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2 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**

3
4 **CAUSE NO: 104 OF 2009**

5
6 **IN THE MATTER OF SECTION 94 OF THE COMPANIES LAW**
7 **(2007 REVISION)**

11-11-09

8
9 **AND IN THE MATTER OF FREERIDER LTD.**



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12 **Coram:** The Hon. Mr. Justice Foster (Actg) in Chambers

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14 **Appearances:** Mr. Jeremy Walton and Ms. Katie Brown of Appleby for the
15 Petitioner
16 Mr. Alan Turner and Ms. Rowena Lawrence of Turner &
17 Roulstone for the company and the opposing shareholder

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19 **Heard:** 26th October 2009

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23 **RULING**

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26 1. The Petitioner Mr. Adrianus Heinen ("Mr. Heinen") is a voting shareholder and
27 director of Freerider Ltd. ("the Company"). He has presented a petition to wind
28 up the Company pursuant to Section 92 (e) of the Companies (Amendment) Law
29 2007 (now the 2009 Revision) ("the Law") on the ground that it is just and
30 equitable that it should be wound up. The Company was incorporated in the
31 Cayman Islands on 11th June 2003. The petition is opposed at present by the
32 Company and also by the other principal shareholder and director of the
33 Company, Mr. Pieter Le Comte ("Mr. Le Comte"). The Company has also filed
34 an application for the petition to be struck out pursuant to O.18, r.19 of the Grand
35 Court Rules on the ground that it discloses no reasonable cause of action, or it is

1 scandalous, frivolous or vexatious or that it is otherwise an abuse of the process of
2 the Court. As an alternative to a strike out of the petition the Company seeks a
3 stay pending the resolution of proceedings brought by the Company in the
4 Supreme Court of the State of New York (index no. 602159/08) (“the New York
5 proceedings”). However the parties have now agreed that the Company’s
6 application to strike out or stay the petition should be heard at the same time as
7 the hearing of the petition itself, which is anticipated to be in approximately 5
8 months time, in March 2010.

9 2. The application before me is on the petitioner’s summons for directions issued
10 pursuant to O.3,r.11 of the Companies Winding Up Rules 2008 (“the CWR”).
11 The particular issue in dispute concerns the applicability of r.11 (2) (a) and (b)
12 and, if applicable, whether or not directions should be given pursuant to those
13 sub-rules.

14 3. Order 3,r.11 of the CWR provides as follows:

15 (1) *Upon the presentation of a petition by a contributory seeking a winding up*
16 *order or an order for alternative relief under section 95(3) of the Law on*
17 *the ground contained in section 92(e), the petitioner must at the same time*
18 *issue a summons for directions in respect of the matters contained in this*
19 *Rule.*

20 (2) *Upon hearing the summons for directions, the Court shall give such*
21 *directions as it thinks appropriate in respect of the following matters –*

22 (a) *whether or not the company is properly able to participate in the*
23 *proceeding or should be treated merely as the subject-matter of the*
24 *proceeding;*

25 (b) *whether the proceeding should be treated as a proceeding against*
26 *the company or as an inter partes proceeding between one or more*

1 *members of the company as petitioners and the other member or*
2 *members of the company as respondents;*

3 *.....*

4 [The Rule continues to list other possible directions which are not material to the
5 particular issues in dispute]

6 Section 94(3), now section 95(3), of the Law, referred to in Rule (1), provides as
7 follows:

8 (3) *If the petition is presented by members of the company as contributories*
9 *on the ground that it is just and equitable that the company should be*
10 *wound up, the Court shall have jurisdiction to make the following orders*
11 *as an alternative to a winding-up order, namely-*

12 (a) *an order regulating the conduct of the company's affairs in the*
13 *future;*

14 (b) *an order requiring the company to refrain from doing or*
15 *continuing an act complained of by the petitioner or to do an act*
16 *which the petitioner has complained it has omitted to do;*

17 (c) *an order authorising civil proceedings to be brought in the name*
18 *and on behalf of the company by the petitioner on such terms as*
19 *the Court may direct; or*

20 (d) *an order providing for the purchase of the shares of any members*
21 *of the company by other members or by the company itself and, in*
22 *the case of a purchase by the company itself, a reduction of the*
23 *company's capital accordingly.*

24
25 4. The purpose of directions made pursuant to O.3,r.11(2)(a) and/or (b) of the CWR
26 apparently relates to the costs in a petition based on just and equitable grounds as
27 set out in Order 24,r.8(2). That sub-rule provides, under the main heading
28 “General Rules as to Costs”, as follows:

29 (2) *In the case of a contributory's winding up petition under Order 3, part III,*
30 *the general rules are that-*

- 1 (a) if the Court has directed that the company itself is properly able to
2 participate in the proceeding, the general rule is that the costs of a
3 successful petitioner be paid out of the assets of the company; or
- 4 (b) if the Court has directed that the winding-up petition be treated as
5 an inter partes proceeding between one or more members of the
6 [company and the] other member or members of the company as
7 respondents, the general rule is that none of the costs should be
8 paid out of the assets of the company and the unsuccessful parties
9 should pay the costs of the successful party, such costs to be taxed
10 on the standard basis unless agreed.

11 5. In his summons for directions (dated 6th March 2009) the Petitioner, Mr. Heinen,
12 seeks directions inter alia as follows:

- 13 1. Whether or not the Company is properly able to participate in the
14 proceeding or should be treated merely as the subject-matter of the
15 proceeding;
- 16 2. Whether the proceeding should be treated as a proceeding against the
17 Company or as an inter partes proceeding between one or more members
18 of the Company as petitioners and the other member or members of the
19 Company as respondents

20

21 6. The CWR only came into effect earlier this year (2009) and I was informed by
22 Counsel they were not aware of any previous consideration by the Court of
23 O.3,r.11 (2)(a) and (b). Since the hearing I have, in connection with another
24 unrelated case, became aware that the Court (Anderson J.) has, on a previous
25 occasion given a direction pursuant to CWR O.3,r.11(2)(a) that the company
26 concerned should be treated merely as the subject-matter of that proceeding.
27 However, I understand that there was no significant argument about the sub-rule
28 on that occasion. I was, however, referred to a number of reported cases from
29 England, although Counsel for the Company and Mr. Le Comte strongly disputed
30 their relevance.

1 7. The background to this matter, in summary, is that Mr. Heinen is the inventor of
2 and held patents for “TheWheel”, which is a new, energy efficient, self propelled,
3 electrically powered wheel which has a range of possible commercial uses on
4 motor vehicles, such as cars, trucks and buses. It is considered to be a
5 revolutionary idea which aims to reduce CO2 emissions by as much as 50% and
6 therefore is likely to significantly change the motor vehicle industry. It
7 accordingly has a potentially very large value once fully developed and
8 commercially exploited.

9 8. Mr. Heinen and Mr. Le Comte, who are both from the Netherlands (although Mr.
10 Le Comte now resides in the USA) and were previously friends, established a
11 structure of related companies and partnerships in various countries known as the
12 “e-Traction Group”. This was done pursuant to what was effectively a joint
13 venture between them to further develop and to commercially exploit TheWheel
14 and its related technology. The idea in principle was to combine and take
15 advantage of Mr. Heinen’s technical knowledge and expertise and of Mr. Le
16 Comte’s business expertise. The Company is one of the entities which they
17 established in this connection. It was to hold the intellectual property rights in
18 TheWheel technology and to be the entity which would receive royalty payments
19 deriving from its commercial exploitation, in particular from the proposed grant
20 of licences for its use. The underlying principal purpose of incorporating the
21 Company in the Cayman Islands was to enable the e-Traction Group to achieve
22 legitimate tax benefits by receiving such payments through a vehicle in the
23 Cayman Islands.

1 9. Mr. Heinen and Mr. Le Comte each hold 50% of the voting shares in the
2 Company. There appears to be a dispute, or at least a lack of clarity, about the
3 precise shareholdings in the Company which, it is agreed, is not accurately
4 reflected in the Register of Members. There is a small number of independent
5 holders of non-voting B and C shares but there is no doubt that Mr. Heinen and
6 Mr. Le Comte hold all the voting Class A shares between them.

7 10. As part of the arrangements between Mr. Heinen and Mr. Le Comte they entered
8 into a Shareholders Agreement dated 19th July 2003, to which the Company and
9 e-Traction Management SARL (a Luxembourg company, part of the e-Traction
10 Group), were also party (“the First Shareholders Agreement”). By this agreement
11 Mr. Heinen and Mr. Le Comte (who were described as the “Managers”) agreed
12 that with regard to any technical issues concerning the intellectual property of the
13 Company in TheWheel, all voting in and actions to be taken by the Company
14 would be in accordance with the recommendations of Mr. Heinen in his sole
15 discretion. They further agreed that in respect to all other business and legal
16 issues of the Company, including issues relating to the management structure,
17 marketing and business strategies, all voting in and actions to be taken by the
18 Company would be in accordance with the recommendations of Mr. Le Comte in
19 his sole discretion. Mr. Heinen and Mr. Le Comte also agreed that they would not
20 sell assign or otherwise transfer any shares in the Company held by them without
21 the prior written consent of the other save to certain expressly permitted
22 transferees, being mainly members of their respective families. The First
23 Shareholders Agreement also provides that it is to be governed and construed in

1 accordance with the laws of the State of New York, provided that issues relating
2 to the internal corporate governance of the Company are to be governed by the
3 corporate law of the Cayman Islands.

4 11. Mr. Heinen and Mr. Le Comte also entered into various other agreements to
5 which the Company and various others were party, including the small number of
6 unrelated passive investors holding non-voting shares, all of whom, I was
7 informed, support Mr. Heinen's winding-up petition.

8 12. Mr. Heinen's petition is based on his contention that there has been a fundamental
9 loss of mutual trust and confidence between him and Mr. Le Comte as a result of
10 serious differences between them and Mr. Le Comte's actions. He alleges that
11 numerous disputes and difficulties have arisen between them resulting in
12 deadlock. He says that Mr. Le Comte has totally excluded him from the
13 management of the Company, that Mr. Le Comte has commenced various legal
14 proceedings, purportedly in the name of the Company, against Mr. Heinen and
15 other shareholders and companies in the e-Traction Group in the Netherlands, in
16 Luxembourg and in New York, all without any regard to Mr. Heinen's position
17 and without seeking the approval or sanction of the Company's board of directors.
18 He says that Mr. Le Comte has acted in bad faith, solely in his own personal
19 interests and entirely without regard to the intended nature of the joint venture
20 between them. He says there is now a complete deadlock between them. Counsel
21 for Mr. Heinen submitted that there are 4 main grounds for Mr. Heinen's petition
22 namely:

- 1 (1) That there has been significant mismanagement and numerous breaches of
2 fiduciary duty by Mr. Le Comte as a director of the Company.
- 3 (2) That Mr. Le Comte has excluded Mr. Heinen from participation in the
4 management of the Company.
- 5 (3) That there is deadlock at both management and shareholder level in the
6 Company which has arisen as a result of the irretrievable breakdown in the
7 relationship between Mr. Heinen and Mr. Le Comte, between whom there
8 is now a complete lack of trust.
- 9 (4) That the Company has lost its substratum, partly as a result of adverse
10 rulings of the Dutch tax authorities in relation to payments made to the
11 Company, partly as a result of the purported termination of inter Group
12 agreements transferring the intellectual property rights in TheWheel and
13 for the provision of other rights and services to or by the Company. These
14 are a sub-licence granted by the Company to another company in the
15 Group in respect of the intellectual property rights in TheWheel and a
16 technology advisory services agreement by which advisory services and
17 technological assistance were to be provided to the Company.
- 18 13. Mr. Heinen submitted three affidavits with exhibits in support of his contentions,
19 as well as an affidavit by a Mr. Hans Van Der Ven who gives details of findings
20 by the Enterprise Chamber of the Amsterdam Court of Appeal that Mr. Le Comte
21 has been guilty of management in relation to the affairs of another company
22 within the Group. Although relating to Mr. Le Comte's conduct as a director of

1 that company rather than of the Company, it is contended that this is evidence of
2 the breakdown of the relationship between Mr. Heinen and Mr. Le Comte and of
3 the deadlock between them.

4 14. The allegations by Mr. Heinen are strongly denied by Mr. Le Comte who
5 submitted three affidavits with exhibits of his own. He places considerable
6 emphasis on the First Shareholders agreement which he contends entitles him,
7 with the express agreement of Mr. Heinen, to manage the Company and to
8 determine the composition of the board of directors and the Company's business
9 strategies. He says that the legal proceedings which he has procured the
10 Company to bring in New York, the Netherlands and Luxembourg are in support
11 of legitimate claims of the Company and are in its best interests. He argues that
12 Mr. Heinen knew that by entering into the First Shareholders Agreement the
13 administration and business management of the Company would be and was
14 intended to be delegated solely to Mr. Le Comte and that he expressly agreed that
15 Mr. Le Comte would be entitled to and would direct the non-technical aspects of
16 the Company's business, its administration and strategies. He categorically
17 denies any breach of fiduciary duty, misfeasance or bad faith and contends that
18 Mr. Heinen is simply trying to avoid the provisions of the First Shareholders
19 Agreement, particularly because of the Company's pursuit of its legitimate claims
20 against him.

21 15. Mr. Le Comte further contends that all of the issues raised by Mr. Heinen in his
22 petition are already the subject of the ongoing New York proceedings, which
23 were commenced in 2008 and have now reached the discovery stage. He says

1 that the First Shareholders Agreement requires all disputes to be litigated in New
2 York and he argues that it is appropriate that the issues are litigated by way of
3 action, not petition. He accordingly will submit at the hearing of the petition that
4 if the petition is not struck out it should, in the alternative, be stayed pending the
5 outcome of the New York proceedings. To allow the merits of the petition to be
6 heard would amount to unjustified, unnecessary and expensive duplication of the
7 matters already being determined by the court in New York anyway, contrary to
8 the express provisions of the First Shareholders Agreement.

9 16. This hearing before me is clearly not the hearing of the petition or of the strike-
10 out or stay applications. It is simply the hearing of the petitioner's summons for
11 directions pursuant to the CWR. It is accordingly not for me at this stage to
12 determine the merits of what is alleged and contended by Mr. Heinen and by Mr.
13 Le Comte respectively or whether the petition should be granted, struck out or
14 stayed. Subject to the arguments of Counsel for Mr. Le Comte that O.3,r.11(2)(a)
15 and (b) of the CWR are anyway *ultra vires* and that the Insolvency Rules
16 Committee ("the IRC") were not empowered or entitled to make those particular
17 sub-rules, what I must consider is whether or not the Company should properly
18 participate in the proceedings or should be treated merely as the subject matter of
19 the proceedings and/or whether the proceedings should be treated as being against
20 the Company or as an *inter partes* proceeding between Mr. Heinen and Mr. Le
21 Comte. I must give such directions as respect to those matters as I think
22 appropriate in my discretion in the circumstances.

1 17. The initial submission on behalf of Mr. Le Comte and the Company is that the
2 IRC, established pursuant to section 154 of the Law, has and only has, pursuant to
3 section 155 (1)(a), power to make rules and prescribe forms for the purpose of
4 giving effect to parts IV, V and XVI of the Law (my emphasis). It was said that
5 the Law makes no provision for a company which is subject to a winding-up
6 petition being treated as merely the subject-matter of the proceedings, nor does it
7 provide for such a petition becoming an *inter partes* proceeding between
8 members of the Company. It was contended that the company concerned has
9 historically always been the respondent in a winding-up petition and that if the
10 Cayman Islands legislature had intended to change such long-established
11 jurisprudence in relation to the winding-up of companies, it would and should
12 have made that clear in the Law itself. The Law would have expressly provided
13 that in certain circumstances the company need not be a respondent to a petition
14 but only the subject-matter of the winding-up proceedings, which should be
15 treated as *inter partes* proceedings between shareholders. It was submitted that
16 section 155(a) of the Law only conferred authority on the IRC to give effect to the
17 primary legislation, namely Part V of the Law, whereas O.3,r.11(2)(a) and (b)
18 amount to an attempt by the IRC to grant the court a wider jurisdiction than that
19 provide for by the primary legislation. The sub-rules are therefore *ultra vires*,
20 being an attempt by the IRC to legislate rather than simply give effect to
21 legislation. Consequently, it was said, the subordinate legislation is to be treated
22 as never having had any legal effect and I was referred, in the skeleton argument

1 of the Company and Mr. Le Comte, to various English authorities as support for
2 that general principle.

3 18. Part V of the Law relates to the winding-up of companies, liquidators and related
4 matters and extends from section 89 to section 155. The Part includes some new
5 provisions; notable amongst them are the provisions of section 95(3), to which I
6 have referred above. These particular provisions appear to be based upon what
7 was section 459 of the Companies Act 1985 in England enabling, for example, the
8 court to make an order providing for the purchase of the shares of any member or
9 members of the company by other members or by the company itself, as an
10 alternative to winding-up the Company on the just and equitable basis. Unlike the
11 English legislation, where there is separate stand-alone provision for a petition to
12 be brought by a member or members of the company seeking such buy-out or
13 other relief, our legislation is, as was described by counsel, something of a hybrid
14 in that this court is only given jurisdiction to grant such alternative relief on a
15 petition for just and equitable winding-up. There is no provision in the Law for a
16 separate petition seeking only such relief. Section 95(3) specifically contemplates
17 such relief being granted on a petition presented by contributories on the just and
18 equitable ground and it is expressly described as an alternative to a winding-up.
19 O.3,r.11 of the CWR is under the heading “Contributory’s Petition” and rule
20 11(1) requires the issue of a summons for directions on such a petition seeking a
21 winding-up order or (my emphasis) an order for such alternative relief. This
22 distinction between the Cayman and the English legislation was noted by Vos JA

1 in the Court of Appeal in Re Strategic Turnaround Masters Partnership Limited
2 (2008) CILR 447 at paragraph 59 when he said:

3 *It is worth mentioning again that, even when the new s.95(3) inserted by the*
4 *Companies (Amendment) Law 2007 comes into force, it will allow a statutory*
5 *remedy for minority shareholders by, for example ordering the purchase of*
6 *shares, but it will do so in the context of a contributories' "just and equitable"*
7 *petition; there will even then be no free-standing unfair prejudice petition in the*
8 *Cayman Islands.*

9 19. It is, in this overall context that, it seems to me, the IRC are empowered by
10 section 155(1) (a) of the Law to make rules, in particular to enable the court
11 giving directions to determine in its discretion in the particular circumstances
12 which parties should most appropriately participate in winding-up proceedings
13 brought under the Law. In my view, in light of this the relevant provisions of
14 O.3,r.11(2)(a) and (b) are essentially procedural in nature and are directly related
15 also to the provisions which the IRC is empowered to make and has properly
16 made in relation to the costs of petitions. I do not think there can be any doubt
17 that the IRC is empowered to make such costs rules.

18 20. I also consider that it is probable that the members of the IRC were aware, or
19 were made aware, of the English authorities in which the courts there have either
20 restrained a company from active participation or refused a company permission
21 to actively participate in a winding-up petition on the just and equitable basis
22 and/or a petition under section 459 of the Companies Act 1985 and/or to do so at
23 the expense of the company, when the reality is that the proceedings are in
24 essence a dispute between shareholders and not a dispute with the company itself.
25 The origin of this approach appears to be Pickering v Stephenson [1872] LR 14

1 Eq 322. In that case English directors of a foreign railway company were
2 restrained from further applying the funds of the company in payment of the legal
3 costs of an action for libel brought by the directors against a former secretary to
4 the board of directors, who it was alleged, had libelled some of the directors. The
5 Vice Chancellor said (page 340):

6 *“It seems to me where a quasi partnership of this sort is divided into a majority*
7 *and minority who differ on a question of internal administration, and litigation*
8 *results from the difference, it is contrary to the spirit of the partnership to pay the*
9 *expense of the litigation out of the general fund; and that this is independent of*
10 *the question whether the majority is overwhelming or a bare majority.*

11 21. There then followed almost a century before the next potentially relevant
12 decision: Re A & B.C. Chewing Gum Ltd. [1975] 1WLR 579. That was a hearing
13 involving two related matters before Plowman J.; a contributory’s petition for
14 winding-up on the just and equitable basis and an action by the petitioner against
15 directors of the company and the company itself seeking a declaration that any
16 payment out of the assets of the company of the costs of the directors of
17 defending the winding-up petition involved a breach by the directors of the
18 articles of association of the company and a breach of their fiduciary duties as
19 directors. In the circumstances of the case the judge made a winding-up order. In
20 relation to the action for the declaration, it was common ground that the action
21 must succeed and the declaration was granted accordingly. There was apparently
22 no doubt that the company should not be paying for the defence of the winding-up
23 petition in which it had no direct interest of its own and in which the real interest
24 was that of the directors. That case was followed by a judgment of Hoffmann J.
25 (as he then was) in October 1988 in Re Crossmore Electrical and Civil

1 Engineering Ltd. [1989] 5 B.C.C. 37. There there were two petitions pending
2 against the company, a creditor’s winding-up petition and a petition under section
3 459 of the Companies Act 1985 by a member of the company seeking an order
4 that his shares in the company be purchased either by the company or by another
5 member. The application was to extend validation relief previously granted in the
6 winding-up petition to cover payments into and out of the company’s bank
7 account in the ordinary course of business pending the hearing of the petitions.
8 The relief was granted but subject to a proviso excluding from the ordinary course
9 of business the cost of defending the section 459 petition. In the course of his
10 judgment Hoffmann J. said:

11 *“The company is a nominal party to the section 459 petition, but in substance the*
12 *dispute is between the two shareholders. It is a general principle of company law*
13 *(my emphasis) that the company’s money should not be expended on disputes*
14 *between the shareholders: see Pickering v Stephenson (ibid).....”*

15 22. The judge drew a distinction between the section 459 petition and the creditors
16 petition, as in the latter case it would be in the ordinary course of the company’s
17 business to pay lawyers to defend itself against such a petition where the debt was
18 disputed by the company and the company was therefore entitled in those
19 circumstances to meet its own defence costs of the creditors petition out of its
20 own resources.

21 23. This was followed only 4 days later by another decision of Hoffmann J. in Re a
22 company [no 005685 of 1988], ex parte Schwartz [1989] BCLC 424. The case
23 involved a winding-up petition brought by minority shareholders. The company,
24 which was fully solvent, applied for a validation order in respect of certain

1 payments into and out of the company's bank account pending the hearing of an
2 application by the principal shareholder to strike out the winding-up petition.
3 There was no dispute in principle about the grant of the validation order but the
4 petitioners requested a proviso to the order stating expressly that the company's
5 debts in the ordinary course of business should not include any of the cost of
6 defending the winding-up petition or of prosecuting the strike out application.
7 The petitioners contended that the proceedings were in substance a dispute
8 between the shareholders and that in principle it was wrong for the company's
9 money to be spent on litigation between the shareholders. Hoffmann J. accepted
10 that general principle although, as he stated, the company is and has to be a
11 formal party to the proceedings. In fact, in the circumstances of that case, the
12 company being solvent, the judge was not willing at that stage to express a clear
13 view that no expenditure of any kind by the company on the cost of the
14 proceedings would be justified and that the question should be deferred until the
15 substantive matters had been gone into on the hearing of the strike out application.
16 However, the general principle that a company's money should not be spent on
17 litigation which was in reality a dispute between shareholders was clearly re-
18 affirmed.

19 24. The next case of this type was a decision of Harman J. in Re Hydrosan Ltd.
20 [1991] BCC 19. This was again an application in the context of a petition under
21 section 459 of the Companies Act 1985. The actual application was for discovery
22 of documents including documents relating to an earlier petition. The judge
23 referred to Re A & B.C. Chewing Gum Ltd. (*ibid*) and the decision of Hoffmann J.

1 Re Crossmore Electrical and Civil Engineering Ltd. (*ibid*) and in particular his
2 statement that it is a general principle of company law that the company's money
3 should not be expended on disputes between the shareholders. Harman J.
4 expressed the view that those observations "plainly express the law as it exists".

5 He went on to say:

6 *"Thus one starts with the proposition that any material which will show that the*
7 *company had been funding the defence of shareholders to a section 459 petition*
8 *must show a wrongful application of the company's funds. In the present case, if*
9 *the company's funds were employed in financing the defence to the first section*
10 *459 petition, that, it is said, must be a wrongful misapplication of funds and*
11 *would warrant the present section 459 petition.*

12 He continued:

13 *The argument here by Mr. Moverley Smith is that the first petition contained not*
14 *only a petition under section 459 for what is commonly called a buy-out of the*
15 *petitioner by the respondents, alternatively by the petitioner of the respondents,*
16 *but also a claim, as was habitually put in the old days, for a just and equitable*
17 *winding-up.*

18 *In my view that is not a complete or any answer to this claim. The claim on the*
19 *petition in Re A & B.C. Chewing Gum Ltd. (*ibid*) was purely and simply only for a*
20 *just and equitable winding up. The claim on a contributory's petition for a just*
21 *and equitable winding-up is not in truth hostile litigation by a shareholder against*
22 *a company. It is in truth a claim by a shareholder based upon some wrongful acts*
23 *by other shareholders or directors which have amounted to some equitable*
24 *wrongdoing even within the articles as is exemplified in the case commonly*
25 *referred to as Re Westbourne Galleries Ltd. [1973] AC 360 which went to the*
26 *House of Lords and reinstated the width of just and equitable petitions.*

27 *It is quite clear in my judgment that the nature of a petition based by a creditor*
28 *against the company, which seeks the winding up of a company is wholly different*
29 *from the nature of relief where there is a just and equitable petition by a*
30 *shareholder against the company, which may also lead to an order for the*
31 *winding-up of the company. It is quite true that if a winding-up order is made on*
32 *a contributories petition the company will suffer what I usually refer to as death,*
33 *that is, its coming to an end and eventual dissolution, but the wrongs claimed and*
34 *the nature of the allegations are of wrongs by those in control of the company*
35 *against a shareholder rather than by the company itself in any real sense. Here*
36 *in this present case if there were documents created in the course of proceedings,*
37 *other than the section 459 petition, such as, it may well be, the claim brought by*

1 the petitioner here against the company in the Chancery Division for wrongful
2 dismissal and also the claim to an industrial tribunal for what is nowadays called
3 unfair dismissal, in such matters, it seems to me, the claim is truly against the
4 company. A judgment recovered on it would make the claimant in it a creditor of
5 the company and would found a creditors petition for the winding-up of the
6 company. Such matters, it seems to me, are hostile litigation within the doctrine
7 of Woodhouse & Co. Ltd. v. Woodhouse which is an exception to the general rule
8 but that exception does not in my judgment have any application to documents for
9 a members just and equitable petition. In such cases the principle applies which
10 Vinelott J. asserted in Re Kenyon Swansea Ltd. (1987) 3 BCC 359 at page 265
11 (the last paragraph in the first column) where the judge said: "There is, however,
12 one matter which has given me considerable concern. At a meeting of the board
13 of directors of the company..... it was resolved to instruct solicitors to act on
14 behalf of the company. In reliance on that resolution solicitors retained by the
15 company have incurred considerable expense in filing evidence and instructing
16 counsel to oppose this application. I can see no possible justification for this
17 course. The directors concerned no doubt have very strong feelings as to the
18 person they would like to see in control of the company and able to appoint and
19 remove its directors including themselves. But they are not entitled at the expense
20 of the company to take part in a dispute as to whether Mr. Kenyon's shares
21 should be compulsorily acquired by Mr. Mitchell or by the company".

22 Plainly an order that the shares be acquired by the company would be an order
23 affecting the company and yet the judge said – and I wholly agree with him – it
24 could not properly be an action where the company's finances should be
25 employed to influence the result of the claim. In my view that supports the
26 proposition I have already enunciated that a contributory's petition for just and
27 equitable winding-up, although it does produce severe results upon the company
28 if it succeeds, yet is not within the classification of Phillimore L.J. and Lush J. in
29 the Woodhouse case I have already cited.

30 25. The following month (November 1990) Mr. Edward Nugee QC sitting as a deputy
31 judge in Milgate Developments Ltd. etc [1993] BC LC 91 heard an application by
32 a petitioner, who had petitioned for relief under section 459 of the Companies Act
33 and in the alternative for a just and equitable winding-up order, for an injunction
34 restraining the other shareholders from utilizing the funds of the companies
35 concerned in payment of their own legal and other expenses in opposing the
36 petition. The solicitors for the individual shareholders accepted that they could
37 not charge the companies for work done for the shareholders and the judge

1 accepted that. However the petitioner also sought an order that the individual
2 shareholders should not cause or procure the companies to be represented on the
3 hearing of the petitions or otherwise be involved in or about the petitions save in
4 respect of any application for a validation order. The judge, having considered
5 the previous authorities and the circumstances of the case concluded:

6 *On the evidence before me I can see no possible justification for the companies*
7 *incurring further expense in taking part in this dispute and that being so they do*
8 *not get over the first hurdle in Cyanamid of showing that there is a serious*
9 *question to be tried. I propose therefore to grant the relief sought in paragraph 2*
10 *of each of [the petitioner's] notices, which should be expressed to be until after*
11 *judgment and should be prefaced in each case by the words "without prejudice to*
12 *the question whether the cost incurred by the respondent company (or companies)*
13 *down to the date of this order should be borne by them or should be borne in*
14 *some other manner, which question is reserved to the judge hearing the petition.*

15 26. In another case soon after that: Re a company (no 004502 of 1988) ex parte
16 Johnson [1992] BCLC 701 Harman J. considered an application by a petitioner
17 for relief under section 459 of the 1985 Act or for a winding-up order on just and
18 equitable grounds for an injunction restraining directors of the company from
19 causing the company to be represented on the hearing of the petition under section
20 459 and restraining them from causing the company to incur any costs in relation
21 to the petition (save for any cost on any validation application and in giving
22 discovery). Harman J. again referred to the statement of general principle of
23 Hoffmann J. in Re Crossmore Electrical and Civil Engineering Ltd. (*ibid*) when
24 he said that it is a general principle of company law that the company's money
25 should not be expended on disputes between shareholders, which Harman J.
26 described as a "*reminder of the classic view*". After explaining the circumstances

1 in Re A & B.C. Chewing Gum Ltd. (*ibid*) he commented on the action brought in
2 that case and said:

3 *The relief sought in the action was primarily a declaration that using the*
4 *company's money to resist the petition was a breach of duty or, one could say, a*
5 *misfeasance by the directors, and that the consequence must be that they repay to*
6 *the company the monies wrongly spent. Plowman J. made that declaration of*
7 *misfeasance and also made consequential recovery orders following upon*
8 *inquiries which he directed. Thus the principle has been clearly represented in*
9 *the reports for a very long time. (my emphasis).*

10 Harman J. also said:

11 *A just and equitable winding-up is frequently, although, following the recent*
12 *practice directions, not so frequently as formerly, joined with a section 459*
13 *petition. In A & B.C. Chewing Gum Ltd. to which I have already referred,*
14 *winding-up on the just and equitable ground was the only relief sought on the*
15 *petition, and yet in that case the learned judge held that the company was no*
16 *more than a nominal respondent to that winding up petition. The petition was*
17 *based on misconduct and breach of fiduciary duty many times by the respondent*
18 *shareholders and directors. Plowman J. finding the misconduct proved*
19 *concluded that that warranted the dissolution of the company and a putting to an*
20 *end all relationship between the members, the company being undoubtedly*
21 *extremely solvent.*

22 27. The next authority in this line of English cases is Re a company no. 001126 of
23 1992 [1993] BCC 325 in which judgment was given in March 1993 by Lindsay J.
24 in the Companies Court. The case again concerned a petition under section 459
25 of the Companies Act 1985 in respect of which the company made an application
26 seeking directions permitting it to actively participate in the petition and as to
27 payment of its cost in doing so. The petitioner did not oppose the company's
28 "passive" participation in the petition by way of participating in discovery,
29 attendance at judgment and the like. The judge carried out an extensive analysis
30 of Pickering v Stephenson (*ibid*) and concluded that it was not possible to derive
31 from that case as a matter of ratio that it could never (my emphasis) be proper for

1 a company either to intervene or take part on one side or another in what was
2 otherwise a dispute only between its shareholders nor that it should never bear its
3 own costs out of its own general funds were it to do so. However, he went on to
4 say that the onus would always be on those who sought to exercise the power (of
5 a company to intervene or take part on one side or another in a dispute between
6 shareholders and to bear its costs of doing so) to show that it was indeed being
7 used *bona fide* for the purposes of the company itself. In effect, the exercise of
8 the power in such a way will be taken to be abusive unless and until specifically
9 justified. Having reviewed the cases to which I have already referred, Lindsay J.
10 concluded that as a body the cases suggested to him that the test of whether such
11 participation (by the company in what is in essence a dispute between
12 shareholders) and expenditure in doing so is proper is whether it is “*necessary or*
13 *expedient in the interests of the company as whole*”. He went on to say:

14 *Fourthly, in considering that test the court’s starting point is a sort of rebuttable*
15 *distaste for such participation and expenditure, initial scepticism as to its*
16 *necessity or expediency. The chorus of disapproval in the cases puts a heavy*
17 *onus on a company which has actively participated or has so incurred cost to*
18 *satisfy the court with evidence of the necessity or expedience in the particular*
19 *case. What will be necessary to discharge that onus will obviously vary greatly*
20 *from case to case....*

21 *Finally on the law, I comment that I do not see this analysis as opening flood*
22 *gates such that the courts will be swamped with applications of the kind before*
23 *me. In the vast majority of section 459 petitions there will, I think, be no real*
24 *prospect of satisfying the tests I have mentioned and applications of the kind*
25 *before me will be so hopeless as not even to be embarked upon....*

26 The judge felt unable on the evidence before him to approve the active
27 participation of the company in the petition proceedings and therefore to give the
28 company the relief it was seeking. He said:

1 *On my view of the law, as I have said, such approval in advance is likely to be*
2 *given only upon proof by cogent evidence of the most compelling circumstances.*
3 *Mr. Moore argues that there can never be any such approval in advance. I see*
4 *that as too extreme. It could lead to directors who honestly and reasonably*
5 *believe, for good reason, that active participation was necessary in the*
6 *commercial interests of a company not sanctioning it for fear that at the end of a*
7 *long and expensive petition they might be made personally liable for massive*
8 *costs. I thus see a need for some mechanism, by analogy with Re Beddoe*
9 *applications, under which, when the evidence aspires to the standard I have*
10 *indicated, advance approval can be given. But the evidence so far adduced is, in*
11 *my judgment, far short of the necessary standard....*

12 I would comment in passing that the provisions of O.3,r.11 (2)(a) and (b) of the
13 CWR may perhaps be seen as a sort of mechanism of the kind referred to by
14 Lindsay J. in that they will enable determination by the court at any early stage in
15 the proceedings by way of directions of whether or not it is procedurally
16 appropriate and desirable, in the particular circumstances, for the company
17 concerned to participate in the petition proceedings or whether it should be treated
18 simply as the subject-matter.

19 28. The last of these cases to which I should refer is Arrow Trading & Investments etc
20 v Edwardian Group Ltd. etc. [2004] BCC 955. That case also arose out of a
21 petition under section 459 on the ground that payment of directors remuneration
22 was alleged to have become unfairly prejudicial to the petitioning shareholders.
23 The petitioners applied for an order restraining the company from meeting the
24 costs of participation in the proceedings out of its assets. According to the
25 headnote, Sir Francis Ferris said that the general rule was that a company's money
26 should not be expended on disputes between shareholders. In a case of the kind
27 before him there was an initial onus on the petitioners to show, first, that the
28 company was seeking to take part and, secondly, that the purposes for which and

1 the manner in which the company wished to take part were not of such an
2 exceptional nature as to justify a departure from the general rule. He said that in
3 that case there was no doubt that the company did indeed intend to take part in the
4 petition proceedings. I should say that in the present case before me also there
5 can also be no doubt about that; the Company is already taking an active part and
6 seeks to continue to do so by applying to dismiss the petition and by seeking a
7 stay in the alternative.

8 29. The head note in the Edwardian Group case further indicates that Sir Francis
9 Ferris went on to say that the essential question was whether it is right to say that
10 [the company] had a separate and independent position on the issue of [the
11 directors'] remuneration. He said that the essence of the petitioners' claims was
12 that the petitioners as shareholders had been unfairly treated as a result of the
13 decisions of the majority shareholders. Those decisions were essentially the
14 decisions of individuals, whether in their capacity as directors or as shareholders.
15 They were embodied in resolutions and the like which were technically
16 describable as "acts of the company", but the reality of the position was that what
17 was complained of was treatment resulting from a decision or series of decisions
18 made which caused [the company] to endorse what was said to be the unfair
19 remuneration policy. He said that it did not seem that [the company] had a
20 separate and independent position and it certainly did not seem expedient that it
21 should be allowed to take an active part in the proceedings simply for the purpose
22 of putting before the court the evidence of [two of the directors] in the manner
23 which they personally preferred. What [the two directors] wished to do was to

1 defend the [the company's] remuneration policy and thus, in substance, if not in
2 intention, support the position of the respondent shareholders. He said there could
3 be no objection to an order to restrain the company expending its money or assets
4 for the purpose of justifying the remuneration policy in this way and accordingly
5 an injunction was granted restraining the company from expending its money and
6 actively participating in the petition in the manner in which it had indicated it
7 wished to do.

8 That analysis and determination was accepted and relied upon by Blackburne J.
9 who said:

10 *Here, as Sir Francis Ferris pointed out, the company is a nominal although*
11 *essential defendant. It has no independent position in relation to the issue of*
12 *remuneration which lies between the petitioners on the one hand and the*
13 *shareholder respondents on the other alone. The fact that the so called*
14 *independent directors have a view on the matter is neither here nor there... ..*

15 30. In the case before me it was argued on behalf of the Company and Mr. Le Comte
16 that the English cases all referred to or related to petitions under section 459 of the
17 English Act and because such an application obviously resulted from a dispute
18 between the shareholders it was appropriate in such cases for the English Court to
19 consider whether the company concerned had an interest in the dispute and should
20 participate in the proceedings. It was submitted that there is no direct equivalent to
21 section 459 in this jurisdiction and that as a matter of longstanding practice it has
22 always been the company which is the respondent in a winding-up petition and
23 which is the appropriate party, if so advised, to defend such a petition. It was said
24 that it is not open to the IRC to, in effect, legislate substantively to change that.

1 31. I do not accept this argument. In my opinion the principle stated by Hoffmann J.
2 Re Crossmore Electrical and Civil Engineering Ltd. (*ibid*) and followed in the
3 English cases, that a company's money should not be expended on disputes
4 between its shareholders is, as he said, a general principle of company law. It is
5 not, in my understanding, confined to any specific type of application concerning
6 a company, although, of course, the application of the principle will depend on the
7 specific circumstances of the particular case. In fact not it is not correct that all of
8 the cases to which I have referred concerned, or solely concerned, petitions under
9 section 459. The first relatively modern authority, Re A & B.C. Chewing Gum
10 Ltd. (*ibid*) itself involved solely a petition for winding-up on just and equitable
11 grounds and it was common ground that there should be a declaration that
12 payment by the company of the cost of opposition to the petition amounted to a
13 breach of the articles of association of the company and a breach of the directors'
14 fiduciary duties. That the general principle applied equally to the position on a
15 petition only for a just and equitable winding-up was again expressly confirmed
16 by Harman J. in Re Hydrosan Ltd. (*ibid*) and again in Re a company (no 004502
17 of 1988, ex parte Johnson (*ibid*) in the passages from his judgments to which I
18 have referred above. The fact that the general principle has been applied in
19 England more recently mainly in the context of petitions under section 459 does
20 not in any way detract from the ambit of the general principle; in all probability it
21 simply reflects the increased attraction to shareholders who consider they have
22 been oppressed or prejudiced by the majority of taking advantage of the
23 availability of the "buy-out" provisions of sections 459 and thereby getting out of

1 the company with their money rather than simply seeking to wind-up the
2 company, which in most cases is probably not what they are really seeking to
3 achieve.

4 32. In Cayman we now have section 95(3) of the Law which enables this Court to
5 make, inter alia, “buy-out” orders as an alternative to a winding-up order but in
6 the context of and on the hearing of a petition for winding-up on just and
7 equitable grounds as pointed by Vos JA in the *Strategic Turnaround* case (*ibid*).
8 This new provision in our Companies legislation was perhaps introduced
9 following the comments of the Privy Council *In re CVC/Opportunity Equity*
10 *Partners Ltd. v Demarco Almedia* (2002) CILR 77. In fact, in the present case
11 before me, the petitioning shareholder, Mr. Heinen, has expressly stated through
12 his counsel that he does indeed seek to have the company wound-up in the
13 particular circumstances and is not seeking a “buy-out” or any of the other
14 alternative remedies now available on such a petition under section 95(3) of the
15 Law. For the reasons he gives he does not want his joint venture with Mr. Le
16 Comte to continue. He wants his business relationship with Mr. Le Comte
17 terminated and the “partnership” between them through the Company dissolved,
18 no doubt so he can make other arrangements for the development and commercial
19 exploitation of his invention and its associated technology which do not involve
20 Mr. Le Comte. However, for the reasons I have stated, I do not consider that the
21 fact that this is only a petition for winding-up on just and equitable grounds and
22 no more makes any difference to the applicability of the general principle. The

1 principle applies whenever the reality is that the dispute is between shareholders
2 and not a dispute with the Company itself.

3 33. I should mention in passing that I was also referred briefly by counsel for Mr.
4 Heinen to the approach taken in the English case of in *Re Bathampton Properties*
5 *Ltd.* [1976] 3 All ER 200 in which Brightman J. reviewed the costs incurred by an
6 insolvent company in unsuccessfully opposing a creditors winding-up petition
7 when the purpose of thereby delaying liquidation was of financial benefit to the
8 owners of the company. The point of the order in respect of costs which he made
9 was intended to ensure fairness as between those owners of the company on the
10 one hand and the general body of creditors on the other. However, as explained
11 by Collett JA in the Court of Appeal in *Re Allied Leasing & Finance Corporation*
12 *v Banco Economico S.A.* (2001) CILR 93 that decision was made when it was
13 considered that there was no jurisdiction in the English court to award costs
14 against non-parties to the action. Once that view was shown to be false such
15 *Bathampton* orders fell out of favour in that jurisdiction. The Court of Appeal in
16 the *Allied Leasing* (*ibid*) case held that such *Bathampton* orders could still be
17 made in the Cayman Islands in appropriate cases and on occasion in the past they
18 have been. However, the Judicature Law has now been amended and section 24
19 (3) of the 2007 Revision gives the court full power to determine by whom (my
20 emphasis) and to what extent the costs [of and incidental to all civil proceedings]
21 are to be paid. The position in this jurisdiction is therefore no longer any different
22 from the position in England and accordingly this Court has jurisdiction in its
23 discretion to award costs against anyone, whether or not a party, in appropriate

1 circumstances. Counsel for Mr. Heinen argued that this demonstrates that the
2 Court has a wide jurisdiction to award costs against whoever it considers
3 appropriate and that O.24,r.8 of the CWR is consistent with this also. It was
4 suggested by Counsel for Mr. Le Comte and the Company that it would be more
5 appropriate and fairer to determine the appropriate awards of costs as between the
6 various interested parties, namely Mr. Heinen, Mr. Le Comte and the Company,
7 after the hearing of the strike-out application and the petition. It was said that at
8 that time the Court would be in a much better position to determine on a fair and
9 just basis who should meet the costs of the proceedings and that the position
10 should not be fettered by directing now that the Company should not participate
11 actively in the petition proceedings or that the petition proceedings should be
12 treated as *inter partes* proceedings between the shareholders. It was submitted
13 that if the Company was allowed to continue to participate actively in the
14 proceeding as it has until now and pursued its application to strike-out,
15 alternatively to stay, the petition and thereby incurred costs as a result of such
16 participation, those costs could be refunded to the Company by Mr. Le Comte if
17 the petition was successful and the Court considered that Mr. Le Comte should
18 meet the Company's costs. Counsel for Mr. Heinen argued that that was
19 undesirable and potentially prejudicial to his client and to the Company if the
20 petition was successful. He contended that there was a risk that Mr. Le Comte
21 might not be able or willing to refund the Company its costs if Mr. Heinen was
22 successful and that the appropriate course, in accordance with the CWR, was to

1 decide now whether the Company should be allowed to actively participate in the
2 proceedings and incur costs by doing so.

3 34. In my view the arguments made on behalf of Mr. Le Comte in this respect are
4 misconceived. There is no application before the Court at this time for any order
5 as to costs or for determination as to which party should bear the costs of any
6 order on the petition or strike-out application at this stage. O.3,r.11 (2) and
7 O.24,r.8 do not envisage that the Court should give directions in that regard on the
8 hearing of this summons for directions. As would be expected, O.24,r.8 of the
9 CWR makes provisions in relation to the determination of costs on a
10 contributory's winding-up petition only once the petition has been determined.
11 Even then, O.24,r.8(2) only purports to state the general rules, which presumably
12 means that there may be exceptions to those general rules in appropriate
13 circumstances. Nor do I consider Mr. Le Comte's argument to be consistent with
14 the line of English authorities to which I have already made reference. In those
15 cases, at least insofar as made clear in the reports, the actual determination of final
16 liability for costs was not made in advance of the hearing of the petition
17 proceedings. It was simply determined whether or not the relevant company
18 should participate in the proceedings and/or meet the actual cost of defending the
19 proceedings out of its own resources. The argument, in my view, does not reflect
20 the true position here in which it is argued that the real protagonists are Mr.
21 Heinen and Mr. Le Comte, not Mr. Heinen and the Company. If that is a correct
22 analysis of the situation the Court is only being asked to determine at this stage

1 whether the Company should actively participate in the proceedings or whether it
2 is simply the subject-matter of the dispute.

3 35. In my judgment therefore, having regard to the jurisprudence which I have
4 endeavoured to outline, and having regard to the general nature of Part V of the
5 Law, and of sections 92 and 95 in particular, the IRC, in making the rules
6 comprising O.3,r.11(2)(a) and (b) and O.24,r.8(2) of the CWR, was indeed
7 making such rules for the purpose of giving effect to Part V of the Law and was
8 within its power under section 155(1) of the Law in doing so. Those Rules are
9 essentially procedural in nature and have clearly been made for the purpose of
10 giving effect to Part V of the Law, consistent, in particular, with as authoritative
11 line of relevant English authority in doing so.

12 36. Accordingly, it now falls for me to give such directions as I think appropriate in
13 the circumstances of this petition in respect of whether or not the Company is
14 properly able to participate in the proceeding or should be treated merely as the
15 subject-matter of the proceeding and whether the proceeding should be treated as
16 a proceeding against the Company or as an *inter partes* proceeding between Mr.
17 Heinen as petitioner and Mr. Le Comte, the other principal member of the
18 Company, as respondent. Incidentally, there is quite rightly no suggestion that the
19 Company should not be a respondent at all, only that it should remain as a purely
20 nominal and passive respondent so that it may be subject to any orders made
21 against or in relation to it.

1 37. In my opinion the issues raised in the petition, the supporting affidavits of Mr.
2 Heinen and Mr. Van Der Ven and the affidavits in response of Mr. Le Comte very
3 clearly demonstrate that this is in reality a dispute between Mr. Heinen and Mr.
4 Le Comte and not a dispute between Mr. Heinen and the Company itself. I have
5 already summarized the allegations and counter allegations made and the issues
6 raised. There is, in my assessment, in essence a joint venture between Mr. Heinen
7 and Mr. Le Comte for the development and marketing of TheWheel. The
8 structure which they put in place, of which the Company is an integral part,
9 reflects and implements that and amounts to a quasi partnership between them.
10 As I have said, Mr. Le Comte relies strongly on the First Shareholders Agreement
11 in particular in support of his position that he has done and is doing no more than
12 pursue his legal right vis-à-vis Mr. Heinen to manage and direct the Company.
13 While it is not for me to determine at this stage whether or not in the
14 circumstances that is a sound basis on which to strike-out or successfully oppose
15 the petition, it is clearly an argument made by and for the benefit of Mr. Le
16 Comte, and not by or for the benefit of the Company itself. I should perhaps note
17 in this context the well known statement of Lord Wilberforce in Ebrahimi v
18 Westbourne Galleries [1973] AC 360 at page 379, which was quoted again by our
19 own Court of Appeal in the Strategic Turnaround case (*ibid*) as support for the
20 proposition that the just and equitable ground can be invoked even where the
21 strict legal rights under the articles (a fortiori a shareholders agreement) have been
22 adhered to:

23 *The foundation of it all lies in the words “just and equitable” and, if there is any*
24 *respect in which some of the cases may be open to criticism, it is that the courts*

1 *may sometimes have been too timorous in giving them full force. The words are a*
2 *recognition that a limited company is more than a mere legal entity, with a*
3 *personality in law of its own: that there is room in company law for recognition of*
4 *the fact that behind it, or amongst it, there are individuals, with rights,*
5 *expectations and obligations inter se which are not necessarily submerged in the*
6 *company's structure. That structure is defined by the Companies Act and by the*
7 *articles of association by which the shareholders agree to be bound. In most*
8 *companies and in most contexts, this definition is sufficient and exhaustive,*
9 *equally so whether the company is large or small. The "just and equitable"*
10 *provision does not, as the respondents suggest, entitle one party to disregard the*
11 *obligation he assumes by entering a company, nor the court to dispense him from*
12 *it. It does, as equity always does, enable the court to subject the exercise of legal*
13 *rights to equitable considerations; considerations, that is, of a personal character*
14 *arising between one individual and another, which may make it unjust and*
15 *inequitable to insist on legal rights or to exercise them in a particular way" (my*
16 *emphasis).*

17 38. In the present case the Company does not have any independent interest in the
18 dispute between its two principal shareholders. It was argued that the Company
19 has an interest inasmuch as if the petition is successful it will be wound up and
20 ultimately cease to exist. However, I do not consider that to be an interest, if it is
21 properly described as an interest, which in the circumstances of this case is, on
22 analysis, that of the Company itself. This Company is, as I have said, in reality a
23 quasi partnership, and an integral part of a quasi partnership, between Mr. Heinen
24 and Mr. Le Comte. They are to be considered as the "partners". It is they who
25 have the interest in whether or not the Company is wound up and in reality it is
26 they, to respectfully adopt Lord Wilberforce's wording "who are individuals with
27 rights, expectations and obligations inter se which are not necessarily submerged
28 in the company's structure" and who are behind the Company. The same
29 argument was made and firmly rejected by Harman J. in *Re Hydrosan Ltd.* (*ibid*)
30 in a passage to which I have already referred. His comments are, in my opinion,
31 equally applicable to the present case and I respectfully adopt what he said. In the

1 present case it is equally true that if a winding-up order is made the Company will
2 be wound up and eventually dissolved but in this case also “the wrongs claimed
3 and the nature of the allegations are of wrongs by those in control of the Company
4 against a shareholder rather than by the Company itself in any real sense”. To
5 suggest, in the circumstances of this case, that the Company itself has some
6 separate and independent interest in the proceeding is quite artificial and ignores
7 the reality that what is in issue are the allegations of Mr. Heinen of wrongs by Mr.
8 Le Comte. There is no claim against the Company itself except in the most
9 technical and notional sense. The Company must, of course, remain as a nominal
10 respondent but it has, in my view, no relevant interest of its own in the
11 proceeding.

12 39. I have previously mentioned the proposal by Lindsay J. in Re a company no
13 001126 of 1992 (*ibid*), namely that the test of whether participation (by the
14 company) and expenditure (by the company) in the proceeding is proper is
15 whether it is necessary or expedient in the interest of the company as a whole.
16 Apart from the small number of minor passive non-voting investors, who, as I
17 have said, all anyway support Mr. Heinen’s petition for winding-up of the
18 Company, in this case, “the company as a whole” is in reality Mr. Heinen and Mr.
19 Le Comte. Lindsay J. also expressed the view that in considering this test the
20 court’s starting point is “a sort of rebuttable distaste for such participation and
21 expenditure, initial scepticism as to its necessity or expediency”. In his view
22 there is a heavy onus on a company to satisfy the court with evidence of the
23 necessity or expedience that it should participate and incur expenditure in the

1 particular case. In my opinion that heavy onus is not discharged by the Company
2 in the present case. On the contrary, like Mr. Nugee, QC in Milgate
3 Developments Ltd. (*ibid*), “on the evidence before me I can see no possible
4 justification for the [Company] incurring further expense in taking part in this
5 dispute”. While, as I have said, the Company requires to remain as a nominal
6 respondent, the only active participation it may possibly require is if it needs to
7 seek a validation order or orders to enable it to meet legitimate payment
8 obligations in the ordinary course of its business. Whether or not such ordinary
9 course of business would or should include its costs in connection with the New
10 York proceedings and or the litigation in the Netherlands and/or Luxembourg
11 may be an issue which, if not resolved may perhaps require to be determined by
12 the Court on another occasion. I make no comment in that respect. Mr. Heinen’s
13 counsel expressly stated that no discovery against the Company is being or will be
14 sought in these proceedings. Thus, apart from the possibility mentioned above,
15 there does not appear to any other need for any active participation in these
16 proceedings by the Company. In my opinion the Company is simply the subject-
17 matter of these proceedings which are in reality a dispute between its
18 shareholders, Mr. Heinen and Mr. Le Comte.

19 40. In the circumstances and in light of my views set out above I therefore direct that
20 the Company is not properly able to participate further in these proceedings and is
21 to be treated merely as the subject-matter of the proceeding, save insofar as the
22 Company may, if necessary, require to apply for any validation order pursuant to
23 section 99 of the Law pending the hearing of the petition. I also direct that these

1 proceedings shall be treated henceforth as *inter partes* proceedings between Mr.
2 Heinen as petitioner and Mr. Le Comte as respondent. The Company shall
3 remain formally as a respondent but only on a nominal and passive basis. I shall
4 make no direction at this stage in relation to the cost incurred by the Company in
5 relation to these proceedings to date since the date of presentation of the petition.
6 I consider it appropriate to leave that to be determined by the judge hearing the
7 petition. I also direct that the costs of this application are reserved until then. The
8 application to strike-out the petition, if to be persisted in, should be made by Mr.
9 Le Comte and not by the Company.

10

11 41. As agreed between the parties I also dismiss the summons dated 20th October 2009
12 and make the further directions pursuant to the CWR O.3,r.11(2) already agreed
13 between the parties. A formal order is to be submitted.

14

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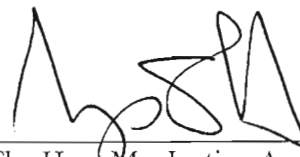
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18 Dated 11th November 2009

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The Hon. Mr. Justice Angus Foster
Judge of the Grand Court (Acting)

