

Interim payments in Cayman Islands shareholder appraisal actions - principles and pitfalls

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| Introduction

Interim payments are an important aspect of section 238 appraisal proceedings, allowing dissenting shareholders receive a substantial sum pending the final determination of the fair value of their former shareholdings in a company.

In *Xingxuan Technology*^[1] the Grand Court confirmed the principles that apply to interim payment applications in fair value proceedings and provided guidance on the use of consulting experts to establish the value of dissenters' former shareholdings at this interlocutory stage.

Background

Xingxuan Technology was a privately held Cayman Islands company, which was sold in August 2017 and transferred by way of a statutory merger. Upon dissenting from the merger, the dissenter became entitled to have the fair value of its former shareholdings in the company judicially determined under section 238 of the Companies Act.

The dissenter recently issued an interim payment application seeking an amount equivalent to the merger consideration it had originally been offered, together with interest. The dissenter contended that the most reliable evidence of value for the purposes of determining the amount of the interim payment was the company's own statements as to fair value in both the merger agreement and the company's post-merger statutory offer to purchase the dissenter's shares. The company opposed the dissenter's application, arguing that due to the company's financial circumstances and a liquidation preference contained in the shareholders agreement, it could not be safely assumed that the dissenter's former shares would be found to have any monetary value at all at trial.

In advancing these arguments, the company relied on the valuation evidence of a "consulting expert". The dissenter filed valuation evidence from its own consulting expert in reply. These consulting experts were not appointed to provide independent valuation evidence at trial and were not available for cross-examination at the hearing of the interim payment application.

Decision

The court endorsed and applied the principles concerning interim payments in section 238 proceedings previously established in *eHi Car*,^[2] including that

- the court may order an interim payment of any such amount as it thinks just in all the circumstances
- the court will seek to determine the "irreducible minimum" amount that it can safely be assumed that the dissenter will recover
- what the company has previously said about fair value (including the merger consideration and its statutory offer) is, at the very least, an important factor when considering what is just
- the court must also consider whether any positive evidence or cogent legal arguments point to a lower amount than the company's statutory offer
- It is necessary to balance the prejudice to dissenting shareholders in being denied access to money that may be found to be due to them at trial against the risk that they may be unable to repay any amount by which the interim payment exceeds what the trial judge may ultimately assess as being fair value

In awarding an interim payment in this case, the court attached limited weight to the valuation evidence from either of the parties' consulting experts due to their perceived lack of independence, particularly in relation to the company's expert who had been assisting the company in these proceedings for several years. The court noted that such evidence is increasingly being used in interlocutory applications in section 238 proceedings and cautioned against unhelpful, expensive time-consuming mini-battles between consulting experts. In doing so, it provided the following helpful guidance

- evidence filed in interlocutory proceedings should be restricted to matters of fact and should not offer opinions, views, comments, discussion, suggestion, arguments or submissions
- opinions provided by consulting experts are not admissible as lay factual evidence
- matters of legal submission should be left to duly qualified attorneys

Taking all of this into account, the court found that there was no positive or persuasive evidence or legal argument from the company pointing to a lower valuation being a possible outcome at

trial than the merger consideration offered to the dissenter in the first place, save for the possible application of a minority discount. Adopting a broad-brush approach and erring on the side of caution, the court applied a 15% discount to the merger consideration for interim payment purposes.

The court also awarded interest on the interim payment at the standard judicial interest rate of 2.375% per annum. However, since the interim payment application was brought at a later stage in the proceedings than is typical, the period over which interest was ordered was reduced by 50%.

Finally, to address the company's concerns that it may not be able to recover any overpayment from the dissenter if fair value was found to be less than the interim payment, the court ordered the interim payment to be made into the interest-bearing account of the dissenter's Cayman attorneys.

Discussion

This decision provides further certainty for dissenting shareholders seeking interim payment in section 238 proceedings. The court will order a just amount by reference to the irreducible minimum sum that the dissenter is likely to be awarded at trial. The company's own statements as to fair value at the time of the merger and statutory offer will be given significant weight, absent any cogent evidence to support a lower valuation.

The court will not conduct a mini-trial at the interlocutory stage, and limited weight (if any) will be given to valuation evidence from experts other than the independent valuation experts appointed to give evidence at trial. The court will undertake its own assessment of value and make any adjustments it considers appropriate to account for the timing of the interim payment application and any risk of a dissenter potentially being unable to repay any interim payment above the ultimate determination of fair value.

Ogier is a leading shareholder appraisal firm in the Cayman Islands and represents the dissenting shareholder in Xingxuan Technology. For more information, contact your usual Ogier contact or one of the authors of this article.

[1] *In the matter of Xingxuan Technology Ltd* (unreported, FSD 227 of 2017 (DDJ), 26 May 2023)

[2] *In the matter of eHi Car Services Limited* (unreported, FSD 115 of 2019 (IKJ), 28 November 2019)

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Meet the Author



[Shaun Maloney](#)

Partner

[Cayman Islands](#)

E: shaun.maloney@ogier.com

T: [+44 1534 514416](tel:+441534514416)

Key Contacts



[Farrah Sbaiti](#)

Managing Associate

[Cayman Islands](#)

E: farrah.sbaiti@ogier.com

T: [+1 345 815 1781](tel:+13458151781)

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