

**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 Malachi Sweetman and Mr Lukas Schroeter, Maples and
Calder, on behalf of Nord Anglia Education, Inc. (“**the
Company**”)

Before: The Hon. Justice Kawaley

Heard: 28 August 2019

Draft Ruling Circulated: 30 August 2019

Ruling Delivered: 9 September 2019



HEADNOTE

Section 238 of the Companies Law petition - application by dissenters for Letter of Request to Hong Kong Court - GCR Order 39 rules 1-2 - jurisdiction to order production of documents without an examination - whether documents sought material and necessary -relevance of delay and risk of imperilling imminent trial date - refusal of application by Company and proposed witnesses to adjourn application

RULING ON APPLICATION FOR LETTER OF REQUEST

Background

1. The present section 238 Petition is said to be one of the larger cases in terms of the value of the dispute and the number of dissenters to come before this Court. It has spawned a dizzying array of interlocutory applications despite the fact that it is clear that the parties have sensibly resolved a variety of procedural matters without troubling the Court. Such applications as the Court has had to resolve have more often than not comprised a staple of genuinely ambiguous points of principle seasoned with generous lashings of tactical stratagems presumably designed to achieve some form of strategic advantage on the wider litigation battleground. The present application for the issue of a Letter of Request falls into this category.
2. The genuinely ambiguous main point of principle is whether the threshold for compelling the production of documents said to be relevant by virtue of the evidence recently filed by one of the Company's witnesses is met. The ambiguity flows largely from the fact that the Appleby Dissenters contend that the Company's positive assertion that the Merger Offer price was negotiated at arms' length is unusual; most section 238 cases involve management buyouts where it is conceded that the negotiated price is not a suitable proxy for the fair market value of the shares. The secondary point of principle is the undisputed need for the Court to be mindful of the fact that the trial is scheduled to commence at the beginning of December and to avoid granting relief which would imperil a timetable which has been substantially settled for several months.
3. The Company's main complaint was that the present application could have been made earlier and that the Appleby Dissenters' main objective was to delay and disrupt the trial timetable. The Appleby Dissenters' riposte was that, if this Court granted the Letter of Request, any disruption to the trial date would be attributable in substance to the Company and the witnesses' own tactical decision (in pursuit of their common commercial interests) to resist the production requests rather than to comply with them.
4. A further nuance was that Writs of Subpoena had been issued against various Cayman-domiciled Baring entities affiliated with the entities to which the Letter of Request application related. Those Subpoenas were returnable on the day after the hearing of the present application. Those matters were adjourned so that the parties to them could consider the implications of the present Ruling. The present Ruling has been prepared in some haste because the trial date of December 2, 2019 is looming and:



- (a) the overriding objective requires the Court to actively manage the case in a way which will support rather than undermine the existing timetable; and
- (b) the present application primarily raises practical issues of case management which ought properly to be resolved in a pragmatic and prompt rather than in a legalistic and technical manner.

The Appleby Dissenters' application

5. The Appleby Dissenters applied for the issue of a Letter of Request to the High Court of the Hong Kong Special Administrative Region Court (the "Hong Kong Court") by Summons dated August 7, 2019. The Summons was supported by the Affidavit of Heather Froude sworn on the same date (the "Froude Affidavit"). The basis of and background to the application may be summarised as follows:

- (a) in July 2019, the Company served an Affidavit sworn in Hong Kong on July 11, 2019 by a Mr Patrick Cordes, Chief Financial Officer and Managing Director of Baring Private Equity Asia Limited ("BPEA") (the "Cordes Affidavit"). The Cordes Affidavit deposed that although the Merger price was negotiated by seller and buyer groups which included Baring affiliates on both sides, the "sell side" was incentivised to negotiate the highest possible price and did so;
- (b) Professor Daniel Fischel's Expert Report (for the Company) dated July 18, 2019 concluded that the Merger Consideration exceeded the fair value of the Shares based on four computation methods, one of which was "*the \$32.50 per Share that the Buyer Consortium agreed to pay, and Nord Anglia Education agreed to accept*" based upon, *inter alia*, "*the process that led to the Transactions*" (paragraph 22);
- (c) Professor Paul Gompers' Expert Report (for the Dissenters) dated July 18, 2019 stated that "*a complete assessment was not possible*" of the assertions made in the Cordes Affidavit that the "sell side" was strongly incentivised to sell at the highest price (paragraph 130). He identified the specific categories of documents which he considered to be relevant to such an assessment;



- (d) Appleby wrote to Maples on July 23, 2019 stating that the Cordes Affidavit was only served on July 16, 2019, two days before the Expert Reports were exchanged. An undertaking by Mr Cordes and/or BPEA to produce the documents identified by Professor Gompers as relevant was requested within seven days. By letter dated August 1, 2019, Maples indicated they would take instructions;
- (e) Appleby by letter dated August 5, 2019 requested a response by August 7, 2019. By letter dated August 6, 2019, Maples indicated that BPEA was a separate entity to the Company, which could not compel production of the information sought. It was asserted that the request had been passed on, a response was hoped for the following week, which response might include some of the documents sought;
- (f) by letter dated August 7, 2019, Appleby advised Mr Cordes and BPEA that due to the urgency of the matter and the December 2, 2019 trial date, a Summons seeking a Letter of Request had been issued;
- (g) on August 9, 2019 the Court offered dates including August 28, 2019 and dates in September to Appleby for the hearing of the Summons. On the same date Appleby emailed the Summons and supporting Affidavit to Maples;
- (h) under cover of letters dated August 15, 2019, Appleby served the Subpoenas on locally domiciled Baring entities;
- (i) on or about August 17, 2019, in a direction communicated to counsel on or about August 19, 2019, I approved the decision of the Clerk of the Court to issue the Writs of Subpoenas returnable for August 29, 2019 and directed that any objections to the issuance of the Writs could be raised on the return date;
- (j) on or about August 19, 2019, the Summons was administratively fixed for hearing on August 28, 2019;
- (k) the Appleby Dissenters filed their Skeleton on August 23, 2019 and informed the Court that they had no notice of any opposition to the Subpoenas returnable for August 29, 2019. ;
- (l) on August 26, 2019, the Company advised the Court that it might be seeking an adjournment on August 28, 2019 because, *inter alia*, (1)



Appleby had refused to serve its Skeleton and Bundles, impairing Maples' ability to adequately prepare and (2) Mr Imrie was not available on 28 August 2019 but would be available on one of the September dates previously offered by the Court;

- (m) on August 27, 2019, Appleby agreed to supply its Skeleton Argument and Authorities Bundle Index to Maples despite their refusal to exchange Skeletons in accordance with the customary practice;
- (n) on August 28, 2019 Mr Cordes wrote the Court indicating that BPEA only learned of the August 28-29, 2019 hearings from Maples on an unspecified date. An adjournment was sought in order to instruct local counsel.

Reasons for refusal of the adjournment application

6. The August 28, 2019 letter requested an adjournment of both the August 28 and 29 2019 hearings in order for BPEA to instruct local counsel without explaining when notice was first received of the fixtures or indicating any express reasons why it had not been possible to instruct counsel in time to make a formal adjournment application. The material before me suggested that:

- (a) Mr Cordes and BPEA had been notified of the fact that the present application had been filed on August 7, 2019 and that the Baring entities had been served with the issued Subpoenas on August 15, 2019;
- (b) they had not been formally notified of the present hearing;
- (c) any Order made by the Court would be *ex parte* and liable to be set aside following an *inter partes* hearing and/or challenged before the Hong Kong Court by the proposed witnesses in any event.

7. I took the view that the only formal application to adjourn which was before the Court was the Company's application advanced orally by counsel to adjourn the application for the Letter of Request.



8. The complaint that the Company had inadequate time to prepare because the Appleby Dissenters declined to agree to a sequential exchange of Skeletons was unconvincing. Maples had the Summons and supporting Affidavit which explained the factual basis of the application since August 9, 2019. The main legal principles governing applications under GCR Order 39 are well settled and the present application essentially turned on the application of those principles to the particular facts of the present case.
9. The desire of the Company to deploy the advocacy of the inimitable Mr Imrie, who was unavailable on August 28, 2019, was entirely understandable but not indispensable to justice having regard to the strength of the Company's local legal team. I was also reluctant in circumstances where the Company itself was credibly complaining that the present application should be refused in part because it would disrupt the trial timetable to deal with the present application in a way which would aggravate these risks.
10. The adjournment application appeared to me to be more heavily influenced by tactical rather than merits concerns. From a case management perspective, it seemed to me that justice delayed could potentially amount to denying the application because the risk of imperilling the trial date would become an even more compelling ground for refusing the application. I accordingly, in the exercise of my discretion, refused the Company's application for an adjournment of the Appleby Dissenters' application.

Evidential basis of the Letter of Request application

11. The Froude Affidavit explains the factual issues in dispute which underpin the present application as follows:

“7...In summary, such evidence from Mr Cordes of BPEA appears to have been adduced to support a case that the merger was an arm's length transaction, robustly negotiated to achieve the highest price which Fund III and Fund IV could obtain for their interest in the Petitioner, and that fair value should be determined to be no more than the Merger Consideration which inter alios those funds received.

8. The Dissenters do not accept that the merger was an arm's length transaction, or that the Merger Consideration represented the fair value of the shares, which they believe to have been much higher. According to the Proxy Statement which the Petitioner filed with the U.S. Securities and Exchange Commission on [sic] 2017 in connection with the (then-proposed) merger, funds



affiliated with a another BPEA-controlled fund, viz. Baring Private Equity Fund VI (Fund VI), were to own 38.1 percent of the Petitioner, post-merger. In summary, they contend that this is indicative of a conflict of interest, or 'self-dealing', transaction, and that the Merger Consideration agreed in the course of that transaction cannot safely be relied upon as an indicator of the fair value of the shares.

9. It is apparent from the Expert Reports of Professor Paul A. Gompers (appointed by the Respondents) and Professor Daniel R. Fischel (appointed by the Petitioner) dated and exchanged on 18 July 2019, which address the broad issue of fair value, that questions of (a) whether the deal price (i.e. the Merger Consideration) is or is not a reliable indicator of, or proxy for, the fair value of the Respondents' shares; and (b) whether and to what extent the Court should place any weight on that deal price when determining the fair value are both matters which will be in issue and will fall to be resolved at trial..."

12. The categories of documents sought and their relevance to these trial issues are taken directly from paragraph 130 of Professor Gompers' Report, where he opines as follows:

"In order to evaluate Mr Cordes' claims in the context of contemporaneous evidence specific to Baring, additional documents and information would be required. Without such information, a complete assessment is not possible. Based on my preliminary review of Mr Cordes' affidavit...this documentation would include the following, as effective for the dates from when Baring signed an NDA with the Company in January 2017 until after any post-transaction syndication took place and was completed: (1) identities and ownership percentages of investors in the selling funds (Fund III and Fund IV); (2) identities and ownership percentage of investors post Take-Private Transaction, both immediately following the Take-Private Transaction as well as the identities and ownership percentages of the ultimate investors (including co-investors) after the initial stake was sold down to ultimate co-investors; (3) identities of the investors on the advisory councils of Fund III and Fund IV; (4) records and copies of information and material provided to the advisory councils; (5) advisory council meeting minutes and other meeting records if they were kept; (6) Baring internal documents and financial models regarding the Take-Private Transaction (in addition to the Project Bach model), including any investment memoranda and financial models reviewed by the General Partners and advisory councils, including in particular documents containing IRR and performance projections for the Take-Private Transaction; (7) meeting



minutes and other records of any meetings that occurred at Baring in the process of discussing and approving the Take-Private Transaction; (8) marketing and other material describing the Nord Anglia investment provided to investors in Fund VI, CPPIB, and other co-investors; (9) complete copies of governing organization documents (such as limited partnership and management agreements) for the selling entities and for Fund VI as well as for any vehicles related to co-investments by both CPPIB and other parties; and (10) fee structure (both management and performance) of all relevant Baring funds (III, IV, VI and all relevant co-investment LPs) and investors to the extent there were any exceptions (including any arrangement with CPPIB), to the extent not already provided as appendices to the Cordes Affidavit....”

13. Professor Gompers’ list of documents is reproduced in the draft Letter of Request, although in their Skeleton Argument, the Appleby Dissenters sought minor additions to that list¹. The Froude Affidavit deposes that none of the key Baring entities are parties to these proceedings so ordinary discovery was not available against them. Accordingly:

“13. The Appleby Dissenters believe that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, particularly the issues identified above, that the Court issues a letter of request to the Hong Kong Court requesting that the Hong Kong Court causes Patrick John Cordes and BPEA to produce documents relating to the matters addressed by the First Affidavit of Patrick John Cordes sworn on 11 July 2019 and falling within the categories described at paragraph 130 of Professor Gompers’ Expert Report...”

14. The penultimate section of the Froude Affidavit is headed “*Full and Frank Disclosure*”, suggesting that the application was intended to be pursued on an ex parte basis. The principles the Hong Kong Court would be likely to apply if asked to give effect to the Letter of Request, which broadly mirror the approach which this Court would take in a corresponding position, are then set out. In a nutshell, pre-trial discovery and fishing expeditions are not permitted.

¹ Paragraph 66(2) (Head 7); paragraph 74(2)(Head 10).



Findings: governing legal principles

15. It was common ground that GCR Order 39 rules 1-2 governed this Court's jurisdiction. Rule 2(1) extends the jurisdiction described in rule 1 to overseas witnesses. Order 39 rule 1 critically provides:

“(1) The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order for the examination on oath before a Judge, the Clerk of the Court, an attorney or some other person at any place, of any person.

(2) An order under paragraph (1) may be made on such terms (including, in particular, terms as to the giving of discovery before the examination takes place) as the Court thinks fit and may contain an order for the production of any document which appears to the Court to be necessary for the purpose of the examination.”

16. Order 39 rule 2 provides:

“Where the person in relation to whom an order under rule 1 is required is out of the jurisdiction, an application may be made -

(a) for an order under that rule for the issue of a letter of request to the judicial authorities of the country in which that person is to take, or cause to be taken, the evidence of that person; or

(b) if the government of that country allows a person in that country to be examined before a person appointed by the Court, for an order under that rule appointing a special examiner to take the evidence of that person in that country.”

17. This confers a broad discretion on the Court to order the production of “*any document which appears to the Court to be necessary for the purpose of the examination.*” The documents must clearly be “*necessary*” (i.e. both relevant and needed to do justice) and implicitly must be described with sufficient particularity to avoid “*fishing*”. Mr Sweetman helpfully amplified the meaning of “*necessary*” by reference to, *inter alia*, Lindley LJ's following observations in *Ehrmann-v-Ehrmann* [1896] 2 Ch, 611 at 614-615:



“The point to be looked to is whether the evidence which it is desired to obtain abroad is really necessary for the purposes of justice. It is not enough to say that possibly it may be of some use on some collateral matter, that it may be useful for the purpose of corroborating a witness, or something of that kind; it must have a closer bearing on the issue.”²

18. The Company’s counsel also referred to a decision³ which was distinguishable on its facts but does illustrate a relevant principle of general application. When documents are sought from a witness who is overseas but expected to be available for cross-examination at trial, a letter of request cannot be used to obtain evidence which will be given in the trial court in any event. This speaks, in part at least, to the need to carefully scrutinise, insofar as is possible, the boundaries between matters which can fairly be limited to exploration through cross-examination and undisclosed underlying documentation which it is necessary to have available to potentially deploy in cross-examination to fairly test the witnesses’ evidence. It also requires one to recall that parties generally resolve many issues relating to the need for redactions and the contents of bundles (and similar issues) in the run-up to trial without resorting to Court orders save as a last resort. Hard-headedness and impracticality can usually, one way or another, be sanctioned by the Court.
19. The Appleby Dissenters rightly submitted in their Skeleton:

“28... it is recognised that certain conditions need to be met in order for the Court to be issue a letter of request to a foreign court, and that these mirror the conditions to be met by incoming letters of request to this Court. These conditions have been applied by the Cayman courts on numerous occasions, particularly in respect of incoming letters of request, and may be summarised as follows:

(1) The documents sought must be described with sufficient particularity;

(2) The request must be for evidence, which can itself be used in the proceedings, and cannot amount to a fishing expedition (or roving enquiry), carried out in search of information which may or may not lead to the discovery of admissible evidence;

² Lopes LJ concurred at 616.

³ *Warner-v-Mosses* (1880) 16 Ch D100 at 102.



(3) *The documents sought must be directly material to the matters in issue in the proceedings for which they are sought; and*

(4) *The Court must be shown that there is good reason to believe that the documents actually exist and are likely to be in the possession of the witness.”*

20. Mr Sweetman also raised the technical objection that the rule only conferred jurisdiction to order an examination coupled with a production order; the Court had no jurisdiction to order the production of documents alone. This submission clearly had merit based upon a straightforward reading of the relevant rules. Mr McMaster QC submitted that it was clear from *Panayiotou –v- Sony Music Entertainment* [1994] Ch. 142 at 146-151C, that any such limitation in the wording of the rule does not prevent the Court from making a freestanding request for the production of documents alone in its inherent jurisdiction. In the course of argument I observed that in my experience letters of request typically fell into three categories:

- (a) cases where an examination was sought for the purposes of obtaining oral evidence and the production of documents; and
- (b) cases where an examination was sought solely for the purposes of obtaining oral testimony; and
- (c) cases where an examination was sought solely for the purposes of obtaining the production of documents, with the witness (absent an agreement waiving these formalities) appearing before the examiner to produce the documents sought.

21. Mr McMaster QC responded with the insightful observation that an Order for the production of documents with the assistance of an overseas court was essentially the equivalent to a *subpoena duces tecum*. This analysis is supported by the observation of The Vice-Chancellor in *Panayiotou –v- Sony Music Entertainment* [1994] Ch. 142 at 149A, in relation to the international legal obligations in relation to inwards letters of request under the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1976:



“The letter of request is to specify the evidence to be obtained. ‘Evidence’ is not defined but there is no reason to doubt it embraces documentary evidence just as much as oral testimony.”

22. The position is no different under Cayman Islands law, which does not define “evidence” when creating a statutory obligation to respond to foreign letters of request: Evidence (Proceedings in Other Countries) Order 1975, sections 1-2. In my judgment Order 39 rules 1-2 clearly permit the Court to order the production of documents (or request a foreign court to do likewise) in circumstances where the only evidence sought is documentary in character. However, having regard to the formality of the letter of request process (which is often abbreviated by consent as between common law courts at least), the appropriate form of order and/or letter of request is to require the relevant witness to attend to be examined to produce the relevant documents. The examination is the practical mechanism whereby the witness is likely to be brought before the foreign court (or its appointed agent) to produce the relevant documents for use at trial in the requesting court.
23. Order 39 rules 1-2 clearly empower this Court to issue a letter of request to a foreign court for a witness to be required to produce documentary evidence. If the foreign court accedes to that request, the foreign court (and the Hong Kong Court’s statutory regime is similar to our own) is likely to require the witness to attend to be examined for the purposes of producing the relevant documents in evidence for the purposes of the trial before this Court. My primary finding is that no jurisdictional impediment to obtaining evidence abroad in this form exists if the relevant rules are construed in a purposive way consistent with the wider legislative context. An order under Order 39 rule 1 and/or 2 for the production of documents is always in substance ancillary to an examination because the witness will be required to attend an examination hearing in order to formally produce the documents sought.
24. I would in the alternative follow the reasoning of Sir Donald Nicholls (V-C) in *Panayiotou* and hold that the Rules cannot oust the inherent jurisdiction of the Court to request the production of documents without also seeking oral testimony in the unlikely event that Order 39 rule 1 purported to have such effect.

Findings: merits of the application

Delay

25. Mr Sweetman complained that the Proxy Statement which was available to the Dissenters long ago disclosed the parties involved in the negotiation process so that



attempts to obtain the information now sought should not have been left to this late stage. In effect, reliance was artificially being placed on the recently served Cordes Affidavit and the respective Expert Reports.

26. It is to a large extent the judgment of hindsight to contend that the Appleby Dissenters ought to have realised that the Company and its Expert would rely on the arm's length nature of the negotiation process to justify using the Merger Consideration as in and of itself an indicator of fair value. There was no dissent from the Company's counsel when their opponents informed the Court that this was not a point which had routinely arisen in past cases. More importantly still, the Company contended that the materiality requirement had not been met in the face of the Expert Reports and the affirmative factual evidence upon which the Company had only recently served. It is difficult to see how the present application could have been validly made based on the mere fact that the Proxy Statement disclosed that related parties were on both sides of the negotiation process. The Company's and/or the witnesses' likely retort would simply have been: "so what?"
27. However a more important and valid submission advanced by the Company's counsel was the overarching need to avoid a situation where the security of the trial date was "imperilled". Mr Sweetman suggested that the Appleby Dissenters should have been willing to undertake not to use the fact that this application was pending (if it was granted) as grounds for seeking to alter the trial date. He referred me to my own Ruling on the Data Room Summons herein, Judgment dated December 21, 2018 (unreported). There I observed (commenting on the Mourant Dissenters' delaying tactics in this action designed to support certain Dissenters making section 1782 discovery applications abroad):

"27. The pursuit of such foreign ancillary relief should have been integrated into the timetable set by this Court for the present proceedings. Against this background the Dissenters will not easily be able to persuade this Court to grant them further indulgences in relation to the timetable of the present proceedings based on any pending foreign proceedings."

28. Case management requires the Court to take into account a variety of potentially conflicting considerations and do its best to strike the right balance. The goal of achieving substantive justice on the merits must be balanced against the goals of expedition and efficiency. In large scale litigation, proceeding in a slow and inefficient



way may in and of itself impair the effective application of the substantive law in question. Where a trial date in a case involving multiple parties and professionals with busy diaries has been fixed, the Court should be astute to manage the final stretch of the route to trial in a way which does not needlessly disrupt a settled timetable.

Materiality

29. Most broadly, it is necessary to decide how important the information sought is to the case as a whole. Professor Fischel relies upon the arm's length character of process which led to the agreed Merger Consideration as one of four bases on which he concludes that the price was fair. To my mind, Mr McMaster QC effectively conceded in the course of argument that this issue was merely one of several and was not, standing by itself, an issue upon which the entire case might turn. He was not willing to rely on the option of persuading me at trial to reject the Company's evidence on this issue as deficient (if it was not voluntarily supplemented by the information sought) and appealing my finding if it was wrong. This was because, I inferred, other evidential considerations might dilute the significance of this issue.
30. This 'big picture' view supports the Company's case that the issue does not merit postponing the trial (or risking such an eventuality). But it also demonstrates beyond sensible argument that the process by which the price was negotiated is a material issue in dispute at trial. However, materiality in this context also requires a closer and more nuanced analysis of whether and to what extent the additional information sought is objectively necessary for the Court to fairly determine the relevant issue.

Particularity

31. The need for particularity was common ground and not a significant consideration in the context of the present application. There must be evidence that the documents sought exist or are likely to exist.

Basis for believing the party has the documents sought

32. The application was based on the premise that Mr Cordes' evidence implied that he was a key representative of the Baring "sell side" during the negotiation process and having



deposed to the commercial rights and rationales of the entities should be presumed to have had access to the corporate material upon which his own evidence was based. This premise in my judgment falls to be tested through analysing whether the material sought is sufficiently material to make it necessary for it to be produced. The nexus between Mr Cordes' evidence and the documents sought must be sufficiently strong to make the documents both material and items which he ought to be able to produce.

The Cordes Affidavit

33. The specific heads of documents may best be considered in relation to the Cordes Affidavit. The Cordes Affidavit may be read as positively asserting the integrity of the negotiation process in response to generalised complaints about its fairness made by the Stockbridge Dissenters through the Affidavit of Anil Seetharam sworn on February 15, 2019.
34. Be that as it may, Mr Cordes deposes that BPEA launched seven private equity funds since 1997 known as Funds I through VII. Funds III and IV were on the "Sell Side" and Fund VI on the "Buy Side". He identifies the General Partners of these three Funds, all Baring entities (paragraph 15), but does not name the Limited Partner investors. The impression given is that the investors are third party investors. He proceeds to assert that the BPEA Group and Funds III and IV were highly incentivized to achieve the highest possible price, explaining that the latter two Funds (together with two other limited partnerships which had the same Baring General Partner) beneficially owned roughly 90% of Premier Education, which in turn owned 66.8 % of the Company's shares (paragraphs 17-20). Funds III and IV alone are said to have owned over 72% of Premier Education. The General Partners of Funds III and IV are said to have owed contractual and fiduciary duties to their respective investors to maximize returns and were not entitled to prefer the interests of the Buyer Side (paragraph 22). It is then deposed:

"23. The Advisory Councils of Funds III and IV, respectively, comprised of most of the largest investors in each fund and representing 45% and 61% of the capital of Funds III and IV, respectively, approved the sale to the purchasing consortium on April 24, 2017. No votes were cast against the Merger transaction by any member of the Advisory Councils. CPPIB was not invested on the Sell Side and was therefore not involved in the Advisory Councils of Funds III and IV."



35. Mr Cordes' evidence appears to be that the Merger transaction was approved by all the investors who served on the Advisory Councils. The significance of this approval is clearly far greater if the investors who voted had no connection with the 'Buy Side' as paragraph 23 suggests.
36. The financial incentives for the BPEA Group on the 'Sell Side' to maximize the Merger price is then explained by reference to its carried interest rights which entitle it to a 20% share of profits made by the limited partners subject to the terms of the relevant methodology which involved a 'Catch-Up' period. These averments are supported by exhibited extracts from the limited partnership agreements (paragraphs 27-34). It is asserted that Fund VI had no accrued or nearly accrued carried interest rights at the time the Merger transaction was approved, with extracts from partnership agreements exhibited (paragraph 39).

Head 1 (identities and ownership percentages of investors in the selling funds (Fund III and Fund IV))

37. In my judgment, Head 1 is very directly material to the Court's ability, with help from the Experts, to fairly assess the central tacit thesis of Mr Cordes that the investors who approved the transaction, as well as the General Partners who presumably negotiated and proposed the transaction, did so on arm's length commercial grounds. As Professor Gompers plausibly states (at paragraph 133) of his Report:

"Mr Cordes' claim regarding the advisory councils' vote cannot be evaluated without knowing the extent to which the advisory council members invested, as limited partners in in Fund VI, or otherwise in the Take-Private Transaction as co-investors..."

38. This Head meets the requirements of materiality and particularity and the evidence sought ought to be in the possession of BPEA as the promoter of Funds III and IV. The time period identified by Professor Gompers ("*effective for the dates from when Baring signed an NDA with the Company in January 2017 until after any post-transaction syndication took place and was completed*") is also appropriate. I will consider necessity on an overall basis below.



Head 2 (identities and ownership percentage of investors post Take-Private Transaction, as well as the identities and ownership percentages of the ultimate investors)

39. Mr Sweetman sought to persuade me that nothing in the Cordes Affidavit justified the request for Head 2 documents. However, this is merely the other side of the Head 1 coin. The main question raised by Mr Cordes' evidence about the approval by the advisory councils is whether or not (as he implies but does not substantiate) the voting investors on the 'Sell Side' had no conflicting interests on the 'Buy Side'. For the same reasons this production request meets the basic requirements of the Letter of Request legal test (subject to considering necessity below).

Head 3 (identities and ownership percentages of investors on the advisory councils)

40. The most important consideration for a fair assessment of the process appears to me at this stage to be the identity and ownership percentages of investors who served and voted on the advisory councils. This is because the Experts will be assisting the Court to assess the relevance of the process which ended with the Merger Agreement and the negotiated Merger price. The identity and ownership interest of investors in Fund III and IV who took no active part in the Transaction process appears to me to be of far less relevance to the issue in question. This Head also meets the basic requirements for the issuance of a Letter of Request.

Head 4 (records and copies of information and material provided to the advisory councils)

41. The information and material supplied to advisory councils is clearly potentially relevant in a general sense applying the test applicable to discovery. In my judgment it is not clearly material to the requisite extent because the most significant issue raised by Mr Cordes' evidence (and the Expert Reports) is not whether the process was a perfect one but whether or not it was an arm's length process. This Head falls short of the level of materiality and particularity required for the purposes of seeking the production of documents through a Letter of Request.



Head 5 (advisory council meeting minutes and other meeting records if they were kept)

42. For the same reasons as stated in relation to Head 4, this Head also falls short of the level of materiality and particularity required for the purposes of seeking the production of documents through a Letter of Request.

Head 6 (financial models reviewed by the General Partners and advisory councils)

43. This Head has a very distinct “discovery” ring to it, resembling the sort of documents the Company sought through Dissenter Discovery. This Head lacks particularity and the direct connection with the issues in dispute in relation to the Merger Transaction process which would meet the requisite materiality test. The relevant issue is not whether or not the advisory councils of Funds III and IV acted on the best possible information; nor indeed why they approved the price which was ultimately agreed. The central issue is whether or not the parties involved in approving the transaction were, in effect, acting as *bona fide* sellers or not.

Head 7 (meeting minutes and other records of any meetings that occurred at Baring in the process of discussing and approving the Take-Private Transaction)

44. Head 7 fails to meet the basic requirements for making a production of documents order through a letter of request for the same reasons as are stated above in relation to Head 6. Neither the Cordes Affidavit nor Professor Fischel’s Report directly bring into issue the discussions at Baring about the process. Obviously such material is potentially relevant in the discovery sense.

Head 8 (marketing and other material describing the Nord Anglia investment provided to investors in Fund VI)

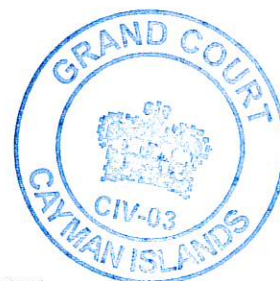
45. Head 8 is not directly material to the question of whether the process which resulted in the Merger price being agreed was an arm’s length process. The Cordes Affidavit focusses on the commercial interests of the ‘Sell Side’. The Company’s Expert relies on this evidence and the Dissenters’ Expert has questioned whether those interests have been accurately characterised. How the ‘Sell Side’ pitched their offer to the ‘Buy Side’



is peripheral to the main issue or issues identified as grounds for the issuance of the Letter of Request.

Head 9 (complete copies of governing organization documents for the selling entities and for Fund VI as well as for any vehicles related to co-investments)

46. Head 9 is not entirely adequately particularized or directly material as a freestanding category of documents. It has two limbs:
- (a) firstly, complete copies of governing organization documents for the selling entities are requested. This request is not adequately particularized to the extent that no specific case as to the inadequacy of the extracts of documents which have already been provided has yet been advanced. To the extent that the Company through the Cordes Affidavit places positive reliance on contractual and fiduciary duties owed by the General Partners on the ‘Sell Side’, the full picture on the contractual and fiduciary duties and obligations relied on is clearly required;
 - (b) secondly, the same documents are sought on the ‘Buy Side’. It is difficult to see (the identity of investors point apart) how the contractual rights and obligations of investors on the ‘Buy Side’ are relevant unless the ‘Buy Side’ includes investors on the ‘Sell Side’. It would be more material to know whether or not sellers had an interest as buyers and far less material, it seems to me at this stage, to know what the extent of that interest was.
47. This Head barely meets the basic requirements of particularity and materiality as regards documents sought in relation to sellers but clearly falls short as regards buyers. Even as regards sellers, an obvious question arises as to whether the necessity requirement is met at this stage when some documents in the category have been provided and it has not been demonstrated to my satisfaction that the extracts provided are inadequate for justice to be done.



Head 10: fee structure (both management and performance) of all relevant Baring funds (III, IV, VI and all relevant co-investment LPs) and investors

48. Head 10 mirrors Head 9 in that:
- (a) documents relating to the fee structure on the ‘Sell Side’ not already provided are clearly material, but why it is considered more information should be disclosed (and, if so, what it consists of) has not been adequately particularised;
 - (b) documents relating to the fee structure on the ‘Buy Side’ are of marginal relevance, and even then only to the extent that there is an overlap of investors on both sides of the fence. I was not persuaded that Professor Gompers’ categorization should be expanded to include agreements between Baring entities and CPPIB as submitted by the Appleby Dissenters in their Skeleton Argument (paragraph 74(2)).
49. On the face of this aspect of the Letter of Request, it does not seem “necessary” in the requisite legal sense for this forensic procedure to be deployed to supplement information an overseas witness has already voluntarily disclosed.

Is it necessary for a Letter of Request to be issued?

50. It is helpful at this juncture to return to an authority of some vintage upon which Mr Sweetman relied in support of the proposition that the present application was inappropriate because the relevant witness would in due course be appearing before the Court. In *Warner-v-Mosses* (1880) 16 Ch D100 at 102, Jessel M.R observed in relation to a rule similar to Order 39 rule 1:

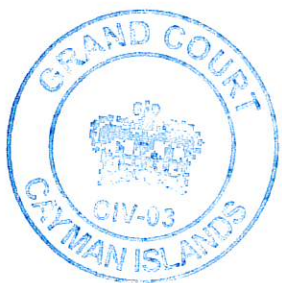
“I do not intend to cut down the generality of its terms, but it is confined to cases in which it appears ‘necessary for the purposes of justice.’ Now it cannot be necessary for the purposes of justice to examine witnesses before the trial who can attend at the trial...”

51. As I stated above, I reject the proposition that as a matter of law a witness who will attend trial cannot as a matter of inflexible principle be examined before trial. However,



this is certainly the general rule. In my judgment the necessity for deploying so significant a procedural remedy as one which involves requesting assistance from a foreign court will have to be assessed based on a strong starting assumption that all evidence the witness is required to give should be given at trial. The main burden on the Appleby Dissenters is, assuming they have satisfied the other conditions for obtaining the relief they seek (principally materiality and particularity), to demonstrate that:

- (a) the further evidence they seek cannot be obtained via the Court's general case management powers in relation to witnesses before the Court at trial; and/or
 - (b) justice requires that the further evidence should be produced in advance of trial.
52. The jurisdiction of the Court to compel a non-party witness to produce documents relevant to his testimony at trial was not canvassed in argument. Assuming in the Appleby Dissenters' favour that no such formal power exists, it seems unrealistic to assume that, where a witness such as Mr Cordes is a voluntary witness with commercial interests aligned with the Company's, that he and/or BPEA would decline to produce evidence the Court signifies that it considers is material to fairly assessing his evidence. However contentious pre-trial discovery may be, most witnesses want at least to give the appearance of being forthright rather than seeking to conceal the truth from the Court. As I observed in the course of argument, the result of a failure to produce information which was genuinely material to Mr Cordes' evidence would potentially be that no reliance would be placed on his evidence to an appropriate extent.
53. Certain general production powers clearly exist. Heads 9 and 10, for instance, relate to documents which have either admittedly or very arguably been referred to in the Cordes Affidavit. The Court can, *prima facie*, order the Company to produce complete copies of the documents which have been partially disclosed under GCR Order 24 rule 10. The response might be that the relevant documents in their full form are not in the custody or power of the Company and that the witness is not under its control. That would be a very unattractive argument in the context of the present case.
54. Looking broadly at the question of demonstrating the need for evidence to be produced in advance of trial, it cannot be denied that the civil litigation landscape has changed markedly since 1879 when *Warner-v-Mosses* was decided. As the present case illustrates, written evidence is ordinarily served well in advance of trial and the usual



practice is for disputes about whether important supplementary material should be produced to be resolved before rather than at trial.

55. Accordingly, I find that the Appleby Dissenters do not bear a heavy burden in terms of justifying seeking supplementary material before trial. The heavier burden lies in demonstrating the Letter of Request is necessary because no other effective remedies exist.
56. Mr McMaster QC acknowledged that there was considerable overlap between the validity of the Subpoenas (which were adjourned on August 29, 2019 to a date to be fixed after the delivery of the present judgment) and the merits of certain aspects of the present application. I put aside points of detail such as which locally domiciled entities have the information sought in their possession, custody or power, and appreciate the fact that those entities may be in a position to advance arguments which the Company was not adequately able to advance on the present application. Nonetheless, *prima facie* any findings that information is material for Order 39 purposes would be difficult to resist in the Subpoena context because the same set of facts are involved.
57. This is a very weighty consideration operating against finding that a Letter of Request is “necessary” in the requisite sense as regards Heads 1-3 which I have found do meet the materiality and particularity requirements of Order 39 rules 1-2. The Appleby Dissenters have already pursued an alternative remedy which cannot be said to be a wholly ineffective one, particularly in light of the fact that the present application has separated the wheat from the chaff as regards meritorious and unmeritorious supplementary document requests.
58. Another less pivotal consideration is the question of the utility of issuing a Letter of Request having regard to the likelihood that the Hong Kong Court would dispose of it before the trial. I accept Mr Sweetman’s twin submissions that:
 - (a) there is no basis for believing the evidence could be obtained in Hong Kong before trial on December 2, 2019; and
 - (b) this Court should not countenance disturbing the fixed trial date because, in effect, the evidence sought is not sufficiently important to warrant such a step. If I had been minded to grant the application, I would have required the Appleby Dissenters to undertake not to use the fact that the evidence sought abroad had not yet been obtained as a ground for seeking to reschedule the trial.



Conclusion

59. For all of the above reasons, I have concluded that the application should be refused. This is principally because:

- (a) although 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, and is necessary for the relevant issues to be fairly determined, an Order under Order 39 rule 1-2 has not been shown to be necessary in the wider discretionary sense. The relevant information is more conveniently potentially available through the Subpoenas issued against other Baring entities. It also seems improbable that the Company in any event will seek to pursue the relevant aspects of its factual evidence while refusing to disclose information (which the Court has now signified it considers to be directly material) in advance of trial;
- (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. A Letter of Request is not necessary because the Court's general powers over a witness who will give evidence at trial in any event appear to provide more appropriate and proportionate relief. Further, why the partial documents disclosed are inadequate to enable justice to be done has not yet been convincingly explained.

60. Unless any party applies within 21 days by letter to the Court to be heard as to costs, the costs of the present application shall be reserved. I shall hear from counsel if required on the terms of the final Order and any other matters arising from the present Ruling.


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

