

UPDATE

Interim payments in Cayman Islands section 238 proceedings

Update prepared by Simon Dickson and David Ramsaran (Cayman Islands)

Background

In the latest case in this ongoing saga,¹ the Court considered an application for an interim payment in ongoing appraisal proceedings pursuant to section 238 of the Companies Act (2023 Revision) (the **Act**).

The matter awaits an appeal and final judgment from the Privy Council, which is when the fair value of the Dissenters' shares will finally be established.

Whilst the quantum of the interim payment had been agreed, an issue arose as to whether the payment should be made directly to the Dissenters or whether it should be paid into escrow or the Court.

The Principles

The Court confirmed the following principles:

1. the Court has the power to take into account the risk that the recipient of the funds would be unable to repay any part of the interim payment in the event that an adjustment was required (the **Irrecoverability Risk**);
2. the Court may draw adverse inferences if the applicant for the interim payment fails to provide evidence on the ability to repay all or some of the interim payments in the event of an adjustment;
3. in exercising its discretion to make an interim payment the Court must further the overriding objective, including ensuring the parties are on an equal footing, by actively managing proceedings; and
4. the Grand Court Rules allow an interim payment to be paid into Court in appropriate circumstances to address issues such as the Irrecoverability Risk.

Outside the section 238 context, it has been held in England and Wales that the Irrecoverability Risk does not preclude the making of an interim payment order. However, this is not a complete answer to a claim for interim payments in the context of section 238. The Grand Court has previously decided that the Irrecoverability Risk is a relevant factor to be considered when making interim payments. Further, GCR O.29, r.13(1) deals separately with the issue of the '*manner of payment*' of interim payments and allows them to be paid into Court. This sub-rule is not replicated in the English Civil Procedure Rules. The purpose of this rule is to ensure that interim payments are preserved and protected at least for a period.

The Decision

The Court decided that although Trina Solar Limited (the **Company**) was right on the law in that there is a power to impose terms and conditions when making an interim payment order to address the Irrecoverability Risk, this was not applicable to the facts of this case because the Dissenters were able to:

- provide evidence as to their financial position;
- demonstrate their net assets were substantially greater than the interim payments;
- show they were financially sound with assets to discharge all of their liabilities;

¹ The decision of *Trina Solar Limited* (Unreported, 9 August 2024).

- provide further assurance by giving an undertaking that the interim payments would not to be transferred away or dissipated; and
- show they were willing to provide an undertaking that the interim payments would be held by respectable financial institutions, segregated and either kept in cash or invested in cash equivalents and not be distributed until the conclusion of the Company's appeal to the Privy Council.

Conclusion

The decision of the Court was made much easier by the evidence provided by the Dissenters. However, two interesting points arise. Firstly, although the Dissenters identified English case law demonstrating that the Irrecoverability Risk only goes to quantification of the interim payments, this did not provide a complete answer to a claim for interim payments in the Cayman Islands. The Cayman Court held it was entitled to take into account the Irrecoverability Risk for both quantification and for the terms and conditions attached to the interim payments. Secondly, the Dissenters provided an undertaking which they stated was for the purpose of confirming they would be able to repay the interim payments to the Company in the event of any overpayment. Realistically it would appear that the undertaking severely restricts the use of the interim payments by the Dissenters until the conclusion of the appeal to the Privy Council.

Practically, when these issues around the Irrecoverability Risk are raised, Dissenters should be able to easily work around them by providing evidence of their financial position and assuaging any concerns the Court might have that they are unable to repay the interim payments should an adjustment need to be made.

For more on section 238, please see our previous updates '[Trina Solar: CICA finds transaction price unreliable and increases DCF weight to 70 per cent](#)', '[Trina Solar Limited and the meaning of 'fair value' in s.238 fair value appraisal cases](#)', and '[The Cayman Standard: Directions in Fair Value Proceedings](#)'.

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