Corporate Supervision Department
Company Law Division

Before Abid Hussain – Executive Director

In the matter of

Drekkar Kingsway Limited

Number and date of notice:	No. CSD/ARN/100/2015-215-21 dated July 27, 2016
Date of hearing:	October 21, 2016, November 10, 2016, December 15, 2016, December 28, 2016, April 24, 2017, January 24, 2018, February 26, 2018 & March 14, 2018
Present:	Mr. Ahmed Bashir Janjua, Advocate, Ahmad Bashir & Associates Mr. Musa Bashir Janjua, Advocate, Ahmad Bashir & Associates Mr. Zahir Shah, Advocate (Authorized Representatives)

ORDER

Under Section 208 read with Section 476 of the Companies Ordinance, 1984

This order shall dispose of the proceedings initiated against the directors including chief executive *(the "Respondents")* of Drekkar Kingsway Limited *(the "Company)* through show cause notice dated July 27, 2016 and the addendum thereto dated March 17, 2017 *(the "SCN")* issued under the provisions of Section 208 read with Section 476 of the Companies Ordinance, 1984 *(the "Ordinance")*. The respondents to this show cause proceedings are listed here below:

S. No.	Respondents
1	Mr. Muhammad Ali Gauhar
2	Mr. Adnan Ullah Tauseef
3	Mr. Kamal Pasha
4	Mr. Mubasher Mehmood Abbasi
5	Mr. Muhammad Ubaid
6	Mr. Taj Muhammad
7	Mr. Rais Umair Habib Ahmed
8	Mr. Ehmer Iqbal
9	Mr. Noor Aurangzeb
10	Mr. Danish Kaiser Monnoo
11	Mr. Sheraz J. Monnoo
12	Mr. Humayun Gauhar

2. Brief facts of the case are that Howarth Hussain Chaudhry & Company, Chartered Accountants *(the "Auditors")* in their review report on accounts of the Company for the six months

ending December 31, 2015 (*the "Accounts"*) had reported that an amount of Rs.28.405 million was advanced to an associated undertaking during the reporting period for which no special resolution was provided and was not in compliance with the requirements of Section 208 of the Ordinance.

3. It was further noted that note 7 to the accounts disclosed a loan to associated undertaking amounting to Rs.29.193 million (the *"loan"*). The name of associated undertaking was not mentioned in the review report by the auditors or in the relevant notes to accounts of the Company. The Company named the associated undertaking as Noor Capital (Pvt.) Limited (*"Noor Capital"*) when inquired by the Commission. It was also stated by the Company that the payment to Noor Capital was made for meeting its operational requirements. The loan is receivable by the company
on June 30, 2017 and interest on loan has been agreed to be charged at rate of 9.5% per annum. The Company did not provide the basis of its associate relationship with Noor Capital. The examination of accounts for the period ended March 31, 2016, Form A and Form 29 as filed by the Company with the Commission, reflect that Mr. Ehmar Iqbal, Chairman and Chief Executive Officer of the Company who was appointed w.e.f. October 30, 2015 and Mr. Noor Aurangzeb, holding office of Director of the Company till October 30, 2015, were also directors of Noor Capital. Thus the Company and Noor Capital were associates in light of common directorship.

4. Subsequently, the SCN was issued to the directors of the Company including the chief executive wherein the respondents were called upon to show cause in writing as to why penal action may not be taken against them. The respondents submitted a written reply dated August 31, 2016 to the SCN through Ahmad Bashir & Associates (*the "Authorized Representatives"*). The relevant part of the reply is reproduced hereunder:

> *"It is pertinent to clarify that Noor Capital is not an associated company or undertaking of DKL. The definition of associated companies or associated undertakings as per section 2(2) of the Ordinance is as under:*
>
> > *"associated companies" and "associated undertakings" mean any two or more companies or undertakings, or a company and an undertaking, interconnected with each other in the following manner, namely:-*
> >
> > *(i) if a person who is the owner or a partner or director of a company or undertaking, or who, directly or indirectly, holds or controls shares*

carrying not less than twenty per cent of the voting power in such company or undertaking, is also the owner or partner or director of another company or undertaking, or directly or indirectly, holds or controls shares carrying not less than twenty per cent of the voting power in that company or undertaking; or

(ii) if the companies or undertakings are under common management or control or one is the subsidiary of another; or

(iii) ....

Provided that shares shall be deemed to be owned, held or/ controlled by a person if they are owned, held or controlled by that person or by the spouse or minor children of the person.... "

[Emphasis Provided]

As per the above quoted definition under section 2(2)(i) any two companies or undertakings which are interconnected in a manner where a person who is an owner or partner or director in one company and holds directly or indirectly at least twenty percent (20%) of voting power or shares in the said company or undertaking. The same person shall also hold directly or indirectly at least twenty percent (20%) of voting power or shares in another company or undertaking.

Please note that at the time of the transaction in question there was no director, partner or owner of DKL who also held at, least twenty percent (20%) of shares or voting power equivalent to that in Noor Capital. Moreover, the two companies are also not under a common management or control nor is one the subsidiary of another. With respect to the management of DKL and Noor Capital, please note that Mr. Ehmer lqbal is the only person who is Chief Executive of DKL and also a Director of Noor Capital representing a meager 6.67% shares/shareholders of Noor Capital.

Therefore Noor Capital is not an associated company or undertaking of DKL, as defined in the Ordinance."

5. The reply of the respondents was not found satisfactory and a hearing was fixed for the case on October 21, 2016 and November 10, 2016. One of the authorized representatives, Mr. Musa Bashir Janjua, appeared on date of the hearings and sought adjournment on both the occasions. Hearing in the matter was once again fixed on December 15, 2016. The authorized representative through his letter dated December 15, 2016 sought an adjournment. Next hearing was fixed on December 28, 2016. The authorized representative appeared on the date of hearing wherein the matter of loan to Noor Capital was discussed in detail. He was informed that the Company and Noor Capital were associated companies in light of the definition of associated companies as given in the Ordinance based on common directorship. The authorized representative failed to provide shareholders approval for the loan provided to the associated company. He requested further time to submit written submissions in the matter.

6. Subsequently, in order to include the additional directors who, *prima facie*, violated the provisions of section 208 of the Ordinance in the instant matter, an addendum to the SCN was issued on March 17, 2017 to the respondents on whom the SCN dated July 27, 2016 was not served. The addendum is part of the SCN and the respondents of the addendum are the respondents of the SCN. It may be mentioned that Ahmed Bashir & Associates were the authorized representatives of Mr. Adnan Ullah Tauseef, Mr. Kamal Pasha, Mr. Mubasher Mehmood Abbasi, Mr. Muhammad Ubaid, Mr. Taj Muhammad, Mr. Rais Umair Habib Ahmed, Mr. Ehmer Iqbal and Mr. Noor Aurangzeb whereas non representation or response to the SCN was received from Mr. Muhammad Ali Gauhar, Mr. Danish Kaiser Monnoo, Mr. Sheraz J. Monnoo and Mr. Humayun Gauhar.

7. The written response from the authorized representative as committed during the hearing held on December 28, 2016 was not submitted thus a hearing in the matter was fixed on April 24, 2017. The authorized representative appeared on the date of the hearing and requested seven days time for submission of the documents. The written response dated May 4, 2017 was submitted by the authorized representative, the relevant portion of which is reproduced hereunder:

> *"It is Respondents' case that Noor Capital (Pvt.) Ltd. and DKL are not 'associated companies'.*

1. As per the definition of 'associated companies' and 'associated undertakings' as contained in Section 2 (2)(i) of the Companies Ordinance, for any two companies to be termed as 'associated companies' on the basis of any common directors, it is essential that such common directors should also hold or control at least twenty percent (20%) of the voting power in both companies.

3. The entire scheme of the Companies Ordinance does not allow to conclude that only the presence of one (or two) common director(s) in any two or more companies or undertakings would make them 'associated companies' or 'associated undertakings'. For such entities to be called 'associated,' the director in question should have at least voting power's equivalent to 20% of the entire shareholding.

4. Section 2(2)(ii) provides that where two companies or undertakings are under 'common management', they shall be treated as 'associated companies' or 'associated undertakings'. 'Management' is the function which is to be performed by the directors of companies under the Companies Ordinance [Section 196(1)]. It is for this reason that various provisions of the Ordinance which prescribe pre-requisites in relation to conduct of business by a company impose lines for violation of such requirements on the directors. All other persons concerned with a company are referred to as 'officers' and not the 'management'. Thus, clearly the term 'common management' used in Section 2(2)(ii) refers to a company's board of directors.

Following from the above, as per Section 2(2)(ii) any companies or undertakings shall be treated as 'associated' if they are working under a common management (i.e. board of directors) or control or if one is subsidiary of another. If Section 2(2)(i) is interpreted to mean that merely presence of a common director would make two or more concerns 'associated undertakings', it would render Section 2(2)(ii) totally redundant. Evidently, if presence of only one director could make two business concerns `associated undertakings', there was no need for the legislature to include Section 2(2)(ii) in the Companies Ordinance.

If Section 2(2)(i) is interpreted to mean that only a single common director can make two entities 'associated undertakings', it will in all likelihood result in absurdity. For instance, if a person is appointed/elected as a director on the basis of his shareholding in a huge commercial enterprise. And at the same time he is appointed as a director by a non-profit company formed under Section 42 of the Ordinance on the basis of his technical

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expertise (e.g. as a legal expert). Along with that he also runs his law firm as a partner or sole proprietor. If SECP's interpretation is applied to this situation, it would mean that a commercial enterprise, a non-profit company and a law firm are 'associated undertakings'. As per the general scheme of the Companies Ordinance, 1984 this clearly is not the intention of legislature.

It is an established principle of the interpretation of statutes that no word or expression or any part of a section is to be read in isolation. The entire section is to be read in totality and likewise in order to ascertain the intention of legislature, the entire statute is to be read together and all the relevant provisions in a statute are to be 'read together and the conclusions are to be drawn which emerge out of the totality of a scheme contained in the Statute, in a manner which is harmonious with all the relevant provisions contained in an enactment. The general rule is that all the relevant provisions in the Statute are to be considered in their totality in a way that the scheme envisaged in the law is applied in its totality without doing violence to any other provision of law, and without rendering any other section in the statute to be redundant, superfluous, nugatory or otiose. (Ref: 2002 MLD, page 209 (Karachi)].

Upshot of the above is that for the two concerns to be 'associated undertakings' under Section 2(2)(i), they should have common directors holding or controlling a minimum of twenty percent (20%) of the voting power.

The legislative intent behind including provisions for treating certain concerns as 'associated undertakings' is to ensure that any act or omission done by one concern should not affect, either adversely or in an extra ordinary favourable way, the other concern. A single common director in two companies holding or controlling negligible shares (i.e. less than the threshold prescribed in Section 2 (2)(i)) cannot possibly have any substantial bearing on any decision being taken in either company.. 'This is also evident from various provisions of the Companies Ordinance which provide bench marks for various matters. For instance, Section 290 of the Companies Ordinance allows minority shareholders can move court on the grounds of oppression and mismanagement. For this the minimum bar for members/shareholders is to have twenty percent (20%) of paid up capital. Section 179 requires a minimum bench mark of twenty percent (20%) of voting rights to challenge validity of election of directors. In this regard it is also relevant to point out that Section 305 (Explanation II) defines 'minority shareholders' as the ones who together hold not less

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than twenty percent (20%) of the equity share capital of the company. Even in cases where rights of shareholders are changed by majority, the shareholders adversely affected by such change can only bring an action if they together hold ten percent of the class of aggrieved shareholders. Under section 164 members cannot even give notice of a resolution unless they hold ten percent (10%) of the total voting power.

5. Provisions relating to 'associated undertakings' in other jurisdictions

The Indian Companies Act, 2013

Under Section 2 (6) of the Indian Companies Act, 2013 for a company to be 'associate company' of another it is necessary for such other company to have a significant influence on it. The term 'significant influence' has been defined in the Explanation to Section 2 (6) as 'the control of at least twenty percent (20%) of the total share capital or of business decision under an agreement.

The Companies Act, 2006 (English Law)

Section 256 of the English Companies Act, 2006 only treats subsidiaries as 'associated bodies corporate'. Section 1159 of this Act defines subsidiary as the one in which its holding company holds majority shares.

A bare perusal of the above mentioned English and Indian laws clarifies the concept of 'associated undertakings' in the company laws. It establishes beyond doubt that for two undertakings to be called 'associated' with each other it is essential that one is in a position to exercise a considerable influence on the other. This is certainly not possible where two Companies may have only one or two common director or the ones who do not even hold a considerable share in the two entities."

8. The respondents vide letter dated July 4, 2017 were inquired about the exact date of the loan and to provide the related supporting documents. The authorized representatives in reply dated August 22, 2017 failed to provide exact date of the loan and submitted that all relevant records, especially relevant accounts have already been provided by the Company. Later, vide letter dated October 4, 2017 the date of loan was communicated as September 11, 2015. It was observed that the date of advance of loan to Noor Capital was not correct as quarterly accounts of the Company for period ended September 30, 2015 did not disclose said loan. It may also be mentioned here that the auditors in their report on the accounts for the period ended on December 31, 2015 provided the following qualification:

"During the reporting period company issued right shares to shareholders on October 15, 2015 for the purpose of investment in various undervalued profitable businesses. According to plan these funds were supposed to be utilized for making equity investments, whereas management made use of these funds for the payment of dividend, repayment of directors and associated company's loan and advance of loan to associated company."

The above observation of the auditors revealed that the loan was extended to Noor Capital after the right issue thus the date of advance of loan stated to be September 11, 2015 was not correct.

9. Next hearing in the matter was fixed on January 24, 2018 wherein Mr. Zahir Shah, Advocate appeared and submitted request for adjournment. He also provided power of attorney which was not signed by any of the respondents thus was defective. He further submitted that proper reply shall be submitted on the next date of hearing. Hearing in the matter was once again fixed on February 26, 2018 as a final hearing opportunity. Mr. Zahir Shah, Advocate appeared on the date of the hearing and once again sought an adjournment. He was asked to submit power of attorney signed by all the respondents. It was observed that the power of attorney submitted by Mr. Zahir Shah is signed by five out of twelve respondents only. The last hearing was fixed on March 14, 2018 which was not attended by anyone. It is to mention the Commission has not received any further communication or response from the authorized representatives in the instant matter whereas no response to the SCN or to various hearing notices issued by the Commission was received from Mr. Muhammad Ali Gauhar, Mr. Danish Kaiser Monnoo, Mr. Sheraz J. Monnoo and Mr. Humayun Gauhar.

10. Before proceeding further, it is necessary to advert to the following relevant provisions of section 208 of the Ordinance;

> *208. Investments in Associated companies and undertaking.- (1) [Subject to sub-section (2A) a] company shall not make any investment in any of its associated companies or associated undertakings except under the authority of a special resolution which shall indicate the nature period and amount of investment and terms and conditions attached thereto.*

Provided that the return on investment in the form of loan shall not be less than the borrowing cost of investing company.

Explanation: The expression 'investment' shall include loans, advances, equity, by whatever name called, or any amount, which is not in the nature of normal trade credit.

(2A) The Commission may-

(a) by notification in the official Gazette, specify the class of companies or undertakings to which the restriction provided in sub-section (1) shall not apply; and

(b) through regulations made thereunder, specify such conditions and restrictions on the nature, period, amount of investment and terms and conditions attached thereto, and other ancillary matters, companies as it deems fit.

(3) If default is made in complying with the requirements of this section [or regulations,] every director of a company who is knowingly and wilfully in default shall be liable to fine which may extend to ten million rupees and in addition, the directors shall jointly and severally reimburse to the company any loss sustained by the company in consequence of an investment which was made without complying with the requirements of this section.

11. In terms of the Commission's notification SRO 751 (I)/2017 dated August 2, 2017, the powers to adjudicate cases under section 208 have been delegated to the Executive Director (Corporate Supervision Department).

12. It is pertinent to discuss the importance of the provisions of section 208 of the Ordinance, particularly the importance with respect to protection of the shareholders rights. It is universal knowledge that fairness of decisions can be marred by conflict of interest that is why company law envisage such provisions as provided in section 208 of the Ordinance which can protect the shareholders from undue losses due to any compromised decisions by the directors. The directors may fail to act in the best interest of the Company due to their personal interest or the interest of a private company where the director holds office of the chief executive or a director or directly/ indirectly holds substantial shareholding.

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13. The law requires that any investment in associated companies shall be under the resolution of the company's shareholders. The wisdom of the law is abundantly clear in the instant case as the Company despite being an entity in losses extended loan to an associated company. This is not a matter of a technical breach of law with no affected parties, it is rather a breach of shareholders' trust and deprivation from participating in key decisions such as investment in an associated undertaking. Such instances can hurt investor confidence in the securities market when the investor cannot trust as to how the money raised from them through right issues or public offerings will be utilized by the directors of a public company in a way not disclosed to the shareholders earlier.

14. The authorized representative has contested that two companies cannot be associated merely on common directorship. In this regard, the wording of the Section 2(2)(i) of the Ordinance is crystal clear and a cursory reading of the same reveals that common directorship in two companies or undertakings binds both into an associated relationship in the eyes of the law. Section 2(2)(i) defines two companies or undertakings as associates wherein a person who is the owner or a partner or director of a company or undertaking or who, directly or indirectly, holds or controls shares carrying not less than twenty percent of the voting power in such company or undertaking, is also the owner or partner or director of another company or undertaking, or directly or indirectly, holds or controls shares carrying not less than twenty per cent of the voting power in that company or undertaking. So the person in question needs to be either of the four i.e. owner, partner, director or holding or controlling at least 20% shares in one company and he can have either of the four roles in the other company, for both the companies to be in a associate relationship. The role of the director in itself does not require any substantial shareholding as the law entrusts the directors with vast decision making powers in order to manage and run the affairs of the Company and same powers can be exercised with the minimum shareholding required under the law for the directors. Thus just being director in both the companies suffices for the definition provided in the law. It is important to mention that the Company itself has disclosed the loan extended to Noor Capital as "loan to associated undertaking" and the letter dated May 21, 2016 of the CEO of the Company also confirms that the payment was made to associated undertaking. Hence, the relationship with Noor Capital as an associated company is already accepted and disclosed on part of the Company whereas the relationship was also corroborated from the Commission's record of both the Company and Noor Capital.

15. The purpose of the law is to minimize any loss to shareholders arising from any decision of directors where they act in their personal interest instead of that of the company. The instant case is a very good example of how common directorship can influence decisions that may not be in the best interest of the Company or its shareholders, as it can be seen that the Company in this case has given a loan to an associate whereas its primary business is to make equity investments in undervalued profitable businesses, as disclosed in Note 1 to the accounts. Furthermore, said loan was provided without the knowledge of the shareholders and at a time when the Company had accumulated losses of over 56 million and had a negative EPS as on December 31, 2015. It was irresponsible for a public company incurring losses to extend loans to associates. It was also financially detrimental as can be seen from subsequent financial figures such as the Company's accumulated losses that stand at Rs.67.5 million on December 31, 2017 compared to the accumulated losses amounting to Rs.9.66 million on December 31, 2014.

16. I have analyzed the facts of the case, provisions of Sections 208 of the Ordinance, arguments put forth in writing and during the hearing by the Authorized Representatives. I am of the view that the provisions of section 208 of the Ordinance have been violated as loan was extended to an associated company. The loan was given without endorsement by the shareholders and they had no prior knowledge of such a transaction. The respondents are liable for penalties under section 208 of the Ordinance. I have observed that Mr. Muhammad Ali Gauhar, Mr. Danish Kaiser Monnoo, Mr. Sheraz J. Monnoo and Mr. Humayun Gauhar have not responded to the SCN and any of the notices issued for the hearing during the instant proceeding. I am therefore constrained to proceed against them on *ex parte* basis. I hereby, under the powers conferred upon me, impose a penalty of Rs.200,000 on each of the respondents other than the common directors. Fine of Rs.500,000 each is imposed on common directors bearing more responsibility in the instant transaction. The details of penalties are as follows:

S. No.	Respondents	Penalty (Rs)
1	Mr. Muhammad Ali Gauhar	200,000
2	Mr. Adnan Ullah Tauseef	200,000
3	Mr. Kamal Pasha	200,000
4	Mr. Mubasher Mehmood Abbasi	200,000
5	Mr. Muhammad Ubaid	200,000
6	Mr. Taj Muhammad	200,000

7	Mr. Rais Umair Habib Ahmed	200,000
8	Mr. Ehmer Iqbal	500,000
9	Mr. Noor Aurangzeb	500,000
10	Mr. Danish Kaiser Monnoo	200,000
11	Mr. Sheraz J. Monnoo	200,000
12	Mr. Humayun Gauhar	200,000
	Total	3,000,000

The aforesaid fines must be deposited in the designated bank account maintained with MCB Bank Limited in the name of the "Securities and Exchange Commission of Pakistan" within thirty days from the receipt of this order and furnish receipted bank vouchers to the Commission. In case of non-deposit of fine, proceedings for recovery of the fines as arrears of land revenue will be initiated. It may also be noted that the said fines are imposed on the Respondents in their personal capacity; therefore, they are required to pay the said amount from personal resources.

Abid Hussain
Executive Director

Announced:
June 11, 2018
Islamabad