IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO.: 119 OF 2021 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF AL NAJAH EDUCATION LIMITED

IN OPEN COURT

Appearances:	Mr James Eldridge, Mr Justin Naidu and Mr Daniel Mills of Maples and Calder (Cayman) LLP for the Petitioners
	Mr Tom Lowe QC and Mr Michael Wingrave of Denton's for the Respondents
Before:	**The Hon. Justice Parker**
Heard:	**14th July 2021**
Draft Judgment Circulated:	**4th August 2021**
Judgment Delivered:	**9th August 2021**

HEADNOTE

Application to wind up company- and to convene an EGM and amend its Articles- ss92 and 95 of Companies Law (2021 Revision)- Interim application to appoint joint provisional liquidators-section 104 (2) Companies Law- prima facie case a winding up order is likely to be made-necessity to prevent dissipation of assets, misconduct and mismanagement-oppression of minority shareholders-discretion.

JUDGMENT

Introduction

1. The Petitioners (H-NSC Ltd and Tisco International Trading FZC) apply by way of summons dated 11 May 2021 seeking the appointment of joint provisional liquidators (JPL's) over Al Najah Education Limited (the Company) and an Order that the Company is wound up under section 92 (e) of the Companies Act (2021 Revision) on the just and equitable ground.

2. The Company was incorporated in the Cayman Islands on 17 October 2011. Its CEO is Mr Raza Khan (Khan) who joined the Company in 2017. The Company has investments in schools and nurseries in the Middle East and South East Asia.

3. The Petitioners hold 5,739,899 of the shares in the Company having purchased these shares for US$10,000,000, which according to the Petitioners represents a 7.87% shareholding in the Company.

4. The Petition is, according to the Petitioners, also supported by a further 37 of the Company's shareholders, representing approximately a further 11,070,086 (approximately 15%, together with the Petitioners approximately 23%) of the Company's shares, having provided the Petitioners' Chief Investment Officer, Mr Porus Satwe, with letters of support. Mr Satwe has filed an affidavit in support of the relief sought[1].

5. By its Amended Petition, the Petitioners are also seeking orders: pursuant to sections 95(3), (4) and (5) of the Companies Act (2021 Revision) ("Companies Act") that (amongst other things) the Company be directed to convene an extraordinary meeting of its shareholders ("EGM") and that the Company's articles of association ("Articles") be amended so as to facilitate the effective removal of the Company's current management and board, and to give control of the composition of board going forward to the Company's non-management affiliated shareholders; or alternatively, that the Company be wound up on just and equitable grounds pursuant to section 92(e) of the Companies Act.

The Petitioners' case

6. Mr James Eldridge appeared for the Petitioners. He argued there has been a proven fraud against certain key persons involved in the management of the Company, which involved (in effect) theft from Company and the forgery of Company documents in an effort to cover up that fraud; there has been a concerted and ongoing effort by the current members of the Company's board of directors ("the Board") to conceal that fact from the Company's shareholders, and to not investigate (let alone pursue) obvious claims the Company very likely has; and there has been separate and very recent conduct by the Board, involving the repurchase of shares and a miscalculation of an incentive allocation, which demonstrates a further pattern of improperly protecting and enriching the Company's management at the expense of its shareholders.

[1] *Satwe 1 9 June 2021*

7. Therefore, there has been a justifiable loss of trust and confidence in the Board; and the conduct of the Board evidences the need for an immediate investigation into the Company's affairs by independent liquidators (or a properly independent board of directors) for the benefit of its shareholders.

8. Mr Eldridge submitted: the Company's key (and until recently) former directors (the Impugned Directors[2]) and its former investment manager (Al Masah)[3] have been found, by the Dubai Financial Services Authority ("DFSA") at first instance and by the DFSA's Financial Markets Tribunal ("FMT") on appeal, to have engaged in very serious dishonesty-based offences directly concerning the Company.

9. In passing I would note that these proceedings were extremely thorough .The proceedings took five years to resolve. The DFSA commenced its investigation against Mr Dash and Mr Singhdeo on 5 November 2015.It extended its investigation by adding Al Masah and Mr Lim on 12 April 2016. On 26 September 2019 Decision Notices were issued to the Impugned Directors and Al Masah. On 27 October 2019 the parties appealed to the FMT. The appeal decision was published on 27 October 2020.[4]

10. Mr Eldridge submitted that the improper conduct was to the detriment of the Company and its shareholders and for the benefit of the Company's then investment manager Al Masah (which was under the common control of those directors). Mr Dash, Mr Singhdeo and Mr Lim set up the former investment manager, Al Masah.

11. In essence, the fraud involved the improper taking of placement fees by Al Masah (orchestrated by the Impugned Directors) in connection with investments being made into the Company.

12. The Impugned Directors then falsified Company documents to conceal their fraud. The entire size of the fraud is not known, but Mr Eldridge submitted that it is in excess of US$10 million.

13. As a result of the FMT's findings, the Impugned Directors have been (amongst other things) prohibited from holding office in or being an employee of a regulated entity in Dubai. Shortly after the time that the DFSA's investigation was extended to Al Masah, in July 2016 the Company replaced Al Masah with another entity controlled by the same individuals.

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[2] *Mr Shailesh Dash, Mr Nurapidtya Singdheo and Mr Don Lim Jung Chiat (Lim) who, until recently, were directors of the Company.*

[3] *Al Masah Capital Limited (Al Masah)*

[4] *The FMT comprised David Mackie QC,Ali Malek QC and Patrick Storey*

14. Mr Eldridge relied upon a finding by the FMT that this new entity[5] was simply the "phoenix" of Al Masah.[6] Mr Eldridge submitted that the only conceivable reasons for such a change are that: (a) it was an attempt to give the Company's shareholders (and prospective investors) the false impression that the investment manager had, in substance, changed in an attempt to "whitewash" Al Masah's conduct; and (b) allow the Impugned Directors to continue to benefit through the new 'phoenix entity' without being concerned with the consequences of the impact of the investigation on Al Masah.

15. Mr Eldridge submitted that notwithstanding the serious findings of fraud against key members of the Company's board, the Company has not taken any steps to inform the Company's shareholders of the appeal decision of the FMT and it has taken further steps to obfuscate the truth when communicating with the Company's shareholders with respect to the nature and bases for the presentation of the Petition. This concern is exacerbated by the fact that the Board, when prompted by the Petitioners, has steadfastly maintained its refusal to inform the Company's shareholders of the findings of the FMT with respect to the impugned Directors.

16. Notwithstanding the investigations by the DFSA having commenced in 2015, and the Board being aware of the conduct of those directors resulting in the sanctions imposed from at least 2017, the Company has taken no steps to investigate the impact of the conduct of those key directors or hold the Impugned Directors or Al Masah accountable for their improper conduct.

17. Instead, the Company has utilised its resources to conduct an "investigation", which Mr Eldridge submitted should more appropriately be characterised as 'a poorly executed smear campaign' against the Petitioners in a misguided attempt to defend the Petition.

18. Despite the Company attempting to give the impression that the members of the Board are independent from the Impugned Directors, and that those directors are no longer involved in the Company's affairs, Mr Eldridge submitted this cannot be true.

19. He argued that it is clear both from their recent conduct and from the available evidence that the majority of the members Board are not in fact independent of the Impugned Directors, but rather that the true focus of the Board remains on protecting the Independent Directors notwithstanding the clear and unequivocal findings of improper conduct of the Impugned Directors by the FMT.

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[5] *Regulus Capital Limited (Regulus)*
[6] *FMT §146*

20. Al Masah was the Company's manager until July 2016 and, at all material times, controlled by the Impugned Directors. It was placed into voluntary liquidation on 19 August 2020 and official liquidation on 15 October 2020. The Impugned Directors are the founding members of Al Masah and Regulus and were instrumental in their operations[7]. The Impugned Directors are each designated as "Key Employees" in the Articles. Mr Lim resigned as a director of the Company on 25 February 2021, Mr Singhdeo on 18 May 2021 and Mr Dash on 6 June 2021.

21. Finally, the Company has recently presented the Petitioners (and all its shareholders) with an offer to buy back a portion of the Petitioners' shares. However, the calculation of the proceeds of that buyback was grossly incorrect and is misleading in a way which has resulted in an improper windfall to the Company's now Manager (again, an entity formed by the Impugned Directors).

22. The Petitioners are seeking the appointment of JPLs to the Company to prevent further mismanagement by the Board pending the hearing of the Petition.

23. Importantly, the appointment of provisional liquidators will also, he submitted, allow a proper, fulsome investigation to be conducted into the impact of the Impugned Directors' conduct on the Company so that the shareholders are properly informed of the true position – a task that the Board have singularly failed or refused to achieve on their own.

The Company's case

24. Mr Tom Lowe QC appeared for the Company. In summary he submitted that the Company had sub contracted the raising of funds to Al Masah and accepted that funds were raised without disclosing relevant information, as found by the DFSA and FMT. He also accepted the findings that in raising those funds Al Masah and its directors acted dishonestly.

25. Those Impugned Directors were not however acting in their capacity as directors of the Company as is clear from both the DFSA Decision and the FMT Decisions. Although the DFSA Decision and the FMT's ruling were serious, it is important in the context of an application for urgent relief to appoint provisional liquidators over the Company, to put the matter into perspective.

[7] *Satwe 1 §§17-21*

26. There are no, as erroneously suggested by the Petitioners, regulatory decisions against the Company at all, although certain of its directors (i.e., the Impugned Directors) were affected. Those directors have resigned from the Company and Regulus.

27. Nor is the Company currently raising funds from investors. It has not engaged a placement agent. Regulus is not a placement agent and only took over Al Masah's role as manager.[8] The Company is currently in the disposal cycle of its investments.

28. The Company had a board in which the Impugned Directors were outnumbered at all material times by independent board members.

29. The Company disclosed the placement fees to its auditors who recorded them in the audited accounts. It was Al Masah and the Impugned Directors who falsified the financial statements.

30. The conduct towards the prospective investors by Al Masah is incapable itself of amounting to gross misconduct in the affairs of the Company.

31. As to the alleged cover up the Company denies that the DFSA and FMT Decisions were not made known to its investors:

(1) The Company took its own advice[9]

(2) The DFSA decision was discussed at its AGM on 15 April 2020, was addressed in the minutes which were then circulated [10]

(3) The Petitioner was in fact aware of the DFSA's Decision in February 2020 [11]

32. The Petitioners further allege that the Company's board failed to take steps following the DFSA Decision and the FMT Decision to initiate recovery proceedings against the Impugned Directors or Al Masah. As to this:

(1) The Company does not accept that such recoveries are due to it from the Impugned Directors or Al Masah who had contractual rights to charge these fees. The fraud was

[8] *Khan 1 § 28*
[9] *Khan 1 §74*
[10] *Khan 1 §74 and RK1 pp1173-1176.*
[11] *Satwe 1 § 39.*

to conceal them from investors – the investors would have such claims against the Impugned Directors and Al Masah.

(2) Given that the investors would have alternative remedies there would be no basis for a winding up[12].

(3) The Company has a good and profitable on-going business.

(4) The buy-back complaint is based on an argument of construction of the Articles which is debated by the attorneys in correspondence. Leaving aside the question whether it is correct it does not justify a winding up order. All the investors had a free choice whether to accept the buy back. Over 90% the investors accepted the offer and waived their rights. There cannot possibly be an allegation that this was a mala fide calculation. If the Petitioners were dissatisfied with the offer, they had a right to reject, and some did. They have a perfectly good alternative remedy by seeking a declaration as to the correct interpretation of the Articles. Disagreement does not justify a winding up.

(5) The Company has agreed to publish the DFSA and FMT decisions in full in its evidence in these proceedings.

Decision

Approach to the legal tests

33. An Order to appoint provisional liquidators as an interim remedy during winding up proceedings against a company must always be viewed by the court as a serious step[13]. The potential adverse consequences for the company are in most cases likely to be considerable, both in relation to its commercial operations and its business reputation more generally.

34. The power to appoint provisional liquidators is a discretionary one[14]. In relation to the balance of justice that needs to be weighed between a petitioner and a company, the discretion should

[12] *Anglo-Greek Steam (1886) LR 2 Eq 1 p5 Re Diamond (1879) 13 Ch D 400 at 408, Re Kitson [1946] 1 AERT 435 at 441 and French on Applications To Wind Up Companies, 4th Edition, p709.*

[13] As a very recent pronouncement of this principle see *ICG I (unreported 4 August 2021 Doyle J) §36*

[14] *Re Highfield [1985] 1 WLR 149*

be exercised in accordance with the overriding principle that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

35. The application is made before all the facts have been found[15], but requires the likelihood, on the basis of a case established by allegations supported by evidence which have not been disproved at the interim stage, that the petitioner would obtain a winding up order on the hearing of the petition[16].

36. In addition, such an order must be necessary to prevent one or more of the risks set out in section 104 (2) (b), namely the dissipation or misuse of the company's assets, the oppression of minority shareholders, or the mismanagement or misconduct of the company's affairs.

37. There must be evidence to show that there is a serious risk that one or more of these wrongs may well occur if provisional liquidators were not appointed[17]. This court has recently emphasised that to discharge the burden of establishing such a risk requires clear or strong evidence as to necessity[18].

Was there a fraud in the conduct of the affairs of the Company?

38. Having reviewed the evidence available on this application, I have formed the following factual conclusions in relation to this critical issue, albeit on an interim basis.

39. As stated in the Petition[19], disclosure to prospective investors indicated that Al Masah would charge a 2% management fee per annum from the capital of the Company, and the investor 20% on any returns exceeding an internal rate of return (IRR) of 10%, provided that such charge would not result in an investor receiving less than a 10% IRR[20].

40. However, Al Masah, now in liquidation, acted under contract as both an investment manager for the Company *and* as a placement agent[21].

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[15] Revenue v Rochdale Drinks [2011] BCC 419 at 447 [109]
[16] Re Asia Strategic (unreported Segal J 30 April 2015) and Re Grand State (unreported 8 April 2021 Parker J)
[17] Ex parte Nyckeln [1991] BCLC 539 in relation to assets.
[18] CW Group (unreported Parker J 2 August 2018 ;and Grand State unreported 28 April 2021)
[19] §§ 8 and 9
[20] §5 of DFSA decision notice 25 September 2019(Charles Flint QC on behalf of the DFSA)
[21] Khan I § 29

41. The Company and Al Masah entered into a Placement Fee Agreement dated 1 December 2011 pursuant to which Al Masah would assist the Company to raise equity capital at a premium to its par value and the Company would pay Al Masah a placement fee of up to 10% of the capital raised from new investors, payable when the Company received the subscription payment from a new investor[22].

42. The existence of this agreement together with the scale and payment of these fees was deliberately concealed from the Company's potential investors by Al Masah and the Impugned Directors. They took steps to conceal financial information in the Company's audited annual reports for 2013 and 2014 which would have disclosed the payment of substantial placement fees by the Company[23].

43. The Placement Fee Agreement dated 1 December 2011 has not itself been called into question by the DFSA and FMT decisions. The essence of the decisions concerned misleading and deceptive conduct by Al Masah and the Impugned Directors by deliberately concealing from investors the payment of the placement fees.

44. The Impugned Directors also issued misleading financial reports as directors of Al Masah, but there is no evidence the Company manipulated accounts or misled investors. The placement fees were recorded in the Company's accounting records as related party transactions[24] which was confirmed by the Company's auditors[25].

45. An analysis of the reasoning in the DFSA and FMT decisions shows that Al Masah, not the Company, was engaged in fraudulent promotion. The Company was not a party to the DFSA and FMT decisions.

46. Al Masah was controlled by the three Impugned Directors who were also directors of the Company, but who were only ever a minority within the Company's board at the material time[26]. Al Masah and the Company were separate legal entities. The fraudulent conduct of Al Masah is not attributable to the Company and cannot be said to be a fraud in the conduct of the affairs of the Company. There is no evidence that the Board connived or were complicit in the

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[22] *DFSA decision notice § 20 and FMT § 48*
[23] *§6 and §§ 30 and 31 of DFSA decision notice*
[24] *DFSA decision notice § 31*
[25] *Unqualified accounts were signed off by the Company's auditors Ernst and Young (2011-2014) and BDO (2014-2019)*
[26] *Khan 1 § 38*

conduct of Al Masah or the Impugned Directors. There is no evidence that the Board had any knowledge of the fraud at the relevant time.

47. In fact the Company can be characterised as a victim of the fraud. In short, there is no finding of fraud against the Company or in the conduct of its affairs by the Dubai regulatory authorities.

48. The findings were that Al Masah deliberately concealed the existence of placement fees during the fundraising process from prospective investors and the Impugned Directors were involved in sending altered financial statements to clients of Al Masah who had invested in or were considering investing in the Company. The thrust of the DFSA and FMT decisions was that the dishonest conduct was in concealing these payments when the funds were promoted to potential investors.

The Company at present

49. The facts relating to the DFSA and FMT decisions occurred before 2015 when the investigation began. There is no evidence of any on-going mismanagement at the Company or risk of future mismanagement.

50. The board of the Company currently comprises eight directors who are a mix of shareholder representatives, representatives of Regulus, and independent directors[27]. I note that the Petitioners have alleged that many of the independent directors have historic and current connections to companies the Impugned Directors are linked with and are not truly independent[28]. These matters cannot be resolved at an interim hearing. On the available evidence and in view of the written evidence submitted by five of these directors personally, I am satisfied that they are independent and well aware of their fiduciary obligations.

51. There is no evidence that the Company is currently being run in a way that makes it necessary to address the risk of dissipation or misuse of the Company's assets or oppression of minority shareholders or mismanagement or misconduct in its affairs. No real questions have been raised as to the integrity of the Company's management and there is in my view no need for an investigation. I should add that the need for an investigation is not enough by itself to satisfy the statutory test under s.104(2). The court only has jurisdiction to appoint JPLs if it is necessary

[27] *Khan 1 §26*
[28] *Satwe 2 §31-40 and Appendix 1*

to prevent one or more of the risks set out[29]. There needs to be strong evidence to show that such an order is necessary for that purpose.

52. The Impugned Directors are no longer directors of the Company or Regulus[30]. The Company appears on the face of the evidence to be well run and successful in all the prevailing circumstances. It appears to be solvent and profitable and enjoys the support of its employees and customers[31]. There is no substantial criticism made of the current board[32].

53. Importantly, it is currently in the last phase of its business which involves the Company realising its assets, widely invested geographically, in an orderly fashion. It is expected that the process will take 12 to 18 months to reach optimal market value. There is no complaint made about how the assets are being realised or the plan regarding the exit process, which in the opinion of the CEO would be put at serious risk by the appointment of provisional liquidators[33].

Is a winding up order likely to be made[34] based on prima facie evidence which has not been disproved?

54. Based on the current evidence, the court is not likely to conclude that it is just and equitable to wind the Company up. This is of course only a provisional view at this stage because the court is not trying the petition.

55. The lack of confidence expressed by the Petitioners must be based upon the conduct of directors regarding the company's business. There is no objectively justifiable evidence of a lack of probity in the conduct of the company's affairs[35].

56. The dishonest mismanagement by its agent Al Masah and the Impugned Directors took place over six years ago. That matter has been exhaustively examined by the relevant regulatory authorities in Dubai, sanctions imposed on the culpable parties, and a new Board and management have been put in place.

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[29] *Orchid Developments 2012 (2) CILR Note 14 § 5 Jones J*
[30] *Khan 1 §27 and § 60*
[31] *Khan 1 §§4-17*
[32] *5 of whom have filed affidavits in support of the Company's case that they are independent and decisions of the Board are made collectively.*
[33] *Khan 1 §§18-22*
[34] *Rochdale drinks (ibid)§ 77*
[35] *RCB v Thai Asia [1996] CILR 9*

57. In view of the contractual position between the Company and Al Masah in relation to the payment of placement fees, which was not called into question in the Dubai regulatory decisions, there is no good case against the Company for failing to investigate and pursue the Impugned Directors and Al Masah. The CEO of the Company is of the view that the misconduct caused no loss to the Company or its shareholders .The placement fees were contractually due and it was the concealment of these fees from investors which led to the findings and sanctions, not the validity of the agreement itself[36].

58. It follows from these findings in relation to the present management and governance at the Company that I also find no grounds for the alternative relief sought concerning an EGM and the proposed amendment to the Articles.

Failure to disclose the Dubai regulatory proceedings and the buy back

59. I accept Mr Lowe QC's submissions in relation to the alleged failure to properly disclose to shareholders matters relating to the DFSA and FMT proceedings, which have now been overtaken by the Company agreeing to disclose the relevant details in full . There appears from the minutes to have been only limited disclosure at the AGM on 15 April 2020 whilst the FMT appeal was pending[37]. Mr Dash is recorded to have said that the proceedings had no direct bearing on the business or operations of the Company. This statement was not sufficiently transparent, as Mr Lowe QC accepted. It is not however a basis for appointing JPL's now when there is no on going threat to the Company and its shareholders.

60. I also accept Mr Lowe QC's submissions that the complaints relating to the 'buy back' can be pursued, as to the correct interpretation of the Articles, by way of declaration if necessary. I also note that that the board took appropriate professional advice at all material times[38].

Dispute concerning publication of material connected with Petition

61. After the hearing, the parties filed written submissions on 29 July 2021 and 2 August 2021 concerning the basis on which the Company should publish details relating to the Amended Petition to shareholders. Section C 6.3 of the FSD Users Guide provides that copies of the petition and affidavits are to be sent to registered shareholders by '…*whatever method or communication is normally used in the ordinary course of business'.*

[36] *Khan 1 §40*
[37] *Khan 1 §74-75*
[38] *Khan 1 §87*

62. The Company proposes that there should be a data room set up that would hold all of the documents connected with and arising from the Petition which would be available to all shareholders. This seems to me to be a sensible suggestion given the likely volume of material.

63. It seems reasonable to me that the Petition and FMT decision if attached to an e mail inviting access to the data room should be balanced by the Company's evidence from Khan 1. It may now be sensible to also attach this Judgment, but I will leave the parties to decide upon that.

64. An issue has arisen as to whether the contact details for Mr Satwe should appear on the face of the invitation email or should be available from the Company's investor relations department on request.

65. The Company object to including Mr Satwe's contact details on the face of the invitation e mail for several reasons including some relating to data protection issues. The Company also says it is unwilling to give Mr Satwe an artificial platform to obtain further support against the Company.

66. I am satisfied that the Company has given an undertaking to the court that it will make available all relevant material in the Petition to shareholders and that it intends to comply with that undertaking. The Company is not obliged to provide Mr Satwe's contact details on the face of any invitation e mail. It will not be in breach of the FSD Guide if it does not do so. I note that the Company has agreed to provide Mr Satwe's details on request without demur.

For the reasons given above the application for the appointment of provisional liquidators is refused.

THE HON. JUSTICE PARKER
JUDGE OF THE GRAND COURT