Notice
9-4-12

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

Cause No: FSD 18/2012

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

BETWEEN:

ARC CAPITAL LLC
&
HAIDA INVESTMENTS LIMITED

PETITIONERS

AND:

TRIKONA ADVISORS LTD.

RESPONDENT

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
Before:	**The Hon. Mr. Justice Charles Quin**
Heard:	**8th March 2012**

JUDGMENT

INTRODUCTION

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

2. On the 13th February 2012 the Petitioners presented a Winding-Up Petition on the just and equitable ground that Trikona Advisors Ltd. ("the Company") be wound up pursuant to s.92(e) of the Companies Law. The Petitioners have the necessary locus standi to present the Petition as contributories of the Company in accordance with s.94(1)(c) of the Companies Law.

3. On the 21st February 2012 the Petitioners served the Company with a bundle of documents including the said Petition and Summons for directions on the Company's registered office at Harney's Services (Cayman) Limited in George Town, Grand Cayman.

4. On the 27th February 2012 Harneys, acting on behalf of the Company, wrote and requested an adjournment of the hearing of the Summons for Directions.

5. On the 29th February 2012 Campbells, the attorneys on behalf of the Petitioners, wrote back to Harneys rejecting their application for an adjournment. On the 2nd March 2012 Campbells wrote to the Company's attorneys and provided a draft order for directions along with their hearing bundle and skeleton argument.

6. The correspondence between the parties' attorneys culminated in Harneys' letter, dated the 6th March 2012, which stated that the Company intended to apply for a stay, and further that the Company was actively considering an application for making for a prospective Order validating payments made by the Company in the ordinary course of its business, including, in particular, payments to its legal advisers in the United States, for the purposes of prosecuting US proceedings.

7. It is common ground that the first named Petitioner ARC is a Delaware Company, and is the legal owner of 25% of the issued shares of the Company. The other Petitioner, Haida, is a corporation which was incorporated in the British Virgin Islands (BVI), and it is a 25% owner of the issued shares of the Company. Collectively the Petitioners are, therefore, the legal owners of 50% of the issued shares of the Company. The remaining 50% shareholding in the Company is held by Asia Pacific Investments Limited (APL), which is another BVI Company.

8. The Company's board of directors consisted, until recently, of Mr. Rakshitt Chugh ("Mr. Chugh"), Mr. Aashish Kalra ("Mr. Kalra"), Mr. Ravi Chitnis ("Mr. Chitnis") and Mr. Saurabh Killa ("Mr. Killa"). On or about March 2006 Mr. Chugh was appointed as a director of the Company and served as the representative of the Petitioners on the board of directors. At the same time Mr. Kalra was appointed as a director of the Company and served as a representative of APL.

9. Mr. Kalra on behalf of the Company has confirmed that the Company was incorporated in the Cayman Islands on the 9th March 2006. He further avers that the Company's issued shares were held as to 50% by APL, which in turn is owned by interests of the extended Kalra family. Mr. Kalra also avers that the other 50% is owned by the Petitioners ARC and HAIDA. Finally, Mr. Kalra asserts that the Company is 50% owned by Mr. Chugh through ARC and Haida.

10. The Petitioners rely on the Winding-Up Petition, the affidavit of Mr. Rakshitt Chugh, sworn on the 10th February 2012 and the affidavit of Mr. Lokesh Chugh sworn on the 13th February 2012 and the affidavit of service of Maggie Greenwood,

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

THE PETITIONERS' POSITION

11. The Petitioners maintain:

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

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

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

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

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

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

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

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

THE POSITION OF THE COMPANY

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

15. The Company maintains that Connecticut is the appropriate forum and that the appropriateness of the Company's decision to remove Mr. Chugh from office and to bring his claim for breach of fiduciary duty will all be determined in the US proceedings currently ongoing in Connecticut. The Company maintains that, accordingly it would be a waste of costs for these issues to be determined in the Petition proceedings as well, and that the Petition is little more than an attempt to frustrate the Company's claims in the US.

16. Counsel on behalf of the Company submits that both case management and comity weigh in favour of a stay *pendente lite*, which the Company respectfully seeks or, alternatively, an adjournment, because the Company is actively considering making an application for an order validating payment of its legal fees in the US proceedings.

17. Accordingly, the Company seeks an adjournment of the Petitioners' Summons for directions so that it can have sufficient time to prepare its application for an order for validation and also an order for a stay.

18. It is clear to the Court that the Company is solvent, and in the event of a liquidation there would be very significant assets from which to make a distribution to the Company's shareholders.

19. Until recently, the Company's board of directors consisted of Mr. Chugh, Mr. Kalra, Mr. Chitnis and Mr. Killa. In his affidavit opposing the Petitioners' application Mr. Kalra deposes to the fact that he and Mr. Chugh were co-managing directors and it is clear that both Mr. Kalra and Mr. Chugh were always on the board of directors until January 2012.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iii. The Petitioners shall have leave to serve APL with the Petition and with any further documents in the proceedings by means of service on its attorneys Harneys.

iv. By no later than 4:00 p.m. on the 23rd March 2012 APL shall file an application by summons seeking a stay of these proceedings (the 'Stay Application'), and the affidavit sworn and filed by Aasish Kalra pursuant to the Company's application shall stand as evidence in support of the Stay Application.

v. The Company may by 4:00 p.m. on the 22nd March 2012, and if so advised, make an application by summons for a validation order and any other applications (the 'Company's Applications')

vi. The Company must file and serve any evidence in support of the Company's Applications at the time they are issued.

vii. The Petitioners must file and serve any evidence in response to the Stay Application and to the Company's Applications by 4:00 p.m. on the 5th April 2012.

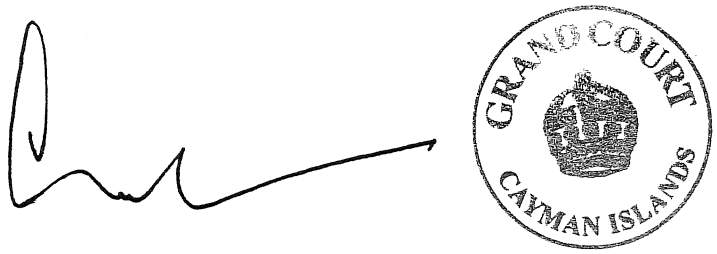
viii. APL and/or the Company must file and serve any evidence in reply by 4:00 p.m. on the 12th April 2012.

ix. The Stay Application and the Company's Applications be listed for hearing on the first available date after the 19th April 2012.

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