IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 115 OF 2019 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF EHI CAR SERVICES LIMITED

IN CHAMBERS

Appearances: Mr Richard Boulton QC instructed by Ms Caroline Moran and Mr Adam Huckle of Maples and Calder on behalf of the Company

Mr Robert Levy QC of counsel instructed by Mr Rupert Bell and Mr Patrick McConvey of Walkers on behalf of the Walkers Dissenters

Mr Matthew Hardwick QC instructed by Mr Rocco Cecere of Collas Crill on behalf of the Collas Crill Dissenters

Mr Shaun Maloney and Ms Marie Skelly of Ogier, on behalf of the Burford Dissenters

Before: **The Hon. Justice Kawaley**

Date of hearing: 18 November 2019

Draft Ruling Circulated: 22 November 2019

Ruling Delivered: 28 November 2019

HEADNOTE

Petition under Companies Law (2018 Revision) section 238-application by dissenters for interim payments-governing principles-GCR Order 29 rule 12-whether interim payment award should be disclosed-GCR Order 29 rule 15

RULING ON APPLICATIONS FOR INTERIM PAYMENTS

Overview

1. The present applications are interlocutory applications arising in proceedings commenced by a Petition presented by eHi Car Services Limited ("the Company") on June 24, 2019 under section 238 of the Companies Law (2018 Revision), a matter substantively assigned to Parker J. The Summons for Directions is due to be heard before Parker J in January 2020.

2. Summonses have been issued requesting the Court to require the Company to make interim payments under Order 29 rule 12 of the Grand Court Rules (the "GCR") by various groups of dissenters who exercised their right to dissent in relation to a Merger Agreement concluded on February 18, 2019 and approved at an extraordinary general meeting of the Company's members on April 8, 2019. The Walkers Dissenters' Summons was filed on September 27, 2019, the Collas Crill Dissenters' Summons was filed on October 25, 2019 and the Burford Dissenters' Summons was filed on November 12, 2019 (together the "Dissenters" or the "Applicants").

3. It was common ground that this Court is jurisdictionally competent to order interim payments to the Applicants, who were clearly likely to recover a substantial sum at trial. The parties were principally unable to agree the quantum of those payments and, incidentally, the legal principles governing the determination of what level of interim payment is "just" in the legal and factual context of proceedings in which the Court will be determining the disputed question of how much the Applicants should be paid for their shares; not whether or not the Company is liable to compensate the Applicants for their compulsorily acquired shares in the Company.

4. The Applicants contended that the most reliable interim amount for the Court to choose was the Merger Consideration of US$6.125 per share, the same price the Company offered as representing the fair value of the shares under section 238(8) of the Companies Law. In any event, the Court had a broad discretion to award what was "just". The Company contended that the "irreducible minimum" amount was US$2.52 per share, reflecting the lower range identified by Duff & Phelps (who provided a fairness opinion before the Merger agreement was approved by shareholders) and the upper minority discount amount identified by Mr Worsnip in a Report prepared for the purposes of the present applications. The Court's discretion was, the Company contended, limited to adopting the lowest undisputed amount the Applicants might recover at trial.

5. The difference between the parties was not a trifling one. The Applicants sought amounts totally in the region of US$100 million. The Company contended that roughly 40% of that sum should be awarded.

The governing procedural rules

6. Applications for interim payments may be made under GCR Order 29 rule 10. GCR Order 29 rule 12 crucially provides as follows:

> *"(1) If on the hearing of an application under rule 10, the Court is satisfied -*
>
> *(a) that the plaintiff has obtained an order for an account to be taken as between himself and the defendant and for any amount certified due on taking the account to be paid; or*
>
> *(b) that the plaintiff's action includes a claim for possession of land and, if the action proceeded to trial, the defendant would be held liable to pay to the plaintiff a sum of money in respect of the defendant's use and occupation of the land during the pendency of the action, even if a final judgment or order were given or made in favour of the defendant; or*
>
> *(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."* [Emphasis added]

7. The Applicants contended that the Court's discretion was ultimately a broad one, being *"to order the defendant to make an interim payment of such amount as it thinks just"*. Mr Hardwicke QC invited the Court to take note of the contrasting language under GCR Order 29 rule 11 (1), applicable to damages claims, which empowered the Court to:

> *"order the respondent to make 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 by the plaintiff after taking into account*

any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely." [Emphasis added]

8. It was argued on behalf of the Applicants that it was only in the context of damages claims that the Court was expressly required to have regard to what was "*a reasonable proportion of the damages ...likely to be recovered*", and that the "irreducible minimum" amount likely to be recovered was a relevant criterion. Mr Boulton QC countered that in substance the legal test for determining the appropriate interim payment amount was substantively the same under both rules.

9. In my judgment there is no material distinction between the test as relates to damages and non-damages claims under GCR Order 29 rules 11 and 12, respectively. The additional wording in rule 11 merely speaks to the need for the Court to have regard to damages likely to be recovered in relation to a damages claim, which often requires a somewhat *sui generis* analysis. For instance, some torts are actionable *per se* without proof of damage and the need to consider whether more than nominal damages should be ordered may therefore arise. In other cases, what damages are likely to be recoverable may be either quite simple or extremely difficult to assess. The critical function of the Court under both rules, however, is to determine what amount of interim payment (if any) is just taking into account:

(a) "*any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely*" (rule 11);

(b) "*any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely*" (rule 12).

10. Clearly, the Court must in both cases consider what amount is appropriate for an interim payment having regard to what sum the applicant is likely to recover at trial. The clearest support for this conclusion may be found in the pre-CPR English case of *Shearson Lehman Inc-v-Maclaine, Watson Ltd* [1987] 1 W.L.R. 480 at 492A where Nicholls LJ (as he then was) opined as follows:

"*By both rule 11 and rule 12 the court is authorised, if it thinks fit, to 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.*"

The correct approach to ascertaining the just amount of an interim payment

11. Mr Hardwick QC and Mr Levy QC rightly submitted that the concept of awarding an "*irreducible minimum amount*" emanates from Walker J (as he then was) dealing with a rule 11 case in *Chiron Corporation-v-Murex Diagnostics Limited* [1996] Ch D 578 at 584. He spoke of an application for an interim payment being an application:

> "*in relation to part (I might say, an irreducible minimum part) of a claim which may be capable of being established without venturing far into disputed areas of fact or law-provided that the irreducible minimum part is substantial enough to justify the trouble and expense of an interlocutory application.*"

12. However, I prefer and accept Mr Boulton QC's analysis that this approach applies with equal force to rule 12 claims as well, as a matter of general principle. The Court ought not to engage too deeply with the likely result at trial, by common accord. As a matter of common sense, the undisputed minimum amount which is shown to be recoverable when the application for an interim payment is heard is at least a good starting point in terms of ascertaining the just amount to be paid. The Applicants, somewhat beguilingly, invited the Court to have regard to the approach adopted by this Court in previous section 238 cases, focussing more on the ultimate interim payment amount than on the way in which it was selected. In past cases where interim payments have been awarded, this Court has either awarded the Merger Consideration/section 238(8) offer or, in one instance, that sum discounted by 15% to allow for the possibility for a minority discount. But when the previous decisions are properly analysed, it is ultimately clear that the approach to determining the appropriate interim payment amount broadly corresponds to the English "irreducible minimum" approach.

13. Mr Hardwick QC did place reliance on the observation of Mangatal J 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*": *Re Qunar* FSD 76 of 2017 (RPJ), Judgment dated August 8, 2017 (unreported) (at paragraph 82). In my judgment, there is a fundamental distinction between the "principle" of whether or not an interim payment award should be made and the consequential question of what approach should be adopted for the purposes of ascertaining the appropriate amount of such an award. Mangatal J went on to discuss factors relevant to the decision as to whether or not an award should be made, notably:

(a) prejudice to the dissenters of being denied access to "*money that may ultimately be found by the Court to be due to them*" (paragraph 85); and

(b) prejudice to the company "*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" (paragraph 89).

14. It is clear from the Judge's summary of the company's submissions in *Re Qunar* that in that case the company was not positively asserting that it would be contending at trial that fair value was lower than the level of its own section 238(8) fair value offer. It merely argued as a matter of principle that reliance could not be placed on the company's own initial fair value assessment. This proposition was roundly rejected with Mangatal J pivotally holding as follows:

> "*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…*"

15. Earlier that same year, Quin J in *Re Qihoo* FSD 129/2016 (IMJ), Judgment dated January 26, 2017 (unreported), declined to consider the expert report but concluded:

> "*78. I am satisfied that…at the trial of the Petition the Dissenters will receive at least this Merger Price and that is the interim payment I order to be made in this case.*"

16. In *Re Zhaopin Limited,* FSD260 of 2017 (RMJ), Judgment dated June 22, 2018 (unreported), the main controversy was whether or not any interim payments should be awarded at all at an early stage of the section 238 proceedings with the company adducing no positive evidence in support of the proposition that the Court might well determine at trial a lower fair value than the company's own initial fair value offer. However, the company did argue that as a matter of law a minority discount had to be applied to the valuation process (as a result of the Cayman Islands Court of Appeal's March 8, 2018 decision in *Re Shanda Games* [2018 (1) CILR 352]). The possibility of this discount being applied was advanced as a basis for not awarding an interim payment at all. McMillan J concluded a fulsome consideration of the interim payment application, in which he approved the approach taken by this Court in the two earlier interim payment cases referred to above, as follows:

> "*51. …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 …*
>
> *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 presently stands.

54...the Court accepts the Merger Consideration as the relevant basis for valuation in the absence any further ex pert evidence at this stage.

55. The Court also accepts...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...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."

17. This Court's approach to interim payment applications in the specific context of section 238 petitions establishes the following approach to the quantification process:

    (a) it is considered inherently prejudicial to the applicants for them to be denied access to compensation for their shares;

    (b) it is considered inherently prejudicial to the company for it to be required to 'overpay' the dissenters at the interim stage, particularly if there are doubts about the recoverability of any overpaid sums;

    (c) in the absence of positive evidence or a cogent legal argument from the company pointing to a lower valuation being a possible outcome at trial, the merger consideration or the company's own initial fair value offer (typically the same amount) has been treated as the most suitable measure of the just interim payment award.

18. In my judgment the overarching principles which this Court has followed in assessing the appropriate quantum of interim payment awards in section 238 cases are, terminology apart, not materially distinguishable from the approach of the English courts both before and after the CPR. Those principles are perhaps most clearly captured in *Allan Nuttall Limited-v- Fri-Jado UK Limited* [2010] EWHC 1966 where Kitchen J (as he then was) summarised them as follows:

    "*11. In my judgment, the task of the court can be expressed rather more simply as being to ascertain what sum it can safely be assumed the claimant will recover in any event.*"

The factual and legal context of the present case

19. The competing prejudices are not heavily weighted on one side or the other. The Applicants rely solely on the inherent prejudice of being denied access to "their money" in circumstances where they will in any event be compensated for any delay in interest and the Company's ability to pay whatever is ultimately adjudged to be the fair value is not in doubt. The Company relies on the inherent prejudice of paying more than is ultimately adjudged to be fair value in circumstances where the Applicants ability to repay any such sums is not (or not seriously) in doubt.

20. The prejudice of which the Applicants complain is relevant to the question of whether or not an interim payment should be awarded, an issue which is not in controversy in the present case. The prejudice of which the Company complains is highly relevant to the quantification of the interim award, but (as I suggested in the course of argument) is somewhat diluted by the fact that the Company is unable to positively assert a risk that any overpayments will not be recoverable. Nonetheless, it cannot be denied that it is inherently prejudicial for a litigant to be required to pay on an interim basis more than is ultimately determined to be payable at trial. There are no material exceptional circumstances which justify a departure from the general approach to determining what is a just amount for the purposes of GCR Order 29 rule 12, namely ascertaining "*what sum it can safely be assumed the claimant will recover in any event.*"

21. The present case appears to be emblematic of past section 238 litigation with the Company seeking to maximise the commercial opportunities which motivated the Merger and privatization process; and with the Applicants seeking to maximize the commercial opportunities which the rights conferred on dissenters under section 238 make available to them. The Applicants are not the 'victims' of the majority in the traditional or ordinary sense; interim payment applications such as those presently before the Court do not engage notions of justice in the same way as might be the case if the applicants were retirees who had invested their life savings in the Company. Instead, the Court is required to do its best to translate submissions which are heavily infused with tactical jostling into a broad brush objective assessment of the minimum amount the Applicants will clearly recover, without unduly trespassing on the function of the trial judge. This sounds the need for approaching the extremes of the positions contended for by the protagonists with caution, when evaluating them, unless those positions are unarguably clear.

22. The Applicants merely flirted with the idea of advancing the proposition that the section 238(8) fair value offer of US$6.125, made by the Company on May 22, 2019 was legally binding. The orthodox view of the legal position at trial was articulated by Jones J in *Re Integra* [2016(1) CILR 192] at 205:

> "*27…There is no presumption that the fair value offer made…in accordance with s.238 (8) constitutes a minimum price and it is open to the court to determine that the fair value is less…*"

23. Mr Levy QC nonetheless strongly urged the Court to approach the Company's case that the Merger Consideration and section 238(8) fair value offer amount was in fact substantially less than the true fair value with great scepticism. Not least because the Extraordinary General Meeting Proxy Statement ("Proxy Statement") foreshadowed the fact that the Merger Consideration price would form the basis of the section 238(8) fair value offer. Mr Boulton QC invited the Court to bear in mind the timelines and the commercial reality that it was impossible for the Company to definitively ascertain the fair value between the date of the Merger Consideration being approved (April 8, 2019) and the fair value offer being made (May 22, 2019). The offer must be made within seven days of the merger agreement being filed. Fair value would be determined by expert evidence at trial, and the Company's Expert had not yet even been retained. He also pointed to the fact that the fair value offer had explicitly been made subject to the following reservation of rights:

> "*Notwithstanding this offer, the Company reserves the right to contend at trial that the fair value of your Shares was in fact lower than the Offer Price, including in light of any minority discount, which has not presently been factored into the Offer Price.*"

24. This express reservation of rights arguably reflected a change of direction from the following statement in the Proxy Statement upon which the Walkers Dissenters relied in their evidence and at paragraph 15 (1) of their Written Submissions and which Mr Hardwick QC for the Collas Crill Dissenters referred to in oral argument. The Applicants relied upon the second of the two following sentences:

> "*If you are considering dissenting, you should be aware that the fair value of your Shares determined under Section 238 of the Cayman Islands Companies Law could be more than, the same as, or less than the Per Share Merger Consideration in cash, without interest, for each Share of the Company that you would otherwise receive as consideration in the Merger. In addition, in any proceedings for the determination of the fair value of the Shares covered by a 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.*"[1] [Emphasis added]

25. Read in isolation, the second sentence is a clear representation as to the position the Company intended to take for the purposes of the present proceedings. Read together with the preceding sentence, the position is at first blush completely unclear. The two sentences are inconsistent with each other and it is not possible to resolve the inconsistency by any straightforward reading of the relevant passage. In hindsight,

[1] Page 194.

having regard to the qualification expressed in the section 238(8) fair value offer letter, one suspects that the better course would have been to either omit the second sentence altogether, or to recraft it to make clear that the intention was to rely on the US$6.125 price only for the purposes of the offer letter, but not for the purposes of the section 238 proceedings generally. As at the date of the Proxy Statement, the Company does not seem to have decisively contemplated that it would at any point positively contend for a different fair value than the "*Per Share Merger Consideration*".

26. The applicable commercial context does require the Court to approach the Company's contention that its initial fair value offer was a grossly overstated one with some scepticism. Where the fair value offer and the Merger Consideration are the same, as has generally been the case under section 238, that price is essentially one that while it represents a negotiated price may also be viewed as largely reflecting what the bidding parties are willing to pay. The protections under section 238 surely exist both (a) as a remedy for the confiscation of minority shareholdings at the whim of the majority, and (b) because there is an inherent commercial risk that minority shares may be acquired at less than their fair value. Because commercial actors ordinarily act in accordance with their own best interests, the proposition that large-scale commercial actors would agree to a Merger Consideration share price which reflected a share value which was roughly 2.5 times the true fair value is a surprising one.

27. Nonetheless, a negotiated share price and a professionally appraised fair value are arrived at by different processes and so will always potentially produce different results. And there is nothing commercially illogical about dissenting shareholders being offered what amounts to a premium with a view to avoiding the costs, distractions and uncertainties of section 238 litigation. When a bid is made by parties who are assured of obtaining the requisite shareholder approval for the proposed merger, what price minority shareholders will be willing to accept is unlikely to be far from the forefront of the bidders' minds.

28. The Company's position as to the irreducible minimum amount being US$2.52 per share rather than US$6.125 per share price assigned by the Merger Consideration and fair value offers was supported by reference to:

(a) the lowest value in Duff and Phelps February 18, 2019 fairness opinion, which gave a range of $3.31 to $5.22 (this was said to be the most reliable evidence before the Court)[2]; and

(b) the maximum Minority Discount, identified by Mr Worsnip in his Report (the Worsnip Report") prepared for the present application, which proposed a low of US$2.52 reflecting the arithmetic average of two alternative methods of approaching the Minority Discount calculation.

[2] Duff & Phelps also referred to a lower DCF figure which I mistakenly confused (in the circulation draft of this Judgment) for the minimum valuation figure relied upon by the Company in argument. The Applicants' counsel helpfully (and properly) pointed out this obvious error and I have as a result elevated the award by roughly 15%.

29. The Applicants attacked the Worsnip Report on both narrow technical and broad principled grounds. Most broadly, it was submitted that in the only section 238 case to consider whether a minority discount was appropriate after the Cayman Islands Court of Appeal decision in *Re Shanda Games*[3], Parker J held in *Re Qunar*, FSD 76 of 2017 (RPJ), Judgment dated May 2, 2019 (unreported) that no minority discount was appropriate because:

> "*401. I have decided that the Company's shares were liquid and well-traded and that their market trading price was reasonably representative of fair value....*
>
> *403... On the assumption that the Company was well run as at the valuation date there was no basis for applying any minority discount for inability to change management. Nor is there any evidence to* [suggest] *that the majority would oppress the minority...*"

30. In my judgment it would be inappropriate for me to assess the merits of the various assertions made in and (by way of argument) about the Worsnip Report. It suffices for me to conclude that the only previous decision of this Court to consider whether a minority discount should be applied, *Re Qunar*, casts doubt on whether there should be a discount at all in circumstances where:

(a) the level of majority control was broadly similar to that in the present case;

(b) there was also a comparatively liquid market for the shares; and

(c) the Worsnip Report was not presented as the evidence of the Company's trial Valuation Expert which the Company is firmly committed to deploying at trial.

31. Mr Boulton QC expressly acknowledged that the Proxy Statement made no mention of a minority discount. I agree with the Applicants that since the Court of Appeal had a year earlier in *Shanda Games* held that such discounts were potentially available in section 238 cases, one would expect that express mention would have been made of the omission of a clearly applicable discount as an additional premium reflected in the fair value price being assigned by the Company to Dissenters' Shares. The absence of any such reference does not to my mind suggest that a minority discount was actually

[3] [2018 (1) CILR 352].

included. Rather it diminishes the weight to be attached to the belated assertion in response to the present applications that such a discount is appropriate.

32. The Company's position in any event was that the Duff & Phelps Report, which was the second iteration of an initial Report prepared for an earlier bidding group, was the "*best evidence currently before the Court*" (Written Submissions, paragraph 120). This formed the basis for the Proxy Statement's assertion that:

> (a) "*taking into account the historical trading prices of the ADSs, the Special Committee and the Board believe that the Per Share Merger Consideration and the Per ADS Merger Consideration offered by the Buyer Group provide the attractive premium that appropriately reflects or exceeds the intrinsic present value of the Shares and ADSs, while allowing sufficient potential for future growth to attract the Buyer Group to enter into the Merger Agreement and complete the Merger…*"[4] and;
>
> (b) "*Duff & Phelps' discounted cash flow analysis resulted in… a range of implied values of the ADSs of US$5.49 to US$9.82 per ADS* [US$ 2.75 to US$ 4.91 per share]…"[5]

33. The Proxy Statement (at page 44) also asserted that the Merger Consideration reflected a premium of 26.9% over the closing trading price of the Shares on January 22, 2019, a premium of 22.9% on the 30 day weighted trading price average and a premium of 19.2% on the 60 day average price prior to January 22, 2019. The declining trading price was one of several factors relied upon to explain why the Revised Offer was less than the Initial Offer. The closing trading price on January 22, 2019 was US$4.825 (US$9.65 per ADS). The parties did not, of course, advert to this price as a relevant benchmark, with more extreme figures being contended for on each side.

34. The Walkers Dissenters submitted that the relevant trading date for valuation purposes was later: the Valuation Date (April 8, 2019). In their Skeleton Argument, the Collas Crill Dissenters submitted:

> "*80. The reality (well known to eHi) is that the Collas Dissenters acquired the majority of their eHi shares following the press announcement of the Original Proposed Transaction in January 2018. It does not make sense to simply ignore*

[4] Page 44.
[5] Page 74.

(1) these actual trading volumes in an assessment of marketability; and (2) the reality that the shares were heavily traded as at the 8 April 2019 Valuation Date."

35. It appeared to me (although this was not common ground) that there was a market for the Shares on or about the Valuation Date and that the Company tacitly admitted in the Proxy Statement that the trading price was one of various relevant factors for assessing the fair value of the Shares. The trading price before the Merger was announced is in my judgment potentially relevant to determining the just interim payment amounts. Parker J is the trial judge, and he recently held that the market price in liquid shares was "*reasonably representative of fair value*": *Re Qunar.*

Findings: the just interim payment amount

36. My task is "*to ascertain what sum it can safely be assumed the claimant will recover in any event*": per Kitchen J in *Allan Nuttall Limited-v- Fri-Jado UK Limited* [2010] EWHC 1966 (at paragraph 11). The need for precision is less than it might otherwise be because the ability of the Applicants to repay any sums which are overpaid is not in doubt. These Petition proceedings do not require pleadings and it is presently unclear exactly what the Company's case at trial on fair value will be. Accordingly, the irreducible minimum amount is far hazier at this stage than it might otherwise be the case in ordinary civil litigation.

37. I have little difficulty in rejecting the Applicants' contention that it would be just to award interim payments based on the section 238(8) fair value offer. That offer, made on May 22, 2019, was expressly qualified and the Company has positively asserted that it will contend that a lower value is fair at trial. That said, the Proxy Statement arguably initially represented that the Merger Consideration would be relied upon by the Company in these Petition proceedings. And it is surprising that the need to apply a minority discount was not mentioned in the Proxy Statement. The suggestion that the fair value of the Shares is as low as $2.75 (the bottom of the Duff & Phelps range) seems inherently improbable, even accepting that the $6.125 fair value offer was intended to include a generous premium. The closing trading price on January 22, 2019 was US$4.825.

38. Mangatal J rightly observed in *Re Qunar* FSD 76 of 2017 (RJP), Judgment dated August 8, 2017 (unreported), in a passage upon which Mr Levy QC relied:

> *"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 the circumstances."*

39. That was a case where it seems that the petitioner company was opposing the principle of any interim award and no adjudication took place between competing levels of potential award. The present case appears to be the first one in this jurisdiction where the principle of an interim award has been agreed and the quantum has been the central issue in dispute. This case is not, however, the first case in which it was positively asserted that interim payments should be awarded at a level lower than the Company's own fair value offer. In *Re Zhaopin Limited,* FSD260 of 2017 (RMJ), Judgment dated June 22, 2018 (unreported). McMillan J discounted the fair value offer amount by 15% to take into account the possibility that a minority discount would be applied at trial.

40. I would add to Mangatal J's observation that the Company's own fair value offer "*must...count for something*" that the market value of the Shares must also "*count for something*" where such a market exists, as arguably was the case at the Valuation Date of April 8, 2019. It would be a surprising result if the Court were to conclude at trial that the fair value of the Shares was not only far lower than the explicitly incentivized Merger Consideration price, but was also far lower than the trading price of the Shares as well.

41. The best available evidence before me, which was admittedly not canvassed in argument, suggests that the trading price was on any view well in excess of the bottom of the Duff & Phelps range of US$3.31 (the closing price on January 22, 2019 was US$4.825), which figure (US$3.31) the Company contended was the most reliable evidence before the Court at this stage. This factor justifies an award which is somewhat higher than the bottom of the range, but not dramatically higher as I have not taken into account the possibility of a minority discount at all for the purposes of the present application. This is because it seems implausible (to me at this stage) that a minority discount if appropriate would not have been mentioned by Duff & Phelps or the Company in its Proxy Statement.

42. As already noted above, I consider I have greater freedom to depart cautiously from a strict "irreducible minimum" amount approach because no concerns exist about the Applicants' inability to repay any sums which are found to have been overpaid. In a context in which the parties appeared to me to be primarily jockeying for tactical advantages at a comparatively early stage in the proceedings, my broad justice concern,

43. by way of the exercise of a residual discretion, has been to avoid conferring an unfair advantage on one side or the other. However, the predominant focus of my approach has been to identify the minimum amount I am satisfied the Applicants will likely recover in any event.

44. In all the circumstances of the present case, I find that the just amount of the interim award the Applicants should be granted, reflecting my best assessment on limited information as to the sum they are likely to recover in any event, is an award based on a share price of US$4.00 per share plus interest at the agreed rate of 2.375% pursuant to the Judgment Debts (Rates of Interest) Rules. The Company, as I understand it, agreed to this rate for the purposes of the present application only and without prejudice to its right to contend for a different rate of interest at trial.

Summary

45. Where the preconditions for the Court to consider granting an interim payment have been met, determining what is a just amount of an interim payment for the purposes of GCR Order 29 rule 12 will in most cases entail ascertaining "*what sum it can safely be assumed the claimant will recover in any event.*" The Court should avoid conducting a "mini-trial" and, so far as is appropriate and possible, rely on valuation data the Company does not (or cannot credibly) dispute at the interim payment application stage. For the reasons set out above, I have determined that the "just" amount of the interim payment the Applicants are entitled to be paid is US4.00 per share, approximately 65% of the Company's own fair value offer. That offer was not cast in stone. It was made on terms that the right to contend for a lower fair value amount should be assessed at trial.

46. Unless any party applies by letter to the Court to be heard as to costs, the costs of the present applications shall be in the Petition or in the cause.

POSTSCRIPT ON DISCLOSURE OF INTERIM AWARD

47. Before the draft of this Judgment was finalized, the Dissenters requested that in accordance with the usual practice this Judgment should not be disclosed to the trial judge because it would prejudice their fair trial rights. The Company invited the Court to publish this Judgment as it was the sole party under the Rules entitled to object and the reasons for this decision should be available for consideration in other similar applications. GCR Order 29 rule 12 critically provides as follows:

"***Non-disclosure of interim payment (O.29, r.15)***

15. The fact that an order has been made under rule 11 or 12 shall not be pleaded and, unless the defendant consents or the Court so directs, no communication of that fact or the fact that an interim payment has been made, whether voluntarily or pursuant to an order, shall be made to the Court at the trial, or hearing, of any question or issue as to liability or damages until all questions of liability and amount have been determined." [Emphasis added]

48. The prohibition on disclosure can either be waived by the paying party or the Court. The paying party alone is empowered to consent presumably because the paying party may, as in the case of payment into court, be concerned that the very fact of making a payment may be construed by the trial judge as an admission of liability in a case where liability is disputed. The Court is presumably empowered to permit disclosure in the public interest. The Supreme Court Practice 1999 Volume 1 commentary on the English pre-CPR version of this rule (at paragraph 29/15/1) misleadingly implies that only the Court may authorize disclosure of an interim payment. The said commentary cites an example of the Court exercising its discretion to publish reasons for an interim payment in the public interest: *British & Commonwealth Holdings plc-v- Quadrex Holdings Inc.* [1989] Q.B. 842, CA. The corresponding rule under the CPR is drafted in a simpler way which reinforces the fact that it is for the paying party to consent to disclosure[6] and eliminates any basis for contending that the interim payment disclosure prohibition simply mirrors that in relation to payments into court under GCR Order 22[7]. This provides some, admittedly indirect, support for the straightforward construction I have adopted in relation to GCR Order 29 rule 15.

49. In the present case, the Company as the paying party (a) consents to publication of the present Judgment and (b) contends that there is a public interest in the reasons for the interim payment awards being freely available. The Applicants/ Dissenters have made no admissions against interest or other concessions which can conceivably prejudice their position at trial. No view expressed in this Judgment about the merits of the case, made without reference to any evidence which will be deployed at trial and solely for

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[6] CPR Part 25 paragraph 25. 9 provides as follows:

"*25.9 The fact that a defendant has made an interim payment, whether voluntarily or by court order, shall not be disclosed to the trial judge until all questions of liability and the amount of money to be awarded have been decided unless the defendant agrees.*"

[7] This confusion is reflected both in the commentary on Order 29 rule 15 in the 1999 White Book and in the brief discussion on GCR Order 29 rule 15 at paragraph 13.5 of Deborah Barker Roye, '*Civil Litigation in the Cayman Islands* ', 3rd edition.

the purposes of the present applications, can sensibly be relied upon by any party at trial.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT