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UPDATE

Fair value update: Company's unauthorised extension to confidentiality safeguards in disclosure condemned by the court

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In a recent judgment Justice Kawaley, of the Grand Court of the Cayman Islands, held that a company subject to a s.238 fair value proceeding was not entitled unilaterally to extend court ordered confidentiality safeguards for the protection of certain 'highly sensitive documents' to *all* of the Company's disclosed documents without the express agreement of the dissenting shareholders or further directions from the court, particularly where those unauthorised safeguards rendered large parts of the company's disclosure inaccessible. In doing so, the Grand Court has re-affirmed the importance of experts having an unfettered ability to inspect the company's disclosure in the production of their expert valuation reports.

Introduction

The courts have recognised that, in petitions filed in the Grand Court pursuant to s.238 of the Companies Law (2018 Revision) (as amended) (the Law and s.238 Proceedings), the vast majority of discovery will inevitably come from the subject company. It is critical that the company provides proper discovery so that the court can have confidence that the valuations produced by the valuation experts are based on sufficient information.[1]

In s.238 Proceedings, the Grand Court will typically order the subject company to produce all documentation relevant to a determination of the fair value of its shares that are within its possession, power or control. The fact that certain of those documents are confidential does not protect them from the obligation of disclosure and the basic rule that a party, his attorneys and agents may view all documents disclosed. This is because a party will usually be adequately protected by the implied undertaking that a party to litigation will not use documents disclosed in proceedings for an improper or ancillary purpose. However, the Grand Court has recognised that in the appropriate circumstances additional protections may be justified.

Nord Anglia Education, Inc

In *Nord Anglia Education, Inc*[2], Justice Kawaley was persuaded that Nord Anglia Education, Inc (the Company) had genuine concerns about protecting its confidential information and ordered a dual disclosure regime (the HSD Regime), whereby:

(a) the Company's disclosure would be generally accessible to the Company's and the dissenting shareholders' respective experts (the Experts), the dissenting shareholders (the Dissenters) and their employees or agents and Cayman Islands' attorneys; but

[1] See the comments of Martin JA in *Qihoo 360 Technology Ltd*, unreported, 9 October 2017 (CICA), para 3.

[2] Unreported, 19 March 2018.

(b) documents which were "highly sensitive" (the **HSDs**) could be redacted by the Company before disclosure was given in order to blank out confidential material, with only the Experts and the Dissenting Shareholders' Cayman Islands' attorneys being given access to the un-redacted HSDs.

In order to provide the Company with even greater protection, the Company and the Dissenters subsequently reached an informal agreement allowing the Company to watermark both the HSDs and its other disclosed documents, subject to the express condition that the functionality of the Company's e-disclosure would not be adversely affected.

Without further consultation with the Dissenters, the Company proceeded to create a "bespoke e-discovery system" which encrypted all of its discovered documents and applied an enhanced "watermark" to all of its documents which was unprecedented in its form. As a result, the functionality of all of the e-discovery provided to the Dissenters for inspection was severely compromised. The Company's documents were not provided in native format and the Dissenters could only access the documents using two different software platforms, each with their own unique limitations. This created genuine difficulties in the ability of those inspecting the documents, primarily the Dissenters' expert team, to utilise the electronic data as they would ordinarily do for the purposes of preparing their valuation report.[3]

Application for provision of native documents

A group of the Dissenters (referred to as the **Mourant Dissenters**) successfully applied to the Grand Court for an order compelling the Company to produce its documents in native format, to remove the enhanced watermarking and other document security measures applied (other than a static watermark) and to provide ready access to the usual document review platform functionalities.

The Grand Court found that the Company was not entitled unilaterally to impose additional safeguards for confidentiality without directions from the court and without express agreement of the Dissenters. The Company was "effectively asserting the right to unilaterally create an expanded HSD regime which would all but extinguish the distinctions created by the Directions Order between HSD and non-HSD documents".[4] The court found that the directions order did not authorise the Company to impose further protections over and above the implied undertaking as to confidentiality, the non-disclosure agreements and the HSD Regime.

The Company's primary proposed solution to the problems with its disclosure was to offer to provide documents to the Dissenters' Expert team and their Cayman attorneys in native format (with the degree of functionality which would normally be expected to be available), but on the condition that the Dissenters themselves would not have access to any documents in this 'unprotected' form. The Dissenters refused this proposal. Justice Kawaley described the Company's attempts to limit the range of users entitled to inspect non-HSD documents in unprotected form in this way as "more than 'mission creep'; it was 'mission leap' on a grand scale".[5] The Company had illegitimately sought to blur the court-approved distinction between the HSDs and the Company's other documents, as far as access to non-HSD documents by the Dissenters themselves was concerned.

Conclusion

Nord Anglia has confirmed that, in Cayman Islands litigation, there is a starting presumption in favour of documents being produced during the disclosure process in native format. In the present case, it was incumbent on the Company to justify a departure from this general rule. It failed to do so. The court re-affirmed the importance of the experts in s.238 Proceedings receiving documents in native format with the full functionality required by the experts to access the documentation that they require in order to produce their expert reports.

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[3] *Nord Anglia Education, Inc*, unreported, 21 December 2018, para 5.

[4] *Nord Anglia Education, Inc*, unreported, 21 December 2018, para 14.

[5] *Nord Anglia Education, Inc*, unreported, 21 December 2018, para 14.

Mourant Ozannes acted on behalf of certain of the Dissenters, referred to as the "Mourant Dissenters".

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