



Interim payments in Cayman Islands shareholder appraisals: how much should be paid?

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Interim payments are an attractive aspect of section 238 shareholder appraisal proceedings, allowing dissenting shareholders to recover a substantial portion of their investment pending the final determination of the fair value of their former shareholdings.

In *China Index Holdings Limited* (unreported, 23 August 2024) the Grand Court of the Cayman Islands (the **Grand Court**) was required to decide how much the company was required to pay the dissenters at an early stage in the proceedings.

In ordering the company to pay the deal price, plus interest, the Grand Court reinforced that in the absence of positive evidence or cogent legal argument pointing to a lower value, the merger consideration is the most suitable measure of what is a just amount for an interim payment.

Background

The company had effected a merger for US\$1 per share. Upon dissenting from the merger, the dissenters became entitled to be paid the fair value of their former shareholdings in accordance with section 238 of the Companies Act. Once proceedings had been commenced, the dissenters sought an interim payment of US\$2.31 per share. The dissenters contended that this was a just amount given alleged errors and omissions in the company's financial records.

The company initially argued that any interim payment should be at a substantial discount to the merger price with no interest. However, during the course of the hearing, it accepted payment of the merger consideration with interest, but no more.

How is the amount of an interim payment determined in s238 proceedings?

In ordering an interim payment equal to the merger consideration, plus interest, Justice Doyle helpfully recounted the applicable principles when determining what is a just amount. Namely that:

- the task of the court is to determine what sum it can safely assume the dissenters will recover at trial
- what the company has said about fair value - this is, at the very least, an important factor
- the possible prejudice to dissenters in being denied access to funds that may later be found due to them must be balanced against possible prejudice to the company if fair value is later determined to be less than the interim payment
- in the absence of positive or cogent evidence pointing to a lower valuation being a possible outcome at trial, the merger consideration or the company's statutory fair value offer (which is often for the same amount) is to be treated as the most suitable measure of the interim payment award

This is consistent with what was said by the Grand Court in *eHi Car* (unreported, 28 November 2019) and endorsed in *Xingxuan Technology Ltd* (unreported, 26 May 2023). For more information on this case, read Ogier's article [Interim payments in Cayman Islands shareholder appraisal actions: principles and pitfalls](#).

What else do I need to know about interim payments in s238 proceedings?

The judgment also highlighted several other important points concerning interim payments, including that:

- applications should not turn into mini-trials and factual evidence should not descend into inappropriate comments, arguments, or opinions
- if issues need to be covered by expert evidence, then such evidence should be adduced from an independent expert, and only if leave has been given to do so
- adverse inferences cannot appropriately be determined at a relatively short hearing with limited evidence and without the benefit of expert evidence or cross-examination, even if a party has chosen not to address a point being made against it
- interim interest should be awarded at 2.375% per annum by reference to the Judgment (Rates of Interest) Rules

Who pays the legal costs of obtaining interim payment?

If an interim payment can be agreed by consent, then each side will bear their own legal costs. However, if an application needs to be made to the court, then the successful party will generally be entitled to recover part of its legal costs from the unsuccessful party.

The proportion of costs that is payable will depend on whether costs are awarded on the standard or indemnity basis. Indemnity costs will be awarded where a party's conduct has been improper, unreasonable, or negligent.

In a subsequent costs decision in *China Index Holdings Limited* (unreported, 13 September), the Grand Court found that the company's refusal to engage with the dissenters requesting interim payment was "unfortunate, disappointing and unimpressive". The company had also fundamentally changed its position on the day of the hearing.

This still wasn't enough for the dissenters to overcome the high hurdle to obtain indemnity costs in this case, but the Grand Court sent a stark future warning that: "Companies should be aware however that if they fail to reasonably engage with dissenters in respect of interim payments and adopt a fundamentally different position to that adopted in their skeleton arguments such conduct may, in the future, attract an adverse costs order against them on the indemnity basis".

Future of interim payments in s238 cases

The Grand Court's decision to quantify the interim payment by reference to what could safely be assumed to be recovered at trial, rather than by reference to any "irreducible" or "undisputed" minimum, is a welcome development.

Dissenting shareholders should now expect to receive an interim payment equal to the merger consideration in the absence of any positive evidence or cogent legal argument pointing to a lower value.

It is hoped that the Grand Court's emphasis on the merger consideration being the appropriate starting (and possible ending) point for interim payments, coupled with its warning that companies must reasonably engage with dissenters, will reduce the number of disputes concerning this important aspect of appraisal proceedings in the Cayman Islands.

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