MAPLES GROUP

UPDATE

Winner Takes All: Costs Ruling in the FGL Holdings s.238 Appraisal Action

Further to the Grand Court's (the "Court") decision on 20 September 2022, where it found that the fair value of the Kingstown Dissenters' shares in *FGL Holdings* ("FGL") was the merger price, the Court has granted FGL its costs of the proceeding[1]. In addition to being the first time that a company has successfully defended the transaction price in a s.238 appraisal action, FGL also marks the first time a company has recovered its costs of such an appraisal action.

The Court also awarded FGL US$4 million in costs on an interim basis pending taxation; the costs of its e-discovery provider and first level document reviewers; and interest on its costs.

The Maples Group represented FGL at all stages of the appraisal action.

Entitlement to Costs

Mac Imrie, KC and Malachi Sweetman, Of Counsel, argued that FGL was the successful party in the proceeding (and therefore entitled to its costs) for the following reasons:

- The Kingstown Dissenters had recovered nothing as a result of exercising their dissent rights, because fair value was the same as the merger price offered to them at the outset;
- Similarly, the Kingstown Dissenters had not accepted FGL's fair value offer made prior to commencement of the proceedings in accordance with s.238(8) (which was also the amount of the merger price);
- Applying the usual test of "costs follow the event", FGL was the successful party;
- FGL had paid more than the merger price by way of non-refundable interim payment before the petition was filed; and
- Even if assessed on an issue-by-issue basis, FGL had succeeded on all but one of the valuation issues in dispute.

The Kingstown Dissenters argued that the appropriate order was no order to costs because:

- At trial, FGL had not argued for the merger price, but for a lower price based on the rolled forward market price of FGL stock;
- The Court did not accept this valuation methodology, nor did it accept that the merger price was an upper-bound on fair value; and
- Properly analysed, the interim payment was less than fair value.

The Court grated FGL its costs on the basis that: the Kingstown Dissenters had received no uplift on the merger price; they had received a non-refundable interim payment of the more than the merger price at the outset; and the Court preferred all of FGL's factual and the bulk of its expert evidence at trial. The Court concluded that FGL was the successful party overall, and there were no grounds to reduce its costs.

[1] *FGL Holdings* (unreported) 19 April 2023, Parker J.

Other Costs Issues

In addition to its standard costs, the Court granted FGL the the costs of its e-discovery provider (provided through its parent company, FNF) and the costs of its first level reviewers retained for its disclosure exercise, both of which were based outside of the Cayman Islands. Such costs are only recoverable if specifically directed by the Court.

FGL also sought an interim payment of US$5 million in respect of its costs pending taxation. The Kingstown Dissenters opposed this order on the grounds that insufficient information had been provided to permit the Court to assess what the minimum recoverable amount would be. The Court ordered the Kingstown Dissenters to pay FGL US$4 million pending taxation.

The Kingstown Dissenters made a late submission that any cost order made against them should be made on a pro-rata basis rather than jointly and severally. The Court concluded that as the five Kingstown Dissenters had dealt with the litigation as group, and could apportion their cost liability internally, it was fair and just that they should be jointly and severally liable for the costs, rather than FGL having to potentially pursue different entities for recovery.

Implications

This is the first s.238 appraisal action where the Dissenters have received nothing as a result of their dissent, and were required to pay the company's costs of the proceeding (including a significant amount summarily) – a positive sign for other companies facing appraisal proceedings.

The Court's decision to award the costs of e-discovery and first level reviewers based outside the Cayman Islands is a welcome recognition of the practicalities of a large scale discovery exercise.

The Court's rejection of the Kingstown Dissenters' pro-rata argument also gives companies greater certainty about their ability to recover costs, especially in appraisal actions with a multiplicity of dissenters.

For further information, please reach out to your usual Maples Group contact or any of the persons listed below.

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