

4-09-12

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FINANCIAL SERVICES DIVISION

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Cause No. FSD 18 of 2012 (AJJ)

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4
5 The Honourable Mr. Justice Andrew J. Jones QC
6 In Chambers, 22nd and 23rd August 2012
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8
9 IN THE MATTER OF THE COMPANIES LAW (2011 REVISION)

10 AND IN THE MATTER OF TRIKONA ADVISORS LIMITED

11
12
13 BETWEEN:

14
15 (1) ARC CAPITAL LLC

16 (2) HAIDA INVESTMENTS LTD Petitioners

17
18 -And-

19
20 ASIA PACIFIC LIMITED Respondent

21
22 Appearances:

23
24 Ms Sara Dobbyn of Stuarts Walker Hersant on behalf of the Respondent (and on behalf
25 of the Company in respect of the Summons dated 3rd April 2012)

26
27 Mr. Ross McDonough and Mr. Guy Cowan of Campbells of behalf of the Petitioners
28

29
30 REASONS

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32 1. On 22 and 23rd August 2012 the Court heard argument on four Summonses. By its
33 Summons dated 23rd March 2012 the Respondent sought a stay of the Winding Up
34 Petition on case management grounds pending the resolution of actions pending in
35 both the Federal and State courts of Connecticut ("the Connecticut Proceedings").
36 The Petitioners response was to issue a Summons dated 28th March 2012 by which
37 they seek an order for the appointment of provisional liquidators. By a Summons
38 dated 13th April 2012 (as amended on 17th July 2012), the Respondent sought an
39 order that the Petition be struck out as an abuse of the process on the grounds that the
40 Petitioners have been offered and refused an adequate alternative remedy and/or
41 because the Petition was presented and is being pursued for an improper purpose.
42 Finally, there is a fourth Summons dated 2nd April 2012 by which the Company

1 applies for an order validating both actual and prospective dispositions of the
2 Company's property made after the presentation of the Winding Up Petition.
3

- 4 2. At the outset of the hearing counsel agreed that these Summonses should be heard
5 and determined sequentially. Having dismissed the Respondent's strike out
6 Summons, I went on to hear the Summons for a stay. In the event Mr. McDonough's
7 argument in opposition to the stay included points made in support of the
8 appointment of provisional liquidators with the result that argument on these two
9 Summonses was merged. I dismissed the Respondent's Summons for a stay and made
10 no order on the Petitioners' Summons for appointment of provisional liquidators.
11 Instead, I made an injunction (and related disclosure order) restraining the Company's
12 directors from using its assets for the purpose of financing the various legal
13 proceedings specified in the schedule to the Order, including the Connecticut
14 Proceedings and the new proceeding commenced in the New York State Court by one
15 of the Petitioners against Mr. Kalra and his companies. The Order leaves open the
16 possibility that the Petitioners could renew their application for the appointment of
17 provisional liquidators in the event of non-compliance with the injunction. As regards
18 the Company's validation Summons, it will be dismissed in so far as it seeks an order
19 validating expenditure on the legal proceedings specified in the schedule to the Order.
20 In so far as it seeks an order to validate expenditure on litigation and arbitration
21 proceedings against third parties unrelated to the Company's shareholders and
22 directors, Ms Dobbyn decided that she was not in a position to pursue the application
23 without filing additional evidence. In the absence of opposition from Mr.
24 McDonough, I made an order that this Summons be adjourned to a date to be fixed. I
25 now give my reasons for making these orders.
26
27

28 STRIKE OUT APPLICATION – ADEQUATE ALTERNATIVE REMEDY 29

- 30 3. It is well established as a matter of Cayman Islands law that when considering a
31 contributory's petition for a winding up order presented on the just and equitable
32 ground, the Court is required to address the questions whether there is an adequate
33 alternative remedy available to the petitioner and whether he is acting unreasonably in
34 not pursuing or accepting that alternative remedy. In *Camulos Partners Offshore*
35 *Limited v. Kathrein and Company* [2010] 1 CILR 303 Sir John Chadwick P. said –
36

37 *If a court is satisfied that both of those questions should be answered in the*
38 *affirmative, then it can be expected to take the view that the presentation of the*
39 *petition is an abuse of its process or, alternatively, that the petition is bound to*
40 *fail because it would not, in those circumstances, be "just and equitable" that the*
41 *Company should be wound up.*
42

43 In cases where the petitioner is a minority shareholder who complains about
44 oppression on the part of the majority, it is well established that an offer to purchase
45 his shares at fair value will be regarded as an adequate alternative remedy, the
46 rejection of which will lead the Court to strike out the petition. See *CVC/Opportunity*



1 *Equity Partners Ltd v. Demarco Almeida* [2002] CILR 77. The same analysis is
2 capable of being applied to cases such as the present in which the Company is
3 characterised as a quasi-partnership between two shareholders (or two groups of
4 shareholders) who each own 50% of the shares.
5

- 6 4. The Petitioners' case is that the Company should be characterized as a quasi
7 partnership between the two Petitioners (which each own 25% of the shares) and the
8 Respondent (which owns 50% of the shares) and that there was a legitimate
9 expectation that the Petitioners and Respondent would each have equal representation
10 on the board of directors, thus giving each of them an effective veto. The Petitioners'
11 representative is Mr. Rakshitt Chugh ("Mr. Chugh") who owns and controls Arc
12 Capital LLC.¹ Their case is that the Respondent, which is wholly owned and
13 controlled by Mr. Aashish Kalra ("Mr. Kalra"), has wrongly seized control of the
14 Company by purporting to remove Mr. Chugh from its board of directors and
15 excluding him from participating in any managerial decisions. It is not in dispute that
16 Mr. Chugh was given no notice of the board meeting at which it was resolved to
17 remove him from office. *Prima facie*, this resolution must be invalid. The
18 Respondent's case will be that Mr. Chugh's *de facto* exclusion is justifiable because
19 he has behaved towards the Company in a manner which constitutes a flagrant breach
20 of his fiduciary duty. The Petitioners make similar allegations against Mr. Kalra. At
21 an earlier hearing Quin J. decided that the Company should be treated as the subject-
22 matter of the Petition which is in reality a shareholder dispute between the Petitioners
23 and Mr. Chugh on one side and the Respondent and Mr. Kalra on the other side.
24
- 25 5. On 1st August 2012 the Respondent/Mr. Kalra made a written offer to the effect that
26 the Company itself would buy back (or redeem) the Petitioners' shares at a "fair
27 value" price to be determined by an expert assessor (referred to by counsel as the
28 "buy out offer"). The proposed mechanism for determining the "fair value" is not
29 derived from any provisions in the Company's articles of association. It is simply
30 reproduced from that which was approved by the House of Lords in *O'Neill v.*
31 *Phillips* [1999] 1 WLR 1092, the factual circumstances of which were wholly
32 different from the present case. In that case the company in question carried on a
33 profitable business. Mr. O'Neill owned 25% of the shares and served as the
34 company's managing director for which he was paid a salary. The House of Lords
35 reversed the decision of the Court of Appeal and held that Mr. Phillips' decision to
36 dismiss Mr. O'Neill from his employment and limit him to receiving 25% of any
37 dividends was not unfairly prejudicial within section 459 of the English Companies
38 Acts. However, the House of Lords held that even if Mr. Phillips' conduct had been
39 unfairly prejudicial to Mr. O'Neill, his petition should still have been dismissed
40 because Mr. Phillips had made an offer to buy his shares at a fair price and this
41 constituted the whole of the relief to which he would have entitled. Lord Hoffman's
42 judgment (at page 1107-8) describes in general terms the valuation principles which

¹ It is asserted in the Connecticut Proceedings that Mr. Chugh also owns and controls Haida Investments Ltd, with the result that the two Petitioners should be regarded as the *alter ego* of Mr. Chugh. It is not disputed that he was appointed to the Company's board of directors as representative of both the petitioning shareholders and that they are acting in concert, but there is no evidence from which to infer that he is the beneficial owner of Haida Investments Ltd.



1 should be used to value a minority interest in a business which is a going concern and
2 also the mechanism for determination of the purchase price.
3

- 4 6. The Respondent's offer embodies the same kind of mechanism for determining the
5 purchase price as that approved by the House of Lords. It involves the appointment of
6 an independent assessor whose function will be to determine the "fair value" of the
7 Petitioners' shares. It is proposed that the assessor will be chosen by the Petitioners
8 from a panel of four qualified chartered accountants nominated by the Respondent;
9 his fees and expenses will be shared equally; he will set a timetable for receiving
10 written submissions from the parties who must also provide him with all the
11 supporting documentation; and the assessor will act as an expert (rather than an
12 arbitrator) and will have full and final authority to determine the price. In my view a
13 valuation mechanism of this sort is both unnecessary and inappropriate in the
14 circumstances of this case. The evidence reflects that Company ceased to carry on its
15 business in 2009. Apart from the proceedings listed in the schedule to the Order,
16 which I characterize as litigation between the shareholders in which the Company has
17 no independent interest, its only activity is the defence of some adverse claims
18 asserted by independent third parties and the pursuit of an insurance claim in respect
19 of legal fees incurred in litigation which has been settled. Messrs Kalra and Chugh
20 are accusing each other of having diverted to themselves (or companies controlled by
21 them) business opportunities which should have belonged to their Company. In these
22 circumstances it is plainly obvious that no new business will ever be put through the
23 Company, or at least not unless and until it is under the sole undisputed ownership of
24 Mr. Kalra. It follows that there is no business or goodwill which needs to be valued
25 by an independent assessor. During the course of the argument I was told by Ms
26 Dobbyn (on instructions from Mr. Kalra) that the Company's assets currently
27 comprise (i) cash of US\$1.4m, (ii) cash of \$5m held in the Company's Indian
28 subsidiary which is said to be "locked up", meaning that it is subject to exchange
29 control restrictions, (iii) a receivable of about US\$2m, (iv) marketable securities
30 worth US\$1.2m and (v) an unsettled insurance claim of US\$8m. I was told that the
31 Company's liabilities and contingent liabilities are about US\$0.5m. It follows,
32 according to the Respondent, that the Company's current net asset value is about
33 US\$9m plus whatever is paid by its insurers which will be US\$8m if the claim is paid
34 in full. Having regard to the nature of these assets and the fact that there is no
35 business capable of being valued on a going concern basis, it would serve no useful
36 purpose to engage in a valuation exercise of the kind considered and approved by the
37 House of Lords in *O'Neill v. Phillips*. If Counsel's description of the Company's
38 assets is complete and accurate, it does not require the certificate of an independent
39 expert assessor to work out that 50% of the NAV is \$4.5m plus half of whatever is
40 paid by the insurers. The proposed valuation mechanism invalidates the
41 reasonableness of the offer because it would result in significant delay and shared
42 expense for no useful purpose.
43
- 44 7. Furthermore, quite apart from the inappropriate valuation mechanism, the terms of
45 the Respondent's purchase offer do not provide the Petitioners with an adequate
46 alternative remedy for the following reasons. First, the proposal is that the Company,



1 not the Respondent, will buy back (or redeem) the Petitioners' shares in accordance
2 with the provisions of section 37 of the Companies Law at a price equivalent to 50%
3 of the NAV, excluding any value attaching to its claim against Mr. Chugh in the US
4 Proceedings and any provision for the actual and prospective cost of conducting the
5 proceedings. In other words, it is proposed that the Company will buy back the
6 Petitioners' shares for up to US\$8.5m or US\$4.5m plus half of whatever is received
7 in respect of the insurance claim. However, it is proposed that payment will be
8 deferred until after conclusion of the Connecticut Proceedings which may not happen
9 for some considerable time. As a matter of law, the Petitioners will be subordinated
10 creditors and their ability to enforce a buy-back/redemption agreement concluded
11 now will depend upon the future solvency of the Company and in the meantime they
12 will have no control over the expenditure of its assets if the Winding Up Petition is
13 consequentially dismissed. During the course of argument, Ms Dobbyn suggested that
14 this point could be met by a guarantee from the Respondent but, in the absence of
15 evidence to the contrary, the reasonable inference must be that it was incorporated as
16 a special purpose vehicle for holding its shares in the Company in which case its
17 guarantee would be worthless. In summary, the "buy back offer" is an offer by the
18 Company to agree that it will buy back or redeem the Petitioners' shares at a price
19 equivalent to 50% of the current NAV, on the basis that payment of the redemption
20 proceeds will be deferred to an uncertain future date and will be contingent on the
21 Company still being solvent. In this respect the "buy back offer" is not an adequate
22 alternative remedy because there is no guarantee that the Company's assets will not
23 have been dissipated by Mr. Kalra in the meantime.

24
25 8. Second, it is a term of the proposal that if the Company obtains a money judgment in
26 the Connecticut Proceedings against Mr. Chugh and/or the Peak companies which are
27 alleged to be the beneficiaries of his breaches of fiduciary duty, the amount will be set
28 off against the sum owed to the Petitioners. This is not necessarily what would
29 happen if a winding up order is made. The effect of section 140 of the Companies
30 Law is that the official liquidator will not be able to set off the debt owed by the
31 Company to the Respondent against the judgment debt owed to the Company by Mr.
32 Chugh (or the Peak companies) unless he can establish mutuality to the satisfaction of
33 this Court. Mr. Chugh denies that the Petitioners are his *alter ego*. If a winding up
34 order is made, the burden will be on the official liquidator to prove mutuality,
35 whereas the Respondent's "buy out offer" comprises an express tripartite set-off
36 agreement which would be binding as between the Respondent and the Company in
37 any event. In this respect, it is not an adequate alternative remedy because it deprives
38 the Respondent of the right to require the official liquidator to prove that the statutory
39 right of set-off applies.

40
41 9. Third, the Respondent's "buy out offer" is conditional upon the Company failing on
42 its claim for an order for the forfeiture of the Petitioners' shares in the Connecticut
43 Proceedings. Ms Dobbyn submits that "The Petitioners' status as Shareholders is sub-
44 justice in the USA". Even if this is right as a matter of Connecticut law (which is
45 disputed by the Petitioners' US attorney), the Respondent would still have to
46 commence an action in this Court for an order for rectification of the register of



1 shareholders and it is by no means clear that this Court would be bound to recognize
2 and give effect to an order for forfeiture. Ms Dobbyn points out that under the articles
3 of association the Company is given lien over a member's shares in respect of unpaid
4 debts, but the lien can only arise if the debt is owed by the Petitioners, as opposed to
5 Mr. Chugh or the Peak companies, and the debt remains unpaid. In effect, it seems to
6 me that the Petitioners are being asked to agree that any order for forfeiture will be
7 given automatic effect, whether or not it would be recognized and given effect by this
8 Court, about which there must be some scope for argument. It is not unreasonable for
9 the Petitioners to reject this proposition.

10
11 10. Finally, Mr. McDonough makes the point that the "buy out offer" is not an adequate
12 alternative remedy because it does not give the Petitioners the opportunity to buy the
13 Respondent's shares at the same fair value. If a solvent company in liquidation owns
14 a business which would be worth more than its net asset value if sold as a going
15 concern, its official liquidator would be bound to consider selling it and the
16 circumstances may be such that all the shareholders would have the opportunity to
17 bid for it. The possibility of an official liquidator proceeding in this way does not
18 arise in the circumstances of this case and so I do not think that it can be said that the
19 "buy out offer" is inadequate as an alternative remedy merely because it does not give
20 the Petitioners the opportunity to buy the Respondent's shares.

21
22 11. For these reasons I do not regard the Respondent's "buy out offer" as an adequate
23 alternative remedy and so it cannot be said that the Petitioners are acting
24 unreasonably by rejecting it and continuing to prosecute their Petition.
25

26 **STRIKE OUT APPLICATION – IMPROPER PURPOSE**

27
28 12. If an action is not commenced *bona fide* for the purpose of obtaining the relief sought,
29 but for some improper ulterior or collateral purpose, it may be struck out as an abuse
30 of the process of the Court. See *RCB v. Thai Asia Fund Limited* [1996] CILR 9. Ms
31 Dobbyn argues that this Winding Up Petition has been presented to "undermine and
32 sabotage" the Connecticut Proceedings. She says that, in reality, it has been brought
33 by Mr. Chugh, who controls the Petitioners, for the purpose of impeding the
34 Company's ability to pursue a legitimate claim for breach of fiduciary duty against
35 him. Conversely, the Petitioners' position, articulated in their Verified Shareholder
36 Derivative Complaint filed in the New York Proceedings, is that Mr. Kalra (acting
37 through the Respondent and various other entities) has "looted" the Company and
38 diverted business opportunities for his own personal benefit. The Connecticut
39 Proceedings are characterized as an illegitimate means of reducing the Company's
40 value and preventing the Petitioners from recovering their 50% share of its NAV in a
41 liquidation.
42

43 13. Having heard the arguments and having read the affidavits, I have reached the
44 following conclusions. Firstly, as Quin J. has already concluded, the Company must
45 be characterized as a quasi-partnership between the Petitioners and the Respondent,
46 represented by Mr. Chugh and Mr. Kalra respectively. There has been a complete



1 breakdown of trust, with the result that it is wholly impossible for the Company to
2 carry on any business so long as it is jointly owned. Secondly, on the basis of the
3 evidence presently before the Court it is not possible to make any finding, no matter
4 how tentative, that the breakdown of this business relationship is attributable to bad
5 behavior (whether or not amounting to a breach of fiduciary duty) on the part of Mr.
6 Chugh or Mr Kalra or both of them. Thirdly, the Company has not carried on any
7 business since 2009 and there is no prospect of any new business being put into it so
8 long as it continues to be jointly owned. Fourthly, Mr. Chugh's purported removal
9 from the Company's board of directors is *prima facie* invalid because it was done at a
10 meeting of which he was not given notice. The timeline of the Connecticut
11 Proceedings tends to suggest that the purpose of removing him from the board was to
12 enable Mr. Kalra to convert the Connecticut Proceedings from a derivative action into
13 one which is now being pursued in the name of Company. By converting it into a
14 company action, Mr. Kalra clearly expected that he would be able to pay for it out of
15 the Company's assets irrespective of the ultimate outcome. In these circumstances, I
16 conclude that it is not illegitimate for the Petitioners to seek a winding up order which
17 will not, by itself, prevent the two shareholder groups from pursuing derivative claims
18 against Mr. Chugh and Mr. Kalra in the Connecticut and New York Proceedings.
19

20 14. The Respondent's application for a temporary stay of the Petition pending the
21 outcome of the Connecticut Proceedings is put on the following grounds. It is argued
22 that if the Company should be awarded damages against the Petitioners in the
23 Connecticut Proceedings, this will become a debt due to the Company which will
24 then have a lien over the debtors' shares. This would also be the case if the Company
25 is awarded damages against the Respondent in the New York Proceeding. In both
26 cases this result depends upon establishing that the corporate shareholders are
27 properly to be treated as the *alter ego* of Mr. Chugh and Mr. Kalra respectively.
28 However, the possibility that the Company might be able to assert a lien in this way
29 does not lead to the conclusion that "The Petitioners' status as Shareholders is sub-
30 judice in the USA". Ms Dobbyn also relies upon the fact that the Company is asking
31 the Connecticut Court to make an order for the forfeiture of the Petitioners' shares.
32 Even if the Connecticut Court has jurisdiction to make such an order as a matter of
33 Connecticut law (which is disputed by the Petitioners' Connecticut attorney), Ms
34 Dobbyn did not explain the basis for recognizing this result. The fact that these
35 remedies are being sought is not, in my view, a good reason for staying this Petition.
36

37 15. Ms Dobbyn's best point is that the allegations of malfeasance made by and against
38 Mr. Kalra and Mr. Chugh in the Connecticut and New York Proceedings will also be
39 made in the Cayman proceeding. The Respondent will contend that the breakdown in
40 their business relationship was brought about by Mr. Chugh's behaviour. Conversely,
41 the Petitioners have given notice of their intention to amend the Petition to include the
42 allegations of malfeasance made in the New York Proceedings against Mr. Kalra. The
43 key witnesses in all these proceedings will be Mr. Kalra and Mr. Chugh. There will
44 be an overlap in the evidence, but the causes of action are obviously different.
45 Evidence about the way in which Mr. Kalra and Mr. Chugh have behaved towards the
46 Company and each other will be relevant in determining whether or not it is just and



1 equitable to make a winding up order, but this Court will not be required to determine
2 whether either or both of them have acted in breach of fiduciary duty. However, the
3 mere fact that there will be some overlap in the evidence does not lead to the
4 conclusion that the Petition should be stayed. The issues likely to be raised on the
5 Petition are far less complex and more easily adjudicated than those raised in the
6 Connecticut and New York Proceedings. The Petition will be adjudicated long before
7 either of the US proceedings are brought to trial. The remedy of a winding up order is
8 one which can be granted only by this Court. For these reasons I concluded that the
9 Petition should not be stayed.

10
11
12 APPLICATION FOR APPOINTMENT OF PROVISIONAL LIQUIDATORS
13

14 16. In order to succeed on their application for the appointment of provisional liquidators,
15 the Petitioners must establish that there is a *prima facie* case for a winding up order
16 and that the appointment is necessary in order to prevent the dissipation or misuse of
17 the Company's assets or prevent mismanagement or misconduct on the part of its
18 directors. I came to the conclusion that the Petitioners have made out a *prima facie*
19 case for a winding up order for the following reasons. As Quin J. has already
20 concluded, the Company is and always has been a quasi-partnership and the
21 Petitioners had a legitimate expectation that they would continue to participate in its
22 management through representation on its board of directors. In the absence of any
23 agreement to the contrary, it is reasonable to infer that the quasi-partners reasonably
24 expected that they would have joint control of the Company through equal
25 representation on its board of directors. By purporting to remove Mr. Chugh from the
26 board, Mr. Kalra succeeded in taking over control of the Company. The Respondent
27 puts forward two defences. First, it relies upon the "buy out offer" which I do not
28 regard as an adequate alternative remedy. Second, it relies upon Mr. Chugh's
29 allegedly flagrant breaches of fiduciary duty as justification for removing him from
30 the board and depriving the Petitioners from exercising any influence or shared
31 control over the Company. Based upon the affidavit evidence, I am unable to reach
32 even a tentative conclusion about the relative merits of the claims and counterclaims
33 which Messrs Chugh and Kalra are making against each other. However, the evidence
34 does point to the conclusion that the Company ceased to carry on its business in 2009
35 and that no new business will be introduced so long as it is jointly owned. For these
36 reasons I concluded that the Petitioners have made out a *prima facie* case.

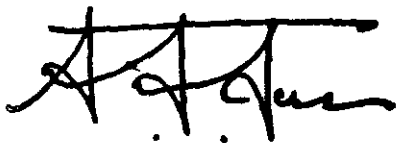
37
38 17. Mr. Kalra has made it perfectly clear that he intends, if at all possible, to use the
39 Company's money for the purpose of funding both the Connecticut Proceedings and
40 the defence of this Petition. I have no doubt that he will adopt the same approach in
41 respect of the New York Proceedings. In his judgment given on 9th March 2012, Quin
42 J. decided that the Company's money should not be used for funding the
43 Respondent's defence of this Petition. The same considerations apply to the
44 Connecticut and New York Proceedings. Although the cause of action in both cases is
45 a breach of the fiduciary duties owed by Messrs Chugh and Kalra to the Company,
46 they are representatives of the Petitioners and the Respondents for whose benefit this



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litigation is being pursued. Even if Mr. Chugh is not the sole beneficial owner of both the Petitioners, they are in fact acting in concert. The Company has no independent interest in the outcome of this litigation. In reality this is litigation between shareholders represented by Mr. Chugh on one side and Mr. Kalra on the other side. The analysis adopted by Quin J. in respect of the Petition applies equally to the Connecticut and New York Proceedings. However, I am not at present satisfied that it is necessary to appoint provisional liquidators in order to prevent Mr. Kalra from misusing and dissipating the Company's money in this way. Assuming that counsel's description of the Company's assets, as they exist today, is not materially inaccurate, it seems to me that it should be possible to secure those assets by means of an injunction without the need to incur the expense of appointing provisional liquidators. In order to ensure that the Court's order is effective and capable, I ordered that Mr. Kalra swear an affidavit verifying the existence and value of the Company's assets. In the event of any failure to comply with this Order, I will give further consideration to the need for appointing provisional liquidators.

DATED this 4th day of September 2012



The Hon. Mr. Justice Andrew J. Jones QC
JUDGE OF THE GRAND COURT

