IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 227 OF 2017 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (AS REVISED)

AND IN THE MATTER OF XINGXUAN TECHNOLOGY LTD

Appearances:	David Chivers KC, Farrah Sbaiti, Marie Skelly and Greg Coburn of Ogier (Cayman) LLP on behalf of the Dissenter Mac Imrie KC, Malachi Sweetman and Dane Muspratt of Maples and Calder (Cayman) LLP on behalf of the Company
Before:	The Hon. Justice David Doyle
Heard:	5 May 2023
Draft Judgment Circulated:	19 May 2023
Judgment delivered:	26 May 2023

HEADNOTE

Determination of an application for an interim payment in proceedings under section 238 of the Companies Act

JUDGMENT

Introduction

1. On Friday 5 May 2023 I heard oral submissions in respect of this matter and reserved judgment. I now deliver my judgment.

2. As long ago as November 2017 petitions pursuant to section 238 (9) of the Companies Act (the "Companies Act") were filed for the determination of the fair value to be paid by Xingxuan Technology Ltd, formerly known as Xiaodu Life Technology Ltd (the "Company"), together with a fair rate of interest, if any, in respect of the shares of Waterwood 020 Project Limited (the "Dissenter") in the Company pursuant to section 238 (11) of the Companies Act, the Dissenter having dissented to a plan of merger between the Company and a wholly owned subsidiary of Rajax Holding formed for the purpose of merging with the Company, Rajax Merger Sub Limited ("Rajax Sub") which was effected on 24 August 2017 (the "Merger"). Unusually for a section 238 proceeding it was not a take private of a listed entity but rather a sale of the Company to a third party purchaser.

3. It was not until January 2023 that the Dissenter filed its application for an interim payment (the "Application"). It was initially to be heard by Segal J on 5 April 2023 but was subsequently reassigned to me and I was able to fit in a hearing on 5 May 2023.

4. The Company says in effect that this is not a straightforward case and the minimum irreducible amount the Dissenter may expect to obtain at trial may be zero. The Company adds that the Application raises new issues not previously dealt with in section 238 proceedings.

5. The Company complains about the Dissenter's delay in filing the Application and says that there is a risk that it will be unable to recover any overpayment made as the result of setting any interim payment too high. The Dissenter says that it was entitled to make the Application at any time and adds that there is a risk that the Company will not pay the amount it will be ordered to pay at trial.

6. I am very grateful for the assistance provided to the Court by the experienced and skillful attorneys who appeared in this case. David Chivers KC appeared for the Dissenter and Mac Imrie KC appeared for the Company. Their sensible cooperation and well focused use of the time allocated ensured that a proportionate and pragmatic approach was taken to the Application and that it was heard utilising just one day of valuable and increasingly scarce court time.

The relevant law

7. The attorneys referred to a lot of case law in their skeleton arguments and their separate bundles of authorities which included many duplicates. In future it would be of assistance if the attorneys in advance of the filing of their skeleton arguments could agree upon a joint bundle of authorities.

Order 29

8. Under Order 29 rule 10 (1) of the Grand Court Rules ("GCR") read together with Order 29 rule 18 a party may "at any time after" the relevant pleading has been served apply to the court requiring the other party to make an interim payment. Under rule 10 (3) the application must be supported by an affidavit which shall (a) verify the sum the application relates to and the grounds of the application and (b) exhibit any documentary evidence relied on in support of the application. Rule 10 (5) provides that notwithstanding the making or refusal of an order for an interim payment, a second or subsequent application may be made upon cause shown.

9. Order 29 rule 12 (c) of the GCR provides in effect that if the applicant would obtain judgment against the respondent "for a substantial sum of money":

> "The Court may, if it thinks fit, and without prejudice to any contentions of the parties as to the nature or character or 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". (my underlining)

10. Order 29 rule 15 of the GCR provides that 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 trial, or hearing, of any question or issue as to liability or damages until all questions of liability and amount have been determined. In *Re Ehi Car Services Limited* (FSD 115 of 2019 (RPJ) unreported judgment 28 November 2019), Kawaley J at paragraph 48 stated that "The Court is presumably empowered to permit disclosure in the public interest" and referred to *British & Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] Q.B. 842, CA. In *Ehi* the paying party contended that there was a public interest in the reasons for the interim payment awards being freely available. In *Ehi* the judgment was published with Kawaley J at paragraph 49 stating:

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

11. The law is well set out in Kawaley J's helpful judgment in *Re Ehi Car Services Limited* (FSD 115 of 2019 (RPJ) unreported judgment 28 November 2019) and I have full regard to it and the other authorities referred to by the attorneys.

12. The following points can be gleaned from Kawaley J's helpful and comprehensive judgment in *Ehi*:

(1) the court must consider what amount is appropriate for an interim payment having regard to what sum the applicant is likely to recover at trial (paragraph 10);

(2) the court ought not to engage too deeply with the likely result at trial. The approach to determining the appropriate interim payment amount broadly corresponds to the English "irreducible minimum" approach (paragraph 12). This is the concept of looking at "an irreducible minimum" namely such which may be capable of being established without venturing far into disputed areas of fact or law – provided that the irreducible minimum is substantial enough to justify the trouble and expense of an interlocutory application (Walker J in *Chiron Corporation v Murex Diagnostics Limited* [1996] Ch D 578 to 584 quoted by Kawaley J at paragraph 11 of his judgment in *Ehi*);

(3) Kawaley J at paragraph 13 of *Ehi* referred to Mangatal J's judgment in *Qunar* (FSD 76 of 2017 (RPJ) unreported judgment 8 August 2017) and two factors relevant to the decision as to whether or not an award should be made (a) prejudice to the dissenters of being denied access to "money that may ultimately be found by the Court to be due to them"; 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";

(4) Kawaley J noted at paragraph 14 of his judgment that in *Qunar* 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. Kawaley J referred to Managatal J's statement that "… 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 …";

(5) Kawaley J at paragraph 15 referred to Quin J's judgment in *Qihoo* (FSD 129 of 2016 (IMJ) unreported judgment 26 January 2017) where Quin J declined to consider the expert report but concluded:

> "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.";

(6) Kawaley J at paragraph 16 referred to McMillan J's judgment in *Zhaopin Limited* (FSD 260 of 2017 (RMJ) unreported judgment 22 June 2018) where the company had adduced 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. The company did argue however that as a matter of law a minority discount had to be applied to the valuation process and this was advanced as a basis for not awarding an interim payment at all. Kawaley J quoted extracts from McMillan J's judgment including the following:

> "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 …

54 … the Court accepts the Merger Consideration as the relevant basis for valuation in the absence of any further expert evidence at this stage …

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";

(7) Kawaley J at paragraph 17 of his judgment in *Ehi* referred to "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.";

(8) Kawaley J at paragraph 18 quoting from English authority felt that the overarching principles were most clearly captured by the words of Kitchin J (as he then was) in *Allan Nuttall Limited -v- Fri-Jado UK Limited* [2010] EWHC 1966:

> "… 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." (my underlining);

(9) Kawaley J recorded at paragraph 19 that the Applicants' ability to repay any sums was "not (or not seriously) in doubt" and at paragraph 20 that "the Company is unable to positively assert a risk that any overpayments will not be recoverable";

(10) "… the Court is required to do its best to translate submissions which are heavily infused with tactical jostling into a broad brush 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." (paragraph 21) (my underlining);

(11) "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." (paragraph 26);

(12) "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." (paragraph 27);

(13) Kawaley J referred at paragraph 28 to the Worsnip Report "prepared for the present application" but at paragraph 30 considered "it would be inappropriate for him to assess the merits of the various assertions made in and (by way of argument) about the Worsnip Report …" and noted that "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";

(14) Kawaley J at paragraph 36 stated that his task was "to ascertain what sum it can safely be assumed the claimant will recover in any event" adding that

"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." Kawaley J stated that it was unclear 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." (my underlining);

(15) At paragraph 38 Kawaley J referred to the comments of Mangatal J in *Qunar* that "what the Company says about fair value is an important factor when the Court is considering what is just in all the circumstances";

(16) Kawaley J at paragraph 42 stated at this comparatively early stage of the proceedings his "broad justice concern 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." (my underlining);

(17) "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." (paragraph 44); and

(18) "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 US$4.00 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." (paragraph 45)(my underlining).

13. I do not apply Kawaley J's judgment as a statute but it is a useful summary of the well established legal principles in this area of the law. Mr Chivers was right to stress that, although the irreducible minimum approach is referred to in the authorities, the relevant rule requires the Court, when it is satisfied that an interim payment is appropriate, to arrive at an amount "it thinks just".

Determination

14. I now turn to my determination of the Application.

The task of the Court

15. My task, based on the limited evidence and argument presented to me at this interlocutory stage, is to decide whether I think it fit to order the Company to make an interim payment of such amount as I think just. What sum can it safely be assumed the Dissenter will recover at trial?

16. I consider all the evidence and in particular focus on the evidence in opposition to the Application, limited and unsatisfactory as it is, and I consider the arguments and my task

is to arrive at a determination as to whether an interim payment is appropriate in this case and if it is to then arrive at a just amount.

17. I refer to Kawaley J's high level statement at paragraph 42 of *Ehi* (merged into paragraph 43) that at a comparatively early stage in the proceedings, his "broad justice concern, by way of the exercise of a residual discretion, has been to avoid conferring an unfair advantage on one side or the other". At this interlocutory stage with limited evidence and submissions that has also been my broad concern. I have focused on ascertaining what just sum I can safely assume the Dissenter will recover. I have also taken into account the justice of the case and the need to preserve the position pending the outcome at trial.

18. What the Company has previously said about fair value is, at the very least, an important factor when the Court is considering what is just in all the circumstances.

19. Two other important factors are (a) possible prejudice to the Dissenter of being denied access to money that the Court may at trial find to be due to it particularly if there is a risk that the Company will not pay the amount ordered to be paid and (b) possible prejudice to the Company if at trial the trial judge determines the fair value to be less than the amount ordered by way of interim payment, particularly if there is a risk that the Dissenter will not repay the amount by which the interim payment exceeds what the trial judge ultimately assesses as fair value.

20. At this interlocutory stage the court has to resort to a somewhat high level broad brush assessment of the available evidence and arguments and do its best to arrive at a just solution. I accept that in some cases a just solution may involve making no order.

21. The authorities caution against interlocutory mini trials but Mr Imrie, who has considerable experience of section 238 cases, adds reference to an English first instance judgment of Coulson J sitting in the Queen's Bench Division Technology and Construction Court in *Trebor Bassett Holding Limited (in liquidation) v ADT Fire and Security Plc* [2012] EWHC 3365 (TCC). Coulson J accepted at paragraph 8 that it is not desirable for an interim

payment application to become a mini-trial: "But at the same time, the court should not decline to entertain an application merely because the parties have chosen to put in a good deal of material; that is almost inevitable in high value or complex TCC cases …". For my part I would not wish to encourage parties to section 238 proceedings in the Cayman Islands to bombard the court with excessive material during the interlocutory skirmishes and turn such into mini-battles between non-independent "consulting experts". With the established jurisprudence in this area of the law competent, sensible and experienced attorneys should be able to advise their clients on agreeing matters such as discovery and interim payments without the necessity of embarking on extremely expensive interlocutory skirmishes which take up a lot of scarce court time and sometimes do little to advance the best interests of the parties. Parties are duty bound to assist the court in the furtherance of the overriding objective and should be slow to reject sensible advice from their attorneys to compromise matters.

The Merger Consideration and the Company's fair value offer

22. As can be seen from the well established authorities in the Cayman Islands 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" (Kawaley J in *Ehi*). I accept, of course, that the fact that the Company has previously asserted in the Merger Agreement that the merger consideration represents fair value is not legally binding on the Company and the Company can argue for a lower interim payment and lower fair value. Once a petition is filed there is no presumption that the deal price will equate to fair value but for determination of interim payment applications it may be a useful starting point and is an important factor for the Court to have regard to.

23. The merger consideration in the case presently before the court was referred to at Section 2.2 of the Merger Agreement as follows:

"(a) Merger Consideration. Based on the Valuation (as defined below) of Xiaodu, the aggregate consideration for the Merger shall be US$480,000,000 ("Merger Consideration"), as may be adjusted pursuant to Section 2.10 below, payable by Rajax in the following manner at the Closing:

(i) Subject to Section 2.2(b) and Section 2.6 below, US$280,000,000 in the form of U.S. dollar cash without interest (the "Cash Consideration") shall be apportioned among and payable to the Xiaodu Shareholders as set out in column #5 of Schedule 2 attached hereto; provided that Rajax shall be entitled to hold back and refrain from paying such portion of the Cash Consideration allocated to the Undecided Xiaodu Shareholders; and

(ii) subject to Section 2.6 below, 360,885,083 validly issued, fully paid, non-assessable Series G-1 Shares, par value US$0.0000125 per share, of Rajax (the "Rajax G-1 Shares") (such number of shares, the "Share Consideration"), with an issue price representing a US$6.4 billion pre-money valuation of the Rajax, shall be apportioned among and issued to the Xiaodu Shareholders as set out in column #7 of Schedule 2 attached hereto; provided that Rajax shall be entitled to hold back and refrain from issuing such portion of the Share Consideration allocated to the Undecided Xiaodu Shareholders."

24. Section 2.6 concerned Dissenting Shares. Section 2.8 concerned "Agreement of Fair Value" and read:

"Rajax, Rajax Merger Sub, Xiaodu, Baidu HK and other Approved Xiaodu Shareholders [I think it was common ground that the Dissenter did not fall within such definition but nothing turns on this] respectively agree that the Merger

Consideration represents the fair value of Xiaodu Shares for the purposes of Section 238 (8) of the Companies Law."

25. Section 2.9 dealt with the Valuation Conditions and subject to them stated that the equity value of the Xiaodu Group Companies as of the closing was US$480,000,000, provided certain pre-conditions were true and correct as of closing.

26. Schedule 2 set out the allocation of the Merger Consideration insofar as the Dissenter is concerned as follows:

Type of shares owned in the Company: Series A Preferred Shares
Number of shares owned in the Company: 125,000,000
Merger Consideration: US$42,000,000
Amount of cash to be paid in US$: US$24,500,000
Number of Rajax G-1 Shares to be allotted and issued as Share Consideration: 31,577,445.

27. The Company's written offer pursuant to Section 238 (8) of the Companies Act was as follows:

> "We refer to your notice of dissent dated 22 September 2017 in respect of the merger between Rajax Merger Sub Limited ("Merger Sub") and the Company ("Merger").
>
> In accordance with s.238(8) of the Law, the Company hereby makes this written offer to purchase all of your shares in the Company ("Shares") for the sum of US$24,500,000 plus 31,577,445 Series G-1 Shares of Rajax Holding (being the merger consideration allocated to you as per Schedule 2 to the merger agreement between Rajax Holding, the Merger Sub, the Company and Baidu (Hong Kong) Limited dated 24 August 2017 ("Merger Agreement"), but subject to any adjustments made pursuant to section 2.10 of the Merger Agreement.

> For the avoidance of doubt, the Company is offering to purchase your shares at the same price as the merger consideration allocated to you under the Merger Agreement.
>
> Please confirm your acceptance of this offer for the purchase of the Shares in writing, setting out the details of the bank account to which proceeds should be remitted.
>
> Please send confirmation of your acceptance initially by email to Mac Imrie .... and Steve Shin at .... with the original to follow by post c/o Maples and Calder, 53F The Center, 99 Queen's Road Central, Hong Kong (FAO: Mac Imrie/Steve Shin).
>
> Please note that the Company reserves all of its rights in relation to any arguments which may be made in any litigation pursuant to section 238 of the Law."

28. I accept that the burden of proof on a balance of probabilities is on the Dissenter to satisfy me that it is just to make an interim payment in the sum of US$42,000,000 or such other sum as this Court thinks fit. The Dissenter places reliance on the Merger Consideration and the written offer to it from the Company pursuant to section 238 (8) of the Companies Act and submits that the sum of US$42,000,000 is the just sum that should be awarded as an interim payment.

Is there any "positive evidence" from the Company pointing to a lower valuation being possible?

29. What "positive evidence" has the Company properly adduced pointing to a lower valuation being a possible outcome at trial? I turn now to the evidence adduced by the Company in opposition to the Application.

Mr d'Almeida's evidence on behalf of the Company

30. The Company's main focus was on an affirmation (wrongly stated and referred to as an affidavit) from Jaime C. d'Almeida ("Mr d'Almeida") of Kroll, LLC affirmed on 4 April 2023. I note Mr d'Almeida's previous valuation expert evidence experience and consulting valuation experience. I also note his stated experience in the Delaware Chancery Court in the United States of America and his educational work.

31. Mr d'Almeida at paragraph 6 says that he has been engaged by the Company:

> "…as a consulting expert in respect of this matter, since April 2018."

32. Mr d'Almeida at paragraph 7 adds that the Company has "asked me to set out my opinion as to the likely irreducible minimum that the Court can safely assume the Dissenter would receive at the hearing of the Petition" (my underlining). In a curiously and poorly worded paragraph 8 Mr d'Almeida states:

> "Given my role as a consulting expert to the Company, and that I will not be providing valuation evidence at the trial to determine fair value, I am not providing this opinion as an independent expert within the meaning of part B5.2 of the FSD Users Guide ("Part B5.2"). My understanding is that the technical description of my affidavits is "lay factual evidence" in the sense that I am setting out how, in my experience, I and other testifying valuation experts approach their valuation tasks, when opining on the fair value of a company. That said, my statements would be the same if I were providing evidence as an independent expert and subject to the requirements of Part B5.2." (my underlining)

33. Despite setting out his understanding that he was providing "lay factual evidence" his affirmation is littered with the words "in my opinion". See for example "my opinion" (paragraph 7), "in my opinion" (paragraph 23), "in my opinion" (paragraph 28) and at

paragraph 68 under the heading "Conclusion" Mr d'Almeida goes so far as to state in a somewhat partisan way:

> "For the reasons discussed above, in my opinion, if there is a number the Court can safely assume the Dissenter would receive at the hearing of the Petition, on basis of it being irreducible, that amount is $0."

34. There are many other paragraphs which do not provide "lay factual evidence" but simply offer opinions, views, comments, discussion, suggestions, arguments and submissions which should not be found in affidavits or affirmations of fact. Opinions are, of course, not "lay factual evidence". Despite its failings I do however, with some reservations, have regard to Mr d'Almeida's affirmation.

35. Mr d'Almeida refers to what he describes as the "Background" and focuses on the food-delivery business in the People's Republic of China ("PRC"). Reference is made to the Dissenter's investment of US$125 million on 24 July 2015 and the provisions of the Articles of Association and the Shareholder Agreements and the position in respect of a Liquidation Event. Mr d'Almeida also provided a summary of the Liquidation Preference and says at paragraph 16 that the effect was that in the event of a Liquidation Event including a Merger proceeds would be distributed to shareholders not on a pro-rata basis but rather in accordance with the liquidation preference provisions, sometimes referred to as a "waterfall". For a transaction including a value of up to US$396 million, all of that amount would go to the Series B Preferred Shareholders only, and the shareholders who owned only Series A Preferred Shares would receive nothing. For a transaction worth $696 million, the first $396 million would go to Series B and the next $300 million would go to Series A. Mr d'Almeida also refers to the Company operating at a loss and losing market share. Mr d'Almeida makes brief reference to the Merger Agreement.

36. At paragraph 23 of his affirmation Mr d'Almeida, who understands he is giving "lay factual evidence", appears to have thought it helpful to seek to present to the court his opinion on the following issue:

> "Based on my review of documents produced in this matter, in my opinion, it is not possible for the Court to safely assume that there will be any payment made to the Dissenter at the hearing of the Petition, because the fair value of their shares in the Company depends on whether the fair value of the Company exceeded US$396m on the Valuation Date, and there are numerous arguments as to why the transaction price of US$480m included a significant provision paid by Rajax to acquire the Company's assets notwithstanding its weak financial position" (my underlining).

37. Mr d'Almeida at paragraph 24 says that a conclusion that the total fair value of the Company's shares was less than US$396 million would result in the Dissenter's Series A Preferred Shares receiving $0. At paragraph 25 Mr d'Almeida stresses his view that the Liquidation Preference is important because it means that a difference of only about 17.5% between the Merger Consideration and the adjudged fair value (i.e. from US$480 million to US$396 million) would result in a value that does not exceed the threshold Series B liquidation preference amount.

38. Mr d'Almeida devotes a lot of his affirmation to a review of studies on synergies and at paragraph 26 expresses the view that "The opportunity for synergies in the merger is particularly high as a result of the similarities of the businesses." At paragraph 25 of his affirmation Mr d'Almeida expresses the somewhat speculative view that "allowing for an adjustment of the Merger Consideration to remove the value of synergies obtained by Rajax could alone result in a fair value of less than US$396m, and therefore less than the Series B liquidation preference. If the fair value is greater than US$396m but less than $696m, the impact of the liquidation preference means that the Dissenter would not recover all of the surplus (because there were other Series A shareholders who would have been entitled to half of such surplus): for example, for the Dissenter to recover US$25m for its shares, fair value would need to be determined to be US$446m."

39. Mr d'Almeida goes even further and at paragraph 29 including the footnote comes dangerously close to providing an opinion on the laws of the Cayman Islands as to synergies and at paragraph 30 including the footnote an opinion on the laws of Delaware. Mr d'Almeida at paragraph 33 provides his comments on "publicly-available information". This is not "factual lay evidence". It is simply comment.

40. Under the heading "There is no market to benchmark the value of the share consideration at paragraph" Mr d'Almeida states:

> "The Rajax Shares were part of the stated share consideration of US$200 million (the "Share Consideration") were not publicly traded and did not have a publicly-traded price by which they could be valued."

41. Mr d'Almeida at paragraph 43 offers the somewhat inconclusive view that:

> "Based on the information available to me, the accuracy of the valuation of the Share Consideration at the Valuation Date cannot be easily assessed nor safely assumed at this time for the purposes of an interim payment calculation. The value placed on the Rajax Shares may have been over or under-stated. Given that these were unlisted shares at the time, the experts and the Court would also have to consider the impact of any marketability or minority discounts on the value of the Share Consideration before its fair value can be assessed."

42. At paragraph 44 Mr d'Almeida says:

> "To the extent the fair value of the Share Consideration was found by the Court to be less than US$200 million, the irreducible minimum amount payable to the Dissenter following the fair value determination would be less than the US$42

million claimed by the Dissenter even if the Merger Consideration was only adjusted for the fair value of the Share Consideration."

43. I have also considered Mr d'Almeida's evidence under the headings "Capitalized Cash Flow Approach Indicates no Value Would Accrue to the Dissenter", "Lack of Funding Indicates Low to Zero Value".

44. Mr d'Almeida at paragraph 68 states that "any concluded value on a controlling-interest basis would need to be adjusted downward for lack of marketability and lack of control. That is, the shares owned by the Dissenter were minority shares in a private company, and the Dissenter had no ability to block a special resolution by other shareholders, let alone to block an ordinary resolution".

45. Mr d'Almeida at paragraph 50 says that "any conclusion of value on a controlling-interest basis (e.g., the Merger Consideration) needs to be reduced for the fact that the Dissenters' shares are minority shares by applying a discount for lack of control ("DLOC"), and reduced for the fact that the Dissenters' shares are not publicly-traded by applying a discount for lack of marketability ("DLOM")". At paragraph 54 Mr d'Almeida makes reference to a "control premium" being the inverse of a DLOC. Mr d'Almeida adds that "an observed premium paid in an acquisition may reflect not only the value of control but also the value of potential synergies between the target's and the acquiror's businesses."

46. At paragraph 56 Mr d'Almeida says that the DLOC is likely to be greater than 0% and offers the view that it is: "…inappropriate to set the irreducible minimum amount at the Dissenter's share of the Merger Consideration (whether US$42m or some other lower amount taking into account the issues with valuing the Share Consideration referred to above) without considering a further downward adjustment for lack of control".

47. At paragraph 65 Mr d'Almeida says that the likely amount for the DLOM will be greater than 0% and adds that it is "problematic to place a firm estimate on the minimum

irreducible fair value at this stage, and a payment of US$42 million or indeed any other amount may result in an overpayment."

48. I note Mr d'Almeida's evidence under the heading "Business Cooperation Agreement."

49. Under the heading "Interest" Mr d'Almeida is good enough to offer "no opinion" on whether or not interest should be awarded but notes the Dissenter's claim for interest on its interim payment "at a statutory rate of 2.375 percent". Mr d'Almeida does however see fit to offer his views on the rate of interest and refers to Cayman Islands caselaw on this point. Frankly, the court does not require a witness giving "factual lay evidence" to express views or provide a summary of Cayman Islands caselaw on interest and rates of interest. Matters of legal submissions should be left to duly qualified attorneys. I note Mr d'Almeida's statements as to equity markets and S&P 500 returns.

50. There is some considerable force in Mr Chivers' submission to the effect that Mr d'Almeida is not an independent expert providing objective assistance to the court and being subjected to cross-examination but is instead a partisan deponent trying his best to assist his client who retained him as long ago as April 2018 to protect its interests in these proceedings not as an independent expert but as a "consulting expert". The same criticism of not providing independent expert evidence however could equally be levied against Steve Taylor whose evidence I now turn to.

Mr Taylor's evidence on behalf of the Dissenter

51. In response to Mr d'Almeida's evidence the Dissenter filed the affidavit of Steve Taylor ("Mr Taylor") of Interpath Limited. I note Mr Taylor's stated experience. Mr Taylor's paragraph 10 is open to similar criticisms levied against paragraph 8 of Mr d'Almeida's affirmation. At paragraph 10 Mr Taylor states:

> "I have been engaged by Ogier ("Ogier") on behalf of Waterwood 020 Project Limited ("Waterwood" or the "Disssenters") to provide my opinion on the First

> Affidavit of Jamie d'Almeida ("d'Almeida 1"). In doing so, I am setting out how, in my experience, I and other valuation practitioners and/or experts approach the valuation of companies for the purposes of advising in relation to private transactions and/or when opining on fair value in a legal context. For the avoidance of doubt, the statements contained herein are made as if I were providing expert evidence and I was an independent expert subject to the requirements of part B5.2 of the FSD Users Guide." (my underlining)

52. I deprecate the apparent increasing use by parties to section 238 proceedings of non-independent "consulting experts" to assist them in interlocutory skirmishes. The hearings of applications for interim payments in section 238 proceedings should not be permitted to turn into unhelpful extremely expensive and time consuming mini-battles between non-independent "consulting experts".

53. Mr Taylor is no more independent than Mr d'Almeida in this context. Mr d'Almeida and Mr Taylor are not the independent valuation experts who will be appearing at trial in these proceedings. Their lack of independence affects the weight to be attached to their evidence.

54. Mr Taylor gives his version of the background to the merger.

55. At paragraph 19 Mr Taylor says that his "opinion" has been sought on Mr d'Almeida's evidence and he sets his opinions out in his affidavit.

56. I note what Mr Taylor has to say under the heading "Baidu Waimai and the PRC food delivery sector".

57. I note Mr Taylor's comments and criticisms of Mr d'Almeida's evidence. Mr Taylor does not share Mr d'Almeida's views on synergies. Mr Taylor criticises parts of Mr d'Almeida's evidence as speculation. Mr Taylor accepts as factually correct Mr d'Almeida's statement that a "Concluded Company Fair Value Below US$396 million would indicate $0 Fair

Value for the Dissenter's Shares in the Company", but adds at paragraph 43 of his affidavit that:

> "…it does not seem balanced."

58. Mr Taylor also sees fit to offer an "opinion". At paragraph 44 he says:

> "…I am of the opinion that what Mr d'Almeida calls synergies are not synergies and I believe it is largely the intrinsic goodwill of the Company, he provides no calculations, and he speculates about how Rajax did or did not value the Company."

59. Mr Taylor at paragraph 52 offers his view that:

> "It would appear that on balance of probabilities that the preference shares are more likely to be undervalued than overvalued at the Valuation Date."

60. Mr Taylor at paragraph 55 says that Mr d'Almeida has "attempted a discounted cash flow by applying a 60% discount rate to the Company's forecasts. I do not believe this is an appropriate methodology."

61. At paragraph 61 Mr Taylor refers to Mr d'Almeida's evidence that the only way that the Company had any value was if it was able to attract further investment. Mr Taylor at paragraph 62 says that Mr d'Almeida has ignored the other option which is to sell the Company.

62. Mr Taylor at paragraph 64 states that "at the Valuation Date no discounts for lack of control or minority discount is applicable. I would however apply a discount for the risk the transaction does not go through, but would ordinarily expect this to be no more than 5%."

63. At paragraph 72 Mr Taylor is good enough to recognise the topic of interest as "a legal matter" but cannot resist adding:

"2.375% appears a modest amount…"

64. At paragraph 75 Mr Taylor criticises Mr d'Almeida for being prepared to consider "all downward risks" but says "he has ignored upside potential such as the BCA adjustment."

65. Mr Taylor at paragraph 76 says that Mr d'Almeida's attempt at a valuation using an income approach is flawed and "He has performed a very simple mathematical calculation, and used a cost of capital of 60% that may not be appropriate." Mr Taylor says Mr d'Almeida's calculation is speculative "with no substance."

66. Mr Taylor adds:

> "77. He has not appreciated the value of goodwill in the Company and how this is fundamental. Rather he has mislabelled this as deal specific synergies not available to other parties. His conclusion relies heavily on incorrectly labelling synergies and assuming the Court will exclude them.
>
> 78. Whilst neither of us have seen a valuation of the non cash consideration – the preference shares, these were valued by the Company. And the subsequent evidence points to there being upside in the value compared with the Valuation Date. I found no market evidence to explain why the value of the merged entity increased by cUS$3 billion between the Valuation Date and February 2018 which must lead one to question the risk of undervaluation of the preferred shares.
>
> 79. Whilst I do not believe a discount for lack of marketability or minority should be applied at the date of the EGM, where he has set out his workings they are not necessarily balanced and have ignored option pricing techniques which tend to give lower discounts."

67. Counsel saw fit to place the evidence of Mr d'Almeida and Mr Taylor in a green bundle 3 volume 1 of 2 entitled "Expert Evidence". Much of the evidence presented by Mr d'Almeida and Mr Taylor amounted to opinion evidence. To be frank I did not find their evidence or the way in which it was presented particularly helpful in this case. I do however take it into account alongside the other evidence in respect of the Merger Consideration and the Company's own fair value offer.

Conclusions on the evidence

68. I take into account all the evidence before the court. Subject to the minority discount point, I have concluded that there is no "positive" or persuasive evidence or argument from the Company pointing to a lower valuation being a possible outcome at trial than the Merger Consideration and the Company's own fair value offer.

69. I refrain from writing anything more in detail as I do not wish to trespass on the trial judge's territory and it is not appropriate to conduct a mini-trial and seek to determine every point presently in dispute between the parties. Of necessity, I have adopted a somewhat high level broad brush approach.

Are there cogent legal arguments presented on behalf of the Company pointing to a lower valuation being possible at trial?

70. Are there any cogent legal arguments presented on behalf of the Company pointing to a lower valuation being a possible outcome at trial than the Merger Consideration and the Company's own fair value offer? I think not, save for the position in respect of a minority discount which I shall come to.

71. Mr Imrie's main arguments have their foundation in the evidence of Mr d'Almeida which is not a solid foundation for all of the Company's arguments.

72. Mr Imrie refers to various facts such as (1) the Company was loss-making and failing (2) it had lost the support of its major shareholders (3) the Dissenter could not freely sell or transfer its shares (4) there was a liquidation preference and the Dissenter's ability to recover its investment depended on a flow of funds waterfall (5) synergies (6) the Company was always privately held (7) lack of control and/or lack of marketability (8) BCA consideration was not cash and various other points all of which were well known to the Company when it agreed the Merger Consideration and made the statutory offer.

73. Mr Imrie stressed that various factors in this case made it more difficult to calculate the irreducible minimum and undisputed recoverable amount for interim payment purposes and suggested that a valuation analysis was necessary. Mr Imrie submitted that a reduced valuation of the Company at the valuation date of approximately 17.5% or more in comparison with the merger consideration would result in a fair value of less than the minimum amount required for the Dissenter to receive any pay-out at all.

74. In respect of interest Mr Imrie referred to the delay and submitted that interest should only be determined after fair value has been determined. Mr Imrie says that awarding interest at the default rate of 2.375% since the merger took place may confer a windfall on the Dissenter, which the Company will likely be unable to recover in the event of overpayment and therefore the determination of what is the fair rate of interest, if any, should be determined by the trial judge.

75. Mr Imrie referred to the Dissenter's delay in filing the Application and submitted that it would not be just to award an interim payment of US$42 million plus interest at this late stage.

76. Mr Imrie submitted that it would not be safe at this stage to award any interim payment to the Dissenter "for the reasons set out in d'Almeida 1".

77. Mr Imrie emphasised that once a petition is commenced there is no presumption that the deal price will equate to fair value. Mr Imrie placed reliance on Kawaley J's judgment in *Ehi* (which he described as the "leading case on interim payment in s238 actions") at

paragraph 22 quoting from Jones J in *Re Integra* 2016 (1) CILR 192 at 205. I, of course, accept that at the trial it is open to the court to determine that the fair value is less than the fair value offer. Kawaley J made it plain that in the context of a hearing considering an application for an interim payment the court is considering the payment of an amount as it thinks just in effect applying the "irreducible minimum amount" test. Furthermore at paragraph 17(c) when setting out the approach to the quantification process Kawaley J stated that 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 has been treated as the most suitable measure of the just interim payment award.

78. Kawaley J in *Ehi* also encouraged the court to approach a company's contention that its initial fair value offer was a grossly overstated one with "some scepticism" (paragraph 26) recognising however that "a negotiated share price and a professionally appraised fair value are arrived at by different processes and so will always potentially produce different results" (paragraph 27).

Minority discount

79. The statutory offer was made by letter dated 29 September 2017. In *Shanda Games Ltd v Maso Capital Investments Limited and others* 2018 (1) CILR 352 the Court of Appeal on 9 March 2018 had held that minority discounts were potentially available in section 238 cases. Subsequently, Lady Arden giving the judgment of the Judicial Committee of the Privy Council in *Shanda Games Ltd v Maso Capital Investments Ltd and others* [2020] UKPC 2 at paragraph 42 stated "in the absence of some indication to the contrary, or special circumstances, the minority shareholder's shares should be valued as a minority shareholding and not on a pro rata basis."

80. In powerful and well presented submissions on this point Mr Imrie sought, as it transpires successfully, to persuade the court to take into account the likelihood or at least possibility that the trial judge may apply a minority discount. To put it another way in view of Mr

Imrie's advocacy the Dissenter did not persuade me that it was, on a balance of probabilities, likely that the trial judge would not apply a minority discount.

81. Mr Imrie was fearless in his bold attack on the point made at paragraph 96 of the Dissenter's skeleton where Mr Chivers had stated that Mr Shin had noted that the Dissenters had "significant control". To Mr Chivers' credit he immediately accepted that this was a misquote. I do not seek to trespass on the task of the trial judge but based on the limited evidence and argument before me, and in the context of an application for an interim payment, I have concluded that I should act cautiously and factor in a generous discount for a possible minority discount being imposed by the trial judge.

82. In my judgment in the context of the determination of an interim payment application in the circumstances of this case I should, erring on the side of caution, factor in a possible deduction for minority discount. I have not lost sight of Mr Taylor's evidence of a no more than 5% discount "for the risk the transaction does not go through", in effect instead of a minority discount and his evidence that discounts for lack of control or lack of marketability are inapplicable in this case.

The Dissenter's delay in filing the Application

83. I should add that in my judgment the Dissenter's delay in filing the Application does not prevent this Court from making an interim payment Order. It is a factor to take into account in the exercise of this Court's discretion but taking into account all other relevant factors I have concluded that the justice of this case requires the Court to make an interim payment order. Ka Wai Cheung in his first affirmation at paragraph 41 stated that the issues with the Company's discovery have caused "extensive delay in the progress of the proceedings" and added:

> "The unexpected delay and the current economic situation globally (and in the PRC in particular) raised the Applicant's concerns about having such a significant

amount of money that remains unpaid. In light of the above, the Applicant instructed Ogier to renew its request for an interim payment from the Company."

84. Ogier subsequently wrote to Maples by letter dated 30 March 2022 renewing the request for an interim payment. I was unimpressed with the Company's approach of, on the one hand, complaining about the Dissenter's delay in filing the Application and, on the other, submitting that the Application was premature and should await the exchange of expert valuation reports. In short summary the delay does not prevent the Court in this case exercising its discretion to make an interim payment Order.

The overall discount in this case

85. Adopting a broad brush somewhat high level cautious approach I would for interim payment purposes make a 15% discount from the US$42 million which would reduce it to US$35,700,000.

Interest

86. In respect of interest I am content to go with 2.375%. There are however serious arguments from both sides in respect of delays and the responsibility for the same. I would therefore, again erring on the side of caution, reduce the period over which interest is to be calculated by 50%. I could not find a draft order amongst the 11 files presented to court. Counsel can do the necessary calculations and the total amount of the necessary payment which I have determined is just can be inserted into a draft Order which counsel should file within 5 days of the delivery of this judgment and the total sum must be paid within 21 days after the delivery of this judgment. I will determine the destination of the payment below after I have dealt with two other important points raised by the parties.

The Company's concern in respect of a risk that the Dissenter may not repay any overpayment

87. Firstly, the Company says that the Court must consider whether there is any prejudice to it in making a potential overpayment at this stage. The Company says this is a potential risk because the Dissenter is a BVI special purpose vehicle incorporated solely for the purpose of investing in the Company. The Company says that the Dissenter is owned by another BVI Company, which is in turn indirectly owned by a Chinese entity, which controls its decision-making powers. The Company adds that there is therefore a risk that the Company would not be able to recover any overpayment made as the result of setting the interim payment too high, as the Dissenter will likely distribute the funds up to its parent and be unable to enforce their recovery from the parent. The Company says it could be left to pursue a BVI entity with no remaining assets. The Company also placed reliance on Kawaley J's comments in his 28 April 2021 ruling at paragraph 48 where reference was made to "the Dissenter's seeming reliance on corporate formalities to evade what would otherwise be straightforward discovery obligations". In view of these concerns the Company wrote to the Dissenter on 26 April 2023 and asked it to agree that any interim payment would be paid into court or be kept in Ogier's interest-bearing trust account not to be released to any party save in accordance with a further order of the court. This was stated without prejudice to the Company's primary position that no interim payment should be awarded. The Company says that there is a clear risk to it of non-recovery if an interim payment greater than fair value is ordered.

The Dissenter's concern in respect of a risk that the Company will not pay the amount due to it

88. Secondly, the Dissenter raises an issue in respect of the payment of any amount due to it. Mr Chivers referred to correspondence requesting details of the financial position of the Company that have not been forthcoming.

89. On 9 January 2023 Ogier sent an email to Maples referring to their letter dated 24 November 2022 which they said raised queries as to the Company's ability to satisfy a

judgment on fair value. Ogier sent follow-up emails on 14 January 2023 and 1 February 2023 and stated:

> "The Company's failure to respond to the queries set out in [the 24 November 2022 letter] only serves to compound and exacerbate our client's reasonably held and serious concerns about the Company's ability to satisfy any judgment given in these s238 fair value proceedings.
>
> In order to allay our client's concerns, the Company is requested to provide substantive - and meaningful – responses (together with supporting documents as required) to the following questions:
>
> 1. Has the Company made any provision for its liability to satisfy a judgment as to the fair value of our client's former shareholdings in the Company?
> 2. If the answer to question 1 is affirmative, please state the amount of that provision and provide copies of the Company's financial statements which demonstrate that this contingent liability has been provided for since the merger became effective on 24 August 2017 (Effective Date).
> 3. If the answer to question 1 is negative, please explain the reason(s) why such provision has not been made and what has happened to the assets of the Company since the Effective Date.
> 4. Please confirm whether the Company has entered into any transactions on or after the Effective Date which have transferred any value or assets away from the Company and provide copies of any documents which relate to such transactions.
> 5. Please confirm the consideration received by the Company for each and every transfer or disposition of the Company's property which has occurred since the Effective Date and provide details as to what has happened to any consideration received.
> 6. Please confirm whether the Company is insolvent on either or both a cash flow and balance sheet basis.

7. Please provide details of the Company's debtors and creditors, and confirm the amount of any indebtedness of the Company and its debtors.

In light of the Company's incontrovertible duty to make proper provision for its liability to our client as a contingent creditor of the Company, we respectfully urge the Company to act with transparency in relation to this request for information, and provide full and frank responses to our questions.

All of our client's rights are reserved and in particular our client reserves its right to bring this correspondence to the attention of the Court should it become necessary."

90. These reminders elicited a somewhat inadequate, combative and terse 2 line response from Maples on 14 February 2023:

"Respectfully, there is no obligation on the Company to provide the information sought absent a Court order, and we have no instructions to do so …"

91. Ogier wrote further on 23 February 2023 referring to the Company's change of name and published information indicating that the Company "has now ceased its operations" and that its "server had already been shut down in 2021."

92. The Company simply says that the Dissenter is not entitled to the information requested and is in effect trying to obtain security through the back door which it could not obtain through the front door by way of an asset freezing injunction. In circumstances where an entity can reasonably be expected to provide financial information and fails to do so (for example security for costs cases against corporate entities, Proudman J in *Thistle Hotels Limited v Gamma Four Limited* [2004] EWHC 322 (Ch) at paragraph 12) certain adverse inferences can be drawn. Lord Sumpton in *Prest v Petrodel Limited* [2013] UKSC 34 at paragraphs 44 and 45 touched upon the position where a court may draw reasonable

inferences as to facts which a party has chosen to withhold. In a judgment delivered by the CICA on 4 May 2023 in *Trina Solar Limited* (Civil) Appeal No 9 of 2021 Birt JA and Field JA made reference to the court's willingness to draw inferences against a company for documentary and evidential failings. I accept that a court cannot engage in pure speculation and that there must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities before a court can draw reasonable inferences. I note the lack of substantive responses from the Company to the enquiries of the Dissenter as to its financial position (some of which seemed reasonable and cried out for a proper substantive response). I accept the Dissenter's prima facie justifiable concerns in respect of possible lack of payment by the Company after trial.

The destination of the interim payment

93. Taking the reasonable and prima facie justifiable concerns of the Company and the Dissenter into account I have arrived at the conclusion that in this case the safest option for both sides and which justice requires is that the interim payment should be paid into an Ogier interest bearing account until further Order or if this is not possible then into an interest bearing account which requires the authority of the Company and the Dissenter for any funds to be released again until further Order. In my judgment this Order will avoid conferring any unfair advantage on one side or the other and will do justice between the parties at this interlocutory stage.

Draft Order

94. I await a draft Order from counsel reflecting the determinations contained in this judgment within the next 5 days, for my approval.

Costs

95. If the same cannot be agreed I am content to deal with costs on paper with the parties filing concise written submissions (no more than 5 pages) and a draft of the costs Orders they seek within 10 days of the delivery of this judgment.

Publication of judgment

96. I am minded, following Kawaley J's lead in *Ehi*, to direct that this judgment be published in the public interest.

The Honourable Justice David Doyle
Judge of the Grand Court