IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 73 OF 2013 (AJJ)

The Hon Mr Justice Andrew J. Jones QC
In Open Court, 12th to 14th August and 10th September 2013

IN THE MATTER OF SECTION 15(4) OF THE EXEMPTED LIMITED PARTNERSHIP LAW (2012 REVISION)

AND IN THE MATTER OF CYBERNAUT GROWTH FUND, L.P.

Appearances: Mr Michael Green QC with and instructed by Mr Matthew Crawford and Mr Luke Stockdale of Maples and Calder for the Petitioners
Mr Richard Hacker QC with and instructed by Ms Anna Peccarino of Thorp Alberga for the General Partner
Mr Ross McDonough and Ms Kirsten Houghton of Campbells for Oriental Financial Holding Corporation

JUDGMENT

Introduction and procedural history

1. Cybernaut Growth Fund, L.P. ("the Partnership") is an exempted limited partnership which was registered on 20th May 2008 under the Exempted Limited Partnership Law (2007 Revision) ("the Law"). It was established as a closed ended investment fund for the purpose of investing up to US$250 million in companies carrying on various types of business in the People's Republic of China ("PRC"), pursuant to the terms of a limited partnership agreement as amended and restated on 18 February 2009 ("the LPA"). It was established for a fixed seven year period due to end in June 2015. The Partnership has six limited partners. Five of them are investment funds advised and/or managed by Partners Group AG, a large well known financial services business based in Switzerland. Collectively, their capital commitment is US$124.9 (representing 49.96% of the limited partner interests) of which $103.2 million has been called and paid up in cash. The Partnership was established following discussions between executives of Partners Group and Mr

Min Zhu ("Mr Zhu"), an entrepreneur with experience in the technology industry in both the USA and the PRC. The other limited partner is Oriental Financial Holding Corporation ("Oriental"), an investment holding company which is said to be owned and managed by Mr Zhu's former wife, Mrs Yuping (Susan) Xu ("Mrs Xu"). It has a capital commitment of US$125.1 million (representing 50.04% of the limited partner interests) of which $103.4 million has been called. Oriental satisfied its initial capital call by transferring assets in kind having a book value of about US$84.6 million and subsequent calls of about US$18.8 million should have been paid in cash.[1] The general partner is Cybernaut Capital Management Limited ("the GP"). It is a company which was incorporated in the Cayman Islands by Mr Zhu for the special purpose of acting as general partner of the Partnership. The GP is owned by Mr Zhu (85%) and its senior employee, Mr Jason Zhao (15%). The GP's financial interest in the Partnership is limited to its right to receive an annual management fee of 2% of the committed capital ($5 million per annum) and a performance fee of 20% of realised gains in excess of the contributed capital plus 5% per annum and 30% of realized gains in excess of a higher benchmark. Leading Counsel for the GP has characterised the Partnership as a "quasi-partnership" between Oriental and the GP on the one hand and the five Partners Group funds on the other hand.

2. On 4 June 2013 the five Partners Group funds (collectively "the Petitioners") presented a winding up petition against the Partnership on the ground that it is just and equitable that a winding up order be made by reason of the fact that the Petitioners have justifiably lost trust and confidence in the GP such that they cannot be expected to remain within the Partnership with the GP in control of its assets and management. Oriental and the GP accept that, in the circumstances, the Partnership does need to be wound up now, but they insist that it should be a voluntary winding up in accordance with the provisions of the LPA, with the GP acting as voluntary liquidator. On the hearing of the initial summons for directions on 11 June 2013 Foster J. made an order pursuant to CWR Order 3, rule 12 that the petition be treated as an *inter partes* proceeding between the Petitioners as petitioners and the GP and Oriental as respondents. By a further order for directions made on 14 June 2013, I set a timetable for the exchange of affidavit evidence and written submissions for the trial of the petition to be heard on 12 and 13 August 2013. On the basis of this relatively short timetable, the Petitioners did not proceed with their application for the appointment of provisional liquidators. Leading Counsel for the GP now complains that this timetable was too short and was prejudicial to his client. I attach no significance to this submission. If his client was presented with any difficulty, it could have made an application for an extension of time and, if necessary, an adjournment of the trial date. No such application was ever made.

[1] According to the Petitioners, there is an open question about the extent to which Oriental has paid its cash calls. The Petitioners withheld payment of a cash call made in respect of management fees for 2012 for reasons explained in Mr Schneller's affidavit. Whether or not the limited partners have complied with their obligations in respect of cash calls is not directly relevant to the issues which I have to decide.

3. The timetable also made provision for the Respondents to issue a summons (which they did on 20 June) for an order that the petition be struck out as an abuse of the process on the grounds that (i) it was presented in breach of a valid and binding arbitration agreement, (ii) an alternative remedy, namely arbitration, is available to the Petitioners who are acting unreasonably by not pursuing it and (iii) on a true construction of the limited partnership agreement, the Petitioners have contracted out of their right to present a winding up petition or apply to the Court for the appointment of an independent liquidator. On the following day (21 June) they commenced an arbitration in New York pursuant to the rules of the American Arbitration Association, by which they sought declarations that the presentation of the winding up petition constitutes a breach of the LPA; that the Partnership should be wound up in accordance with the termination and liquidation provisions of the LPA; and that the GP should be appointed as "liquidating trustee" (meaning voluntary liquidator) of the Partnership. A further summons was then issued by which they sought a stay of the petition pending the outcome of the arbitration. On 25 June, on the application of the Petitioners, I made an anti-suit injunction restraining the Respondents from taking any further steps in the arbitration pending the outcome of the substantive hearing of the summonses. Having heard them on 3 July, I dismissed the Respondents' summonses for reasons delivered on 23 July 2013. I subsequently made an injunction restraining the Respondents from taking any further steps in the arbitration until after the outcome of the substantive hearing of the winding up petition.

4. On 1 August 2013 the Respondents commenced a proceeding against the Petitioners in the United States District Court for the Southern District of New York by which they sought an anti-suit injunction to restrain the Petitioners from proceeding with their winding up petition. Following an *inter partes* hearing on 7 August 2013 Judge William H. Pauley III dismissed this application on the basis that it was an attempt to re-litigate the same issue which I had already decided against the Respondents. An appeal against Judge Pauley's decision was still pending at the time when the petition came on for trial.

5. No party made an application to cross examine any of the deponents with the result that the winding up petition was tried on the basis of the affidavit evidence alone. The evidence for the Petitioners comprises affidavits sworn by Messrs Yves Adrian Schneller ("Mr Schneller") and Mr Adam Howarth ("Mr Howarth"), both of whom are employees of Partners Group AG. Mr Schneller is a lawyer admitted to practice in Switzerland. He is employed as a senior vice president at Partners Group's head office in Zug, Switzerland. Mr Howarth is a professional asset manager. He is employed as managing director of the Partners Group subsidiary in Singapore. The GP's evidence comprised an affidavit sworn by Mr Zhu, together with a large volume of documentary exhibits. Oriental supported the GP's opposition to the petition, but no affidavit evidence was filed on its behalf and its counsel's participation in the trial was limited to adopting the submissions made by Leading Counsel for the GP.

Applicable legal principles

6. Leading Counsel for the Petitioners puts their case on the basis of the principles contained in the well known decision of the House of Lords in *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360 and it is not disputed that these principles apply to the liquidation of an exempted limited partnership in the same way as they would apply to a company. Their case is that it is just and equitable to make a winding up order because the GP's misconduct and mismanagement of the Partnership has given rise to a justifiable and irreparable loss of trust and confidence on the part of the Petitioners, such that they cannot be expected to remain in the Partnership. The onus is on the Petitioners to establish that the GP is guilty of misconduct as alleged in the petition; that their loss of trust and confidence in the GP is both justifiable and irreparable; and that the circumstances justify the making of a winding up order. The parties are agreed that the Partnership should be wound up now. The onus is on the Petitioners to establish that the circumstances are such that it should be wound up compulsorily by independent professional insolvency practitioners acting under the supervision of the Court as opposed to being wound up voluntarily by the GP, in which case the limited partners will have no contractual right to participate in the process.

Petitioners' allegations of managerial misconduct on the part of the GP

7. The LPA imposes upon the GP an exclusive responsibility for the management and control of the business and affairs of the Partnership. In effect the GP is intended to perform the dual role of investment manager and administrator.[2] The Petitioners make a series of specific complaints about managerial misconduct, some more significant than others. Whilst it may be said that each complaint contributes to their loss of trust and confidence in the GP, I think that their case turns on the fundamental allegation that the GP has become a dysfunctional organisation which is no longer capable of properly managing the Partnership, as evidenced by its inability to produce current financial statements or obtain audit opinions in respect of those relating to 2010 and 2011 and its inability to produce any reliable reports about the status of the Partnership's assets.

8. By section 12 of the Law the GP has a statutory obligation to maintain proper books and records which means that it must maintain all such records which are necessary to enable it to generate a set of financial statements which give a true and fair view of the Partnership's financial condition and to explain its transactions. By Clause 9 of the LPA the GP has an obligation to prepare and approve annual financial statements of the Partnership in accordance with International Financial Reporting Standards. There is a further obligation on the GP to cause its financial statements to be audited by one or other of the so-called "Big Four" accountancy firms.[3] The GP must furnish

[2] Clause 10.6 of the LPA requires the GP to appoint one of its Affiliates as investment manager. There is no evidence that it actually did so, but nothing turns on this point.

[3] Clause 1.1 of the LPA defines "Auditor" to mean Ernst & Young, PricewaterhouseCoopers, Deloitte & Touche or KPMG.

copies of the audited financial statements to the limited partners as soon as they become available and in any event not later than 120 days after the financial year end which is defined to be 31 December. The statutory obligation to maintain proper books and records and the contractual obligation to produce audited financial statements are of course intimately inter-related. Initially, the GP complied with its obligations. The Chinese firm of Ernst & Young Hua Ming ("E&Y") was engaged and audited financial statements for the period from inception to 31 December 2008 and the year ended 31 December 2009 were issued within the 120 day deadline. It is relevant to observe that E&Y expressed unqualified audit opinions. This fact does point to the conclusion that proper books and records relating to these accounting periods must have been maintained and existed at the time when the audit opinions were issued. The Petitioners' complaint is that no audited financial statements have been produced for the subsequent years ended 31 December 2010, 2011 and 2012.

9. By Clause 9(b) of the LPA, the GP also has an obligation to produce quarterly investment reports which are to be distributed to the limited partners within 45 days of each quarter end. The GP complied with this obligation up to and including Q4 2011. These are detailed reports (each one around 50 pages long) comprising a high level manager's report, a portfolio review and unaudited quarterly financial statements. The portfolio reviews comprise a detailed analysis in respect of each of the Partnership's investments. The final section of each quarterly report, entitled Fund Financials, comprise Statements of Assets, Liabilities and Partners' Capital, Statements of Operations, Statements of Investments, Statements of Changes in Partners' Capital, Statements of Cash Flows and the Notes to the Financial Statements. They reflect the cumulative position as at each quarter end, with the comparative figures for the prior year end. In other words, these are proper financial statements obviously intended to comply with International Financial Reporting Standards and not merely summarised management accounts. The Petitioners make no complaint about the form or content of these Quarterly Reports. The complaint is that the GP stopped producing them after Q4 2011, except for a report for Q3 2012 which has been disowned by Mr Zhu.

10. The audit issue came to a head during October and November 2012. In a telephone conversation on 17 October between Mr Zhu and Ms Chuanbi Xu, one of the Partners Group executives based in Singapore, it was agreed that Partners Group would instruct the Shanghai firm of PricewaterhouseCoopers ("PWC") to perform an audit of the 2010 and 2011 financial statements. It was agreed that the Petitioners would pay PWC's fees on terms that it would be credited against their outstanding obligation for management fees.[4] PWC was sought to be engaged, but an engagement letter was not signed and the audit fieldwork was not commenced because the GP was unable to produce the relevant accounting records and supporting materials.

[4] For reasons explained in paragraphs 124 – 133 of Mr Schneller's affidavit, the Petitioners have withheld payment of the management fees due for 2012.

On 5 November a quarterly report for Q3 2012 was sent by Mr Zhao to Partners Group. It is in the same format as the earlier reports except that it does not contain any financial statements. Its content gave rise to serious concerns and on 21 November attorneys acting for the Petitioners sent a formal letter before action to the GP in which they set out a series of complaints, including the failure to audit the 2010 and 2011 financial statements and the failure to distribute the proceeds of the sale of certain investments which are recorded in the Q3 2012 Quarterly Report as having been sold. On 27 November Messrs Howarth and Schneller had a meeting with Mrs Xu in California. She expressed concerns about the management of the Partnership. In particular, she expressed the opinion that Mr Zhao could not be trusted. On 3 December 2012 PWC reported to Partners Group that the GP's employee designated to co-ordinate with the auditors appeared to be unfamiliar with the audit process and had been unable to find the relevant documentary material. By this time there was a recognition on both sides that the Partnership should be dissolved and representatives of the GP (Daryl Magana ("Mr Magana"), based in the United States), Partners Group (Mr Howarth) and Oriental (Mrs Xu) exchanged e-mails in which they discussed how to bring about this result. By his e-mail of 19 December, Daryl Magana also recognised that a third party audit would need to be conducted in order to satisfy the parties about the fairness of any dissolution.

11. A meeting took place in Hong Kong on 16 January 2013 attended by Mr Zhu, Mr Howarth and two other employees of Partners Group. This is an important meeting at which a wide range of matters were discussed, including the content of the Q3 2012 Quarterly Report and the GP's inability to have the financial statements audited. The Q3 2012 Quarterly Report says that the Partnership has realised about US$85 million from three of its investments. If true, most of this money should have been distributed to the Petitioners as they have a preference over Oriental under the terms of the LPA as amended in 2009. The investments in question are -

SVG Capital – this is a financial services business in which the Partnership initially made an equity investment of US$31.25 million (representing 56.4% of the equity) and subsequently made a loan of US$10 million. Mr Zhu, Mr Zhao and Mrs Xu sit on SVG Capital's board of directors. The Q4 2011 Quarterly Report says that the Partnership has signed a term sheet reflecting an agreement to sell its interest to SVG Capital's founder for RMB359 million (about US$58.4 million). By an e-mail transmitted on 23 March 2012, Mr Zhu said that the Partnership had received a deposit of RMB100 million (about US$16.3 million) and that he was working hard on receiving the balance. The transaction was discussed in further e-mails and telephone conversations with Mr Zhu during the second and third quarters of 2012. The Q3 2012 Quarterly Report says the sale price is RMB550 million (about US$89.5 million) in cash and 6 million shares in a company called AnXin Security Company and that the buyer has already paid RMB240 million (about US$39 million). It also states that the Partnership is in the process of receiving the balance of the cash and the transfer of the AnXin shares. In the light of these

statements, I agree with the Petitioners' counsel that Mr Zhu's description of this investment in paragraphs 39-44 of his affidavit is incomprehensible. He appears to be saying that no sale transaction ever took place and that the Partnership still has an unrealized investment in SVG Capital which he values at US$57 million (about RMB350 million).

Hairui Education – this is a company which provides education services in which the Partnership indirectly invested US$18.5 million via an entrustment arrangement intended to achieve the economic equivalent of a shareholding. The Q3 2012 Quarterly Report states that the Partnership's interest has been sold to a local Chinese buyer for RMB178.12 million (about US$28.73 million) and that the proceeds went to a fund controlled by Mr Zhu and that there is a need to check with the deal team and Mr Zhu about the status of proceeds collection. At the meeting on 16 January 2013 Mr Zhu appeared to deny that any sale transaction had ever taken place. Paragraphs 46-48 of Mr Zhu's affidavit describes the ownership structure of this investment and the table at paragraph 64 reflects an assertion that the Partnership still has an unrealized investment in Hairui Education which he values at US$20.6 million. In spite of the fact that this issue is clearly raised in the Petitioners' letter before action sent to him on 21 November 2012, Mr Zhu's affidavit simply fails to address the fact that the GP's Q3 2012 Quarterly Report says that the investment was sold for USD28.73 million.

Teacher.com.cn – this is the trade name of an online education service provider called Beijing Ji Jiao Wang Technology Co Ltd in which the Partnership indirectly invested US$11.2 million via an entrustment arrangement intended to achieve the economic equivalent of a shareholding. It subsequently invested an additional US$7 million in convertible debt. In various conversations in June, July and August 2012, Mr Zhao told Partners Group that this entity had been restructured as a wholly domestic company and that all the foreign investors had exited. The Q3 2012 Quarterly Report says that "[the Partnership's] share was transferred by the deal team to on-shore entities. No proceeds were received by [Partnership] account" and it is recorded in the investment summary as a realized investment. The realized proceeds are said to be US$17.9 million, representing a very small loss on the original investment. At the meeting on 16 January 2013 Mr Zhu told Mr Howarth that, following the death of Teacher.com's founder, he had to find another investor who wanted more than just the founder's interest and so he had to sell some of the Partnership's interest to him. Paragraphs 49-52 of Mr Zhu's affidavit says that the Partnership still has a 28.87% interest in this company which he values at US$18.2 million (being its cost price). He makes no attempt in his affidavit to explain why the GP's Q3 2012 Quarterly Report treats this investment as having been realized for US$17.9 million.

12. In the light of what Mr Zhu said at the 16 January 2013 meeting about the Q3 2012 Quarterly Report – he has accused Mr Zhao of being "a crook and liar" – and the fact that PWC had been unable to commence any audit fieldwork because the relevant books and records had not been

made available by the GP, it was agreed that they would be instructed to carry out a forensic review. The object of this exercise was to provide the parties with sufficient comfort about the existence, ownership and value of the assets as at 31 December 2012 to enable them to negotiate and agree upon a dissolution of the Partnership. At a meeting with PWC held on 20 February 2013, in which Mr Zhu, Mrs Xu and representatives of Partners Group participated, it was agreed that they would undertake an "agreed upon procedures engagement", the terms of which are set out in the document attached to the e-mail sent by Mr Howarth to Mr Zhu on 27 February 2013. PWC was formally engaged to do this work on 3 April 2013. It provides for the performance of specific audit procedures in respect of each of the companies in which the partnership is invested (referred to as "the portfolio companies") aimed at establishing the Partnership's ownership of the assets and their value as at 31 December 2012. It also provides for procedures to be performed in respect of the existence and ownership of the Partnership's bank account. By its terms, the performance of these procedures is highly dependent upon the ability of Ms Tianyi Huang, the GP's financial controller, to provide documents to the accountants, either from the GP's own records or by obtaining them from the portfolio companies. In the event, PWC was unable to perform the agreed upon procedures because the GP failed to provide the necessary documentation. Mr Schneller's evidence is that PWC confirmed to him that, as of 22 May 2013, they estimated that they had received, at most, 50% of the documents requested of the GP for the first phase of the work.

13. The GP's response to the Petitioners' concerns is contained in Mr Zhu's affidavit sworn on 19 July 2013. It is wholly inadequate because it fails to address the serious issues. Paragraphs 20 – 57 describe the ownership structure of Partnership's investment in each of twelve portfolio companies,[5] but the concerns arising out of the Q3 2012 Quarterly Report are not addressed. In paragraph 74 of his affidavit, Mr Zhu states that –

> "As financial information, albeit not in audited form, was provided to the Petitioners throughout, failure to have accounts audited for two years is at best a technical breach which is rectifiable and which the GP is in the process of rectifying".

This statement is remarkably complacent. It is not true to say that the Petitioners have been provided with unaudited financial information "throughout". The GP has failed to produce *any* financial statements for any period after 31 December 2011. Nor do I regard the failure to produce audited financial statements for the past three years as a "technical breach". The evidence is that the Petitioners attempted to have the 2010 and 2011 financial statements audited in November 2012 but PWC was unable to commence any audit fieldwork because the GP failed to provide them with access to the necessary books and records. Mr Zhu's affidavit does not

[5] The Partnership did invest in one other company called *8Ins.com*. It is not mentioned in Mr Zhu's affidavit. Nor was it included in the agreed upon procedures engagement intended to be performed by PWC Shanghai. It appears that the parties are agreed that it has a nil value and should be written off.

explain why the relevant material could not be made available. When it became apparent that an audit could not be conducted, or at least not easily, PWC was instructed to perform an agreed upon procedures engagement, the scope of which was narrower than an audit. Again, the work could not be performed because the GP was unable or unwilling to obtain all the relevant material. In the light of the GP's inability to make any meaningful progress towards the production of either an audit opinion or an agreed upon procedures report, the statement contained in paragraph 75 of Mr Zhu's affidavit that "the GP has taken steps to rectify this situation retaining the Partnership's former auditors, E&Y, who have confirmed that they will complete their financial audit by the end of August" is wholly lacking in credibility, especially when draft unaudited financial statements for the YE 2012 do not even exist. E&Y issued a standard form engagement letter dated 1 July 2013 which has been signed by Mr Zhu on behalf of the Partnership. A draft audit timetable has been created. It requires E&Y to provide a "document request list" by 19 July, a "list of material pending audit matters (if any)" by 16 August, draft financial statements by 30 August and an audit opinion by 10 September. Paragraph 75 of Mr Zhu's affidavit (sworn on 19 July) goes on to say "As [E&Y] have already been provided with all relevant information (see "MZ3") that deadline is likely to be met".[6] There is no evidence to support this assertion. Mr Zhu's suggestion that the absence of reliable financial information will be "rectified" by mid September lacks credibility because he makes no attempt to explain how the problems previously encountered by PWC will be overcome. There is no evidence from which to infer that the documentary material which was not available or could not be obtained for PWC in November/December 2012 or again in April/May 2013 has now actually been obtained and made available to E&Y. Nor is there any evidence that any audit fieldwork has actually been commenced.

Have the Petitioners justifiably and irreparably lost trust and confidence in the GP?

14. Leading Counsel for the GP recognises that its failure to produce quarterly reports and financial statements after Q4 2011 and the failure to have the 2010, 2011 and 2012 annual financial statements audited is a breach of duty. He also recognises that the dispute between Mr Zhao and Mr Zhu, which came to the Petitioners' attention prior to the publication of the contested Q3 2012 Quarterly Report, is a legitimate cause for concern. However, he puts his case on the basis that the Petitioners did not actually lose all trust and confidence in Mr Zhu as a result of these problems or, if they have now done so, it cannot be said that their loss of trust and confidence is objectively justifiable and irreparable. Rather, he suggests that the winding up petition was motivated not by a loss of confidence in the GP, but by frustration at not being able to obtain relevant information to which the Petitioners are unquestionably entitled. In these circumstances it is suggested that the remedy is to enforce their right to receive information, not to present a winding up petition on the just and equitable ground. I do not accept this proposition.

[6] "MZ3" comprises copies of the Quarterly Reports (excluding Q3 2012) and the audited financial statements for 2009.

15. The evidence points to the conclusion that the Petitioners' attitude changed during the second half of 2012, in my view justifiably so. The Petitioners had reminded Mr Zhu of the need for audited financial statements in 2011 and the first half of 2012 but they did not begin to press him until the GP failed to produce any quarterly report for Q1 2012 and the conflicts between Mr Zhu and Mr Zhao began coming to their attention. The Q4 2011 Quarterly Report was published, albeit three months late, in May 2012. It does contain unaudited financial statements for the YE 31 December 2011 with the comparative figures for 2010. Shortly after its publication, the situation began to change. During June the Petitioners' representatives were told about a transaction concerning Teacher.com by Mr Zhao and heard about a transaction concerning Hairui from a third party. Follow up calls did not produce any response from Mr Zhao. Instead, he referred them to Mr Zhu. By this time, publication of the Q1 2012 Quarterly Report was overdue. Various excuses were offered by Mr Zhu for the failure to produce current financial information and the failure to audit past financial statements. On various occasions he said that the GP no longer had any employees, that there was no one to co-ordinate an audit and that the GP had no money to pay for an audit. (The GP had received US$15.67 million in management fees up to the end of 2011.) On 31 July Mr Zhao informed a Partners Group executive that US$10 million had been received in relation to the Hairui investment and that Teacher.com had been restructured. These statements were repeated by Mr Zhao during a meeting in Singapore on 6 August 2012. During this period conversations also took place in connection with the receipt of sale proceeds relating to the investment in SVG Capital. However, no sale proceeds were distributed and, perhaps more importantly, the GP failed to produce the Q1 and Q2 2012 quarterly reports, in which these transactions should have been described. On 28 September Mr Zhao told Mr Howarth that Mr Zhu was negotiating with the purchaser of the Partnership's interest in SVG Capital for RMB180 million to be paid into an escrow account due to an investigation into irregularities concerning that company. On 17 October Mr Zhao reported that the Partnership's interest in Hairui had been sold and that a fund managed by Mr Zhu had purchased the Partnership's interest in Teacher.com. Then, on 5 November Partners Group received the Q3 2012 Quarterly Report. Whilst this report does refer to these transactions, it does not do so in a detailed way and it does not contain any financial statements, as it should have done, for the nine months ended 30 September 2012.

16. In my view this sequence of events justified the Petitioners' decision to instruct its lawyers to send a formal letter before action, which was done on 21 November. In the meantime, it had been agreed that PWC would audit the 2010 and 2011 financial statements, but on 3 December they reported that it had not been possible to commence work because the relevant documentary material had not been made available. On 9 January, Mr Howarth was told by Mr Magana (Mr Zhu's representative in the United States) that he had not even seen the Q3 2012 Quarterly Report and Mr Zhao, the GP's senior employee and 15% owner, was described as a "disgruntled employee". At the meeting on 16 January 2013, Mr Zhu disowned the Q3 2012 Quarterly Report

and accused Mr Zhao of being a "crook and a liar". On any view, it seems to me that this sequence of events justifies the Petitioners' loss of trust and confidence. I think that the evidence justifies Leading Counsel's characterisation of the GP as having become "dysfunctional" by this stage. To my mind, PWC's inability to perform the agreed upon procedures engagement (which was a substitute for a full scope audit) in April and May 2013 confirms that the Petitioners' loss of trust and confidence is entirely justifiable. The complacent response reflected in Mr Zhu's affidavit tends to confirm rather than change this conclusion. Leading Counsel for the GP pointed to Mr Howarth's summary of the 16 January meeting, as recorded in his e-mail sent on the following day to Mr Schneller, as evidence that Partners Group had not lost all trust and confidence in Mr Zhu personally. It is right to say that Mr Howarth did not say that he suspected Mr Zhu of dishonesty. Nor has any such allegation been made by the Petitioners. However, the final paragraph of this e-mail records his recommendation that they "continue preparing for a Cayman wind down" (meaning a liquidation proceeding) "while seeing if we can negotiate a settlement". I do not accept the GP's argument that this e-mail somehow points to the conclusion that the Petitioners have not in fact lost trust and confidence in their GP.

The Respondents' arguments against making a winding up order

17. Having reached the conclusion that the Petitioners' loss of trust and confidence in the GP is objectively justifiable and irreparable, I now turn to consider why it is said that it is nevertheless not just and equitable to make a winding up order. First, it is said that the Petitioners are not in truth applying for a class remedy. It is said that they are seeking a winding up order for their own purposes and that a winding up is not demonstrably for the benefit of the limited partners as a whole. This argument turns on the fact that the LPA was amended in 2009 to give the Petitioners a preference over Oriental. The effect of Clause 6 is that 100% of net realizations will be distributed to the Petitioners until they have each received a sum equivalent to their contributed capital plus interest at 5% per annum calculated from the drawdown dates. Thereafter, net realized gains will be distributed to all the limited partners pro rata to their capital commitments until they have all received an aggregate amount equal to their capital commitments (which is US$250 million in total). What this means is that Oriental would have no interest in a liquidation of the Partnership unless and until the net realisations exceed US$103.2 million (of which US$34 million has already been realised and paid) plus 5% per annum for about five years. Oriental's interest will be equalised only when net realisations exceed US$250 million. On this basis Leading Counsel for the GP argues that the Petitioners' position is equivalent to that of a preference shareholder in a company. Whilst this may be a reasonable analogy, it would not lead to the conclusion that the "preference shareholders" should be denied a winding up order merely because the financial circumstances are such that the "ordinary shareholders" may have no interest or that they face a greater risk of losing part of their investment. In fact, the evidence suggests that the Petitioners' preference is likely to be of academic interest only. Mr Zhu's

evidence is that the fair value of the Partnership's assets is about US$362.6 million (including the US$34 million already distributed). Whilst expressing the view that a compulsory winding up order would have a disastrous effect on the value of certain of the investments, he does not suggest that the total value would fall to such an extent that the limited partners would have an unequal financial interest in the outcome.

18. Second, it is said that even if the Petitioners' loss of trust and confidence in the GP is objectively justifiable and irreparable, there is still no good reason why the Court should interfere with the contractually agreed dissolution process mandated by the LPA. Clause 8.3(b) provides that upon termination of the Partnership the GP shall act as liquidating trustee (meaning voluntary liquidator), provided that, if it is terminated for Cause, then the limited partners may by a Special Majority Limited Partner Consent designate some other party to act as liquidating trustee. "Cause" is defined to include any act of gross negligence, reckless disregard, wilful misconduct or bad faith on the part of the GP. A "Special Majority Limited Partner Consent" is defined in a way which means that the Petitioners cannot appoint a professional insolvency practitioner to act as liquidator in place of the GP without the consent of Oriental, which is not forthcoming. Moreover, Leading Counsel for the GP points out that the Petitioners believed at the time they executed the LPA that Oriental was owned and controlled by Mr Zhu, rather than his former wife. In other words, it is said that the Petitioners entered into the LPA knowing that, as a practical matter, they would not be able to insist upon the appointment of anyone other than the GP as voluntary liquidator, even if the need to liquidate the Partnership had been brought about by the GP's own wilful default, reckless disregard or bad faith. In the absence of any allegation of actual fraud, Leading Counsel for the GP's argument is that the managerial misconduct relied upon by the Petitioners falls squarely within the definition of Cause and that the Court should exercise its discretion by holding the parties to their bargain unless there is some compelling reason not to do so. The decision of Henderson J in *Re Fortuna Development Corporation* which was upheld by the Court of Appeal (2010(2) CILR 85) is said to provide support for this approach, albeit in the context of an agreement about valuation methodology.

19. I think that there is a compelling reason in the circumstances of this case for making a winding up order, notwithstanding the terms of Clause 8.3(b). The events which have occurred since the second half of 2012 lead me to the conclusion that the GP is dysfunctional. It has demonstrated that it is incapable of taking even basic steps which are necessary to dissolve the Partnership. These steps will be the same, whether the process is conducted by the GP exercising its contractual powers as voluntary liquidator or by a professional insolvency practitioner exercising the statutory powers pursuant to an order of the court. The liquidator must produce reliable financial statements; identify the assets, which may or may not include cash or receivables due from purchasers; satisfy himself about the ownership structure and the entrustment arrangements; and he must report to the limited partners in a credible way. The GP has attempted

to do these things by consenting to the Petitioners instructing PWC to conduct an audit and, when that proved not to be possible, instructing them to perform an agreed upon procedures engagement. These efforts patently failed to produce any results. I think that the Petitioners accept that Mr Zhu is well able to value the assets and negotiate with potential purchasers but I am not persuaded by his recent performance and the content of his affidavit, which is both evasive and complacent in tone, that he can be relied upon to bring these skills to bear in the interests of the limited partners. If it could be said that the GP was ready, willing and able to perform its obligations as voluntary liquidator, there might be a case for allowing it to do so, notwithstanding that its prior breaches of duty amount to Cause as defined in the LPA, but this is not the case. I think that there is a compelling reason for making a winding up order because it is evident on the basis of its past performance that the GP is not capable of conducting a voluntary liquidation in a proper and credible manner.

20. Third, it is said that the Petitioners have alternative remedies. It is well established that a winding up petition presented on the just and equitable ground will be dismissed, in the exercise of the Court's discretion, if there is an alternative remedy available to the petitioner and that he is acting unreasonably in not pursuing it. See the decision of the Court of Appeal in *Camulos Partners Offshore Limited v. Kathrein & Co* 2010(1) CILR 303. The Respondents' case was intended to be put on the basis that there would be three alternative remedies, the first of which would be an offer to buy out the Petitioners' partnership interest. In the event no offer was forthcoming and so this remedy was taken off the table.

21. The second alternative remedy is the suggestion that the Petitioners should enforce their statutory and contractual rights of access to the Partnership's books and records arising under section 12 of the Law and Clause 5.1 of the LPA. The GP offered an undertaking to allow the Petitioners and their professional advisers (that is to say PWC) unrestricted access to the books and records and available audit evidence. Leading Counsel for the GP conceded that this is nothing more than an undertaking that the GP will comply with its existing obligations. It seems to me that this is really no remedy at all. The GP has never actually refused to allow the Petitioners or PWC access to the Partnership's books and records. The problem appears to be that the relevant documentary material either does not exist in the possession of the GP or Ms Tianyi Huang was unable or unwilling to obtain it from the portfolio companies or that the GP's staff are simply not up to the job. Given this past performance, it cannot sensibly be said that the GP's undertaking (or a mandatory injunction for that matter) is a useful remedy at all. So long as the GP is a dysfunctional operation, the most effective means of obtaining the information necessary to prepare reliable financial statements and a credible report to the limited partners is to appoint a professional insolvency practitioner who can exercise the statutory powers.

22. The third alternative remedy is the suggestion that the Petitioners should rely upon "a contractual wind-down", meaning a voluntary liquidation with the GP acting as liquidator. For reasons which I have already explained, I do not regard this as a credible remedy. However, Leading Counsel for the GP's argument is that, notwithstanding Mr Zhu's admitted shortcomings as a fund administrator and the fact that the GP has become a dysfunctional organisation which is incapable of managing a liquidation properly, it is still unreasonable not to go down this route because Mr Zhu says that a compulsory winding up order will have a disastrous adverse effect upon the realizable value of the assets. Mr Zhu's expressed concerns should be given some weight, but I do not have any expert evidence which explains why this case should be treated differently from any other investment holding company whose assets comprise minority interests (both shareholdings and "variable interest entity" arrangements) in a portfolio of companies carrying on business in the PRC. In any such case, this Court will always insist that one of the joint official liquidators is a professional restructuring/insolvency practitioner whose firm is based in Hong Kong, Shanghai or Beijing and whose understanding of the local business culture and regulatory regime will enable him to deal with the realisation of assets in an effective way. The risk that a winding up order may be destructive of value to some extent does not, in all the circumstances of this case, justify refusing to make an order.

Conclusion and post judgment applications

23. For these reasons I conclude that it is just and equitable that a winding up order be made. There being no dispute that Stuart Sybersma and Timothy Derksen of the Cayman Islands firm of Deloitte and Touche and Lai Kar Yan of the Hong Kong firm of Deloitte Touche Tohmatsu meet the criteria specified in the Insolvency Practitioners Regulations, I appoint them as official liquidators of the Partnership with power to act jointly and severally.

24. Having delivered a draft of this judgment to the parties' attorneys on 29 August 2013, I fixed today's hearing for the purpose of making the winding up order, determining any issues relating to costs and dealing with any other consequential matters, including any issue about the initial directions to be given to the official liquidators. The following matters were raised.

Application to adduce further evidence

25. By a summons issued yesterday without proper notice, the GP made an application for (a) leave to adduce in evidence the correspondence and documentation exhibited to an affidavit sworn by Mr Magana and (b) an order pursuant to section 95(3)(d) of the Companies Law (as an alternative to a winding up order) for the purchase by the GP and/or Oriental of the Petitioners' partnership interests. It is not in dispute that a trial judge has a discretion to receive new evidence after a judgment has been given but before the Court's order has been drawn up, signed and sealed. I was referred to a decision of the English High Court in *Charlesworth v. Relay Roads*

Ltd [2000] 1 W.L.R. 230 in which it was held that a trial judge is entitled to take a somewhat more flexible approach than that adopted by the Court of Appeal in determining whether to admit fresh evidence on appeal. Neuberger J. said at page 237 D-E –

"It is also germane to consider the approach laid down by the Court of Appeal to the admission of new evidence on appeal. In a well known passage in *Ladd v. Marshall* [1954] 1 W.L.R. 1489, 1491, Denning L.J. said that three conditions had to be satisfied before the Court of Appeal would be prepared to receive new evidence:

> "first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible."

While I think that these three factors should be in the forefront of the mind of the court when considering an application to admit new evidence after judgment has been handed down, but before the order has been drawn up, I incline to the view that the court is entitled to be somewhat more flexible, and not to proceed on the strict basis that each of these three conditions always has to be fully satisfied before fresh evidence can be admitted before judgment. Of course, in many ways, an applicant seeking to persuade the judge to receive fresh evidence and/or argument on a new point is in a very similar position to an appellant seeking similar relief from the Court of Appeal. He has had a full opportunity to collect his evidence and to marshall his arguments, and there must be a strong presumption against letting him have a second chance, particularly after he has seen in detail from the judgment why he has lost."

He went on to conclude at page 238 E-H –

"In these circumstances, I conclude that the following principles apply where party is seeking to call fresh evidence on a new point after judgment has been given but before the order has been drawn up: (1) the court has jurisdiction to grant an application to amend the pleadings to raise new points and/or to call fresh evidence and/or to hear fresh argument; (2) the court must clearly exercise its discretion in relation to such an application in a way best designed to achieve justice; (3) the general rules relating to amendment apply so that: (a) while it is no doubt desirable in general that litigants should be permitted to take any reasonably arguable point, it should by no means be assumed that the court will accede to an application merely because the other party can, in financial terms, be compensated in costs; (b) as with any other application for leave to amend, consideration must be given to anxieties and legitimate expectations of the other party, the efficient conduct of litigation, and the inconvenience caused to other litigants; (4) quite apart from, and over and above, those principles, because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the court was prepared to accede to an application where the applicant could not satisfy the three requirements in *Ladd v. Marshall*; (5) almost inevitably, each case will have particular features which the court will think it right to take into account when deciding how to dispose of the application before it; (6) the court should be astute to discourage applications which involve parties seeking to put in late evidence, but cases where new evidence is found after judgment is given and before the order is drawn up will be comparatively rare." .

I adopt these statements as representing Cayman Islands law.

26. Mr Magana's affidavit exhibits an exchange of correspondence between the attorneys acting for Oriental and the Petitioners which took place on the morning of 29 August 2013, before they had received my draft judgment. In brief summary, Oriental offered to purchase the Petitioners' partnership interests for US$97.1 million payable by 31 December 2013. The Petitioners made a counter-offer to sell for US$105 million payable by 30 November 2013 and subject to various important conditions. Having received my draft judgment, this counter-offer was withdrawn later the same day. The principle purpose of Mr Magna's affidavit is to put in evidence a letter dated 8 September 2013 by which both Oriental and the GP offered to buy the Petitioners interests for US$105 million subject to various conditions. This sequence of events has to be put into the context of the way in which the GP presented its case at trial. Its written skeleton argument (dated 7 August 2013) states –

> "35. Oriental has already offered a buy-out of the Petitioners' interest in the Partnership, but its offers have not been acceptable to the Petitioners.
>
> 36. However, the offer process is not yet exhausted and there is likely to be a further buy-out offer made before the hearing, which will be intended to meet the objections raised by the Petitioners in response to the existing offers."

That was written less than a week before the commencement of the trial. In opening the GP's case, its counsel said that no further buy-out offer had been made and that the intended argument that a buy-out offer constituted an alternative remedy was now, in counsel's words, "off the table".

27. I have concluded that I should not admit this evidence and permit the Respondents to re-open their case in this respect because I think that the Respondents had a reasonable opportunity to make this argument at trial. They decided, for reasons which were not explained to the Court at the time, to take this particular argument off the table. In my judgment it would be unjust to allow them to hold this argument in reserve (thereby deferring the need to make any buy-out offer) and to bring it in to play after judgment only in the event that they lose. Whether or not this is actually what happened is unclear. It cannot be said that the Court has had the benefit of a full and frank disclosure. I regard Mr Magana's affidavit as opaque at best. The parties had come to the conclusion that the Partnership should be dissolved by January 2013 at the latest. There was a recognition (shared by Mr Magana) that the production of reliable, up-to-date financial information was a necessary precondition to a consensual dissolution, which was why PWC was instructed to perform the agreed upon procedures engagement. The Respondents have had many months in which to formulate a buy-out offer and arrange the necessary financing. At least one offer was in fact made. According to Mr Magana's affidavit, the difficulty facing the Respondents is that they could not finance a buy-out offer without charging Oriental's partnership interest which the Petitioners do not want them to do. He says that the preferred solution is to find a new partner and that "The GP spent a number of weeks negotiating with

prospective partners and were only recently able to sign a partnership agreement with China Huayang Economic and Trade Group Co Ltd "(China Huayang"). He does not say whether this agreement was signed before or after the commencement of the trial. This is an important point. However, the agreement exhibited to Mr Magan's affidavit states on its face (in both the Chinese original and the English translation) that it was signed *before* the commencement of the trial. Both the cover page and the signature page of the Chinese original are dated 7 August 2013. In the absence of any explanation in Mr Magana's affidavit, I agree with Mr Green that this is evidence tending to suggest that the GP's summons is an abuse of process. It tends to suggest that the Respondents could have made a purchase offer supported by China Huayang prior to the commencement of the trial but decided for tactical reasons to hold back until they knew whether or not a winding up order was going to be made. However, Mr Hacker told me that his instructions are that, in spite of what is expressly stated in the agreement, it was not in fact signed (by China Huayang) until after the trial. Whilst being sceptical about this assertion, I concluded that it would be wrong to dismiss the GP's application as an abuse of process without having heard Mr Magana's explanation.

28. Mr Green also points out another important inconsistency in Mr Magana's evidence. He states (in paragraph 6.1 of his affidavit) that the rationale for entering into a *partnership agreement* with China Huayang was that "The GP and Oriental were not able to finance the purchase of [the Petitioners'] interest in the partnership on their own without charging Oriental's interest in the Partnership, which [the Petitioners] did not want them to do. Therefore it became clear that they needed to find another partner to help them finance the proposed purchase". However, the agreement with China Huayang which is exhibited to Mr Magana's affidavit is not a partnership agreement at all. By its express terms, it is a secured loan agreement. It provides (by clause 4) for China Huayang to lend US$100 million to Oriental for the purpose of buying the Petitioners' interests in the Partnership upon security of Oriental's interest in the Partnership (by clause 7). The loan is expressed (by clause 9) to be repayable on or before 31 March 2014 with interest at 1% per month. In the event of default China Huayang has the right to convert the loan into equity at a to-be-negotiated price or auction off the collateral to repay the loan.

29. Mr Magana's affidavit does not comprise new evidence in the sense of describing events which have only recently happened or only recently come to the Respondents' attention. It actually describes business activities conducted by the Respondents prior to the trial. Even if the agreement with China Huayang had not been signed on 7 August 2013, the draft must have existed on that date (unless it was deliberately backdated). They could have made a buy-out offer conditional upon obtaining finance or conditional upon concluding this agreement with China Huayang. If they had been willing then to make a full and frank disclosure of the matters now relied upon, they could have applied for a short adjournment. To the extent that Mr Magana's

affidavit describes pre-trial negotiations with China Huayang, it is obviously not new evidence at all. It is evidence which the Respondents decided to withhold from use at trial.

30. It is only new evidence to the extent that it describes the sequence of events taking place since trial, culminating in the buy-out offer made on 8 September. This evidence would not have had an important effect upon my decision to exercise the Court's discretion to make a winding up order. In my view, it would not be unreasonable for the Petitioners to reject a buy-out offer from Oriental unless and until they had the benefit of reliable and reasonably up to date information about the Partnership's financial condition. Absent an audit report from E&Y in respect of the financial statements for the year ended 31 December 2012 or, failing that, a satisfactory report from PWC in respect of the agreed upon procedures engagement, I would not regard it as unreasonable for the Petitioners to have rejected Oriental's offers. If allowed to re-open their case, the Respondents will argue that the need for reliable financial information is no longer relevant because their offer to buy for US$105 million made on 8 September is substantially the same as the Petitioners' offer to sell for US$105 million made on the morning of 29 August. If the Petitioners considered that US$105 million was a fair price which they were willing to accept on 29 August, the argument is that it must be unreasonable to reject that very same price today. I reject this argument. The Petitioners' 29 August offer was made at a time when the parties did not know the outcome of this case. The offer was made in the context of attempting to settle the case and must have taken into account the Petitioners' assessment of their litigation risk (the analysis of which is privileged information). The Respondents' 8 September offer was made at a time when they knew that I had decided that the Petitioners are entitled to a winding up order. In these circumstances I think it most unlikely that Mr Hacker would succeed in persuading me that the Petitioners' decision to reject the Respondents' 8 September offer is unreasonable, such that I should change my mind and either dismiss the petition or make an order under section 95(3(d). For these reasons the GP's summons is dismissed.

Costs

31. The appropriate order for costs depends upon whether the winding up petition is characterised as a proceeding against the Partnership or an *inter partes* proceeding between the partners in which the Partnership itself takes no part. On 11 June 2013 Foster J. made an order by consent ("the Consent Order") pursuant to CWR Order 3, rule 12(1)(a) that the Partnership shall not participate in the proceedings on the petition which shall be treated as an *inter partes* proceeding between the Petitioners as petitioners and the GP and Oriental as respondents. It follows that the GP has not conducted the defence of the petition on behalf of the Partnership in its capacity as general partner. Instead, the GP was made a respondent to the petition in its own right because it has a personal financial interest in the assets of the Partnership by virtue of the performance fee arrangement which I have described in paragraph 1 above. Having decided the case in favour of

the Petitioners, there is no dispute that I should make an order pursuant to Order 24, rule 8(2)(b) that Oriental and the GP do pay the Petitioners' costs of the petition, such costs to be taxed on the standard basis if not agreed. However, the Petitioners also proposed that I should make an express order that the GP shall have no recourse, whether by indemnification under clause 10.4 of the LPA or otherwise, to the assets of the Partnership for the purpose of reimbursing its own costs and the costs payable to the Petitioners. In my view it is not necessary to make such an order, because the inevitable consequence of the Consent Order is that rule 8(2)(b) is brought into play. This rule states that when the Court has directed that a winding up petition presented against a partnership be treated as an *inter partes* proceeding between one or more partners as petitioner(s) and the other partner(s) as respondent(s), "... the general rule is that none of the costs be paid out of the assets of the [partnership] and the unsuccessful parties should pay the costs of the successful parties...". The purpose and effect of this rule would be defeated if an unsuccessful general partner could reimburse itself in reliance upon its statutory and/or contractual right of indemnity. Nevertheless, Mr Hacker suggested that the Court has no jurisdiction to deprive an unsuccessful partner of his right of indemnity. In principle, it seems to me that a general partner's right of indemnity only applies when it conducts the defence of a winding up petition on behalf of the partnership, in which case rule 8(2)(a) is brought into play. In this case, the effect of the Consent Order is that the Partnership did not participate in the proceeding. The GP was acting in its own personal right and the effect of rule 8(2)(b) is that it must bear the risk in costs personally. However, I was persuaded by Mr Hacker not to make any final determination of this point on the basis that it is academic because the GP has not in fact made any claim for an indemnity. Should the GP change its mind and make a claim in the liquidation, this point of law can be more fully addressed and decided by means of a sanction application.

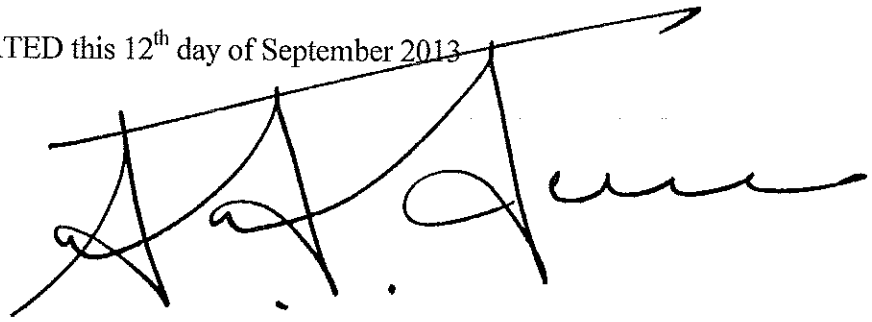
Directions to the Official Liquidators

32. The GP sought to include in the winding order a direction that, in the event that the Respondents lodge an appeal, the official liquidators shall not exercise any of their powers (other than the power to engage lawyers and other professional advisors) without first seeking the directions of the Court. I rejected this application because it seems to me that such a direction is not necessary in order to avoid rendering an appeal nugatory, but it would tend to prejudice the position of the limited partners. The first order of business for the official liquidators must include identifying the Partnerships' assets (which may or may not include cash and/or receivables due from purchasers) and determining its current financial position. In order to prepare their first report to the partners, it seems to me that the official liquidators will have to carry out much the same work which PWC were unable to perform. The performance of such work cannot possibly prejudice an appeal. Nor can it be said that such work will be wasted. In the circumstances of this case, the official liquidators are bound to consider inviting the partners to bid for the assets before taking steps to realise the assets by sales to third parties. In any event, a sale of the assets,

whether to Oriental or to a third party, would require the sanction of the Court. In my view a restrictive direction in the terms proposed on behalf of the GP would serve no useful purpose.

Order accordingly.

DATED this 12th day of September 2013



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