

UPDATE

Updated guidance: interim payments in section 238 fair value proceedings

Update prepared by Simon Dickson and Laura Stone (Cayman Islands)

The Cayman Islands Grand Court has provided a useful reminder as to how the Court will approach interim payments in appraisal proceedings and the importance of providing reliable evidence.

Background

In the Matter of Xingxuan Technologies Ltd (unreported, 26 May 2023), the Court considered an application for an interim payment in ongoing appraisal proceedings pursuant to section 238 of the Companies Act (2023 Revision).

In November 2017, a fair value petition was issued. In January 2023 (more than four years later) Waterwood 020 Project Limited (the **Dissenter**) filed an application seeking an interim payment from the Company (the **Application**). The Company challenged the Application on the basis that (i) the minimum amount that the Dissenter may obtain following trial could be zero (ii) there was a real risk that the Company may not be able to recover any overpayment following trial and (iii) the Dissenter had delayed in filing the Application.

The Law

It is settled law that a Dissenter may make an application for an interim payment. In considering such applications, the Court should:

- Have regard to the minimum amount that the dissenter is likely to recover at trial. In the absence of positive evidence or a cogent legal argument from the company pointing to a lower valuation being a possible outcome, then the merger consideration or the company's own initial fair value offer will likely be the most suitable measure.
- Apply a minority discount if there is a possibility that a minority discount may be applied at trial. This may be a higher discount than ultimately awarded at trial, but the Court should take a 'just and measured' approach.
- Consider the possible prejudice that a dissenter may suffer by being kept out of money. However, this must be balanced against the risk that a company is not forced to overpay.
- Where there are doubts as to recoverability, consider whether the dissenter's ability to repay is seriously in doubt and whether there is evidence that overpayments will not be recoverable.
- Conduct a high-level, broad-brush assessment of the available evidence and arguments and be cautious not to conduct a mini trial at this interlocutory stage.

In applying these principles, the Court found that:

- (i) The Company provided no persuasive or positive evidence or argument pointing to an amount less than the merger price being a possible outcome at trial and accordingly the Company's own fair value offer was the appropriate starting point.
- (ii) Delay does not prevent the Court from making an interim payment. The Grand Court Rules allow an application to be made 'at any time' after the pleading has been served and Doyle J concluded that the justice of this case required the Court to make an interim payment order. Although the judgment is not

clear, it would seem that in part because of the delay in bringing the application, the period over which interest was calculated was reduced by 50 per cent.

- (iii) The Court agreed that a minority discount may be applied by the trial judge. Although the Dissenter's evidence was that any discount should be no more than 5 per cent, the Court took a 'high level cautious approach' and ordered that a generous 15 per cent discount be applied.
- (iv) To address the Company's concern that the Dissenter may not be able to repay any overpayment, the Court ordered that the interim payment be paid into the attorneys' interest-bearing account where the funds would be held on behalf of the Dissenter with no funds to be released without agreement of the parties or further court order. The Court deemed this to be the 'safest' way to address both parties' concerns about not receiving payment and recoverability following the outcome at trial and would avoid conferring any unfair advantage on either party.

Conclusion

This decision is an example of the balancing act the Court must perform in protecting the parties' respective interests in an application for interim payment. Notably, the decision demonstrates the importance to properly evidence an ability to repay any potential overpayment. In the absence of reliable evidence, a dissenter risks the Court making an order which effectively prevents the dissenter from freely using the interim payment, thereby negating some, if not all, of its utility. Further, while a party's delay may not prevent the Court from ordering an interim payment, it is a factor that the Court can take into account and may reduce the value of the amount ordered.

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