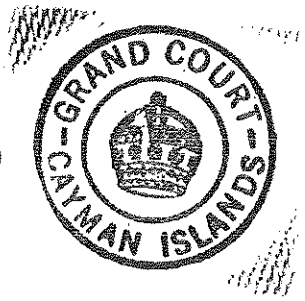
IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Cause No. FSD 18 of 2012 (AJJ)

The Honourable Mr. Justice Andrew J. Jones QC
In Open Court, 7th – 11th, 18th and 31st January to 2013



IN THE MATTER OF THE COMPANIES LAW (2012 REVISION)

AND IN THE MATTER OF TRIKONA ADVISORS LIMITED

BETWEEN:

(1) ARC CAPITAL LLC
(2) HAIDA INVESTMENTS LTD **Petitioners**

-And-

ASIA PACIFIC LIMITED **Respondent**

Appearances:

Mr. Ross McDonough and Mr. Guy Cowan of Campbells on behalf of the Petitioners

Mr. Anthony Akiwumi of Stuarts Walker Hersant on behalf of the Respondent

JUDGMENT

Introduction and the Parties

1. This is a contributories' winding up petition presented on 13th February 2012 in respect of Trikona Advisors Limited ("Trikona") by ARC Capital LLC and Haida Investments Ltd (referred to individually as "ARC" and "Haida" and collectively as "the Petitioners"). At the initial hearing for directions heard on 8th March 2012, Quin J. determined pursuant to Order 3, rule 11(2) of the Companies Winding Up Rules that Trikona should be treated as the subject-matter of this proceeding in which it will take

no further part. He directed that the petition should continue as an *inter partes* proceeding between ARC amd Haida as petitioners and Asia Pacific Limited ("APL") as respondent.

2. The evidence before Quin J. comprised affidavits sworn on behalf of the Petitioners by Messrs Rakshitt Chugh ("Mr Chugh") and Lokesh Chugh on 10th and 13th February respectively and an affidavit sworn by Mr Aashish Kalra ("Mr Kalra") on 7th March. On the basis of this evidence Quin J. reached the following conclusions –

> " ... I find that [Trikona] is simply the subject matter of these proceedings which are, in reality, a dispute between the Petitioners on the one hand, and [APL] on the other hand – each holding 50% of the [Trikona's] shares. Alternatively, they are the representatives of the quasi partners – Mr Chugh and Mr Kalra – who have made serious allegations and counter allegations against each other. Consequently, I find that there has been a complete cessation of trust and confidence between the quasi partners"

Both Messrs Chugh and Kalra were born in India, but they were educated and have pursued their careers in the United States. After graduating from Middlebury College, Vermont in 1991, Mr Chugh's career began as an analyst with Prudential Securities in New York. In 1996 he joined Lehman Brothers as head of its asset backed structuring group. In 2000 he started his own financial research business named Byte Consulting, Inc ("Byte"), of which Lehman Brothers was a client. Mr Chugh became a US citizen in 2004. Mr Kalra was educated at St. Stephen's College in Delhi, where he obtained a degree in economics in 1993. He later attended Brandeis University in Massachusetts, where he obtained a master's degree in economics and international finance in 1996. He then became a partner at Cambridge Technology Enterprises, a venture capital company based in Cambridge, Massachusetts which specialized in promoting companies engaged in the information technology industry. He also became a US citizen in November last year. In 2000 Mr Kalra was introduced (or re-introduced) to Mr Chugh by Mr Chugh's brother as someone who might be able to contribute to Byte's business. In 2002 Mr Kalra was retained as a consultant to Byte.

3. The event which led Messrs Chugh and Kalra to go into business together was the announcement by the Government of India that foreigners would be allowed participate in real estate development in India with effect from 2004. They took advantage of this opportunity by promoting a closed ended investment fund called Trinity Capital Plc ("Trinity"),[1] whose shares were listed on the Alternative Investment Market of the London Stock Exchange. They established Trikona simultaneously, as the company through which Trinity would be managed. They treated each other as equal partners in

[1] It was originally called Trikona Trinity Capital Plc, but subsequently changed its name to Trinity Capital Plc in recognition of the fact that is no longer managed by Trikona.

Trikona and acted as its joint managing directors. For present purposes I characterize Trikona as a "quasi partnership" between Mr Chugh and Mr Kalra, although the actual ownership of the company's shares is more complex. Mr Chugh's unchallenged evidence is that Trikona's ownership was initially structured to take account of the fact that the applicable regulations in India required a degree of local participation which was provided by Messrs Chugh and Kalra's respective fathers who were and still are resident in India. Trikona's shares were originally issued as follows: APL (then wholly owned by Mr Kalra's father) owned 45%, Mr Kalra owned 5%, ARC (in which the RC Family Trust and Mr Chugh have 75% and 25% shareholdings respectively) owned 25% and Mr Chugh's father owned 25%. In other words, Kalra and Chugh family interests each owned 50% of Trikona. This split remains unchanged except that APL is now wholly owned by Mr Kalra and Mr Chugh's father transferred his shares to Haida, a company wholly owned by a discretionary trust of which Chugh family members are beneficiaries.[2] Messrs Chugh and Kalra were paid salaries through Trikona Capital Advisers LLC, a company incorporated in Delaware whose shares are owned by them personally in equal half shares.

4. The re-amended petition pleads that Trikona should be treated as a quasi-partnership between the Chugh family and the Kalra family and that the Chugh family had a legitimate expectation that they would continue to fully participate in the company's management. By paragraph 12 of its amended defence, APL admits that Trikona "was set up as a Quasi-Partnership between Chugh and Kalra, but not as a quasi partnership between their respective families". It is also admitted (by paragraph 13) that Mr Chugh and the Petitioners would have a legitimate expectation of being involved in the management, but only so long as Mr Chugh was acting in good faith in the interests of the company. A great deal of forensic effort has been devoted to the question whether Mr Chugh has acted in breach of fiduciary duty.

5. The evidence leads me to the conclusion that, for present purposes, Trikona should be characterized as a quasi partnership between Messrs Chugh and Kalra. They founded the company jointly. They managed it jointly. Although Trikona group companies employed as many as 50 people at one time, its business was dependent upon the personal involvement of Messrs Chugh and Kalra. Whilst Trikona's board of directors included two so-called "independent directors", there is no evidence that they played any real role at all in the management of the company's business and neither of them gave evidence in connection with the trial of the petition.[3] The fact that Mr Chugh contributed most of his ownership interest in Trikona to the trustees of discretionary trusts for the benefit of

[2] The trustees of the R.C Family Trust is Mr Chugh's wife and an unrelated person. The trustee of the trust which owns Haida is a professional trust corporate based in Switzerland.

[3] Mr Saubabh Killa did swear an affidavit at an early stage of the proceedings for the purpose of seeking an extension of time, but it had no relevance to the issues raised at the trial.

his family members has no relevance to the issues which I have to decide. A good deal of forensic effort has been devoted to the proposition that the Petitioners are in fact wholly owned and controlled by Mr Chugh personally, which is tantamount to asserting that the trustees of the trusts are party to sham transactions. There is no evidence tending to support this allegation, which is being made by Mr Kalra for tactical purposes in connection with the related litigation pending before the Federal and State courts in Connecticut.

6. Trinity's initial public offering took place in April 2006, with support from Lehman Brothers and Wacovia Bank, and the fact that it raised £250 million of equity represented a significant achievement for Messrs Chugh and Kalra. It was promoted to invest in real estate and infrastructure projects in India on the basis that it would be managed and advised by Trikona pursuant to a Portfolio Management Agreement dated 13th April 2006 which provided for Trikona to be paid an annual fee calculated at 2% of NAV, plus a performance fee of 20% of realized gains (or 30% if certain hurdles were achieved). Trikona's role was advisory in the sense that all investment decisions were made by Trinity's board of directors. Investment projects identified and recommended by an investment committee were put by Trikona to Trinity's board of directors for a final decision. Apart from Mr Chugh, Trinity's board originally comprised a number of independent directors who were well known figures in the UK property industry. Trinity invested successfully in some 19 projects, but its shares traded at a discount to NAV which presented Trikona with the difficult problem of trying to find ways in which to realize value for its shareholders. At its height, the amount of Trikona's gross assets under management is said to have been in the region of US$750 million but the whole of this business was eventually lost, largely as a result of events beyond the control of Messrs Chugh and Kalra. Their working relationship became increasingly strained during 2008 and had completely broken down by broken down by the end of 2009, by which time they were both setting up their own separate businesses and actively discussing how to divide what remained of Trikona's business and assets. Mr Kalra's subsequent attempt to accuse Mr Chugh of stealing Trikona's assets and destroying a lucrative business is completely at odds with the evidence of what actually happened at the time.

The Loss of Trikona's Business

7. The events leading to the loss of Trikona's business began in the first half of 2008. Having regard to the general economic climate at the time, it is not surprising that some of Trinity's shareholders were looking for ways in which to realize the true value of their shares. Trinity's board of directors was coming under pressure to sell assets and

distribute capital. The two shareholders most actively seeking ways of realizing their investment without having to sell their shares in the market were QVT Financial ("QVT") and Carrousel Capital Ltd ("Carrousel"). QVT is a well established alternative investment manager based in New York. Carrousel is a hedge fund manager based in London. By 2008 the investment funds managed by QVT collectively owned 29% and those managed by Carrousel owned about 14% of Trinity's equity. The conflicts of interest inherent in this situation are obvious and should be well understood by institutional investors and professional fund managers. Any realisation of assets and repayment of capital to Trinity's shareholders would have the long term effect of reducing Trikona's fee income (which was 2% of NAV), although it might have the short term benefit of triggering the payment of a performance fee (20% of net realized gains). However, the relevant decisions were made by Trinity's board of directors, not Trikona, which only had an advisory role. This situation exposed a philosophical difference between Messrs Chugh and Kalra. Mr Chugh's evidence is that he was conscious of the fiduciary duty which Trikona owed to Trinity and described himself as "investor friendly". He attempted to work with Trinity's shareholders, recognizing no doubt that it would be in the long term commercial interest of Trikona to maintain good relations with them. I accept Mr Chugh's evidence that Mr Kalra adopted a rather different, more confrontational attitude. He was more focused on the fact that, under the terms of the Portfolio Management Agreement, Trikona was appointed for a ten year term and could be removed only for cause.

8. A partial solution to the conflict between the shareholders' desire to realize assets and the investment adviser's desire to maintain and, if possible, grow Trinity's NAV appeared to have been found by the beginning of September 2008. Messrs Chugh and Kalra had come to the conclusion that they might be able to fund the acquisition of QVT's shares and a put/call option agreement was negotiated. The option period was two months. The option price was £2 million. The exercise price was 110 pence per share which equated to almost £69 million. Most importantly, the option agreement was conditional upon Trikona obtaining the necessary third party finance, for which purpose they intended to use the future cash flow generated by the Portfolio Management Agreement as collateral. In the event, the option agreement was not executed because QVT changed its mind at the eleventh hour. It still wanted to sell its shares but it did not want to make the market announcement which would have been required as a result of signing the option agreement. The parties therefore concluded an alternative agreement contained in the Deed of Exclusivity executed on 23rd September 2008. Instead of agreeing to a two month put/call option in consideration of £2 million, QVT agreed not to sell or otherwise dispose of its shares for two months. The intention was that Trikona would have two months in which to find the money to buy the shares, or at least buy sufficient to be able to block a special resolution. Messrs Chugh and Kalra debated the

merits of this revised proposal in e-mail exchanges on the 19th and 20th September. They met Mr David Gold, the CEO of QVT, at its office on 23rd September. I have very limited evidence about what was actually said at this meeting, but Mr Kalra's evidence was that he came away from it believing that Trikona would in fact have the opportunity to buy QVT's shares, notwithstanding the absence of any enforceable option agreement. On this basis he signed the Deed of Exclusivity after the meeting on the same day. Trikona paid the £2 million fee to QVT. In the event QVT honoured its obligations under the deed and Trikona did have the opportunity to buy QVT's shares, but was unable to do so because it could not raise the necessary finance. From Trikona's perspective, the credit market could hardly have been worse in the period following the bankruptcy of Lehman Brothers. With the benefit of hindsight, it has to be said that Messrs Chugh and Kalra were fortunate that QVT did change its mind, because Trikona would not have been able to perform its obligations had QVT been in a position to exercise a put option.

9. Mr Kalra now accuses Mr Chugh of having acted in breach of fiduciary duty in connection with this transaction. His allegation is as follows –

> "During the course of 2008 and 2009, [Trinity] was subject to a hostile takeover by a London and New York based hedge fund, QVT Financial ("QVT"). ..... Despite his position as Co-Managing Director of [Trikona], Mr Chugh actively supported QVT's ultimately successful take-over of [Trinity], and otherwise worked in the interests of QVT at the expense of [Trikona]. One of the most egregious examples of this conduct was causing [Trikona] to pay £2 million to QVT to obtain covenants from QVT of extremely limited value, and then frustrating all attempts to recover the money when QVT acted in flagrant breach of covenant." (2nd Affidavit, paragraph 57(a).)

These assertions are wholly contradicted by the evidence. Mr Kalra must know full well that QVT never in fact made any take-over bid for Trinity. Mr Chugh did not "cause" Trikona to pay £2 million to QVT. Whilst Mr Chugh took the lead on this negotiation, it is perfectly clear from the contemporaneous documentary evidence that he and Mr Kalra debated the merits of the transaction and made the decision jointly. They both signed the Deed of Exclusivity. Mr Kalra's later suggestion that he signed the deed under duress is not credible. Having observed both men in the witness box and listened to them giving evidence at some length, I find it impossible to imagine Mr Chugh being able to coerce his partner into doing anything. To the contrary, Mr Kalra came across as the domineering character. Having failed to raise the finance necessary to buy QVT's shares, Mr Kalra then wanted to sue Trinity for the return of its £2 million, apparently on the basis of what Mr David Gold had said in the meeting immediately before the deed was executed. Mr Chugh resisted. He considered that there was no legitimate legal basis for suing QVT and that it made no commercial sense to sue their biggest shareholder. They had access to legal advice from SJ Berwin, a well known firm of London solicitors. Mr Kalra accepted his partner's point of view. It was only later that he made

the allegation that Mr Chugh "prevented" Trikona from suing QVT because he was motivated by some arrangement to the effect that QVT would invest in his new business, which did not even exist at that time. This allegation is wholly unsupported by any evidence.

10. Whilst Mr Chugh was taking the lead on the negotiations with QVT, Mr Kalra was engaged in negotiations on behalf of Trinity with a leading German fund manager called SachsenFonds Holdings GmbH ("SachsenFonds"). The business relationship with SachsenFonds dated back to December 2007 when it established the first of two limited partnerships for the purpose of buying minority stakes in certain of Trinity's real estate investments. These limited partnerships[4] were managed by TSF Advisers Mauritius Limited, a company incorporated in Mauritius and jointly owned by Trikona and SachsenFonds. A third transaction between Trinity and SachsenFonds was disclosed to the market on 9th September 2008. It was announced that a third limited partnership established by SachsenFonds[5] had agreed to buy stakes in three of Trinity's existing investments for £45 million and to co-invest a further £45 million with Trinity in five proposed new investments. The sale was due to be closed on 30th September and the co-investment was expected to be closed by 31st March 2009. The contracts were executed, but SachsenFonds fell victim to the credit crunch and defaulted on its obligations. This turned out to have serious adverse consequences for Trikona.

11. The third SachsenFonds transaction did not meet with the approval of Carrousel, Trinity's second largest shareholder. It wanted Trinity to realize assets and distribute cash and objected to the fact that this transaction committed Trinity to reinvesting the proceeds of the sales into five new projects. On 13th October 2008 Carrousel requisitioned an extraordinary general meeting of Trinity's shareholders for the purpose of resolving to reconstitute the board of directors and change the company's investment policy. The requisition called for Mr Chugh and one of the independent directors to be removed and replaced by Carrousel's nominees. Two weeks later, Trinity's board announced that Mr Chugh and the independent director had resigned and been replaced by two of Carrousel's executives. It was also announced that the board had committed to undertake a strategic review, which would include a review of the ongoing investment policy and the strategy regarding distributions of capital. On this basis, the requisition was withdrawn.

12. These events, and their timing, impacted adversely upon Trikona in a number of ways. Firstly, Mr Chugh said that his removal from the Trinity's board led to a fundamental

[4] The limited partnerships were established under the laws of Germany and are called Immobilien Development Indien I GMBH and Co. KG and Immobilien Development Indien II GMBH and Co. KG.

[5] Immobilien Development Indien III GMBH and Co. KG.

change in the relationship with Trikona which, thereafter, exercised less and less influence over Trinity's affairs. However, there was no "takeover" of Trinity by QVT, as Mr Kalra has alleged. However, QVT did subsequently obtain representation on Trinity's board of directors when Mr Martin Adams became its chairman in March 2009. Secondly, Trinity's reconstituted board adopted an investment policy which emphasized the early realization of assets and return of capital to the shareholders. This inevitably meant a reduction in Trinity's NAV, with a consequential reduction in Trikona's fee income. It would also lead to a change in the role of the investment adviser, with the result that Trikona came under pressure to change the commercial terms of the Portfolio Management Agreement to its disadvantage. Thirdly, according to Messrs Chugh and Kalra, SachsenFonds attempted to avoid the consequences of its default by commencing proceedings against Trinity, Trikona and Messrs Chugh and Kalra personally, in which it claims damages of about €127 million on the basis that it was induced to enter into the two original transactions as a result of misrepresentation, deceit and fraudulent concealment. There is also a cross claim against SachsenFonds for damages arising out of its default in respect of the third transaction. Whilst Trinity's directors agree with Messrs Chugh and Kalra that SachsenFonds' allegations are unfounded, they inevitably take the position that Trikona, as Trinity's adviser, must bear responsibility if SachsenFonds should ultimately succeed. This litigation is still ongoing. Fourthly, Trinity's board subsequently relied upon Trikona's role in the SachsenFonds' transactions as a basis for alleging that it was in material breach of its obligations under the Portfolio Management Agreement, thereby giving rise to a right of termination. Its termination in December 2009 marked the end of Trikona's business – a result which had been anticipated by Messrs Chugh and Kalra and their staff since the first quarter of the year. Trikona responded by commencing an arbitration and the only issue was what, if any, compensation it was entitled to receive from Trinity.

13. The arbitration was eventually settled pursuant to the terms of Arbitration Settlement Agreement and Ancillary Settlement Agreement executed in February 2011. In brief summary, the parties agreed that Trinity would pay compensation to Trikona, having a potential total value of about £14 million. This compensation package comprised cash of £7.5 million, the transfer of Trinity's shares in a subsidiary which owns the Sankalp project in India (having an attributed value of £2.5 million) and a share of any profit on the sale of certain assets during a specified period. The Ancillary Settlement Agreement recognizes that the parties (including Messrs Chugh and Kalra personally) have a common interest in defending the claims made against them by SachsenFonds. It therefore comprises a mutual defence agreement whereby the parties agree to co-operate and assist each other in putting forward a common defence. Trinity agreed to indemnify Messrs Chugh and Kalra against all liabilities etc (including legal fees) arising in connection with the performance by Trikona of its services relating to the

SachsenFonds' transactions. Most importantly, by Clause 2.1 all the parties, including Messrs Chugh and Kalra, unconditionally and irrevocably waived and settled all claims of whatsoever nature which they had against any other party arising out of or in connection with the arbitration proceedings. Notwithstanding that Mr Kalra signed the Arbitration Settlement Agreement on behalf of Trikona and signed the Ancillary Settlement Agreement, both personally and on behalf Trikona, he is now suing Mr Chugh (originally derivatively, but now in the name of Trikona) for US$210 million in connection with the arbitration proceeding. He contends that, if he had not been "forced" to execute these settlement agreements by Mr Chugh, Trikona would have succeeded in the arbitration on all points and would have obtained an award worth US$210 million more than the amount for which they settled. The remedy sought is the forfeiture of all the Petitioners' shares in Trikona on the basis Mr Chugh should be treated as the true beneficial owner of the shares and that his family trusts are a sham. There is not a shred of evidence tending to suggest that Mr Kalra was "forced" to enter into the settlement agreements. Having listened to his explanation for pursuing this claim in the Connecticut proceedings,[6] I conclude that it is a thoroughly dishonest abuse of process.

The Petitioners' Case for Making a Winding Up Order

14. Counsel for the Petitioners puts their case on the basis that there are a series of related grounds on which the Court should conclude that it is just and equitable to make a winding up order. He says that it is oppressive for the Connecticut proceedings to be pursued at the expense of the company, when its only purpose is to enable Mr Kalra to seize ownership of the company. Mr Kalra has misused and misappropriated the company's money and will continue to do so unless restrained by this Court. There has been a complete and irreversible loss of trust between Messrs Chugh and Kalra, such that it has been wholly impossible for Trikona to be managed as a quasi partnership for at least the past three years. There is deadlock at the shareholder level. Trikona has not carried on any business since 2009, apart from managing the litigation resulting from the termination of its business and there is no prospect of any new business being put into the company by either party. Mr Kalra's seizure of managerial control was unjustifiable and contrary to the Petitioners' legitimate expectation that there would be joint control at board level. Mr Kalra's behavior since seizing control demonstrates that Trikona's affairs will not be wound up properly in the absence of a winding up order and the appointment of qualified insolvency practitioners. There is evidence to support each of these grounds. Taken together, the case for making a winding up order is overwhelming.

[6] I use the expression "the Connecticut proceedings" to mean the action (No.11-cv-2015-MRK) commenced on 28th December 2011 in the US District Court for the District of Connecticut entitled *Trikona Advisers Limited et al –v- Rakshitt Chugh et al* and the action (No. X03-HHD-CV-12-6030347-S) commenced on 21st February 2012 in the Superior Court of Fairfield entitled *Trikona Advisers Limited –v- Haida Investments Ltd et al.*

Loss of substratum

15. The expression "loss of substratum" is used to describe, *inter alia*, the principle that a winding up order will be made on the just and equitable ground, upon the petition of a shareholder, where it is shown that it has become practically impossible for a company to carry on the business for which it was established. See: *In Re Heriot African Trade Finance Fund Limited* [2011] (1) CILR 1. A combination of factors leads me to the conclusion that it is now practically impossible for Trikona to carry on the business for which it was established or, indeed, any other business. First, the company's original business was lost during 2009 in the way in which I have described, largely as a result of economic forces beyond the control of Messrs Chugh and Kalra. Second, the possibility of creating a new business has never really existed, because the working relationship between Mr Chugh and Mr Kalra has broken down completely. Managing the litigation resulting from the termination of its business has been Trikona's only activity during the past three years and it is wholly unrealistic to suggest that the company will ever do anything else.

16. It is clear from the contemporaneous documentary evidence that Messrs Chugh and Kalra both recognized, from early 2009 onwards, that their business relationship was at an end and that they would set up their own separate businesses. They also recognized that, subject to resolving the litigation with SachsenFonds and Trinity, the assets and liabilities of Trikona needed to be divided between the shareholders and they did in fact engage in extensive negotiations, but unfortunately failed to reach any comprehensive agreement. By September 2009, Messrs Chugh and Kalra had set up their own businesses under the names Peak XV and Duranta respectively. However, Mr Kalra is now adopting an entirely different position. His written evidence is that Trikona "continues to be a viable business" which "has had a great past and can still have a very successful future". This statement is not merely euphoric. It is disingenuous. In an e-mail to Mr Chugh sent on 2nd November 2011, he said "Since March [2011] … I've been trying to shut down as much as possible. [Trikona] does not have any operating business or revenue". Mr Kalra confirmed the accuracy of this statement in a deposition given on 4th August 2012 in connection with the Connecticut proceedings. He went on to confirm that the statement in his e-mail meant shutting down the whole of the Trikona group because "we didn't have Trinity and [SachsenFonds] anymore". Whilst I am sure that Mr Chugh and Mr Kalra are both perfectly capable of establishing new viable businesses of their own, they are not prepared to do so as "quasi partners" through Trikona. I do not think that Mr Kalra genuinely believes that *Trikona* has a potentially viable business. He admitted in evidence that he would not in fact put any new business

into Trikona so long as it is jointly owned by the Petitioners. This is tantamount to admitting that Trikona's business is at an end and that it needs to be wound up, which is in fact the position adopted by Mr Kalra prior to the presentation of the winding up petition.

Mr Chugh's exclusion from the board of directors

17. It is admitted (in paragraphs 12 and 13 of the amended defence) that Trikona should be characterized as a quasi partnership between Messrs Chugh and Kalra and that Mr Chugh (and the Petitioners whom he represents) had a "legitimate expectation of being involved in [Trikona's] management". Mr Kalra's case is that, from 2009 onwards, there could be no such expectation that Mr Chugh would continue to be involved in the management as a director of the company because "he sought to sabotage the business of [Trikona] and acted in egregious breach of his fiduciary duties." This allegation is wholly unsupported by any credible evidence.

18. From its inception Trikona's board of directors comprised Mr Chugh and Mr Kalra and two so-called independent directors, namely Mr Ravindra Chitnis (nominated by the Petitioners) and Mr Saurabh Killa (nominated by the Respondent). Messrs Chugh and Kalra are described in various documents as "co-managing directors" and the evidence is that they did in fact manage Trikona jointly. The two independent directors appear to have played no role in Trikona's affairs at all. This situation changed following the commencement of the Connecticut proceedings on 28th December 2011. Two weeks later, on 10th January 2012 Mr Chitnis resigned as a director. He has not given evidence and I do not know why he resigned at this time or whether Mr Chugh had any advance warning of his intended resignation. In any event, on the following day Mr Kalra seized the opportunity to sign a "unanimous" written resolution by which Mr Chugh was removed as a director. Mr Killa signed it on the same day. Mr Kalra's US attorneys wrote to Mr Chugh on 17th January informing him that he had been removed from the board of directors. I do not think that it is necessary for me to decide whether or not this written resolution was legally effective or, if not, whether it is capable of being ratified at a meeting of which Mr Chugh is given notice. For present purposes, what is relevant is that Mr Kalra did in fact succeed in taking control of Trikona and proceeded to treat the company and its remaining assets as his own. Notwithstanding the admission that Trikona should be treated as a quasi partnership in which the Petitioners had a legitimate expectation of being involved in the management – which must mean having equal representation on the board of directors – Mr Kalra seeks to justify his seizure of control by reference to the baseless allegations asserted against Mr Chugh in the Connecticut proceedings. Mr Kalra's seizure of control had serious adverse consequences for Mr

Chugh and the Petitioners because it enabled him to misuse the company's money for his own benefit.

Misuse of the company's money

19. Immediately after having removed Mr Chugh from Trikona's board of directors, Mr Kalra proceeded to sign a series of "unanimous" written resolutions (with the assistance of his nominee, Mr Killa) by which he sought to justify using Trikona's remaining cash for his sole benefit. On 14th January 2012 they signed a written resolution for the purpose of converting the original Connecticut proceedings from a derivative action into an action by the company itself. Then, on 7th February 2012, they signed off on another written resolution to the effect that Trikona would reimburse $80,061.00 which had been incurred by APL in legal fees. For the reasons explained in Quin J's judgment delivered on 9th March 2012 and in my own ruling delivered on 4th September 2012, the Connecticut proceedings and the proceedings on this winding up petition must be treated as "shareholder litigation", the cost of which should be bourne by the protagonists and not the company. (See also *Re Freerider Limited* [2009] CILR 604). Between 31st December 2011 and 30th August 2012 a total of $785,000 of the company's money was paid to Adler Pollock & Sheehan P.C., the attorneys instructed by Mr Kalra in connection with the Connecticut proceedings.[7] This was a misuse of Trikona's money which continued notwithstanding the terms of Quin J's judgment. Of these sums, $445,000 was paid *after* Mr Kalra was put on notice that this Court would not permit shareholder litigation to be financed at the expense of the company.

20. The winding up petition was presented and served on 13th February 2012. Three days later, on 16th February 2012, Mr Kalra caused Trikona to enter into a ten year consultancy agreement with a company called Beachside LLC, which he had incorporated solely for the purpose of receiving fees on his behalf. The agreement provides for Beachside LLC to receive a fee of $20,000 per month, reimbursement of expenses and a performance fee calculated at 20% of the receivables from prosecuting litigation (against Mr Chugh et al) and the savings achieved by defending litigation (against SachsenFonds). Mr Kalra sought to justify this transaction by signing another written resolution which contains a lengthy, self-serving statement to the effect that he is devoting substantial time and effort in connection with prosecuting the Connecticut proceedings, defending the SachsenFonds proceedings and various other matters for which it is agreed that he should be compensated. It was put to Mr Kalra that this was

[7] Mr Michael C. Gilleran, a partner of Adler Pollock & Sheehan, P.C., swore an affidavit in which he said that his firm had billed Trikona a total of $745,804.02 between 27th January and 15th June 2012, of which $659,522.06 had been paid. The Barclays bank statements reflect that Trikona paid a total of $785,000 and £40,000 to his firm between 31 December 2011 and 30 August 2012.

blatantly improper self-dealing. His response is that professional managers are entitled to be paid for their services and that the amount payable is good value. He did not seek to explain why he should have the benefit of a ten year term, save to say that the terms were based upon the Portfolio Management Agreement between Trikona and Trinity. I regard this consultancy agreement, which was signed after the presentation of the winding up petition and without notice to Mr Chugh, as a means of misappropriating Trikona's money.

21. On 21st February 2012 Mr Kalra and Mr Killa signed another lengthy, self-serving written resolution by which Trikona resolved that –

> "..the Company hereby authorizes payment to Mr Kalra of an additional twenty percent (20%) of all assets of [Trikona] and any proceeds of litigation settlements paid or payable to [Trikona], over and above any other compensation or fees [Trikona] has agreed to pay to Mr Kalra, including payment to any company with which he is associated such as Beachside LLC."

The justification for this decision, stated in paragraph 16 of the resolution, is that it constitutes the implementation of a decision allegedly made on 22nd June 2010 by the Collegium of Advisers ("COA") set up by Messrs Chugh and Kalra pursuant to a memorandum of understanding signed by them four days earlier on 16th June. The COA comprised four members – two nominated by Mr Chugh and two nominated by Mr Kalra. Its terms of reference were twofold. It was to assist in settling the issues then being arbitrated/litigated against Trinity and SachsenFonds. It was also to assist in the negotiations, then ongoing between Mr Chugh and Mr Kalra, to divide up the net assets of Trikona between them or, more accurately, between the corporate shareholders whom they represented. The memorandum of understanding reflected that Messrs Chugh and Kalra had agreed that 40% of the NAV should be allocated to each of them and the remaining balance of 20% was to be disbursed to either of them in any proportion that the COA may deem fit. The COA was to have sole discretion in this regard and its decision was to be binding on the parties. This was a mechanism for dealing with Mr Kalra's argument that the Petitioners should receive less than their nominal 50% share of Trikona's NAV because "Mr Chugh had not pulled his weight" and that Mr Kalra had borne a greater share of the burden of management. It is worth noting that the terms of reference do not relate to arbitrating allegations of "sabotaging the business", "stealing the assets" or "acting in egregious breach of fiduciary duty". These allegations came later, although some of the matters now relied upon by Mr Kalra had already taken place and were known to him at the time he signed this memorandum of understanding.

22. On 22nd June, less than a week after the memorandum of understanding had been signed, the COA sent an e-mail to Messrs Chugh and Kalra entitled *Minutes of First Meeting of COA*. Paragraphs 2 and 3 of these minutes stated –

> "2. In considering the incentive amount under paragraph h of the MoU, the CoA recognizes and will take into account the major contribution made by [Mr Kalra] in the growth of the business over the last two years while deciding on the incentive to be paid to [Mr Kalra]. Any of the incentive amount not disbursed will revert to [Trikona].
>
> 3. Dr. P.S. Rana will be Chairman of the CoA. While the CoA will normally act through consensus on all matters, if consensus cannot be achieved the CoA will take a vote in which case the matter will be decided by majority. In the case of deadlock the Chairman shall have the casting vote."

It must have been obvious to Mr Kalra that paragraph 2 of these minutes did not mean that the COA had made any actual decision, let alone a decision to award to him the whole of the 20% over which it was given a discretionary power. Nevertheless, in his written resolution signed on 21st February 2012, this is exactly what Mr Kalra asserted. His position is that he and Mr Killa signed the written resolution in order to implement the decision of the COA (made 21 months earlier) because Mr Chugh had refused to do so. In fact, Mr Chugh's objection related to the decision to appoint Mr Rana as chairman of the COA with a casting vote. Not surprisingly, Mr Chugh believed that the decision to give Mr Kalra's nominees voting control undermined the whole purpose of the COA. On 8th March 2012, the very day on which Quin J heard the application for directions, Mr Kalra paid himself £750,000 from Trikona's bank account. This is said to represent his extra 20% share of the cash element of the money paid by Trinity pursuant to the Arbitration Settlement Agreement.

23. None of these written resolutions were disclosed to Mr Chugh at the time they were signed. They came to light in October 2012 when Mr Kalra disclosed Trikona's bank statement in response to the order for discovery which I made on 23rd August 2012. Mr Chugh's attorneys wrote to all four members of the COA on 26th October 2012 asking them to confirm whether or not they had ever decided to make any award. They responded three days later stating that "There has been no formal declaration/decision under para (f) of the MoU of 16 June 2010 till date." Mr Kalra must have known that the COA had not in fact made any decision to award 20% of Trikona's NAV to him and he must have known that his interpretation of paragraph 2 of the minutes would not be accepted by the COA, let alone Mr Chugh. He also knew that the payment of £750,000 would come to light if he complied with my order for discovery. He therefore made a further attempt to justify having taken this money by signing off on another written resolution on 19th October 2012. It contains another lengthy self serving narrative explaining that he deserves an extra 20% of the economic benefits of Trikona's business (which effectively means an extra 20% of its NAV) regardless of the fact that the COA never made any award in his favour. The explanatory narrative ends (in paragraph 18) with the following conclusion –

> "Thus, the Board specifically finds and recognizes, regardless of the COA's findings and actions, the substantial additional effort and contribution which Kalra made to [Trikona's] business and therefore that he is entitled to an additional 20% of the economic benefits of [Trikona's] business."

Having listened to Mr Kalra's oral explanation for these events, I have come to the conclusion that he will do whatever it takes, no matter how dishonest, to ensure that Mr Chugh and the Petitioners are excluded from any share in Trikona's remaining NAV. In these circumstances, the Petitioners are entitled to a winding up order.

The Respondent's Defence to the Winding Up Petition

24. Counsel for the Respondent focused the defence almost entirely upon the proposition that Mr Chugh had acted in breach of fiduciary duty by "sabotaging" Trikona's business and "stealing" its assets in the manner alleged in the Connecticut proceedings. Thus, notwithstanding the admission that Trikona is properly characterized as a quasi partnership, it was said that Mr Chugh's removal from the board of directors was a legitimate response to his egregious breaches of duty. To the extent that Mr Kalra accepts that Trikona has no business, he not only blames Mr Chugh for its loss but alleges that an additional $210 million in compensation would have been recovered from Trinity if Mr Chugh had not "forced" him to sign the settlement agreements.

25. At the hearing of the Petitioners' application for the appointment of provisional liquidators on 22nd and 23rd August, I concluded that they had made out a prima facie case for a winding up order. I came to this conclusion on the basis that the company had ceased to carry on business in 2009 and that no new business will be introduced so long as it is jointly owned. However, on the basis of the affidavit evidence then before the Court, I felt unable to express even a tentative conclusion about the relative merits of the claims and counterclaims which Messrs Chugh and Kalra are making against each other. Having now considered the underlying documentary evidence and listened to them being cross-examined over a period of four days, I have come to the firm conclusion that there is no merit whatsoever in the allegations made against Mr Chugh in both this proceeding and the Connecticut proceedings. I consider Mr Kalra's evidence to be wholly unreliable. He gave evidence in the manner of an advocate – apparently convinced of the merits of his case, but wholly blind to the realities of what actually happened. His original complaint was that Mr Chugh was "failing to pull his weight" in sharing the burden of managing the litigation against Trinity and SachsenFonds. It seems to me that Mr Chugh responded to this allegation by agreeing to establish the COA on the basis that, having conducted an objective investigation, it would award up to 20% of the NAV to either of them based upon their relative contributions. This did not work because the COA resolved to appoint one of Mr Kalra's representatives as chairman with a casting vote. I think that Mr Kalra became increasingly frustrated with his inability to bring Trikona's affairs to a conclusion,

or establish an agreed mechanism for bringing them to a conclusion. I think that Mr Chugh's analysis of his subsequent behavior is right. The allegations made in the Connecticut proceedings have been contrived to pressurize Mr Chugh (and through him the Petitioners) to abandon their interest in Trikona.

26. Both Mr Chugh and Mr Kalra started their own separate business in October 2009. This was not done secretly. They were attempting to divide up both assets and liabilities between them. It is not in dispute that Mr Kalra wanted to close Trikona's London office whereas Mr Chugh wanted to use it for his new business. There may be some scope for argument about the allocation of costs as between Peak VX and Trikona, but there is no legitimate basis for converting such a dispute into an allegation that Mr Chugh "stole" the assets. Similarly, it is not in dispute that from October 2009 onwards Mr Chugh made use of Trikona's computerized database for the purposes of his own business. I accept his evidence that he provided a copy of the database, as it then existed, to Mr Kalra in the expectation that Mr Kalra would use and build on his version for the purposes of his own business. The allegation, made almost two years later, that Mr Kalra "stole" a valuable asset belonging to Trikona is untrue. The allegations that Mr Chugh "sabotaged" Trikona's business by supporting QVT and Carrousel in their moves to secure representation on Trinity's board of directors and then change its investment strategy, is patently untrue. It is inherently unlikely that Mr Chugh would act against his own interest in this way and there is no evidence that he did so. The allegation that he "forced" Mr Kalra to sign the Deed of Exclusivity and the subsequent settlement agreements is simply a fabrication.

27. Finally, I turn to Mr Kalra's revised purchase offer. On 1st August 2012 the Respondent/Mr Kalra made a written offer to the effect that Trikona itself would buy back (or redeem) the Petitioner's 50% shareholding at a "fair value" price to be determined by an expert assessor. The proposed mechanism for determining the "fair value" of the shares was reproduced from that which was approved by the House of Lords in *O'Neill v. Phillips* [1999] 1 WLR 1092, the factual circumstances of which were wholly different from the present case. For the reasons given in my Ruling dated 4th September 2012, I did not consider that this "buy-out offer" constituted a reasonable alternative remedy for the Petitioners. On 12th December 2012, the respondent put forward another "buy-out offer", also based upon the proposition that the shares would be purchased at "fair value" to be assessed by an independent expert. I had previously concluded that this valuation methodology would be inappropriate. I am still of the same opinion. There is no business capable of being valued. Apart from the subsidiary which owns the Sankalp project in India (acquired from Trinity pursuant to the Arbitration Settlement) and whatever cash is left, Trikona's NAV depends upon the outcome of various claims which are not susceptible to a valuation exercise of the kind contemplated by the House of Lords in *O'Neill –v- Phillips*. I do not see how the Petitioners could reasonably be expected to take

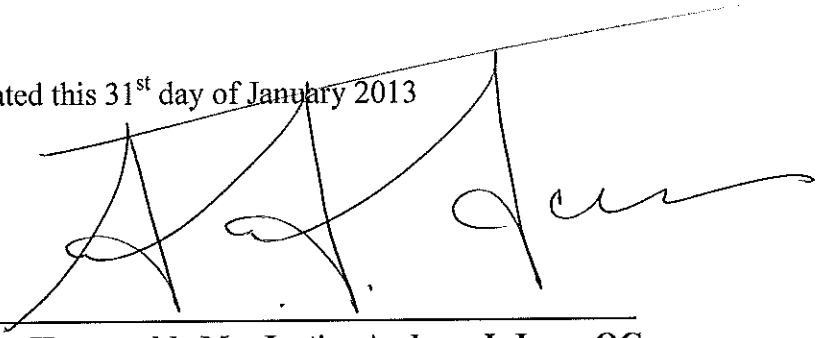
this offer seriously. Having listened to Mr Kalra's evidence, it is impossible to avoid the conclusion that he has no genuine intention of paying anything for the Petitioners' shares.

Conclusion

28. In my judgment there are overwhelming grounds for making a winding up order in this case. Since there is no objection to the qualified insolvency practitioners nominated by the Petitioners, I will therefore appoint Mr Mark Longbottom and Mr Jess Shakespear of Kinetic Partners (Cayman) Limited as joint official liquidators. I will hear submissions about what directions should be given to them.

29. Finally, I order that the Petitioners' costs shall be paid by the Respondents, such costs to be taxed if not agreed.

Dated this 31st day of January 2013



The Honourable Mr. Justice Andrew J. Jones QC
JUDGE OF THE GRAND COURT