IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Cause No FSD No. 112 of 2017(RPJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND

IN THE MATTER OF KONGZHONG CORPORATION

IN CHAMBERS

Appearances: **Mr Tom Lowe QC, Mr Paul Madden and Ms Anya Park of Harney Westwood & Riegels in Cayman on behalf of Kongzhong Corporation ("the *Company*").**

Mr Robert Levy QC via video link in France, Mr Rocco Cecere and Mr Jonathan Moffatt of Mourant Ozannes in the Cayman Islands on behalf of Maso Capital Investments Limited, Blackwell Partners LLC – Series A, Kevin X Lu and Haifeng Tang

Before: **The Hon. Justice Parker**

Heard: **27 June 2018**

Draft Judgment Circulated: **5 July 2018**

Judgment Delivered: **6 August 2018**

HEADNOTE

SECTION 238 COMPANIES LAW (2016 REVISION)-COURT'S APPROACH TO DIRECTIONS HEARING-MANAGEMENT MEETINGS WITH EXPERTS.

INTRODUCTION

1. The essential background facts in this dispute can be found in my Judgment delivered on 2 February 2018 (unreported).

2. The parties agreed to a procedure for the discovery by the respondents ("the *Dissenters*") shortly before the hearing which took place before me on 27 June 2018.

3. Therefore, the sole issue which remains in dispute relates to meetings to be held between the experts and the Company's management to obtain further and/or better information to allow them to prepare their evidence with which to assist the court. This is a procedure that has been developed in the Cayman court as a matter of case management. There are no prescribed rules, statutory or otherwise, to regulate these meetings. To date there have only been three trials in section 238 Companies Law valuation cases so there is as yet limited experience of how the case management directions play out at trial.

4. In my Judgment delivered on 2 February 2018 I found that the court had jurisdiction to order the Company's management team to meet with the experts (following Segal J in *Trina unreported 25 July 2017*) and that such meetings are to be "open" so that the experts are entitled to refer to and rely upon any information obtained during the course of such meetings in helping them to prepare their reports, unless good arguments are advanced as to why that should not be the case.

5. This was because I took the view that these meetings are likely be very helpful to the experts and it would be more productive if the experts were able to rely on information obtained. If any party wished to suggest that the expert should not rely on any such information, they may apply to the court with reasons as to why that should be so: see paragraphs 24-26 of my Judgment.

6. I noted in passing that I was not following Segal J's approach in *Trina* which as I understood it was to render inadmissible in evidence anything said in such meetings unless the parties agreed to waive what he considered to be a form of 'without prejudice' privilege.

The parties' contentions

7. Mr Tom Lowe QC who appeared on the behalf of the Petitioner Company applied pursuant to the liberty to apply provision in a Directions Order dated 5 February 2018 ("*Directions Order*") to make an amendment concerning paragraph 14. That paragraph requires the Company to procure that appropriate members of its management team be available to meet with all experts in person or by telephone or by way of video link.

8. The purpose of such a meeting (which takes place after the experts have reviewed the discovery which goes to the issue of 'fair value') is for the management of the

Company to provide information and to answer queries which are relevant to the preparation of the experts' opinions.

9. Because many of the Company's management are native Chinese, provision was made for interpreters. The Company was required to arrange for the meetings to be recorded and a transcript prepared. A copy of the recording of the transcript was to be provided to the Dissenters and the experts as soon as reasonably practicable following the meeting. There was provision for the experts to prepare a list of questions and/or issues to be provided to the Company not less than 14 days prior to the meeting which had with it a best endeavours obligation for the experts to ensure that the Company is aware ahead of time of the questions and/or issues to be discussed. But the experts were not to be limited to the matters set out in the list of questions, but rather could raise any matter they considered relevant to the question of fair value.

10. Mr Lowe QC accepted that a management meeting with experts will occur in accordance with this direction but sought a further direction in respect of what could be done with the transcript produced from such a meeting. In particular the Company seeks an order that the transcript of the meeting and its contents is not admissible at trial unless agreed by the parties or directed by the court. He was not saying that the experts could not use the transcript to help them prepare their reports, but that the parties by agreement and ultimately the trial judge should have a chance to determine whether and on what basis it is admitted as evidence in court. It should not be admissible as of right.

11. In support of this submission Mr Lowe QC argued that since the proper purpose of a management meeting is to assist the experts in the preparation of their valuation reports it should not be allowed to turn into a litigation tool or a trap for management. He submitted that the Dissenters should not have the opportunity of 'ambushing' the Company's management and receiving unclear responses so as to draw an adverse inference from the transcript to be used at trial, because that is not the purpose of a management meeting and would be unfair to the Company's management. It was essentially an inquisitorial, not adversarial process.

12. Moreover he pointed out that valuation experts may or may not be adept at asking questions, which may not always be clearly put. There was a real risk of misinterpretation because the Company's management is Chinese and the language that they will be most comfortable speaking in is Chinese. Even with a translator/interpreter the Company is concerned that there is a significant risk of misinterpretation of a question especially where it is not contained in the pre-prepared list of questions.

13. As a matter of fairness and sensible case management Mr Lowe QC argued that it would not be right to treat transcripts arising from these meetings in the same way as say, depositions.

14. He referred for support in particular to the recent Judgment of Justice Kawaley in *Nord Anglia (unreported 19 March 2018 at paragraph 41)* in which the learned judge noted that:

> *"... it is wrong as a matter of legal principle..... for a transcript of such a meeting to be used as a form of deposition in the absence of the legal protections present in the deposition process. Permitting a transcript to be used in such a fashion would undermine the informality which should prevail and would potentially stem the free flow of information from the management pseudo—witnesses".*

15. He submitted that in the earlier cases of *Integra* and *Shanda Games* transcripts of the management meetings were treated as if they were transcripts taken in deposition. He pointed out however that in a subsequent case (*Trina*) Segal J, who of course was the trial judge in *Shanda Games,* seemed to have departed from this practice.

16. Mr Robert Levy QC for the Dissenters submitted that what the Company was really trying to achieve was that the management meetings should be held on a 'without prejudice' basis, which was wrong in law and principle. Moreover on this point he said that this court cannot revisit its own previous order which was, as I have said, that the management meetings were to be held on an 'open' basis.

17. The Company should have appealed to challenge this position and the court cannot simply change its previous ruling.

18. He argued that the utility of the management meetings was to enable all experts to gain a better and fuller understanding of issues. They have been ordered or agreed in the vast majority of cases under section 238 of the Companies Law and he submitted, had operated without difficulty. It is inappropriate to limit the use of information gathered at such meetings.

19. In support of his submission that the Company's position is wrong as a matter of law he pointed out that the management meetings are not an attempt to compromise litigation or indeed any issues in the litigation. What is said at those meetings is not as a matter of law 'without prejudice': see *Cutts v Head [1984] Ch 290 at 306 per Oliver LJ and Phipson on Evidence (19th Edition) Paragraph 24-13*. These were not settlement negotiations. They are fact-finding meetings.

20. He submitted that, in effect, the Company was challenging the entirety of the reasons for this court ordering management meetings to be held on an 'open' basis as set out in my Judgment of 2 February 2018.

21. The transcript was protection enough and if any party or person objected to any part of it they could do so. These were professional people who were perfectly capable of looking after their interests. Experts should not in any way be asked to 'reveal their hands' before preparing and finalizing their reports.

The evidence

22. Mr Sammy Lai, who is a valuation expert and partner in PwC Beijing, is the Company's expert appointed to opine on fair value. In his first affidavit of 24 May 2018 he says at paragraphs 12 and 13:

> *"12. I support the further directions sought by the company in relation to management meetings and am of the view that such meetings should be held on a without prejudice basis for the following reason.*
>
> *13. While it is important that an expert has freedom to ask any question that will assist him/her in the preparation of the report, it is equally important that management feels comfortable providing information and is not inhibited from speaking freely in a meeting. It is my view that open management meetings do not function as effectively as those with protections in place so the parties have a chance to clarify anything that may have been misunderstood or misrepresented during the meeting. Anything that is said in a management meeting and which either expert would like to include in their valuation report should be subject to follow-up questions and answers so that there is no ambiguity as to what was said".*

23. Mr Michael Thornton a partner and valuation expert with Grant Thornton UK LLP submitted an affidavit sworn on 11 June 2018 in answer to Mr Lai's evidence.

24. Having referred to the Company's application that the transcript of the management meeting and its contents should not be admissible in evidence unless otherwise agreed or directed by the court, he says:

> *"Paragraph 6: I understand that, if ordered in such terms, this means that the Experts .... would not be able to rely on the information provided in the Management Meetings unless agreed or directed otherwise by the Court."*

> *"Paragraph 13: The Experts would also have discussions with the Company's management in order to obtain explanations and/or clarifications of financial and/or non-financial data provided by the Company. Such information, explanations and/or clarifications form a crucial and integral part of the Experts' underlying analysis in reaching their valuation opinions, and informs their professional judgement as to what their conclusions may be."*

25. He goes on to say in the balance of his affidavit why, in his view, it would be appropriate for the meetings to be held on an open basis and explain why it would hinder the experts and therefore be of less assistance to the court if they were held on a without prejudice basis.

26. He disagrees with Mr Lai's views that management meetings would be more effective if they were held on a without prejudice basis.

> *"Paragraph 23: I do not consider that conducting Management Meetings on an open basis would inhibit management from speaking freely in the way Mr Lai suggests. In my experience, if the Company's management is committed to assisting the Experts in discharging their duties to the Court, conducting the Management Meetings on an open basis would better serve in achieving this purpose by allowing for a transparent transfer of information from the Company to the Expert."*

> As to transcripts he says:

> *"Paragraph 24: In addition, on the basis that the transcripts of the Management Meetings are made available to the parties, if, upon review of the same the Company's management realises that they had made error(s) on certain points, in practice, it would always be open to them to raise that fact after the Management Meeting. The Expert would then be able to use his or her Expert judgement to determine whether the original explanation provided during the Management Meeting, or the revised explanation provided subsequent to the management meeting, was more credible and/or consistent with documentary evidence. If the expert determined that the original explanation provided in the Management Meeting was the more credible one, it would place him or her in an awkward situation if such information could not then be used to justify his or her conclusions due to the imposition of the without prejudice restrictions."*

27. Mr Tavish Maclean swore an affidavit on 15 June 2018 for the Company in response to Mr Thornton's evidence. He is a valuation expert with Perun Consultants in Hong Kong.

28. At paragraph 7 he says that in his experience management meetings are not a common feature of business valuation exercises.

He says at paragraph 14:

> *"As I understand it, the Company accepts that the Management Meeting shall be transcribed but seeks a restriction on the use of the transcript of the Management Meeting or its contents from forming part of the evidence in these proceedings without the consent of the Court or agreement of the parties. I understand that the restriction sought is not intended to prevent the experts from relying on explanations or clarifications provided by the Ccompany during the Management Meeting or in response to a pre-prepared list of questions. The real benefit of having a transcript is to ensure that there is very limited scope for misunderstanding on the part of the experts when they review what was said at the meeting for the purposes of their report."*

29. Mr Thornton swore a second affidavit on 22 June 2018 which was objected to before the hearing but which Mr Lowe QC did not appear to object to at the hearing itself. Mr Thornton disagreed with the statement made at Mr Maclean's paragraph 7 that management meetings are not a common feature of business valuation exercises and he gave some statistics about the valuations that he had completed in the last 10 years, 90% of which had involved meetings with management. Mr Thornton also took issue with Mr Maclean's evidence that he considered transcribed meetings to be unusual as in his experience, particularly in contentious matters, it was not at all unusual for minutes or for a contemporaneous note meeting to be taken and circulated between the attendees.

Decision

30. It seems to me that the central issue in dispute between the parties on this summons is a question for the court to determine as a case management issue.

31. The issue is not whether or not the meetings held between the experts and the Company's management are 'open' or not. I have already decided that they should be 'open' in the sense that relevant matters which are imparted can be referred to and relied upon by the experts in the preparation of their reports: see paragraphs 25 and 26 of my Judgment of 2 February 2018. I did not deal with transcripts of such meetings in that Judgment, and no arguments were advanced in relation to that issue. The question of revisiting this, or an appeal of it, does not arise.

32. Nor, notwithstanding Mr Lai's evidence, did I understand Mr Lowe QC to be submitting in oral argument that these meetings were to be protected by without prejudice privilege.

33. The issue is whether a transcript is admissible in evidence without more or whether there should be some protection governing its admissibility.

34. For the reasons Mr Levy QC put forward as a matter of legal reality these are not meetings held 'without prejudice' in any event and in my view there are no good reasons to give them the same effect in this case.

35. The experts are free to rely on explanations, clarifications, comments and the like made by the Company's management at the meetings to the extent that they facilitate the preparation of their reports. For this they can also use the transcript.

36. Mr Lowe QC is perfectly entitled to apply as he has done under the liberty to apply provision of the Directions Order for a specific direction in relation to the status of the transcripts.

37. The court is heavily reliant on the experts in section 238 cases. To further the overriding objective of dealing with these cases expeditiously, economically and fairly so that the court is provided with (as efficiently as possible) all relevant information upon which ultimately to make a decision on fair value, the maximum benefit that can be derived from these meeting is desirable. The court should do what it can to facilitate this. That is why the meetings should be 'open.'

38. However, I have decided that the admissibility of the transcript of such a meeting should be a matter for agreement between the parties and ultimately a matter for the trial judge. It seems to me that arguments over precisely what was said, the context in which it was said, the room for interpretation of what was said and the emphasis which may be placed on a verbatim written transcript is not helpful to the overriding objective or to assisting the court. If these transcripts were admissible in evidence without more it seems to me that inordinate amounts of time and effort could be spent in arguing over the subtleties and nuances of exactly what was said, the accuracy of precise translation, and the argued for implication or consequence. There is a real risk of more heat than light being generated.

39. The purpose of the transcript is simply, as a practical matter, to make sure that there is a verbatim record of what was said and there were no material miscommunications or misunderstandings so that a proper record was agreed. As an alternative to a transcript the experts could take manuscript notes and use only those but it seems to me that would be less efficient and could cause further confusion and disagreement.

40. As a matter of fairness to the company's management it is also not right to treat transcripts of these meetings as documents upon which points may be advanced at trial in the manner of a deposition process. They are not being deposed as witnesses. I agree with Justice Kawaley's reasoning at paragraph 41 of *Nord Anglia*.

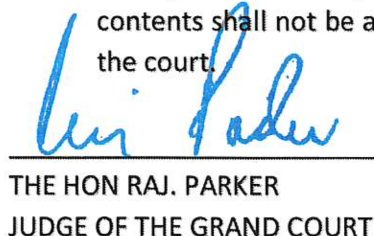
41. The company's management attending such meetings do not take an oath, there is no Judge supervising the proceedings, and although they are given a list of questions/issues which the experts are likely to be interested in in advance, they can be asked for any information that the experts consider to be relevant at the meeting itself.

42. Management in my view should be entitled to feel that they may speak openly and honestly and not in a way that is less than forthcoming for fear of a transcript being used against either the company or the individual at a trial. There is a degree of flexibility and informality to these meetings which should be preserved. I accept Mr Lowe QC's submissions that a protection should be put in place to avoid transcripts of management meetings becoming litigation tools or traps. I note that section 238 cases are notoriously hard-fought even at the procedural and interlocutory stages.

43. I take the view that not only would these meetings be more productive when open, but also that they would be more productive if people attending them appreciated that they would not automatically be at risk of a subsequent and more formal examination as to precisely what they may have said which was recorded in a transcript produced in evidence at trial.

44. Of course, that does not prevent the experts from using the information and other material obtained at these meetings in order to prepare their reports. If they were precluded from doing this so that information supplied at the meeting which they considered relevant to fair value could not be explained in their reasoning and by reference in their reports they would be put in a very difficult and unfair position.

45. It follows that I accede to the Company's application that the transcript of the management meeting held pursuant to paragraph 14 of the Directions Order and its contents shall not be admissible in evidence, unless otherwise agreed or directed by the court.



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