



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 184 OF 2020 (RPJ)

IN THE MATTER OF SECTION 238 OF THE COMPANIES ACT (2022 REVISION)

AND

IN THE MATTER OF FGL HOLDINGS

BETWEEN

FGL HOLDINGS

Petitioner

AND

- 1. KINGSTOWN PARTNERS MASTER LTD**
- 2. KINGSTOWN PARTNERS II LP**
- 3. KTOWN LP**
- 4. KINGFISHERS LP**
- 5. KINGSTOWN 1740 FUND LP**

Dissenters

Before: The Hon. Justice Parker

Heard: On the papers

**Draft judgment
circulated: 8 April 2022**

Judgment delivered: 8 April 2022

HEADNOTE

S.238 Companies Act - cross examination of witnesses- no formal pleadings or statements of case - application for indices of documents to be used and no others without agreement or permission - case management - cross examination bundles - fairness and balance to be struck regarding advance disclosure and surprise - Court's power to control the process to ensure fairness and to prevent cross examination which is oppressive or improper - provision of themes/topics in advance of trial



RULING

1. An application has been brought by the Petitioner Company following the Case Management Conference, which took place on 28 February 2022 (the CMC), for an order (i) that the Dissenters provide indices for the documents which they wish to put to the Company's factual witnesses in cross examination by 11 April 2022 and (ii) that no further documents be permitted without the consent of the Company or leave of the Court.
2. The parties have agreed that the issue can be determined on the papers and I am prepared to do so.
3. The Dissenters resist the application on a number of bases including that such an order would be unfair, and extraordinary. Neither the FSD Guide, the Grand Court Rules, the Rules of the Supreme Court or the English Civil Procedure Rules provide for a witness to have advance notice of the exact documents upon which they will be cross examined.
4. They argue that making such an order without a special reason would undermine the balance of adversarial proceedings which is well established in the common law system. The Court can always control the process to ensure fairness and to prevent cross examination which is oppressive or improper.
5. The trial is fixed to start on 23 May 2022 in person in the Grand Court. There will, as is usual, be a digital trial platform available on to which the agreed trial documents will be uploaded. The factual witnesses will be cross-examined in person, and they will be shown the documents from the agreed trial documents that are to be put to them at trial on a screen manned by a third party operator.
6. Section 238 trials are principally concerned with expert evidence given by valuation professionals called by the parties to assist the Court in its fair value deliberations.
7. However there is often factual evidence usually led by the Company. It is in my view preferable, as a matter of fairness in section 238 trials and in accordance with the Overriding Objective, where there is extensive factual evidence to be called, that the factual witnesses to be examined and cross examined understand the gist of the case that is made concerning their evidence.
8. There are often thousands of documents but no formal pleadings or statements of case in s.238 cases, as would be available in ordinary commercial litigation. Most of the written material is

germane to the expert process. Parties may be unaware of the specific case to be made which concerns the factual witnesses until written openings are served shortly before trial.

9. In this case the Company proposes to call three factual witnesses. They are members of the Company's senior management team and have, on behalf of the Company, given statements about the merger and were closely involved with the merger. They will likely be familiar with the factual material concerning their evidence.
10. However, the agreed trial documents will comprise thousands of pages and in my view some assistance should be given to the witnesses to focus their preparation. They will reasonably want to know what they need to familiarise themselves with so that they can use their time efficiently and be ready to provide meaningful responses to the Court in answer to questions put to them under cross examination.
11. As I indicated at the CMC it is my experience in conducting s.238 trials that it can be useful to have the main topics agreed or even better that a cross examination bundle is agreed which the Court receives at the same time as the Company and its factual witnesses (usually shortly before trial). This in my experience aids fairness, efficiency, and reduces the scope for argument.
12. In the intense preparation that is no doubt occurring in the lead up to trial it would not in my view be fair to the Dissenters to order them to complete their preparation for cross examination of the factual witnesses by disclosing to the Company the exact documents they intend to rely on before written opening submissions are due to be exchanged and well in advance of trial. Neither is it appropriate at this stage to make an order which restricts them to only use documents with the Company's agreement or with the leave of the court when those documents are already in the agreed trial documents.
13. Instead what I propose to order is that the Dissenters will by 2 May 2022 (3 weeks before trial) provide a list of topics or themes that they intend to cover in cross examination of each of the Company's factual witnesses so that there is no unreasonable element of surprise or 'ambush' at the trial. It will be a matter for the Court's discretion as to whether other lines of cross examination can be pursued outside of the topics /themes identified, or whether documents outside the agreed trial documents can be utilised. The Court will control the process to ensure fairness and to prevent cross examination which is oppressive or improper.
14. I understand the trial bundle is to be finalised by 11 April 2022. I make no order that 'cross examination bundles' be provided by the Dissenters at any particular time prior to the hearing

and leave it to the attorneys and Counsel to agree whether, acting in accordance with the Overriding Objective, there is a fair and pragmatic way of providing the witnesses (and the Court) with the relevant material which is to be put to them in one convenient place, and preferably before they give their evidence. I would have thought if this is agreed it should be done in the week of 16th May 2022 (the week before trial).

15. If there is a difficulty with this the parties may have liberty to apply and I will consider the matter further. Costs will be in the cause.



THE HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT