IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA NO 23 OF 2017
FSD CAUSE NO 76 OF 2017 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2016) REVISION
AND IN THE MATTER OF QUNAR CAYMAN ISLANDS LIMITED

BETWEEN

QUNAR CAYMAN ISLANDS LIMITED

Petitioner/Appellant

And

(3) BLACKWELL PARTNERS LLC – SERIES A
(4) MASO CAPITAL INVESTMENTS LIMITED

Dissenters/Respondents

Appearances: Terence Mowschenson QC instructed by Paul Madden and Lachlan Greig of Harney Westwood & Riegels for the Petitioner/Appellant

Robert Levy QC instructed by Rocco Cecere and Jessica Bush of Mourant Ozannes on behalf of the Dissenters/Respondents.

Before:

SIR JOHN GOLDRING *President*
SIR BERNARD RIX JA
SIR RICHARD FIELD JA

Date of Hearing and Delivery of Decision: **13 November 2017**

Judgment finalised and released: **20 June 2018**

JUDGMENT

Sir Bernard Rix, JA

1. This is the judgment of the Court. This appeal concerns an application for interim payment made by the Third and Fourth Respondents herein against the Petitioner/Appellant. At first instance, the Hon Justice Ingrid Mangatal, by her judgment and order dated 8 August 2017, made an order for interim payment in favour of Maso Capital Investments Limited ("**Maso**") and Blackwell Partners LLC – Series A ("**Blackwell**"), the Third and Fourth Respondents: of US $4,102,650.00 in favour of Maso and US $5,897,361.84 in favour of Blackwell. The Petitioner/Appellant, represented by Mr Terence Mowschenson QC, appeals.

2. The essential issue is whether the provisions for interim payment contained in Order 29 Part II of the ***Grand Court Rules*** ("***GCR***") apply, or can apply, to proceedings under section 238 of the ***Companies Law*** whereby shareholders who dissent from an offer to acquire their shares are entitled to the *fair value* of their shares to be determined by the court. The Petitioner/Appellant submits that the *sui generis* nature of section 238 does not contemplate or lead to a money judgment, and that the wording of Order 29 rule 9, which speaks of "*a payment on account of any damages, debt or other sum...which he may be held liable to pay*", and of Order 29 rule 12(c), which requires the prospect of "*judgment for a substantial sum of money*", is therefore inapplicable.

3. The agreed background facts are as follows.

4. The Petitioner/Appellant, Qunar Cayman Islands Limited ("**the Company**") has been listed on the NASDAQ since 2013. It became the subject of a take private transaction which concluded on 28 February 2017. The transaction was effected as a merger, pursuant to Part XVI of the ***Companies Law***, between the Company and Ocean Management Merger Sub Limited, a wholly owned subsidiary of Ocean Management Holdings Limited, with the Company continuing as the surviving company.

5. The proposal for the merger was announced on 23 June 2016. A finalised merger agreement was entered into on 19 October 2016. The merger price offered to the

Company's shareholders was US $10.13 per share (or US $30.39 per American Depository Share, each representing three ordinary shares).

6. On 24 February 2017, the merger was approved by a special resolution of the Company's shareholders at an EGM called for that purpose. Indeed, the buyer group already owned 94.8% of the Company's shares. Notice of that approval was provided by a notice of the same date to those dissenters who had provided their written objection to the merger prior to the EGM, pursuant to section 238(2) of the ***Companies Law***. The merger was certified as effective as of 28 February 2017 by the Assistant Registrar of Companies.

7. Eight of the Company's shareholders, including the two Respondents herein, gave written notices of their decision to dissent from the merger, pursuant to section 238(5) of the ***Companies Law***. At the time of the merger, Maso held 405,000 shares in the Company, and Blackwell held 582,168 such shares.

8. On 23 March 2017 the Company served offer letters on the dissenting shareholders which, pursuant to section 238(8) of the ***Companies Law***, offered to purchase their shares at the merger price, being the price the Company had also determined to be their fair value (the "**Fair Value Offer**"). No settlement was reached during the 30 day negotiation period prescribed by section 238(8) of the ***Companies Law***. Accordingly, all of the statutory steps required by the ***Companies Law*** prior to seeking a determination of fair value of the Dissenters' shares had been fulfilled prior to the petitions referred to below.

9. The Company has repeatedly affirmed that the price of US $10.13 per share is the fair value, and in its Proxy Statement issued to the world at large on 24 January 2017 in preparation for the EGM has said that the Company intends to assert the same in any proceedings taken under section 238 of the ***Companies Law.***

10. In the meantime, the Respondents' shares had been cancelled in exchange for the right to receive fair value, pursuant to section 238(7) of the ***Companies Law.*** The statutory effect of a shareholder's election to dissent is that he ceases to have any rights as a member except the right to be paid fair value.

11. On 24 April 2017 the Company and the Respondents each filed a petition pursuant to section 238(9) of the ***Companies Law,*** respectively seeking a determination of the fair

value of the Company's shares. The two sets of proceedings were consolidated by consent under cause number FSD 76 of 2017.

12. On 27 April 2017 the Respondents issued a summons pursuant to Order 29 Rules 10 and 12(c), seeking an order that the Company make the following interim payments to the Respondents (or alternatively that the Company pay such sums as the Court thinks just), viz US $4,102,650 to Maso, and US $5,897,361.84 to Blackwell. These sums were equal to their respective former shareholdings valued at the Merger Price and the Fair Value Offer.

13. On 26 June 2017 the interim payment summons was heard before the Hon Justice Mangatal. On 8 August 2017, she gave judgment in favour of the Respondents and on 15 August 2017 her order giving effect to her judgment was filed.

14. Permission to appeal from the judge's order and judgment was sought, and obtained on the basis that the Company had paid an equivalent sum into court, which was done on 21 August 2017. The judge's order granting the Company leave to appeal was granted on 12 September 2017. She also granted a stay of the interim payment order pending appeal.

15. Meanwhile, the Respondents had issued their summons seeking payment out of the sums paid into court.

16. The hearing of the appeal took place on 13 November 2017. At the conclusion of the hearing, the Court announced its decision, dismissing the Company's appeal, and thus affirming the Respondents' right to the interim payments applied for, for reasons to be given later. The Court awarded the Respondents costs on the standard basis, to be paid forthwith. On 13th November 2017 the Court gave permission for the money in court to be paid out to the Respondents.

17. This judgment contains the reasons for the Court's dismissal of the Company's appeal.

Section 238 of the Companies Law

18. It is necessary to set out parts of section 238, as follows:

"*(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...*

(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 vote...

(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...

(c) a demand for payment of the fair value of his shares.

.....

(7) Upon giving the 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...

(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...

(13) The order of the Court resulting from proceeding 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."

19. The Respondents, by their counsel Mr Robert Levy QC, refer to and emphasise various passages in these provisions which, in the Respondents' submission, demonstrate that proceedings under section 238 are intended to result in a liability on the part of a constituent company to pay to dissenting members the fair value of their shares: such as subsection (1)'s "*shall be entitled to payment of the fair value of his shares*"; or subsection (3)'s "*the member proposes to demand payment for his shares*"; or subsection (5)'s "*stating...(c) a demand for payment of the fair value of his shares*"; or subsection (7)'s "*shall cease to have any of the rights of a member except the right to be paid the fair value of his shares*"; or subsection (8)'s "*the company shall pay to the member the amount in money forthwith*"; or subsection (11)'s "*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*"; or subsection (13)'s "*The order of the Court resulting from the*

proceeding shall be enforceable in such manner as other orders of the Court are enforced...".

20. The Company, on the other hand, through its counsel Mr Terence Mowschenson QC, submits that section 238 proceedings conclude in a declaration of fair value only, and not in an order for payment of a sum of money – save in the situation, separately and expressly dealt with, where an agreement is reached between company and member as to fair value (see section 238(8)). It refers to section 238(13) as the provision which allows for enforcement by an order for payment pursuant for instance to sequestration, but only as part of separate enforcement procedures, and not as part of the section 238 proceedings. It submits that if the section 238 proceedings could end in an order for payment, then subsection 13 would be entirely unnecessary.

Order 29

21. It is also necessary to set out the following provisions of Order 29, Part II, headed "*Interim Payments*":

> "*9. In this Part of this Order –*
>
> *"interim payments," in relation to a defendant, means a payment on account of any damages, debt or other sum (excluding costs) which he may be held liable to pay to or for the benefit of the plaintiff...*
>
> *10. (1) The plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired, apply to the Court for an order requiring that defendant to make an interim payment...*
>
> *(3) An application under this rule shall be supported by an affidavit which shall –*
>
> *(a) verify the amount of the damages, debt or other sum the application relates to and the grounds of the application; and*

(b) exhibit any documentary evidence relied on by the plaintiff in support of the application...

12. If on the hearing of an application under rule 10, the Court is satisfied –

(a) ...

(b)...

(c) that if the action proceeded to trial the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs, the Court may, if it thinks fit, and without prejudice to any contentions of the parties as to the nature or character of the sum to be paid by the defendant, order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely.

.....

18. The preceding rules in this Part of this Order shall apply with the necessary modifications to any counterclaim or proceeding otherwise than by writ, where one party seeks an order for an interim payment to be made by another."

22. The Company, for its part, emphasises certain provisions of these rules as supporting its submissions concerning the inability of section 238 proceedings to generate a liability to pay a sum of money which is the foundational condition of an interim payment order. Thus Mr Mowschenson refers in rule 9 to the language "*damages, debt or other sum (excluding costs) which he may be held liable to pay*"; and to rule 12(c)'s "*if the action proceeded to trial the plaintiff would obtain judgment against the defendant for a substantial sum of money*". The Company submits that because a section 238 fair value petition is a *sui generis* proceeding which can conclude only in a determination of fair value and thus only in a declaration, therefore the necessary condition for an interim payment can never be achieved. Mr Mowschenson accordingly submits that rule 18 only refers to proceedings for an interim payment, and not to section 238 petitions.

23. The Respondents, on the other hand, dispute that a section 238 petition can only end in a declaration, and rather submit, as indicated above, that the finding of a liability to pay and an order to pay the determined fair value is a natural result of such proceedings. Order 29, rule 18 for its part is intended to deal with substantive proceedings such as a section 238 petition, not interlocutory proceedings for an interim payment.

The judgment below

24. In her judgment below, the judge posed three questions: (i) Does the court have jurisdiction to award an interim payment in section 238 proceedings? (ii) If so, should it exercise its discretion to do so? (iii) Is there sufficient evidence upon which the court can decide a "*just*" sum?

25. On appeal, only the first of those questions remains for decision. The Company's grounds of appeal (see below) object only to the judge's answer on jurisdiction. Thus no question any longer arises as to the exercise of the court's discretion, or as to the amount in which any interim payment order ought to be made, if there is jurisdiction to make one.

26. In concluding that the court does have jurisdiction, the judge emphasised the following matters, while acknowledging that the question was far from simple. First she referred to, and accepted, the reasoning of Quin J in *In the matter of Qihoo 360 Technology Company Limited* (Cause No FSD 129 of 2016 (IMJ), unreported, 26 January 2017) ("*Qihoo*"), where the issue had previously been debated and decided in favour of dissenting shareholders. There was no appeal from Quin J in *Qihoo*. Secondly, she referred to two other cases in which, on completion of section 238 fair value determinations, the court actually made orders for sums of money to be paid to participating dissenting shareholders, apparently without controversy: in *Shanda Games* (Cause No FSD 14 of 2016 (NSJ), unreported, 25 April 2017) and *Re Integra* (Cause No FSD 92 of 2014 (AJJ), unreported, 28 August 2017), the first a decision of Segal J, the latter a decision of Jones J. On the Company's argument, those orders should never have been made. Thirdly, she regarded the Company's argument that what was required to enforce a declaration of fair value, where fair value was not thereafter paid, were some separate

proceedings, was impractical, unnecessary and an unjust preference of form over substance. She said (at para [48]):

> *"It would have the undesirable consequence of multiplicity of law suits and increased costs, which is not a commercially desirable result. In any event, it is not hard to see that any declaration that the Court makes can be relied upon by dissenting shareholders who so choose in order to obtain an ascertained quantum judgment in their favour. Further, in my judgment, the overriding objective of dealing with cases justly favours substance over form."*

Fourthly, she was impressed by the fact that section 238(11) made provision for the court to order interest to be paid. If interest, one might ask, why not the principal sum?

The submissions on appeal

27. The submissions on appeal reflected the grounds of appeal entered by the Company, and were developed by reference to the wording of section 238 and Order 29 Part II as indicated above.

28. As the grounds of appeal stated:

> *"The learned judge should have held that:*
>
> *(a) the only remedy to which a dissenting shareholder is entitled in Section 238 Petitions is a declaration as to the fair value of its shares pursuant to Section 238(11): accordingly Section 238 Petitions are not proceedings where a money judgment would be obtained; and accordingly*
>
> *(b) GCR Order 29, Rule 9 and 12(c) do not apply to Section 238 Petitions."*

29. In developing these grounds, Mr Mowschenson contended that Section 238 was a self-contained, *sui generis*, code; that Order 29, rule 18 only applies where an interim payment is properly sought as a substantive remedy in a petition; and that enforcement of

the sole section 238 remedy of a declaration had to be sought in separate proceedings, as supported by section 238(13).

30. He also submitted that *Qihoo* was wrongly decided. In *Integra*, he said that the order for payment had been included by consent. He also positively relied on the statement of Jones J at para [3] of that judge's costs judgment in *Integra* (unreported, 19 September 2015) that –

> *"The purpose of an appraisal action under section 238 is limited to the determination of the fair value of the shares held by the dissenting shareholders."*

As for specific provisions of section 238, he submitted that it was significant that subsection (11) did not include an express reference to an order for payment of the fair value determined; and that subsection (13) would have been entirely unnecessary if the court could make an order to pay the fair value of the shares. It was there because a declaratory judgment is not normally enforceable: in the light of subsection (13), however, the court could appoint a receiver or order sequestration, and in the case of an overseas company a shareholder could sue on the judgment or set up an issue estoppel.

31. In opposing these submissions, Mr Levy submitted that there was nothing in the language of section 238 to support the Company's case, and much to undermine it; and that general principles of statutory interpretation pressed in favour of giving to section 238 a construction which favoured common sense and avoided absurdity, promoted justice and fairness, avoided causing prejudice to the interests of parties suffering the deprivation of their property (their shares), and facilitated the object of the statute (the obtaining for dissenting shareholders of payment of fair value for their shares), and avoided impracticable and unnecessary consequences.

Qihoo

32. In *Qihoo* it was argued, as here, that the section 238 petition procedure is a self-contained statutory code and that the Order 29 interim payments rules do not apply. It was further argued that interim payments are inconsistent with, and outside the scope of, section 238 proceedings.

33. Quin J however rejected these submissions, holding that section 238 petitions are "*proceedings otherwise than by writ*" within Order 29, rule 18. He observed moreover that GCR Order 1, rule 2 specifically sets out certain cases in which the GCR shall not apply, but does not refer to section 238. He said (at para 70):

> "*At the time of the introduction of s.238 proceedings to protect dissenting shareholders' rights: If the intention had been to exclude the GCR, it would have been a perfectly simple exercise to amend GCR O.1 r.2(5) to add a carve-out provision. This could simply have read "these rules shall not apply to petitions governing the rights of dissenting shareholders pursuant to the new s.238 Companies Law." No such carve-out provision was inserted into GCR O.1, r.2 and therefore the GCR must apply to section 238 petitions.*"

Discussion and reasons for decision

34. In our judgment, the submissions of the Respondents are to be preferred to those of the Company. We would seek to put the matter in the following terms.

35. First, the submission that it would be wrong, because it would be outside the court's jurisdiction, to make an order for the payment of the Company's liability in terms of fair value for the dissenters' shares, is counter-intuitive. In brief, having determined fair value, why on earth should not the court order that that fair value, as determined, be paid to dissenting shareholders before the court? The whole proceeding takes place on the footing that dissenting shareholders *must* be paid for their shares, in circumstances where

there is no issue otherwise. The only issue is what value is to be placed on those shares. The statutory obligation is to determine that value as being fair value. Once that value has been determined, whether by agreement (see section 238(8)) or by the court, the liability to pay that value must be met.

36. Secondly, there is nothing in section 238 to say that the court is *not* authorised to order that the fair value determined by it be paid to dissenting shareholders before the court. The whole of the Company's argument proceeds on the footing that, for such an order to be made, express reference to it must be found within the section. That would be a very surprising argument to accept. It would mean that section 238 proceedings existed in a complete void, as though the whole administration of justice and the law of civil procedure had no application to it – unless perchance some explicit reference were to be made in the section to such an application, piecemeal by piecemeal. That would be destructive of common-sense, convenience, and ultimately of justice. The legislators could not have intended any such result. Mr Mowschenson nevertheless seeks to invoke such a result by expressions such as "self-contained code" or "*sui generis* proceedings". However, those expressions and the arguments based on them take the matter no further. It may (or may not) be useful to think of section 238 as a self-contained code or of section 238 petitions as being proceedings *sui generis*: but the question before this Court is whether those expressions should be understood as meaning that for all purposes going beyond the express provisions of the section the court is without power or guidance from the general law. In our judgment, that is not the case. Section 238 may have its own idiosyncratic purposes, which may affect the exercise of the court's powers and discretion in ways which would mould them to the purpose of this enactment: but that is not the same as saying that anything that is not expressly provided for in the section is denied by the section.

37. Thirdly, this matter can be tested by asking questions about matters for which there is no express provision in section 238. For instance, and we mention it because it has been the subject of much judicial thought in recent years, there is the question of disclosure of documents relevant to the issue of fair value. Section 238 says nothing at all about disclosure of documents. Does that mean that there is to be no disclosure of documents

pursuant to Order 29? Of course not: see, for instance this court's judgment in *Qunar Cayman Islands Limited v. Athos Asia Event Driven Master Fund & Ors* CICA. 24 of 2017, unreported 10 April 2018. The issue there was whether or not *dissenting shareholders* as well as companies subject to merger or buy-out should be subject to the obligation of relevant disclosure. This Court said they were so subject. But not even the Company, in these very proceedings, has submitted that Order 29 does not apply, and indeed the Company successfully urged its application to the dissenting shareholders in this very case.

38. The same is true of procedures for the taking of evidence including expert evidence, none of which is mentioned in section 238.

39. Therefore section 238 is not a self-contained code in the sense sought by the Company's submissions on this appeal.

40. Fourthly, the fact is that the question of a liability to pay the dissenting shareholders *is expressly made the subject of section 238 provisions*. As Mr Levy has submitted, there are numerous references to such a liability, which can be found set out above. It is the basis of section 238 that a dissenting shareholder "*shall be entitled to payment of the fair value of his shares*" (section 238(1)). If that is the case, as it is, it is hard to see why there needs to be any further express reference to the power to order such payment at the conclusion of the determination of fair value. There is, of course, reference to the requirement to pay the *agreed* fair value (section 238(8)), because that only arises *prior to* the commencement of a petition (section 238(9)). Thus there is a statutory obligation to pay the agreed fair value, on top of whatever contractual obligation exists. Once, however, a petition has been filed, the matter is in the hands of the court. It is fanciful to think that an obligation which is created by agreement and by statute, namely an obligation to pay, falls outside the jurisdiction of the court to contain in its order once the Court is petitioned to determine the fair value which the company must pay.

41. The wrongness of this fancy is, in our judgment, emphasised in section 238(11) which speaks both of determining the "*fair value of the shares of such dissenting shareholders as it finds are involved*" and of determining "*a fair rate of interest, if any, to be paid by the company*" upon such amounts. It is to be noted that it is not simply the fair value of a

share (eg US $10.13 as offered by the Company) which is to be determined by the Court, but the fair value of an individual dissenting shareholder's shares. In such a case it is a fortiori obvious, to my mind, that the individual dissenting shareholder is entitled to be paid, under the order of the court resulting from the court's determination, the fair value amount so determined. This is again emphasised by the reference to a fair rate of interest "*to be paid*". That is exactly similar to what happens in the multitude of cases where the court determines the rate of interest to be applied to a money judgment, which is translated into the court's order.

42. That this is so is, in our judgment, expressly recognised in section 238(13) which refers to "*The order of the Court resulting from proceeding on the petition*" being "*enforceable in such manner as other orders of the Court are enforced*". What is the prime method of enforcement of a liability to pay? It is done by all the many means by which an order for the payment of money can be enforced. An "*order resulting from proceeding on the petition*" can clearly include an order for the payment of money, and that is what everything in section 238, in our judgment, looks forward to.

43. Mr Mowschenson nevertheless submits that subsection (13) would be unnecessary, were the court permitted to include an order to pay in its order resulting from proceeding on the petition. We do not understand that submission. Whether it would be necessary or not, it is usefully stated, just as the provision concerning costs (in subsection (14)) is usefully stated, we would not accept that no costs could be imposed in the absence of anything in section 238, even if the court's underlying discretion over costs, as discussed in the ***GCR***, would have to be moulded to the particular circumstances of a section 238 petition. As it is, subsection (13) usefully speaks, but consistently with the regime of costs generally, of costs being "*determined...and taxed upon the parties as the Court deems equitable in the circumstances*". It was in that context of costs that Jones J said what he is cited above as saying in *Integra*: he was not concerned with the question of what he could put in his final order as to the company's liability to pay fair value to the dissenters, and he had already included an order for payment in his order, even if that was done by consent.

44. As it is, we consider that subsection (13) is necessary, in as much as it makes clear that all the means of enforcement are to be at the dissenting shareholders' disposal even in the case of a company incorporated outside these Islands. That entails the need for a money award. If, on the other hand, Mr Mowschenson were right to submit that the only remedy available to a judge in section 238 proceedings was a declaration, then there would be at least two unfortunate consequences. First, the normal situation in the case of a declaration, that it does not in itself give rise to an order directly enforceable in money terms against a defendant, would be turned on its head, in the very circumstances where an order for payment is the obvious remedy for "*The order of the Court resulting from proceeding on the petition*". Secondly, there would, in the case of an overseas company, be no easy means of enforcement, which an *in personam* final and conclusive money judgment is needed to provide.

45. As for the normal situation arising from a merely declaratory judgment, see *Zamir & Woolf, The Declaratory Judgment*, 4th Ed, 2011, under the heading of "*The nature of the declaratory judgment*", where the learned authors write:

> "*A declaratory judgment...is to be contrasted with an executory, in other words, coercive, judgment which can be enforced by the courts...A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant.*"

46. However, section 238(13) indicates most strongly that the order of the Court resulting from a section 238 petition is intended to have coercive effect: most obviously by such an order containing an order to pay the very sum, with any interest due, which the Court has taken care to calculate in the case of each relevant dissenting shareholder.

47. In our judgment Mr Levy is in general right to submit that to accept the Company's submissions would be to give to section 238 an interpretation which lacks justice and common-sense, and is unnecessarily formalistic and hostile to the obvious intent of the statute: which is to get into dissenting shareholders' hands as efficiently as possible the payments of fair value, once they have been determined by the court, to which those shareholders have always been entitled, and which a company has always been liable to pay, ever since the shareholders exercised their rights of dissent and thereby lost their

shares. It would be a poor statute which deprived such shareholders of their shares and did not ensure that their rights to fair value were vindicated by the court's order.

48. Finally, we address Order 29, rule 18 which Mr Mowschenson submits cannot apply to a section 238 petition, presumably even if he were wrong on all his other submissions concerning section 238 itself. However, we do not accept his argument that, although rule 18 does expand Order 29 Part II to proceedings commenced otherwise than by writ, such as proceedings by petition, nevertheless those expansionary words are then immediately and severely curtailed by the succeeding words "*where one party seeks an order for an interim payment to be made by another*". His argument is that the proceedings contemplated are substantive proceedings for an interim payment, which section 238 petitions are not. However, we do not accept that that is the purpose of the relative clause in question. In our judgment, those words merely express the context of the expansion from writ to other proceedings engineered by this rule, viz that the expansion takes effect "*where one party seeks an order for an interim payment to be made by another*". That will, in context, always be an interlocutory or interim measure.

49. In the light of the reasons given regarding section 238 above, it therefore follows that Order 29, rule 9's "*which he may be held liable to pay*" and Order 29, rule 12(c)'s "*judgment against the defendant for a substantial sum of money*" are fulfilled. Every part of section 238 and a judgment given thereunder acknowledges that liability to pay and a judgment against the Company for substantial amounts.

Conclusion

50. In sum, these are the reasons for which this Court upheld the order of Mangatal J at the hearing of this appeal.