IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO.: FSD 92 OF 2017 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

IN THE MATTER OF TRINA SOLAR LIMITED

IN CHAMBERS

Appearances:

Ms Catherine Newman QC and Katie Pearson of Harney Westwood & Riegels for the Petitioner.

Mr. Robert Levy QC and Rupert Bell of Walkers for the Dissenting Shareholders.

Before: **The Hon. Justice Segal**

Heard: **17 July 2017**

Extempore Judgment Delivered: **18 July 2017**

Note of extempore judgment on the Petitioner's summons to set aside the consent order dated 21 June 2017

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1. This is a brief note of my decision on the summons issued by Trina Solar Limited (the ***Petitioner***) seeking a declaration that the consent order dated 21 June 2017 (the ***Consent Order***) is defective and invalid or, in the alternative, an order granting the Petitioner relief from any sanctions to which it would otherwise be subject upon a breach of the Consent Order. The summons was supported by two affidavits of Shuion Chan dated 7 July 2017 and dated 13 July 2017. Mr Chan is the Vice President of Legal Affairs of the Company.

2. The Consent Order was made in connection with a petition under section 238 of the Companies Law pursuant to which the Petitioner applies to the Court to determine the fair value of the shares of two shareholders who dissented from the Petitioner's merger transaction. The dissenting shareholders are Maso Capital Investments Limited and Blackwell Partners LLC (the ***Dissenting Shareholders***). The Consent Order provided for the Petitioner to make interim payments to the Dissenting Shareholders by a certain date. The Petitioner has not made these payments. The reasons for and circumstances surrounding the failure to make the payments are set out in Mr Chan's affidavits. In brief, Mr Chan explains that after the Consent Order had been signed certain unnamed stakeholders in the Petitioner, whose consent was sought and presumably required to the making of the payments, refused to give such consent and as a result the Petitioner, after having sought an extension of time in which to make the payments which was not agreed, failed to make the interim payments as provided in the Consent Order. Mr Chan deposes that the reason why the stakeholders refused to give their consent was because they became aware on 28 June 2017 of two other cases pending before the Court (in the *Qunar* and *Eurasia* matters) in which a challenge is being mounted to the Court's jurisdiction to make interim payment orders in section 238 cases. They then decided to challenge the Petitioner's earlier decision to enter into the Consent Order. He further deposes that the Petitioner received legal advice from Harneys on 5 July that the Consent Order was in fact defective because interim payment orders could not be made by consent.

3. The Consent Order provided that the Petitioner make "*interim payments pursuant to Order 29, rules 10 and 12 of the GCR (as applicable pursuant to Order 29, rule 18 of the GCR)*" to the Dissenting Shareholders. The Consent Order also provided that these payments were to be "*made by the Petitioner in cleared funds no later than 14 days from the date of [the] Consent Order*" and that the Dissenting Shareholders "*may only make a second or subsequent application for an interim payment upon cause shown pursuant to Order 29, rule 10(5) of the Grand Court Rules and in any event, shall not make a second or subsequent application for interim payment until after the first exchange of expert reports..*"

4. The Consent Order contained three recitals. The first recital stated that the Petitioner and the Dissenting Shareholders had "*agreed the terms of this consent order*" and sought "*to have the order .. approved by consent pursuant to Order 42, Rule 5A of the Grand Court Rules ..*" The second and third recitals stated that the Dissenting

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Shareholders had (separately) undertaken "*to refund forthwith to the Petitioner any amount of the [interim payments] paid in excess of the amount ultimately determined by [the] court to be the fair value [of the Dissenting Shareholders' shares in the Petitioner.*"

5. The draft Consent Order, signed by the attorneys for the Petitioner and the Dissenting Shareholders, being Harneys and Walkers respectively, was submitted to the Court by Mr Bell of Walkers under cover of an email dated 14 June (copied to Harneys) in which he stated that "*We wish to inform his Lordship that the parties have reached an agreement whereby the Company will make an interim payment to each of the [Dissenting Shareholders] in this matter on the terms set out in the attached Consent Order [and] that we would be grateful if you could bring [sic] to his Lordship's attention. If his Lordship is agreeable to making the Consent Order we would be grateful if you could let the parties know at your earliest convenience.*" I signed the Consent Order on 21 June.

6. Ms Newman QC, counsel for the Petitioner, submitted that:

   (a). the Consent Order was made without jurisdiction and should be set aside. She submitted that the Court only has jurisdiction to make an order for an interim payment under GCR Order 29 following the issuing of a summons (and the filing of evidence in support) and in this case since no such summons was issued, the Court was unable to make an order for interim payments. The fact that the order was made by consent did not affect this conclusion. The parties could not waive the mandatory requirement for there to be a summons and evidence in support and the parties could not by agreement give the Court jurisdiction to make orders which it otherwise had no jurisdiction to make.

   (b). alternatively, if the Court does have jurisdiction to make an order for interim payments without such a summons and evidence in support, there was no jurisdiction to make the Consent Order since it was expressed to be made pursuant to GCR Order 42, rule 5A and that rule did not apply to orders for interim payments. This was because interim payment orders made pursuant to GCR O.29 indisputably involve the exercise of a judicial discretion and cannot therefore in principle be made pursuant to O.42 r.5A (Ms Newman referred to and relied on paragraph 9 of the Explanatory Memorandum to the Grand Court

Rules). In addition, interim payment orders made pursuant to Order 29 did not fall within any of the categories set out in O.42, rule 5A(2) and rule 5A(2) contained an exhaustive list of the circumstances in which a consent order could be made. Ms Newman noted that Mr Levy QC, counsel for the Dissenting Shareholders, had argued that an interim payment order involved the payment of a "liquidated sum" and therefore fell within Order 42, rule 5A (2) (a) (i) which covers "*a judgment or order for the payment of liquidated sum, or damages to be assessed, or the value of goods to be assessed*". Ms Newman submitted that this construction was incorrect. The terms "liquidated sum" and "liquidated demand" have specific meanings in the context of the Grand Court Rules. She referred to a number of the rules in the Grand Court Rules which use these terms and concluded that a liquidated sum for the purposes of the Grand Court Rules (including Order 42, rule 5A) is the sum demanded in a writ of summons indorsed pursuant to GCR, O.6 r.2 and it did not have any wider meaning. However, she also submitted that if she was wrong on this point, and the term liquidated sum did have a wider meaning, it should not be read as including interim payments. A liquidated sum is an amount that the parties stipulated in advance (or the plaintiff stipulated in its writ) was payable. In section 238 cases, since the Dissenting Shareholders had rejected the offer of a payment of the merger price and instead have exercised their statutory right to ask the court to determine the fair value of their shares, they could not be said to be making a claim of a liquidated sum. Further, the fact that the Consent Order provided for any excess to be repaid to the Petitioner also indicated that the sum payable under the Consent Order was not an agreed or certain amount.

(c). in the further alternative, if the Consent Order was properly made (because the Court had jurisdiction to make it and the order was properly approved and made), the Court had jurisdiction to grant relief to the Petitioner from the consequences of a breach of the Consent Order (resulting from a failure to pay the interim payments before the payment date contained in the Consent Order) and should exercise its discretion to grant relief by making an order in the form proposed by the Petitioner. This order provided for the Petitioner to make a payment into Court of the interim payments on terms (as I understand what is proposed) that the payment into Court did not constitute an admission of any kind by the Petitioner (including an admission that the Dissenting Shareholders were entitled to be paid the interim payments); that the Dissenting Shareholders

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issue and serve a summons seeking an order for payment of the interim payments; that the Dissenting Shareholders' claim to interim payments only be determined following the outcome and determination of applications being made in two other section 238 petitions currently being heard by the Court in *Qunar* and *Eurasia* in which there is a challenge to the Court's jurisdiction to make orders for interim payments in section 238 proceedings; and that if the Court makes an order on the Dissenting Shareholders' summons that the Dissenting Shareholders are entitled to the interim payments then, after the expiry of the time period for lodging an appeal or if an appeal is brought after the determination of the appeal (at least an appeal to the Court of Appeal but perhaps not an appeal to the Privy Council), the sums in Court be paid to the Dissenting Shareholders but if the Court rules against the Dissenting Shareholders by declining to make an order for any interim payments or to makes an order in an amount less than the amount currently claimed and paid into Court, then the funds in Court (or the balance above the amount ordered to be paid to the Dissenting Shareholders) shall be paid to the Petitioner.

(d). further, there had been no binding agreement between the Petitioner and the Dissenting Shareholders under which the Petitioner agreed to make the interim payments. Accordingly, this was not, for the purposes of the exercise of the Court's discretion to relieve the Petitioner from the consequences of failing to pay on time (by extending time for payment or making the alternative order in the form proposed by the Petitioner) an example of what is described in a number of the authorities as a "real contract" case (see, for example *Siebe Gorman v Pneupac Ltd* [1982] 1 WLR 185 and 189, per Lord Denning, and *Pannone LLP v Aardvark Digital Ltd* [2011] 1 WLR 2275). Even if there had been a binding contract, the contract was void by reason of common mistake. The operative mistake, Ms Newman submitted, was a mistake of law made by all parties who believed that there was jurisdiction to make an order for interim payments by consent.

7. Mr Levy submitted that all the challenges made by the Petitioner should be rejected. He submitted that the Court had jurisdiction to issue a consent order without a summons being issued; that even if a summons was required, a failure to issue a summons was only an irregularity and in reliance on GCR O.2, r.1, did not affect the validity of the Consent Order; that it was clear that the Petitioner was bound in contract to make the

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interim payments and that the circumstances relied on by the Petitioner as set out in Mr Chan's affidavits did not justify the granting of relief to the Petitioner. Indeed, Mr Levy invited the Court to treat a number of the explanations for failure to comply with the Consent Order as inherently incredible.

8. In my view:

(a). the failure by the Petitioner to issue a summons supported by affidavit evidence (as referred to in GCR O.29, sub-rules 10(2) and (3)) does not result in the Consent Order being invalid by reason of it being made without jurisdiction:

(i). it seems to me that the Court has jurisdiction to make an order by consent in proceedings which have been properly commenced and which are before the Court. In the present case, those proceedings are the section 238 petition. The interim payment jurisdiction is ancillary to and arises within those proceedings. Clearly, in the absence of agreement, a party seeking an interim payment must issue an application and GCR O.29, r.10 requires that in order to do so a summons be issued. But if there is no need to issue an application because the parties are in agreement then there is equally no need to issue a summons. If the parties to the section 238 proceedings reach agreement for the making of interim payments they can apply to the judge dealing with the proceedings for a judgment or order in the terms agreed and if the judge approves and issues the order it is binding on the parties. There is nothing special nor are there any limitations expressly included or to be implied in relation to the interim payments jurisdiction which preclude the Court from having the jurisdiction to make an order in terms agreed by the parties where and after a section 238 petition has been presented.

(ii). there are two ways in which consent orders can be made. Either administratively, using the procedure established by GCR O.42, r.5A and O.42, r.1(4), where the Clerk of the Court is authorised to sign the order, or by an application to the judge. If the later course is chosen, it is open to the Court to make the order without a hearing (see paragraph B1.1 of the FSD Guide). Of course, the FSD Guide also states that "*Consent orders must be submitted to the assigned Judge for approval and signature.*" So it appears that as regards FSD matters, all orders will be signed by the Judge and so technically there is no need to come within the listed categories in r.5A(2).

(iii). in the present case, in accordance with FSD practice, the order was submitted to me for approval and signature. 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) it seemed to me, without of course the jurisdiction issue having been raised, appropriate to sign and make the order.

(iv). even if I am wrong on this, it seems to me that, as Mr Levy submits, the failure to issue a summons is an irregularity which does not nullify the application made by the parties for an order in agreed terms or the Consent Order. I agree that GCR O.2, r.1 applies. It would be open to the Court to order the Dissenting Shareholders to issue a summons with a short affidavit in support and to confirm that the Consent Order was valid and effective from the date on which it was issued. But to my mind there would be no useful purpose served by requiring such a summons to be issued and this is indeed one of the reasons why I consider that no such summons is required in cases of orders in agreed terms.

(b). the Consent Order was an order for the payment of a liquidated sum within GCR O.42, r.5A (2)(a)(i). As is noted in the commentary in the 1999 White Book when discussing the equivalent provision under the RSC "*the first group under para 2(a) consists of any agreed judgment or order which requires the payment of **money**..*" [emphasis added]. I do not consider that the reference to "liquidated sum" in that sub-rule has any special or limited meaning, as contended for by Miss Newman.

(c). furthermore it also seems to me that the parties did reach a binding agreement in this case which agreement was evidenced and formalised in the Consent Order. There was a settlement agreement pursuant to which the Dissenting

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Shareholders gave up the right to bring proceedings and seek larger interim payments and qualified their right to make subsequent applications for further interim payments. In addition to the substantive terms embodied in the Consent Order the parties agreed to assent to, sign and be bound by an order of the Court. This agreement was enforceable as a judgment, since it was embodied in the Consent Order. But there was also a binding agreement independent of the Consent Order. Even if for any reason the Consent Order had been defective then, as it seems to me, the Petitioner was still contractually obliged to make the interim payments on the dates agreed, the Dissenting Shareholders could have issued proceedings by way of writ for a judgment in the amount of the sums agreed to be paid and could have sought an order requiring the Petitioner to sign another consent order in suitable form. I do not accept that this agreement would be void by reason of mutual mistake if the Consent Order was made without jurisdiction because there had been a failure to issue a summons seeking the order. This is because either (a) the core commercial purpose of the agreement was to settle the dispute regarding the Dissenting Shareholders' entitlement and claim to interim payments and such purpose was achieved even without an immediately effective court order (so that a claim of mutual mistake based on the purpose of the contract being incapable of achievement at the time the contract was made was not established) or (b) if having an effective consent order was one of main purposes of the agreement, that purpose was achievable and was not legally impossible since it would have been possible to issue a summons with a supporting affidavit and thereafter to have a consent order.

(d). I accept and agree that the Court has jurisdiction to extend time for payment of the sums payable under the Consent Order or to grant other appropriate relief. I rely in particular on the English Court of Appeal's judgment in *Pannone LLP v Aardvark Digital Ltd* (above) in which Tomlinson LJ said as follows (after referring to the judgments in *Siebe Gorman*):

> *"These observations were made in the context of the old RSC . It may be, as I shall show, that the distinction there being drawn is now of no significance so far as concerns the jurisdiction of the court to grant relief from the "agreed" consequences of non-compliance with an order but it remains in my view of importance in the context of the court's exercise of its discretionary power. There is a world of difference between a case management decision made at the instance of one party to which the other party makes no objection, such as occurred in the Siebe Gorman case and a genuine settlement of a substantive dispute as to the parties' rights, such as was*

under consideration by this court in Weston v Dayman [2008] 1 BCLC 250 .. *[in that case] the court was invited to vary the consent order so as to permit the bringing of an action against the receiver for breach of duty for failing to take proper care of a motor yacht which formed part of the estate of the receivership. Arden LJ, with whom the other members of the court agreed, said at para 24 that the court "must be very careful in exercising a discretion to vary the terms of an order which represents a contract between the parties". Assuming without deciding that the court had such a power, the court declined to exercise it, noting that "a bargain freely made should be upheld": para 25, per Arden LJ. The applicant Mr Weston had himself obtained benefits under the consent order and it would not be right to exercise any discretion to vary it. The court was there being invited to interfere with a concluded settlement of substantive disputes.* ***Assuming that there is a power so to do, where the settlement is embodied in an order of the court, it can rarely be appropriate for the court to intervene further than to the extent to which the contract can, by its own terms or pursuant to general contractual principles, be modified or discharged in the light of changed circumstances.*** " [emphasis added].

(e) I have carefully considered the evidence regarding the circumstances in which the Petitioner has found itself unable or unwilling to pay the sums agreed to be paid in the Consent Order and the terms of the order proposed by the Petitioner and set out in paragraph 7 of Mr Chan's first affidavit. I have also carefully considered the submissions made by Ms Newman on this issue, in particular her submission that the form of order is intended to provide and should be seen as giving the Dissenting Shareholders reasonable security and the same protections and relief that they could reasonably have expected had the Petitioner decided to raise the same jurisdictional challenge as are raised in *Qunar* and *Eurasia* before agreeing to the Consent Order. However, I am of the view that it would not be appropriate to make the order sought by the Petitioner in the present circumstances. The Petitioner initially sought to delay payment of the sums agreed because certain stakeholders only became aware of the issue as to whether the Court had jurisdiction in section 238 cases to make orders for interim payments after the Consent Order had been agreed and issued. Mr Chan acknowledges in paragraph 6(o) of his first affidavit that the Petitioner itself was aware of the issue before the Consent Order was approved and signed and the evidence, limited though such evidence is as to the precise circumstances surrounding the discussions and communications with the unnamed stakeholders, indicates that there seems to have been a failure of internal governance in failing properly to brief and obtain the approval of those whose consent is now said to be needed to the making of the agreed payments. It seems to me that the circumstances established by the evidence are not sufficient to justify relief (I note that the

Consent Order had been signed and agreed by those with undoubtable authority to do so and to bind the Petitioner). Nor do I consider that the issues raised concerning the asserted invalidity of the Consent Order (by reason of a lack of jurisdiction to make it in the absence of a summons) are sufficient to justify granting relief or an extension of time in which to make payment. I have concluded and held that the Consent Order was valid and that these challenges are without foundation.

(f). accordingly for these reasons I decline to make the orders sought in the summons and hold that the Consent Order is valid and remains in full force and effect.

9. I would add two final points. First, I make no comment on the validity of the challenge made to in *Qunar* and *Eurasia* to the jurisdiction of the Court to make interim payment orders in section 238 cases. That issue is not before me. Secondly, I note that GCR O.29, r.15 states that unless the defendant consents "*no communication ... of the fact that an interim payments order has been made whether voluntarily or pursuant to an order shall be made at trial or hearing of any question or issue as to liability ..until all questions of liability and amount have been determined.*" I take it that since the Petitioner issued the summons to be heard and has appeared before me, such consent, to the extent relevant or required, has been given.

Segal

THE HON. JUSTICE SEGAL
JUDGE OF THE GRAND COURT, CAYMAN ISLANDS

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