Interest and costs in section 238 proceedings revisited

Insights - 22/12/2021

The Grand Court of the Cayman Islands (**Court**) has recently revisited the approach that is to be taken to calculating interest on awards, and determining costs, in proceedings under section 238 of the Cayman Islands Companies Act.

For further background on interest and costs in section 238 proceedings, please refer to this briefing.

This latest decision in the appraisal of *Trina Solar Limited*[1] is likely to be welcomed by dissenting shareholders, particularly where their rate of return on other investments has been high during the period of the section 238 litigation, or where the uplift achieved on the merger price is relatively modest compared to the valuation that they contended for at trial.

Background

Trina Solar Limited (**Company**) effected a take private transaction and certain minority shareholders (**Dissenters**) challenged the fair value that the Company had ascribed to their cancelled shares. Following a trial at which the Dissenters had sought a 1,565% uplift on the merger price, but were awarded an increase of only 1.29%, the Court was required to determine the interest payable to the Dissenters and whether any party was entitled to payment of its legal costs.

Midpoint approach confirmed and prudent investor rate clarified

The Court refused the Company's invitation to determine the fair rate of interest according to the Dissenters' borrowing rates and instead followed the midpoint approach taken in earlier cases, whereby interest is calculated by reference to the average between:

- the rate at which the company could have borrowed the amount representing the fair value of the dissenting shareholders' shares (**Borrowing Rate**); and

- the rate of return which a prudent investor in the dissenting shareholders' position could have obtained if they had the money to invest (**Prudent Investor Rate**)

The Borrowing Rate was found to be 4.7% per annum, being the rate that was actually available to Company during the period in which it was able to retain the fair value of the Dissenters' shares.

As regards the Prudent Investor Rate, the Court rejected the Company's argument that this should be based on an entirely risk-free strategy and clarified that this is to be determined by reference to what a prudent investor in the position of the specific dissenting shareholders would have done - having regard to both the investment strategy that those shareholders generally adopted and the likely duration of this notional investment. This allows the ordinary asset allocation of the dissenting shareholders to be used, provided that a prudent investor in their position would have also been likely to apportion its investment in this way for the time that the shareholders were actually kept out of their funds.

On the facts of the case, the Court adopted an asset allocation of 40% equities, 45% bonds and 15% cash. This equated to a Prudent Investor Rate of 9.67% for the period between the date of the Company's statutory fair value offer until interim payment was made (**First Period**), and approximately 8.8% for the remaining time until the judgment sum was paid (**Second Period**). Taking the midpoint between these Prudent Investor Rates and the Company's Borrowing Rate, the Dissenters were awarded interest at 7.19% per annum for the First Period and approximately 6.75% per annum for the Second Period.

No award of costs

The Dissenters had been awarded an uplift of 1.29% on the merger price. This equated to a judgment sum of just over US$260,000 (following an earlier interim payment). However, this was nearly US$8 million more than the Company had argued should be payable to the Dissenters in its submissions at trial.

The Dissenters contended that they were the successful parties and that the Company should pay 75% of their costs, subject to taxation in the usual way. Meanwhile, the Company asserted that it was the victor and that the Dissenters should instead pay its costs (totalling almost US$8.5 million) on the standard basis.

The Court noted that the Dissenters had recovered a material sum above the amount which the Company had claimed was payable at trial, and also more than the Company's statutory offer of the merger price. Even though this uplift was far less than the 1,565% (US$181 million) uplift that Dissenters had sought at trial, the Court found that the Dissenters should still be treated as the successful parties in all the circumstances.

However, since the Company had won on a substantial number of the discrete issues arising out of the expert valuation evidence, the Court found that there were strong reasons for not applying the

general rule that the successful party is to be awarded its costs. The Court consequently held that the equitable (fair) result was that there be no order as to costs and that each of the parties should bear its own costs.

The Court further found that this outcome was not affected by the Dissenters' earlier refusal to accept an offer made by the Company before trial to settle the proceedings for US$500,000 above merger price. The Company had only left this offer open for acceptance for seven days (which encompassed the New Year holiday period), which had not provided the Dissenters with a reasonable period in which to consider it and they were held to have acted reasonably in not accepting the offer.

Comment

Dissenting shareholders should take some comfort from this latest decision by the Cayman Court. By calculating the Prudent Investor Rate in accordance with the dissenting shareholders' ordinary asset allocations, interest on any unpaid sums will be closer to what they could have theoretically obtained if they had the money to invest themselves. Furthermore, the Court's classification of the Dissenters as being the successful parties in this case suggests that dissenting shareholders are unlikely to be ordered to pay adverse costs to the Company if they beat the merger price at trial, regardless of the difference between this amount and the uplift that they sought.

---

[1] In the Matter of Trina Solar Limited Unreported Judgment, 8 December 2021 (Segal J)

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

Key Contacts

Shaun Maloney

Partner

Cayman Islands

E: shaun.maloney@ogier.com

T: +44 1534 514416

Marc Kish

Partner

Cayman Islands

E: marc.kish@ogier.com

T: +1 345 815 1790

Oliver Payne □□□

Partner □□□

Hong Kong

E: oliver.payne@ogier.com

T: +852 3656 6044

Jeremy Snead

Partner

London

Cayman Islands

British Virgin Islands

E: jeremy.snead@ogier.com

T: +44 20 3835 9470

Related Services

Section 238 Shareholder Appraisal Rights

Dispute Resolution

Legal