IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION
IN CHAMBERS

CASE NO. FSD 103 OF 2015 (RMJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP LAW, 2014

AND IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND THE MATTER OF TORCHLIGHT FUND L.P.

Appearances:	Mr. Thomas Lowe Q.C. and Ms. Hilary Stonefrost instructed by Ms. Jessica Williams and Ms. Gemma Lardner of Harneys Westwood & Riegels for the Petitioners Mr. John Wardell Q.C. instructed by Mr. Ben Hobden and Mr. Erik Bodden of Conyers Dill & Pearman for Torchlight Fund L.P. and the General Partner
Before:	The Hon. Mr. Justice Robin McMillan
Heard:	24, 25 and 26 October 2017
Draft Judgment Circulated:	7 Nov 2017
Judgment Delivered:	9 Nov 2017

HEADNOTE

Power of the Court to decide the order in which issues are resolved-Appropriateness and convenience of deciding similar issues at same time-Court's duty to ensure the normal advancement of proceedings

JUDGMENT

Introduction

1. On 21 August 2015 Clifford J granted an interim injunction in this matter following an ex parte hearing also dated 21 August 2015.

2. The Applicants were Aurora Funds Management Ltd ("Aurora"), a Petitioner, and Millinium Asset Services Pty Ltd. ("MAS")

3. In relevant part the Order of Clifford J states:

> " 1. *Until the determination of the Applicants' Summons or further order of this Honourable Court, the Respondent be restrained, whether directly or indirectly, whether by itself, its directors, its officers, its agents or any of them howsoever, from:*
>
> (a) *enforcing, relying on or acting upon the notice of default dated 13 August 2015 sent by the Respondent to the First Applicant*;
>
> *(b) considering, treating or deeming the First Applicant to be a 'Defaulting Party' under clause 10.1 of the limited partnership agreement of the Torchlight Fund L.P. (the Fund) dated 7 November 2012 (as amended) (the LPA);*

(c) *causing or procuring the sale, transfer or disposition of, or otherwise dealing with, all or any part of the First Applicant's limited partnership interest in the Fund;*

(d) *causing or procuring the convening or holding of any meeting of the limited partners of the Fund that excludes the First Applicant or at which the First Applicant is not entitled to vote or be represented; and/or*

(e) *exercising or purporting to exercise any rights, powers or remedies under clauses 10.2 to 10.8 (inclusive) of the LPA.*

2. *The Summons be listed for further hearing on a date to be fixed.*

3. *The Respondent may apply to the Court at any time to vary or discharge this Order but before doing so must first inform the Applicants' attorneys in writing on not less than three clear working days' notice.*

4. *There be liberty to apply generally."*

4. It should also be noted that the relevant Summons which led to this Order had also sought the following relief:

"1. A declaration that Aurora Funds Management Ltd is not a defaulting limited partner of Torchlight Fund L.P. (the Partnership) under the terms of the Limited

Partnership Agreement of the Partnership dated 7 November 2012 by reason of it having disclosed certain information to Millinium Asset Services Pty Ltd.

2. *A declaration that a notice of default issued by Torchlight GP Limited to Aurora Funds Management Ltd dated 13 August 2015 (the Notice of Default) is void and of no force and effect."*

5. The declarations sought have not yet been addressed or decided upon by this Court.

6. Notwithstanding the terms of Clifford J's Order, in particular paragraph 2 of that Order, no subsequent arrangements were made by Aurora for an inter parties hearing to take place.

7. It is also clear from an Attendance Note provided by Harneys on behalf of Aurora and MAS that the Applicants anticipated that Clifford J would be providing directions to the parties for the hearing of the notice of default aspect of the Summons (see page 12).

8. It was in those circumstances that the learned Judge then stated:

"At the moment you want for the injunction to hold the ring".

9. However, directions in relation to the hearing of the declarations applications were never sought.

10. The issue currently before the Court arises from a further Summons by Torchlight GP Limited ("the General Partner") as General Partner of Torchlight Fund L.P. ("the Partnership"). It is dated 11 August 2017.

11. This Summons seeks the following Orders:

> *"1. That the summons issued by Aurora Funds Management Limited ("Aurora") and Millinium Asset Management Pty Ltd ("MAS") dated 19 August 2015 be dismissed;*
>
> *2. That the interim injunction made in these proceedings and dated 21 August 2015 be discharged;*
>
> *3. That the Default Notice issued by the General Partner on 13 August 2015 in respect of Aurora be deemed valid;*
>
> *4. That Aurora and MAS do pay the costs of the General Partner on such basis as the Courts thinks just;*

5. *Such other or further orders as the Court deems fit."*

12. In the meantime the hearing of the Petition in Cause No. FSD 103 of 2015 has been proceeding through various stages between 21 February 2017 and the present time and a considerable volume of sworn evidence has been adduced.

13. As matters stand, final written arguments are due to be exchanged by the opposing parties, followed by Leading Counsels' oral submissions scheduled to commence on 27 November 2017.

14. It is common ground that MAS does not oppose the discharge of the interim injunction, certainly in the sense that MAS no longer asserts an interest as a potential Petitioner or as a Limited Partner.

The Procedural Issue

15. At paragraphs 1 and 2 of the Applicants' Skeleton Argument dated 20 August 2015, Mr. Lowe Q.C. made the following submission:

"1. *This is an application by Aurora Funds Management Ltd (Aurora), Petitioner, and Millinium Asset Services Pty Ltd (MAS) (together the Applicants), for an order that the Court restrain the Respondent from operating default provisions in the*

limited partnership agreement establishing the Fund (the LPA) which would deprive Aurora of standing in the proceedings.

2. *The Applicants believe that the bases upon which the General Partner of the Fund, Torchlight GP Limited (the General Partner), proposes to take these steps under the default provisions of the LPA are wholly misconceived. As this would be an issue about the standing of Aurora, the Court clearly could and, in the Applicants' submission, should resolve the legal issues in the course of hearing the petition (see Alipour v Ary [1997] 1 W.L.R. 534)."*

16. Clearly this was an important factor that Clifford J took into account in commenting at paragraph 12 of the Attendance Note that the Applicants "*have the protection of the injunction until a further hearing.*"

17. Aurora in fact amplifies this submission at paragraphs 3, 4 and 5 of Aurora's current written submissions dated 17 October 2017 which state as follows:

"3. *On 13 August 2015, shortly after the petition to wind up the Partnership was issued (the Petition), the General Partner sent a default notice (the Default Notice) to Aurora, which asserted that Aurora was in breach of the Limited*

Partnership Agreement (the LPA) on the basis of allegations that Aurora had provided confidential information to Millinium Asset Services Pty Ltd (MAS).

4. *The purpose of the Default Notice served so shortly after the Petition was plainly to ensure that Aurora could not be treated as a limited partner and an attempt to stymy the Petition. At the time it was served, it was not motivated by the anger that Mr. Kerr admitted or the costs and trouble that Mr. Wardell prompted him to describe in his evidence in these proceedings, all of which posted-dated the Default Notice. Further, the service of the Default Notice was in circumstances where the General Partner had full knowledge of MAS's purported replacement of Aurora as trustee of the Bear Fund since at least January 2014 (i.e. almost 18 months earlier).*

5. *Anticipating that this was a manoeuvre to defeat the winding up petition, which relied on conduct predating the Default Notice, Aurora and MAS sought and on 21 August 2015 obtained an order from Clifford J, ex parte, restraining the General Partner from acting on the Default Notice (the* ***Aurora Injunction****). Aurora had first sought an undertaking from the General Partner that it would not rely on the Default Notice pending resolution of the Petition, however no such undertaking was forthcoming and no reply whatsoever was received to that letter."*

18. Aurora makes this further submission at paragraph 10 as follows:

> *"However this is put procedurally, this application is only the General Partner's Summons to discharge the injunction and not the hearing of a random preliminary issue. Aurora's position is that the General Partner's Summons is an abuse of process: it is simply a device to persuade the Court to hear a preliminary issue a few weeks before closing. It is not an application that could ever have succeeded had the General Partner applied soon after the injunction."*

19. Putting the matter another way, Aurora contends that it would be wrong in principle for the Court to determine factual issues which are the subject of the General Partner's Summons in a manner somehow divorced from the rest of the trial.

20. In contrast the General Partner submits at paragraph 3 of the General Partner's written submissions dated 29 September 2017 in these terms:

> *"3. In summary, the General Partner's position is as follows:*
>
> *3.1 Now that the factual evidence has closed, it is clear beyond question that the Aurora Default Notice was validly served and*

there is no basis for preventing the General Partner from relying upon it in accordance with its contractual rights to do so.

3.2 The Interim Aurora Injunction was obtained on the basis of material non-disclosure and misrepresentations by the Applicants. This constitutes a stand-alone reason justifying the immediate discharge of the Interim Aurora Injunction.

3.3 Even if there was a sustainable case against the validity of the Default Notice (which there is not), the discharge of the injunction is also justified because any possible loss to Aurora could be compensated in damages. Accordingly, one of the basis conditions for granting an interim injunction is not satisfied.

*3.4 It is also now clear that Aurora has committed further breaches of the Limited Partnership Agreement ('**LPA**') that justify the General Partner exercising its contractual rights to treat Aurora as a Defaulting Partner but which the General Partner is currently prevented from doing given the extremely wide terms of the Interim Aurora Injunction."*

21. The General Partner also complains of prejudice caused to the Partnership by the interim injunction remaining in place. Paragraph 5 of the written submissions states:

> "5. *The prejudice caused to the Partnership by the Interim Aurora Injunction remaining in place is significant.*
>
> 5.1 *At Present, the General Partner is prevented from exercising its contractual rights in the interests of the Limited Partners as a whole.*
>
> 5.2 *The lifting of the injunction and exercise of the General Partner's rights may result in Aurora losing standing as a Petitioner. If the General Partner has a contractual right to take steps which lead to that outcome, it should not be prevented from exercising that right by an ex parte injunction that was obtained on a false basis and which so clearly cannot be justified.*
>
> 5.3 *The Interim Aurora Injunction was granted on the basis that it was a temporary holding measure until the substantive issues raised by the Default Notice could be determined on an inter partes basis. Reflecting this, the General Partner was given an express right to apply back to Court for the injunction to be varied or discharged on giving 3 working days' notice. That being the case, and as was accepted by both the Court and the Petitioners at the recent CMC, the General*

Partner is clearly entitled to have the matter considered at an inter partes hearing.

5.4 *Accordingly, it is not appropriate for this issue simply to be determined along with the balance of the issues in the Petition. To do so, would give Aurora an unjustified benefit by denying the General Partner the ability to exercise its contractual rights which might result in the removal of Aurora's status as a Petitioner."*

General issues of Law

22. In addressing the question of what can perhaps generally be described as case management Aurora relies inter alia on what it submits are two salient authorities.

23. First, attention is drawn to *Alipour v. Ary and another* [1997] 1W.L.R. 534. There the English Court of Appeal held that on a contributory's petition where the locus standi of the petitioner is disputed, the Court will consider all the circumstances, including the likelihood of damage to the company if the petition is not dismissed, in determining whether to require that petitioner to seek the determination of the dispute outside the petition.

24. It is appropriate to add that in the view of this Court that if indeed locus standi falls to be determined within the Petition that means in effect that there will be a determination at the time at which the Petition itself is decided.

25. The important related question of deciding the order in which issues are to be resolved is one to which the Court will return later in this Judgment.

26. It is noted that Peter Gibson LJ indicates at page 545 H-page 546 A that the Court would not go so far as to say that the Court cannot take into account the factor that there is a genuine dispute as to the locus standi of the petitioner.

27. In this context of asserting a genuine dispute as arising, Aurora also relies upon certain dicta of Lady Hale, then Deputy President, in *Braganza v. BP Shipping Limited and another* [2015] UKSC 17 in relation to implied terms.

28. At paragraph 19 Lady Hale states:

> *"There is an obvious parallel between cases where a contract assigns a decision-making function to one of the parties and cases where a statute (or the royal prerogative) assigns a decision-making function to a public authority. In neither case is the Court the primary decision–maker. The primary decision-maker is the contracting party or the public authority."*

29. In regards to the giving of a Default Notice, Aurora contends that the General Partner is exercising such an assigned decision-making function. For the purposes of the present Summons, the Court accepts this function to be the case on the part of the General Partner.

30. At this juncture it is helpful to illustrate this aspect by setting out the terms of the Default Notice itself, which are found in a letter dated 13 August 2015 from the General Partner and addressed to Mr. Steuart Roe of Aurora Funds Management Ltd.

31. The Default Notice states:

"Dear Sir

Torchlight Fund LP

We write to give you formal notice under Clause 10 of the Limited Partnership Agreement ("LPA") that you are in default by reason of your having breached a provision of the LPA, namely clause 15.5, which breach by its very nature is incapable of remedy and accordingly you are in immediate default. By reason of that breach you deemed to be a Defaulting Partner as defined in the LPA.

You breached clause 15.5 by disclosing to Millinium Asset Services ("MAS") confidential Limited Partnership information concerning the affairs of the Limited Partnership,

including copies of the LPA and other partnership documents and communications on a Portfolio Company, namely Lantern Hotels and any proposed or actual Investment by the company, including Lantern Hotels amongst other investments. MAS are a competitor of the Limited Partnership and are running a competing strategy in respect of, inter alia, Lantern Hotels.

Evidence, which demonstrates the breach, is contained in the first and second affidavits of Thomas James Wallace, a director of MAS, filed in the Grand Court of the Cayman Islands in Cause FSD No. 103 of 2015 and in documents exhibited to those affidavits.

Without prejudice to all of our other rights pursuant to clause 10 of the LPA, and in particular our rights under clauses 10.4 and 10.8 of the LPA, we inform you that pursuant to clause 10.2 of the LPA, unless we determine otherwise, you have no right to vote at any meeting of the Limited Partnership. In addition, and again without prejudice to all of our rights, pursuant to clause 10.2 (a) we hereby suspend all of your rights under the LPA, including, but not limited to, your rights to receive valuations, reports and other information, whether under clause 13 of the LPA or otherwise. This is necessary to protect the interests of the Limited Partnership having regard to the fact that you have previously breached your confidentiality obligations under clause 15.5."

32. After reviewing a number of authorities Lady Hale further states at paragraphs 28-30:

"28. *There are signs, therefore, that the contractual implied term is drawing closer and closer to the principles applicable in judicial review. The contractual cases do not in terms discuss whether both limbs of the Wednesbury test apply. However, in Gan Insurance, where the issue was the limits, if any, to the reinsurers' power to withhold approval to the insured's agreement to settle a claim, Mance LJ first commented that "what was proscribed was unreasonableness in the sense of conduct or a decision to which no reasonable person having the relevant discretion could have subscribed" (para 64); but he concluded that "any withholding of approval by reinsurers should take place in good faith after consideration of and on the basis of the facts giving rise to the particular claim and not with reference to considerations wholly extraneous to the subject matter of the particular reinsurance..." (para 67).*

29. *If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question. It is of the essence of "Wednesbury reasonableness" (or GCHQ rationality") review to consider the rationality of the decision-making process rather than to concentrate upon the outcome. Concentrating on the outcome runs the risks that the Court will substitute its own decision for that of the primary decision-maker.*

30. *It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable-for example, a reasonable price or a reasonable term – the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the Wednesbury formulation in the rationality test. Indeed, I understand Lord Neuberger (at para 103 of his judgment) and I to be agreed as to the nature of the test.*"

33. Taking only one aspect of how an implied term of rationality, or perhaps even of proportionality, might arise in practice, Aurora complains that before issuing the Default Notice (set out above), the General Partner first should have informed Aurora of the course it was proposing to adopt and the adverse factors which the General Partner might choose to take into account, and Aurora argues that the General Partner should have invited Aurora to provide a response before a final decision to issue the Default Notice was in fact made.

34. At this particular stage the Court does not propose to weigh the merits of such points as these. However, the Court recognises that in relation to the *Alipour* case and the *Braganza* case, for example, issues of serious contention have been raised by Aurora in the course of this interlocutory application.

35. The General Partner in turn puts forward serious criticisms of Aurora's conduct in obtaining the interim injunction including the making of alleged misleading statements, coupled with numerous material nondisclosures and urged both that the injunction should immediately be discharged and the Aurora Default Notice declared to be valid.

36. By way of general comment, the Court is constrained to state that had the parties been more engaged in resolving the matter of the injunction at an earlier stage than at the present stage the parties would not have been found themselves the current situation. The General Partner emphasizes that until a fuller picture of the Petitioners' evidence had emerged it was not productive or possible to pursue the matter. In any event, the matter was not pursued in a timely fashion regardless of any apportionment of blame.

37. All of this now gives rise to the central question of how as a matter of practice and procedure the Court should address this difficulty once it has arisen.

The Inherent Power of the Court to Regulate its Proceedings

38. The precepts of common sense and good order which the Preamble to the Rules of the Grand Court 1995 (Revised Edition) contain are no less insightful as illustrative guidance for matters under the Companies Winding Up Rules 2008. This is especially so as these Preamble precepts are not as such an actual component of the Grand Court Rules but antecedent to them.

39. Accordingly, the Court is not prevented from looking to the Preamble as a source of assistance in considering how the inherent powers of the Court to regulate its proceedings are to be sensibly exercised.

40. Section 4 of the Preamble is headed "***Court's duty to manage proceedings***" and section 4.1 provides that the Court must further the overriding objective (to deal with proceedings in a just, expeditious and economical way) by actively managing proceedings. In other words, this is a case management requirement imposed upon the Court rather than an exercise of the Court's discretion at large.

41. Section 4.2 goes on to stipulate that furthering the overriding objective may include "(e) *deciding the order in which issues are resolved.*"

42. It is important to note that this provision refers not simply to the order in which issues are heard but rather to the order in which issues themselves are resolved.

43. The Court bears firmly in mind its inherent power to decide the order in which issues are resolved in determining how the General Partner's Summons should be dealt with.

Relevant Factors

44. In deciding the order in which issues are to be resolved, the Court has regard in this case to a number of factors which are set out below.

45. First, the Court bears in mind that in addition to Aurora there are two other Petitioners, Crown Asset Management Ltd ("CAML") and Accident Compensation Corporation of New Zealand ("ACC').

46. In relation to CAML and ACC and a separate Default Notice Summons issued by CAML and ACC, this Court by a Case Management Order dated 5 October 2016 has already ordered at paragraph 2 of the order that this Summons "*is adjourned to the trial of the Petition*".

47. In light of this history it may well be somewhat anomalous that these Summonses should be respectively decided at different times. Such a course appears to this Court to be inconsistent with securing the just, most expeditious and least expensive determination of the Default Notices arguments on their respective merits.

48. Secondly, as indicated previously, Aurora has raised legal arguments for the Court's ultimate consideration based upon the principles identified in the *Braganza* case.

49. If these principles are followed and applied in determining the validity of the Default Notice procedure adopted by the General Partner, that course may well constitute an

important development of the law of contract in the Cayman Islands. In circumstances of such potential public importance it is desirable, in ensuring that the substantive law is rendered effective and that it is carried out, that the Court makes a decision at the final stage of this Petition rather than at an antecedent interlocutory stage.

50. Thirdly, in the course of the General Partner's very helpful written submissions it was evident that extensive criticism has been made of the conduct of Aurora, MAS and a number of individuals including but not limited to Ms. Jacqui Lemon, Mr. Thomas Wallace and Mr. Gregory Marshall. Much emphasis too was placed on alleged non-disclosure/misrepresentation to Clifford J at the ex parte hearing.

51. Clearly the Court will be invited to consider these matters again in deciding whether the Partnership should be wound up on the just and equitable ground.

52. Accordingly there is a strongly persuasive basis for the Court to form the view that all such issues should be determined in the appropriate manner, at the appropriate time and without the Court having in the meantime formed any provisional or preemptive assumptions as to the evidence.

53. Once again, this factor is some indication that the Court should not decide the issues raised by the General Partner's Summons or indeed by Aurora's Summons at this

particular time, so as to ensure what may best be described as the normal advancement of the proceedings.

54. Fourthly, it will be recalled from the *Alipour* case that where the locus standi of the Petitioner is disputed, as it likely will be in the event of the Default Notice being effective, the Court should consider all the circumstances including the likelihood of damages to the company, or in this instance the Partnership, in determining whether to require the Petitioner to seek the determination of the standing dispute outside of the Petition, (or inside it for that matter).

55. In assessing any likelihood of damages to the Partnership, Aurora states at paragraphs 37-40 of Aurora's written submissions:

"37. *Clause 15.5 of the LPA prohibits the disclosure by a Limited Partner of:*

"any confidential information which may have come to its knowledge as a result of being a Partner concerning:

(i) the affairs of the Limited Partnership...

(ii) any of the Partners (including their identity); or

(iii) *the proposed or actual investment by the Limited Partnership..."*

38. *There are exceptions to this prohibition. The exception that is relevant in this case, because MAS acted as trustee of the Bear Fund in place of Aurora and the*

General Partner recognised that MAS was the acting trustee of the Bear Fund, is that the confidential information can be provided:

> *"... to a person to whom the Partner proposes and is entitled to transfer the Partnership interest in accordance with this Agreement...provided the person agrees to keep the information confidential on the terms of this Agreement and for the benefit of the Limited Partnership and each of the Partner's."*

39. *A Limited Partner who damages the Partnership in consequence of a breach of Clause 15 is liable in damages to the Limited Partnership. The General Partner has the power to enforce the right to bring proceedings for this and, if a recovery was made, it would inure for the benefit of all the Limited Partners. This would be the conventional remedy for breach. Instead, the General Partner proposes to invoke Clause 10.*

40. *Clause 10 of the LPA contains a "default" provision and then sets out a sequence of consequences of a breach of the LPA which are heavily weighted against the Limited Partner."*

56. In contrast, the General Partner submits at paragraph 5.1 of the General Partner's written submissions that "*at present the General Partners is prevented from exercising its contractual rights in the interests of the Limited Partners as a whole.*"

57. Mr. Wardell Q.C. in his oral submissions elaborates upon this point, asserting that because Aurora has been enabled to remain a Limited Partner which otherwise Aurora could not have done, then as the equity value of the Partnership had increased, Aurora has unjustly benefited from that actual increase to the detriment of other, legitimate Limited Partners.

58. The Court considers arguments as to the likelihood of damages to the Partnership arising if Aurora wrongly remains a Limited Partner to be closely balanced. However, as Mr. Lowe Q.C. has indicated, a Limited Partner who damages the Partnership in consequence of a breach of clause 15 is liable in damages to the Limited Partnership in any event, and those damages would of course be measured by actual provable loss.

59. In these circumstances, the Court finds that ultimately Aurora's continued participation per se in these proceedings as a Limited Partner is not likely to cause substantial damage or inconvenience to the Partnership. In arriving at this finding the Court reminds itself that it should as far as is practicable deal with a cause or matter in ways which are proportionate to the complexity of the issues.

Conclusion

60. Having fully taken into account the relevant factors previously set out, the Court arrives at a determination to postpone further consideration of the issues raised by the General Partner's Summons and Aurora's Summons until the Court has dealt with and decided the issues raised in the Petition itself.

61. Depending on the outcome of those other issues, and the extent to which these Summonses may then remain germane to those other issues, the Summonses may then be disposed of as appropriate.

Robin McMillan

The Hon. Mr. Justice Robin McMillan

Judge of the Grand Court