

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN
3 FINANCIAL SERVICES DIVISION

Cause No: FSD 18/2012

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6 IN THE MATTER OF THE COMPANIES LAW (2011 REVISION)
7 AND IN THE MATTER OF TRIKONA ADVISORS LIMITED



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9 BETWEEN:

ARC CAPITAL LLC
&
HAIDA INVESTMENTS LIMITED

PETITIONERS

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15 AND:

TRIKONA ADVISORS LTD.

RESPONDENT

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21 Appearances:

Mr. Ross McDonough and Mr. Guy Cowan
of Campbells on behalf of the Petitioners

Mr. Michael Mulligan and Mr. Andrew
Holden of Harneys on behalf of the
Company

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28 Before:

The Hon. Mr. Justice Charles Quin

29 Heard:

8th March 2012

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JUDGMENT

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INTRODUCTION

34 1. This is the hearing of the Summons brought by the Petitioners, ARC Capital LLC
35 ("ARC") and Haida Investments Ltd. ("HAIDA"), for directions pursuant to O.3
36 r.11 of the Companies Winding-Up Rules 2008.

- 1 7. It is common ground that the first named Petitioner ARC is a Delaware Company,
2 and is the legal owner of 25% of the issued shares of the Company. The other
3 Petitioner, Haida, is a corporation which was incorporated in the British Virgin
4 Islands (BVI), and it is a 25% owner of the issued shares of the Company.
5 Collectively the Petitioners are, therefore, the legal owners of 50% of the issued
6 shares of the Company. The remaining 50% shareholding in the Company is held
7 by Asia Pacific Investments Limited (APL), which is another BVI Company.
- 8 8. The Company's board of directors consisted, until recently, of Mr. Rakshitt Chugh
9 ("Mr. Chugh"), Mr. Aashish Kalra ("Mr. Kalra"), Mr. Ravi Chitnis ("Mr. Chitnis")
10 and Mr. Saurabh Killa ("Mr. Killa"). On or about March 2006 Mr. Chugh was
11 appointed as a director of the Company and served as the representative of the
12 Petitioners on the board of directors. At the same time Mr. Kalra was appointed as a
13 director of the Company and served as a representative of APL.
- 14 9. Mr. Kalra on behalf of the Company has confirmed that the Company was
15 incorporated in the Cayman Islands on the 9th March 2006. He further avers that the
16 Company's issued shares were held as to 50% by APL, which in turn is owned by
17 interests of the extended Kalra family. Mr. Kalra also avers that the other 50% is
18 owned by the Petitioners ARC and HAIDA. Finally, Mr. Kalra asserts that the
19 Company is 50% owned by Mr. Chugh through ARC and Haida.
- 20 10. The Petitioners rely on the Winding-Up Petition, the affidavit of Mr. Rakshitt
21 Chugh, sworn on the 10th February 2012 and the affidavit of Mr. Lokesh Chugh
22 sworn on the 13th February 2012 and the affidavit of service of Maggie Greenwood,

1 sworn on the 28th February 2012. The Company relies on the first affidavit of Mr.
2 Kalra, filed on the 7th March 2012.

3 ***THE PETITIONERS' POSITION***

4 11. The Petitioners maintain:

5 i. The Company is and has always been a quasi partnership;

6 ii. The Petitioners have been unjustifiably excluded from the management
7 of the Company contrary to a legitimate expectation that they would
8 participate in that management through their representative Mr. Chugh;

9 iii. The Company is now under the total control of Mr. Kalra and has
10 commenced litigation in Connecticut against the Petitioners and others,
11 which, *prima facie*, means that the current board has a significant and
12 ir-remediable conflict of interest. One set of proceedings had been
13 brought by the Company and APL against the Petitioner ARC and
14 others in Connecticut and another set of proceedings has been brought
15 by the Company against HAIDA and others in the Superior Court JD of
16 Fairfield.

17 iv. The Petitioners maintain that the prosecution of the US proceedings is
18 motivated by the desire on the part of one of the quasi partners – APL
19 and its representative, Mr. Kalra, to improperly seize complete
20 ownership of the Company.

1 v. The prosecution of the proceedings and the removal of Mr. Chugh from
2 the board of directors is oppressive to the Petitioners;

3 vi. The proceedings are, in any event, vexatious and devoid of any merit
4 and their prosecution is not in the best interests of the Company, and
5 the assets of the Company should not be improperly dissipated by the
6 funding of the proceedings.

7 12. As a result of the foregoing the Petitioners maintain that there has been a complete
8 and justifiable loss of confidence by the Petitioners in the management of the
9 Company, and a complete and irrevocable cessation of trust and confidence
10 between the quasi partners.

11 13. Accordingly, the Petitioners maintain that only an independent Liquidator will be
12 able to achieve an orderly wind down of the Company's affairs, and a fair and
13 lawful distribution to all the shareholders of the value remaining in the Company.

14 *THE POSITION OF THE COMPANY*

15 14. The Company's main claim is that the central issue in the Petition will be whether
16 the Petitioners have come to the Court with clean hands. The Company maintains
17 that the Petitioners do not have clean hands because the Petitioners are merely the
18 alter egos of Mr. Chugh. The Company submits that Mr. Chugh has committed a
19 series of flagrant breaches of fiduciary responsibility against the Company.
20 Accordingly, the Company argues that the Petitioners have suffered no oppression
21 and are entitled to no relief.

- 1 15. The Company maintains that Connecticut is the appropriate forum and that the
2 appropriateness of the Company's decision to remove Mr. Chugh from office and to
3 bring his claim for breach of fiduciary duty will all be determined in the US
4 proceedings currently ongoing in Connecticut. The Company maintains that,
5 accordingly it would be a waste of costs for these issues to be determined in the
6 Petition proceedings as well, and that the Petition is little more than an attempt to
7 frustrate the Company's claims in the US.
- 8 16. Counsel on behalf of the Company submits that both case management and comity
9 weigh in favour of a stay *pendente lite*, which the Company respectfully seeks or,
10 alternatively, an adjournment, because the Company is actively considering making
11 an application for an order validating payment of its legal fees in the US
12 proceedings.
- 13 17. Accordingly, the Company seeks an adjournment of the Petitioners' Summons for
14 directions so that it can have sufficient time to prepare its application for an order
15 for validation and also an order for a stay.
- 16 18. It is clear to the Court that the Company is solvent, and in the event of a liquidation
17 there would be very significant assets from which to make a distribution to the
18 Company's shareholders.
- 19 19. Until recently, the Company's board of directors consisted of Mr. Chugh, Mr.
20 Kalra, Mr. Chitnis and Mr. Killa. In his affidavit opposing the Petitioners'
21 application Mr. Kalra deposes to the fact that he and Mr. Chugh were co-managing
22 directors and it is clear that both Mr. Kalra and Mr. Chugh were always on the
23 board of directors until January 2012.

1 20. On the evidence before this Court Mr. Chugh was removed, without notice, at a
2 meeting on or around the 9th January 2012. It is not challenged by the Company that
3 Mr. Chugh received no notice of any board meeting to consider his removal as a
4 director. Mr. Chugh was only informed when he received a letter, dated the 17th
5 January 2012 from the US attorneys Messrs Adler, Pollock and Sheehan, who had
6 been retained by the Company, which confirmed that Mr. Chugh had been
7 removed. The Court has been informed that Mr. Killa has resigned.

8 21. On the 18th January 2012 Mr. Chugh's Cayman attorneys, Campbells, wrote to the
9 Company's US attorneys requesting a copy of the resolution removing Mr. Chugh
10 as a director. Up to the time of this hearing, no response had been received to the
11 letter and also the Petitioners have not received a copy of the resolution which
12 purportedly removes Mr. Chugh as a director.

13 22. The US proceedings in Connecticut are brought by APL in its own name and
14 purportedly derivatively on behalf of the Company. Indeed it is properly conceded
15 by the Company's Cayman counsel that the US proceedings have been adopted and
16 are now pursued by the Company in its own name. This Court notes that the
17 Connecticut District Court found that the likelihood of success on the merits and,
18 the balance of hardships, are not decidedly in favour of the US Plaintiffs.

19 23. There is evidence that at the hearing on the 3rd February 2012 in Connecticut the
20 District Court made clear its view that it did not necessarily believe that
21 Connecticut was the appropriate forum for the resolution of the dispute between
22 quasi-partners. It is not challenged that the Petitioners are Chugh entities for the

1 ultimate benefit of Mr. Chugh and his family, whilst APL is the vehicle for Mr.
2 Kalra and his family.

3 24. Having heard counsel for the Petitioners and for the Company, and having read the
4 Petition and affidavits filed by both parties, it is my view that this Company is, and
5 always has been a quasi-partnership.

6 25. The Court is concerned by the manner in which Mr. Chugh was removed as a
7 director without any notice or without any opportunity to be heard. This Court is
8 also concerned about the fact that a request by the Plaintiff's attorneys for the
9 minutes of the meeting of the board of directors on or about the 9th January 2012
10 has been ignored. Accordingly, the Petitioners have been prevented from
11 participating in the management of the Company through Mr. Chugh.

12 26. Undoubtedly, there are serious allegations against Mr. Chugh and, similarly, against
13 Mr. Kalra. This Court does not intend to make any determination as to the merits of
14 the allegations and counter allegations at this stage. However, the directions being
15 sought by the Petitioners will allow those allegations and counter allegations to be
16 fully ventilated at the hearing of the Petition.

17 27. This Court accepts that the Petitioners had a legitimate expectation that they would
18 continue to participate in the management of the Company, and now they have been
19 completely removed, and, on their case, unjustifiably excluded from that
20 management.

21 28. In addition to the proceedings brought by the Company against ARC in
22 Connecticut, and against Haida in the Superior Court of Fairfield, the Company is

1 engaged in litigation in Mauritius and arbitration proceedings in Singapore. On any
2 view, there are significant funds of the Company being spent in litigation, and in
3 particular in two separate actions against the Petitioners. Accordingly, on a prima
4 facie view, the Court finds that the US proceedings, at least, are oppressive to the
5 Petitioners.

6 29. I have received considerable guidance from the dicta of Foster J. in the matter of
7 *Freerider Limited* [2009] CILR 604. Foster J. conducted a thorough and detailed
8 review of the law in relation to the winding up of companies on the just and
9 equitable ground. Like Foster J. I think it is instructive and important to record the
10 well known statement of Lord Wilberforce in the House of Lords case of *Ebrahimi*
11 *v. Westbourne Galleries Ltd.* [1973] A.C. 360 where Lord Wilberforce stated at
12 page 379:

13 *“The foundation of it all lies in the words ‘just and equitable’ and, if there is*
14 *any respect in which some of the cases may be open to criticism, it is that the*
15 *courts may sometimes have been too timorous in giving them full force. The*
16 *words are recognition of the fact that a limited company is more than a mere*
17 *legal entity, with a personality in law of its own: that there is room in company*
18 *law for recognition of the fact that behind it, or amongst it, there are*
19 *individuals, with rights, expectations and obligations inter se which are not*
20 *necessarily submerged in the company structure. That structure is defined by*
21 *the Companies Act and by the articles of association by which shareholders*
22 *agree to be bound. In most companies and in most contexts, this definition is*
23 *sufficient and exhaustive, equally so whether the Company is large or small.*
24 *The ‘just and equitable’ provision does not, as the respondents suggest, entitle*
25 *one party to disregard the obligation he assumes by entering a company, nor*
26 *the court to dispense him from it. It does, as equity always does, enable the*
27 *court to subject the exercise of legal rights to equitable considerations;*
28 *considerations, that is, of a personal character arising between one individual*
29 *and another, which may make it unjust, or inequitable, to insist on legal rights,*
30 *or to exercise them in a particular way.”*

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1 30. Just as Foster J. found in *Freerider Ltd.* I find that in the present matter, the
2 Company does not have any independent interest in the dispute between its 50%
3 shareholders.

4 31. For the purpose of this application I rely upon and apply the words in the first
5 holding of Foster J’s Judgment at page 604 where it states:

6 *“The company would not be permitted to participate actively in the proceedings*
7 *on the basis of the established principle that a company’s funds should not be*
8 *expended on what was in reality a dispute between shareholders—a principle*
9 *not confined to winding-up petitions on the just and equitable ground. In*
10 *accordance with this principle, the company would have to discharge the onus*
11 *that it was “necessary or expedient in the interests of the company as a whole”*
12 *for it to participate and incur costs. It was evident that this was a dispute*
13 *between the principal shareholders of a quasi-partnership, the petitioner and*
14 *respondent, rather than one involving any independent interest of the company,*
15 *since the disagreement centred on the respondent’s role under the*
16 *shareholders’ agreement. Further, the possibility that it could be wound up*
17 *could not be deemed an interest of the company itself, since it was in reality a*
18 *quasi-partnership between the petitioner and the respondent, and it was only*
19 *they who had the real interest in whether or not the petition was successful.*
20 *There was no claim against the company itself and thus the company had not*
21 *discharged the heavy burden upon it to show that it was “necessary or*
22 *expedient in the interests of the company as a whole” to participate in the*
23 *hearing. It would therefore be treated merely as the subject-matter of the*
24 *proceedings, which would be heard inter partes as between the petitioner and*
25 *the respondent, and the company would remain only as the nominal*
26 *respondent, only actively participating if it required a validation order to meet*
27 *legitimate payment obligations in the ordinary course of business.”*

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29 32. Having heard arguments from counsel on behalf of the Company and on behalf of
30 the Petitioners, and having read the affidavit evidence admitted by both parties, I
31 find that the Company is simply the subject matter of these proceedings which are,
32 in reality, a dispute between the Petitioners on the one hand, and APL on the other
33 hand – each holding 50% of the Company’s shares. Alternatively, they are the
34 representatives of the quasi partners – Mr. Chugh and Mr. Kalra – who have made

1 serious allegations and counter allegations against each other. Consequently, I find
2 that there has been a complete cessation of trust and confidence between the quasi
3 partners.

4 33. It is not challenged that this is a Quasi-Partnership and it appears that the
5 Petitioners have been removed from any influence or participation in the
6 management of the Company. Significant fees have been incurred to bring
7 proceedings against the Petitioners, who are shareholders of the Company, in both
8 US proceedings.

9 34. The Company is a Cayman Islands Company governed by the law of the Cayman
10 Islands and it is quite appropriate for the Petitioners to seek these directions under
11 the Companies Winding-Up Rules.

12 35. The Court notes that paragraph 6.4 of section B of the Financial Services Division
13 (FSD) Guide provides:

14 *“If the company is treated as the subject-matter of the petition (as it will be in*
15 *any case in which the petitioner alleges that its management is deadlocked, for*
16 *example), the opposing shareholders will be treated as the respondents and the*
17 *Court will direct that they be individually served. In these circumstances, it will*
18 *not be appropriate for the petition to be advertised. The Court will give*
19 *directions for trial and will consider directing service of pleadings, exchange of*
20 *affidavit evidence and attendance for cross examination. Any application for a*
21 *pre-emptive costs order should be made at the summons for directions.”*

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1 36. The Court understands the concern of the Petitioners and can see no prejudice to the
2 Company in making directions pursuant to O.3 r.11 of the Companies Winding-Up
3 Rules (2008 Revision). Indeed, it would be fair to all parties concerned for
4 acknowledged insolvency experts to perform a neutral role as Liquidators of the
5 Company and as officers of the Court, to ensure that the Company is not used
6 improperly in the dispute between the Petitioners and APL, or in any dispute
7 between Mr. Chugh and Mr. Kalra.

8 37. In making the directions sought by the Petitioners the Court notes that this will not
9 prevent the Company from making an application for a Validation Order

10 38. It is my view that the Petitioners have followed the correct course in bringing a
11 Summons for Directions pursuant to O.3 r.11 of the Companies Winding-Up Rules
12 as read with paragraph 6.4 of s.B of the Financial Services Division Guide. From all
13 the material that has been put before this Court, it is in the best interests of the
14 Company for these Directions to be given and, accordingly, pursuant to O.3 r.11(2)
15 of the Companies Winding-Up Rules I make the following Directions:

16 i. The Company shall be treated merely as the subject matter of the
17 proceedings and, subject to any application for a validation order made
18 by the Company, shall play no further part in the proceedings;

19 ii. The proceedings shall be treated as *inter partes* proceedings between
20 the Petitioners as Plaintiffs and APL as the Respondent, and
21 accordingly APL shall be joined as a Respondent to these proceedings;

- 1 iii. The Petitioners shall have leave to serve APL with the Petition and
2 with any further documents in the proceedings by means of service on
3 its attorneys Harneys.
- 4 iv. By no later than 4:00 p.m. on the 23rd March 2012 APL shall file an
5 application by summons seeking a stay of these proceedings (the ‘Stay
6 Application’), and the affidavit sworn and filed by Aasish Kalra
7 pursuant to the Company’s application shall stand as evidence in
8 support of the Stay Application.
- 9 v. The Company may by 4:00 p.m. on the 22nd March 2012, and if so
10 advised, make an application by summons for a validation order and
11 any other applications (the ‘Company’s Applications’)
- 12 vi. The Company must file and serve any evidence in support of the
13 Company’s Applications at the time they are issued.
- 14 vii. The Petitioners must file and serve any evidence in response to the Stay
15 Application and to the Company’s Applications by 4:00 p.m. on the 5th
16 April 2012.
- 17 viii. APL and/or the Company must file and serve any evidence in reply by
18 4:00 p.m. on the 12th April 2012.
- 19 ix. The Stay Application and the Company’s Applications be listed for
20 hearing on the first available date after the 19th April 2012.

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- x. Skeleton arguments be filed and exchanged at least three clear days before the hearing.
- xi. Costs in the Petition.

Dated this the 9th March 2012



**Honourable Mr. Justice Charles Quin
Judge of the Grand Court**