



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

CAUSE NO: FSD 201 OF 2023 (IKJ)

**IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF CHINA INDEX HOLDINGS LIMITED**

Before: The Hon. Justice David Doyle

Appearances: David Quest KC and Rocco Cecere of Collas Crill LLP for the
Dissenters

Tom Lowe KC, Erik Bodden and Alecia Johns of Conyers Dill &
Pearman LLP for the Company

Heard: 18 July 2024

**Supplemental skeleton
arguments received:** 24 July 2024 and 31 July 2024

Judgment circulated: 20 August 2024

Judgment delivered: 23 August 2024

Company law – civil procedure – determination of application for an interim payment in proceedings pursuant to Section 238 of the Companies Act (2023 Revision) – Order 29 Part II of the Grand Court Rules - publication of judgment

JUDGMENT

Introduction

1. Under section 238 of the Companies Act (2023 Revision) (“Section 238”) a member of a company is entitled to payment of the fair value of that person’s shares upon dissenting from a merger.
2. By petition dated 19 July 2023 China Index Holdings Limited (the “Company”) in effect requested the Grand Court to determine the fair value of the shares in the Company held by Koa Capital L.P (“Koa Capital”) and 507 Summit LLC (the “Dissenters”) together with the fair rate of interest, if any, on the amount payable by the Company to the Dissenters.
3. In this case the consideration for a merger was about US\$14.8 million in total (the “Merger Consideration”) based on the rate of US\$1.00 per share (the “Merger Price”). On 3 June 2023, the Company made a written fair value offer to the Dissenters on the basis of the Merger Price.
4. By letter dated 4 August 2023 the attorneys acting for the Dissenters wrote to the attorneys for the Company seeking to agree the appropriate amount of an interim payment to be paid by the Company to the Dissenters. In paragraph 2 of the letter it was stated “... the Dissenters are willing to accept an interim payment of US\$1.00 ...”. The words of “per share” are missing but it is obvious that they should have appeared in that paragraph. On page 4 of that letter it is stated that “the Dissenters will accept US\$1.00 per share as an interim payment” and they also seek that interest be paid at the rate of 2.375% per annum from 17 April 2023 (being the date on which the merger became effective and the Dissenters’ shares were cancelled) to the date the interim payment was made. Although the letter was acknowledged on 11 August 2023 there appears to have been no substantive response to it.
5. By summons dated 15 January 2024 (the “Summons”) the Dissenters applied for interim payments on the basis of US\$2.27 per share. In an affidavit sworn on 24 May 2024 the Dissenters increased that figure to US\$2.31 per share. The Dissenters say that Koa Capital held 1,682,400 shares and seeks an interim payment in the amount of US\$3,886,344. 507 Summit LLC is stated to have held 4,986,302 shares and seeks an interim payment in the amount of US\$11,518,358. The total interim payment requested is US\$15,404,702.

The relevant jurisdiction and law

6. The relevant jurisdiction and law does not appear to be in dispute.
7. The relevant jurisdiction of the court to make an interim payment order in Section 238 cases is contained in Order 29 Part II of the Grand Court Rules (“GCR”) as confirmed by the Court of Appeal in *Re Qunar* 2018 (1) CILR 625.
8. Drawing heavily on previous authorities, in particular Kawaley J’s helpful judgment in *Re eHi Car Services Limited* (FSD unreported judgment 28 November 2019), I endeavoured to set out the relevant law in *Xingxuan Technology Ltd* (FSD unreported judgment 26 May 2023) and such should be treated as incorporated into this judgment without repetition. The attorneys have referred to no other Cayman authorities relevant to interim payments in Section 238 cases since 26 May 2023.
9. I do however wish to emphasise two points. Firstly, hearings of interim payment applications in Section 238 cases should not be allowed to be turned into mini-trials. At the interlocutory stage the court has, of necessity, to resort to a somewhat pragmatic high level broad brush assessment of the evidence and arguments put before it and do its best to arrive at a just solution. Secondly, evidence from witnesses of fact should stick to the facts. Witnesses of fact should not descend into inappropriate comment, argument or opinions. If issues need to be covered by independent expert evidence then, if leave is granted, appropriate independent expert evidence should be adduced.

Evidence

10. I have considered the evidence filed in this matter including:
 - (1) the first affidavit of Henry Patner (“Mr Patner”) sworn on 15 January 2024 (“Patner 1”). Mr Patner describes himself as the Chief Investment Officer of Koa Capital and appears to be based in the United States of America;
 - (2) the affirmation of Lili Chen (“Ms Chen”) affirmed on 25 March 2024 (“Chen 1”). Ms Chen describes herself as the Deputy Chief Financial Officer of the Company and appears to be based in the People’s Republic of China; and

- (3) the second affidavit of Mr Patner sworn on 24 May 2024 (“Patner 2”).

Submissions

11. In respect of submissions, I have considered:

- (1) the Dissenters’ skeleton argument dated 11 July 2024;
- (2) the Company’s skeleton argument dated 8 July 2024;
- (3) the oral submissions of David Quest KC on behalf of the Dissenters;
- (4) the oral submissions of Tom Lowe KC on behalf of the Company;
- (5) the Company’s supplemental skeleton argument dated 24 July 2024; and
- (6) the Dissenters’ supplemental skeleton argument dated 31 July 2024.

12. I am grateful to counsel for their helpful assistance to the court.

The Dissenters’ case

13. The Dissenters’ case is that the court can safely assume that the fair value of the Dissenters’ shares will be found to be at least US\$2.31 per share and that it is just that the Company be ordered to make an interim payment at that rate.
14. The Dissenters rightly say that in the absence of positive evidence or a cogent legal argument pointing to a lower value as a possible outcome at the final hearing, the merger consideration is generally treated as the starting point for quantifying an interim payment. They add that the Company is unlikely to prove at trial that the shares were worth less than it was willing to pay for them.
15. However, the Dissenters say that the present case is an unusual one. The Dissenters add that not only is there no positive evidence pointing to a lower value there is “overwhelming evidence” that the assessment of the Company and its valuation experts Roth Capital Partners (“Roth”) involved

errors and omissions that, if corrected, would result in a much higher value than the Merger Consideration.

16. The Dissenters say that the “most significant omission” was that the Merger Consideration failed to account for a debt of US\$84.3 million due from Fang Holdings Ltd (“Fang”) under a loan agreement dated 24 September 2021 (the “Fang Loan”).
17. The Dissenters say that the asset represented by the Fang Loan alone is worth US\$0.93 per share and that the other errors and omissions taken together further increase the fair value by US\$0.38 per share to US\$2.31 and an interim payment should be made at that rate.
18. The Dissenters refer to their request for an interim payment and their subsequent repeated requests for the Company to provide evidence that it has made provision for its liability under Section 238 and no substantive responses have been received.
19. The Dissenters say that given the lack of engagement by the Company, they are legitimately concerned that the Company cannot or will not pay what is due under Section 238.
20. The Dissenters add that to avoid any argument about the risk of any overpayment by the Company, they are content that the part of the interim payment that exceeds the Merger Consideration should be held in court or in an interest-bearing escrow account administered by the Dissenters’ attorneys pending the consideration of the trial.

The position of the Company

21. The position adopted by the Company in its skeleton argument dated 8 July 2024 and the position it adopted by way of oral submissions presented on its behalf on 28 July 2024 varied significantly.

The position of the Company adopted in its skeleton argument dated 8 July 2024

22. The Company, in its skeleton argument, did not accept that in this case it was indisputable or obvious that the Dissenters would recover an amount based on the Merger Price. The Company submitted that any interim payment should be calculated by applying a substantial discount to the Merger Price having regard to the risk of overpayment and the prejudice to the Company.

23. The Company, in its skeleton argument, also submitted that there was no basis for an interim payment of interest (paragraph 7) and said at paragraph 17 that “There is no explanation for the claim for interest. It is unprecedented for interest to be awarded at the interim payment stage. Interest in a Section 238 trial depends on expert evidence and no such evidence has been produced.” This was a somewhat startling submission to see in the Company’s skeleton argument. The Company in the very same skeleton argument at paragraph 9 had referred to *Re eHi* and *Xingxuan Technology*. In both those cases, interest at the rate of 2.375% had been awarded. An award of interest at the interim payment stage is far from “unprecedented”.
24. The Company, in its skeleton argument, submitted that at trial it would be its case that the Merger Consideration exceeded a fair value. It said that this was demonstrated by the actual results for 2021 and 2022 when compared with the financial projections. The Company said that for this reason alone the Merger Consideration ought not be the starting point and the court could not conclude that it was the minimum amount that the Dissenters will likely recover in any event.
25. The Company, in its skeleton argument, added that at trial it would also contend that the Merger Consideration should be discounted. The Company said that the buyer group controlled over 90% of the Company and the fairness valuation would have been subject to a massive control premium which would have been deducted from the Dissenters’ shares. The Company said that in addition there would have been a significant minority discount. The Company accepted that there will be a debate about the control premium and the minority discount but says that such represent another reason why the Company will contend at trial that the Merger Consideration was too high.
26. In its skeleton argument, not supported in its evidence, the Company said for the first time that there was no confidence that it would recover any overpaid monies. The Company said “The Dissenters are unknown US entities. They are not apparently regulated and Mr Patner neglects to give any information about them. It is not known who the principals or beneficial owners are ... There is no comfort that the Dissenters would return funds. In the circumstances, the risk of prejudice to the Company is real” (paragraph 10 c. of the Company’s skeleton argument dated 8 July 2024).
27. The Company referred to Mr Patner’s criticisms of the deal process and the Roth fairness opinion. The Company said that these criticisms were far off the mark but added that the court “cannot possibly investigate these complaints at this stage so as to identify an undisputable uplift: to do so would be to conduct a mini-trial.” (paragraph 10 e.). The Company said that Mr Patner was not

himself an expert witness and the Dissenters' case was unsupported by any expert evidence. Furthermore, the Company said that Fang's solvency is not indisputable or uncontroversial and in any event the issue is not solvency but collectability of a related party loan. The Company said that the court cannot possibly conclude, at this stage, that Roth was wrong to act on the write off or that a fair valuation would have been entitled to ignore this.

28. The Company, in its skeleton argument, invited the court to quantify the interim payment as 60% of the Merger Consideration (to take account of revised financials, minority discount and the existence of a control premium) and to reject the Dissenters' attempts to rewrite the quantum of Roth's fairness opinion which it said did not establish an irreducible minimum increase to the Merger Consideration.

The position of the Company adopted by way of oral submissions

29. The Company, in its oral submissions, adopted a fundamentally different position to that adopted in its skeleton argument.
30. The fundamentally different position can be briefly summarised as follows:
- (1) the Company no longer sought a reduction of 60% of the Merger Price "to take account of revised financials, minority discount and the existence of a control premium";
 - (2) the Company accepted the "landing point" was the Merger Price and that it could not resist the determination of the Summons at the Merger Price;
 - (3) the Company accepted that for the purposes of the Summons the court, as it had done in the past, could also award interest at the rate of 2.375% per annum from 17 April 2023 to the date the interim payment was made; and
 - (4) the Company did not challenge the fact that the Dissenters were entitled to an interim payment: it was the amount of the interim payment that was in dispute.
31. In its oral submissions, the Company maintained that there should be no "uplift" to the Merger Price. In short, it submitted that there was no expert evidence justifying the same and the court should, as the authorities stress, avoid a mini-trial in this respect.

32. It almost goes without saying that any concessions made by the parties were made only for the limited purposes of the interim payment hearing and the parties' positions remain fully reserved in respect of the substantive trial. Furthermore, nothing I say in this judgment can sensibly or appropriately be relied upon by the parties at such trial.

Determination

33. I now turn to the determination of the Application.
34. The task of the court, based on the limited evidence and argument presented to it at this interlocutory stage, is to decide whether the court thinks fit to order the Company to make an interim payment of such amount as the court thinks just. What sum can it safely be assumed the Dissenters will recover at trial?
35. 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.
36. Two other important factors are (a) possible prejudice to the Dissenters 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 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 Dissenters will not repay the amount by which the interim payment exceeds what the trial judge ultimately assesses as fair value.
37. As can be seen from previous authorities (see *Xingxuan Technology* at paragraph 22 quoting Kawaley J in *eHi*) 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 interim payment award."
38. The Company has, in the context of the Summons, produced no "positive evidence" or "cogent legal argument" pointing to a lower figure than that calculated on the basis of the Merger Price as being the appropriate figure for an interim payment.

39. Moreover the Company does not say that the award should be reduced to reflect its unevidenced assertion that there is a risk that the Dissenters will not be able to repay any overpayment.
40. The Dissenters have, however, produced evidence (including their substantively unanswered requests for the Company to provide evidence that it has made provision for its liability under Section 238) that they are legitimately concerned that the Company cannot or will not pay what is due under Section 238. Mr Lowe realistically and sensibly accepted that the Company had not covered itself in glory in respect of its lack of substantive responses to the communications from the Dissenters.
41. Mr Lowe does not, for present purposes, suggest that any deductions should be made from the Merger Price or Merger Consideration and refers to the lack of positive evidence to support the contentions in the Company's skeleton argument. The court independently determines that there is before it no "positive evidence" or cogent legal argument from the Company pointing to a lower valuation than the Merger Price or Merger Consideration being a possible outcome at trial.
42. In this case I have concluded that the starting point of the Merger Price or Merger Consideration is also the finishing point in respect of the amount of the interim payment. For present purposes I make no deductions from it and I make no increases to it. I also award interest at the rate and during the period requested by the Dissenters.
43. The Dissenters invited me to enhance the US\$1.00 per share Merger Price initially to US\$2.27 and then to US\$2.31 on the basis that the Roth Fairness Opinion had various errors and omissions which they summarised as follows:
- (1) the Roth Valuation did not account for the Fang Loan ("Disputed Point 1");
 - (2) the Roth Valuation failed to account for other loans and receivables owed to the Company ("Disputed Point 2");
 - (3) the Roth Valuation understated the valuation by double counting operating expenses as debt ("Disputed Point 3");
 - (4) the Roth Valuation used the wrong tax rate in calculating free cash flow ("Disputed Point 4");

- (5) the Roth Valuation relied on an out-of-date balance sheet that excluded accumulated profits earned by the Company (“Disputed Point 5”);
 - (6) the Roth DCF Valuation excessively discounts values back to 1 January 2023 rather than the date the notice was sent on 2 March 2023 (“Disputed Point 6”); and
 - (7) the Roth Valuation relied on an incorrect assumption, regarding the number of ADS (depository shares) outstanding (“Disputed Point 7”).
44. The Dissenters tried to entice the court into determining these various disputed issues on a summary basis at this interlocutory stage by saying:
- (1) there is “overwhelming evidence” that the assessment of the Company and Roth involved errors and omissions;
 - (2) the Company’s arguments on the Fang Loan can and should be “summarily rejected”;
 - (3) the court can conclude that the mistakes in the “Roth materials” results “in an irreducible minimum that is greater than the Merger Consideration” and “The Court can reach this conclusion without a trial or expert evidence”;
 - (4) the “errors and omissions in the Company’s and Roth’s assessment of fair value are of a kind that become readily apparent through simple fact-checking”;
 - (5) they “have uncontested evidence that the irreducible minimum is *above* the deal price”.
45. I do not think it appropriate to grind into the evidential detail of Disputed Points 2 to 7 and to descend in this judgment into the detailed arguments in respect of such points. I should however, if only to establish how inappropriate it is for the court to be drawn into a mini-trial in respect of disputed issues at the interim payment hearing, spend some words on the major point raised by the Dissenters namely Disputed Point 1 (the Fang Loan). At its core the Dissenters’ position on Disputed Point 1 (the Fang Loan) was that its value should be taken into account when determining what a just amount would be by way of an interim payment. At the hearing I indicated to Mr Quest for the Dissenters that we would have to be careful not to slip into a mini trial which he accepted but emphasised that his submissions relied upon “uncontroverted facts”. Mr Lowe for the Company did not accept that position. Mr Quest criticises the Company for failing to deal with the Fang

Loan in its evidence in detail. Ms Chen in Chen 1 on behalf of the Company at paragraph 25 strays into commenting on the relevant law and procedure and notes that “when considering applications for interim payment (sic), the Court typically conducts a high-level, broad assessment of the available evidence and arguments, and is typically cautious not to conduct a mini-trial at this interlocutory stage”. That is an accurate statement of the position but would have been better placed in a skeleton argument rather than in an affidavit of fact. Ms Chen importantly adds:

“So far as is appropriate and possible, the Court would rely on valuation data the Company does not, or cannot credibly dispute at the interim payment application stage. With that in mind, I would like to clarify that the absence of a response in this Application to an allegation made in Patner 1 should not be taken to constitute any admission or acceptance of such allegation. In any case, the Company considers that the Roth Fairness Report is reputable and there is a firm basis for the valuation to the Special Committee.”

46. In certain cases when a party fails to respond to allegations or evidence of the other side certain adverse inferences can properly be drawn. See for example *BTU Power Management Company v Hayat* 2011 (1) CILR 315 at paragraphs 15-16 recently referred to at paragraph 45(3) of the judgment of the Court of Appeal in *CMB International Securities Limited v Oakwise Value Fund SPC* (CICA unreported judgment 13 June 2024). Proudman J also touched upon adverse inferences in the context of security for costs in *Thistle Hotels Limited v Gamma Four Limited* [2004] EWHC 322 (Ch) at paragraph 12. In another context, Lord Sumption in *Prest v Petrodel Resources Limited* [2013] UKSC 34 at paragraphs 44 and 45 of his judgment referred to the ability of a court to draw adverse inferences when a party fails to call witnesses which that party may be expected to call. In *MacKenzie v Alcoa Manufacturing (GB) Limited* [2019] EWCA Civ 2010 Dingemans LJ stated the following propositions at paragraph 50:

“First whether it is appropriate to draw an inference, and if it is appropriate to draw an inference the nature and extent of the inference will depend on the facts of the particular case ... Secondly silence or a failure to adduce relevant documents may convert evidence on the other side into proof, but that may depend on the explanation given for the absence of the witness or document ...”

47. In an interim payment context where mini-trials are not permitted and where evidence is not tested by way of cross-examination I am not persuaded that any adverse inference can properly be drawn

against the Company for failing, in addition to placing reliance on the audited financial statements, to produce further evidence in respect of the writing off of the Fang Loan. These may be matters for trial but they cannot appropriately be determined at this interlocutory stage. I do not think it appropriate for the court, after a relatively short interlocutory hearing based on limited evidence and without the benefit of expert evidence or cross-examination, to second guess management or professional auditors as to the treatment of the Fang Loan.

48. In my judgment, no adverse inferences can be drawn against the Company in this case for its failure to adduce detailed evidence in respect of the Fang Loan. The undisputed fact is that it was written off or as the Dissenters now say “provisioned against” and the auditors were content to sign off on the accounts containing such write off or provision.
49. The Company’s combined and consolidated financial statements for 2019 and 2020 audited by KPMG Huazhen LLP Beijing, China dated November 15, 2021 under the heading “Related Party Transactions”, “Amounts due from Fang”, “Allowance for doubtful account” refer to Note 14. Note 14 refers to “the Company accrued the guarantee liability in the amount of US\$84.0 million (equivalent to RMB547,069) as of December 31, 2020”. The following is added:

“Based on the Company’s credit assessment on the collectability of amounts due from Fang, taking into consideration of current market conditions and Fang’s financial condition, as well as (1) Fang is subject to a winding-up petition by a noncontrolling shareholder in Cayman Court; (2) Fang is late in the filing of its annual 20-F for the year ended December 31, 2020; (3) Fang had to rely on the Company as the guarantor to settle the convertible notes agreements; and (4) the Company does not have any collateral placed by Fang against the amounts due from Fang, the Company has accrued 100% provision against the amounts due from Fang in the amount of RMB547,069 as of December 31, 2020, which was recorded as bad debt expense on the combined and consolidated statements of comprehensive income (loss) for the year ended December 31, 2020.”

50. Mr Quest agreed that the write off or provision had been signed off by KPMG the auditors and initially agreed that he was asking the court to look behind that to which, during exchanges at the hearing, I responded “that’s a big ask at this interlocutory stage.” Mr Quest criticised the failure of management to put in any evidence as to why they felt it appropriate to treat the Fang Loan as they had treated it and noted that we had no evidence from the Company’s auditors. Mr Quest referred

to material (including the evidence referred to by Smellie CJ as he then was in *Evenstar Master Fund SPC v Mo and Fang Holdings Limited* 2021 (2) CILR 400 at paragraph 8, Fang’s offer to the board of the company and the reference to “cash in hand”, the affirmation of Vincent Tianquan Mo in December 2021 and the reference at paragraph 7 that Fang is “demonstrably solvent”, Fang’s representation that it had available funds of not less than US\$14.8 million over and above the aggregate amount of all its other outstanding obligations including the Fang Loan, the purchase of Fang equity by Vincent Mo, the interest of General Atlantic in buying Fang equity, the reference to Fang’s creditworthiness in the proxy statement and Jiangong Dai’s offer to buy Fang equity) as evidence of Fang’s solvency and ability to repay the Fang Loan. Mr Quest criticised the reasons given in Note 14. He noted that the winding up petition referred to was not on the basis of an inability to pay debts but on the just and equitable basis. Mr Quest emphasised that the task of the court is not to investigate the diligence and competence of the auditors but to assess objectively the irreducible minimum fair value of the shares by reference to the material available in April 2023. Mr Quest added that on any objective basis that value should include the value of the Fang Loan.

51. Recognising the steep mountain he had to climb in asking the court to look behind the KPMG auditor’s acceptance of the treatment of the Fang Loan Mr Quest made two further points. Firstly, he made reference to the position of KPMG Huazhen. Mr Patner at paragraph 22 of Patner 2 stated:

“In 2023, the PCAOB [the US Public Company Accounting Oversight Board] found deficiencies in 100% of the audit engagements reviewed at KPMG Huazhen, [at footnote 43 reliance is placed on Mark Maurer “Audits of Chinese Companies are Highly Deficient, US Regulator Says”, 10 May 2023 at 2] and recently sanctioned three partners for violations of audit standards [at footnote 44 there is reference to “PCAOB Sanctions Three Partners of KPMG China for Violation of Audit Standards, 20 March 2024, at 1] ...”

52. Secondly, Mr Quest tried to reassure the court by submitting in effect that the court is not concerned at the interim payment hearing as to whether the auditors did a good job or not as they were not challenging the decision of the auditors, they were challenging the decision of the Company. Mr Quest submitted that a party can ask the court, for fair value purposes, to find that the financial statements do not reflect the true position and that does not require the court to go back and rewrite the accounts or to investigate whether they were correctly audited. Mr Quest submitted that the court simply assesses the entirety of the evidence before it and reaches a conclusion about what the correct factual position is. Mr Quest in effect submitted that there should be an uplift on the Merger

Consideration to the extent of the Fang Loan because it should not have been written off or provisioned against and this results in a 93 cent addition to the Merger Consideration. In his initially enticing efforts to persuade the court that this was really a quite simple and straightforward point capable of summary determination on the evidence and documentation before court Mr Quest submitted that he was not asking the court to decide any questions of fact or expert evidence.

53. The short article by Marker Mauer of Dow Jones & Company on its own admission does not identify the “companies at the center of the audits being reviewed”. There is no reference to the Company or to Fang. The statement issued by the US PCAOB Office of Communication and Engagement Washington DC 20 March 2024 did not relate to the Company. It related to Tarena International Inc. A fine totalling \$150,000 was imposed as was a “practice limitation on partner with responsibility for IT audit personnel.” It is difficult to conclude what weight, if any, I should attach to this material in the present context. It does not help me in arriving at a just amount for an interim payment.
54. The Company rejects the Dissenters’ complaint that the Fang Loan should have been taken into account in the restated balance sheet as an asset by Roth. The Company says that the accounts had already written off the loan in December 2021 and the rationale for the write off was explained in the Company’s 20-F as follows:

“Notwithstanding our ongoing effort to collect the amounts due from Fang, based on our credit assessment on the collectability of the amounts due from Fang, taking into consideration current market conditions and Fang’s financial condition, as well as that (1) Fang is subject a winding-up petition by a noncontrolling shareholder in the Cayman Court; (2) Fang was late in the filing of its annual report on from 20-F for the year ended December 31, 2020; (3) Fang had to rely on us as the guarantor to settle the 2022 Notes; and (4) we do not have any collateral placed by Fang against the amounts due from Fang, we have accrued 100% provision against the amounts due from Fang in the amount of RMB547.1 million (US\$84.0 million) as of December 31, 202, which was recorded as bad debt expense in 2020.”

55. Mr Quest, on behalf of the Dissenters, conducted a superficially powerful critique of those reasons.

56. The Company says that the Dissenters may find the explanation provided unconvincing but that is beside the point: a purchaser would have been presented with the known fact that the Fang Loan had been written off. The Company adds that if the basis of valuation was that of a willing buyer and willing seller, the Dissenters would need to establish by means of admissible evidence what would have happened if the Company had attempted to write the Fang Loan back into the accounts. The Company says that it is as likely as it is not that the market would have also discounted the balance sheet value by such a related party loan. The Company stresses that the evidence of Fang's solvency is not "indisputable or uncontroversial" and says that the issue is not solvency but collectability of a related party loan. The Company says that the court cannot possibly conclude that Roth was wrong to act on the write off or that a fair valuation would have been entitled to ignore it. These disputed issues are not capable of proper determination at this interlocutory stage.
57. Mr Lowe referred to Mr Quest's attack on the Company's audited financial statements and submitted that it is not for the court to rewrite the audited financial statements in a valuation case. These are historic accounts and the court has no valuation evidence that explains to it how the court can disregard them. I agree that this court at this stage is not in a position to second guess management and the auditors in respect of the Fang Loan. Mr Lowe submitted that the market in 2022 obviously knew about the write off of the Fang Loan because it was in the filed financial statements. The market knew that Fang was a very solvent company because that is in filed statements and the former Chief Justice's public judgment. Mr Lowe submitted that Roth should be taken to have known about Fang as a very substantial New York listed company. Mr Lowe added that neither the market, nor Roth, saw reason to write the Fang Loan in and increase the value.
58. Mr Quest retorted that there was no evidence in support of those assertions and quite simply the Fang Loan was a cash receivable which belonged to the Company but it was not taken into account in the valuation process and, with superficially attractive simplicity, added that the valuation was diminished by that amount and the obvious adjustment is simply to add the \$84 million back.
59. I am reluctant to drill into the detail on this point and conduct a mini-trial in respect of the KPMG audit (and in fairness Mr Quest does not ask the court to do that). However, I have reached the conclusion that, despite the methodical eloquence of Mr Quest, this court cannot at this interlocutory stage confidently and safely add the value of the Fang Loan to the starting point of the Merger Consideration.

60. I have considered the evidence and arguments on Disputed Points 1 to 7 in some detail. I do not set all the evidence and arguments out in this judgment but have full regard to all the evidence and arguments put before the court.
61. Mr Quest submitted that the errors or omissions in respect of Disputed Points 2 to 7 were of a different character to the Fang Loan evidence and submissions on Disputed Point 1. Mr Quest submitted that Disputed Points 2 to 7 all stem from obvious errors in the discounted flow analysis that Roth has done as part of its fairness opinion. Mr Quest reiterated that he did not want the court to embark on a mini-trial but Disputed Points 2 to 7 were of “special obviousness that the court can take [them] into account at this stage.”
62. Mr Lowe criticised the Dissenter’s reliance on the Discounted Cash Flow method of valuation alone and reminded the court that there is no single methodology in Section 238 cases. Mr Lowe took the court back to basics and helpfully referred to some of the extensive caselaw in this area. Birt JA (with whom Beatson JA and Field JA agreed) delivering the leading judgment of the Court of Appeal in *Trina Solar Limited* 2023 (1) CILR 569 at paragraph 35 referred to the trial judge’s judgment and various points to emerge namely:
- (i) The “*true worth*” of a share can in an appropriate case be assessed by assuming an immediate sale under certain conditions (i.e. a ‘*market-based*’ approach using the adjusted trading price and/or merger price as a measure of fair value). But ‘*true worth*’ can also, in an appropriate case, be assessed by assuming that the shareholder retains the share and obtains the financial benefits of doing so. This is sometimes referred to as the “*intrinsic value*” i.e. establishing a monetary value for the shareholder’s bundle of rights by reference to the financial benefits flowing from the right to participation in profits and obtain distributions in a winding up.
 - (ii) A Discounted Cash Flow (“DCF”) valuation of the company can assist and be relied upon on either approach; either (directly) as a model of what the shareholder will receive if the share is retained or (indirectly) as an estimate of what a purchaser would be likely to pay for the share if it is sold.
 - (iii) Apart from the fact that market perceptions may affect the market price, the worth of a share is not, as a matter of principle, the same as or limited to its market price, but can also

be assessed by reference to the financial benefits which can be derived from retention of the share. As the Court of Appeal said in *Shanda Games Limited* 2018 (1) CILR 352 at [22] “fair value is not necessarily the same as the merger price or the price at which the shares were trading”.

- (iv) The selection of valuation methodology (or methodologies) is a fact sensitive issue. In some cases it would be appropriate to give particular weight to a market based indicia of value and use a DCF valuation as a means of testing those other valuation methodologies. Thus, where the adjusted trading price and merger price may be seen as reliable, they may probably be used as a starting point of the valuation subject to testing by reference to a DCF valuation.
 - (v) In other cases it will be appropriate to estimate fair value exclusively or primarily using a DCF valuation.
63. Birt JA at paragraph 36 emphasised the point that although a court will undoubtedly look to expert evidence in order to assist it, the court must reach its own decision as to fair value and the constituent elements which go to make up that fair value. It must not simply plump for one expert over another. The need for the court to reach its own decision was also emphasised by the Court of Appeal in *Shanda Games Limited* at [22].
64. Mr Lowe also referred me to Segal J’s 179 page judgment in *Ikang Healthcare Group, Inc* (FSD unreported judgment 21 June 2023) and in particular paragraphs 30-38 as to the court’s approach to determining fair value.
65. Mr Lowe says it is somewhat odd that the Dissenters focus on the DCF method of valuation in their submissions in respect of the amount of the interim payment and yet Roth refers to 6 different valuation methodologies under the headings (1) Comparable Companies, Discounted Cash Flows, Premiums Analysis – U.S. Listed Take-Privates, Premium Analysis – Global Majority Shareholder Purchasing Remaining Shares, all of which will need to be further explored at trial. I think Mr Lowe is correct when he says that it is difficult if not impossible for a court, at this interlocutory stage, to stray upwards from the Merger Price especially in the absence of expert evidence. The Merger Price is safe because normally it will be the same as the fair value offer by the company and uncontested, although there may be arguments in respect of deductions.

66. Mr Quest stressed, in effect, that his submissions on the Fang Loan were not reliant on the DCF method of valuation and the court should simply add in the value of the Fang Loan, which should not have been written off or provisioned against, and accordingly determine an interim payment at an amount higher than the Merger Price to take into account the value of the Fang Loan. Although I note that at paragraph 65 of their skeleton argument dated 11 July 2024 the Dissenters stated:

“Using the method and assumptions in the Roth Analysis but correcting for these errors and omissions [Disputed Points 1 to 7] result [in] an irreducible minimum value of US\$2.31. For the avoidance of doubt, the Applicants expect that, when full evidence is advanced at trial, the actual fair value will be materially higher than that figure.”

67. Mr Quest accepted that the Disputed Points 2-7 had been presented as adjustments or errors in the Roth DCF calculation and that was only one way, albeit an important way, of looking at how fair value would be determined at trial.

68. The Dissenters also complained about the deal process adopted by the Company which they say was “profoundly deficient”. Again I am not, at this interlocutory stage on the basis of the limited evidence presented to the court, in a position to determine whether there were breaches of established norms for a fair trial process and if there were how that would affect fair value determinations in this case. Again such issues are for the trial judge, as I think Mr Quest recognised during the hearing when I indicated to him that it was going to be difficult for the court to determine such issues at the interlocutory hearing to which Mr Quest responded “I appreciate that” but added that this was an unusual case and in effect to limit the calculation of the interim payment on the basis of the Merger Price was inappropriate, in the particular circumstances of this case.

69. The Fang Loan and the other issues relied upon by the Dissenters do not, however, persuade me that I can with confidence, comfort and safety increase the amount of the interim payment beyond the basis of the Merger Price. It would take a rare and exceptional case with clear and compelling evidence and/or legal argument to persuade a court to do so. Despite the considerable eloquence of Mr Quest, I have concluded that this is not such a case.

70. I note all of the Dissenters’ arguments in respect of Disputed Points 1 to 7 namely the alleged errors and omissions (which are not accepted by the Company) and I note all of the contrary arguments presented by the Company. I am, however, unable at this interlocutory stage to determine them or

at least to confidently and safely predict that they will result in an enhancement to the Merger Consideration. That is quintessentially a matter for the trial judge. It is wrong to press the court, dealing with an interlocutory application for an interim payment prior to trial, to embark in effect on a mini-trial. Moreover, I have no expert evidence before me.

71. I am not in a position to fairly and justly determine all these opposing arguments at this interlocutory stage. To do so, would have involved a mini-trial over a number of days rather than the half day the Dissenters estimated at the foot of their Summons. I reiterate the well-established principle that there should be no mini-trials in respect of interim payment applications. Hopefully this oft repeated message will get across to dissenters sooner or later or adverse costs consequences may follow.
72. As the English cases (see for example *Alan Nuttall Limited v Fri-Jado UK Limited* [2010] EWHC 1966 (Pat) at paragraph 10) make clear generally the interim payment procedure is not suitable where factual issues are complicated or where difficult points of law arise. This does not prevent an award from being made even in respect of complex claims if the court can identify “an irreducible minimum ... without venturing too far into the disputed area of fact or law.” Furthermore it may well be appropriate simply to ignore certain heads of claim altogether whilst concentrating on those parts of the claim which can be assessed on established principles with some confidence. In *Xingxuan* at paragraph 13 I stated that counsel 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.” A broad brush approach to detail may be appropriate at this stage but it is necessary to take a conservative view however broad the brush employed is. The English phrase “irreducible minimum” does not suggest that the sums awarded must be undisputed. There is room for a degree of uncertainty provided that that it is treated in a conservative manner. As Kitchin J added in *Alan Nuttall Limited* at paragraph 11 “the task of the court can be expressed rather more simply as being to ascertain what sum it can safely be assured the claimant will recover in any event.”
73. On the evidence and arguments placed before the court, I am not persuaded that I can confidently and comfortably go higher than the Merger Consideration.
74. I should also add that the Company’s belated allegations to the effect that the Dissenters would not be “good for the money” if they were subsequently required to repay any amounts did not persuade me that I should not make an interim payment or to reduce it to take account of the risk or to order

payment into an escrow account rather than to the Dissenters direct. There is no evidence that the Dissenters would not be “good for the money”. I am not persuaded that I should draw any adverse inferences against the Dissenters in this respect. I am however satisfied that it is appropriate to order the Company to make an interim payment direct to the Dissenters.

Interim payment

75. Doing the best I can at this early stage of the proceedings I have reached the conclusion that I can safely and justly make an interim payment order on the basis of the Merger Price with no discounts and no increases.
76. I am also willing to make an order in respect of interest as requested by the Dissenters at the rate of 2.38%.
77. I regard the payments referred to in the two previous paragraphs as being in an amount which is “just” pursuant to Order 29 of the GCR.
78. The payments I have ordered should be made to the Dissenters’ designated bank account within 28 days.

Costs

79. On the costs position I would be minded to order that the Company pays the Dissenters their costs but on the standard basis not the indemnity basis as requested by the Dissenters in their draft Order but not in their Summons. If there are any written submissions to the contrary they should be filed within the next 14 days.

Publication of judgment

80. During the hearing I raised the issue as to whether the judgment should be published subsequent to the hearing. I referred to my judgment in *Xingxuan Technology* where at paragraph 10 I stated:

“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 payment 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.”

I should add that in *eHi* as is apparent from paragraphs 47 and 49 it was the Company as the paying party who consented to the publication of the judgment and contended that there was a public interest in the reasons for interim payment awards being freely available. The Dissenters however requested that the judgment should not be disclosed to the trial judge because it would prejudice their fair trial rights. The Company invited the court to publish the judgment so that reasons for the decision could be available for consideration in other similar applications.

And at paragraph 96 of my judgment in *Xingxuan Technology* I added:

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

81. Mr Lowe stated that he required time to take instructions as to whether the Company consented to publication of the judgment and he felt that there might be “sensitivity” about the Fang Loan. I indicated that I kept a mind that was open to persuasion but much preferred judgments to be published unless there were very good reasons for them not to be published and that I did not want to turn Order 29 rule 15 of the GCR “upside down”. At Mr Lowe’s suggestion I agreed to give the

parties some time to take instructions and put in some written submissions so that the publication point could be decided without the need for another hearing. I gave the Company 7 days to file any written submissions on the issue and the Dissenters were given 7 days thereafter to file any written submissions and I would then decide the issue “on the papers”.

82. I reserved judgment on 18 July 2024 and at 5:23pm that day the attorneys for the Company by way of an email indicated that the Company did not consent to the judgment being made public.
83. The Company in its concise and well-focused supplemental skeleton argument dated 24 July 2024 made reference to *eHi, Xinghuan Technology* and also to *British & Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842 (although it is the Times Law Report 8 December 1988 which deals with the publication of the interim payment judgment) where the court made its reasons public because the defendant was listed, the large interim payment was price-sensitive and there was a public interest in ensuring that no false market was created (see English White Book 1999 commentary at 29/15/1 and the Hong Kong Civil Procedure 2024 commentary at 29/15/2). The commentary at 25.9.1 of the English White Book 2024 includes the following statement:
- “Circumstances may arise in which a judge would be entitled to make public their reasons for granting an interim payment order for a large amount (*British & Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] QB 482; [1989] 3 ALL ER 492, CA)”.
84. The Company says that the balance between the public policy principles of open justice and fairness is struck by Order 29 rule 15 of the GCR itself which provides that as the starting point there is to be no disclosure to the trial judge unless one of two exceptions is met (1) the paying party consents or (2) the court directs.
85. The Company says that there is no more than the usual open justice principle here and that is not enough. The Company adds that there are no special reasons, such as in *Quadrex*, which warrant the exception being applied.
86. The Company says that it is concerned that by traversing the allegations that were made in relation to the Company’s financial statements (which are matters to be dealt with in due course by the trial judge) the interim payment judgment may include material which may influence the mind of the trial judge on these and other issues prior to trial (whatever caveat is applied).

87. The Company emphasises that the starting point in Order 29 rule 15 of the GCR is for complete non-disclosure including of the fact of an interim payment (as opposed to partial disclosure) so as not to taint the trial judge's perception whatsoever.
88. The Times Law Report 8 December 1988 provided a summary of the judgment of the Court of Appeal delivered on 5 December 1988 in the *Quadrex* proceedings dealing with the judgment publication point. It is noted that Lord Donaldson, the Master of the Rolls referred to Hirst J giving judgment on an Order 14 application "in open court because he considered that the outcome of the case might affect the market value of public companies and important issues were at stake." The first instance judge also decided to give his judgment on an application for an interim payment in open court "so as to make his judgment public". The Times Law Report continues: "His reasons for doing that were that the parties accepted that there was a public entitlement to know that an interim payment had been ordered, to know the amount of the award and that the order had been stayed. Such public entitlement arose from the Stock Exchange regulations and the fact that British and Commonwealth at least was a public-quoted company." Lord Donaldson "would have put the matter on a broader ground: which he considered implicit in the judge's judgment: that where very large sums of money relating to public companies were involved and the information was truly price sensitive, there was a public interest in ensuring that there was no false market, both in the interests of those holding shares and maybe wishing to sell, and of those considering or refraining from buying on the basis of incomplete information". It was also noted in respect of Order 29 rule 15 that "There were therefore very strong contra-indications to the normal rule that the administration of justice was a matter in which the public had a real interest; and accordingly these two factors had to be weighed up."
89. The Dissenters in their supplemental skeleton argument dated 31 July 2024 say that, like in *Quadrex*, there is a risk of creating a false market in the stock of a publicly traded company if the prohibition on disclosure is not waived as Fang is publicly listed and is the counterparty that owes the Company \$84 million. The Dissenters say that it is however unnecessary to cite the specific public interest reason or any other so long as the judge is convinced that issues of public interest are at stake. The Dissenters rightly submit that in the time between the publication of the *Quadrex* decision and now, both the English and Cayman Islands legal systems have seen a greater shift towards general transparency in the court system. Having said that it is correct to note that Order 29 rule 15 of the GCR has not been amended and is still in force.

90. The Dissenters, relying on the judgment of C J Smellie (as he then was) in *Re SPhinX Group of Companies* 2017 (1) CILR 176 at paragraphs 9-12, submit that it is commonly accepted that there is a public interest in having decisions of the Grand Court and the reasons behind them publicly available. The Dissenters add that this is all the more the case in circumstances where there are relatively few decisions of the Grand Court in relation to interim payment applications, especially in the context of highly specialised Section 238 merger appraisals. As such the Dissenters say that issues of open justice are fundamental and the appropriate and just decision would be to publish the judgment.

91. Smellie CJ (as he then was) in *SPhinX* was dealing with an application for a sealing order in the context of a sanction application. At paragraph 7 Smellie CJ stated:

“7 Open justice is a fundamental principle of the common law and is enshrined in s.7 of the Constitution (the Cayman Islands Constitution Order 2009, Schedule 2) as follows:

“(1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.

...

(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.”

92. Smellie CJ at paragraph 9 added (footnotes omitted):

“9 Given the principle of open justice is, however, one of common law, it does not depend exclusively on s.7 of the Constitution being engaged. Rather, the principle requires that, in general, the public should have access to court proceedings and access to information about what occurs in such proceedings.”

93. At paragraph 11 Smellie CJ recognised that the principle of open justice is not unlimited and forms part of the overriding principle that justice must be done and that limitations can be placed upon

the access to information by the public. At paragraph 12 it was stated that “Limitations can only be placed on the principle where the interests of justice so require”.

94. In *SPhinX Smellie* CJ was ultimately persuaded that it was appropriate, in the particular circumstances of that case, to make a sealing order. In *AuBit International* (FSD unreported *ex tempore* judgment delivered 16 October 2023) I was not persuaded that I should make an order sealing the court file. At paragraph 42 I stated:

“... The need for open justice and transparency in respect of the serious issues raised in this case to my mind trumps any confidentiality or abuse concerns (see my judgment in *Silicon Valley* FSD 163 of 2023 (DDJ), unreported judgment 29 June 2023) ...”

At paragraph 44 I added:

“... The rules must be read subject to the fundamental common law principle of open justice (see *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38).”

95. Order 29 rule 15 of the GCR may be regarded as an exception to the principle of open justice but it still provides the court with a discretion to direct the publication of a judgment where it sees fit to do so and for good reason.
96. The Court of Appeal in *Douglas and Ramoon v Governor* 2022 (1) CILR 640, with Moses JA delivering the lead judgment, in the context of an appeal regarding whether a closed material procedure was available under the laws of the Cayman Islands in the absence of any statutory basis, at paragraph 93 stated:

“The appellants’ submission is orthodox and straightforward: absent express or implied statutory authority there is no warrant for a court to depart from fundamental principles of open justice.”

This paragraph was not criticised when the Judicial Committee of the Privy Council ([2023] UKPC 9) advised His Majesty that an appeal should be allowed and that the proceedings be remitted to the Grand Court for the hearing of the judicial review.

97. I should add, for the sake of completeness that in *AB v C* (CICA unreported judgment 19 May 2022) Beatson JA, with whom Birt JA and President Goldring agreed, referred at paragraph 9 to two judgments following hearings in chambers, one in respect of an application for an interim payment which was granted and one for permission to adduce further expert evidence which was rejected and at paragraph 10 stated:

“10. Both these judgments contained sensitive personal information about the plaintiff’s injuries and health. During the hearing the plaintiff informed us that they were both published as unreported cases on the judicial website, as was the judgment declaring him to be a patient. He stated that people in these islands were able to read the judgments and had been contacting him about them and defaming him. The court was sympathetic to his complaints about this. At the conclusion of the hearing, the President stated that, although it might be rather late in the day, he had asked for the judgments to be taken down from the website while the matter was investigated. He also stated that in future in cases such as this, consideration should be given to providing an anonymised version of a judgment which did not reveal the identity of the plaintiff.”

98. At paragraph 42 President Goldring added:

“... this judgment should not be reported until and unless it has been anonymised. That is something which, I am afraid, will have to be done by counsel.”

99. The Court of Appeal judgments in the alphabet soup case of *AB v C* reflect the fact that there are exceptions to the principle of open justice and such have been supported at appellate level in the Cayman Islands.

100. The well-respected appellate judges of the Cayman Islands are not alone in the British Overseas Territories in stressing, at the intermediate appellate level, the importance of open justice and the justifiable exceptions to it. In *Director of Public Prosecutions v Cindy Clarke* [2019] CA (Bda) 8 Civ, 21 June 2019 the Court of Appeal of Bermuda considered the proper approach to confidentiality orders in judicial review. Kay JA at paragraph 5 emphasised that open justice was a fundamental principle of the judicial process and at paragraph 6 added that “... open justice is the rule, but there must be exceptions in circumstances where publicity would itself be productive of

injustice”. At paragraph 9 the Justice of Appeal added “... I do not accept that the size of the country requires the public interest in open justice to be modified ...”.

101. The fundamental common law principle of open justice is also well established in the Crown Dependencies. For example the Appeal Division in the Isle of Man in *Reid v McNicholas* (judgment [2] 24 July 2018) at paragraph 27 stated:

“The principle of open justice is well established in Manx law ...”

102. The Manx Appeal Division in *Taylor and Neale* 2012 MLR 199 at paragraph 97 stated “Anonymity is inconsistent with the overriding requirement for open justice and transparency ...”.

103. These well-established and important principles have also been applied in Jersey. See for example the judgment of the Jersey Court of Appeal in *Lewis and others v Attorney General* 2014 (1) JLR Note 1.

104. Closer to my present judicial home, other local judges have reiterated the importance in the Cayman Islands of the fundamental principle of open justice. I refer just to a few examples in the context of publication of judgments.

105. Somewhat extraordinarily, the Cayman Islands Monetary Authority in *Maples Corporate Services Limited v Cayman Islands Monetary Authority* 2023 (1) CILR 467 sought to persuade Kawaley J that he should not publish a judgment. In the context of that case Kawaley J was having nothing of it and rightly gave CIMA short shrift and refused the regulatory authority’s application to embargo publication of the judgment. The hearing in that case had taken place in open court and at paragraph 5 of a concise and well-crafted judgment Kawaley J stated:

“... the Plaintiffs have heavily relied on open justice principles and I myself have been deeply concerned about the implications of this application for open justice. It has to be said that the notion of stifling the publication of a judgment in relation to proceedings that have taken place in open Court reviewing documents that have only to a very limited extent been redacted finds no precedent anywhere.”

106. Kawaley J referred to section 7 of the Cayman Islands Constitution Order.

107. At paragraph 12 Kawaley J added:

“... our system of governance requires that judgments should be published as soon as they are delivered, absent truly “*extreme circumstances*”, as is made clear in the *Mohamed* case [(2011 Q.B. 218)] at paragraph 41, and that is simply part of the framework within which public authorities and citizens have to operate.”

108. Segal J in *Perry v Lopag* (FSD unreported judgment on the papers 23 February 2023) dealt with an application by a trustee seeking an order to prevent the publication of a judgment while the Fifth Defendant sought permission to disclose the judgment in other proceedings in Liechtenstein. At paragraph 5 of his comprehensive judgment Segal J helpfully and succinctly summarised the position of the court as follows:

“I have reviewed these submissions and concluded that the Trustees’ application should be dismissed and that the Fifth Defendant’s application should be granted. The Trustees have, in my view, failed to establish a proper basis on which an order precluding publication of the Judgment, and the overriding of the principle of publicity and open justice, can be justified ...”

109. At paragraph 27 Segal J referred to Section 7 of the Constitution and at paragraph 28 to Order 63 rule 3(4) of the GCR and at paragraph 29 to Order 63 rule 7(1) of the GCR and at paragraph 30 to *Ahmad Hamad Algozaibi & Bros Co v Saad Invs. Co. Ltd* 2011 (1) CILR 326 which he said held that the “tenor of the more recent decisions lead to the conclusion that the principles of open justice apply fully also in the context of interlocutory proceedings.”

110. In the *Algozaibi* judgment Smellie CJ (as he then was) in the context of an application for disclosure of a confidential schedule attached to an order for security of costs, referred to English authority on the right to open justice and the exceptions to it, and at paragraph 16 commented in effect that he did “not understand the law and practice in our jurisdiction to have departed from those fundamental principles” applicable in English law and at paragraph 17 stated:

“... the fact that judgments given in chambers proceedings are nonetheless to be regarded as public judgments, unless otherwise ordered by the court, was explained some time ago

in Practice Direction No 3/1997, Confidentiality and Publication of Chambers Proceedings.”

At paragraph 25 Smellie CJ summarised the relevant considerations as follows:

“The principle of open justice predisposes towards the disclosure of all the records of proceedings including those taken in chambers, where the interests of justice so require. While, for reasons of the proper administration of justice, only certain aspects of a case file are routinely made publicly available under the rules of court without order of the court, all aspects may be made available to any person who applies, including non-parties, if the interests of justice or some other public interest (such as investigative journalism) properly so require.”

111. In a different context, but still on the topic of open justice, the present Chief Justice, the Hon. Justice Margaret Ramsay-Hale, in *White Crystals Ltd v IGCF General Partner Limited* (FSD unreported judgment 2 April 2024) has relatively recently re-emphasised the importance of open justice in the Cayman Islands. That case involved an application to discharge an order granting leave to enforce an arbitral award made by the London Court of International Arbitration. The application was dismissed. At paragraph 49 the learned Chief Justice, reflecting her position on the importance of open justice, importantly added:

“I also refused an application by the GP to hear the application in private. While recognizing the force of the English authorities to which Mr Chapman referred me which illustrated the exercise of the Court’s discretion to hear enforcement proceedings in private where the arbitral agreement mandated that the arbitration be confidential, I considered it was consistent with the principle of open justice and the statutory steer in the [Foreign Arbitral Awards Enforcement Act (1997) Revision] that the hearing be concluded in public.”

112. Even in a private arbitration context, the court hearing was conducted in public and the judgment was published and is available online at judicial.ky and www.bailii.org under citation [2024] CIFSd 33.

113. This case reinforces the obvious point that the principle of open justice is alive and kicking on the ground in the Cayman Islands.
114. In the present context the starting point is Order 29 rule 15 of the GCR which in effect provides that the fact that an order for an interim payment has been made shall not be pleaded and, unless the company 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 with all questions of liability and amount have been determined”. The literal wording of these provisions do not expressly prohibit the publication of judgments but the clear purpose is, as a starting point, to prevent the trial judge being notified of the fact that an interim payment has been made.
115. Context is important in the law as in life. I am dealing with the interim payment application in the context of Section 238. I am not dealing with a damages for breach of contract case where liability has yet to be determined. I am not dealing with a damages for personal injuries case where liability has yet to be determined.
116. The Court of Appeal (Goldring P, Rix and Field JJA) in *Re Qunar* 2018 (1) CILR 625 agreed with Mangatal J, in published judgments, that the court had jurisdiction to award an interim payment in Section 238 proceedings. Rix JA said at paragraph 2 of his judgment that the essential issue in that appeal was “whether the provisions for interim payment contained in Order 29 Part II of the Grand Court Rules (“GCR”) apply, or can apply, to proceedings under section 238 of the Companies Law ...”. The Court of Appeal held that they did apply to proceedings under Section 238. Rix JA referred to the nature of Section 238 proceedings and at paragraph 36 stated:
- “Section 238 may have its own idiosyncratic purposes, which may affect the exercise of the court’s powers and discretion in ways which would mould them to the purpose of this enactment, but that is not the same as saying that anything that is not expressly provided for in the section is denied by the section.”
117. Under Section 238 a dissenter is “entitled to payment of the fair value of that person’s shares”. Liability to pay a fair value is not in issue. The only issue is what amounts to a fair value.

118. It is also important to read Order 29 rule 15 of the GCR in light of the fundamental common law principle of open justice and section 7 of the Constitution and the increasing public interest in the publication of judgments, and the special interest which Section 238 cases appear to attract.
119. Order 29 rule 15 of the GCR does not circumscribe how the court should exercise its discretion in considering whether or not direct that a judgment in respect of an interim payment application be published. Kawaley J ordered such in *eHi* in the public interest but in that case the company had in any event consented so strictly speaking there was no need for a direction under Order 29 rule 15 of the GCR. In *Xingxuan Technologies* I directed that the judgment be published in the public interest.
120. The exercise of the court’s discretion under Order 29 rule 15 of the GCR cannot be at large or unrestrained by principle. In my judgment before a judge can direct publication of a judgment on an interim payment application there must be a good reason to do so.
121. In *Quadrex* the good reasons included the fact that “important issues were at stake” and there was “a public entitlement to know that an interim payment had been ordered” and such “public entitlement arose from the Stock Exchange regulations and the fact that British and Commonwealth at least was a public-quoted company”. The good reasons were also put on a “broader ground” by Lord Donaldson, the Master of the Rolls, namely “that where very large sums of money relating to public companies were involved and the information was truly price sensitive, there was a public interest in ensuring that there was no false market, both in the interests of those holding shares and maybe wishing to sell, and of those considering, or refraining from buying, on the basis of incomplete information.”
122. In our case the Company is no longer a publicly listed company but Fang apparently is.
123. In my judgment, there are good reasons why the court should direct that this judgment be published and they include the follow:
- (1) It is in the public interest that the judgment is published in order that members of the public and companies, dissenters and attorneys may be aware of how the court determined a novel interim payment application in the context of Section 238. Mr Quest in the opening section of his oral submissions described the application as a “somewhat unusual” one as “the interim payment that we are seeking, which is US\$2.31 per share, is a higher amount that

the merger consideration.” In the closing section of his oral submissions Mr Quest described the case as a “very unusual case”.

Mr Lowe commenced his oral submissions with the comment that it was a “typical understatement” by Mr Quest to describe this as “an unusual application”. Mr Lowe continued:

“There hasn’t been an application for interim payment asking for anything like any sort of uplift like this. It’s completely unprecedented. If you make an order on these terms, it will be wholly out of the norm. That’s not to say you can’t do it, but it’s something to bear in mind.”

Mr Quest stated that the particular facts of this case are “unprecedented” but applying the relevant legal test the question is whether it will result in a figure above the merger consideration and this turns on the facts of the case.

This case is far removed from a “bog standard” application for an interim payment.

It is in the public interest that the developing jurisprudence in this area of the law be made public. It is important that the public, including those companies, dissenters and attorneys who may become involved in Section 238 cases and interim payments are aware of the Grand Court’s decision on this novel case.

Such is the public interest in the jurisprudence surrounding Section 238 cases that a special section of the judicial.ky website under the FSD heading provides what is entitled “s238 Summaries”. The latest note is some 32 pages “[as at January 2023]” and it is produced by an experienced FSD Users Sub-Committee. It is of great assistance to court users and those involved in Section 238 cases. In that note is a specific section running to some 3 pages under the heading “Interim Payments” and various judgments are referred to including *eHi*.

- (2) It is in the public interest that there is as much certainty as possible in this area of the law. Knowledge of the court’s position on this novel issue (a request, in the context of an application for an interim payment, for significant enhancements to the merger

consideration starting point) should assist those advising companies and dissenters in Section 238 interim payment applications and encourage sensible agreements to be arrived at in respect of interim payments without the need to incur significant legal costs and management time and without taking up scarce and valuable court time on contested interim payment applications. Certainty in the law is of great public importance. The publication of judgments assists in achieving certainty in the law and informs the public and attorneys as to the relevant law;

- (3) The Company's main objection to publication namely that "by traversing the allegations that were made in relation to the Company's financial statements (which are squarely matters to be dealt with in due course by the trial Judge), the interim payment may include material which may influence the mind of the trial Judge on these and other issues prior to trial (whatever caveat is applied)" is not just overstated, it is unjustified. It is fanciful in the extreme to suggest that anything in this judgment is likely to unduly influence the trial judge. The trial judge will decide the case on the evidence, the law and the submissions put before him at trial;
- (4) It is important that those who have dealings with the Company are aware that an interim payment has been made against it in a significant amount;
- (5) Any "sensitivity" the Company may have in respect of the Fang Loan is insufficient to override the compelling reasons justifying the publication of the judgment; and
- (6) Publication of the judgment in this case would not be productive of injustice. I hope I am not overstating the position or full of my own self-importance when I add, quite the contrary. The publication of the judgment should, albeit only in a very small way, assist in the administration of justice and the just determination of interim payment applications in the future and assist in achieving certainty in the law and sensible agreements being arrived at in respect of interim payments.

124. I direct that this judgment should be published in the public interest.

Order

125. Counsel are required to file a draft order reflecting the determinations in this judgment within 7 days following the delivery of this judgment.

Postscript

126. I should record that in response to an advance draft copy of this judgment being circulated amongst the attorneys those acting for the Dissenters suggested amendments (which were not agreed by the Company) that would in effect delete the references to “write-off” in respect of the Fang Loan and insert “provisioned against”. The Dissenters say as a factual matter the Fang Loan was not “written off” but “provisioned against”. The Dissenters say that the correct language is that used in Note 14 of the 20F disclosure which is set out above at paragraph 49 and which refers to a “100% provision”. The Dissenters add that their position is that the Fang Loan was wrongly omitted rather than wrongly “written off”. In fairness I note in Patner 2, filed on behalf of the Dissenters, the heading in Section IV changed to “LOAN TO FANG WRONGLY OMITTED IN THE ROTH VALUATION” whereas in Patner 1 it had read “LOAN TO FANG WRONGLY WRITTEN OFF”.
127. I do not want to throw this minor point out of all reasonable proportion, as whether the Fang Loan was written off or provisioned against makes no difference to the determinations set out in this judgment.

David Doyle

The Hon. Justice David Doyle
Judge of the Grand Court