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

Heard: On the papers

Draft Judgment circulated: 11 September 2024

Judgment delivered: 13 September 2024

Determination of application for costs following interim payment order

JUDGMENT

Introduction

1. On 23 August 2024 I delivered a judgment (the "Judgment") determining an application for an interim payment in proceedings pursuant to section 238 of the Companies Act (2023 Revision). The definitions used in that judgment are used also in this judgment.

2. By order made on 30 August 2024 it was ordered that on or before 20 September 2024 the Company pay Koa Capital (1) the principal amount of US$1,682,400 and (ii) interest at the rate of 2.38% per annum on the principal amount from 17 April 2023 to the date of payment. It was also ordered that on or before 20 September 2024 the Company pay 507 Summit LLC (i) the principal amount of US$4,986,302 and (ii) interest at the rate of 2.38% per annum on the principal amount from 17 April 2023 to the date of payment.

3. The parties were given liberty to file any written submissions with respect to costs (if so advised) by 4 p.m. on 6 September 2024 and it was indicated that the court would determine the issue of costs on the papers.

The submissions

4. I have considered:

(1) the Company's written submissions dated 6 September 2024; and

(2) the Dissenters' written submissions dated 6 September 2024.

The Company's position

5. The Company accepts that it should not recover its own costs but submits that it should pay only a proportion of the Dissenters' costs. The Company, relying on (amongst other authorities) *Scully Royalty Limited v Raiffeisen Bank AG* (CICA; Birt JA unreported judgment delivered on 8 April 2022 with Moses JA and Morrison JA agreeing), maintains that it would be unjust for the Company to have to pay the proportion of costs which was incurred by the Dissenters seeking more than the Merger Price. The Company points out that the Dissenters were wholly unsuccessful in their application to obtain more than the Merger Price. The Company adds that if the costs order is to operate forthwith there should be a proportionate reduction otherwise the costs should be costs in the cause.

6. The Company submits that following an interlocutory determination such as the present, as in *Scully*, the court is entitled to reflect the failure of the successful party on issues or elements of a hearing. The Company says that the Dissenters were seeking an uplift based on a controversial view

of value which was hopeless without the benefit of "expert report". The Company adds that had the Dissenters sought only the Merger Price on the application the evidence and argument would have been short and costs accordingly reduced. The Company further submits that the Dissenters in effect wrongly sought a mini-trial in respect of the challenges to the audited accounts and the DCF and add that the Dissenters' conduct in that respect was excessive and unreasonable and the final costs order should reflect that.

7. The Company submits that the appropriate costs order would be for the Company to pay 50% of the Dissenters' costs of the interim payment application to be assessed on the standard basis if not agreed. The Company says alternatively, if the court does not agree a percentage reduction the appropriate order should be costs in the cause.

The Dissenters' position

8. The Dissenters' position is that the Company should pay the Dissenters' costs on an indemnity basis from 4 August 2023 (the date of the Dissenters' letter) to the Company offering to accept an interim payment of US$1.00 per share (the Merger Price) plus 2.375% per annum in interest.

Determination

9. Costs normally follow the event (i.e, the successful party obtains an order for costs against the unsuccessful party).

10. As Birt J.A. recognised in *Scully* (at paragraph 25 of the judgment) it is also well-established that the general rule that costs follow the event does not cease to apply simply because the successful party raises issues on which he fails, but the courts are more willing than in earlier times to make separate orders which reflect the outcome of different issues.

11. In my judgment, in the particular circumstances of the case presently before the court, it would be unjust to deprive the Dissenters of their costs. I do not think a costs order in their favour should be reduced by a percentage to reflect the fact that the court declined to go higher than a calculation based on the Merger Price, namely US$1.00 per share.

12. As is apparent from the Judgment, by letter dated 4 August 2023 the Dissenters sought an interim payment from the Company on the basis of the Merger Price and interest at 2.375% per annum

from 17 April 2023 to the date of the interim payment. The letter was acknowledged on 11 August 2023 but there was no substantive response to it (see paragraph 4 of the Judgment).

13. In such circumstances the Dissenters had to apply to the court for an interim payment. They did so initially on the basis of US$2.27 per share and then increased that figure to US$2.31 per share.

14. At paragraphs 22-28 of the Judgment I covered the position of the Company as set out in its skeleton argument dated 8 July 2024. In summary the Company did not accept that it was indisputable that the Dissenters would recover an amount based on the Merger Price. The Company sought a substantial reduction to the Merger Price. The Company also submitted at paragraph 7 of its skeleton argument that there was no basis for an interim payment of interest arguing at paragraph 17 that such would be "unprecedented". 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).

15. It was only part way through the hearing and after most of the costs and time had already been incurred that the Company adopted a fundamentally different position (see paragraph 30 of the Judgment). It no longer sought a reduction of 60% it accepted that the "landing point" was the Merger Price. It accepted that the court could award interest at the rate of 2.375% per annum from 17 April 2023 to the date the interim payment was made.

16. The Dissenters' case is summarised at paragraphs 13-20 of the Judgment. It is correct that they sought a significant increase to the starting point of the Merger Price as originally claimed in their letter of 4 August 2023. It is correct that I rejected the Dissenters' attempt to obtain the significant increase.

17. Looked at in the round it can be seen that the Dissenters were successful and obtained an interim payment order, albeit not at US$2.31 per share but at US$1.00 per share. The Company however had declined to make any interim payment at all. In respect of the application for an interim payment order the Dissenters were substantially successful and the Company was unsuccessful. Costs should follow the event.

18. The Dissenters had sought a substantial increase to the starting point of the Merger Price. The Company had sought a substantial decrease to the starting point of the Merger Price. To that extent it was a dull 0-0 draw on the side issue of whether the interim payment order should be based on an increase or decrease to the starting point of the Merger Price. On the main issue however of

whether an interim payment order should be made the Dissenters were plainly victorious and would have left the courtroom punching the air in substantial victory even though they did not get all they had asked for at the hearing. The Company would have left the courtroom in defeat with its tail between its legs and reflecting upon its lack of wisdom in declining to positively respond to the letter of 4 August 2023 and in adopting the position it adopted in its skeleton argument. The Company had an interim payment order made against it well in excess of US$6 million plus interest, when it had previously declined to pay a cent. I accept that the Dissenters at the hearing were seeking much more than the amount requested in their initial letter of 4 August 2023. However, looking at the matter in the round through my eyes, the Dissenters were the successful parties in respect of the determination of the interim payment application and the Company was the unsuccessful party.

19. In my judgment, justice requires that the Company pay the Dissenters their costs of the Dissenters' successful application for an interim payment.

20. The Dissenters boldly argue for, or "humbly seek" as they put it at paragraph 26 of their skeleton argument dated 6 September 2024, costs on the indemnity basis from the date of their letter dated 4 August 2023. In my judgment the costs should be taxed on the standard basis in default of agreement. Although it is unfortunate, disappointing and unimpressive that the Company did not respond positively to the letter of 4 August 2023 and fundamentally changed at the hearing the position it had adopted in its pre-hearing skeleton argument, I do not think that such goes far enough "outside the norm" to justify costs on the indemnity basis. The Company's conduct was not improper, unreasonable or negligent to a high degree so as to warrant costs on the indemnity basis.

21. In the particular circumstances of this case (also bearing in mind that the Dissenters attempted to push the court to award a significant uplift to the Merger Price starting point) the conduct of the Company does not justify an award of costs on the indemnity basis.

22. Companies should be aware however that if they fail to reasonably engage with dissenters in respect of interim payments and adopt at the hearing a fundamentally different position to that adopted in their skeleton arguments such conduct may, in the future, attract an adverse costs order against them on the indemnity basis. In the particular circumstances of the present case the Dissenters have just failed to jump the high hurdle a litigant has to jump to justify the court making an award of costs on the indemnity basis against the losing side.

23. I would be grateful if the attorneys could provide a draft order within 7 days of the delivery of this judgment reflecting the determinations contained herein.

David Doyle

THE HON. JUSTICE DAVID DOYLE

JUDGE OF THE GRAND COURT