IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO 72 & 74 of 2022 (DDJ)

IN THE MATTER OF SECTION 238 OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF NEW FRONTIER HEALTH CORPORATION

Appearances:	Tom Lowe KC, Gráinne King and Catie Wang of Harney Westwood & Riegels for the Company Blair Leahy KC for the Dissenters, instructed by Nigel Smith of Carey Olsen and Katie Logan of Campbells for the Dissenters
Before:	The Hon. Justice David Doyle
Heard:	9 November 2023
Judgment Delivered:	9 November 2023
Draft transcript circulated:	11 November 2023
Transcript Approved:	16 November 2023

HEADNOTE

Determination of various issues arising at a case management conference in respect of an application for an extension of time to provide discovery

JUDGMENT

Introduction

1. Some of the background to this matter is set out in my judgments delivered on 12 August 2022 and 31 March 2023 and I do not repeat it here.

2. By Summons dated 18 August 2023 (the "Application"), New Frontier Health Corporation (the "Company") applied for an order that it be granted a further extension of time in respect of the period provided for in paragraph 10a of an Order made as long ago as 12 August 2022 as extended by Order made on 31 March 2023 as regards the obligation to give discovery until the later of 7 days following:

   (a) the grant of regulatory approval by the government authorities of the People's Republic of China ("PRC"); and
   (b) the conclusion of the discovery process pursuant to the applications ongoing in the United States of America under section 1782 of Title 28 of the United States Code related to the Company.

   The estimated length of the hearing of the Application was put at 1 day.

3. Paragraph 10a of the Order made on 12 August 2022 required the Company to upload to the Data Room certain documents comprising the categories of documents set out in Appendix 3 of the Order in the 5 year period ending on the Valuation Date and relevant to the determination of the fair value of the Dissenters' shares in the Company within 120 days, namely by 19 December 2022. Appendix 3 referred to the following headings for convenience: (1) Financial Advisor, (2) Special Committee, (3) Buyer Group and potential purchasers, (4) Corporate and financial documents (5) Projections and valuations, (6) Operations and strategy, (7) Shares and shareholders and (8) the Merger.

4. Appendix 6 contained, with the agreement of the parties, a detailed protocol "regarding documents required to be redacted in order to comply with the laws of the People's Republic of China."

5. On 31 March 2023, "somewhat reluctantly" (paragraph 43 of the judgment) I gave the Company "one further extension to 29 September 2023 to comply with its discovery obligations". It is now 9 November 2023 and the Company has failed to meet the extended deadline and has failed to comply with its discovery obligations pursuant to an Order of this Court made in the jurisdiction of the Company's incorporation.

6. By letter dated 10 October 2023 Harney Westwood & Riegels, the attorneys acting for the Company, requested a case management conference ("CMC") in relation to the Application, for a further extension, with a time estimate of two hours.

7. The CMC was originally listed for 10am on 8 November 2023. By email dated 10 October 2023 4.19pm counsel were notified of the requirement to file "any relevant documents, including an agreed concise list of issues" before 3pm on 2 November 2023. By email dated 17 October 2023 4.10pm counsel were reminded to "submit any relevant documents, including an agreed concise list of issues before 3pm on 2 November 2023."

8. At 3.26pm on 2 November 2023 the Dissenters filed a skeleton argument and authorities with a hard copy bundle of authorities following at 3.57pm.

9. At 4.40pm on 2 November 2023 the Company filed two CMC Bundles and its skeleton argument.

10. By email dated 6 November 2023 at 1.45pm, Harneys notified the Court that the Court of Appeal required Ms Leahy's appearance before it on 8 November 2023 in respect of an appeal in another case, so the hearing in respect of this matter was moved to 9am today, Thursday 9 November 2023.

The list of issues

11. At the first tab 5 of Bundle 1 the Company's list of issues for the CMC appeared as follows:

(1) Should the court determine at this hearing the test which should be applied on the Application? (Issue 1)

(2) If so, is the applicable test the test set out in *Bank Mellat* (the "*Bank Mellat* Test") or some other test? (Issue 2)

(3) Should the court give permission to the parties to adduce expert evidence? (Issue 3)

(4) If so, should the experts attend for cross-examination? (Issue 4)

(5) Should the Company provide further information and clarification of its case including in particular on PRC law? (Issue 5)

(6) What timetable should be ordered for the exchange of factual and (if ordered) expert evidence? (Issue 6)

(7) What is the appropriate time-estimate for the hearing of the Application? (Issue 7)

12. At the second Tab 5 of Bundle 1 the Dissenters' list of issues appears identical but at 1.2 it is added "The Dissenters' position is that this is a debate that ought to happen at the hearing of [the Application]" and at 7.2 "The Dissenters' position is that (on the assumption that expert evidence is ordered) it would be prudent to allow 1.5 days of Court time for the determination of the [Application] regardless of which test is the applicable test."

Submissions

13. I have considered all the written and oral submissions put before the Court.

Determination of the issues

14. In respect of the issues, I have reached the following determinations.

Issue 1

15. Until very recently the Company's position was that the Court should, at the CMC, determine the "test" that would be applied at the hearing of the Application. By letter dated 5 November 2023 Harneys, attorneys for the Company, belatedly conceded that the Court could deal with the *Bank Mellat* point at the hearing of the Application.

16. In respect of Issue 1, my conclusion is that the Court should not determine at this CMC "the test" which should be applied on the hearing of the Application. It will be for counsel for the parties to address the relevant law in their written and oral submissions at the hearing of the Application. It would be premature and inappropriate at this CMC, almost in the abstract and certainly without the benefit of full argument, for the Court to determine the test which should be applied in respect of the Application.

Issue 2

17. In light of my determination on Issue 1, Issue 2 does not arise.

Issue 3

18. Issue 3 concerns expert evidence. In the list of issues the parties unhelpfully did not identify the issues to which the expert evidence would be addressed although they agreed that they should have "permission to adduce expert evidence as to such matters as to be determined by the Court at the CMC". I do not understand that reference. Presumably "at the CMC" should read "at the hearing of the Application."

19. FSD Guide B5.1(a) provides "Any application for leave to call an expert witness or to serve an expert's report should be made at a case management conference or on a summons for directions. The party applying for such leave will normally be expected to identify to which issue or issues in the proceedings the proposed expert evidence relates".

20. FSD Guide B5.6(a) provides that the Court will normally direct a meeting or meetings of expert witnesses before trial. B5.6(e) unless the Court orders otherwise, at or following any meeting the experts should prepare a joint memorandum for the Court recording:

(i) the fact that they have met, when and where and that they discussed the expert issues;

(ii) the issues on which they agree;

(iii) the issues on which they disagree; and

(iv) a brief summary of the reasons for any such disagreement.

21. In the Dissenters' draft directions order the issues for the experts were defined as:

"a. how likely it is that disclosure and inspection would infringe PRC law, and, to the extent that some risk of infringement might arise (Issue 1) …

b. whether there is a real risk of prosecution (Issue 2)."

22. In the undated skeleton argument of the Dissenters at paragraph 32 it is stated:

"The questions the experts will be addressing are broadly two-fold: (i) how likely it is that disclosure and inspection would infringe PRC law, and, to the extent that some risk of infringement might arise, (ii) whether there is a real risk of prosecution. They will also address the issue of the absence of any mechanism to obtain JAEC approval, and in particular whether the JAEC intends to put a mechanism in place in future."

23. I have not heard full argument on the point, and I keep a mind open to persuasion, but looking at the caselaw and in particular *The Public Institution for Social Security v Al Wazzan* [2023] EWHC 1065 (Comm) (at paragraphs 154 and 156) in addition to "real risk of prosecution" I think the words "or other serious prejudice" could usefully be added and I note that counsel are content with that.

24. In the Company's draft directions order the issues for the experts were not defined and such were not covered in the Company's skeleton argument dated 2 November 2023.

25. In my judgment the expert evidence should deal with the following issues:

(1) how likely is it that disclosure and inspection would infringe PRC law ("Issue 1");

(2) to the extent that some risk of infringement might arise, is there a real risk of prosecution or other serious prejudice ("Issue 2"); and

(3) what is the mechanism and likely timing for obtaining any necessary approvals ("Issue 3").

26. Liu 1 and Liu 2 shall stand as the Company's expert evidence in respect of Issue 1. The Company shall file and serve any supplemental expert evidence from Mr Liu in respect of Issue 2 and Issue 3 by 3pm on 16 November 2023.

27. The Dissenters shall file and serve any expert evidence in response by 3pm on 12 December 2023.

28. There should also be a meeting of experts (in person or remotely) prior to 12 January 2024 and the experts should prepare a joint memorandum for the Court and such should be filed prior to 3pm on 19 January 2024, recording:

(i) the fact that they have met, when and where and that they discussed the expert issues;

(ii) the issues on which they agree;

(iii) the issues on which they disagree; and

(iv) a brief summary of the reasons for any such disagreement.

Issue 4

29. In respect of Issue 4 the parties are agreed that there is no necessity for cross-examination of the experts. I note the observations of Segal J in *Trina Solar* 2017 (2) CILR 858 and I note that in *The Public Institution for Social Security v Al Wazzan* [2023] EWHC 1065 (Comm) there was no cross-examination of the expert witnesses and there are no references to cross-examination of experts in the judgments in *Tugushev v Orlov* [2021] EWHC 1514 (Comm) or in *Bank Mellat*. Based on my present state of knowledge I do not go against the agreement of the parties that cross-examination of the experts is not necessary to determine the Application, at this interlocutory stage. I make an order therefore that the makers of the expert reports and affidavits do not need to attend for cross-examination.

Issue 5

30. No orders have been requested in respect of Issue 5 and I make none.

Issue 6

31. In respect of Issue 6, the Dissenters shall file and serve any factual evidence by 3pm on 12 December 2023. It would be useful if such evidence could also provide an update as to any section 1782 applications still "on foot" and an estimate as to when any outstanding applications will be determined.

32. The Company shall file and serve its factual evidence in reply by 3pm on 22 December 2023.

33. I have already dealt with the directions in respect of the filing and serving of the expert evidence.

Issue 7

34. By letter dated 5 November 2023 Harneys, the attorneys for the Company, belatedly conceded that the appropriate time estimate for the hearing of the Application should be 1.5 days. In respect of Issue 7, I order that the Application be set down for hearing at 10am on 13 February 2024 with 1.5 days allocated. The Company shall file and serve duly paginated bundles before 3pm on 26 January 2024. Properly cross-referenced skeleton arguments and authorities are to be filed before 3pm on 2 February 2024.

The "Dissenters Summons"

35. There is one further issue I need to refer to before I can deal with costs. The reference to the "Dissenters Summons" issue did not appear as an issue in the List of Issues. I did however notice in the Dissenters' draft directions order at tab 4 of the Bundle there was reference to:

> "AND UPON the Dissenters notifying the Company that they intend to oppose the Second Extension Summons and seek an order that unless the Company complies with its discovery obligations it be debarred from filing any valuation evidence (the "Dissenters Summons")"

and there were references at paragraphs 4 and 6 within the main body of the draft order to the "Dissenters Summons".

36. I found the reference in the draft order to the "Dissenters Summons" and the directions for evidence to be filed and for it to be heard together with the Application rather strange as I was not aware that the Dissenters filed a summons.

37. I searched through the index of the bundles and the documents within the bundles to find such. My search was in vain. It was not there. The Dissenters had filed no such summons. They still have not, to my knowledge, filed a summons. Today the Dissenters have wisely abandoned their insistence that reference to the "Dissenters Summons" appear in the recitals and main body of the Order.

Costs

38. I now deal with the applications in respect of costs and note all that counsel have had to say in that respect.

39. It appeared that in the List of Issues the parties were agreed except on 2 points. First, on 1.2 the Dissenters' position was that the debate as to the applicable test ought to happen at the hearing of the Application and secondly, the Dissenters' position at 7.2 was that it would be prudent to allow 1.5 days of Court time for the hearing of the Application.

40. By letter dated 5 November 2023, Harneys for the Company finally conceded points 1.2 and 7.2. I was informed today that the Dissenters in effect abandoned their wish to include reference in the order to be made to what in an earlier draft was entitled the "Dissenters Summons". It was wrong of the Dissenters to include reference to a non-existent summons in the recitals and main body of their draft order. The List of Issues did not include reference to this issue but it was raised in correspondence and no doubt time has been spent on it.

41. On the question of costs I have to say that I have not been impressed with the conduct of all the parties and their attorneys and was tempted to say "A plague on all your houses". In view, however,

of the lack of agreement from the Company on points 1.2 and 7.2 until recently, I make an order that the Company pay the Dissenters' costs in respect of Issue 1 and Issue 7, to be taxed on the standard basis in default of agreement. The conduct of the Company was not so unreasonable as to properly attract indemnity costs.

42. I make an order that the Dissenters pay the Company's costs in respect of the time wasted on the "Dissenters Summons" issue such costs to be taxed on the standard basis in default of agreement.

43. By email dated 8 November 2023 11.56am (some 1 hour and 56 minutes after the hearing was originally due to commence) Harneys, the attorneys for the Company purported, without leave of the Court, to file an affirmation attaching some 40 pages of correspondence. The attorneys may wish to revisit Practice Direction No 2 of 2014 Communications between counsel and the Court etc. In this case the Court should not have been burdened with the attorney to attorney correspondence. It would have been better if an updated list of issues had been filed. It would have been even better if the attorneys could have sensibly co-operated well before the 3pm, 2 November 2023 deadline and finalised the list of issues and sorted out any disagreements on Issue 1 and Issue 7 before then.

44. Section 238 cases seem to bring the worst out of the parties and their attorneys. I have to say that I have been unimpressed with the conduct of the parties and their attorneys in respect of the lack of progression of the Application dated as long ago as 18 August 2023. With positive and constructive co-operation in accordance with the Overriding Objective it could have been heard this week. Much time and money has been spent on setting up this CMC. At this stage I say no more other than to stress that I expect sensible co-operation between the parties and their attorneys in the future and if that does not happen adverse consequences will follow.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT