IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 5 OF 2012

IN THE MATTER OF THE COMPANIES LAW (2011 REVISION)
AND
IN THE MATTER OF MERCHANTBRIDGE MANAGERS INC.

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 15TH AND 16TH JANUARY 2012 AND FEBRUARY 9 2012

Appearances: Mr. Anthony George Bompas QC (with him Mr. Tom Gentleman) instructed by Mr. Michael Mulligan of Harneys, for Mena Financial Inc. and Mr. Eric Le Blan.

RULING

1. By this ex parte application the applicant Mena Financial Inc. ("MENAFIN) seeks two types of injunctions, acting at the behest of Mr. Eric Le Blan, its principal and sole shareholder. The injunctions are sought in support of MENAFIN's petition to wind up the respondent company which is a Cayman Islands company ("ManCo."). MENAFIN brings its application without notice to ManCo or others interested in ManCo, because of Mr. Le Blan's attested belief that there would be a serious risk of injustice – as explained below – if notice were to be given of the application before it is heard.

2. The first of the injunctions seeks to prevent the board of ManCo, which is the management company of the MerchantBridge Group, from removing Mr. Eric Le Blan,

as director of nine special purpose companies ("SPVs") which are the investment holding companies of the MerchantBridge Group and which hold substantially all its assets. ManCo either holds the voting shares in the SPVs on behalf of the investors, or it was given control under provisions of the articles of the relevant SPVs, allowing it to appoint their directors. Mr. Le Blan is a director of the board of each of the SPVs. MENAFIN is said to hold substantial interests in the SPVs on behalf of Mr. Le Blan.

3. The second of the injunctions would restrain ManCo from disposing of its shares in MerchantBridge Holdings (Cayman) Ltd. ("MBTopCo.") – the Cayman Islands holding company through which the investment consortium, now comprised in the MerchantBridge Group, was constituted and through which their shares are held. This consortium includes the nine SPVs.

4. The petition for the winding up of ManCo has been filed but not yet served on ManCo by MENAFIN. The injunctions are thus intended to maintain the status quo until the petition can be heard or until further order of the Court or written consent of MENAFIN as the petitioner, in respect of the conduct to be restrained.

5. The petition to wind up ManCo is based on the just and equitable ground. It proceeds on the basis that ManCo, while a legal entity, is in essence a quasi-partnership of which Mr. Le Blan is not only a shareholder through his equity interests held through MENAFIN, but is also in essence a "partner" by virtue of the understanding reached between himself and the other original founders, Messrs Basil Al-Rahim, Colin Craig and Samir Arab. Later, by the terms of a 2007 Investment Management Agreement restating the terms of the quasi-partnership, the participants became Messrs Basil Al-Rahim, Abdulla Lahoud, Samir Arab and Mr. Le Blan, with Mr. Samir Arab having been subsequently bought out.

6. Following the loss of both Mr. Basil Al-Rahim and Mr. Abdulla Lahoud in an air accident in February 2011 – described by Mr. Le Blan as a "catastrophic loss" for the partnership arrangement – Mr. Le Blan became the only surviving shareholder, director and partner of ManCo.

7. He was, however, later purportedly removed as a director – in breach, he says of the partnership arrangement – by resolution passed by Mrs. Al-Rahim, Mr. Al Rahim's widow and other family members of Mr. Al Rahim; persons who had been appointed to the board of ManCo by Mr. Le Blan himself upon the passing of Mr. Al-Rahim.

8. This is the action which Mr. Le Blan cites as evidencing the destruction of the quasi-partnership asserted by him as having underlain the legal corporate identity of ManCo.

9. With his removal, says Mr. Le Blan; ManCo as an investment management company has been effectively paralyzed, because there remains no one else capable of carrying on its functions. The result is that those functions are not being performed. Effectively therefore, the substratum of ManCo as a management entity has failed and on that basis also, says Mr. Le Blan, it is liable to be wound up on the just and equitable ground.

10. Having considered the evidence in support of the petition to wind up and in support of this application, I am satisfied that the tests for the grant of the interlocutory injunctions are met.

11. First, on the tests as laid down in ***American Cyanamid Co. v Ethicon Ltd. [1995] A.C. 396*** - there is a serious issue to be tried. There is material that could quite arguably be found to evidence the existence of the quasi-partnership for which Mr. Le Blan contends as the basis for the formation of ManCo. His purported removal from the board of ManCo could be found to justify his loss of confidence and trust, such that a petition to

wind up on the just and equitable ground may be sustainable: ***Ebrahimi v Westbourne Galleries [1973] AC 360.*** Further, and as an alternative to winding up, the petition could arguably sustain an order that Mr. Le Blan's shares be bought out by those now interested in ManCo (and in the related Group entities) in the place of his original co-participants: see section 95 (3) (d) of the Companies Law (2011 Revision) ("the Law").

12. A question of jurisdiction to grant the petition has, however, been raised. It goes to the question of MENAFIN's standing to petition on the just and equitable ground while not itself being privy to the quasi-partnership on which Mr. Le Blan as an individual relies.

13. In light of the case law to be discussed below, the fact that the quasi-partnership involved certain of the individuals (notably Mr. Basil Al-Rahim and Mr. Le Blan himself as well as Mr. Arab and Mr. Craig) participating through special purpose companies (in Mr. Le Blan's case, MENAFIN), does not detract from the jurisdiction to grant a petition on the just and equitable ground citing the loss of confidence of one of the individual participants and the loss of substratum. The court should approach the position broadly, not being impressed in this case, by the separateness of identity of MENAFIN and of Mr. Le Blan as the individual participant. MENAFIN's entitlement as a member of ManCo is to have Mr. Le Blan participate as a director and manager; its own participation is through Mr. Le Blan.

14. The case of ***R&H Electric v Haden Bill Electrical [1995] 2 BCLC 280 (at 294F)*** is an example of this broad approach being adopted (by Robert Walker J, as he then was) in a judgment later approved by Lord Hoffman in his speech in ***O'Neill v Phillips [1999] 1 WLR 1092 at 1105G-H.***

15. The circumstances considered in ***R & H Electric v Haden Bill Electrical*** (above) are illustrative and involved a company set up by the petitioner ("P") with funding provided by P through another company the plaintiff ("R & H") and in which three other parties became participating shareholders (Mr. and Mrs. H, and W). Although various documents regulating the management of the company along the lines of a quasi-partnership were discussed and drafted, none was ever completed, as the parties decided to proceed on the basis of trust. The business prospered but relations between P, on the one hand, and Mr. & Mrs. H and W on the other, broke down. Mr. & Mrs. H and W determined to remove P from the chair of the board of directors. P issued proceedings seeking declaratory and injunctive relief to establish that he could not be validly removed from effective control of the affairs of the company. When, despite the institution of those proceedings, Mr. & Mrs. H and W proceeded to have the resolution for his removal passed at an emergency general meeting; P issued a petition seeking an order under section 459 of the Companies Act 1985 that the majority shareholders be ordered to purchase his shares; alternatively, that the company be wound up on the ground that it was just and equitable to do so. The petition went further relying, among other things, on the assertion that the Company had been formed on the basis of mutual trust and confidence and that the ouster of P from his entrenched rights as amounting to conduct of the company's affairs which was unlawfully prejudicial to P's interests pursuant to s.459.

16. The respondents, in resisting the petition contended that no prejudice had been caused to P in his capacity as shareholder and that if R & H had a complaint as loan creditor, it would be contrary to principle to treat P as if he were identical with R & H and allow him

to rely in his petition on any prejudice that had been caused to R & H; further, that the company should not be regarded as a quasi-partnership founded upon trust.

17. It was held, among other things, that:

> ***"When considering the capacity in which a petitioner complained for the purposes of s 459 of the 1985 Act, the court should take a broad view of what might properly be regarded as a petitioner's interest as a member of the company. That interest was not necessarily limited to the member's strict legal rights under the constitution of the company but, in the case of a small private company in which a member had ventured capital, might include a legitimate expectation that he would continue to participate in the management of the company and be a director unless for some good reason a change in management and control became necessary.***
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> ***In the circumstances, although P and R & H were separate legal persons, that did not exclude P from seeking relief under s.459 on the basis that R & H's loans to the company had been procured by P and formed an essential part of the arrangements entered into for the venture to be carried on by the company: moreover, all the parties regarded R & H as P's company and there was no indication that it made any difference to any of the majority shareholders whether the money came from P himself or from R & H.***
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> ***Further, there was no doubt that Haden Bill [the company] had been planned, formed and set up in business on the basis of mutual trust, at***

least between each of the pairs P and W; Mr. & Mrs. H; and P and Mr. H, and such reservations as might have existed between other combinations of the parties could not negate that conclusion. It followed that P had a legitimate expectation of being able to participate in the management of the company for at least as long as R & H remained a significant loan creditor and P was closely associated with R & H."

18. On the basis of that analysis, while P's petition to wind up the company was not granted, the respondents were nonetheless ordered as majority shareholders to buy out his shares without a discount and that R & H's loans to the company should be repaid as soon as reasonably possible.

19. A further illustration of the "broad approach" is to be found at paragraph [38] of the judgment in ***Atlasview Ltd. v Brightview Ltd. [2004] 2 BCLC 191.***

20. In the present case, the taking of a similarly "broad approach" would allow the Court to look through the corporate veil of ownership of MENAFIN to recognise Mr. Le Blan's real interest as a personal participant in the quasi-partnership that was ManCo (if so found to be the case by the Court).

21. And while the "unfair prejudice" relief as defined by s.459 of the Companies Act 1985 UK has no direct counter-part in the Law, the "just and equitable" ground is wide enough to found relief, where there is good reason for loss of confidence and trust leading to the breakdown of relationships underpinning a company formed and operated in the nature of a quasi-partnership: ***Ebrahimi*** (above) as applied in ***Strategic Turnaround 2008 CILR 447.***

22. For those reasons, I am satisfied that, as the vehicle through which Mr. Le Blan claims to have participated in the quasi-partnership which he says ManCo is, there is standing by MENAFIN to petition on the just and equitable ground for the winding up of ManCo. I am also satisfied that damages would not be an adequate remedy if ManCo's interests in MBTopCo were to be divested without due regard to their full value and without the intention of preserving and protecting MENAFIN's full interests in the shares of ManCo. I am told that there is a real risk that this could happen in the context of a settlement agreement that may be imminent in respect of current litigation involving the MerchantBridge Group and the Al-Rahim family interests, in respect of an entity called Bluewood Inc.

23. It is in respect of his position taken relative to the underlying dispute of the Bluewood proceedings contrary to the perceived Al-Rahim interests, that Mr. Le Blan has been told by Mrs. Al-Rahim that he has been removed as a director of ManCo. His apprehension that he would be removed as a director of MBTopCo and of the underlying investment SPVs, upon knowledge of the petition for winding up ManCo getting to the Al-Rahims and those interested with them, is therefore a reasonable apprehension. On the other hand, no immediate harm likely to arise to the Al-Rahim interests or to ManCo is apparent from the grant of the injunctions.

24. In all the circumstances, I am satisfied that the "balance of convenience" lies with granting the injunction to preserve the status quo until the petition can be heard; further adopting the well known principles settled in ***American Cyanamid Co. v Ethicon*** (above).

25. In any event, MENAFIN is prepared to and will be required to enter into appropriate undertakings in damages which, from the evidence presented; MENAFIN is indicated as having the assets to fulfill.

26. I also grant the directions sought for service of the petition and summons for directions for the petition, as well as a copy of this order, upon the 2nd respondent Nauf Limited out of the jurisdiction by way of substituted service. The evidence discloses Nauf Limited as a Lebanese entity through which the Al Rahim interests hold their shares in the Merchant Bridge Group and therefore as a necessary party to the petition proceedings. MENAFIN is entitled to serve the petition outside the jurisdiction upon Nauf Limited without the leave of the Court, pursuant to Grand Court Rules ("GCR") Order 102 Rule 16. As the petition is for the winding up of the Company under the Companies Law, the case falls under GCR Order 102 rule 4(d), and so Order 102 Rule 16 provides that it may be served on a shareholder of the Company without the leave of the Court. Service is to be deemed effective upon delivery by process server at the registered office of Nauf Limited at its known address in Beirut and by the transmission of the pleadings and injunctive order by email to the known address of Mrs. Al-Rahim, as chairman of Nauf Limited and that of her lawyer, Maitre Rabah Matar, with both of whom Mr. Le Blan attests to have had regular communications by email.

GRAND COURT CAYMAN ISLANDS

Hon. Anthony Smellie
Chief Justice

February 9 2012