UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

Affidavit of Mark A C Diel

Tab 14

THE COURT OF APPEAL FOR BERMUDA

CIVIL APPEALS Nos. 28 & 29 of 2001

LILY CHIANG - First Appellant

PACIFIC CHALLENGE HOLDINGS LIMITED - Second Appellant

and

KISTEFOS INVESTMENT A.S. - Respondent

Before **Astwood, P**
Zacca, J.A.
Worrell, J.A.

Date of Hearing: **June 17 - 20, 2002**

Date of Judgment: **June 21, 2002**

Date of Reasons: September 20th 2002

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REASONS FOR JUDGMENT

Astwood,P.

Kistefos Investment A.S. (Kistefos) by an amended petition filed in the Supreme Court seeks relief against Pacific Challenge Holdings Limited and Lily Chiang (the Company and Chiang).

The relief sought is :

"1. An Order:-

(a) that the Company and /or Chiang purchase Kistefos' shares in the Company at a fair value to be determined by the Court: and/or

(b) if necessary or appropriate, that the Company's capital be reduced to permit compliance with any Order made under (a) above; and/or

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(c) in the alternative to (a) or (b) above, that Chiang be ordered to pay Kistefos such sum as the Court considers just, by way of compensation for the diminution in the value of Kistefos' shareholding in the Company attributable to the matters complained of in this Petition. Kistefos will contend that a fair measure of such compensation would be the value referred to in (a) above less such sum as Kistefos is able to realise on an arms length market sale of the shares.

(d) further or in the alternative to (a) – (c) above, such further or other relief as may be just for regulating the conduct of the Company's affairs in the future, including but not limited to such injunctive relief as may be necessary or appropriate to protect the interests of the Company's members including Kistefos

(2) In the alternative to (1) above, and Order that the Company may be wound up by the Court.

(3) Such accounts and inquiries as may be necessary.

(4) Such further or other Order or relief as may be just."

Kistefos, a substantial shareholder in the Company, has alleged in the petition that from their investigation, starting in about May, 2000, they have identified a pattern of behaviour in relation to the conduct of the Company's affairs which demonstrates that the affairs of the company "have been and/or being conducted in a manner which is oppressive or unfairly prejudicial to the interests of some part of its members including itself."

Kistefos gives details of their allegations at para. 30 of the Petition which we set out below:

> "30. The transactions and events upon which Kistefos relies:-
>
> (i) together, as constituting a pattern of conduct which is oppressive or unfairly prejudicial to the interests of some part of its members including itself; and/or
>
> (ii) singly as conduct which is oppressive or unfairly prejudicial to the interests of some part of its members including itself (save that (b) below is not relied upon singly)
>
> are as follows:-
>
> (a) One of the Company's principal assets - its brokerage businesses – was sold in early 2000, not as a *bona fide* arms length transaction, but rather as a sale at an undervalue to a buyer which was not independent of the Company.
>
> (b) The Company attempted to acquire Cents.com, a company beneficially owned as to 60% by Chiang, not as a *bona fide* transaction proposed in the best interests of the Company, but rather as an attempt by Chiang to siphon away the cash assets of the company for her own benefit.
>
> (c) The company entered into a share placing and subscriptions which was neither *bona fide* nor in the interests of the Company as a whole, but was rather carried out to dilute the share holding and reduce the influence of the minority shareholders including Kistefos.

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(d) Chiang, as Chairman of the Annual General Meeting, caused the proceedings of the Annual General Meeting of the Company held in Hong Kong on 26th September, 2000 (the "AGM") to be conducted exclusively in Cantonese. She, and those other directors of the Company present, Chan and Shah, thereby prevented Kistefos from exercising its rights as a member of the Company, effectively to participate in the discussion at the meeting and to raise concerns as to the conduct of the Company's affairs.

(e) The Company has wrongfully striven to thwart Kistefos' legitimate attempts to obtain information concerning the true beneficial ownership of the Company's shares in that, wrongfully and in breach of its statutory duty to do so, it persistently refused to comply and then delayed in complying with a requisition by Kistefos under Section 21 of the Securities (Disclosure of Interests) Ordinance, Cap. 396 of the Laws of Hong Kong ("the Disclosure Ordinance"), that the Company exercise its powers under Section 18 of the Disclosure Ordinance to investigate the beneficial ownership of its shareholders.

(f) The Company has entered into a joint venture arrangement under which a very substantial part of its cash reserves have been invested, in circumstances where the transaction has no evident commercial rationale and/or is other than in the ordinary course of business and/or is structured so as to enable the Company to avoid the connected

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party transaction requirement of the Listing Rules of the HKSE ("the Listing Rules")."

Kistefos then sets out some general and particular facts on which they rely to support their allegations.

The Company and Chiang applied unsuccessfully to the Supreme Court to strike out the petition on the grounds that the petition discloses no cause of action, is scandalous, frivolous or vexatious or is an abuse of the process of the court. But they succeeded in having the application for a winding up order stricken from the petition. They appealed the order of the Supreme Court refusing to strike out the petition and Kistefos sought an order by cross notice to have the application for a winding up order restored to the petition.

We dismissed the appeals by the Company and Chiang and we dismissed Kistefos' application on June 21, 2002, and we now give our reasons for so doing.

Mr. Richards, Q.C. made written and oral submissions supporting the company's grounds of appeal and his contention that the petition should be struck out. Mr. Dunch for Chiang adopted Mr. Richards' submissions and made some further written and oral submissions as to why the petition, as far as it relates to Chiang, should be struck out also.

In the case **Re Saul D Harrison & Sons plc.** BCC [1994] 475, Hoffman LJ, as he then was, made certain remarks at p491 in a judgment delivered on March 25, 1994 in the Court of Appeal of England, which we adopt with editing as applicable to the facts of the instant case. The references to the Companies (Unfair Prejudice Applications) Proceedings Rules 1986 and to the Insolvency Rules, do not apply to Bermuda. Otherwise, his reasoning is pertinent to our current exercise. He said:

> "The petition largely confined itself to the general allegations which I have summarised and did not go into detail. This is in accordance with the modern practice, by which after service of the petition there is a return day at which the registrar gives directions for the filing of evidence and, if appropriate, the delivery of particulars of claim and defence; see r.5 of the *Companies (Unfair Prejudice Applications) Proceedings Rules* 1986 (SI

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1986/2000) and r. 4.22 (3) of the *Insolvency Rules* 1986 (SI 1986/1925). The result was that the first statement in any detail of the facts concerning the company's business came in the affidavit of Mr. Alan Harrison, chairman of the company, in his afficavit in support of the application to strike out. A full statement of the petitioner's case emerged from the evidence sworn in answer and depended almost entirely upon the expert opinion of Mr. Simmons, a chartered accountant who had examined the company's financial statements. Further exchanges of evidence followed and the judge gave his decision on 9 March 1992. In this court leave was given to both sides to adduce further evidence exhibiting financial statements which have since come into existence.

Mr. Purle reminded us that the court's power to strike out a petition under RSC,O.18,r.19 or the inherent jurisdiction should be exercised only in a plain and obvious case. He referred us to a well-known passage in the judgment of Danckwerts LJ in *Wenlock v Moloney* [1965] 1WLR 1238 a p. 1244B:

'.....this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do this is to usurp the position of the trial judge, and to produce a trial of the case in chambers on affidavits only, without discovery and without oral evidence tested by cross- examination in the ordinary way.'

I entirely accept that the court cannot ordinarily resolve disputes of fact on affidavit and I agree with Mr. Purle that the filing of an affidavit in reply by the applicant (as

> happened in this case) is usually a symptom of the existence of issues which can be resolved only at a trial. In this case, however, the primary facts concerning the company's history and financial performance are not in any serious dispute. The question is whether those facts could arguably support an inference that the directors had abused their powers."

The jurisdiction of the Supreme Court in relation to striking out a petition is the same as in England. The judge who heard the application to strike out seems to have been under the impression that the court had no jurisdiction to hear the summons under Order 18 Rule 9 *(sic)* of the Rules of the Supreme Court. It seems that he did not refer to Order 18 Rule 19 (3) of the rules of the Supreme Court 1985, or to Rule 159 of the Companies Winding – Up Rules 1982. The judge proceeded under "the inherent jurisdiction of the court".

We were taken to affirmations by Erling Thiis filed in support of the petition and to affirmations filed in opposition thereto. We had to decide whether Kistefos had an arguable case, or, put another way, whether the Company and Chiang could satisfy us that Kistefos' case is plainly and obviously unsustainable.

It seemed clear to us that the Company was solvent and is a viable business with 'lots of cash', to use Mr. Hacker's expression, and it would appear that Kistefos is not pressing to have the Company wound up. They are actually seeking an order that the Company and/or Chiang purchase their shares in the Company.

The main thrust of Kistefos' contention is that the Company sold its brokerage businesses shortly after Chiang became the chairperson of the Company. She became a director and chairperson on March 15, 2000. The agreement for the sale was completed on March 28, 2000. The allegation is that although the sale was negotiated under the chairmanship of Chiang's predecessor and completed under Chiang's administration, the sale was not carried out as a *bona fide* arms length transaction but as a sale at an undervalue to a buyer who was not independent of the Company.

Kistefos contends moreover that Chiang dominated the Board of the Company and directed the Company's affairs in such a way as to promote her own business interests.

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Mr. Richards submitted that the Petitioner pleads no facts to support the allegation that Dr. Chiang knew that the sale price was at an under-value. He submitted further that it is quite improper to make such an allegation of fraud without pleading any facts on which the allegation can be made good, and that Kistefos has adduced no evidence to establish the allegation or to provide any basis of pleading it.

The background history to this petition as gleaned from an examination of the particulars and facts given in the petition and in the affirmations of Thiis and Chiang indicate that Kistefos is experiencing problems from the manner in which the company's affairs are being conducted. The facts and particulars are hotly contested and it is impossible for us to resolve the conflicts. This is a matter for the trial judge to come to grips with when all the evidence is before the court and tested in cross-examination.

The judge hearing the strike out application had before him an extensive record prepared for the trial of the petition, but the hearing was halted while applications to strike out were entertained. The result was that a great deal of court time and expense were devoted to issues which could only be resolved at trial. The judge quite rightly refused to embark on a protracted examination of the affidavits and affirmations and documents in order to decide whether he should allow the petition to proceed to trial. The trial judge said he was guided by what Danckwerts LJ said in the case of *Wenlock v Maloney and Others* [1965] 1WLR 1238 at p1244. The passage he referred to is reported in the judgment of Hoffman LJ *(supra)*.

Mr. Richards referred to p. 492 of *Saul D Harrison* case where Hoffmann LJ was dealing with a s. 459 (s.111) proceeding. He stated at p. 492 of his judgment:

> "In exercising his discretion to strike out the petition, the judge referred to the damaging effect of the presentation of a petition under s. 459 and the burdensome nature of the proceedings, which may involve a lengthy and detailed investigation of the company over a long period. Mr. Purle said that this was not a proper consideration to take into account. If the petitioner had a statutory cause of action, she was entitled to have it tried, whatever the consequences for the company.

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> I accept that the notoriously burdensome nature of s.459 proceedings does not lighten the burden on the respondent who applies to have the petition struck out. He must still satisfy the court that the petitioner's case is plainly and obviously unsustainable. But I think that the consequences for the company mean that a court should be willing to scrutinise with care the allegations in a s.459 petition and, if necessary, the evidence proposed to be adduced in support, in order to see whether the petitioner really does have an arguable case. This is particularly so when the petition rests on allegations of bad faith akin to fraud: see Sir George Jessel MR in *Re Rica Gold Washing Co* (1879) 22 ChD 36."

Mr. Richards submitted that in the instant case, since the allegations made are tantamount to an allegation of fraud, the judge should have gone into a detailed examination of the material before him. We did not accept that this was necessary. In our opinion, the judge has conducted a sufficient examination to satisfy himself that the petition should go forward to trial.

The particulars given in the petition and verified by an affidavit, would normally be sufficient *prima facie* evidence of the statements in the petition. The court concerned with the application to strike out the petition should not be required to go beyond this in its scrutiny to see whether the petitioner has an arguable case.

We were nevertheless taken on an excursion not only into the affirmation of Mr. Thiis in verifying the petition, but also into the affirmations of Chiang, which were filed in opposition. We were left in the untenable position where these persons would have to be cross-examined before any conclusion could be reached on their allegations in their statements.

The crux of Kistefos' claim is that the transactions and events detailed in para. 30 of the petition show the conduct of which they complain.

At trial Kistefos would be inviting the trial judge to infer from the facts that they are able to establish that the conduct of the Company and Chiang is as they claim. They rely on

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the case of *in re H.R. Harmer Ltd* [1959] 1WLR 62 (C.A.) and the *dictum* of Jenkins LJ at p. 84 when he cited with approval the judgment of Roxborough LJ in these terms:

> "But I would just observe in passing that [Section 111] does not say 'who complains of acts of oppression'; it says 'that the affairs of the company are being conducted in a manner oppressive.' In other words, I think it invites attention not to events considered in isolation but to events considered as part of a consecutive story: and it is because I take that view that I have not dealt (and do not propose to deal) with each of the items I have enumerated one by one.....it remains in my view, a question for the court to decide on the whole story, as revealed in the evidence, whether the affairs of the company are being...conducted in a manner oppressive to some part of the members."

The judge said in his conclusion at p. 16 of his judgment:

> "1) I have heard the submissions of counsel over a period of some five and a half days. I have considered the Petition in detail and the Affidavits and 22 files of documents which accompany them. I have effectively been called upon to carry out a minute and protracted examination of the documents and alleged facts of the case in order to see if the Plaintiff has a real cause of action. This I am not prepared to do. I am not prepared to usurp the position of the trial judge who must have the benefit of oral evidence tested by cross-examination in order to decide the issues between the parties.
>
> 2) I have come to the conclusion that the Petition discloses a prima facie allegation of complaint that the affairs of the Pacific are being conducted or have been conducted in a manner prejudicial to the interests of some part of the members including Kistefos."

We agree with the judge's approach to the strike out application. He will come to his final conclusion when he has heard the evidence tested in cross-examination as to whether the conduct complained of amounts to conduct which is oppressive and/or unfairly prejudicial to the interests of some part of the members of the company including Kistefos.

We concluded that the judge had not erred and that the petition should be allowed to proceed to trial. In our view, sufficient facts are pleaded in the petition to indicate to the Company and Chiang what the allegations are which are asserted against them. In our opinion if these allegations are established, the judge could infer that the conduct complained of has been proved.

The application to wind up the Company was, in our opinion, the remedy of last resort. Kistefos wish to divest themselves of their shares and if a fair or reasonable offer is made to them by the Company or Chiang to purchase their shares, no doubt they will accept it. We adopt as applicable to this case the words from the judgment of Sir Richard Scott, V.C. in the case of *Re a Company and others* [1997] 1BCLC 479 at p. 491:

> "..it seems to me clear that the retention in the petitions of a prayer that the companies be wound up is a source of potential damage to the companies. If those with whom the companies do business are led to believe that the winding-up orders may be made against the companies, it is easy to accept that damage to their trading prospects may follow. This risk of damage might have to be accepted if there were a real prospect that the judge who heard the petitions might conclude that in the circumstances winding-up orders should be made. But since, as I have concluded, there is no real possibility that that may happen, it seems to me that the risk of the damage to which I have referred is an additional reason why the prayers for winding-up orders should be struck out."

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We therefore dismissed the appeals and cross notice. Kistefos to have their costs in the appeal against the Company and Chiang. The Company and Chiang to have their costs against Kistefos in their cross notice.

Kistefos to have 2/3 of their costs in the court below and we granted certificates for two counsel each to Kistefos and the Company.

.....
Sir James Astwood, President

.....
Rt. Hon Edward Zacca, J.A.

.....
Hon. Lindsay Worrell, J.A.

Mr. Alan Dunch — **for the 1st Appellant**

Mr. David Richards, Q.C.
Mr. Paul Smith — For the 2nd Appellant

Mr. Richard Hacker, Q.C.
Mr. John Rihiluoma — For the Respondent