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 Peter McMaster QC and Mr Andrew Jackson, Appleby, for the Appleby Dissenters
	Mr Lukas Schroeter and Mr Malachi Sweetman, Maples and Calder, on behalf of Nord Anglia Education, Inc. ("**the Company**")
	Mr Nick Hoffman and Mr Niall Dodd, Harneys, for the Baring Entities (the "**Baring Entities**")
Before:	**The Hon. Justice Kawaley**
Heard:	**10 October 2019**
Draft Ruling Circulated:	**16 October 2019**
Date of Decision:	**16 October 2019**
Ruling Delivered:	**21 October 2019**

HEADNOTE

Section 238 of the Companies Law petition- application by Petitioner to set aside subpoenas- whether subpoenas should be dismissed without prejudice to right of applicants to renew applications at trial-whether witnesses wishing to produce documents subject to the highly sensitive document regime established for parties should be required to attend the case management hearing in relation to the precise scope of that regime

RULING ON APPLICATION TO SET ASIDE SUBPOENAS

Introductory

1. The Company applied by Summonses dated August 29, 2019 for an Order that "*the 22 writs of subpoena dated 15 August 2019 issued by the dissenters numbered 1, 9, 18, 19, 21, 24, 25, 27 and 28 in Appendix 1 (together the 'Appleby Dissenters') be set aside*". On the same date 6 of the 22 subpoenaed entities which are affiliated with the Company: (i) Bach Aggregator, L.P.; (ii) Bach Finance Limited; (iii) Bach Holdings Limited; (iv) Bach Holdings 2 Limited; (v) Bach Preference Limited; (vi) Nord Anglia Education Limited applied to set aside the subpoenas issued to each of them respectively. I did not understand these second set of 6 Summons to have been pursued. The relevant writs of subpoena ("Subpoenas") were issued against 22 witnesses, 16 of which were affiliated with Baring ("Baring Entities") and 6 of which were affiliated with the Company ("Company Entities"). The Baring Entities applied by Summons dated October 2, 2019 for similar relief, and/or an Order that:

> "*2. Any documents produced by the Barings Subpoenas be treated in accordance with the Highly sensitive Documents regime that is in place in this proceeding.*"

2. It was common ground that the same basic legal test applied to whether or not the Subpoenas were validly issued and whether or not the same categories of evidence could be obtained via a letter of request. In *Re Nord Anglia Education, Inc.* FSD 235 of 2017(IKJ), Judgment dated September 9, 2019 (unreported) (the "Letter of Request Ruling"), I made the following findings (summarised at paragraph 59) of pertinence to the present application:

> "*(a) ...Heads 1, 2 and 3 seek information which is directly material to the issues raised by the Cordes Affidavit and one broad issue addressed in the Expert Reports;*
>
> *(b) the information sought under Heads 4-8 is not sufficiently material to potentially qualify for Order 39 rule 1-2 relief;*
>
> *(c) the information sought under Heads 9 and 10 marginally qualifies in materiality and particularity terms, to the extent explained in paragraphs 46 to 49 above. Complete copies of documents mentioned and/or partially disclosed are sought...why the partial documents disclosed are inadequate to enable justice to be done has not yet been convincingly explained.*"

3. The Appleby Dissenters agreed before the hearing that the Subpoenas in relation to the Company Entities should be withdrawn based on (a) the Letter of Request Ruling, and (b) the Company Entities' indication that the relevant entities did not have any documents responsive to the Subpoenas. At the hearing it was sensibly accepted that there could be no objection to this limb of the Summons being dismissed. The Baring Entities agreed before the hearing to produce documents falling within Heads 1-3 and 9-10, subject in relation to the latter two categories the materiality and necessity for the full documents to be substantiated by the Appleby Dissenters. The Appleby Dissenters agreed not to pursue Heads 4-8. However, the following disputes required determination:

(a) a dispute between the Company and the Appleby Dissenters as to the terms upon which the Subpoenas against the Barings Entities should be dismissed, with three elements to it. The Company's primary argument was that the Subpoenas should be dismissed altogether. Alternatively, they should be dismissed subject to production of the categories of documents referred to in the Baring Entities' September 26, 2019 letter and overall subject to the requested special confidentiality protections. As regards Heads 4-8, the Appleby Dissenters wished to reserve the right to pursue such documents at trial if shown to be material and necessary at such later stage. The Company wished to avoid the issue being re-litigated;

(b) a dispute between the Appleby Dissenters and the Barings Entities as to whether or not the scope of the highly sensitive document regime applicable to the parties' discovery ("HSD regime"), which it was agreed in principle should apply to the documents to be produced by the Baring Entities, should be determined either:

(i) at the Case Management Conference scheduled for October 17, 2019, or

(ii) on a freestanding basis under the Baring Entities' October 2, 2019 Summons;

(c) a dispute between the Appleby Dissenters and the Baring Entities as to whether or not the witnesses should be compelled to produce the Heads 9-10 documents now, or whether they should be permitted to insist upon the materiality and necessity of these documents to be substantiated.

Findings: on what terms should the Subpoenas against the Baring Entities be dismissed?

Should the Subpoenas be entirely dismissed?

4. The Company advanced the following argument in its Written Submissions which was addressed orally by Mr Schroeter:

> *"28...the 'potential reasons' Professor Gompers outlines in the First Gompers Report at paragraphs 131 to 135...for 'why the selling funds may have accepted a price lower than fair value' take him no further...Each 'reason' is highly speculative and lacks any economic credibility..."*

5. Mr McMaster QC submitted that this analysis was clearly a trial issue. I agree.

6. I decline to dismiss the Subpoenas in their entirety on this ground prior to having the benefit of full expert evidence at trial.

What should the Baring Entities be required to produce?

7. It was common ground that the Baring Entities should be required to produce documents falling within Heads 1-3. The dispute was whether Heads 9-10 should be ordered to be produced now (because this had been agreed by them in the September 26, 2019 Harneys letter) or whether the need for production should first be substantiated as contemplated by the Letter of Request Ruling. The September 26, 2019 offer was expressly made "*without prejudice to the fact...the Appleby Dissenters have not convincingly explained why the extracts previously provided are not sufficient*".

8. I find that the Baring Entities should be ordered to produce, or undertake to the Court to produce, documents falling within Heads 1-3 without qualification and Heads 9-10 subject to the Appleby Dissenters providing an objectively credible explanation as to why the full documents are required. This is, of course, subject to the application of the HSD regime which it is agreed in principle should apply.

Should the Appleby Dissenters be permitted to reserve the right to pursue Heads 4-8 documents which are shown to be relevant at trial?

9. The dispute as to whether or not the pursuit of Heads 4-8 should be preserved was a somewhat odd one. It was essentially agreed at the hearing that no Order should be made compelling the production of these heads of information at this stage. The Company submitted:

> "*11. The Company is concerned that the Appleby Letter implies that the Appleby Dissenters intend to re-litigate at, or shortly before, trial issues on which the Court has already given strong guidance. This carries with it the prospect of disruption before and during the trial, when efforts should be focused on the parties' substantive submissions on the valuation issues in dispute and the examination of the parties' factual and expert witnesses.*"

10. The countervailing concerns set out in the Appleby Dissenters' Skeleton Argument was as follows:

> "*6....it appears that the Company would have the Court direct that no Dissenter can henceforth have anything further to say about the relevance, materiality or necessity of any document which is not presently produced under the subpoenas.*"

11. Both these concerns are justified and the appropriate direction lies in the middle ground. In my judgment the Subpoenas should be set aside as regards the Baring Entities and Heads 4-8. It would be an abuse of process for the Appleby Dissenters to concede at this stage that there is no basis for compelling the production of these categories of documents and seek to re-litigate the issue based on presently available information at or before trial. No such application is in fact contemplated. I decline to rule out the possibility that new material might come to light at or before trial which changes this picture and justifies a fresh application for the production of this material at or before trial. Nonetheless, since the information currently being sought is based on presently available Expert Reports, the likelihood of the relevance landscape shifting before oral evidence is given at trial seems very slim indeed.

Findings: should the Baring Entities be required to participate in the CMC to determine the extent to which the HSD regime applies to their production?

12. Had the parties adopted a more conciliatory stance, this issue might not to have to have been placed before the Court. The parties agreed in correspondence that the established HSD regime should apply to the Baring Entities. (That regime most significantly contemplates that unredacted HSDs will only be seen (in the first instance at least) by the Experts, their appointees and Cayman counsel). Having reached that foundational consensus, it then became impossible to agree what the regime would be when the Appleby Dissenters understandably insisted that the precise regime could not be agreed before the issue, which would be a live one at the CMC, was canvassed by the parties at the forthcoming hearing.

13. In the course of the hearing I expressed sympathy with the concerns expressed by Mr Hoffman about the Baring Entities as non-parties participating in the CMC. I also noted that, the parties' prior agreement notwithstanding, it seemed to me that the confidentiality concerns articulated by the witnesses had a different character to the concerns of the Company and the Dissenters. That was not a fully considered and informed judgment; it may have been an ill-informed judgment. On reflection, I would be slow without hearing full argument to substitute my own judgment on this matter for that of the parties as to what type of protection is appropriate. But I did in the course of the hearing invite the parties to seek agreement on a freestanding HSD regime and still hope that if a different approach is indeed feasible, consensus will be achieved.

14. The parties having agreed in principle that the HSD regime in force in relation to the parties should apply to the Baring Entities' production, how that regime will apply at trial will be determined at the CMC. It makes no sense, absent agreement, to apply the existing HSD regime to the Baring Entities' production when it is possible that the existing regime may be modified in a way which may be relevant to this production being given not an early stage of the litigation, but on the eve of the trial. In the absence of any other agreement between the witnesses and the Appleby Dissenters and the Company, the Baring Entities are granted liberty to:

(a) participate in that portion of the CMC which deals with the HSD regime;

(b) elect to be bound by whatever HSD regime it is determined should apply to the parties at the CMC; and/or

(c) apply to the Court for further directions after the CMC in relation to paragraph 2 of their October 2, 2019 Summons and/or as to costs, for

which eventuality their Summons is adjourned generally with liberty to restore.

Summary of findings

Company's Summons

15. The Subpoenas issued against the Company Entities are set aside. It was accepted before the hearing (Appleby letter to the Court dated October 3, 2019, page 1 paragraph 1) that those 'witnesses' had no relevant documents to produce and thereafter the disposition of that limb of the Company's Summons was uncontroversial.

16. The Subpoenas against the Baring Entities are set aside as regards Heads 4-8 alone. The Baring Entities shall either undertake to produce or be ordered to produce documents under Heads 1-3 and 9-10 (in the latter case on the basis set out in paragraph 59 (c) of the Letter of Request Ruling).

17. For the avoidance of doubt, the Appleby Dissenters are not precluded from making a fresh application for Heads 4-8 documents, in the unlikely event that fresh evidence at or before trial provides a clear basis for revisiting this Court's present judgment (based on the Letter of Request ruling (paragraphs 41-45, 59(b)).

18. Mr McMaster QC submitted that all costs should be in the cause while Mr Schroeter in reply sought the Company's costs in relation to the six Company entities. In my judgment the appropriate costs order is:

    (a) the Appleby Dissenters shall pay the Company's costs of its August 29, 2019 Summons as they relate to the Company Entities up to and including October 3, 2019 in any event, to be taxed if not agreed;

    (b) the costs of the Company's said Summons generally shall be in the cause (or in the Petition).

Barings Entities' Summons

19. No Order was made in relation to paragraph 1 of the Summons, which was addressed by the Company under its Summons. The Summons is adjourned generally with liberty to restore, as regards the prayer for the imposition of the HSD regime applicable to the parties in relation to the applicants' production. The Baring Entities are at liberty to

attend and/or participate in that portion of the CMC which relates to the HSD regime issue. It is a matter for them whether they pursue alternative options such as electing to be bound by any modifications which may be made to the existing HSD regime at the CMC or, alternatively, agreeing to adopt a freestanding HSD framework which is different to the parties' regime.

20. The costs of this Summons can only properly be reserved.

GRAND COURT CIV-03 CAYMAN ISLANDS

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT