

9/3/2004

IN THE GRAND COURT OF THE CAYMAN ISLANDS - Civil

CAUSE NO. 509 OF 2003



IN THE MATTER OF **KOSMO CORPORATION**
AND IN THE MATTER OF SECTION 94 (d) OF THE
COMPANIES LAW (2003) REVISION



Ruling delivered by
The Honourable JUSTICE HENDERSON
on the 9th day of March 2004,
in George Town, Grand Cayman.

APPEARANCES:

MR. R. Gardner: For the petitioner
MR. M. Terziano: For the respondent

Ruling

1 TUESDAY, MARCH 9, 2004

2 RULING

3 **HENDERSON, J.**

4 This petition for the winding up of Kosmo
5 Corporation is presented by Mr. Duncan Ritchie.
6 The petition does not clearly and unequivocally
7 allege that he is a contributory to the company
8 but proceeds largely on the assumption that he
9 is. The company itself takes the position that
10 he is not.

11 In light of this situation, the Chief
12 Justice, by order made November 18th, 2003,
13 directed that there be a trial in open court of
14 a preliminary issue to determine whether or not
15 the petitioner has *locus standi* to bring the
16 petition on the basis of being a "shareholder
17 of the company". His *locus standi* would really
18 have to depend, because of the terms of the
19 Companies Law (2003 Revision), on whether or
20 not he is a "contributory" within the meaning
21 of that Law.

22 Standing to bring a winding up petition is
23 governed by section 96 of the Companies Law
24 which in its material parts reads as follows:
25

Ruling

1 "Any application to the Court for the
2 winding up of a company shall be by
3 petition which may be presented by
4 the company or by any one, or more
5 than one, creditor or contributory of
6 the company or by all or any of the
7 above parties together or
8 separately."

9 In my view, anyone bringing a petition
10 under section 96 on the footing that he is a
11 contributory or, alternatively, a creditor,
12 should clearly say so in the petition itself.
13 In other words, the justification for standing
14 to bring the petition should be alleged
15 unequivocally in the originating process.

16 "Contributory" is a defined term. Section
17 89 of the Companies Law says this:

18 "The term 'contributory' means every
19 person liable to contribute to the
20 assets of a company in the event of
21 the same being wound up under this
22 Law and, for the purpose of any
23 proceedings for determining the
24 persons who are to be deemed
25 contributories and of any proceedings
prior to the final determination of
such persons, includes any person
alleged to be a contributory."

26 The first part of the definition must be
27 understood as meaning that a "contributory"
28 includes every person who would be liable to

Ruling

1 contribute to the assets of the company if the
2 sum he has agreed to contribute has not yet
3 been fully paid up, as well as those whose
4 agreed contributions are fully paid up.

5 Mr. Ritchie is an investment banker of
6 considerable experience. Kosmo was, in its
7 early stages at least, personified by
8 Mr. Chwoon Ang Lim, a corporate and banking
9 solicitor of considerable experience.

10 Kosmo had an ambitious and apparently
11 somewhat novel business plan. It intended to
12 market in China, and elsewhere, coffee in a way
13 that that product had not previously been
14 presented to the public.

15 Mr. Lim was enthused about the prospects
16 of Kosmo. In February, 2002, he encountered
17 Mr. Ritchie, who was a business acquaintance,
18 and invited him to dinner. Just the two of
19 them were present. This dinner, which was held
20 towards the end of February 2002, is the
21 occasion upon which Mr. Ritchie says an
22 enforceable contract was entered into. He says
23 that the company, in the person of Mr. Lim at
24 this stage, agreed unequivocally and
25 unconditionally to issue shares to Mr. Ritchie

Ruling

1 in return for Mr. Ritchie's promise to devote
2 his energies to the management of Kosmo and to
3 take a leading role in it.

4 Mr. Ritchie says that, agreement having
5 been reached during the dinner, the subject was
6 thereafter never discussed.

7 Mr. Lim denies that any enforceable
8 contract was reached on that or any other
9 occasion. He says there was an understanding
10 between the two men; in effect, an agreement to
11 agree. He says that Mr. Ritchie's commitment
12 to the company was always conditional.

13 Mr. Ritchie was investing a large proportion of
14 his personal net worth and mortgaging his
15 residence to do so. Mr. Lim says that
16 Mr. Ritchie had not decided whether this would
17 be an equity purchase or simply a loan to the
18 company, and did not wish to decide that until
19 after he had been given a management role which
20 would permit him to exercise a large measure of
21 control over Kosmo's affairs.

22 Mr. Lim also says that the understanding
23 involved fundamental conditions on Kosmo's
24 part. The company (in the person of Mr. Lim)
25 did not wish to commit unequivocally to the

Ruling

1 issuance of shares to Mr. Ritchie until after
2 it was satisfied that his efforts would benefit
3 the company and that trust and confidence,
4 which the company proposed to place in
5 Mr. Ritchie, was justified. Mr. Lim says that
6 the involvement of Mr. Ritchie in the affairs
7 of the company was a "trial and error" period.
8 There was no agreement on how long this trial
9 would go on for. He says that Mr. Ritchie
10 never succeeded in gaining the trust and
11 confidence of Mr. Lim and Mrs. Fion Lin,
12 another leading member of management.

13 At the time of the dinner, Mr. Ritchie was
14 employed at S.G. Asia. He was in the process
15 of leaving that organization, so he agreed to
16 work part time for Kosmo Corporation until the
17 severance could be completed. Apparently he
18 had a reduced workload at S.G. Asia, which
19 enabled him to devote part of his energies to
20 Kosmo.

21 Until November 2002, Mr. Ritchie was
22 spending part of his time working on the
23 establishment of Kosmo Corporation and at the
24 same time arranging the termination of his
25 employment at S.G. Asia.

Ruling

1 There is no memorandum or letter
2 evidencing the February dinner discussion.
3 Both witnesses were, for the most part,
4 credible when cross-examined on its terms.
5 There is no independent evidence of what each
6 said to the other during dinner.

7 This state of the evidence does not permit
8 a conclusion on the balance of probabilities
9 that an enforceable agreement was reached on
10 that occasion. I find it was, at best, as
11 Mr. Lim argues, an understanding or an
12 agreement to agree.

13 That, however, is not the end of the
14 analysis.

15 Within the next eight weeks or so after
16 the dinner, Mr. Ritchie provided the sum of
17 \$175,000 US to the company. If he was, as he
18 says, making an equity investment, this would
19 have represented \$700,000 of the seed shares
20 issued to the founding shareholders.

21 As I have found, he was not a shareholder
22 or entitled to be registered as a member during
23 this period of time as there had not yet been a
24 meeting of the minds between Kosmo and
25 Mr. Ritchie. His subscription was still viewed

Ruling

1 on both sides as conditional during this trial
2 period. He had not yet committed his full time
3 efforts to the company and Mr. Lim had not yet
4 made any unconditional commitment to him.

5 In November and December of 2002, the
6 position changed. Mr. Ritchie resigned from
7 S.G. Asia and took up full-time duties with
8 Kosmo on November 18th, 2002 as its chief
9 financial officer.

10 Around November 25th, 2002, a share
11 certificate was prepared. Mr. Lim was the sole
12 director of Kosmo at that time. The share
13 certificate is dated November 25th, 2002 and is
14 certificate number 3. It is in the name of the
15 petitioner and it is for 700,000 shares. That
16 certificate was signed by Mr. Lim, who
17 describes himself on it as a director and
18 secretary of the company. Mr. Ritchie also
19 signed it, ostensibly as a director, although
20 there is little concrete evidence that he had
21 been appointed to that position.

22 The original certificate was delivered to
23 Mr. Ritchie, apparently by covering letter
24 dated December 10th, 2002. That letter was
25 signed by Mr. Lim; he describes himself in the

Ruling

1 letter as company secretary.

2 There was nothing accidental or
3 unconditional about this act, despite Mr. Lim's
4 evidence to the contrary. He now says the
5 issuance of the certificate "was more in the
6 nature of the shares being reserved for the
7 petitioner" pending agreement on Mr. Ritchie's
8 ultimate role with the company. I noted
9 earlier that Mr. Lim was an experienced
10 corporate solicitor. He was the sole director
11 of the company at the time, by the general
12 acquiescence of the shareholders.

13 By placing a signed share certificate in
14 the hands of Mr. Ritchie, I am of the view that
15 Mr. Lim crossed a legal Rubicon. He must have
16 known that at the time. A reasonable and
17 objective observer would conclude nothing from
18 this other than a binding and enforceable
19 agreement between the company and Mr. Ritchie
20 to make Mr. Ritchie a contributory and a
21 member. That observer would readily infer that
22 the company no longer had any reservations
23 about Mr. Ritchie's performance. He had been
24 working for them part time for some six months.

25 Mr. Ritchie, by accepting the certificate

Ruling

1 and by signing it, indicated his own lack of
2 reservations about making an equity purchase
3 rather than advancing a loan to the
4 corporation.

5 The earlier conditions and reservations
6 which each party harboured and sought to impose
7 on the share subscription were swept away.
8 What was conditional became unconditional on
9 November 25th or, at least, by December 12th.
10 I am satisfied that Mr. Ritchie became a
11 contributory to Kosmo at that point.

12 The share certificate was and is prima
13 facie evidence of Mr. Ritchie's status as
14 someone entitled to be registered on the
15 Register of Members. He was entitled to rely
16 upon that evidence not only against third
17 parties but against the Company itself.

18 An alternate way of looking at the
19 situation is this - a valid share certificate
20 creates a rebuttable presumption of membership
21 in the Company. The evidence I have heard and
22 described does not succeed in rebutting that
23 presumption. There is no documentation
24 contemporaneous with the issuance of the share
25 certificate which seeks or purports to impose

Ruling

1 any condition upon its issuance.

2 These findings are sufficient to dispose
3 of the preliminary issue.

4 Under section 112(1) of the Companies Law,
5 if a winding up order is made, I am then
6 required to settle a list of contributories and
7 to rectify the register as needed.

8 These findings of fact are sufficient to
9 entitle Mr. Ritchie to rectification with
10 respect to the shares represented by the
11 certificate.



12 I have decided not to make further
13 findings regarding Mr. Ritchie's claims in
14 connection with the second and third tranches
15 of shares purportedly issued by Kosmo. That
16 question can and should be addressed when it is
17 necessary to do so.

18 My order is an order declaring that
19 Mr. Ritchie has *locus standi* to proceed with
20 the petition as a contributory of \$175,000
21 representing 700,000 shares.

22

23

Henderson, J.

24

THE HONOURABLE JUSTICE HENDERSON

25