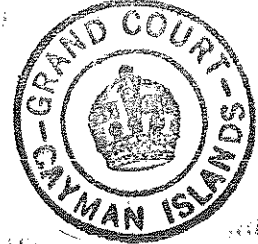


1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FINANCIAL SERVICES DIVISION**

Cause No. FSD 18 of 2012 (AJJ)

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



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10 **IN THE MATTER OF THE COMPANIES LAW (2012 REVISION)**
11
12 **AND IN THE MATTER OF TRIKONA ADVISORS LIMITED**

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15 **BETWEEN:**

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

19
20 **-And-**

21
22 **ASIA PACIFIC LIMITED** **Respondent**

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25 **Appearances:**

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

28
29 Mr. Anthony Akiwumi of Stuarts Walker Hersant on behalf of the Respondent

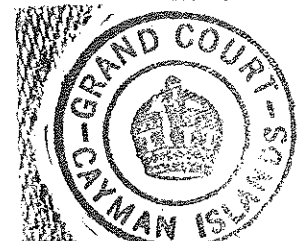
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33 **REASONS**

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36 1. Immediately after I pronounced the Court's winding up order on 31st January 2013,
37 counsel for the Petitioner sought to apply for an order for costs on the indemnity basis
38 and counsel for the Respondent sought to apply for a stay pending an appeal to the Court
39 of Appeal. It seemed to me that both these applications should be made by summons on
40 notice to the other side and that they should be supported by written submissions. Both
41 counsel were content with this approach and I therefore directed that, if the parties
42 wished to pursue these applications, they must serve a summons and supporting written
43 submission within seven days, my intention being that the applications would be heard
44 consecutively on a convenient date during the course of this week. Counsel for the
45 Respondent failed to comply with this direction and chose take a different course by

1 applying for his client's appeal to be heard on an expedited basis on 14/15th February
2 (when the Court of Appeal was expected to be in session to hear an appeal which was in
3 fact settled) or on 18/19th February, in which case there would have been no real need to
4 apply to this Court for a stay. In the event the Court of Appeal declined to hear the appeal
5 on an expedited basis and it is now set down for hearing on 9/10th April.
6

7 2. The fact that the Respondent had a potential alternative remedy is not a justification for
8 failing to comply with the directions contained in this Court's Order. It seems to me that
9 Counsel for the Respondent could and should have protected his client's position by
10 serving his application in a timely manner, in the knowledge that it could have been
11 withdrawn if the Court of Appeal had been willing to hear the appeal later in the week.
12 In the event, the time limit was allowed to expire and Counsel for the Petitioner is now
13 expected to deal with the matter on less than 24 hours' notice. In my judgment the
14 Respondent has failed to comply with an explicit time limit and failed to show cause why
15 that time limit should be waived or extended. Nevertheless, I did in fact hear the
16 application and dismissed it on the merits. I now put into writing the reasons delivered
17 orally on 12th February.
18

19 3. Counsel's written submission makes various points, but his oral argument focused
20 entirely on the proposition that the failure to grant a stay will prevent Mr Kalra from
21 dealing with an appeal pending before the Privy Council which will in turn result in
22 Trikona incurring a liability of €130 million, thereby rendering the appeal nugatory. It is
23 supported by two new affidavits sworn on 5th February by Mike Gilleran and Daniel
24 Loblowitz. This appeal relates to part of what has been described as "the SachsenFonds
25 litigation", to which I referred in paragraph 12 of my Judgment. The current state of this
26 particular aspect of the litigation is described in the two new affidavits. The limited
27 partnerships managed by SachsenFonds have sued Trinity, Trikona, TSF and Messrs
28 Chugh and Kalra for €127 million for misrepresentation, deceit and fraudulent
29 concealment in respect of the first and second purchases of assets from Trinity. TSF has
30 counterclaimed for \$15 million in respect of unpaid management fees. TSF is
31 incorporated in Mauritius. It was established to manage the assets sold to the
32 SachsenFonds limited partnerships and is 50% owned by SachsenFonds and 50% owned
33 by Trikona. SachsenFonds has presented a winding up petition against TSF. Trikona
34 intervened and sought to have the petition dismissed on the basis that the issues fell
35 within the scope of the arbitration clause contained in the shareholders agreement made
36 between SachsenFonds and Trikona. The Supreme Court of Mauritius ruled against
37 Trikona on the basis that the arbitration clause is unenforceable because it was made prior
38 to the enactment of the International Arbitration Act of Mauritius. This is the point of law
39 in respect of which Trikona has appealed to the Privy Council. Counsel for the
40 Respondent now submits that the "failure to impose a stay, which would allow the former

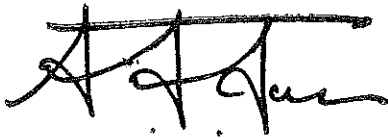


1 directors of [Trikona] to engage in the SF litigation, will make it overwhelmingly likely
2 that [Trikona's] Mauritius appeal will be dismissed and [Trikona] will incur a liability of
3 €130 million". This conclusion is obviously misconceived and there is no evidence to
4 support it. In particular, it is not a conclusion advanced by Messrs Loblowitz and Gilloran
5 in their respective affidavits. The appeal to the Privy Council has nothing to do with the
6 substantive claim for €130 million. I regard counsel's submission as nothing more than
7 unsubstantiated rhetoric. The fact that a winding up order has been made will not prevent
8 Trikona from pursuing the appeal. If there is any merit in this appeal and if it does serve
9 any useful purpose to pursue it, the official liquidators will be better placed than Mr Kalra
10 to deal with the matter in the interests of Trikona and its stakeholders.

- 11
12 4. Having considered the various other points made in the written submission, upon which
13 counsel did not elaborate in argument, I came to the conclusion that the Respondent has
14 shown no good reason why a stay should be granted. The application is dismissed.
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17 DATED 15TH FEBRUARY 2013

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

