

IN THE GRAND COURT OF THE CAYMAN ISLANDS

4-03-11

FINANCIAL SERVICES DIVISION

FSD 48/2009 (AJEF)

IN THE MATTER OF FREERIDER LTD. (IN OFFICIAL LIQUIDATION)

Coram: The Hon. Mr. Justice Angus Foster

Appearances: Mr. Heinen - Ms. Katie Brown - Appleby

Mr. Le Comte – no appearance

Heard: Friday 4<sup>th</sup> March 2011

EX TEMPORE RULING


1. This is the Court's decision with regard to Mr. Heinen's application for an "unless" order in light of Mr. Le Comte's failure to pay the sum of US\$320,707.62 pursuant to a Costs Certificate dated 23 November 2010 to Mr. Heinen's attorneys. Mr. Heinen seeks an order that unless the said sum is paid within seven days of service of the order requiring him to pay, he should be debarred from participating any further in these proceedings.
2. The Court is conscious of the fact that Mr. Le Comte's previous attorneys, Turner & Roulstone, have come off the record and are no longer acting for him. On the other hand,

Mr. Le Comte has had at least three weeks since that order in which to take steps to retain other attorneys and he has known about his obligation to make payment under the outstanding Costs Certificate for considerably longer than that. His submissions to the Court by his letter dated 3 March 2011 were only made yesterday. He asked for a postponement of this application until he has been able to find and instruct alternative attorneys but he gives no indication of how long that is likely to take or what active steps he has taken to date in that regard.

3. There is no merit in the point which Mr. Le Comte seeks to make in the final substantive paragraph of his letter in seeking to draw a distinction between his position as a shareholder and his position as a creditor of the Company in this context, and I reject that entirely.
4. The only substantive issue which Mr. Le Comte raises in his letter which requires any consideration is his contention that the sum of approximately US\$400,000 which he claims, but has not established, is a debt owed to him by Mr. Heinen (or more properly Mr. Heinen's company AHAB B.V.) which should be set-off against the amount due by him to Mr. Heinen pursuant to the Costs Certificate. Mr. Le Comte has issued a complaint in New York against Mr. Heinen claiming payment of that alleged debt but despite the fact that the complaint was filed on 14<sup>th</sup> January 2011, almost two months ago, it has not yet been served on Mr. Heinen. I do note, however, that Mr. Le Comte appears to be representing himself in that matter.

5. It is reasonably clear that in circumstances where a debt, including one other than in respect of costs, is the subject of a judgment or court order, it may, in appropriate circumstances, be set-off against a liability to pay costs in the discretion of the Court, although the authorities for that are all rather old and none are directly in point.
6. Nonetheless, in all the circumstances, I am concerned that Mr. Le Comte, who is currently without legal representation, and notwithstanding the Court's concerns about his apparent lack of appropriate urgency with regard to his compliance with court orders, should have a fair opportunity to satisfy the Court that his argument concerning set-off is well founded, despite the Court's prima facie view to the contrary.
7. Accordingly, I shall, with reluctance, adjourn this application for a further period of 21 days from the date on which this ex tempore ruling and the order consequent thereon is served on Mr. Le Comte, which may be done by email. I also direct that Mr. Heinen's skeleton argument submitted in support of his application shall be served on Mr. Le Comte at the same time. The costs of and incidental to this application to date are reserved.

4<sup>th</sup> March 2011



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The Hon. Mr. Justice Foster