IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD 75 of 2016 (IMJ)

IN THE MATTER OF PART XVI OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF HOMEINNS HOTEL GROUP

BETWEEN

HOMEINNS HOTEL GROUP

PETITIONER

AND

1. **MASO CAPITAL INVESTMENTS LIMITED**
2. **BLACKWELL PARTNERS LLC – SERIES A**
3. **CROWN MANAGED ACCOUNTS SPC ACTING FOR AND ON BEHALF OF CROWN/MASO SEGREGATED PORTFOLIO**

RESPONDENTS

IN CHAMBERS

Appearances: **Mr. R Hacker QC instructed by Mr. P Madden of Harneys for the Petitioner.**

Mr. R Levy QC instructed by Mr. A Heaver-Wren and Mr. A Jackson for the Respondents

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **29 July 2016**

Draft Circulated to the Parties and Counsel only: 9 August 2016

Ruling Delivered: **12 August 2016**

Released for Publication: 7 February 2017

HEADNOTE

Company Law – Section 238 – Court's function to determine fair value of shares of Dissenting Shareholders – Summons for Directions – Discovery – Factual Evidence.

RULING

1. This is an application for directions in proceedings commenced by the Petitioner Homeinns Hotel Group ("the Petitioner"/ "Homeinns") pursuant to section 238 of the ***Companies Law (2013 Revision)*** (***"the Companies Law"***). The purpose of the proceedings is to seek a determination by the Court of the fair value of the Dissenting Shareholders' (Maso Capital Development Limited, Blackwell Partners LLC – Series A, and Crown Managed Accounts SPC Acting for and on behalf of Crown/Maso Segregated Portfolio ("the Dissenting Shareholders")) shares in Homeinns and a fair rate of interest (if any) upon the fair value so determined.

2. The Petitioner filed the Petition on 30 May 2016 as required by section 238(9). According to the written submissions of the Petitioner, the Petitioner did not file a summons for directions at the same time as the Petition as there is no requirement to do so under the GCR or the ***Companies Law***; instead the Petitioner requested that the Court list the Petition for a directions hearing. This hearing was fixed for 5 August 2016. However in the meantime, the Dissenting Shareholders filed a summons for directions on 20 June 2016 and requested an earlier hearing, which has taken place. The Dissenting Shareholders' summons sets out the issues for determination as follows:-

> *"An application by the Respondents for directions to be given for the hearing of the Petition, including inter alia, the following:-*
>
> *(1) The manner in which evidence is to be given.*
>
> *(2) Directions as to discovery and inspection of documents.*
>
> *(3) Directions as to permission to adduce expert evidence, the service of expert reports, meetings between experts and preparation of a joint expert report.*
>
> *(4) Such further or other orders and directions as the Court shall think fit.*
>
> *(5) That the costs of this application be costs in the Petition."*

3. The relevant sections of the Companies Law are Part XVI – Merger and Consolidation, sections 232 and 238 which read as follows:-

"*Definitions:*

232. In this Part –

……

"constituent company" means a company that is participating in a merger or consolidation with one or more other companies...."

Rights of Dissenters

"*238. (1) A member of a constituent company incorporated under this Law shall be entitled to payment of the fair value of his shares upon dissenting from a merger or consolidation.*

(2) A member who desires to exercise his entitlement under subsection (1) shall give to the constituent company, before the vote on the merger or consolidation, written objection to the action.

(3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for his shares if the merger or consolidation is authorised by the vote.

(4) Within twenty days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, the constituent company shall give written notice of the authorisation to each member who made a written objection.

(5) A member who elects to dissent shall, within twenty days immediately following the date on which the notice referred to in subsection (4) is given, give to the constituent company a written notice of his decision to dissent, stating:-

a. *his name and address:*
b. *the number and classes of shares in respect of which he dissents; and*
c. *a demand for payment of the fair value of his shares.*

(6) A member who dissents shall do so in respect of all shares that he holds in the constituent company.

(7) Upon the giving of a notice of dissent under subsection (5), the member to whom the notice relates shall cease to have any of the rights of a member except the right to be paid the fair value of his shares and the rights referred to in subsections (12) and (16).

(8) Within seven days immediately following the date of the expiration of the period specified in subsection (5), or within seven days immediately following the date on which the plan of merger or consolidation is filed, whichever is later, the constituent company, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase his shares at a specified price that the company determines to be their fair value; and if, within thirty days immediately following the date on which the offer is made, the company making the offer and the dissenting member agree upon the price to be paid for his shares, the company shall pay to the member the amount in money forthwith.

(9) If the company and a dissenting member fail, within the period specified in subsection (8), to agree on the price to be paid for the shares owned by the member, within twenty days immediately following the date on which the period expires:-

a. *the company shall (and any dissenting member may) file a petition with the Court for a*

determination of the fair value of the shares of all dissenting members; and

b. *the petition by the company shall be accompanied by a verified list containing the names and addresses of all members who have filed a notice under subsection (5) and with whom agreements as to the fair value of their shares have not been reached by the company.*

(10) A copy of any petition filed under subsection (9)(a) shall be served on the other party; and where a dissenting member has so filed, the company shall within ten days after such service file the verified list referred to in subsection (9)(b).

(11) At the hearing of a petition, the Court shall determine the fair value of the shares of such dissenting members as it finds are involved, together with a fair rate of interest, if any, to be paid by the company upon the amount determined to be the fair value.

(12) Any member whose name appears on the list filed by the company under subsection (9)(b) or (10) and who the Court finds are involved may participate fully in all proceedings until the determination of fair value is reached.

(13) The order of the Court resulting from proceedings on the petition shall be enforceable in such manner as other orders of the Court are enforced, whether the company is incorporated under the laws of the Islands or not.

(14) The costs of the proceedings may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances; and upon application of a member, the Court may order all or a portion of the expenses incurred by any member in connection with the proceeding, including reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata

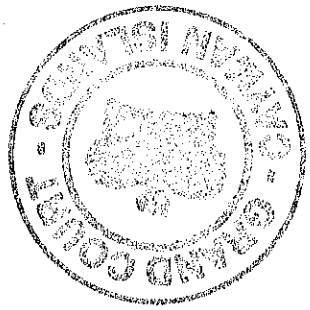
against the value of all the shares which are the subject of the proceeding.

(15) Shares acquired by the company pursuant to this section shall be cancelled and, if they are shares of a surviving company, they shall be available for re-issue,

(16) The enforcement by a member of his entitlement under this section shall exclude the enforcement by the member of any right to which he might otherwise be entitled by virtue of his holding shares, except that this section shall not exclude the right of the member to institute proceedings to obtain relief on the ground that the merger or consolidation is void or unlawful."

4. In ***In re Charm Communications Inc*** FSD 149 of 2014(IMJ), (unrep), delivered 26 February 2015, cited by the Petitioner's Counsel, I made directions at a time when there had not yet been any decided local cases in relation to section 238 applications, although there had been directions given in ***In the Matter of Integra Group*** FSD 92 OF 2014(AJJ). I opined, in response to submissions in that case, that directions given in any other case are not to be regarded as "precedents". To my mind, that was stating the obvious. However, quite obviously also, if an order for directions made in a previous case appears appropriate for the case currently before the Court, and appears to achieve the overriding objective of dealing with cases in a just, expeditious and economical way, then the Court will make such directions. Equally plain is that by the nature of these types of cases, there will be some orders that are, or may become, for want of a better term, "standard" (as opposed to being precedents), in what may properly be described as the "usual" type of case. However, the point is that the Court will make directions that accord with the overriding objective of dealing with each particular case in a just, expeditious and economical way.

5. I think that it is appropriate to also remember that the overriding objective stated in the Preamble to the ***Grand Court Rules 1995(Revised Edition)***, at paragraph 3, also imposes a duty on the parties as follows:



> ***"3. Duty of the parties***
>
> *The parties are obliged to help the Court to further the overriding objective. In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure in this respect."*

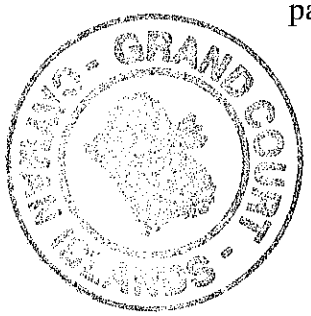
6. I have considered the eleven pages of submissions on the part of the Petitioner, and twenty-two pages of submissions on the part of the Dissenting Shareholders, together with draft orders, and oral concessions made during the hearing, in order to determine what are the matters agreed, and what are the matters in dispute. An authorities bundle consisting of 14 Tabs was also presented to the Court. The Order proposed by the Dissenting Shareholders is set out at Tab 2 ("DSD"), and the Order proposed by the Petitioner is set out at Tab 3 ("PAD").

7. In addition, Learned Queen's Counsel for the Dissenting Shareholders, Mr. Levy, referred me to a number of orders made in previous cases, which at my request, (since much reliance was being placed upon them), have been produced to the Court. Unsurprisingly, many of the orders and directions referred to were made "by Consent" in those cases. That is not the situation in relation to some of the same matters in the instant case. It is trite that generally, not just in this area of the law, orders made by consent (and therefore not the subject of contest) or orders made without opposition, particularly when a written ruling is not available, are of limited assistance to a Court which now has the task of adjudicating on the same issues, now in contest between parties before the Court. This Court does not have the benefit of either the facts and circumstances extant in the earlier matters, nor the benefit of a reasoned ruling. The consent orders are therefore useful only to the extent that they can be examined by this Court to see if they also seem

just and appropriate in this particular case, after considering competing arguments as to their suitability.

8. It seems to me that parties should make considerable effort to agree directions that appear reasonable and that appear to further the overriding objective. This should be done in advance of a Directions Hearing, in order to appropriately narrow the areas of dispute and to assist the Court in allocating an appropriate share of the Court's resources to the hearing. It is in my view desirable that if possible, a single draft order be placed before the Court, indicating the Orders agreed, and also the respective versions of the Orders not agreed.

9. As I understand it, it has now been agreed that the Court can make the direction sought at paragraph 1 of the Petitioner's draft order ("PAD"), which is as follows:



> *"1. Crown/Maso Segregated Portfolio, Maso Capital Investments Limited and Blackwell Partners LLC-Series A (the **Dissenting Shareholders**) be joined as Respondents to the Petition."*

10. It would also appear that whereas initially, there had been disagreement and objection by the Petitioner to providing discovery via an electronic data room, (apparently on costs grounds which have since been resolved), these have now fallen away.

11. It also appears that the format of meetings between the experts and management has been agreed. That is, it has been agreed that in addition to meetings in person, or by telephone, the meetings can take place by way of Skype. Further, in its skeleton argument, the Petitioner has indicated that former members of its management team, named at paragraph 38 of the skeleton argument, who were members of the management team at the time of the merger, will be available to meet if required, and that no order to this effect is required (Paragraph 11 of the DSD **[A/2]** had sought such an order).

12. It seems to now be agreed not only that the Petitioner and the Dissenting Shareholders shall each have leave to separately instruct an expert witness in the field of valuation in order to opine upon the fair value of the shares, but also that the valuation date should be as at 25 March 2016, the date of the extraordinary general meeting ("the EGM").

13. Learned Queen's Counsel Mr. Hacker, in his skeleton argument on behalf of the Petitioner, at paragraph 9, puts his assessment of the remaining real points of difference between the parties as follows:

> *"(a) whether, as they contend they should, the Dissenting Shareholders should have some form of early discovery - or perhaps an order for discovery of the documents set out in paragraph 4 of their draft order* ***[A2, DSD paras 1-5, and 7]****, or whether (as the Petitioner contends) at this stage the order for discovery should be limited to standard GCR Order 24 discovery.... (adjusted only to take account of the use of an electronic data room)*
>
> *(b) whether (as the Dissenting Shareholders contend) the Petitioner should be required to procure translations of documents which exist only in the Chinese Language [DSD para 6] , or whether the obligation to provide translations should be limited to those documents of which translations exist* ***[A3, PAD para 4]***
>
> *(c) whether, once discovery has been given, a request for the provision of additional documents should in the first instance be made by the experts jointly (as the Petitioner has proposed)* ***[A/3, PAD para 7]****, or whether it is sufficient if only one expert makes the request, as the Dissenting Shareholders have proposed* ***[A/2, DSD para 11]****. It is to be noted that both parties accept that whichever option is preferred, the Court should have the final decision if there is a dispute as to production:....."*

14. There is also another matter of contention. This involves the Petitioner seeking an order that provides for the service of affidavit evidence following the service of the Experts' Reports. Learned Queen's Counsel Mr. Levy, who appears for the Dissenting Shareholders, on the other hand, takes the position, as set out at paragraph 98 of the skeleton argument, as follows:

> *"...for reasons that are not clear, Hommeinns' draft order provides for factual evidence. It is not immediately apparent why such a provision has been included. The function of the Court is to determine the fair value. It does so aided by expert evidence. It would be quite incorrect (and administratively difficult) if lay evidence that could impact upon the question of valuation, was led after the experts have produced their reports. If that happened it could well result in the experts having to amend or reconsider their reports "on the hoof". If, on the other hand, the factual evidence in question does not impact upon valuation then it is difficult to see how it could be relevant."*

15. In the course of oral submissions, Mr. Levy QC was ultimately content to propose a compromise solution, which would allow for affidavit evidence, but that this evidence be exchanged before the Expert Reports.

PROCESS OF DISCOVERY

16. In relation to the process of discovery, which appears to be the main fundamental source of dispute, the Petitioner contends that this is an ordinary piece of litigation in which the ordinary principles and practices of discovery should apply. Discovery, it was submitted, should be given by the parties and if either is dissatisfied with that given by the other, they can make an appropriate application to the Court. The Petitioner's position is further that this is not the time for the Dissenting Shareholders to seek discovery of certain documents, which is essentially a specific discovery application.

17. The Dissenting Shareholders, on the other hand, say that without prejudice to the obligation to disclose all documents relevant to fair value, paragraph 4 of the DSD specifically refers to particular classes of documents that should be uploaded to the data room on the grounds of relevancy. At paragraph 81 of the Skeleton, it is stated:

> *"An order of this type was made in a number of other s.238 cases, and makes perfect sense. Plainly documents within the classes mentioned will exist, should be readily to hand and will be of central relevance to the issue the Court has to answer, namely what is the fair value of the shares. The documents in this class represent documents on which various parties based their decisions; i.e. the financiers based their decision to lend; Credit Suisse based its decision to consider the offer fair, and the Buyer Group based its decision to purchase the company. Their relevance are* [sic] *self-evident for their purpose. Therefore these documents will be of great importance to the experts and there is every reason why these specific classes of documents, which necessarily exist, should not be expressly listed (as equivalent classes of documents have been in other cases)".*

18. I have been greatly assisted by the fact that at this time, there is now a completed substantive hearing in the ***Integra*** matter. Jones J. delivered his Judgment on 28 August 2015 and provides very useful guidance in relation to the relevant principles and issues in s. 238 cases. Indeed, Jones J. has even discussed some of the directions orders that he made, the utility thereof, the compliance, or lack of compliance therewith, and some of the consequences arising therefrom. This is of particular relevance and assistance in relation to this application for directions. In ***Integra*** Jones J. had made orders for the establishment of an electronic data room. He also had before him affidavit evidence, but this affidavit evidence appears to have been exchanged before any expert reports were prepared.

19. At paragraphs 11, 13, 15, 21, and 22, the learned Judge stated the following:

*"**Establishment of an electronic data room***

11. It goes without saying that the information contained in Integra's own books and records is highly relevant to any appraisal of its fair value as a going concern. The Court's intention was that all the relevant material should be uploaded into an electronic data room where it would be available for inspection by the experts (and those instructing them) subject to giving appropriate confidentiality undertakings. The experts are the best judge of what information is or is not relevant for their purposes. It was the Court's intention, expressed in paragraph 7 of an order for directions made on 27 October 2014, that all documentary information requested by either expert should be uploaded into the data room. This did not happen. A great deal of material was uploaded, but Integra's management took it upon themselves to control what information would be made available to the experts and refused to upload some of the material requested by Mr. Taylor (or did so in a heavily redacted form) on the ground that they considered it to be irrelevant. There is no means of knowing whether material withheld by Integra's management might have affected the experts' judgments in any way."

.....

Factual affidavit evidence

13. In addition to the expert reports, each side filed affidavits. Mr. Neil Gaskell swore two affidavits on behalf of Integra. He had ceased to be a director of Integra following completion of the merger, but he was retained as a consultant to assist the MBO Participants with this proceedings. Subject to one paragraph in which he commented in a very superficial way upon the directors' earlier attempt to identify potential purchasers for some or all of Integra's business, Mr. Gaskell's affidavits set out the factual and procedural history in a non-controversial way. Mr. Magnus Lekander swore an affidavit on behalf of the Respondents. He is East Capital's General Counsel and

his evidence essentially comprises a complaint, made at an early stage of the proceedings, about the failure of Integra's management to disclose material thought to be relevant to the valuation exercise.

……

15. *This is the first time that the Court has been called upon to value a company's shares in connection with a merger carried out in accordance with the provisions of Part XVI of the Companies Law. Similar statutory remedies have existed in the State of Delaware and in Canada for many years and both counsel have referred me to decisions of the courts in those jurisdictions as a guide to the way in which section 238 of the Cayman Islands legislation should be interpreted and applied.*

……

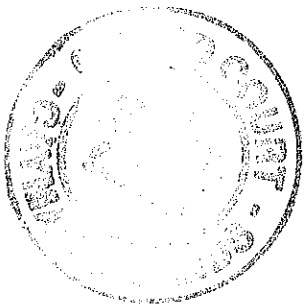
21. *The Canadian courts have emphasized that every appraisal case turns on its own facts and that there is the need to consider all the evidence that might be helpful to the court. Lambert J.A. writing for the majority of the Court of Appeal of British Columbia in* ***Cyprus Anvil Mining Corp v Dickson*** *(1986) 8 B.C.L.R. 145, said:-*

……

> *The one true rule is to consider all the evidence that might be helpful, and to consider the particular factors in the particular case, and to exercise the best judgment that can be brought to bear on all the evidence and all the factors. I emphasize: it is a question of judgment. No apology need be offered for that. Parliament has decreed that fair value be determined by the courts and not by a formula that can be stated in the legislation.*

……

22. ***The Companies Law*** *does not specify the date at which the determination of fair value is made. The order for directions made on 27 October 2015 identified two potential valuation dates, namely 23 April 2014 (which was the date upon which the Circular*



containing the merger proposal was sent to shareholders and published to the market) and 21 May 2014 (which was the date upon which the EGM was held). Counsel ultimately agreed that the latter date should be adopted and this is consistent with both the Delaware and Canadian law."

(My emphasis)

DISCOVERY

20. In my judgment, overall, the draft order presented by the Dissenting Shareholders at paragraphs 4 and 5 in relation to discovery appears more consonant with the requirements of the Court in adjudicating an application under section 238. In particular, it does appear to me that the Discovery Order should contemplate the documents listed at paragraph 4, which the Petitioner plainly has readily to hand and which must be relevant. The Discovery Order in a section 238 application is somewhat unusual, in that it is the Company that will have the documents and information relevant to the determination of fair value. I accept the submission of Mr. Levy QC in paragraph 7 of the skeleton argument. In particular, I accept that the experts and the Court are to have regard to all relevant documents and information, not just publicly available information. Further, in my judgment, it is not appropriate to make a standard order under order 24 of the GCR for disclosure by both parties. In my judgment, it is not in keeping with the purposes of section 238 for the Dissenting Shareholders to be ordered to provide discovery. Further, the Order sought at paragraph 3 of the DSD, i.e. as to an index for the Data Room, will be more useful than lists of documents, as proposed at paragraph 7 of the PAD.

TRANSLATION

21. In my judgment, paragraph 3 of the PAD which proposes that the Petitioner should provide an English translation of documents only where one is available, is more appropriate than the Order sought at paragraph 6 of the DSD Order. I accept the submission of leading Counsel for the Petitioner that, in reliance upon the judgment of Hoffman J. (as he then was) in ***Bayer AG v Harris Pharmaceuticals Ltd*** [1991] FSR 170, it is a well-established principle that a party that comes under a compulsion to

disclose documents should not be obliged to translate each foreign document. Rather, it is for the party seeking to rely upon that document to translate it.

FURTHER DOCUMENTS AND/OR INFORMATION, AT REQUEST OF EITHER EXPERT OR JOINT REQUEST

22. In my view, paragraph 8 of the DSD draft, which provides for the uploading to the Data Room of any additional documents or information that either expert considers necessary, with any request or response to such a request being provided to the expert on the other side, is more appropriate than PAD, paragraph 7. I am of the view that the additional requirements should relate not only to documents, but also to information. In my judgment, paragraph 8 as proposed by the Dissenting Shareholders, is appropriate and consistent with Jones J's views as expressed in ***Integra*** to the effect that the experts are the best judges of what is relevant when it comes to disclosure. However, whilst I agree that the requests by the Experts for additional information should be on a rolling basis, as opposed to being on a "once only" basis, at the same time, I agree with the Petitioner that there must be a cut-off point, particularly if the experts are to meet deadlines as to exchange of signed Expert Reports as envisioned.

FACTUAL/AFFIDAVIT EVIDENCE

23. During oral submissions, Mr. Hacker QC candidly conceded that it may at first blush seem counter-intuitive to ask for factual evidence to follow after the expert reports. However, Learned Counsel explained his client's position very clearly, and it is to address a concern that the Experts may, for example, comment upon matters taken, or not taken into account by Management and therefore a response is needed. However, it seems to me that it would be incorrect and cumbersome in any event, to have factual lay evidence led after the experts have produced their reports. An appropriate order would be to have the affidavit factual evidence come first, after the discovery process, and before the Expert Reports. Each party's expert would themselves be able to, under paragraph 12 of the DSD Order, following the exchange of their respective reports, meet to discuss the differences between their reports with a view to narrowing the issues. The Experts would be required to attend Court for cross-examination on their respective Reports. The factual

witnesses would also be required to attend Court for cross-examination. In my judgment, these combined processes should be adequate to encompass any loose ends and concerns of the Petitioner in this regard.

24. In any event, Courts are well-accustomed to making appropriate Orders as and when required, and it would seem to me that without more, and without some specific issue arising requiring the Court to contemplate hearing from a lay witness in response to what an Expert has said, it would be inappropriate to make a blanket order for factual evidence to come after the Expert Reports. The Directions Order should include the usual scope for further Case Management Orders to be applied for, if necessary, and for liberty to apply.

25. The time line at paragraph 1 of the DSD as to the time for opening the data room, will have to move back to say, 16 August 2016. The time for uploading in paragraph 4 would also need to move to, say, 30 August 2016, in paragraph 5, move to 16 September, the time in paragraph 7, move to say, 16 September, the time in paragraph 11, move to say, 16 November 2016.

26. The trial of this matter should be set down in Open Court with a provisional estimate of 5 days, not before 23 January 2017.

27. The parties had agreed to provide a draft order incorporating my rulings and I should like to receive that draft, along with any agreed time-table modifications proposed by the parties.

28. It would seem appropriate that costs are to be costs in the cause.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT