Trina Solar: dissenting shareholders successfully challenge fair value awarded by Cayman Grand Court

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The dissenting shareholders in *Trina Solar*[1] have successfully challenged the fair value awarded to them by the Grand Court of the Cayman Islands, improving the appraisal landscape for future dissenters in the jurisdiction.

The Cayman Islands Court of Appeal threw out the merger price altogether, and placed a 70% weighting on a positively adjusted discounted cash flow valuation. This has sent a clear signal to merging companies that they

- must demonstrate a sufficiently robust deal process if they wish to rely on the merger price
- will bear the negative consequences of providing insufficient discovery or unsatisfactory witnesses at trial

The decision shows that merging companies will struggle to rely on the merger price in circumstances where there are conflicts of interest and insufficient protections in place to ensure that the interests of unaffiliated shareholders are adequately protected. This is particularly acute in management buy-outs, where companies should now expect the deal process to come under increased scrutiny.

Background to the Trina Solar shareholder dispute

Trina Solar was listed on the New York Stock Exchange from December 2006 until it was taken private by a group of investors in March 2017. A small number of dissenting shareholders were unhappy with the merger price offered and sought to have the fair value of their shares determined under section 238 of the Companies Act.

In September 2020, the Grand Court ordered an uplift on the merger price of slightly over 1% to the dissenters (based on a weighting of 45% merger price/30% adjusted trading price/25%

discounted cash flow), [2] which they then challenged on appeal.

Successful appeal by the dissenting shareholders to the Cayman Islands Court of Appeal

Merger price

The Court of Appeal was particularly critical of the Grand Court's reliance on the merger price and made the following key findings:

- **Full disclosure by companies is essential**

It is of it is of fundamental importance, particularly in management buy-outs, that companies give full disclosure of all documents relating to the deal process (including market checks) and the relevant communications with financial advisers. The most effective way to ensure this is if the company knows that inferences are likely to be drawn against it if it fails to be entirely open and transparent.

- **Fairness opinions cannot be relied on without supporting evidence**

Fairness opinions will carry some influence, but they will not be decisive. In the absence of any evidence supporting the reliability of the fairness opinion provided in support of the merger, the Grand Court should not have placed any reliance on it.

- **Special committees must document and explain their decision making**

The company failed to provide a witness who could explain the actions of the special committee. This was exacerbated by the fact that very few documents in relation to the sale process were available, including significant gaps in the documentary evidence to explain the actions of the special committee.

- **Delaware caselaw is relevant but must be properly applied**

Guidance in the Delaware caselaw[3] as to the need for a market check and the circumstances in which a merger price may be relied upon in the Cayman Islands. However, the Grand Court had misunderstood the Delaware caselaw[4] with respect to when the court can take account of the merger price where there are flaws in the deal process.

- **Special committees must be shown to be genuinely independent**

It is an important indicator of reliability that the special committee be composed of independent experienced directors. The connections between the members of the special committee and the buyer group raised unresolved concerns as to their willingness to act adversely, proactively seek out competing bids or adequately oversee the preparation of management projections.

- **Market checks must be robust**

There were serious defects in the market check conducted by the special committee, including main competitors not being approached and potential alternative bidders not being put in touch with each other, but instead being directed to the buyer group.

- **Special committees must be alive to conflicts of interest in management buy-outs**

The presence of Trina's founder, chairman and chief executive in both the company and the buyer group gave rise to a material risk of a chilling effect on competing bids, which was not properly addressed by the special committee.

- **Unaddressed conflicts of interest and deficiencies in market checks won't be easily excused**

Even though

(i) the buyer group only held 5.6% of the company's shares

(ii) the merger was approved by 94.4% of independent shareholders

(iii) the market in the company's shares was liquid, moved with announcements and was followed by analysts

(iv) the timing of the deal was not opportunistic

these factors could not possibly outweigh the deficiencies in the market check and concerns about the impact of the founder's conflicted position in both the company and buyer group.

As a result, the Court of Appeal determined that no reliance could safely be placed on the merger price.

Discounted cash flow

The Court of Appeal found that the Grand Court had erred in finding that management forecasts could only be varied if they were obviously wrong, careless, or tainted by an improper purpose. It found that the starting point is to consider the general reliability test (that is, whether the management projections had been prepared in good faith by a competent management team which understood the business and could make informed judgements about future performance). If that test is satisfied, then the court must consider the evidence of both sides and reach its own decision on the most realistic forecast.

The Grand Court had reached findings on projected cashflows that were plainly wrong and not reasonably open to it. Having decided that the figures in the management projections were too

low, the Grand Court should have then reached its own figures based on the evidence before it.

The Court of Appeal made its own findings as to how the management projections should be adjusted and invited the experts to recalculate the discounted cash flow valuation on this revised basis.

Adjusted trading price

Although the Court of Appeal identified certain issues with the reliability of the trading price, it found that it was reasonably open to the Grand Court to conclude that there was a semi-strong efficient market for the company's shares and that the trading price was not adversely impacted by material non-public information.

As such, it did not interfere with the Grand Court's findings on the adjusted trading price.

Weighting of valuation methodologies and outcome

Where the trading price and merger price are seen as reliable, they may be used as the starting point of the fair value calculation, subject to testing by reference to a discounted cash flow valuation. Although the Court of Appeal confirmed that in other cases it may be appropriate to estimate fair value primarily or exclusively using a discounted cash flow valuation.

In the present case, the Court of Appeal found that there were no grounds for interfering with the Grand Court's weighting of 30% for the adjusted trading price, but that the only reasonable decision was to give zero weighting to the merger price. It consequently shifted the 45% weighting that the Grand Court had previously given to the merger price over to the discounted cash flow valuation.

This resulted in a weighting of 70% discounted cash flow / 30% adjusted trading price, with the dissenting shareholders receiving an over 26% uplift on the merger price (prior to the ordered adjustments being made to the discounted cash flow valuation, which will increase this amount further).

Key takeaways from the Court of Appeal's decision

1. **Companies will struggle to rely on the merger price where there are conflicts of interest and insufficient protection for unaffiliated shareholders**

The Court of Appeal's decision highlights the difficulties in merging companies seeking to rely on the merger price in circumstances where there are unaddressed conflicts of interest and insufficient protections in place to ensure that the interests of unaffiliated shareholders are adequately protected. This is critical in management buy-outs, where companies should now expect the deal process to come under increased scrutiny.

2. **Management projections will no longer be uncritically accepted**

The lower threshold set by the Court of Appeal, which only requires the court to assess reliability and exercise its own judgment, provides a much clearer path to adjusting cashflows in discounted cash flow valuations.

3. **The company has an obligation to make all relevant information available**

The Court of Appeal has put it beyond doubt that the obligation to make all relevant documents and witnesses available to the court (and therefore the dissenting shareholders) rests upon the company and it is the company which will bear the consequences if it fails in this obligation.

While it is always possible for dissenting shareholders to apply for specific or further discovery, this should not normally be necessary. If the company does not fulfil its obligations, not only may it face orders for costs or other orders at the court's disposal, but it should also expect adverse inferences to be drawn as a result of its failures.

Ogier is a leading shareholder appraisal firm in the Cayman Islands. For more information, contact one of the authors of this article.

[1] *In the matter of Trina Solar Limited*, CICA 9 of 2021, 4 May 2023, Birt JA, Field JA, Beatson JA

[2] *In the matter of Trina Solar Limited*, FSD 92 of 2017, 23 September 2020, Segal J

[3] *Dell Inc v Magnetar Global Event Driven Master Fund Limited*, 177 A. 3d 1 (2017); *DFC Global Corporation v Muirfield Value Partners LP*, 172 A. 3d 346 (2017)

[4] *Blueblade Capital Opportunities LP v Norcraft Inc* [2018] WL 3602940 (27 July 2018)

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