

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

3
4 Cause No. FSD 18 of 2012 (AJJ)

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6
7 The Honourable Mr. Justice Andrew J. Jones QC
8 In Chambers, 12th and 14th February 2013

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11 IN THE MATTER OF THE COMPANIES LAW (2012 REVISION)

12
13 AND IN THE MATTER OF TRIKONA ADVISORS LIMITED

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16 BETWEEN:

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18 (1) ARC CAPITAL LLC
19 (2) HAIDA INVESTMENTS LTD Petitioners

20
21 -And-

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23 ASIA PACIFIC LIMITED Respondent

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26 Appearances:

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

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30 Mr. Anthony Akiwumi of Stuarts Walker Hersant on behalf of the Respondent

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34 RULING ON COSTS

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- 36 1. Order 62 of the Grand Court Rules applies to liquidation proceedings. See GCR O.1,
37 r.2(4). Part II of Order 24 of the Companies Winding Up Rules prescribes the way in
38 which these rules will be applied to liquidation proceedings, which do not normally take
39 the form of adversarial *inter partes* litigation. In the case of a contributory's petition
40 where the Court has directed that it be treated as an *inter partes* proceeding between two
41 or more shareholders, as it did in this case, the general rule is that none of the costs
42 should be paid out of the assets of the company and the unsuccessful party should pay
43 the costs of the successful party, such costs to be taxed on the standard basis unless

1 agreed. See O.24, r.8(2)(b). On 31 January, immediately after I pronounced the winding
2 up order, counsel for the Petitioners sought an order for costs to be taxed on the
3 indemnity basis. There was no basis upon which counsel for the Respondent could
4 oppose the usual order for costs on the standard basis but I think that applications for
5 indemnity costs should always be made on notice. I therefore made the usual order for
6 costs to be paid by the Respondent, subject to giving the Petitioners an opportunity to
7 apply for indemnity costs provided that they served a summons, supported by a written
8 submission, within the following seven days. The Petitioners made an application in
9 compliance with this direction and, having read counsel's written submission dated 7th
10 February 2013, I also heard oral argument on 12th February.

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12 2. It was not disputed that GCR O.62, r.4(11) applies to liquidation proceedings. CWR
13 O.24, r.8(2)(b) merely sets out the general rule and, when read with rule 8(4), does not
14 exclude the Court's power to make an *inter partes* order for the costs of a contributory's
15 winding up petition to be taxed on the indemnity basis. Rule 4(11) provides that –

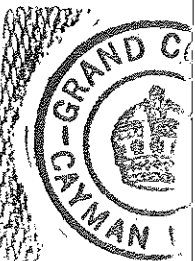
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17 “The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is
18 satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the
19 order relates, improperly, unreasonably or negligently.”

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21 Mr McDonough put his case on the basis that the Respondent conducted his defence of
22 the entire proceeding, which lasted almost exactly one whole year, in a manner which
23 was “improper” and “unreasonable” within the meaning of this rule.

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25 3. It was apparent from his written submission that Mr McDonough had not read my
26 unreported decision in *Sadik v. Investcorp Bank BSC* (16th July 2012) in which I
27 addressed the meaning and effect of Rule 4(11) and its interplay with the provisions of
28 Rule 11(2) relating to wasted costs. Copies of this ruling were sent to both counsel prior
29 to the hearing. I explained what is meant by conducting a proceeding “improperly” in
30 the following way –

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32 “(11) In my judgment a proceeding, or some identifiable part of it, can only be said to have been
33 conducted “improperly” within the meaning of r.4(11) if the Court is satisfied, in all the circumstances of
34 the case, that a party has invoked the Court's jurisdiction illegitimately or abused the process in a way
35 which attracts moral condemnation. A party who asserts a cause of action when he knows that he has no
36 legitimate basis for doing so is acting improperly. Pursuing an action for some ulterior motive is an abuse
37 of the process which may be characterized as improper.”

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39 In *Sadik* the order for costs was made against the plaintiff. However, the analysis applies
40 equally to applications made against plaintiffs or defendants. It is never improper for a
41 defendant to put his opponent to proof, but a defendant who asserts a positive defence,
42 when he knows that he has no legitimate basis for doing so, is acting improperly. It may



1 be said that a defendant who conducts a positive defence for some ulterior motive is
2 abusing the process.

- 3
- 4 4. In my judgment there was an overwhelming case for make a winding up order in respect
5 of Trikona. Nevertheless, Mr Kalra defended the petition relentlessly on a number of
6 grounds, which were unsupported by credible evidence. For the reasons given in Mr
7 McDonough's written submission, I have come to the conclusion that this petition was
8 defended in a manner which was "improper and unreasonable" within the meaning of
9 Rule 4(11) and that I should express the Court's disapproval by making an order that the
10 Petitioners' costs be taxed on the indemnity basis.

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13 DATED 14TH FEBRUARY 2013

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

