

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2
3 CAUSE NO. FSD 48 OF 2009



4
5 IN THE MATTER OF THE COMPANIES LAW (2007 REVISION)

6
7 AND IN THE MATTER OF FREERIDER LTD.

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11 **Coram:** The Hon. Mr. Justice Foster, QC

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13 **Appearances:** Mr. G. Halkerston and Ms. K. Brown of Appleby for the
14 Petitioner Mr. A. Turner and Ms. R. Lawrence of Turner &
15 Roulstone for the Respondent shareholder

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17 **Heard:** 4th March 2010

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21 **REASONS FOR ORDER**

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24 1. There are the reasons for my refusal of an application for an order for security for
25 costs in proceedings governed by the Companies Winding Up Rules 2008 ("the
26 CWR") on the ground that the Court does not have power to make such an order
27 in such proceedings.

28
29 2. This is a petition for winding up a company, Freerider Ltd. ("the Company")
30 brought by the Petitioner ("Mr. Heinen") who is a voting shareholder, on just and
31 equitable grounds. The petition is strongly opposed by the shareholder
32 Respondent ("Mr. Le Comte"), the only other voting shareholder. The contested
33 petition is listed for hearing over 5 days commencing on 19th April 2010. The
34 overall background to the matter is set out in various affidavits and summarized
35 in my Ruling of 11th November 2009. Pursuant to that Ruling, I made an order

1 for directions on 20th November 2009 by which I ordered *inter alia* pursuant to
2 O.3, r.11 of the CWR that the Company is not properly able to participate in and
3 is merely to be treated as the subject matter of the proceeding and that the
4 proceeding be treated as an *inter partes* proceeding between Mr. Heinen as
5 Petitioner and Mr. Le Comte as Respondent. Accordingly the petition is being
6 treated as a proceeding between the 2 members of the Company, Mr. Heinen and
7 Mr. Le Comte, although the Company remains a nominal respondent.

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9 3. By summons dated 10th February 2010 Mr. Le Comte applied for orders relating
10 to discovery and also for an order that Mr. Heinen provide security for costs
11 within 10 days in the sum of US\$765,797.89 or such other sum as the Court
12 deems fit. He also applied for a stay of the proceedings pending the provision of
13 security for costs and further discovery by Mr. Heinen.

14
15 4. The application relating to discovery has been dealt with, at least for the time
16 being. These reasons relate to the order I made refusing the application for an
17 order for security costs.

18
19 5. Both Mr. Heinen and Mr. Le Comte are resident out of the jurisdiction, Mr.
20 Heinen in the Netherlands and Mr. Le Comte in the U.S.A. It is clear that the
21 proceedings have already involved and will continue to involve significant legal
22 costs.

23
24 6. Counsel for Mr. Heinen raised what was in effect, a preliminary point, although
25 it was not dealt with as such at the hearing and neither the Court nor counsel for

1 Mr. Le Comte were given advance notice of it. The point was whether or not the
2 Court has jurisdiction to make an order for security for costs in proceedings such
3 as these which are governed by the CWR. Having heard argument, I allowed
4 counsel for Mr. Le Comte time over the short adjournment to consider the point.
5 Having reserved over the weekend I made an order on 8th March 2010 dismissing
6 Mr. Le Comte's application for an order for security for costs, being of opinion
7 that the Court does not have jurisdiction to make such an order in proceedings
8 such as these.

9
10 7. Mr. Le Comte's application for an order for security for costs was initially made
11 pursuant to Order 23 of the Grand Court Rules ("the GCR") on the ground that
12 the Petitioner, Mr. Heinen is ordinarily resident out of the jurisdiction and that,
13 having regard to all the circumstances of the case, it was just for the Court to
14 order him to give security for Mr. Le Comte's costs of the proceedings in an
15 amount of US\$765,797.89, based upon a draft Bill of Costs (see GCR O.23, r.1).

16
17 8. However, O.1, r.2 (1) of the CWR provides that the CWR shall apply to every
18 winding up petition presented on or after the commencement date, which was 1st
19 March 2009. The petition in the present case is dated and was filed on 6th March
20 2009 and accordingly it is governed by the CWR and not by the GCR. The
21 CWR contain no provision relating to security for costs.

22
23 9. CWR O.1, r.4 does provide that certain of the GCR should apply in winding up
24 proceedings. They are GCR Orders 10 and 65 (sub rule (1)), GCR Orders 41 and
25 66 (sub rule (2)), GCR Order 42 (sub rule (3)) and GCR 92 (sub rule (4)). GCR

1 O.23 is clearly not one of the GCR which is incorporated into the CWR or said
2 to apply to proceedings such as these.

3
4 10. The GCR themselves provide by O.1, r.2 (4) as follows:

5 *Except for Orders 3 (Time), 4 (Assignment, Transfer and Consolidation of*
6 *Proceedings), 5 (Mode of Beginning Proceedings), 38 Part II (Writs of*
7 *Subpoena), 39 (Evidence by Deposition, 62 (Costs), 67 (Change of Attorney), 45-*
8 *51 (Enforcement) and 52 (Committal) these Rules shall not apply to any*
9 *proceedings which are -*

10
11 *(c) governed by the Companies Winding Up Rules 2008; ...”*

12
13 It is notable that O.62 of the GCR relating to costs is specifically made
14 applicable to proceedings governed by the CWR but, as I have said, there is no
15 inclusion of GCR Order 23.

16
17 11. Having heard the submissions of counsel for Mr. Heinen, counsel for Mr. Le
18 Comte conceded that GCR O.23 is not made applicable to proceedings governed
19 by the CWR but argued that the Court nonetheless has an inherent jurisdiction to
20 make an order for security for costs in such proceedings in appropriate
21 circumstances.

22
23 12. Reference was made by both counsel to the recent judgment of the Court of
24 Appeal in *HSH Cayman I GP Ltd. & Others v ABN Amro Bank NV London*
25 *Branch* (9th December 2009 – Unreported) in which the circumstances in which
26 the court has and may invoke an inherent jurisdiction was extensively discussed
27 in the context of the court below having exercised a purported inherent power to
28 dispense with strict compliance with certain provisions of the CWR. The

1 President, Sir John Chadwick, in giving the judgment of the Court, referred to
2 the decision of the Court of Appeal in England in Tombstone Limited v Raja &
3 Another [2009] 1WLR 1143. He also referred to the recent decision of the Privy
4 Council in Texan Management Limited & Others v Pacific Electric Wire &
5 Cable Company Limited [2009] UK PC 46 when it was said with reference to
6 the Tombstone case (ibid):

7
8 *The modern tendency is to treat the inherent jurisdiction as inapplicable*
9 *where it is inconsistent with the CPR [Civil Procedure Rules], on the basis that it*
10 *would be wrong to exercise the inherent jurisdiction to adopt a different*
11 *approach and arrive at a different outcome from that which would result from an*
12 *application of the rules: Raja v Van Hoogstraten (No. 9) [2009] 1WLR 1143.*
13 *That decision concerned the court's power under the inherent jurisdiction to set*
14 *aside an order made without notice ex debito justitiae. It was held that although*
15 *the inherent jurisdiction may supplement rules of court, it cannot be used to lay*
16 *down procedure which is contrary to or inconsistent with them and therefore*
17 *where the subject matter of an application is governed by the CPR it should be*
18 *dealt with in accordance with them and not by exercising the court's inherent*
19 *jurisdiction".*
20

21 13. The Court of Appeal concluded *inter alia*, that:

22 (3) *In the absence of a power to relieve from the consequences of failure to*
23 *comply with the winding up rules either in the rules themselves, or incorporated*
24 *in the rules by reference to the Grand Court Rules, or made applicable to*
25 *winding up by the Grand Court Rules or exercisable pursuant to Section 18 (2)*
26 *of the Grand Court Law, the judge was entitled to invoke the inherent*
27 *jurisdiction of the court to control its own process. But in exercising that power,*
28 *he was not entitled to vary the scheme for the winding up of companies in this*
29 *jurisdiction laid down by the winding up rules".*
30

31 14. The upshot of this guidance, as I understand it, is that the Court's inherent power
32 may be exercised to supplement the CWR but only in a way that is not
33 inconsistent with their overall scheme. If my understanding is correct, the
34 question in this case is therefore is whether an inherent power to order the

1 Petitioner to give security for costs would or would not be inconsistent with the
2 overall scheme of the CWR.

3
4 15. Counsel for Mr. Le Comte pointed out that in a recent decision of Mr. Justice
5 Andrew Jones at another stage of the same case: *HSH Cayman I GP Ltd.*
6 (Reasons dated 4th January 2010 – Unreported) the judge granted leave to the
7 petitioners to amend their petitions notwithstanding that the CWR do not contain
8 any express power to allow a winding up petition to be amended and the power
9 to allow the amendment of a petition contained in GCR O.20, r.5 and 7 is not one
10 of the GCR which the CWR provide is applicable. In giving leave to amend the
11 judge considered that the Court has an inherent power to allow amendment of a
12 winding up petition on the ground that such a power is clearly not inconsistent
13 with the overall scheme of the CWR. He considered that the existence of a
14 power to amend is a useful supplement to the CWR and is anyway necessary to
15 give effect to the CWR because it would otherwise be impossible to make an
16 order substituting a party to the proceedings. Counsel for Mr. Le Comte argued
17 that by analogy the power to make an order for security for costs was also not
18 inconsistent with the overall scheme of the CWR and was a desirable and useful
19 supplement to the Rules. He contended that there is an obvious lacuna in the
20 CWR in this respect and that it should be filled by the exercise of the Court's
21 inherent jurisdiction.

22

1 16. In my opinion it cannot be said that an inherent power to order security for costs
2 would not be inconsistent with the overall scheme of the CWR. Both the GCR
3 and the CWR incorporate specific Orders of the GCR into the CWR, including
4 GCR O.62 relating to costs. The CWR also contain other provisions relating to
5 costs, particularly the provisions of CWR O.24, yet they make no reference to
6 security for costs. In the circumstances, it does not seem to me that I can or
7 should assume that the absence of a provision in the CWR relating to security for
8 costs was an omission by the Insolvency Rules Committee established pursuant
9 to Section 155 of the Companies (Amendment) Law 2007). It may equally well
10 have been intentional. In fact on balance it seems to me that the probability is
11 that it was. Clearly the Rules Committee had costs in mind in determining that
12 GCR O.62 should be applicable and also in including the provisions of CWR
13 O.24. In those circumstances it would be surprising if the absence of any
14 provision relating to security for costs was simply an accidental omission. I do
15 not consider that it can or should necessarily be inferred that there is a lacuna in
16 the CWR in this respect. It is more likely in my opinion that the absence of any
17 provision for security of costs in the CWR reflects a deliberate decision by the
18 Rule Committee having regard to the nature of proceedings governed by the
19 CWR. I do not think it is appropriate for me to speculate in this regard but I do
20 not consider that it can be said that security for costs is or should necessarily be
21 inferred to be part of the overall scheme of the CWR.

22
23 17. I respectfully agree with Mr. Justice Andrew Jones that an inherent power to
24 allow amendment of a winding-up petition is clearly supplemental to the CWR

1 and not inconsistent with the overall scheme; on the contrary, it is necessary and
2 appropriate. A power to allow an amendment of the petition is, in my opinion,
3 fundamentally different from a power to order security for costs and I do not
4 accept the analogy which was suggested. As I have said, in my view it cannot be
5 said that power to order security for costs is necessarily consistent with the
6 overall scheme of the CWR. It follows that it is accordingly not a power which
7 can appropriately be exercised inherently in those circumstances. The matter of
8 security for costs is governed by the CWR which provide no power for the Court
9 to make such an order in proceedings governed by the CWR.

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11 18. I therefore concluded that the Court does not have an inherent jurisdiction to
12 order security for costs in these proceedings and for that reason I made the order
13 of 8th March 2010.

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17 Dated 9th March 2010

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Hon. Justice Angus Foster QC
Judge of the Grand Court