IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVI HC (COM) 0026 OF 2014

BETWEEN:

(1) QVT Fund V LP
(2) QVT Fund IV LP
(3) Quintessence Fund LP

Claimants/Respondents

And

(1) China Zenix Auto International Group Ltd
(2) Richwise international Investment Group Ltd
(3) Jianhui Lai
(4) Richburg Holding Ltd

Defendants

Appearances:

Mr. Jonathan Addo of Harneys for the Claimants;
Mr. Adam Hinks of Conyers Dill & Pearman for the First Defendant;
Messrs. Alex Heylin and Tim de Swardt of Kobre & Kim for the Second to Fourth Defendants.

2017: January 11, 12; 24.

JUDGMENT

[1] I ask the parties to forgive the brevity of this ruling which has taken longer to finalise than I would have wanted.

[2] The Application is made by the Claimant for specific disclosure of 18 classes of documents (a through to r) pursuant to CPR Part 28. The Application was resisted by the Defendants. During the course of the hearing, Mr. Addo for the Claimants indicated that the Application was no longer being pursued with respect to 7 of these classes, namely classes g), i), j), l), m), n) and p).

[3] A submission was made by Mr. Heylin, who appeared for the Second to Fourth Defendants, which he asked to be treated as a point in limine even though at my invitation he addressed it in his reply to Mr. Addo. I propose to deal with this point first.

[4] Mr. Heylin's submission, which was endorsed by Mr Hinks who appeared for the First Defendant, was that the lateness of the Application coupled with the absence of a good explanation in the supporting evidence for its timing meant that the court should exercise its discretion against making the Order sought by the Applicants.

[5] The relevant chronology appears to be that standard disclosure and inspection was to have been completed by the end of March 2016 and extended by agreement to April 2016; in June 2016 the Applicants' legal practitioners in correspondence identified the classes of documents for which additional disclosure was required; in December 2016 the Application for specific disclosure was issued with a hearing date in mid-January 2017; the trial has been fixed to commence in March 2017.

[6] Mr. Addo responded to this submission by pointing out that the Defendants had been aware from June 2016 of what the Claimants were requesting by way of additional disclosure and the Application in December 2016 merely set out this previous request in more detail. This submission was helpfully endorsed by Mr. Heylin's mark-up of the letter of 27 June 2016 from the solicitors for the Claimants. Mr. Addo further submitted by way of explanation for the timing that the Claimants were awaiting the court's decision as to whether the Second to Fourth Defendants would be allowed to put in and rely on their witness statements which were filed out of time.

[7] Mr. Addo also submitted that the court should take cognisance of the responses by the Respondents in correspondence to the Application in December 2016. On 23rd December, the legal representatives for the First Defendant indicated that the company is prepared to conduct a further search for any of the requested classes of documents. On 28th December 2016, the legal representatives of the Second to Fourth Defendants indicated that their clients were seeking to review further records and intended to provide reasonable and proportionate disclosure. The witness statements of Messrs Shi, Lai and Cheung also addressed directly the requests made in the Application.

[8] My attention was directed to the decisions of the English High Court in **Banwaith [2013] EWHC 883; Fox [2013] EWHC 4012** and **Monde Petroleum [2016] EWHC 755**.

[9] In **Banwaith** the Application for specific disclosure was dismissed inter alia on the ground that it was issued very late (17 days before trial) and a month after it had been settled. The court, however, indicated several other grounds on which it refused to order specific disclosure so it is fairly clear to me that the timing, which was more egregious than in the instant case, was not a dispositive point. In **Fox**, the relevant passage appears to be the final paragraph of the judgment of Tugendhat J where he found that the disclosure exercise (based on the vague and overly wide classes requested by the Applicant) would be disproportionate and

oppressive in light of the short period before the trial was due to start. That period was approximately 2 months from the hearing date.

[10]In **Monde Petroleum**, the Application was issued approximately 5 weeks before trial. The Application was refused on the grounds that it was made too late, was unlikely to turn up any evidence of relevance and would have been a disproportionately expensive exercise within the period before trial.

[11]Having reviewed these authorities, I am of the view that the issue of the timing of an application for specific disclosure is not dispositive but is merely a discretionary matter and it was therefore correct to have Mr. Heylin make these submissions as part of his reply. I will therefore consider this issue in the context of the general matters for consideration under CPR Part 28 and the overriding objective which I must bear in mind in exercising my discretion.

[12]The Claimants' Application seeks an Order for disclosure of documents identified by them by class. An Order can only be made for disclosure of documents that are directly relevant to one of more matters in issue. Under CPR 28.1 (4) a document is "directly relevant" if the party with control of it intends to rely on it; it tends to adversely affect his case; or it tends to support another party's case. A document is disclosed if the party reveals that it exists or has existed. Documents mean anything on or in which information is recorded. In deciding whether to order specific disclosure, in accordance with CPR 28.6 I must consider whether this order is necessary in order to dispose fairly of the claim or to save costs and have regard to the likely benefits and cost of specific disclosure and whether I am satisfied that the financial resources of the Defendants against whom disclosure is sought are likely to be sufficient to enable them to comply with the Order. As a background to these specific matters, I have to bear in mind that I should strive to give effect to the overriding objective to deal with the Application in a manner that is just and proportionate in the context of the litigation between the parties and more general requirements of the administration of justice.

[13]The starting point must be to consider what is at stake in the action. The Claimants are the minority shareholders of the First Defendant, a BVI company that operates as a holding company via a Hong Kong company for sub-subsidiaries in China that are involved in the manufacture of wheels. The other Defendants are alleged to be involved in the conduct of which complaint is made on the claim. The nub of the Claimants' complaint is that the Second to Fourth Defendants sent a restructuring proposal to the board of directors of the First Defendant in November 2013 proposing effectively that the First Defendant should transfer the majority of its interest in the Hong Kong holding company (and effectively in the wheel manufacturing business) to the Third Defendant and acquire via a share swap the unidentified holding company of an online rental property business at a price based on a purely private valuation by the owners of that business which included the Third Defendant himself. They further complain that (i) the moving forces behind the proposal were the Third and Fourth Defendants who own between them 75% of the shares of the First Defendant; (ii) the First Defendant issued a press release in November 2013 regarding its receipt of the

proposal; and (ii) even though the proposal was withdrawn subsequently, there has been no guarantee that it will not be implemented at a later date.

[14]The Claimants aver that the effect of the publication of the proposal was that the share price of the First Defendant collapsed, which ought to have been a foreseeable consequence to the Defendants and that this also would have been the consequence of the implementation of the proposal as the online business was worth significantly less than the $300million asserted by the Second to Fourth Defendants.

[15]It is the Claimants' case in a nutshell that the First Defendant has acted oppressively and unfairly discriminated or favoured the interests of the second to fourth Defendants by inter alia (i) agreeing to the publication of the restructuring proposal while not publicly releasing the name or details of the online business so as to allow the merits of the proposal to be examined and it should have been apparent that the uncertainty so created would negatively impact the value of the First Defendant's listed shares; (ii) refusing to provide details of the proposal so that the Claimants can assess its merits and as a consequence putting the majority shareholders (who have such knowledge) in a different position to the Claimants; and (iii) expressing their intention only to release information after they have announced an agreement to the proposed restructuring thereby depriving the Claimants from taking any effective action to protect their own interests and that of the First Defendant.

[16]The Claimants seek purchase of their shares by the Second to Fourth defendants under the Business Companies Act 2004 section 184I on the ground of unfair prejudice and oppression; an Order under section 184B to restrain the company from implementing the proposal; and for damages for conspiracy to injure.

[17]The Defences in summary are (i) that the proposal has been withdrawn; (ii) that the Claimants have made further investments in the First Defendant since the conduct complained of; (iii) the proposal was merely a proposal and there was no conspiracy among the Defendants to injure or to cause loss or to do an unlawful act; (iv) the value ascribed to the online business was genuinely held and the Second and Fourth Defendants genuinely believed that the online business would be more profitable than the wheel business.

[18]As part of the case management process under the rules, the parties submitted a list of issues to be determined at trial which included (i) whether the proposed restructuring amounted to unfairly prejudicial conduct by the Defendant and (ii) whether the conduct of the Defendants before and after the withdrawal of the proposal constitute an actionable conspiracy.

[19]At the heart of the claim therefore lie questions concerning the motive and intentions that lay behind the impugned conduct of the Defendants at the relevant time.

[20]The Defendants mounted a second line of attack that the evidence in support of the Application was defective in that it failed to explain why it is reasonable and proportionate for each class of documents to be disclosed and that any explanation was made via submissions rather than in the evidence in support of the Application. The force of this

submission is somewhat diminished by the fact that the Defendants, in response to service of the Application and evidence in December 2016, undertook to do further searches for documents falling within the classes formulated by the Claimants.

[21]The Defendants also submit that the Claimants' evidence on the Application is defective in that they do not confirm the existence of the documents sought nor do they explain the direct relevance and necessity of each document sought.

[22]I agree with the criticism of the evidence made by the Defendants but am of the view that in the context that (i) they had been aware of the classes since mid-2016 and had agreed then to search and (ii) they repeated their offer to search in December 2016, the court can assume that the Defendants, rightfully in furtherance of the overriding objective, had no strenuous objection to the relevance of the classes in issue or that disclosure of such documents would be disproportionate to the achievement of the objective of a just disposal of the claim.

[23]Nevertheless, as the Claimants have made the Application rather than rely on the undertakings given by the Defendants to conduct the searches, they must satisfy me of (i) the direct relevance of the documents they seek to the issues to be determined at trial; (ii) that the Order that they seek is necessary to dispose of the claim fairly and (iii) the Order will be proportionate in all the circumstances including the limited time left before trial.

[24]Mr. Addo justifies the classes of documents sought by the fact that they deal with documents that relate to the period immediately prior to the announcement of the proposed restructuring. The Claimants' position (if I may paraphrase) is that the disclosure sought is necessary and proportionate because (i) the Defendants were advised on the restructuring proposal by Houlihan Lokey, investment bankers, but no documents from that company or from the company's attorneys who were also advising have been disclosed; (ii) the Defendants were similarly advised with respect to the withdrawal of the proposal and nature of this advice is also necessary to determine the state of mind of the principal actors which is relevant to the claims in conspiracy as well as for oppression and unfair prejudice; and (iii) it is likely that such advice above must have been in the form of documents which are directly relevant to the issues and should have been disclosed.

[25]Having reviewed the issues raised by the claim I am in agreement with Mr. Addo that at the highest level any documents that provide an understanding of what went on prior to the communication and publication of the proposal would be directly relevant to the Claimants' complaint about the conduct of the Defendants. In light of the responses by the Defendants to the Application, I do not find that the shortcomings in the Claimants' evidence were critical as the Defendants did not seem to be in any doubt about what they were to search for. I can now turn to the classes of documents of which the Claimants seek disclosure.

[26]Class a) seeks all correspondence between the second and fourth Defendants or their representatives relating to the proposed restructuring including activities undertaken to formulate the proposed restructuring. Class b) seeks any undisclosed internal conversations

relating to the proposed restructuring as referred to in the email from Frank Li dated 23rd November 2013. Class c) seeks all correspondence between the Defendants.

[27] Mr. Heylin submitted that Mr. Shi and Mr. Lai gave evidence of the method of their communications and that the Claimants must be bound by such evidence: see **Henderson v Overall (2001) Unreported**. I agree. However, as class a) also seeks communications between representatives of these parties and the Defendants' evidence does not address the existence of representatives, I am prepared to allow class a). I do not allow classes b) and c) on account of vagueness with respect to class b) and the width with respect to class c) and the fact that they do not seem to add to class a).

[28] Class d) seeks disclosure of documentary correspondence between the Second to Fourth Defendants and their financial advisor and any affiliate or representative of the advisor. There was no strong objection to this class of documents from the Defendants. I am prepared to allow it but in a narrower form than that sought by the Claimants. The documents should be correspondence in relation to the proposed restructuring of the First Defendant and its Hong Kong subsidiary that was communicated to the First Defendant in November 2013.

[29] Class e) seeks disclosure of communications between the Third Defendant and his legal counsel in relation to the proposed restructuring. The Defendants objected to this class (and made a similar objection to class h) that these documents are covered by legal professional privilege. I am of the view that legal professional privilege is not in itself a bar to disclosure: see **Matthews and Malek 5th ed para 6.15**. Such privilege merely requires the person claiming the privilege to indicate his right to withhold inspection and the ground on which he does so. It would therefore be premature for me at this stage to seek to rule on the specific issues of privilege as was argued by the parties. My difficulty with class e) is that the Claimants have not satisfied me that such documents, so far as they are not subject to privilege, are directly relevant to the conduct of the Company or the other defendants of which complaint is made. It seems to me that unless the Third Defendant shared those documents with his alleged co-conspirators or with the Company so that this formed part of the motive or intention of the Company in carrying out its actions, the Claimants cannot say that they are needed to dispose of the claim fairly.

[30] Classes f) and q) are the same and are directed primarily at the First Defendant which has given evidence through Mr. Cheung that the company does not believe that it has any further correspondence as sought under this class but has directed its agents to conduct further searches of their records. I regard that the relevance and proportionality of this class have been accepted by the First Defendant and that the statement that it does not believe that further documents exist is not sufficiently definite to put it in the category of the statements made in **Henderson v Overall**. I will therefore allow these classes. So far as a claim is made that any such documents are privileged so as not to be liable to inspection by shareholders of the Company receiving the advice, my comments above on the requirements of disclosure will apply.

[31] Classes h) and r) can be taken together as Mr. Addo has frankly admitted that these classes are duplicative of each other. These classes deal with the issue of the withdrawal of the restructuring proposal and there appears to be substantial overlap between these classes. The undoubted target of these classes is the Houlihan Lokey correspondence and any correspondence with the legal advisors that does not attract privilege. I agree with Mr. Addo that it is likely that Houlihan Lokey's communication with the Third Defendant would have been by way of documents rather than purely orally. I also agree that any instructions to or advice from attorneys would also be directly relevant and so subject to disclosure with the usual limitation as to inspection where legal professional privilege is claimed.

[32]Mr. Shi's evidence is that there are no minutes of meetings among consortium members so this sub-class of documents must be excluded. However, this evidence is specific and does not address the existence of documents other than minutes of meetings and communications between himself and Mr. Lai which both claim were oral only. The First Defendant also relies on Mr. Sharp's evidence that the proposed meeting between the third Defendant and the Special Committee in July 2014 did not take place before the withdrawal of the proposal was announced and no reasons other than those contained in the announcement of the withdrawal of the proposal were given to the members of the Special Committee. Again I consider that this evidence, which was not given in the specific context of this Application, is very specific and does not address communications with the First Defendant generally but only with the Committee. Neither the Claimants' evidence on the Application nor their submissions at the hearing addressed the existence or identity of 3rd parties.

[33]I am prepared to permit class r) but as I am of the view that this substantially duplicates the material aspects of class h), there is no need for class h).

[34]I will deal with classes k) and o) together as they both shift the focus of any disclosure to EStay. With respect to class o), Mr. Addo has not satisfied me that the appointment of Mr. Gao bears any direct relevance to the matters in issue nor that even if there is some tangential relevance, that documents in relation to this appointment would assist the court in disposing of the claim fairly. I therefore do not permit this class. In my view, class k) is more justifiable as being directly relevant to the claim in conspiracy in particular. However, I am of the view that this class is too widely stated and that any disclosure should be limited to correspondence including minutes of meetings between the Consortium and/or its representatives and EStay and/or its representatives prior to the announcement of the Proposed Restructuring relating to the ownership, nature and value of the business of EStay.

[35]I now consider whether there are any relevant factors that should cause me to exercise my discretion against making an Order along the lines that I have indicated in the preceding paragraphs. I believe that timing is a critical consideration but in light of the fact that these classes were (i) advanced since June 2016 and (ii) the requests, including this Application, were met generally with promises of cooperation rather than objection, the timing of the Application and of this decision should not prevent me from making the Order. None of the parties advanced evidence or submissions concerning expense of the exercise of disclosure or its effect on the resources of the parties even though this exercise would have been in train

since late December 2016 at the very latest so considerations of likely expense or of the resources also should not adversely affect my decision.

[36]I also consider taking the matter as a whole that the disclosure sought appears to be proportionate to the issues joined by the parties in the proceedings and the likely advantage to the trial judge of having the fullest evidence before him at the hearing the claim.

[37]I have considered the submission made by the Defendants that the Claimants have not given specific evidence that the documents exist. CPR Part 28.5 permits me to order inter alia that searches be made for the documents. The appropriate Order should therefore be that the Defendants should carry out a search for documents in the classes permitted above and that any document located as a result of that search should be disclosed to the Claimants forthwith in light of the time constraints facing the parties. I appreciate that this may mean that more than one list may have to be prepared in the circumstances but I believe that the costs of so doing are unlikely to outweigh the benefits of all parties having the opportunity to consider the disclosed documents at the earliest opportunity and to make any further applications with respect to documents over which privilege is claimed.

[38]I will hear the parties on the costs of the Application.

Commercial Court Judge

24th January 2017