

**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<sup>1</sup>:**

Mr Mac Imrie (with Lord Grabiner and Mr Richard Boulton QC) and Mr Lukas Schroeter of Maples and Calder on behalf of Nord Anglia Inc (“the Company”)

Mr Richard Millett QC instructed by Ms Jessica Vickers and Mr Harry Rasmussen of Mourant Ozannes on behalf of the Mourant Dissenting Shareholders

Mr George Bompas QC instructed by Mr Hamid Khanbhai and Mr Jeremy Durston of Campbells on behalf of the Campbells Dissenting Shareholders

Mr Jonathan Adkin QC instructed by Mr Andrew Jackson of Appleby on behalf of the Appleby Dissenting Shareholders

**Before:** **The Hon. Justice Kawaley**

**Heard:** **17 October 2019**

**Judgment Circulated:** **28 October 2019**

**Judgment Delivered:** **5 November 2019**



**HEADNOTE**

*Case Management Conference - section 238 of the Companies Law Petition - whether regime for highly sensitive documents directed in relation to discovery should be modified for the purposes of trial - access to unredacted copies of highly sensitive documents restricted to experts, local and leading counsel, excluding clients - whether denying parties full access to documents to be deployed at trial inconsistent with fundamental fair rights of litigants - Bill of Rights section 7 - means of preserving commercial confidentiality at trial in open court - case management directions for trial*

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<sup>1</sup> Lord Grabiner QC and Mr Richard Boulton QC for the Company, Mr Richard Millett QC for the Mourant Dissenters and Mr George Bompas QC for the Campbells Dissenters all appeared remotely.

## RULING ON HIGHLY SENSITIVE DOCUMENTS AT TRIAL

### Introductory

1. At the Case Management Conference held on October 17, 2019 in relation to the trial due to commence on December 2, 2019 and conclude on December 20, 2019, it was apparent that the parties had worked well together to agree most logistical aspects of the trial process. The Court was requested to (a) confirm the availability of Court No. 5, which had been requested several weeks ago as most suitable in terms of its size, and (b) to confirm whether or not a hearing was possible on either December 19, 2019 (despite the fact that that date had recently been declared a Public Holiday) or Saturday December 7, 2019, so that the trial would not have to be concluded (with considerable wasted costs) at a date to be fixed in the New Year. I am able to confirm that:

- (a) Court 5 has been assigned for the hearing of the present Petition; and
- (b) the Court can sit, as originally scheduled, on December 19, 2019, on the understanding that all parties will strain every sinew to ensure adherence to a timetable which will result in the trial concluding on December 20, 2019.

2. Subject to minor contentious tweaks which the parties will seek to resolve by consent, the trial timetable set out in Schedule 1 to the Draft Order was agreed in all material respects except the important issue of how highly sensitive documents (“HSDs”) should be dealt with at trial. There were two main sub-issues:

- (a) whether the Dissenter clients (and, where applicable, their US lawyers) should be entitled to see unredacted versions of all HSDs their counsel had identified as intended to be deployed in cross-examination at trial;
- (b) irrespective of how (a) is resolved, how will HSDs be referred to at trial in terms of preventing the publication of commercially confidential material to any person attending Court and not entitled to be privy to the relevant material?



Before considering the governing legal principles, it is necessary to clarify the intent underpinning the HSD regime approved on the hearing of the Summons for Directions. The Company contended that the burden was on any party seeking to loosen those

protections to make out a case for so doing. The Appleby Dissenters, who led the opposing charge on this issue, contended that the existing regime was always intended to be revisited prior to trial. It was, for reasons of legal principle, for the Company to justify at this stage depriving the litigants themselves from full access to documents seen by their Expert and their lawyers and which would be seen by the Court at trial.

#### **The existing HSD regime**

4. The existing HSD regime was imposed following the hearing of the Summons for Directions over the objections of the Dissenters based on a legal analysis of the way in which confidentiality was imposed in the context of discovery: *In Re Nord Anglia Education, Inc.* [2018(1) CILR 164] at paragraphs 19-26. The key elements of the regime I approved were summarised at paragraph 26 of the judgment as follows:

- “(1) the company should be permitted to designate documents as HSDs in the general manner it proposes;*
- (2) the company should not be permitted to decide unilaterally that some HSDs should not be posted in the data room at all;*
- (3) all HSDs shall be placed in the data room in redacted and unredacted form with access to unredacted HSDs limited to experts and counsel in the first instance;*
- (4) each expert shall provide the company with a list of his/her team members who will be given access to HSDs;*
- (5) where the dissenters’ expert wishes to refer to HSDs or extracts therefrom in a memorandum or draft report to be shared with clients, only the redacted versions of the relevant HSD may be mentioned or referred to and best efforts shall be made to protect the confidentiality of information which is not central to the valuation analysis;*
- (6) where the document the dissenters’ expert wishes to rely upon has been redacted in whole or in part, the dissenters’ counsel shall seek to agree the terms of such reliance with the company’s counsel with liberty to apply to the court as a last resort;*
- (7) for the avoidance of doubt I find that proposed paras. 2.71 and 2.72 of the draft confidentiality and non-disclosure agreement between the company and the experts are unreasonably restrictive of the ability of the experts to carry out their professional valuation task;*



*(8) the parties shall use their best endeavours to agree the final wording of the proposed non-disclosure agreements and any matters not expressly addressed in the present ruling.”*

5. The critical provision in the Directions Order dated March 6, 2018 which foreshadowed how HSDs might be used at trial provided as follows:

*“11.2 In the event the Dissenters' Expert wishes to rely in any final report (including any supplemental report) upon confidential information contained in any redacted portion of any Highly Sensitive Document (which has not already been the subject of a successful challenge by the Dissenters under paragraph 11.3), (a) the Dissenters' Cayman attorneys shall seek to agree the terms of such reliance with the Company's attorneys; and (b) in the absence of such agreement, the Dissenters shall have liberty to apply for further direction, including as to how that information should be dealt with in any final report and at the trial of the action. Until and unless such agreement is reached or order is made, no such information shall be divulged, disclosed or otherwise referenced in any final report.*

6. The HSD regime envisaged that the Company would decide which documents should receive the additional protections and that the Dissenters could challenge such designation. This implicitly applied to the initial discovery stage. Where the Dissenters' Expert wished to refer to a redacted portion of an HSD in his Report, the parties are required to seek agreement failing which *“the Dissenters shall have liberty to apply for further direction, including as to how that information should be dealt with in any final report and at the trial of the action”*.
7. Implicit in the scheme is the notion that the Dissenters' Expert is best placed to assess the extent to which factual matters, including redacted material, is relevant to the valuation questions to be determined at trial. In these circumstances, commercial confidence would (potentially at least) have to give way to litigation fair hearing rights. It is clear that:

- (1) the language used in the Directions Order only expressly contemplated the lifting of HSD status in relation to redacted portions of documents the Dissenters' Expert considered relevant and wished to reference in his Report;



- (2) the liberty to apply provision in paragraph 11.2 did not expressly contemplate the Court giving directions for the deployment of redacted portions of HSDs which the Dissenters' Expert did not refer to in his Report;
- (3) the liberty to apply provision in paragraph 11.2 did not expressly contemplate the Court permitting the deployment at trial of redacted portions of HSDs with fact witnesses at all. However:
  - (a) it is obvious that the parties would wish to explore with fact witnesses the factual bases for their opinions in so far as they relate to redacted portions of HSDs; and
  - (b) it is not obvious that the parties would wish to explore with fact witnesses the redacted portions of HSDs which are not relied upon in the Expert Reports.

8. In summary, the existing HSD regime (which the Company persuaded the Court to impose) expressly contemplated that redacted HSD material which the Dissenter's Expert relied upon in his Report could potentially be relied upon at trial to an extent which was either agreed between the parties or directed by the Court under the liberty to apply provision in paragraph 11.2 of the Directions Order. By necessary implication, the existing regime contemplated that the same initially redacted material could potentially be deployed at trial with relevant fact witnesses as well. Before considering the governing legal principles, the starting assumption must be that it is for the Company to justify depriving the Dissenters' counsel of the ability to share with their clients unredacted portions of documents to which their Expert has referred immediately before and at trial.

9. On the other hand, the HSD regime neither expressly nor implicitly contemplated that the veil of HSD protection would be lifted if counsel identified redacted material not referenced in the Expert Report which they wished to deploy at trial. Before considering the governing legal principles, the starting assumption must be that attempting to alter the regime to this extent falls beyond the scope of the liberty to apply provisions in paragraph 11.2 of the Directions Order. The burden would seem to rest on the Appleby Dissenters to justify a departure from the existing scheme, a burden which they are entitled to seek to discharge under the broader and more general liberty to apply provisions in paragraph 35 of the Directions Order.



10. It is against this background that the present application must be considered.

## **Governing legal principles**

### **The Appleby Dissenters' submissions**

11. Mr Adkin QC's starting point was to place reliance on section 7 of the Bill of Rights. He argued that this made it clear that, although the fundamental right to a fair and public hearing could be diluted by way of excluding the public from a hearing in exceptional circumstances, a litigant had an unqualified right to fully participate in the hearing of its case. The notion that the Court, counsel and the Experts should be permitted to engage with documentation at trial which the litigants themselves were not privy to was said to be inconsistent with this principle.
12. Two further authorities were relied upon. The first was *Dyson Limited-v-Hoover Limited* (No. 3) [2002] R.P.C. 42. There the parties had agreed that certain highly sensitive documents would only be seen by lawyers and experts. Prior to the assessment of damages trial, Hoover asserted that it was essential for certain representatives of its client (as well as experts and lawyers) to see unredacted copies of "Tier 1" documents. Dyson objected. Each party asserted that the onus lay on the other to justify wider access to the unredacted documents or maintaining the highly sensitive document regime at the final hearing. Laddie J crucially held:

(a) *"...In my view, it is a fundamental part of the conduct of fair proceedings that that all parties before the judge should have access to the same material the judge has access to for the purpose of coming to his conclusion..."* (paragraph 27);

(b) *"...the onus must be on the party seeking to show that the case is sufficiently exceptional that significant restrictions on disclosure must be maintained. That must mean that it is on the party trying to restrict disclosure to justify it and to show why, in all the circumstances, notwithstanding the onerous undertakings as to confidentiality and the like, nevertheless documents should not be shown to the litigant on the other side..."* (paragraph 35).



13. The second case was *McKillen-v-Misland (Cyprus) Investments Limited et al* [2012] EWHC 1158 (Ch). David Richards J (as he then was) summarised the factual matrix of that case as follows:

*“2. The proposed confidentiality regime concerns a particular issue and would have two principal features. First, the substantial number of documents covered by it, and the written and oral evidence given in relation to the issues, would not be available to the defendants but only to their solicitors and counsel. Secondly, the part of the trial dealing with the issue, including the oral evidence of witnesses, would be held in private.”*

14. That was an interim regime which was then revisited after the commencement of the trial. The central holding of David Richards J upon which Mr Adkin QC relied was the following:

*“50. In the light of the decision and discussion in Al Rawi, it is my view that at common law the court has no jurisdiction to deny a party access to the evidence at trial. But if the jurisdiction does exist, it is in my judgment so exceptional as to be of largely theoretical interest only.”*

### **The Company’s submissions**

15. Mr Imrie relied particularly on the first two of three authorities of his own. The first, *Sport Universal SA-v-Prozone Holdings Ltd and others* [2003] IP & T 560 was a breach of copyright case. The matter came before Anthony Mann QC (sitting as a Deputy High Court Judge) on January 14-15, 2003 with the trial fixed for hearing on October 31, 2003 that year. It was common ground that the key evidence would come from experts although reports had not yet been exchanged. The relevant application, for present purposes, was for the claimant’s director to have access to a source code. The critical findings of the Deputy Judge upon which the Company relied were as follows (at 567d-h and 568 a-b):

*“[19]...I have not found this part of the case easy. However, in the end I consider that at least at present the claimant should not be released from its undertaking. I start from the premise that although any bar on disclosure to a party is exceptional, this is a case in which there should be such a bar. The restrictions on disclosure were offered in an*



*undertaking given by the claimant at the outset and it is only relatively recently that it has sought to be released from it. The claimant obviously accepts that the defendants' source code is not material which should be freely available and disclosed to all the claimant's officers, and to that extent the burden on the defendants as showing that there should be some restrictions on disclosure has in effect been automatically fulfilled. The claimant was prepared to continue with that non-disclosure regime for a significant number of months during which the action was conducted at the outset. In particular, for a period of, I think, over a year, it did not seek any release from the undertaking and was apparently content for the work of comparison of the two programmes to be carried out by its expert unassisted by Mr Giorgi or any other employer or officer of the claimant seeing the source code him or herself. It might have preferred a different regime, and I can quite see it might have been more convenient, but it did not press for one. I am, therefore, prepared to conclude that the source code is very sensitive information, and that there would be a potential damage to the interest of the defendants if it is revealed to officers of the claimant, and that it is not absolutely necessary at this stage that the blanket restrictions on disclosure should be released, at least in terms of the proper analysis of the software.*

*[20]... The claimant has managed for a considerable time without the technical assistance of Mr Giorgi and it is in the nature of this case that the claimant's case at trial will turn on the evidence of the expert and not Mr Giorgi himself. I accept that it might be more convenient for Mr Giorgi to assist the expert but I do not think it is necessary, even bearing in mind the proximity of the trial. As to the giving of instructions, I do not think that it is necessary at this stage for Mr Giorgi, as opposed to perhaps a non-technical officer, to have access to the code. I do not see at present that that access is necessary..."*

16. The second case was a decision of the Competition Appeal Tribunal, *The Carphone Warehouse Group PLC-v- Office of Communications* [2009] CAT 37. This case also entailed a “confidentiality ring” established at the beginning of the appeal process under which the applicant’s external advisers alone were granted access to confidential material. An attempt was being made to vary this regime so the appellant’s Executive Director could have sight of a model upon which the respondent regulator (OFCOM) based the impugned price control. Mr Imrie primarily relied upon the following passages in the Tribunal’s judgment:

*“19. In our judgment this illustrates that the confidentiality ring has worked entirely as it is intended to do. Mr Heaney is able to identify on*





*behalf of CPW the grounds of challenge available to it on the basis of the published information and further information which has been disclosed in these proceedings outside the ring. CPW's experts are able to identify further grounds of challenge in the confidential information available to them. We recognise that the process whereby these experts and Mr Heaney have to liaise in order to formulate CPW's case in relation to the points where only the experts can see the full picture is more laborious and time consuming than it would be if Mr Heaney had access to the models. Having explained matters, CPW has to rely on the value judgments of these experts as to whether a potential point they have identified is material to CPW's case and worth pursuing. It may be that CPW has a residual concern that if Mr Heaney could see the information then he might take a different view from the experts. But in this CPW is really in no different position from many parties who appear before the Tribunal and who accept the burdens and benefits of a confidentiality ring which restricts them from access to the other parties' information but also protects their own information from access by those other parties...*

*21. CPW is also advised by Mr Hugh Kelly, a forensic accountant, who says in his witness statement that he has worked in the telecoms sector for over ten years and specialises in providing advice on regulatory accounting in telecoms and other regulated sectors. Mr Kelly formerly worked as a Principal Financial Analyst at OFCOM. We do not think that the likelihood that points in the model will slip past Dr Houpis or Mr Kelly is sufficiently strong to override the importance of protecting the information contained in the model."*

17. The third case was *Bombardier Transportation Limited-v-Merseytravel* [2017] EWHC 575 (TCC). The central issue was whether a third party interested in procurement proceedings could access confidential documents on the public file. However the case did support the Company's general contention that notwithstanding overarching principles of open justice, exceptions could be made, even in relation to a hearing which was for most purposes held in public, in the interests of protecting commercial confidence. Coulson J observed in this regard as follows:

*"7...Confidentiality rings are of course commonplace in cases of this sort and are in accordance with the decisions in **Mears v Leeds CC** [2011] BLR 155 and **Geodesign Barriers Limited v Environment Agency** [2015] EWHC 1121 (TCC). Moreover, it is sometimes necessary for parts of a procurement trial, which deal with the confidential elements of a tender (whether that of the claimant or that of the successful bidder), to be heard in private: see by way of example **Energy Solutions***



*EU Ltd v Nuclear Decommissioning Authority [2016] EWHC 3326 (TCC)."*

18. In his oral submissions, Mr Imrie, without any reference to decided authority, invoked the proportionality principle in the Overriding Objective which he invited the Court to apply when considering whether or not to lift the HSD restrictions as far as the Dissenters were concerned at trial. The Court should not seek to achieve a “Utopian” form of justice, he urged. The Company was not seeking to exclude the Dissenters from any part of the trial, but merely challenged the need to further liberalise the regime in light of the concessions the Company had made as regards full access to the Expert Reports themselves.

**Findings: governing legal principles**

19. Section 7 of the Bill of Rights does provide general support for the broad proposition that, while the public’s right to participate in a hearing can be restricted, such exceptions do not apply to a litigant. These provisions broadly reproduce corresponding principles expressed in article 6 of the European Convention of Human Rights. The key provisions in section 7 are as follows:

*“(1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time...”*

*(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.*

*(10) Nothing in subsection (1) or (9) shall prevent the court from excluding from the proceedings persons other than the parties to them and their legal representatives to such extent as the court—*

*(a) may be empowered by law to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of minors or the protection of commercial confidence or of the private lives of persons concerned in the proceedings...”*



20. The public hearing requirement in section 7 in my judgment is an expression of the open justice principle and Mr Adkin QC was right to draw a distinction between the rights of the public and the rights of his clients, which he was seeking to vindicate. But the broad fair hearing rights conferred by section 7(1) combined with the limited exceptions permitted by section 7(2) do indeed justify the conclusion that a fair hearing ordinarily requires a litigant and their legal representative (if any) to fully participate in the hearing.
21. I say ordinarily, because it is well recognised that fair hearing rights are not absolute and may in certain circumstances be waived or lost. As regards civil proceedings in particular, both a claimant and a respondent have potentially conflicting fair hearing rights which must always be carefully balanced by the Court. Even a criminal accused can in certain circumstances be validly tried in his absence. Nonetheless, the Bill of Rights does support at least a strong starting assumption in favour of a litigant enjoying a right to fully participate in a trial both in terms of :

- (a) being present, even for private hearings from which the public are excluded;  
and
- (b) being afforded full access to any documents referred to at trial and upon which the Court may base its ultimate decision.

22. The same governing principles contended for by the Appleby Dissenters were affirmed in a case upon which the Company relied. In *Sport Universal SA-v-Prozone Holdings Ltd and others* [2003] IP & T 560, Anthony Mann QC opined as follows:

*“[19] The principles applicable to a decision to withhold evidence and material from a party or a party’s agent, when the party would normally expect to see that material in litigation, have been the subject of full authority. It is a problem that arises not infrequently in trade secrets cases. From the cases of Warner-Lambert Co v Glaxo Laboratories Ltd [1975] RPC 354 and Dyson Ltd v Hoover Ltd [2002] EWHC 500 (Pat), [2002] RPC 841, I derive the following short principles relevant to the decision I have to make, and indeed I do not think these principles are in dispute between the parties:*

- (1) *It is a fundamental part of the fair conduct of proceedings that all parties should have access to the same material that the judge will, in due course, see when hearing a case. It is*



*an exceptional course to deny a party or its representative's access to that material.*

- (2) *However, the court does have, in an appropriate case, a discretion to control access to material where the justice of the case requires it, and*
- (4) *The burden is on the person alleging there should be some restriction on disclosure and that burden is a very significant or heavy one.”*

23. The controversy centred on how the agreed broad umbrella principles should be applied in the context of the present case. The critical context is that not of discovery but of trial. As Mr Adkin QC pointed out, none of the three authorities relied upon by the Company's counsel illustrated a party being denied access to unredacted versions of confidential documents at trial:

- *Sport Universal SA-v-Prozone Holdings Ltd and others* [2003] IP & T 560 involved an attempt to liberalise a highly sensitive documents regime not only before trial but before the experts had even completed their reports. The Judge explicitly made it clear that he would revisit the issue of whether the client himself should have access to the confidential source code at a later stage;
- *The Carphone Warehouse Group PLC-v- Office of Communications* [2009] CAT 37 was a regulatory appeal, not a commercial dispute. As the Tribunal noted:

*“14. In our judgment, the analogy between the current appeal and the proceedings in the Dyson case cannot be pushed too far. Dyson concerned inter partes litigation where the party seeking disclosure had to defend itself against a claim for a very substantial amount of money. Disclosure and inspection of documents is the standard procedure in such litigation. The difference is illustrated by the fact that Hoover argued that one of the reasons they needed to see the information was in order to decide whether to make an offer of settlement to Dyson and, if so, of how much. Here the appeal is not a commercial dispute between BT and CPW – there is no question of the parties settling the dispute between themselves...” [Emphasis added];*



- *Bombardier Transportation Limited-v-Merseytravel* [2017] EWHC 575 was an open justice case, and did not address client access to confidential documents at all.

24. I accept the Appleby Dissenters’ fundamental submission that they must be entitled to see any documents deployed at trial subject to an important qualification. It is true that in *McKillen-v-Misland (Cyprus) Investments Limited et al* [2012] EWHC 1158 David Richards J stated:

*“50. In the light of the decision and discussion in Al Rawi, it is my view that at common law the court has no jurisdiction to deny a party access to the evidence at trial. But if the jurisdiction does exist, it is in my judgment so exceptional as to be of largely theoretical interest only.”*

25. That was a case, somewhat different to the present case, in which it was common ground that the confidential material needed to be deployed at trial. The law cannot be that a party can use fair hearings as an artifice to gain access to highly sensitive material which is not genuinely relevant to the issues at trial. It is clear from *Dyson Limited-v- Hoover Limited (No. 3)* [2002] R.P.C. 42 that the fair hearing concept is grounded in substantial rather than purely abstract (or Utopian, as Mr Imrie put it) notions of justice. Thus Laddie J, after stating the fundamental principle favour of access to the same material as the Court (in paragraph 27 of his judgment set out above), went on in the same paragraph to state:

*“The same point can be put the other way round. It would appear to me to be prima facie unfair for a judge to decide a case against a party on the basis of material to which the judge had access but the party against whom he find does not. In my view this is at least one of the reasons why, in Roussell Uclaf, Aldous J said it would be ‘exceptional’ to prevent a party from access to information which would play a substantial part in the case. As I have said already, the documents at issue before me are likely to play a substantial part in the case.”*  
[Emphasis added]

26. Accordingly, in my judgment this Court must possess the jurisdictional competence to assess whether the relevance of the HSD material (in this and any similar case where relevance is in dispute) is sufficiently cogent to justify loosening the protections initially



imposed at the trial stage. In a case which will depend primarily on expert evidence, it is not enough to say that this relevance requirement has been met by the fact that the documents have been disclosed. A secondary relevance test falls to be carried out by reference primarily, if not solely, to the Expert Reports. It is true that access to the HSDs will be conditional upon the new members of the confidentiality club signing strongly worded non-disclosure agreements. That does not mean that the Court should dismiss out of hand concerns that such legal protections alone are not enough. A real-world view of the circumstances requires the Court to take judicial notice of the fact that we currently live in times in which:

- (a) at a popular level respect for traditional notions of privacy is not what it used to be;
- (b) the standards of commercial morality are not as consistent as they used to be, particularly when large sums are at stake; and
- (c) the potential for accidental leaks of confidential material is greater than it was in the pre-digital era.

### **Findings: appropriate directions in relation to HSD regime for trial**

#### **The factual matrix**

27. The Appleby Dissenters adopted the broad brush approach that all HSDs met the requisite relevance test and any documents their counsel wished to deploy at trial should be unredacted (for client and US attorneys purposes). It was accepted that they would in terms of public access retain their protected status. By letter dated August 5, 2019 to Maples, Appleby provided a list of 46 HSDs “*which we have presently identified as needing to be disclosed to key Dissenter representatives and US attorneys in unredacted form*”. This was said to be needed by these persons:

*“in order to understand fully (and where applicable, provide instructions in relation to) the evidence and cross-examination, advice, submissions and the Court’s findings and conclusions on the question of fair value; additionally or alternatively, in order to consider properly, and on a fully-informed basis, the price at which it might be appropriate to settle*



*their respective claims to fair value: see e.g., Dyson Limited v Hoover Limited (no 3) [2002] R.P.C. 42.”*

28. By letter dated September 13, 2019, Maples set out the Company’s position in response to Appleby’s August 5, 2019 letter as follows:
- (a) 15 documents would be made available to the Dissenters and their representatives in unredacted form;
  - (b) 5 documents would be made available in partially redacted form;
  - (c) the position in relation to 26 documents was set out in a table, which indicated one or more of the following broad positions in terms of the requested expanded access to presently redacted material:
    - (i) where the Dissenters’ Expert had expressly referred to an HSD in his Report, the relevant references would be unredacted,
    - (ii) where a document was not referenced in the Report at all, there was no justification for expanded access,
    - (iii) where the reference was to unredacted portions of an HSD, there was no justification for expanded access,
    - (iv) where the reference to an HSD was merely in a footnote, there was no justification for expanded access.
29. At the hearing, the Company agreed that the First Affidavit of Patrick Cordes (the **Cordes Affidavit**) should be unredacted and the Company agreed that key dissenter representatives could have access to it in unredacted form.
30. The main focus at the Case Management Conference was on references to HSD materials in Professor Gompers’ First Report. Mr Imrie submitted that the Company had discharged any burden imposed on it to justify maintaining the existing HSD protections. Mr Adkin QC submitted that the Court should not second guess counsel’s judgment and ought not to require counsel to effectively reveal its cross-examination before trial by way of explaining how it wished to deploy the HSD material. His position was supported by the other Dissenters with Mr Millett QC explaining that some



Dissenters had US attorneys advising on Delaware law, which was relevant to the valuation principles. The controversy accordingly centred on:

- (a) whether access to entire unredacted copies of HSDs mentioned in the Report should be expanded, or whether expanded access should be limited only to any initially redacted commentary on an HSD which was set out in the Expert Report;
- (b) whether expanded access to entire unredacted copies of HSDs which were not mentioned in the Expert Report should be granted.

31. The merits of the contending positions need to be assessed not simply with due regard to the governing legal principles, but also in the specific context of the initial HSD regime which, as indicated above:

- (a) envisaged that the Experts, not the litigants, would initially determine which HSDs were relevant to the valuation question to be addressed by the Court at trial;
- (b) envisaged that where the Experts referred to redacted material in their Reports, the parties would seek to agree (or the Court would determine) how it should be deployed at trial;
- (c) implied that HSDs relied upon by the Experts in their Reports could be explored with relevant fact witnesses;
- (d) did not contemplate explicitly or implicitly that HSDs upon which the Experts did not rely would be deployed at trial.

32. The Appleby Dissenters' skeleton argument identified various logistical problems of attempting to prepare for and conduct the trial if their clients were unable to see redacted portions of key documents. The question of how HSDs should be referred to at trial, whether by way of technology which allowed the Court and counsel to see unredacted

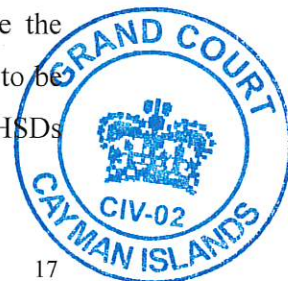




documents or by the Court converting the hearing into a private one was addressed somewhat tentatively, with various options being canvassed but none being firmly pressed. Mr Bompas QC submitted that the most efficient and simplest approach was for the Court to sit in private when HSDs were being addressed.

**Partial or full unredaction of HSDs mentioned in the Expert Reports**

33. The governing legal principles are that exceptional circumstances must be made out by the Company to justify withholding access to the Dissenters' key representatives to any HSDs which are referred to at trial. It is common ground that the HSD restrictions should be lifted as regards key client representatives in relation to substantive references to redacted material in the Dissenters' Expert's Report. No principled objection to extending similar access to US lawyers engaged in the case has been articulated.
34. It is self-evident that the express references in the Report to any HSDs are highly material and the Company has sensibly agreed that these portions of the Report should be unredacted, while maintaining the existing safeguards for the public at large. The result should be that, in terms of expanded access to key Dissenter representatives and (where applicable) US attorneys as well, only unredacted versions of the Reports are considered (by counsel, the parties the witnesses and the Court) at trial. The redacted portions of the Reports will still be relevant to determine when the Court will sit in camera, as opposed to in open Court. The position as regards underlying documents was far less clear.
35. The practical conundrum which is presented by the partial versus full unredaction approach appears to me to be the following, based on the predominantly high-level principle-based view which the Appleby Dissenters advanced, supplemented by the logistical complaints which were made. If only those portions of HSDs which are expressly referenced by Professor Gompers are unredacted at this stage, is there a real risk that at trial further portions of the documents will have to be unredacted if he confirms at trial that unmentioned redacted portions of the HSDs were relevant to his opinion? The timetable envisages that the fact witnesses will be called before the Experts, so not only would the question of the extent of further redactions have to be addressed, but fact witnesses might have to be recalled to address portions of the HSDs



that counsel was unable to raise with them at the outset. Looking at the question from another perspective, can the Court safely conclude at this stage that only portions of a document which are explicitly referenced in Professor Gompers' Report are likely to be materially relevant to his analysis and conclusions? Or, more radically still, should the Court preclude the Dissenters from deploying at trial on parts of any HSD which was not expressly referenced in their Expert's Reports?

36. Another potentially important practical consideration is that the redactions appear not in Professor Fischel's Report but in that of the Dissenters' own Expert who they cannot cross-examine. On this basis, what he expressly mentions is the best indicator of what is likely to be material to his evidence. On the other hand, he will give his evidence after Professor Fischel. Although Professor Fischel does not rely on any HSDs which were contentious for present purposes, the Dissenters should in principle be entitled to cross-examine him on HSDs which are relied upon by Professor Gompers. Expert evidence is usually tested in large part through an analysis of the validity of the assumptions upon which the relevant opinions are based, not solely through a theoretical analysis of the posited assertions completely detached from the relevant facts. In this regard, it seems odd for a Court to be implicitly invited to determine before trial that cross-examination should not be permitted of an opposing Expert witness on the entirety of a document portions of which are referenced in that party's own Expert's Report. This is, after all, merely commercial litigation, not a trial involving State secrets or a case involving an informer whose life will be at risk if his or her identity is revealed. I also feel bound to assume at this juncture that counsel have identified the documents they seek enhanced access to in good faith.

37. As far as the HSDs referenced in Professor Gompers' Reports are concerned, they are *prima facie* material to the issues to be determined at trial. I accept entirely that the text of the Reports lie at the top of the materiality scale. But in my judgment the Court should err in favour of permitting unredacted versions of these documents to be shared with the wider group because it would be fundamentally unfair for the Court to constrain the way the Dissenters present their case by effectively prohibiting them from exploring the underlying material referenced in their Expert's Reports. Although the analogy is perhaps a somewhat artificial one, it is nonetheless instructive to consider a case involving expert evidence as to foreign law. Would a reasonable Court ever decide to



preclude a party from exploring with their own expert and/or an opposing expert, full unedited reports of cases referred to in a footnote in their own expert's report? While particular passages in a case may be of particular importance, they are usually best understood in light of reviewing the judgment(s) as a whole.

38. This question highlights another potential, unintended, consequence of this Court accepting the Company's submission that reference should be made to the opinions based on the underlying HSDs without reference to the supporting documents themselves in their entirety. The Company would be precluded from cross-examining Professor Gompers on the extent to which the underlying HSDs, read as a whole, supported his opinions. Because those underlying materials could not fairly be considered by the Court in circumstances where the Company, its counsel and its key representatives, together with the Court, had access to the unredacted documents, but the Dissenters did not. Has the Company gone far enough to discharge the heavy burden on it to justify depriving the Dissenters' key representatives of access to unredacted copies of documents referenced in their Expert's Reports? The position could perhaps have been put beyond doubt if the Company had offered an undertaking not to challenge Professor Gompers' opinions on the basis that, to the extent that they were based on HSDs, it was accepted that the underlying documents potentially supported his conclusions.
39. Instead, Mr Imrie argued that the Company's more nuanced position justified not lifting the existing protections in respect of each HSD to which the Dissenters' Expert referred. The central thesis was that, where the comments in the Report which related HSDs were based on portions of the underlying documents which were not redacted, the redacted portions were immaterial and no need for unredaction arose. It is necessary to analyse the Company's detailed position, as set out in Maples' September 13, 2019 letter, to see whether the complaints that this position is unfair have any substance. In light of the fact that I was not referred to any of the documents, I only seek to decide as a matter of principle whether partial redaction is or is not permissible at this stage.
40. Category 1 documents were to be completely unredacted (as far the wider confidentiality club is concerned). Category 2 ("*Documents which the Company is willing to provide to the Dissenters on a partially redacted basis*") was not accompanied by any



explanation as to the basis on which the partial un-redactions were being made; but in a subsequent letter of October 8, 2019, Maples advised that wider access to all category 2 documents was now agreed. This left Category 3 documents (“*Documents which the Company is not willing to provide to the Dissenters on a partially redacted basis*”), which were set out in a table at pages 2-6 of the September 13, 2019 letter. In respect of each of the 19 HSDs referenced in the Dissenters’ first Expert Report, the Company (in the third “comment” column”) gave a concise explanation as to why there was no need to broaden access the entire document. Mr Adkin QC did identify one specific HSD area which he said would be of particular significance to the valuation question: the China Bilingual project.

41. Rather than adopting a binary broad brush approach to the question of whether underlying documents referenced in the Reports should be produced, in my judgment each explanation should (on a provisional basis with liberty to the parties to file supplementary written submissions in relation to the actual underlying documents themselves to which I was not referred) be assessed on its individual merits in light of both (a) the reference made to the HSD in the relevant Reports, and (b) the comment in the said Table in section 3. I adopt this approach because, at the Case Management Conference, the extent of time devoted to the dispute about the governing principles limited the ability of counsel to address the particularities of the HSD issues.
42. In relation to the First Gompers Report, my provisional views (adopting a default position in favour of granting access to the underlying documents when in doubt) are as follows:
  - (a) **Documents entire unredacted copies of which need not be seen by the Dissenters:** 1, 5, 10, 22 and 24. The first three references are plausibly said to be made solely to already unredacted portions of the relevant HSDs. The second two references are plausibly said to be a passing reference in the already unredacted footnote 110 to the First Gompers Report, alongside other Reports. I note that the references occur in an introductory portion of the Report in a section headed “*Overview of Barings Involvement in Nord Anglia*”. I would accept the Company’s position;



(b) **Documents entire unredacted copies of which should be seen by the Dissenters:** 2, 6, 7, 8, 9, 13, 14, 15, 16,17,18,19, 23, 25. These documents all appear to me to be likely to be material to the valuation question. For instance, although item 9 is said to be merely a passing reference in footnote 393 to one of many emails, paragraph 251 of the Report suggests the relevant correspondence may be relevant to a dispute which will be addressed in factual evidence. It may be further addressed by the Expert at trial. The other documents more clearly appear to be material to the valuation issues. The most striking example of a document which is seemingly obviously material is item 25, which item is referred to in six separate paragraphs of the Report.

43. Maples' letter of October 8, 2019 (paragraph 8) dealt with Professor Gompers' Supplemental Report and identified three areas of Company HSDs. Two areas were said to be references to HSDs made in the First Report which the Company had already agreed to unredact. So the provisional views I have expressed above apply, *mutatis mutandis*. The third was "*a passing reference to Operational Excellence...We are seeking instructions as to whether the Company is willing to lift this redaction also*". My provisional view is that this document should be provided to the Dissenters on an unredacted basis as no reasoned objection has been raised.

44. While addressing these issues on a provisional basis, I obviously hope that the parties will not need to further trouble the Court with this issue and will be able to resolve any borderline disputes having regard to the approach it is hopefully now clear that I am likely to adopt.

#### **Documents not mentioned in the Expert Reports**

45. I have indicated above that in my judgment the existing HSD regime does not contemplate the Court giving directions for the deployment at trial of HSD material which is not referenced in the Expert Reports. The Company objected to broadening access to any such HSDs on this ground. These were the following documents listed



in the table in section 3 of Maples' September 13, 2019 letter to Appleby: items 3, 4, 12<sup>2</sup>, 21 and 26.

46. It is for the Appleby Dissenters to establish the relevance at trial of this category of documents, under the general liberty to apply provisions of the Directions Order. I was not referred to any coherent response by way of correspondence to Maples' September 13, 2019 assertion that there was no principled basis for expanding access to HSD material not referred to in the Expert Reports. During the Case Management Conference, it was broadly asserted that the Dissenters had the right through their counsel to deploy whatever relevant documents they wished and that it was legally unfair to refer to HSDs at trial which the Dissenters themselves were unable to see in unredacted form. For the reasons set out above, I do not accept the submission that Dissenters' fair hearing rights are as expansive as that. In a case where the key valuation evidence will be provided by experts, lifting special confidentiality protections requires, over and above the generous discovery relevance test, a party seeking to rely on unredacted HSDs to meet a higher materiality test as well.
47. I find that no sufficient case has been made out by the Appleby Dissenters at this juncture to justify the requested HSDs which are not referenced in the Gompers Reports being made available to the Dissenters' key representatives and their US attorneys. In light of these provisional findings, a further application can be made on the papers if the matter cannot be agreed.

### **HSD Management at trial**

48. Unless otherwise agreed, I direct that the Court should sit in private when dealing with HSDs to protect the confidential material from being potentially published to the world at large. It ought to be possible for counsel to prepare cross-examination and submissions in such a way that the protected material is dealt with in clearly defined segments of time within the trial. While more complicated technological measures were mentioned, the options were raised, it seemed to me, without much conviction and the

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<sup>2</sup> For the avoidance of doubt, there is no item 11 in the table between items 10 and 12. The omission of any reference to item 11 in this Ruling is not an oversight.



best judgment that can be made is that the most efficient tool is ‘traditional’ case management.

**Conclusion**

49. The parties have liberty to apply in relation to any matters arising from the present Ruling. As agreed at the end of the hearing, the costs of the Case Management Conference shall be in the cause.

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

