IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 260 of 2017 (RMJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF ZHAOPIN LIMITED

IN CHAMBERS

Appearances: **Mr. Robert Levy Q.C. instructed by Mr. Rocco Cecere and Ms. Jessica Bush of Mourant Ozannes for the Applicant**
Mr. Richard Boulton Q.C. instructed by Ms. Caroline Moran and Ms. Grace Boos of Maples & Calder

Before: **The Hon. Justice Robin McMillan**

Heard in Chambers: 15 March 2018

Draft Judgment Circulated: **20th June 2018**

Judgment Delivered: **22nd June 2018**

HEADNOTE

The jurisdiction to award interim payments in fair value proceedings under section 238 of the Companies Law – Consideration as to what may ultimately constitute success in fair value proceedings – Irrelevance of commercial purpose on the part of a purchasing shareholder – Application of appropriate minority discount in the context of an interlocutory hearing.

JUDGMENT

Introduction

1. This is an application by Maso Capital Investments Limited ("MCIL"), Blackwell Partners LLC – Series A ("Blackwell") and Star V Partners LLC ("Star V", and together with MCIL and Blackwell, the "Applicants") made pursuant to Order 29, rules 10 and 12 (c) of the Grand Court Rules.

2. The Respondent is Zhaopin Limited ("the Company").

3. The Summons Application seeks the following relief for Orders that:

> "1. *Zhaopin Limited (the Company) do make the following interim payments of:*
>
> (i) *US$7,262,400.00 to MCIL;*
>
> (ii) *US$11,015,265.60 to Blackwell; and*
>
> (iii) *US$2,937,844.80 to Star V.*
>
> 2. *In the alternative, the Company do pay the Applicants by way of interim payments such sums as the court considers just.*
>
> 3. *The interim payments referred to in paragraphs 1 and 2 above be made to the Applicants' designated bank accounts within 7 days of any order.*
>
> 4. *The Company do pay the Applicants' costs of and incidental to this Summons, to be taxed forthwith on an indemnity basis, if not agreed.*
>
> 5. *Such further or other orders as this Honourable Court thinks fit."*

4. The Applicants are former shareholders in the Company, a Cayman Islands incorporated company whose shares were, until the completion of the merger transaction described in the First Affidavit of Manoj Jain ("Jain 1"), traded on the New York Stock Exchange. The Maso Dissenters together with other 27 other shareholders in the Respondent who are not

connected to the Applicants dissented from the merger transaction, but nonetheless as the buyer group controlled 92.6% of the outstanding votes of the Company, its result was a foregone conclusion and the merger was approved at an extraordinary general meeting held on 25 September 2017.

5. By their Summons dated 22 December 2017 the Maso Dissenters seek an interim payment equal to US$8.16 for each of their shares in Zhaopin. That equates to the following payments to each of them, as previously indicated:

(i) US$7,262,240.00 to Maso Capital Investments Limited;
(ii) US$11,015,265.60 to Blackwell Partners LLC- Series A; and
(iii) US$2,937,844.80 to Star V Partners LLC.

6. The sums sought by the Summons are equal to the amounts which the Company has repeatedly asserted equate to the fair value of the shares. Indeed, in a statement filed with the United States Securities and Exchange Commission ("the SEC"), Zhaopin clearly stated that in these proceedings it would assert that the fair value of its shares equated to the per-share amount sought by the Applicants by this interim payment Application.

7. The Company's fair value Petition describes it as a provider of online job search and recruitment services, which specializes in connecting employers and employees in the People's Republic of China.

8. The Company was listed on the New York Stock Exchange and it was taken private using the provisions of the Companies Law (2016 Revision) ("the Law").

9. As part of the merger process, the Company made an offer to all relevant shareholders of US$8.16 per ordinary share (being US$9.10 per share less a special dividend of US$0.94 per share declared as part of the merger process and paid by the Company at the time the merger completed). The Applicants did not accept that the amount offered by the Company represented the fair value of their shares, and therefore dissented from the merger.

10. As part of the dissent process, each of the Applicants demands payment of what they claim to be the fair value of their shares.

11. By way of a response to the demand to be paid the fair value of their shares, on 26 October 2017, the Company wrote to each of them stating that "*in accordance with s238(8) of the Companies Law, the Company hereby offers to purchase all your ordinary shares,... for the price of US$ 8.16 per Share, which together with the US$ 0.94...amount of the Special Dividend already paid to you, equates to US$ 9.10 in cash per each Share held by you prior to the Effective Time (the "Offer Price"). The Company has determined that the Offer Price is the fair value of the Shares and is the same consideration paid under the Merger Agreement to each holder of shares immediately prior to the Effective Time who did not exercise their right to dissent from the Merger pursuant to s238(8) [sic] of the Companies Law*". The Petition was issued on 30 November 2017, around a month after this letter was written.

12. The Applicants contend that the letters of 26 October 2017 were all plainly written by, or at the very least, with the assistance of, experienced Cayman Islands attorneys. They were expressly written pursuant to section 238(8) of the Law. That section requires a company that has merged under the statutory regime "*to make a written offer to each dissenting shareholder to purchase his shares at a specified price that the company determines to be their fair value*".

13. They submit at paragraph 13 of their Written Submissions dated 8 March 2018 that there can be no doubt at all that the Company believed, as at 26 October 2017, that the fair value of its shares, after payment of the special dividend, was US$8.16 per share. They say it is clear that the Company had determined what the fair value was. No matter that Mr Fink seeks to suggest that there is no evidence of fair value or that, "*the Company has not yet put forward its assessment of fair value*", they say there is absolutely clear evidence, as to what the Company's assessment of fair value is: in its very own offer under section 238(8)

of the Law the Company has said that it had determined that the offer price is the fair value of the shares. They submit it is not clear quite how the Company can say that on one hand, and yet Mr. Fink says that the Company has not yet put forward its assessment of fair value, on the other.

14. In Mr. Ronnie Fink's First Affidavit dated 2 February 2018 it is further stated at paragraph 30 that the statement as to value made by the Company in its Proxy Statement is a statement of intent only, and at paragraph 29 he further points out that the Company has expressly reserved all of its rights in relation to any arguments which may be made in any litigation pursuant to section 238 of the Companies Law.

15. The Company in its Skeleton Argument dated 8 March 2018 at paragraph 10.3 states that these proceedings are at an early stage and that the Company has not yet confirmed the figure it believes is the fair value for the shares in question and it is unable to do so "*until the valuation is complete, further the Applicants have not indicated what they will say is the fair value of the shares.*"

16. It is submitted by the Company that therefore the Court is being asked to undertake a guessing game only.

17. For the purposes of these interlocutory proceedings, which must not be regarded as or treated as a mini-trial, the Court is fully satisfied that it can accept as adequate and sufficient the statements of value which the Company itself has thus far put forward.

18. Indeed as the Applicants have persuasively argued at paragraph 18 of their Written Submissions section 238(8) of the Law, by its express language, requires the Company to make a determination by the time the relevant section 238 notice is sent. Effectively, the Company has made an admission that it has determined what fair value is, and it has determined that the Merger Price is fair value.

19. It is on the basis of this interlocutory finding of fact which the Court has made that the Court will now proceed to consider the Application.

Interim Payments

20. The Applicants helpfully set out the procedural requirements for interim payments at paragraphs 31-34 of their Submissions as follows:

> "*31 Interim payments are dealt with in Ord 29 rule 10 of the Grand Court Rules ("GCR") and following. The GCR expressly provide that an application for an interim payment can be made in any action, no matter how it is commenced (see Order 29 rule 18).*
>
> *32 For present purposes the relevant provision is Order 29 r12 (c). That provides that "if on the hearing of an application under Rule 10, the Court is satisfied 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."*
>
> *33 Order 29 rule 18 of the GCR provides that the preceding rules apply with necessary modifications to any counterclaim or proceedings other than by writ "where one party seeks an order for an interim payment to be made by another."*
>
> *34 Thus it is clear that interim payments are available in proceedings such as these, which were commenced by Petition, and on an application by a Respondent. According to Order 29 rule 12 of the Grand Court Rules, an order can be made if the Court is satisfied that if the matter proceeded to trial, one party would obtain judgment against another for a substantial sum of money.*"

21. Equally helpfully the Company has conceded at paragraph 32 of its Skeleton Argument that there is jurisdiction in principle to make interim payments awards in section 238 cases.

22. Their own Argument then continues :

> *"33 The historical background to the interim payment jurisdiction is summarized in the White Book 2017 as follows:*
>
> > *"The [ability to make interim payments] was first established by the Administration of Justice Act 1969 s. 20 which implemented a recommendation made in the Report of the Committee), and was regarded as a significant innovation at the time. Its purpose was to mitigate the hardship caused to claimants making well founded personal injuries claims by the long delays then existing between commencement of proceedings and receipt of damages by way of compensation. The committee envisaged that this exceptional power would be of particular use in personal injury cases where (a) the defendant has admitted full liability, (b) the liability of the defendant has been established by the entry of interlocutory judgment for damages to be assessed, (c) where the claimant sues two or more defendants who blame each other but do not allege contributory negligence against him, provided all the defendants are insured and substantial... the primary legislation was enacted in terms wide enough to enable the jurisdiction to be exercised in cases other than personal injury claims should rules of court so permit. In 1969, the draft rules which were confined in their effect to claims for damages in respect of wrongful death and personal injuries, were enacted. In 1980, the rules were amended to enable orders to be made for the payment of "any damages debt or other sum (excluding cost)" thereby enlarging considerably the scope of the power." (emphasis added).*

34 *Accordingly, the underlying purpose of the interim payment jurisdiction is to mitigate hardship or prejudice that may be suffered by a plaintiff whose claim is well founded and who is being kept out of his money pending judgment. It is a jurisdiction that is founded in principles of fairness and requires the Court to consider what is fair between the parties in the circumstances.*

35 *The ability to make rules for interim payments in the Cayman Islands is found at section 20 of the Grand Court Law which relevantly provides as follows:*

> *"(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 circumstances as may be specified in such Rules, to make an order requiring a party to any proceedings before it to 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...*
>
> *(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."*

36 *The jurisdiction to make interim payments is then set out in GCR 0.29 r 10. The Applicants make their application pursuant to rule 10 and rule 12 (c). Rule 12(c) provides:*

> *"If on the hearing of an application under rule 10, the Court is satisfied 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."(emphasis added)."

23. The Company then concludes by stating:

"37 There are therefore three cumulative elements to this interim payment application:

37.1 The Court must be satisfied that the applicant would (a) obtain judgment in its favour at trial and (b) that the judgment would be for a substantial sum;

37.2 Even if these conditions are fulfilled, the Court must then consider as a matter of discretion if it is fit to make an interim payment order in all the circumstances or whether there is any bar to making the interim payment order; and

37.3 If it is fit to make the order, the Court must consider what amount is a just amount to be ordered as an interim payment.

38 The burden of proof is on the Applicants to show that they will succeed against the defendant at trial and they must establish this on the balance of probabilities based on the evidence before the Court at the time of the interim payment application."

The Relevant Case Law

24. The Court begins by stating that it must of course take all of these procedural issues comprehensively into account.

25. However, in this regard considerable assistance may also be found in two decisions of the Grand Court delivered by Quin J and Mangatal J respectively.

26. In *In the Matter of Qihoo 360 Technology Co. Ltd,* Cause No. FSD 129 of 2016, Quin J accepts that interim payments pursuant to GCR 0.29 r 10 and 12(c) are available in proceedings such as those pursuant to section 238.

27. The learned Judge also comments at paragraph 68 as to the Petitioners in that case having had the use of the Dissenters' funds "*for a considerable time*.".

28. Significantly Quin J awarded an interim payment even though he noted at paragraph 75 that in that Application there was no expert evidence (as to fair value) before him.

29. Then in *In the Matter of Qunar Cayman Islands Limited*, Cause No. FSD 76 of 2017, Mangatal J. concluded that Quin J's reasoning was clear, and that not being convinced that Quin J was wrong on the issue of jurisdiction she should follow his ruling as to the jurisdiction to award interim payments.

30. However, the learned Judge goes further in explaining the appropriate exercise of the Court's jurisdiction at paragraphs 84-94:

> *"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.*

86 *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 Applicant's 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."*

92 *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."*

31. Mangatal J's thoughtful analysis as to the application of the relevant principles is admirably clear and it appears to this Court to be extremely sound and sensible. This Court is not convinced that Quin J. and Mangatal J. were in error. On the contrary, this Court accepts that the learned Judges were entirely right in their approach.

The Legal Arguments

32. The legal argument of the Applicants in its essential terms is put in this manner at paragraphs 73-74 of their Written Submissions:

"*73* *The availability of interim payments in s238 has been considered and determined in Qihoo 360 and Qunar. The reasons for making them, and not permitting companies to withhold them, have also been discussed in those cases.*

74 *There is every reason why an interim payment should be ordered in this case. The Company has determined what fair value is and has stated that it will contend as much in these very proceedings. There can be no doubt that at trial the Maso Dissenters will recover at least US$8.16 per share. That is Zhaopin's case - it has told the entire world that it will contend that that is fair value. Whilst it may be theoretically possible that the Court might arrive at a lower valuation that is improbable in the extreme - the Company has told the entire world (including its*

regulator/s) it will not contend for a lower price. In any event, even if the trial Court was to determine fair value at less than US$8.16 per share, the Maso Dissenters would have to pay back any balance. That extremely remote possibility should not result in an interim payment of less than the Merger Price."

33. At this juncture, in terms of simply applying the general law to the facts of this case the Court would have no difficulty in acceding to the relief sought in the Summons Application.

34. However Mr. Richard Boulton Q.C on behalf of the Company raises certain additional points which he claims are points of first impression.

35. Mr. Boulton's first submission is that the Applicants cannot show that they will obtain Judgment in their favour in the sense of both actually succeeding in their claim by obtaining a firm judgment in their favour and as a result of that obtaining a substantial sum of money.

36. Reliance is placed upon the following statement of Aiken LJ in *Test Claimants in the FFI Group Litigation v. Revenue and Customs Comrs (formerly Inland Revenue Comrs) (No 2)* [2012] IWLR 2375, where Aiken LJ comments at paragraph 38:

"In my view this means that the court must be satisfied that if the claim were to go to trial then, on the material before the judge at the time of the application for an interim payment, the claimant would actually succeed in his claim and furthermore that, as a result, he would actually obtain a substantial amount of money. The Court has to be so satisfied on a balance of probabilities. The only difference between the exercise on the application for an interim payment and the actual trial is that the judge considering the application is looking at what would happen if there were to be a trial on the material he has before him, whereas a trial judge will have heard all the evidence that has been led at the trial, then will have decided what facts have been proved and so whether the claimant has, in fact, succeeded. In the latter case,

as Lord Hoffman makes plain in In re B (Children) (Care Proceedings:0. Standard of Proof) (CAFCASS intervening) [2009] AC 11, para 2, if a judge has to decide whether a fact happened, either it did or did not: the law operates a "binary system" and there is no room for a finding that it might have happened. In my view the same is true in the case of an application under CPR r 25.7 (1) (c). The court must be satisfied (to the standard of a balance of probabilities) that the claimant would in fact succeed on his claim and that he would in fact obtain a substantial amount of money. It is not enough if the court were to be satisfied (to the standard of a balance of probabilities) that it was "likely" that the claimant would obtain judgment or that it was "likely" that he would obtain a substantial amount of money."

37. While seemingly accepting that what would constitute success or failure in an appraisal matter depends on the circumstances of the case, the Company argues that the Court must look at "*the substantive effect of the Judgment*" (paragraph 45).

38. The Company then applies this formulated proposition in order to state at paragraphs 48-49:

> *"48 It follows that, in order for the Applicants to satisfy the conditions to found jurisdiction in GCR O.29 r. 12 (c), they must therefore show that they will obtain a final judgment in their favour at trial in the sense of establishing that they are more likely than not to obtain significantly more than the Merger Consideration.*
>
> *49 In this case, the Applicants have adduced no evidence at all on this application to show that they will obtain more than the Merger Consideration at trial. To the contrary, the evidence and recent authorities show that the fair value of the shares is unlikely to exceed the Merger Consideration."*

39. With great respect, the Court is unable to accept this conclusion. In the *Test Claimants* case, the dispute was in substance a bilateral dispute only.

40. Similarly in *Deutsche Bank AG and others v. Unitech Global Ltd*, [2016] IWLR 3598, another authority relied upon by the Company, the dispute itself concerned a claim in contract.

41. Such proceedings are entirely different in character from section 238 proceedings, where the Court is required under section 238(11), to determine the fair value of the shares of the dissenting members 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.

42. The dicta of Mangatal J cited above deal very fully with the factors confronting the Court in an interim payment application for these particular purposes. The threshold is not merely whether the Applicants must show that they will obtain a further judgment in their favour in the sense of establishing that they are more likely not to obtain significantly more than the Merger Consideration.

43. It would be entirely wrong to substitute this formulation for the precise wording of 0.29 r 12 (c). Redefining the provision in the manner proposed is not only implausible but also specious. The guidance provided in the *Qunar* case by Mangatal J is both adequate and concise. For the Company to argue that the Applicants will not "*win*" at trial by simply getting their money back, and using that argument to keep them out of their money in the first place, is profoundly unattractive as well as illogical.

44. Accordingly this submission as to jurisdiction is rejected.

45. The Company then makes a further submission as to how interim payment relief is inappropriate as a matter of the proper exercise of the Court's discretion because no hardship or prejudice in the meantime is being suffered by the Applicants.

46. This argument appears at paragraph 56 of their Skeleton Argument thus:

"*56.1 No hardship or prejudice is being suffered by the Applicants:*

(a) *The Applicants are sophisticated investment funds whose strategy focuses on merger arbitrage, and in furtherance of this strategy, deliberately bought into the Company following the announcement of the Merger, with full knowledge of the offer price. They did so for the sole purpose of dissenting from the Merger and refusing payment of the Merger Consideration. The Applicants have participated in no less than 11 section 238 proceedings before this Court and are fully aware of the process and the time it takes to get to trial. A list of the cases in which the Applicants have been involved is at Schedule 1.*

(b) *The Applicants are not suffering hardship by "being kept out of their money" or indeed being prevented from using their money by the Company. Rather, at the time that they invested in the Company they were aware of the proposed Merger and invested with the knowledge that by dissenting there would be a delay before they received any return. Put another way they elected to seek an investment return by choosing to invest their money into this dissenters' rights appraisal process by purchasing ADSs in the Company after the Merger announcement. The Applicants are not being kept out of or being prevented from using their money, rather, their money is being used for exactly the purpose for which it was invested i.e to participate in dissenters' litigation in order to try to get a return.*

(c) *The Applicants are therefore not seeking an interim payment to alleviate hardship or prejudice. Instead they are seeking a payment to de-risk their investment, and effectively use the dissenter rights appraisal process as a risk-free arbitrage play. This is illustrated by their conduct in this case: the Applicants demanded an interim payment be made to them before the Petition was even filed and the jurisdiction could be engaged. Awarding the Applicants an interim payment would simply free up their funds to allow them to invest in another s.238 litigation play.*

(d) *Having dissented from the Merger, on the Merger Effective Date, the Applicants nevertheless received a special dividend in connection with the Merger of US$.94 per share. The Applicants have therefore collectively already received the sum of US$2,443,943.60.*

(e) *The Company is solvent, and there is no allegation of (nor any risk of) non-payment of the appraised fair value of the Company's shares, plus interest, and costs if necessary.*

(f) *The Applicants are protected by the Court's discretion to award an appropriate rate of interest (over 4% in the two cases decided to date) if the fair value is determined to be higher than the Merger Consideration which has been offered to the Dissenters, but rejected by them in favour of an appraisal process."*

47. The Company also argues that conversely hardship and prejudice could be suffered by the Company if the relief sought were to be granted. It submits that because of the requirement that a discount is now to be applied to the Merger Consideration, the Court cannot conclude with any confidence that the fair value of the Applicants' shares will be the Merger Consideration; and that "*it would be a hardship if the Company was required to pay a larger amount by way of interim payment than was ultimately found to be fair value at trial.*" This proposition takes account of the Cayman Islands Court of Appeal decision in *In the Matter of Shanda Games Limited* on recognising the minority discount principle.

48. As to the first limb of this argument, section 238 makes no distinction between dissenting shareholders who purchased the shares for one commercial purpose as distinct from another. Had the legislature sought to make any such distinction it would have done so. Accordingly is not open to this Court to withhold interlocutory relief on a basis that neither the Grand Court Rules nor the Law itself has ever intended. Other than in the context of considering and applying a minority discount as may be appropriate, it would be beyond the Court's authority to go further and to adopt and apply such interventionism.

49. The Company records its concerns, for example at paragraph 59.3-59.5:

> "*59.3 Allowing arbitrage dissenters an interim payment pending the determination of fair value entirely de-risks their investment strategy. In effect, the interim payment gives them a free roll of the dice because the money which they deliberately invested in the dissent proceedings is now freed up to apply to other investments.*
>
> *59.4 The correspondence in this case shows that the Applicants fully intended to pursue this investment strategy again in this case. They wrote to the Company on 10 November 2017, before the Petition had even been filed demanding an interim payment. Making an interim payment to the Applicants means that there is no downside to the arbitrage investment strategy and only upside.*
>
> *59.6 This is an abuse of the interim payment jurisdiction and is not the purpose for which it was intended. It does not serve the interests of justice, re-balance an unjust state of affairs or mitigate hardship or prejudice for a wronged plaintiff. Rather, it encourages and rewards multi-million dollars arbitrage funds by allowing them to use the dissenter process as a risk instrument of arbitrage."*

50. Ultimately however, these are all matters of economic policy and have no relevance to the exercise of the Court's actual powers in these proceedings. Accordingly this argument is rejected.

51. As to the second limb of the Company's hardship argument, it appears to the Court that while it would of course be a hardship if the Company was required to pay a larger amount by way of interim payment than was ultimately found to be fair value at trial, the real solution to the difficulty is not therefore to pay the Applicants nothing but instead to pay them a sum which is suitably discounted. Such an approach would be consistent with the course which the Court of Appeal of the Cayman Islands has previously approved.

52. The Court nonetheless finds considerable merit in a further submission made by the Company at paragraphs 60-65:

"60 *The Company has not yet confirmed in the proceedings the amount it believes represent fair value. The Company will do so within the next several months once expert reports have been exchanged.*

61 *The Court of Appeal decision in Shanda Games confirms that (a) it is not the company itself that is being valued, it is the shares of the dissenter and (b) a minority discount should be applied to such shares (see paragraphs 48-49).*

62 *This is a very different approach to valuation than has been adopted previously by this Court which has focused on the value of the company as a whole. Further, the amount of the minority discount that should be applied is a matter for expert evidence and is not something that can be determined by the Court at this hearing.*

63 *The Merger Consideration was based on the value of the Company as a whole with no minority discount. The decision in Shanda means that the Merger Consideration cannot be taken as the starting point for the fair value of the Applicants' shares.*

64 *The Company may ultimately take the position that the fair value of the Applicants' shares should be significantly lower than the Merger Consideration. Further, the fair value that is ultimately determined by the Court at trial may also be well below the Merger Consideration for the reasons identified above. There are many examples of appraisal rights cases from other jurisdictions where fair value has been found to be less than the merger consideration.*

65 *Any amount payable as an interim award should not be such as to expose the Company to the risk that the eventual judgment will be less than the award. Unlike in Qihoo and Qunar, and particularly in light of the decision in Shanda Games, the Court cannot conclude with any confidence that the Merger Consideration is the fair value of the Applicants' shares at trial."*

53. The Court understands that the application of the *Shanda Games* minority discount principle is in practical terms accepted by the Applicants, or at the very least it is not disputed by them, as reflecting the jurisprudence in this jurisdiction as it currently stands.

54. Furthermore, as the Court has already indicated the Court accepts the Merger Consideration as the relevant basis for valuation in the absence of any further expert evidence at this stage upon the issue of fair value.

55. The Court also accepts for the various reasons which have been set out above that in the circumstances of this Application it is in the interests of justice to award an interim payment.

56. The final question therefore arises as to what is a lawful and suitable level of payment.

57. Given that the parties have declined at this stage to adduce expert evidence as to fair value that may assist the Court, the Court must decide quantum in accordance with the prescriptive requirements of O.29, r 12. The Court does not think it fit to order a sum of interim payment as sought in the Summons Application, but instead to order one subject to a discount of 15% of the amount claimed. The Court considers such amount to be both just and measured. In light of the limited material which has been made available to the Court, this discount is the most suitable one at which it can prudently arrive.

Conclusion

58. The Court therefore declines to grant an Order in terms of paragraph 1 of the Summons and instead grants an Order in terms of paragraphs 2 and 3.

59. The Court will hear the parties as to costs, if not agreed.

THE HON. JUSTICE McMILLAN
JUDGE OF THE GRAND COURT