IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Cause NO. FSD 103 OF 2015 – NRLC

The Hon. Justice Nigel Clifford
In Chambers, 21st and 22nd January2016

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND

IN THE MATTER OF TORCHLIGHT FUND L.P.

Appearances: Mr Robin Hollington QC instructed by Mr Ben Hobden and Mr Erik Bodden of Conyers Dill & Pearman for Torchlight Fund L.P. and the General Partner

Mr Gabriel Moss QC (appearing by video-link) instructed by Mr David Butler and Ms Jessica Williams of Harney Westwood & Riegels for the Petitioners

GRAND COURT CAYMAN ISLANDS

RULING

Introduction

1. In these proceedings for the winding up of Torchlight Fund L.P. (the "**Partnership**") there have been two applications before the Court:

   (a) An application by summons dated 19 November 2015 by the Partnership for a validation order pursuant to section 99 of the Companies Law (2013 Revision) in respect of payments and dispositions made in the ordinary course of business of the Partnership (the "**Partnership's Application**").

(b) An application by summons dated 25 November 2015 by Aurora Funds Management Ltd (as trustee for the Bear Real Opportunities Fund), Crown Asset Management Ltd and the Accident Compensation Corporation of New Zealand (the "**Petitioners**") for an injunction in respect of the disposition of proceeds from the sale of the Partnership's interest in Local World Holdings Limited (the "**Local World Transaction**") and of any other dispositions of the Partnership's assets (the "**Petitioners' Application**").

2. On 21 and 22 January 2016, I heard the applications and then made the following orders:

(a) That the Partnership's Application be dismissed with costs.

(b) That on the Petitioners' Application an injunction be granted, restraining any disposition of the assets of the Partnership by the General Partner to persons related to the General Partner without the consent of the Petitioners or an order of the Court made on an application, supported by evidence, for prospective validation; with the costs to be the Petitioners' costs in the Petition.

3. This Ruling contains the reasons for those orders.

Overview

4. The Partnership is an exempted limited partnership registered under the laws of the Cayman Islands. It was set up to make, hold and dispose of investments in accordance with the investment criteria set and defined in the Partnership Agreement.

5. The General Partner of the Partnership is Torchlight GP Limited (the "**General Partner**") an exempted limited company registered under the laws of the Cayman Islands. Mr George Kerr ("**Mr Kerr**") is the managing director of the General Partner and, with Mr Russell Naylor, is a director of the General Partner. The General Partner is a wholly owned subsidiary of Pyne Gould Corporation ("**PGC**"), a company which has been listed on the New

Zealand Stock Exchange, although such listing is currently suspended. Mr Kerr is the managing director of PGC and owns some 80% of the issued share capital of that company.

6. The Partnership and the General Partner were established in order to facilitate the relocation of assets from a fund established in New Zealand, Torchlight Fund No 1 LP (the "**NZ Fund**") to the Cayman Islands.

7. On 25 June 2015 the Petitioners issued a winding up Petition (the "**Petition**") against the Partnership. The Petition asks that the Partnership be wound up on just and equitable grounds.

8. The Petitioners are limited partners of the Partnership who hold some AU$89.9 million of committed capital in the Partnership. The Petition is supported by other limited partners with holdings of, in total, some AU$5.58 million (the "**Supporting Limited Partners**"). The Petitioners and the Supporting Limited Partners represent between 36.9% and 44.2% of the total committed capital of the Partnership. The Petitioners believe that this is some 85% of the committed capital not held by persons who are associated with or related to the General Partner, although Mr Kerr's figures are somewhat different. Prior to the transfer of assets from the NZ Fund, the Petitioners were limited partners of the NZ Fund.

9. The primary relief sought in the Petition is that the Partnership be wound up in accordance with the Companies Law and that liquidators be appointed.

Issues to be tried

10. The Petitioners seek a winding up order in respect of the Partnership because they have lost trust and confidence in the General Partner and in Mr Kerr. The Petition is also brought on further and/or alternative grounds: the General Partner is not conducting the affairs of the Partnership in the best interests of the Partnership and is acting in a manner prejudicial to the interests of the Limited Partners and/or is acting with a lack of probity as the General Partner of the Limited Partnership. It is also alleged that the Petitioners have suffered oppression by the conduct of the General Partner acting by Mr Kerr. There is claimed to have been an irreconcilable breakdown in the relationship between

the General Partner, the Petitioners and the Supporting Limited Partners. It is the Petitioners' case that it is just and equitable that the Partnership be wound up.

11. The Petition has been directed to be treated as an *inter partes* proceeding between the Petitioners and the General Partner.[1] The action is contested by the General Partner. He denies that there are grounds for winding up the Partnership. It is maintained by him that the Petitioners are using the proceedings for the improper collateral purpose of interfering in the running of the Partnership. He also alleges that the Petitioners have brought the Petition because they have been seeking an early exit from the Partnership.

12. Three of the Petitioners or Supporting Petitioners agree that they have indeed been seeking an early exit from the Partnership. Crown Asset Management Ltd spent nearly two years negotiating an exit because of concern about investment in long-term distressed debt. It was thought that Mr Kerr had agreed to their exit. The two others have sought to exit because they claim to have been provided with misleading or incomplete information by Mr Kerr.

13. Extensive evidence has been exchanged. It is clear from this, in my view, that there are serious issues to be tried in this case in respect of a number of matters. This is relevant in relation to both the Partnership's Application and the Petitioners' Application. The issues go to the very core of what can properly be regarded as being in the ordinary course of business of the Partnership and its proper management and disposition of assets.

14. The issues raised on the case put forward by the Petitioners can be summarised as follows:

    (a) The General Partner has failed, contrary to the terms of the Partnership Agreement, to establish an Advisory Committee or, at least, has failed to establish a properly functioning Advisory Committee in accordance with the Partnership Agreement. The task of the Advisory Committee is, among other things, to approve related party transactions, to approve borrowing, and to review actual or potential conflicts of

[1] Order dated 31 July 2015, paragraph 1

interest between the General Partner(or its affiliates) and the Partnership. The Petitioners and the Supporting Limited Partners have never been invited to appoint anyone to the Advisory Committee notwithstanding that the Partnership Agreement requires members of the Advisory Committee to be representatives of the Limited Partners. It is apparent from Mr Kerr's own evidence that Mr Kerr was the only member of the Advisory Committee for a year from May 2014 to August 2015 and was therefore approving his own related party transactions.

(b) The Advisory Committee has never provided the Limited Partners with information about the related party transactions that are said to have been approved by that committee. In the period 2012 to 2015 the General Partner appears to have caused the Partnership to enter into related party transactions in the total sum of NZ$80 million.

(c) It is maintained that the General Partner has charged fees to the Partnership that it is not entitled to and in breach of the Partnership Agreement. Under the terms of the Partnership Agreement the General Partner is entitled to a management fee, an acquisition fee and a performance fee. There is an issue about acquisition fees of AU$6 million received by the General Partner for a period when the acquisitions are said to have been substantially less than the amount required for such fees. A further issue arises in relation to a performance fee paid of approximately AU$10.26 million in connection with the in specie distribution of interests in the Partnership to the investors in the NZ Fund. Mr Kerr admits the sum was paid, but maintains that it was paid to the NZ General Partner not to the General Partner.[2] No explanation has been provided as to the entitlement to this fee.

[2] Kerr 1st Affidavit, paragraph 50

(d) The General Partner has failed to provide the Limited Partners with the audited accounts that they are entitled to receive. The 31 March 2014 audited accounts, which were due on 13 August 2014, were not provided until Mr Kerr filed evidence in these proceedings. The 31 March 2015 audited accounts were due on 13 August 2015, but have still not been provided. In a Torchlight Investor Report dated 13 November 2015, Mr Kerr informed Limited Partners that "*The audited annual financial statements for 2015 are being prepared for circulation this month.*"[3] At the outset of the hearing counsel for the Partnership and General Partner, Mr Hollington, informed the Court that the 2015 audited accounts are expected to be finalised by the end of January 2016. He applied for an adjournment of the Applications until after the production of such accounts, on the basis that they would be relevant, particularly to validation. Mr Moss, for the Petitioners, opposed the adjournment. He pointed out that no undertaking had been offered to alleviate the concern which had prompted the Petitioners' Application. Furthermore, he submitted that a deliberate decision appeared to have been made not to put in full evidence in support of the Partnership's Application. He also pointed to the very significant history of delay in producing audited accounts. I accepted the submissions of Mr Moss. In my view these were compelling reasons for proceeding with the Applications without delay.

(e) There has also been a delay in providing tax statements and a failure to provide fund valuations. A number of fund valuations dating back to 30 June 2014 are overdue and there has been no explanation as to why these have not been provided. Such financial information as has been provided is said to be contradictory and difficult to understand, with discrepancies between fund valuations and figures in the audited accounts.

[3] Exhibit SLB-2, page 135 at page 138

(f) The General Partner appears to have failed to comply with the investment criteria in the Partnership Agreement. Mr Kerr has responded in evidence to the issues raised, but the Petitioners allege that even on this evidence the investment criteria have still been breached.

(g) There has been a failure to convene a meeting in accordance with the Partnership Agreement[4]. This has been resisted by Mr Kerr on the basis that one of the Limited Partners requesting the meeting was said to be a defaulting trustee of the Fund it represented for such purpose, the Bear Real Opportunities Fund. However, on 21 August 2015, I granted an injunction restraining the General Partner from treating this party as a defaulting trustee and there has been no opposition to this order.

(h) Multiple issues of mismanagement have been raised regarding the transfer of assets of the NZ Fund to the Partnership without notice and on different terms. These issues extend back to alleged misconduct of the affairs of the NZ Fund. Mr Kerr maintains that his conduct of the NZ Fund is not relevant to the Partnership. But the Limited Partners submit this to be wrong for a number of reasons. Issues are raised about damage said to have been caused to the value of the assets of the NZ Fund by Mr Kerr, related party transactions, and the incurring of liabilities. Mr Kerr seeks to rely on what he claims to be the liability of the Partnership to indemnify the NZ Fund, including in relation to proceedings brought in New Zealand against the NZ Fund in respect of a loan. He has produced an undated Subscription Payment and Assignment Deed.[5] It is said to contain the indemnity, but this is plainly in issue on a proper construction of the document

[4] Clause 14.1

[5] Exhibit GCDK-3, pages 62-65

15. There are clearly a substantial number of serious issues to be tried. These extend to questions of the General Partner's probity and the conduct of the affairs of the Partnership, including related party transactions.

The Local World Transaction

16. Matters have been brought to a head, giving rise to these Applications, as a result of a transaction concerning Local World Holdings Limited ("**Local World**") an entity incorporated in England as the holding company for one of the largest regional news publisher groups in the United Kingdom.

17. The Partnership owned 11% of the shares of Local World. An announcement made on 31 August 2015 by PGC included reference to several parties being interested in taking over Local World. On or about 16 September 2015 there were media reports that Trinity Mirror proposed to take over Local World.

18. On 18 September 2015 the Petitioners' attorneys, Harney Westwood & Riegels ("**Harneys**"), wrote to the attorneys for the General Partner, Conyers Dill & Pearman ("**Conyers**"), requesting information about the proposed sale of Local World.[6] There was no response to the letter. But then on 30 October 2015 PGC announced that the Partnership had agreed to sell its shares in Local World to Trinity Mirror for approximately £20 million.[7] On the same date Harneys wrote again to Conyers expressing concern that the General Partner might use the proceeds from the sale (the "**Proceeds**") in a manner contrary to the interests of the Partnership and, specifically, to pay sums due in respect of the New Zealand proceedings against the NZ Fund. Harneys asked Conyers to explain on what basis the Partnership could be liable in respect of such liability of the NZ Fund and asked that the following undertakings be given by the General Partner:

    (a) The General Partner would give the Petitioners seven days' notice of any proposed receipt of or payment away of the Proceeds;

[6] Exhibit SLB-2, pages 48 -49

[7] Exhibit SLB-2, page 1

(b) The General Partner would pay the Proceeds from such sale into Conyers' trust account and would not make payments to or from that account without first complying with the undertaking to give seven days' notice.[8]

19. In response, by letter dated 6 November 2015, Conyers informed Harneys that the General Partner would not provide the Petitioners with any undertakings.[9] The letter also asserted that the NZ Fund had the benefit of an indemnity from the Partnership.

20. Harneys, in a letter dated 12 November 2015, explained the Petitioners' concerns to Conyers and asked the General Partner to agree to obtain prospective validation orders prior to disposing of the proceeds and asked for a copy of the indemnity.[10] In a letter dated 13 November 2015, Conyers stated that the General Partner was in the process of " *preparing an application seeking validation of any payments made in the ordinary course of business*" and that the application would be issued shortly and served on the Petitioners.[11] The letter did not provide any detail as to the terms of the validation order that would be sought, in particular whether it would be in relation to the Proceeds, and no undertakings were given. Conyers did not provide a copy of the indemnity. The Investor Report dated 13 November 2015 (referred to above) provided some further information about the investment in Local World and repeated that the value received for the shares would be about £20 million.

21. On 16 November 2015, Harneys wrote again to Conyers repeating the request for undertakings or assurance that an application for a validation order, supported by proper evidence, would be made within 72 hours.[12] On 19 November 2015, the Partnership's Application for a validation order was filed.

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[8]Exhibit SLB-2, pages 120 -123

[9] Ibid, page124 -126

[10] Ibid, pages 127 - 129

[11] Ibid, pages 130 -131

[12]Exhibit SLB-2, pages 132 -133

This was then followed, on 25 November 2015, by the Petitioners' Application for an injunction.

The Partnership's Application

Background

22. The Partnership's Application was for an order that:

(a) *Payments made into or out of the bank accounts of the Partnership in the ordinary course of business of the Partnership; and*

(b) *Dispositions of the property of the Partnership made in the ordinary course of its business for proper value between the date of presentation of the Petition or further order in the meantime*

shall not be void by virtue of the provisions of section 99 of the Companies Law (2013 Revision) in the event of an Order for the winding up of the Partnership being made on the said Petition provided that the Partnership's bank(s)/the relevant bank shall be under no obligation to verify for itself whether any transaction through the Partnership's accounts is in the ordinary course of business, or that it represents full market value for the relevant transaction

In the alternative ... that notwithstanding the presentation of the Petition, dispositions of the Company property for the purposes and of the kind described in paragraph 12 of the Second Affidavit of George Charles Desmond Kerr sworn on 19 November 2015 shall not be void by virtue of s.99 of the Companies Law.

23. On the Partnership's case the order sought is the standard kind of validation order made pending the hearing of a winding up petition in the case of a solvent entity in accordance with longstanding practice. It was contended that the Partnership should be able to trade as usual. The evidence referred to in the Second Affidavit of Mr Kerr stated that the Partnership has a number of day-to-day ordinary course of business expenses.[13] It instanced payment of management fees to the General Partner and payment of fees owed in respect of the Partnership's administration, professional fees, rent, loan repayments and Partnership related travel and accommodation. No details were provided. However, subsequently Mr Kerr produced a list of payments said to have been

[13] Kerr 2nd Affidavit, paragraph 12

made by the Partnership in the ordinary course of business since the presentation of the Petition in the period from 22 June to 16 November 2015.[14]

24. The Petitioners resisted the Partnership's Application on the ground that the evidence filed in support of it is wholly inadequate to enable the Court to determine, in accordance with established principles, whether to make a validation order. Their concern was that the Partnership had paid out substantial sums, but had failed to show proper grounds for validation of those payments, including large sums paid to related parties.

The relevant legal principles

25. Section 99 of the Companies Law (2013 Revision) provides as follows:

> "*When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void.*"

26. The practice has developed of prospective orders being made, in appropriate cases, pending the hearing of winding up petitions.

27. There are English authorities in this regard relating to corresponding English statutory provisions, dating back some years, on which Mr Hollington particularly relies in support of the Partnership's Application.

28. In ***Re Burton & Deakin Ltd***[15] it was held that the Court would normally, in the case of a solvent company, sanction a disposition falling within the powers of the directors, said to be necessary or expedient in the interests of the company, and would not, except in the case of proven bad faith or other exceptional circumstances, interfere with the discretion of the directors, even if a winding up petition had been presented. In the judgment of Slade J he said as follows:

> *"If on an application under s 227* [the equivalent English provision] *relating to a solvent company, (a) evidence is placed before the court showing that the directors consider that a particular disposition falling within their powers under the company's constitution is necessary or expedient in the interests of the company, and (b) the reasons given for*

[14] Exhibit GCDK-3, page 55

[15] [1977] 1 All ER 631

> *this opinion are reasons which the court considers that an intelligent and honest man could reasonably hold, it will in the exercise of its discretion normally sanction the disposition notwithstanding the opposition of a contributory, unless the contributory adduces compelling evidence proving that the disposition is in fact likely to injure the company.*"[16]

29. This case, it is to be noted, involved sanctioning a particular disposition, rather than making a general validation order for transactions in the ordinary course of business. Moreover, Slade J made clear that the statements of principle he formulated were "*intended merely as broad guidelines*" and that "*No limits are placed by the sections on the court's discretion to grant or refuse an application under* [the section] *and such a discretion will of course be exercised in every instance having regard to the particular circumstances of the particular case.*" [17]

30. I was also referred by Mr Hollington to ***Re a company (No 005685 of 1988), ex parte Schwarcz and another***[18]. In that case Hoffman J (as he then was) referred in the case of a company being fully solvent to "*the common formula, that the company may pay debts in the ordinary course of business*"[19]. There the petitioners were seeking a proviso to a validation order which was tantamount to an interlocutory injunction restraining the company's board from dealing with the assets of the company in a certain way. In refusing to allow the proviso to be inserted into the validation order he said:

> "*It does not seem to me right that that jurisdiction should be used in a case where there is no question about the company being able in the end to pay all its lawful debts and therefore no such protection is required. What I am being asked to do is to use the* [section 99] *jurisdiction in order to give the petitioners what would amount to an interlocutory injunction restraining the company's board from dealing with its assets in a certain way on the ground that that would be a breach of their fiduciary duty.*"[20]

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[16] At page 637

[17] Alsoat page 637

[18] [1989] BCLC 424

[19] At page 425

[20] At page 426

31. On the basis of these English authorities it is submitted, in support of the Partnership's Application, that it has become established practice, in the case of a solvent liquidation, to validate transactions in the ordinary course of business. The order sought is said to be the standard validation order.

32. However, the matter does not rest there. The relevant law has moved on and particularly here in the Cayman Islands it has been held that, even in the case of a solvent company, particular elements must be established before an applicant is entitled to a validation order.

33. The case of ***In the Matter of Fortuna Development Corporation***[21] concerned a contributory petitioning for the winding up of a solvent company and the company seeking an order validating the giving of security on a refinancing of its debt. The Court granted an order validating the proposed disposition following an adjournment for disclosure of documents. In reaching his decision Henderson J referred to ***Re Burton & Deakin***, and other decisions, and then went on to say as follows:

> *"Thus there are four elements which must be established before an applicant is entitled to a validation order. First, the proposed disposition must appear to be within the powers of the directors. There is no dispute about that here. Secondly, the evidence must show that the directors believe the disposition is necessary or expedient in the interests of the company. There is no dispute here that the directors do have that belief. Thirdly, it must appear that in reaching the decision the directors have acted in good faith. The burden of establishing bad faith is on the party opposing the application. Fourthly, the reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold."*[22]

34. In considering the fourth of these elements the Court was concerned with two questions: first, whether the decision to arrange a refinancing was within the realm of reasonableness; and second, whether the terms of the proposed refinancing were also within the realm of reasonableness. As to this Henderson J said:

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[21] [2004-05] CILR 533

[22] Page 536

> *"The test the applicant must satisfy is not high. Nevertheless, there must be a body of evidence which, viewed objectively, establishes that the decision is one which a reasonable director, having only the best interests of the company in mind, might endorse.*[23]

35. So too the other elements necessary for an order plainly have to be established by evidence, even if this has the effect, in relation to the third element, of shifting the burden of establishing bad faith on to the party opposing the application. There has to be a body of evidence relevant to the required elements for the Court to consider in exercising its discretion.

36. As to these elements, they were taken a stage further by the Chief Justice in the case of ***In the Matter of Cybervest Fund.***[24] He refused to make a validation order in respect of management fees on the footing that, where there could be shown to be irregularities in the conduct of a company's affairs, it by no means followed that because the company was solvent and able to pay its debts as they fell due the conduct of the company's business should be continued, potentially at the expense of its investors. This is particularly pertinent to the present case. The Chief Justice agreed with and adopted the summary of the principle in ***Fortuna Development***comprising the four elements to be established before an applicant is entitled to a validation order.

37. He then said:

> *"There is another consideration to add to this list, in light of the concerns raised in the matter, although arguably it is subsumed within the third and fourth elements. This would be whether irregularities in the conduct of the affairs of the company can be shown, even if the company is clearly solvent, as is alleged here.*[25]

38. This added element has to be taken into consideration in the present case having regard to the serious issues raised concerning the conduct of the affairs of the Partnership.

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[23] Also page 536

[24] [2006] CILR 80

[25] Paragraph 29

Application of the principles to the present case

39. The Partnership places particular reliance on its alleged solvency. Mr Hollington, on its behalf, referred to its last audited accounts for the year ended 31 March 2014.[26]He also referred to a Management Balance Sheet for 16 November 2015[27] and the Indicative Quarterly Fund Valuation Report as at 30 September 2015.[28] As already mentioned, he asked for an adjournment until after the production of 31 March 2015 audited accounts (considerably overdue but expected by the end of January 2016) in the expectation that they would reinforce the position on solvency. However, none of this, including Mr Kerr's evidence as to solvency, is enough of itself to justify the making of a validation order. This is clear on the authorities referred to.

40. Nor is it sufficient, as the development of the law has shown, to expect the Court to make what Mr Hollington termed a standard ordinary course of business validation order, not related to any particular transactions and without any proper evidence directed to the elements which must be established for the making of a validation order.

41. The evidence in support of the Partnership's Application, as far as it goes, is the assertion by Mr Kerr that the General Partner has continued to make payment of ordinary course of business expenses since the Petition.[29] As referred to above, these are said to relate to management fees, administration and professional fees, loan repayments and other expenses, and a single page list of these payments has been produced. In addition Mr Kerr has produced a cash flow forecast.[30] This shows single line items of expected outflows for creditor payments, management fees and loan repayments for each month from November 2015 to April 2016. Reliance is also placed on disclosure in the proceedings of bank statements up to 31 October 2015, showing receipts and payments of the Partnership.

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[26] Exhibit SLB-2, pages 2- 43

[27] Exhibit GGDK-2, page 23

[28] Exhibit GCDK-3, page 61

[29] Kerr 2nd Affidavit, paragraphs 12-13; Kerr 3rd Affidavit, paragraph 7

[30] Exhibit GCDK-2, page 24

42. In response Mr Moss, on behalf of the Petitioners, submitted that it is obvious that the evidence here does not meet the criteria necessary for the making of a validation order on the established principles.

43. So far as the listed payments are concerned, that is all it is, a list. There is no evidence to show that the payments were necessary or expedient and in the interests of the Partnership. Nor are there reasons given for the payments so that it can be ascertained whether an intelligent and honest General Partner would have made these payments.

44. There are specific payments referred to, but there is lack of information in respect of them and some relate to matters which are very much in issue in the proceedings. Thus payments have been made in respect of a Credit Suisse loan, but no information has been provided about the loan or whether this involves related parties. It appears that substantial payments have been made to certain related parties, but again there is a lack of explanation for or documents relating to the payments. This is of obvious concern having regard to the issues about such payments. Much the same can be said of the payment of management fees and the issue whether it is necessary or expedient in the interests of the Partnership that such payments should be made.

45. The cash flow forecast, by itself, without supporting evidence, is insufficient for the purpose. The Proceeds of the Local World transaction, of particular concern in relation to the Applications before the Court, have not even been included in the inflows section of this forecast. Mr Kerr says in very general terms in his Third Affidavit that the General Partner will do nothing other than use the proceeds in the ordinary course of business of the Partnership.[31] But he has not provided any detail of payments needed to be made in the interests of the Partnership.

46. As has been made clear in ***Cybervest***, on an application for a validation order the evidence must show that the directors (or here the General Partner) believe the disposition (or dispositions) to be necessary or expedient in the interests of the entity. Further the reasons for the same must be shown to be ones which an

[31] Paragraph 11

intelligent and honest director or general partner could reasonable hold. In my view the evidence here falls far short of meeting the criteria necessary for the grant of a validation order.

47. There is also the added element which arose in ***Cybervest***and also arises here. This is that issues raised in the case concern irregularities in the conduct of the affairs of the Partnership. Having regard to such issues, which go to the very core of the question of what can properly be regarded as being in the ordinary course of business, it would not be proper to make a general validation order in the form sought. In ***Cybervest*** there was (as here) an objection raised in respect of fees, as to which the Chief Justice said:

> *"Given the nature of the allegations, the history of thismatter and the evidence which I have seen, I need only state that I do not consider the making of such an order to be appropriate at this time."*[32]

48. I respectfully adopt the same analysis as a further reason, in the exercise of my discretion, for declining to make the order sought on the Partnership's Application. At an early stage of the proceedings, on the hearing of the first summons for directions on 31 July 2015, I declined to make a general validation order having regard to the lack of evidence for such an order and the issues raised in the proceedings. That remains the position. It will be open to the Partnership, or perhaps more appropriately the General Partner, to make application in the future for a validation order. This will require to be done on a proper basis in respect of dispositions which can be supported by evidence going to the elements which must be established for the making of such an order.

The Petitioners' Application

[32] Judgment, paragraph 32

49. This requires far less elaboration. It has been on shifting ground which resulted in a modified application for an injunction which could be dealt with quite shortly.

50. As originally constituted the Petitioners' Application sought an injunction providing that:

> *Unless the [General Partner] gives three clear business days' notice of any (i) receipt of the proceeds from the sale of Torchlight Fund Limited Partnership's interest in Local World Holdings Limited (the "Local World Transaction"); and of any (ii) proposed disposition (including incumbrance) or series of dispositions of any of the Partnership's assets (including the proceeds of the Local World Transaction) to Harney Westwood & Riegels, the attorneys for the Applicants, no such disposition may be made without an application to the Court, supported by evidence, for prospective validation, and either the prior written consent of the Applicants or an Order of the Court*

51. However, as matters developed, it became apparent that no useful purpose was likely to be served in pursuing an order in relation to the first part of the Application, concerning the Proceeds of the Local World Transaction. This was because, on the evidence, it appeared that not only have the Proceeds probably already been received by the Partnership, but also they have likely been spent. Mr Kerr has not condescended to provide any detailed evidence about this. In his Third Affidavit he has merely stated:

> "*I can confirm that the General Partner intends to do nothing other than use these proceeds in the ordinary course of business of the Partnership and in this regard had already issued the Partnership's Summons.*"[33]

[33] Paragraph 11

52. During the hearing Mr Hollington informed the Court that the Proceeds had gone into a Partnership bank account. However, even on the second day of the hearing, he was not in a position to clarify the position any further or provide any assurance as to whether the Proceeds remained in the bank account.

53. Attention then turned to the second part of the Application, relating to any proposed disposition. I indicated that I thought that this was too wide. In my view it was too much to expect notice to be given of any proposed disposition, without which application would have to be made to the Court for prospective validation. This was casting the net too wide. It could have resulted in undue disruption to the business of the Partnership and multiple applications to the Court.

54. Mr Moss, on behalf of the Applicants, then very fairly indicated that he did not want to stop the business of the Partnership. He contended for a modified form of order to restrain dispositions to persons related to the General Partner (which are much in issue) without the consent of the Petitioners or an order of the Court made on application, supported by evidence, for prospective validation. This would not prevent the carrying on of business or the paying of debts due to innocent third parties, such perhaps as Credit Suisse, although there remains a lack of information about the loan from Credit Suisse and other liabilities incurred.

55. This Court has the same jurisdiction as the English High Court to grant an injunction.[34] The principles for the grant of an interlocutory injunction set out in ***American Cyanamid Co v Ethicon Ltd***[35]are followed in this Court. They were conveniently summarised by the Chief Justice in ***Kelly and Four Others v Fujigmo Limited, Port Authority and Attorney Genera***l.[36]

56. On these authorities it is well established that the Court needs to decide:

[34] Grand Court Law (2015 Revision) – section 11; Senior Courts Act 1981 – section 37(1)

[35] [1975] AC 396

[36] [2012] 2 CILR 222

(a) Whether there is a serious issue to be tried. The Court's task on this point is to decide whether the Petitioners' case "*shows any real prospect of succeeding*";

(b) Whether damages are an adequate remedy;

(c) Whether any loss to the defendant needs to be and if so can be met by an award of damages, in respect of which the applicant may be required to give an undertaking to indemnify the defendant for any such damages found wrongfully to have been caused by the injunction; and

(d) Taking into account all the circumstances of the case, and if there is any doubt about the adequacy of the respective remedies in damages, where the balance of convenience lies.

57. There is no doubt here that there are serious issues to be tried. This was very fairly and properly accepted by Mr Hollington. The issues include those referred to in respect of related party transactions.

58. As to adequacy of damages, I acceded to the submissions of Mr Moss. Dispositions of assets of the Partnership, particularly payments to parties related to the General Partner, may become void but would not necessarily be recoverable. This is because of the risk of either the parties not being capable of repaying them or of being abroad in jurisdictions which would not give effect to the avoidance. The potential difficulties are such that it could well prove not to be economical to seek recovery. Damages are not, therefore, an adequate remedy.

59. The Partnership for its part can be protected by an undertaking to comply with any order the Court may make to compensate it for any loss caused to it by the injunction. Such an undertaking is being provided by Crown Asset Management Ltd, a New Zealand Crown Company wholly owned by the New Zealand Government. So there is no doubt as to the protection afforded.

60. Nor was there any doubt about the balance of convenience. The limited injunction sought should not interfere with the legitimate business of the Partnership or the meeting of liabilities to innocent third parties. Even in respect of related party transactions, it will be open to the General Partner to make an application to the Court, properly supported by evidence, to validate any dispositions which can be shown to be in the ordinary course of business for the benefit of the Partnership. The corollary of this is that if any disposition is not in this category, then it should not be made anyway.

61. Mr Hollington suggested that the burden of making application to the Court should not be put on the General Partner. He proposed that the General Partner should only be required to give notice of any proposed disposition, leaving it then for the Petitioners to apply for an injunction if they thought necessary. This, however, would carry the risk of disposition before the matter came before the Court, as has happened with the Proceeds of the Local World transaction. In any event I am satisfied that it is incumbent upon the General Partner to make a proper application for prospective validation if so required. The injunction granted is to ensure that this happens.

Conclusion

62. In summary, for the reasons given in this Ruling, I have determined that the Partnership's Application for a general validation order should be dismissed. I have also determined that an injunction should be granted on the Petitioners' application restraining any disposition of the assets of the Partnership by the General Partner to persons related to the General Partner without the consent of the Petitioners or an order of the Court made on an application, supported by evidence, for prospective validation.

63. Orders have been made accordingly.

DATED the 9th day of February 2016

The Hon. Justice Nigel Clifford
JUDGE OF THE GRAND COURT

GRAND COURT - CAYMAN ISLANDS