

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

FSD 76 of 2017 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

IN THE MATTER OF QUNAR CAYMAN ISLANDS LIMITED

BETWEEN:

**(1) MASO CAPITAL INVESTMENTS LIMITED
(2) BLACKWELL PARTNERS LLC – SERIES A**

Dissenters/Applicants

QUNAR CAYMAN ISLANDS LIMITED

Respondent



Appearances: Mr. Robert Levy QC instructed by Mr. Rocco Cecere of Mourant Ozannes
on behalf of the Dissenters/ Applicants
Mr. Terry Mowschenson QC instructed by Mr. Paul Madden and Mr.
Lachlan Greig of Harneys on behalf of the Respondent Company

Before: The Hon. Justice Ingrid Mangatal

Heard: 26 June 2017

Draft Judgment

Circulated: 28 July 2017

Judgment Delivered: 08 August 2017

HEADNOTE

Fair value proceedings under section 238 of the Companies Law (2016 Revision) - Application for interim payment under O. 29, r.10 and 12(c) of the Grand Court Rules - Jurisdiction- Discretion

Previous decision of Court of concurrent jurisdiction - Second Court not bound by first decision, but should follow decision of first Court unless convinced that it is wrongly decided – Judicial Comity



JUDGMENT

By agreement, two Petitions, FSD 73 and FSD 76 of 2017 have been consolidated and bear the consolidated title of FSD 76 of 2017.

2. Both Petitions were filed on the same day. FSD 76 of 2017 was filed by Qunar Cayman Islands Limited ("the **Company**") and seeks the Court's determination of the fair value of the shares of a number of shareholders (the "**Dissenting Shareholders**") who have all dissented to the merger of Ocean Management Merger Sub Limited ("**Merger Sub**") with and into the Company. The Dissenting Shareholders include Maso Capital Investments Limited ("**MCIL**") and Blackwell Partners LLC - Series A ("**Blackwell**") (together "**the Applicants**"). FSD 73 OF 2017 was filed by the Applicants and also seeks that the Court determine the fair value of the shares.
3. The Petitions are filed pursuant to section 238(9) of the *Companies Law (2016 Revision)* ("**the Law**").
4. By a summons for interim payment dated 27 April 2017, filed in FSD 73 of 2017, the Applicants apply pursuant to Order 29, rules 10 and 12(c) of the *Grand Court Rules* (1995 Revision) ("**the GCR**") for the Company to be ordered to make interim payments of US\$4,102,650.00 to MCIL, and US\$5,897,361.84 to Blackwell. In the alternative, the Applicants ask that the Company be ordered to pay, by way of interim payment, such sums as the Court considers just.
5. The Applicants also seek their costs of and incidental to the application, on an indemnity basis, to be taxed if not agreed.

The Evidence

6. The application is supported by the Second Affidavit of Manoj Jain ("**Jain 2**"), the Co-Chief Investment Officer of Maso Capital Partners Limited ("**Maso**"), the Investment Adviser for MCIL and the Investment Manager for Blackwell. There is also the affidavit



of Jessica McKenzie Bush, an associate at Mourant Ozannes, Attorneys for the Applicants, whose affidavit simply exhibits correspondence.

7. An affidavit has been filed by the Company in response, being that of Xiaolu Zhu, the Company's Chief Financial Officer. This affidavit speaks to costs incurred by the Company to date, and an estimate of costs up to and including trial.

Background

8. The Company is a Cayman Islands exempted limited company whose operations and business have largely been conducted in the People's Republic of China ("**the PRC**"). The Company describes itself as "*one of the leading mobile and online commerce platforms for travel in China.*"
9. Until the completion of the merger transaction described in Jain 2, the Company's American Depositary Shares ("**ADS**") were listed on the NASDAQ Global Market Exchange. Each ADS represented three Class B ordinary shares in the Company.
10. MCIL held 405,000 Class B ordinary shares, and Blackwell held 582,168 Class B ordinary shares.
11. All the relevant steps required under section 238 of the *Law* have been taken, allowing the proceedings to reach the Court for appraisal of the fair value of the Dissenting Shareholders' shares.

Order 29

12. Order 29, rule 18 makes it plain that Order 29 refers to proceedings begun otherwise than by Writ, even though rule 10 refers to applications being made in a Writ action. Order 29, rules 10 (1)–(3) of the *GCR* provide as follows:

"Application for interim payment (O.29, r.10)



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 the defendant to make an interim payment.*
- (2) *An application under this rule shall be made by summons but may be included in a summons for summary judgment under Order 14 or Order 86.*
- (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.*
-”

13. Order 29, rule 18 provides as follows:

“Counterclaims and other proceedings (O.29, r. 18)

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

14. Order 29, rule 12(c) provides as follows:

“Order for interim payment in respect of sums other than damages (O.29, r. 12)

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

...



(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."

15. Order 29, rule 9 provides the meaning of "interim payments" as follows:

"II. INTERIM PAYMENTS

Interpretation of Part II (O.29, r.9)

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 ..."

The Main Issues

16. The main issues on this application, as fleshed out in the arguments advanced on both sides, are as follows:

- (1) Does the Court have jurisdiction to award an interim payment in section 238 proceedings?
- (2) If the Court does have that jurisdiction, should it exercise its discretion to do so?
- (3) Is there an evidential basis, or sufficient evidential basis, upon which the Court can decide what is a "just" sum?

Issue No.1: Does the Court have jurisdiction to award an interim payment in section 238 proceedings?

17. At the hearing, I referred both sides to section 20 of *the Grand Court Law* in its current Revision, the 2015 Revision. That section embodies the primary legislation which allows for interim payments to be made. Section 19 of the *Grand Court Law* empowers the Rules Committee to make rules of court and this included the power to make the interim payment Rules embodied in Order 29. Section 20 provides as follows:



“Orders for interim payments

20 (1) *The power to make Rules under section 19 shall include power to make provision for enabling the Court, in such circumstances as may be specified in such Rules, to make an order requiring a party to any proceedings pending before it make an interim payment of such amount as may be specified in the order, either by payment into Court or (if the order so provides) by paying it to another party to the proceedings.*

(2) *Rules made under subsection (1) may include-*

- (a) *provision for enabling the party who, in pursuance of such order, has made an interim payment to recover the whole or part of the amount thereof in such circumstances as may be determined in accordance with the Rules; and*
- (b) *such incidental, supplementary and consequential provisions as the Rules Committee may consider necessary or expedient.*

.....

(4) *In this section-*

- (a) *“interim payment” means a payment on account of any damages, debt or other sum (excluding any costs) which a party to any proceedings may be held liable to pay to or for the benefit of another party to the proceedings if a final judgment or order of the Court in the proceedings is given or made in favour of that other party;*

.....”

The Applicants' Arguments

18. Mr. Levy QC, who represents the Applicants, submits that Order 29 of the *GCR* provides the Court with jurisdiction. He relies upon the recent decision of Quin J in *In the Matter of Qihoo 360 Technology Company Limited* FSD 129 of 2016 (IMJ), unreported, delivered 26 January 2017. Mr. Levy QC also appeared for the dissenting shareholders in *Qihoo* who, incidentally, are the same dissenting shareholders, the Applicants, in respect of the instant application.



19. The Applicants rely upon the fact that the Company has on numerous occasions, expressly stated that, so far as it is concerned, the merger price is the fair value of the shares for the purposes of the proceedings under section 238 of the *Law*. In particular, the Applicants refer to the following:

- (a) S. 2.07 of the Agreement and Plan of Merger where it is stated "*Agreement of Fair Value.* Parent, Merger Sub and the Company respectively agree that the Per Share Consideration represents the fair value of each of the Shares for the purposes of Section 238(8) of the *CICL* [Cayman Islands Companies Law]."
- (b) The Proxy Statement, that provided "In addition, in any proceedings for determination of the fair value of the Shares covered by any Notice of Dissent, the Company and the Buyer Group intend to assert that the Per Share Merger Consideration is equal to the fair value of each of your Shares."
- (c) The letters of 23 March 2017, from the Company's attorneys, Harneys, to the Dissenters' Attorneys, Mourant Ozannes, which letters were expressed to be sent pursuant to section 238(8) of the *Law*. That sub-section required the Company to "make a written offer to each dissenting member to purchase its shares at a specified price that *the company determines to be their fair value*" (Queen's Counsel's emphasis). The letters of 23 March 2017 offered US \$10.13 per share.
- (d) Harneys' letter to Mourant Ozannes of 30 March 2017, stating that "Our client maintains that the Per Share Merger Consideration of \$10.13 per share represents fair value".
- (e) Harney's letter of 13 April 2017 that stated "the Company maintains that the Per Share Merger Consideration of \$10.13 per share represents fair value."



On behalf of the Applicants it was submitted that there is no doubt at all that the Company's own case is that the fair value of the shares is (not less than) US \$10.13.

21. The Applicants also have referred to their various overtures prior, and post the filing of the Petitions, seeking to have interim payments made by the Company at the amount that it had asserted was the fair value, i.e. US\$10.13. If successful, the Applicants seek to have the costs of this application awarded to them on an indemnity basis.
22. Mr. Levy QC submits that this Court should follow the *Qihoo* decision unless convinced that it is wrong. Reference was made to the decision of Gloster J sitting in the Commercial Court for England and Wales in *Lornameade Acquisitions Ltd v Kaupthing Bank HF* [2013] 1 BCLC 73, and to my own decision in *China Shanshui Cement Group Limited* 2015 (2) CILR 255.
23. The decision in *Qihoo* was the first time that the Grand Court has ordered an interim payment in section 238 proceedings. In that case, it was submitted on behalf of the company (as indeed has Mr. Mowschenson QC on behalf of the Company in the instant case) 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.
24. In his closely-reasoned judgment in *Qihoo*, Quin J rejected those submissions, holding at paragraph 63 as follows:

"Section 238 petitions are in my view "proceedings otherwise than by writ, where one party seeks an order for an interim payment to be made by another" pursuant to O.29 r. 18 and therefore GCR O.29 r.9-18 apply to these proceedings."

25. At paragraphs 69 and 70, Quin J also discussed the applicability of the **GCR** to section 238 proceedings as follows:



- "69. ...GCR O.1, r.2 specifically sets out certain rules and circumstances in which the GCR shall not apply.....
70. It is accepted that the drafting of Part XVI of the Companies Law (2016 Revision) and in particular s.238 was heavily influenced by the law in Delaware and Canada. 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 of the 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."

The Company's Arguments

26. The arguments of Mr. Mowschenson QC on behalf of the Company, which relate to the Court's jurisdiction to make an interim payment order, fall broadly under two heads:

- (1) Order 29, rule 12(c) does not apply as no relevant judgment will be obtained; and
- (2) Order 29, Part II does not apply as it is inconsistent with section 238 as a statutory code.

(1) Order 29, rule 12(c) does not apply as no relevant judgment will be obtained

27. Learned Queen's Counsel referred to section 238(11) of the **Law**. He argues that this subsection legislates for the Court's role at the hearing and provides that "*at the hearing of the 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 fair value.*" He submits that there is no



provision in section 238 that requires the Court on determining the Petition (i.e, in the Petition proceedings) to do other than declare the fair value and the interest, if any. Section 238(11) does not provide that the Court shall order payment of the sum of money. Contrast is made to section 238(8) which provides that the Company shall pay an amount equivalent to the fair value if agreement is reached as to the price to be paid.

28. The submission continues that the fact that enforcement proceedings might give rise to an order that a particular sum be paid and thus might eventually give rise to a judgment debt does not result in the proceedings being proceedings "*in relation to a defendant, in which a payment on account of any damages, debt or other sum which he may be held liable to pay to or for the benefit of the plaintiff.*": Order 29, rule 9. Furthermore if the petition proceeds to trial the "*plaintiff*" will not obtain judgment for a substantial sum of money apart from damages or costs: Order 29, rule 12(c).
29. Mr. Mowschenson QC says that the point that these are not proceedings in which the Company will be held liable to pay "*damages, debt or some other sum*" is demonstrated by the fact that the draftsman considered it necessary to provide in section 238(13) that "*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*". He goes on to contend that such a provision would be wholly unnecessary if the fair value determination of the petition were intended to give rise to an order to pay a sum of money.
30. Accordingly, while section 238 undoubtedly creates a liability in favour of the Dissenting Shareholders (both in the case of agreement of fair value and following determination by the Court), the only remedy afforded to a dissenting shareholder by the Court is a declaration as to fair value.
31. Learned Counsel posits that the fact that the remedy under section 238 is by way of declaratory relief is consistent with the fact that it is the Company which is clearly



envisaged by section 238(9) as the natural party to present a petition seeking a determination as to fair value.

32. This was said to be consistent with the fact that the proceedings must be brought by petition pursuant to section 238(9). Reference was made to paragraph 13.12 of the Explanatory Memorandum to the **GCR** which explains that:

"In principle, applications are made by petition if the resulting order will be binding upon 'the whole world' or upon a substantial class of persons, whether or not they were aware of the petition or participated in the hearing."

33. Thus, it was said that section 238 proceedings fit this description perfectly, as the Court must make a determination as to the fair value of the relevant company's shares which binds all dissenting shareholders, including those who do not exercise their right under section 238(12) to participate in the proceedings. From that, it was argued, it follows that the appropriate remedy is one that pertains to the entire class of interested parties (i.e. a declaration) rather than a money judgment that only benefits actively participating dissenters.

(2) Order 29, Part II does not apply as it is inconsistent with section 238 as a statutory code.

34. The Company contends that for the Court to order that it make interim payments to the Dissenters at the merger price would be logically inconsistent with the statutory scheme established under section 238. The clear intent as to when liability is created, would, it was submitted, be subverted, and the determination by the Court at the end of the process pursuant to section 238(11) would become merely an "*adjustment*" of the previously paid sum. It was submitted that this would represent a fundamental change to section 238's self-contained procedure and, in effect, procedural rules overriding statute.



35. Learned Counsel also referred to section 238(11) of the *Law* which empowers the Court to determine a fair rate of interest, if any, as demonstrating that the statutory code that is section 238 expressly provided for any delay in the dissenting shareholder receiving the share value of his shares being compensated by interest. This, it was argued, is a further indication that interim payments are not applicable.

36. Learned Counsel went on to say that, since fair value has not yet been established, there is no starting point from which the Court could say that it was satisfied that the dissenting shareholders would obtain a substantial sum. Further, the authorities indicate that there is no presumption that the fair value offered by the Company constitutes a minimum price. Reference was made to paragraph 27 of Jones J 's judgment in *Re Integra* 2016 (1) CILR 192, where it was stated:

"There is no presumption that the fair value offer made by [the Company] on 2 July 2014 in accordance with section 238(8) constitutes a minimum price and it is open to the Court to determine that the fair value is less than \$10 per share."

37. It was Mr. Mowschenson QC's submission that if this presumption would be unreasonable, then in like fashion, it would be peculiar for the Court to then say that the fair value offered by the Company is a "*just*" sum to be paid to the dissenting shareholders.
38. Lastly under this head, Mr. Mowschenson QC argues that a further indication that Order 29, rule 9 is not intended to apply to petitions brought under section 238 is that Order 29, rule 15, provides that an order for an interim payment shall not be communicated to the trial judge until questions of liability and quantum have been determined. However, under section 238 there is no issue as to liability; the only issue is as to fair value. It was further contended that the point is not answered by reference to Order 72, rule 2(8) which provides that all interlocutory matters should be before the Commercial Judge to which they are assigned.

39. It was learned Counsel's submission that the decision in *Qihoo* was wrong and should not be followed. It was also pointed out that an additional reason why the decision of another Judge of coordinate jurisdiction would carry less weight is that section 238 is a relatively new jurisdiction and it is quite conceivable that the Judge may have gone somewhat too far, or not been fully advised, so to speak, in making the decision.

40. Reference was made to the recent decision of the UK Supreme Court in *Willers v Joyce and Anor (No. 2)* [2016] 3 W.L.R. 534, where at paragraph 9 Lord Neuberger PSC provided the following authoritative guidance:



"9 So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful decision for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those should be followed in the absence of cogent reasons to the contrary: see Patel v Secretary of State for the Home Department [2013] 1 WLR 63, PARA. 59."

41. In the alternative, it was argued that in the event that the Court does have jurisdiction, this application is premature. It was submitted that the Applicants may have "*jumped the gun*", and should only be applying after Expert Reports have been exchanged.

42. During his submissions, Mr. Mowschenson QC stated that the Company will not, at the fair value hearing, necessarily be saying that the fair value is US\$10.13. He made the submission that it does not matter what the Company's position was previously about the merger price, or about fair value, or that they may have stated that the merger price represents fair value. He segued into a submission that perhaps what the Company may



have meant to say in the Proxy Statement is that fair value will not be higher than the merger price.

43. Mr. Levy QC in my view quite rightly characterised these statements as being completely inconsistent with the Company's previous assertions, and as representing somewhat of a *volte-face*.

DISCUSSION AND ANALYSIS ON ISSUE NO.1

44. I note that I asked Mr. Levy QC whether there were any decisions or authorities in the Delaware or Canadian jurisdiction and he responded that though the *Law* may have been copied from Delaware and Canada, this does not mean that the procedure adopted in those jurisdictions should be followed. He submitted that issues of procedure are governed by the law of the *Lex Fori* and referred to *Dicey, Morris & Collins on The Conflict of Laws*, 14th Edition, Volume 1, paragraphs 14-001-14-005. With respect, I did not find that authority helpful or relevant.
45. However, in any event, in my judgment, the matter of interim payment, although governed by Rules, is also a matter of substantive Law – *The Grand Court Law*. Prior to legislation allowing for interim payments, as I understand the learning on this issue, there was no power at common law to order a party to make a payment until a judgment had been made against him/it.
46. The fact of the matter is that no authorities were cited to me by either side emanating from the jurisdictions of Delaware or Canada. I would have thought that a comparison of the language of the Statutes copied or which served as a guide, as well as the decisions made in those jurisdictions, would be of some utility, particularly given that other Delaware decisions are being cited in other cases on other aspects of section 238 proceedings.



47. Be that as it may, I do think that the question of jurisdiction is far from simple. For example, I am concerned that there may be some merit in the Company's argument that under section 238, the Court's task in assessing fair value is not one that is intended to result in a money judgment in the dissenting shareholders' favour, but is rather meant to be declaratory relief, particularly as the petition proceedings and the resulting order will be binding on the entire relevant class of dissenting shareholders, whether participating in the section 238 proceedings or not.

48. On the other hand, that may well be an overly technical approach, since in fact, as Mr. Levy QC points out, in the cases that have proceeded to finality in section 238 proceedings, there have been orders by the Court of sums of money to be paid by the relevant company in respect of the particular dissenting shareholders who participated in the proceedings – see *Re Integra* and *Shanda Games*, unreported decisions of Segal J, delivered 25 April 2017, and 16 May 2017. Mr. Mowschenson QC's submission that after the declaration is made, if the Company does not act upon it, the dissenters may enforce by way of another suit for specific performance or by filing another suit seems impractical and unnecessary. 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 plainly favours substance over form.

49. I also think that the fact that the *Law* expressly provides in sub-section 238(11) for the Court to order interest to be paid by the Company after the Court has determined fair value may tend to suggest that the draftsman expressly considered the question of how the dissenting shareholders right to be paid fair value should be treated. It may suggest that it was considered that there would be delay, and that in appropriate circumstances, the dissenters should be compensated for the delay in receiving payment by way of interest. It may well have been so expressly contemplated, even if a fair value determination by the Court occurs years after the merger or consolidation. The fact that



this provision regarding interest appears in the *Law* itself may well support the Company's argument that the *Law* is a self-contained code.

50. This argument may gain some traction from the fact that sub-section 238(8) of the *Law* commands the Company to pay the amount determined by the Company to be fair value to the dissenting shareholder **if agreement is reached**. Further, sub-section 238(9) goes on to set out what steps are to be taken if agreement is not reached (eg. the filing of the petition), but does not say that in this circumstance, the Company's offer sum must also be paid over. (My emphasis)

51. On the other hand, it is well known, that even though the Court has the power to award interest on, for example, damages claims in respect of a road traffic accident, pursuant to section 34 of the *Judicature Law (2013 Revision)*, this does not mean that in appropriate circumstances an interim payment cannot be ordered under Order 29, rule 11.

52. However, all told, I find the reasoning of Quin J regarding the applicability of the *GCR* and the interim payment rules to section 238 proceedings, in terms of a lack of carve-out provision, very clear. I think that another point that would support Quin J's decision in *Qihoo* is that there is in fact primary legislation, and not just simply rules, that govern interim payments, notably the *Grand Court Law*.

53. At paragraph 98 of *Halsbury's Laws of England*, Volume 11, 5th Ed. (2009) which was cited at paragraph [53] of the *Lornameade* decision, and also at paragraph 60 of my decision in *China Shanshui*, the learned authors express the relevant considerations regarding decisions of co-ordinate courts as follows:

"98. Decision of co-ordinate courts. There is no statute or common law rule by which one court is bound to abide the decision of another court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that



a second judge of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will usually follow the decision of another judge of first instance unless... convinced that that judgment was wrong..."

(My emphasis)

54. In my view it is appropriate to follow the approach set out in paragraph 98 of *Halsbury's Laws of England* and by Gloster J in *Lornameade* at paragraph [56]. Thus, in circumstances where: (i) Quin J's decision (a) was made after full argument on the points in issue, over the course of a day, where the parties were represented by eminent Queen's Counsel, (b) was set out in a cogent and fully reasoned judgment, with its conclusions expressed in the clearest terms and (ii) Quin J's decision was clearly a "*definite decision on a matter arising out of a complicated and difficult enactment*" (or more accurately, on the meaning and interplay of the **Law** and the **GCR**), and (iii) there are clearly strong arguments contrary to those presented by the Company, as accepted by Quin J in *Qihoo* (including as referred to in paragraphs 23-25 above), I am not convinced that Quin J was wrong on the issue of jurisdiction. I am of the view that I should accordingly follow his decision as to the Court's jurisdiction to grant interim payments in section 238 proceedings.
55. As far as I am aware, there was no appeal of the *Qihoo* decision. However, it is plainly more appropriate for me in the circumstances of this case where there has been full contested argument in *Qihoo* and I am not convinced that Quin J was wrong, to follow *Qihoo* on the issue of jurisdiction and leave it to the Court of Appeal, if and when the point ever arises, to consider the pertinent issues and provide authoritative guidance. Since there are a number of section 238 proceedings before the Grand Court currently these issues may well make their way to the Court of Appeal for determination in due course.
56. In *Qihoo*, Quin J was presented with some expert evidence by the Dissenting Shareholders giving a range of values. The position taken by the Dissenting Shareholders



was also that they would recover at the very minimum, the merger price. This figure, the merger price, was the same price at which the Company made its offer pursuant to section 238(8) (which requires the Company to offer at a price that it determines to be the fair value). The Company did not present any expert evidence. Quin J indicated that he was reluctant to examine and make any decision based upon experts' reports. He did not wish to "*stray into the jurisdiction of the judge who will be making such a determination [as to fair value]*". See paragraphs 74-76.

57. His Lordship indicated, however, that he was satisfied that at the trial the Dissenting Shareholders would obtain an award in their favour (paragraph 73) and at paragraph 78 he indicated that he was satisfied that on the balance of probabilities, the Dissenting Shareholders will receive at least the merger price, which was the Company's own stated fair value. This was the amount that Quin J decided to award as an interim payment.
58. Mr Levy QC argues that in the instant matter, the case for finding that the Applicants will at trial obtain a substantial award in their favour, and at a minimum at the value which the Company has said represents fair value, is even stronger than in *Qihoo* because of the matters set out at paragraph 19 above. He makes the point that whilst it may be theoretically possible that the Court may arrive at a lower valuation, that is improbable in the extreme - the Company has told the entire world (including its regulator/s) that it will not contend for a lower price.
59. Applying the reasoning of Quin J in *Qihoo*, I start from the premise that a decision under section 238 proceedings can fall within Order 29, rule 12 as being a judgment against the Company for a substantial amount.
60. Further applying *Qihoo* in the case before me, I am satisfied that if the matter proceeds to trial, the Applicants would obtain judgment against the Company for a substantial sum of money, and that the award under section 238 falls within the definition of "*other sum*" in Order 29, rule 9. In this type of case, there is no issue of any set-off or defence on the part



of the Company that arises for consideration at this stage or, indeed, at the discretion of the Court at this stage.

61. In this case, there was no expert evidence presented on the application. Like Quin J, I too would not wish to have my finding that the Applicants would obtain judgment for a substantial sum of money to be seen as in any way trespassing on the territory that is the sole preserve of the trial Judge, Parker J, who on 20 July 2017 delivered a judgment for directions in respect of these Petitions, and whose task it will be to determine the fair value of the shares at trial - see Parker J's unreported judgment delivered 20 July 2017.
62. I also find that based upon Quin J's reasoning in *Qihoo* it cannot be said that this application is premature, or that it ought to have awaited the exchange of Expert Reports. The decision in that case was not predicated on any Expert Reports. Albeit the decision took place against the backdrop of the Dissenters having provided Expert evidence, there is nothing in the decision that suggests that Quin J's ruling was dependent upon the Expert Report. Further, there was no Expert Report before Quin J presented by the Company. I am not convinced that this aspect of the decision is wrong either.

Issue No. 2: If the Court does have that jurisdiction, should it exercise its discretion to do so?

Issue No. 3: Is there an evidential basis, or sufficient evidential basis, upon which the Court can decide what is a "just" sum?

63. In my view, there is some amount of overlap to these two issues, so it is appropriate to discuss them together.
64. What are some of the factors that could inform this aspect of the matter? In that regard, it may be useful to consider what is the purpose of the Interim Payment regime? In the 1999 *Supreme Court Practice*, paragraph 29/12/5 (where Order 29, rule 11 and Order 29, rule 12 are in identical terms to the *GCR*), cited by the Company, some indication is there given. That note reads as follows:

"Alternative claims in debt and damages"



Although the powers contained in O. 29 r. 11...and 12, are separate, the underlying purpose of each rule, namely the mitigation of hardship to a defendant [plaintiff?] which may exist during the period from commencement of the action until trial, is the same, and will be defeated if the rules are treated as being mutually exclusive. Accordingly, where a plaintiff makes alternative claims in debt and damages and seeks an interim payment, the court can order such a payment to be made if it is satisfied that the plaintiff will recover a substantial amount under one or other of the two alternative claims. (Shearson Lehman Bros Inc. v. Maclaine Watson & Co. Ltd [1987] W.L.R. 480; [1987] 2 All E.R. 181, CA).

65. Thus, the aim is to mitigate hardship that may be occasioned to a party until the trial where it appears to the Court that that party would obtain judgment. Further, it is fair to say there is no specific evidence here of any hardship to either the Applicants or the Company. However, in my view the **Grand Court Law** and Rules in relation to interim payments appear to assume that it is a hardship to be kept out of money in certain circumstances.
66. I think it might be useful to also consider the other aspects of Order 29 that seek to deal with the relative rights of the parties. Order 29, rule 17 gives the Court the power to make an adjustment on the final judgment being made. This power is also addressed in the **Grand Court Law** primary legislation. Order 29, rule 17 provides as follows:

***“Adjustment on final judgment or order or on discontinuance
(O. 29, r.17)***

17. Where a defendant has been ordered to make an interim payment or has in fact made an interim payment, whether voluntarily or pursuant to an order, the Court may, in giving or making a final judgment or order..., make an order with respect to the interim payment as may be just, and in particular:-



- a) *an order for the repayment by the plaintiff of all or part of the interim payment; or*
- b) *an order for the payment to be varied or discharged; or*
- c) *an order for the payment by any other defendant of any part of the interim payment which the defendant who made it is entitled to recover from him by way of contribution or indemnity or in respect of any remedy or relief relating to or connecting with the plaintiff's claim."*

67. The Supreme Court Practice, at paragraph 29/17/1, discussed this Rule as follows:

"29/17/1

Adjustment on final judgment or order

Where an action proceeds to trial either on the issue of liability or of damages or both after the defendant or one of two or more defendants has made an interim payment whether voluntarily or pursuant to order, the Court may, before the final judgment or order is given or made, make such adjustments with respect to the interim payment as may be necessary for the purpose of giving effect to its determination of that defendant's liability....

...

Both the requirements of justice and the legislative policy embodied in S.C.A. 1981, s.32 demand that the court should have the power to award interest to compensate for the period when the defendant has unjustifiably been deprived of the amount of an interim payment and the plaintiff has unjustifiably had the use of it. Hence the court may, in making such order "as may be just" under r. 17, award interest when ordering repayment of an interim payment. (Mercers Co. v New Hampshire Insurance Co. [1992] 1 W.L.R 792; [1992] 3 All E.R. 57). Such an order may also properly include payment of interest which the defendant has paid to the plaintiff by virtue of an order under r. 11 or r. 12 (see para. 29/11/13)." (My emphasis)



The Court therefore has the power to re-tilt the scales, and adjust interim payments ordering repayment of any overpayment plus interest. In the instant case, it would therefore seem that whichever way one turns, interest can be used to compensate a party that is kept out of money which ultimately is determined to be due to it. In the case of the dissenting shareholders where an interim payment order is not made, interest may be awarded as compensation for being kept out of money ultimately found due to them. In the case of the Company where an interim payment order is made, the Company may be compensated by an award of interest for being deprived of a portion of an interim payment or for the dissenting shareholder unjustifiably having the use of it.

69. Mr. Mowschenson QC sought to argue that in *Qihoo*, Quin J ignored the fact that under Order 29, rule 12, interim payments are discretionary. I agree with Mr. Levy QC that with a Judge of the experience of Quin J, it is difficult to succeed on such an argument.

The Company's Arguments

70. Mr. Mowschenson QC asked the Court to exercise its discretion by declining to order any interim payment. He submitted that the points set out in paragraphs 71-76 below, are relevant to any exercise of the Court's discretion to make an order for interim payments.

No evidence as to what a 'just' sum is

71. Learned Counsel submitted that if the Court is satisfied that an interim payment ought to be made, the sum to be paid is such amount as the Court considers just. He submits that the burden of establishing what would be a just sum clearly falls on the Applicants.
72. He goes on to say that the Applicants have provided no evidence of what a "just" amount would be. It was argued that the Applicants' failure to adduce expert evidence makes it practically impossible for the Court to form a reliable view as to the likely fair value of the Company. Reference was made to the decisions in *Re Integra* and *Re Shanda Games* as clear authority for the fact that the Court cannot rely on the merger price as being any kind of indicator of what the fair value might be.



Reference was made to the decision of Smellie CJ in *Algosaibi v Saad* [2012] (1) CILR 335, which was within the context of an application for an interim payment in a claim for damages. Smellie CJ held (at paragraph 49) that “*the procedures for the making of an interim payment of damages are not suitable if the court will not be able to assess the just and reasonable proportion of the damages which, in the opinion of the court, the plaintiff will likely be able to recover upon the final outcome of the case.*”

74. The Company submits that this principle applies equally to interim payment applications - if the provision applies at all to section 238 proceedings - made in non-damages claims pursuant to Order 29, rule 12(c). Learned Counsel rounds off this submission by saying that the evidence before the Court is plainly insufficient for the Court to assess what a ‘just’ amount would be, as the only safe way for such an assessment to be carried out is by reference to evidence as to the likely fair value (or range of potential values) of the shares.

Risk of inability to pay

75. On this score, the Company contends that the Court cannot be satisfied as to the ability of the Applicants to repay the balance of any interim payment ordered, whether under Order 29, rule 17 or otherwise, if the fair value of the shares is determined to be less than the merger price. In particular:
- (a) No information regarding the financial standing or assets of the Applicants has been provided. Neither is a publicly traded entity, and very little information about them has been published.
 - (b) Blackwell is a foreign entity, being incorporated in the United States. To award an interim payment in favour of Blackwell would remove those monies from the jurisdiction and further increase the difficulty of securing repayment if the fair value is less than the merger price.
76. It was submitted that these concerns ought to factor heavily in the Court’s exercise of its discretion under Order 29, rule 12. Further, that the potential ramifications of a large



interim payment to an impecunious applicant are cited as a factor relevant to the exercise of the Court's discretion - see the commentary in the Supreme Court Practice at paragraph 29/11/9.

The Applicants' position - No evidence as to what a 'just' sum is

77. It was the Applicants' submission that it is important to note the difference in the language of the Rule which was under consideration in *Algosaibi* – Order 29, rule 11(1) of the **GCR** as opposed to Order 29, rule 12. It was noted that rule 11(1) empowers the Court to order an interim payment “*of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered.*” In that case the Chief Justice held that “*likely*” meant “*proved in accordance with the civil burden to be ultimately recoverable.*”
78. However, as Mr. Levy QC points out, rule 12 contains no similar limitation by which the interim payment may not exceed a reasonable proportion of the damages that are likely to be recovered. Rather, rule 12 speaks of “*such amount as [the Court] thinks just.*”
79. Learned Counsel indicates that the Applicants accept that the Court has to be satisfied on the balance of probabilities that they will, at trial, obtain an award in their favour and that the award must be such amount as the Court thinks just in the circumstances. However, given the various matters referred to by the Applicants as discussed previously, which they say manifestly demonstrates that the Company has told the world, including its regulators that in these proceedings it will contend that fair value is (not less than) US \$10.13, it must plainly be just to order the Company to pay sums calculated on that price by way of interim payment.

RISK OF INABILITY TO REPAY

80. Mr. Levy QC responded that it cannot be seriously contended that the Applicants are impecunious or unable to repay any portion of the interim payment if required so to do.



DISCUSSION AND ANALYSIS IN ISSUE NOS. 2 AND 3

81. In my view, Mr. Levy QC does have a point about the difference in language between rule 11(1) and rule 12. Rule 12 does not expressly limit the Court to awarding sums that it is satisfied are likely to be recovered.
82. Further, in my judgment, once one starts, as Quin J has in *Qihoo*, that by virtue of Order 29, rule 18 the Rules apply with the necessary modifications, to these proceedings, it seems to me that the principle of making such order as the Court considers just, is not limited to the issue of what the likely amount of the ultimate appraisal of fair value may be.
83. It is also in my judgment appropriate to make a distinction between the exercise of the appraisal of fair value at trial, which is the task of the presiding Judge, and as to what is just as between the Company and the Dissenting Shareholders in their capacity as parties and participants in the proceedings at the stage when an interim payment application is made.
84. What the Company says about fair value must, it seems to me count for something, if even ultimately there is of course no presumption that the merger price or what the Company has determined to be fair value will be the same as what the Court concludes to be fair value. What the Company says about fair value is an important factor when the Court is considering what is just in all of the circumstances.
85. In that regard, what really are the true competing considerations? If the Court does not make an interim payment order, the consequence will be that the Applicants will be without money that may ultimately be found by the Court to be due to them. Upon a determination of the fair value at the end of the day, the Company may be liable to pay interest at a fair rate and period. It is arguable that it is hard to understand why the Company is not motivated to make the payment of what it surely seems to have confidently maintained was a fair value, and save itself from interest payments or a potential portion thereof down the road.



On the other hand, is it that the Company feels that it can earn interest in excess of what it may ultimately have to pay? Or is it that by withholding the sum which it stated represents fair value, that may be to the Company's advantage in settlement negotiations with the Applicants? If it is this last reason, that does not seem to me to be an approach which the Court should put its stamp of approval upon or assist.

87. What of the position of the Applicants in this case, who are dissenting shareholders in other cases before the Court too? Is it fair that they should refuse a sum offered to him as the fair value of their shares, and yet demand to receive it, without prejudice to their position that the fair value is higher than the amount offered by the Company?
88. What of the position if the Court decides to make the interim payment order? What would be the hardship to the Company? It seems to me that there would be no hardship in the Company making the payment since at this time it obviously has the means and resources to make the payment, since it offered the sum in the first place.
89. The only hardship to the Company would be if at the end of the day the Court determines the fair value to be less than the amount ordered by way of interim payment, particularly if there is a risk that the Applicants will not be able to repay the amount by which the interim order exceeds the Court-assessed fair value.
90. However, in my view, there is no substance to the Company's complaint about the Applicants' financial status or genuine risk that these Applicants may not be able to repay any interim amounts ordered. Put another way, the likelihood of such a risk materialising in my judgment seems remote.
91. All told, as in countless other situations and circumstances where the outcome of proceedings has not yet occurred, the Court has to weigh the balance of justice and decide which course seems the most just in all the circumstances.



In my judgment, having regard to all of the circumstances, it would be appropriate to exercise my discretion by ordering an amount which appears to me to be just in all of the circumstances. The purpose of the jurisdiction to order interim payment is to mitigate the hardship or prejudice that may be occasioned to the Applicants by being kept out of money, during the interval between the commencement of the proceedings and the ultimate outcome.

93. In my judgment, a just amount for the Company to pay by way of interim payments should be predicated on the basis of what the Company has maintained is the fair value, i.e. US \$10.13 per Share.
94. In the alternative, if I am wrong as to the meaning of rule 12 and as to the meaning of what is “*just*” within that rule, then along the same lines as discussed in *Qihoo* at paragraph 78, I am satisfied that on a balance of probabilities the Applicants are likely to be held entitled to a value of at least the merger price, which is the price that the Company offered up as its determination of fair value. Indeed, given the Company’s repeated statements and refrain as to fair value, this applies in the instant case with even greater force than in *Qihoo*.

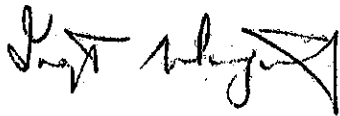
Deduction of the Company’s costs

95. The Company submits that the Company’s likely costs ought to be deducted from any interim payment amount awarded by the Court. I can see no basis for such an argument, whether on the construction of the language of the relevant rules or as a matter of principle.

The Order

96. I therefore make an order in terms of paragraphs 1 and 3 of the summons.
97. Although the Applicants have argued strenuously for costs upon an indemnity basis, I am of the view that it would not be appropriate to so order. Section 238 proceedings are, as Mr. Mowschenson QC has submitted, a relatively recent jurisdiction engaged in the

Grand Court and I have indicated that I do not think the issues involved in this case are easy of resolution. I therefore think that it was not unreasonable or improper for the Company to maintain the position that it was not obliged to make interim payments, having regard to its views as to the proper construction of the *Law* and of Order 29 of the *GCR*. I therefore order that the Applicants are to have their costs of this application, on the standard basis to be taxed if not agreed.



THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT

