IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 92 OF 2017 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2016 REVISION)
AND IN THE MATTER OF TRINA SOLAR LIMITED

Before:	**The Hon. Justice Segal**
Appearances:	**Barry Isaacs KC instructed by Walkers for Maso Capital Investments Limited and Blackwell Partners LLC – Series A**
	Graham Chapman KC instructed by Harney Westwood & Riegels for the Company
Heard:	**19 July 2024**
Further evidence filed:	**24 July 2024**
Draft judgment circulated:	**31 July 2024**
Judgment delivered:	**9 August 2024**

HEADNOTE

Application by dissenting shareholders in section 238 appraisal proceedings for interim payments – Company's appeal to the Privy Council pending – amount of interim payments agreed – Company asserted that dissenting shareholders had failed to provide adequate evidence of their ability to repay any overpayment in the event that Company's appeal was successful - dispute as to whether evidence of risk of irrecoverability could be taken into account where the quantum of the interim payments was agreed and whether evidence established such a risk to the requisite standard

JUDGMENT

Introduction

1. By way of a summons dated 6 September 2023 (the ***Application***), Maso Capital Investments Limited (***MCIL***) and Blackwell Partners LLC – Series A (***Blackwell***) (together, the ***Dissenters***) seek orders requiring Trina Solar Limited (the ***Company***) to make interim payments to them pending the final determination of the fair value of the shares they previously held in the Company.

2. The fair value of the Dissenters' shares will only be finally established following the Company's appeal to the Privy Council (the Cayman Islands Court of Appeal granted the Company leave to appeal and the Company filed its notice of appeal with the Privy Council on 28 September 2023).

3. The Company and the Dissenters have agreed that a total of US$10,591,747.56 should be paid by way of interim payments (the ***Interim Payments***). However, the parties are unable to agree the destination of the Interim Payments. The Dissenters say that the Interim Payments should be paid directly to them albeit that they have offered to give certain undertakings concerning how the funds paid over will be invested and dealt with. The Company says that the Interim Payments should be paid into an escrow account with an escrow agent or into Court.

4. The Company has concerns as to the financial position and solvency of the Dissenters (and therefore the Dissenters' ability to repay any part of the Interim Payments that in due course is established to be an overpayment) and says that in the absence of sufficient and satisfactory evidence from the Dissenters confirming their ability to make such a repayment the Interim Payments should be paid into Court (or into a suitable third party escrow account) pending the final determination of the fair value amount payable to the Dissenters.

5. In response to these concerns the Dissenters have adduced some evidence as to their financial position and offered various undertakings. The Dissenters submit that there is no basis on which the Court should impose conditions on the payment of the Interim Payments and that the Interim Payments should be paid to and held by them.

6. The Application was heard on Friday, 18 July 2024. Barry Isaacs KC appeared for the Dissenters and Graham Chapman KC appeared for the Company. At the hearing I gave the Dissenters permission to file a brief supplementary affidavit to clarify and confirm two points in their evidence as to their financial position (which evidence was filed on 24 July 2024 in the form of the Ninth Affidavit of Manoj Jain (***Jain 9***)) and said that I would reserve my judgment on the Application. I now hand down that judgment. For the reasons set out below, I have decided to grant the Application and order that the Interim Payments be paid to the Dissenters subject to the Dissenters formalising and confirming the undertakings (as undertakings to the Court) which they have offered to provide (and which I discuss below).

The Dissenters' evidence and position in relation to their financial position

7. The Dissenters, prior to the hearing, provided affidavit evidence as to their financial position in the Seventh Affidavit of Mr Jain (***Jain 7***) and the Eighth Affidavit of Mr Jain (***Jain 8***) that:

(a). in Jain 8 at [11], Mr Jain confirmed that:

> *"the cumulative net asset values of the [Dissenters] are many multiples of the [Interim Payments] (the "NAVs"). The NAVs are the value of the assets of [the*

> *Dissenters] respectively less their respective liabilities as at the NAV Date. For the purpose of calculating the NAVs, the [Dissenters] assets include all prior payments made by the Company to [the Dissenters] during the course of these proceedings (including all previous interim payments made … and the "top-up" payments made following the determination of the fair value of the [Dissenters'] shares…) as the [Dissenters'] policy is not to make any distributions of monies that relate to an appraisal process until that proceedings has finally concluded.*

(b). in Jain 8 at [12], Mr Jain further confirmed that the funds representing the Interim Payments will be held entirely in cash or cash equivalents at Morgan Stanley in London or JP Morgan in New York.

(c). in Jain 8 at [13] and [14], Mr Jain said that the Dissenters remain engaged in five appraisal proceedings in this Court (iKang; 58.com; New Frontier Health Corporation; 51job Inc; and Win Trix DC Group) and therefore have a significant presence and assets in this jurisdiction. These assets include an impending interim payment in the Win Trix proceedings which is expected to be at least US$14 million.

(d). in Jain 8 at [15], Mr Jain confirmed that the Dissenters have never defaulted on any obligation in any appraisal proceeding in which they have been involved and that they will continue to properly manage their operations to ensure that this did not occur. In Jain 7 at [14(b)], Mr Jain confirmed that the Dissenters intend to comply with any order that the Court makes and that he saw no reason to doubt their inability to do so.

8. The Dissenters also noted that the Company had previously made interim payments directly to them in these proceedings in 2017 and 2023 (in amounts exceeding US$22 million).

9. The Dissenters also rely on the fact that they obtained interim payment orders without the funds being paid into an escrow account or an account with the Court in *Re Qunar Cayman Islands Limited* (Unreported, 8 August 2017, Justice Mangatal) (***Qunar***) and *Re eHi Car Services Limited* (Unreported, 28 November 2019, Justice Kawaley) (***eHi***). They also rely on what was said by the Cayman Islands Court of Appeal in its judgment in the present case (Unreported, CICA, Field JA, Birt JA and Beatson JA, 4 August 2023). The Company

applied for an order that the Dissenters provide security. The CICA dismissed the Company's application in the following terms:

> *"[53] [t]he Company submitted … that, if the Court was minded to refuse a stay it should direct the Dissenting Shareholders to provide security prior to execution, i.e. prior to the hearing before the Grand Court proceeding.*
>
> *[54] No grounds in support of this suggestion were included. It was not suggested that the Dissenting Shareholders would be unable or unwilling to pay any costs order in connection with the 'wasted' Grand Court hearing and there is nothing in the papers before us to support any suggestion. The Dissenting Shareholders have been funding the present very expensive litigation for a number of years and the inference must be that they have access to substantial funds. Furthermore, they have been previous litigants in at least two substantial section 238 cases in this jurisdiction, namely Qunar and Shanda Games the latter of which went all the way up to the Privy Council. There is nothing before us to suggest they have failed to make any required payments in connection with such litigation.*
>
> *[55] In the absence of any evidence, I cannot find that there is a material risk of the Dissenting Shareholders not meeting any order for costs which may be made in connection with the proposed limited hearing before the Grand Court."*

The undertakings offered by the Dissenters

10. The Dissenters have offered to provide certain undertakings to the Company, but the Company rejected these as inadequate. The Dissenters' position at the hearing was that it is unnecessary for them to provide these undertakings and that the Application should be granted without them but if the Court was against them on this and concluded that the undertakings were required then they would be prepared to give them.

11. These undertakings (the ***Undertakings***) are as follows:

(a). that the Interim Payments will be kept entirely in cash or cash equivalents at Morgan Stanley in London or JP Morgan in New York.

(b). that the Interim Payments will be kept separate from the Dissenters' other assets.

(c). that no payment of the Interim Payments will be made to any person or for any purpose prior to the conclusion of the appeal to the Privy Council.

12. The Dissenters have also confirmed on affidavit that the purpose of the Undertakings is to ensure that they will be able, and that they will, repay the Interim Payments to the Company in the event of any overpayment.

The relevant provisions in the Grand Court Rules (2023 Revision) (*GCR*)

13. The relevant rules in the GCR are as follows:

(a). GCR O.29 deals with interlocutory injunctions, interim preservation of property and interim payments.

(b). GCR O.29, r.10(1) states that:

> *"The plaintiff may, at any time after the writ has been served on a defendant and the time limited for the defendant to acknowledge service has expired, apply to the Court for an order requiring that defendant to make an interim payment."*

(c). GCR O.29, r.12(c) details one of the circumstances where the Court may exercise its discretion to make an order for an interim payment. It states:

> *"that if the action proceeded to trial the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs, the Court may, if it thinks fit, and without prejudice to any contentions of the parties as to the nature or character of the sum to be paid by the defendant, order the defendant to make an interim payment of such amount as it thinks just, after taking into account any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely."*

(d). GCR O.29, r.13(1) (which is headed "*Manner of payment*") deals with who should receive the interim payments and provides that:

> *"Subject to Order 80, rule 12, the amount of any interim payment ordered to be made shall be paid to the plaintiff unless the order provides it to be paid into Court, and where the amount is paid into Court, the Court may, on the application of the plaintiff, order the whole or any part of it to be paid out to the plaintiff at such time or times as the Court thinks fit."*

The Dissenters' submissions

14. The Dissenters submit that:

(a). the Court should order the Interim Payments be paid to them without conditions. There being no dispute as to the quantum of the Interim Payments, the Dissenters were entitled to such an order and the Court was not entitled to impose conditions regarding the recipient of the Interim Payments and the terms on which the funds would be held.

(b). once the Court had decided that interim payments should be made and determined their amount, any risk (the ***Irrecoverability Risk***) that the Dissenters would be unable to repay any part of the Interim Payments in the event that an adjustment was required pursuant to GCR O.29, r.17 following the outcome of the Company's appeal to the Privy Council was irrelevant. If the Court is properly of the view that the case comes within GCR O.29, r.10 it is of no concern to the Court how the interim payment is used by the applicant and an order requiring payment to the applicant would be appropriate even if the interim payments would be irrecoverable from the applicant.

(c). the Irrecoverability Risk was only relevant to the issue of, and should only be taken into account on, an application for interim payments for the purpose of determining the quantum of the interim payments. If the Court was properly satisfied on the evidence that there was an Irrecoverability Risk, then it could adjust and reduce the quantum of the interim payments to ensure that there was no risk of overpayment. But in the present case, since quantum was not in issue and had been agreed, any Irrecoverability Risk could be ignored and could not justify the order sought by the Company.

(d). in the alternative, if the Court when considering whether to make an interim payment order had a general discretion as to whether to make an order and as to the terms on which the order was to be made so that the Court was able to impose terms and conditions and could take into account a material Irrecoverability Risk, the evidence in this case demonstrated that there was no material Irrecoverability Risk.

(e). in the further alternative, if the Court adopted the analysis in (c) but concluded that absent the Dissenters giving the Undertakings there would be a material Irrecoverability Risk that would require or justify the payment of the Interim Payments into an escrow account or to the Court, then the Dissenters would provide the Undertakings.

15. The Dissenters submit that the authorities establish two related propositions. First, the Irrecoverability Risk only goes to quantification of the interim payments. Secondly, once the Court has concluded that interim payments should be made it is of no concern to the Court how the interim payments are to be used by the applicant. Since the Company has conceded that it is appropriate to pay the Interim Payments in the agreed amounts, payment of the Interim Payments to the Dissenters would be appropriate even if they were irrecoverable in the hands of the Dissenters. Since the Court is not concerned with what the Dissenters would do with the Interim Payments after they receive them, they should be paid to the Dissenters even if the Company's alleged concern as to Irrecoverability Risk were substantiated.

16. The Dissenters submit that the judgment of His Honour Judge Humphrey Lloyd QC in *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons (No 2)* 72 ConLR 21 (***Harmon***) supports the first proposition and the Dissenters relied on part of [9] of the judgment which states as follows:

> "*However in my judgment the fact that any sum paid might be irrecoverable is irrelevant, except that, where the amount or an element of it may be a matter of judgment or discretionary, care will be taken not to over-compensate the applicant. First, the object of CPR 25.7 is to give the applicant part of what it is or will be entitled to receive. A court does not normally decline to assess damages because of the possibility of an appeal against the amount of the award (as opposed to an appeal on*

> *liability). A stay of execution may be granted but even then the defendant will have to persuade the court that there is a good reason why the claimant should not be paid. Second, CPR 25.7 does not provide for an order to be made on conditions. The absence of any such reference suggests that the court's function is to decide what is or may be due and not to be concerned about what the claimant might do with the award when it is received or its recoverability. Third, the rules provide no link between CPR 25.7 and 25.8. If it had been intended that the possibility of irrecoverability precluded an interim payment order being made or was to affect the exercise of the power then some overt link would have been made* [my underlining]*."*

17. The Dissenters submit that the second proposition is supported by *Smith v Glennon* (EWCA), Unreported, 29 May 1990, *Stringman (a minor) v McArdle* [1994] 1 WLR 1653 (EWCA) at 1656-7 and *McDow v Dolphin Discovery (Cayman) Ltd* (Unreported, Grand Court, Walters J, 7 July 2022) at [15]).

18. The Dissenters argue that if they are wrong that Irrecoverability Risk only goes to quantum and the Court is entitled to impose conditions on the making of interim payments where there is material Irrecoverability Risk, then in this case the evidence shows that there is no such risk.

19. They submit that Justice Mangatal's characterisation in *Qunar* of what had to be shown to establish Irrecoverability Risk was correct. She had held (at [90]) that in that case there was no *"genuine risk that the Applicants [the Dissenters in this case] would not be able to repay any interim amounts ordered* [my underlining]." The risk was only remote. The company in that case had claimed (see [75]) that the Dissenters had failed to provide any information regarding their financial standing and that neither was a publicly traded entity and very little financial information had been published, Furthermore, Blackwell was a foreign entity so that any interim payments would be removed from the jurisdiction.

20. The Dissenters also argue that Justice Mangatal's finding that there was no Irrecoverability Risk in relation to the Dissenters is relevant and could be relied on in this case (and noted that, as in the present case, Justice Kawaley had said in *eHi* that the company there had been unable to positively assert a risk that overpayments will not be recoverable). As the Court of Appeal in the present proceedings had concluded in the security for costs

application which they had dismissed, there was no *material risk* of the Dissenters not being able to meet an order for costs made against them.

21. The Dissenters argue that the Application was an *a fortiori* case because the Dissenters had adduced evidence that established that any risk of repayment was remote. Furthermore, the Dissenters' evidence had been responsive to and in many respects answered the Company's concerns. The Company's concerns had been raised as long ago as Harneys' letter of 21 September 2023, but had not been pursued until Harneys' letter of 14 May 2024 in which the range and type of information requested had been substantially increased and by which point the demands were unreasonable. The Dissenters suggested that the Company was making these demands in order to provide a foundation for its claim that the Court should draw adverse inferences from the Dissenters' failure to provide the further information.

22. The Dissenters submit that the evidence establishes that there is no genuine or material risk that they will be unable to repay the Interim Payments in full if the Company's appeal to the Privy Council is successful. They say that they have not failed to adduce relevant evidence of their financial position and that no adverse inference can be properly drawn against them, as the Company contends. This is not a case of deliberate reticence. Rather it is clear, on the totality of the evidence (following the approach adopted in *Harmon*) that there was no Irrecoverability Risk.

23. The Dissenters submit that the decision of Justice Doyle in *Xingxuan Technology* (Unreported, 26 May 2023) (***Xingxuan***) is clearly distinguishable. The relevant facts were set out at [87] of the judgment. The dissenter in that case was a BVI special purpose vehicle incorporated solely for the purpose of investing in the company and because of the corporate structure there was said to be a risk that the dissenter was likely to upstream and distribute the interim payments to its parent company. In addition, there had been evidence of the dissenter's reliance on corporate formalities to evade its discovery obligations. The Dissenters said that the position in this case was wholly different.

24. The Dissenters argue that even if they are wrong on this, and that it could be said that there remained a genuine or material risk that they would be unable to repay the Interim Payments, the Undertakings ensured that the Company has more than adequate protection. The Undertakings would ensure that the Interim Payments were retained by the Dissenters, kept separate from the Dissenters' other funds or investments and retained in the form of cash or invested in low-risk securities in identified accounts with world class financial institutions. The distinction between this case and the facts in *Xingxuan* became even clearer.

The Company's submissions

25. The Company argues that the Court has a power, when exercising its discretion to make an interim payments order, to require, as a condition to the order, that the interim payments be paid into an escrow account on suitable terms (or to the Court) and that in this case the Court should do so in view of the Dissenters' failure to provide adequate financial information (despite having received reasonable requests to do so) evidencing their ability to repay the Interim Payments in the event that the Company's appeal to the Privy Council is successful.

26. The Company submits that there are six relevant principles:

(a). in exercising its discretion under GCR O.29, r.12 and r.13 the Court must have regard to the overriding objective.

(b). GCR O.29, r.13(1) may require that interim payments be paid into Court and the power given to the Court to make such an order is not confined to cases involving minors or those with disabilities.

(c). outside the section 238 context, it has been held in England that Irrecoverability Risk did not preclude the making of an interim payments order. It was not a knockout blow and a complete answer to a claim for interim payments.

(d). but the Court was entitled to and should take into account Irrecoverability Risk which was relevant both to the quantification of the amount to be paid and to whether terms and conditions should be ordered and attached to the interim payments.

(e). in the section 238 context, it has been decided by this Court that Irrecoverability Risk is a relevant factor to be taken into account and that it can justify the Court ordering that the interim payments be paid into an escrow account.

(f). when considering whether there is a genuine or material risk that the party to whom the interim payments are to be made may be unable to repay all or some of those payments in the event of an adjustment, the Court is entitled to draw appropriate adverse inferences for that party's failure to provide financial information when it has been reasonably requested.

27. Mr Chapman KC submits that the authorities establish that the Court may impose conditions when making an interim payments order and require that the interim payments be paid into an escrow account:

(a). he relies on the judgment in *Harmon*, in particular [7], [9], [13] and [52].

(b). he notes that His Honour Judge Humphrey Lloyd QC had held that the court had the power to impose conditions in reliance on the requirement that the court apply and give effect to the overriding objective (which applied equally in this jurisdiction). The learned judge had said this (at [7]):

> *"CPR 25.7 has to be interpreted and the powers granted by it have to be exercised in accordance with the overriding objective as required by CPR 1.2. The overriding objective includes ensuring that parties are on an equal footing. Depriving a party of money which one party has but which is rightfully the other's does not place the latter on an equal footing with the former. Nevertheless it might be equally wrong to order an interim payment to a party who might not be able to repay it if an adjustment were required under CPR 25.8."* (my underlining)

(c). His Honour Judge Humphrey Lloyd QC had also stated explicitly (in a passage from [9] which I had drawn to the attention of Mr Isaacs KC when he was quoting from that paragraph of *Harmon* during his oral submissions) that the court had the power to impose terms and conditions:

> *"However, I have no doubt that conditions could be attached where in an appropriate case it was thought necessary to meet the overriding objective set out in CPR 1.1. CPR 1.2 requires the court to give effect to the overriding objective when it exercises any power or interprets any rule. Thus, if any rule does not contain adequate provision to achieve the overriding objective it will have to be made to do so by "interpretation". Alternatively, if the circumstances require the power (eg that given by CPR 25.7) will have to exercised so as to achieve the overriding objective and if this means attaching conditions then such conditions are authorised by CPR 1.2."* (my underlining)

(d). Mr Chapman KC also notes that His Honour Judge Humphrey Lloyd QC took into account the Irrecoverability Risk when making his decision in the case. He considered that the court had the power to impose a condition relating to, or require a third-party guarantee as security against, the Irrecoverability Risk, considered whether to do so but decided that since he had fixed the amount of the interim payments at a suitably low level there was no need to make payment subject to a condition or guarantee. Judge Humphrey Lloyd QC said the following at [13] and [52]:

> *"13. If the court considers that the claimant will probably recover a part (but might not do so) then some lower proportion will be ordered. If that is equivalent to saying that there is almost certainly no real prospect that that proportion will be recoverable then equally no condition or guarantee of repayment should be applied. However the proportion may also reflect the possibility of irrecoverability. Again I understood Mr White to accept that it would not be wrong to do so and thus to apply discount to reflect that factor. If the court is however unsure about the balance or about part of the claim the total of which it is otherwise able to assess no interim payment will be ordered for it would not be reasonable to do so (even though "nil" is not a proportion). If the court although unsure nevertheless thought there should be a generous payment then a condition to secure repayment might be included in the order. It follows that H of C in offering Harmon 100% of its claim for wasted tender costs rather than a reasonable proportion of it was not wrong in making it subject to a*

> *condition guaranteeing partial recoverability (and that Harmon was equally not wrong in refusing it).*
>
> ……
>
> 52. *I am firmly of the view that Harmon has a realistic prospect of success or is bound to recover one-third of this amount, i.e. £1,232,310 - which would represent a more realistic realised margin related to those anticipated at the time of Harmon's demise for contracts then current but which is less than the amount of the currency adjustment. It thus might signify that the contract would otherwise have been lossmaking. Since Harmon prices were not markedly out of line with those of its competitors I doubt very much if they were all intent on buying the fenestration contract for the NPB. In addition to an interim payment of 100% of £1,232,310 it would thus also be right to award a reasonable proportion of the balance of £2,464,620. Here however I bear particularly in mind the possibility of irrecoverability, as well as the possibility that my findings may not be right in whole or in part, and the need to investigate many matters, such as loss of contribution to overhead. I therefore consider that Harmon should be paid only 25% of the balance, namely £616,155. On the first and fourth bases of claim Harmon is therefore entitled to an interim payment of £1,848,466. Since this figure represents the amount which I believe to be sensible to award and which I am reasonably certain will prove not to be recoverable I shall not make payment subject to[a] condition or guarantee of repayment."* (my underlining)

(e). Mr Chapman KC also relies on the judgments in *Qunar*, *eHi* and *Xingxuan* as demonstrating that this Court considers that Irrecoverability Risk is a factor to be taken into account by the Court when deciding whether to make an interim payments order and whether to make it on terms. He submits that it is clear from [75], [76], [80], [87], [89] and [90] of *Qunar* that Justice Mangatal considered that it was appropriate to take into account the Irrecoverability Risk but that because she considered that it was not made out on the facts she did not go on to consider the consequences of there being such a risk. In *eHi* at [17] Justice Kawaley, when summarising the Court's approach to making interim payment orders, had noted that it was considered inherently prejudicial to the company in section 238 cases to be required to overpay dissenters at the interim stage particularly if there are doubts about the recoverability of overpaid sums (albeit that Justice Kawaley focussed on the impact of such doubts on the quantum of the interim payments). Mr Chapman KC further submits that Justice Doyle

in *Xingxuan* clearly took into account the risk that the company in that case would be unable to repay the interim payments and that this risk (established by adverse inferences) justified requiring the interim payments to be paid into an escrow account. He relied on what Justice Doyle said at [5], [12], [13], [19], [87], [90], and [93]. He noted that the risk asserted by the company in that case was similar to that asserted by the Company in this case and he submits that the Company is similarly entitled to an order requiring that the Interim Payments be paid into an escrow account.

(f). in addition, Mr Chapman KC relies on the judgment of Mr Justice Pumfrey in *Ultraframe (UK) Ltd v Eurocell Building Plastics Ltd* [2005] EWHC 2111 (Ch). Mr Chapman KC submits that this case is directly on point and demonstrates that the Court may (and should) take into account the Irrecoverability Risk and that the decision, in the exercise of the Court's discretion, to impose terms can be made independently of a determination as to the quantum of the interim payments. Mr Justice Pumfrey considered the issues of quantum and whether to impose terms separately and sequentially. On the evidence, he decided not to reduce the amount of the interim payments on account of the Irrecoverability Risk (resulting from the likelihood of intra-group payments by way of dividends) but instead to impose terms to protect Eurocell.

(g). in *Ultraframe,* an application was made by Ultraframe for a payment on account of damages in the context of an inquiry as to damages awarded by the English Court of Appeal to Ultraframe in an action for patent infringement. Eurocell had sought permission from the House of Lords to appeal the English Court of Appeal's judgment but had not sought a stay of the damages assessment. Eurocell contended that the fact that they had more than a negligible chance of obtaining permission to appeal, and thereafter prosecuting that appeal to a successful conclusion, meant that Ultraframe's ability to repay any interim sum paid was a factor that the court should take into account either in fixing the sum to be paid or, at the very least, imposing terms to protect the money in the event that Ultraframe appeared to be unable to repay it. Mr Justice Pumfrey assessed Ultraframe's likely entitlement to damages and a reasonable

proportion of what would ultimately be recovered. He decided, having regard to various considerations, that the appropriate sum was £800,000 which he proposed to order be paid as interim damages (see [17]). He then said that there were two further matters to be considered. First, whether the sum should be reduced to take account of the uncertainty of a pending petition for leave to appeal to the House of Lords. Second, whether any terms should be attached to the interim payment. The learned judge considered the evidence adduced as to Ultraframe's overall financial position. The evidence was detailed and included Ultraframe's interim accounts. It also showed that Ultraframe was a wholly owned subsidiary of Ultraframe plc and that it wished to obtain the award of interim damages as a matter of urgency largely for the purpose of paying a dividend to Ultraframe plc. He concluded as follows (my underlining):

> *21. ……. Accordingly, it seems to me that, as usual, the balance sheet and the accounts need considerable interpretation before one can draw the inference that the Claimant will be unable to repay the sum of £800,000 if required to do so in consequence of a successful appeal to their Lordships' House.*
>
> *22. At the same time, I have sympathy with the contention that the paying party's tasks should not in that event be made more difficult by intra-group transfers. Accordingly, I do propose to make the order for interim payment, subject to the condition that both the holding company, Ultraframe plc, and the Claimant join together in entering into an undertaking to repay in the usual circumstances. So, there will, in effect, be a guarantee for the payment from Ultraframe plc."*

28. Mr Chapman KC submits that Justice Doyle's judgment in *Xingxuan* shows that adverse inferences as to the existence of Irrecoverability Risk may be drawn against a party where they fail to provide financial information which is reasonably requested. Justice Doyle had found that the company had reasonable concerns and took these into account (at [93]) when balancing the interests of the company and the dissenter and deciding that the "*safest option*" was to require the interim payments to be paid into an escrow account with Ogier. At [92] Justice Doyle said that:

> *"I accept that a court cannot engage in purse speculation and that there must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities before a court can draw reasonable inferences. I note the lack of substantive responses from the Company to the enquiries of the Dissenter as to the financial (some of which seemed reasonable and cried out for a proper substantive response). I accept the Dissenter's prima facie justifiable concerns in respect of possible lack of payment by the Company after trial."*

29. Mr Chapman KC also submits that the security for costs cases are analogous and relevant to interim payment cases and support the proposition that adverse inferences can be drawn from a failure to provide financial information when reasonably requested (see *Thistle Hotels Limited v Gamma Four Limited* [2004] EWHC 322 (Ch) and *SARPD Oil International Limited v Addax Energy SA & Another* [2016] EWCA Civ 120). In *SARPD Oil* Lord Justice Sales (as he then was) had said (for the purpose of deciding whether the court considered that there was reason to believe that the claimant would be unable to pay the defendant's costs, an admittedly different test with a lower threshold than that applied in interim payment cases) that a party's deliberate reticence in providing financial information:

> *"can and should [be taken into account] as part of the overall picture. An evaluation has to be made of the totality of the evidence before the court; part of that totality is the absence of relevant evidence from the only party who is able to provide it… [any practice] that security for costs will often be granted against a foreign company who is not obliged to publish accounts, has no discernable assets and declines to reveal anything about its financial position … is a sound one."*

30. At the hearing, the Company challenged the Dissenters' evidence as to their financial position. The Company says that it is incomplete and insufficient to establish that there is no genuine Irrecoverability Risk. During the hearing, Mr Chapman KC scrutinised the statements made by Mr Jain at [11] of Jain 8. He noted that the date by reference to which the financial information was prepared was unclear. Mr Jain referred to the "*NAV Date*" which was not defined or explained. He also noted that while Mr Jain had confirmed that the net assets were "*many multiples*" of the Interim Payment, Mr Jain had only said that the *cumulative* net assets of the Dissenters did so. The Company said that it remained possible that the net assets of one of the Dissenters were substantially below the amount of the Interim Payments to be made to them (and that the reference to cumulative figures was suspicious and gave rise to reasonable concerns). Furthermore, the Dissenters' net assets were said to

include all previous interim and other payments but did not say what had happened to these funds and whether they had been and would be retained by the Dissenters (the Dissenters had only confirmed that their policy was not to make any distributions of funds received pursuant to an appraisal process until the relevant proceeding had been finally concluded). The Company said that the Dissenters failure to provide a clear, simple and up to date statement of their assets and liabilities was unreasonable and justified the concerns it had expressed. Such failure also justified the Court drawing the inference that the reason why the Dissenters had refused to give such information was because it would reveal at least that one of the Dissenters had net assets below the amount of the Interim Payments to be made to them and also that it was not clear that the Dissenters would be able to repay the Interim Payments if the Company's appeal succeeded.

Jain 9

31. At the hearing, in response to the challenges to the Dissenters' evidence made by Mr Chapman KC (which Mr Isaacs KC characterised as late and unjustified by being overly critical of points of detail while failing to see the big picture and attribute proper weight to what had been said), Mr Isaacs KC said that any points of detail in the evidence that needed clarification could be dealt with by way of a short further affidavit. He said that the failure to identify the date referred to as the NAV Date was clearly an error and oversight and that the reference to the Dissenters cumulative NAVs had not been intended to obfuscate the position. Without objection from Mr Chapman KC, I gave the Dissenters permission to file a further affidavit by 24 July 2024 dealing with these two points.

32. In Jain 9, Mr Jain states as follows (at [4]):

> *"I make this Affidavit [with the authority of both Dissenters] to confirm two matters in relation to paragraph 11 of my Eighth Affidavit, which arose during the course of the hearing of the Application on 19 July 2024, as follows:*
>
> *(a). the "NAV Date" referred to is 30 April 2024.*
>
> *(b). as at the NAV Date (and also as at 30 June 2024 being the most recent date on which the NAVs were struck):*

(i). the NAV of MCIL was more than ten times the agreed quantum of the interim payment attributable to MCIL (i.e. US$4,522,177.69); and

(ii) the NAV of Blackwell was more than ten times the agreed quantum of the interim payment attributable to Blackwell (i.e. US$6,073,029.87)."

33. The Company confirmed to the Court by an email from Harneys dated 29 July 2024 that it would not be filing further evidence or submissions in response to Jain 9.

Discussion and decision

34. In my view, the Company is right on the law but wrong on the facts. While I consider that the Court may, in order to address the Irrecoverability Risk, impose terms and conditions when making an interim payments order and require the interim payments to be paid into and held in an escrow account for a period, I am satisfied that the Dissenters' evidence, as clarified and confirmed in Jain 9, establishes that there is no genuine or material risk that they (or one of them) will be unable to repay any sum ordered to be repaid by way of adjustment to the Interim Payments following a successful appeal to the Privy Council by the Company. The Dissenters have satisfied the *onus probandi* and are entitled to an order that the Interim Payments be paid to them.

35. Mr Chapman KC's six principles and his analysis of the case law (as I have summarised it above) seem to me to be right. I accept that the Court has the power to impose or attach terms and conditions to an interim payments order to address the Irrecoverability Risk. Irrecoverability Risk is not just relevant to quantum, although it can be taken into account and addressed by fixing an appropriate amount for the interim payments so as to remove or minimise the risk that there will be an overpayment. If Irrecoverability Risk can be addressed by fixing the interim payments at an appropriate amount then there will be no need to go on to consider whether additional protections for the party paying them are needed and whether to require the interim payments to be paid into Court (as explicitly permitted by GCR O.29, r.13(1)) or paid subject to other terms such as for the payments to be held in another type of escrow account.

36. It would, as it seems to me, be unsatisfactory if the Court's power to make interim payment orders, which is acknowledged to involve the exercise of a broad discretion, was confined so as to prevent the Court from addressing Irrecoverability Risk in this way. The overriding objective, even in its attenuated form as adopted in this jurisdiction, requires it. Furthermore, GCR O.29, r.13(1) (which admittedly is referred to in the 2024 CPR White Book at 15-124 as having been seldom used and which was not retained in CPR r.25, although payments into court can be ordered pursuant to CPR r.3.1(3)) explicitly gives the Court the power to order that interim payments not be made to the applicant and its purpose must be seen as at least including the protection of the party making the interim payments. It might be suggested that the inclusion of GCR O.29, r.13(1) in GCR O.29 should be understood as meaning that the Court's only way of protecting the interests of the paying party is by ordering a payment into Court, but that seems to me to involve too narrow a view of the power and the Court's discretion to make an appropriate order when exercising it.

37. It is clear that both Justice Mangatal in *Qunar* and Justice Doyle in *Xingxuan* considered that Irrecoverability Risk was a factor to be taken into account when deciding whether to make an interim payments order and that Justice Doyle considered that Irrecoverability Risk justified and required that his interim payments order provide that the payments be made to Ogier and held in an escrow account (so as to protect the position of the company). In my respectful view, he adopted the proper approach which I would follow (albeit that the basis for the exercise of the jurisdiction was not challenged in the way it has been in this case).

38. This view is supported by the English cases based on the CPR rules governing interim payments (which are different in detail but not in substance). These cases include *Harmon* and *Ultraframe*. *Ultraframe* shows how broad the court's discretion is. There, Mr Justice Pumfrey concluded that it was not possible to conclude on the evidence as to Ultraframe's financial position that Ultraframe would be unable to repay the interim payments if Eurocell's appeal was successful but that nonetheless terms could be imposed to protect Eurocell from a risk of non-payment arising because of the making of distributions to its

parent company. The decision is technically, as Mr Isaacs KC submitted, distinguishable from the present case since the Dissenters' Undertakings will remove a risk of upstreaming or payments away. There was no Irrecoverability Risk by reason of Ultraframe's weak financial position. But there was an Irrecoverability Risk for another reason, because of the risk of upstreaming, which Mr Justice Pumfrey considered that Eurocell should be protected against by imposing a term requiring a parent guarantee (at least the effect of upstreaming and intra-group transactions would make Eurocell's task of recovering the interim payments more difficult and that was sufficient to justify the imposition of terms).

39. In addition, it is worth noting the English Court of Appeal's summary of the position in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* (No 2) [2012] 1 WLR 2375 (a case not included in the joint authorities bundle). In that case, the English Court of Appeal held, in relation to interim payments under CPR 25.7(1)(c), that the general approach should be that where the court has power to order an interim payment, it should do so unless there was a sufficient specific reason not to do so. There is no absolute requirement once the quantum has been fixed to make an order for an interim payment. There may be reasons for not doing so or for imposing conditions. Aikens LJ said this:

> *"22. On the second question, the judge concluded that the general approach should be that, where the court has power to order an interim payment it should do so unless there was a sufficient specific reason not to do so. In the present cases, Sir Andrew considered at that there were powerful specific reasons in favour of making an order, viz (a) the fact that the litigation might go for years before being finalised; (b) potential interest in favour of the claimants will be running at the Government's borrowing rate, which was a good deal lower than the rate at which the claimants were themselves able to borrow: para 21. Sir Andrew also concluded, at para 23, that there were no specific reasons not to order interim payments. In that respect the judge rejected the argument advanced by counsel for HMRC that no interim payment order should be made because there were many difficult questions concerning the quantification of the relief that was ultimately due to the claimants on the basis of Henderson J's decision.*
>
> *...*
>
> *47. I agree with Sir Andrew Park's general proposition that if the court is satisfied that the conditions in rule 25.7(1)(c) have been fulfilled then the court should*

> *order an interim payment to be made unless there is a sufficient specific reason not to do so."* (my underlining)

40. CPR 25.7(1)(c) is in substantially similar terms to GCR O.29, r.12(c).

41. The current English White Book (2024) (at [15-119]) (which was cited by the parties and included in the joint authorities bundle) states that the court has a very wide discretion and, by virtue of or perhaps as confirmed by the rules relating to the application of the overriding objective, has the power to impose conditions.

> *"Whether or not an order is made is a matter of discretion. In the former RSC rules, it was said that the court could make an interim payment order "if it thinks fit" and the amount of the payment was expressed to be "of such amount as [the court] thinks just". It was these phrases which encouraged the courts to emphasise that the discretion is extremely wide (Crimpfil Ltd v Barclays Bank Plc, The Times, 24 February 1995, CA) and that no limitations on its exercise (over and above those imposed by the rules themselves) should be implied (Schott Kem Ltd v Bentley [1991] 1 Q.B. 61; [1990] 3 All E.R. 850, CA)…….*
>
> *Where the court makes an order, it may make it subject to conditions and may specify the consequence of failure to comply with the order or a condition (r.3.1(3)). Presumably, where the order made is an interim payment order, in certain circumstances it may be appropriate for the court to specify that the defendant should not be entitled to defend if he fails to comply* with the order *(Casio Computer Co Ltd v Sayo, 28 January 2000, unrep. (Rimer J))."*

42. Reference is made to CPR3.1 (the court's general powers of case management) sub-rule 3 when discussing the court's power to impose conditions. This sub-rule states that when the court makes an order, it may make it subject to conditions. The case management powers set out in CPR 3.1 are not incorporated into the GCR, but I do not consider that the power to impose conditions is dependent on such an explicit rule. The preamble to the GCR requires the Court to seek to give effect to the overriding objective when it applies or exercises any discretion given to it by the GCR or interprets the meaning of any rule and the that the Court must further the overriding objective by actively managing proceedings. His Honour Judge Humphrey Lloyd QC in *Harmon* considered that the power to impose conditions when making an interim payments order could be justified by reliance on the

overriding objective itself (in the terms which are replicated in the preamble to the GCR). He said this (at [9]):

> *"However, I have no doubt that conditions could be attached where in an appropriate case it was thought necessary to meet the overriding objective set out in CPR 1.1. CPR 1.2 requires the court to give effect to the overriding objective when it exercises any power or interprets any rule. Thus, if any rule does not contain adequate provision to achieve the overriding objective it will have to be made to do so by "interpretation". Alternatively, if the circumstances require the power (e.g. that given by CPR 25.7) will have to exercised so as to achieve the overriding objective and if this means attaching conditions then such conditions are authorised by CPR 1.2."*

43. I have already noted that GCR O.29, r.13(1) deals separately with the issue of the "*manner of payment*" of interim payments (and that this sub-rule is not replicated in CPR 25 - although section 32(1) of the Senior Courts Act 1981 provides that provision may be made for payments into court – but remains in the Hong Kong Rules in O.29, r.13(1)). The purpose of GCR O.29, r.13(1) appears to be to ensure that the interim payments are preserved and protected at least for a period. The applicant/plaintiff in whose favour the interim payments order has been made is permitted to apply to withdraw funds. It must be envisaged that on such an application the Court can consider whether there are any grounds for not permitting such a withdrawal and that on such an application, in light of the apparent purpose of the rule which keeps the interim payments out of the hands of the claimant, the Court can consider whether, by reference to evidence adduced by the parties, there is a sufficient Irrecoverability Risk which justifies a refusal to allow a withdrawal of funds. During the hearing, I asked Mr Chapman KC whether the Company contended that GCR O.29, r.13(1) set out a separate and self-contained regime for regulating the manner in which interim payments could be held pending the final determination of the sums due to the applicant/plaintiff so that the process for determining an application for interim payments under GCR O.29 would follow a two-stage process – first, determine whether an interim payment should be made and the amount of the interim payment and second, determine, pursuant to GCR O.29, r.13(1), how any interim payment is to be paid and held. Mr Chapman KC said that he did not contend for this construction of GCR O.29. He took the view that under GCR O.29 there was a single integrated decision-making process so that the Court had

a wide discretion to determine whether to make an order, the amount of the interim payments and whether to impose conditions regulating how the interim payments were to be held. While I can see that it can be argued that by dealing separately with the manner of payment in GCR O.29, r.13(1), that sub-rule should be seen as exhaustively defining the Court's powers with respect to the manner of payment so that if the evidence establishes a genuine and material Irrecoverability Risk the Court's only option is to order that the interim payments be paid into Court. However, neither party has invited me to adopt this construction and for the reasons I have already given it seems to me to require an unduly narrow view of the scope of the Court's discretion when exercising the interim payments jurisdiction.

44. Shortly before the hearing, I sent (via my PA) an email to the parties reminding them of PD No.2 of 2024 and the explanatory memorandum regarding the use of the Hong Kong White Book as an aid to the interpretation and application of the GCR, and referred them to the notes in the Hong Kong White Book at rule O.29, r.11, in particular the notes at 29/11/5, 29/11/6 and 29/11/7:

(a). at 29/11/5 the Hong Kong White Book says under the heading "*Amount of interim payment – generally*":

> "*In deciding the amount of interim payment to order, the court will estimate the damages that are likely to be awarded which it must do by judiciously weighing the evidence presented to it, giving it such weight that it deserves …. Once the court has made that estimate it must award a reasonable proportion of that estimate taking into account the financial ability of the plaintiff to repay any overpayment should it transpire, after the assessment of damages has been concluded, that the estimate was wrong and taking into account the hardship to the defendant from having to make an immediate payment and from being unable to recover any overpayment…."*

(b). at 29/11/6 the Hong Kong White Book says under the heading "*Practice*" and the sub-heading "*Amount of interim payment – personal injury claims*":

> *"The problem is aggravated if there is uncertainty as to the quantum of damages. The court must not risk over-paying the plaintiff since a final adjustment under r.17 may not be effective in such a case… If there are doubts as to a defendant's solvency it would …. Be appropriate in these circumstances to seek as substantial an interim payment as possible …"*

(c). at 29/11/7 the Hong Kong White Book says, under the same heading, with the sub-heading "*Amount of interim payment – other claims*" deals with the impact of the applicant (the plaintiff) being impecunious and having a particular need for funds.

45. Neither Mr Chapman KC nor Mr Isaacs KC considered that the commentary in the Hong Kong White Book added much to what could be found in the English and Cayman Islands authorities. Nor, from what of necessity a rather hurried review of the case law referred to, did they consider that the Hong Kong cases were worthy of note (copies of the relevant cases were emailed to me after the hearing). During the hearing, Mr Isaacs KC drew to my attention the fact that the discussion of the plaintiff's impecuniosity was always under the heading of the amount of the payment, thereby in his submission supporting his case that the Irrecoverability Risk was only relevant to quantum. He also noted that the commentary in 29/11/8 stated that normally payment is made to the plaintiff and the power under r.13(1) to order payment into court was seldom used. Mr Chapman KC noted that *Re Lehman Brothers Securities Asia Ltd (No 1)* (2010) 1 HKLRD 43 supported the Company's case that there was jurisdiction to impose conditions when making an interim payments order in a case where the evidence showed that the applicant (plaintiff) was subject to an Irrecoverability Risk. In that case it was held that, in a case involving an application by provisional liquidators for interim payments in proceedings relating to their remuneration, the court had the power to order the giving of security by the provisional liquidators for the repayment of the interim payments. However, since an undertaking was obtained from the provisional liquidators and their principal firms of solicitors that they would repay any excess amount of the interim payment allowed by the order should such fees and disbursements ultimately be determined to be less than the amount received by them, no security was necessary as the firms in question were all well-known and substantial professional firms and there was little doubt that they would honour their undertaking.

46. I agree that the commentary in the Hong Kong White Book does not materially supplement or change the analysis of the applicable law derived from the Cayman Islands and English authorities but, (a) I accept that Justice Barma in *Re Lehman Brothers* was clearly satisfied that the court had the power to impose conditions on the interim payments order to make provision for "*appropriate safeguards in case the interim payment turned out to be excessive*" and that, (b) Justice Suffiad in *Sun Jianqiang v Chan Tai Kau & Another* [2001] HKLRD 435 (a case cited in 29/11/5 although not sent to me by the attorneys) following Lord Justice Stuart-Smith in *Stringman* held that the court's focus was on whether the threshold conditions in RSC O.29, r.11(1) (a) or (c) are satisfied and that if they are, what the court has to do if it thinks fit is fix the quantum of the interim payments without the need to address extraneous questions such as whether the plaintiff has demonstrated a particular need over and above the general need that a plaintiff has to be paid his or her damages as soon as reasonably may be done (as Stuart-Smith LJ said "*That is all the judge should have been concerned with. In the case of an adult of sound mind, the court making an order under RSC O.29 r. 11 is not concerned in any way with what the plaintiff does with his damages*"). But it does not follow from the fact that the Court will generally (but not always – see *Poon Catherine (a minor by her next friend Tshi Miau Sian) & Anor v Hospital Authority* [2011] 6 HKC 114, Master KK Pang) not be concerned with what the applicant (plaintiff) will do with the interim payments that the Court may not take into account the risk to the defendant that the applicant (plaintiff) may be unable to repay the interim payments. Where the applicant (plaintiff) is solvent (or to be more precise, where there is no evidence as to the impecuniosity or insolvency of the applicant/plaintiff) then there is no basis for being concerned with how the applicant/plaintiff uses the interim payments.

47. I also accept Mr Chapman KC's submission that in an appropriate case (where there is deliberate reticence) the Court may draw an adverse inference from an applicant/plaintiff's failure to provide information as to its financial position when the request is reasonable in the sense of being reasonably required in view of the absence of publicly available information (and other evidence adduced by the applicant/plaintiff) and where the information requested is relevant and the applicant/plaintiff can reasonably be expected to have it and to produce it. However, as Lord Justice Sales pointed out in *SARPD Oil* and as

Mr Chapman KC accepted when I put the point to him during his submissions, the Court is required to evaluate the totality of the evidence and the adverse inference (to the effect that the applicant/plaintiff has refused to produce evidence of its financial position because it would reveal its financial difficulties) is part of that totality.

48. In this case, the Dissenters have not refused to produce any evidence as to their financial position. Jain 8 (as clarified and confirmed by Jain 9) confirms that the net assets of each of the Dissenters (as at 30 June 2024) are substantial and substantially (by a factor of ten) higher than the amount of the Interim Payments they are to receive. This shows that each of the Dissenters is financially sound and has more than sufficient assets to discharge all its liabilities. The Dissenters have also provided, by way of the Undertakings, assurances that the Interim Payments will not be transferred away or dissipated. They have each confirmed that they will undertake to pay the Interim Payments into accounts with first class financial institutions in major financial centres separate from their other assets, keep them in cash or invest them in cash equivalents and retain all and not distribute any of the Interim Payments until the conclusion of the Company's appeal.

49. The Company has not adduced any evidence to challenge the Dissenters' evidence. In my view, the evidence adduced by the Dissenters shows that there is no genuine or material risk that the Dissenters will or are likely to be unable to repay the Interim Payments (in full if necessary) if the Company's appeal succeeds. I understand, and take into account, the fact that if that appeal is successful, it is likely that the full amount of the Interim Payments will be repayable. I also accept that, as the Company submits, the Dissenters' evidence does not provide the Company with *certainty* that it will be repaid in full. This is because if one or both of the Dissenters become insolvent and commence an insolvency proceeding the funds held by the Dissenters will be available to all creditors in the proceeding (or could be attached by a single execution creditor before an insolvency proceedings commences). They will be assets of their insolvent estates and not available to repay the Company. But, as Mr Isaacs KC emphasised during his oral submissions, the Company is not entitled to certainty. There is no evidence of financial distress or the prospect of such distress. The size of the Dissenters' net assets strongly indicate to the contrary. The likely existence of substantial liquidity is

supported by the inference made by the Court of Appeal. A theoretical risk of insolvency is not sufficient. It seems to me that, having regard to the state of the evidence, and the absence of a genuine or material risk that the Dissenters will or are likely to be unable to repay the Interim Payments, it would be wrong to deprive the Dissenters of their *prima facie* right to be paid and have the ability to invest (albeit subject to the restrictions arising pursuant to the Undertakings) the Interim Payments. But it does seem to me that they should be required to give the Undertakings in order to ensure that the Company has a proper level of protection.

50. Following the distribution of the draft of this judgment there was a dispute between the parties as to whether the Dissenters had offered or should be required to undertake to repay any overpayment in the event that the Company's appeal was successful. Having reviewed the Dissenters' evidence, draft order and written submissions I was satisfied that the Dissenters were right to say that they had never offered an undertaking that the Interim Payments would be repaid (even though the language used by Mr Jain had linked the confirmation of repayment to the proposed undertakings). However, Mr Jain in Jain 8 had clearly gone further than simply saying that it was the Dissenters' intention to repay any overpayment. In Jain 8 at [8] Mr Jain said that (my emphasis):

> *"… Walkers sent a letter … on 31 May 2024 by which it was confirmed that the Dissenting Shareholders were prepared to undertake that, if payment was made directly to the Dissenting Shareholders, no distribution of the interim payments would be made to investors of the Dissenting Shareholders prior to the conclusion of the Company's appeal to Judicial Committee of the Privy Council (the Appeal). For the avoidance of doubt, the Dissenting Shareholders were also willing to undertake that those funds would be kept separate from any other assets of the Dissenting Shareholders and that no payment would be made to any person or for any purpose prior to the conclusion of the Appeal. As such, the funds are intended to be,* ***and will be****, repaid to the Company in the event that they represent an overpayment…."*

51. Mr Jain in the wording in italics is setting out the purpose and effect of the Undertakings ("*As such*….."). He says that the Undertakings are intended to ensure that the Dissenters will be able to repay any overpayment. But he states separately that any over payment will be repaid. This is a clear statement on oath of the Dissenters' commitment to repay. I do not consider that it is necessary or appropriate to go further and require that the Undertakings include an undertaking to repay any overpayment. This was not sought by

the Company and is not necessary. In the event that the Company's appeal succeeds and an overpayment has been made the Court will order its repayment which will impose an obligation on the Dissenters to make the repayment. If they fail to repay the overpayment all the usual serious consequences of failure to comply with such an order will follow. Furthermore, it would then likely to be necessary closely to examine the basis for Mr Jain's confirmation on oath that payment will be made and he could face serious consequences if turns out that the statement was made without a proper basis.

52. I accept that the Dissenters have not provided the detail to back up Mr Jain's statements on oath. For example, it remains unclear as to what percentage of the assets on which they rely is represented by the payments made by the Company during these proceedings (I take Mr Jain's confirmation of the NAVs of the Dissenters to be based on the methodology set out at [11] of Jain 8 so that assets include these prior payments by the Company). But I do not consider that it is necessary to have this detail in view of the clear statements now made by Mr Jain.

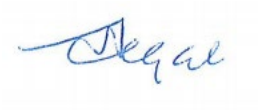
53. In my view, I must have regard only to the evidence in this case and not to evidence in other cases for the purpose of deciding the Application. Having said that, I consider that I can equally draw and take additional comfort from the inference made by the Court of Appeal that the Dissenters must be taken to have access to substantial funds. This is based on the undisputed fact that the Dissenters have been funding the present very expensive litigation for a number of years. In addition, I regard the Dissenters' evidence as to their outstanding claims in this jurisdiction as providing additional comfort and as supporting the decision I have made.

54. I do however accept that the key financial information was provided late in the day by the Dissenters. The reasons for and the history of the Company's requests for financial information were clearly set out by Mr Fraser (an associate at Harneys, the Company's Cayman Islands attorneys) in his affidavit. MCIL is registered in this jurisdiction but has its headquarters in Hong Kong while Blackwell is incorporated in Delaware. Only limited financial information is publicly available and it not possible from that information to form

a clear view of the current financial position of the Dissenters and whether they have substantial net worth.

55. The Company's first request for financial information was made in September 2023 and even though it can be said that the Company's supplemental request in Harney's letter dated 14 May 2024 expanded its information request to some extent, the Dissenters' significant responsive information and confirmations were only provided in Jain 8 which was sworn on 18 June 2024 (and then clarified and confirmed in Jain 9, which was filed and served after the hearing).

56. I would note that even though it might be said that Jain 9 only made explicit that which was implicit in Jain 8 (and Jain 7), it has made a significant difference by identifying the NAV Date (a crucial piece of the evidence), by removing the doubts raised by Mr Jain's previous reference to cumulative net assets and by quantifying the extent to which each of the Dissenters' net assets exceed the amount of the Interim Payments to be paid to them.



The Hon. Justice Segal
Judge of the Grand Court, Cayman Islands
9 August 2024