

## BRITISH VIRGIN ISLANDS COURT OF APPEAL

### ***Basab Inc. -v- Accufit Investment Inc. and Double Key International Limited Claim No. BVI HMAP 2014/0020 (November 2015)***

### INTERLOCUTORY APPEAL - DERIVATIVE PROCEEDINGS - INTERPRETATION OF SECTION 184C(2)(C) OF BVI BUSINESS COMPANIES ACT, 2004 (AS AMENDED) - MEANING OF 'LIKELY' IN WORDING 'WHETHER THE PROCEEDINGS ARE LIKELY TO SUCCEED' - APPEAL AGAINST FINDINGS OF FACT MADE BY LEARNED JUDGE

The Appeal concerns the refusal by the Court to grant leave to the Appellant pursuant to Section 184C(2)(c) of the *BVI Business Companies Act, 2004* (as amended) (the "BCA") to commence derivative proceedings on behalf of the first Respondent, for what it contends was the sale at an undervalue of the shares in its wholly owned subsidiary.

The Learned Judge's refusal was based on his Judgment that the intention and effect of Section 184C(2)(c), was that for a claim to be "*likely to succeed*" it must be obvious, without any substantial consideration of or debate on the merits that it is likely to succeed and the proposed Claim must appear to the Court to be self-evidently strong without conducting an inquiry. He observed the application for leave under Section 184C was not an occasion for painstaking analysis of valuation or other evidence and based on a limited examination of the evidence found that the Appellant's Claim was not likely to succeed.

The Court of Appeal dismissed the Appeal. They found that the Learned Judge's interpretation and application of Section 184C(2)(c) of the BCA was wrong because it seemed to be moving into the realm of requiring a strong likelihood or almost requiring certainty that the proceedings would succeed. Applying the case of *Cream Holdings Limited and Others -v- Banjeree and Others* [2004] UKHL 44, the Court found that the correct meaning of the phrase "*whether the proceedings are likely to succeed*" in Section 184C(2)(c) of the BCA was "*whether it is more probable than not that the proceedings will succeed*". The

Applicant was therefore not required to demonstrate that success was an absolute certainty, or that the probability of success was very strong. The Court further held that with regard to the level of examination of the evidence required in the present case, the threshold for the grant of leave to bring derivative proceedings – "*whether it is more probable than not that the proceedings will succeed*" – would require a full and proper examination of the evidence then before the Court. The Court further held that the potential nature of derivative claims, especially those that may be both complex and defended, did not predispose themselves to a cursory review and required the Court to evaluate the evidence before it and the arguments advanced by both parties in order to determine "*whether the proceedings are likely to succeed*".

However, having exercised its discretion afresh, the Court held that the evidence did not show that the proceedings were likely to succeed and dismissed the Appeal on that basis.

Founded in 1928, Conyers Dill & Pearman is an international law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. With a global network that includes 130 lawyers spanning eight offices worldwide, Conyers provides responsive, sophisticated, solution-driven legal advice to clients seeking specialised expertise on corporate and commercial, litigation, restructuring and insolvency, and private client and trust matters. Conyers is affiliated with the Codan group of companies, which provide a range of trust, corporate secretarial, accounting and management services.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.