

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

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

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

7
8 **BETWEEN:**

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10 1. **BLACKWELL PARTNERS LLC –**
11 **SERIES A**
12 2. **CROWN MANAGED ACCOUNTS SPC**
13 **for and on behalf of CROWN/MASO**
14 **SEGREGATED PORTFOLIO**
15 3. **MASO CAPITAL INVESTMENTS**
16 **LIMITED**

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19 **DISSENTERS/APPLICANTS**

20
21 **AND:**

22 **QIHOO 360 TECHNOLOGY CO. LTD.**

23
24 **THE COMPANY/PETITIONER**

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26 **Appearances:**

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

30 **Mr. Richard Millett Q.C. instructed by Mr.**
31 **Dhanshuklal Vekaria of Harneys on behalf of**
32 **the Petitioner**
33

34 **Before:**

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

35 **Dissenters’ Written Submissions:**

22nd February 2017

36 **Dissenters’ Further Written Submissions:**

28th February 2017

37 **Company’s Written Submissions:**

22nd February 2017

38 **Company’s Further Written Submissions:**

28th February 2017

39 **Costs Judgment delivered:**

29th March 2017

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HEADNOTE

Section 238 of the Companies Law – GCR O.62 r.4(2) and r.4(5) – The award of costs following the Order for an interim payment pursuant to GCR O.29 Part II in s.238 proceedings.



1 **JUDGMENT**

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3 ***INTRODUCTION***

4 1. On the 26th January 2017 I acceded to the Dissenters' claim set out in the Summons
5 dated the 25th November 2016 seeking interim payments to the Dissenters pursuant to
6 O.29 r.10 and r.12 of the Grand Court Rules (the "GCR").

7 2. In the conclusion of my judgment I stated that I would consider submissions from
8 counsel as to the question of costs.

9 3. The parties' respective leading counsel Mr. Robert Levy Q.C. for the Dissenters and
10 Mr. Richard Millett Q.C. for the Company submitted written submissions on costs on
11 the 22nd February 2017 and then both leading counsel submitted further and final reply
12 written submissions on the 28th February 2017.

13 4. In summary the Dissenters submit that despite the Company's opposition to their
14 Summons for interim payment, interim payments were awarded by me, and, therefore,
15 the Dissenters should be awarded their costs in the ordinary way.

16 5. The Company submits that the Dissenters should pay the Company's costs because the
17 Dissenters lost on the merits of the application because the Court awarded a fraction of
18 the sums claimed by the Dissenters.





RELEVANT CHRONOLOGY

6. Pursuant to s.238(8) of the Companies Law, on the 22nd July 2016, the Company made an offer of US\$51.33 per share in cash without interest to the Dissenters – this being the price the Company had determined to be the “fair value” of the Dissenters’ shares. This is known as the “Merger Consideration.”
7. On the 15th August 2016 this offer to pay the Dissenters the Merger Consideration was withdrawn. It is the Dissenters’ position that the “fair value” of the their shares is considerably higher than the Merger Consideration.
8. As was apparent from the evidence contained in the First Affidavit of Manoj Jain sworn on the 25th November 2016, the Dissenters made a number of requests for an interim payment (or payment on account of the Merger Consideration) on the ground that there could be no dispute that the same monies would be ultimately payable following the final determination of the fair value – pursuant to the s.238 proceedings.
9. The Dissenters first written request for their interim payment was made on the 31st July 2016 and repeated in correspondence on the 11th August 2016 and the 7th September 2016. Moreover, notice that the Dissenters’ Summons for an interim payment might be filed in the Grand Court was given to the Company on the 3rd, 13th and 20th of October 2016.
10. It is apparent from the evidence before me that no offer of any amount was ever made by the Company for any interim payment or payment on account to the Dissenters. Also Mr. Levy Q.C. submits that the Company’s response to the request for an interim payment was simply and consistently to say no.

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GENERAL PRINCIPLES - GRAND COURT RULES

11. GCR O.62 r.4 sets out the general principles regarding the question of entitlement to costs and states:

“PART II: ENTITLEMENT TO COSTS

General principles (O.62, r.4)

4. (1) *This rule shall have effect unless otherwise provided by any Law.*
(2) *The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.*
(3)
(4) ...
(5) *If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*
(6)
(7) “

12. On the 26th January 2017 I found, contrary to the Company’s submissions that the GCR, and specifically, GCR O.29 r. 9 and r.18 do apply in s.238 proceedings.

13. I made an order for interim payments – for the Merger Consideration which, in my view, was the just amount that came within the Dissenters’ claim “for such other amounts as this Court considers fit”, as set out in the Summons dated the 25th November 2016.



1 14. I can find no circumstances which could justify my departure from the long-established
2 principle that costs follow the event. Having considered all the circumstances leading
3 up to the filing of the Dissenters' Summons, and the submissions I heard on the 18th
4 January 2017 I found the Dissenters to be the successful party in my judgment.

5 15. Mr. Levy Q.C. has submitted that the authorities are clear that on deciding which party
6 was successful for the purposes of ordering costs the Court should look at which party
7 has been ordered to pay the other party for the purpose of determining the winner.

8 16. In *A L Barnes Ltd. V Time Walk (UK) Ltd*¹, Longmore L.J. set out at paragraph 28 of
9 his Judgment the formulation a judge ought to adopt to determine the identity of the
10 successful party when he stated:

11 *"In deciding who is the successful party the most important thing is to identify the*
12 *party who is to pay money to the other. That is the surest indicator of success and*
13 *failure."*

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15 17. In *Day v Day*² Ward LJ endorsed this approach and stated at paragraph 17:

16 *"I would go further and say that in a case like this, this question of who is the*
17 *unsuccessful party can easily be determined by deciding who has to write the*
18 *cheque at the end of the case."*



¹ [2003] EWCA Civ 402, [2003] BLR 331

² [2006] EWCA Civ. 415

1 18. In response to the Dissenters' application for an interim payment the Company took
2 the position that the GCR, and specifically GCR O.29 r.9-18, did not apply in s.238
3 proceedings and that no interim payments were payable to the Dissenters. I rejected the
4 Company's submissions and ordered interim payments to be paid by the Company to
5 the Dissenters.

6 19. Consequently, the Dissenters are the successful party and I order, pursuant to GCR
7 O.62 r.4(2) and r.4(5), that costs follow the event.

8 20. Accordingly, I order that the Dissenters' costs of and incidental to the Summons are to
9 be paid by the Petitioner and such costs are to be taxed on the standard basis if not
10 agreed.

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12 **Dated this the 29th March 2017**

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15 **Honourable Mr. Justice Charles Quin Q.C.**
16 **Judge of the Grand Court**

