

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

3
4 **Cause No: FSD 129/2016 (IMJ)**

5
6 **IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)**
7 **AND IN THE MATTER OF QIHOO 360 TECHNOLOGY CO. LTD**



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9 **BETWEEN:**

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1. **BLACKWELL PARTNERS LLC –
SERIES A**
 2. **CROWN MANAGED ACCOUNTS SPC
for and on behalf of CROWN/MASO
SEGREGATED PORTFOLIO**
 3. **MASO CAPITAL INVESTMENTS
LIMITED**

DISSENTERS/APPLICANTS

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AND:

QIHOO 360 TECHNOLOGY CO. LTD.

THE COMPANY/PETITIONER

Appearances:

**Mr. Robert Levy Q.C. instructed by Mr.
Rupert Bell of Walkers on behalf of the
Applicants (the “Dissenters”)**

**Mr. Richard Millett Q.C. instructed by Mr.
Dhanshuklal Vekaria of Harneys on behalf of
the Petitioner**

37 **Before:**

The Hon. Mr. Justice Charles Quin Q.C.

38 **Heard:**

18th January 2017

39 **Judgment delivered:**

26th January 2017

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HEADNOTE

Section 238 of the Companies Law — Whether dissenting shareholders can receive an interim payment in s.238 Petition proceedings or whether the provisions of s.238 are a self-contained statutory code which does not permit any discretionary overlap for an interim payment as provided for under GCR O.29 Part II.



JUDGMENT

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3 1. This is the hearing of a Summons issued by the Applicants on the 25th day of
4 November 2016 by each of Blackwell Partners LLC – Series A, Crown Managed
5 Accounts SPC for and on behalf of Crown/Maso Segregated Portfolio and Maso
6 Capital Investments Limited (collectively the “Dissenters”) seeking orders that:

7 *i.* Qihoo 360 Technology Co. Ltd. (the “**Petitioner**”) do make the following
8 interim payments pursuant to O.29 r.10 of the GCR 1995 (the “**GCR**”) (as
9 applicable pursuant to O.29 r.18 of the GCR):

10 a) US\$46,155,571.15 to Blackwell Partners LLC – Series A;

11 b) US\$10,125,124.20 to Crown Managed Accounts SPC for and on
12 behalf of Crown/Maso Segregated Portfolio; and

13 c) US\$35,719,304.64 to Maso Capital Investments Limited,

14 or such other amount/s as the Court considers fit (collectively the
15 “**Interim Payments**”).

16 *ii.* Upon provision by the Dissenters of bank wiring details to the Registrar of
17 the Financial Services Division (of the Grand Court of the Cayman
18 Islands), the Interim Payments shall be paid to the Dissenters out of the
19 funds held by the Court in account number 023-09492 within seven (7)
20 days;

21 *iii.* The costs of and incidental to the Summons be paid by the Petitioner; and

22 *iv.* Such further or other relief as the Court sees fit.



1 **BACKGROUND**

2 2. The Petitioner is a Cayman Islands exempted limited company whose operations and
3 business has overwhelmingly been conducted in the People’s Republic of China (the
4 “**PRC**”). The Petitioner’s 2015 Annual Report described it as “*a leading internet*
5 *company in China.*”

6
7 3. On the 11th January 2016: The Petitioner announced that it had entered into an
8 agreement and plan of merger dated the 18th December 2015 (“the **Merger**
9 **Agreement**”) with:

10 i. Tianjin Qixin Zhicheng Technology Co., Ltd., a limited liability company
11 incorporated under the laws of the PRC;

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13
14 ii. B Tianjin Qixin Tongda Technology Co., Ltd., a limited liability company
15 incorporated under the laws of the PRC;

16
17 iii. True Thrive Limited, an exempted company incorporated with limited
18 liability under the laws of the Cayman Islands;

19
20 iv. New Summit Limited, an exempted company incorporated with limited
21 liability under the laws of the Cayman Islands; and

22
23 v. (*Solely for the purposes of Section 6.19 of the Merger Agreement*), Global
24 Village Associates Limited and Young Vision Group Limited.
25



1 4. Immediately prior to the completion of the merger, the Petitioner's shares comprised of
2 Class A and Class B ordinary shares. A number of the Class A ordinary shares were
3 represented by American depositary shares ("ADSs"), 2 ADSs representing three Class
4 A ordinary shares, and were held by the Bank of New York Mellon, in its capacity as
5 the ADS depository. The ADSs were listed on the New York Stock Exchange.

6
7 5. The Dissenters were all shareholders of the Petitioner holding 329,097 shares.

8
9 6. It was a term of the Merger Agreement that all of the shares issued in the Petitioner
10 (including ADSs) would be cancelled and cease to exist for the right to receive
11 US\$51.33 per share in cash without interest and each ADS would have the right to
12 receive US\$77.00 in cash without interest (the "Merger Consideration") except for:

13
14 i. 3,534 Class A ordinary shares and 29,340,366 Class B ordinary shares
15 held by Global Village Associates Limited;

16
17 ii. 4,904,709 Class B ordinary shares held by Young Vision Group Limited;

18
19
20 iii. the Petitioner's treasury shares, which were cancelled with no payment or
21 distribution; and

22
23 iv. the ordinary shares held by the shareholders who validly exercised their
24 right to dissent from the Merger Agreement, which shares were cancelled
25 and ceased to exist in exchange for the right to receive the payment of fair
26 value of such shares as determined in accordance with s.238 of the
27 Companies Law.



1 7. The position of the Dissenters is set out in the First Affidavit of Manoj Jain, sworn on
2 the 25th November 2016.

3
4 8. The Dissenters maintain that the Petitioner entered into an agreement and plan of
5 merger, the effect of which was to take it private (the "**Merger**"). The buyer group
6 taking the Petitioner private was made up of certain members of the management of
7 the Petitioner and their affiliates and financing partners ("**Buyer Group**"). The
8 Dissenters contend that the vote in favour of a merger was essentially a foregone
9 conclusion because whilst management owned 25.4% of the Petitioner's shares, it
10 owned over 60% of the Petitioner's voting rights and therefore any vote in favour of a
11 merger was essentially a foregone conclusion.

12
13 9. As part of the Merger process, the Petitioner commissioned a report from JP Morgan
14 Securities (Asia Pacific) Limited ("**JP Morgan**"). JP Morgan's remit was to give an
15 opinion on the fairness of the Merger Price, from a financial point of view, to the
16 holders of shares unaffiliated with the Buyer Group.

17
18
19 10. On the 18th December 2015: JP Morgan provided its independent opinion – confirming
20 that it considered that the Merger Consideration represented the fair value of the
21 shares. Taking the JP Morgan report at fair value i.e. US\$51.33 per ordinary share, the
22 total value of the Dissenters' shareholdings is approximately US\$16,892,549.01.



- 1 11. The Dissenters complain that JP Morgan relied solely on unverified and unchecked and
2 untested numbers provided by management, and submit that the JP Morgan report
3 should be treated with the utmost caution.
- 4 12. There is considerable controversy and difference of opinion between the Petitioner and
5 the Dissenters relating to the value of the JP Morgan report.
- 6
7 13. On the 18th December 2015: The Petitioner's board approved the Merger Agreement,
8 the Plan of Merger and the transactions contemplated thereby, and resolved to
9 recommend the approval and authorisation of the Merger Agreement to the
10 shareholders.
- 11
12 14. On the 24th March 2016: The Dissenters wrote to the Petitioner setting out their
13 objections to the Merger, pursuant to s.238(2) of the Companies Law.
- 14
15 15. On the 30th March 2016: By way of a special resolution at an EGM which was
16 convened to consider the same, the Merger was approved. The Dissenters submit that
17 this was essentially a foregone conclusion due to management's control of such a
18 significant portion of the voting rights.
- 19
20 16. In mid-April 2016: The Dissenters received notices confirming the approval of the
21 Merger Agreement.
- 22
23 17. On the 5th May 2016: The Dissenters provided the Petitioner with further written
24 notices of dissent with regard to the Merger and demanded the payment of the fair
25 value of the shares pursuant to s.238(5) of the Companies Law.
- 26



1 18. On the 15th July 2016: The Plan of Merger was filed with the Registrar of Companies
2 who issued a Certificate of Merger on the same day, deeming the Merger effective on
3 the 15th July 2016.

4
5 19. On the 22nd July 2016: The Dissenters received an offer of the Merger Price for their
6 shares and the Petitioner submits that this is a fair value offer of US\$51.33 per ordinary
7 share which corresponds to the amount independently valued by JP Morgan.

8
9 20. The Dissenters were and remain of the view that the Merger Price was substantially
10 less than the fair value of the shares.

11
12 21. On the 31st July 2016: The Dissenters rejected the Petitioner's offer and without
13 prejudice to their position demanded a payment on account of the sum of
14 US\$16,892,549.01 (equivalent to the Merger Consideration).

15
16 22. On the 8th August 2016: The Dissenters' attorneys wrote to the Petitioner's former
17 attorneys to request further information concerning the holding structure of the
18 Petitioner, and in particular the transfer out of Tianjin Qisi Technology Co. Ltd from
19 the group structure, which the Dissenters alleged caused value to be transferred out of
20 the Petitioner without appropriate consideration. In the same letter, the Petitioner was
21 asked to confirm that security would be given for the Dissenters' claim.

22
23 23. On the 9th August 2016: The Petitioner's then attorneys wrote to the Dissenters'
24 attorneys stating that the Dissenters were not entitled to, nor would they receive, any
25 security in respect of their fair value claims.



1 24. On the 16th August 2016: The Dissenters' attorneys sent the Petitioner's attorneys a
2 valuation memorandum setting out the Dissenter's assessment as to fair value.

3
4 25. On the 31st August 2016: The Dissenters' attorneys again requested that an interim
5 payment on account be made to the Dissenters in the amount of US\$51.33 per share.
6 This was rejected by letter dated the 2nd September 2016 from the Petitioner's then
7 attorneys.

8
9 26. On the 7th September 2016: The Dissenters' attorneys wrote to the Petitioner's
10 attorneys requesting payment of the Merger Consideration as an interim payment and
11 foreshadowed this application for an interim payment if the Petitioner did not comply.

12
13 27. On the 20th October 2016: The Petitioner's attorneys wrote to say that they would be
14 willing to pay the sum of US\$92m into Court.

15
16 28. On the 26th October 2016: A Consent Order was filed in which:

17 i. *The Company shall pay the sum of US\$92,000,000 (Ninety two million*
18 *United States Dollars) (the "Funds") into Court as security for payment*
19 *by the Company to the Dissenting Shareholders of the fair value of the*
20 *shares of the Dissenting Shareholders to be determined in this Petition*
21 *(the "Fair Value") with such payment to be made to the Company's*
22 *attorneys in the Cayman Islands on or before 12:00 p.m. (Cayman Islands*
23 *time) on the 28th October 2016, and to be paid into Court as soon as*
24 *practicable thereafter.*

25
26 ii. *The balance of the said sum in excess of the Fair Value shall be paid out to*
27 *the Company upon determination thereof by Agreement or final Judgment*
28 *in these Proceedings, but otherwise the Funds shall be paid out only*
29 *pursuant to an Order of the Court or by agreement of the Parties.*

30
31 iii. *Payment of the said sum shall be without prejudice to the Dissenting*
32 *Shareholders' rights to claim interest pursuant to s.238(ii) of the*
33 *Companies Law, other otherwise.*



1 iv. *The Petitioner shall have liberty to apply to reduce the amount of the said*
2 *sum held in Court, but only in the event that following the exchange of*
3 *expert reports pursuant to paragraph 11 of the directions made in this*
4 *matter by consent as agreed on or about 24th October 2016*
5 *("Directions"), in the opinion of both experts nominated pursuant to the*
6 *Directions ("Experts") the Fair Value of all the Dissenting Shareholders'*
7 *shares (in aggregate) is less than the amount of the Funds, and if so then*
8 *any reduction shall only be to the total amount which is the higher Fair*
9 *Value opined by either.*

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11
12 29. On the 21st December 2016: Mangatal J. ordered that:

- 13 i. *The time for uploading documents to the electronic data room in*
14 *accordance with paragraph 4 of the Order for Directions dated 25*
15 *October 2016 (the "Order") be extended to the 10 January 2017.*
- 16
17 ii. *The time for service or exchange of any factual affidavit evidence in*
18 *accordance with paragraph 10 of the Order be extended to 10 January*
19 *2017.*
- 20
21 iii. *The time for exchange of experts' reports in accordance with paragraph*
22 *11 of the Order be extended to 6 March 2017.*
- 23
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25 iv. *Paragraph 20 of the Order be amended to read that the trial be fixed not*
26 *before 29 May 2017.*
- 27
28 v. *The Petitioner shall convene a management meeting in accordance with*
29 *the request of the Dissenting Shareholders' expert dated 1 December 2016*
30 *on or before 14 January 2017.*
- 31
32 vi. *The Petitioner shall provide additional responses to the request made by*
33 *the Dissenting Shareholders' expert by letter dated 1 December 2016 on*
34 *or before 10 January 2017, including but not limited to the attempts which*
35 *have been made by the Petitioner to obtain information from third parties.*
- 36
37 vii. *Where the response of the Petitioner is that the documents do not exist, the*
38 *Petitioner shall provide an affidavit verifying:*
- 39 a) *What searches have been undertaken to locate the documents, and*
40 *where;*
41 b) *The results of those searches; and*
42 c) *That in the deponent's knowledge, information and belief the*
43 *document requested does not exist.*
- 44
45 viii. *The Dissenting Shareholders' costs of and incidental to the Summons be*
46 *paid by the Petitioner, such costs to be taxed on the standard basis if not*
47 *agreed."*
- 48



1 **THE POSITION OF THE DISSENTERS**

2
3 30. The Dissenters apply pursuant to GCR O.29 r.10 and submit that an application for
4 interim payment can be made in any action no matter how the action is commenced –
5 pursuant to GCR O.29 r.18.

6
7 31. The Dissenters rely upon GCR O.29 r.12(c) which provides that:

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

- 9
10 12. *If on the hearing of an application under rule 10, the Court is satisfied -*
11 (a) *that ...; or*
12 (b) *that ... ; or*
13 (c) *that if the action proceeded to trial the plaintiff would obtain*
14 *judgment against the defendant for a substantial sum of money*
15 *apart from any damages or costs, the Court may, if it thinks fit,*
16 *and without prejudice to any contentions of the parties as to the*
17 *nature or character of the sum to be paid by the defendant, order*
18 *the defendant to make an interim payment of such amount as it*
19 *thinks just, after taking into account any set-off, cross-claim or*
20 *counterclaim on which the defendant may be entitled to rely.”*

21
22
23 32. The Dissenters rely upon GCR O.29 r.18 which provides that the preceding rules apply
24 with necessary modifications to any counterclaim or proceedings other than by writ
25 *“where one party seeks an order for an interim payment to be made by another.”*

26
27 33. Accordingly, it is the position of the Dissenters that interim payments are available in
28 s.238 proceedings and on an application by a Respondent. The Dissenters submit that
29 according to GCR O.29 r.12, an order can be made if the Court is satisfied that if the
30 matter proceeded to trial, one party would obtain judgment against another for a
31 substantial sum of money.
32



1 34. Furthermore, the Dissenters submit that under GCR O.29 r.12 they are entitled to an
2 interim payment “*of such amount as [the Court] thinks just...*”

3
4 35. It is the Dissenters’ position that at the very minimum, on the balance of probabilities,
5 at trial the Dissenters will receive at least the Merger Price of US\$16,892,549.01 and
6 that is the minimum interim payment that the Court should make.

7
8 36. The Dissenters have presented two expert valuation reports. One is from Mr. Gwynn
9 Hopkins (“**Mr. Hopkins**”) – exhibited to his affidavit of the 24th November 2016. The
10 second is a supporting report from Mr. Bruno Arboit (“**Mr. Arboit**”) – exhibited to his
11 affidavit of the 7th January 2017. Mr. Arboit is also a valuation expert from Zolfo
12 Cooper and agrees with Mr. Hopkins’ valuation. There is no expert valuation evidence
13 on behalf of the Petitioner before this Court.

14
15 37. Mr. Hopkins has undertaken his analysis on two bases:

- 16
17 *i.* First he has conducted a discounted cash flow valuation; and
18 *ii.* Secondly he has conducted an analysis based on capitalisation of earnings.

19
20 38. It is not challenged that these are both very well recognized analyses – routinely
21 performed by experts in share valuations, share valuation disputes and fair value
22 proceedings.



1 39. Mr. Levy contends that the discounted cash flow approach tends to be the favoured
2 approach of both the Courts and the experts in the jurisdictions with a mature fair value
3 appraisal jurisprudence (such as Delaware and Canada), and was adopted in *In re*
4 *Integra Group*¹.

5
6 40. Mr. Hopkins' discounted cash flow analysis fixes upon a range of values. His ultimate
7 range of figures is based upon the results of both his discounted cash flow and his
8 multiples analysis. He then arrives at a range between approximately US\$124.4 and
9 US\$290.49 per share. As Mr. Jain points out in his affidavit at paragraph 8: "*This*
10 *would value the Dissenters' shares at between US\$41 million and US\$95.6 million.*"
11 Mr. Levy highlights the fact that the Petitioner's payment in of US\$92 million is below
12 Mr. Hopkins' highest figure.

13
14 41. Accordingly, the Dissenters submit that in light of the expert evidence of Mr. Hopkins
15 as supported by Mr. Arboit, a range of between approximately US\$124.40 and
16 US\$290.00 per share bringing a total range of between US\$41 million and US\$95.6
17 million and the Petitioner's own payment in of US\$92 million – in the absence of any
18 expert evidence to the contrary the Court can feel safe to make an interim payment
19 towards the bottom end of Mr. Hopkins' range in the sum of US\$40,939,666.00.

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¹ [2016 (1) CILR 192].



1 42. Mr. Levy highlighted the fact that the Petitioner's payment in of US\$92 million
2 pursuant to GCR O.22 was made before the Petitioner saw Mr. Hopkins' Report and
3 submits with some force that it is nigh on inconceivable that such a substantial sum
4 would have been paid into Court without anxious consideration by the Petitioner and
5 without the benefit of expert advice as to quantum.

6
7 43. Mr. Levy submits that in the absence of any evidence to the contrary, the only credible
8 explanation for the Petitioner's payment into Court in the sum of US\$92 million is that
9 the Petitioner plainly considered that the Dissenters will recover a substantial amount
10 in excess of the Merger Price at the trial to determine the fair value pursuant to s.238 of
11 the Companies Law.

12
13 44. The Dissenters contend that the GCR are sufficiently flexible to deal with the
14 possibility that the fair value will be assessed in a sum less than US\$92 million. The
15 Dissenters further submit that GCR O.29 r.17 provides that the Court can, when giving
16 judgment (that is when determining the fair value of the Dissenters' shares following
17 trial) make an order with respect to an interim payment as may be just. And this would
18 plainly include requiring the Dissenters to repay any "overpayment".



POSITION OF THE PETITIONER

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3 45. The Petitioner’s Petition under s.238(9) is not a proceeding to provide relief to a
4 dissenting shareholder for an accrued cause of action, but is instead a statutory process
5 for establishing and creating a liability on the part of the Petitioner, which the statute
6 then expressly states is to be enforced in the same manner as other orders of the Court
7 are enforced (See s.238(13)). Accordingly, the Petitioner submits that an application for
8 an interim payment must be seen in that context.

9
10 46. The Petitioner’s position is that the Applicant (i.e. the Dissenters) for an interim
11 payment under GCR O.29, r.10(3)(a) has to be a claimant who is owed a debt or is
12 entitled to damages, or some other sum (such as restitution or an account) . The
13 Dissenters are not entitled to any of those kinds of payment. Their only rights are the
14 right to be paid fair value for their shares, to be established by agreement under s.238(8)
15 or Petition under s.239(9). Critically, there is nothing in the section that indicates that
16 the Dissenters are entitled to any payment in advance of agreement under s.238(8) or
17 the Court valuing the fair value of the shares on the hearing of the Petition under
18 s.238(9).

19
20 47. Mr. Millett submits that the application for an interim payment under GCR O.29 r.10
21 and r.12 should be dismissed because the s.238 Petition is governed by a self-contained
22 statutory code and there is no scope for any discretionary overlap for interim payments
23 under GCR O.29. It is the Petitioner’s position that any interim payment subverts the
24 statutory scheme and the Court cannot and should not order it.



1 48. Mr. Millett submits that the sum of US\$92 million bears no relation to any particular
2 value relied on by the Dissenters. The Petitioners complain that Mr. Jain, in his
3 affidavit has not verified it as the actual sum due, nor has Mr. Hopkins or Mr. Arboit –
4 the Dissenters’ valuation experts on this application. It is simply the figure that the
5 Petitioner paid into Court as security pursuant to GCR O.22.

6
7 49. The Petitioner’s contention is that the fair value offer under s.238(8) is US\$51.33 per
8 share or US\$16,892,549.01. Mr. Millett highlights the fact that despite initially
9 threatening an application for an interim payment of that sum on the 31st July 2016
10 when rejecting the Petitioner’s fair value offer, the Dissenters have not actually ever
11 thereafter applied for an interim payment in that amount, but have applied for an
12 amount many times greater.

13
14 50. The Petitioner’s main objection is that the Dissenters’ application for an interim
15 payment is inconsistent with the statutory scheme and the Petitioner’s liability – at
16 which this application is directed. The Petitioner’s liability arises under, and only
17 under, the scheme established by s.238 of the Companies Law as to the fair value for
18 the Dissenters’ shares in the Petitioner. The Petitioner submits that the section is very
19 clear that upon dissent the Dissenters’ only rights are the rights to be paid at fair value
20 and the specific rights conferred by s.238(12) and s.238(16).

21
22 51. Under s.238 the Petitioner can be liable to pay fair value to the Dissenters on three
23 bases:





- i. If the dissenting shareholder accepts the fair value offer under s.238(8);
- ii. If the Petitioner and dissenting shareholder agree another amount; and
- iii. In default of an agreement the Court determines the fair value of the dissenting shareholder's shares under s.238(11).

52. Accordingly, the Petitioner maintains that it has no actionable liability to make any payment until the Court has determined the fair value and, it is only at that point that the Petitioner becomes liable at all. To put it another way: s.238 is a statutory process for establishing and creating a liability on the part of the Petitioner which the Companies Law expressly states is then to be expressly enforced in the same manner as other orders of the Court are enforced. Therefore, an application for an interim payment is outside the self-contained statutory code.

53. If the Dissenters reject the Petitioner's fair value determination and opt for the Court's determination, the Dissenters assume the risk that the Court will determine the fair value at a lower sum than the Petitioner's original determination.

54. Mr. Millett submits that s.238 does not entitle Dissenters to an advance on the disputed amount by way of an interlocutory determination of value. Section 238 envisages that there is a single process of determination by the Court after a trial followed by payment and the Court should not entertain what is, in effect, an interlocutory dress rehearsal of expert evidence followed by the performance. The Petitioner contends that the Dissenters' application is an attempt to interpose an additional stage to the s.238 Petition process for which the legislation did not provide.



1 55. The Petitioner contends that the payment into Court is US\$92 million and provides no
2 basis for the interim payment sought. Indeed, the Petitioner submits that the terms in
3 the Consent Order expressly agreed the sum of US\$92 million to be security for the
4 payment by the Petitioner to the Dissenters of the fair value of their shares to be
5 determined in the Petition as stated in paragraph 1 of the Consent Order. Furthermore,
6 paragraph 2 of the Consent Order expressly states that the US\$92million is only to be
7 paid out pursuant to an Order of the Court or by agreement of the parties.

8
9 56. Accordingly, it is the Petitioner's view that the whole point of the payment into Court
10 was precisely to avoid the threatened application for an interim payment and not to
11 provide the basis for such an application.

12
13 57. Mr. Millett submits that in the circumstances in which the Consent Order was agreed,
14 the "Order of the Court" referred to in paragraph 2 of the Consent Order clearly meant
15 a final order following a trial of fair value and not an interlocutory order for an interim
16 payment in advance of the trial.

17
18 58. Accordingly, in these circumstances it is the Petitioner's position that the terms of the
19 Consent Order positively preclude any payment out of Court by way of an interim
20 payment, at least in the absence of any application by the Dissenters to vary the
21 Consent Order (which has not been made and could not be justified).

22
23 59. The Petitioner maintains that the Dissenters' application is a misguided and
24 opportunistic attempt by the Dissenters to take advantage of the Petitioner's payment
25 into Court. It is contrary to the statutory scheme laid down by s.238 of the Companies
26 Law. It is prohibited by the terms of the Consent Order and the figure sought is wholly
27 unsupported by the evidence adduced by the Dissenters.

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ANALYSIS AND CONCLUSION

60. The question I must ask myself is whether Dissenters are entitled to receive an interim payment in s.238 proceedings brought by the Petitioner or whether the provisions of s.238 are a self-contained statutory code which does not permit any discretionary overlap for an interim payment as provided for under GCR O.29 r.9.

61. If I find that the Dissenters are not entitled to an interim payment that is the end of the matter. If I find that Dissenters are entitled to an interim payment during the s.238 proceedings, I then must arrive at a “just” amount.

62. Interim payments are governed by GCR O.29 r.9-18. O.29 r.9 provides:

“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 and any reference to the plaintiff or defendant includes a reference to any person who, for the purpose of the proceedings acts as next friend of the plaintiff or guardian of the defendant.”*

In my view a fair value determination by the Court in s.238 proceedings comes within the interpretation of “interim payment” pursuant to GCR O.29 r.9 by constituting an “other sum” which the Petitioner will be liable to pay to the Dissenting Shareholders together with a “fair rate of interest, if any, to be paid by the Company...”



1 63. GCR O.29 r.18 provides:

2 ***“Counterclaims and other proceedings (O.29, r.18)”***
3

4 18. *The preceding rules in this Part of this Order shall apply with the*
5 *necessary modifications, to any counterclaim or proceeding*
6 *otherwise than by writ, where one party seeks an order for an*
7 *interim payment to be made by another.”*
8

9 Section 238 petitions are in my view “*proceedings otherwise than by writ, where one*
10 *party seeks an order for an interim payment to be made by another”* pursuant to GCR
11 O.29 r.18 and therefore GCR O.29 r.9-18 apply to these proceedings.
12

13 64. O.29 r.12(c) provides that:

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

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

17
18 (a) *that the plaintiff has obtained an order for an account to*
19 *be taken as between himself and the defendant and for any*
20 *amount certified due on taking the account to be paid; or*
21

22 (b) *that the plaintiff's action includes a claim for possession*
23 *of land and, if the action proceeded to trial, the defendant*
24 *would be held liable to pay to the plaintiff a sum of money*
25 *in respect of the defendant's use and occupation of the*
26 *land during the pendency of the action, even if a final*
27 *judgment or order were given or made in favour of the*
28 *defendant; or*
29

30 (c) *that if the action proceeded to trial the plaintiff would*
31 *obtain judgment against the defendant for a substantial*
32 *sum of money apart from any damages or costs, the Court*
33 *may, if it thinks fit, and without prejudice to any*
34 *contentions of the parties as to the nature or character of*
35 *the sum to be paid by the defendant, order the defendant*
36 *to make an interim payment of such amount as it thinks*
37 *just, after taking into account any set-off, cross-claim or*
38 *counterclaim on which the defendant may be entitled to*
39 *rely.”*
40
41



1 I find that, based on the Petitioner’s offer dated the 22nd July 2016 to pay the Merger
2 Price of US\$51.33 per share to the Dissenters, and, the payment into Court by the
3 Petitioner of US\$92 million – pursuant to GCR O.22 – that the Dissenters will obtain
4 “*judgment against [the Petitioner] for a substantial sum of money*” pursuant to GCR
5 0.29 r.12.

6
7 65. Section 238 establishes a right on behalf of Dissenters to be paid the fair value of their
8 shares. On any view the Dissenters in these proceedings will receive from the
9 Petitioner a substantial sum as fair value for their shares.

10
11 66. Accordingly, I agree with Mr. Levy that interim payments pursuant to GCR O.29 r.10
12 and 12(c) are available in proceedings such as those pursuant to s.238 of the
13 Companies Law which were commenced by Petition and on an application by a
14 Respondent being the Dissenters.

15
16
17 67. Furthermore, I find there is some considerable force to the Dissenters’ reliance on the
18 dicta of Jones J in *Integra*² when he was dealing with s.238(11) and in particular the
19 issue of the Court requiring to determine the fair value together with a fair rate of
20 interest, if any, to be paid by the Petitioner upon the amount determined to be the fair
21 value. Although the Court did not specifically address an application for payment in
22 under GCR O.29 r.10 & 12, Jones J stated at paragraph 74:

23
24

² 2016 (1) CILR



1 “It could be said that the Respondents have been kept out of their money since July
2 2nd 2014, a date on which Integra made its written offer to pay Fair Value of
3 US\$10 per share pursuant s.238(8). For whatever reason, it did not offer to pay
4 this amount (or any lesser amount) on account pending the outcome of the
5 proceedings. It follows that Integra has had the use of the Respondent’s money for
6 more than a year.”
7

8 68. Like *Integra*, the Petitioner has had the use of the Dissenters’ funds for a considerable
9 time and there can be no question that absent an agreement between the parties, the
10 Court will determine a fair value in the s.238 proceedings and the Petitioner will have
11 to make a payment of the fair value to the Dissenters.
12

13 69. Finally, and for the sake of completeness, on the question of whether the GCR apply to
14 s.238 proceedings, I turn to GCR O.1 r.2. GCR O.1 r.2 specifically sets out certain
15 rules and circumstances in which the GCR shall not apply:

16 “Application (O.1, r.2)

17 2.

18 (1) Subject to the following provisions of this rule, these Rules shall
19 apply in relation to all proceedings in the Court.

20 (2) Except for Part I of Order 52 (Committal), Order 53 (Applications
21 for Judicial Review), Part III of Order 62 (Wasted Costs Orders)
22 and Order 103 (Confidential Relationships (Preservation) Law),
23 these Rules shall not apply to any criminal proceedings.
24

25 (3) The Probate Registry established pursuant to Rule 3 of the
26 Probate and Administration Rules (2008 Revision) shall continue
27 as part of the Civil Division of the Grand Court but these Rules
28 shall not apply to any application made under the Probate and
29 Administration Rules (2008 Revision).
30

31 (4) Except for Orders 3 (Time), 4 (Assignment, Transfer and
32 Consolidation of Proceedings), 5 (Mode of Beginning
33 Proceedings), 38 Part II (Writs of Subpoena), 39 (Evidence by
34 Deposition), 62 (Costs), 67 (Change of Attorney), 45-51
35 (Enforcement) and 52 (Committal) these Rules shall not apply to
36 any proceedings which are –
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- (a) governed by the Matrimonial Causes Rules (2005 Revision),
 - (b) governed by the Grand Court (Bankruptcy) Rules 1977, as amended,
 - (c) governed by the Companies Winding Up Rules 2008; or
 - (d) on appeal from civil proceedings in the Summary Court.
- (5) Notwithstanding the provisions of paragraphs (2) to (4) of this rule-
- (a) every affidavit or other document filed in the Court office shall comply with the requirements of Orders 41 and 66;
 - (b) every judgment and order made by the Court shall comply with the requirements of Order 42;
 - (c) except in the case of petitions in proceedings governed by the Matrimonial Causes Rules (2005 Revision), every originating process or other document required to be served by these Rules or any other rules in connection with any civil proceedings shall be served in accordance with Orders 10 and 65;
 - (d) Part I of Order 80 shall apply to every proceeding to which a person under disability is a party; and
 - (e) every interlocutory summons issued by the Court, including summonses issued in proceedings governed by the Matrimonial Causes Rules (2005 Revision) and those issued in proceedings under the Companies Winding Up Rules 2008, shall be endorsed in accordance with Order 32, rule 2(4), and Order 32, rules 2 to 8 shall apply to the hearing of such summonses.
- (6) All funds required to be paid into or out of Court, whether by order of the Court of Appeal, the Court, the Summary Court or otherwise, in both criminal and civil proceedings, shall be lodged, paid, invested and dealt with in accordance with the provisions of Order 92."



1 70. It is accepted that the drafting of Part XVI of the Companies Law (2016 Revision) and
2 in particular s.238 was heavily influenced by the law in Delaware and Canada. At the
3 time of the introduction of s.238 proceedings to protect dissenting shareholders' rights:
4 If the intention had been to exclude the GCR, it would have been a perfectly simple
5 exercise to amend GCR O.1 r.2(5) to add a carve-out provision. This could simply
6 have read "these rules shall not apply to petitions governing the rights of dissenting
7 shareholders pursuant to the new s.238 of the Companies Law." No such carve-out
8 provision was inserted into GCR O.1 r.2 and, therefore, the GCR must apply to s.238
9 petitions.

10
11 71. Accordingly, pursuant to GCR O.29 r.12 an order can be made if the Court is satisfied
12 that if the matter proceeded to trial (final determination of the fair value in this case)
13 the Dissenters will obtain judgment against the Petitioner for a substantial sum of
14 money. For the aforesaid reasons I find that the Dissenters are entitled to an interim
15 payment – pursuant to GCR O.29 r.9-18.

16
17 72. I turn now to the question of what, in the circumstances of this case, constitutes a
18 "just" amount. The learned Chief Justice Anthony Smellie in *Algoaibi v Saad*³,
19 considered GCR O.29 r.11(1). The learned Chief Justice noted that GCR O.29 r.11(1)
20 empowers the Court to order an interim payment

21 *"...of such amount as it thinks just, not exceeding a reasonable proportion of the*
22 *damages which in the opinion of the Court are likely to be recovered."*
23
24



³ [2012] (1) CILR 335

1 In that case the Chief Justice held that “likely” meant “proved in accordance with the
2 civil burden to be ultimately recoverable.”

3
4 73. I am satisfied that on the balance of probabilities the Dissenters will, at trial, obtain an
5 award in their favour and pursuant to GCR O.29 r.12 the award of an interim payment
6 must be such amount as the Court thinks “just” in all the circumstances of this case.
7

8 74. I indicated at an early stage of the proceedings on the 18th January 2017 that I was
9 reluctant to examine and make any decision based upon experts’ reports. I am still
10 reluctant. The Petitioner’s s.238 proceedings are at a fairly advanced stage. On the 21st
11 December 2016 Mangatal J ordered the exchange of experts’ reports to be extended to
12 the 6th March 2017. In Mr. Hopkins’ Report he comes to his conclusion based on “the
13 limited available information” and further adds that “extensive additional analysis and
14 considerably more information and explanations would be required to narrow the
15 range to a likely outcome of values.” What is of particular significance is that at
16 paragraph 3.4 of his report Mr. Hopkins states:

17
18 “This report does not constitute an expert witness submission on what the fair
19 value of Qihoo is or should be determined to be; not only is that outside the scope
20 of this engagement, but there has been insufficient time and insufficient
21 information to enable such a determination to be made.”
22
23
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25



1 75. In addition, in this application for an interim payment, there is no expert evidence
2 before me from the Petitioner as to what the fair value is or should be determined to be.
3 Consequently, because of the limited nature of the Dissenters' expert evidence, and the
4 absence of expert evidence on behalf of the Petitioner, I do not wish to stray into the
5 jurisdiction of the judge who will be making such a determination.

6
7 76. It is for the Judge hearing the Petition to come to a determination of the fair value of
8 the shares of all Dissenters after hearing expert evidence from both the Petitioner and
9 the Dissenters.

10
11 77. For the purposes of this application I have decided to award the sum of
12 US\$16,892,549.01 which is the Petitioner's own stated fair value of the shares
13 pursuant to s.238(8) – being US\$51.33 per share. Therefore, the award following on
14 this application is:

15

INTERIM PAYMENT (US\$)	DISSENTERS
\$8,474,839.65	Blackwell Partners
\$1,859,121.27	Crown Managed Accounts
\$6,558,588.09	Maso Capital Investments
TOTAL: \$16,892,549.01	

16
17
18 78. I am satisfied that on the balance of probabilities, at the trial of the Petition the
19 Dissenters will receive at least this Merger Price and that is the interim payment I order
20 be made in this case.



1 79. I will hear submissions and/or consider submissions in writing from counsel as to the
2 question of costs and, if necessary, the wording of the appropriate Order to be made as
3 a result of this ruling.

4

5 **Dated this the 26th January 2017**

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8 **Honourable Mr. Justice Charles Quin Q.C.**
9 **Judge of the Grand Court**