

18.3.09

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

6 CAUSE NO. 455 OF 2008

10 IN THE MATTER of section 94 of The Companies Law (2007 Revision)

12 R LIMITED



16 BETWEEN:

19 JEAN-MICHEL HANNOUN

Petitioner

24 AND:

- 26 (1) R LIMITED
- 27 (2) BANQUE SYZ CO. LIMITED

Respondents

32 **Appearances:** Ms. Sara Collins of Maitland for the Petitioner
33 Mr. Aristos Galatopoulos and Mr. Matthew Crawford
34 of Maples and Calder for the First Respondent

37 **Before:** Hon. Justice Henderson

40 **Heard:** January 6, 2009

JUDGMENT

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The Petitioner Jean-Michel Hannoun seeks an order winding up the First Respondent R Limited (the "Fund") on the just and equitable grounds under section 94(d) of the *Companies Law* (2007 Revision). This challenge to his standing to do so poses a pure question of law.

Mr. Hannoun is not a registered shareholder of the Fund. He says that he is the beneficiary of a bare trust of which the Second Respondent Banque Syz & Co. Limited (the "Trustee") is the Trustee and that the Trustee is the legal owner of shares in the Fund. He has called upon the Trustee to file a petition in its own name seeking a winding up order but the Trustee has refused to do so. The Trustee says that seeking such relief would place it in a conflict of interest position *vis a vis* its other clients. All parties are content to have the court assume these brief facts for the purpose of resolving the point of law in question.

A winding up petition may be presented by a company itself or by a creditor or contributory of the company: *Companies Law*, section 96. It is accepted that Mr. Hannoun is not a creditor or contributory. The Trustee is a contributory and would have standing itself to issue a petition if it chose to do so.

It is well established that where a trustee is the legal owner of shares in a company, a beneficiary of the trust is not a contributory of that company. The

1 following authorities cited by the Fund provide an ample demonstration of the
2 general applicability of the rule:

- 3 1) *In re Great Wheal Busy Mining Company (King's Case)*
4 (1871) 5 Ch App 196;
- 5 2) *In re Humber Ironworks and Ship Building Company*
6 (*Williams' Case*) (1875) 1 Ch D 576;
- 7 3) *Re National Bank of Wales Ltd (Massey and Griffin's Case)*
8 [1907] 1 Ch 582;
- 9 4) *In re HL Bolton Engineering Co. Ltd* [1956] 1 Ch 577;
- 10 5) *In re a Company* [1986] BCLC 391;
- 11 6) *Re Pimilico Capital Ltd, TFB Mortgages Ltd v. Pimilco*
12 *Capital Ltd* [2002] 2 BCLC 544;
- 13 7) *Palmer's Company Precedents*, page 398;
- 14 8) *Halsbury's Laws of England* (Volume 7(4)) (2004 reissue)
15 paragraph 703;
- 16 9) *Re Exclusive Master Book-Binding And Manufacturing Pty*
17 *Ltd* (1977) 2 ACLR 549, 552 and
18 10) *Kelly v. Mawson* (1982) 6 ACLR 667, 673.

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20 The applicability of these decisions has been accepted and applied by the
21 Cayman Islands Court of Appeal in *Svanstrom and ors v Jonasson* [1997]
22 CILR 192 at 199 (CA).

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24 Mr. Hannoun takes no issue with the general applicability of the rule that a
25 beneficiary of a bare trust is not a contributory of a company in which the trust
26 is a shareholder. He seeks to avoid the rigour of the rule by characterizing his
27 action as a derivative action brought by him in his own name on behalf of the
28 Trustee. He relies upon a line of cases which establish that in "exceptional
29 circumstances" a beneficiary may be allowed to sue a third party in the place of
30 his trustee. The line of authority is reviewed and summarized by Lord
31 Templeman in *Hayim and another v. Citibank NA and another* [1987] 3 WLR
32 83 (PC). The authorities, as Lord Templeman said, "demonstrate that a

1 beneficiary has no cause of action against a third party save in special
2 circumstances which embrace a failure, excusable or inexcusable, by the
3 trustees in the performance of the duty owed by the trustees to the beneficiary
4 to protect the trust estate or to protect the interests of the beneficiary in the trust
5 estate” (at page 92).

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7 The equitable jurisdiction to wind up a company presents different and broader
8 concerns than the sorts of claims which the beneficiaries wished to advance in
9 the line of authority canvassed by Lord Templeman. For obvious reasons, the
10 mere existence of a winding up proceeding may have a substantial detrimental
11 effect on the business of a company. When a winding up order is requested,
12 the court is obliged to have regard to the interests of all of the creditors (if the
13 company is insolvent) or all of the contributories (if the company is solvent).
14 A winding up order is discretionary. If, for some reason, the petitioner can no
15 longer maintain the action, the court is at liberty to substitute the name of
16 another creditor or contributory as petitioner. These considerations serve to
17 illustrate the distinct nature of a winding up proceeding which, although
18 brought in the name of a single petitioner, is really being advanced in the
19 interest of the creditors or contributories as a whole.

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21 If the beneficiary of a bare trust whose existence and identity have not been
22 disclosed to the corporate directors is permitted to step out of the shadows and
23 seek the dissolution of a company in which he has an indirect interest, the law

1 would be expanded undesirably. No case has been cited in which such a claim
2 has been allowed to proceed and counsel said they were not aware of any. The
3 considerations I have just mentioned are an ample justification for restricting
4 standing to bring a winding up petition to contributories who are registered as
5 such on the books of the company.

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7 For these reasons, I have concluded that Mr. Hannoun has no *locus standi* to
8 maintain this petition. Nothing I have said should be taken to suggest that Mr.
9 Hannoun may not have a right to bring a derivative action on behalf of the
10 Trustee against the Fund for some other less draconian relief.

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12 Dated this 18th day of March, 2009

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Henderson, J.

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Henderson, J.

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Judge of the Grand Court

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