

28/9/11



CAUSE NO: 41307/2009

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 FINANCIAL SERVICES DIVISION

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

7 AND IN THE MATTER OF FREERIDER LTD. (IN OFFICIAL LIQUIDATION)

10 BETWEEN: ADRIANUS JOHANNES HEINEN APPLICANT

13 AND: PIETER LE COMTE RESPONDENT

17 Coram: The Hon. Mr. Justice Angus Foster

19 Parties: For the Applicant: Mr. Jeremy Walton and Ms. Katie Brown of Appleby

21 For the Respondent: Mr. Guy Manning of Campbells

23 Application: Determined on the papers by request of the parties

26 RULING

28 1. By order dated 13<sup>th</sup> May 2010 I ordered that Freerider Ltd ("the Company") should  
29 be wound up on the just and equitable ground ("the Winding-Up Order") on the petition  
30 of the Applicant ("Mr. Heinen"), which was strongly contested by the Respondent ("Mr.  
31 Le Comte"). I also ordered that the costs of the petition be reserved to a future  
32 hearing.

34 2. By Summons dated 17<sup>th</sup> June 2010 Mr. Heinen applied for an order that his costs of the  
35 petition be paid by Mr. Le Comte on the indemnity basis. That application was also  
36 strongly resisted by Mr. Le Comte. After reviewing the affidavit evidence submitted in

1 support of and in opposition to the application, the parties' skeleton arguments and  
2 hearing the oral submissions of counsel (to all of which I shall refer in more detail below)  
3 on 25<sup>th</sup> June 2010, I ordered that Mr. Le Comte should pay Mr. Heinen's costs of the  
4 petition to be taxed, if not agreed, on the standard basis, (and not on the indemnity basis)  
5 ("the Costs Order").  
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7 3. Mr. Le Comte appealed to the Court of Appeal against the Winding-Up Order and Mr.  
8 Heinen cross-appealed against the Costs Order, contending that his costs of the petition  
9 should have been awarded on the indemnity basis and not the standard basis.  
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11 4. The appeals were heard by the Court of Appeal on 23<sup>rd</sup> and 24<sup>th</sup> August 2010 and  
12 immediately following the hearing the Court of Appeal dismissed Mr. Le Comte's appeal  
13 and said it would give its reasons for doing so at a later date. The Court of Appeal  
14 reserved its decision on Mr. Heinen's cross-appeal on costs. In its subsequent Reasons  
15 released on 4<sup>th</sup> August 2011 the Court of Appeal remitted one ground of Mr. Heinen's  
16 cross-appeal back to me for determination and on 31<sup>st</sup> August 2011 a Certificate of the  
17 relevant Order of the Court of Appeal was issued by the Registrar of the Court of Appeal  
18 in the following terms:

19 *"I HEREBY CERTIFY that an Order was made as follows:*

- 20  
21 1. *The application brought by Arjan Heinen dated 17 June 2010 for costs on the*  
22 *indemnity basis be remitted to Mr. Justice Foster so that he may consider*  
23 *whether his Order of 25 June 2010 [the Costs Order] should be varied in light*  
24 *of the allegation in paragraph 4(d) of Mr. Heinen's Amended Respondent's*  
25 *Notice dated 16 July 2010;*  
26  
27 2. *Mr. Le Comte pay Mr. Heinen's costs of the appeal, to be taxed forthwith on*  
28 *the standard basis if not agreed, save for those costs relating solely to Mr.*

1                                    *Heinen's cross-appeal against the Order of Mr. Justice Foster dated 25 June*  
2                                    *2010 (the "Cross-Appeal");*

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5                                    *3. The costs of the Cross-Appeal be reserved to the decision of Mr. Justice*  
6                                    *Foster on the Cross-Appeal as remitted to him by order of the Court."*  
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8    5.        The allegation in paragraph 4(d) of Mr. Heinen's Amended Respondent's Notice dated  
9                                    16<sup>th</sup> July 2010 referred to in paragraph 1 of the said order of the Court of Appeal (which  
10                                    was one of the four grounds on which Mr. Heinen relied in his Amended Respondent's  
11                                    Notice in support of his Cross-Appeal, the other three grounds having been rejected  
12                                    by the Court of Appeal) provided as follows:

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14                                    *(d)    The Appellant [Mr. Le Comte] has now disclosed in the New York proceedings*  
15                                    *correspondence between him and 733 Properties which demonstrates that the*  
16                                    *Appellant deliberately concealed the transaction with 733 Properties from the*  
17                                    *Respondent, [Mr. Heinen] and that the Appellant offered the security to 733*  
18                                    *Properties voluntarily in a deliberate attempt to ensure that if a winding-up Order*  
19                                    *was made, 733 Properties, rather than the liquidators, would have control of the*  
20                                    *Company's assets. As this correspondence was only disclosed on 28 June*  
21                                    *2010, the Respondent was unable to put it before the judge on 25 June 2010.*  
22

23    6.        Accordingly, the Court of Appeal has remitted back to me the application by Mr. Heinen  
24                                    for his costs of the petition on the indemnity basis so that I may consider whether the  
25                                    Costs Order should be varied in light of the allegation at paragraph 4(d) of Mr.  
26                                    Heinen's Amended Respondent's Notice as set out above. Since the correspondence  
27                                    referred to was apparently only disclosed on 28<sup>th</sup> June 2010, it was obviously not put  
28                                    before me at the hearing on 25<sup>th</sup> June 2010.  
29

1 7. In essence, therefore, the Court of Appeal has remitted to me the question whether the  
2 Costs Order should now be varied in light of this correspondence which I had not seen  
3 when making the Costs Order. I am now being asked whether I would have awarded  
4 Mr. Heinen his costs of the petition on the indemnity basis, rather than on the standard  
5 basis (as was the case), had I seen this correspondence on 25<sup>th</sup> June 2010 before I made  
6 the Costs Order.

7  
8 8. By agreement between the parties, as approved by myself, this matter has been dealt with  
9 “on the papers” and the parties submitted written submissions in accordance with an  
10 agreed timetable also approved by myself. In particular Mr. Heinen’s counsel submitted  
11 written submissions dated 30<sup>th</sup> August 2011 in support of his application for variation of  
12 the Costs Order, Mr. Le Comte’s counsel submitted written submissions in reply dated 8<sup>th</sup>  
13 September 2011 and Mr. Heinen’s counsel submitted further written submissions dated  
14 16<sup>th</sup> September 2011 in response to the written submissions by counsel to Mr. Le Comte.

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16 9. At the hearing on 25<sup>th</sup> June 2010 Mr. Heinen supported his application for indemnity  
17 costs with the First Affidavit of Ms Katie Brown of Appleby, Mr. Heinen’s attorneys,  
18 sworn on 16<sup>th</sup> June 2010 (“the Brown Affidavit”).

19  
20 10. The Brown Affidavit expressly stated that it was made in order to inform the court of  
21 certain matters which had come to light since the Winding-Up Order, which were of great  
22 concern to Mr. Heinen and which were being relied on in support of Mr. Heinen’s  
23 application for indemnity costs. The Brown Affidavit then set out in considerable detail

1 how Mr. Le Comte, after the presentation of the winding-up petition in March 2009 and  
2 prior to the Winding-Up Order, without the consent or even the knowledge of Mr.  
3 Heinen, had granted security over the entirety of the Company's assets to a New York  
4 company, 733 Properties Inc., owned by a friend of his, by way of two Promissory Notes  
5 ("the Security Arrangement"). The Brown Affidavit set out the circumstances in which  
6 this had come to Mr. Heinen's attention and made reference to certain exhibited  
7 correspondence from the New York attorneys representing 733 Properties Inc., all in  
8 support of the statement in the affidavit that this appeared *"to be a cynical attempt to*  
9 *subvert the very purpose of the winding-up and to ensure that the Company's assets*  
10 *remain under Le Comte's control or that of his associates, rather than under the control*  
11 *of the Liquidators appointed by this court"*.

12  
13 11. The Brown Affidavit also referred in some detail to the two Promissory Notes which Mr.  
14 Le Comte had procured the Company to enter into constituting the Security Arrangement  
15 in furtherance of what was stated to be Mr. Le Comte's *"attempt to ensure that if [a*  
16 *winding-up order] was made, the assets of the Company would fall into the hands of 733*  
17 *Properties Inc. rather than those of the Liquidators appointed by the Court, and that*  
18 *the Liquidators would not be able to have conduct of the on-going litigation in New York*  
19 *and elsewhere on behalf of the Company. Mr. Le Comte did not disclose the security*  
20 *interest or that the winding-up order constituted an event of default [under the*  
21 *Promissory Notes granted by the Company] despite direct questioning from his own*  
22 *counsel [at the hearing of the Petition] that should have elicited this information"*. These

1 and related allegations relating to the Security Arrangement made up the most substantial  
2 part of the Brown Affidavit.

3  
4 12. In opposition to Mr. Heinen's application on 25<sup>th</sup> June 2011 Mr. Le Comte also submitted  
5 an affidavit (his Eleventh Affidavit) sworn on 21<sup>st</sup> June 2010 in which he acknowledged  
6 that he had caused the Company to enter into the Security Arrangement and that Mr.  
7 Heinen had deliberately not been informed of it.

8  
9 13. Counsel for Mr. Heinen and counsel for Mr. Le Comte both submitted skeleton  
10 arguments for the hearing on 25<sup>th</sup> June 2010. Mr. Heinen's skeleton argument rehearsed  
11 the evidence given in the Brown Affidavit concerning the Security Arrangement and  
12 emphasized and relied heavily on that evidence in support of Mr. Heinen's application for  
13 his costs of the Petition on the indemnity basis.

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15 14. In his oral submissions at the hearing on 25<sup>th</sup> June 2010 counsel for Mr. Heinen argued  
16 strongly that there was what he described as a sophisticated scheme by Mr. Le Comte by  
17 which, without informing Mr. Heinen, the entire assets of the Company were intended in  
18 the event of a winding-up order to pass to a third party company in New York owned  
19 by a friend of Mr. Le Comte and which, counsel contended, was intended to defeat the  
20 purpose of a winding-up. I recollect the forcefulness of these submissions well (and have  
21 confirmed my recollection from my own notes of the hearing) and I was left in no doubt  
22 that the Security Arrangement was the principal basis upon which Mr. Heinen contended  
23 that he should be awarded his costs of the petition on the indemnity basis.

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15. In the circumstances, I do not consider that the production to me of the correspondence between Mr. Le Comte and 733 Properties Inc., which was subsequently disclosed in the New York proceedings, as referred to in paragraph 4(d) of Mr. Heinen's Amended Respondent's Notice, would have significantly added to the weight or persuasiveness of the argument or have affected my eventual decision to award Mr. Heinen his costs of the petition in the standard basis. The Security Arrangement was, as I have said, very strongly emphasized to me as the principal reason for an award of costs to Mr. Heinen on the indemnity basis and I clearly recollect giving anxious consideration at the time to whether I should, in all the circumstances, exceptionally award costs to Mr. Heinen on the indemnity basis rather than the standard basis in accordance with the usual rule prescribed by the Companies Winding-up Rules, O.24, r 8(2). However, ultimately I did not consider that there were sufficiently exceptional and special circumstances relevant to the issues arising on the hearing of the Petition to take the award of costs to Mr. Heinen out of the usual rule. It did not seem to me that the conduct of Mr. Le Comte in relation to the Security Agreement was directly relevant to the ultimate issue arising on the hearing of Mr. Heinen's petition, namely whether it was just and equitable in the circumstances that the Company should be wound-up.

16. As set out in my Reasons for the Winding-Up Order and as the Court of Appeal agreed in their Reasons for dismissing Mr. Le Comte's appeal against the Winding-Up Order, the principal questions on the hearing of the Petition were, in summary, whether there had been a relationship of mutual trust and confidence between Mr. Heinen and Mr. Le

1 Comte; whether that relationship, as reflected in the corporate and partnership structure  
2 which was set up, of which the Company was part, was for these purposes to be treated  
3 as if it was in effect a joint venture/quasi-partnership between them in the sense  
4 identified in the relevant authorities; whether that relationship had broken down  
5 irretrievably; whether there was a justifiable loss of confidence in Mr. Le Comte's  
6 management of the Company due to a lack of probity on his part; whether the  
7 substratum of the Company had failed; whether in all the circumstances, applying  
8 equitable principles to the facts, it was just and equitable that the Company should be  
9 wound-up and whether any of the alternative remedies provided for in the Companies  
10 Law were appropriate in the circumstances. It did not seem to me that Mr. Le Comte's  
11 conduct in procuring the Company to enter into the Security Arrangement was or would  
12 have been directly relevant to my determination of these questions. In fact, in the event,  
13 the Official Liquidators, who were appointed following the hearing of the Petition,  
14 subsequently successfully applied for and obtained a declaration from the court that the  
15 Security Arrangement was void under Section 99 of the Companies Law (Ruling dated  
16 16<sup>th</sup> September 2010). In my view it was at that time, namely after the appointment of  
17 Liquidators by the court, that the Security Arrangement, and the circumstances  
18 surrounding it, was clearly directly relevant.

19  
20 17. I therefore considered on 25<sup>th</sup> June 2010 that in the circumstances costs should be  
21 awarded to Mr. Heinen in accordance with the general rule, namely on the standard  
22 basis. I am satisfied that, even if the correspondence referred to at paragraph 4(d) of Mr.  
23 Heinen's Amended Respondent's Notice dated 16 July 2010 had been put before me at



1 the hearing on 25<sup>th</sup> June 2010, I would not have exercised my discretion any differently  
2 from the way in which I did in making the Costs Order. I was made very well aware by  
3 the Brown Affidavit, by the skeleton argument submitted on behalf of Mr. Heinen and by  
4 the oral submissions of his counsel that the Security Arrangement and its apparent  
5 intention was being relied on heavily as the principal ground for an order for costs on the  
6 indemnity basis. I gave full consideration to this and I do not accept that production at  
7 the hearing on 25<sup>th</sup> June 2010 of the correspondence concerned would have made any  
8 significant difference to my view of the matter or the conclusion which I reached.  
9 Accordingly, I refuse the application by Mr. Heinen as subsequently remitted to me by  
10 the Court of Appeal and I decline to vary the Costs Order.

11  
12 18. As is clear from paragraph 3 of the Registrar's Certificate set out at paragraph 3 above,  
13 the Court of Appeal also ordered that the costs of Mr. Heinen's cross-appeal should be  
14 reserved to my decision on the cross-appeal as remitted to me by the Court of Appeal.  
15 Having now declined to vary the Costs Order on Mr. Heinen's application, I can see  
16 no good reason why costs should not follow the event in the usual way. The issue  
17 remitted to me by the Court of Appeal was whether I consider that the Costs Order should  
18 be varied in light of the allegation in paragraph 4(d) of Mr. Heinen's Amended  
19 Respondent's Notice. As it seems to me, that is a discrete question which I have now  
20 determined in the negative, notwithstanding the written submissions submitted on behalf  
21 of Mr. Heinen. Accordingly, I consider that Mr. Heinen should pay Mr. Le Comte's  
22 costs of Mr. Heinen's cross-appeal and his costs of and incidental to the determination

1 of the issue remitted to me by the Court of Appeal, such costs to be taxed, if not agreed, on the  
2 standard basis.

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5 Dated 28<sup>th</sup> September 2011

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A handwritten signature in black ink, appearing to read "A. Foster".

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