

UPDATE

Fair value update: consent means consent

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A party who agrees to make an interim payment in a fair value determination pursuant to s. 238 cannot back out of the agreement, and the court will give effect to terms agreed between parties in such circumstances.

Mr Justice Segal of the Cayman Islands Grand Court recently rejected an application challenging the validity of a consent order providing for certain interim payments. The consent order was made in connection with a petition under s. 238 of the Companies Law (2016 Revision) (as amended) (the **Companies Law**), pursuant to which the Petitioner, Trina Solar Ltd (**Trina**), sought an order determining the fair value of the shares of two shareholders who dissented from its merger transaction (the **Dissenters**). The Dissenters are funds which are managed by Maso Capital.

In doing so, Segal J emphasised that a party who agrees to make an interim payment in s. 238 proceedings cannot back out of that agreement, and the court will give effect to terms agreed between parties.

Background

In March 2017, Trina merged with another Cayman Islands exempted company pursuant to the statutory merger regime set out in Part XVI of the Companies Law. The Dissenters dissented from the merger, and when they were unable to agree a price for their shares with Trina within the statutory negotiation period, Trina petitioned for a determination of the fair value of the shares by the Grand Court. Prior to the hearing of the fair value petition, Trina and the Dissenters agreed in a consent order (the **Order**) that Trina would make certain interim payments to the Dissenters by a certain date; however, those payments were never made.

Trina's reasons for non-payment

Notwithstanding that Trina had, on legal advice, agreed to the terms of the Order and instructed its attorneys to sign on its behalf, it refused to make the interim payments. Trina told the court that some of its stakeholders had refused to permit the interim payments on the basis that those stakeholders had learned of two other cases pending before the court which were considering whether the court had jurisdiction to order interim payments in s. 238 proceedings.¹ Trina then belatedly challenged the validity of the consent order, claiming it was defective and invalid, and in the alternative, sought relief from any sanctions to which it would otherwise have been subject for breaching the Order.

In support of its position, Trina argued that the Order should be set aside because the court did not have jurisdiction to make it. Trina submitted the court may only make an order for an interim payment pursuant to GCR Order 29 following the issuing of a summons and the filing of evidence in support of the summons.

¹ *In the matter of Qunar Cayman Islands Limited* and *In the matter of Eurasia Drilling Company Ltd*. The decision in *Qunar*, in which the Dissenters also appear, is eagerly anticipated and expected to be released in the coming weeks.

² In this matter, the Order was expressed to be made pursuant to Order 42, rule 5A and no summons was issued.³ Trina argued in the alternative that even if the court did have jurisdiction to make an order for interim payments where a summons had not been issued, there was no jurisdiction to make the Order because it was expressed to have been made pursuant to Order 42, rule 5A and Trina submitted that the rule did not apply to interim payments.

Further, Trina submitted there was no binding contract between it and the Dissenters under which it agreed to make the interim payments. Even if the court found there was a contract, that contract was void due to a common mistake of law on the part of both parties who erroneously believed the court had the jurisdiction to grant interim payments by consent. In the alternative, if the Order was properly made, Trina asked the court to grant it relief from the consequences of its decision to breach the Order.

The Dissenters' arguments

Leading counsel for the Dissenters asked the court to reject all of Trina's arguments and to treat many of the explanations for failure to comply with the Order as 'inherently incredible.' In particular, the Dissenters argued:

- the court has jurisdiction to issue a consent order without a summons being issued
- even if a summons should have been issued, failure to do so was merely an irregularity addressed by GCR Order 2, rule 1 which did not affect the validity of the Order;⁴ and
- Trina was clearly contractually bound to make the interim payments and the circumstances relied upon by Trina did not justify the granting of relief.

The Ruling

Segal J rejected all of Trina's arguments. Specifically, the learned judge found that the court has jurisdiction to make a consent order in proceedings which are before it. The interim payment jurisdiction is ancillary to and arises within such proceedings. In the absence of agreement between the parties, a summons would have been needed, but in this case the parties were in agreement and the judge approved the Order containing the terms of their agreement, making it binding on them. Segal J found there was nothing unique in the interim payment jurisdiction which would prohibit the court making an order where the parties had agreed that order's terms between themselves. The learned judge found that on the basis that the parties were in agreement and the order was appropriately drafted (making the time for and consequences of payment perfectly clear), that it was appropriate to sign and make the order in circumstances where the jurisdiction issue had not been raised when he was presented with the order for signing.

Segal J also held that the Dissenters were correct on the application of GCR O.2, r.1 (i.e. that a failure to issue a summons is an irregularity which would not nullify an application). Further, the parties reached a binding agreement as evidenced and formalised in the Order. Even if the Order was defective, Trina was still contractually obliged to make the interim payments as Segal J considered that there was a binding agreement which was independent of the Order.

In closing, Segal J made two additional points, namely: that he made no comment as to the challenges to the court's jurisdiction to make interim payments raised in *Qunar* and *Eurasia* as that issue was not before him; and that he took Trina's summons seeking, *inter alia*, a declaration that the Order was defective as Trina's consent, as required by O. 29, r. 15, that the fact that an interim payment had been made could be communicated to him as the trial judge.⁵

² GCR Order 29, Part II, deals with interim payments.

³ GCR Order 42 deals with requirements relating to judgments and orders; Order 42, rule 5A deals with consent orders.

⁴ GCR Order 2, rule 1 states that a failure to comply with the GCR at the outset of proceedings *shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*

⁵ O. 29, r. 15 provides that unless the defendant consents there should be no communication of the fact that an interim payment has been made (either voluntarily or pursuant to an order) at trial or at any hearing until all questions of liability and amount have been determined.

Conclusion

Whilst Segal J's decision is unsurprising, it is reassuring that the court upheld the consent order agreed between Trina and the Dissenters. When parties enter into a contract or agree a consent order with an opponent, it is important that they have confidence that the court will enforce the promises made in the event of a dispute, and will not be swayed by technical arguments designed to permit a party to avoid fulfilling those promises. The decision sends a clear message that a company who agrees to make an interim payment in a s. 238 context cannot subsequently refuse to do so without facing the usual consequences following a breach.

The Dissenters have also brought a winding up petition against Trina, asserting that the outstanding interim payments represent debts which are undisputed, due and payable. They seek an order that Trina be wound up on the basis that it is insolvent, or in the alternative, that it is just and equitable that it should be wound up.

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