IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No FSD 260 of 2017 (IKJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)
AND IN THE MATTER OF ZHAOPIN LIMITED

IN CHAMBERS

Appearances:	Ms Caroline Moran and Mr Malachi Sweetman of Maples and Calder on behalf of Zhaopin Limited ("the Company")
	Mr Robert Levy QC and Ms Jennifer Maughan of Mourant Ozannes on behalf of Maso Capital Investments, Blackwell Partners LLC-Series A and Star V Partners LLC (the "Maso Dissenters")
Before:	**The Hon. Justice Kawaley**
Heard:	**18 April 2018**
Date of Decision:	**14 June 2018**
Draft Ruling Circulated:	**14 June 2018**
Ruling Delivered:	**21 June 2018**

HEADNOTE

Summons for Directions-section 238 of the Companies Law Petition-terms of non-disclosure agreement-whether individuals accessing confidential information supplied by the Company to dissenters should sign non-disclosure agreement as a pre-condition of access to disclosed material.

RULING ON THE PAPERS

The issues in controversy

1. The Petition was presented on November 30, 2017 and the Summons for Directions heard on April 18, 2018. The terms of the Directions Order have been agreed or determined save for the narrow question relating to one clause in the Non-Disclosure Agreement ("NDA").

2. The Company seeks the inclusion of a clause in the following terms to which the Maso Dissenters object:

> "*In advance of being granted access to the data room and/or receiving the Confidential Information,* ***Recipient*** *[i.e. the Expert] shall ensure that each of its* ***agents, advisors, representatives*** *or* ***Appointees*** *[i.e. a person appointed by the Expert to assist him/her in any work relating to the Proceedings including the preparation of the Expert Reports and the Joint Memorandum (as defined in the Directions Order)] expressly agrees in writing to comply with the confidentiality agreement imposed by this Agreement in the form of Schedule A hereto, and Recipient shall deliver to the Company a copy of such agreement in writing without delay. Recipient shall provide the Company with a list of names of its respective agents, advisors, representatives, or Appointees who will require access to the data room for the purpose of receiving documents from the Company.*"

3. The Maso Dissenters contend that the following substantially agreed confidentiality obligations should suffice:

> "*3.3 Recipient shall be entitled only to make copies for the benefit of its legal advisers or expert advisers who shall each expressly agree in writing to be bound by this Agreement prior to receipt of Confidential Information. Recipient and its respective agents, advisors, representatives, or Appointees shall not disclose any Confidential Information or permit any Confidential Information to be disclosed, either directly or indirectly, to any third party without the Company's prior written consent.*
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> *3.4 Recipient shall reproduce Company's proprietary rights notices on any copies, in the same manner in which such notices were set forth in or on the original.*
>
> *3.5 Recipient shall immediately notify Company of any unauthorised use or disclosure, or suspected unauthorised use or disclosure, of Confidential Information by Recipient or its respective agents, advisors, representatives, or Appointees; or any actions by Recipient or its respective agents, advisors, representatives, or Appointees which are inconsistent with their respective obligations under this Agreement. Recipient shall cooperate with any and all reasonable efforts of the Company to help the Company regain possession of Confidential Information and/or prevent its further unauthorized use or dissemination. Recipient agrees to be responsible for any breach of this Agreement by any of its respective agents, advisors, representatives or Appointees receiving Confidential Information*" (the Company proposes the addition of "Appointees").

The respective arguments

4. Similar clauses to those set out in paragraphs 3.3-3.5 above were agreed and approved by this Court on July 1, 2016 (*Mindray Medical International Limited*, McMillan J); October 25, 2016 (*Quihoo 360 Technology Co. Ltd,* Mangatal J); November 15, 2017 (*Trina Solar Limited*, Segal J); and February 7, 2018 (*Khongzong Corporation*, Parker J). The key elements of the form of NDA which the Maso Dissenters contend is both appropriate and consistent with past practice may be summarized as follows:

   (a) each Dissenter is party to the NDA;

   (b) each Dissenter gives access to the Company's disclosed material on terms that its legal advisers and experts agree to comply with the terms of the NDA;

   (c) each Dissenter agrees to be responsible for any breach of confidentiality which occurs which are attributable to their advisers, agents etc., and to cooperate with the Company in remedying such breach.

5. The Company submits it is not contested that precedents do exist for individuals entering into an NDA and proposes to add the following additional layers of protection for its confidential material:

   (a) each adviser, agent etc. who will gain access to the Company's discovery should expressly agree in writing to comply with the NDA;

   (b) a copy of the written confirmation of such individuals agreeing to be bound by the NDA should be given to the Company with a list of their names before the Dissenters are given access to the Data Room.

6. The argument set out in correspondence (May 8, 2018 Maples email to Mourant) is the following:

   "*It is important to our client that it has a direct right of recourse against persons that are in possession of its confidential information rather than having to rely on the relevant corporate entity to enforce confidentiality obligations on its behalf. This should not come as a surprise to professionals who are getting access to confidential information and it is concerning that Mourant as a firm seems to have difficulty with this.*"

7. Mourant had in an earlier May 3, 2018 email raised logistical objections in addition to the novelty of approach complaint:

"The main problem as I see it, is that, foreseeably, dozens of letter agreements will need to be signed and there is no obvious benefit. Properly advised, if any individuals are to sign something themselves, they will need to take their own advice on the terms of the NDA which seems rather uncommercial. Any primary individuals will obviously be assisted by support staff to varying degrees...As you will be aware, the provision we have proposed is standard."

Guiding principles

8. In my Partial ruling on the Summons for Directions in *Nord Anglia* (FSD 235 of 017 (IKJ), March 6, 2018), I indicated that the following principles should inform this Court's approach to section 238 Summonses for Directions:

> "8. *Expedition and economy are explicitly given a higher priority in this Court's Rules than under the English CPR, which opens by formulating the purpose of the overriding objective as being to "enable the court to deal with cases justly". Order 1.2 of this Court's Rules defines "justly", non-exhaustively, in terms which largely mirror the corresponding rule in the English CPR, and which includes the proportionality principle. However it adds, with implicit priority, the following additional elements:*
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> *'(a) ensuring that the substantive law is rendered effective and that it is carried out;*
> *(b) ensuring that the normal advancement of the proceeding is facilitated rather than delayed... '*
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> 9. *These guiding principles must inform this Court's approach to the present Summons for Directions, taking cognizance of the fact that section 238 is designed to accord substantive commercial justice to merger companies and dissenting shareholders alike. These increasingly common petitions should in my judgment be judicially managed in a way that will, so far as is reasonably practicable, promote confidence in the processes of this Court for all key stakeholders. Where, as here, the parties have achieved substantial agreement on the proposed directions but found certain issues to be intractable, the Court must do its best to adopt a balanced approach to the opposing contentions. An approach which will encourage the parties to cooperate in the ensuing phases of the proceedings, and indeed, in future similar cases.*
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> *10. Of particular importance will be the need, so far as is consistent with the facts of this particular case, to strive for a consistent approach to similar issues on the part of the various judges of this Court. The starting assumption must be that the approach adopted in previous section 238 cases will be of considerable assistance to me in the present case. The fact that the present case is of higher value and may involve more documents than previous cases does not to my mind undermine this starting assumption..."*

Analysis and decision

9. I find that the Company's proposal has the following implications:

   (a) it represents a departure from what appears to me to be the more common (but not uniform) past practice of relying upon Dissenters to enforce their confidentiality obligations as regards persons gaining access to the Data Room on behalf of Dissenters;

   (b) it will be legally problematic to require all persons gaining access (as opposed to legal representatives and experts, as previously contemplated) to the Data Room and/or its documents to sign the NDA;

   (c) it is a disproportionate request likely to add costs and delay to the discovery and inspection process, without any demonstrably significant corresponding benefits (in terms of confidentiality protection for the Company) in practical terms.

10. In my judgment, where the Dissenters are contractually liable for any breaches of confidence which their agents commit and are under a duty to cooperate with the Company in the event of any breach which occurs, this should ordinarily provide sufficient protection for the Company's legitimate concerns. The Dissenters accept that they are obliged to require their experts and attorneys to confirm in writing to them (the Dissenters) that they agree to be bound by the NDA: "*3.3 Recipient shall be entitled only to make copies for the benefit of its legal advisers or expert advisers who shall each expressly agree in writing to be bound by this Agreement prior to receipt of Confidential Information*".

11. There may of course be exceptional circumstances clearly justified in supporting evidence, special safeguards including some of those requested might be justified. The special protections ordered in *Nord Anglia* in relation to highly sensitive documents, for instance, included a requirement for the Dissenters to give the Company prior notification by list of all persons in the Experts' teams who would be afforded access to the highly sensitive material: Ruling dated March 19, 2018, paragraph 26(4). The Company's evidence in the present case falls short of justifying such special protections in the present case. Its submissions placed un-particularised reliance on the First Affirmation of Won Cheol Shin affirmed on March 9, 2018 a supporting the need for extra precautions to protect the confidentiality of the documents being disclosed. However, that Affirmation does not address the issue of a special approach to the NDA at all. All it justifies is the need for redactions to comply with PRC Cybersecurity Law.

12. In all the circumstances of the present case, I approve the Maso Dissenters' form of wording modified only by the cosmetic change (inserting "or Appointees").

THE HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT