

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

The Hon Mr Justice Andrew J. Jones QC

In Chambers, 1st September 2011

Cause Nos. FSD 269 of 2010 (AJJ)

IN THE MATTER OF THE COMPANIES LAW (2010 REVISION)

AND IN THE MATTER OF ICP STRATEGIC CREDIT INCOME MASTER FUND LTD (In Liquidation)

Appearances: Fraser Hughes of Conyers Dill & Pearman for the Joint Official Liquidators

RULING

1. This is an application by the Joint Official Liquidators (“JOLs”) of ICP Strategic Credit Income Master Fund Ltd (“the Master Fund”) for an order that two affidavits sworn by one of the JOLs and an affidavit sworn by the JOL’s New York attorney (“the Affidavits”) be sealed and kept confidential. The application was amended at the hearing to include a second affidavit sworn by the New York attorney. The application is made by an *ex parte* summons issued pursuant to Order 24, rule 6 of the Companies Winding Up Rules which confers a limited power upon the Court to order that any document required to be put on the Court file shall be sealed and kept confidential for a specific period or until the happening of a specified event. There is jurisdiction to make such an order only if the Court is satisfied that (a) the information contained in the affidavits is of a confidential nature and will not come into the public domain unless and until they are filed in Court and (b) the publication or immediate publication of the information contained in these documents will harm the economic interests of the company’s stakeholders. If I am satisfied in respect of both limbs of this test, I then have a discretionary power to make an order that the documents be sealed for a limited time. This discretionary power has to be exercised for the purpose of protecting the economic interests of the general body of creditors (if the company is insolvent) or shareholders (if it is solvent). The Court’s power cannot be exercised for the benefit of third parties.

2. The Master Fund was incorporated on 8th September 2005 as part of a master/feeder structure comprising (a) ICP Strategic Credit Income Fund Ltd, a Cayman Islands incorporated company which was put into compulsory liquidation by order of this Court on 10th August 2010 and (b) ICP Credit Income Fund LP, a limited partnership registered in Delaware which is not the subject of any bankruptcy proceedings (which I shall refer to collectively as “the Feeder Funds” and individually as the “Offshore” and “Onshore” Feeder” respectively). On 27th October 2010 the Master Fund was put into voluntary liquidation by a special resolution passed by its shareholders (the Feeder Funds) and the liquidation was brought under the supervision of the Court by an order made on 23rd December 2010. Messrs Hugh Dickson of Grant Thornton Specialist Services (Cayman) limited and Stephen Akers of Grant Thornton UK LLP have been appointed as joint official liquidators of both the Master Fund and the Offshore Feeder. The Onshore Feeder continues to be managed by its general partner, a Delaware company called ICP Strategic Credit Income GP, LLC, (“the GP”) which is controlled by Mr Thomas C. Priore (“Mr Priore”). The Offshore Feeder owns about 78½% of the Master Fund’s shares and the Onshore Feeder owns about 21½% (including 0.87% which appears to be beneficially owned by the GP).
3. Mr Priore played a crucial role in the establishment and management of the ICP funds. He owns and controls ICP Asset Management, LLC, (“ICP Management”) which carried on an asset management and broker-dealer business in New York, focused on investment in resident mortgage backed securities. ICP Management acted as investment manager of the Master Fund pursuant to an investment management agreement dated 26th October 2006. Mr Priore served as a director of both the Master and the Offshore Feeder.
4. The Master Fund’s principal asset originally comprised a portfolio CDOs issued by various companies which I shall refer to collectively as “Triaxx Funding”, all of which were managed by ICP Management under the control of Mr Priore. As a result of the collapse of the US residential property market, the value of the Master Fund’s CDO portfolio collapsed. It failed to publish an NAV per share for the quarter ended 31st March 2009 and on 23rd April 2009 its board of directors resolved to suspend redemptions and subscriptions. The Master Fund’s principal liability is US\$37.7 million owing to the Offshore Feeder in respect of unpaid redemption requests which were received in respect of the 31st December 2008 redemption day and processed prior to the suspension. The Onshore Feeder did not submit any redemption requests in respect of the 31st December 2008 redemption day. The

Master Fund's only (immediately) realizable asset comprises cash of about US\$24 million. In addition it has (or had) the following assets which do not have any present realizable value, namely (1) the portfolio of CDOs issued by Triaxx Funding, for which there is presently no market; (2) a receivable of about US\$3 million due from Institutional Credit Partners LLC (which is part of the investment management business owned by Mr Priore) in respect of a participation in a loan made to Lerin Hills Holder LLC; and (3) a claim in the bankruptcy of Lehman Brothers Holdings LLC in the sum of about \$3.5 million which has been transferred to Barclays Bank Plc, apparently for no consideration. The JOLs are of the view that the circumstances surrounding the acquisition and subsequent management of these assets, including payments totaling about \$36.5 million made for the benefit of Triaxx Funding for which the Master Fund appears to have received no commercial benefit, give rise to causes of action against ICP Management for breach of contract and against Mr Priore personally for negligence and breach of fiduciary duty. On 21st June 2011 the JOLs issued a summons by which they sought, inter alia, the sanction of the Court to commence an action in the United States District Court for the Southern District of New York against both ICP Management and Mr Priore for damages for breach of duty. The sanction application came on for hearing on 19th August and has been adjourned, part heard, to a date to be fixed. The JOLs' now apply for an order pursuant to CWR Order 24, r.6 that the three affidavits sworn in support of the sanction application be sealed and kept confidential until such time as the proposed action is finally concluded. The application is prompted by the fact that ICP Management has sought to exercise its right, as the Master Fund's former investment manager, to inspect the Court file relating to the liquidation proceeding.

5. Court files relating to liquidation proceedings are not open to public inspection. CWR O.26, rule 4(1) defines who may inspect these files as follows –

“The following persons shall have the right to inspect the Court file in respect of a liquidation proceeding and take copies of filed documents –

- (a) the liquidator;
- (b) any former liquidator or controller of the company;
- (c) any person who was a director or professional service provider of the company immediately before the commencement of the liquidation;
- (d) the [Monetary] Authority, in the case of a company which carried on a regulated business; and
- (e) any person stating himself in writing to be a creditor or contributory of the company.”

It follows that ICP management is entitled to inspect the file because it was engaged by the Master Fund as a professional service provider immediately before the commencement of the liquidation.¹

6. Because the Master Fund and the Offshore Feeder are separate companies they are necessarily the subject of separate liquidation proceedings, each with its own Court file, notwithstanding that the outcome of the liquidations is entirely interdependent and that they have the same liquidators. Technically, the offshore investors have access to the Offshore Feeder's Court file (FSD #82 of 2010) but not the Master Fund's Court file (FSD #269 of 2010), because they are neither shareholders nor creditors of the Master Fund, although the Court can (and almost certainly would) grant them access by giving special leave under CWR O.26, r.4(3). The content of a Court file relating to a liquidation proceeding will contain the following categories of documentation. First, it will contain the petition by which the proceeding is commenced, together with the supporting/opposing affidavits, any interlocutory summonses and orders, and the Court's ruling and winding up order.² Second, it will contain various certificates and notices reflecting key decisions made by the official liquidator, such as his determination of the company's financial status (as solvent, insolvent or of doubtful solvency), the currency of the liquidation and the composition of the liquidation committee. Third, the official liquidator's reports to creditors/shareholders (but not reports to the liquidation committee) are required to be filed. Fourth, documents relating to appeals against the rejection of proofs of debt and applications to expunge admitted proofs are put on the Court file. Similarly, in connection with solvent liquidations in which the register of shareholders is rectified, notice of rectification is filed but the underlying documentation will only be filed if there is an appeal against the official liquidator's decision. Finally, the Court file will contain summonses, affidavits and orders relating to all the sanction applications made throughout the life of the liquidation proceeding, including the applications for approval of the official liquidator's remuneration. It follows that Court files often contain a very large number of affidavits (sworn by or on behalf of official

¹ It also follows that Mr Priore (in his capacity as a former director) and the Onshore Feeder (in its capacity as a contributory) are entitled to inspect the Court file relating to the liquidation proceeding of the Master Fund.

² The petition and the winding up order became a matter of public record (which can be inspected a copied by anyone) as a result of being placed on the *Register of Writs and Other Originating Process* and the *Register of Judgments* respectively. Because winding up orders and supervision orders affect a company's status and are binding upon the whole world, they are also required to be registered with the Registrar of Companies and thereby become a matter of public record by a second route.

liquidators, creditors, shareholders and others) but it is relevant to note that the exhibits to these affidavits are not retained on the Court file.

7. The right to inspect and copy the contents of a Court file under O.26, rule 4(1) is not absolute. It is exercised by submitting a written request to the Registrar of the Financial Services Division who must satisfy himself about the “propriety” of the application which means that the Registrar must be satisfied that the applicant is a person falling within one or more of the categories contained in rule 4(1) and that the application is made for a proper purpose. In deciding whether or not to allow inspection, the Registrar may consult with the official liquidator or the judge to whom the matter is assigned, but is not bound to do so especially when the application is made on behalf of a creditor or contributory of the company. In the event that the Registrar refuses to allow inspection, the applicant may apply to the assigned judge who may allow inspection, either unconditionally or on such terms as he thinks fit. For example, it would be open to me to allow ICP Management to inspect all the contents of the Master Fund’s Court file except for the materials relating to the Official Liquidators’ application for sanction to commence proceedings against it. Clearly, ICP Management is entitled to know whether or not proceedings threatened or commenced against it by the JOLs have been sanctioned by the Court, but it may well be inappropriate for it to have copies of any affidavits or written submissions which discuss the merits of the cause of action.

8. However, the purpose and effect of the Official Liquidators’ application to seal the Affidavits goes beyond denying ICP Management the right to inspect and take copies of them. The effect of an order under CWR O.24, rule 6(1) is that *no one* may inspect the document(s) in question. In particular, it would prevent all the investors (whether they are actual shareholders or unpaid redeemed shareholders) from inspecting the documents in question, notwithstanding that the documents relate to litigation intended to be commenced at their expense and for their benefit. This result is justifiable only if the Court is satisfied that disclosure to creditors and/or shareholders (not only the Feeder Funds, but also their creditors/shareholders/limited partners) will harm their own economic interests. Having exercised its right to inspect and take a copy of a document on the Court file, a creditor/shareholder may do what he pleases with his copy and may pass it on to others if he wishes to do so. Those who exercise their rights under CWR O.26, rule 4(1) are not subject to any express or implied duty of confidentiality. For this reason the Court assumes that disclosure pursuant to this rule will result in documents being put into the public domain. Therefore, the issue which I have to

decide in this case is whether it will harm the economic interests of the Feeder Funds and, through them, the underlying creditors/shareholders/limited partners if these Affidavits to be put into the public domain in this way. I now turn to consider the content of these Affidavits, bearing in mind that the exhibits are not available for inspection in any event.

9. The 2nd Affidavit of Hugh Dickson filed on 23rd June 2011 deals with five subjects, as follows. Under the heading *Economic Interest in the Master Fund*, it gives a very brief overview of the status of the liquidation. This is a brief summary of information repeated in more detail in the Official Liquidators' First Report which is also to be found on the Court file. Under the heading *Master Fund Cannot Establish a Liquidation Committee*, Mr Dickson describes why he thought it was impractical to establish a committee for the Master Fund (as opposed to the Offshore Feeder which does have a liquidation committee). Under the heading, *Priore's Failure to Hand Over Book and Records*, Mr Dickson describes at some length his efforts to persuade ICP Management and Mr Priore to comply with their legal obligation to deliver up the Master Fund's books and records which are still in their possession. In the final paragraph of this section he states that "The liquidation committee of the Offshore Feeder has been unequivocal in its support for taking whatever means are necessary to obtain the Books and Records from Priore and ICP Management and to preserve claims against them". Finally, under the heading *Potential Prejudice of U.S. Claims/Urgency*, Mr Dickson explains the need to commence proceedings against ICP Management and Mr Priore in order to recover the Master Fund's books and records and also prevent any limitation periods (applicable to breach of contract, negligence and breach of fiduciary duty claims) from expiring. In my judgment, this affidavit contains information which the Master Fund's stakeholders are entitled to know. It is information which either has been or will be contained in the Official Liquidators' reports. There is no credible reason for believing that it would be harmful to the economic interests of the stakeholders for this information to be put into the public domain now. If the Official Liquidators do commence the intended action against ICP Management in the United States District Court for the Southern District of New York ("the New York court"), this information will then be put into the public domain whether or not I make an order to seal this Affidavit, because that court's file will be open to public inspection.

10. The 3rd Affidavit of Hugh Dickson filed on 16th August 2011 is effectively a supplement to his 2nd Affidavit. It explains why (based upon legal advice) he considers that it would be more appropriate to commence the intended legal

proceedings against ICP Management and Mr Priore in the New York court rather than in this Court. Again, this is something which he will need to explain in his next report.

11. The Affidavit of John A. Morris sworn on 12th August 2010 reads like a complaint or statement of claim against ICP Management and Mr Proire. He is an attorney qualified to practice in New York and employed by Pachulski Stang Ziehl & Jones, the firm retained by the JOLs to represent the Master Fund in the action intended to be commenced against ICP Management and Mr Priore. This Affidavit sets out the facts necessary to support the intended causes of action based upon information provided to him by the JOLs. To some extent, it repeats factual allegations made in the complaint in the action commenced in the New York court on 21st June 2010 by the Securities and Exchange Commission against ICP Management, Mr Proire and others (No.10 Civ.4791). To the extent that Mr Morris expresses the view that, based upon the stated facts, the Master Fund has good causes of action with reasonable prospects of success, it may be said that this Affidavit contains legal advice. However, the fact that the JOLs have taken legal advice, the identity of the law firms, and his belief (based upon their advice) that the Master Fund has good causes of action, with reasonable prospects of success is something which the stakeholders are entitled to know. It will have to be stated in the JOLs' next report. Mr Morris' affidavit does not contain any legal analysis. Nor does it contain any statement which could be regarded as an admission against the Master Fund's interest. In my judgment this Affidavit does nothing more than tell the Court that which the JOLs will have to tell the creditors/shareholders (albeit in much less detail) in their next report. It follows that the information contained in the Affidavits is not of a confidential nature and that it will be put into the public domain in any event, in the sense that it will be disclosed to the creditors/shareholders in the JOLs next report.

12. Mr Morris' second Affidavit was sworn on 26th August 2011 in support of this application, rather than the sanction application. He argues that if ICP Management and/or Mr Priore have access to the content of legal advice given to the JOLs in connection with causes of action intended to be asserted against them, this arguably constitutes a waiver of the attorney-client privilege and attorney work product protection as a matter of New York law. Unfortunately, his conclusion is tentative and his evidence lacks any real legal analysis. He has not referred me to any applicable New York statute or rules. Nor has he cited any authority in support of his proposition.

13. It is not uncommon for the official liquidators of failed investment funds to commence litigation against their former professional service providers, as they propose to do in this case. In such circumstances, the official liquidators will have to make one or more sanction applications. They will also have to report upon the progress and outcome of the litigation to the creditors and/or shareholders, who are entitled to be heard on the questions whether litigation should be commenced, continued or settled. It is incumbent upon official liquidators to prepare their affidavits and reports in a way which does not unnecessarily include information, the publication of which would be counter-productive, but the shareholders/creditors are entitled to be given all the information necessary to make informed judgments about the course of action proposed by their official liquidators. In this context, official liquidators will have to express a view about the prospects of success, which they can only do on the basis of legal advice. In this way, it is inevitable that official liquidators must say something in their reports about the legal advice which has been received. The problem in this case, to the extent that it exists at all, is that Mr Morris has sworn an affidavit which could and should have been sworn by Mr Dickson. For the purposes of this sanction application the Court needs to know, inter alia, that the JOLs have taken appropriate legal advice. This fact could be proved without having Mr Morris himself swearing any affidavit. If it becomes necessary for the Court to consider the actual legal advice obtained by an official liquidator, it should be exhibited to his affidavit, in which case it will not remain on the Court file.
14. In my judgment it cannot be said that the information contained in the Affidavits will not come into the public domain unless they are sealed and that the publication of this information will cause any harm economic harm to the Master Fund's shareholders/creditors. The Affidavits tell the Court what the JOLs will have to tell the shareholders/creditors in their next report. The evidence relating to the waiver argument is superficial and thoroughly unsatisfactory and it seems to me that the point would never have arisen if all these affidavits had been sworn by Mr Dickson rather than his New York attorney. In these circumstances I am not satisfied that a case has been made out for sealing the Affidavits. However, I do have power under CWR O.26, r.4(5) to refuse to allow ICP Management and Mr Priore access to the Court file or to do so on terms, if I am not satisfied about the propriety of their application. Given that the JOLS' have decided, subject to obtaining the Court's sanction, to commence an action against ICP Management and Mr Priore, I think that it is open to me to conclude that it would be improper

for them to seek access to the JOLs' legal advice in respect of the case against them. I shall therefore direct that ICP Management and Mr Priore shall be entitled to inspect and take copies of everything on the Court file except for the two affidavits sworn by Mr John A. Morris.

Dated 1st September 2011

The Hon. Mr Justice Andrew J. Jones, QC