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:	Quentin Cregan and Adrian Davey of Maples and Calder (Cayman) LLP for the Company Jeremy Goldring QC for the Dissenters, instructed by (i) Sam Keogh of Campbells, (ii) Nigel Smith and Mark Dowds of Carey Olsen, and (iii) Rocco Cecere, Zachary Hoskin and Dawn Major of Collas Crill
Before:	The Hon. Justice David Doyle
Heard:	11 and 12 August 2022
Judgment Delivered:	12 August 2022
Ex Tempore Judgment Circulated:	12 August 2022
Ex Tempore Judgment Approved:	17 August 2022

HEADNOTE

Directions in respect of petitions filed pursuant to section 238 of the Companies Act (2022 Revision)

JUDGMENT

Introduction

1. In FSD 72 of 2022 (DDJ) Alpine Partners (BVI), L.P. presented a petition dated 28 March 2022 and in FSD 74 of 2022 (DDJ) New Frontier Health Corporation (the "Company") presented a petition dated 28 March 2022 both seeking, pursuant to section 238 of the Companies Act (2022 Revision) ("Section 238") this Court's determination of the fair value of the shares held in the Company together with a fair rate of interest, if any, on the amount payable by the Company to certain dissenters. The remaining dissenters are Blackwell Partners LLC – Series A, Maso Capital Investments Limited, Star V Partners LLC, Alpine Partners (BVI), L.P., Hildene Opportunities Master Fund II, Ltd., Invictus Special Situations Master I, L.P., and Oasis Investments II Master Fund Ltd., (the "Dissenters").

2. The Company and the Dissenters have been negotiating the terms of a draft Directions Order (the "draft Order"). Certain issues have been agreed but some have not. The issues still in dispute are concerned, in the main, with the discovery process. Other disputed issues are as mundane as information requests, timings in respect of consideration of transcripts of management meetings, timings in respect of responsive factual evidence and terms of an indemnity. The duties of the parties and their attorneys to help the Court to further the overriding objective of dealing with cases justly and in particular the avoiding

of disproportionate expense and the taking up of excessive Court time (which should be focused on determining substantive issues) require that they should sensibly cooperate with each other and make comprehensive and genuine attempts to agree directions in this well-trodden area of the law. I am grateful to the parties and the attorneys for the work they have undertaken in agreeing many issues but disappointed that so many remain in dispute.

3. I record that I have considered the hearing bundle. I note in particular the evidence of Carl Wu, the Company's Chief Executive Officer, and the evidence of Gwynn Hopkins, the managing director of Perun Consultants instructed on behalf of the Dissenters. I have considered the two skeleton arguments and the two bundles of authorities. I have also benefited from the helpful oral submissions of Quentin Cregan who appears for the Company and Jeremy Goldring QC who appears for the Dissenters.

The relevant law

4. I have considered the law relevant to the issues before the Court for determination, including section 238 and the numerous authorities referred to in the helpful skeleton arguments placed before the Court.

5. I note in particular:

   (1) *Re Qihoo 360 Technology* 2017 (2) CILR 585 (Cayman Islands Court of Appeal judgment 9 October 2017);

   (2) *Re Homeinns Hotel Group* 2017 (1) CILR 206 (FSD; Mangatal J judgment 7 February 2017);

   (3) *Re Nord Anglia* 2018 (1) CILR 164 (FSD; Kawaley J judgment 19 March 2018);

   (4) *Re Xiaodu Life Technology Ltd* (Unreported; FSD; Kawaley J ruling 26 March 2018);

(5) *Re Qunar Cayman Islands Limited* 2018 (1) CILR 199 (Cayman Islands Court of Appeal judgment 10 April 2018);

(6) *Re KongZhong Corporation* (Unreported; FSD; Parker J judgment 6 August 2018);

(7) Practice Direction No 1 of 2019;

(8) *Re JA Solar Holdings Co Ltd* (Unreported; FSD; Smellie CJ ruling 18 July 2019);

(9) *Re eHi Car Services Ltd* (Unreported; FSD; Parker J judgment 24 February 2020);

(10) *Re FGL Holdings* (Unreported; FSD; Parker J judgment 18 December 2020);

(11) *Re Sina Corporation* (Unreported; FSD; Parker J judgment 25 January 2022); and

(12) *Re 58.com, Inc.* (Unreported; FSD; Ramsay-Hale J ruling 8 March 2022).

Rulings on disputed issues

6. In my preparation for the hearing I largely used the issue numbers provided in the skeleton argument of the Dissenters. The Company's skeleton argument did not divide the issues into numbered issues but yesterday at the start of the hearing Mr. Cregan for the Company handed in a document (the "Company's Issues Document") which helpfully, albeit somewhat belatedly, specified some 18 issues (some of which had not been canvassed in the skeleton arguments) and it was to that document that counsel referred to at the hearing. In specifying my various rulings I have used the numbered issues provided in the Dissenters' skeleton argument and, where possible, I have cross-referenced these to the Company's Issues Document. Hopefully this will assist those who will be producing an updated Order for my approval following the delivery of my rulings on the various issues.

7. I deal with the remaining issues in dispute as follows:

Issue 1 (Company's Issues Document Issue 2)

(1) Whether the lookback period for the Company's discovery should be 5 years as sought by the Dissenters or 3 ½ years as sought by the Company.

Ruling

My ruling is that it should be 5 years.

Reasons

Although the Company was only incorporated on 28 March 2018, Mr. Hopkins notes (at paragraph 20) that in July 2019 it entered into an agreement to acquire Healthy Harmony Holdings L.P. whose healthcare business operations had ongoing operations prior to the incorporation of the Company and indeed beyond the 5-year lookback period being proposed by the Dissenters. I am not persuaded that I should reduce the "customary" 5-year lookback period. I noted that the Company had already offered to accept a 5-year lookback period for its discovery but only if the Dissenters accepted a 3-year lookback period for their own discovery in return (see emails from the Company's attorneys Maples dated 16 July 2022 and 13 July 2022). The Company itself sensibly acknowledged the applicability of a 5-year lookback period. It should, however, have agreed to this self-standing issue without trying to connect it to another. At the hearing yesterday the Company sensibly did not seriously contest the 5-year period.

Issue 2 (Company's Issues Document Issues 10 and 11)

(2) Disputed categories of Company discovery under Appendix 3 of the draft Order including whether certain categories of that discovery should be subject to lookback periods of 1 year or whether a 5-year period should apply to all Appendix 3 categories (as contended for by the Dissenters).

Ruling

My ruling is that it should be 5 years.

Reasons

I am not persuaded to reduce the period to below 5 years. The 5-year period should apply to all Appendix 3 categories. I am not persuaded that in respect of paragraphs 23 and 27 the period should be limited to a 1-year period and I note the lack of evidence to support such a shortened period.

Issue 3 (also Company's Issues Document Issue 3)

(3) Whether the lookback period for the Dissenters' discovery under Appendix 4 of the draft Order should be the 2-year period sought by the Dissenters or the 3-year period sought by the Company.

Ruling:

My ruling is that the relevant period should be a 2-year period.

Reasons:

This would be largely consistent with previous rulings in other cases. I am not persuaded that a 3-year period is warranted in the circumstances of this case even for the limited number of Dissenters identified by Mr. Cregan in his oral submissions. I have noted the evidence of Mr. Hopkins at paragraphs 28 – 30. I think a 2-year period is appropriate and proportionate in the circumstances of this case.

Issue 4 (Company's Issues Document Issue 1)

(4) Whether the Company should be ordered to provide the bulk of its discovery within 180 days (as contended for by the Company) or within 120 days (as contended for by the Dissenters).

Ruling

My ruling is that a period of 120 days should be allowed. This should be specified at paragraph 11a of the draft Order.

Reasons

I am not persuaded that the impact of the COVID 19 pandemic and the PRC Data Protection Laws mean that a longer period than 120 days should be allowed. 120 days should be adequate and realistic. The discovery process cannot be permitted to unduly delay the determination of the issues in this case within a reasonable time. The Dissenters have referred to authorities where a "customary" 70 days has been ordered in the past. The evidence before the Court goes nowhere near justifying 180 days. I noted with concern Mr. Wu's statement at paragraph 24 that "the company is yet to begin the process of

collecting documents from custodians." The Company seems to have dragged its feet in starting the discovery process earlier than it did and must now get on with the process and devote sufficient resource to it. The Company has already had significant time to progress discovery. The Company must now focus on complying with its discovery obligations.

Issue 5

(5) Ancillary issues in relation to information requests by experts under section F of the draft Order, management meetings under section G and the time period for the Dissenters to file their responsive factual evidence.

Rulings

Issue 12 of the Company's Issues Document

The Dissenters have produced strong arguments (supported by the approach adopted by the Grand Court in previous cases) against the Company's suggestion that paragraph 23 of the draft Order should remain so that if an expert submits a "new" information request before the deadline for the Company's response to a prior request has elapsed, then the period for responding to the subsequent request will run from the deadline for the prior request, rather than the date on which the subsequent request is submitted. The parties need to be reasonable about this to ensure a fair, workable and efficient process. In my judgment the time for compliance with the subsequent request should run from the date the subsequent request is made. In short I accept the Dissenters' suggested approach and I reject the Company's suggested wording which appears in its paragraph 23 as follows:

> "23. If an Expert submits an Information Request ("Subsequent Request") prior to the deadline of the immediately prior Information Request (the "Prior

Request Deadline"), then the time period in paragraph [18] for the Company to provide its response to the Subsequent Request shall commence on the Prior Request Deadline (rather than the date the Subsequent Request is submitted to the Company)."

At paragraph 76.1 of its skeleton argument dated 3 August 2022, the Company now says that it is prepared to agree to the deletion of this paragraph if the Dissenters will confirm that if an expert submits multiple information requests in short succession without waiting for the answer to an earlier information request, which is relevant to a subsequent request, then the Company would be at liberty to address all similar or related questions at the same time. The Company says that this would be of benefit to all experts as it avoids the situation in which answers to similar questions are provided in piecemeal fashion.

My ruling is that paragraph 23 of the draft Order should be deleted. I leave the Company, the Dissenters, the attorneys and the experts to deal with information requests in a fair, professional, workable, sensible, efficient and manageable way.

Now we will be "grinding small" on certain time periods, to use Mr. Goldring's expression.

Issue 13 of the Company's Issues Document

Paragraph 32 - the time period in respect of list of questions and topics should be 21 days prior to the agreed date for a Management Meeting.

Issue 14 of the Company's Issues Document

Paragraph 34 - the time periods should be 21 days to upload the transcript and 14 days for the Dissenters to confirm their agreement to any errors to the transcript which the Company later identifies.

Issue 15 of the Company's Issues Document

Paragraph 40 - the time period should be 28 days for the Dissenters to serve any responsive factual evidence which is in line with directions in previous cases. In some cases the time period has been limited to 14 days. It certainly should not exceed 28 days. The 35 days requested by the Dissenters is not justified and I reject it.

Issue 17 of the Company's Issues Document

Paragraph 6 of the draft Order should come out as I think the Dissenters now recognise. There is a general liberty to apply provision at paragraph 54 of the draft Order. Any such applications should be on a timely basis.

Issue 18 of the Company's Issues Document

Paragraph 33 of Appendix 3 of the draft Order should come out. Again I think the Dissenters now sensibly agree to its omission. It is not necessary or appropriate to have a general catchall provision in Appendix 3 which covers specific categories. The Company recognises its general disclosure obligations in any event.

Issue 6 (Issue 16 of the Company's Issues Document)

(6) Issues in relation to the wording of the Confidentiality and Non-Disclosure Agreement ("NDA") under Appendix 2, and the scope of the indemnity being sought from the Dissenters under the NDA.

Rulings:

The dispute over the restrictions in the NDA with regard to third party discovery applications has fallen away but the dispute in relation to the scope of the indemnity in the NDA requires a ruling. The Company seeks the inclusion of the following:

> "(including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal costs (calculated on a full indemnity basis) …".

The Dissenters say that such wording is proposed *in terrorem* and the Company has produced no evidence to explain what the perceived issue is which this wording addresses. The Dissenters invite the Court to reject the wording proposed by the Company. The Company says it is a standard order and gives clarity on the type of loss covered. The Dissenters say in effect it may muddy the waters rather than provide clarity. My ruling is that this wording should be included and I note substantially identical wording was included in the order in *58.com* although this issue was not referred to in the judgment so is unlikely to have been the topic of submissions and debate. In *58.com* the additional words "but not limited to" were used but no one has pressed me to include such additional wording in this case and I do not do so. The word "including" should be sufficient on its own.

Issue 7 (Issues 4 and 5 of the Company's Issues Document)

(7) Whether the Dissenters should be ordered to enter into a "Privilege Clawback Agreement" ("PCA") under Appendix 7 and a related paragraph 21 in the Discovery Protocol at Appendix 5.

Rulings and Reasons

I have considered the respective positions of the Company and the Dissenters. In short summary, the Company says that PCAs are reasonable and proportionate, particularly in litigation which involves large-scale and complex disclosure exercises such as is routine in section 238 cases. The Company used the wording of its arguments carefully and did not go so far as to say that PCAs were "routine" in section 238 cases. Indeed, although its skeleton argument on other issues helpfully referred in boxes to how the issues in dispute between the parties in this case had been dealt with in other cases, no boxes appeared in respect of issue 7 and no previous cases were referred to. That might be because PCAs have not appeared in previous directions issued in previous cases. The Dissenters say that the entry into PCAs does not form part of the standard directions ordered by the Court and is not referred to in Practice Direction No 1 of 2019. The Dissenters say as far as they are aware this is the first time that such an "agreement" has been proposed in section 238 proceedings.

The Dissenters say that the Company has not adduced any evidence regarding (i) the practical necessity for an agreement and (ii) any alleged insufficiency of protections offered under the general law.

I am not persuaded that it would be appropriate for this Court to in effect order that the Dissenters must enter into the PCA as a condition to accessing the Company's discovery.

I agree that there are well established principles applicable where a privileged document is inadvertently disclosed which seek to balance the rights of the parties. Segal J in *Lea Lilly Perry v Lopag Trust* (Unreported; FSD judgment 11 March 2019) briefly touched upon the position at paragraph 13 (b) of his judgment referring to some of the leading English cases on the waiver of privilege issue. I am not inclined to interfere with the general law by requiring the Dissenters to execute the PCA. The Company will have the protection of the general law. For these reasons, Appendix 7 and the related paragraph 21 in the Discovery Protocol at Appendix 5 should be deleted. Paragraph 8 b of the draft Order which refers to "a Privilege Clawback Agreement in the same or substantially similar form attached to this Order at Appendix 7" should also be deleted.

The Schedule of Dates should also be checked to ensure that the time periods reflect the various rulings I have made. The cross-references to paragraphs throughout the draft Order should also be carefully checked before an updated draft is provided to the Court for my approval.

Issue 8

(8) Certain categories of specific disclosure to be provided by the Company pursuant to Appendix 3.

Ruling on paragraphs 12 and 13 **(Issue 6 of the Company's Issues Document)**

My ruling is that the words "long-term" should be inserted in paragraphs 12 and 13 of Appendix 3 as per the Company's suggested formulation.

There is insufficient evidence before the Court to persuade me to delete what appears to be standard wording namely "long-term" in previous orders.

Ruling on paragraph 14 **(Issue 7 of the Company's Issues Document)**

My ruling is that paragraph 14 of Appendix 3 "Communications and Documents relating to the value of any real estate holdings of the company including but not limited to, valuations, lease agreements with tenants, investment plans or proposals" should not be included. This is in effect a whole new non-standard category of specific disclosure and I am not persuaded on the evidence and arguments before me that it should be included. I note the evidence of Mr. Hopkins (especially at paragraphs 28 and 39) but I have been influenced by considerations of proportionality in addition to relevance.

Ruling on paragraph 20 (now 21) **(Issue 8 of the Company's Issues Document)**

My ruling in respect of paragraph 20 (now 21) of Appendix 3 is that it should read as follows namely "Agreements with the Company's major suppliers" and the words "and any related Documents" be deleted. The discovery process must be proportionate.

Ruling on paragraph 23 (now 24) (**Issue 10 of the Company's Issues Document**)

I do not include the Company's suggested words of limitation in paragraph 23 (now 24) of Appendix 3 namely, "during the 12 months prior to the Valuation Date". Clarity in respect of the Company's capital structure is crucial. Mr. Hopkins states that he "cannot definitely rule out the prospect of information more than 12 months prior to the Valuation Date as being potentially useful to the valuation experts" (paragraph 47). Mr. Hopkins also reasonably accepts that "the relevance of historic share count and structure information does diminish with time" (paragraph 47). I think it would, however, be unwise to include the 12-month period limitation. The "standard" 5 years is appropriate.

Ruling on paragraph 26 (now 27) (**Issue 9 of the Company's Issues Document**)

My ruling in respect of paragraph 26 (now 27) of Appendix 3 is that it should read "Documents relating to any actual or potential significant transactions of the Company's shares". Indeed it is now sensibly, albeit belatedly, agreed between the parties that the words "actual or potential" are to be included.

Ruling on paragraph 27 (now 28) (**Issue 11 of the Company's Issues Document**)

I do not think in this case it is appropriate in paragraph 27 (now 28) of Appendix 3 to insert a time period as suggested by the Company namely "during the 12 months prior to the Valuation Date" (although I accept this was recently done in *58.com*). I note, in the case presently before me, the evidence of Mr. Hopkins that a period of five years (where available) is "in accordance with reasonable valuation practice" (paragraph 54) and "it appears arbitrary to restrict the disclosure to 12 months prior to the Valuation Date being a period where the Company's take private transactions was already in contemplation." (paragraph 58). In my judgment based on the evidence before me in this case, the "standard" 5-year period should be applicable.

8. Those are my rulings in respect of the various issues. I think I have covered all 18 issues in the Company's Issues Document handed up to the Court yesterday. If I have missed any issues no doubt the attorneys will let me know.

Ancillaries

9. The attorneys should let me have an updated draft Order for my approval before 3pm Tuesday, 16 August 2022. I am minded to order costs in the cause. If any party objects to that they should file concise (no more than 5 pages) written submissions within 14 days

and any concise responsive written submissions should be filed within 14 days thereafter and I will decide costs on the papers without a further hearing.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT