



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

**CAUSE NO. FSD 227 OF 2017 (IKJ)**

**IN THE MATTER OF THE COMPANIES ACT (AS REVISED)  
AND IN THE MATTER OF XINGXUAN TECHNOLOGY LTD**

**Before:** The Hon. Justice David Doyle

**Heard:** On the papers

**Draft Judgment  
Circulated:** 23 August 2023

**Judgment delivered:** 28 August 2023

**HEADNOTE**

*Determination of issues relating to costs*

**JUDGMENT****Introduction**

1. By judgment delivered on 26 May 2023 I determined that it was appropriate for Xingxuan Technology Ltd (the “Company”) to make an interim payment to Waterwood 020 Project Limited (the “Dissenter”) in the sum of US\$35,700,000 plus interest at the rate of 2.375% discounted by 50%. On 2 June 2023 I made an Order reflecting the determinations in the judgment and ordered that the monies be paid within 21 days from the delivery of the judgment in an interest bearing account held by the Dissenter’s attorneys where such sum is to be held subject to further Order of the Court. I also made an order requiring the Company and the Dissenter to file concise submissions (no more than 5 pages long) on the matter of costs.
2. By email dated 26 July 2023 12:08pm Ogier on behalf of the Dissenter advised the Court that the Company had failed to make payment and that Maples had withdrawn from acting for the Company. Ogier asked that the Court take account of the conduct of the Company following the hearing on the issue of costs and that any costs order in favour of the Dissenter be paid forthwith and on the indemnity basis.
3. By email dated 26 July 2023 2:39pm my Personal Assistant responded:

“Justice Doyle is content to permit you until 3pm on 2 August 2023 to provide evidence re non-payment and further concise submissions limited to the point you raise and the Company be at liberty to file evidence as to payment and concise submissions in reply before 3pm on 9 August 2023. By concise we mean no more than 3 pages.”

**The submissions and evidence**

4. I have considered:
  - (1) the 5 pages of the Dissenter’s written submissions on costs dated 5 June 2023 together with 9 authorities running to some 104 pages;

- (2) the first 5 pages of the Company's written submissions on costs dated 5 June 2023 together with a bundle of 1036 pages, comprising a letter, an email chain and authorities;
- (3) the 3 pages of the Dissenter's further submissions on costs dated 2 August 2023 together with a further 7 authorities running to some 82 pages;
- (4) the first affirmation of Greg Coburn affirmed on 2 August 2023; and
- (5) an email dated 16 August 2023 from Ogier on behalf of the Dissenter attaching a copy of a draft Order.

### **Determination**

5. Birt J.A. in *Maso Capital Investments Limited v Trina Solar Limited* (CICA unreported judgment 4 August 2023) provided a helpful review of the well-established relevant principles in respect of costs and I do not set them out again in this judgment, but have full regard to them and the other authorities provided to the court. I also note Kawaley J's useful summary of the law on indemnity costs in his judgment in *Principal Investing Fund I Limited and others* (FSD unreported judgment 27 July 2023).
6. The Dissenter was substantially successful and there is no good reason as to why it should not have its costs against the Company. Costs should follow the event. It does not appear to me that, in the circumstances of this case, some other order should be made as the whole or any part of the costs.
7. I see no good reason to make an order that costs be "costs in the cause" or that costs be reserved as requested by the Company or to make an issue based costs order. The Dissenter has not acted improperly or unreasonably.
8. In my judgment the Company has however acted outside the norm and improperly and unreasonably to a high degree. It offered nothing. It would appear, in the absence of any explanation for the non-payment, that the Company never had any intention of paying an interim payment if ordered to do so. The filing of the evidence of Mr d'Almeida was unimpressive. The failure to pay and the breach of the interim payment Order, with no attempt at offering an

explanation, is also unimpressive. The conduct of the Company is worthy of the imposition of a costs order on the indemnity basis against it.

9. In the exceptional circumstances of this case a “forthwith” order is also fair and fully justified. The interim payment issue was a discrete issue and the Company’s conduct has been unreasonable.
10. In the Dissenter’s draft Order at paragraph 2 an interim payment on account of costs is sought in the sum of US\$250,000. There is no reference to any application for an interim payment on account of costs in the written submissions of the Dissenter and no evidence has been filed in respect of the quantum of costs. I am not therefore in a position to make an order requiring an interim payment on account of costs and I do not do so.
11. I do however make a determination that the Company do pay the Dissenter’s costs of and occasioned by the Summons dated 3 January 2023 incurred on or after 30 March 2022, being the date that the Dissenter renewed its request for an interim payment, such costs to be payable forthwith and taxed on the indemnity basis if not agreed.
12. Counsel to provide within the next 7 days a draft Order for my approval reflecting the determinations contained in the judgment.
13. I cannot leave this judgment without, once again, stressing the importance of strict compliance with court orders (see for examples my unreported judgments in *Enigma Diagnostics Limited (in liquidation) v Boulter* 19 January 2022 and *Toledo v Walkers* 25 January 2022). It may seem a trivial point to the attorneys acting for the Company (and certainly pales into relative insignificance when considered next to the failure of the Company to make the interim payment) but when an Order imposes a page limit on the number of pages for written submissions such limit should be strictly complied with as I stressed at paragraph 8 of *Oakwise Value Fund SPC* (unreported judgment 16 June 2023). If such orders continue to be disregarded by attorneys adverse consequences will follow.

#### **Postscript**

14. Following receipt of an advance draft of this judgment the attorneys who had been acting for the Company apologised for exceeding the page limit on the written submissions on costs and explained the position by way of a formatting issue within the Curia system for uploading

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documents. I accept the apology and the explanation and note the intention of the attorneys, in the future, to take into account Curia formatting requirements and to comply with page limit orders.

*David Doyle*

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**The Honourable Justice David Doyle**  
**Judge of the Grand Court**