"

4. This was, by the time the Company's Summons was actually heard, in substance an application by all of the Dissenters to replace the expert they had previously notified as their joint expert (Mr Osborne) with another expert (Professor Gompers). The Company did not oppose the application altogether. Rather, it submitted the Court should grant leave subject to conditions designed to ensure that the Dissenters were not engaged in "expert shopping".

5. This was in large part because the Dissenters' position on the replacement of Mr Osborne was inconsistent and incoherent when it ought to have been a united one. This of course assumes, as the Company was entitled to assume, that the joint instruction contemplated by the March 6, 2018 Order had occurred. It was not until July 25, 2018 that the Campbells Dissenters eventually agreed to the replacement of Mr Osborne by Professor Gompers.

6. On July 27, 2018 I granted leave for the Dissenters to jointly instruct Professor Gompers as their expert and only imposed one of several conditions proposed by the Company. I was satisfied there was no objective basis for concerns about "expert shopping". I made the following Order in respect of costs:

    (1) the costs of the Company's Summons relating to the replacement of expert issue up to and including July 25, 2018 were awarded to the Company in any event (as against the Appleby and Mourant Dissenters), to be taxed if not agreed;

    (2) the Company's and the Mourant and Appleby Dissenters' costs after July 25, 2018, were ordered to be in the cause;

    (3) The Campbells Dissenters' costs generally in relation to the Summons were ordered to be in the cause.

7. I now give reasons for that decision.

Legal principles governing the grant of leave to replace an existing expert

8. The content of the governing principles was not in controversy and derived from English case law which the Company commended to this Court. Expert witnesses though retained by parties owe their primary duties to the Court and the opinions they advance are supposed to be independent non-partisan ones. To ensure that a litigant wishing to replace an expert initially retained is not simply seeking another expert who will provide a more favourable opinion, the Court when exercising its discretion to grant leave may require the applicant to disclose any previous opinion rendered by the expert it is proposed not to call. Any privilege which existed in a prior report falls away once the Court decides to grant leave to adduce fresh expert evidence. It may also impose other necessary conditions designed to allay concerns about "expert shopping".

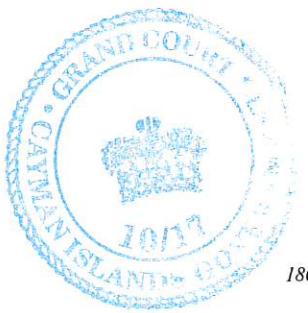
9. The controversy in the present case was whether or not there was any objective basis for concerns that the Dissenters' changing of the expert may have been attributable to what is colloquially referred to in the legal trade as "expert shopping".

10. The first case upon which reliance was placed was *Beck-v-Ministry of Defence* [2005] 1 WLR 2206. Simon Brown LJ, delivering the leading judgment in the English court of Appeal, described the central point raised as follows:

> "*2.... It...raises a question of some little importance, namely whether it can ever be appropriate to allow a party to substitute one expert for another without, at some stage at least, being required to disclose the first expert's report.*"

11. The substantive principles approved by the English Court of Appeal in *Beck* are set out at the end of Simon Brown LJ's judgment:

> "*23. The burden of the defendants' argument in this regard is that, whilst it is one thing to assert, as clearly in general terms they were asserting, that their expert's report, essentially supportive of their case though it was in many respects unsatisfactorily set out and reasoned; it is quite another to be forced to make that argument by specific reference to the details of the report, every point thereafter becoming directly available against them if ultimately they are*



forced to rely upon his evidence. Put on that basis, and that must necessarily have been the basis upon which the point was understood by both judges below, I, for my part, am likewise disposed to accept it.

24. Very different considerations, however, seem to me to arise once in principle it has been decided to make the order allowing a new expert to be instructed. At this point I can see no reason for continuing to withhold disclosure of the original report which is now to be discarded, and every possible reason why such disclosure should be made. In Lane v Willis [1972] I WLR 326, one notes, the Court of Appeal was told, on indicating that they proposed to allow the defendants to instruct a further expert, that the defendants would thereupon disclose their existing evidence. Roskill LJ, at page 335, described that as a very proper undertaking by counsel for the defendants:

> *'....that if this court makes the order which he seeks, at any rate in some form, the defendants' solicitors will, as soon as they get [the new report], send to the plaintiff's solicitors a copy not only of that report but of the various reports which Dr Carroll has already made as a result of his several examinations of the plaintiff. If the defendant does not wish to call Dr Carroll at the trial, it would then be open to the plaintiff to call him if he so desired.'*

25. The disclosure of the original report, as a condition of being allowed to instruct a fresh expert, would also meet the concern expressed by Sachs LJ in the third passage of his judgment cited above:

> *'No room should be left for a plaintiff to wonder whether the application is really due to the reports of a defendants' medical expert being favourable to the plaintiff.'*

26. I do not say that there could never be a case where it would be appropriate to allow a defendant to instruct a fresh expert without being required at any stage to disclose an earlier expert's report. For my part, however, I find it difficult to imagine any circumstances in which that would be properly permissible and certainly, to my mind, no such circumstances exist here.

27.It seems to me that there clearly ought to be a condition attached to the order here permitting the defendants to instruct a fresh psychiatrist; namely that they should, on taking up such permission, forthwith disclose Dr Goodhead's report upon which they no longer seek to rely."

12. The English Court of Appeal, in a decision which was (on this point) strictly *obiter*, unconditionally approved its earlier decision in *Beck* in *Vasiliou-v-Hajigeorgiou* [2005] 1 WLR 2195. Dyson LJ opined as follows:

"27. In our judgment, these factual differences are immaterial to the point of principle that was decided in Beck which is encapsulated in para 26 of Simon Brown LJ's judgment and are not a sufficient basis for distinguishing that case from the present. The court approached the issue that was before it on the footing that the defendants required permission in order to rely on a second expert. That is the basis on which we are approaching the second issue in the present case. The question of principle that was decided in Beck was that the court has the power to give permission to a party to rely on a second (replacement) expert which it should usually exercise only on condition that the report of the first expert is disclosed. This decision is binding on us. We cannot accept that the decision is wrong or that it is conceivable that the court was unaware of the fact that reports prepared for the purposes of litigation are, until they are disclosed, protected by privilege."

13. In *Edwards-Tubb-v- JD Wetherspoon Plc* [2011] 1 WLR 1373, the English Court of Appeal confirmed that the legal policy imperative of discouraging "expert shopping" was sufficiently flexible and strong to apply even at the pre-litigation stage. Hughes LJ opined as follows:

"30. Authority apart, it seems to me that the imposition of a condition of disclosure is as justified in pre-issue as in post-issue cases. I certainly accept that there may be perfectly good reasons for a party to wish to instruct a second expert. Those reasons may not always be that the report of the first expert is disappointingly favourable to the other side, and even when that is the reason the first expert is not necessarily right. That means that it will often, perhaps normally, be proper to allow a party the option, at his own expense, of seeking a second opinion. It would not usually be right simply to deny him permission to rely on expert B and thus force him to rely on expert A, in whom he has, for whatever reason, lost confidence. But that is quite different from the question whether expert A's contribution should be denied to the other party by the fact of who instructed him. An expert who has prepared a report for court is different from another witness. The expert's prime duty is unequivocally to the court. His report should say exactly the same whoever instructed him. Whatever the reason for subsequent disenchantment with expert A may be, once a party has embarked on the pre-action protocol procedure of co-operation in the selection of experts, there seems to me no justification for not disclosing a report obtained from an expert who has been put forward by that party as suitable for the case, has been accepted by the other party as suitable, and has reported. Thus although the instruction of a medical expert is a matter almost of course in most

personal injury cases, it is appropriate for the court to exercise the control afforded by CPR 35.4 in order to maximise the information available to the court and to discourage expert shopping. Whilst at the time of Access to Justice this development may not have been foreseen, the ethos of litigation which it established is promoted rather than prevented by the exercise of this power."

14. The most significant authority elucidating the factual circumstances which will trigger the imposition of conditions on the grant of leave to call a replacement expert which was cited was *BMG (Mansfield) Ltd-v- Galliford Try Construction Ltd.* [2013] EWHC 3183 (TCC). This case illustrates that an order will automatically be made requiring the disclosure of any reports prepared by the former expert, but further more intrusive disclosure will not be justified unless there is a strong appearance of "expert shopping". Edwards-Stuart J crucially held as follows:

> "*37. It seems to me that, at best from the Defendants' point of view, this might just be said to be a case where there is an appearance of "expert shopping". In my judgment any such appearance is faint. I consider that the Defendants have pitched their submissions too high.*
>
> *38. In these circumstances this is not a case where I am prepared to order disclosure of all attendance notes by BLM in which Mr. Streeter's opinions on any matter in issue have been recorded. To make such an order would result in a significant invasion of the Claimants' privilege which is not justified in the light of the evidence about the circumstances and timing of Mr. Streeter's withdrawal from the case. It would add considerably to the costs of this already expensive litigation with no certainty that it would provide the Defendants with any material that might significantly assist their case. I appreciate that the policy of imposing a condition requiring disclosure of a previous expert's reports is to deter the practice of "expert shopping", but it seems to me that there has to have been "expert shopping" or at least a very strong appearance of it, before disclosure of the type sought on this application should be ordered. I therefore decline to make an order of the type that the Defendants seek.*
>
> *39. However, I will order the Claimants to disclose any other report or document provided to BLM by Mr. Streeter in which he expressed opinions or indicated the substance of such opinions on the matters in issue in these proceedings. I understand that there may be no such report or documents, but I do not see why the Defendants should not have the comfort of such an order in case any such documents should hereafter come to light.*"

15. Grant HHJ summarised the principles established (primarily) by the above cases as follows in *Allen Tod Architecture Ltd.-v-Capita Property and Infrastructure Ltd.* [2016] EWHC 2171 (TCC) (at paragraph 32):

> "*... (1) The court has a wide and general power to exercise its discretion whether to impose terms when granting permission to a party to adduce expert opinion evidence: that is consistent with both the general way in which CPR rule 35.4 (1) is expressed, and the wide and general nature of the court's case management powers, in particular those set out in CPR rules 3.1 (2) (m) and 3.1 (3) (a).*
>
> *(2) In exercising that power or discretion, the court may give permission for a party to rely on a second replacement expert, but such power or discretion is usually exercised on condition that the report of the first expert is disclosed: see Dyson LJ at paragraphs 27 and 29 of his judgment in Vasiliou.*
>
> *(3) Once the parties have engaged in a relevant pre-action protocol process, and an expert has prepared a report in the context of such process, that expert then owes a duty to the Court irrespective of his instruction by one of the parties, and accordingly there is no justification for not disclosing such a report: see Hughes LJ at paragraph 30 of his judgment in Edwards-Tubb.*
>
> *(4) While the court discourages the practice of 'expert shopping', the court's power to exercise its discretion whether to impose terms when giving permission to a party to adduce expert opinion evidence arises irrespective of the occurrence of any 'expert shopping'. It is a power to be exercised reasonably on a case-by-case basis, in each case having regard to all the circumstances of that particular case. See the approach of Hughes LJ in Edwards-Tubb, in particular at paragraph 30 of his judgment when referring to the range of circumstances which might lead to a change of expert, and Edwards-Stuart J in BMG; both those judges found that the fact that an expert had produced a report in the course or context of a relevant pre-action protocol process was a critical or decisive factor, rather than there having been any instance of 'expert shopping'.*
>
> *(5) The court will require strong evidence of 'expert shopping' before imposing a term that a party discloses other forms of document than the report of expert*

A (such as attendance notes and memoranda made by a party's solicitor of his or her discussions with expert A) as a condition of giving permission to rely on expert B: see paragraphs 29-32 of the judgment of Edwards-Stuart J in BMG.

Conditions sought by Company

16. The Company proposed that leave to call Professor Gompers as the Dissenters' Joint Valuation Expert should be granted but subject to the following conditions:

> "*(a) Within 7 days of the date of this Order, the Dissenters shall provide affidavits (which are compliant with GCR Order 41 r.5) setting out:*
>
> *(i) A full explanation as to the means by which Mr Osborne's engagement has been terminated*
>
> *(ii) Confirmation that no US attorney advising the Campbells or Appleby Dissenters has spoken to Mr Osborne about any views he might have or conclusions he may have reached as to the fair value of the Dissenters' shares, or seen any work product produced by him since his engagement*
>
> *(iii) An explanation as to what were the significant concerns referred to in the Campbells letter dated 6 July 2018 and the responses by the Appleby and Mourant Dissenters to those concerns*
>
> *(iv) Confirmation that no work product or related documents from Mr Osborne or FTI will be received by the Dissenters.*
>
> *(b) The affidavits should exhibit the terms of engagement between the Dissenters and Mr Osborne and FTI, and the means by which that engagement has been terminated, to include any written communications about the termination of the engagement since the issue of the Fischel conflict first arose on 29 March 2018, and to include the*

documents referred to but not exhibited at paragraphs 14 and 17 of the First Affidavit of Simon Dickson."

17. The proposed conditions went beyond merely requiring draft or final reports of the discarded expert to be disclosed. They could, based on the legal principles set out above, only be justified if the Court had real concerns about an appearance of "expert shopping".

Findings: the reasons for changing expert horses

18. There was ultimately no reason to doubt that concerns about a perceived conflict of interest prompted the Dissenters' decision to abandon Mr Osborne. He was attached to the same entity (FTI Consulting) as the Company's expert, Professor Fischel. However, because the two larger Dissenter groups severally instructed Mr Osborne, side-lining the smaller Campbells group (it seemed to me), the Company for several weeks had reasons to be suspicious about what was really going on. The chronology can for present purposes be distilled as follows:

- **April 12, 2018**: Appleby wrote to Maples notifying them that Mr Osborne had been retained through FTI before Professor Fischel had been retained through FTI on behalf of the Company. It was argued that Professor Fischel should step down. It was accepted the Company had no prior knowledge when retaining its expert that Mr Osborne had already been retained through the same firm;

- **April 18, 2018**: Maples wrote to Appleby disputing that any conflict exists and citing an example of experts from FTI Consulting giving opposing evidence in the same case;

- **June 5, 2018**: Appleby wrote to Maples advising that they have decided to resolve the conflict dispute by terminating their retainer of Mr Osborne and seeking a replacement;

- **June 7, 2018**: Maples asked Mourant and Campbells to confirm that Appleby's position is a joint one and foreshadows seeking conditions for any Court approval of a replacement expert. Mr Osborne notified Mourant that he was withdrawing and indicating that he had previously indicated that he felt he would "*not be wholly uncompromised*" by the Fischel appointment;

- **June 8, 2018**: Campbells indicated that the Appleby letter does not reflect its clients' position. Maples expressed consternation as to why a letter written in relation to a jointly instructed expert's termination did not reflect the joint position of all Dissenters;

- **June 14, 2018**: Mourant advised Maples that "*on 7 June 2018, Mr Osborne withdrew from his retainer with the Mourant Dissenters*";

- **June 15, 2018**: Maples wrote to all three Dissenter groups indicating it proposed to file a summons for directions in relation to the expert evidence issue;

- **July 5, 2018**: Mourant advised Maples that it and Appleby proposed to appoint Professor Paul Gompers as their expert;

- **July 6, 2018**: Campbells wrote to Maples expressing their clients' "*significant concerns about the conduct of the Mourant Dissenters and the Appleby Dissenters in these proceedings in connection with the issue that has arisen in relation to the dissenters' expert, including the fact that they have now purported to name a replacement expert in correspondence, prior to a choice being made by all dissenters...The aggregate size of our clients' shareholding is nothing to the point....*";

- **July 24, 2018**: Simon Dickson, a partner at Mourant Ozannes, swore an affidavit herein deposing as to the history of the conflict issue. He further swore that neither he, his firm, his clients nor the clients' US attorneys had received any work product from Mr Osborne or discussed the fair

value of the Company's shares with him. Daniel Hayward-Hughes, an associate of Appleby, swore that neither he, his firm nor his clients had received any work product from Mr Osborne or discussed the fair value of the Company's shares;

- **July 25, 2018**: the Dickson Affidavit was filed in Court. Campbells advised Maples that they now consented to the appointment of Professor Gompers.

19. The Appleby Dissenters through Mr Adkin QC explained that their clients had no US lawyers involved in the conduct of this matter, which was why their deponent had not confirmed (like Mr Dickson for the Mourant Dissenters) that US attorneys had received no information from Mr Osborne. They offered to file a further affidavit confirming the position. Both he and Mr Harlowe argued that there was no objective basis for the Court to find that there was even an appearance of "expert shopping". More importantly still, lawyers had deposed that no expert advice had been received either in writing or orally from Mr Osborne and there was no reason to go behind this evidence.

20. Mr Imrie ably demonstrated that the Company had grounds for anxiety because, contrary to the Court's directions, Mr Osborne had not been jointly instructed. The Campbells Dissenters' initial opposition to replacing Mr Osborne excited suspicion. However, in my judgment, those suspicions ought to have been allayed once (a) the Mourant Dissenters and the Appleby Dissenters had filed evidence explaining (in the latter case somewhat tersely) the change of expert decision, and (b) the Campbells Dissenters confirmed on July 25, 2018 their support for appointing Professor Gompers.

21. Mr Isaacs QC persuaded me that a fair and non-cynical reading of the Campbells letter of July 6, 2018 tended to suggest that the only concerns the Campbells Dissenters had were about not being adequately consulted by the larger Dissenter groups. That benign view is far easier to see in hindsight, particularly in light of the fact that the Campbells Dissenters withdrew their opposition to the replacement of Mr Osborne on July 25, 2018.

22. One small aspect of Mr Dickson's evidence banished any doubts I had about even the appearance of "*expert shopping*". Mr Dickson deposed that during a telephone call on May 3, 2018, "*Mr Osborne expressed dissatisfaction at FTI's decision not to insist that Professor Fischel stand down from his engagement and informed us as a result that, he had resigned from FTI's executive committee*" (paragraph 18). This was to my mind very clear and convincing evidence that whatever the strict position on conflict was, Mr Osborne himself felt strongly from an early stage that his ability to serve as an expert 'against' Professor Fischel was compromised. The expert not only felt somewhat compromised (or "*not wholly uncompromised*", as he obliquely put it in his letter to Mourant), he also apparently considered that his firm's approach to the 'conflict' issue was inconsistent with what he considered the internal conflict policies should be.

23. Conflict of interest is a very fluid concept, typically based (to some extent at least) on appearances and perceptions rather than neatly defined categories of relationships. In the judicial arena it has confounded even a distinguished member of the Judicial Committee of the House of Lords. Reasonable professionals can, as Mr Osborne's position illustrates, disagree as to what institutional conflict policies should be adhered to. What is acceptable today may be unacceptable tomorrow. It was entirely understandable against this background that Mr Osborne's bifurcated retainer unravelled somewhat untidily and, from the Company's viewpoint, incoherently.

24. In short I considered that, objectively viewed, there was not even a faint appearance of "expert shopping" in light of the evidence sworn by local lawyers on July 24, 2018 combined with the post-July 25, 2018 Campbells Dissenters' modified position. However, I also found that the Company's suspicions were reasonably aroused before that date, in large part by the deviance of the Mourant and Appleby Dissenters from the Court-sanctioned joint instruction of expert approach. This materially contributed to the initially suspicious divergent approach adopted by the Campbells Dissenters to the replacement of expert issue.

Conditions for granting leave

25. Having rejected the Company's appearance of "expert shopping" case, and accepted the Dissenters' evidence that no formal or informal report had been communicated to them by Mr Osborne, it followed that there was no legal or factual basis for either:

(a) ordering the Dissenters to disclose any reports prepared by Mr Osborne; and/or

(b) the more intrusive enquiries into the reasons for the Dissenters' change of expert decision which the Company through its draft Order sought.

26. On the other hand I saw no harm in requiring the Appleby Dissenters to follow through on their offer to file a further affidavit confirming that their clients have no US attorneys who spoke to Mr Osborne regarding fair value nor saw any work product produced by him since his engagement and explaining the omission of any reference to US attorneys in their evidence.

Costs

27. I found that the Mourant Dissenters and the Appleby Dissenters had acted unreasonably in failing to comply with this Court's direction that their expert be jointly instructed. No explanation was proffered. I accept that the Dissenter groups are large and inherently unwieldy. Yet if the joint instruction direction became unworkable, an application to vary the Order could and should have been made. This impropriety was cured by the time their evidence had been filed and they had reached agreement to (notionally at least) jointly instruct a new expert with the support of the Campbells Dissenters. Accordingly, I made the following Order in relation to the costs of the Company's Summons:

(a) the Mourant Dissenters and the Appleby Dissenters were ordered to pay the costs of the Company's Summons relating to the replacement of expert issue up to (and including) July 25, 2018, and all costs thereafter were in the Petition/cause;

(b) all costs as between the Campbells Dissenters and the Company (in relation to the replacement of expert issue) were in the Petition/cause.

Conclusion

28. For the above reasons, on July 27, 2018 I granted the Dissenters leave to instruct and call Professor Gompers as a replacement expert valuation witness.

HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT