

1 IN CHAMBERS
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS



3
4 CAUSE NO: 465 OF 2006

5
6 IN THE MATTER OF THE COMPANIES LAW (2004 REVISION)
7 AND IN THE MATTER OF THE GRAND COURT RULES (ORDER 102)
8 AND IN THE MATTER OF ANSBACHER (CAYMAN) LIMITED

4/12/06

9
10 BEFORE: The Honourable Madam Justice Levers

11 APEARANCES:

12 Mr. Andrew Jones, QC for the applicants
13 Mr. Emil Georges, QC with Ms. Laura Hatfield for the opposition
14 Mr. Martin Burke and son, the Beneficiaries

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17 Heard: 24th November 2006
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JUDGMENT



20 Levers, J.

22 This is a hearing of the Petition of Ansbacher (Cayman) Limited for an order
23 pursuant to Section 16 of the Companies Law (2004 Revision) confirming
24 the proposed reduction of its share capital.

26 By a Resolution signed by the one shareholder, the company was authorized
27 to reduce its share capital.

1 The power to reduce is found in Article 48.2: the Company is a wholly
2 owned subsidiary of a long-standing financial group (Ansbacher). The net
3 asset value is 4.7 million US dollars. The share capital was 10 million
4 dollars. More than half the share capital is not represented by the assets.

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6 As a matter of background it is an agreed fact that the company has ceased
7 to carry on business, it has no premises and no staff. It is no longer
8 generating any income or incurring any trade liabilities. All future
9 administrative expenses will be paid by its parent company. There are two
10 reasons for the reduction of the share capital.

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12 (1) US \$5,267,710 million dollars of its capital have been lost
13 permanently in the ordinary course of business and is no longer
14 represented by available assets;

15 (2) The remaining capital of 4,732,290 million dollars is in excess of the
16 company's needs. If the reduction is approved, the amount in excess
17 of US \$500,000 thousand dollars will be returned to the shareholder
18 by way of dividend. The reason for the application is clearly that
19 there is no commercial justification for leaving that substantial

1 amount of capital in the Company now that it has ceased to carry on
2 business.

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4 The issue before me however is whether or not the company's creditors
5 interest is being treated fairly.

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7 **The Law**

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9 The Companies law permits limited liability companies to reduce their
10 issued and paid up share capital in three ways:

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12 (1) Pursuant to Section 14 (1) (b) and/or (c) by passing a special
13 resolution;

14 (2) Pursuant to Section 37 (1) by redeeming part of its issued shares; or

15 (3) Pursuant to Section 37 (2) by buying back its own shares. Provided

16 in each case the company's Articles authorizes it to do so. In the case

17 of (a) under section 14 (1) (b) and/or 14 (1) (c) a reduction effected by

18 special resolution takes effect only if confirmed by an order of the

19 Court made under section 16. This company is empowered to reduce

20 its capital by Article 48 (2).

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2 **The Companies Creditors**

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4 The evidence before me is that the company appears to have no other
5 creditors to be taken into account except for the contingent creditor who is
6 being heard in this application (the Burke Family Trust). This trust is
7 represented by Emil George, QC at this hearing. The Court must proceed on
8 the basis that it is a bona fide claim which the Burkes have against the
9 company and that the company has denied all liability. It would appear that
10 the alleged cause of action arose in 2002. No Writ has been issued to-date.
11 The amount claimed is £5.1 million pounds sterling plus interest and cost.
12 This sum represents the whole of the Burke's alleged loss. The allegation is
13 that the investment manager is liable for the whole or part of the same loss
14 with the result that the company has a potential right of contribution. I agree
15 with the submissions of Mr. Jones on behalf of the company that I should
16 take this claim at face value and not adjudicate or inquire into the merits of
17 the claim for purpose of this application.

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19 **The Company's Submissions**

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1 The Company submits that the interests of the Burke Family Trust are
2 properly safe guarded. The company's ability to pay will not be impeded by
3 the reduction of the capital, as it will be covered by professional indemnity
4 insurance. Further counsel submits that the company will not be incurring
5 any further liability, as all administrative costs will be covered by the parent
6 company. It is perfectly straightforward for a company to rely on the
7 professional indemnity insurance. He therefore submits that I must accede
8 to this application and dispense with the list of creditors. Ansbacher is now
9 being managed by Appleby Trust and the company states that it is Appleby's
10 duty to notify the creditors. It is worthy of note that Appleby Trust has
11 managed the company now for some two years and they have received no
12 claims. Of course, if they had in fact received claims it would be their duty
13 to pursue them on behalf of the creditors. Mr. Hue Moses who represented
14 Appleby Trust was in Court and he put forward no evidence or allegations of
15 any claims being made against the company. Through Mr. Jones he advised
16 the Court that he had written to every client about the purchase and that in
17 fact no response had been received (I note however that he does not say that
18 he had written to every client as to the reduction of the share capital). For
19 these reasons Mr. Jones submits that there should be no further
20 advertisement.

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2 Mr. Emil George, QC on behalf of the objectors i.e the Burke Family Trust
3 submits that insurance companies are notorious for clinging on to any slight
4 problem to avoid payment. He further submits that the Court does not know
5 the law governing the insurance policy and therefore there has not been full
6 and frank disclosure. He submits that Ansbacher has not established that his
7 client's interest as contingent creditors will not be adversely effected by the
8 proposed reduction of share capital. He concedes that he has made a
9 mistake in the written submissions and that it is not sum of \$9,500,000.00
10 million dollars that is being repaid but in fact \$4 million approximately. The
11 claim he says is simply this, that as a result of Ansbacher's negligence his
12 clients lost substantial monies in investments. The reality and the factual
13 position is that Ansbacher has denied liability because for various reasons
14 including the fact that it was not the investments manager. A company
15 called Newton was the investments manager.

16

17 Mr. George's submissions can, I think be succinctly put by quoting his
18 written submissions:

19

1 "The Burke Beneficiaries are contingent creditors
2 of Ansbacher for the sum of GB£5.1 million
3 approximately (without any provision for cost).
4 The claim therefore greatly exceeds the capital
5 which will be left following the proposed
6 reduction taking effect. At present Ansbacher has
7 paid up share capital of US\$10 million and as such
8 has sufficient assets to meet the Burke
9 Beneficiaries' claim, if any liability is established.
10 The proposed reduction in share capital to
11 US\$500,000 would mean that Ansbacher would
12 not have sufficient assets to meet the Burke
13 Beneficiaries' claim, if any liability is established.
14 Perhaps surprisingly, the Ansbacher group is not
15 providing a guarantee of the liabilities of its
16 subsidiary notwithstanding that the group is taking
17 out all of the material value of that subsidiary."

18
19 He then goes on,
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1 “Ansbacher has stated at paragraph 11 (b) of
2 Erickson Affidavit as well as in the MMA
3 Affidavit that any liability that is established by the
4 Burke Beneficiaries against Ansbacher will be
5 provided for due to the fact that Ansbacher has the
6 benefit of professional indemnity insurance which
7 will more than cover the amount of Burke’s
8 Beneficiaries’ claim.”

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10 Several matters arise out of this submission:

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12 (1) Ansbacher paid up share capital of US\$10 million is not covered by
13 the assets. Admittedly, the limited assets will no longer be available
14 through the company if the share capital reduction is taken into effect.

15
16 He then goes on to say, we do not know the governing law of the policy and
17 that we can’t tell that the company will therefore be bound. In my view it
18 matters not what the governing law of the policy is, as long as this court has
19 evidence that the policy does cover a claim such as the Burke’s claim. The
20 Court has been advised that Lloyds are the insurers that cover this policy and

1 I agree with Mr. Jones, in his submissions that as long as there is a valid
2 insurance policy, it matters not what law governs it. A further submission
3 from Mr. Emil George is that if the company defaults in the premium in
4 2007, then the Burkes will be prejudiced. That the Court should only be
5 satisfied in this matter by a guarantee from the insurance company that in the
6 event that liability is established they will pay the damages. As I have said
7 this is a commercial matter, therefore commercial realities must assist the
8 court in coming to a reasonable decision. The reality is that it would be
9 extremely unreasonable to expect an insurance company to give such a
10 guarantee. Its also matters not as long as there was an existing valid policy
11 at the material time if the company defaults in the payment of the premium
12 in the future.

13

14 Mr. George also submits that the Court must call for the policy and look at it
15 in order to assess whether the insurance company would be bound. I can do
16 no more than the company's attorneys have done and that is come to a
17 conclusion either that the policy is valid and binding or that it is not. But
18 that is purely the opinion of one legal mind. The merits have to be fully
19 aired at the time in litigation if the insurance company feels it is not bound.
20 The call for a policy, therefore, in my view, will not assist me or necessarily

1 prevent any prejudice to the Burkes in the future. Mr. George's submits that
2 it is necessary for Ansbacher to show that there are no circumstances in
3 which the insurance cover would not provide the coverage for the Burke
4 Beneficiaries in the event of their claim succeeding. He says anything short
5 of an absolute assurance on that question leaves the Burkes Beneficiaries
6 exposed as a result of the proposed reduction. Finally, he makes the point
7 that even on Ansbacher's own evidence it is unclear whether the capital after
8 the proposed reduction will be sufficient to cover its deductibles under the
9 insurance policy. Three persons are being sued, the Company, and two
10 individuals. Each individual is liable for a reduction of \$25,000 and the
11 company \$250,000. Admittedly, the \$250,000 deductible and the liquidity
12 of the company of US\$478,496.37, is very close to the reduced share capital.
13 However the company will have no liabilities, the parent company having
14 taken over all its administrative costs, including legal fees. Mr. Georges
15 submits that it is the company who has failed to show that there are special
16 circumstances as he has failed to establish that it has assets to cover its
17 proveable liability to the Burkes Beneficiaries, as well as paying out millions
18 to its shareholders.

19

1 As in all matters of this nature, it is in the discretion of the Court to allow
2 such a reduction. The court must look at several factors including
3 competing interests. As contingent creditors the Burkes have a right to be
4 heard and have been heard. Mr. Emil George on their behalf concedes that
5 the court must be satisfied on a balance of probability. In order to do so the
6 Applicant Company has put before the Court sworn evidence of the
7 Financial Controller and the Legal Director of the Ansbacher group. The
8 Legal Director's evidence is of some importance he says, "*Given that the*
9 *claim is asserted on their behalf by a reputable firm of English solicitors, I*
10 *recognise that the Court will simply accept it as a bona fide claim and*
11 *proceed on the assumption that the beneficiaries of the Burke Family Trusts*
12 *are contingent creditors who have asserted a claim of approximately £5.1*
13 *million plus costs, being the amount specified in their letters before action.*
14 *The limit of Ansbacher (Cayman) Limit's professional indemnity insurance*
15 *for the 2002/3 policy year is far greater than the amount claimed. This*
16 *amount (plus the most generous allowance for costs) is substantially less*
17 *than the limit of liability under the primary layer of coverage. In other*
18 *words, the amount claimed is so small that there would be no possibility of it*
19 *breaking through primary limit and giving rise to a claim under the excess*
20 *layer policy, unless there are other claims against other Ansbacher Group*

1 *companies which were first notified to the insurance during the 2002/3*
2 *policy year and have either been settled,(thus using up part of the coverage)*
3 *or remain outstanding. I did in fact notify certain troublesome practice*
4 *matters to the professional indemnity insurers on behalf other Group*
5 *companies. However, these matters were resolved in the ordinary course of*
6 *business without developing into actual claims. It follows that it is*
7 *impossible for the claim asserted on behalf of the Burke Family Trusts*
8 *against Ansbacher (Cayman) Limited to go through the primary layer of*
9 *coverage.” He goes on, “In conclusion, I am wholly satisfied that Ansbacher*
10 *(Cayman) Limited will be indemnified by its primary layer insurers in the*
11 *event that the Burke’s claim is successful.”*

12 This evidence remains unchallenged. It has neither being subjected to cross-
13 examination (Mr. Mayhew-Arnold was in court and could have been cross-
14 examined), nor has it been contradicted by any evidence filed on behalf of
15 the objectors. Mr. Emil George when confronted with this unchallenged
16 evidence complained that he did not have enough time to respond as certain
17 pieces of evidence were filed and served on him three days ago. This I
18 might add was at the end of the hearing of the application, only when
19 confronted on the question of unchallenged evidence. It is a fact that Mr.
20 George knew as far back as sometime in early to middle November that the

1 concerns were based around the insurance policy. Indeed, on 17th November
2 2006, the Burke's Family attorneys Abshore Goddard wrote to Maples and
3 Calder setting out their concerns. The question of the share capital has been
4 canvassed for some time and it is in my view a poor excuse to say that the
5 delay prevented them from asking the Court for permission to cross examine
6 or file any further evidence. Even when the application started there was no
7 question of an application for cross-examination. In the mater of ING
8 Securities (Japan) Limited (2004-2005) CILR at page 308, this Court held
9 that the following should be taken into account before the Court exercises its
10 discretion in granting the capital reduction:

11 (1) The shareholders were treated equally in this matter, there is only one
12 share holder who has passed and signed a special resolution;

13 (2) The reduction proposals were properly explained. The evidence
14 before the court is that the explanation is full and clear;

15 (3) The creditors were safeguarded. The only issue in this case is whether
16 by this capital reduction, the Burke Family Trust would be
17 safeguarded. In any event, even if there were no capital reduction, the
18 company would look to the insurers to settle this claim. There is
19 evidence before me that the primary layer of the insurance policy will

1 cover the liability. Ansbacher group is a huge long standing financial
2 entity and to ask that company to disclose its insurance policy to
3 satisfy the Court would reveal confidential information pertaining to
4 the other members of the group. It is in my view unreasonable and
5 uncalled for in these circumstances. The evidence from Mr. Mayhew-
6 Arnold stands unchallenged and the Court is mindful of the fact that it
7 comes from an attorney and director of the group and therefore should
8 be credible evidence;

9 (4) That the reduction was for a discernable purpose, in this case, the
10 purpose is understandable and is desirable. The loss must be regarded
11 as permanent because the company has ceased to carry on business
12 and there is an intention that it is to be liquidated in due course. Also
13 having ceased to carry on business, it does not need a capital of more
14 than \$500,000. It serves no commercial purpose to have excessive
15 capital locked up in a dormant subsidiary. Litigation has not yet been
16 commenced some four years after the cause of action arose and one is
17 unaware of when the liability will be announced or known if at all. In
18 those circumstances, I find that the Court is apprised sufficiently to
19 feel satisfied on a balance of probabilities sure enough that the Burkes
20 will be covered adequately by the indemnity insurance and I therefore

1 grant the order for the confirmation of the reduction of the share
2 capital.

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4 It follows therefore that the question of the list of creditors must now be
5 addressed. The evidence before me is that there are no other creditors but three.
6 Two of which have been settled and the last one being the Burkes Family
7 Trust is still outstanding. In those circumstances, I shall order that the list of
8 creditors be dispensed with.

9

10 The question of advertisement must also be addressed by the Court. This
11 company has ceased to do business. Appleby's have been in charge for the
12 last two years. They have not heard from any of the creditors. There is only
13 one shareholder who is well aware of what is happening. It is established
14 and unchallenged that the company did business locally albeit there are
15 foreign investors. But commercial sense and common sense dictates that in
16 circumstances such as this, where Appleby's have not heard from anybody
17 for the last two years and the company only did business locally, that the
18 advertisement should be local. The evidence before me is that the company

1 advertised in the Gazette and in those circumstances, I consider it reasonable
2 to order that there should be no further advertisement published.

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4 Dated this 4th day of December 2006

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6 Judge of the Grand Court

